Guideline 2: Any person may challenge the ballot title or text of a ballot proposition at an expedited administrative or judicial hearing on the grounds that the assigned title or submitted language is misleading or confusing or that it violates state statutory or constitutional requirements for an initiative. Judicial review of a determination by an appropriate state official concerning a ballot title or text of a ballot proposition should follow an abuse of discretion standard. Such challenges should be permitted prior to the circulation of petitions or the election on the initiative at issues, but the state should set a reasonable period of time before the certification of the question to the ballot by which all pre-election claims must be filed. Challenges to the substance of the initiative on general state or federal constitutional grounds should be permitted only in accordance with state law.

The Section's recommendation was then approved by voice vote. It reads:

RESOLVED, That the American Bar Association supports the adoption of guidelines:

(a) to improve public comprehension of the issues raised by Initiatives and Referenda on the ballots in those states which allow Initiatives or Referenda; and,

(b) to provide a fair opportunity to present or to challenge proposed Initiatives or Referenda.

BE IT FURTHER RESOLVED, That the American Bar Association endorses the Model Guidelines for Initiatives and Referenda dated August, 1993, as suggested examples of such guidelines for jurisdictions allowing Initiatives or Referenda.
THE CHALLENGE OF DIRECT DEMOCRACY IN A REPUBLIC

Report and Guidelines of the Task Force on Initiatives and Referenda

Intersectional Task Force under Auspices of the Section of Tort and Insurance Practice

American Bar Association

August 1993
TASK FORCE ON INITIATIVES AND REFERENDA

HUGH REYNOLDS, JR., Indianapolis, Indiana, Chair
JACK H. BLAINE, Washington, D.C.
DAVID E. CARDWELL, Lakeland, Florida, Standing Committee on Election Law
DAVID L. CALLIES, Honolulu, Hawaii, Urban, State and Local Government Law Section
JIM CARRIGAN, Denver, Colorado
I. MICHAEL HEYMAN, Berkeley, California, Business Law Section
LEO J. JORDAN, Bloomington, Illinois
ALAN B. MORRISON, Washington, D.C., Consumer Organization Representative
LEONARD M. RING, Chicago, Illinois
DONALD L. SAMUELS, Los Angeles, California, Litigation Section
MARIANNA S. SMITH, Washington, D.C.
JEFFERY ANNE TATUM, San Francisco, California
CLAYTON P. GILLETTE, Charlottesville, Virginia, Reporter
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EXECUTIVE SUMMARY

In 1990, the Tort and Insurance Practice Section of the American Bar Association appointed a successor to an earlier Task Force that had begun investigation into the use of statewide initiatives and referenda. In order to obtain the fullest representation of views about this subject, the Chairman of the Task Force invited various sections of the ABA to appoint delegates as full voting members. The successor Task Force has held several meetings and formulated guidelines that will be presented to the ABA House of Delegates, and, if adopted, forwarded to the states.

The Task Force undertook to examine and make guidelines that would reconcile two competing views of initiatives and referenda. One view holds that direct democracy is an important incident of self-governance that should be fostered and utilized frequently. This view considers the plebiscite as a mechanism by which the public can serve as a check on legislators who may be unwilling to consider controversial proposals. The public may also fill voids where the legislature is unable to act because of competing political forces. In such a case, the thesis goes, the majority of the public should determine the law, subject to constitutional constraints. For advocates of direct democracy, the process necessarily entails substantial debate and deliberation by citizens and thus strengthens democratic values. Another view suggests, however, the costs of engaging in political debate exceed the expected benefits for most potential participants. If there is insufficient meaningful participation, the result is that the process is dominated by special interests, for whom salient benefits may justify the substantial costs of qualifying a proposition for the ballot, advertising among the electorate (sometimes through misrepresentation), and enduring judicial challenges. Further, the ability to register preferences in the privacy of the voting booth rather than, as is the case with legislators, in an open forum, increases the possibility that decisions will be made out of base prejudice rather than reasoned analysis. Finally, detractors of direct democracy contend, initiative proposals do not undergo the process of scrutiny, compromise, and careful analysis to which legislative proposals are subjected.

The Task Force recognized that, notwithstanding the intensity of feelings about these competing views, the initiative and referendum are unlikely either to be eliminated or substantially expanded in the immediate future. It is clear that the perception of the value of initiatives changes with the evaluator's view of what has been accomplished by these procedures. It is not surprising that views vary widely and change from proposal to proposal. The Task Force takes no absolute position on whether initiatives and referenda are desirable or undesirable. Rather, the Task Force sought to consider the merits and defects of direct democracy relative to other lawmaking procedures and to consider proposals for reforms that would improve both the substance of laws that emerge from the plebiscitary process and the procedure for enacting those laws. These proposals concentrate on the educational aspects of direct democracy and on the potential for effective self-governance.

The Task Force recommends a variety of procedural measures that would increase voters' comprehension of ballot propositions and facilitate understanding of the legal
implications of their passage. Most of the guidelines are taken from practices that have been adopted in some, but not all, jurisdictions that employ the initiative and referendum. These guidelines involve state officials in the drafting and review of proposition and ballot language, the circulation of streamlined pamphlets that explain arguments concerning and consequences of the ballot propositions, and public hearings. The Task Force recognizes that constitutional or statutory provisions might make adoption of specific guidelines difficult in some states. Thus, the general approach of the Task Force has been to explain the general justification for its guidelines and to encourage each jurisdiction to consider how the proposed changes would affect its existing law.

The Task Force recognized that much of the criticism directed at the initiative and referendum is based on a perception that these processes have been captured by special interests to advance a particular agenda. The Task Force guidelines attempt to limit the capacity of special interests through devices such as a reasoned use of the "single-subject" requirement and expanded use of voters' pamphlets.

The Task Force further recognized that a lively debate exists about the extent to which well-financed interests have a distinct advantage in placing propositions on the ballot and having them accepted or defeated. The Task Force guidelines, therefore, include provisions that directly address reforms of campaign finance and disclosure within the range of currently constitutionally permissible options.

Throughout its deliberations, the Task Force sought to identify those characteristics that would tend to make the initiative and referendum more susceptible to abuse and to propose mechanisms to neutralize those tendencies. Thus, the Task Force has devoted its attention primarily to reducing the costs to the public of becoming educated about ballot propositions (e.g., by circulating more comprehensible publicity pamphlets) and increasing the costs to special interests of initiating a successful campaign (by imposing regulations that ensure a proposition enjoys widespread support before being placed on the ballot and by imposing financial and disclosure restrictions comparable to those employed for electoral campaigns). The ultimate objective of the Task Force guidelines, therefore, is to change behavior in a way that more nearly ensures that the initiative and referendum are used to respond to legislative inaction or excess, rather than to permit particular interests an opportunity to avoid legislative pursuit of popular will.

The Task Force guidelines are as follows:

Guideline 1: Procedures for submitting and reviewing ballot language should proceed along the following lines.

1. Any proponent of a ballot proposition shall submit a draft of the proposal, and may submit a proposed ballot title, to the appropriate state official with a filing fee. An appropriate state official, such as the attorney general, secretary of state, or legislative drafting office of the state, may make suggestions to the proponents concerning the text of the ballot.
(2) An appropriate state official shall review the ballot language and draft a ballot title or accept the ballot title submitted by the proponents. The ballot title shall appear on the voters' pamphlet, if any; on petitions circulated for signature; and on the ballot, unless successfully challenged in court as to accuracy or clarity.

Guideline 2: Any person may challenge the ballot title or text of a ballot proposition at an expedited administrative or judicial hearing on the grounds that the assigned title or submitted language is misleading or confusing or that it violates state statutory or constitutional requirements for an initiative. Judicial review of a determination by an appropriate state official concerning a ballot title or text of a ballot proposition should follow an abuse of discretion standard. Such challenges should be permitted prior to the circulation of petitions or the election on the initiative at issue, but the state should set a reasonable period of time before the certification of the question to the ballot by which all pre-election claims must be filed. Challenges to the substance of the initiative on general state or federal constitutional grounds should be permitted only after the election on the initiative at issue.

Guideline 3: Courts should be entitled to order alterations in the language of a ballot title in order to make the title conform to state statutory or constitutional requirements or to avoid misleading or confusing language.

Guideline 4: At a minimum, public notice should be given of the attainment of each significant stage of the initiative process. These stages include circulation of petitions, receipt of completed petitions, and certification of the question for the ballot.

Guideline 5: Jurisdictions where it is concluded that there are too many plebiscites should increase the number of signatures necessary to place a proposition on the ballot rather than arbitrarily limit the number of propositions on the ballot.

Guideline 6: Jurisdictions where it is concluded that sectional differences permit one locality to obtain discrete benefits at the expense of others, or permit a group of localities to impose a discrete burden on others, should adopt a geographical distribution requirement for signatures.

Guideline 7: Any state in which an initiative or referendum election is scheduled should provide voters a pamphlet that contains information about the issues and arguments for and against. This information should be made available not less than 30 days prior to the election at least to each household in which one or more registered voters resides. Copies should also be readily available to persons who register to vote between the period when distribution is made to previously registered voters and the election to which the voter information relates.
Guideline 8: The voters' pamphlet should contain at least the following:

(1) The ballot title drafted or accepted by the appropriate state official.

(2) An explanation of the effect of the proposal and the effect of an affirmative and of a negative vote. This explanation should be drafted in a neutral, objective manner by a public official not directly affected by the proposal.

(3) Advocacy statements by proponents and opponents of the proposition. The state should limit the statements to a number and length that is consistent with the number and complexity of propositions to be voted on at any given election. Where the number of supporting statements submitted exceeds the number permitted, proponents of the measure should be entitled to select which statement or statements are published in the voters' pamphlet. Where the number of opposing statements submitted exceeds the number permitted, those submitting statements should be entitled to determine which statements are published in the voters' pamphlet. If, however, proponents or opponents are unable to agree, an appropriate state official should determine which statements are published.

Guideline 9: Voters' pamphlets should not be required to contain the full text of the proposal, but should contain as much of the proposed language as possible, consistent with enhancing the readability and use of the pamphlet. The extent of the text to be published should be dictated by a specific, objective standard, such as "reasonable comprehensive," that is likely to permit substantial detail of the proposal without inviting selective inclusion or exclusion of provisions. Each voter should be able to obtain a copy of the full text of the proposal. The pamphlet should indicate the appropriate procedure for obtaining the full text, e.g., by returning a postcard or by calling an "800" number.

Guideline 10: An individual or group who submits an argument for publication in the voters' pamphlet should be charged a modest filing fee to help defray the cost of processing that submission.

Guideline 11: Prior to each election in which a vote will be held on a ballot proposition, the state should sponsor and moderate debates or hearings involving representatives of proponents and opponents of each proposition. Questions of frequency, location, and selection of participants should be decided on a state-by-state basis.

Guideline 12: Each ballot proposition should be limited to a single subject. Whether or not this requirement has been violated should be determined by reference to the underlying purposes of the requirement, which are to avoid logrolling and confusion.

Guideline 13: An appropriate state official shall determine whether there has been compliance with the single-subject requirement at the time the proposed law is submitted for assignment of a ballot title. Should the state official determine that the proposal violates the single-subject requirement, the proponents of the measure shall be required to redraft and
resubmit the proposal. In order to permit the proponents to attempt to qualify the proposition for the ballot, the state shall provide a prompt judicial remedy for a declaratory judgment on the question of whether the proposition satisfies the single-subject requirement. Pending the determination of the case, the proponents may continue to collect signatures on petitions relating to the proposition. If the state official issues no notification of a violation of the single-subject requirement, any other person may seek a declaratory judgment on the question of whether the proposition satisfies the single-subject requirement.

Guideline 14: States should not limit the number of ballot propositions at any election.

Guideline 15: States should not prohibit defeated propositions from being resubmitted at a subsequent election.

Guideline 16: The initiative should not be available to direct appropriations for particular budgetary items. The initiative and referendum should, however, be available to restrict prospectively the use of public monies.

Guideline 17: Following a reasonable period of time, to be determined by each jurisdiction, after the effective date of any law passed through the initiative or referendum, such law may be amended or repealed by the legislature by the process that applies to other legislation. Within such reasonable period of time after such a law becomes effective, amendment or repeal should be permitted only on passage by a two-thirds supermajority of each house of the legislature. At the very least, technical amendments should be permissible within such reasonable period of time after such a law becomes effective on passage by a two-thirds supermajority of each house of the legislature if an appropriate state official certifies that the proposed amendment is only technical in nature. Any limitation on the process of amendment or repeal more restrictive than the foregoing should not be enforceable.

Guideline 18: The names of proponents of an initiative or of a referendum other than one sponsored by the legislature should be filed with the appropriate state official with whom the ballot proposition is filed. These names should appear on each petition that is circulated for signatures to place the proposition on the ballot.

Guideline 19: Where petition circulators are paid for obtaining signatures, that fact should be disclosed conspicuously on each petition.

Guideline 20: Although states cannot limit contributions that can be made by an individual or an entity to an initiative or referendum campaign, states should require reporting of contributions to initiative and referendum campaigns and should enforce these requirements through criminal sanctions. Reporting should be made to an appropriate state official and should be made at time intervals prior to the election on the proposition for which contributions have been made. These time intervals should provide ample opportunity to permit pre-election disclosure to the electorate of the names of contributors. Reporting should be consistent with the following principles.
(1) The threshold dollar amount that requires reporting should be no lower than the state requires for reporting of monetary contributions (cash or its equivalent) to campaigns for candidates for elective office.

(2) In-kind contributions should be disclosed by reporting the nature of the in-kind activity and its approximate monetary equivalent. The threshold dollar equivalent that requires reporting may be higher than the threshold dollar amount that requires reporting of monetary contributions.
I. Introduction: Objectives of the Task Force

In 1988, the Tort and Insurance Practice Section of the American Bar Association ("TIPS") created a Task Force on Initiatives and Referenda to study the legal and public policy problems that were perceived to have resulted from increased use of initiatives for the enactment of state legislation or constitutional amendments. That Task Force was chaired by Robert McKay, former dean of New York University School of Law. After a series of meetings, that Task Force reported that further research would be necessary before a recommendation could be promulgated to the House of Delegates. Following the untimely death of Dean McKay, the Council of TIPS concurred in the proposal that a new Task Force be created to look more rigorously into the propriety and use of initiatives and referenda. In order to obtain optimal participation in this process from throughout the ABA, the Chairman of the Task Force invited various Sections to designate representatives to serve as full voting members of the Task Force. Delegates from the Standing Committee on Election Law; the Business Law Section; the Litigation Section; and the Urban, State and Local Government Law Section subsequently joined in the deliberations and drafting of this Report. Additionally, a member of a prominent citizen's action group was appointed to ensure representation of consumers who are affected by initiative proposals. As a result, the deliberations and drafting of this Report emerge from a uniquely intersectional Task Force.

The Task Force recognized that popular decisionmaking constitutes only one mechanism among many for lawmaking in an ordered society. Thus, the Task Force sought to consider the merits and defects of direct democracy relative to those of other lawmaking procedures, particularly legislative lawmaking, rather than in isolation. The Task Force, therefore, considered it inappropriate simply to note existing imperfections. Instead, our ultimate views of the plebiscite depend on its comparative advantages and disadvantages. Obviously, initiatives and referenda are most useful where they can compensate for defects in the legislative process without generating defects of their own.

The Task Force believes that lawmaking by representatives should remain the primary form of decision making in a republican form of government. Thus, the Task Force sought to structure reforms consistent with the supplementary role of the initiative and referendum. With few exceptions, the Task Force did not seek to extend the reach of participatory democracy. At the same time, the Task Force recognized that, even in jurisdictions that have experienced some of the problems with initiatives and referenda discussed in this Report, it is unlikely that this means of participatory democracy will be eliminated or even significantly curtailed. The objective undertaken by the Task Force, therefore, was not to build a case for or against electoral lawmaking, but to consider incremental improvements for a process that has been established and is used as a means of lawmaking in the public interest outside of the legislative process. To accomplish this objective, the Task Force attempted to understand the nature of the criticisms that have recently been directed at electoral lawmaking. The specific attacks on the plebiscite range
from accusations that too many proposals clutter the ballot and hence render any one incomprehensible to the average voter, to the allegation that special interests are able to buy their way onto the ballot and hence gain control over the lawmaking process. What all the criticisms share, however, is an implicit view that law made through the plebiscite does not really reflect the will of the electorate. The general accusation is that — whether through capture of the process by those with intense interests in the outcome, lack of information or education among voters about the underlying issues, or fraud — the result of the initiative and referendum process varies significantly from what would be preferred by an informed, deliberative representative body.

While these claims are not readily susceptible to empirical proof, the Task Force concluded that some current procedures for initiatives and referenda rendered the plebiscite susceptible to the kinds of biases of which critics complain. Even if these allegations are provable, however, plebiscites are not likely to disappear from the political landscape; indeed, given the opportunities that initiatives and plebiscites provide to check legislative inaction or misconduct and to permit expression of popular will, the Task Force concluded that it would not recommend eliminating these political processes. The objective of the Task Force, therefore, was to address these criticisms by increasing the burden on special interests of using the process while decreasing the burden on the public of becoming educated or deliberating about the subjects of initiatives and referenda. In short, the Task Force sought to suggest a system of checks and balances in the plebiscitary process consistent with these incorporated into legislative lawmaking.

