Structuring the Ballot Initiative: Procedures that Do and Don't Work

Richard B. Collins
University of Colorado Law School

Dale Oesterle
University of Colorado Law School

Follow this and additional works at: https://scholar.law.colorado.edu/articles

Part of the Constitutional Law Commons, Legal History Commons, Legislation Commons, and the State and Local Government Law Commons

Citation Information

Copyright Statement
Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact jane.thompson@colorado.edu.
STRUCTURING THE BALLOT INITIATIVE:
Procedures That Do and Don't Work

RICHARD B. COLLINS*
DALE OESTERLE**

I. Initiatives and Constitutional Change .................. 49
II. History of Initiatives .................................. 53
III. Assessing the Aims of Direct Democrats .............. 55
   A. Empowerment .......................................... 56
   B. Good Government ...................................... 56
   C. Majority Rule ......................................... 58
   D. Efficiency ............................................. 60
IV. “The Devil’s in the Details”: The Design of Initiative
    Procedures with a Special Focus on Colorado ......... 64
   A. Introduction ........................................... 64
      1. Four Basic Procedural Issues ..................... 64
      2. The Colorado Experience With Initiatives ....... 65
   B. The Petition Process as a Gate to Ballot Access ... 70
      1. Introduction to the Petition Process ............. 70
      2. The Colorado Petition Procedure ................. 71
      3. Comments on the Colorado Petition Process ...... 74
   C. Drafting Initiatives: Amateurism, Ardency, and
      Inadequate Review ..................................... 76
      1. Introduction to the Drafting Problem .......... 76
      2. The Non-Binding, Consultative Procedures in
         Colorado ............................................. 81
      3. Comments on the Colorado Procedures .......... 82
   D. Scope of Initiatives ................................... 84
      1. Introduction to the Problem of Multi-Issue
         Initiatives ........................................ 84
      2. The Colorado Single-Subject Rule ............... 88
   E. Informing Initiative Voters ............................. 91
      1. Introduction to the Problem of Voter Education
         on Initiatives ..................................... 91
      2. The Influence of Money ............................. 92
      3. The Colorado Notice Procedure: The Ballot
         Title, the Ballot Information Booklet and
         Newspaper Notices .................................. 93

* Professor of Law, University of Colorado School of Law.
** Monfort Professor of Law, University of Colorado School of Law. A
preliminary version of this paper was presented at a conference on Governing by
Initiative, sponsored by the University of Colorado School of Law, September 23,
1994.
Ballot initiatives that add provisions to state constitutions are rapidly coming to dominate state government in California, Colorado, and Oregon, and other states will soon join the list. The initiative device has become a major outlet for citizens dissatisfied with their governments, and its use is likely to increase, both in frequency and geography. There is significant support for amending the United States Constitution to
authorize a national initiative. Given this trend, the structure and procedures for initiatives have ever greater consequences.

Public discussion of the initiative process focuses almost exclusively on the content of controversial measures. If one favors term limits for elected officials, tax limits, or limitations on gay rights, then initiatives are a meaningful instrument of democracy. If one does not support most of the successful measures, then initiatives are tyranny of the majority and a threat to the republican form of government. The error is the assumption that all initiative processes are indistinguishable. The discussion overlooks the importance of the details of initiative procedures. Some initiative processes work substantially better than others. The adequacy (or inadequacy) of procedure is central to the debate over whether initiatives are useful or harmful.

This article explores the principal procedural differences among forms of state-wide initiatives, both generally and with particular attention to Colorado. It assesses the goals of initiators and reviews the most frequent criticisms of the device. The article then analyzes the structure of Colorado's initiative laws in detail, both in the state constitution and statutes. The concluding section recommends ways to structure the initiative to avoid its practical shortcomings and better realize its potential for genuine reform.

I. INITIATIVES AND CONSTITUTIONAL CHANGE

Initiatives are among several forms of "direct democracy" in common use in American states. The initiative empowers citizens, by petition, to require a popular vote on whether to adopt a statute or constitutional amendment they have drawn up. Twenty-four states authorize state-wide initiatives, and

1. See infra note 28 and accompanying text.
4. DAVID B. MAGLEY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 1, 35-36 (1984). Some writers, especially outside the United States, define the initiative as a particular kind of referendum, using the latter term to mean any popular vote to adopt or reject a law. Others limit referendums to popular votes on measures originating in legislatures, in contrast...
many local governments have them, including some in states lacking state-wide initiatives. Our concern in this article is with state-wide initiatives. We refer to other forms of direct democracy only incidentally.

Initiatives can be direct or indirect. The indirect initiative requires that citizens first petition the legislature. Only if rebuffed may they force a popular vote, although at that point the citizens' proposal has the same right to popular enactment as under the direct initiative. Thus the terms are unfortunate, suggesting that the indirect version is an inferior form of "direct democracy." More accurate terms would be immediate and delayed initiative. But the direct/indirect locution is in wide use, so we adhere to it in this paper. So defined, the most important example of the indirect initiative is the Swiss national initiative. Most initiative states in the United States allow only direct initiatives to compel popular votes without any
involvement of the legislature. The indirect initiative is important in the five states that allow it but do not have the direct initiative, notably Massachusetts.9

Most initiative states, including Colorado, allow initiatives either to enact statutes or to amend their constitutions.10 However, the distinction between statutory and constitutional initiatives is blurred because many states that allow statutory initiatives restrict the power of their legislatures to amend or repeal initiated statutes.11 In California, an initiated statute can be changed only by another popular vote.12 Under the California rule, the statutory initiative is nearly as entrenched as the constitutional. The principal difference is that the statutory initiative is subject to judicial review under the state constitution, while the constitutional initiative overrides inconsistent provisions of the state constitution.13

In most states that allow it, the constitutional initiative is easy enough to qualify for the ballot that it is frequently used. Our received concept of the U.S. Constitution is fundamental law that is seldom changed and only with substantial consen-

9. CALIFORNIA COMM’N ON CAMPAIGN FIN., DEMOCRACY BY INITIATIVE 359-60 (1992) [hereinafter CALIFORNIA COMM’N] (Alaska, Maine, Massachusetts, and Wyoming allow only the indirect initiative. Utah and Washington allow both. Michigan, Nevada, and Ohio allow only direct for constitutional amendments and only indirect for statutes); MISS. CONST. art. 15, § 273 (providing for indirect initiative only). Colorado’s provision for local-government initiatives authorizes only the indirect initiative, while its state-wide initiative is only the direct form. See infra note 76.

10. Six states (Alaska, Idaho, Maine, Utah, Washington, and Wyoming) allow initiatives only to enact statutes, and three (Florida, Illinois and Mississippi) allow them only to amend their constitutions. MAGLEBY, supra note 4, at 38-39; MISS. CODE ANN. §§ 23-17-1 to -61 (Supp. 1994).

11. CALIFORNIA COMM’N, supra note 9, at 366-67 (half the states allowing initiated statutes impose some restrictions on legislative repeal; four impose severe restrictions).

12. Id. at 366 (unless the initiated measure itself authorizes legislative amendment). Arizona imposes the same limit when an initiative is approved by a majority of registered voters. Id. at 367. Colorado allows amendment or repeal of initiated state statutes by the normal legislative process, but requires that changes in laws initiated in local governments be made only by another initiative. See infra note 76.

13. E.g., Floridians Against Casino Takeover v. Let’s Help Fla., 363 So. 2d 337, 341-42 (Fla. 1978). But see MISS. CONST. art. 15, § 273(5)(a), (d) (constitutional initiative cannot be used to amend state’s bill of rights or initiative provision). All state and local initiatives are, of course, subject to review under the U.S. Constitution.
sus. By that standard, many state constitutional initiatives look more like ordinary legislation than fundamental law.  

When initiators have a choice between enacting a statute or amending the state constitution, they incline strongly toward entrenching their handiwork in the constitution. For example, Colorado's initiators proposed fifty-five amendments and thirty-eight statutes between 1912 and 1958. This is not surprising because initiators tend to be very strong advocates of their proposals. Moderate views usually do not generate the incentive to conduct an initiative campaign.

In recent years, dominance of the constitutional form has increased in the states that allow it. For example, in Colorado twenty-six of the thirty measures on the ballot since 1984 have sought to amend the state constitution. The constitutional initiative is the dominant form of state-wide initiative today, and it presents the most controversial issues about the initiative and its uses.

The state-wide, constitutional initiative works a significant change in the traditional American concept of governmental structure. Differences between constitution and legislation are much reduced. The notion of a constitution as fundamental law that is seldom changed, and only with substantial consensus, is gone. Constitutions are amended often and by voting majorities that are typically a minority of a state's adult population.

---


16. CALIFORNIA COMM’N, supra note 9, at 359.

17. See infra note 77; see also CALIFORNIA COMM’N, supra note 9, at 174–82.

18. For example, two prominent amendments that passed in Colorado in 1992 each received about 32.5% of the voting age population, or about 40.6% of registered voters. See Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1, 4 (Colo. 1993) (812,908 votes for 1992 Amendment One, limiting taxing and spending); Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993) (813,966 votes for 1992 Amendment Two, restricting gay rights); THE ELECTION DATA BOOK: A STATISTICAL PORTRAIT OF VOTING IN AMERICA 1992, at 132 (Kimball W. Brace ed., 1992) (voting age population of Colorado in 1992 estimated at 2,501,000, with 2,003,375 registered voters). California's best known ballot measure, tax-cutting Proposition 13, was adopted at a primary election by about 26.9% of the voting age population, or 43.9% of registered voters in 1978. Votes for the measure are computed from MAGLEBY, supra note 4, at 88 (44% of voting age turnout); CALIFORNIA COMM’N, supra note 9, at 186 (96.5% of turnout voted on Proposition
The role of the state’s judiciary is reduced, and the executive veto is bypassed.

This is not necessarily bad. Many democracies in the world function well without our concepts of a fundamental constitution and separation of powers. In traditional parliamentary governments, such as Britain’s, constitutional change can be enacted by majority vote of Parliament.\(^9\) In Switzerland, the constitutional initiative is used frequently.\(^2\) However, those governments have traditional sources of stability that ours lack.

State constitutions filled with provisions that look like ordinary legislation, and easily amended by a small percentage of the voters, diverge greatly from what most Americans think a constitution is. By our traditions, a constitution establishes the structure for government to act subject to basic and general prohibitions in a bill of rights. It is supported by consensus and should seldom need amending. Constitutional language is broad and general, destined to endure.

II. HISTORY OF INITIATIVES

Americans of the generation that framed the Constitution were familiar with accounts of Athenian and other ancient examples of direct democracy, and the New England town meeting was established well before independence.\(^21\) But many of the Framers expressed hostility to direct democracy, and during the founding period, constitutional and ratifying conventions were the broadest form of citizen participation in general use.\(^22\)

\(^{13}\); \textit{David D. Schmidt, Citizen Lawmakers: The Ballot Initiative Revolution} 132 (1989) (64.8% yes votes). California had 10,129,986 registered voters. \textit{The Election Data Book, supra}, at 108. These are the most prominent ballot measures; votes on others are lower. \textit{See Magleby, supra} note 4, at 77-99.


\(^{20}\). \textit{See Kobach, supra} note 4, at 70-78.


\(^{22}\). \textit{Cronin, supra} note 5, at 12-20, 22, 41; \textit{see also Magleby, supra} note 4, at 31. \textit{See generally Lobingier, supra} note 21, at 137-87 (discussing constitutional origin and development during Revolutionary Era); \textit{The Federalist} Nos. 10, 55, 63 (James Madison).
Referendums were prominent in Europe during the French Revolution and its Napoleonic aftermath. They gradually took hold in this country as the means to ratify state constitutions and amendments. But these were measures referred to the voters by legislatures or constitutional conventions. The concept of the initiative was a Swiss innovation, copied here during the Progressive Era. Several Swiss cantons adopted the constitutional initiative during the 1830s, and the legislative initiative during the 1860s. In 1891, Switzerland added the constitutional initiative for amending its national constitution. American interest in broader forms of direct democracy grew during the 1880s and 1890s, propelled by Swiss practice. Americans who had visited that nation led the movement to promote the initiative and referendum in this country.

Most states that allow the initiative adopted it during the Progressive Era. Beginning with South Dakota, nineteen states authorized state-wide initiatives between 1898 and 1918. The next state to do so was Alaska in its statehood constitution in 1959, and four states have adopted it since. Several states have rejected the initiative at various times. However, the initiative is very popular, and it is far more likely that more states will adopt it than any will repeal it. There is also a movement to establish a national right to initiative. It does not seem close to success, although opinion polls back the concept. Other movements seek to promote various forms of


24. See Cronin, supra note 5, at 41. See generally Lobingier, supra note 21, at 188-291 (overview of the extension of "popular ratification" throughout the United States).

25. See generally Kobach, supra note 4, at 18-30 (examining development of the initiative in Switzerland). Some Swiss cantons and towns had the town-meeting form of direct democracy long before the nineteenth century. Id. at 16-18.

26. California Comm'n, supra note 9, at 35-36. See generally Cronin, supra note 5, at 43-54 (overview of populist movement and state adoptions of initiative and referendum). Lobingier claims that a colonial Rhode Island law and another in Georgia's first constitution were the first American initiatives. Lobingier, supra note 21, at 358. However, the Rhode Island practice seems more like a town meeting and Georgia's a form of convention.

27. See Cronin, supra note 5, at 51; see also id. at 3-4 (discussing states that have rejected the initiative).

28. Magleby, supra note 4, at 7, 12-14; see also Cronin, supra note 5, at 4-5. See generally id. at 157-95 (examining the desirability of a national initiative and referendum).
electronic voting that might make initiatives and referendums cheaper to conduct.29

Colorado adopted the initiative in 1910.30 The right was added to the state's constitution by a measure proposed by the legislature in a year when Democrats controlled both houses.31 The governor, John Shafroth, was of Swiss descent and sought to promote the concept as a bastion of Swiss liberty. As an amendment to the constitution, the proposal required approval in a popular referendum. It had the backing of most major newspapers and swept the state, receiving over seventy-five percent of the votes cast on the measure.32

III. ASSESSING THE AIMS OF DIRECT DEMOCRATS

Proponents often claim that the initiative is a more democratic way of governing than representative elections, that it is a way of perfecting democracy. We sometimes say that representative democracy is indirect democracy, while initiatives are a form of direct democracy. It is natural to assume that direct is better, more nearly perfect, than indirect—that the ideal of consent of the governed is better achieved by consenting to the laws themselves, rather than to representative lawmakers. This argument from the logic of democracy surely has much to do with the initiative's popularity.33

When discussion turns from the abstract to messy reality, proponents' claims become more particular, and some range beyond the appeal to democracy into the realm of governmental efficiency. We have chosen to group concrete claims into four categories: empowerment of ordinary citizens; "good government" aims such as increased participation, involvement, and public discussion; majority rule as an ideal; and countering governmental inefficiency.

29. CRONIN, supra note 5, at 220-22.
30. SCHMIDT, supra note 18, at 225-26. For an overview of Colorado's adoption of the initiative, see generally CRONIN, supra note 5, at 52; Starr, supra note 15, at 9-20.
31. See CRONIN, supra note 5, at 52.
32. Id.
33. William Jennings Bryan lent his oratorical gifts to this proposition during the Progressive Era. See CRONIN, supra note 5, at 165-68. See also MAGLEBY, supra note 4, at 21; WALKER, supra note 6, at 50-52; Starr, supra note 15, at 11.
A. Empowerment

Money was central to Progressive Era debates about the initiative. The most common claim was that the initiative was a way around monied influence on elected representatives. Corruption, especially of The Machine, had pride of place in every debate. The initiative would empower citizens to override legislatures held in thrall of wealthy patrons; it would "thrust from power the Captains of Greed." Direct democracy would allow citizens to enact measures to curb legal privileges of wealth. Populists saw the initiative as a means to enact redistributive measures.

As originally envisioned, these aims have been very little realized. While states have enacted some redistributive measures, virtually all have been the work of legislatures. Some anti-corruption campaigns have succeeded, but the initiative was not a prominent weapon in them. Moreover, it is generally agreed that money is at least as important in initiative campaigns as in elections. In California, money is now essential simply to get enough signatures to force a vote.

On the other hand, the initiative tends to benefit social groups that are different from those served by representative democracy on an important class of issues. These arise where self-interest of the governing class is challenged. Such challenges usually relate to the efficiency of government, so we discuss them under that heading below. But they have a distant kinship with the original, populist aims of initiative proponents.

B. Good Government

In addition to the general appeal to the logic of democracy, proponents of the initiative tout good government aims of promoting greater citizen involvement and participation in government, of increasing and broadening public discussion of

34. See CRONIN, supra note 5, at 53-57.
35. CALIFORNIA COMM’N, supra note 9, at 33.
36. See CRONIN, supra note 5, at 54-57, 200-01. For general discussions of reformers’ distrust of the political machine, see RICHARD HOFSTADTER, THE AGE OF REFORM 257-67 (1955); MAGLEBY, supra note 4, at 21-25.
37. See HOFSTADTER, supra note 36, at 242-43, 268.
38. See generally id. at 257-71.
39. See CRONIN, supra note 5, at 196, 202; MAGLEBY, supra note 4, at 64, 76.
issues, and of reforming the procedures of representative government. Polls show a sizeable number of citizens who say that being able to vote directly makes them more likely to vote at all.\textsuperscript{40}

Good government aims have been realized to some extent. Initiative campaigns do involve large numbers of people, many of whom are not involved in ordinary politics. Campaigns over controversial subjects attract media attention, probably more than the same issues before a legislature.\textsuperscript{41} And some initiatives, particularly in Colorado, have improved government procedures in ways that representatives would not have done.\textsuperscript{42}

However, circulating petitions has become a business in California, belying any image of amateur lawmaking.\textsuperscript{43} If this tendency spreads to smaller states, participation will diminish. Moreover, the total vote cast on initiative measures is usually somewhat lower than for representatives. That is, some who vote for representatives skip initiatives. Thus the promise of inspiring more citizens to vote may not work out in practice, with the exception of a few, very controversial issues.\textsuperscript{44} The falloff in votes cast on initiatives from those cast for representatives tends to increase with the length of the ballot, so one irony is that the more the initiative is used, the less effectively it involves more voters.\textsuperscript{45}

Another good government claim is that availability of the initiative keeps representatives in line, that fear of the initiative induces better representation. However, there is little

\textsuperscript{40} See Cronin, \textit{supra} note 5, at 4, 11, 198, 202; Magleby, \textit{supra} note 4, at 2, 21-25, 28, 181-84; Walker, \textit{supra} note 6, at 52-54.

\textsuperscript{41} See Schmidt, \textit{supra} note 18, at 26-29; Cronin, \textit{supra} note 5, at 198, 202.


\textsuperscript{43} California Comm'n, \textit{supra} note 9, at 9, 12-13. For an examination of how the practice of gathering signatures has lived up to its original purpose, see generally id. at 125-55.

\textsuperscript{44} On average the falloff is not large. Cronin, \textit{supra} note 5, at 67-68, 209-10. See generally Magleby, \textit{supra} note 4, at 77-121 (analyzing who votes on ballot propositions).

\textsuperscript{45} See Magleby, \textit{supra} note 4, at 90-95 ("voter fatigue"). But see Cronin, \textit{supra} note 5, at 68-70 (phenomenon of ballot fatigue is exaggerated).
evidence that this is achieved by the direct initiative. It may result from the indirect initiative, where the first phase elicits consideration by the legislature. Studies in Switzerland, where direct democracy rights are most extensive and most often used, suggest that the legislature is more influenced by the threat of a referendum to rescind enacted statutes than by the initiative. This is because those who lose a vote in the legislature often begin the adoption of a rescinding referendum.  

