

# Reforming Direct Democracy: Lessons From Oregon

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*Direct democracy was originally a progressive instrument designed to break the power of corrupt state governments and corporations. Today, it has become a tool of corporations and well-funded interest groups that claim to speak for the people but instead seek only to further their own agendas. Oregon has seen both the heights to which a state can rise under direct democracy and the depths to which it can sink. Ballot measures that mandate tax cuts and funding for programs have taken budgets out of the hands of state legislators. Initiative activists have utilized the system to discriminate against minorities. Fraudulent signature gathering has shaken the public's confidence in the system's integrity. In response, progressives have sought to rein in direct democracy, or at least minimize the harms with which it has become synonymous.*

*Toward that end, Oregon state officials have increased the difficulty of placing initiatives on the ballot. The Oregon Supreme Court recently interpreted the state constitution to bar initiatives that make more than one constitutional amendment at a time. These efforts set a positive example for other states to follow. But Oregon and other direct democracy states must do more. They should, for instance, improve their tracking and publication of ballot measure campaign finances and prohibit initiatives that discriminate against minorities or commandeer state funding. These and other steps would cure most of direct democracy's defects while retaining its advantages and preserving its progressive heritage.*

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## INTRODUCTION

In the late nineteenth century, railroads and large trust corporations controlled state and federal legislation through graft and party-machine politics.<sup>1</sup> Tired of the representative democracy status quo, progressives<sup>2</sup> looked to Switzerland, where a recently enacted system of direct democracy allowed citizens to vote directly on legislative matters.<sup>3</sup> The progressives teamed with women's suffragists, prohibitionists, backers of "good government," anti-monopolists, single taxers,<sup>4</sup> labor unions, and farmer groups to form a "motley band of reformers and radicals" under the banner "equal rights to all, special privileges to none."<sup>5</sup> They believed that if they could bypass the legislature, they could bring about a "bloodless social revolution"<sup>6</sup> leading to more just laws and better government. By 1898, they had convinced South Dakota to become the first state to allow for direct democracy.<sup>7</sup> By 1918, twenty-one other states had followed South Dakota's lead.<sup>8</sup>

Initially, the success of the progressives' coalition was stunning. Not only did direct democracy spread throughout the country, especially in the

1. THOMAS GOEBEL, *A GOVERNMENT BY THE PEOPLE: DIRECT DEMOCRACY IN AMERICA, 1890-1940*, at 18-24 (2002); STEVEN L. PIOTT, *GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA I* (2003).

2. A "progressive" for the purposes of this Comment is one who advocates the enforcement of rights necessary to respect the dignity of each individual, actual and legal equality for all, freedom from criminal sanction except where one has harmed another person, state action to protect people and the environment from the harmful side-effects of capitalism, and "good government." Good government advances what is best for society with a maximum of efficiency, intelligence, and wisdom, and a minimum of partisanship, parochialism, political favors, and other factors that hinder lawmakers from achieving that goal. Early backers of good government pushed the commission form of city governance, city-wide elections, nonpartisan elections, corrupt practices laws, reliance on experts, and other similar measures. GOEBEL, *supra* note 1, at 72, 83.

3. RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 28 (2002). Switzerland adopted the system in reaction to democratic revolutions. PIOTT, *supra* note 1, at 2-3. For a brief description of direct democracy in Switzerland and around the world, see PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS* 46-70 (1998).

4. Single taxers, in the words of Henry George, their most able leader, sought to "abolish all taxes save one single tax levied on the value of land, irrespective of the value of the improvements in or on it." Henry George, *The Single Tax: What It Is and Why We Urge it*, Address (1890), at [http://members.aol.com/\\_ht\\_a/singletax](http://members.aol.com/_ht_a/singletax) (last visited Apr. 15, 2005).

5. Goebel, *supra* note 1, at 12, 49; *see also id.* at 35-49, 75-79; THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 243-50 (1989) (describing the coalition); Larry J. Sabato et al., *A Call for Change: Making the Best of Initiative Politics*, in *DANGEROUS DEMOCRACY?: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* 179, 180 (Larry J. Sabato et al. eds., 2001) [hereinafter *DANGEROUS DEMOCRACY?*] (same).

6. ELLIS, *supra* note 3, at 28; *see generally* PIOTT, *supra* note 1, at 1-15 (describing the rise of the movement in the United States); GOEBEL, *supra* note 1 (same).

7. DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 16 (1989). For a history of South Dakota's adoption of direct democracy, see PIOTT, *supra* note 1, at 16-32.

8. SCHMIDT, *supra* note 7, at 16. In addition, some states approved direct democracy in non-binding advisory referenda only to see the state legislature fail to enact the reform. *Id.* at 17.

West, it also led to many substantive reforms. The Oregon experience is illustrative. In 1902, Oregon became the third state in the nation to adopt a direct democracy system when it approved the initiative and its counterparts, the referendum and the referral.<sup>9</sup> Two years later, Oregon became the first state to place an initiative on the ballot.<sup>10</sup> In 1906, the state extended direct democracy to local governments, and in 1908, voters approved the recall, both through initiatives.<sup>11</sup> By 1909, Oregon had seen forty-eight statewide ballot measures.<sup>12</sup> Early progressive victories secured in Oregon through initiatives included the direct primary, mandatory primaries for presidential candidates, the direct election of U.S. senators, a corrupt practices act, a ban on poll taxes, and women's suffrage.<sup>13</sup> Together, the reforms became known as the "Oregon System."<sup>14</sup>

Originally, backers of direct democracy believed that it would be "the medicine of the constitution, cautiously administered when occasion might require; not its daily bread."<sup>15</sup> Today, however, professional direct democracy firms gather signatures and shop ballot titles while interest groups spend millions on advertising and political efforts.<sup>16</sup> More recently, conservative interests have commandeered direct democracy to slash taxes<sup>17</sup> and discriminate against homosexuals.<sup>18</sup> These developments have eroded

9. Dennis Polhill, *Democracy's Journey, in THE BATTLE OVER CITIZEN LAWMAKING* 5, 13 (M. Dane Waters ed., 2001). These terms are defined in Part I.A. Oregon's eleven-to-one margin in favor of direct democracy remains the greatest degree of voter approval of the system in U.S. history. SCHMIDT, *supra* note 7, at 16-17.

10. Polhill, *supra* note 9, at 13.

11. OREGON BLUE BOOK, INITIATIVE, REFERENDUM, AND RECALL, available at <http://bluebook.state.or.us/state/elections/elections06.htm> (last visited Apr. 15, 2005).

12. Howard R. Ernst, *The Historical Role of Narrow-Material Interests in Initiative Politics, in DANGEROUS DEMOCRACY?*, *supra* note 5, at 1, 10.

13. *Id.* at 7; GOEBEL, *supra* note 1, at 82. Other early progressive victories in Oregon included prohibition, abolition of the death penalty, increased school funding, better working conditions, environmental protections, and public power. OREGON BLUE BOOK, *supra* note 11. However, various progressive proposals also failed, including the single tax (which failed seven times) and a measure that would have taxed large inheritances to fund a state program by which every worker who wanted a job would be guaranteed one. *Id.*; Initiative & Referendum Institute, Oregon, at <http://www.iandrinstute.org/Oregon.htm> (last visited Apr. 15, 2005) [hereinafter Oregon].

14. See, e.g., ALLEN H. EATON, THE OREGON SYSTEM: THE STORY OF DIRECT LEGISLATION IN OREGON 1-6 (1912).

15. JAMES D. BARNETT, THE OPERATION OF THE INITIATIVE, REFERENDUM, AND RECALL IN OREGON 78 (1915).

16. See generally ELIZABETH R. GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION (1999) (describing this trend nationally); David McCuan et al., *California's Political Warriors: Campaign Professionals and the Initiative Process, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 55-79 (Shaun Bowler et al. eds., 1998) [hereinafter CITIZENS AS LEGISLATORS] (describing this trend in California).

17. Anti-tax activists have utilized direct democracy so much in the last thirty years that they have become the subject of an entire book. DANIEL A. SMITH, TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY (1998).

