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In Search of the Deliberative Initiative: A Proposal for a New Method of Constitutional Change

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"In Search of the Deliberative Initiative:
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IN SEARCH OF THE DELIBERATIVE INITIATIVE: 
A PROPOSAL FOR A NEW METHOD OF CONSTITUTIONAL CHANGE

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I. INTRODUCTION

The use of citizen’s initiatives to amend state constitutions reached record high levels in the 1992-93 biennium.¹ By far the most popular subject of both constitutional and statutory initiatives during this period was the imposition of term limits on elected representatives. Voters passed all seventeen of the term limit initiatives that appeared on the 1992 ballot, and most of these initiatives passed by an overwhelming majority.² Both the volume and the subject matter of citizen’s initiatives in the 1990s suggest an unmistakable conclusion: there is a widespread and deep-seated distrust of representative government in our nation today.

Proponents of the initiative argue that it provides a healthy means of turning a voter’s distrust into much-needed governmental reform. Yet critics are quick to point out that correcting the abuses of representative government is not the only objective of the initiative campaigns of the 1990s. The initiative also has been used to denigrate the rights of
minorities, as evidenced by California's Proposition 187 and Colorado's recent initiative restricting the rights of gays and lesbians. Critics of these anti-minority initiatives are now in court trying to invalidate them on federal constitutional grounds. Regardless of what protection the courts provide in these cases, many critics will continue to argue the initiative has become a weapon of tyrannical majorities and wealthy special interest groups. In addition to threatening the rights of minorities, some critics argue this weapon may undermine the federal guarantee that each state shall have a republican form of government.

On a philosophical level, the current debate over the proper roles of initiatives and elected representatives turns on the same issue that prevailed at the time the earliest state constitutions were framed: how shall we choose between popular sovereignty and representative government? Yet at a practical level, the question is not that simple. In no state does the initiative entirely supplant the legislative process, nor does the work of a state legislature necessarily crush every vestige of popular sovereignty. On the contrary, every state that has an initiative process also has a legislature, and in these states, "the legislature and the initiative not only coexist but interact in a system of lawmaking." Thus, the real
question is not whether laws and constitutional amendments should be enacted through either
a legislature or a citizen's initiative, but how to obtain the right blend of representative
institutions and direct democratic processes. Moreover, in formulating this blend, "[t]he
great challenge . . . is to go beyond general statements and to come up with concrete and
practical recommendations."8

The purpose of this article is to answer this challenge by offering a concrete proposal
for a new method of bringing about constitutional change that combines elements of
representative government with the type of direct democratic influence associated with the
citizen's initiative. This proposal is intended to strike a balance between the need to provide
citizens with unimpeded access to a legitimate means of reforming their government and the
countervailing interest in protecting minorities and legislatures from the sorts of abuses
associated with the traditional, direct initiative process. Although this article uses the
constitutional amendment process in the State of New Mexico as its primary example, the
method proposed to structure this amendment process is intended to serve as the foundation
for further work on new methods of enacting both statutory and constitutional initiatives in other states.

Part II of this article begins the task of constructing a new method of amending state constitutions by reviewing the various procedures that states have devised to structure the process of constitutional change in the past. Part III then focuses on the initiative process in particular and analyzes the strengths and weaknesses of this process in its traditional form. This analysis sets the stage for the concluding sections of this article, which set forth a concrete proposal for a new method of constitutional change and show how this new method avoids the weaknesses of the traditional initiative process while enhancing its strengths.

II. STRUCTURING THE PROCESS OF CONSTITUTIONAL CHANGE

The earliest state constitutions can be divided into two waves. The first wave of state constitutions, exemplified by the Pennsylvania Constitution of 1776, were written and ratified exclusively by legislative bodies. Not surprisingly, these constitutions made legislatures the predominant branch of government. The second wave of state constitutions, exemplified by the Massachusetts Constitution of 1780, generally were drafted and ratified by conventions
specially elected for that purpose. These constitutions had more checks and balances to
counter the legislative power, but only two of them were sent to the people for ratification.⁹

A total of twenty-eight state constitutions were adopted prior to 1800. With respect to
providing for constitutional amendment or revision, these early constitutions can be grouped
into three categories: those that had no provisions regarding constitutional amendment, those
that gave the legislature control over the amendment process, and those that reserved to the
people the right to simply abolish the existing government and start over.¹⁰ None of these
early constitutions resulted in a workable, legal method of structuring constitutional change.
While the right to revolt and abolish the existing government may have worked in the
extreme situation where "the ends of government are perverted . . . and all other means of
redress are ineffectual,"¹¹ this right hardly provided an orderly procedure for making minor
revisions and amendments. A constitution that was silent on the issue of amendment
provided no better solution, for no matter how perfect and everlasting a constitution's framers
envisioned their work to be, it still remained subject to a judicially recognized, inherent
power of the people to revise their constitution.¹² With this unarticulated, inherent power
looming over it, a constitution that was silent with respect to the amendment process provided no more protection against revolution than a constitution that expressly reserved to the people the right to revolt. The third alternative, whereby legislatures took control of amending the state constitution, proved no more workable than the first two. A constitutional amendment process that thwarted popular sovereignty only gave rise to constitutional change by extra-legal means, such as the famous Dorr Rebellion in Rhode Island during 1841-42.  

Perhaps the most basic cause of constitutional turmoil during the early nineteenth century was the fact that so few of the state constitutions adopted before 1800 were sent to the people for ratification. Prior to that date, most constitutions simply were adopted by the members of legislative bodies or the delegates to constitutional conventions. A handful of states began sending proposed constitutional provisions to the people for ratification in the first quarter of the nineteenth century. By 1857, Congress required referendums to approve constitutions for newly admitted states, and this procedure had become the norm. By 1900, only Delaware had no procedure requiring popular ratification of constitutional changes.
After winning the limited right of the people to ratify or reject proposed constitutional changes submitted by the legislature or a constitutional convention, the champions of popular sovereignty turned to a broader campaign to institutionalize two new methods of lawmaking: initiative and referendum. The *initiative* is a process whereby new laws or constitutional changes are proposed and placed on the ballot by citizen’s petition and then enacted by popular vote.\(^\text{15}\) Initiatives can be divided into two types: *direct initiatives*, which are submitted directly to the voters without any action by the legislature, and *indirect initiatives*, which are proposed by citizen’s petition but sent to the legislature for further action before appearing on the ballot.\(^\text{16}\) The *referendum* is a process whereby new laws or constitutional changes are passed by the legislature and then referred to electorate for final approval.\(^\text{17}\) Referenda also can be divided into two types: the *popular referendum* by which citizens can petition to have a law enacted by the legislature submitted for a vote by the people before going into effect, and the *proposition submitted by the legislature* in which the state legislature submits to the voters a proposed constitutional amendment or statute without being prompted by a citizen’s petition.\(^\text{18}\)
Prior to 1898, the proposition submitted by the legislature was the only kind of statewide initiative or referendum used in the United States. In that year, South Dakota became the first state to include a provision in its constitution allowing direct, statewide initiatives at both the statutory and constitutional level. Oregon was the first state to make law using the initiative process, enacting two statutes by initiative in 1904, followed by four constitutional amendments enacted by initiative in 1906.19

The initiative’s success in Oregon fueled an explosive growth of initiative and referendum provisions in the constitutions and statutes of western states during the first part of the twentieth century. In 1907, Oklahoma became the first state to provide for initiative and referendum in its original state constitution, and Arizona followed suit in 1912.20 Between 1898 and 1918, nineteen states adopted the initiative in some form, and fourteen of these states allowed constitutional amendments to be proposed by initiative.21

Of the states admitted to the Union during the first half of the twentieth century, only New Mexico failed to provide a workable initiative and referendum provision in its original state constitution. The initiative was the most hotly debated topic at New Mexico’s
constitutional convention of 1910, but the ring of "Old Guard" Republicans who dominated
the convention made sure that efforts to include an initiative provision in the state’s
constitution were soundly defeated. Instead, populists in New Mexico had to settle for a
referendum provision that was intended by its own drafters to be unworkable. 22

Despite the shenanigans at New Mexico’s constitutional convention, the use of
initiative provisions in state constitutions throughout the nation peaked around the time New
Mexico was admitted to the Union in 1912 -- attracting the support of such luminaries as
labor leader Samuel Gompers and former president Theodore Roosevelt. 23 In that same year,
the U.S. Supreme Court decided that the initiative could not be held invalid under the
guarantee clause of the U.S. Constitution because such a holding would require the court to
rule on a political question. 24 The use of the initiative soon peaked with ninety separate
statutory and constitutional initiatives appearing on the ballot in 1914. 25

Even in the heyday of the progressive movement, the initiative was not without its
critics. Most notably, President Taft, who had proclaimed New Mexico’s admission to the
Union in 1912, offered the following criticism after he left office and went to teach law at Yale University:

Could any system be devised better adapted to the exaltation of cranks and the wearying of the electorate of their political duties than the giving of power to 5 percent or even 8 percent of the voters to submit all the fads and nostrums that their active but impractical minds can devise, to be voted on in frequent elections?26

President Taft's strongest criticism was reserved for the constitutional initiative, which he regarded as "minimiz[ing] the sacredness of those fundamental provisions securing the personal rights of the individual against the unjust aggression of the majority of the electorate."27 Taft’s Attorney General, George Wickersham, had led an unsuccessful effort to block Arizona’s admission to the Union because that state’s constitution permitted the use of initiatives.28

The decline in the creation and use of initiative provisions in the middle of the twentieth century is often attributed to fears sparked by the first world war and the Russian revolution. However, this decline also may be viewed as part of a larger shift in lawmaking power away from the states and toward the federal government. As one commentator notes, "[t]he attempts of the states to develop modern constitutional power to deal with modern economic and social issues [during the first three decades of the twentieth century] were ...
all too often to be thwarted by a conservative [Supreme] Court obsessed with restraining
government from interfering with the free enterprise system. The restraint imposed by the
Supreme Court during this period "created a vacuum in state constitutionalism which, in the
depression of the thirties, invited federal occupancy." Initiatives at the state level were
subsumed by this "vacuum in state constitutionalism" for many years before reemerging in
the 1960s and 1970s, when Illinois, Montana and Florida added new initiative provisions to
their constitutions.