C. Majority Rule

An important variant of the concept that the initiative is a perfection of democracy is the claim that the initiative allows expression of pure majoritarian will, and that this is a virtue. The premise is true relative to laws passed by legislatures. Representative government in America is designed to avoid pure majority rule, for purposes of protecting minorities, promoting compromises, and insuring deliberation of issues. The initiative is a way around these barriers for at least some majorities.

The initiative hardly enacts all majority preferences. To the extent that money is necessary for a successful initiative campaign, the initiative is not available to unorganized interests lacking financial backing. And those who actually vote on initiatives tend to be better educated and more affluent than those who vote for representatives or who do not vote at all. Some issues are passed based on genuine voter confusion. Nevertheless, initiatives surely enact majority will more effectively than do legislatures.

Whether direct majority rule is a virtue is fiercely contested. It clearly was not for Madison and other framers; who spoke against it and deliberately designed the Constitution to avoid it. But majority rule at some level remains the fundamental principle of democracy, as Madison often acknowl-

46. See CRONIN, supra note 5, at 10, 53; Blankart, supra note 14, at 90-91.
48. MAGLEBY, supra note 4, at 103-09, 183; see also CRONIN, supra note 5, at 67.
49. CALIFORNIA COMM’N, supra note 9, at 87-89.
50. See text accompanying note 22; see also CRONIN, supra note 5, at 17-19.
edged. Its opposite, minority rule, is plainly undemocratic. The question is how ultimate majority rule should be tempered to protect minority interests and ensure deliberation.

Every successful initiative defines the minority who voted against it, as does every successful enactment by a legislature. Concern for all such minorities would put into question any majoritarian act and thus be contrary to democracy. Rather, concern for minority interests arises in those cases when a majority targets distinct groups that are unpopular generally, groups that are consistent losers in the majoritarian process or are the subject of disabilities that are hard to explain in terms other than dislike. America's classic example was the Jim Crow system. Three examples adopted by initiative are Colorado's amendment barring legal protection for gays, California's law disabling Japanese farmers from owning land, and Oregon's law requiring Catholic children to attend public schools.52

Compare the initiative with the complex relationship between legislatures and minority interests. Recall the many times one has thought a legislature too responsive to a distinct electoral ("special") interest, such as farmers, or oil companies, or veterans, or environmentalists, or defense contractors, or a civil rights group. We can all think of legislation enacted or blocked because of intense support of a well-organized group whose preference would probably not be approved by a referendum of the whole electorate.

There are two reasons why organized interests can influence legislatures in this way. The more familiar is the corruption of financial support. When the initiative overcomes that, it is performing as its idealistic backers intend. The other reason, less often acknowledged in common discourse, is that legislatures reflect not only the number of a measure's proponents, but also the intensity of their preferences. In this way, minority interests are able to get their most strongly desired legislation passed, even when that legislation would not achieve majority support in a referendum. More important still, minorities can persuade legislatures to amend the parts of majoritarian-

51. See, e.g., THE FEDERALIST Nos. 39, 49 (James Madison).
ian bills they find most objectionable, even if a referendum would give majority backing to those parts.\textsuperscript{53}

That legislatures are able to reflect intensity of preferences as well as their popularity may make legislatures less efficient, a point taken up below. But it is also an important feature of mature democracy. Madison's solution to tyranny of the majority was layered representative government, in which no minority should consistently lose out.\textsuperscript{54} Legislatures have failed to achieve his aim in some circumstances, such as the long reign of Jim Crow. But initiatives can much more readily isolate minorities, as recent anti-gay measures show.

Initiatives that target unpopular minorities are not a large percentage of citizens' initiatives,\textsuperscript{55} but they are some of the best known. Many of these have been overturned by the courts on constitutional grounds, and proponents of the initiative sometimes argue that judicial review is sufficient protection.\textsuperscript{56} But there are several reasons for concern about relying solely on judicial review. First, the constitutional initiative neutralizes judicial review under the state's constitution, which would otherwise preserve more legal diversity, thereby nationalizing more issues. Second, judges are troubled by judicial review of initiatives. Some of them personally believe the initiative to be more democratic than the legislature and give it more deference. Others sense that overturning an initiative is more likely to incur popular wrath than overturning a legislative act. This inhibits the timid, particularly in states where recall of judges is allowed.\textsuperscript{57}

D. Efficiency

When the initiative was adopted during the Progressive Era, government in America was much smaller than it is today. Government internally was not a major target of reformers; rather, it was thought to be the tool of powerful private interests. Proponents of the initiative tended to be on the political left, more concerned about private power than public, and indeed, wanting to increase the ability of public power to

\textsuperscript{53} See MAGLEBY, supra note 4, at 184-86.
\textsuperscript{54} See THE FEDERALIST. Nos. 10, 51 (James Madison).
\textsuperscript{55} See, e.g., CRONIN, supra note 5, at 92.
\textsuperscript{56} See SCHMIDT, supra note 18, at 38.
\textsuperscript{57} See Eule, supra note 2, at 1579-84.
improve the lot of have-nots.\textsuperscript{58} Thus attacking governmental inefficiency was not a prominent aim of original promoters of the initiative, although it had occasional mention.\textsuperscript{59}

In recent years, attacking the size and inefficiency of government has become a major purpose of initiators.\textsuperscript{60} Also, the initiative arguably reduces what economists call agency costs—the costs of supervising agents, here elected representatives and appointed bureaucrats, by a principal, here the electorate. More controversially, some economists, dubbed “Leviathan theorists,” have argued that modern representative government has an inherent bias toward excessive budget size.\textsuperscript{61}

Fully assessing all arguments about the relationship of the initiative to governmental efficiency presents many difficulties. Formidable questions include what definition of efficiency to apply and whether efficiency is a coherent concept in various contexts. However, the most serious and obvious class of problems is rather clearly connected to governmental efficiency. These are problems arising from self-interest of the governing classes, both elected and appointed, in their compensation, job-security, power, and prestige. Agency costs are very likely to be high on this class of issues.

The attentiveness of legislatures to minority interests has the virtue, already noted, of giving effect to the intensity of preferences, to which majorities are deaf. But that virtue comes at a cost because legislatures try to satisfy all well-organized interests at their door, often by spending or protectionism at the expense of unorganized taxpayers or consumers. And legislators do this in large part for the self-interested purpose of garnering reelection support from organized groups.

The initiative is deployed as a remedy for these costs, at least on behalf of taxpayers. In modern times, initiatives to limit governmental borrowing and taxing have become prominent, curbing legislators’ ability to buy favor with organized groups. The job-security interest of legislators has also been

\begin{footnotes}
\textsuperscript{58} See MAGLEBY, supra note 4, at 21-25; CRONIN, supra note 5, at 43-59.
\textsuperscript{59} E.g., ROCKY MTN. NEWS (Denver), Nov. 3, 1910, at 1 (cartoon).
\textsuperscript{60} See CRONIN, supra note 5, at 203-07; SCHMIDT, supra note 18, at 125-45.
\end{footnotes}
the target of initiatives on reapportionment, term limits, and campaign finance regulation.\textsuperscript{62}

Claims to improve governmental efficiency must reckon the cost of direct democracy itself. Initiatives incur administrative costs to review, verify, and print petitions, print ballots, and administer more elaborate, and sometimes more frequent, elections.\textsuperscript{63} Moreover, there are gains from agency that can be lost when laws are made by initiative. It is cheaper for a few officials to become fully informed about an issue, or expert in an activity, than for the electorate as a whole. To sustain a claim of efficiency for the initiative, these costs must be exceeded by gains in governmental efficiency flowing from initiated measures. Gains seem likely in the discrete class of issues directly related to the self-interest of legislators and bureaucrats, but are more doubtful for other questions.

The Leviathan theorists make a theoretical case for greater efficiency under direct democracy than under representative government.\textsuperscript{64} We have found no good studies to test whether their claim has empirical support. There is abundant political commentary, particularly about California. All agree that the state's tax-cutting initiatives have succeeded in reducing taxes and government spending. But some argue that the crudeness of initiatives, and their use to mandate spending priorities as well as tax cuts, have led to less efficient government.\textsuperscript{65}

One very crude question about efficiency of government is its per capita cost. Higher cost does not equate with inefficiency, because it may correspond with better services. Yet the suspicion that higher average costs mean less efficiency is widespread.\textsuperscript{66} Thus we compared the per capita cost of state government in states with and without the initiative. Initiative

\textsuperscript{62} See Ranney, \textit{supra} note 5, at 78; \textsc{California Comm'n, supra} note 9, at 72-73; \textsc{Schmidt, supra} note 18, at 15, 30-34, 51-54, 108.

\textsuperscript{63} See \textsc{California Comm'n, supra} note 9, at 121, 126, 243. In every state, initiative proponents bear the costs of circulation, which can be considerable. In 1994, an unsuccessful Colorado initiative, Amendment 12, sought to shift this cost to the state. 1994 Amendment 12 (rejected by Colorado voters Nov. 8, 1994) (on file with the Colorado Secretary of State).

\textsuperscript{64} See Arthur T. Denzau et al., \textit{On the Initiative-Referendum Option and the Control of Monopoly Government}, in \textsc{TAX AND EXPENDITURE LIMITATIONS, supra} note 61, at 191.

\textsuperscript{65} See, e.g., Peter Schrag, \textit{California's Elected Anarchy}, \textsc{Harper's Mag.}, Nov. 1994, at 50.

\textsuperscript{66} See, e.g., Helen F. Ladd, \textit{Introduction to TAX AND EXPENDITURE LIMITATIONS, supra} note 61, at 2.
states are somewhat above average in taxing and spending, so
the initiative does not seem to curb taxing and spending better
than the representative process in any absolute sense.\footnote{67}
Studies of states that have initiated tax limits show significant
reductions in government spending over time,\footnote{68} but we have
not found any study that compares efforts to control spending
through the initiative, such as in California, with efforts to do
so legislatively, such as that presently underway in New
Jersey.\footnote{69}

Other claims that initiatives improve efficiency are occasion-
ally made. There are issues that deadlock the representa-
tive process, and the initiative can be a way to resolve them.
The most obvious and dramatic examples are tax revolt
initiatives in California and Colorado, which followed periods of
legislative stalemate.\footnote{70} Some argue that the threat of an
initiative deters legislators and bureaucrats from self-dealing.
It is hard to substantiate this claim. Swiss practice shows that
the rescinding referendum has an important effect on the
legislative process, deterring passage of bills by thin majorities
because of the threat that the legislators who voted against the
bill will promote a rescinding referendum.\footnote{71} However, it is
difficult to know whether that threat promotes more efficient
government. It could have the opposite effect by inducing the
majority to buy off more legislative minorities.

\footnote{67} See U.S. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, PUB. NO.
with authors).

\footnote{68} See, e.g., DEAN STANSEL, CATO INSTITUTE, TAMING LEVIATHAN: ARE

\footnote{69} On California, see Schrag, supra note 65, at 50. On New Jersey, see
Christine Scissorhands, THE ECONOMIST, Apr. 23, 1994, at 32; Jim Florio’s

\footnote{70} On California, see CALIFORNIA COMM’N, supra note 9, at 9. On Colorado,
see S. Con. Res. 2, S. Con. Res. 6, S. Con. Res. 7, S. Con. Res. 8, S. Con. Res. 9, H.
measures).

\footnote{71} See Blankart, supra note 14, at 91.
IV. "THE DEVIL'S IN THE DETAILS".\textsuperscript{72} THE DESIGN OF INITIATIVE PROCEDURES WITH A SPECIAL FOCUS ON COLORADO

A. Introduction

1. Four Basic Procedural Issues

States with initiatives must specify procedures for initiating a popular measure. The procedures selected have their roots in state constitutions, enabling legislation, and judicial decisions. The ease or difficulty of qualifying an initiative for the ballot is based, at least in part, on an important policy question regarding the seriousness of ballot measures. There is a general assumption that initiators ought to be able to demonstrate substantial public support before the state is put to the expense of conducting a vote. Also, proliferation of ballot measures reduces citizens’ understanding. States have chosen the petition process as the primary method of restricting ballot access. This process requires a minimum number of registered voters to sign petitions requesting state officials to place any given measure on the ballot. The process is supplemented by procedures to detect obvious petition fraud. States must also decide on judicial review of these procedures, particularly for review that might delay a vote.

Beyond qualifying procedures, regulation of initiatives is concerned with three related issues: minimizing voter confusion, defining the extent of legal change that can be made in a single initiative, and informing voters on the issues. A related subject on the last issue is the delicate matter of controlling the influence of money. The first two questions are closely related because voter confusion increases with the length and complexity of an initiative. For an extreme example, in 1948 California citizens proposed an initiative that exceeded 21,000 words and would have rewritten much of the state’s constitution.\textsuperscript{73}


\textsuperscript{73} \textit{See} McFadden v. Jordan, 196 P.2d 787 (Cal. 1948).
The judiciaries of initiative jurisdictions have parallel concerns and issues of their own. Can substantive questions about initiatives be reviewed before a vote or only after? How are courts to determine legislative intent of initiated measures? In constitutional review, should courts treat initiated measures with greater or less deference than given to ordinary legislation? Are initiatives a unique threat to minority rights? An issue that has become prominent in California is how courts should interpret conflicting initiatives that are both enacted, the so-called counter-initiative question.

Our interest here is regulation of initiatives. We are not directly concerned with substantive judicial review. Therefore, some of the judicial questions stated above are beyond the scope of this article.

2. The Colorado Experience with Initiatives

In 1910 the citizens of Colorado voted to amend the Colorado Constitution, adding a procedure empowering citizens to initiate and pass constitutional amendments and laws.

74. See generally Eule, supra note 2, at 1503.
76. Colorado citizens may, by petition, initiate laws or constitutional amendments that become effective if passed by majority vote. See COLO. CONST. art. V, § 1; COLO. REV. STAT. §§ 1-40-101 to -133 (Supp. 1994).

[T]he people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly.

The . . . power hereby reserved by the people is the initiative.

. . . All elections on measures initiated by . . . the people . . . shall become the law or a part of the constitution, when approved by a majority of the votes cast thereon, and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed.


The Colorado Constitution also reserves to its citizens the power to submit, by petition, referendums on laws enacted by the General Assembly. Id. art. V, § 1(3). The power, however, does not apply to laws that the General Assembly has declared “necessary for the immediate preservation of the public peace, health or safety” (an emergency clause) and to laws that contain “appropriations for the support and maintenance of the departments of state and state institutions.” Id. Since the General Assembly routinely attaches an emergency clause to its bills invoking the public safety exception, and the Colorado courts have refused to look behind the declaration, referendum by citizen petition has not occurred since 1932, when the electorate rejected a legislative measure increasing the tax on
Since that time there have been over 160 ballot initiatives to amend the constitution and approximately sixty ballot initiatives to enact laws.\textsuperscript{77} The clear trend is towards the increasing use of the initiative power, with an emphasis on proposals to amend the constitution.\textsuperscript{78} Since 1976 there have been over eighty constitutional initiatives (over one half of the total of all

oleomargarine. \textit{See}, \textit{e.g.}, \textit{In re Interrogatories by Governor}, 181 P. 197 (Colo. 1919); \textit{Van Kleeck v. Ramer}, 156 P. 1108 (Colo. 1916); \textit{In re Senate Resolution No. 4}, 130 P. 333 (Colo. 1913); \textit{see also} American Constitutional Law Found. v. Meyer, 33 F.3d 62 (10th Cir. 1994) (unpublished disposition), \textit{reported at} 1994 U.S. App. LEXIS 19136 (10th Cir. July 27, 1994) (use of emergency clause does not violate the First Amendment).

Colorado also sports a complex system of initiatives and referendums at the local level. The Colorado Constitution provides that the initiative and referendum powers are also "reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities." \textsc{Colo. Const.} art. V., \$ 1(9). The Colorado Constitution also provides for the amendment of home rule municipal charters and for adoption of "any measure" by initiative. \textit{Id.} art. XX, \$ 5. All home rule charters must include referendum and initiative provisions. \textit{Burks v. City of Lafayette}, 349 P.2d 692, 694 (Colo. 1960).

Interestingly, the procedures for local initiatives deviate in substantial respects from the procedures for state wide initiatives, demonstrating that there is substantial disagreement among even initiative proponents in Colorado on the best procedures for implementing the process. The General Assembly has established an indirect initiative system for local governments. \textsc{Colo. Rev. Stat.} \$\$ 1-40-127 to -129 (Supp. 1994). Five percent of the registered electors of a city or town jurisdiction can, by petition, submit a proposed ordinance to the local legislature. If the legislature refuses to adopt the proposal "without alteration" within twenty days (or refuses to override an executive veto), \textit{id.} \$ 1-40-128, the proposed ordinance is put to the electorate at a regular or special election within one hundred and fifty days. \textit{Id.} \$ 1-40-129. A second difference is the treatment of initiatives that generate local ordinances. Once a measure is adopted by initiative, it can be amended or repealed only by initiative. \textsc{Colo. Const.} art. XX, \$ 5.

\textsuperscript{77} A tally of all initiatives, successful and unsuccessful, is on file with the authors. This paper cites Colorado initiatives by ballot number and year \textit{e.g.}, 1994 Amendment 12). The text of Colorado initiatives is available through the Colorado Secretary of State's office. Where initiatives have been formally incorporated into the Colorado Constitution, the appropriate article and section numbers are also cited.

\textsuperscript{78} The reason for the modern popularity of constitutional initiatives and the declining popularity of statutory initiatives is easy to understand; the petition and vote requirements are the same for both, but a constitutional amendment by initiative is more difficult to alter or repeal. It may be altered or repealed only through a subsequent constitutional amendment (either initiated by the people or referred by the General Assembly or by a constitutional convention). \textsc{Colo. Const.} art. V, \$ 1(1) (initiative and referendum power), art. XIX, \$ 1 (constitutional convention). Initiatives that enact laws may not be vetoed by the Governor but may be altered or repealed by subsequent legislation passed by the General Assembly and signed by the Governor as well as by subsequent initiated laws. \textit{Id.} art. V, \$ 1(4).
amendment initiatives proposed since 1910) and only ten statutory initiatives.\(^7\) Of these modern initiatives, about half of the amendment proposals have passed, but only three statutory initiatives have passed.\(^8\)

The more important of the successful initiatives to amend the Colorado Constitution include amendments changing procedures for recalling state officials, providing for appointed rather than elected judges, setting home rule for cities and towns, establishing a state civil service, repealing state Prohibition, creating a reapportionment commission to draw state legislative districts, limiting the power of cities to annex territories without a favorable vote of those in the territory annexed, setting eight-year term limits for all state elected officials, and establishing taxing and spending limitations on all government districts.

The popularity of constitutional initiatives has caused the Colorado Constitution to be lengthened substantially with language one would not expect to find in the constitution of a sovereign government. Examples of unusual constitutional subjects added by initiatives include participation in the 1976 Winter Olympics,\(^9\) gambling for selected cities,\(^10\) using selected tax revenues only for roads,\(^11\) old age pensions of one hundred dollars a month for Colorado citizens,\(^12\) nuclear detonations,\(^13\) preference for veterans on civil service exams,\(^14\) public funding for abortion,\(^15\) use of lottery funds for state parks,\(^16\) busing to achieve racial balance,\(^17\) and English

\(^7\) See supra note 77.

\(^8\) In 1980 a proposal to create a Regional Transportation District passed; in 1984 a voter registration act passed; and in 1992 an act prohibiting the hunting of black bears by the use of bait or dogs or in the spring passed. COLO. REV. STAT. §§ 32-9-103(3.5), -109.5, -111, -112, -117 (Supp. 1994) (Regional Transportation District); id. § 33-4-101.3 (Supp. 1994) (black bear hunting); Act effective Jan. 14, 1985, 1985 Colo. Sess. Laws 1793 (voter registration). See also supra note 77 (since 1984, 26 of 30 initiatives have attempted to amend the Colorado Constitution).

\(^9\) COLO. CONST. art. X, § 20, art. XI, § 10 (both repealed).