18. In 2004, voters in thirteen states passed ballot measures banning same-sex marriage. Kate Zernike, *Groups Vow Not to Let Losses Dash Gay Rights*, N.Y. TIMES, Nov. 14, 2004, at A30. For a

direct democracy's foundations, necessitating reform. Progressives have attempted to rein in the system, or at least to adjust it so as to limit its negative effects. Proposals to decrease ballot access and increase judicial scrutiny of initiatives have sparked much debate.<sup>19</sup>

This Comment seeks to add to that debate by highlighting Oregon's experience with direct democracy reform. Part I of the Comment briefly describes the history and present role of direct democracy in the United States, using Oregon as a case study. Part II identifies the problems of direct democracy, again relying on Oregon's experience to illustrate broader themes. Part III analyzes recent efforts to curb direct democracy, particularly those in Oregon. Part IV examines the desirability of various proposed reforms of the ballot measure system.

## I

### HOW DIRECT DEMOCRACY WORKS

#### A. *Direct Democracy in the United States*

Direct democracy consists of several types of proposed laws (known as ballot measures, propositions, issues, or questions),<sup>20</sup> which require voter approval for enactment.<sup>21</sup> Once enacted, a ballot measure creates, changes, or repeals a law; however, some states only allow advisory ballot measures that carry no legal force.<sup>22</sup> There are four kinds of ballot measures: initiatives, referenda, referrals, and recalls. Initiatives are citizen-created statutory changes or constitutional amendments that are placed on the ballot after collection of a set number of citizens' signatures.<sup>23</sup> Direct initiatives, the most common type, bypass the legislature completely, while indirect initiatives must be submitted to the legislature for consideration

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comparison of early progressive and conservative initiatives in Oregon, see BARNETT, *supra* note 15, at 117-20.

19. See, e.g., THE BATTLE OVER CITIZEN LAWMAKING, *supra* note 9 (featuring several arguments about numerous direct democracy reforms).

20. See, e.g., OHIO REV. CODE ANN. § 3519.21 (Supp. 2003) (referring to ballot measures as propositions, issues, or questions); OR. REV. STAT. § 250.035 (2003) (referring to them as measures).

21. CRONIN, *supra* note 5, at 2; DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 35-36 (1984).

22. For example, in 1902 and 1910 Illinoisans approved advisory referenda encouraging adoption of the initiative. SCHMIDT, *supra* note 7, at 16-17. The legislature did not follow up on direct democracy until 1970, when a constitutional convention approved it as part of the new state constitution. *Id.*

23. Twenty-four states and the District of Columbia permit initiatives. Those states, listed in order of adoption, are South Dakota, Utah, Oregon, Nevada, Montana, Oklahoma, Maine, Michigan, Missouri, Colorado, Arkansas, California, Arizona, Nebraska, Idaho, Ohio, Washington, Mississippi, North Dakota, Massachusetts (all before 1918), Alaska (1956), Wyoming (1968), Illinois (1970), Florida (1972), and the District of Columbia (1977). Initiative & Referendum Institute, Statewide I&R, at [http://www.iandrinstute.org/statewide\\_i&r.htm](http://www.iandrinstute.org/statewide_i&r.htm) (last visited Apr. 15, 2005) [hereinafter Statewide I&R]; SCHMIDT, *supra* note 7, at 16-17. Of the states that allow initiatives, six allow only statutory initiatives (Utah, Maine, Idaho, Washington, Alaska, and Wyoming); three allow only initiative amendments (Mississippi, Florida, and Illinois); and the other fifteen allow both. Statewide I&R, *supra*.

first.<sup>24</sup> As with initiatives, referenda proponents must gather a set number of citizens' signatures to place a referendum on the ballot, but referenda force statewide votes on laws passed by the legislature during its last session.<sup>25</sup> Referrals are laws and amendments that the legislature itself places on the ballot, and which may only be passed with the electorate's support.<sup>26</sup> Finally, a recall allows citizens to remove public officials from office directly, without resort to impeachment.<sup>27</sup>

States' use of direct democracy varies.<sup>28</sup> Not only do most states allow for some forms of direct democracy but not others, the frequency of usage also differs from state to state. For instance, in the twenty-four states that have adopted the initiative, citizens in seven states voted on less than twenty-five statewide ballot measures each before 1996, and voters in eleven more states faced less than 100 ballot measures each.<sup>29</sup> In contrast, there were between 118 and 170 statewide initiatives in each of four states: Washington, Arizona, Colorado, and North Dakota.<sup>30</sup> Surpassing all of these, there were 257 statewide initiatives in California and 292 in Oregon.<sup>31</sup> In all, voters have approved approximately 40% of the more than

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24. The legislature is typically given a set period of time in which to consider the law, ranging from forty days to an entire legislative session. DUBOIS & FEENEY, *supra* note 3, at 36. If the legislature approves the law, most states require it to submit the measure to the people as well. *Id.* at 35 n.12. If the legislature does not pass the law, then the measure goes to the people either directly or after proponents have gathered a set number of additional signatures. *Id.* at 35-37. In some states, the legislature may also choose to submit both its own version of the law and the initiative to the people. *Id.*

Of the eighteen states that allow initiative amendments, Massachusetts and Mississippi require indirect initiatives while the other states require direct initiatives. Statewide I&R, *supra* note 23. Of the twenty-one states that permit initiative statutes, seven allow only indirect initiatives, twelve allow only direct initiatives, and Utah and Washington allow both. *Id.* In all, state legislatures have only adopted 19% of the indirect statutory initiatives they have considered, generally in the form of a law substantially similar to the initiative; in another 4% of the cases, they placed an alternative measure on the ballot along with the initiative. DUBOIS & FEENEY, *supra* note 3, at 88-90.

25. Twenty-four states and the District of Columbia allow referenda. Those states are Kentucky, Maryland, and New Mexico (all before 1918), plus all of the states that allow initiatives except Missouri, Florida, and Illinois. Statewide I&R, *supra* note 23; SCHMIDT, *supra* note 7, at 16-17. In contrast, Minnesotans rejected the initiative and referendum all three times they have appeared on the state ballot. SCHMIDT, *supra* note 7, at 16-18.

26. Today, every state allows referrals. Statewide I&R, *supra* note 23. In the early days of nationhood, many states passed their constitutions through referrals. Polhill, *supra* note 9, at 12.

27. Nine states, the District of Columbia, and several U.S. territories and possessions permit the recall of all elected state officials; another six states exempt judges from recall. CRONIN, *supra* note 5, at 125-27. In addition, at least thirty-six states allow for the recall of local officials. *Id.*

28. In this Comment, I focus on statewide initiatives as opposed to referenda, referrals, and recalls. For more information on local ballot measures, see Tari Renner, Initiative & Referendum Institute, *Local Initiative & Referendum in the U.S.*, at <http://www.iandrinstute.org/Local%20I&R.htm> (last visited Apr. 15, 2005). For more information on referenda, see JOSEPH F. ZIMMERMAN, *THE REFERENDUM: THE PEOPLE DECIDE PUBLIC POLICY* (2001). For more information on the recall, see JOSEPH F. ZIMMERMAN, *THE RECALL: TRIBUNAL OF THE PEOPLE* (1997).

29. DUBOIS & FEENEY, *supra* note 3, at 30.

30. *Id.*

31. *Id.*

2,000 initiatives that have appeared on statewide ballots in the last 100 years.<sup>32</sup>

While voters used direct democracy frequently in the first two decades of the twentieth century, the public saw few ballot measures during the 1920s.<sup>33</sup> The Great Depression led voters to utilize initiatives more often, but once America entered World War II, direct democracy fell out of use and did not become popular again until the 1970s.<sup>34</sup> In 1978, California's revolutionary anti-tax Proposition 13 once again catapulted the initiative to the forefront of the national public discourse, and initiative use has been frequent throughout the country ever since.<sup>35</sup> Recurring subjects have included tax and government spending cuts, funding for schools and other programs, campaign financing and other political reforms, environmental protections, nuclear power, minority rights, and anti-crime measures.<sup>36</sup>

### *B. Direct Democracy in Oregon*

It is easiest to show the workings of direct democracy through a case study of one state's experiences; for this, Oregon is an ideal candidate.<sup>37</sup> One of the first states to adopt direct democracy, Oregon has remained a leader in its use ever since. Oregon has had more statewide initiatives than any other state (318 between 1904 and 2000), the highest average number of initiatives per election (6.6 per general election), and the most statewide initiatives in a single year (27 in 1912).<sup>38</sup> Further, Oregon has enacted many of its signature laws through direct democracy, including those that require government bodies to conduct open meetings, permit physician-assisted suicide, allow adoptees to see their original birth certificates, and

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32. See *id.* at 32 (counting more than 1,800 as of 1996). By contrast, of the forty-seven attempts between 1918 and 1992 to amend the Massachusetts constitution through indirect initiatives, only two succeeded. DUBOIS & FEENEY, *supra* note 3, at 90.