The next method of amending state constitutions to appear on the American political
scene involved the use of commissions or other administrative bodies as sources of
constitutional change. The use of constitutional commissions might be viewed as an
outgrowth of the modern administrative state, as a symptom of the vacuum in state
constitutionalism during the middle of the twentieth century, or as an ominous diminution of
popular sovereignty. Adopting the latter view, one commentator suggests that the first
constitutional commissions were the product of renegade legislatures that sought to revise
outmoded state constitutions with a minimum of popular debate. According to this view,
the appointment of a commission was a means of dispensing with a constitutional convention -- and with the level of constitutional debate, political compromise and citizen participation that should accompany a proper convention. In light of the high cost of holding a constitutional convention\(^3\) and the alarming rate at which voters have rejected full-scale constitutional revisions proposed at such conventions in recent years,\(^4\) one can make an equally compelling argument that the current use of commissions is not intended to thwart popular sovereignty so much as it is intended to provide a method of constitutional revision that is more practical and efficient than holding a constitutional convention.

Although their role has diminished in the 1990s,\(^5\) constitutional commissions remain at work in several states and serve two main purposes: "to study the constitution and propose changes; and to prepare for a constitutional convention."\(^6\) Commissions that are directed toward the first of these purposes generally are created by statute and serve as advisors to the state legislature.\(^7\) The exception to this rule is the Florida Taxation and Budget Reform Commission, which has the power to submit proposed constitutional amendments directly to the electorate.\(^8\) The second variety of constitutional commission, which is charged with the
task of preparing for a convention, can be authorized in the constitution itself or merely created by an executive order. All members of the constitutional commissions at work in the 1990s were appointed and not elected.

The use of initiatives and commissions arguably has diminished the role of constitutional conventions in shaping constitutional change at the state level. Of the fourteen states that require a periodic referendum on the question of calling a convention, only three required a vote on this question during the 1992-93 biennium, and voters rejected the call in all three states. Thus, piecemeal amendment by legislative proposal and popular ratification remains the norm in most states, accounting for eighty-four percent of all proposed constitutional changes submitted to the voters in 1992-93. A summary of the methods of constitutional change authorized in the constitutions of the fifty states is appended to this article as Table 1.

Eighteen states currently allow their constitutions to be amended by citizen's initiative. A summary of the initiative process in each of these states is appended to this article as Table 2. Among these states, California has remained at the center of controversy in recent years.
First added to the state’s constitution in 1911, California’s provision for initiatives was seen as a reaction to the Southern Pacific Railroad’s undue influence over state government. Among the most notable of California’s early initiatives were a series of proposals to revamp the state’s law enforcement and criminal justice systems. These early initiatives were sponsored by Earl Warren, who later became the Chief Justice of the Supreme Court.

By the end of the 1940s, critics argued that California’s initiative provision made the state’s constitution too easy to amend — subjecting it to "amendomania." The legislature tried to correct this problem by adding a requirement that constitutional amendments or statutes proposed by initiative "relate to but one subject." However, the California Supreme Court gave this single-subject rule a relaxed interpretation and never invalidated an initiative measure for violating the rule. Among the initiatives that were challenged in court for allegedly violating the single-subject rule were the property tax relief amendment known as Proposition 13 and the "Crime Victim’s Justice Reform Act" enacted as Proposition 115 in 1990. In addition to challenging these controversial initiatives in court, critics of
California's initiative process have pursued reforms in the state legislature. In 1991, the California legislature was entertaining at least forty initiative reform proposals.51

The California legislature responded to these proposals by appointing a Citizen's Commission on Ballot Initiatives to study the advantages and disadvantages of the state's initiative process. This Commission returned its recommendations in January of 1994, and these recommendations have resulted in proposals for a new, hybrid method of constitutional amendment that attempts to integrate the initiative process with legislative procedures -- and thereby make initiatives more amendable and more subject to legislative oversight.52 A recent example of this new hybrid approach is found in Mississippi's constitutional revisions of 1992, according to which constitutional initiatives must be submitted to the legislature, and voters must then choose between the original initiative, the legislature's amended version of that initiative, or no initiative at all.53

III. CONSTITUTIONAL AMENDMENT BY CITIZEN'S INITIATIVE

Underlying the new methods of constitutional amendment proposed in California and enacted in Mississippi are two fundamental premises: first, the initiative process produces enough benefits to be worthy of retaining in some form, and second, the initiative process in
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its traditional form dating from the turn of the century is seriously flawed and in need of improvement. Among the flaws in the traditional initiative process are its potential for undermining the values of representative government, confusing or misleading voters, limiting access to the ballot to wealthy special interest groups, and providing a source of ill-conceived or unconstitutional amendments. Among the benefits of the initiative process are increasing citizen participation in government, educating voters, providing a source of innovation in lawmaking, and, perhaps most importantly, correcting the abuses of a representative system of government. To understand these benefits of the initiative, one must first examine how they arose in response to certain perceived defects in the legislative process.

A. Defects in the Legislative Process

The notion that state legislatures were defective and untrustworthy was a major premise of the arguments presented in favor of the initiative during the late nineteenth and early twentieth century. Proponents of the initiative saw three major problems with state legislatures during this period: the poor character of legislators, the domination of the
legislative agenda by wealthy special interests, and the use of questionable legislative procedures that facilitated domination by special interests while obstructing citizen participation.

At a philosophical level, complaints about the quality of legislators arise from the classic conflict between the common good and the good of the rulers. However, critics of state legislatures at the turn of the century did not explain the problem in such abstract terms. Instead, they attributed the poor quality of their legislators to the fact that "[i]t is increasingly difficult today to get a man of serious knowledge on any subject to go to Congress, if he has other pursuits and other sources of income. To get him to the state legislature, in any of the populous and busy states, is well-nigh impossible." Behind this criticism was the idea that the apportionment of many state legislatures allowed rural districts to dominate the agenda with parochial issues that were considered routine and uninteresting by the young, urban professionals of the time.

The poor quality of elected representatives remains a common complaint in the 1990s, and at least one cause of this complaint remains the same: the pool of candidates from which
voters may draw is simply too small and homogenous. However, the reasons and the remedies for this problem have changed. Rather than stemming from a learned professional’s desire to avoid the rural, parochial nature of a malapportioned legislature, good candidates are now kept off the ballot because of their inability to muster the financial resources necessary to mount a serious campaign against an incumbent or "professional politician," and because of concerns that the media will intrude upon the privacy of the candidates and their families. With regard to the first of these reasons, one recent study showed that state senate incumbents in California’s 1986 election outspent their challengers by seventy-five to one while state assembly incumbents outspent their opponents by thirty-nine to one. Every single incumbent who sought re-election to the California legislature in 1986 won it.57 Given this data, it is no surprise that term limits have replaced the initiative as the popular remedy for an untrustworthy legislature.58

The efforts by which today’s incumbents amass campaign funds from political action committees (PACs) and other high-paying special interest groups is comparable to the efforts by which political bosses of an earlier era inserted their puppet candidates into the political
process. Both of these practices point to a second defect in representative government: the tight grip that wealthy special interest groups or political bosses have on the legislative agenda. This grip was certainly felt at New Mexico's constitutional convention of 1910, where the agenda was controlled by land speculator Thomas Catron and his "Santa Fe Ring." Other states also felt the grip of railroads, lumber and mining interests, banks and land speculators during this period. These interests saw state legislatures as merely a gateway through which they must pass in order to raid the state's treasury and natural resources. By the 1980s, public participation in the legislative process had increased dramatically in many states, and this increase arguably makes it harder to discern which groups represent special interests rather than the public interest. Nonetheless, few will disagree that some particularly well-funded and highly influential interest groups remain a source of consternation to initiative proponents. According to an official of the California Republican Party, "the legislature was dominated by railroad interests [in 1911]. Now it's dominated . . . by liberal politicians[;] we need another access to enact our agenda . . . ."
To understand how special interests can dominate a state legislature, it is necessary to understand the practice known as "logrolling." This practice occurs when legislators obtain enough votes to pass a measure favoring a minority faction by adding that measure to a bill containing other provisions favorable to other factions, so that each faction is forced to vote for another faction's measure in order to obtain the passage of their own measure. This arrangement often results in legislation that is favorable to each of the powerful minority factions but unfavorable to the broader interests of a majority of citizens. A frequently criticized variation on logrolling is porkbarrel legislation. In porkbarrel legislation, each legislative district functions as a minority faction, and so long as a bill brings home enough porkbarrel projects in the majority of legislative districts, a majority of legislators are happy to vote for projects in other districts regardless of whether those projects are needed.

In the 1990s, logrolling and porkbarrel legislation often appear as symptoms of the larger problem of "governmental gridlock." Governmental gridlock occurs when different factions within the legislature become so sharply divided that they are unwilling or unable to agree to compromises that truly benefit the majority of citizens. The result is that such
sharply divided legislatures "fail to resolve -- or even respond to -- the problems felt by large numbers of citizens." Absent the atmosphere of civility and consensus that would enable a majority of elected representatives to address such commonly felt problems, legislatures often resort to logrolling as the only means of attracting enough votes to pass a bill.

Logrolling and porkbarrel legislation are by no means the only legislative procedures that facilitate domination by minority factions and perpetuate governmental gridlock. During the era of the progressive movement, critics of legislatures argued that "[t]heir proceedings involved too much secrecy, too little discussion, too much automatic passage of what legislative committees proposed." In more recent years, these questionable legislative practices include influence-peddling by lobbyists, gerrymandering of legislative districts to allow domination by one political party or ethnic group, heavily guarded control of legislative committee assignments, sudden schedule changes and the many procedures by which legislators can pass or kill bills without deliberation or public notice. A common element of all these procedures is a lack of the kind of meaningful public participation that is necessary to give lawmaking the stamp of legitimacy.
B. Benefits of the Initiative

Some advocates in the progressive movement viewed the initiative as a replacement for the legislature. According to this view, representative government was no more than "a succession of 'quasi-oligarchies,' only indirectly and remotely responsible to the people." However, more recent proponents of the initiative regard it as merely a means of correcting the abuses that overreliance on the legislature or other elected officials has engendered — a means that "pose[s] no more of a threat to the representative principle than has judicial review or the executive veto." Like judicial review or the executive veto, what enables the initiative process to correct these abuses is its independence from the legislature. Thus, according to one recent proponent, "[t]he best case for direct legislation in a system of representative government is that it may play a role in just those areas in which institutional pressures cause representatives to stray from the interests of popular majorities: government structures and regulation of the political process, taxation, and spending."