\(^10\) Id. art. XVIII, § 9.

\(^11\) Id. art. XI, § 3. The section also contains very technical limitations on the state's bonding authority.

\(^12\) Id. art. XXIV, § 6.

\(^13\) Id. art. XXVI.

\(^14\) COLO. CONST. art. XII, § 15.

\(^15\) Id. art. V, § 50.

\(^16\) Id. art. XXVII (creating the "Great Outdoors Colorado Program").

\(^17\) Id. art. IX, § 8.
as the official language for the State. 90 In the latest election, proposals failed that would have added provisions on workers compensation and a special tobacco tax.91

Recently, however, initiative petitioners, recognizing the power and permanency of amendments on the structure of government, have proposed constitutional amendments that relate to the election process and the general powers and responsibilities of government officials. In 1992 and 1994, state ballots included constitutional initiative proposals on limiting taxing and spending powers of government absent a ratifying vote,92 on election reform,93 on recall of state judges,94 on initiative and referendum procedures,95 and on term limits for elected officials.96

The Colorado Constitution contains selected procedural requirements,97 but most of the details of Colorado initiative procedure are found in legislation supplementing the constitutional language.98 Recently, the General Assembly passed two

90. Id. art. II, § 30a.
91. 1994 Amendments 11 and 1 (both rejected by Colorado voters Nov. 8, 1994) (on file with Colorado Secretary of State).
92. COLO. CONST. art. X, § 20 (Taxpayer's Bill of Rights). This provision itself requires a vote of the people on every measure to increase taxes, borrowing, or government spending. The required ballot measure can be referred by a legislative body or initiated by citizens.
93. LEGISLATIVE COUNCIL OF THE COLO. GEN. ASSEMBLY, AN ANALYSIS OF 1994 BALLOT PROPOSALS, RESEARCH PUB. No. 392, at 20 (1994 Amendment 12), 41 (1994 Amendment 15) [hereinafter LEGISLATIVE COUNCIL] (both amendments were rejected by Colorado voters Nov. 8, 1994) (full text of amendments on file with Colorado Secretary of State).
94. Id. at 20 (1994 Amendment 12).
95. Id.
96. COLO. CONST. art. XVIII, §§ 9(a), 11 (1994 Amendment 17) (adopted by Colorado voters Nov. 8, 1994).
97. Article V, § 1, in several separate bits of language, generally empowers the General Assembly to enact implementing legislation, specifically empowers the Secretary of State to prescribe the form of petitions, and specifically empowers the General Assembly to pass laws on publication. In subsection (2), the General Assembly may prescribe the "form" or, in subsection (7) "all matters pertaining to the form" of initiative petitions and, in an odd bit of language in Subsection (7), may, through "general laws" guide the Secretary of State on "submitting" initiatives "to the people for adoption or rejection at the polls." Subsection (7.3) states that the "form and manner of publication shall be as prescribed by law." Under subsection (6), the Secretary of State can designate or prescribe the "general form" of the "top" of the "printed or written" petition "sheets." Subsection (5.5) impliedly authorizes the ballot title statutes.
98. The courts have interpreted the general grants of legislative authority to authorize the General Assembly to pass statutes that "prevent fraud, mistake or abuse in the initiative process," but the statutes may not "create an undue
major overhauls of the implementing legislation, one in 1989 and another in 1993. Occasionally, as this year, the General Assembly proposes constitutional amendments, complete with contingent legislation, to amend the initiative process. The implementing legislation must, of course, be consistent with the constitutional language, and according to the courts, the General Assembly has overstepped its constitutional authority with some regularity over the years.

Colorado answers the four basic procedural questions in the following manner. First, in accord with all other initiative jurisdictions, Colorado limits access to the ballot through a petition requirement. Registered voters, equal in number to five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous election, must sign a petition requesting that specified language be put on the ballot to amend the constitution or enact a law. With the petition requirement comes, of necessity, a host of supplement-

See, e.g., Committee for Better Health Care for All Colo. Citizens v. Meyer, 830 P.2d 884, 893 (Colo. 1992). The General Assembly has passed Article 40, in its current version a 34 page, 35 section provision on initiative procedures. COLO. REV. STAT. §§ 1-40-101 to -133 (Supp. 1994). The procedures specified are complex and the time deadlines short. Only the most committed or the best advised members of the public are able to negotiate the maze.

101. LEGISLATIVE COUNCIL, supra note 93, at 2 (1994 Referendum A), 5 (1994 Referendum B) (adding subsections (5.5), (7.3) and (7.5) and amending old subsection (7) to art. V, § 1 of the Colorado Constitution) (both adopted by Colorado voters Nov. 8, 1994).
ing rules designed to deter and detect petition fraud and other petition irregularities. Second, to minimize drafting problems, Colorado requires proponents to submit to a non-binding consultation procedure with state officials. Third, Colorado's efforts to notify citizens on the content of initiatives consist of an elaborate ballot title procedure, newspaper publication of the text, an official summary of initiatives, and a pamphlet mailed to all registered voters containing the text and an official summary of initiatives. Fourth, until 1994, Colorado had no regulation of the scope of initiatives, but a successful 1994 referendum amended the constitution to add a single-subject limit.\(^\text{103}\)

**B. The Petition Process as a Gate to Ballot Access**

1. Introduction to the Petition Process

The process of qualifying an initiative for the ballot varies greatly among jurisdictions, for both policy and practical reasons. States allowing only the indirect initiative require that a measure first be considered by the legislature, necessarily slowing the process.\(^\text{104}\) Even in direct initiative states, the time periods to qualify for the ballot vary substantially.\(^\text{105}\)

The most central part of the qualifying process is gathering voters' signatures on petitions, and the number of qualifying signatures has a major effect on the frequency of citizens' resort to the initiative. Some states set high qualifying numbers, or set significantly higher numbers for constitutional than for statutory initiatives.\(^\text{106}\) In others, the number is low enough that qualifying is not difficult.\(^\text{107}\)

The size of a state's population has a great effect on the qualifying process. California requires a higher percentage of voter signatures to qualify a constitutional initiative than does

---

\(^\text{103}\) See LEGISLATIVE COUNCIL, supra note 93, at 2 (1994 Referendum A) (providing summary of proposed referendum); see also infra part IV.D.2.

\(^\text{104}\) See supra note 7 and accompanying text.

\(^\text{105}\) See CALIFORNIA COMM'N, supra note 9, at 130, 361 (from 90 days in Oklahoma to unlimited time in five states).

\(^\text{106}\) See id. at 130, 361-62 (all but two states require more signatures for constitutional than for statutory initiatives).

\(^\text{107}\) See id. Colorado is the easiest state in which to qualify a constitutional initiative and may also be the easiest for statutory initiatives.
Colorado. In California, the actual number needed is over 600,000—about eleven times Colorado's. The logistics of gathering over half a million signatures are significantly different from 55,000. Signature gathering is often an amateur enterprise in Colorado, but it is mostly a commercial venture in California. Signatures must be gathered personally in Colorado, but California allows solicitation by mail. The process of administrative review of a proposed initiative can be very complex and can cause difficulties for those unfamiliar with it. Knowledgeable opponents can seek judicial review at strategic moments to cause substantial and sometimes fatal delay to an initiative.

2. The Colorado Petition Procedure

As noted above, ballot access for initiatives is limited by a petition requirement. After the fixing of the ballot title, submission clause, and summary, proponents have no more than six months to gather signatures and file their petition with the Secretary of State. They must then file completed petitions at least three months before the election. The constitution requires “signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election” for an initiative petition.

A series of provisions in the Colorado Constitution deals with the form of the petition itself. Every petition must include the full text of the measure proposed, and signers must be “proper persons” who sign for themselves and the signatures must include a residential address and date. Petition circulators must be registered electors and must attach a notarized affidavit to each petition attesting that “each signature thereon is the signature of the person whose name it purports to be and that, to the best of the knowledge and belief of the

108. Id. at 130.
109. Id. at 126.
110. See infra note 119 and accompanying text.
111. CALIFORNIA COMM'N, supra note 9, at 137-42, 151-55.
112. See infra text accompanying note 238.
114. COLO. CONST. art. V, § 1(2).
115. Id.
116. Id.
117. COLO. CONST. art. V, § 1(6).
affiant, each of the persons signing said petition was, at the
time of signing, a registered elector.\textsuperscript{118}

Supplementing legislation adds that persons circulating
petitions must do so in person.\textsuperscript{119} Circulators do not have to
know the signers personally.\textsuperscript{120} A provision recently held un-
constitutional by a federal district court had required circula-
tors to wear badges identifying themselves and designating
whether they were volunteer or paid circulators.\textsuperscript{121} Each
circulator must sign, date, and have notarized an affidavit
containing information about the circulator’s address and status
as a registered voter.\textsuperscript{122}

The required form for petitions is cumbersome. Each
individual petition for a single initiative, defined as a “sec-
tion,”\textsuperscript{123} must begin with pages containing a specified warning
statement,\textsuperscript{124} the title, the summary, the ballot title (which in
large part repeats the title), and the proposed language.\textsuperscript{125}
The top of each succeeding page, on which signatures are
affixed, must repeat the warning statement and the ballot title
(or title for a local ballot issue).\textsuperscript{126} The final page must
contain the affidavit of the petition circulator.\textsuperscript{127}

Upon receiving the petitions, the Secretary of State has
thirty days to check the form of the petitions. The Secretary of
State verifies that the petitions are prepared on printed forms,

\textsuperscript{118} Id.
\textsuperscript{119} COLO. REV. STAT. §§ 1-40-111(2), -112(1), -113(1) (Supp. 1994).
\textsuperscript{120} Brownlow v. Wunsch, 83 P.2d 775, 781 (Colo. 1938).
\textsuperscript{121} COLO. REV. STAT. § 1-40-111(2) (Supp. 1994). This requirement was
held to violate the First Amendment. American Constitutional Law Found. v.
appeal docketed, No. 94-1576 (10th Cir. Dec. 16, 1994).
\textsuperscript{122} COLO. REV. STAT. § 1-40-111(2) (Supp. 1994). See Committee for Better
(requirements do not violate Colorado Constitution).
\textsuperscript{123} COLO. REV. STAT. § 1-40-102(6) (Supp. 1994).
\textsuperscript{124} Id. § 1-40-110. The warning statement contains two parts. First, it
warns that it is against the law to forge another's name, to sign more than once,
or to sign knowing the signer is not a registered elector. Second, the statement
commands that a voter not sign unless the voter has read the proposed initiative,
or a summary thereof, and understands its meaning.
\textsuperscript{125} Id. § 1-40-102(6). Petition circulators have reported that no one reads
the text or summary of initiatives in their petitions and that the warning would,
if enforced, disqualify all signers on all petitions. See JoElyn Newcomb and
audience, Tape of Conference on Governing by Initiative, sponsored by the
University of Colorado School of Law (Sept. 23, 1994) (on file with authors).
\textsuperscript{126} COLO. REV. STAT. § 1-40-102(6) (Supp. 1994).
\textsuperscript{127} Id.
include the warning, contain no extraneous material, show no evidence of disassembly, and have sections bound by the hundreds. The Secretary must also verify that petition circulators have signed, notarized, and dated appropriate affidavits. Finally, the Secretary must sample at least five percent or four thousand signatures, whichever is greater. The Colorado Supreme Court has held that the constitutional requirement that a properly verified petition “shall be prima facie evidence that the signatures thereon are genuine and true and that the persons signing the same are registered electors” does not prohibit the Secretary of State from investigating the validity of signatures of circulators and petition signers.

If the Secretary of State declares that a petition does not have a sufficient number of valid signatures, the proponents have fifteen days to gather additional signatures. Parties contesting the Secretary's finding on the sufficiency of signatures may file a protest within thirty days in district court with an appeal to the Colorado Supreme Court. The Colorado Supreme Court has ruled that the Secretary's rejection of petition signatures was arbitrary and capricious and has

128. See id. § 1-40-113(2); Elkins v. Milliken, 249 P. 655 (Colo. 1926) (evidence of disassembly of sections destroys the integrity of each section).

129. COLO. REV. STAT. § 1-40-116(4) (Supp. 1994). Random sample results are extrapolated to the full number of signatures and used to make one of three determinations of the petition's validity. If the random sample establishes that the number of valid signatures is less than or equal to 90% of the number needed, the petition “shall be deemed to be not sufficient.” Id. If the sample established that the number of valid signatures is equal to or greater than 110% of the number needed, the petition “shall be deemed sufficient.” Id. For anything between, the Secretary “shall order the examination and verification of each signature filed.” Id. See also infra text accompanying notes 141-43.

130. COLO. CONST. art. V, § 1(6).


132. COLO. REV. STAT. § 1-40-117(3)(b) (Supp. 1994). See Montero v. Meyer, 795 P.2d 242 (Colo. 1990) (amended petition may be filed within three months of election, but case decided under prior law before § 1-40-117(3)(b) was adopted).

133. COLO. REV. STAT. §§ 1-40-118, -119 (Supp. 1994). The protestor must plead specific defects in the Secretary of State's signature verification results and has the burden of proof in the hearing. Id.

134. Committee for Better Health Care, 830 P.2d at 884, 896-97, 898-99 (reversing Secretary of State's rejection of petition forms, where Secretary assumed that initiative sections with extra staple holes had been disassembled, and Secretary rejected affidavits that had different dates for the signature and notarization).
also ruled that the Secretary of State's acceptance of signatures was unreasonable. In most cases, however, the supreme court has sustained the Secretary's determinations.

3. Comments on the Colorado Petition Process

Drafters of the Colorado Constitution limited ballot access by requiring, as a condition to appearing on the ballot, the signatures of a significant number of registered voters. But the petition process is open to fraud and misrepresentation. Those gathering signatures can forge them (copy them from telephone books), or solicit signatures from individuals who lack capacity to sign (individuals who are not registered voters in the appropriate jurisdiction), or solicit signatures from individuals under false pretenses. The last category includes clearly actionable conduct by those soliciting signatures, such as reattaching signatures solicited for one petition to another, altering petition language after signatures have been solicited, and the like. It also includes conduct that is borderline illegal, like oral misrepresentations or material omissions about the content and effect of the initiative to induce individuals to sign otherwise accurate and legally compliant petition forms.

Initiative proponents do not have a monopoly over questionable behavior in the petition process. Opponents of initiatives have been known to offer to pay signature solicitors, particularly those that are paid solicitors, more per signature to destroy already gathered signatures than the solicitors will make per signature if they turn in their petitions. Moreover, proponents of one initiative, needing paid solicitors to gather signatures, have hired signature solicitors off the street who are doing the bidding of proponents of another initiative.

The Secretary of State's office reports that the incidence of petition fraud in Colorado appears to be on the increase.

135. Elkins v. Milliken, 249 P. 655 (Colo. 1926) (invalidating signatures where petition sections separated and altered).
137. This is illegal if the petition signatures gathered are not returned to the original employer. *COLO. REV. STAT.* § 1-40-131 (Supp. 1994).
138. *See* Catharyn Baird, Tape of Conference on Governing by Initiative, *supra* note 125. In 1982, the Secretary of State ordered a controversial casino gambling proposal removed from the ballot. *Secretary of State Rejects Petition*
The use of circulators paid on a commission basis by signature, illegal in Colorado until a 1988 Supreme Court opinion, is one of the reasons for the trend. Currently a single citizen with an extra $40,000, fifty cents a signature for eighty thousand signatures, has a good chance of putting an initiative on the state-wide ballot using paid solicitors. The state legislature has applied a minor salve by requiring paid solicitors to identify themselves.

The State's main protection against forged signatures and signatures of unregistered voters is not signature verification from filed signature cards and the like. There are simply too many signatures on too many petitions to check them individually. Instead, the Secretary of State's office has relied on cross checks of a random sample of signers against local voter rolls. If a signed name and address do not match the name and address on a voter roll, the signature is rejected. Some critics argue that the process is too easily abused. For example, an unscrupulous petition circulator could forge signatures equal in number to 125% of the minimum required, gathering them from a phone book (or other mailing lists that can be bought commercially) and assuming that seventy percent of the people listed were registered voters and that the names and addresses in the phone book match local voter rolls. Only careful attention to ink color and handwriting and the like would detect the fraud.

Other critics contend that the random sample process results in the rejection of too many valid signatures for technical errors that ought to be excused. Some signatures are rejected because there is not a perfect match between the petition signature and address and the voter rolls. There can be

---

Effort, UPI, Sept. 10, 1982, available in LEXIS, Nexis Library, ARCNWS File. Testimony indicated that some names were forged and others added after petitions were notarized. Id. Petitions were left in bars and many names appeared in alphabetical order. Id.


140. The rule is currently of questionable constitutional status. See supra note 121 and accompanying text.

141. Catharyn Baird, Tape of Conference on Governing by Initiative, supra note 125.

142. This is a common complaint of Colorado initiative activist Douglas Bruce and led him to propose an initiative in 1994 (Amendment 12) that, among other things, would have stopped the Secretary of State from using the random sample process. The initiative failed. See supra note 93.
a registration error in the voter rolls or an error in the petition signature, or the signature, although accurate, may not be a perfect match with the form of the voter rolls (when, for example, a signer uses a middle initial and a full name appears on the rolls). Some signatures are rejected because voting rolls have yet to be updated to correspond with a change of address. Proponents can contest the rejection of these signatures, although this is difficult, or simply use the fifteen-day grace period to gather others.

The results of the sample are extrapolated to the full number of signatures for an evaluation of whether the initiative meets the minimum signature requirements. To protect their initiatives, petitioners solicit excess signatures (if 55,000 is the minimum, they will file 80,000) so that disqualification of some signatures (in this example, a twenty-nine percent error rate) would leave the petitions with sufficient signatures. The effect of the random sampling process is to induce proponents to tender substantially more than the minimum number of required petition signatures. With the large numbers involved and the limited staff of the Secretary of State's office, however, the verification process using the random sample seems a reasonable compromise.

C. Drafting Initiatives: Amateurism, Ardency, and Inadequate Review

1. Introduction to the Drafting Problem

There are four separate drafting problems. First, initiatives can be ineptly written: internally inconsistent, full of lacunae, incoherent, or leading to unintended consequences. Second, initiative drafting does not allow room for compromise with targeted (and often minority group) opponents. Third, initiatives can be mischievous; they can be intentionally misleading in their complexity or opaqueness. Fourth, when several initiatives pass that contain conflicting individual provisions, the result can be a patchwork monster of regulations. The initiative with the most votes pre-empts contrary

143. Newcomb, Tape of Conference on Governing by Initiative, supra note 125.
provisions of any other initiatives that pass with lesser majorities, but a fragmentary, maimed residue of the other initiatives may survive. The problem of inept drafting arises in large part from the way initiatives are drafted. A group of citizens comes up with a draft provision. The group can be small, and they are likely to be very strong partisans of their proposal. They can be inexperienced in the drafting of legislation. They can work in secret. After some procedural steps, their draft is printed on petitions for circulation to voters. From that moment, the draft is frozen. Both petition signers and voters must accept or reject the proposal as is.

The contrast with representative democracy could not be starker. When a legislative bill is introduced, it may get review from a legislative counsel or administrative department. It will often go to a committee that includes members of both major parties. It will undergo hearings, at which both expert and lay witnesses testify. Opponents will have an opportunity to explain what parts of the bill are most objectionable to them and to make amendments, and this will often result in changes. Unintended consequences of the bill will often be brought to the sponsors' attention. Possible costs of the bill will be estimated and discussed, and more amendments may result. Ambiguities will be pointed out and clarified. The process will be more or

144. Colo. Rev. Stat. § 1-40-123 (Supp. 1994). “A majority of the votes cast thereon shall adopt any measure so submitted, and, in case of adoption of conflicting provisions, the one which receives the greatest number of affirmative votes shall prevail in all particulars as to which there is a conflict.” Id. (emphasis added).