33. Ernst, *supra* note 12, at 22.

34. *Id.* In the 1970s there was even a significant movement to establish nationwide direct democracy. See SCHMIDT, *supra* note 7, at 171-82.

35. *Id.*

36. See, e.g., OREGON BLUE BOOK, *supra* note 11 (listing Oregon's ballot measures); SMITH, *supra* note 17 (describing the anti-tax movement); SCHMIDT, *supra* note 7, at 51-58 (describing a California campaign finance reform initiative); *id.* at 44-51, 95-104 (describing environmental initiatives nationwide); *id.* at 63-95 (describing nuclear power initiatives nationwide); ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES (Stephanie L. Witt & Suzanne McCorkle eds., 1997) (describing anti-homosexual initiatives nationwide) [hereinafter ANTI-GAY RIGHTS]. Other common subjects include regulation of alcohol, fishing, and hunting, formation of counties and local governments, and pension and veterans' funds. See OREGON BLUE BOOK, *supra* note 11; JOSEPH F. ZIMMERMAN, THE INITIATIVE: CITIZEN LAW-MAKING 99 (1999).

37. Most of the literature on direct democracy focuses on California, although Oregon has also been the subject of some recent direct democracy research and analysis. See, e.g., B. Carlton Grew, *Governing by Initiative: The Rise and Fall—and Rise Again—of Oregon's Initiative Ballot Measure*, 61 OR. ST. B. BULL. 9 (2000).

38. Oregon, *supra* note 13.

tie the minimum wage to inflation.<sup>39</sup> Finally, direct democracy trends in Oregon reflect those throughout the nation.<sup>40</sup> Like many other states, Oregon used the initiative to create a medical marijuana program,<sup>41</sup> establish term limits for Oregon's federal and statewide offices,<sup>42</sup> debate the issue of nuclear power,<sup>43</sup> adopt anti-crime laws<sup>44</sup> and anti-homosexual measures,<sup>45</sup> and severely cut back taxes.<sup>46</sup>

To place a statutory initiative on the ballot, Oregon requires petitioners to gather signatures equal in number to 6% of the number of votes cast in the last gubernatorial election.<sup>47</sup> For initiative amendments, the threshold

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39. OREGON BLUE BOOK, *supra* note 11. Further, Oregonians have rejected many significant laws, including some that would have created a state universal healthcare system, mandated labeling of genetically modified foods, prohibited the use of public funds for abortion, created school vouchers, denied pornography First Amendment protection, and capped damages in tort cases. *Id.*

40. See Ernst, *supra* note 12, at 22-25 (using Oregon's 1994 ballot to analyze national trends).

41. OREGON BLUE BOOK, *supra* note 11. Ten other states have done the same, although these laws may be overturned soon by the U.S. Supreme Court. See *Supreme Court is Set to Consider Medical Marijuana*, N.Y. TIMES, Nov. 28, 2004, at A40.

42. OREGON BLUE BOOK, *supra* note 11. The Oregon Supreme Court struck down the measure on procedural grounds. See *infra* notes 226-33 and accompanying text. Between 1987 and 1992, twenty-one states voted on term limits measures. Caroline J. Tolbert, *Public Policy and Direct Democracy in the Twentieth Century: The More Things Change, the More They Stay the Same*, in THE BATTLE OVER CITIZEN LAWMAKING, *supra* note 9, at 48-49.

43. Between 1976 and 1992, Oregonians voted on the issue of nuclear power ten times. OREGON BLUE BOOK, *supra* note 11; see also SCHMIDT, *supra* note 7, at 63-95 (discussing nuclear power initiatives in several states).

44. OREGON BLUE BOOK, *supra* note 11. The first package of such laws came in 1984. *Id.* In 1986, voters added a "victim's bill of rights" law. *Id.* In 1994, voters passed Measure 11, which added mandatory sentences and required state inmates to work full-time. *Id.* In 1996, voters revised the principles governing state criminal law. *Id.* They also expanded the "victim's bill of rights." *Id.* In 1999, they constitutionalized the "victim's bill of rights" and voted on a number of other "tough on crime" laws, passing some while rejecting others. *Id.* In 2000, they refused to repeal Measure 11. *Id.* Similarly, California has faced several "tough on crime" ballot measures, ranging from "three strikes" to "victim's bill of rights" laws. See JOHN M. ALLSWANG, THE INITIATIVE AND REFERENDUM IN CALIFORNIA, 1898-1998, at 124-25, 128-29, 177-81, 192-93 (2000).

45. See discussion *infra* pp. 1209-12.

46. See discussion *infra* pp. 1206-09. Between 1970 and 1992, fourteen states, including Oregon, voted on measures requiring a two-thirds vote of the legislature to enact tax increases, and four states voted on measures requiring all tax increases to be approved by voters. Tolbert, *supra* note 42, at 48-49.

47. OR. CONST. art. IV, § 1(2)(b). In 2004, this amounted to 75,630 signatures in Oregon. BILL BRADBURY, HOW TO QUALIFY A BALLOT MEASURE IN OREGON (2004), at <http://www.ballot.org/states/Oregon.pdf>. Fifteen of the twenty-two states that allow statutory initiatives set their signature threshold in relation to the number of votes in the last gubernatorial election. DUBOIS & FEENEY, *supra* note 3, at 33-34. Three states use the number of votes in the last election, Colorado uses the last vote for secretary of state, Oklahoma uses the highest vote total for a statewide officer, North Dakota uses the total population, and the District of Columbia uses the number of registered voters. *Id.* For the direct initiative, the signature thresholds vary from 2% of the respective measure (North Dakota) to 5% (California, Colorado, Missouri, Montana, South Dakota, and the District of Columbia) to 10% (Arizona and Idaho). *Id.* For the indirect initiative, the threshold ranges from 3% in Ohio and Massachusetts to 15% in Wyoming. *Id.* In Washington and Utah, which have both indirect and direct statutory initiatives, the threshold is the same for both. *Id.* Additionally, in some indirect initiative

is 8%;<sup>48</sup> for referenda, only 4% is required.<sup>49</sup> Any voter who is entitled to vote on an initiative or referendum once it is placed on the ballot may sign a petition to place that measure on the ballot.<sup>50</sup> To initially qualify for placement on the ballot, petitions for proposed initiatives must include twenty-five signatures, the names and addresses of up to three chief petitioners, and the “full text of the proposed law or amendment.”<sup>51</sup> Petitioners must also state whether they intend to pay signature gatherers, and if that changes, they must notify the secretary of state.<sup>52</sup> Further, petitioners must establish a political committee, designate a treasurer, and state how they “intend to solicit funds.”<sup>53</sup> The secretary of state reviews each petition, with public comment, to ensure that the petition and initiative comply with Oregon procedural law.<sup>54</sup> If the secretary determines that either does not, the petitioners may not gather additional signatures; petitioners may, however, file suit challenging the secretary’s decision.<sup>55</sup> If the secretary or a

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states, if the legislature fails to pass the law and its proponents want to place it on the ballot, the threshold increases by between 0.5% (Massachusetts) and 5% (Utah). *Id.*

48. OR. CONST. art. IV, § 1(2)(c). In 2004, this amounted to 100,840 signatures in Oregon. BRADBURY, *supra* note 47. In every state except Nevada and Colorado, the signature threshold for initiative amendments is higher than that for statutory initiatives. DUBOIS & FEENEY, *supra* note 3, at 34-35. The size of this difference ranges from 2% or 3% (Arkansas, California, Michigan, Missouri, Nebraska, North Dakota, and Oregon) to 5% (Arizona, Montana, and South Dakota) to 7% (Oklahoma). *Id.* Of those states that only allow initiative amendments, Illinois and Florida require 8% of the number of votes in the last gubernatorial and presidential election, respectively, and Mississippi requires 12% of the number of votes in the last gubernatorial election. *Id.*

49. OR. CONST. art. IV, § 1(3)(b). In every state, the threshold for referenda either matches or is less than that for statutory initiatives, with the difference usually being commensurate to the difference between the threshold for statutory initiatives and initiative amendments. *See* MAGLEBY, *supra* note 21, at 43.