The Task Force also attempted to remain sympathetic to differences between initiatives and referenda. Referenda deal with proposals that have already been subjected to the legislative process. Thus, these proposals have survived the traditional checks and balances that apply to the legislative process. Initiatives may be more troublesome in that the underlying proposal has not been approved after the normal course of hearings, committee reports, and lobbying that is expected to filter desirable from undesirable legislation. Thus, some may view the initiative to be more mischievous than the referendum. Many of the recommendations of the Task Force, therefore, apply only to the initiative process.

At an early meeting, the Task Force determined to limit its investigation to initiatives and referenda that appeared on statewide ballots. Local governments are also frequently authorized to enact legislation through plebiscites, typically to the same extent as they are authorized to enact legislation through a representative process. Although many of the difficulties that affect the plebiscite at the state level are repeated at the local level, local plebiscites require analysis of additional issues and procedures. For instance, the propriety

of a local referendum may depend on whether the underlying issue is characterized as legislative or executive, a distinction that does not appear at the state level. In addition, some of the criticisms that are directed at statewide plebiscites may have different force when applied to the local level. The claim that residents have an insufficient interest in the outcome to deliberate about a statewide issue, for instance, may have less force when applied to local issues. Finally, the plebiscitary process deviates too substantially among localities to permit easy comparison. Thus, without speculating as to the effects of these differences, the Task Force concluded that it would address only statewide ballot propositions, although some of its analysis and recommendations may also be applicable to local plebiscites.

In addition, the Task Force limited the range of ballot propositions that it investigated. In many jurisdictions, for instance, bonds can be issued, or issued in excess of certain amounts, only after voter approval. Although the sheer numbers of bond proposals may increase the burden on voters who wish to familiarize themselves with ballot issues — one of the concerns considered by the Task Force — this report deals only with proposals for new laws or constitutional amendments. Numbers, types, and procedures for bond elections were considered too diverse for inclusion in the deliberations. Moreover, few of the criticisms of the initiative and referendum have been directed at these requirements.

II. An Overview of the Initiative and Referendum

Twenty six states and the District of Columbia currently permit the electorate to vote in some form on proposed laws, either by initiating legislation (the initiative) or by


2 See, e.g, Gillette, Plebiscites, Participation, and Collective Action in Local Government Law, 86 Mich. L. Rev. 930 (1988). Notwithstanding the decision of the Task Force to concentrate on statewide ballot propositions, there has been significant analysis recently on the effect of initiatives at the local level, particularly in the area of land use. See, e.g., David C. Calise, Nancy C. Neuffer, & Carlito P. Caliboso, Ballot Box Zoning: Initiative, Referendum and the Law, 39 J. of Urb. & Contemp. L. 53 (1991); Robert H. Freilich & Derek B. Guemmer, Removing Artificial Barriers to Public Participation in Land-Use Policy: Effective Zoning and Planning by Initiative and Referendum, 21 Urb. Lawyer 511 (1989). The Task Force recognizes the adoption by the House of Delegates of the American Bar Association of a recommendation that would bar the initiative and referendum in site specific zoning cases and in cases where a proposal is inconsistent with a community's land use plan.

approving or disapproving legislation previously passed by the legislature (the referendum). Depending on the jurisdiction, a referendum may be demanded by the electorate, or the legislature may refer a proposition to the electorate for its approval. While these provisions grow out of the populist movements and antipathy towards organized government in the late 19th century, they have an importance to the overall political process and democratic governance that transcends their effect on particular laws. Individuals tend to become engaged in campaigns on ballot propositions in ways that are not found in electoral campaigns for individual officials. The issues that are the subject of the campaign may hold an especially intense interest for certain individuals and entice them into political action. Thus, wholly apart from the benefit they confer as a check on legislative excess or inaction, initiatives and referenda possess the potential to foster a level of participation that is highly desirable in a democratic state. They permit individuals to go beyond the role of citizens who are "represented" in the lawmaking process and instead to become lawmakers, even if their involvement is limited to single issues and for short periods of time.

Initiatives and referenda simultaneously serve as a check on representative democracy. In theory, representatives enact the will of the represented. Representatives, however, may deviate from that role. They may fail to enact popularly preferred legislation for fear of offending particular interest groups who can provide financial or other support during election campaigns, or because the proposed measures run counter to the personal interests of legislators. Conversely, representatives may enact legislation considered detrimental by a majority but preferred by particular interests who have greater access to and more influence with lawmakers or who can benefit legislators seeking re-election or higher office. Proponents of the initiative and referendum thus perceive legislators as captives of interest groups or as overly attentive to action that will ensure personal welfare rather than the welfare of their constituents. On this view, legislators will sacrifice long-term benefits for immediate ones whenever they fear retaliation at the polls.

Similarly, proponents of the initiative contend that the need to obtain a majority vote will avoid divisive or radical proposals in favor of more moderate ones and that individual voters will take sufficient responsibility to engage in deliberation and fact-seeking sufficiently similar to that of the average state legislator. In all of these cases, the initiative and referendum provide a potential check on legislative disregard of popular will.

At the same time, the initiative and referendum have recently been the object of dissatisfaction. At the center of most of these criticisms has been an explicit or implicit suggestion that lawmaking by the electorate is inferior to legislative lawmaking. Legislators are viewed by some as better able to deliberate and more likely to do so, since they are accountable for their decisions in ways that individual voters, who need only register their preferences in the privacy of a voting booth, are not. In addition, legislators are perceived

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3 Useful histories may be found in David Magelby, Direct Legislation (1984); Thomas Cronin, Direct Democracy (1989); and David Schmidt, Citizen Lawmakers (1989).
as more attentive to the overall public interest in ways that the electorate, voting on a single issue, will not be. Legislators, on this view, are more responsive to the long-term consequences of legislation than individual voters. Finally, the legislative process may have institutional advantages over the plebiscite, even if the two share a common view of the public interest. Legislators can form committees, convene hearings, and obtain information in ways that exceed the capabilities of the voters, even in most cases where voters are able to organize. Further, legislators — small in number and constantly in contact with one another — can work with each other in ways not available to the electorate at large to reach compromises and engage in informed debate. For instance, the legislative process facilitates the correction of drafts of proposed laws and permits amendments that are foreclosed by the binary choice of total acceptance or rejection that is available in an initiative or referendum.

Additional criticisms suggest that, process aside, the subject matter of initiatives is likely to contravene popular conceptions of the public interest. Commentators have argued that special interests may resort to the initiative where they are unable to win a majority of representatives and believe that they can more readily persuade the electorate to support their position. Underlying this concern is a view about who, within the electorate, is most likely to participate. Those who have an intense interest in the outcome of a question — members of the special interest group to be benefited — certainly have incentives to become involved in advocating its passage. As with all political action, however, most people will avoid involvement in lobbying or supporting a ballot proposition since these efforts are costly and time consuming, and even silent supporters of a measure will obtain its benefits without incurring any costs if those who participate are successful. Hence, only those to whom the personal benefits of involvement exceed the costs are likely to participate. Critics of ballot propositions fear that special interests will foresee sufficiently unique benefits to make it worth their while to dominate the process. If this occurs, the level of participation falls far short of what is envisioned in the ideal description of direct democracy.

There have also been suggestions that ballot issues are decided by large expenditures of money, that issues are deliberately stated in an obtuse fashion to confuse voters, that the multitude of ballot propositions at a given election make intelligent voting on any of them difficult, and that minority interests are ignored in the initiative process. Indeed, one frequent criticism of the plebiscite is that it is sometimes used as a direct attack on minorities.4

One criticism of initiatives and referenda in recent years has been that they have proliferated in numbers that exceed their utility. There are two concerns that underlie this criticism. The first is that the referendum and initiative process was originally intended only as a check on legislative excess or inaction rather than a replacement for legislative

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lawmaking. On this theory, plebiscites should be used only when there is evidence of a substantial gap between the legislature and the electorate. Frequent use of the initiative process, however, also may indicate that legislators are avoiding controversial issues on which votes may offend constituents. The second concern is related to the issue of voter competence. If ballot propositions are too numerous, then voters may be unable or unwilling to devote sufficient attention to the issues, so that they will be resolved by a minority of residents with an intense interest in a particular outcome that may deviate from the interests of the public at large.

The following table indicates the frequency of use of the initiative in various states from 1986 through 1990 as reported to the Task Force by the officials of the listed states. The table indicates only those propositions on which votes have been held. It does not reflect petitions that have been filed but withdrawn or filed with an insufficient number of signatures, or propositions struck by the courts from the ballot prior to the election. It does, however, include propositions for constitutional amendments as well as for statutes and initiatives as well as referenda.

<table>
<thead>
<tr>
<th>State</th>
<th># of Propositions</th>
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<tbody>
<tr>
<td>Arkansas</td>
<td>16</td>
</tr>
<tr>
<td>California</td>
<td>71</td>
</tr>
<tr>
<td>Florida</td>
<td>4</td>
</tr>
<tr>
<td>Idaho</td>
<td>2</td>
</tr>
<tr>
<td>Illinois</td>
<td>0</td>
</tr>
<tr>
<td>Maine</td>
<td>6</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>15</td>
</tr>
<tr>
<td>Michigan</td>
<td>9</td>
</tr>
<tr>
<td>Missouri</td>
<td>12 (since 1987)</td>
</tr>
<tr>
<td>Montana</td>
<td>7</td>
</tr>
<tr>
<td>Nebraska</td>
<td>4 (through 1988)</td>
</tr>
<tr>
<td>Nevada</td>
<td>3</td>
</tr>
<tr>
<td>North Dakota</td>
<td>38</td>
</tr>
<tr>
<td>Ohio</td>
<td>7</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>37</td>
</tr>
<tr>
<td>South Dakota</td>
<td>19</td>
</tr>
<tr>
<td>Washington</td>
<td>5 (excludes const. amendments)</td>
</tr>
<tr>
<td>Wyoming</td>
<td>0</td>
</tr>
</tbody>
</table>

The table indicates that use of the plebiscite varies substantially among the states. In some cases, a large number of propositions does not necessarily mean that the electorate has had to confront a large number of issues at a given election. In North Dakota, for instance, several votes on initiatives or proposed constitutional amendments occurred at special or primary elections. Thus, the largest number of propositions at any election in that state during the 1986-1990 period was eight. Similarly, votes on some propositions in
of Oklahoma were held on dates of primary rather than general elections. Thus, the largest number of propositions on the ballot during this time period was six.

The most frequent use of the ballot proposition occurs in California. There is no evidence, however, that California is a precursor of plebiscite use in other states. In addition, California provides for a large number of different types of ballot measures, not all of which are available in other states. Apart from bond acts (which are not included in the above table), California permits the electorate to vote on initiative constitutional amendments and statutes, legislative constitutional amendments, and legislative initiative amendments. This latter device permits the legislature to propose, by a two-thirds vote of each house, to amend a statute established by initiative. Three of the measures included in the table fell into this category. Although the number of ballot propositions in California has given rise to some criticism, the above table indicates that raw numbers do not necessarily translate into a nationwide trend or to abuse of the plebiscitary process. Whether there are "too many" ballot propositions at any one election will depend on variables such as the complexity of the issues, the ethos of the particular jurisdiction, and the number of candidates standing for election on the same ballot, as much as on the sheer number of ballot questions.

The Task Force undertook to consider each of these issues and to make recommendations that would capitalize on the strengths of the initiative and referendum while reducing their pitfalls. In doing so, the Task Force reviewed the constitutional and statutory provisions that regulate the initiative and referendum in each state (as well as the District of Columbia) where they are available, the case law that has developed under these provisions, and much of the secondary literature that has been written on the subject.

A dizzying variation in the procedures for initiatives and referenda belies the apparent similarity of these measures. Some jurisdictions permit initiative or referendum, but not both. Some permit only an indirect form of initiative, whereby initiated proposals are first submitted to the legislature and are voted on by the electorate only if the legislature fails to enact the measure within a specified period; other jurisdictions allow both types. Two states permit initiatives only for constitutional amendments (and Illinois permits them only with respect to a narrow range of amendments), while others permit them for statutes

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8 Some states, e.g., Michigan, Nevada, Ohio, Utah, and Washington permit use of both direct and indirect initiatives.

9 See Fla. Const. art. 11, §3; Ill. Const. art. XIV, §3. North Carolina provides that any revision of or amendment to the state constitution must be initiated by the people or by the legislature and, in either case, submitted to the people for a vote. N.C. Const. art. XIII, §§3, 4. As this is the only provision in North Carolina relating to popular vote on subjects at issue in this report, it will not be further discussed.
or both statutes and constitutional amendments. Several states prohibit the initiative or referendum for certain subjects, such as appropriations, special legislation, or laws necessary for the preservation of health and safety. Other states have relatively unique exceptions such as matters dealing with religion, property classifications, or support of the state government.

Procedures among the states also vary. While all states require that a ballot proposition be preceded by the filing of petitions with a certain number of names supporting the plebiscite, these numbers are based on differing criteria. Although many states require that petitions bear a number of names equivalent to a particular percentage voting in the preceding gubernatorial election, other states base the requirement on the number of voters in some other electoral contest or on the total population of the state, or number of qualified electors in the state. Some jurisdictions require that signatures be collected from a geographically broad range within the state, while others are silent on the issue.

States also vary on the role of officials in the drafting of the underlying law, the ballot title, and the ballot summary which will frequently be the primary source of information for voters. Some permit state officials to play an advisory role in drafting the proposed statutory language, and several involve state officials in drafting summaries and ballot titles that are included in materials circulated to voters or that appear on the ballot. Further, states have different mechanisms for informing voters about the substance of a proposed ballot measure. In some jurisdictions, the state is actively involved in publicizing the existence of the question on the ballot and in circulating arguments of proponents and opponents. In other jurisdictions, however, the state plays little, if any, role in providing information to voters.

Finally, the relationship between popularly enacted legislation and legislation enacted by the legislature differs among the states. In some states, neither the governor's veto power

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10 See, e.g., Ala. Const. art. XI; Wyo. Const. art. 3, §52.
12 Ohio Const. art. II, §1e.
13 S.D. Const. art. III, §1.
14 See e.g., Maine Const. art. IV, pt. 3, §18; Or. Const. art. IV, §1.
15 See Colo. Const. art. V, §1(2) (secretary of state).
16 N.D. Const. art. III.
17 Mont. Const. art. III, §§4, 5.
nor the legislature’s power to amend or repeal statutes applies to popularly enacted measures.\textsuperscript{18} In other jurisdictions, however, these measures are treated similarly to other legislation.\textsuperscript{19}

This Report addresses the primary criticisms of the initiative and referendum and recommends procedures to improve direct democracy. The Report begins by exploring the methods by which proponents of an initiative or referendum secure a place on the ballot. Typically, this includes submitting a proposal to state officials and obtaining a specified number of signatures in support of an election on the issue. Although these requirements seem technical, their content substantially implicates the quantity and quality of information that is available to voters at an early stage of the process. These requirements similarly can be used to gauge the level of support that exists for a particular proposition prior to the time when substantial state resources are invested in the process.

The Report next explores the ways in which states do and can educate voters about ballot propositions. The state’s role in the educational process ranges from passively making available general information about ballot propositions to those who inquire, to actively preparing and mailing to registered voters pamphlets that explore the propositions in depth. The Report concludes that state intervention to educate the electorate is an essential element of successful direct democracy.

In Part V, the Report addresses specific mechanisms that might be employed to limit the availability of the initiative. These include “single subject” requirements, substantive restrictions on initiatives that burden discrete minorities, and substantive restrictions on topics, such as appropriations, that are not readily susceptible to decision making by the electorate.

The Report then addresses the issue of amendment or repeal of laws enacted through the initiative, a subject that is generally overlooked in both the law and commentary on plebiscites. Finally, the Report examines appropriate limitations on the financing of, and disclosure requirements for, campaigns involving initiatives and referenda. The Task Force was aware that much of the criticism directed at the plebiscite involves the claim that both places on the ballot and outcomes can be “bought” by sufficiently wealthy organizations. Nevertheless, the Task Force was concerned that constitutional principles involving campaign finance, many of which have emerged from candidate elections, must be brought to bear on the area of ballot propositions.

The recommendations of the Task Force should be read against its general objective of increasing the costs of special interest capture of the process and reducing the costs of

\textsuperscript{18} See, e.g., Ariz. Const. art. 4, Pt. 1, §1(6); Neb. Const. art. III, §4.

\textsuperscript{19} See, e.g., Mass. Const. Amend art. 48, Pt. 6.
Some of these recommendations, however, were arrived at only after substantial debate among Task Force members and, on occasion, with some reluctance. The Task Force also was constrained in its recommendations by both the need to retain constitutional safeguards for political activity and by practical concerns about implementation.