145. In the 1994 election an initiative (Amendment 12) had language in conflict with both another initiative (Amendment 15) and a referendum (Referendum A). Amendments 12 and 15 contained conflicting provisions on campaign finance reform, and Amendment 12 and Referendum A conflicted on the single-subject rule for initiatives. See Legislative Council, supra note 93. If all three had passed with different majorities, we would be left with bits and pieces of the least successful provisions on the books, a result no one wanted. For example, Amendment 12, with multiple issues, could have pre-empted Referendum A, with a single issue, although one could argue that the result should be the opposite because voters were voting for Amendment 12 on other grounds and disagreed with Amendment 12's position on the Referendum A issue.

less open. When the process works properly, the bill will undergo genuine deliberation by a body that includes opponents and neutral members as well as backers. Bicameralism and the executive veto repeat the process. Representative democracy suffers many instances when these processes do not work as ideally intended, but even in an imperfect world, they are very different from drafting of initiatives. Except for executive veto, the same drafting safeguards are in place for a legislative referendum.¹⁴⁷

As this discussion suggests, several problems arise from the way initiatives are drafted. The most obvious is that initiatives are more likely than legislation to be drafted badly. Less expertise is brought to bear, and a small group of proponents will overlook unintended effects and ambiguities more often than will the broad range of interests present in the legislative process.¹⁴⁸

The drafting problem is severely magnified by early freezes of initiatives' wording. The many opportunities for adjustment in the representative process are lacking. Moreover, entrenchment of enacted initiatives makes later adjustment extremely difficult. If the initiative is in the form of a constitutional amendment, it can be altered only by the same process. If it is nominally a statute, many states either disable legislative adjustments or require a super-majority in the legislature to make them.¹⁴⁹ Fine-tuning a measure in the light of experience, a common aspect of the legislative process, is difficult to impossible.

A troublesome aspect of the drafting process is that it shuts out minority comment and thus minority interests. Target groups do not have an opportunity to make their case in the drafting process; they can only campaign against the initiative language before the electorate. By contrast, the representative process often accommodates minority concerns during the enactment process. (This is true to a greater extent in parlia-

¹⁴⁷. E.g., COLO. CONST. art. XIX, § 2.
¹⁴⁸. See generally CALIFORNIA COMM’N, supra note 9, at 79-91. The problem is not new. See Hubert D. Henry, Popular Law-Making in Colorado, 26 ROCKY Mtn. L. REV. 439, 448 (1954). Drafting problems can surface during the campaign on an initiative that has already qualified for the ballot. For two dramatic examples, see Christopher A. Coury, Note, Direct Democracy Through Initiative and Referendum: Checking the Balance, 8 NOTRE DAME J.L. ETHICS & PUB. POLY 573 (1994).
¹⁴⁹. See supra notes 11-12 and accompanying text.
mentary systems lacking judicial review, where accommodative traditions are stronger than in the United States.) Opponents of a bill can often persuade its backers to modify parts that are most objectionable to opponents and least important to proponents. The legislative process forces opposing sides to listen to one another before wording is final. Two houses and a governor must be satisfied. The initiative process does none of this.

Several methods are used to try to improve drafting of citizens' initiatives. Most formal and successful is the indirect initiative. Initiators must first submit their proposal to the legislature for its review and possible action. The legislature can employ its procedures to point out shortcomings of the initiators' draft. It can enact an alternative measure or propose an alternative by referendum. This procedure is one reason for success of the Swiss national initiative. An additional procedure recommended by some critics is a public hearing on the measure during or after petitioning.

A second method is to require that a state official, such as the attorney general or legislative counsel, review drafts of all proposed initiatives and point out any shortcomings to the initiators. Some form of this procedure is used in many initiative states, including Colorado. However, this method is much less thorough than legislative review. A more drastic reform is to have the actual ballot measure drafted by a public official, who is charged with carrying out the initiators' purpose, and whose draft is subject to judicial review. This form is presently used in New Zealand.

A third approach involves efforts to postpone freezing of the initiative's text. One variation is to lengthen the period between the initial submission and petitioning. It is very short

---

150. The Swiss system enacts few initiatives as such; it is much more common for voters to enact legislative counterproposals or substitutes. See KOBACH, supra note 4, at 87, 110. See generally id. at 70-121 (trends in the exercise of direct democracy in Switzerland). See also CALIFORNIA COMM'N, supra note 9, at 104-07 (advisory legislative hearings after ballot qualification).

151. See CALIFORNIA COMM'N, supra note 9, at 112-19.

152. Id. at 99-103. On Colorado, see also supra part IV.A.2. For the view that this method is too expensive for California because of the number of proposals, see CALIFORNIA COMM'N, supra note 9, at 121.

in some states, including Colorado.\textsuperscript{154} Another is to allow amendments by the initiators later in the process.\textsuperscript{155} The difficulty is how to allow alterations to the petitions citizens have signed without undermining the integrity of petitioning. However, if changes do not alter the essence of a proposal, they can be allowed to clarify it or to correct unintended defects.

One purpose of each of the procedures discussed above is to promote discussions and bargaining between initiators and public officials to get better-drafted and more practicable initiatives. An alternative to amendment of an initiative, discussed in the last paragraph, is withdrawal of an initiative after its proponents are satisfied by a legislative substitute. The latter can, of course, be either a statute or a measure submitted by the legislature for referendum. This practice is well-established in Switzerland but rare in the United States.\textsuperscript{156} To make it work, it is important to know who has the right to withdraw an initiative and how late in the process this can be done. State laws are vague on these points. Statutes use indefinite terms such as "proponents" to refer to the persons who submit initiative proposals,\textsuperscript{157} and it is implicit that whoever controls signed petitions can withdraw an initiative simply by failing to submit them to elections officials.\textsuperscript{158} But there are no rules to govern disputes among persons claiming to be proponents. If bargaining with officials becomes common, disputes are likely to arise.

Finally, drafting problems can be alleviated by lowering the barriers to post-enactment amendment. If procedures for statu-

\begin{itemize}
\item \textsuperscript{154} \textit{California Comm'n}, supra note 9, at 130. On Colorado, see infra text accompanying note 300.
\item \textsuperscript{155} \textit{See generally California Comm'n}, supra note 9, at 109-19 (amendability of initiatives).
\item \textsuperscript{157} \textit{E.g.}, \textit{Cal. Elec. Code} § 3502 (Supp. 1994) ("proponents" are persons presenting draft petition).
\item \textsuperscript{158} California proponents may formally withdraw their petition before filing if they all sign the notice. \textit{Id.} § 5354. (On Colorado, see infra note 172 and accompanying text.) Under the California statutes, suppose that three people claim to be proponents and two want to withdraw a proposed initiative. Section 5354 seems to say that the withdrawal is ineffective. What then if the two refuse to file petitions in their possession, or even destroy them? What if there is a dispute about who is properly called a proponent?
\end{itemize}
tory initiatives were distinctly less burdensome than for constitutional, the trend toward entrenching everything would likely reverse. And legislatures can be given power to amend statutory initiatives, especially after an intervening election.

2. The Non-Binding, Consultative Procedures in Colorado

As noted above, Colorado has a mandatory but non-binding consultative procedure to improve initiative drafting enacted in 1974. The act followed on the heels of several unsuccessful initiatives in the 1972 election on taxation and gambling issues that were long, complicated and awkwardly drafted and anticipated ultimately successful, technically sophisticated initiatives in the 1974 election on annexation and reapportionment. Originally the comments were confidential until the ballot title was established, but a 1980 constitutional amendment made the comments public. The Colorado Supreme Court has held that the ballot title board has no jurisdiction to set a ballot title unless the public comment and review procedures have been followed.

The current version of this process requires that before the solicitation of petition signatures, proponents must submit proposed initiative language to the directors of the legislative council and the office of legislative legal services for comment, and the directors may request comments from other executive agencies. Although proponents are not bound to accept any suggested changes, the statute does have one exhortation and two requirements pertaining to drafting style: The statute encourages them “to write . . . drafts in plain, nontechnical language and in a clear and coherent manner using words with common and everyday meaning which are understandable to

160. See supra text following note 80.
161. COLO. CONST. art. V, § 1(5).
163. COLO. REV. STAT. § 1-40-105 (Supp. 1994). The directors are appointed by, and answerable to, joint committees of the General Assembly. Id. §§ 2-3-301 to -508
the average reader,” requires that “drafts shall be worded with simplicity and clarity and so that the effect of the measure will not be misleading or likely to cause confusion among voters,” and requires that “[t]he draft shall not present the issue to be decided in such manner that a vote for the measure would be a vote against the proposition or viewpoint that the voter believes that he or she is casting a vote for . . . .”

Thus far, perhaps because no complainants have made the argument, Colorado courts have not viewed this statutory language as a license to rule on the clarity of initiatives. The Court has saved its time and attention for review of the language of the ballot title and summary, both the work of the ballot title board, which we explore below.

3. Comments on the Colorado Procedures

Colorado solutions to the drafting problems are anemic and impractical. Legislation calls for clarity, coherency, and plain language, but the only enforcement mechanism is the consultation system, which is seriously flawed. Every petition must be submitted in draft form for official review and comment, but the process is both too broad and too shallow. It is too broad because every proposal must be reviewed, including the frivolous and whimsical. Lacking any filing fee, there is no deterrent to casual submissions. The process is too shallow because it must be done in two weeks, and in practice state officials do not comment on the merits of a draft. The directors of the legislative council and the office of legislative legal services, who review initiative drafts, are accountable to powerful legislators of both parties and take pains to be politically neutral on the merits of every proposal. As a consequence, they routinely do not point out the effects of the draft on existing law and practice, nor do they suggest alternative language to cure substantive defects. Time pressure and their caution confine their review to correcting grammar and simple internal inconsistencies. Drafters are not required to adopt any of the reviewer’s suggestions.

---

164. Id. § 1-40-105(1), (3).
165. The statute requires that reviewers suggest “editorial changes to promote compliance with the plain language provisions of this section.” Id. § 1-40-105(1). However, this cannot be done effectively under the existing requirements that every draft be reviewed in two weeks.
The consultation system has not affected several recent, poorly drafted initiatives, which are drafting nightmares. The consequence of inept drafting has been a flood of litigation as disagreements over the meaning of initiative language inevitably end up in court. The tax and spending limitation initiative passed in 1992 has generated a new, lucrative sub-specialty for lawyers in municipal law, at taxpayers' expense. City and county attorneys struggle to comply, often by hiring outside counsel to advise on and defend against lawsuits. Litigation over the meaning of the language has proven to be very costly and has held up projects clearly favored by voters (school bonds, for example), adding significantly to the projects' expense. It will take years of judicial precedent to work out some of the kinks in the more complicated of the recent initiatives.


167. See COLO. CONST. art. X, § 20, which has prompted over 60 lawsuits since passage in 1992. See also Court to Decide Tax Cases: Amendment 1 Violations Alleged, DENV. POST, June 28, 1994, at B3. Two cases on a technical procedural point (can a bond question and the tax to repay it be combined in a single question on the ballot) have already reached the Colorado Supreme Court. See Bickel v. City of Boulder, No. 94SA130, 1994 Colo. LEXIS 742 (Colo. Oct. 11, 1994) (consolidating the cases). See also Margot Duvall, Amendment One is Causing Schools to Suffer, ROCKY MTN. NEWS (Denver), Oct. 9, 1994, at 95A (outraged at proponents motion for rehearing adding more delay on local bonds).

168. See Mary George, Green Light for Bond Issue; Court: Amendment 1 Intent Fulfilled, DENV. POST, Sept. 13, 1994, at A1 (delay caused by litigation has cost taxpayers $70 million in increased interest alone; delay also increased construction costs and funds needed to buy land on which to build). See also Mary George & Janet Day, Court Rejects New Bid to Halt Sale of Bonds: Amendment 1 Ruling Clears Way for Construction of New Schools, DENV. POST, Oct. 13, 1994, at B1 (delay will cost Boulder Valley taxpayers $12 million in added interest). An irony of the delays in implementing voter-approved projects is that proponents sold Amendment One as a citizen empowerment scheme.

169. Courts expend much more political capital when they overturn initiated measures than when they overturn legislative acts. Bickel was a rare decision in which a court had to decide between two popular votes, spending political capital either way. Bickel v. City of Boulder, No. 94SA130, 1994 Colo. LEXIS 742 (Colo. Oct. 11, 1994). The court reviewed an attack on compliance by local governments with 1992 Amendment One, a constitutional initiative forbidding increases in taxing, borrowing, or spending without voter approval. Four such measures had been proposed by governments and approved by voters. The court rejected most of the attacks by applying the election-law rule of substantial compliance to technical aspects of Amendment One, and by interpreting an ambiguous provision in favor of the governments. Id. One of us (Oesterle) thinks the court erred in failing to read Amendment One strictly. The other (Collins) thinks the court
Examples of mischievousness in initiatives are also not hard to find. How could Colorado voters understand that the words “any subject or subjects whatsoever” in the definition section of an initiative (Amendment Twelve, defeated in the 1994 election) were intended by the initiative drafter to nullify the single-subject requirement in a referendum on the ballot in the same election (Referendum A, an amendment which passed)?

Citizens have standing to challenge successful initiatives on the grounds that voters were misled, but the burden of proof is very high and has never been carried. Colorado lacks any effective procedure to promote discussions and bargaining between proponents and officials over drafting, and between proponents and opponents. As noted above, an effective procedure must allow amendment or withdrawal late in the process, in case a compromise or clarification is decided on. In Colorado, the right of amendment ends early, and the right of withdrawal is unclear.

D. Scope of Initiatives

1. Introduction to the Problem of Multi-Issue Initiatives

Long and complex initiatives can be criticized on three grounds. First, constitutional stability is undermined by initiatives that alter state government too much because initia-

reached the correct result. On problems of interpreting initiatives, see Eule, supra note 2.

170. See supra note 145.
172. On amendment, see supra note 146. On withdrawal, see COLO. REV. STAT. § 1-40-105 (Supp. 1994). “Proponents” are persons who submit draft petitions and who file campaign reports. Id. §§ 1-40-104, -117. “Proponents” are required to designate two “representatives” who can cure signature shortages or federal law defects. Id. §§ 1-40-104, -117, -120. To be effective, signed petitions must be filed within six months after fixing title and summary, id. § 1-40-108, and at least three months before the general election date. COLO. CONST. art. V, § 1(2).

Suppose A, B, C, D and E submit a draft petition and thus become “proponents.” At the same time, they designate A and B as their “representatives.” Later, A and B reach a compromise with legislators for withdrawal of the initiative in favor of a legislative substitute. But C, D, and E disagree. Can there be a lawful withdrawal? Can A and B lawfully refuse to file petitions in their possession, or destroy them?
tives can entrench a measure beyond the reach of the legislature. Second, voter confusion—and irritation—increases with the length of an initiative.¹⁷³ The ballot title or summary becomes less representative of the full text, and the full text is read and understood by fewer citizens. When a initiative is long and complicated, joining several issues, it exacerbates the problem of informing voters. The tendency to compress the debates over initiative issues into thirty second television spots means that the debate over multi-issue initiatives will focus on one or two issues out of the five or six in the text of the initiative. Voters will simply not know about, much less understand in any depth, many of the sub-issues.¹⁷⁴

Third, long initiatives inevitably contain positions on multiple issues, which critics say should be divided for separate votes so that citizens can say yes to one and no to another. Bundling of issues is a recognized abuse within the representative process, and it is no less so in direct democracy. Even if one assumes all voters know about and understand each of the issues in a multi-issue initiative, they can be coerced by such initiatives into placing language in the constitution that would not have alone been supported by a majority.

To illustrate, assume an initiative with four separate issues. A voter may be strongly in favor of issue one but marginally against issues two, three and four. If she could vote separately on each, she would vote yes on one and no on issues two, three and four. But she does not have such a choice; it is all or nothing. Does she vote yes, absorbing the cost of supporting issues two, three and four? Or vote no, absorbing the cost of opposing an issue she deeply favors? Many voters in such a situation will vote yes. If a majority does so, the state

¹⁷³. See CALIFORNIA COMM’N, supra note 9, at 182-83.
¹⁷⁴. 1992 Amendment One added over 1700 words to the Colorado Constitution on taxation and spending limits. COLO. CONST. art. X, § 20. The Amendment requires voter approval of increases in tax and government spending and of new government indebtedness. The theme of the campaign to pass the Amendment was the empowerment of citizens. See, e.g., Douglas Bruce, Amendment 1 Face-Off Initiative Puts Control Back in Hands of People, ROCKY Mtn. News (Denver), Oct. 17, 1990, at 49. But hidden in the language were flat prohibitions on government choice, even if ratified by a citizen vote. Examples include prohibitions on new or increased transfer taxes on real property, on any new state property tax, on any new local government income tax, on a state progressive income tax, and on state general obligation bonds, and an incentive for the sale of public land. See Dale Oesterle, Bruce’s Hidden Agenda in Amendment 1, DENV. POST, Dec. 5, 1992, at B15.
constitution contains language favored by the majority, the text of issue one, and language disfavored by the majority, the text of issues two, three and four. In an extreme case, minority supporters of several issues could join to pass an initiative composed of parts which would all fail if offered to the electorate alone.

The combination of the two disadvantages of multi-issue initiatives gives petitioners a strategic opportunity. If petitioners want language that they know will not, alone, get a majority vote, they can put the language in a multi-issue initiative with several other issues that are hot, hoping one of the hot issues will carry their language along with it into the state constitution.175 They hope that those who would vote against

175. In passing Amendment One in 1992, the voters, as experience suggests, wanted a taxation limitation but not a revenue limitation. Voters supported the proposition that government should not increase taxes without a citizen vote. But the success of many referendums to exempt local jurisdictions (and the overwhelming success of specific revenue retention measures) demonstrate that voters do not in general favor a revenue limitation, which, among other things, requires governments to give back tax revenues when revenues increase not because of increased tax rates but because, for example, of increased economic activity, unless voters approve revenue retention. Eric Anderson, Measures Try to Undo Amendment 1: Cities Want to “De-Bruce” Tax and Spending Limits, DENV. POST, Nov. 2, 1994, at B1 (forty-six de-Brucing questions on the November 8, 1994 ballot; measures do not ask for tax increases, they allow government to keep money received); Aldo Svaldi, Bond Issues Fly, While Taxes Die, DENV. BUS. J., Nov. 11-17, 1994, at 1A, 38A (voters generally approved “de-Brucing” measures that allowed government to keep excess revenues from old taxes but generally did not approve requests for new or higher taxes; requests for new debt had a 62% approval rate with school districts faring the best). Several propositions on spending attempted to exempt selected local expenditures permanently from Amendment One, moves of questionable legality under the language of the Amendment. See Loveland Issue A and Issue B (both rejected by voters in Loveland, Colo., Nov. 8, 1994) (on file with Loveland, Colo. City Clerk). Many Colorado voters simply did not understand the details of the initiative beyond the basic tax limit. Sarah Ellis, Pollster Says Voters Still Back Amendment 1; But Many are in Dark About Law’s Details, DENV. POST, Apr. 30, 1993, at B3 (voters did not know that measure would prevent city from keeping sales-tax revenues from new outlet mall).

The mix of taxation and revenue limits in Amendment One is not just a nuisance. It has serious effects. The combination creates a “ratchet down” effect on both limits. Jeffrey A. Roberts, Tax-Limit Amendment Passes, DENV. POST, Nov. 4, 1992, at A1 (spending limits will ratchet down over time without voter approval); see also Mark J. Shaw, Amendment 1: Bruce’s Ratchet Creates Confusion, Uncertainty, DAILY J., Jan. 27, 1993, at 2.