50. OR. REV. STAT. § 250.025(1) (2003) (all subsequent statutory citations are to the Oregon Revised Statutes unless otherwise noted). Recently, the secretary of state has interpreted this to mean that the signatures of inactive voters do not count for purposes of petition certification. *See infra* notes 209-12 and accompanying text. Voters can remove their signatures at any time before the petition is turned over to the secretary of state’s office. § 250.025(2).

51. § 250.045(3); OR. CONST. art. IV, § 1(2)(d). These requirements are similar to those of other states.

52. § 250.045(4). The Oregon Court of Appeals recently upheld the state Employment Department’s determination that petitioners must pay signature gatherers as employees and not as independent contractors, guaranteeing the gatherers benefits they otherwise might not receive. *Canvasser Servs., Inc. v. Employment Dept.*, 987 P.2d 562 (Or. Ct. App. 1999). This ruling increased the cost of hiring signature gatherers, and thus of placing measures on the ballot, a result that irks many professional petitioners. *See* ELLIS, *supra* note 3, at 72 (describing the ruling and reactions to it).

53. § 260.118. Only North Dakota and South Dakota do not require campaign committees to register with the state. DUBOIS & FEENEY, *supra* note 3, at 190.

54. OR. ADMIN. R. 165-014-0028 (2003). Other states that require this review designate other officers to perform the task, such as the lieutenant governor, the attorney general, a governmental board, or the petitioners themselves. DUBOIS & FEENEY, *supra* note 3, at 38-39.

55. OR. ADMIN. R. 165-014-0028. Oregon allows for pre-election review in the context of procedural challenges. *Dale v. Keisling*, 999 P.2d 1229, 1231 (Or. Ct. App. 2000). But pre-election review for substantive constitutional infirmity is not allowed. *State ex rel. Carson v. Kozer*, 270 P. 513 (Or. 1928). Post-election review is provided for by section 250.044. The law is similar in most states,



court declares the petition and initiative lawful, signature gathering may resume.<sup>56</sup> Petitioners may amend their initiative at any point prior to completion of the ballot title.<sup>57</sup>

Signature gatherers must certify that all signatures were gathered in their presence and that they believe each signatory is an eligible voter.<sup>58</sup> Signature gatherers must also have a copy of the full initiative on them at all times while gathering signatures for signatories to review.<sup>59</sup> Signature sheets must contain ballot titles; captions; and, if signature gatherers are being paid, a notice stating: "Some Circulators For This Petition Are Being Paid."<sup>60</sup> Each sheet may only contain signatures from voters of one county.<sup>61</sup> It is a crime for petitioners and signature gatherers to lie about petitions or collect false or invalid signatures.<sup>62</sup> It is also a crime for signatories to falsely, invalidly, or twice sign a petition.<sup>63</sup> It is illegal to pay and to accept payment for signing or not signing a petition.<sup>64</sup> It is also illegal to buy and sell signature sheets.<sup>65</sup> If a chief petitioner is aware that his or her signature gatherers have violated any statute, he or she is strictly liable for that violation unless he or she notifies the secretary of state.<sup>66</sup> Further, false advertising regarding initiatives is prohibited.<sup>67</sup>

Once enough signatures have been gathered, petitioners submit them to the secretary of state for signature review.<sup>68</sup> The secretary verifies signatures within thirty days by thoroughly examining a random sampling.<sup>69</sup> If

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although a few do allow for pre-election review of a ballot measure's substantive constitutionality. DUBOIS & FEENEY, *supra* note 3, at 39-45; *see also infra* notes 366-70 and accompanying text.

56. Although there is no statutory period in which all the signatures must be gathered, to place a measure on the next ballot, petitioners generally have two years between election cycles to gather the necessary number of signatures and give them to the secretary of state. BRADBURY, *supra* note 47. Of course, if a petitioner did not mind waiting until the next election cycle, the petitioner would have a longer period in which to collect signatures. Several states also have no time limit for signature gathering. Caroline J. Tolbert et al., *Election Law and Rules for Using Initiatives*, in *CITIZENS AS LEGISLATORS*, *supra* note 16, at 27, 30 (1998). Several other states do have statutory time limits, however, ranging from ninety days in Oklahoma to four years in Florida. ZIMMERMAN, *supra* note 36, at 36-37.

57. § 250.045(2).

58. § 250.045(7).

59. § 250.045(8).

60. § 250.045(5)(b)(B). Signature sheets, like all forms related to petitions, are designed by the secretary of state. § 250.015. Several other states also require paid signature gatherers to disclose that they are being paid. ZIMMERMAN, *supra* note 36, at 40-42.

61. § 250.045(5).

62. § 260.555(1)-(3).

63. § 260.555(4).

64. § 260.558(1).

65. § 260.558(2).

66. § 260.561.

67. § 260.532.

68. § 250.105. The secretary retains the materials for six years. § 250.135. Few states allow signatures to be removed from petitions after they have been submitted to the appropriate government official for counting. ZIMMERMAN, *supra* note 36, at 42.

69. § 250.105(4).

the first review indicates that not enough signatures have been collected, a second, more comprehensive review takes place.<sup>70</sup> If an initiative qualifies for the ballot, the secretary assigns it a number; numbers go from one to ninety-nine before starting at one again.<sup>71</sup> The initiative is voted on at the next general election to be held not less than four months later.<sup>72</sup> If approved, the initiative takes effect thirty days after the election.<sup>73</sup> If two initiatives with conflicting provisions pass, the one with the greatest number of affirmative votes trumps the other in all respects in which they conflict, even if it had a narrower margin of victory.<sup>74</sup>

To ensure that voters understand the substance of all ballot measures, the secretary of state publishes a voter's pamphlet for every election.<sup>75</sup> The pamphlet contains general information about how to register and vote, as well as specific information concerning each political candidate and ballot measure.<sup>76</sup> Measure-specific information includes ballot titles, the full text of each measure, an explanatory statement, a statement of the measure's impact on state finances, and arguments for and against each measure.<sup>77</sup> Earlier in the process, the attorney general, with comment from the public, drafts a ballot title for each statewide measure that includes (a) a "caption of not more than 15 words that reasonably identifies the subject matter of the state measure"; (b) a "simple and understandable statement of not more than 25 words that describes the result if the state measure is approved";<sup>78</sup> (c) a "simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected"; and (d) a "concise and impartial statement of not more than 125 words summarizing

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70. *Id.*; see *infra* notes 209-12 and accompanying text.

71. § 250.115. The state began using this numbering system in 1993. OREGON BLUE BOOK, *supra* note 11.

72. OR. CONST. art. IV, § 1(2)(e), (4)(c).

73. OR. CONST. art. IV, § 1(4)(d). The states set various effective dates for ballot measures, generally ranging from the date the measure is passed to ninety days afterward. DUBOIS & FEENEY, *supra* note 3, at 86.

74. § 254.065. The governor proclaims which initiative "won." OR. CONST. art. IV, § 22; § 254.555(2)(b). In California, the initiative that garners the most votes is enacted in its entirety and the one that receives fewer votes is rejected in its entirety. *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm'n*, 799 P.2d 1220 (Cal. 1990). Most states have adopted an approach similar to those of Oregon and California. DUBOIS & FEENEY, *supra* note 3, at 158-63.

75. § 251.026. Additionally, the secretary may air information from the pamphlet on radio and television. § 251.295. Montana allows its secretary of state to do the same, although the secretaries of state of Oregon and Montana have never exercised this authority. DUBOIS & FEENEY, *supra* note 3, at 179. In the eleven states that provide voter's pamphlets, the quality varies from mere reprints of the ballot measures to California's and Oregon's full-blown books. *Id.* at 165-178; CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT* 227-62 (1992). Studies have shown that voters rely on these pamphlets as key sources of information on ballot measures. DUBOIS & FEENEY, *supra* note 3, at 166-69.

76. § 251.026. The secretary designates the form of the pamphlet. § 251.012.

77. § 251.185.