III. Qualifying for the Ballot

A. Drafting the Proposal and Ballot Title.

The Task Force believes that there exists a need for an orderly process by which ballot propositions are placed before the electorate. This process should require ballot propositions to be stated in a clear, comprehensible manner that reflects their legal effect, consistent with providing flexibility for the proponents of the propositions. Since the function of the initiative process is to allow the electorate to engage in lawmaking outside of representative channels, state intervention in the process should be limited. Nevertheless, the process should provide for the generous availability of judicial review both for proponents and opponents in order to safeguard the underlying functions of electoral lawmaking.

Recommendation 1: Procedures for submitting and reviewing ballot language should proceed along the following lines.

1. Any proponent of a ballot proposition shall submit a draft of the proposal, and may submit a proposed ballot title, to the appropriate state official with a filing fee. An appropriate state official, such as the attorney general, secretary of state, or legislative drafting office of the state, may make suggestions to the proponents concerning the text of the ballot proposition.

2. An appropriate state official shall review the ballot language and draft a ballot title or accept the ballot title submitted by the proponents. The ballot title shall appear on the voters' pamphlet, if any; on petitions circulated for signature; and on the ballot, unless successfully challenged in court as to accuracy or clarity.

The initiative and referendum process varies significantly from state to state on issues such as petition circulation, drafting of proposals, drafting of ballot titles, and judicial review of ballot language. Numerous states require the attorney general to review a proposal and draft a ballot title. As a general matter, petitions can be circulated only after a state official has approved appropriate language, although the identity of the official differs

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among the states. The Task Force saw no need for uniformity on many of these issues. With respect to some procedures, however, the Task Force believed that certain processes would enhance the fairness and utility of the initiative and referendum. The Task Force was primarily concerned with the manner in which language that was potentially misleading or confusing could be clarified by a combination of official involvement in the drafting process and judicial review.

Current practice in many states, which the Task Force approves, is for the proponents of a ballot proposition to submit their proposal to a state official, typically the secretary of state. That official may review the language of the proposal or assign that function to some other designated official. The official may also forward the proposal to the attorney general for assignment of a ballot title.

The Task Force believed that proponents of the measure should be entitled to suggest a ballot title, but the state official charged with drafting should not be bound to the proponents' suggestion. The title will ultimately appear on petitions for circulation, in the voters' pamphlet, and on the ballot itself. Thus, it may serve as a primary source of information for voters. For this reason, the Task Force was concerned that there be assurance of both objectivity in the drafting of the title, and recourse for any party who seeks to challenge the accuracy or clarity of the ballot title, whether as used on ballot petitions, informational distributions, or on the ballot itself. While the Task Force recommendation indicates that challenges to the ballot title may occur at any level of the state's judiciary, it is desirable to obtain an expeditious resolution of the issue. Thus, expedited hearings before the supreme court of the state may be appropriate.

Many states, foreseeing the possibility of deliberate confusion of voters, require that ballot titles be stated in the form of a question and be so worded that those in favor of the initiative or of retaining a measure referred to the electorate will vote in the affirmative and

22 In Missouri, for instance, the Secretary of State drafts a ballot title and transmits it to the attorney general for review. Once approved, the ballot title is placed on petitions circulated for signature. See Mo. Rev. Stat. §116.334.2.


25 Florida currently provides for the attorney general of the state to request an advisory opinion regarding the compliance of the text of the proposal with constitutional and statutory requirements, including the format of the ballot title and explanatory statement. See Fla. St. Ann. §16.061.
those opposed to the initiative or referred measure will vote in the negative. The Task Force believes that this mechanism is helpful and has minimized confusion among voters.

Unlike the ballot title, the text of the proposal should remain entirely within the discretion of proponents. To permit state officials to intervene in the drafting process might help to clarify proposition language or better ensure consistency with existing laws, but it would also frustrate the very function of permitting the electorate to enact laws beyond the control of elected officials. Thus, the Task Force believes that a state should have the authority to review and comment on submitted proposals, but that any suggestions to the proponents be advisory only. This procedure is consistent with practice in numerous states.

B. Judicial Review of Proposal and Ballot Title.

Recommendation 2: Any person may challenge the ballot title or text of a ballot proposition at an expedited administrative or judicial hearing on the grounds that the assigned title or submitted language is misleading or confusing or that it violates state statutory or constitutional requirements for an initiative. Judicial review of a determination by an appropriate state official concerning a ballot title or text of a ballot proposition should follow an abuse of discretion standard. Such challenges should be permitted prior to the circulation of petitions or the election on the initiative at issue, but the state should set a reasonable period of time before the certification of the question to the ballot by which all pre-election claims must be filed. Challenges to the substance of the initiative on general state or federal constitutional grounds should be permitted only after the election on the initiative at issue.

Recommendation 3: Courts should be entitled to order alterations in the language of a ballot title in order to make the title conform to state statutory or constitutional requirements or to avoid misleading or confusing language.

Recommendation 4: At a minimum, public notice should be given of the attainment of each significant stage of the initiative process. These stages include circulation of petitions, receipt of completed petitions, and certification of the question for the ballot.

Many of the allegations of confusing or misleading language in ballot titles or propositions could be addressed by some form of administrative or judicial review prior to the vote on a particular initiative. A common form of review involves challenges to the ballot title or summary prepared by a public official, typically the attorney general. In


virtually all states in which a public official is charged with either drafting or approving parts of the ballot proposition or voters' pamphlet, dissatisfied persons may petition an appropriate court of the state for a timely review that allows pre-election corrections and clarifications.\textsuperscript{28}

Some states employ a formal body established for the specific purpose of examining the initiative language or an entity that reviews proposals that are typically submitted to the legislature. The state of Washington maintains an office of the code reviser who is certifies that the measure has been reviewed for form and style and that advisory recommendations have been forwarded to the proponents. Similarly, in Colorado, all initiatives are submitted to the directors of the legislative council and the office of legislative legal services for review.\textsuperscript{29} A board consisting of the secretary of state, attorney general, and the director of the office of legislative legal services then constitute a board to fix a ballot title in the form of a question that can be answered "yes" or "no" and to prepare a summary of the proposition.\textsuperscript{30}

The Task Force concluded that some form of administrative or judicial review of the proposition was appropriate in order to ensure better comprehension by the electorate, avoid confusing language, and ensure compliance with statutory and constitutional requirements for initiatives. Presumably, a pre-election review could reduce ambiguities in wording and misleading language, and advance voter education by providing information to potential petition signers.\textsuperscript{31} Some members of the Task Force expressed the opinion that a commission would be superior to pre-election approval of language by an elected official. Their concern was that political officials might be or appear to be compromised in their consideration of a particular proposition. Regardless of the form of pre-election review, the Task Force concluded that subsequent judicial review should remain permissible.

The rules governing timely judicial review of a ballot measure vary widely among jurisdictions. In many jurisdictions, where proponents or opponents may challenge ballot language (titles or proposed statutory language) as confusing or as violative of the

\textsuperscript{28} See, e.g., Colo. Rev. Stat. §1-40-102 (petition for expedited hearing by supreme court); Okla. Stat. tit. 34, §10 (appeal to supreme court); Or. Rev. Stat. §251.223 (expeditions appeal to supreme court); Wash. Rev. Code §29.79.060 (appeal to superior court).

\textsuperscript{29} Id. See In the Matter of Title, Ballot Title and Submission Clause, and Summary Adopted May 16, 1990, 797 P.2d 1283 (Colo. 1990).

single-subject rule, judicial review occurs prior to the election. Some jurisdictions, however, permit these challenges to be brought only after the measure has been approved. While post-election review may reduce total judicial costs, since questions involving defeated measures will be rendered moot, courts may be more reluctant to strike down measures that have already been adopted by the people. Thus, as a practical matter, timing of the review may affect the substantive result.

The Task Force believed that prompt judicial review of proposition summaries, ballot titles, and propositions is essential to orderly conduct of the process by ensuring compliance with statutory requirements and avoiding language that might be confusing to voters. At the same time, the Task Force was concerned that litigation could be used by opponents of a proposition to prevent or delay a vote on an issue. In order to avoid the prospect that opponents could substitute litigation for elections, the Task Force recommends that judicial review be made available in a manner that minimally interferes with the statutory schedules and substantive requirements for holding an initiative election. Judicial review of a determination to accept or reject a proposal, therefore, should be immediately available for challenges made on the basis of an alleged violation of statutory requirements, such as "single-subject" requirements or requirements that appropriations issues be excluded from the ballot. This review should follow from a determination of the issue by an appropriate state official. For instance, if the secretary of state should reject a proposed ballot on the grounds that it contains more than a single subject, proponents should be able to obtain a judicial determination of the question on an expedited basis that will not substantially interfere with submission of the question to the voters at the election for which the question would have been available had the proposal been accepted by the secretary of state. The Task Force recommends, however, that any judicial review follow an abuse of discretion standard in order to provide the decision of the state official with a presumption of correctness.

32 See text accompanying notes 92-104 infra.
34 See, e.g., Surratt v. Prince George's County, 320 Md. 439, 578 A.2d 745 (1990); Wadhams v. Board of County Commrs., 567 So.2d 414 (Fla. 1990) (county referendum).
35 See, e.g., Burrell v. Mississippi State Tax Commn., 536 So.2d 848 (Miss. 1988) (giving great deference to fact that amendments have been passed by electorate).
36 The Montana Constitution prohibits attacks on the sufficiency of the initiative petition after the election has been held. Mont. Const. art. III, §4(3). The Ohio Constitution precludes a court from holding any law enacted by initiative or law rejected by referendum from being ruled unconstitutional or void on account of the insufficiency of the underlying petitions after the election. Ohio Const. art. II, §1g.
Judicial review should not be considered ripe at this stage, however, for challenges on the basis of general state or federal constitutional issues, for instance, a challenge that the proposal, if enacted, would deny certain persons due process of law. These challenges, which may affect the desirability of the proposal, but are not directed to the specific qualifications for a ballot issue, may more appropriately be brought when and if the electorate enacts the proposal. While early determination of these issues may result in certain economies of judicial time if joined with other challenges, and would avoid the expenditure of funds for the election process on a proposition that is ultimately invalidated, the Task Force believed that these considerations were outweighed by a desire to avoid delay in the initiative campaign. Limiting litigation on these issues to post-election challenges is also consistent with the general principle that constitutional questions are to be avoided unless it is necessary to resolve them. Even where confronting constitutional issues seems inevitable, these questions should not usually be determined under conditions that permit only a limited time for reflection.

While litigation is pending, proponents should be entitled to continue the process of circulating petitions should they desire to do so. If the ruling of the appropriate state official is adverse to the proponents, they run the risk that their efforts in circulating petitions will be in vain should the reviewing court uphold the administrative or executive determination. On the other hand, should the initial ruling be favorable to the proponents but be challenged by others, the ability to circulate petitions during the litigation process will reduce the probability that litigation will be used as an effective delaying tactic. Proponents of a measure, of course, should be entitled to defer the petition circulation process until termination of the litigation should they so desire. The existence of litigation, however, should not toll any applicable time periods for submission of petitions or other procedures. These time periods are generally intended to allow the electorate sufficient time to become informed about ballot propositions. Thus, any tolling could seriously restrict opportunities for dissemination of information about the initiative.

In theory, a court has at least three remedial options on finding a violation of state requirements prior to the election on a ballot proposition. One option is to strike the proposition or the offending portions thereof from the ballot. The second is to rewrite the proposition in a manner consistent with statutory requirements. The third is to issue a writ of mandamus to another party to redraft the proposition. If the objective of pre-election review is to avoid waste and ensure clarity on the ballot, it would seem appropriate to

Litigation brought prior to qualification of a proposition for the ballot or prior to election might itself be challenged as failing to involve a case or controversy. Thus, the Task Force believes that these actions be instituted in accordance with a state's Declaratory Judgment Act or similar legislation.
remand the petition back to proponents for new signatures and resubmission.\textsuperscript{34} Certainly, this should be the case where language is successfully challenged prior to the time that petitions have been circulated. If the measure has already qualified for the ballot, one possible remedy is to strike the question from the ballot.\textsuperscript{35} This seems an unduly harsh remedy where the review postdates the investment by proponents of substantial resources in the signature collection process. Thus, some jurisdictions authorize judicial or executive redrafting of the offensive passage. In Oregon, for instance, the state supreme court is authorized to modify and correct the language of a ballot summary drafted by the attorney general on a finding that it is "insufficient or unfair."\textsuperscript{36} Similarly, Oklahoma is authorized by its supreme court to correct or amend a ballot title should the one submitted by proponents and approved by the attorney general be deemed inappropriate by the court.\textsuperscript{37} In Nevada, on the other hand, the supreme court has recently issued a writ of mandamus to the secretary of state to revise a summary of argument in order to retain the ballot measure while avoiding misleading language.\textsuperscript{38}

The Task Force believed that if the language found inadequate by the court has been approved by a public official (such as in the case of a ballot title drafted by the attorney general), the presumption should be in favor of reformation. If, on the other hand, the offending language had been drafted by a proponent of the ballot proposition, the presumption might be different. The Task Force was concerned that, absent some deterrent, proponents may have sufficient incentives to use confusing or misleading language, or otherwise to avoid statutory and constitutional requirements that it would be appropriate to create a presumption that misleading or confusing language will be struck from the ballot.

The Task Force also concluded that certain administrative matters could facilitate use of the Initiative. A state might consider that a modest filing fee would be appropriate both to filter frivolous proposals and to help defray the costs of official review of the proposal. The fee would be payable at the time that the proposed initiative or request for referendum was submitted to file appropriate state office. In order to enhance comprehension of ballot propositions and thereby ensure increased participation by the electorate, the Task Force also believed that, where a language other than English is the primary language of a

\textsuperscript{34} See In the Matter of Title, Ballot Title and Submission Clause, and Summary Adopted May 16, 1990, 797 P.2d 1283 (Colo. 1990).

\textsuperscript{35} See Dust v. Riviere, 277 Ark. 1, 638 S.W.2d 663 (1982); Evans v. Firestone, 457 So.2d 1351 (Fla. 1984).


\textsuperscript{37} Okla. Stat. tit. 34, §10.

significant percentage of the population, all state-supplied materials relating to the ballot proposition should be made available in that language.


Once a ballot title is assigned, proponents of an initiative or referendum are typically entitled to circulate petitions for the collection of sufficient signatures to qualify for the ballot. The signature collection process is intended to satisfy two objectives. It ensures that the measure that is put to a vote is of sufficient public interest to warrant being addressed by the electorate. It also, in theory at least, constitutes an independent educational process by which potential voters can learn about the issues on which voting will occur. Nevertheless, this process has been subjected to substantial criticism that suggests a failure to fulfill these functions.

Various jurisdictions attempt to enhance the educational elements of the petition circulation process and avoid deception of potential signers by imposing certain requirements on circulators and the forms of the petition. As noted above, several jurisdictions require that a pre-approved ballot title appear on petitions. California requires that the attorney general’s summary appear on petitions. Thus, these states require substantial governmental input prior to circulation. In Nebraska, the petition must contain a statement of the object of the proposal, although that statement is drafted by the proponents.

In practice, it is unclear that these statutes accomplish the objectives of the signature requirement. Some commentators have suggested that few signers of petitions actually take the time to read or consider the proposition or summary that they are asked to sign. Instead, the advent of circulators who are paid on a per signature basis has increased incentives to minimize the time spent with each potential signer. The incentive of the circulators is to spend as little time as possible with any particular individual. Far from seeking to educate the voter, the circulator hopes to make a quick determination of whether the person will sign, presumably based on either a general description of the proposal or a plea to the passerby to help place the proposal on the ballot, even if the prospective signer opposes or is indifferent to the measure. Since efforts to prevent signature collection by paid circulators have been found unconstitutional, it seems unlikely that direct attacks on this process will be effective.

The Task Force discussed the possibility that the educational function of the petition circulation process would be enhanced by requiring each signer to state in writing that he

45 See, e.g., Idaho Code §34-1809; Wash. Rev. Code §29.79.070. Petitions in Washington must also include the summary prepared by the attorney general.


or she had read the petition or had it explained. While the Task Force was unprepared to recommend this course of action due to the logistical difficulties explained below, the factors that the Task Force considered may be of assistance to any state that contemplated such a requirement. Any such requirement should provide for suitable arrangements to permit some form of signature by persons who are handicapped or illiterate. Note that the signer need not indicate agreement with the proposition; there need only be agreement that the proposition be presented to the electorate. This requirement would make explicit what commentators understand to be the implicit significance of signing the petition. At the same time, this requirement might induce potential signers to consider ballot propositions more seriously and might frustrate, if not eliminate, opportunities for circulators to obtain signatures with little or no explanation of the underlying question. Additionally, limiting signers to those who understood and satisfied their obligation to consider the petition they were asked to sign would help restrict ballot propositions to questions that the requisite number of signers actually thought deserved to be placed before the electorate. The trade-off for this increased educational value would be a more expensive and time-consuming petition circulation process. At the same time, such a requirement may be undesirable in a jurisdiction that made amendment of the state constitution relatively free of burdens. If the signature collection process for a proposed constitutional amendment turned out to be less onerous than the signature process for initiating legislation, advocates of propositions might attempt to accomplish their objectives through constitutional amendment, a result that the Task Force believes would be unfortunate given the presumed stability of constitutions. Thus, legislators in states that permit constitutional amendment with a limited signature collection requirement should consider the implications of adopting a more rigorous requirement for initiatives.