The history of the initiative in the United States is replete with examples that support this claim. In the area of government structures and regulation of the political process, the
examples range from women's suffrage, which became law through the initiative in Colorado, Oregon and Arizona years before it reached the federal constitution, to "motor voter" laws that register people to vote when they get a driver's license, to the more recent fascination with term limits. While California's Proposition 13 and more recent initiatives requiring voter approval of tax increases stand out as the most obvious examples of tax reform that became law through the initiative process, lesser known examples in this area include a North Dakota initiative that doubled the state tax on oil production, and a Missouri initiative that increased the sales tax by one percent to generate new revenues for schools and provide property tax relief.

Not only do these examples show how the initiative allows citizens to get at issues that recalcitrant legislators, powerful committee chairs and headstrong governors are unwilling to address, they also show the kinds of innovation that initiatives have added to the political process. In bringing forth women's suffrage and "motor voters" laws years before such ideas became law at the federal level, the initiative may be viewed as "a happy incident of the federal system [in which] a single courageous state may, if its citizens choose, serve as a
laboratory; and try novel social and economic experiments without risk to the rest of the country." Indeed, some politicians argue the states' experiments with direct legislation have been such a success that it is time for Congress to provide for a national initiative. 75

Even when the experiments performed by an initiative result in failure, they still provide grist for the legislative mill and have spillover effects on candidate campaigns, voter education and citizen participation. With regard to candidate campaigns, it is important to note how political candidates often sponsor initiative measures, hoping that voter's support for an initiative measure will spillover into their campaign for office. This strategy has been employed successfully by several of California's governors, from the criminal justice reforms of the Earl Warren era to Jerry Brown's involvement with the political reform initiative and George Deukmejian's sponsorship of the "Victim's Bill of Rights" initiative. 76 The interaction of candidate campaigns with initiative propositions shows one way that the initiative process works together with representative government rather than against it. Even when candidates or elected officials oppose an initiative measure, the initiative may place an issue on the agenda and lead them to respond to it.
Proponents of the initiative also argue that it serves to educate and draw participation from voters in ways that representative government cannot or has not. Some statistical evidence suggests that voter turnout is higher when initiatives appear on the ballot, but most scholars agree that the main benefits of the initiative with regard to citizen participation are qualitative. To the extent a law passed by initiative is more likely to take effect than a law that a political candidate promises to enact, initiative campaigns are more likely than candidate campaigns to produce immediate, tangible results such as lower taxes, harsher penalties for criminals, or legalized gambling. These direct consequences gives initiative participants a greater sense that they can "make a difference." By allowing citizens to participate directly in the making of a law or constitutional amendment, the initiative also gives people a greater sense that they are governing themselves rather than being governed by outside forces beyond their control. This sense of empowerment and political self-control arguably increases the psychological and social well-being of the individuals participating in an initiative campaign. Because of these positive feelings that an initiative process
engenders, the laws that result from this process may enjoy greater legitimacy with the public.

A final corollary to the benefits of citizen participation is voter education. At a practical level, initiatives stir a public debate which results in greater awareness of underlying policy issues. To the extent initiatives remain issue-focused rather than becoming as personality-focused as candidate campaigns, they are in a better position to genuinely inform voters rather than just entertain them. At a more philosophical level, participation in initiative campaigns can perform an important educative function that the state’s other educational institutions are not in a position to perform. To the extent these other institutions must remain value-neutral to comply with the establishment clause, multicultural norms or "political correctness," they leave to processes like the initiative the important function of teaching values and developing the intellectual and moral tools needed to act as a responsible citizen. As expressed by Thomas Jefferson: "I know of no safe repository of the ultimate power of society but the people, and if we think them not enlightened enough, the remedy is not to take the power from them, but to inform them by education." This view of the
relationship between education and popular sovereignty is central to the Jeffersonian faith in the will of the people -- a faith upon which the initiative is entirely premised.

C. **Flaws in the Traditional Initiative Process**

The traditional opponents of the initiative do not share this Jeffersonian faith. They see the initiative as more of a tool for deceiving or confusing the public than a source of education. They dispute that the presence of ballot initiatives has any quantifiable effect on voter turnout. And with regard to the qualitative effects on participation, opponents of the initiative argue that it limits access to the political process more than it promotes citizen participation in that process.

The source of these problems, according to some critics, is an "initiative industry" that allows wealthy special interests simply to buy an initiative much like they would buy the vote of a legislator through campaign contributions or influence-peddling.Important to this criticism are data showing that ballot access is not easy: most initiative proponents fall short of gathering the number of signatures required to put their proposal on the ballot. The majority of initiatives that do appear on the ballot got there because their proponents hired paid, professional signature collectors. Critics charge that paid signature-gathering results in
voter deception, and flagrant examples of such deception abound. Yet so far no state has devised a means of preventing the use of paid petition signature collectors that does not violate the First Amendment or free speech clauses in state constitutions.

Once an initiative qualifies to appear on the ballot, special interest groups affected by that initiative hire the initiative industry as media consultants to advertise their position. According to critics of the initiative process, these advertisements often use emotional appeals that play on people’s fears or create confusion. When the task at hand is to defeat an initiative that is overwhelmingly popular, opponents of that initiative hire the initiative industry to create a counter-initiative that dilutes support for the original initiative, or simply confuses voters about the underlying issue so they will vote against both initiatives. Other techniques such as coalition-building and the burying of riders within an initiative suggest that the initiative process does not necessarily escape the practice of logrolling.

The initiative industry is highly profitable, but relatively few groups can afford to hire the firms that make up this industry. By one critic’s calculations, over $117 million were spent on ballot measures in 21 states in 1992. The groups spending large sums of money on
initiatives are the same special interests that initiative proponents accuse of defiling the legislatures. For example, the National Rifle Association and its bedfellows spent $6.8 million on a gun control referendum in Maryland, and the tobacco industry recently spent $21 million to oppose an increase in California's tobacco tax.93

Another element that the initiative industry seeks to control for its clients is the timing of initiatives. Where their polling indicates a favorable result can be obtained from an election with low voter turnout, the initiative industry will ensure that the issue is presented at a special election or primary election. Or, an initiative will be timed to coincide with an election at which members of one political party or interest group have less of an incentive to vote. Such was the case with California's Proposition 13 -- a property tax relief initiative that coincided with "a primary at which the Democratic party had no contested statewide party race for Governor, while the Republicans did."94 Moreover, critics of the initiative point out that regardless of how the initiative industry attempts to manipulate the turnout at a particular election, the turnout in all elections is lower for voters who are young, who have lower incomes, or who have less education. The result is that "[v]oting on ballot
propositions only amplifies the social class bias in participation. In other words, initiatives are not very representative.\textsuperscript{96}

Another common criticism of the initiative and other forms of direct legislation is that they clutter the ballot with technical propositions that overwhelm the capacity of voters to comprehend and make rational decisions. This ballot clutter only aggravates the class bias problem because younger, poorer and less educated voters are more likely to be overwhelmed and confused.\textsuperscript{97} Several states, such as California, have attempted to control ballot clutter by distributing ballot initiatives more equally among special, primary and general elections, but this procedure only makes initiatives more susceptible to turnout manipulation by the initiative industry. A related problem is that once a group of lengthy, technically worded constitutional initiatives receive the approval of the electorate, these initiatives proceed to clutter the state’s constitution with material that arguably belongs elsewhere or is quickly outdated once the fad that drove a particular initiative campaign has passed. Based on data that indicate passage rates are virtually the same for statutory and constitutional initiatives,
critics argue that it is too easy for initiative proponents to make their proposal into a constitutional amendment rather than a statute. 98

If they do not detract from a state's constitution because of their sheer volume and technical detail, initiatives still may litter the document with language that is ill-conceived, poorly drafted or violative of the federal constitution. Part of this criticism stems from the fact that many state constitutions "prohibit any one initiative from altering more than one article at a time, thereby preventing voters from using this method to fashion comprehensive revisions affecting several parts of the constitution." 99 Yet such prohibitions on comprehensive reform have not prevented citizens from using the initiative process to adversely affect the rights of minorities. The history of direct legislation is replete with examples of initiatives that may unconstitutionally denigrate minority rights: California's "open housing" initiative in 1964, 100 the "English-only" initiatives that have appeared on the ballot in several states, 101 the initiatives in Colorado and Oregon proposing to deprive gays and lesbians of equal protection under housing and employment discrimination laws, 102 and
California's latest proposals to deprive illegal immigrants of social services and ban affirmative action.

Initiatives that denigrate minority rights also raise the specter of majority tyranny. Without the checks and balances of the legislative process, the only restraints on the majoritarian excesses of the initiative process are the courts. Yet courts too are ultimately subject to the control of the majority. After ruling a series of initiatives unconstitutional during the 1960s and 1970s, three of California's Supreme Court justices were defeated in the 1986 judicial retention elections. The irony of this majoritarian excess is that the issues which provoke it often are not really the chief concerns of a majority of citizens. In place of a broad agenda of issues that truly affect every citizen, the initiative directs the public's attention toward such specialized concerns as "the rights of homosexuals, whether nondentists can prescribe dentures, or restrictions on the hunting and trapping of black bears."