78. Most states require the ballot to either state the effects of a "yes" vote clearly or to make clear that a "yes" vote will enact the measure. DUBOIS & FEENEY, *supra* note 3, at 118-20.

the state measure and its major effect.”<sup>79</sup> Additionally, an “impartial, simple and understandable statement explaining the measure” in not more than 500 words is drafted by a committee of five citizens: two proponents chosen by the chief petitioners, two opponents designated by the secretary of state, and another person selected by those four.<sup>80</sup> If an initiative affects state income or expenditures, that impact, as assessed by government officials, must be stated in the voter’s pamphlet and on the ballot.<sup>81</sup> If bonds may be passed in an election, the envelope with the ballot inside must state “clearly and boldly” in red print: “CONTAINS VOTE ON PROPOSED TAX INCREASE.”<sup>82</sup> Finally, anyone who pays \$500 or collects 1,000 voter signatures can file a 325-word argument for or against any measure.<sup>83</sup> There are no limits on the number of arguments that may be submitted.<sup>84</sup>

Numerous times throughout the process, petitioners must report to the secretary of state the name and address of each person and organization contributing \$50 or more to the committee; how much each contributed;

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79. §§ 250.035(2), 250.065, 250.067. No two ballot titles may resemble each other. § 250.035(6). Initiative amendment captions must further state “Amends Constitution” before the fifteen-word caption. § 250.035(2)(a). The language of the twenty-five-word statements must be parallel “to the extent practical” and include phrases like “vote yes” and “vote no” so that they correspond to affirmative and negative responses. § 250.035(2)-(5). Upon request, the state supreme court reviews ballot measure titles and summaries for clarity and accuracy. § 250.085. While some could argue that this discretion can lead to subjective framing of titles and summaries, the Tenth Circuit has upheld the practice. *Campbell v. Buckley*, 203 F.3d 738 (10th Cir. 2000) (rejecting petitioners’ claim that they were discriminated against based on the content of their initiatives).

Other states variously designate the lieutenant governor, the attorney general, the secretary of state, other governmental bodies, or the petitioners themselves to prepare the ballot title. DUBOIS & FEENEY, *supra* note 3, at 40. About half the states do this before signatures may be gathered; the other half do it afterwards. *Id.* Few states have as clear, concise, or informative a system for ballot titling as Oregon. *See id.* at 140-43 (describing practice in other states).

80. §§ 251.205, 251.215. The statement is subject to public and judicial review. §§ 251.215, 251.235. In Arizona the word limit is 300 words and in Utah it is 1,000 words. DUBOIS & FEENEY, *supra* note 3, at 174. In California, where there is no word limit, this analysis averaged more than 1,000 words between 1972 and 1996. *Id.*

81. § 250.125. If no financial impact will occur, the pamphlet and ballot must state so. *Id.* Estimates are subject to public and judicial review. §§ 250.127, 250.131.

82. § 250.038(3). This requirement stems from Bill Sizemore’s 1996 Measure 47. OREGON BLUE BOOK, *supra* note 11.

83. § 251.255. All fees go to the general fund. § 251.016.

84. All other states limit the number of pro and con arguments that may be submitted. DUBOIS & FEENEY, *supra* note 3, at 173. California, Idaho, Montana, and Utah each allow one pro and one con argument of up to 500 words, with one rebuttal per side of up to 250 words. *Id.* Washington has 250-word arguments and 75-word rebuttals. *Id.* Massachusetts allows just one 150-word argument per side and no rebuttals. *Id.* “The voter information pamphlet prepared for the Multnomah County, Oregon, general election of November 3, 1998, holds the record for length. Volume I contains 154 pages relating to 14 statewide questions and 248 arguments for and against the measures. Volume 2 contains 192 pages, including 76 pages of state information and the 116-page Multnomah County information pamphlet.” ZIMMERMAN, *supra* note 36, at 47. In contrast, the fall 1986 Massachusetts voter’s pamphlet described eight ballot measures in just thirteen pages. DUBOIS & FEENEY, *supra* note 3, at 169; *see also id.* at 171-75 (describing lengthy California voter’s pamphlets and encouraging states to limit the size of their voter’s pamphlets in the interest of voter-friendliness).

and details about each expenditure made, including the identity of the party to whom it was made and the purpose for which it was made.<sup>85</sup> Individuals who serve as their own campaign committees need only disclose expenditures of \$50 or more.<sup>86</sup>

## II

### DIRECT DEMOCRACY'S FLAWS

Direct democracy never truly lived up to its progressive creators' ideals.<sup>87</sup> While the vast majority of early ballot measures produced progressive results, the process quickly became industrialized.<sup>88</sup> Professional signature gatherers and political strategy firms have long dominated the process. As early as 1912, a California man charged ten cents for every signature he gathered to place a business-backed initiative on the ballot.<sup>89</sup> In 1913, Oregonians worried that "any person with sufficient money . . . can get any kind of legislation on the ballot."<sup>90</sup> Today, direct mail firms across the nation "guarantee specific numbers of valid signatures on a money back basis," ensuring qualification of constitutional amendments, "even to 110%, in 45 days."<sup>91</sup> For this service, they charge

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85. § 260.118. In-kind contributions must also be reported. § 260.118(3). Every direct democracy state requires ballot measure campaign committees to file disclosure forms with the state. DUBOIS & FEENEY, *supra* note 3, at 189. The various states set different threshold amounts for mandatory disclosure of contributions by campaign committees: the amounts range from any amount (Florida and Ohio) to \$50 (Idaho, Maine, Massachusetts, Oklahoma, Utah, and the District of Columbia) to \$100 (Arkansas, California, Missouri, Nebraska, North Dakota, Oregon, and South Dakota) to \$500 (Nevada). *Id.* at 190. For campaign committee expenditures, the thresholds range from any amount (Arizona, Florida, Maine, Montana, Ohio, Oregon, South Dakota, Utah, and Wyoming) to \$100 (Arkansas, California, Missouri, and Nebraska) to no disclosure necessary (South Dakota). *Id.* For individuals, only nineteen states require disclosure, generally only for expenditures; the thresholds range from \$100 (Colorado, Michigan, Nebraska, Ohio, Oregon, and Washington) to \$1,000 (California) to \$3,000 (Illinois). *Id.*

86. § 260.044.

87. See ELLIS, *supra* note 3, at 177-92 (describing the "Myth of a Golden Age").

88. By industrialized, I mean that direct democracy became an industry filled with corporate actors, powerful interest groups, a reliance on capital instead of volunteers, and institutionalization rather than ad hoc issue advocacy. One commentator accurately described industrialized direct democracy as "driven not by the demands of the public, but by the activists and professionals who supply the initiatives." Richard J. Ellis, *Direct Democracy in Oregon*, OREGON'S FUTURE (Fall 2004), at 6, available at [http://www.willamette.edu/publicpolicy/OregonsFuture/New\\_Site/PDFvol5no2/direct\\_democracy.pdf](http://www.willamette.edu/publicpolicy/OregonsFuture/New_Site/PDFvol5no2/direct_democracy.pdf). For a description of the early industrialization of direct democracy in Colorado, see Daniel A. Smith & Joseph Lubinski, *Direct Democracy During the Progressive Era: A Crack in the Populist Veneer?*, 14 J. POL'Y HIST. 349 (2002).

89. GOEBEL, *supra* note 1, at 145. The man paid his employees two-and-one-half to three cents a signature. *Id.*

90. ELLIS, *supra* note 3, at 48. For an early discussion of the ills of paid signature gathering in Oregon, see BARNETT, *supra* note 15, at 54-77. In the case of one 1912 referendum, a court declared that more than 60% of the 13,000 signatures gathered for the measure were fraudulent; the petitioners themselves admitted that at least 30% were either forged or fabricated. Ellis, *supra* note 88, at 6.