The Task Force had some concern that the handwritten statement requirement could be the basis for substantial litigation concerning the sufficiency of petitions. Lawsuits to resolve allegations of technical errors in the statements could substantially affect the timing of the initiative vote. A jurisdiction that adopts this requirement, therefore, should consider whether to make the statements incontestable, as their primary objective is educational rather than to ensure that the measure qualifies for the ballot.

D. Signature requirements.

Recommendation 5: Jurisdictions where it is concluded that there are too many plebiscites should increase the number of signatures necessary to place a proposition on the ballot rather than arbitrarily limit the number of propositions on the ballot.

Recommendation 6: Jurisdictions where it is concluded that sectional differences permit one locality to obtain discrete benefits at the expense of others, or permit a group of localities to impose a discrete burden on others, should adopt a geographical distribution requirement for signatures.
1. Numerical requirements. All states that permit referendums require petitions for any proposition to bear a certain number of signatures in order to qualify the measure for the ballot. Nevertheless, the number of signatures required varies widely among jurisdictions, evidencing that there is no single view about what constitutes a sufficient percentage of the electorate that must be interested in an issue before a vote on it can be justified. The presumed function of this requirement is to avoid placement of frivolous petitions. For instance, in the State of Washington, where initiatives are filed with the secretary of state prior to the commencement of the signature collection process, 551 initiatives were filed between the 1914 and 1989. During this same period, only 85 initiatives were ultimately certified as containing sufficient signatures to warrant placement on the ballot. In Montana, there have been 30 initiative proposals filed since 1980. Only half of these, however, have proceeded to a vote; the remainder were withdrawn by proponents or specifically disqualified for failure to obtain sufficient signatures.

Given the costs associated with holding initiative or referendum elections, some demonstration of threshold support seems appropriate. But that leaves open the issue of the appropriate threshold. State laws on the issue vary widely. Even where states use the same base of voters, e.g., the number of votes cast in the preceding election, the required percentage ranges from 3\% to 10.\textsuperscript{5,6} Five and ten percent appear to be common percentages. While there does appear to be a relationship between the number of signatures required and the number of plebiscites held, the relationship is not necessarily related to the quality or desirability of ballot propositions presented.\textsuperscript{7}

The Task Force believed that there is no optimal percentage of signers that will ensure appropriate use of the plebiscite. In any jurisdiction, the proper percentage will depend on such factors as the number of plebiscites that have been held, the state's ethos about use of the plebiscite, the costs of holding plebiscites, and the reliability of the legislature to represent its constituents. The Task Force recognized, however, that the signature requirement could affect the costs of the plebiscitary process significantly, and that higher requirements could help to limit plebiscites to situations of legislative failure. Thus, members of the Task Force concluded that, for those jurisdictions in which the number of initiatives has become cumbersome, signature requirements should be used as a check on the frequency of the process. The Task Force believed that any other method of reducing plebiscites (e.g., random selection among propositions that otherwise qualified for the ballot) could be effective.

\textsuperscript{5} Mass. Const. Amend. Art. 81, §2.

\textsuperscript{6} Nev. Const. art. 19, §2.

\textsuperscript{7} David Magelby suggests that the statistical relationship between signature thresholds and the number of initiatives and referenda is statistically significant, although it is higher for initiatives than for referenda. Magelby, supra note 5, at 42. But that quantitative indication fails to consider whether the thresholds of some states are too low (so that some states have too much direct legislation) or too high (so that some states have too little).
would pose greater logistical and philosophical difficulties. Some Task Force members, however, contended that the additional costs that attend high signature requirements could restrict the plebiscite to wealthy groups. Thus, the Task Force recommendation provides only for examination of this subject in any jurisdiction in which there is a perception that the plebiscite is overutilized, and for increases in signature requirements where a jurisdiction determines there has been overuse.

2. Geographical distribution requirements. Several states not only require that a minimum number of signatures be obtained to qualify a proposition for the ballot, but also require that the signatures be collected from a cross section of the state. Missouri, for instance, requires that initiative petitions be signed by eight per cent of the voters in each of two-thirds of the state’s congressional districts. Montana requires that initiative petitions be signed by at least five percent of the qualified electors in each of at least one-third of its legislative representative districts. Nebraska requires that signers include five percent of the electors of each of two-fifths of the counties of the state. Massachusetts provides that no more than one quarter of the signatories on any petition may be registered voters in the same county.

Geographical distribution requirements may help ensure that issues of local concern are not subsidized by the state. In the absence of such requirements, parochial issues could have two adverse effects. First, they would require that the entire state bear the cost of the initiative or referendum process, even though only a small section of the state would obtain the related benefits should the proposition receive a majority of votes. Alternatively, a small segment of the state could receive a discrete and intense benefit that imposed a diffuse adverse effect on the remainder of the state that, in the aggregate, outweighed the local benefit. In this latter situation, it would be worthwhile to the benefited area to lobby for passage of the initiative, but it might not be worthwhile for any of the adversely affected areas to lobby against it. In this event, the measure might well pass, even though it imposed a net negative effect on the state at large.

Conversely, a geographical distribution requirement might prevent various localities from imposing a disproportionate burden on another locality. If several localities sought to prevent another locality from engaging in a particular activity, or wished to engage in an activity only by shifting its costs to some other locality, a numerical requirement alone may serve as an insufficient obstacle. A geographical distribution requirement could create a sufficient obstacle to preclude such burden shifting.

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51 Mass. Const. Amend. Art. 48. See also Ohio Const. art. II, §1g.
Notwithstanding these possibilities, some Task Force members were concerned about possible consequences of a geographical distribution requirement. The signature collection process is certainly made more expensive by the requirement, especially if it imposes an obligation to collect signatures in rural areas where relatively few signatures can be obtained per work-hour invested in the collection process. Thus, one of the effects of such a requirement is to favor well-financed campaigns over grass-roots campaigns. The Task Force determined that the balance of these effects would vary with the extent to which sectional differences (e.g., rural-urban or upstate-downstate) were evident in a state's political process. The greater the likelihood of sectional differences, the more appropriate a geographical distribution requirement.

IV. Increasing Voter Comprehension

A. The Lines of Debate

The decision to vote on an issue entails a different range of considerations than the more common decision to vote for a candidate. The voter who seeks to make an informed choice about a candidate needs to consider past records and the general philosophy of that candidate in order to gauge compatibility with the voter's own concerns. A few salient issues may be determinative for a particular voter, but a general impression of the candidate's likely votes on those issues will typically be sufficient. Informed voting on a single issue, however, requires a more precise understanding of the likely consequences of the proposal, including its relation to existing law. Elections for a candidate may frequently become a contest about whom the informed voter believes is likely best to specialize in making decisions about issues of interest to the voter. Elections on a single issue, however, require the informed voter to become that specialist.

Given these differences, it should not be surprising that most of the criticisms of initiatives and referenda call into question the capacity of the average voter to understand the ballot proposition and its consequences and to vote in a manner that reflects the public interest. Voters are also considered by some to be incapable of predicting the consequences of approving or rejecting the proposition. Ballot propositions are considered to be too numerous and complex to command the understanding of most voters, and mechanisms designed to assist voters are considered to fall far short of the mark. These mechanisms include a signature collection process that some commentators believe is operated to generate names rather than to educate, and wording of the actual ballot proposition that is intended to obfuscate rather than clarify the consequences of passage.\(^{58}\)

\(^{58}\)See Magelby, supra note 5; Cronin, supra note 5; Lowenstein, Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment, 29 UCLA L. Rev. 505, 551-56 (1982).
With this critique in mind, the Task Force considered a variety of issues, including devices used in various jurisdictions to educate voters and to ensure presentation of the ballot proposition in a clear, comprehensible, and objective manner. It should be recognized at the outset that no claim is made that state legislators have anything close to perfect knowledge or comprehension of the issues on which they are voting. Thus, the fact that some voters are confused or misled does not itself render the plebiscite an inferior mode of lawmakers. Nevertheless, the Task Force recognized that since state legislators are repeat players (they interact with each other regularly on issues of common concern), there are likely to emerge individual legislators who are known to follow particular issues closely. These legislators may be perceived as specialists on those particular issues, so that other legislators may take their cue from them. These economies may mean that legislators are casting educated votes, even if they have no or little information about the issue before them. Plebiscites are less susceptible to economizing. Nevertheless, some “coattails” may exist. One person may vote a particular way because trusted friends are voting that way. Where political parties or respected representatives endorse or oppose certain propositions, voters generally sympathetic to that party or representative may tend to follow their lead. Finally, the need for economizing may be less than is the case in the legislature. The development of specialties may be essential to efficient operation where the legislature must consider a wide array of proposals. But if the number of ballot propositions before the electorate is small, they may have time to become personally informed about each.

B. The Use of Voters’ Pamphlets.

Recommendation 7: Any state in which an initiative or referendum election is scheduled should provide voters a pamphlet that contains information about the issues and arguments for and against. This information should be made available not less than 30 days prior to the election at least to each household in which one or more registered voters resides. Copies should also be readily available to persons who register to vote between the period when distribution is made to previously registered voters and the election to which the voter information relates.

Recommendation 8: The voters’ pamphlet should contain at least the following:

(1) The ballot title drafted or accepted by the appropriate state official.

(2) An explanation of the effect of the proposal and the effect of an affirmative and of a negative vote. This explanation should be drafted in a neutral, objective manner by a public official not directly affected by the proposal.

(3) Advocacy statements by proponents and opponents of the proposition. The state should limit the statements to a number and length that is consistent with the number and complexity of propositions to be voted on at any given election. Where the number of supporting statements submitted exceeds the number permitted, proponents of the measure should be entitled to select which statement or statements are published in the voters' pamphlet. Where the number of opposing statements submitted exceeds the number permitted, those submitting statements should be entitled to determine which statements are published in the voter's pamphlet. If, however, proponents or opponents are unable to agree, an appropriate state official should determine which statements are published.

Recommendation 9: Voters' pamphlets should not be required to contain the full text of the proposal, but should contain as much of the proposed language as possible, consistent with enhancing the readability and use of the pamphlet. The extent of the text to be published should be dictated by a specific, objective standard, such as "reasonably comprehensive," that is likely to permit substantial detail of the proposal without inviting selective inclusion or exclusion of provisions. Each voter should be able to obtain a copy of the full text of the proposal. The pamphlet should indicate the appropriate procedure for obtaining the full text, e.g., by returning a postcard or by calling an "800" number.

Recommendation 10: An individual or group who submits an argument for publication in the voters' pamphlet should be charged a modest filing fee to help defray the cost of processing that submission.

1. An overview of current practices. A number of states that hold initiatives and referenda use pamphlets to educate voters. These include Arizona, California, Idaho, Maine, Massachusetts, Oregon, Montana, and Washington. In some of these states, distribution of a pamphlet is required by statute. The length of the voters' pamphlet varies depending on state statutory requirements and the number and length of ballot propositions. The "Publicity Pamphlet" circulated in Arizona for the general election of November 1988, contained information relating to 8 propositions and ran 40 pages. The "Publicity Pamphlet" circulated for the state's November 1990 general election covered 14 propositions and ran 224 pages. Massachusetts also provides substantial information about voter registration, absentee ballots, and the services of the secretary of state in its pamphlet. The pamphlet in that state for the 1990 general election covered six ballot propositions in 30 pages. The Washington State Voters Pamphlet includes information on initiatives, legislative resolutions, and candidates (including pictures) for federal, state, county, and judicial offices. In each of these cases, the Task Force believed that a voters' pamphlet significantly increased opportunities for voter comprehension. The ultimate utility of the pamphlet depends on resolution of a variety of issues including the following:

In resolving these issues, the Task Force was motivated by three considerations. First, the Task Force believed that monetary charges could operate as a check on frivolous or duplicative arguments and, as long as charges were not too great, would not give an unfair advantage to groups that represented wealthier interests. Second, the Task Force was concerned that use of the voters' pamphlet could be inversely correlated with length. Thus, the objective of the Task Force was to encourage widespread distribution of essential arguments about each ballot proposition in the expectation that the pamphlet would encourage greater education and debate about the underlying issues rather than be a self-contained repository of all relevant information. Finally, the Task Force believed that, while public officials would frequently have an interest in the outcome of ballot propositions, those officials should be trusted to make distinctions among the quality and utility of arguments to be made for and against any proposal.

There is some debate about the use and utility of voters' pamphlets. A summary of current practices will reveal the various strategies that might be adopted.

Arizona: The voters' pamphlet is required to include the full text of the proposition, the official title, the descriptive title prepared by the secretary of state, arguments for and against the proposal, and a legislative council analysis. Any person may file an argument for or against the measure, but no argument may exceed 300 words. The party submitting the argument must be identified. The voters' pamphlet also contains a form of the ballot as it will appear on the election. That form contains a summary of the principal provisions of the measure, not to exceed 50 words, and a description indicating the effect of a 'yes' vote and a 'no' vote. Both the summary and the statement of effects must be approved by the attorney general.

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California: The voters’ pamphlet is required to include a title and official summary prepared by the Attorney General, an analysis prepared by the Legislative Analyst, arguments for and against the measure, and the complete text of the measure, separated from the summaries and arguments. The analysis prepared by the Legislative Analyst must include a fiscal analysis of the measure showing the amount of any increase or decrease in revenue or cost. The Legislative Analyst’s analysis is not limited by number of words, but must fit on a single page of the pamphlet and should “be easily understood by the average voter.” In order to accomplish this objective, the Legislative Analyst is required to submit the analysis to a committee of five persons for review of its clarity and easy comprehension. The committee must include a specialist in education, a professional writer, and a bilingual member of the public.

Idaho: The voters’ pamphlet must contain the title and text of each measure and a copy of the arguments for and against the measure. The ballot title is drafted by the attorney general and consists of a short title, not to exceed 20 words, and a general title not to exceed 200 words. Arguments are limited to 500 words; if more than one argument for or against the proposition is filed, the secretary of state selects one to be printed in the pamphlet.

Maine: The state prints a booklet that contains the law being proposed, a copy of the proclamation issued by the Governor calling for the election, and an explanation of the proposal by the Attorney General. Arguments for and against the measure are not included.

Oregon: For each qualifying measure, a committee of five citizens is selected to prepare an explanatory statement that is to be included in the voters’ pamphlet. Two members are appointed by proponents of the measure. The Secretary of State appoints two members from among the opponents of the measure. These four appoint the fifth member. Once the explanatory statement is filed with the secretary of state, a hearing is held to receive suggestions for changes. The Legislative Counsel Committee also prepares a statement of

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38 Cal. Gov’t Code §3503.
39 Cal. Gov’t Code §3571.
40 Cal. Gov’t Code §3572.
41 Id.
42 Idaho Code §34-1812C.
43 Idaho Code §34-1809.
44 Idaho Code §34-1812A.
no more than 500 words explaining each ballot measure and its effect. Apparently, this explanation is included in the voters’ pamphlet if no Committee statement is available.

Washington: The voter’s pamphlet contains an official ballot title, a summary of the law as it exists, a statement of the effect of the proposition, and arguments for and against the proposition. The ballot title (not to exceed 25 words) and summary (not to exceed 75 words) are drafted by the attorney general. The ballot title is stated in the form of a question and written in such a way that an affirmative answer would result in changing current law while a negative answer would result in no change in current law.

Notwithstanding these efforts, anecdotal evidence indicates that voters’ pamphlets are underutilized or quickly discarded. Cronin reports that surveys in Massachusetts, Oregon, and Washington reveal significant use of pamphlets by voters, especially on ballot issues. Cronin also recites evidence, however, that California voters rely on the pamphlets less than they do on television, newspapers, and radio. The Task Force was not in a position to determine the level of pamphlet use. The Task Force did, however, believe that the level of use could profitably be increased by making pamphlets more readable. Additionally, the Task Force considered that the state has an obligation, as a matter of principle, to place relevant information concerning ballot propositions before the voters. While drafting, printing, and distributing voters’ pamphlets may impose substantial costs on the state, voter ignorance also imposes substantial, if less quantifiable, costs.

As indicated by the review of current practices, most voters’ pamphlets are divided into discrete sections. The first section tends to recite the proposition in abbreviated form as it will appear on the ballot. The second section typically summarizes the ballot

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64 Wash. Rev. Code §29.81.
67 Cronin, supra note 5, at 81-83. Cronin concludes:

In a survey of 1,024 Oregon citizens in 1970, 45 percent said they had read “all or most” of the pamphlet; 69 percent rated the quality of the information it contained “excellent” or “pretty good.”

Studies in Massachusetts and Seattle also indicate that where voter pamphlets are available, voters claim to read some or all of them and consider them a valuable resource in helping them decide how they will vote.