A humorous example is provided by Colorado’s 1994 Amendment 13. In 1991, and again in 1993, voters in Manitou Springs rejected overwhelmingly an amendment to the city charter to allow gambling in their city. A frustrated potential casino owner put the issue on the state-wide ballot and, hoping to attract
the petitioners' pet language if informed and focused on the issue either will not know the language is in the initiative or will not focus on the effect of the language because the hot issue will dominate the short television spots. Those who do focus on and understand the petitioners' pet language and would vote against it if they could, may vote yes nevertheless on the hot issue. Indeed, a failure in one election to have the right mix of issues gives lessons for later elections. Eventually, on the second or third try, petitioners will get the mix of issues right and pass their total package.176

In sum, multi-issue initiatives give opportunities to proponents to put language in a state constitution, either by accident or by design, that does not have majority support of the voters.

Two methods are used to confine the scope of initiatives. The more common is to limit the scope to a single subject or single question. At least fifteen states, including Colorado, do this in one form or another.177 The same concept has long been in use in many jurisdictions to limit the scope of bills in legislatures.178 Whether for direct or representative democracy, this device is of limited utility because defining single subject is highly subjective.179

The single-subject limit on initiatives has greater effect when review of the issue is made before a measure is put to a vote. Once the electorate has passed a law, courts are very reluctant to throw it out for multiple subjects. A prominent example was California's Proposition 8 in 1982, called the Victim's Bill of Rights. The measure covered a broad range of

state-wide support, tied it to a provision that would allow the operation of slot machines in public airports. The measure failed. 1994 Amendment 13 (rejected by Colorado voters Nov. 8, 1994) (on file with Colorado Secretary of State).

176. The citizens of Colorado voted on initiatives imposing taxation limitations in nine successive bi-annual elections. The last three initiatives were written by the same author, Douglas Bruce, and revised in light of circumstances. See Roberts, supra note 175, at A1 (The seventh and eighth initiatives, written by Mr. Bruce, failed in 1988 and 1990). The ninth initiative, 1992's Amendment One, passed. Id.

177. See CALIFORNIA COMM'N, supra note 9, at 362 (at least 13 states; Colorado and Mississippi adopted the rule thereafter). On Colorado, see infra notes 184-94 and accompanying text. On Mississippi, see MISS. CONST. art. 15, § 273(2).


179. See In re Tax Limitation, 644 So.2d 486 (Fla. 1994).
matters, but the state supreme court solemnly pronounced it consistent with the single-subject rule. The other device to limit the scope of initiatives is a creature of judicial inventiveness. When the California Supreme Court reviewed a proposed 21,000 word initiative in 1948, it held that the state's initiative can be used to "amend" but not "revise" the state constitution, and the proposed initiative was a wrongful attempt at revision. The state's provisions for constitutional amendments used the word amend when describing the initiative. When authorizing a constitutional convention, the provision said amend or revise. The court decided that this scheme implied a limit on the scope of initiatives, and the proposal at issue exceeded the limit. Several other state courts have invalidated referendums or initiatives on the same rationale.

2. The Colorado Single-Subject Rule

Success in the 1992 Colorado election of a multiple issue tax and spending limitation initiative and the prospect of several multiple issue initiatives appearing on the ballot in the 1994 election led the General Assembly to propose a single-subject rule by referendum. The referendum passed, in spite of bitter opposition by the most active advocate and user of the initiative process in the state. So Colorado now has a sin-

---


182. McFadden, 196 P.2d at 799; see also Raven, 801 P.2d at 1085-90 (invalidating parts of one other initiative on same rationale).


184. COLO. CONST. art. V, § 1(5.5) (amended 1994). See infra note 313. See also COLO. CONST. art X, § 20(4). Ironically Mr. Bruce argues, in essence, that his successful 1992 initiative on tax reform contains a single-subject requirement. Mr. Bruce sued, and lost, arguing that the language requires two votes on a single bond issue, one vote for the bond issue and a second for the taxes that will support the repayment. For Mr. Bruce, then, a single-subject rule ought to apply to tax or spending requests by a government unit, but not to his personal initiative
single-subject rule for initiatives. Legislation accompanying the referendum states that the single-subject rule is aimed at "forbid[ding] the treatment of incongruous subjects in the same measure, . . . for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits" and "[t]o prevent surreptitious measures and apprise the people of the subject of each measure by the title . . . to prevent surprise and fraud."185

A single-subject rule has long been in force for bills,186 except general appropriation bills, and case law on the requirement will now apply to all constitutional amendments, whether by initiative or by referendum.187 An early Colorado Supreme Court case explained the purpose of the single-subject requirement for legislation, and the arguments apply with similar force to initiatives:

[I]t is important to bear in mind the evils sought to be corrected . . . . The practice of putting together in one bill

187. COLO. REV. STAT. § 1-40-106.5(3) (Supp. 1994) ("[I]n setting titles . . . the initiative title setting review board . . . should apply judicial decisions construing the constitutional single-subject requirement for bills and should follow the same rules employed by the general assembly in considering titles for bills."). The statute's instruction to apply both judicial decisions and legislative "rules" for single-subject review may create some conflict. According to the current director of the office of legislative legal services, "the rules we use in our office [for single-subject determinations] are stricter than the courts use." See Fred Brown, Keeping the Ballot Constitutional, DENVER POST, Dec. 28, 1994, at 7B (quoting Douglas Brown). This difference makes sense when one compares administrative review of a bill with judicial review of an enacted law; courts give enacted laws a strong presumption of constitutionality. E.g., In re House Bill No. 1353, 738 P.2d 371, 372 (Colo. 1987) (must show unconstitutionality "beyond a reasonable doubt"). Administrative review has an opposite incentive, to apply the single-subject standard strictly to avoid later trouble in court or legislative debate. However, the Colorado Supreme Court also review bills when referred by the General Assembly, and no presumption of constitutionality applies. E.g., Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1, 5 n.4 (Colo. 1993). Also, the Court has an established practice of deferring to the title board. See infra text accompanying note 222. Thus the statutory commands can be reconciled by applying the legislative practice in the context of single-subject review by the title board, including judicial review of the board. But when single-subject challenges are made in litigation filed after passage of a measure (and thus long after title-board approval), the judicial precedents with a presumption of constitutionality should apply.
subjects having no necessary or proper connection, for the purpose of enlisting in support of such bill the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits, was undoubtedly one of the evils sought to be eradicated. Another object is to prevent surprise and fraud from being practiced upon legislators, and to apprise the people of the subjects of legislation.\textsuperscript{188}

Courts applying the single-subject rule to legislation speak simultaneously in the language of caution and in the language of righteousness. They, on the one hand, presume a statute to be constitutional and should not be declared invalid "unless that conclusion is established beyond a reasonable doubt,"\textsuperscript{189} and, on the other hand, state that the rule "must have a reasonable and liberal" construction.\textsuperscript{190}

In the end, one can rely only on the specific holdings of individual cases to give meaning to the rule. An example of a bill that the court found to be invalid is House Bill No. 1353, a forty-four page, forty-six section bill. The bill, among other things, reduced state contributions to state employees' retirement funds, imposed charges on inmates for medical visits, imposed a surcharge on insurance carriers based on workers' compensation premiums, revised the statutory formula for Medicaid reimbursements to nursing homes, provided for the forfeiture of abandoned intangible property by banks, and eliminated state aid for instructional television.\textsuperscript{191} The Colorado Supreme Court held that the common characteristic of financial savings did not save the bill.\textsuperscript{192} On the other hand, the court recently upheld a health care bill that prohibited certain advertising practices and specified abuses of health insurance by health care providers.\textsuperscript{193} The court held that the advertis-

\textsuperscript{188} Catron v. Board of Comm'rs of Archuleta County, 33 P. 513, 514 (Colo. 1893).

\textsuperscript{189} In re House Bill No. 1353, 738 P.2d at 371.

\textsuperscript{190} Catron, 33 P. at 514 (the court also noted that the rule is "not designed to hinder or unnecessarily obstruct legislation").

\textsuperscript{191} In re House Bill No. 1353, 738 P.2d at 372-73.

\textsuperscript{192} Id. at 373.

\textsuperscript{193} Parrish v. Lamm, 758 P.2d 1356 (Colo. 1988). The statute was aimed at the practice of health care providers to waive their right to demand payment of the deductible and co-payment features of insurance policies, relying instead on the insurance coverage for full payment. Id. at 1359. The statute made the practice a crime and prohibited health care providers from advertising that they were willing to engage in the practice. Id. at 1360.
ing prohibited and the abuse interdicted were connected, "because the act of advertising is simply one means of alerting patients that a health care provider is willing" to engage in the abusive practice.¹⁹⁴

E. Informing Initiative Voters

1. Introduction to the Problem of Voter Education on Initiatives

Voter confusion in initiative campaigns can arise from overly long initiatives, or from confusing and ambiguous drafting, the subjects of the previous sections. It can also arise from several other sources. An initiative's subject can be technical, not apparent to citizens without special knowledge. There can be so many initiatives and candidates that voters' capacity to understand them is overwhelmed. And, as in all political campaigns, there can be misleading claims made for or against a measure, particularly in advertisements. Several measures to address these problems are in common use.

Many initiative states require a public official to draft ballot titles or captions for proposed initiatives.¹⁹⁵ Many states also require drafting of an official summary of each measure.¹⁹⁶ Some require an official assessment of the fiscal effect of a proposal.¹⁹⁷ And a number of states publish and mail to each voter an official pamphlet explaining each ballot measure and outlining arguments for and against it.¹⁹⁸

The most important of these provisions is probably the requirement of an official ballot title. When initiators can impose their own title, the path is open to advertisers' gimmicks to sell the initiative. As it is, initiators often advertise their work under a label or title, such as "Save Our State," the name

¹⁹⁴. Id. at 1362. More recently, the court held that a single referendum can encompass both authority for bonded indebtedness and for taxes to repay it. Bickel v. City of Boulder, No. 94SA130, 1994 Colo. LEXIS 742 (Colo. Oct. 11, 1994). See discussion supra notes 167, 169.
¹⁹⁵. CALIFORNIA COMM’N, supra note 9, at 229, 231 (official caption in nine states; official approval of proponents’ caption in five; proponent writes caption in two; no caption in eight).
¹⁹⁶. Id. (official summary in nine states; official approval of proponents’ summary in four; proponent writes summary in four; no summary in five).
¹⁹⁷. See id. at 235 (five states require fiscal impact analysis to be printed in ballot information pamphlets); see also infra note 214.
¹⁹⁸. See id. at 235-38.
adopted by initiators of California's Proposition 187, intended to forbid state services to aliens who are present in the state in violation of immigration laws. These are often misleading. Florida initiators write their own titles and summaries, the source of some controversy there. Summaries and pamphlets are also important for voters who take the time to read them, and surveys show that some do.

As initiative ballots grow ever longer, the contrast between American ballots and those in parliamentary nations becomes sharper. In every state, we vote separately for a long list of officials, and in initiative states, many ballot measures are added on. In parliamentary systems, a voter simply chooses a party, which will represent her in all aspects of government. For a literate and informed voter, the American system has obvious advantages. For others, the question is which system represents them better. The populists who led the original push for the initiative in America were sure it would improve the lot of have-nots. History has raised substantial doubts.

2. The Influence of Money

Concern that money unduly corrupts the initiative process is widespread. The subject has also been thoroughly studied. For this reason, it is not a point of emphasis in this paper. Our comments are limited to noting some regulations

199. Proposition 187 (adopted by California voters Nov. 8, 1994) to be codified at CAL. PENAL CODE §§ 113, 114, 834(b); CAL. WELF. & INST. CODE §§ 10001.5, 130; CAL. HEALTH & SAFETY CODE § 130; CAL. EDUC. CODE §§ 48215, 66010.8; CAL. GOVT CODE § 53069.5.
201. CALIFORNIA COMM'N, supra note 9, at 244-48 (pamphlets important for educated voters).
202. See, e.g., id. at 182 (November 1990 ballot in Los Angeles had 36 ballot measures).
204. See supra text accompanying notes 35-39.
that states have attempted to impose in order to limit distor-
tions thought to arise from spending on initiative cam-
aigns.\textsuperscript{206}

Some states have attempted to limit the influence of money
on the initiative process by limiting contributions to initiative
campaigns and by forbidding paid petition circulators.\textsuperscript{207}
Several of these provisions have been struck down by courts
under the First Amendment.\textsuperscript{208} Others have proved ineffect-
ive. As a result, researchers who have studied the effect of
money on the initiative process conclude that it is at least as
great as on the representative process.\textsuperscript{209} The only form
of regulation generally sustained by the courts is requirements
to disclose contributors and contributions to initiative cam-
aigns.\textsuperscript{210}

3. The Colorado Notice Procedure: The Ballot Title,
the Ballot Information Booklet and Newspaper
 Notices

Colorado relies on three types of public notice to get
information out to the electorate on initiative questions: the
ballot information booklet, the ballot title, and newspaper
notices. Of the three, the ballot title process is the most
important.

\textit{a. The Ballot Title Board Procedure}

After their public meeting with the legislative council and
legislative legal services, proponents submit a final draft of

\textsuperscript{206} More dramatic proposals have been made. For an argument that the
"fairness doctrine" ought to apply to initiatives, see Robyn R. Polashuk, Protecting
the Public Debate: The Validity of the Fairness Doctrine in Ballot Initiative
Elections, 41 UCLA L. Rev. 391 (1993) (the doctrine, among other things, would
require media to give free air time to the unfunded side of a ballot initiative
campaign).

\textsuperscript{207} See \textit{CALIFORNIA COMM’N}, supra note 9, at 296-301; \textit{see also infra} note
311 and accompanying text.

\textsuperscript{208} \textit{E.g.}, Meyer v. Grant, 486 U.S. 414 (1988); Federal Election Comm’n v.
Massachusetts Citizens For Life, 479 U.S. 238 (1986); Citizens Against Rent
Control v. City of Berkeley, 454 U.S. 290 (1981); Buckley v. Valeo, 424 U.S. 1
(1976); American Constitutional Law Found. v. Meyer, No. 93-M-1467, 1994 U.S.
Dist. LEXIS 17134 (D. Colo. Nov. 23, 1994), \textit{appeal docketed}, No. 94-1576 (10th
Cir. Dec. 16, 1994).

\textsuperscript{209} See \textit{CALIFORNIA COMM’N}, \textit{supra} note 9, at 265-91.

\textsuperscript{210} \textit{Id.} at 291. \textit{But see} Austin v. Michigan Chamber of Commerce, 494 U.S.
652 (1990) (sustaining limit on spending by for-profit corporations).
their initiative to the Secretary of State. The Secretary of State convenes a “title board” consisting of herself, the Attorney General and the director of the office of legislative services, which meets in public, when there is business, on the first and third Wednesdays of each month from the first Wednesday in December after an election until the third Wednesday in May in an election year. Proponents must submit their draft twelve days before one of the Wednesday meetings. Within two weeks, the title board, by majority vote, must draft a title for the initiative (“which shall correctly and fairly express the true intent and meaning thereof” and which “shall unambiguously state the principle of the provision sought to be added, amended, or repealed”), a submission clause, and a “clear, concise summary” which “shall be true and impartial and shall not be an argument, nor likely to create prejudice, either for or against the measure.” The title board also has responsibility to apply the new single-subject and clear expression requirements to ballot titles. If a measure contains more than one subject, no title can be set.

The importance of the title cannot be overstated. The title and submission clause, together known as the “ballot title,” appear on the ballot and on each page of the petition. Neither

211. COLO. REV. STAT. § 1-40-105 (Supp. 1994). A version of the ballot title procedure has been in place since 1919. Act of Mar. 31, 1919, ch. 131, § 1, 1919 Colo. Sess. Laws 431. Originally the ballot title board consisted of the Secretary of State, the Attorney General and the Reporter of the Supreme Court. Id. From 1913 to 1919, proponents wrote ballot titles. See infra note 296.


213. Id.

214. The board must request a “fiscal impact” statement from the office of state planning and budgeting or the department of local affairs “if, in the opinion of the title board, the proposed law or constitutional amendment will have a fiscal impact on the state or any of its political subdivisions.” Id. § 1-40-106(3)(a). The target agency “shall furnish any assistance so requested,” and the information must be filed on the Friday before the Wednesday title board meeting at which the initiative is considered. Id.

215. Id. § 1-40-106(3)(b).

216. Id. § 1-40-106(3)(a). If the measure proposes to increase taxes or government borrowing or spending, its title is regulated by a provision in the Colorado Constitution added by citizens’ initiative in 1992. COLO. CONST. art. X, § 20(3)(c).

217. COLO. CONST. art. V, § 1(5.5) (amended 1994); COLO. REV. STAT. § 1-40-106.5(3) (Supp. 1994).

218. COLO. CONST. art. V § 1(5.5) (amended 1994). In that event, proponents may revise the measure, id., or sue. See infra note 223 and accompanying text.
the summary nor the language of the initiative itself is on the ballot; they are on each petition and appear in the newspaper notices and ballot information booklets before the election. Since the ballot title is so important, the statute provides for an elaborate appeals procedure. Interested parties may file for a rehearing before the title board within seven days after the titles and summary are set. If protesters lose on rehearing, they may, within five days, seek review in the Colorado Supreme Court, which "shall" place the matter at the "head of the calendar" and dispose of it summarily. Many ballot title controversies end up in the Supreme Court of Colorado, most brought by aggrieved initiative proponents, and a select few brought by petition opponents, with the court upholding the title board in all but a few cases. The same procedures

219. Measures referred by the General Assembly are listed by letter; measures initiated by the people are listed numerically. COLO. REV. STAT. § 1-40-115(2) (Supp. 1994). "A 'yes' vote on any measure is a vote in favor of changing constitutional or statutory law . . . ." Id. Only the ballot title appears on the ballot. Id. § 1-40-115(1).

Colorado Constitution article V, section 1(5.5) refers to the ballot title and to "officials responsible for the fixing" of it. But there is no explicit provision to put only the title on the ballot, excluding the text. Article V, section 1 directs the Secretary of State to "submit all measures initiated by or referred to the people for adoption or rejection at the polls," COLO. CONST. art. V, § 1 (emphasis added), and article XIX, section 2 directs that "amendments shall be submitted to the registered electors." COLO. CONST. art. XIX, § 2 (emphasis added). One could argue that these provisions require that the full text of an initiative appear in ballots because a title is not a "measure" or an "amendment." Practice is clearly to the contrary, however.

221. Id. § 1-40-107(2).
222. For the state-wide 1994 election alone, the Colorado Supreme Court issued 13 opinions on ballot titles. In re Proposed Initiated Constitutional Amendment Concerning "Fair Fishing," 877 P.2d 1355 (Colo. 1994); In re Proposed Initiated Constitutional Amendment Concerning the "Fair Treatment II," 877 P.2d 329 (Colo. 1994); In re Proposed Initiative on "Obscenity," 877 P.2d 848 (Colo. 1994); In re Proposed Initiative on Water Rights, 877 P.2d 321 (Colo. 1994); In re Petition on Campaign and Political Finance, 877 P.2d 311 (Colo. 1994); In re Proposed Initiative Concerning “Automobile Insurance Coverage,” 877 P.2d 853 (Colo. 1994); In re Proposed Initiative for an Amendment to Article XVI, Section 6, Colorado Constitution, Entitled "W.A.T.E.R.,” 875 P.2d 861 (Colo. 1994); In re Proposed Initiative Designated “Governmental Business,” 875 P.2d 871 (Colo. 1994); In re Petition On School Finance, 875 P.2d 207 (Colo. 1994); In re Proposed Initiative on School Pilot Program, 874 P.2d 1066 (Colo. 1994); In re Proposed Initiated Constitutional Amendment Concerning the Fair Treatment of Injured Workers Amendment, 873 P.2d 718 (Colo. 1994); In re Proposed Tobacco Tax Amendment 1994, 872 P.2d 698 (Colo. 1994); In re Proposed Election Reform Amendment, 852 P.2d 28 (Colo. 1993). Only eight initiatives made the ballot.
should apply when the title board refuses to set a title for a measure that contains more than one subject.  