91. JIM SCHULTZ, THE INITIATIVE COOKBOOK 34 (1998) (quoting Advanced Voter Communication, Inc.). By 110%, the firm meant that it would collect 110% of the required number of

\$2, and even \$5, per signature, often amounting to \$1 million for guaranteed qualification in California.<sup>92</sup> As of 1996, \$150,000 was enough to guarantee qualification in Oregon, \$100,000 sufficed in Colorado, and a mere \$70,000 in Idaho.<sup>93</sup> There are at least two dozen major California consulting firms and hundreds of campaign consultants offering general and specialized services, ranging from strategizing to polling to advertising.<sup>94</sup> Between 1988 and 2000, the number of Oregon initiatives using only volunteers, as opposed to paid signature gatherers, dropped from more than half to less than one fifth.<sup>95</sup> Ninety-four percent of all initiatives to make the Oregon ballot between 1996 and 2002 used paid signature gatherers; of the three that did not, the government sponsored one.<sup>96</sup>

This industrialization of the initiative process highlights the three main problems plaguing direct democracy systems today: they are too often exploited by well-financed corporate media campaigns; interest groups regularly take advantage of them to enact pet laws without meaningful public debate; and they facilitate discrimination against minorities. Each problem will be discussed in turn.

#### A. Corporate Capture

Based on statistics about paid signature gatherers, initiative researcher Betty Zisk noted that “the most damning of all my findings, from the Progressive reform perspective, is the obvious success of the well-financed media campaigns in defeating so many proposals initiated by ad hoc groupings of concerned citizens.”<sup>97</sup> Indeed, more money is sometimes spent on initiative campaigns than campaigns for political office or government lobbying.<sup>98</sup> In each election between 1996 and 2000, more money was spent

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signatures on the assumption that some would be invalid. That way, assumedly, qualification would be assured. In 1988, California “insurance companies paid a direct mail firm \$16 million to gather the signatures required in just 48 days.” *Id.*

92. *Id.* at 34, 81. The story in Oregon is similar. See Diane Dietz, *Oregon Officials Debate Measure Limiting Payments to Signature Gatherers*, REGISTER GUARD (Eugene, OR), Oct. 21, 2002, (describing Oregon’s rates).

93. ELLIS, *supra* note 3, at 59.

94. Todd Donovan et al., *Political Consultants and the Initiative Industrial Complex, in DANGEROUS DEMOCRACY?*, *supra* note 5, at 101-05.

95. ELLIS, *supra* note 3, at 50.

96. Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 53 (2003).

97. BETTY H. ZISK, MONEY, MEDIA AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS 251 (1987); see also McCuan, *supra* note 16, at 55 (describing similar problems). For an example of a modern-day, low-budget initiative brought about by a concerned citizen, see ELLIS, *supra* note 3, at 5-16 (describing Oregon’s 1998 Measure 58, which gave adoptees the right to see their original birth certificates).

98. ZIMMERMAN, *supra* note 36 at 144 ; SCHULTZ, *supra* note 91, at 81. In a related vein, it has become standard for statewide political candidates in California to increase attention on their campaigns by pushing popular initiatives aggressively. See, e.g., ELLIS, *supra* note 3, at 79-90 (describing initiatives sponsored by former governor Pete Wilson and Senator Diane Feinstein). More

on Oregon ballot measures than all campaigns for statewide office combined.<sup>99</sup> In 1976, California lobbyists spent twice as much money influencing state legislators as they spent influencing initiative voters; by 1988 the ratio had nearly reversed itself.<sup>100</sup> During that time, spending on California initiatives grew by more than 1,200%, from \$8.9 million to \$127 million.<sup>101</sup> Sixty-seven percent of that money came from contributions of \$100,000 or more, half of which were gifts of \$1 million or more.<sup>102</sup> In 1990, business interests contributed 66% of the money in initiative campaign coffers, while individuals and politicians gave 21% and labor unions gave only 1%.<sup>103</sup> In 2002, Arizona tribes pushing a gambling initiative spent more than \$21 million, 675 times as much as their opponents; the initiative passed.<sup>104</sup> Insurance corporations broke the Oregon record for initiative campaign spending in 2004, doling out more than \$7 million in a failed attempt to abolish Oregon's state-run worker's compensation fund.<sup>105</sup>

While big money makes it easier to get a message across to more people through television, radio, and print, it does not actually guarantee results.<sup>106</sup> In 2000, for instance, only two of the top ten most expensive ballot measure campaigns succeeded, despite spending between \$6.15 and \$65.78

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recently, Arnold Schwarzenegger, who became governor of California after winning a recall election, made frequent use of ballot measures and the threat of creating more of them as bargaining tools in negotiating with the Democratic state legislature. Dean E. Murphy, *Schwarzenegger Hits Road for "True Reform" on the Ballot*, N.Y. TIMES, Mar. 2, 2005, at A14.

99. In Oregon, 1996 primary and general election ballot measure spending totaled \$28 million, while spending for non-partisan statewide political offices totaled only \$5 million; in 1998 the difference was \$14 million to \$13 million; and in 2000 the difference was \$31 million to \$20 million. Bill Bradbury, Summary Report of Campaign Contributions and Expenditures for the 2002 General Election, at i-vi (2002), available at <http://www.sos.state.or.us/elections/c&e/summary/G02/toc.pdf>.

100. CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *supra* note 75, at 264. In 1976, lobbyists spent \$20 million on legislators and only \$10 million on initiatives. *Id.* In 1988, they spent just over \$80 million on legislators and \$130 million on initiatives. *Id.*

101. *Id.* at 16.

102. *Id.* at 16-17.

103. *Id.* at 19. The rest of the money came about evenly from political parties and interest groups.

104. BALLOTFUNDING.ORG, A BUYER'S GUIDE TO BALLOT MEASURES: THE ROLE OF MONEY IN 2002 BALLOT INITIATIVE CAMPAIGNS 8 (2003).

105. Steve Law, *Money Flows to Disband SAIF*, STATESMAN JOURNAL (Salem, OR), Oct. 22, 2004, at 1C. Opponents of the measure, including many Oregon businesses, spent only \$2.5 million. *Id.* Total spending on Oregon's six 2004 statewide initiatives broke the state record, even exceeding the \$23.7 million spent on initiatives in the 2000 general election. Edward Walsh & James Mayer, *Key Ballot Measures Pulling in Big Bucks*, OREGONIAN, Oct. 2, 2004, at A1. Proponents of a failed medical malpractice measure spent nearly \$5 million while opponents spent \$2.5 million. Law, *supra*. Proponents of a successful same-sex marriage ban spent nearly \$2 million while opponents spent \$2.5 million. *Id.* Proponents of a failed forest conservation initiative spent less than \$400,000 while opponents, mostly timber companies, spent \$2.7 million. *Id.* Proponents of a successful property rights initiative spent less than \$700,000 while opponents spent \$2.4 million. *Id.*

106. For example, in 2000, Oregonians rejected a measure that would have guaranteed utilities a return on their investments in retired properties by a margin of 88%. OREGON BLUE BOOK, *supra* note 11.

per vote.<sup>107</sup> Thus, corporations tend not to instigate many initiatives, but rather spend their capital opposing potentially adverse initiatives.<sup>108</sup> The most powerful effect of money in initiative elections is that opponents of an initiative win 80% of the time when they outspend proponents.<sup>109</sup> For example, in 2002, opponents of universal healthcare in Oregon successfully killed an initiative by outspending proponents thirty-two to one.<sup>110</sup> Opponents of another failed 2002 initiative that would have required labeling genetically modified food in Oregon raised \$5.1 million while proponents raised \$131,000, a ratio of forty-to-one.<sup>111</sup> In Montana, mining interest groups spent nearly nine dollars per vote to defeat a 1996 environmental initiative.<sup>112</sup> When Arizona gambling interests outspent the proponents of a 2002 initiative by a ratio of 364 to 1, the initiative failed.<sup>113</sup>

Another tactic used by corporations is the counter-initiative. By sponsoring an initiative that is similar to but more business-friendly than a progressive one, corporations can confuse voters and get them to vote no on both. In 1988, Californians faced five auto insurance and tort initiatives: two sponsored by consumer groups and trial lawyers, and three counter-initiatives sponsored by the insurance industry.<sup>114</sup> After the then-most expensive campaign in state history, voters rejected all but one of the initiatives.<sup>115</sup> Similarly, in 1990, Californians faced three sets of competing initiatives: the progressive "Nickel per Drink," "Big Green," and "Forests Forever" squared off against the corporate "Penny per Drink," "Big Brown," and "Big Stump."<sup>116</sup> Voters rejected all six.<sup>117</sup> Thus, even if initiatives are not easy to win with money alone, they can be easy to kill.