68 Id. at 82.
proposition and states its effect. In some pamphlets, the pamphlet states the effect of a "yes" and a "no" vote. The third section sets forth arguments for and against the proposition. The final section sets forth the full text of the proposition. These texts are frequently printed in smaller type at the end of the pamphlet. In many cases, it is this last section that accounts for the length of the pamphlet. For instance, the text of Proposition 303 set forth in the 1990 Arizona voters' pamphlet ran 55 pages. The text of Proposition 129 occupied 11 double-columned pages of the 1990 California voters' pamphlet.

That, however, raises the question of how useful these texts are. Cronin and Magelby have noted an educational bias in the use of the pamphlets and concluded that they are of little use to those with little education. Magelby, applying standard readability measures, asserts that short titles and descriptions that appear on ballots in states that he studied are written at a level that requires a 15th to 18th grade education for full comprehension. He also concluded that the sections of the pamphlet dealing with the arguments, the analysis of consequences, and the text of the proposition range from the twelfth to the post-graduate grade level, depending on the readability scale used.

These conclusions may overstate the difficulty of the material. For instance, in California, the summary of the initiative is often stated in short sentence fragments. Thus, a recent initiative that would have limited terms of office and campaign spending was summarized in terms including:

- Limits gifts to elected state, local officials.
- Enlarges conflict of interest prohibitions, remedies applicable to state, local government officials.
- Prohibits use of public resources for personal or campaign purposes.

The Arizona and Massachusetts pamphlets, for instance, are required by law to state the effects of each vote.

Cronin, supra note 5, at 82; Magelby, supra note 5, at 137.

Id. at 138.

Some states attempt to legislate the readability of the information concerning the ballot proposition. In Oklahoma, proponents of a ballot proposition must submit a proposed ballot title that cannot exceed 150 words and that must explain the effect of the proposition. As a matter of statute, the ballot title must be written on the eighth-grade reading comprehension level. Okla. Stat. tit. 34, §9.B.3.
These summary statements may be so general that they do not provide much of the information that a voter would desire before making a decision on the ballot proposition. For instance, the voter in the above circumstances cannot discern from the summary statement the conditions under which special prosecutors would be appointed, the terms of appointment, the definition of a conflict of interest, or the precise limits imposed on gifts to public officials. While summaries may be of questionable utility, they do not necessarily involve the length or grammatical complexity that commentators fear makes the pamphlets inaccessible to those without substantial educational background. On the other hand, it is by no means clear that prospective voters who cannot comprehend the remainder of the pamphlet consider just the summaries.

Still less clear are the implications of, or remedies for, low levels of readability. Although there are some claims of attempts to confuse voters, authors of ballot propositions and of the pro or con argument sections generally have incentives to make them understood. It is also unclear what the relationship is between those who read the pamphlets and those who vote. If there is a direct correlation, then failure to read might mean a less democratic process than the plebiscite is expected to provide, but it also means that those who vote will tend to be those who understand the underlying issue.

Given the need for accuracy, clarity, and comprehensiveness in the pamphlet (as well as readability), the Task Force considered who writes the different parts of the pamphlet. As indicated above, this process varies from state to state, although state officials are frequently involved in drafting, reviewing, or both. Readability may be enhanced by the format of the pamphlet. Separation of different sections of the pamphlet — summary, arguments, statement of consequences — perhaps by color coding, may allow interested persons to proceed to those sections that may be most important to them.

2. Content of the voter’s pamphlet. As indicated by the summary above, voters’ pamphlets tend to include discrete sections that contain a ballot title, summaries of each ballot proposition, and arguments for and against the proposition. Some states also require an analysis by a state official. The Task Force believed that the content of the pamphlet should vary with the experience of each state and the availability of particular offices to

73 California Ballot Pamphlet for November 6, 1990, Proposition 131.

74 However, if those who do not vote represent a particular class of individuals with a discrete perspective on the issue, that constitutes an independent basis for criticism of the plebiscite.

75 See, e.g., Mont. Stat. §13-27-312, which requires the attorney general to write the statement of purpose, and requires the budget director to prepare a fiscal note that indicates expected fiscal effects of the proposition.
review and analyze propositions. Nevertheless, the Task Force also believed that each state should provide certain minimum procedures to ensure the accessibility and fairness of the pamphlet.

The first item to be included is the ballot title. This will be the same title that will have been assigned prior to petition circulation and will appear on the actual ballot. Thus, drafting and approving the ballot title will follow the process described above.

The second item is a summary of the ballot proposition and its effects. This summary should be prepared in as neutral and objective a manner as possible. In states that have an official who reviews proposed legislation that is submitted to the legislature, that same official should prepare the summary. This would include officials such as the Legislative Analyst in California or the code reviser in the State of Washington.

Several commentators have complained that initiatives can be drafted in a manner that is deliberately confusing to the electorate. In some cases, the wording of the proposition is cast in a manner that requires a vote contrary to what many people believe would be required to bring about the desired objective. The summary, therefore, may be the most important section of the pamphlet. In order to alleviate any confusion, the summary should state the effect of an affirmative or negative vote. For the same reason, the question — whether set forth in the summary or elsewhere — should be stated in such a manner that an affirmative vote effects a change in current law.

Should either proponents or opponents of the proposition believe that the summary or the statement of its effects prepared by an official is misleading or confusing, they should be able to receive expedited judicial review of the matter. Nevertheless, a heavy presumption of validity should accompany the official summary. Thus, a court should be entitled to require redrafting only if the summary as presented constitutes an abuse of the official drafter’s discretion.

The Task Force believed that advocacy statements play a variety of roles for the education of voters. Most obviously, advocacy statements set the parameters of the debate about the effects of the proposition and their desirability. Equally important, these statements can provide voters with information about who supports and opposes each proposition, as long as advocacy statements are required to be signed. This mechanism reduces the costs to voters of investigating propositions in which they do not have substantial interest. Instead, voters may be able to determine the preferences of individuals or groups with whom they identify politically and follow the lead of those advocates. While some may feel that this is an unfortunate dilution of democratic governance, it is the inevitable result of voters having limited time to investigate the advantages of each ballot issue and such a

See Lowenstein, supra note 53, at 522.
process does not vary substantially from legislators' dependence on committees or specialists to determine their votes.

Nevertheless, advocacy statements may duplicate each other, may contain frivolous arguments, or may be so numerous that publication of all both imposes financial costs and deters potential readers without offsetting benefits. The Task Force believed that the essential utility of advocacy statements does not lie in permitting each proponent or opponent to be heard, but in permitting all relevant arguments to be made. Thus, the Task Force concluded that there should be some limits on the number of advocacy statements on each side, although there was no reason that the limit should be only one. Nevertheless, advocacy statements may duplicate each other, may contain frivolous arguments, or may be so numerous that publication of all both imposes financial costs and deters potential readers without offsetting benefits. The Task Force believed that the essential utility of advocacy statements does not lie in permitting each proponent or opponent to be heard, but in permitting all relevant arguments to be made. Thus, the Task Force concluded that there should be some limits on the number of advocacy statements on each side, although there was no reason that the limit should be only one. Nevertheless, advocacy statements may duplicate each other, may contain frivolous arguments, or may be so numerous that publication of all both imposes financial costs and deters potential readers without offsetting benefits. The Task Force believed that the essential utility of advocacy statements does not lie in permitting each proponent or opponent to be heard, but in permitting all relevant arguments to be made. Thus, the Task Force concluded that there should be some limits on the number of advocacy statements on each side, although there was no reason that the limit should be only one.

Where it is necessary to eliminate some statements, the choice should be made by those who have made submissions, rather than by the state. This mechanism will reduce charges of official bias and increase the likelihood that the strongest arguments for each position are published. Thus, state selection of arguments should occur only where proponents or opponents cannot agree.

In addition, most of the Task Force concluded that a filing fee was both appropriate to help defray the cost of reviewing advocacy statements, and simultaneously to deter frivolous arguments or those not supported by a significant number of persons. While it may be argued that a fee poses an obstacle to the presentation of ideas, the suggested fee is no different from a variety of charges imposed on expression such as postage stamps or parade permits. It is unlikely that a fee calculated to defray expenses would preclude any legitimately motivated group from entering the political marketplace. Finally, the Task Force believed that any person whose statement was omitted should have an opportunity to challenge the omission on the grounds that it was not duplicative or confusing and made necessary arguments, but that any judicial review should again be made pursuant to an abuse of discretion standard.

The Task Force considered at length the propriety of including the full text of the proposed legislation. Some members believed that it was important to publish the full text of each proposal, the practice currently employed in virtually every state that distributes pamphlets. To those who wish to become fully informed about the proposal, study of the full text may be important and may permit judgments on issues not directly addressed by summary statements or advocacy arguments. In addition, inclusion of the full text may signal voters that their decision is an important one that imposes on them a lawmaking function identical to that of legislators. Task Force members who espoused these views also believed that in the absence of evidence that differentiated voter use of pamphlets based on the presence or absence of the full text, the presumption should be in favor of placing the entire proposal before the electorate. Finally, any summary creates the possibility that elements

79 California and Idaho, for instance, require the secretary of state to select one argument for each side if more than one is submitted.
of the proposition that are important to certain voters will be omitted or that other elements will be unduly emphasized.

Other members, however, believed that the full text adds unnecessarily to the costs of the pamphlet and, by adding substantially to the length of the pamphlet, could intimidate many potential voters from consulting the pamphlet at all. These members noted that many or most lengthy ballot questions involved proposals to make changes in tax rates or other details that might be summarily described. Since these texts typically comprise the lengthiest and most technical section of the pamphlet and are printed in relatively small type, they are likely to be the least read sections. Some members of the Task Force thus believed that the pamphlet should contain none of the proposed text. Instead, voters who wished to consider the full text should be given the opportunity to call an "800" number or mail in a postcard included in the pamphlet that would entitle them to receive the full text of each ballot proposition.

A majority of Task Force members believed that publication of the full text of each proposed law was unnecessary, but that partial publication would, in most instances, permit voters to review the salient provisions of the proposition. Thus, the Task Force recommends publication of text up to a number of words set by statute in each state. In the case of short proposals, this limit may be sufficient to permit publication of the full text. In other cases, the secretary of state or other appropriate state official should select provisions that reveal the primary thrust of the proposal and summarize the remainder. While this mechanism provides some opportunity for public officials to misrepresent the primary effects of a proposal, that possibility is offset by potentially greater use and lower cost of the pamphlet. That opportunity is also limited by imposing a specific word limit on the publication of full text in all cases. Finally, the Task Force concluded that, where the full text exceeded the statutory limit and thus could not be included in the pamphlet, voters should have an opportunity to obtain the full text through the "800" number or postcard mechanism.

The Task Force took no position on other organizational matters concerning advocacy arguments. These include the order of arguments, e.g., whether proponents and opponents should alternate or whether one group should precede the other, and whether there should be an opportunity for rebuttals.

3. Costs of the voters' pamphlet. Although it seems clear that an appropriate voters' pamphlet can clarify several issues involving ballot propositions, and enhance both education and comprehension, these benefits obviously come at significant cost. In some jurisdictions,
the total cost of the pamphlet is paid out of state funds. Other states require those who submit arguments to pay the associated cost of printing. The Task Force considered the possibility of relying more heavily on a user fee system that would require proponents and opponents to pay a pro rata share of printing and disseminating voters' pamphlets. This mechanism might deter some groups from submitting arguments, but might have the positive effect of keeping submitted arguments concise and of deterring some frivolous arguments. Since those submitting arguments are likely to be individuals and groups who have the most concerted and intense interest in the outcome of the election, user fees would also be appropriate under the rationale that they are a proper funding mechanism where benefits of an expenditure can be matched with burdens. The primary beneficiaries of the arguments submitted, however, include the electorate, whose understanding of the issue should be advanced. Thus, a user fee imposed on proponents or opponents in the full amount of the printing and distributing costs would place the entire cost on only a subset of beneficiaries. The Task Force believed that any charge should be limited to a modest filing fee rather than be linked to the costs of printing or distribution the pamphlet. The recommended limitation on arguments should be sufficient as a filtering mechanism to keep the length of pamphlets manageable. At the same time, any fee that exceeds a modest amount could raise constitutional issues concerning financial limits on access to the process.

The Task Force was also concerned that the utility of pamphlets would be reduced if they are mailed only to registered voters. Return rates would likely be high under these circumstances, while new registrants would likely be denied ready access to the pamphlets. One way to avoid this difficulty would be to mandate mailing to each household. This method, however, necessarily increases the cost of publication.

C. Other Forms of Educating the Public.

1. Overview. Even among the states that do not provide ballot pamphlets, the state government usually plays some role in publicizing the content of the ballot proposition, usually through newspaper publication. For instance, in Nebraska, the Secretary of State publishes a copy of the title and text of each ballot measure in newspapers at least once

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82 See, e.g., Wash. Rev. Code §29.81.130.
85 See, e.g., Idaho Code §34-1812(c); Wash. Rev. Code §29.81.140.
each week for three weeks. In these states, however, the government plays far less of a role in circulating arguments concerning the propriety of the measure. For instance, Missouri statutes provide only for the publication of the text of proposals. Nevada distributes sample ballots and publishes the text of ballot questions in newspapers, but does not otherwise publicize arguments or summaries.

2. Public Hearings.

Recommendation 11: Prior to each election in which a vote will be held on a ballot proposition, the state should sponsor and moderate debates or hearings involving representatives of proponents and opponents of each proposition. Questions of frequency, location, and selection of participants should be decided on a state-by-state basis.

Few states hold hearings or debates on ballot propositions. California law provides for such hearings, but does not mandate them. In Colorado, a proposed initiated constitutional amendment is submitted to the legislative research and drafting offices of the general assembly, and those offices report their comments at a meeting open to the public. A bill introduced into the Nebraska legislature in 1991 would have required that hearings be held for initiatives. The bill would require that the sponsor of record of an initiative hold at least one public hearing in each congressional district in the state between the 15th and 60th day prior to the general election.

The Task Force concluded that hearings or debates are a useful mechanism for dissemination of arguments about a ballot proposition. These proceedings would not only provide an opportunity for clarification of issues and the presentation of competing perspectives, but would also have positive spillover effects for those not in attendance, as they are likely to generate media coverage that further enhances debate. Thus, public proceedings are likely to advance the quantity and quality of deliberation among the public, an objective consistent with the original justification for popular lawmaking. Hearings or debates are likely to be costly, and the Task Force was not in a position to weigh those costs against tangible benefits. These costs may vary with the size of the state, the frequency of hearings, and the geographic area that each hearing is intended to cover. Benefits, on the

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86 Neb. Rev. Stat. §32-711. In Ohio, the proposed law, together with arguments drafted by proponents and opponents, not exceeding 300 words each, are published once a week for three consecutive weeks preceding the election in at least one newspaper of general circulation in each county of the state where a newspaper is published. Ohio Const. art. II, §1g.


88 Colo. Const. art. V, §1(5).

89 Legislative Bill 585, Legislature of Nebraska, 92nd Leg., 1st Sess.
other hand, will vary with the level of public interest in the particular proposition and the
difficulty of the underlying issues. The Task Force, therefore, believes that the details of
public proceedings should be left for determination within individual states and should be
flexible to take account of the number and importance of ballot propositions at any given
election. A jurisdiction that holds public hearings may want to ensure that there exists
sufficient time between such hearings and the holding of an initiative election to permit
technical amendments to the language of the proposition.

V. Limits on the Initiative and Referendum: Controlling Special Interests

A. Overview.

While the initiative is potentially an effective tool of participatory democracy, it serves
that function only if a significant percentage of the electorate does, in fact, participate.
Participation levels in initiatives and referenda tend to vary widely, depending on such issues
as the level of controversy generated by the proposal, ballot position, the timing of the
election, and the popularity and importance of other issues in the same election.\(^{\star}\)

The possibility of low turnout suggests that special interests could use the initiative
process to obtain benefits that they were unable to obtain through the legislative process.
One concern that has been expressed by some commentators is that special interests, rather
than attempting to confuse the electorate, may simply avoid educating the electorate in the
hope that only those who share their view will turn out to vote.

It is difficult to gauge whether any particular issue that qualifies for the ballot serves
only a narrow interest rather than the public at large. Given the time, money, and effort
that must be expended to get a measure on the ballot and to campaign for its passage, it
seems clear that only those with an intense interest in the outcome, i.e., one far in excess of
the average citizen, would be willing to make the necessary investment. Thus, as a
theoretical matter, the concerns about narrow interests seem well grounded. One indication
of special interest might be the passage or defeat of a proposition by a substantial majority.
That result might indicate that a discrete group of voters anticipated substantial benefits
from the vote while the great majority of voters were indifferent or were convinced by the
first group to support their position. The little evidence on this issue, however, does not
support the concern about special interests. Data from California indicate that since 1980,
eight ballot propositions in that state have been adopted with a greater than 80 percent vote.
These include some issues, such as having elected district attorneys, that cannot easily be

\(^{\star}\) Magelby, supra note 5, at 90-95. Dropoff rates, however, may not always be
substantial. For eight ballot propositions voted at the December 5, 1989 special election in
North Dakota, for instance, total votes cast ranged from 254,285 to 241,636, about a 6%
difference. Of eight propositions in the same state at the November 1990 general election,
total votes ranged from approximately 228,000 to 212,000.
explained as special interest measures, but also some issues, such as property tax exemptions for particular groups, that are susceptible to special interest pleading. Nevertheless, the Task Force believed that tendencies in this direction can be effectively countered by regulations that ensure widespread support for any proposition to attain a ballot position. Procedural safeguards such as geographical distribution requirements for signatures constitute one form of such regulation. Several states have enacted additional provisions aimed at ensuring that ballot measures are of interest to a substantial number of residents.