In reviewing ballot titles, the court typically notes that it "will not address the merits of the proposed initiative; instead, we give great deference to the Board's action in exercising its drafting authority." Courts will set aside the language only when it is "clearly misleading." The language "need only fairly reflect the content of the measure." The court is otherwise careful not to "interpret the meaning of proposed language or suggest how it will be applied if adopted by the electorate." ['The Board is not required to include every aspect of a proposed measure in the title and submission clause . . ."'] The court refuses to consider the constitutionality of the initiative in the ballot title review process or otherwise consider challenges on the merits of the initiative proposal.

The court's deference to the ballot title board's determinations is consistent with the court's interpretation of the "clear expression" requirement for titles of legislative bills. In Colorado, any given bill is limited to a single subject "which shall be clearly expressed in its title" and "if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." The title of legislative bills is more often the subject of litigation than the single-subject content require-

\[\text{In all but two of the cases, the title board's action was affirmed. } \text{In re Proposed Initiative Designated "Governmental Business," 875 P.2d 871 (Colo. 1994); In re Proposed Election Reform Amendment, 852 P.2d 28 (Colo. 1993) (ballot title inaccurate).}\]

223. The single-subject provisions say nothing about rehearing or judicial review. COLO. CONST. art. V, § 1(5.5) (amended 1994); COLO. REV. STAT. § 1-40-106.5 (Supp. 1994). The statute governing rehearing and review says nothing about review of refusal to set a title or single subject, but it seems broad enough to apply. Id. § 1-40-107. If it applies, opponents as well as proponents should be able to seek review when the title board finds that a measure contains more than one subject.

224. In re Petition on School Finance, 875 P.2d at 210.
225. Id.
226. In re Petition on Campaign and Political Finance, 877 P.2d at 313.
227. In re Proposed Election Reform Amendment, 852 P.2d at 31-32.
228. In re Petition on Campaign and Political Finance, 877 P.2d at 313.
229. In re Proposed Election Reform Amendment, 852 P.2d at 33 n.2.
230. In re Petition on Campaign and Political Finance, 877 P.2d at 313.
The purpose of the title requirement is identified in an early case:

Another object is . . . to apprise the people of the subjects of legislation by the titles of the bills, so that they might have an opportunity to be heard . . . . But few are able or care to take the time necessary to keep informed of all the legislation proposed at a single session, where it is necessary to examine in detail every bill in order to obtain this information. When, however, each proposed act is confined to a single subject, and that subject is clearly expressed in the title, those interested are put upon inquiry when legislation is proposed affecting such subject, without its being necessary for them to examine every bill for the purpose of seeing that nothing objectionable is coiled up within the folds of the measure.233

In applying the language, however, the court has lost sight of the public notice aspect of the requirement and focused instead on preventing “surprise and deception to the members of the General Assembly” itself.234 As a consequence, and in its desire to defer to the General Assembly, the court has discouraged particularity and detoothed the standard by holding that “[a]n appropriate general title which is broad enough to include all the subordinate matters is considered safer and wiser than an enumeration of several subordinate matters in the title.”235

The “clear expression” requirement now applies to the titles of initiatives.236 Perhaps this will lead courts to strengthen the standard.237 In any event, there is ample room for better judicial protection of the public interest in both the clear expression rule and the ballot title process.

For an understanding of how an officious citizen can use the process, consider the recent cases on ballot titles that were brought by Mr. Douglas Bruce against both the title board and

232. See In re House Bill No. 1353, 738 P.2d 371, 374 n.4 (Colo. 1987) (“The great majority [of cases under Article V, § 21 of the Colorado Constitution] have focused principally on the sufficiency of the title to describe the contents of the bill.”).


236. See supra note 217 and accompanying text.

237. The General Assembly declares that it intends the new standard to “prevent surprise and fraud from being practiced upon voters.” COLO. REV. STAT. § 1-40-106.5(1)(e)(II) (Supp. 1994) (emphasis added).
the proponents of two separate initiatives. Mr. Bruce, the successful sponsor of a 1992 constitutional initiative and proponent of a 1994 initiative, contested the ballot title of a measure on school finance. The measure threatened to put on the ballot language that, if passed, would modify his 1992 tax amendment. Mr. Bruce also contested the ballot title of an initiative on campaign and political finance that threatened to compete with his 1994 initiative proposal. By challenging the ballot title on school finance, Mr. Bruce was able to reduce significantly the time its proponents had to gather petition signatures, with the result that they were not able to gather enough valid signatures to get their measure on the ballot.

In a third hearing, Mr. Bruce supported the ballot title of his own initiative. The juxtaposition of Mr. Bruce’s arguments on the ballot title of his own initiative and his arguments on the ballot titles of other initiatives demonstrate how a sophisticated student of the initiative process can abuse the system. In attacking the school finance initiative, Mr. Bruce argued that the ballot title, already over two hundred words, needed more detail and that the summary should have included more detail on fiscal impact. Included in his complaint was a request that the title board indicate in the ballot title that the initiative was “internally conflicting.” In his attack on the campaign and political finance initiative Mr. Bruce also argued for more detail in the ballot title and in the fiscal impact statement. In defense of his own initiative, however, Mr. Bruce argued that the ballot title was too long. Moreover, under his 1994 proposed initiative, future ballot titles would have been limited to seventy-five words, and

238. In re Petition on School Finance, 875 P.2d 207 (Colo. 1994); In re Petition on Campaign and Political Finance, 877 P.2d 311 (Colo. 1994).
240. In re Petition on School Finance, 875 P.2d at 210.
241. Id. at 211.
242. Id. at 212.
244. In re Proposed Election Reform Amendment, 852 P.2d 28, 33 (Colo. 1993); see also Jeffrey A. Roberts, Bruce Raps Title Assigned Election Reform Bid, DENV. POST, Feb. 4, 1993, at B5.
any requirement of a fiscal statement would have been eliminated.\textsuperscript{245}

Mr. Bruce's activism in contesting ballot titles for the 1994 election must be compared with his success in the ballot title procedure in 1992. His initiative in 1992, Amendment One on taxation and revenue limits, passed with what is now regarded as an incomplete ballot title. The title left out many of the details in the proposal,\textsuperscript{246} and may have even contradicted parts of the text.\textsuperscript{247}

\textbf{b. The Ballot Information Booklet and Newspaper Notice}

In the 1994 election Colorado voters passed a referendum that amended the Colorado Constitution to provide for a ballot information booklet.\textsuperscript{248} The booklet will be mailed to all registered voters before any election in which an initiated or referred measure is on the ballot, at no charge to the proponents. The booklet will contain the text and ballot title of each measure and a "fair and impartial analysis" of each measure.\textsuperscript{249} The analysis, to be prepared by a "nonpartisan research staff of the general assembly," will include a summary of the measure and a synopsis of the major arguments for and against the measure and "may include any other information that would assist understanding the purpose and effect of the measure."\textsuperscript{250} Any individual may file comments for consideration by the drafting

\textsuperscript{245} 1994 Amendment 12, ¶ 6(a) (rejected by Colorado voters Nov. 8, 1994) (on file with Colorado Secretary of State). To add further irony, Mr. Bruce's successful amendment initiative on taxing and spending powers of the government requires the government, when submitting revenue and expenditure requests to the populace, to include something akin to a fiscal impact analysis. \textit{COLO. CONST.} art. X, § 20(3)(b)(ii)-(iv) (1992 Amendment One).

\textsuperscript{246} See supra note 174.


\textsuperscript{248} \textit{COLO. CONST.} art. V, § 1(7.5) (amended 1994).

\textsuperscript{249} \textit{Id.} The booklet also includes the special notice required for all measures that propose to increase taxes or government borrowing or spending by article X, section 20(3)(b). \textit{Id.} § 1(7.5)(c).

\textsuperscript{250} \textit{Id.} § 1(7.5)(a). The director of research of the legislative council prepares the booklet, which is reviewed by the legislative council itself. \textit{COLO. REV. STAT.} § 2-3-303(1)(g) (Supp. 1994). The council consists of eighteen legislators including the leadership. \textit{Id.} § 2-3-301.
staff. Interestingly, as yet, there is no procedure in place for protesting the contents of the booklet in a judicial forum, in stark contrast to the technical review procedure in the ballot title process. 251

When initiatives relate to issues that are uniquely in the realm of expertise of public officials, initiatives that alter the processes of government, for example, the public would seemingly be interested in the views of some of those officials on the suggested change. Our distrust of elected officials prevails, however. Colorado has enacted strict limits on the role of public officials in the initiative process, regardless of the issue. The ballot information booklet and other official summaries are the only fora for comment on initiatives by the state or any political subdivisions. 252 No government unit can make contributions, in cash or in kind, to either side in an initiative campaign nor can they expend funds to urge electors to vote in favor or against a given initiative, 253 although a unit can pass a resolution taking a position on the issue. 254 An official may answer unsolicited questions but may spend no more than fifty dollars of public money on letters and phone calls incidental to expressing her opinion. 255 Public officials can, however, use private time and money to express their personal opinions. 256 But they do so at the risk that interested parties will charge that private time was really public time. 257

The 1994 referendum also amended the constitutional provisions on newspaper notice. 258 Under a decades-old provision, proposed constitutional amendments had to be published in two issues of two newspapers of “opposite political faith” in each county in the state. 259 The new requirement reduces the number of newspaper notices in favor of the ballot

---

251. This assumes that the summary prepared by the ballot title board is not the same as the summary prepared under this provision.
253. Can a state university hold a public debate on an initiative, using university facilities and university personnel?
255. Id. § 1-45-116(1)(a).
256. Id. § 1-45-116(1)(b)(II).
257. Can a city attorney (or a law professor) leave work and debate a proponent, during a weekday, at the invitation of a city bar association?
258. COLO. CONST. art. V, § 1(7.3) (amended 1994).
259. Id. art. XXIII, § 1, amended by COLO. CONST. art. V, § 1(7.3).
information booklet. As a result, several newspapers editorialized against the referendum, often without disclosing their pecuniary interests, causing the vote to be close.\textsuperscript{260} The new language requires publication of the text and title of each initiated and referred measure only once in one newspaper in each county at least fifteen days before the election.\textsuperscript{261} Another early law, now rescinded, had added a publication requirement paid for by the proponents,\textsuperscript{262} which had the effect of substantially decreasing the use of initiatives.\textsuperscript{263}

4. Comments on the Colorado Notice Procedures

Voters in Colorado have traditionally had two means of informing themselves on the text of initiatives, short of requesting the text from proponents or traveling to a public library, and as noted above, voters have just added a third. First, when voters are approached by petitioners, the petitions contain ballot titles, summaries, and the full text of the initiatives. Second, a summary and the full text of each initiative is published once in every major newspaper. Third, each voter will, in the future, receive a ballot information booklet on statewide initiatives. It is easy to minimize the effect of each of the three sources of information.

Petitions are signed by a small fraction of the electorate. Even those who sign do not read the summary or text of the initiative in question. Petitioners report that they can gather several thousand signatures and have not one signer read the petition language when she signs. Instead signers choose to sign or not to sign based entirely on an abbreviated oral representation made by the solicitor. A solicitor for the failed

\textsuperscript{260} The main newspaper in the city of Boulder, the Daily Camera, opposed the referendum and it lost in Boulder County. "No" on Referendums A, B, and C, DAILY CAMERA (Boulder, Colo.), Oct. 12, 1994, at C2.

\textsuperscript{261} COLO. CONST. art. V, § 1(7.3) (amended 1994).

\textsuperscript{262} For over 30 years, legislation provided for another round of newspaper publications. A 1941 statute provided that after the ballot title had been fixed, the Secretary of State was required to publish, once a week for two successive weeks in each county in a newspaper of general circulation, a copy of the title and text at the expense of the proponents. Act of Mar. 31, 1941, ch. 147, § 1, 1941 Colo. Sess. Laws 480, 481. The Colorado Supreme Court held the statute unconstitutional in 1972. See Colorado Project Common Cause v. Anderson, 495 P.2d 218 (Colo. 1972).

1994 Amendment Twelve, for example, might have said exclusively: "Will you sign a petition for limiting politicians' pay raises?"

Newspaper publication is effective only for those who read newspapers and even then only for those who look beyond the sports page and the comics. Those who read or skim the news usually skip the omnipresent Legal Notice materials, which list sheriff sales and the like. Even vigilant newspaper readers can easily miss the one or two days that initiatives appear. Moreover, if our vigilant reader does find the text of initiatives on the one or two days they are published, she will face the daunting task of reading small typeface and turgid text, threatening a significant increase in newspaper reading time. More often than not, most in this small band of readers (and even smaller subgroup of voters) will put the section aside for later reading only to find, thankfully perhaps, that a spouse has thrown the papers out in the trash.

The ballot information booklet offers the most promise for voter education, if people separate it from their junk mail and take the time to read it. The booklet is expensive and will generate litigation, once rules for appeal are established, as proponents and opponents with much at stake fight over (and appeal until exhaustion) whether the content of booklets is "fair and impartial." Our courts will be very busy around election time.

Like it or not, most voters in Colorado will take their cue, first, from thirty second television spots on any initiative and, second, from the ballot title language, which they will confront when they get to mark their ballots.

The importance of television spots, and to a lesser extent radio spots, cannot be overstated.\textsuperscript{264} Television spots must necessarily be very conclusory on the effect of an initiative, there is little or no time to explain detail, and spots often stretch and bend the truth; advocacy pushes out accuracy. If one side has more money, as did the opponents of 1994 Amendment One on the tobacco tax (proponents had no money for television spots at all), it can be a lopsided match in-

\textsuperscript{264} Newspaper advertisements on initiatives, which allow for more detail in the argument, are uncommon, perhaps for many of the reasons noted in the text on the ineffectiveness of required newspaper publication of the text of initiatives.
Money counts in this battle of ads, and, more likely than not, will determine the winner. A fast-forming lucrative business is coalescing around those who service initiative activists. The trustworthiness of those who pay for and compose the television spots is an issue. It is fair game for opponents to question each other’s sources of funding because it bears on their credibility. Tobacco companies’ ads against the tobacco tax are self-serving and ought to be discounted. Yet, in spite of legislation regulating contributions, it is often difficult to track down the real source of many contributions.

The ballot title, a stale, abstracted rendition of the issues in an initiative, often with little or no indication of the effect of initiative language on the matters listed, is the only language on the ballot. For example, a ballot title of “campaign spending reform” does not specify what the reforms are, and the title would be the same if the reform is that no corporations can contribute to campaigns or is a dollar limit on all contributions from whatever source. Many voters confront initiatives for the first and only time in this sterile form. As a consequence, disputes over ballot titles are frequent, with the Colorado

265. The proponents of 1994 Amendment One spent $209,850 and the opponents spent $6.6 million. See Jerd Smith, Initiative Tabs Top $10 M, DENV. BUS. J., Nov. 4-10, 1994, at 1A, 47A. 1994 Amendment One was defeated with 62% of the voters opposing it. Aldo Svaldi, Bond Issues Fly, While Taxes Die, DENV. BUS. J., Nov. 11-17, 1994, at 1A, 37A.

266. In the 1994 election, campaigns backing initiatives were outspent by forces opposing them by almost six to one. Smith, supra note 265. Of nine initiatives only one passed, Amendment 17 on term limits, and there was little or no money spent on either side of the campaign. Id. Seven of the other eight initiatives passed or failed in correlation with whether the proponents or opponents spent more. Id. The only exception, Amendment 13 on gaming in Manitou Springs, had proponents spending $183,664 and opponents spending $97,468. Id.

267. The business consists of those who provide advertising, political consultants, lawyers, and campaign managers. In the 1994 Colorado election, political consultants billed the proponents of Amendment 400 (the arts tax initiative) almost $100,000 for two months work. Id. Overheads on campaigns, for managers and others, is estimated by professionals at 10 to 15% of the total contributions for the big ticket measures. Id.

268. In Colorado, political committees supporting or opposing initiatives must file a list of their contributors and individuals spending funds outside the political committees must file separately. COLO. REV. STAT. §§ 1-45-104, -108, -110 (Supp. 1994). But the use of layers of front committees or the use of individuals whose occupations are not specified can make it difficult to track down funding sources. But see id. § 1-45-106 (1980 & Supp. 1994) (political committees must list all supporting and affiliated organizations).
Supreme Court often called on to decide whether the title board has accurately listed the issues.\textsuperscript{269}

V. Recommendations

A. Our Primary Conclusion: Procedures Not Only Determine the Mix of Representative and Direct Democracy, They Also Determine Whether the Initiative Process Works to Effect Direct Democracy

The populists who gave us initiatives at the turn of the century had lofty aims: they believed that the initiative process would best empower citizens, promote good government, perfect majority rule, and control disobedient and dishonest government officials. Inherent in their optimism were beliefs that representative democracy must be supplemented with a heavy dose of direct democracy and that the initiative process was an effective mechanism to achieve direct democracy. Traditional arguments about the value of the initiative process dwell on the content of successful controversial proposals.\textsuperscript{270} These debates miss the important, indeed crucial, role played by procedural choices. Not all initiative processes are alike, and the differences affect both of the populist assumptions. We discuss the effect of procedure on both assumptions below.

First, the procedural details of the initiative process control the mix of representative and direct democracy. Those who favor a maximum role for direct democracy argue for no limits on the content of initiatives, low qualifying thresholds for accessing the ballot, a simple majority of votes cast for enactment,\textsuperscript{271} protection from repeal or revision by elected officials,\textsuperscript{272} government subsidies for petitions and publication,\textsuperscript{273} and limits on campaign involvement and even com-
Those who believe in a more limited role for direct democracy argue primarily for limited ballot access, higher voting thresholds, the indirect form of the initiative, and ease of amendment or repeal. The impact of the initiative process on a representative system is controlled by these procedural choices.

The authors' positions on the best mix of representative and direct democracy are the following. Our primary form of government is representative. We delegate power to our elected officials under general guidelines, such as campaign platforms, and ask them to attend to the details of government. Taking our cue from shareholder voting power in publicly-held corporations, we believe that initiatives ought to be structured as validation process, or subsidies for hiring petition circulators.

274. 1994 Amendment 12, which failed with only 23% of the vote in favor, contained a form of these provisions. Jerd Smith, Deep Pockets Fuel Election Victories, DENV. BUS. J., Nov. 11-17, 1994, at 1A; 1994 Amendment 12 (rejected by Colo. voters Nov. 8, 1994) (on file with Colorado Secretary of State).

275. Examples include higher signature requirements for petitions, prohibition of mail-in signatures, rigorous circulator qualifications, and proponent payment of the government costs of reviewing and publishing an initiative.

276. An example is to require a supermajority vote for constitutional amendments. See Lynn A. Baker, Constitutional Change and Direct Democracy, 66 U. COLO. L. REV. 143 (1995). Other examples include a minimum vote requirement, so that a majority vote at a low turnout election cannot effect a major change.

277. Advocates seek to treat most initiatives as normal laws, with veto power in the governor and power in the legislature to repeal or amend.


Under the current version of the Rule, shareholders may put proposals in the firm's proxy if they own at least one percent or one thousand dollars in market value of the securities entitled to vote at the meeting. See 17 C.F.R. § 240.14a-8(a)(1). The proposal may be omitted if, among other things, it "deals with a matter relating to the conduct of the ordinary business operations" of the firm or is not "significantly related" to the firm's business. Id. § 240.14a-8(c)(7). A Rule 14a-8 proposal may not be resubmitted unless it receives specified levels of support. See id. § 240.14-8(c)(12).