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107. *BALLOTFUNDING.ORG*, *supra* note 104, at 5. In contrast, the candidate who spent the most money won 96% of all Congressional elections in 1998. Paul Jacob, *The Initiative Process: Where People Count*, in *DANGEROUS DEMOCRACY?*, *supra* note 5, at 94, 97.

108. *ZIMMERMAN*, *supra* note 36, at 144. Nationally, approximately 40% of all initiatives pit business against labor directly, 10% merely push the interests of one of those groups, another 10% pit the public against one of them, and 40% do not involve either directly. Ernst, *supra* note 12, at 9, 15, 19, 23. Those initiatives pitting the two groups against each other generally pass at about a 34% rate; those merely sponsored by one of the two groups win about 27% of the time; those merely attacking one group succeed in 29% of the cases; and those not involving either business or labor have a 52% approval rate. *Id.*

109. *ZIMMERMAN*, *supra* note 36, at 79.

110. *OREGON BLUE BOOK*, *supra* note 11; Press Release, Money in Politics Research Action Project, Major Contributors Dominate Ballot Measure Giving (Oct. 28, 2002), at <http://www.oregonfollowthemoney.org/Press/2002/October2802.html> [hereinafter MPRAP]. Proponents raised \$37,000 to support their initiative while opponents raised \$1.2 million to defeat it. MPRAP, *supra*.

111. *OREGON BLUE BOOK*, *supra* note 11; MPRAP, *supra* note 110.

112. Daniel Smith, *Campaign Financing of Ballot Initiatives in the American States*, in *DANGEROUS DEMOCRACY?*, *supra* note 5, at 71, 78.

113. *BALLOTFUNDING.ORG*, *supra* note 104, at 8. However, in 1998, casinos spent more than \$71 million in an unsuccessful effort to defeat a California initiative that legalized gambling on Indian reservations. *ZIMMERMAN*, *supra* note 36, at 79.

114. *SCHULTZ*, *supra* note 91, at 83.

115. *Id.*

116. *Id.*

### B. Interest Group Capture

In terms of the impact on direct democracy as a system, corporate involvement pales in comparison to the activity and influence of interest groups.<sup>118</sup> These interest groups, and the ideologues behind them, abuse direct democracy by running roughshod over state constitutions and manipulating public opinion, all in an effort to pass pet laws that often do little good for the general public. Bill Sizemore and his organization, Oregon Taxpayers United, provide an example of the stronghold a single interest group can have on the initiative process. In the 1990s, Sizemore, a former Bible teacher and businessman, was the reigning king of direct democracy in Oregon.<sup>119</sup> He led Oregon Taxpayers United in placing anti-tax<sup>120</sup> and anti-labor initiatives on the ballot nearly every year, gaining notoriety and the ire of unions and progressives throughout the state.<sup>121</sup> His “power really stems from just one main thing: the ability of Oregon Taxpayers United to pull together the forces to get an issue on the ballot.”<sup>122</sup> Even when Sizemore’s initiatives failed, he fulfilled his objective by distracting unions from pushing their own initiatives. As an assistant of his once rejoiced, “Imagine the mischief they could have done . . . . They were completely tied up trying to play defense and were not able to play offense.”<sup>123</sup> Thus, it is with reason that “officials throughout Oregon have been cursing Mr. Sizemore’s name.”<sup>124</sup>

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117. *Id.*

118. See, e.g., Daniel A. Smith, *Special Interests and Direct Democracy: An Historical Glance, in THE BATTLE OVER CITIZEN LAWMaking*, *supra* note 9, at 59-71. These interest groups include anti-tax, environmental, labor, Native American, and other issue groups, in addition to rich eccentrics. ELLIS, *supra* note 3, at 91-116.

119. Carey Goldberg, *Shaking Up the Piggy Bank in Oregon*, N.Y. TIMES, Apr. 13, 1997, at A18.

120. While most people might describe themselves as against tax increases generally, anti-taxers hate taxes and, as one leading anti-taxer put it, hold a fervent suspicion of “money, the politicians, the government.” Howard Jarvis, *quoted in* SMITH, *supra* note 17, at xii (citing *Sound and Fury Over Taxes*, TIME, June 19, 1978, at 13).

121. See Dave Hogan & Jeff Mapes, *Is Oregon Losing its Initiative?*, OREGONIAN, May 22, 2003, at A1; Dietz, *supra* note 92. Other prominent Oregon anti-taxers include Don McIntire, Jason Williams, and Russ Walker. Scott Learn, *Portland Trails in Election Turnout*, OREGONIAN, May 15, 2003, at C1; James Sinks, *Measure 30 Vote May Be Closer Than Expected*, BULLETIN (Bend, OR), Jan. 31, 2004, available at [http://www.bendbulletin.com/news/story.cfm?story\\_no=12455](http://www.bendbulletin.com/news/story.cfm?story_no=12455).

122. Goldberg, *supra* note 119.

123. Dave Hogan & Harry Esteve, *Unions Enjoy Election Victories*, OREGONIAN, Nov. 12, 2000, at B1 (quoting Becky Miller).

124. Goldberg, *supra* note 119. “Between 1996 and 2000, only three Oregon politicians received more statewide media coverage than Sizemore: the governor and the state’s two U.S. senators.” ELLIS, *supra* note 3, at 93. Sizemore even ran for governor as the 1998 Republican candidate. James Mayer, *Ballot Measures Face Higher Hurdle*, OREGONIAN, Jan. 22, 1999, at C6. Indeed, a 2000 political cartoon depicted the three branches of the Oregon government as legislative, executive, and Sizemore. Doug Sanders, *Practical Pitfalls of the Plebiscite*, CANNABIS NEWS (Oct. 24, 2000), at <http://cannabisnews.com/news/thread7433.shtml>. Ironically, a political cartoonist used similar words in 1906 to describe William S. U’Ren, the father of Oregon’s direct democracy system: “In Oregon the



Sizemore's successful initiatives include laws that reduced public employee retirement benefits, cut funding for Portland light rail, limited property taxes, prohibited the state from compensating for financial loss through new taxes, and enacted a double-majority requirement invalidating any new tax or tax increase adopted in a non-general election unless more than half of the registered voters cast ballots on it.<sup>125</sup> Sizemore was also behind a failed initiative that would have prohibited public employee unions from using dues for political advocacy.<sup>126</sup> In 2000, Sizemore placed a staggering five initiatives on the ballot.<sup>127</sup> While each of these initiatives failed, they included proposals that would have made federal income taxes fully deductible on state income tax returns, prohibited all payroll deductions used for political purposes without an employee's consent, and prohibited efforts to make it more difficult to place initiatives on the ballot.<sup>128</sup>

Like other anti-tax barons in California, Colorado, and across the nation, Sizemore raised the banner of the populist,<sup>129</sup> asking, "Which makes more sense—paying a politician to increase your taxes, or paying a petitioner to collect signatures to give you a chance to vote on lowering your taxes?"<sup>130</sup> In response to efforts to thwart his anti-tax objectives,<sup>131</sup> Sizemore stated, "It's predictable that the politicians of this state, the government class, would attempt to use any trick or maneuver possible to overthrow the will of the people."<sup>132</sup> Yet Sizemore and many other

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state government is divided into four departments - the executive, judicial, legislative, and Mr. U'Ren - and it is still an open question which exerts the most power." BARNETT, *supra* note 15, at 17.

125. Bill Sizemore, Accomplishments, at <http://www.billsizemore.net/accomplishments.htm> (last visited Apr. 15, 2005).

126. *Id.*

127. OREGON BLUE BOOK, *supra* note 11.

128. *Id.*

129. In California, Howard Jarvis and Paul Gann revolutionized the use of populist rhetoric in ballot measure campaigns back in 1978, when they convinced Californians to drastically cut taxes through passage of Proposition 13. *See, e.g.,* ALLSWANG, *supra* note 44, at 102-19; SCHMIDT, *supra* note 7, at 125-37; SMITH, *supra* note 17, at 28-31. The campaign for Proposition 13 was arguably a grassroots effort. *See* ALLSWANG, *supra* note 44, at 105-07 (describing large numbers of highly-motivated volunteers and small contributions to the campaign, proponents adept at gaining free publicity, and well-heeled and organized opponents); *accord* SCHMIDT, *supra* note 7, at 125-37. *But see* SMITH, *supra*, note 17, at 83-84 (arguing that Proposition 13 was not truly a populist measure). Regardless of how one views Proposition 13, Jarvis and Gann's rhetoric spawned a host of industrialized, Sizemore-like followers in the decades to come. *See infra* pp. 1207-08.