B. Single-Subject Requirements.

Recommendation 12: Each ballot proposition should be limited to a single subject. Whether or not this requirement has been violated should be determined by reference to the underlying purposes of the requirement, which are to avoid logrolling and confusion.

Recommendation 13: An appropriate state official shall determine whether there has been compliance with the single-subject requirement at the time the proposed law is submitted for assignment of a ballot title. Should the state official determine that the proposal violates the single-subject requirement, the proponents of the measure shall be required to redraft and resubmit the proposal. In order to permit the proponents to attempt to qualify the proposition for the ballot, the state shall provide a prompt judicial remedy for a declaratory judgment on the question of whether the proposition satisfies the single-subject requirement. Pending the determination of the case, the proponents may continue to collect signatures on petitions relating to the proposition. If the state official issues no notification of a violation of the single-subject requirement, any other person may seek a declaratory judgment on the question of whether the proposition satisfies the single-subject requirement.

Several states require that any particular initiative or referendum be limited to a "single subject." The Task Force was of the view that single-subject requirements may, in theory, play either of two roles. First, they may limit use of the plebiscite to situations in which the legislature has truly failed to comply with its representative obligations. This objective is not explicitly tied to avoidance of special interest issues. Rather, this objective views the plebiscite as an ameliorative for legislative inaction on specific issues. It remains, however, a form of lawmaking subordinate to the legislative process. This restrictive view considers plebiscites to be appropriate only to remedy occasional political failures and assumes that when that occurs, the particular failure can readily be subsumed within a single subject. The presence of multiple subjects in the same proposition, therefore, signals that some goal other than compensating for legislative failure is being addressed. That other

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9 In the same period, one proposition was defeated with a greater than 80 percent negative vote.

2 See, e.g., Cal. Const., art. II, §8; Fla. Const. art. XI, §3; Mo. Const. art. III, §50.
goal may be the attempt by a special interest to place its agenda within a proposition that is so broadly based as to garner significant support from unaffiliated groups.

An alternative, though related, justification for the requirement is prevention of an equivalent to legislative logrolling. There is substantial debate about the propriety of logrolling in the legislature. On one view, logrolling promotes compromise, encourages the formation of constructive coalitions that prevent governmental inertia, and permits minority groups to trade support in order to gain passage of part of their agenda that would otherwise not command sufficient support. A contrary view, however, suggests that logrolling promotes too much government regulation and constitutes the equivalent of vote selling. Allowing amalgamation of various issues, each of which appeals to a particular minority group, may permit passage of substantial regulation, none of which would — if voted on alone — attract a majority vote. Regardless of how one feels about logrolling, its use in the legislature is quite different from in the initiative. In the legislature, current offers to trade may invite reciprocity later. Because legislators are repeat players who meet with each other in relatively small groups, bargains of one vote now for another in the future can be effectively enforced. No such repeat play is possible among the electorate, however. In addition, the votes of the electorate are private rather than public, so that the bargain among actors cannot readily be enforced. Thus, logrolling in the electorate can be effective only if consideration on all sides is exchanged simultaneously. The result is that initiative and referendum measures must include all elements of the deal. A group that seeks electoral approval for a victims’ rights measure, for instance, may seek to gain support from environmentalists by including a provision for bottle deposits in its proposal. It cannot effectively promise the environmentalists that subsequent support will be forthcoming on a measure sponsored by that group. Thus, the single-subject rule is, theoretically, an effective, if implicit, bar on logrolling in the electorate.

The Task Force was concerned about two issues that affect the propriety of the single-subject requirement. The first problem is the inherent difficulty in determining when a violation has occurred. Tests of whether various provisions of an initiative comprise a single subject vary among the states. Arizona courts, for instance, have addressed directly the test’s function of avoiding logrolling by asking whether voters supporting one section of the initiative “would reasonably be expected to support the principle of the others.” Massachusetts and California courts purport to examine whether all provisions are "germane"
to the same general subject. Montana requires that all subjects be "properly connected" with the same central purpose. Each of these tests is sufficiently vague as to allow the arbiter (whether pre- or post-election and whether administrative or judicial officials) sufficient discretion to leave them open to the charge that decisions were based on political, rather than legal, considerations.

Numerous states also subject legislative lawmaking to a single-subject requirement. The presence of this similar test, however, does not necessarily inform the decision about compliance with the requirement as applied to initiatives. Courts may wish to take into account the repeat play among legislators that permits other forms of logrolling, while groups involved in the initiative process are unlikely to have other opportunities to trade votes. At least one state supreme court has applied a different standard to the test, depending on the context. In *Fine v. Firestone*, the Florida Supreme Court held that because the legislature has greater opportunities for debate and public hearing, legislation is entitled to more deference than initiatives when challenged under the single-subject requirement.

The difficulty of the inquiry into single subject is apparent in the recent case of *Raven v. Deukmejian*, in which the California Supreme Court upheld an initiative that declared rights involving issues as disparate as postindictment preliminary hearings, the independence of state constitutional rights, the granting of constitutional rights to the prosecution, "reciprocal" discovery, voir dire, the felony-murder rule, procedural and substantive law relating to special circumstances, life imprisonment without possibility of parole for 16- and 17-year-old juveniles who commit special circumstance murders, a new crime of torture, abrogation of the prosecution's duty to provide certain discovery in felony cases, sufficiency of hearsay as a basis for probable cause at preliminary hearings, and immediate writ review of delays in felony trials. The court declared the relevant test to be: "an initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, all of its parts are "reasonably germane" to each other," and to the general purpose or object of the initiative." Over a vigorous dissent the court held that all these provisions were "reasonably germane" to the subject of criminal justice reform. Once the relevant "subject" is defined with sufficient breadth, therefore, virtually any subset of provisions can fall within it.


448 So. 2d 984 (Fla. 1984).

There are, however, some limits, even under this test. A California Court of Appeal, applying the same test, subsequently invalidated an initiative on the grounds that it merged disparate provisions involving notice on disposal of toxic products, contract provisions for health insurance for elderly citizens, Anti-Apartheid measures for corporations, a rating system for insurance companies, and advertising for initiatives. The court rejected a claim that all these provisions related to the general subject of the public’s right to know or to advertising. Courts outside of California have used a less open-ended formula. The Florida Supreme Court struck from the ballot as contrary to the single-subject requirement an initiative that would have limited defendants’ liability in civil actions by including three new provisions concerning tort law. Application of the test, in short, may be perceived by skeptics as evidencing the deciding court’s reaction to the substance of the proposition rather than to the propriety of having the proposition submitted to the electorate.

The Task Force believed that the test for compliance with the single subject requirement, however framed, should gauge whether the concerns that underlie the requirement have been triggered in the particular situation. Thus, a ballot proposition is more likely to satisfy the requirement of single-subject where it responds to a long period of legislative inaction on the issue the proposition addresses. Similarly, the "germaneness" of various issues may be examined by determining whether different sections seek to appeal to different interest groups for the primary purpose of obtaining support on unrelated issues.

The difficulty of discerning violations of the single-subject requirement has implications for the timing of any review of challenges to a proposed initiative. As in the case of post-election review of ballot language, post-election decisions about the single-subject requirement threaten to waste the substantial costs involved in the initiative election. Similarly, it is reasonable to assume that courts will be less willing to invoke the single-subject rule to strike down a measure that has already been passed by the electorate. A more considered and objective review of the requirement is likely to occur prior to the election, when the court or board making the review will be less concerned with offending the sensibilities of voters. That is not to say that review needs to be limited to the pre-election process. If opponents of the measure believe that it offends the single-subject rule, but wish to avoid pre-election litigation on the issue (in the belief that the measure will be defeated or to consolidate the single-subject question with other post-election attacks), there seems no substantial reason to insist on their making the claim only pre-election. Nevertheless, there will be circumstances in which opponents reasonably fear that a favorable election result will, as a practical matter, prejudice their claim.

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91 Evans v. Firestone, 457 So.2d 1351 (Fla. 1984).
Equally difficult is the issue of remedy when an initiative is found to have violated the single-subject requirement. Some courts have simply struck questions from the ballot.\(^1\) Were this determination made prior to circulation, the proponents could delete one or more of the offending provisions. Even if signatures had been collected, but the vote had not occurred, there would be less disruption and cost in remedying the situation than if the vote had occurred. Post-election review imposes more substantial remedial problems. In situations not involving the single-subject requirement, courts have been willing to sever impermissible from permissible provisions of an initiative and allowed the latter to stand, at least where the initiative itself contained a severability clause.\(^2\) That remedy, however, poses the difficulty in the single-subject context of not knowing which of the multiple subjects should remain and which should be struck. The striking of a particular subject could call into question the viability of other subjects as some signatories would have signed petitions only to endorse the subject that has been struck. There is no way to determine the support that any provision would have obtained independently of the others.\(^3\) While there may be occasional cases in which the clear thrust of the initiative deals with one subject and only a tangential provision creates the offending additional subject, the bulk of cases resists such easy bifurcation.

The Task Force concluded that the difficulty of discerning whether or not an initiative embraced more than a single subject, the desire to avoid wasted efforts in initiatives ultimately deemed invalid, the possibility that the legal issue of "single-subject" would be affected by post-election political judgments, and the difficulty of creating a post-election remedy all indicated that some form of pre-election review of initiatives be available to test compliance with the single-subject requirement. Some members believed that the attorney general (or other state official charged with review of the proposal and drafting of the ballot title) should be authorized to deny the right to circulate petitions on finding a violation of the requirement. Other members thought that this mechanism placed too much of a burden on the initiative process by restricting the time period for the collection of signatures after

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\(^1\) See, e.g., Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824 (Mo. 1990); Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984).


\(^3\) See, e.g., Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824 (Mo. 1990). The court was confronted with a proposed constitutional amendment that offended the requirement because it affected both legislative and executive functions. The court concluded:

It is impossible to say the signers intended only to support those provisions related to the internal operation of the legislature or to endorse only those provisions related to the general regulation of the conduct of public officials.

799 S.W.2d at 832.
a judicial determination of compliance with the requirement. Further, this remedy would have no effect in states that permit signature collection before ballot language is approved. The Task Force concluded that proponents should have the right to continue circulation of the petition, but should bear the burden of bringing an action for a declaratory judgment to place the proposition on the ballot should the attorney general find a violation of the requirement. In this manner, the proponents can decide whether to take the risk of incurring the costs related to circulation. The Task Force also recommends a brief period in which opponents may seek judicial consideration of the question. In any event, a court that determines that a violation of the single-subject requirement exists should issue an order striking the proposition from the ballot in its entirety.

Private parties may believe that the single subject requirement has been violated, even if the attorney general makes no such determination. These parties should also be entitled to bring an action on the question. Since opponents may not be organized at the time when the proposal is drafted or when petitions are circulated, the Task Force recommends no time limits (including the post-election period) for such private challenges to the proposal.

C. Are There "Too Many" Ballot Propositions?

Recommendation 14: States should not limit the number of ballot propositions at any election.

Recommendation 15: States should not prohibit defeated propositions from being resubmitted at a subsequent election.

Notwithstanding the difficulty of developing a standard by which to determine whether there are "too many" ballot propositions, the Task Force did not discern any nationwide problem with pure numbers of initiatives and referenda. Certainly the issue seems insufficiently problematic to raise the difficult questions that any limiting legislation would entail. These would include the need to amend state constitutions to create the limits and the need to create a selection mechanism where the number of otherwise qualifying petitions exceeded the state limit. While first come, first served may seem appropriate, that allocation principle does not ensure that the most urgent issues are addressed first and could create incentives for haste that exacerbate existing difficulties with signature collection and careful drafting and review of proposals.

Although the evidence appears to suggest little need for restrictions on the number of ballot propositions, one possible source of complaint is repeat of defeated propositions. Given the costs to the public related to the plebiscitary process, one might contend that a question that has been defeated should be barred for a certain period of time. Massachusetts, for instance, prohibits a measure from being certified for submission to the people if the attorney general finds that it is substantially the same as a measure that has
been qualified for submission within the previous three years. On the other hand, lawmaking is often an incremental process, and it may be that a ballot question that is unsuccessful at one point in time could subsequently gain support sufficient for passage. Bars on repeat petitions may also generate litigation about whether a new petition that deviated insubstantially from a defeated proposition dealt with a subject that was the same as the prior proposition. Thus, the Task Force concluded that prohibitions on repeat petitions are inappropriate. Any such resubmission, however, should be treated as a new petition, so that all requirements applying to original petitions, such as signature requirements and approval of a ballot title, would apply to a resubmitted petition.

D. The Use of Plebiscites to Burden Minorities.

An additional attack on the use of some plebiscites is the claim that they invite majorities to place inappropriate burdens on discrete minority groups. The underlying concern is that because voters in voting booths do not have to reveal their preferences publicly as do elected representatives, they are more likely to vote their prejudices. There is some evidence of occasional statewide plebiscites in which prejudice plays an important role. For instance, in 1920 Californians adopted an alien land law by a three to one margin and an alien poll tax by a four to one margin. Each measure imposed substantial burdens on Japanese residents. Nevertheless, it is not clear how much of the incentive for this vote (even if based on invidious prejudice) was dependent on the unique characteristics of the plebiscite. The alien land law, for instance, was initially considered by the legislature and was delayed because of federal intervention. The alien poll tax was adopted as a legislative constitutional amendment, proposed by a two-thirds vote of each house of the legislature. Thus, any prejudice within the electorate appears to have been equally reflected in the legislature.

Recent history reveals occasional statewide attempts to place burdens on minorities through ballot propositions, as evidenced by propositions to restrict the rights of homosexuals in the November 1992 elections. These same events, however, demonstrate the capacity of courts to intervene where initiatives threaten civil liberties. As of this writing, a Colorado initiative preventing the designation of homosexuals as a class entitled to special protection has been invalidated by a trial court. The Supreme Court invalidated a Washington initiative that sought to terminate the use of mandatory busing to integrate schools on the grounds that the effect was to burden racial minorities, but the Court was


105 See Cronin, supra note 5, at 93.
careful to draw the boundaries of its decision narrowly.\textsuperscript{108} In 1978, a California initiative to restrict the rights of homosexual school teachers was defeated by 58 percent to 42 percent, even though anti-gay initiatives had been passed in various cities. An attempt to restrict homosexual rights as an anti-AIDS measure failed in California in 1986 by a 70 percent to 30 percent vote. On the other hand, the defeat in 1990 of two referenda that would have established Martin Luther King, Jr. Day as a holiday in Arizona was interpreted by some as a sign of racial prejudice, although recent propositions have reversed that result. Nevertheless, the Task Force's review of statewide plebiscites over the past five years revealed an insufficient number of propositions that could only be explained as resulting from prejudice to warrant a recommendation restricting use of the initiative.\textsuperscript{109}

One issue that has raised the specter of minority burdens in recent years has been initiatives declaring English the official language of a state.\textsuperscript{110} These measures have passed in Arizona in 1988 (50.5 percent to 49.5 percent), California in 1986 (73 percent to 27 percent), and Florida in 1988 (percentages not available). The question of official language, however, is not necessarily dominated by prejudice. Reasoned individuals can differ over arguments such as the cost of bilingualism and the desirability of creating incentives for non-English speakers to become integrated into mainstream American society. At the same time, the Task Force recognized that similarly reasonable arguments could be raised about virtually any issue that had a potentially prejudicial characteristic. The crucial issue, therefore, is whether any governmental entity should be charged with preventing the electorate from voting on an issue that is potentially tainted by prejudice.

\textsuperscript{108} Washington v. Seattle School District No. 1, 458 U.S. 457 (1982). The Court found that the initiative changed the decision making structure for addressing integration in a manner that burdened racial groups and did not simply try to resolve an ongoing political debate. For an example of a referendum that has implications for racial groups but that was not invalid, see Arthur v. City of Toledo, 782 F.2d 565 (6th Cir. 1986).

\textsuperscript{109} This is not to say that plebiscites do not traditionally involve controversial issues. For instance, an initiative to restrict abortions passed in Arkansas in 1988, while initiatives to liberalize or guarantee the right to abortions were passed in Nevada in 1990 and in Washington in 1991. An initiative restricting abortion was filed in Oklahoma in 1990, but was not held due to judicial action. A referendum on a law to allow abortion under certain conditions was rejected in Michigan in 1972. An "Unborn Child Amendment" received sufficient signatures for the ballot in Arkansas in 1984, but was struck from the ballot after the ballot title was ruled misleading by the Arkansas Supreme Court. See Arkansas Women's Political Caucus v. Riviere, 283 Ark. 463, 677 S.W.2d 846 (1984).