Some argue that initiatives undermine the very foundations of representative government when they divert the political agenda toward such a narrow range of special
issues. This argument was made most forcefully by the early critics of direct legislation, such as President Taft:

The effect of the initiative and referendum upon the legislative branch of the Government, even if it be retained, is necessarily to minimize its power, to take away its courage and independence of action, to destroy its sense of responsibility and to hold it up as unworthy of confidence. Nothing would more certainly destroy the character of a law-making body. 107

There is some evidence to support the claim that the efforts of political parties and candidates to articulate a broad legislative agenda have been subsumed by the need to respond to the special, narrow issues raised by initiative campaigns -- thereby decreasing the power of political parties and increasing the influence of single-issue groups that propose initiatives. 108

However, after several decades of experience with the initiative, it is clear that direct legislation has not brought about the collapse of representative government feared by the early critics. Hence, more recent critics of the initiative do not advocate eliminating direct legislation entirely. 109

The better criticism is not that initiatives destroy representative government, but that representative government has certain key values that enable it to make better law and avoid some mistakes that frequently arise in the initiative process. According to California
Supreme Court Justice Stanley Mosk, "the flaws apparent to recent initiative measures would have been caught if they had proceeded through the legislative process... a committee hearing in one house, debate on the floor of the house, committee hearings in the other house, debate on the floor; and the ultimate governor's opportunity to veto." In the words of another critic:

In the initiative process, the voter is only partially legislator. Voters generally are not permitted to participate in the drafting of initiatives, nor may they amend the measure, as legislators can. There are no hearings, markup, floor debate, or conference between the two houses to work out technical issues or modify the bill to make it more acceptable. Sponsors of initiatives rarely circulate their proposals before the petition phase, and once this phase begins, the language of the measure cannot change. Voters instead face an initiative crafted entirely by the sponsors on which they may only cast a "yes" or "no" vote.

Underlying the specific procedures that these critics articulate are several key values that the legislative process seeks to foster: compromise, accommodation and, most of all, deliberation. These values are lacking from the traditional, direct initiative process.

To restore these values to the initiative process, and thereby improve the quality of the laws and constitutional changes that result from this process, critics have offered several recommendations. Foremost among these recommendations is the idea that states should switch from the direct initiative process to an indirect procedure that includes a "cooling off
period" during which the legislature can hold hearings, amend the initiative by supermajority vote, or at least vote on the initiative in some form before it appears on the ballot. In addition to involving the legislature, some critics have suggested establishing a permanent constitutional commission to oversee the initiative process and placing greater reliance on the role of civil society in shaping this process. Other recommendations focus on increasing deliberation among the citizenry by requiring initiatives to have formal sponsors and allowing these sponsors to amend their initiative and seek drafting advice from an attorney general or other state official with the requisite expertise. To further differentiate statutory and constitutional initiatives, it has been suggested that constitutional initiatives should require a supermajority or a majority in two separate elections, while statutory initiatives should enjoy no special, protected status vis-a-vis other statutes. Finally, critics of the traditional, direct initiative look to the courts to continue their active role in scrutinizing initiatives -- or even increase their scrutiny during the pre-election period.

The initiative process also can be changed to minimize the problem of voter deception and confusion. Recommendations in this area include: requiring initiative petitions to be
accompanied by an official statement and summary of the petition's contents authored by a neutral party, ballot title requirements, and putting the full text of the initiative on the ballot. In order to reduce the ballot clutter that might result from such proposals, critics have suggested strictly enforcing the single-subject rule for initiatives, adding a 500-word limit to the length of proposed constitutional amendments, or even restricting initiatives to brief, general policy statements that guide implementation by the legislature. Finally, despite the fact that many voters cannot or will not read them, some critics have encouraged the publication of voter's pamphlets to increase voter understanding of what is on the ballot.

Still other recommendations focus on loosening the grip of the initiative industry. In the area of prerequisites to ballot qualification, some have suggested lengthening the circulation period to allow volunteers to compete with paid petitioners, adding geographic distribution requirements and exacting strict penalties from those who engage in deceptive petitioning. As a check on the financing of initiative campaigns, it is suggested that states impose mandatory financial disclosure requirements on those spending money to support or
oppose an initiative, including disclosure of names and affiliations of campaign contributors, and provide public financing to establish a floor for campaign expenditures. To control advertising about initiatives, one critic has suggested a return to the fairness doctrine in media coverage, and the imposition of stiff penalties for false advertising. Finally, to prevent the initiative industry from manipulating voter turnout on initiatives, there is a recommendation that constitutional initiatives only be voted on at general elections and not at primaries or special elections.

IV. A PROPOSAL FOR A NEW FORM OF CONSTITUTIONAL INITIATIVE

Despite its flaws, the traditional, direct initiative has become a primary vehicle for channeling public discontent and attacking problems that representative institutions fail to resolve. However, such public discontent and the attacks it engenders are not limited to the eighteen states in which the use of the initiative is constitutionally authorized. There is ample evidence of deep discontent with representative government in other states, and this discontent spans both ends of the political spectrum. For example, in New Mexico -- one of the minority of western states in which the initiative is not authorized -- citizens in some rural counties have rebelled against existing representative institutions by enacting county
oppose an initiative, including disclosure of names and affiliations of campaign contributors, and provide public financing to establish a floor for campaign expenditures.\textsuperscript{121} To control advertising about initiatives, one critic has suggested a return to the fairness doctrine in media coverage, and the imposition of stiff penalties for false advertising.\textsuperscript{122} Finally, to prevent the initiative industry from manipulating voter turnout on initiatives, there is a recommendation that constitutional initiatives only be voted on at general elections and not at primaries or special elections.\textsuperscript{123}

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ordinances and land use plans which purport to preempt state and federal law and return broad governmental powers to the local level.\textsuperscript{124} While courts have found such ordinances and land use plans unconstitutional,\textsuperscript{125} the "county movement" spawned by rural New Mexicans continues to spread to other states.\textsuperscript{126} At the other end of the political spectrum, New Mexico now has a third major political party, the Greens, and this new party's gubernatorial candidate obtained close to eleven percent of the vote in the 1994 election.\textsuperscript{127} A fundamental element of the Green's political platform is "grassroots democracy," and the party's counterpart in Germany repeatedly has called for a national initiative lawmaking process in that country.\textsuperscript{128}

The rising call for grassroots democracy exemplified by the county movement and the Green Party suggests that many of the thirty two states which currently lack a procedure for amending their constitution by citizen's initiative are ripe for a new method of bringing about constitutional change. To provide a check on abuses of power by elected representatives, and to construct a channel through which popular discontent may flow, these states should consider amending their constitutions so that their citizens may initiate changes to the state's
constitution. In formulating such amendments, lawmakers should begin by learning from the mistakes that other states have made in their initiative process as well as the recommendations of the various scholars and commissions that have studied the subject. The proposed constitutional amendment attached to this article as an appendix is an attempt to do just that.

This proposed amendment is built around six central principles that provide the foundation necessary to shore up the weaknesses in the traditional, direct initiative process while reinforcing the proven strengths of this process.

1. *The initiative should supplement and not replace the legislature’s capacity for proposing constitutional amendments.*

The first sentence of the proposed amendment states that the people’s power to propose and ratify constitutional amendments by initiative shall be *in addition to* the existing methods provided elsewhere in this article. This language is intended to allow the legislature to continue its current practice of proposing constitutional amendments and submitting them to the electorate for ratification. In addition to this current practice, the legislature will be able to take part in the initiative process by appointing two individuals to serve on the independent commission charged with overseeing this process.
The new language in the proposed amendment does not preclude the legislature from making a proposal that conflicts with an initiative scheduled to appear on the same ballot, nor does this language prevent the legislature from proposing a change to a constitutional provision that previously became law through the initiative process. Legislative proposals that conflict with initiatives are accommodated by subsections (I) and (J) of the proposed amendment. Subsection (I) provides that when two or more conflicting amendments appear on the same ballot and both receive the required number of votes, then only the amendment receiving the higher number of votes shall become law. Subsection (J) provides that when two or more amendments, whether initiated by the people or proposed by the legislature, are submitted to the voters, each shall appear on the ballot in a manner that allows voters to vote on each of them separately. These subsections are intended to ensure that legislative proposals remain distinct from initiated amendments on the ballot, so that voters have a clear choice among them. However, the separate voting provision is not intended to limit initiatives to a single subject.
Finally, subsection (K) makes clear that there are two subject areas in which the power to amend the constitution by initiative is restricted. The first of these areas is minority rights. The second is the constitutional initiative process itself. The latter restriction is intended to prevent the new language in the proposed amendment from opening the door to further amendments that infringe upon the legislature’s capacity to institute constitutional change.

2. **An independent, constitutional commission should be utilized to add deliberation and balance to the initiative process.**

Subsection (A) of the proposed amendment provides for the creation of an independent commission to oversee the initiative process. The composition of this commission is intended to be diverse and inclusive, with expertise and experience drawn from each branch of state government, each major political party and each congressional district. This diversity and inclusiveness is intended to prevent the commission from being dominated or captured by a single branch of government, political party or special interest group. The duties of the commission are to receive, consider and vote upon initiatives submitted by the people. These duties are carried out by providing technical assistance to initiative sponsors, approving the
form of initiatives, holding public hearings, receiving written comments, ruling on proposed modifications and conflicts among proposed amendments, voting and expressing opinions on the merits of initiatives, and arranging for the publication of voter information about initiatives. The central purpose behind all of the commission’s duties is to facilitate deliberation upon initiatives and thereby improve their quality. These duties are not intended to serve as a mechanism for obstructing or detracting from initiatives submitted by the people.

By referring citizen’s initiatives to a constitutional commission instead of the legislature, the proposed amendment departs from the indirect initiative processes recently proposed in California and enacted in Mississippi. There are several reasons for this departure. First, the commission is intended to be an independent body performing a special, constitutional function that is separate and distinct from those functions performed by other branches of government. If this independent body and its functions were subsumed by the legislature, then its ability to serve as a check on legislative abuses would be diminished. The diversity needed to protect the commission from domination or capture by special
interests also would be diminished if it were merely a component of the legislature. Officials from other branches of government might not be able to serve on a constitutional commission that was an arm of the legislative branch without raising serious concerns about separation of powers, and the commission would be more subject to control by the majority party in the legislature. The use of an independent commission is intended to answer these concerns by distinguishing the constitutional initiative function from those functions performed by the legislative branch.