The analogy between popular elections and corporate elections is, of course, imperfect. Disgruntled shareholders can easily sell their shares, while disgruntled citizens cannot as easily leave their domicile. The difference is reflected perhaps
a check on this delegation, a safety valve, but not a substitute or even an equal partner. When discontent with elected officials reaches high levels of intensity on selected issues, the initiative process provides a pressure release. The threat of an initiative, even when unused, has some effect on aligning the interests of elected officials and their electorate. Those who believe that policy-setting through the initiative process ought to dominate or be an equal partner with policy-setting through representative government run afoul of the process's basic and unavoidable paradox: The more the populace uses the initiative process, the less effectively it works. Our safety valve view is reflected in some of our recommendations below.

Second, most of our recommendations are directed at the populists' second assumption: that initiatives are synonymous with direct democracy. Regardless of one's view on the proper mix of representative and direct democracy, the initiative process as a vehicle for direct democracy is problematic. An initiative process with an inadequate procedural base does not serve as a voice for the populace, it serves only the purposes of those discrete individuals and groups who can best capture the process. The major abuses that must be addressed through procedural solutions are drafting deficiencies, petition fraud, and misleading public communications in campaigns. Whatever one's view on the positive potential of initiatives, an initiative process that invites abuse may be inferior to no initiative right at all. At issue is how to structure the initiative process to minimize abuse and maximize its value, that is, its accuracy in reflecting the honest view of a majority of the populace.

We offer our suggestions in three parts. First, we provide recommendations about how the initiative should be structured when there is complete freedom of choice, that is, when one is drafting from scratch constitutional and legislative provisions on the process. These proposals are relevant for those designing a proposal for a national initiative as well as those suggesting amendments to state constitutions. In our second and third...
parts, we offer suggestions specific to the current situation in Colorado, aimed at the state legislature under the assumption that the constitution stays as is, and at the courts under the assumption that both the constitution and state implementing legislation stay as they are.

B. **Writing on a Clean Slate**

1. Use the Indirect Initiative Process

By involving the legislature, yet allowing a vote of the people, the indirect initiative tends to get some of the best of both systems. It offers better chances to overcome the drafting problems of the direct initiative. The legislature can, or must if a state’s constitution requires, give the initiative consideration in hearings and deliberations. This process can point out unintended consequences to initiators, and can at least make them aware of the points of most intense disagreement. In some instances, the problem of oppressing unpopular minorities can be reduced. Under some systems, the legislature can propose alternatives that avoid problems with the citizens’ draft.

Opponents of the indirect initiative often complain that it is simply a delaying device, and that American legislatures in indirect initiative states seldom do anything during the period set for legislative review. However, we think the process in many American states is too hasty anyway, so some delay is wise even if the indirect form is not used. And legislative lethargy can be reduced by requiring a minimum degree of legislative consideration, and by empowering legislatures to offer alternatives, if that power is lacking.

2. Preserve the Integrity of the American Constitution: Require Minimum Votes and Word Limits for Constitutional Amendments

As we have pointed out above, frequent and easy resort to the initiative device to amend state constitutions has filled some of these constitutions with measures that are, by the traditions of American constitutionalism, matters for ordinary legislation. It also allows sweeping changes to be embedded in the constitution by the modest plurality that typically adopts initiated amendments, sometimes at serious cost to constitutional stability.
These effects are also true in Switzerland, where the device works well, so they are not necessarily bad. But they seriously revise the nature of a state's constitution away from the American tradition and in favor of the Swiss. The Swiss constitution is very different from ours in other ways as well. Judicial review is much more limited, and there is a much weaker sense of separation of powers. These effects will result from heavy use of the initiative here. When the state's constitution is amended, judicial review under the state's constitution is eliminated, and traditional executive and legislative functions are constricted. Even initiated statutes avoid the executive veto.

We think the American system is worth preserving. Accordingly, in this section we recommend ways to reduce resorting to the initiative to amend constitutions and to encourage its use to enact statutes instead. To do this, the statutory route must be made much more attractive, and the amending process less so. There is traditionally a higher number of signatures needed for initiatives that amend constitutions than for those that enact statutes, although even that difference has been eliminated in Colorado. In any case, the petitioning industry can readily meet the constitutional threshold in most states, so this difference does not have much significance.

Other proposals offer more promise. In the order of the intensity of our preference we suggest four approaches. First, we would require, as is in place in a few states, a minimum vote to enact a constitutional amendment. The present rule in most states requires simply a majority of the votes actually cast, and this is often a rather low percentage of the electorate. For a relevant example, in the few modern referendums held in Britain on constitutional matters, there has been a requirement of approval by at least forty percent of the electorate.280 Another version would require a majority of registered

---

voters. Statutory amendments would continue to require only a majority of votes cast.

Second, we would limit constitutional amendments rather strictly to a single subject, but be less strict about the scope of statutory initiatives. The traditional single-subject rule is usually not a very strict limit. To make it effective, we recommend, third, combining it with a rule limiting constitutional initiatives to five hundred words. Constitutional amendments that are longer ought to be promulgated through constitutional conventions or legislative proposals. We think a limit on the length of statutory initiatives might be prudent as well, but the limit could be much higher, say 5000 words. Fourth, we recommend requiring that the final text of constitutional initiatives be drafted by the state's attorney general, legislative counsel, or other official, as is now done in New Zealand. This would of course be subject to an enforceable requirement that the text accurately carry out the initiators' purpose. Statutory initiatives would not have this limit.

These measures would induce initiators of measures that would traditionally be viewed as statutory to go the statutory route, preserving the state constitution as fundamental law. Even when initiators would need to amend the constitution, they would be induced to make a simple, enabling amendment with a matching statute to carry out their program.

To make the measures fully effective to restore dignity to state constitutions, it might be necessary to impose some parallel restrictions on the ability of the state legislature to propose constitutional amendments because low-level provisions are added to state constitutions that way as well. Moreover, these measures would be problematic to add to a state constitution that is already cluttered with many "legislative" provisions, which would then be made more difficult to amend or repeal.

---

281. Cf. MINN. CONST. art. 9, § 1 (referred constitutional amendments require a majority of total votes cast on any matter in the election); MISS. CONST. art. 15, § 273(7) (initiated constitutional amendments require 40% of total votes cast on any matter in the election).

282. The limit is analogous to the limit in the shareholder proposals rule, SEC Rule 14a-8(b)(1). See supra note 278. The Rule requires all shareholder proposals and their supporting statements to be under 500 words. 17 C.F.R. § 240.14a-8(b)(1) (1994). See also CALIFORNIA COMM'N, supra note 9, at 111 (proposing limit of 5000 words for all initiatives).
than they were to enact. To meet this problem, we propose that an initiative to repeal a constitutional provision be subject to less severe restrictions than one proposed to add language. The scheme we propose makes best sense in the context of a state constitutional convention or in designing a national right of initiative.

3. Treat Initiated Laws No Differently Than Legislatively Passed Statutes

As previously noted, many initiative states restrict the power of their legislatures to amend initiated statutes. In California, changes can be done only by another initiative or referendum. This entrenches measures similarly to constitutional amendments. It makes very difficult even technical amendments to work out defects in legislation. We think these limits are based on an unrealistic fear of legislatures. Legislatures are in fact very cautious about trying to change anything in initiatives because of popular criticism that is aroused. However, this fear is real and needs to be accommodated.

We suggest that legislatures be empowered to amend initiated statutes subject to two protections. First, such changes must not be combined with any other legislation; there should be a strict single-subject rule. Second, the procedures for a referendum to rescind this particular kind of legislation should be easier to meet than for rescinding referendums generally. The Swiss experience shows that the rescinding referendum can be a powerful check on the legislature.

---

283. For a failed attempt to clean up a badly cluttered state constitution, see Arrow, supra note 47.
284. See supra note 11 and accompanying text.
285. There is no evidence that legislatures in states that allow unrestricted amendment or repeal abuse the power. Similar arguments can be made for giving a governor veto power. It will rarely be exercised, and when exercised, a governor will do so only when her extraordinary concern about the effect of a measure on the welfare of the state outweighs the risk to her political future. This is a fire alarm we may want to respect, especially since most initiatives are passed by a favorable vote of less than 33% of the total number of registered electors in the state. The major difference between an initiative and a legislative bill is, of course, there is no process for overriding a veto of an initiative. A partial solution could allow a governor to veto only initiatives that pass by less than a 67% majority vote (or, in the alternative, a favorable vote of less than 50% of the total number of registered voters).
286. See supra note 46 and accompanying text.
This kind of check would tend to induce advance negotiations between proponents of the measure to be amended and the legislature, which would work out many problems.

4. Enforce a Single-Subject Rule

Many difficulties with present practices for initiatives arise out of issues about their scope. If an initiative covers unrelated subjects, voters must decide whether to swallow the bitter to get the sweet. In general, the longer an initiative, the less well voters understand it. Its title and summary become less accurate. Its problems of drafting, unintended consequences, hidden issues, and the like become more serious. In our discussion of constitutionalism and amending statutes above, we have made several proposals to address problems of scope. Here we add a few more that do not directly connect with those subjects.

A single-issue rule, interpreted sensibly, is a useful limit on the scope of initiatives, both constitutional and statutory. Proponents of the initiative complain that such limits unduly restrict the initiative or make it too expensive to circulate multiple petitions. To meet this objection, we propose allowing initiatives that cover more than one subject to be joined in a common petition, but to require separate votes by the electorate. In this way, voters, like state legislators, can vote separately on discrete measures. But petition circulators can circulate multiple measures on a common petition.

In our discussion above on constitutionalism, we have proposed limits on the number of words in an initiated measure, a strict limit for constitutional amendments, and a more generous limit for statutes. These limits can also be worked into a multiple petition process.

As discussed below, some state courts have imposed a limit on the scope of initiatives by ruling that the scope of some initiatives is so broad that they "revise" rather than "amend" the state's constitution. This rule depends on language in the state constitution that contrasts revising, which requires a constitutional convention, with amending, that can be done by initiative.287

287. See supra notes 181-83 and accompanying text; infra notes 321-24 and accompanying text.
5. Provide a Qualifying Period Long Enough to Allow Discussion, Deliberation, and Amendment of Proposed Initiatives

As previously noted, qualifying periods vary from ninety days to an unlimited period of time.\textsuperscript{288} We think mandated short periods, such as Colorado's six month limit, are too hasty, especially for constitutional initiatives. Even if the indirect initiative is not adopted, some of its virtues can be achieved by extending the period for qualification. Based on the Swiss experience, one to two years seems optimal.

To make the extended period useful, there must also be reasonable procedures for review of drafts, public notice and hearing, consultation among proponents, officials, and opponents, and opportunities to amend proposals or to withdraw them in favor of legislative substitutes that are satisfactory to proponents. Legislatures should be empowered to refer competing measures, as in Switzerland. There should be clear rules about who can speak for proponents to amend or withdraw proposals.\textsuperscript{289}

Mandatory public review and comment on draft initiatives can be valuable if there is time enough for discussion, negotiation, and involvement of opponents. However, if officials must give serious and substantive review to every draft proposal, no matter how frivolous, the cost of review will cause the review of each proposal to be inadequate. Therefore we propose a substantial filing fee for initiative proposals, on the order of one thousand dollars for statewide proposals, to deter the frivolous\textsuperscript{290} and to defray some of the cost of review and comment. This recommendation may strike some advocates of direct democracy as unfair to poor proponents, but that is a shortsighted view. It takes a lot of money, much more than one

\textsuperscript{288} See supra note 105 and accompanying text.
\textsuperscript{289} Also, when initiators qualify an initiative too late to make the ballot in the year of submission, the measure should go on the next year's ballot, unless withdrawn in favor of a compromise with the legislature. This will reduce the intense pressures that surround the qualifying process in many states.
\textsuperscript{290} In the September 1994 conference, a Colorado state official related the case of parents who submitted an initiative proposal with their child as a civics lesson. Catharyn Baird, Tape of Conference on Governing by Initiative, supra note 125. However educational this was for the family, mandatory review by the state was expensive. Id.; see also CALIFORNIA COMM'N, supra note 9, at 137 (similar problems in other states).
thousand dollars, to qualify a statewide initiative. And it takes broad and organized support to get a favorable vote. Thus to qualify and then to win the election requires organized backing of sufficient extent that a one thousand dollar filing fee is not a significant barrier. And the need to improve drafting of ballot measures, particularly those that amend state constitutions, is very great.

An alternative to the filing fee is a two-step initiative process. Initiators gather a certain number of signatures to show significant backing for their proposal. At that point, public review, hearing, and comments are required, and the proposal can be amended or withdrawn in favor of a legislative alternative. However, the cost to proponents of this procedure probably exceeds a one thousand dollar filing fee, so we think the fee the more reasonable procedure. Of course, proponents might be given a choice of either method.

C. The Role of Implementing Legislation in Colorado

The Colorado Constitution empowers the General Assembly to pass implementing legislation on initiatives. Another relevant provision states, "The general assembly shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise." The lead role in protecting the populace against abuses of the initiative power then rests with the legislature. Many of the recommendations made above are clearly beyond the power of the legislature (the minimum vote requirements for constitutional amendments, for example) and some are arguably beyond the power (the word limit, for example). In any event, the legislature can work within the structure of its existing legislation to effect some positive changes.

291. See supra note 97.
292. COLO. CONST. art. VII, § 11.
293. It is interesting to speculate whether the courts would have some role if the legislature, breaching its obligations, refused to pass any legislation. At issue would be whether such a case was justiciable. Cf. Pacific States Tel. & Tel. v. Oregon, 223 U.S. 118 (1912) (challenge to initiative under “republican guarantee” clause held not justiciable).
1. Extend the Qualifying Periods, and Establish Fair and Effective Procedures for Ballot Title Protests, Single-Subject Review, and Negotiations About Draft Initiatives

The Colorado Constitution requires review of every draft initiative within two weeks after its submission. The defects in this procedure have been pointed out, and the state constitution would have to be amended to cure most of them. One remedy open to the legislature is to direct that review be broader than the narrow, technical review now undertaken. It would be useful for reviewers to do more to carry out their existing duty to suggest “editorial changes to promote compliance with the plain language provisions” of the statute, particularly for initiatives that would amend the state constitution. However, the short time span and requirement to review every proposal, including the trivial, limit the review procedure in any case.

Other preliminary procedures are controlled by statutes, which the General Assembly can amend. First, procedures governing the new single-subject requirement should be clarified. Administrative review is sensibly done simultaneously with the fixing of the ballot title, but it should be clear that

---

294. COLO. CONST. art. V, § 1(5).
295. COLO. REV. STAT. § 1-40-105(1) (Supp. 1994). See supra notes 159-64 and accompanying text.
296. It would be more useful still to impose enforceable requirements of simplicity and clarity, but this would probably require a constitutional amendment. See COLO. CONST. art. V, § 1(5). There is historical precedent for judicial intervention to enforce standards of minimal drafting clarity. The first statute implementing the Colorado initiative allowed proponents to write the ballot title. Act of May 8, 1913, ch. 97, § 4, 1913 Colo. Sess. Laws 310, 312, repealed by Act of Mar. 31, 1919, ch. 131, 1919 Colo. Sess. Laws 431. The ballot title had to be “brief and not conflict with that selected in any petition previously filed.” Id. If the ballot title was “misleading or unreasonably long,” private parties could ask the state courts to enjoin its use. Id. If enjoined, “a majority of persons representing signers shall select another ballot-title that shall fairly describe the measure submitted to vote.” Id.

Judicial enforcement of clarity is now done by the Supreme Court of Florida. See Advisory Opinion to the Attorney Gen. re Tax Limitation, 644 So.2d 486 (Fla. 1994).
rehearing and judicial review of both can be done together in a single proceeding open to opponents as well as proponents.\textsuperscript{298}

Second, there should be adequate notice of the pendency of titling and single-subject review both to the legislature and to the public, and review of these decisions should be fairly available to opponents who are new to the process.

Third, the General Assembly should establish a regular procedure to review pending measures to identify those likely to be important to its members. These in turn should be considered for committee hearing and in appropriate cases for discussion and negotiation with proponents. In general, the General Assembly should be more actively involved in the initiative process, while initiative proponents retain the right to force a vote on their own proposal.

Fourth, the authority of proponents to negotiate compromises with the legislature should be made clear. The definition of who are proponents should be made certain, and it should be clear that they can act to amend or withdraw their proposal by majority vote.\textsuperscript{299}

Fifth, to facilitate other measures, the periods for qualifying an initiative should be lengthened. Present periods for review of drafts (two weeks) and title-setting (about the same) are too short. The maximum period for the entire process (about eleven months) should be longer, especially for constitutional initiatives. These changes are needed to allow more time for legislative review and possible negotiation with proponents. They would also give more time for other interested persons to participate in the qualifying process, yet give proponents ample time to gather signatures. The opportunity under present procedures for opponents to tie up an initiative proposal in court so that proponents do not have enough time to gather signatures\textsuperscript{300} should be eliminated.

2. Put the Full Text of Initiatives on the Ballot

With the single-subject rule in place, initiatives will be shorter. With shorter initiatives comes an opportunity to take some of the importance away from the currently momentous

\textsuperscript{298} See supra note 223 and accompanying text.
\textsuperscript{299} Swiss practices provide a model. See supra note 156.
\textsuperscript{300} See supra notes 238-45 and accompanying text.
and decisive ballot title procedure.\textsuperscript{301} The government can put the full language of any initiative on the ballot.\textsuperscript{302} Proponents, recognizing the problem of asking for voters to pass a long measure, would be further pressured to keep their measures brief.\textsuperscript{303} The change would give voters the best chance of not being misled by a conclusory or incomplete ballot title,\textsuperscript{304} avoid some of the contentious and expensive procedures currently employed,\textsuperscript{305} and eliminate the disadvantage suffered by targeted groups who wake up late to the importance of the ballot title process and are, therefore, excluded.\textsuperscript{306}

D. The Role of the Colorado Courts in Policing Initiative Procedures

Assuming that neither the Colorado Constitution nor Colorado statutes are revised, the last line of defense against initiative abuse is in state courts. As noted above, state courts play two roles in the initiative process; they review administrative determinations and they rule on claims of unconstitutionality. Of the total time the Colorado courts spend on cases involving initiatives, most is spent on tasks enumerated in the implementing legislation. The Colorado Supreme Court has direct review of ballot title board decisions.\textsuperscript{307} And District Courts hear protests of the Secretary of State's findings on the sufficiency of petition signatures.\textsuperscript{308}

Cases on claims of unconstitutionality come infrequently and are of two types: first, frustrated proponents attack state implementing legislation on the initiative process as inconsis-

\begin{itemize}
\item \textsuperscript{301} See supra part IV.E.3.a.
\item \textsuperscript{302} In Colorado, the full text of an initiative has never appeared on the ballot.
\item \textsuperscript{303} The legislation putting the full text on the ballot could apply only to initiatives for constitutional amendments, giving proponents two incentives: First, to consider a non-constitutional initiative, and second, to keep constitutional amendments brief.
\item \textsuperscript{304} For an extreme example, consider what many people would infer from a ballot title on "Election Reform" or "Taxation and Spending Limits" if they have not read the specific language (or an adequate summary) of an initiative.
\item \textsuperscript{305} See supra text accompanying notes 219-22.
\item \textsuperscript{306} See supra text accompanying notes 211-16.
\item \textsuperscript{307} See supra notes 221-23 and accompanying text.
\item \textsuperscript{308} COLO. REV. STAT. § 1-40-118 (Supp. 1994). The protesting party has the burden of proof. Id. § 1-40-119 (Supp. 1994). The district court is to hold hearings "as soon as is conveniently possible" and conclude hearings within thirty days. Id. Appeals go directly to the Colorado Supreme Court. Id.
\end{itemize}
tent with the state constitution; and, second, unsuccessful opponents of a successful initiative attack the content of the initiative as a violation of the federal Constitution. Claimants have been successful in each genre. What is missing

309. See supra note 102. Proponents have also successfully attacked state legislation under the First Amendment. Meyer v. Grant, 486 U.S. 414, 428 (1988); see infra note 311.