\textsuperscript{110} A challenge under the federal Voting Rights Act to the Colorado process that considered such an initiative was rejected in Montero v. Meyer, 861 F.2d 603 (10th Cir. 1988).
Given the difficulty of demonstrating that passage of a particular initiative was motivated by prejudice and the lack of evidence that such initiatives are currently common, the Task Force recommends no action be taken in this area. Where allegations of inapposite motivation, denial of equal protection, or other forms of improper burdens are made, the process of judicial review is as available as it is with respect to the legislative process. The Supreme Court's decision in Washington v. Seattle School District No.1 illustrates the capacity of courts to discern cases in which constitutional principles have been violated. The Task Force was concerned that any attempt to draw content-based boundaries on the availability of the initiative would create unnecessary restrictions without necessarily providing safeguards for minority groups.

Nevertheless, the Task Force was concerned about two possible negative implications of the plebiscite for minority groups. Even if a majority would be unwilling affirmatively to impose burdens on a minority through the initiative, that same majority might be willing to employ the referendum to reject legislative efforts to assist a particular minority. Here, again, it would be difficult to determine whether such a rejection was predicated on prejudice towards the minority or reflected a proper majoritarian allocation of limited state resources. Since the Task Force was not aware of recent allegations that the referendum has been used in this way, no recommendation is made.

Second, the Task Force was concerned about possible means of expediting judicial review of initiatives that may be unconstitutionally discriminatory. While some members favored pre-election challenges in state court under state declaratory judgment acts, others were concerned about the effect of such a procedure on the ability of complainants to proceed in federal court post-election should the allegedly discriminatory proposition receive a majority vote.

E. Exclusion of Appropriation Issues.

Recommendation 16: The initiative should not be available to direct appropriations for particular budgetary items. The initiative and referendum should, however, be available to restrict prospectively the use of public monies.

Several states exclude budgetary or appropriations issues from matters that are subject to plebiscite. In light of the process by which appropriations are made, this exclusion seems appropriate as applied to initiatives that seek to direct appropriations for particular budgetary items. Appropriations are typically constructed by dividing a fixed sum of money among competing uses. This allocation process is likely to reflect both fragile

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compromises and subtle relationships among the various public goods and services that states provide. Budgetmaking, therefore, is uniquely appropriate for decision making by the type of committee structure that characterizes legislatures. A legislative body is capable of examining simultaneously all claims for a share of the budget pie, creating priorities among these claims, and investigating the relationships among claims. Any attempt to reallocate components of the budget through a referendum or initiative that speaks only to a single section of it is likely to upset this delicate balance and frustrate rather than advance a rational lawmaking process.

This is not to suggest that legislative budgetmaking will not deliver benefits to particular groups. It is only to suggest that some issues, budget being among them, are best dealt with comprehensively, even if the end result is less than perfect. Since voters would only be examining a single slice of the budget pie, they would be unable to determine how the segment on which they are voting affects the remainder. Assume, for instance, that an initiative were held to increase the amount of the state budget to be devoted to education. That issue, standing alone, fails to consider which appropriations are to be cut in order to make additional education funds available. The decision about what activities to fund with limited resources is best made through a legislative process that can examine and balance the interests of all claimants simultaneously. Any argument that legislatures may systematically ignore the will of the electorate in favor of special interests is met by the response that the ballot box is the best remedy for restricting such legislative abuse. The Task Force assumes that the political process will operate to obtain redress against legislators who ignore a public mandate to fund programs established through the initiative and, to the extent that the political process fails, any restructuring of the budgetary process to permit budget-making by initiative would create even worse results.

Further, plebiscites on budgetary issues are uniquely susceptible to domination by special interests. Each group, if permitted, would wish to increase its own funding at the expense of others. Unlike the legislative process, where these groups must compete with each other for parts of a fixed pie, a plebiscite on budgetary issues would allow each group to seek full funding of its request without making the zero-sum quality of the choice apparent. The Task Force, therefore, concluded that these restrictions on the use of the plebiscite are appropriate. This also implies that general allocational restrictions, for instance, a requirement that a minimum percentage of the state budget be spent on education, are undesirable subjects for the initiative. The one exception, in which an initiative should be permitted, would arise where the proposition would both create a program and mandate that the program be funded by the legislature. It has been argued that failure to permit such a mandate leaves to the legislature the discretion to implement or frustrate the proposition voted for by the electorate.

A different balance should be struck, however, with respect to initiatives that seek to prohibit the future use of unappropriated public funds for particular purposes. A prohibition on expenditures has implications for other budget items only in that it makes funds available for them. Thus, the resulting reallocation of budget priorities does not
threaten the same type of coerced shortfall for an underrepresented interest as does the reallocation that must occur when an appropriation is required by a plebiscite. Where the initiative seeks to prohibit expenditures, it is also likely that interests directly affected by the proposal will actively participate in the ensuing debate. Those who favor the ban are likely to participate, as evidenced by their sponsorship of the measure. Those opposed to the ban are similarly likely to become engaged as the restriction will, in all probability, substantially restrict the availability of the underlying activity. Assume, for instance, that an initiative is proposed to bar state funding of abortions. All sides of the abortion controversy would likely participate in the debate over the propriety of the proposition, so that voters could be expected to have an informed view on which to vote. At the same time, other funding opportunities are only implicated indirectly, since disapproval of the proposal does not necessarily require a particular amount of state expenditures, while approval of the proposal does not constrain the use of funds for other state purposes. Nevertheless, some members of the Task Force expressed concern that even prospective constraints on spending could provide opportunities for the public to engage in invidious expenditure decisions. These members contended that the electorate, being unaccountable to other parties, would be more likely to make expenditure decisions in this manner than the legislature. Other members of the Task Force wanted to permit the electorate to set spending priorities and thus would have reduced limits on electorate intervention in the budgetary process. The Task Force concluded that adoption of a reasonable time limit disabling the legislature from repealing or amending popularly enacted legislation, discussed below, reduced the importance of the budgetary intervention.

The Task Force discussed, but did not resolve, the appropriate use of the initiative for one distinctive type of budget measure—a law that creates a fund and directs how it will be spent. Assume, for instance, that an initiative proposes the creation of a toll bridge and requires that tolls collected be used for bridge repairs. On the assumption that the funds for repair would not otherwise have been available, this appropriation does not have direct implications for other parts of the budget. Nevertheless, since the tolls could also be used for other purposes, there is some sense in which this proposal is not revenue neutral. Perhaps for this reason, there is recent judicial authority for the proposition that the integrity of the budgetary process precludes use of the initiative to appropriate funds even where the initiative simultaneously creates the revenue stream being appropriated.113

The Task Force was divided on the issue of whether the referendum should be available to prevent an expenditure of appropriated funds and makes no recommendation on that issue. Some states do exclude appropriations for the current expenses of the state government or institutions from the referendum power.114 This position may be justified by the availability of other political processes, such as lobbying legislators during the

114 Mich. Const. art. II, §9; Ohio Const. art. II, §1d.
legislative process, to influence budgetary decisions, and the possible disruption to the budgetary process that could result if delicate budget compromises could be unravelled through the referendum. Additionally, some Task Force members were concerned that a referendum on appropriations for an ongoing program could have Contracts Clause implications insomuch as the program had created entitlements to future appropriations. Other Task Force members, however, believed that the referendum was an effective means of registering popular disapproval of a particular appropriation that should not be disregarded simply because alternative mechanisms for expressing displeasure were available. Taken to its extreme, the argument about alternatives would swallow up the referendum entirely. Additionally, grass roots movements may have little power within the legislature compared to more traditional and organized lobbyists, but may be far more effective in reaching the electorate. Hence, the legislature and the referendum may not be functional equivalents for purposes of expressing the electoral will. Finally, these members believed that the relatively short period between the passage of a law making an appropriation and the time in which the referendum must occur would eliminate most difficulties that might otherwise arise from disrupting budgets.

The foregoing discussion is not intended to apply to bond elections. These forms of direct democracy do entail appropriations decisions. At the same time, elections to incur debt have a particular place in the constitutions and history of most jurisdiction that makes their special treatment appropriate.

VI. Amendment and Repeal of Laws Enacted through Initiative

Recommendation 17: Following a reasonable period of time, to be determined by each jurisdiction, after the effective date of any law passed through the initiative or referendum, such law may be amended or repealed by the legislature by the process that applies to other legislation. Within such reasonable period of time after such a law becomes effective, amendment or repeal should be permitted only on passage by a two-thirds supermajority of each house of the legislature. At the very least, technical amendments should be permissible within such reasonable period of time after such a law becomes effective on passage by a two-thirds supermajority of each house of the legislature if an appropriate state official certifies that the proposed amendment is only technical in nature. Any limitation on the process of amendment or repeal more restrictive than the foregoing should not be enforceable.

As a general rule of state constitutional law, one legislature cannot bind another, so that - short of federal Contracts Clause considerations - state legislatures are able to modify the perceived errors of their predecessors. That flexibility, however, does not always apply with equal force to laws enacted through the initiative. Many states make no provision

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for amendment or repeal of popularly initiated laws or those approved through the
referendum. States that address the question tend to impose severe restrictions on
amendment or repeal. Arizona specifically excludes ballot measures from the power of the
legislature to amend or repeal statutes. Arizona permits amendment or repeal, but
only by a two-thirds vote of all members. Massachusetts and Michigan, on the other
hand, do permit legislative amendment or repeal. Nevada seeks a compromise; no
initiative measure approved by the voters may be amended or repealed within three years
from the date it takes effect. Analogously, several states exclude ballot measures
adopted by the people from the scope of the Governor’s veto power.

Absent the capacity to amend or repeal laws created by initiative or referred to the
people, even technical errors cannot readily be corrected. This problem could be
particularly acute in the case of initiated legislation since the absence of professional drafting
could create serious problems or leave unforeseen and anomalous gaps in the proposal as
passed. Thus, the Task Force recommends that amendments certified as merely technical
in nature be permissible at any time after passage of the initiative and be effective on vote
of a two-thirds supermajority of each house of the state legislature. Although the concern
for drafting errors suggests that a limitation on legislative changes to technical amendments
might be sufficient, such a limit would inevitably invite substantial litigation over whether a
particular alteration met that standard. Further, if the circumstances that made such a law
appropriate at the time of its passage should subsequently change in a manner that renders
such a law inadvisable, the lack of a process for amendment or repeal (other than another
costly initiative) may further affect the capacity of the state to respond to current needs.
This may be particularly troublesome with respect to restrictions on taxation or other fiscal
matters that restrict the state’s ability to respond to financial hardship.

At the same time, there is a reasonable concern that legislative amendment or repeal
of popularly enacted legislation could undermine the plebiscitary process. Lobbyists for
interests adversely affected by the initiative could have superior access to the legislature to
change an initiated law, since the coalitions that sponsored the proposition are unlikely to
remain intact once passage occurs. Some members of the Task Force noted, however, that
there was little empirical evidence of legislative attempts to overturn laws enacted through
the initiative, and that fear of electoral redress serve as a check on the willingness of the

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116 Ariz. Const. art. IV, Pt. 1, §1(6).


119 Nev. Const. art. XIX, § 2(3).

120 See, e.g., Ariz. Const. art. IV, Pt. 1, §1(6); Ark. Const. Amend. 7; Mass. Const. Amend. art. 48; Ohio Const. art. II, §1b.
legislature to nullify popular will. The Task Force observed that the risk that the legislature
will spitefully overturn a popularly enacted measure is effectively countered by a desire for
political self-preservation. The Task Force concluded that, while laws enacted through the
plebiscite should stand somewhat apart from the normal assumptions about the susceptibility
of law to amendment and repeal, that status should not remain in perpetuity. The Task
Force thus recommends that the amendment and repeal process that applies within a
jurisdiction to other legislation should apply to laws passed through the initiative or
referendum within a reasonable period of time after their effective date. The precise time
considered to be "reasonable" should be established by each jurisdiction. Within that period
of time, amendment or repeal should be permitted only on passage by a supermajority of
the legislature. In setting the length of the reasonable period, each jurisdiction should take
into consideration that initiatives not be immutable, that any change to them be the result
of a mandate for change (hence the supermajority requirement), and that whatever period
is adopted generally should not be subject to override within an individual initiative.

The Task Force noted that there have been recent attempts to restrict amendment
or repeal of an initiative within the proposal itself. For instance, Proposition 134 placed
before the California electorate in 1990 permitted amendment only by four-fifths of the
membership of both houses of the legislature. The Task Force concluded that attempts to
impose more restrictive limits on the amendment and repeal process within the proposal
should be prohibited. Any alternative would invite sponsors of particular initiatives to
circumvent these principles with ad hoc restrictions.

VII. Campaign Finance and Disclosure.

**Recommendation 18:** The names of proponents of an initiative or of a referendum
other than one sponsored by the legislature should be filed with the appropriate state
official with whom the ballot proposition is filed. These names should appear on each
petition that is circulated for signatures to place the proposition on the ballot.

**Recommendation 19:** Where petition circulators are paid for obtaining signatures,
that fact should be disclosed conspicuously on each petition.

**Recommendation 20:** Although states cannot limit contributions that can be made
by an individual or an entity to an initiative or referendum campaign, states should require
reporting of contributions to initiative and referendum campaigns and should enforce these
requirements through criminal sanctions. Reporting should be made to an appropriate
state official and should be made at time intervals prior to the election on the proposition
for which contributions have been made. These time intervals should provide ample
opportunity to permit pre-election disclosure to the electorate of the names of contributors.
Reporting should be consistent with the following principles.
(1) The threshold dollar amount that requires reporting should be no lower than the state requires for reporting of monetary contributions (cash or its equivalent) to campaigns for candidates for elective office.

(2) In-kind contributions should be disclosed by reporting the nature of the in-kind activity and its approximate monetary equivalent. The threshold dollar equivalent that requires reporting may be higher than the threshold dollar amount that requires reporting of monetary contributions.

One of the major criticisms of initiatives and referenda concerns the capacity of well-funded organizations to invest heavily in campaigns that allegedly affect the outcome of the election. These expenditures are alleged to have a variety of deleterious effects. First, they permit questions to attain ballot status because of the wealth of supporters rather than the popularity of the proposal. Second, they allow one side of the issue a distinct advantage in providing information to the electorate. Third, donors of significant amounts may be thought to anticipate a quid pro quo if the recipient of funds is successful. Fourth, the quest for dollars by those involved in the initiative process, such as compensated collectors of signatures, is considered to be an incentive to commit fraud.

Against this litany lie constitutional protections for political speech, which clearly includes the use of funds to support political positions or candidates. Any restrictions on campaign contributions or expenditures, therefore, must be examined to determine whether they impermissibly burden the exercise of free speech. An affirmative response to this question can be justified only if the restriction serves a compelling state interest. Nevertheless, some state campaign finance restrictions have been upheld, most recently by the Supreme Court in the case of Austin v. Michigan Chamber of Commerce, which sustained a prohibition on the use of corporate treasury funds for independent expenditures in support of or opposition to candidates for elective office.

Most of the developing law in the area of the constitutionality and propriety of campaign expenditures has evolved in the context of elections for individual candidates. The

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122 Id. at 44-45.

arguments have varying application to the area of initiative and referendum. The relationship between expenditures and success of an initiative or referendum measure is somewhat uncertain. Some highly financed campaigns are clearly successful. Some lose handily. It is, of course, difficult to demonstrate a causal relationship between expenditures and success in any given case, since the outcome in the absence of such spending is untestable.\footnote{See Cronin, supra note 5, at 110: "Because most citizen initiated ballot measures lose, it is difficult to prove that money rather than poor strategy or the voter's natural proclivity to vote no when in doubt is the chief or even a significant reason for defeat. Explaining outcomes over a broad range of issues and in diverse states is a challenge that defies tidy causal analysis."}

Even critics of the initiative, who consider the process too susceptible to the interests of well-financed campaigns, sometimes concede that money has an uncertain effect. In an article otherwise critical of the Supreme Court's decision that held limits on payment to petition circulators unconstitutional, Daniel Lowenstein and Robert Stern conclude that recent experience in California revealed "an impressive degree of discernment and rationality on the part of the electorate."\footnote{See Daniel Lowenstein & Robert Stern, The First Amendment and Paid Initiative Circulators: A Dissenting View and a Proposal, 17 Hast. Const. L.Q. 175, 177 (1989). The authors found that "only one of the five insurance initiatives passed, and it received by far the least amount of campaign spending in its behalf. A measure to increase the excise tax on cigarettes was approved in the face of massive spending by the tobacco industry against it. An AIDS testing measure widely perceived as moderate passed, while a far more extreme proposal was rejected." Id. at 177 n.10.}

Nevertheless, there appears to be some consensus that expenditure levels can affect results in an initiative or referendum campaign.\footnote{See Daniel Lowenstein, Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment; 29 U.C.L.A.L Rev. 505, 511 (1982); Shockley, supra note 121. Both studies conclude that there is a greater correlation between heavily one-sided spending and a negative vote than heavily one-sided spending and an affirmative vote.} One study found that campaign spending was the decisive factor in about one-eighth of the plebiscites held between 1976-1984.\footnote{D. Schmidt, Citizen Lawmakers: The Ballot Initiative Revolution 35 (1989).} It also appears that heavy expenditures are more successful in persuading people to vote against a proposition than in favor of it.\footnote{Id.; Lowenstein, supra note 127, at 511.}

The justifications for campaign contribution restrictions on election to office may also apply to ballot measures, though with less force in some instances. One of the motivations...
for restricting contributions to political office campaigns — the quid pro quo concern — is the fear that the victorious candidate will reward contributors rather than serve the public interest. That threat is less viable in the case of a ballot proposition, as the outcome of the election is to enact a new law, not to place any person in a position to reward contributors.116 Other justifications for restrictions, such as the risk that unrestricted campaigns will reflect the wealth of a few supporters rather than broad-based political support,117 apply with equal or greater force in the context of ballot propositions.