There are also several practical concerns that motivate the decision to base the constitutional initiative process in an independent commission instead of the legislature. One of these concerns is the recent rise in the use of counter initiatives that simulate the language of an original initiative while changing certain key provisions. Recent studies show that the effect of such counter initiatives is to dilute support for the original initiative or make voters confused by the similarity between the two initiatives. If initiatives were sent to the legislature before appearing on the ballot, then there is a high risk that the legislators will facilitate the manufacture of such deceptive counter-initiatives. If given the opportunity, it
is also likely that legislators will engage in logrolling by attaching riders to constitutional
initiatives.\textsuperscript{131}

Another concern is whether the legislature is in a position to carry the burden imposed
by the duty to receive, consider and vote upon initiatives. The Senate Constitutional
Amendments Committee in California recently objected to a proposal that would require it to
hold hearings and make recommendations on constitutional initiatives, noting that such
requirements "could be cumbersome when numerous initiatives are certified, or when several
competing initiatives have qualified that take conflicting stands on the same subject matter."\textsuperscript{132}
The Committee sought to avoid this burden by suggesting that its practice of holding hearings
and making recommendations on initiatives should be permissive rather than mandatory.\textsuperscript{133}
However, by permitting some initiatives to pass without any hearings or recommendations,
this suggestion would detract from the fundamental goal of making the initiative process more
deliberative.

A final concern with running the initiative process through the legislature is that the
legislative agenda is already full, and there already are too many measures that either pass or
die without deliberation in the relatively short legislative sessions to which some states are
limited. The legislature and the governor in some states already have difficulty performing
such basic legislative functions as passing a budget and appropriating funds. Imposing an
additional duty to consider initiatives could divert the legislature from these basic functions
and instead require legislators to spend an inordinate amount of time on highly controversial
but less consequential issues such as bear hunting, insurance rates or the morality of
homosexual behavior.134

3. The sponsors of an initiative should have the power
to withdraw or propose modifications to an initiated
constitutional amendment before it appears on the ballot.

Subsection (C) of the proposed amendment requires that a petition to initiate a
constitutional amendment be sponsored by twenty or more registered voters who shall serve
as the sponsoring committee for that initiative. Aside from its possible effect of keeping
frivolous initiatives off the ballot, the purpose of this initiative is twofold. First, it
establishes an identifiable group of citizens that is ultimately responsible for an initiative.
Second, and more importantly, requiring a sponsoring committee to initiate constitutional
amendments provides a means for engaging civil society in the initiative process. It is
contemplated that such sponsoring committees often will consist of church groups, community organizations, labor unions, and other special institutions that "stand between the public and private sectors -- and have elements of both." While the proposed amendment does not attempt to establish detailed rules of order for conducting the business of a sponsoring committee, it is contemplated that sponsoring committees will work as quasi-legislative bodies and hold public meetings in which they deliberate about how to craft their initiative.

Subsection (F) provides that the authority to withdraw or modify an amendment proposed by initiative shall vest in the sponsoring committee after the public has been given the opportunity to speak at public hearings and submit written comments on that amendment. While there is no requirement that the sponsoring committee review or comment upon the feedback received at public hearings or in writing, the intent behind this subsection is that the sponsoring committee's decision to withdraw, modify or take no action on their original initiative will be a carefully considered response to the public comments received by the commission.
Since modification by the sponsoring committee will occur after all the signatures supporting the initiated amendment and all public comments have been gathered, certain safeguards are needed to prevent the sponsoring committee from departing from the wishes of the supporters who signed the petition. Subsection (F) answers this concern by requiring the sponsoring committee’s modification to remain within the scope and purpose of the original initiative. The commission has the authority to finally determine whether this requirement is met.

The commission also has the authority to issue additional rules governing the withdrawal and modification process. This rulemaking authority is based on the recognition that the withdrawal or modification process is an experimental one that has not been tried in other states. To respond to unforeseen consequences of this experimental process, the commission needs the option of resorting to administrative rulemaking in lieu of asking the legislature for an amendment to the constitutional language in subsection (F). However, to prevent abuse of this rulemaking authority, the commission’s administrative rulemaking is made subject to judicial review under the state’s administrative procedure act.
Subsection (F) departs from the indirect initiative process recently enacted in Mississippi because it vests the authority to modify an initiated amendment in the sponsors of that amendment rather than the governmental body charged with considering the initiative.

This departure reflects a belief that the power to modify an initiative belongs in the hands of the people who originally drafted it. To do otherwise would undermine the public confidence and sense of empowerment that the initiative process is meant to inspire. If a governmental body were allowed to modify citizen initiatives, then the door would be open for initiative opponents or special interests to attach riders or other provisions that would render an initiative unworkable, defeat its purpose and ultimately make the initiative process futile.

While riders and other harmful provisions might be prevented by the requirement that a modification must remain within the scope and purpose of the original initiative, the effectiveness of this requirement would be diminished if the authority to decide whether it is met is vested in the same body that proposed the harmful modification in the first place.

Subsection (F) avoids this problem by separating the power to propose modifications from the power to determine whether such modifications meet the original scope and purpose
requirement. The sponsoring committee has the former power, while the commission has the latter.

4. The initiative process should be structured to limit undue influence by the initiative industry and encourage citizen participation.

The proposed amendment contains several provisions aimed at minimizing inequalities between well-funded, industry-sponsored initiative campaigns and volunteer efforts carried out by citizens groups. Subsection (C) requires sponsors of an initiative to present it to the commission or its designated representative before officially circulating any petitions. The commission must approve the form of the initiative before it is officially circulated. The intent of this requirement is to provide an opportunity for citizens to receive technical assistance in drafting an initiative and to ensure that initiative petitions circulated to voters are not deceptive, misleading or incomprehensible. However, except for the requirement that petitions be printed in both Spanish and English, the formal requirements for an initiative petition are left for the commission to determine under its own rulemaking authority. Such requirements could include disclosure of finances and identification of the contributors that are funding an initiative campaign. Regulation of the time, place and manner in which an
approved petition is circulated also is left for the commission to determine under its rulemaking authority. While it should never result in the kind of unfettered discretion that could raise First Amendment concerns, this rulemaking authority gives the commission some much-needed flexibility to accommodate volunteer initiatives and respond to manipulation by the initiative industry as the need arises.

Once an initiative petition is approved for circulation, subsections (C) and (D) of the proposed amendment establish certification requirements which strike a balance between the need to limit the ballot to serious, well-supported proposals and the desire to accommodate volunteer efforts by reducing the demand for paid signature-collectors. Subsection (D) requires the signatures of eight percent of the registered voters in the state. This requirement is equal to the percentage of voters required under the California, Florida and Oregon Constitutions but is less than the ten to fifteen percent requirement found in most state constitutions that provide for citizens initiatives. Although volunteer organizations have found it difficult to get their initiatives on the ballot even in states with the eight percent requirement, the commission may use its rulemaking authority under subsection (C) to reduce
this difficulty by, for example, lengthening the amount of time available to collect signatures
on an initiative petition.

The eight percent requirement is coupled with a geographic distribution requirement of
two percent of the registered voters in each congressional district. The geographic
distribution requirement is intended to make initiative campaigns a truly statewide effort and
reduce undue influence by voters in the large, urbanized areas of the state. However, the
geographic distribution requirements are kept to a minimum to avoid placing obstacles in the
path of citizens groups that lack the resources to mount an extensive, statewide circulation
effort. Manipulation of voter turnout is controlled to some extent by the requirement in
subsection (H) that initiatives shall appear on the ballot at general elections only. There is no
provision for voting on initiatives at special elections or primaries.

The activities of the commission laid out in subsections (E) through (G) are intended
to provide an additional layer of protection against manipulation of the initiative process by
unduly influential special interest groups. The commission guarantees public hearings and
votes on every initiated amendment that is the subject of a certified petition. The
commission's hearings are intended to provide both a spotlight in which deceptive appeals may be uncovered and a level playing field on which all participants can compete for the attention of the media and the public. By voting and expressing their opinions on initiated amendments, the members of the commission can serve as opinion leaders and, in that capacity, may offset the impacts of "hired guns" retained for the purpose of directing public opinion.

The commission's voting power on initiatives also is intended to control the influence of tyrannical factions and serve as a check on collective passions. Although not subject to judicial review on their merits, votes by the commission are intended to be reasoned decisions that result from careful consideration of the arguments presented at public hearings and in written comments. Subsection (H) provides that when a majority of the commission votes in opposition to an initiative, then that initiative must receive a two-thirds supermajority of the votes cast in the next general election in order to become part of the constitution. This provision is intended to restrain the ability of special interests to use high spending, emotionally manipulative campaign tactics to force the passage of an initiative that is...
otherwise meritless or contrary to the public interest. Among the types of initiatives that are most vulnerable to opposition by the commission are initiatives that embrace more than one subject, deceptive counter initiatives and initiatives that denigrate minority rights.137

In addition to its restraining effect on tyrannical factions and collective passions, subsection (H) is designed to avoid concentrating too much power in the commission itself. In particular, subsection (H) does not go so far as to allow the commission through its voting power to keep initiatives off the ballot entirely. Data from several states shows that some initiatives can meet the two-thirds supermajority requirement that subsection (H) may impose.140 If a potentially unconstitutional initiative such as California’s Proposition 187 were to obtain the votes of a supermajority, opponents of that initiative ultimately would have to seek relief in court.

5. *The initiative process should actively promote voter education.*

The proposed amendment provides for voter education at several stages within the initiative process. In requiring initiative sponsors to seek approval as to form from the commission, subsection (C) provides the commission or its designated representative with an
opportunity to give technical assistance to sponsors who are trying to draft an initiative.

While this subsection leaves some room for the commission to decide in what form an initiative must appear in order to be approved for circulation, its basic purpose is to put initiative petitions in a form that promotes voter comprehension and provides a level of information about the initiative that is sufficient to support informed decisionmaking by voters. Subsection (C) does not go so far as to prescribe penalties for circulating an unapproved petition or obtaining petition signatures by fraud or deceit, but that is an obvious topic for implementing legislation or administrative rulemaking.

The public hearing process provides another forum for voter education. The proposed amendment does not specifically provide for open meetings or public inspection of the commission’s records, but it is assumed that the commission’s meetings and records must be open to the public in order to comply with existing freedom-of-information and government-in-the-sunshine statutes. After the public comment period, subsection (G) permits commission members, at their discretion, to accompany their votes with a concise written opinion.
The opinions of the commission are intended to resemble something inbetween a court opinion and a legislative committee report. Like the decisionmaking of a court, it is anticipated that commission members will join with other members to form majority, plurality or dissenting opinions. However, reaching such opinions is not intended to be a secretive process, and there is no constitutional restriction on commission members expressing their opinions outside of commission meetings or engaging in *ex parte* communications with initiative sponsors or other groups.\(^{141}\) In this respect, commission members are more like the legislators who author a committee report. Also, in contrast to both judicial opinions and committee reports, commission members are encouraged to write their opinions in language that is both brief and comprehensible so that they may be understood by the electorate.