310. See supra notes 13, 52.

311. See supra notes 52, 102. The courts have on occasion frustrated the efforts of the state legislature to impose sensible controls on the initiative procedure. In Meyer v. Grant, 486 U.S. 414 (1988), for example, the Court held that the Colorado prohibition against paying circulators of initiative petitions violated the First Amendment. The prohibition was aimed at reducing incentives for petition fraud. And, to no one's surprise, the aftermath of the opinion has increased petition fraud in signature gathering. See supra text accompanying notes 138-40. The Supreme Court held, citing Buckley v. Valeo, 424 U.S. 1 (1976), that because the prohibition involved a limitation on political expression it was subject to "exacting scrutiny." Meyer v. Grant, 486 U.S. at 420. But the concern rejected by the Court in Buckley, the domination of the political process through expenditures on media advertising, is distinguishable from rules aimed at curbing fraud. The Meyer Court found that the prohibition limits the "number of voices" of those who will convey the message of the initiative proponents to garner the necessary signatures. Id. at 422-23. The Court held that the burdens on speech were not justified by the state's interest in curbing petition fraud because after-the-fact prosecutions of those who do forge a signature "seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition." Id. at 427. The Colorado state legislature disagreed, of course, and new evidence would appear to support their view over the Court's speculation to the contrary. It is troubling to consider where the Court's reasoning can go. Is it unconstitutional to prohibit, as Colorado does, mail solicitations of signatures? The prohibition on mail solicitations imposes the same burdens (it is more difficult to gather signatures) which concerned the Court in Meyer v. Grant, and the same alternative (after the fact prosecutions for petition fraud) is available. One could make similar arguments against any procedural rule that imposes burdens on proponents (the affidavit requirement for circulators or the Secretary of State's refusal to accept disassembled petition sections, for example). In short, the case may require courts to evaluate, under the strict scrutiny test of the First Amendment, all of the intricate procedural details of the initiative procedure. The Courts ought not assume this administrative role, whatever the constitutional doctrine ostensibly involved.

For an example of further judicial meddling with initiative procedures, see American Constitutional Law Found. v. Meyer, No. 93-M-1467, 1994 U.S. Dist. LEXIS 17134 (D. Colo. Nov. 23, 1994), appeal docketed, No. 94-1576 (10th Cir. Dec. 16, 1994). The plaintiffs sought to invalidate seven technical aspects of the Colorado procedure, the identification and reporting of paid circulators, the requirement that circulators be 18 and a registered elector, the reporting of contributions, the six month circulation period, and the circulator affidavit requirement. Id. at *2-3. The court held that the Colorado requirement that paid circulators wear badges identifying themselves as "paid" is unconstitutional. Id. at *20. It also invalidated the state's requirement that the proponents of a petition must disclose the names, addresses, and county of voter registration of all paid circulators, and the state's requirement that proponents report the amount
In the case law is a third type of claim, a hybrid of the claims courts now entertain, a claim based on constitutionality under the state constitution of the form and content of individual initiatives. The Colorado courts have not recognized any way to enforce the minimum affirmative demands of the constitutional reservation of initiative power on the content of the initiatives themselves. This omission is unfortunate. The language and history of the 1910 amendment to the Colorado Constitution establishing the initiative right support a judicial role in the development of minimal standards of scope and clarity.312

In response, perhaps, to this lacuna in the case law, the General Assembly referred the single-subject amendment to the electorate in 1994. The amendment, although attracting biting comment by well known initiative activists,313 passed by more than a two-thirds margin. Courts will be asked to enforce the single-subject rule. Had the courts explored the necessary implications of existing language in the constitution, the single-subject rule may not have been necessary.314 In the discussion below, we consider both the general constitutional language on initiatives and the enforcement of the new single-subject rule.

1. Necessary Implications of the Initiative Grant

Article V of the Colorado Constitution reserves for the people of Colorado the initiative power.315 The courts quite correctly protect the people's right from the state legislature by invalidating implementing legislation which frustrates the

---

312. See supra notes 76-77, 296 and accompanying text. In this regard, the Colorado Supreme Court has often taken the general position that the initiative provisions of the Colorado Constitution should be liberally construed to effectuate their purpose and facilitate the exercise by electors of this most important right reserved to them by the Constitution. E.g., Colorado Project Common Cause v. Anderson, 495 P.2d 220 (Colo. 1972).

313. An active initiative proponent referred to it as "the most evil proposition . . . on any ballot, anywhere, at any time." Steve Lipsher, Two Days and Counting; Measure Would Cut "Log Rolling," DENY. POST, Nov. 6, 1994, at C1 (quoting Douglas Bruce).

314. For a general discussion of implied or implicit powers of adjudication, see generally CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

315. COLO. CONST. art. V, § 1(1)-(2).
initiative process, but they have not protected the people's right from opportunistic proponents of initiatives. An opportunistic proponent attempts not to convince a majority of the people of the correctness of a proposal, but to put language in the constitution, via clever issue matching or confusion and deception, which does not have the support of a majority of the electorate.

In most cases, the people can protect themselves from opportunistic initiative proponents by voting “no.” Someone or some group will publicly oppose almost any given initiative, fund an attack, and push the proponents to justify publicly the details of their proposal. Even absent a well-funded public debate in the media, many conscientious voters will inform themselves and others in discharge of their civic responsibility. The ballot box may be protection enough if proponents are too obvious in their manipulations. Occasions arise, however, when voters are overmatched by an opportunistic strategy used by a clever proponent. In such cases, the courts may need to step in and enforce minimal standards of content aimed at preventing the more egregious cases of proponent misbehavior.

a. The People's Initiative Right is Frustrated by Multi-Issue Initiatives

The problems created by multi-issue initiatives are discussed extensively above. A multi-issue initiative can frustrate the ability of the people to voice their true views on each issue, with the result that such initiatives empower only proponents, whose strategic behavior puts voters in an unacceptable bind.

b. The People's Initiative Right Is Frustrated by Initiatives That Are Devious, Vague and Opaque, or Inaccessibly Complex

Initiatives that cannot be understood by reasonably informed Colorado voters ought also to fail constitutional muster. It is hard to see how putting language to the populace

316. See supra note 309 and accompanying text. The courts take great pains to construe the legislation "liberally" to facilitate the process. E.g., Montero v. Meyer, 795 P.2d 242, 245 (Colo. 1990) (three month filing requirement does not apply to "refiled" petitions).

317. See supra part IV.D.
that is devious, opaque or inaccessibly complex is consistent with the people's exercise of their constitutional power. Clever proponents, whose strategy is either to mislead voters into voting affirmatively or to confuse enough voters into abstaining so that an intense group of supporters can carry the vote, ought to be interdicted. Successful deception or confusion by initiative proponents is not, in any meaningful way, consistent with the people's constitutional right to propose and vote on initiatives. Of course, the standards for rejecting a devious, opaque or inaccessibly complex initiative as unconstitutional ought to be rigorous and difficult, with only those initiatives that easily and obviously fail the test being rejected. The test ought not to be that an initiative is not understood by the Colorado voters, although this is positive evidence of a problem, but that an initiative cannot be understood by even conscientious and reasonably informed citizens. And rejection should allow reasonable opportunity for proponents to cure their draft.

c. Is Judicial Inaction Justified?

Those who do not want the state courts more involved in the initiative process can make several arguments. First, one can argue that the people can protect themselves from even extreme forms of opportunistic behavior by using the initiative power to repeal unwanted constitutional language. History has shown, however, that it is very difficult to repeal a successful initiative. In Colorado, for example, the only repealed initiatives were those caught in a general referendum stripping the constitution of outdated language. One of the expunged provisions was a prohibition on funding for the 1976 Olympics, put in by initiative. There is typically no discrete organized constituency interested in gathering petitions to repeal a successful initiative, and the General Assembly, wary of "insulting voters," will not use its referendum authority to ask voters to reconsider or even redraft a successful initiative.318

318. See supra part IV.C.1. There was widespread agreement after Amendment One passed in 1992 that no one had even a general sense of its practical effect beyond its basic requirement of a vote on new or increased taxes. See Shaw, supra note 175, at 2 (State House Majority Leader: "You have to read the Amendment two times a day to try and understand it.").

319. One of the authors, convinced that voters wanted a tax limit in 1992 but not a ratchet down effect given them by Amendment One, see supra note 175, offered, through a state senator, referendum language that would clean up
Second, one can argue that "the people will get what they deserve" if they do not protect themselves at the polls. This is a harsh evaluation of the deserts of a basically trusting populace. Should we learn distrust? Will the costs of a painful post-election surprise on the effect of a successful initiative encourage more informed voting in the future? As noted above, the evidence is to the contrary; voters tend to weary of initiatives and abstain.

Third, one can argue that judges have too little political capital to get in the business of overturning initiatives that have passed with a majority vote. As we have recently seen with the Colorado Supreme Court's decision on Amendment Two, a decision throwing out a successful initiative is unusually controversial, with passionate critics attacking the court's legitimacy as well as its judgment. The state court's role on Amendment Two generated support for an initiative on recalling state judges. This message is of course not lost on our judges, and gives them the proper incentive, that is, to overrule the electorate in only the most egregious cases. Moreover, a procedure empowering judges to review clarity before a vote is taken would alleviate much of the problem.

2. Comparing "Amendments" to "Revisions and Alterations": Initiatives Cannot Fundamentally Alter the Existing Constitutional Structure

The scope of initiatives can also be limited by how fundamental is the change to the existing structure of Colorado government. In the Colorado Constitution, the people may propose "amendments" to the constitution by initiative (and the legislature may propose "amendments") but the people can "revise, alter and amend" the constitution only through a constitutional convention. This difference in language has a purpose. Some changes are so fundamental that they must be

accomplished through a constitutional convention.\(^{321}\) The California Supreme Court, on similar constitutional language, has recognized the distinction.\(^{322}\) At issue is whether any initiative effects such a deep fundamental change.

There are two kinds of initiatives that fail this test. First, some individual constitutional changes ought not be done by initiative. They change provisions that are too basic and have too long a history. Examples include initiatives that eliminate one of the three branches of state government (elimination of the Governor's Office, for example) or effect a fundamental rebalance of power among the branches (vesting taxing power solely in the Governor's Office, for example) or eliminate an essential aspect of sovereignty (such as the power of eminent domain).\(^{323}\) Second, some initiatives which, through their multi-issue content, contain wholesale tinkering with numerous parts of the constitutional language, are too invasive. Any one provision in the initiative may not effect a fundamental change, but when all the provisions are added up, the change is too sweeping to be done by a single initiative amendment.\(^{324}\)

3. The Due Process Clause and Initiative Procedures

As discussed above, the implementing legislation of the initiative process can and has been ruled inconsistent with the constitutional language in the Colorado Constitution that created the initiative process. The Due Process Clause of the federal Constitution and the due process clause of the Colorado Constitution also support challenges to deficient initiative procedures in implementing legislation. If the initiative procedures are inaccessible to all but a few, because, for example, of very short review and appeal deadlines or because of nonpublic hearings before hidden tribunals, the due process

---

\(^{321}\) COLO. CONST. art. V, § 1(2); Id. art. XIX, §§ 1, 2.

\(^{322}\) Courts in several states have held that, although the state constitution reserves to the electorate the power to "amend" by initiative, the people may "revise" the constitution only through constitutional conventions. See supra notes 181-83 and accompanying text.

\(^{323}\) But see Legislature of the State of Cal. v. Eu, 816 P.2d 1309 (Cal. 1991) (ballot measure limiting California legislature's terms and budget not a "revision"); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1284-89 (Cal. 1978) (Proposition 13, a taxation reform measure, was not a "revision").

\(^{324}\) E.g., McFadden v. Jordan, 196 P.2d 787 (Cal. 1948).
clauses ought to come into play. The courts have rejected all such challenges to date.

In *Montero v. Meyer*, 325 for example, the Tenth Circuit heard a challenge by Spanish-speaking citizens against an initiative that designated English as Colorado's official language. The plaintiffs argued that their due process rights were violated because they had inadequate notice of the title board hearing and of their right to appeal the title board findings. The Tenth Circuit's holding, reversing the district court, 326 was unfortunate. The Tenth Circuit held, first, that the title board was "ministerial," not judicial, and that the notice standards of judicial proceedings were inapplicable. 327 Second, it held that the plaintiffs had no "constitutionally protected liberty interest" because "the Colorado Constitution creates no legitimate entitlement in the plaintiffs to participate in the process of placing an amendment on the ballot." 328 Furthermore, the implementing legislation creates "no special rights."

Any rights created by the Colorado statutes in qualified electors are rights in a narrowly-circumscribed procedural review of the actions of the title board in carrying out its responsibility to make sure that the title, submission clause and summary are fairly worded and reflect the intent of the proponents. . . . [A] liberty interest created by state law is by definition circumscribed by the law creating it. . . .

... Plaintiffs missed their statutory procedural opportunity for review that they share with all qualified electors. They have no further rights. 329

The court's holding overlooked the essence of the plaintiff's claim that given the brief, hidden nature of the ballot title review process, whatever rights they had could not be exercised. They were not arguing for special notice but that the process in

---

325. 13 F.3d 1444 (10th Cir. 1994).
326. The District Court granted partial summary judgment to the plaintiffs, ordering that the title board comply with specified notice and publication requirements. The court refused to order retroactive relief, however, and would not invalidate the successful initiative. *Id.* at 1446.
327. *Id.* at 1446 n.2.
328. *Id.* at 1448.
329. *Id.* at 1449-50.
place did not give interested parties a sufficient opportunity to appeal the title board's determination.\textsuperscript{330}

The Tenth Circuit supported both arguments using a flawed vision of the title board process.

Plaintiffs' alleged expectation in this case would inject into the initiative process a debate on the merits (or at least the phrasing of a ballot measure) that would diminish, at the critical point of framing the issue to reflect the intent of the proponents, the constitutional grant of the clear right of the people of Colorado to propose laws and amendments and have them presented to the electorate.\textsuperscript{331}

No one disputes that the opponents of an initiative, if fortunate enough to know of the details of the title board procedure, have standing to contest the accuracy of the ballot title. So the "debate" feared by the Tenth Circuit is already an established procedure, as it should be. Opponents as well as proponents have an interest in the accuracy of the ballot title. Indeed, opponents are a check on the desire of some proponents to put inaccurate or misleading but saleable ballot title language on the ballot. The argument, misunderstood by the Tenth Circuit, is that a professional initiative proponent and opponent can use the procedure to contest ballot title board holdings, while other groups such as the Spanish-speaking population of Colorado, not normally engaged in the process but finding something dear to them on the table, find themselves closed out of the process.

4. Enforcing the Single-Subject Requirement

What level of commonality among issues will satisfy Colorado's new single-subject requirement? Courts often recite vague, general standards of germaneness or relevance among issues.\textsuperscript{332} Such concepts make sense only with an eye to the intended purposes of the rule. For Colorado, these are well set

\textsuperscript{330} There is no publication requirement in Colorado until after the time has expired for a protest of the title by a registered elector before the Secretary of State. COLO. REV. STAT. § 1-40-107, -124 (Supp. 1994).

\textsuperscript{331} Montero v. Meyer, 13 F.3d at 1450.

\textsuperscript{332} E.g., Perry v. Jordan, 207 P.2d 47, 50 (1949) ("all parts . . . are reasonably germane"). Colorado's recent cases on bills state the standard as "necessarily or properly connected to each other rather than disconnected or incongruous." \textit{In re House Bill 1353}, 738 P.2d 371, 374 (Colo. 1987). On problems of defining a suitable test, see CALIFORNIA COMM'N, \textit{supra} note 9, at 312-20; Daniel Lowenstein, \textit{California Initiatives and the Single-Subject Rule}, 30 UCLA L. REV. 936 (1983).
out in supporting legislation and in judicial opinions interpreting the state's longstanding single-subject rule applicable to legislative bills. The rule serves to avoid the logrolling mischiefs of bundling bills with partial support so that the sum has greater backing than any of its parts, and of using a popular lead provision to bring along others that could not pass alone. It improves voter information and understanding of the subjects of their vote, and it empowers voters to make more choices. When a reasonable voter would want the chance to vote on parts of a measure separately, the rule should guarantee that right.

Two recent examples illustrate possible applications of the rule. The constitutional amendment passed as Amendment One in 1992, when no single-subject rule applied, contains at least five subjects: limits on tax increases, limits on spending increases, limits on debt increases, general election procedures, and relations between state and local governments. Both public polls and voter behavior since 1992 suggest that voters would have voted no on parts of the measure if given the choice. A second example is Amendment 13 on the 1994 ballot, which failed to pass. It combined authorizations for gambling in the town of Manitou Springs, and in airports.

Colorado's rule is applied in the first instance by the title-setting board. Its decision should be subject to prompt judicial review, which takes place not only before enactment by voters but before petitions are circulated. At that stage, proponents' investment in their draft is minimal and corrections can readily be made.

Single-subject challenges to ballot measures can also be made after enactment. Review at that stage differs in important respects. Proponents have already incurred the expense of circulating petitions and of an elective campaign, and the measure can no longer be redrafted. For these and other reasons, the courts apply a strong presumption of validity,

333. See supra notes 186-90 and accompanying text.
334. See supra notes 166-69, 174 and accompanying text. It also forbids some taxes outright and creates an incentive to sell public land. The latter could be considered a sixth subject.
335. See supra note 175 and accompanying text.
336. Id.
337. See supra note 223 and accompanying text.
which does not apply before enactment. On the other hand, in post-enactment review a Colorado court can find the measure severable and sustain its principal parts. But that is a crude remedy. It is clearly better to have single-subject review completed before petitions are circulated. Without legislation, courts cannot do that directly, but they can apply different standards of review at the two stages. Review of title-setting should faithfully carry out the purposes of the single-subject rule, to combat logrolling and increase voter understanding and choice. On the other hand, review after enactment should apply the traditional presumption of constitutionality.

On the single-subject rule, procedures are again of crucial importance. Colorado’s procedures differ significantly from those in California, which have been largely ineffective. If the Colorado title board and courts carry out the duties that the single-subject provisions appear to impose on them, the Colorado rule should be a useful corrective to abuse of the initiative.

VI. CONCLUSION

Like any avenue to power, the initiative has attracted abusers. However, most critics of the device miss the mark by focusing entirely on the substantive results of the initiative votes. Abuses of the initiative are largely caused by structural and procedural flaws. If they are corrected, the initiative can work as an important check on representative and administrative government.

338. See supra note 187 and accompanying text.
340. In California, judicial review under the single-subject rule rarely occurs before enactment, and this substantially weakens the rule. See Steven W. Ray, Note, The California Initiative Process: The Demise of the Single-Subject Rule, 14 PAC. L.J. 1095, 1105-07 (1983). See also CALIFORNIA COMM’N, supra note 9, at 312-20. Moreover, California courts must either sustain or strike down an initiated law in its entirety; there is no authority to sever and save parts. See CAL. CONST. art. II, § 8(d) (“An initiative measure embracing more than one subject may not . . . have any effect.”). Florida requires judicial review on single subject after 10% of needed signatures have been gathered, and the state courts apply a strict standard. If a measure contains more than one subject, proponents may then amend, and the state allows four years to qualify for the ballot. See Advisory Opinion to the Attorney General re Tax Limitation, 644 So.2d 486 (Fla. 1994); CALIFORNIA COMM’N, supra note 9, at 108-09.
How the initiative right is structured also affects the essential nature of a state's constitution. Where initiatives to amend state constitutions are easily available, constitutions are changed frequently and by modest pluralities of state voters. Provisions that seem legislative in character are added and placed beyond the reach of judicial review under the state constitution. We recommend designing the initiative right to enact a statute to be much more accessible than the right to amend the state constitution. We also address other procedural shortcomings of the initiative process, particularly in Colorado.

The details of our recommendations aside, the most important insight of our research is that questions of structure and procedure should be an essential part of America's debate on the merits of state ballot initiatives and proposals for a national initiative.