A. Limitations on contributions or expenditures.

Current laws concerning contribution and expenditures limits for initiatives and referenda vary widely among the states. Some of these laws may be suspect after the Supreme Court's decision in First National Bank of Boston v. Bellotti,118 which invalidated, on First Amendment grounds, restrictions on the use of corporate funds to influence voting in a referendum, and Citizens Against Rent Control v. Berkeley,119 which invalidated restrictions on contributions to committees formed to favor or oppose ballot measures. The District of Columbia places a flat limit of $1000 on contributions that can be made for the purpose of obtaining signatures on an initiative or referendum petition or to promote or oppose ratification of a ballot question.120 Arkansas prohibits ballot question committee from accepting any contribution in currency or coin in excess of $100, but does not otherwise restrict contributions.121 Alaska, which imposes a $1000 limit on contributions to candidates for elective office, does not prohibit contributions in excess of that amount on behalf of a ballot proposition. Such amounts must, however, be reported.122 Similarly, Oklahoma prohibits corporate contributions to political parties, but does not prohibit

116 This was the rationale of the Second Circuit in Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974), which held that a prohibition on corporate expenditures "for political purposes" did not apply to nonpartisan public referenda. See id. at 851. See also Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981); C & C Plywood Corp. v. Hanson, 583 F.2d 421 (9th Cir. 1978). For a view that the quid pro quo argument applies sufficiently to ballot issues, see Shockley, supra note 121, at 383-88.


120 D.C. Code Ann. §1-1441(a)(6), (f).

121 Ark. Stat. §7-9-405(a).

corporate contributions to campaign funds for or against a state or local question. This distinction presumably reflects the difference, discussed above, between the relative capacity for paybacks of substantial contributions in the cases of candidates and ballot propositions.

Any limits on expenditures or contributions, including reporting provisions, cause particular difficulties in the case of initiative and referendum. As in the case of candidate elections, dollar limits create the difficulty of valuing in-kind contributions. These would include such measures as donating telephone time, printing and mailing or promotional material, and employee time. In the case of ballot propositions, however, limitations may also be rendered ineffective or unduly complex by the possibility that independent groups that share a view about a ballot proposition may have no central mechanism for allocating shares of the permitted expenditure or contribution. The Task Force concluded that the difficulty of valuing services and allocating any limit, as well as the reduced threat of a quid pro quo in the context of the initiative or referendum, warrants relatively high thresholds for reporting. The report of such activity is likely to be most informative if it contains a narrative description of the nature of the contribution, rather than simply its dollar equivalent.*

Perhaps the most significant restrictions on contributions and expenditures apply to corporations. The Michigan restriction on corporate expenditures that was upheld in Austin has been enacted in substantially similar form in North Dakota. These statutes prohibit corporate expenditures for "political purposes" except through a fund separate and segregated from the corporation's treasury. Administrators of these funds must file statements relating to contributions and are subject to further restrictions that attempt to protect corporate employees from undue pressure for contributions. The Supreme Court, however, has recognized that the restrictions on segregated funds may become so onerous for certain types of organizations as to exceed constitutional limits.**

The Task Force recommendation recognizes the possibility that financial capacities may affect the outcome of the initiative or referendum process. Nevertheless, members of the Task Force believe that constitutional restrictions and the difference between ballot propositions and campaigns for elective office make reporting a more appropriate safeguard than absolute restrictions on contributions and expenditures.

* South Dakota follows a similar pattern. Corporations in the state are prohibited from contributing to any candidate, committee, or political party, but are permitted to contribute to a ballot question committee. See S.D. Codified Laws Ann. §12-25-2.

** See e.g., Neb. Rev. Stat. §49-1469(1).


B. Disclosure.

Several forms of disclosure are required by the various states that employ the initiative and referendum. Some disclosure relates to sponsorship of campaign literature or advertisements. As noted above, voters' pamphlets typically include arguments for or against a ballot proposition, and the authors or sponsors of these statements are required to disclose their identities. Further, some states require that campaign activity include the names of sponsors of the particular piece of campaign literature. Arizona, for instance, creates a misdemeanor for any person (other than a radio or television broadcasting station\textsuperscript{141}) knowingly to publish any advertisement for or against a ballot proposition without setting forth the name of the organization making the advertisement, along with the names and addresses of persons affiliated with the organization.\textsuperscript{142} Alaska mandates that any advertisement relating to a ballot proposition identify the person or group who paid for the advertisement and the name of the campaign chairman.\textsuperscript{143} Missouri requires that campaign matter relating to a ballot measure contain the identification of the sponsor.\textsuperscript{144} Oklahoma similarly prohibits anonymous campaign literature.\textsuperscript{145}

Other disclosure regulations require revelation of identities of contributors and amounts contributed. In several jurisdictions, this requirement takes the form of an obligation to form a committee and report contributions to the secretary of state. For instance, in Arkansas, any person other than an individual who receives contributions or makes expenditures advocating passage or defeat of an initiative or referred question must form a committee that files a statement of organization with the secretary of state. No such committee may accept any contribution in "currency or coin" in excess of $100 or make a currency or coin expenditure in excess of $50. Both committees and individuals who spend in excess of $250 must file a report with the secretary of state.\textsuperscript{146} Similarly, North Dakota requires any person soliciting contributions to qualify a ballot proposition or to promote or defeat a ballot proposition to file a statement with the secretary of state listing the name and amount contributed by each person who contributed in excess of $100. A then-up-to-date statement must be filed at least ten days prior to the election.\textsuperscript{147} In Nebraska, a copy of

\textsuperscript{141} A radio or television station need only have the relevant names on file.
\textsuperscript{143} Alaska Stat. §15.13.090.
\textsuperscript{144} Mo. Rev. Stat. §130.031(8).
\textsuperscript{145} Okla. Stat. tit. 74, §4220.A. See also Idaho Code §67-6614A.
\textsuperscript{147} N.D. Cent. Code §16.1-08.1-03.1.
the petition form to be used by proponents of an initiative must file with the secretary of state accompanied by a statement containing the name of each person sponsoring the petition or contributing anything of value for the purpose of defraying the cost of preparing the petition or receiving anything of value for preparing or circulating the petition.\(^{114}\)

Disclosure may also be required at the petition circulation stage. At one point in time, it might have been appropriate to discuss petition circulation under the heading of restrictions on expenditures. Several states attempted to ban payments to petition circulators or payments on a per signature basis\(^{115}\). One underlying rationale appears to be that such payment schemes are an inducement to fraud. Some cases of fraud by petition circulators have, in fact, occurred, and some commentators suggest that the frequency of fraud increases with payment to circulators, so that defalcations cannot be assumed to flow simply from overzealousness on the part of proponents of an initiative.\(^{116}\) One might respond that the appropriate reaction is to increase penalties for fraud, thus reducing the incentive to engage in such conduct, or to require more stringent signature verification requirements. Some commentators have also suggested that the presence of professional circulators means that ballot propositions will increase in number as the ability of proponents to gain access to the ballot depends on financial wherewithal as much as political popularity.

The debate about paid circulators has been ended, at least temporarily, by the recent decision in \textit{Meyer v. Grant}.\(^{117}\) In that case, the Supreme Court held that a Colorado law banning payment to petition circulators for the qualification of initiatives violated the First Amendment. The decision presumably would also render invalid laws such as a Washington provision that makes it a gross misdemeanor for a person to advertise that he or she will solicit signatures on an initiative or referendum petition.\(^{118}\) Thus, the primary issue about professional circulators currently involves disclosure rather than prohibition on expenditures for this purpose. Ohio, for instance, does not ban the use of paid circulators, but does require that those in charge of a petition drive file with the secretary of state a report showing payments made for circulation.\(^{119}\) Oregon imposes a similar requirement.\(^{120}\) Presumably, the Nebraska statute cited above that requires disclosure of those who receive


\(^{116}\) See, e.g., Lowenstein & Stern, supra note 126, at 188.


\(^{118}\) Wash. Rev. Code §29.79.490.


\(^{120}\) Or. Rev. Stat. §250.045(4).
value for circulation petitions would have the same effect. Indeed, after the decision in *Meyer v. Grant*, Colorado altered its statutes to require that proponents of an initiative petition file with the secretary of state the names and addresses of paid circulators. The Task Force does not read *Meyer v. Grant* to prohibit requirements that circulators state on the petition that they have been paid, where that is the case, and recommends adoption of such requirements.

One type of disclosure that might be appropriate and appears to be underutilized is identification of sponsors at the time that petitions are circulated. Potential signers of petitions who are confused about the affect of a proposal may be able to use the names of existing sponsors as a surrogate measure of whether the petition serves their own interests. A pro-environmentalist, for instance, might look askance at a petition being circulated with an apparent pro-environment catchline, e.g., Oregonians for Better Air, if he or she saw that the petition was sponsored by companies known to be opponents of more stringent environmental regulation.

The Task Force believed that each form of disclosure was appropriate. Nevertheless, the Task Force was attentive to various costs associated with disclosure. The first cost involves the direct cost of making disclosure, for instance, of assembling and providing to state officials the names of those who have contributed in excess of a threshold amount. The second cost involves the potential that disclosure will chill contributors who might otherwise engage in political activity. Appreciation of these costs has led to rare decisions that limit the capacity of the state to require disclosure. In *People v. White*, the Supreme Court of Illinois considered an election code provision that prohibited the distribution of political literature that did not identify the publisher or distributor. The same statute applied to literature soliciting votes in favor of or opposed to any public question to be submitted for the ballot. The court, relying on *Talley v. California*, held that the requirement of identification imposed "a substantial restriction on the right to express political views." That the statute applied only to political speech only increased the burden of the state to justify the regulation. These decisions rest in part on the historical use of anonymous political literature, especially during the period immediately preceding the drafting of the First Amendment. The potential value of such literature appears to be incontestable. The relevant question for the issue of disclosure requirements is whether

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117 362 U.S. 60 (1960). In *Talley*, the Supreme Court invalidated an ordinance that prohibited the distribution of anonymous handbills. The Court reserved judgment on the validity of an ordinance narrowly drawn to prevent fraud.

118 For a similar holding, see State v. North Dakota Education Association, 262 N.W.2d 731 (1978).
anonymity continues to play an active role in political debate given a common culture of
toleration and whether any positive value is outweighed by tendencies for anonymous
campaigning to consist of misleading or fraudulent statements.

The Task Force takes no position on the propriety of statutory limits on the time
when contributions can be made to support or oppose a ballot proposition. Such limitations
may facilitate informed voting, but may impede worthwhile activity, such as post-election
fundraising to retire a campaign debt. The Task Force did conclude, however, that many
of the reasons for which restrictions are imposed on contributions for candidates apply with
equal force to campaigns for ballot propositions. Thus, a jurisdiction that places restrictions
on contributions for candidates should consider the extent to which similar restrictions should
apply to initiative and referendum campaigns.
CONCLUSION

The initiative and referendum theoretically constitute useful checks on legislative inaction or abuse. The plebiscitary process itself, however, is subject to its own defects. The ultimate utility of the initiative and referendum depend on our capacity to capitalize on their strengths and control their weaknesses. The recommendations contained in this Report attempt to address that need. Creation of an orderly process for the drafting and circulation of ballot proposals and involvement of the state in the process of educating the public can only enhance the electorate's ability to cast an informed vote. Placement of constraints on the ability of special interests to capture the plebiscitary process can only increase the probability that the results reflect the will of the majority. Together, these advances in education and majority rule can advance lawmaking in the public interest. Legislative lawmaking is likely to enjoy corresponding benefits, as legislators in states that hold initiatives and referenda perceive the electorate as a more effective alternative should the legislature fail to enact necessary or desirable legislation. The Task Force thus believes that implementation of its recommendations will increase both the efficiency and the fairness of the lawmaking process.

Many of the recommendations included in this Report require amendment of existing state law. Some require amendment of state constitutions. Others may be implemented through judicial interpretation of existing laws and doctrine. The Task Force therefore believes that wide circulation of this Report will generate the level of discussion and awareness of the underlying issues that is essential to realizing the potential of direct democracy.

Hugh E. Reynolds, Jr., Chair
August 1993
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(1980).
1. **Summary of Recommendation(s).** The Task Force recommends a variety of procedural measures that would increase voters' comprehension of ballot propositions and facilitate understanding of the legal implications of their passage. Most of the recommendations are taken from practices that have been adopted in some, but not all jurisdictions that allow the initiatives or referenda. These recommendations involve state officials in the drafting and review of proposition and ballot language, the circulation of streamlined pamphlets that explain arguments concerning and consequences of the ballot propositions, and public hearings. The Task Force recognizes that constitutional or statutory provisions might make adoption of specific recommendations difficult in some states. Thus, the general approach of the Task Force has been to explain the reasons for its recommendations and to encourage each jurisdiction to consider how the proposed changes would affect its existing law.

The Task Force recognized that much of the criticism directed at the initiative and referendum is based on a perception that these processes have been captured by special interests to advance a particular agenda. The Task Force recommendations attempt to limit the capacity of special interests through devices such as a reasoned use of the "single-subject" requirement and expanded use of voters' pamphlets.

The Report itself sets forth in detail reasons for adoption of recommendations which are 20 in number and cannot be presented in 15 pages or less.

2. **Approval of Submitting Entity.** The Report has been approved by the Task Force, the Torts & Insurance Practice Section, the Section of Urban, State and Local Government and the ABA Standing Committee on Election Law.

3. **Has this or a similar recommendation been submitted to the House or Board previously?** No.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?** None of which we are aware.
5. **What urgency exists which requires action at this meeting of the House?** There is a general perception among the members of the Task Force and, we believe, within the Bar generally, that the process by which initiatives and referenda are presented, considered and adopted or rejected should be improved. Assuming this to be so, the sooner a Report and Recommendation is available for consideration in those states which allow initiatives and referenda, the better the public interest is served.

6. **Status of Legislation (if applicable).** Not applicable.

7. **Cost to the Association (both direct and indirect costs).** None.

8. **Disclosure of Interest (if applicable).** The members of the Task Force were selected to represent potentially conflicting points of view. In addition, the decision by TIPS to ask other sections to participate was to secure the widest possible collection of potentially differing points of view. Since it was not clear that the point of view of consumer advocates would be represented by any of the section representatives, Alan Morrison was asked to and agreed to become a member of the Task Force as a representative of consumer rights groups. We are unaware of any specific individual member of the Task Force has a conflict of interest.

9. **Referrals.** The Report has been approved by the Council of the Tort & Insurance Practice Section. The Report has also been approved by the ABA Standing Committee on Election Law. We are informed that the Report has been approved by the Section of Urban, State and Local Government, but believe that approval may require ratification by the Council of that Section at its next meeting. The Report has been referred to the Sections of Business Law and Litigation. We are awaiting their comments. The Task Force members from each of those sections believe those sections will also approve the Report and agree to co-sponsor it.

10. **Contact Person (prior to the meeting).** Hugh E. Reynolds, Jr., LOCKE REYNOLDS BOYD & WEISELL, 201 North Illinois Street, Suite 1000, Indianapolis, IN 46204 (317-237-3840; 237-3900 fax).

11. **Contact Person (who will present the Report to the House).** Andrew C. Hecker, HECKER BROWN, SHERRY & JOHNSON, 1700 Two Logan Square, Philadelphia, PA 19103 (215-665-0400; 636-0366 fax).
12. **Contact Person Regarding Amendments to this Recommendation**

(Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.)

Hugh E. Reynolds, Jr., LOCKE REYNOLDS BOYD & WEISELL, 201 North Illinois Street, Suite 1000, Indianapolis, IN 46204

(317-237-3840; 237-3900 fax); Andrew C. Hecker, HECKER BROWN, SHEDDY & JOHNSON, 1700 Two Logan Square, Philadelphia, PA 19103 (215-665-0400; 610-0366 fax).

We are unaware of any proposed amendments at this time.