Subsection (G) provides that commission members may publish their opinions in a manner provided by law. As with the requirements for formal approval of a petition under subsection (C), the proposed amendment leaves room for the commission or the legislature to determine what material should be published, and in what form this material should appear.
6. **The initiative should not be used to denigrate the rights of minorities.**

Subsection (K) of the proposed amendment states that the people’s power to initiate constitutional amendments shall not be used to denigrate the constitutional rights of minorities. This restriction is intended as a check on collective passions and majority tyranny. Subsection (K) is phrased as a general but enforceable policy statement that should guide the decisionmaking of the commission and any court that is called to review the constitutionality of an initiative. The commission should interpret this policy statement as an almost *per se* rule that initiatives which denigrate minority rights require a "no" vote, thus triggering the two-thirds supermajority requirement provided in subsection (H). However, the restriction in subsection (K) is not intended to give the commission the power to strike an initiative from the ballot on the grounds that it will denigrate minority rights. That power, as well as the power to strike an anti-minority initiative from the state constitution after it is enacted, is reserved to the courts.

The general policy statement in subsection (K) was chosen in lieu of more specific prohibitions on repealing existing portions of the constitution that protect individual rights or
elective franchise. This choice is premised on a concern that the inclusion of specific prohibitions could imply that any right not specifically mentioned is fair game for an anti-minority initiative. It is not possible to anticipate all the minority rights that might be implicated by an initiative and list them in subsection (K); it is equally impossible to specify all of the rights that might fall outside of the protection afforded by this subsection. However, the language in subsection (K) is limited to minority rights that are constitutionally recognized at the state, tribal or federal level. This subsection is not intended to create new rights for minorities, except for the limited right to be protected from initiatives that take away other existing constitutional rights.

V. CONCLUSION

Our nation now has almost a century of experience with constitutional initiatives. That experience has produced many benefits which suggest that the initiative process is worthy of retaining in some form. Our century of experience also has revealed serious flaws in the traditional initiative process. In recent years, legal scholars, constitutional study commissions and social scientists have carefully identified many of these flaws and
recommended changes aimed at fixing them. However, no state has yet ratified a constitutional amendment that successfully implements these recommendations.

This article attempts to carry the work of these scholars and commissions a step further by transforming their recommendations into a proposed constitutional amendment that provides a new method of bringing about constitutional change. This new method allows the kind of direct democratic process associated with the traditional initiatives of the past century but channels this process through the work of an independent, constitutional commission. The proposed constitutional amendment that results from this article is not intended to stand alone. Further work is required to develop implementing legislation and administrative rulemaking for this amendment. In addition, the constitutional initiative process proposed in this article needs to be paired with another constitutional amendment providing a similar process for enacting statutory changes.
Section __. [Initiating and ratifying amendments.]

In addition to the methods of constitutional amendment provided elsewhere in this article, the people of this state reserve unto themselves the power to propose and ratify constitutional amendments by initiative subject to the following procedures and restrictions:

**(A) Citizen’s Commission on Constitutional Amendment.** An independent commission to consist of nine members is hereby created, which shall be known as the "Citizen’s Commission on Constitutional Amendment" or "CCCA." The CCCA shall be composed of six appointed members and three elected members. Each of the following state officials shall appoint one person to serve as a member of the CCCA: the Speaker of the House of Representatives; the President Pro Tempore of the Senate; the Governor; the Attorney General; the Chief Justice of the Supreme Court; and the Chief Judge of the Court of Appeals. No more than three of the appointed members of the CCCA shall be from the same political party. Registered electors shall elect three members of the CCCA from single-member districts. Such districts shall coincide with the state’s congressional districts.
unless otherwise apportioned by law. Elected members of the CCCA may not simultaneously hold another elected state office. All members of the CCCA shall serve for a term of four years from the date they are elected or appointed. Except as specified in this constitution, the CCCA shall prescribe its own rules of order and procedure in accordance with the State Administrative Procedure Act. The legislature shall provide suitable quarters for the CCCA, appropriate funds for its lawful expenses and compensate its members for their services.

(B) **Duties and Powers of the Commission.** It is the duty of the CCCA to receive, consider and vote upon initiatives to amend this constitution submitted by the people of this state. The CCCA shall have the powers necessary to carry out these duties.

(C) **Approval and Circulation of Petitions.** A petition to initiate a constitutional amendment must be sponsored by twenty or more registered electors who shall serve as the sponsoring committee for that initiative. Such a petition must be approved as to form by the CCCA or its designated representative before it may be officially circulated. The CCCA shall issue rules governing the form of a petition, the frequency with which it may be
submitted, and the time, place and manner of its circulation, except that all approved
petitions must be printed in both English and Spanish.

(D) Certification of Petitions. After circulating an approved petition, the
sponsoring committee shall submit it to the Secretary of State for certification. The Secretary
of State shall certify an approved petition if that petition was signed by eight percent of the
registered electors in the State, including at least two percent of the registered electors in each
congressional district, and the signatures were collected in accordance with law. The number
of registered electors who signed the petition shall be measured as a percentage of the total
number of votes cast for all candidates for Governor in the last gubernatorial election. The
Secretary of State shall verify that each petitioner is a registered elector in a manner
prescribed by law.

(E) Public Hearings. The Secretary of State shall promptly file certified petitions
with the CCCA. The CCCA shall promptly provide public notice, hold public hearings and
receive written comments on each initiated constitutional amendment that is the subject of a
certified petition.
(F) **Withdrawal or Modification.** Following public hearings and the opportunity to comment on an initiated constitutional amendment that is the subject of a certified petition, the amendment’s sponsoring committee shall have the opportunity to withdraw or modify that amendment. Any such modification must remain within the scope and purpose of the original initiative. The CCCA by a majority vote shall make the final determination as to whether the sponsoring committee’s modification falls within the scope and purpose of the original initiative and may issue rules governing the withdrawal or modification of initiated amendments consistent with this article.

(G) **Votes and Opinions of the Commission.** Following the opportunity to withdraw or modify an initiated constitutional amendment and the CCCA’s final determination regarding any modification proposed by the sponsoring committee, the CCCA promptly shall vote either in favor of, or in opposition to, the initiated amendment as a whole. Each CCCA member may accompany his or her vote on an initiative with a concise written opinion, and the CCCA may cause these opinions to be published as provided by law.
(H) **Submittal to the Electorate.** Following the CCCA's final vote on an initiative to amend the constitution, that initiative shall be placed on the ballot at the next general election. If a majority of the CCCA has voted in favor of an initiative, then that initiative must receive a majority of the votes cast on the initiative in the general election in order to become part of the constitution. If a majority of the CCCA has voted in opposition to an initiative, then that initiative must receive at least two-thirds of the votes cast on the initiative in the general election in order to become part of the constitution.

(I) **Conflicting Amendments.** The CCCA by a majority vote shall make the final determination as to whether an initiated amendment conflicts with any other constitutional amendment question that is scheduled to appear on the same ballot. If two or more conflicting amendment questions receive the number of votes required to become part of the constitution, then only the amendment receiving the greater number of votes shall become part of the constitution.

(J) **Separate Voting.** If two or more amendments, whether proposed by the legislature or initiated by the people, are submitted to the voters at the same election, then...
such amendments shall appear on the ballot in a manner that allows voters to vote on each of them separately. This subsection shall not be construed to require that an initiated amendment embrace no more than one subject.

(K) Restrictions. Neither this article nor any other constitutional provision regarding amendment of this constitution shall be subject to the people’s power to initiate constitutional amendments. The people’s power to initiate constitutional amendments shall not be used to denigrate the constitutional rights of minorities.

1 During 1992-93, the constitutional initiative generated 34 proposed amendments, "a record high as measured by biennium averages during the past 60 years." Janice C. May, State Constitutions and Constitutional Revision, 1992-93, in 30 Book of the States 2 (Council of State Gov’ts ed., 1994-95 ed. 1994).

2 David Kehler and Robert M. Stern, Initiatives and the 1980s and 1990s, in 30 Book of the States, supra note 1, at 279, 286. By comparison, only three state legislatures passed term limits bills during this period. Id.

3 See Evans v. Romer, 882 P.2d 1335 (Colo. 1994), cert. granted, 115 S. Ct. 1092 (1995); LULAC v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995). While these initiatives were pending in court, Californians were in the process of placing another initiative on the ballot to end affirmative action programs that

See Hans A. Linde, *When Initiative Lawmaking is not "Republican Government": The Campaign Against Homosexuality*, 72 *Or. L. Rev.* 19 (1993). The claim that state initiatives violate the guaranty clause was also raised during an earlier era. See *William Howard Taft, Popular Government* 72-80 (1913).


Id. at 1314.

The two states that required popular ratification of their original constitutions were Massachusetts and New Hampshire. Williams, supra note 5, at 546-47.

Maryland Declaration of Rights of 1776, art. IV, in 4 Sources and Documents of United States Constitutions 372 (William F. Swindler ed. 1975).

One of the more extreme exercises of this inherent power occurred in Georgia in 1945, when the legislature proposed, and voters accepted, a single, 92-page amendment that replaced the state's 1877 constitution in its entirety. Despite the fact that the enactment of this "amendment" plainly violated the procedures expressed in the 1877 constitution, the Georgia Supreme Court upheld the new constitution as an exercise of the people's inherent power. Wheeler v. Board of Trustees, 37 S.E.2d 322 (1946); see Michael G. Colantuano, Comment, The Revision of American State Constitutions: Legislative Power, Popular Sovereignty and Constitutional Change, 75 Cal. L. Rev. 1473, 1482-86 (1987).

See Colantuano, supra note 12, at 1476.


Magleby, Direct Legislation, supra note 16, at 36.

Schmidt, supra note 14, at 5-8.

Id. at 16-17.


Schmidt, supra note 14, at 6-9.

Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).

Schmidt, supra note 14, at 24.

Taft, supra note 4, at 54.

Id. at 64.

See William F. Swindler, State Constitutions for the 20th Century, 50 Neb. L. Rev. 577, 585 (1971) (quoting George W. Wickersham, New States and Constitutions, 21 Yale L.J. 1, 24 (1911)).

Swindler, supra note 28, at 585. This obsession can be seen in the Supreme Court’s decision to invalidate a New York law setting an eight-hour day for bakers. Lochner v. New York, 198 U.S. 45 (1908).

Swindler, supra note 28, at 585-86.


During the four-year period from 1967 to 1970, the products of constitutional conventions in seven states, including New Mexico, were rejected by voters. Swindler, supra note 28, at 590-91. For a discussion of how more recent efforts to call a state constitutional convention have failed, see Gais & Benjamin, supra note 7, at 1303-04.

According to one recent survey, "the number of active constitutional commissions has declined from thirty-two between 1965 and 1969, to nine between 1975 and 1981, and down to three between 1990 and 1991. Gais & Benjamin, supra note 7, at 1303.

May, supra note 1, at 5.

See e.g., N.M. STAT. ANN. §§ 12-15-1 to -7 (Repl. Pamp. 1994). Other constitutional commissions operating under statutory authority are listed in May, supra note 1, at 26-27.

See FLORIDA CONST. art. XI, § 6.

See e.g., TEXAS CONST. art. XVII, § 2 (created to prepare for the state’s convention of 1974).
See e.g., New York Executive Order 172 (May 26, 1993) (temporary commission created by governor to evaluate convention processes and start discussions about proposed revisions).

May, supra note 1, at 26-27.

Id. at 4.

Id. at 3.

Schmidt, supra note 14, at 222-23.

Id. at 224.

See Note, California’s Constitutional Amendomania, 1 Stan. L. Rev. 279, 281 (1949).

Cal. Const. art. IV, § 1C (1948, amended 1966) (current version at Cal. Const. art. II, § 8(d)). Other states have tried to curb the use of the initiative with a single-subject requirement. See, e.g., Marks, supra note 31 (recounting the history of Florida’s single-subject requirement).


See Kehler and Stern, supra note 2, at 287.

Miss. Const. art. XV, § 273; see May, supra note 1, at
3. For additional examples of the indirect initiative, see Gais & Benjamin, supra note 7, at 1309-10.

54 Thomas E. Cronin, Direct Democracy: The Politics of Initiative, Referendum and Recall 54 (1989). This notion was still in the minds of voters when Florida added an initiative provision to its state constitution in 1968 in response to "decades of abuses perpetrated by a badly malapportioned legislature . . . ." Marks, supra note 31, at 1241.


56 Cronin, supra note 54, at 55 (quoting from an 1898 speech by Edwin L. Godkin, editor of The Nation).

57 Schmidt, supra note 14, at 30 (citing a study by the California state chapter of Common Cause).

58 See Thad Beyle and Rich Jones, Term Limits in the States, in 30 Book of the States, supra note 1, at 28.

59 Cline, supra note 22, at 32-33.

60 Cronin, supra note 54, at 55-56.

L. & Pol. 313, 316 (1985). California Republicans argue that gerrymandering of electoral districts in favor of Democrats necessitated the increased use of the initiative in recent years. Id.

Arrow, supra note 55, at 22-23, offers a simple example of logrolling found in the conflict between federal budget deficit reduction and increased spending on defense and entitlement programs. Though the majority of taxpayers may strongly favor reducing the deficit over increased spending on either defense or entitlements, Congress in recent years has been unwilling to side with this majority. In order to reduce the deficit by a significant level, Congress would have to cut both defense and entitlement spending and thereby risk alienating two minority factions that together can overpower the taxpaying majority.

Gais & Benjamin, supra note 7, at 1297.

Cronin, supra note 54, at 56.

See Schmidt, supra note 14, at 30-34.

Cronin, supra note 54, at 48 (quoting J.W. Sullivan, Direct Legislation by the Citizenship through the Initiative and Referendum 5 (1893)).

Id. at 196.

Briffault, supra note 6, at 1368.

Cronin, supra note 54, at 97.

Arizona enacted a "motor voter" law by initiative in 1982, and Colorado soon followed with its own "motor voter"

\footnote{See generally Beyle \& Jones, \textit{supra note 58.} } 

\footnote{For more on the issue of tax reform initiatives, see Gais \& Benjamin, \textit{supra note 7, at 1293-94, and sources cited therein.} }

\footnote{See \textit{Schmidt, supra note 14, at 143.} }

\footnote{New State Ice Co. \textit{v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).} }

\footnote{\textit{Jack Kemp, An American Renaissance: A Strategy for the 1980s, at 189 (1979).} }


\footnote{See Arrow, \textit{supra note 55, at 46-48 (citing several studies suggesting a correlation between voter turnout and ballot initiatives).} }

\footnote{See \textit{id. at 48; Schmidt, supra note 14, at 26-27.} }

\footnote{\textit{Schmidt, supra note 14, at 27.} }

\footnote{See Arrow, \textit{supra note 55, at 49.} }

\footnote{See \textit{Schmidt, supra note 14, at 27-28.} }

\footnote{See Arrow, \textit{supra note 55, at 26-28.} }

\footnote{Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted in \textit{Great Issues in American History 115} (Richard Hofstadter ed. 1958).}

\footnote{The term "initiative industry" was coined by David Magleby in \textit{Direct Legislation, supra note 16, at 59.} }
In California, only twenty percent of the proposals that were titled actually made it to the ballot during the 1980s. Magleby, Let the Voters Decide, supra note 76, at 23, 28.

Magleby, Direct Legislation, supra note 16, at 61.

In one such example, agricultural interests "sent young people into middle class neighborhoods with large glossy pictures of Chicanos picking onions. Residents were told . . . that by signing the petition they would be 'helping farm workers.'" The real purpose of the initiative petition was to restrict farm labor organizing practices. Ertukel, supra note 61, at 319.


Magleby, Let the Voters Decide, supra note 76, at 30.

Id. at 24; see also Matthews, supra note 51, at A3.

See Minger, supra note 48, at 885. But see Daniel H. Lowenstein, California Initiatives and the Single Subject Rule, 30 U.C.L.A. L. Rev. 936, 958 (1983) (arguing that the presence of these types of logrolling in the initiative process is "probably benign").

Magleby, Let the Voters Decide, supra note 76, at 30.

Id.

Id. at 31.
This initiative was held to violate the Fourteenth Amendment of the U.S. Constitution in Reitman v. Mulkey. 387 U.S. 369 (1967).


See Burdman & Rojas, supra note 3, at All.


Magleby, Let the Voters Decide, supra note 76, at 37.

TafT, supra note 4, at 63-64.

Magleby, Direct Legislation, supra note 16, at 18-90.

See Ertukel, supra note 61, at 332.

Stanley Mosk, Speech at the Second Annual Symposium on Elections, (December 1984), quoted in Ertukel, supra note 61, at 329. As an example of a flaw in a recent initiative, Mosk makes the following observation about California’s "Victims Bill of
Rights" Initiative: "The measure provides that any prior conviction of a felony, whether by an adult or juvenile, may be used for impeachment of a witness. Now the person who sat down at the typewriter to write the measure had in mind that it would aid in convicting a defendant who had a past criminal record. But as written, it applies to all witnesses for the defense and prosecution. So if we say we had an elderly lady who was mugged and is a prosecution witness against the mugger, she may be humiliated by the defense lawyer by bringing up that as a juvenile she was convicted for burglary or shoplifting . . . . Now, knowing that this ancient past could be dredged up, would that lady willingly come forward to testify against the mugger? Obviously not." Id. at 329-30.

111 Magleby, Let the Voters Decide, supra note 76, at 43-44.

112 Id. at 46; Gais & Benjamin, supra note 7, at 1309-10; Richard B. Collins & Dale Oesterle, Structuring the Ballot Initiative: Procedures that Do and Don’t Work, 66 U. COLO. L. REV. 47, 107 (1995); Kehler & Stern, supra note 2, at 287-88 (summarizing the recommendations of three recent California studies); Cronin, supra note 54, at 237-38.

113 Gais & Benjamin, supra note 7, at 1310-13. Coupled with the idea of a permanent constitutional commission is the idea that the initiative process should include notice and comment requirements similar to those found in administrative rulemaking. Id. at 1310. Greater reliance on civil society
carries with it the notion that community organizations and the like should serve as the primary sponsors of initiative petitions. *Id.* at 1314.

114 Arrow, supra note 55, at 79; *Cronin*, supra note 54, at 234-35; Kehler & Stern, supra note 2, at 287-88.

115 Kehler & Stern, supra note 2, at 287-88; Collins & Oesterle, supra note 112, at 110.

116 Magleby, *Let the Voters Decide*, supra note 76, at 46; Collins & Oesterle, supra note 112, at 121.

117 Arrow, supra note 55, at 80; *Cronin*, supra note 54, at 235; Collins & Oesterle, supra note 112, at 115.

118 Arrow, supra note 55, at 84; Collins & Oesterle, supra note 112, at 109; Magleby, *Direct Legislation*, supra note 16, at 195.

119 Arrow, supra note 55, at 85; Kehler & Stern, supra note 2, at 287-88; *Cronin*, supra note 54, at 238.

120 *Cronin*, supra note 54, at 235-37; Kehler & Stern, supra note 2, at 287-88.

121 *Cronin*, supra note 54, at 238-39; Kehler & Stern, supra note 2, at 287-88.

122 *Cronin*, supra note 54, at 239.

123 *Id.* at 240.


125 See Boundary Backpackers v. Boundary County, No. 21287,


See Magleby, Let the Voters Decide, supra note 76, at 24 n.46.

130 The proposed amendment reduces this risk but does not
eliminate it. The legislature may still pass its own legislative proposal that serves the same function as a counter initiative. However, such a proposal cannot masquerade as an "amendment" of an initiative.

131 In this respect, the rationale for not allowing the legislature to amend initiatives parallels the rationale for not allowing the legislature to amend revisions proposed by a constitutional revision commission. See NMCRC, supra note 33, at 101.


133 Id.

134 See Magleby, Let the Voters Decide, supra note 76, at 37.

135 Gais & Benjamin, supra note 7, at 1313.

136 This requirement is intended to avoid the effect of recent court rulings that allowed "English-only" initiative petitions on the grounds that the initiative process is not protected by the federal Voting Rights Act. See Delgado v. Smith, 861 F.2d 1489 (11th Cir. 1988), cert. denied, 492 U.S. 918 (1989); Montero v. Meyer, 861 F.2d 603 (10th Cir. 1988), cert. denied, 492 U.S. 921 (1989).

137 The proposed amendment does not impose a single-subject requirement on initiated amendments. However, it is certainly within the commission's discretion to consider the number of subjects that an initiative embraces in deciding whether to
oppose it. There are two main reasons why the single subject requirement was omitted from the proposed amendment. First, such a requirement may impose an arbitrary barrier to comprehensive reform. Second, there are no clear standards for enforcing such a requirement. See Marks, supra note 31, at 1289 (commenting on Florida’s struggle to interpret its single-subject requirement). Hence, the requirement is superfluous and probably amounts to the same thing as allowing the commission to exercise its discretion.

For criticism of counter initiatives, see Magleby, Let the Voters Decide, supra note 76, at 24.

Subsection (K) of the proposed amendment specifically prohibits initiatives that denigrate the constitutional rights of minorities. However, the commission has some discretion in defining what denigrates minority rights, and the question is ultimately to be decided by the courts.

See SCHMIDT, supra note 14, at 287-94. Notably absent from the list of initiatives that obtained the votes of supermajorities are California’s Proposition 187, see LULAC v. Wilson, 908 F. Supp. 755, 763 (C.D. Cal. 1995) (passed by a vote of 59% to 41%), and Colorado’s anti-gay initiative. See Romer v. Evans, 882 P.2d 1335, 1338 (Colo. 1994) (passed by a vote of 53.4% to 46.6%), cert. granted, 115 S. Ct. 1092 (1995).

Lobbying and ex parte communications could be the subject of administrative rulemaking or implementing legislation, however.

For additional guidance, the commission and the courts
may turn to Justice Linde's recent listing of initiatives that are suspect because they target minorities. See Linde, supra note 4, at 41-42. However, the restrictions in subsection (K) do not spring from Justice Linde's argument that anti-minority initiatives violate the guarantee clause of the U.S. Constitution.
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<td>Arizona Const. art. IV, pt. 1; art. XXI, § 1</td>
<td>Petition by 15% of qualified electors filed with Sec'y of State 4 mos. before election.</td>
<td>Court implies single subject rule from general provision requiring separate votes on each amendment.</td>
<td>Same as for other proposed const. amends.</td>
<td>Neither governor nor legislature can veto, repeal or amend; provisions are self-executing.</td>
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<td>Arkansas Const. amend. VII</td>
<td>Petition by 10% of legal voters filed with Sec'y of State 4 mos. before election, including 5% of voters in 15 counties; no prohibition on paying people to collect signatures.</td>
<td>AG prepares title and summary prior to circulation of petition; initiative measure may not embrace more than one subject.</td>
<td>Petitioners must publish in paper 30 days before filing at their own expense.</td>
<td>Governor cannot veto and legislature cannot amend or repeal.</td>
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<td>California Const. art. II, §§ 8, 10; art. XVIII, § 3</td>
<td>Petition by 8% of electors filed with Sec'y of State at least 131 days before election; petition must be submitted to AG before circulation.</td>
<td>Single subject requirement.</td>
<td>Ballot information booklet published by nonpartisan research staff of General Assembly.</td>
<td>Legislature created com'n to review initiative process in 1991.</td>
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<td>Colorado Const. art. V, § 1; art. XIX</td>
<td>Petition by 5% of voters filed with Sec'y of State at least 3 months prior to election.</td>
<td>One subject rule.</td>
<td>Exception to one subject rule for amends. limiting power of gov't to raise revenue.</td>
<td>No veto or amendment by legislature; newly added section requiring 60% approval.</td>
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<tr>
<td>Florida Const. art. XI</td>
<td>Petition by 8% of voters, including 8% of votes cast in half of cong. districts</td>
<td>One subject rule.</td>
<td>Limited to structural and procedural subjects contained in legislative article.</td>
<td>Requires three-fifths majority of those voting on amendment or majority of those voting in election.</td>
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<td>Massachusetts Const. pt. 2, c. 6, art. X; amend. art. XLVIII</td>
<td>Petition by 10 voters to AG for review, then 3% of voters with no more than one fourth from one county, then to legislature.</td>
<td>Only subjects which are related or are mutually dependent.</td>
<td>List of subjects excluded from initiative includes: religion, judges, appropriations, individual rights.</td>
<td>Proposed amendment, existing constitutional provisions that would be changed by it, and ballot question must be published, posted at polling places and furnished to media.</td>
<td>legislature must approve at two sessions and may offer substitute, petitioners can amend initiative, requires at least 30% of total vote at election.</td>
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<td>Michigan Const. art. XII, § 2</td>
<td>Petition by 10% of registered electors filed as authorized by law.</td>
<td>Must contain 100-word statement of purpose.</td>
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<td>Constitutional initiative is separate and distinct from statutory initiative provision.</td>
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<td>Mississippi Const. art. XIV, § 273</td>
<td>Petition by 12% of qualified voters in a 12-month period, no more than one fifth from one cong. district, filed with Sec'y of State, who then files with legislature.</td>
<td>Sponsor must identify amount, source, reduction and/or reallocation of revenue required to implement the initiative, legislative budget officer also does fiscal analysis.</td>
<td>Initiatives may not: amend Bill of Rights, Public Employees Retirement System, right-to-work provision, or initiative process itself.</td>
<td>If legislature amends or passes an alternative, then both the initiative and the legislative proposal appear on the ballot and voters can choose between them.</td>
<td>Legislation may adopt, amend or reject, or take no action on an initiative, but the original initiative still appears on the ballot, requires at least 40% of total vote at election.</td>
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<td>Missouri Const. art. III, §§ 49-53; art. XII</td>
<td>Petition by 8% of legal voters in each of two-thirds of the cong. districts filed with Sec'y of State at least 4 months before election.</td>
<td>Must contain enacting clause and full text of measure; may not contain more than one amended and revised article of constitution or one new article concerning not more than one subject.</td>
<td>Initiative shall not be used for appropriations or for any other purpose prohibited by the constitution.</td>
<td>If possible, each proposed amendment published once a week for two consecutive weeks in two newspapers of different political faith in each county, lasting until 30 to 15 days before election.</td>
<td>Constitutional initiative is separate and distinct from statutory initiative provision.</td>
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<td>Montana Const. art. III, § 4; art. XIV</td>
<td>Petition by 10% of qualified electors including 10% in each of two-fifths of cong. dists. filed with Sec'y of State.</td>
<td>Petitions must contain full text of proposed amendment.</td>
<td></td>
<td>Sec'y of State shall cause to be published as provided by law twice each month for two months prior to election.</td>
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<td>Nebraska Const. art. III, §§ 1-4; art. XIV</td>
<td>Petition by 10% of registered voters including 5% in each of two-fifths of the counties filed with Sec'y of State.</td>
<td>Must be nonpartisan; cannot indicate or suggest that initiative has been approved or endorsed by political party.</td>
<td>Proposed amendment and any explanatory matter shall be published in newspaper in each county on three separate occasions.</td>
<td>Governor cannot veto; self-executing; requires at least 35% of total vote at election.</td>
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<td>Nevada Const. arts. XVI, XIX</td>
<td>Petition filed with Sec'y of State and then refiled after circulation; must have at least 10% of registered voters including 10% in not less than 75% of counties.</td>
<td>Mandatory enacting clause.</td>
<td></td>
<td>Majority of voters must approve proposed amendment at two consecutive general elections before it becomes law.</td>
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<td>North Dakota Const. art. III</td>
<td>Petition with 25 sponsors filed with Sec'y of State for approval; may be circulated only by electors; requires signature of electors amounting to 4% of state's population.</td>
<td>Petition must be &quot;in proper form&quot; and contain names and addresses of sponsors as well as full text of proposed amendment.</td>
<td></td>
<td>Self-executing; Se'cy of State's decisions re: petition process subject to judicial review by supreme court but court cannot invalidate a measure after it has been approved by voters.</td>
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<td>Ohio Const. art. II, §§ 1a - 1g, art. XVI</td>
<td>Petition by 10% of electors filed with Sec'y of State, including at least 5% in each of half the state's counties.</td>
<td>Mandatory enacting clause.</td>
<td>Initiative not to be used to pass law classifying property for purpose of levying different rates of taxation.</td>
<td>Proposed amendment together with ≤ 300 words of arguments and explanations for and against, published once a week for three consecutive weeks before election in at least one newspaper in each county.</td>
<td>Self-executing; but actual ballot language (including explanation of purpose and effect) prescribed by Ohio Ballot Board.</td>
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<td>Oklahoma Const. art. V, §§ 1-8; art. XVII</td>
<td>Petition by 15% of legal voters filed with Sec'y of State.</td>
<td>Single subject restriction appears in provision regarding amendments proposed by legislature but written in general terms that could apply to initiatives as well.</td>
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<td>Legislature to implement the initiative provision with laws to prevent corruption in making, procuring and submitting initiative petitions.</td>
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<td>Oregon Const. art. IV, § 1; art. XVII</td>
<td>Petition by 8% of voters who voted in last gubernatorial election filed with Sec'y of State at least 4 months before election.</td>
<td>Proposed amendment shall embrace one subject only and matters properly connected therewith.</td>
<td></td>
<td>Allows for voting on alternatives: legislative revision vs. initiative.</td>
<td>Legislative proposals can avoid the single subject rule if the proposed revision gets two-thirds supermajority of all members in each house.</td>
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<tr>
<td>South Dakota Const. art. III, § 1; art. XXIII</td>
<td>Petition filed with text and names and addresses of sponsors at least one year before election, then refiled with signatures of at least 10% of total votes cast in last gubernatorial election.</td>
<td>May amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment.</td>
<td></td>
<td>Initiative is presented to the legislature.</td>
<td>Legislature may provide for withdrawal of an initiated amendment by its sponsors at any time prior to its submission to the voters.</td>
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<td>Model State Const. art. XII, § 12.01</td>
<td>Variable percentage of voters required, petition is filed with secretary of the legislature.</td>
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<td>A vote in favor of the initiative by a majority of the members of the legislature is required to put it on the ballot; legislature may provide procedure for sponsors of initiative to withdraw it.</td>
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