130. Brad Cain, *Names Spell Case for Most Petitions*, BULLETIN (Bend, OR), June 3, 1996, at B3.

131. Sizemore successfully defeated initiatives that advocated property and gas tax increases, establishment of a sales tax, and repeal of his double-majority requirement. He could not defeat two others: one that instituted a requirement that all future supermajority requirements pass by the same supermajority they would impose, and one that increased the maximum amount of federal taxes that can be deducted from state income tax returns (Sizemore disliked that measure because it did not go as far as his own failed initiative to make federal taxes fully deductible). OREGON BLUE BOOK, *supra* note 11.

132. *Portland May Sue to Halt Tax Limit*, BULLETIN (Bend, OR), Dec. 1, 1996, at B4.

anti-taxers are not truly populist.<sup>133</sup> Despite their claims, they do not reflect “the spontaneous, populist spirit of direct democracy as envisioned by those who championed the radical process a century ago.”<sup>134</sup> One commentator has even termed their movement “*faux* populist” because it consists of merely “populist rhetoric and message without ‘the people.’”<sup>135</sup> Sizemore, for instance, could never rely on a large base of grassroots supporters to aid his efforts; no vociferous throngs attended rallies in support of his causes.<sup>136</sup> Rather, he paid signature gatherers and consultants, took in large donations from national anti-tax groups, and marketed his initiatives with simplified messages to make it seem as if there were groundswells of angry voters supporting his efforts.<sup>137</sup>

Sizemore is not alone in his manipulation of the initiative process or his conception of populist revolt. In Colorado, wealthy landlord and real estate investor Douglas Bruce has used direct democracy “to force his way onto the center of Colorado’s political stage, where he has remained for more than a decade.”<sup>138</sup> Like Sizemore, Bruce used mailing lists purchased from the Republican Party to raise money, was found guilty of violating elections law, suffered defeats in addition to successes, and attempted to use his notoriety to win elections as a political candidate.<sup>139</sup> The man behind Colorado’s draconian Taxpayer’s Bill of Rights also uses *faux* populist rhetoric: “It’s a question of who should decide how much government we can afford, we the people who earn the money, or the politicians who want to spend it? . . . The simple rule is that everything the politicians say is a lie.”<sup>140</sup> In Washington, Tim Eyman, responsible for that state’s version of Proposition 13, says that he gains media attention by using dramatic words such as “ransoming” and “hostage” to describe legislative decisions to raise taxes.<sup>141</sup>

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133. See generally SMITH, *supra* note 17 (describing the anti-tax movement as one of industrialized interest group politics, not a grassroots revolt).

134. *Id.* at 10.

135. *Id.* at 41. “Absent from *faux* populist moments is the active laboring and protest of the masses . . . With a *faux* populist moment, turnout on election day . . . supplants the mass movement of the common people.” *Id.* at 48-49.

136. Dietz, *supra* note 92. The same holds true for anti-taxers nationwide. SMITH, *supra* note 17, at 10.

137. Dietz, *supra* note 92. In 1996, Oregon Taxpayers United received more than \$500,000 from Americans for Tax Reform, a national anti-tax organization which in turn had received more than \$4.5 million from the Republican National Committee to finance conservative initiatives around the country. Smith, *supra* note 118, at 67.

138. ELLIS, *supra* note 3, at 95. Like Sizemore, Bruce brings new initiatives, as well as recycled old ones that failed the first time around, to the voters nearly every year. *Id.*

139. *Id.* at 95-98.

140. *Id.* at 96-97; see also SMITH, *supra* note 17, at 128-56 (describing Bruce).

141. ELLIS, *supra* note 3, at 99; see also SMITH, *supra* note 17, at 85-127 (describing Massachusetts’s anti-taxer Barbara Anderson).

The results of such interest group capture of direct democracy have not been good for government. While I have focused here on anti-taxers as one example of a successful interest group, many others have also met with great success. For instance, groups such as the education lobby routinely earmark government funds for their causes through initiatives.<sup>142</sup> In 1996, the City Club of Portland concluded that the twin factors of unfunded mandates and earmarked funds were two primary problems with Oregon's direct democracy system.<sup>143</sup> In California, initiatives cutting taxes, mandating government spending, and establishing term limits have "created a situation in which California's inexperienced, term-limited legislators are forced to cope as best they can with a jerry-rigged system of complex and often conflicting initiative mandates. To say the least, it is a far cry from the rational, professional model of government the Progressives envisioned."<sup>144</sup>

### C. Discriminatory Capture

The danger of interest group capture does not lie merely in convincing voters to approve obnoxious laws that create havoc in state legislatures. When it comes to laws that discriminate against minorities, initiatives can easily play to popular prejudices.<sup>145</sup> Thus, while initiatives promoting civil rights for minorities generally fail, those restricting minority rights often succeed.<sup>146</sup> As recent history shows, religious interest groups have used Oregon's direct democracy system to advance an anti-homosexual agenda. Since the late 1980s, Lon Mabon has played a major role in Oregon initiative politics, sponsoring numerous anti-gay and other fundamentalist Christian initiatives on state and local levels.<sup>147</sup> Between 1991 and 1994,

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142. See ALLSWANG, *supra* note 44, at 158-59, 235 (describing two California initiatives that mandated funding for schools).

143. CITY CLUB OF PORTLAND, *THE INITIATIVE AND REFERENDUM IN OREGON* 31-34 (1996); see also Donald J. Stabrowski, *Oregon's Increasing Use of the Initiative and its Effects on Budgeting*, 20 COMP. ST. POLS. 31 (1999) (describing the problem).

144. Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1056 (2001). For a comparison of early progressives and populists in the direct democracy context, see Bruce E. Cain & Kenneth P. Miller, *The Populist Legacy: Initiatives and the Undermining of Representative Government*, in DANGEROUS DEMOCRACY?, *supra* note 5, at 33, 34-37, 48-53; GOEBEL, *supra* note 1, at 11-14. For a comparison of modern progressives and populists in the direct democracy context, see Richard Clucas, *Populists Help Shape Important Issues in Oregon*, OREGON'S FUTURE (Fall 2004), at 9-10, available at [http://www.willamette.edu/publicpolicy/OregonsFuture/New\\_Site/PDFvol5no2/direct\\_democracy.pdf](http://www.willamette.edu/publicpolicy/OregonsFuture/New_Site/PDFvol5no2/direct_democracy.pdf).

145. Cain & Miller, *supra* note 144, at 50-53.

146. William E. Adams, Jr., *Is It Animus or a Difference of Opinion?: The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449, 462-64 (1998) (citing Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 254 (1997)).

147. See generally David Douglass, *Taking the Initiative: Anti-Homosexual Propaganda of the Oregon Citizen's Alliance*, in ANTI-GAY RIGHTS, *supra* note 36, at 17-32 (describing Lon Mabon's anti-homosexual initiative campaigns); Elizabeth A. Tedesco, "Humanity on the Ballot": *The Citizen Initiative and Oregon's War Over Gay Civil Rights*, 22 B.C. THIRD WORLD L.J. 163, 163-64 (2002)

Mabon and the organization he chairs, the Oregon Citizen's Alliance (OCA), sponsored nearly thirty anti-gay initiatives in Oregon municipalities, almost all of which passed.<sup>148</sup> Moreover, Mabon succeeded in the face of well-funded and high profile opposition.<sup>149</sup>

Mabon's first move to prevent homosexuals from being treated equally was 1988's Measure 8, which overturned an executive order from the governor banning sexual orientation discrimination.<sup>150</sup> The initiative passed with 53% of the vote, succeeding in twenty-nine of Oregon's thirty-six counties, although it was overturned in the courts on free speech grounds.<sup>151</sup> In 1992, Mabon, emboldened by his prior success, sponsored Measure 9, which would have amended the Oregon constitution to define homosexuality as "abnormal, wrong, unnatural, and perverse," and required the state Department of Education to discourage it.<sup>152</sup> Like Colorado's infamous unconstitutional Amendment Two, the measure would also have prohibited all governmental entities in the state from "encouraging" homosexuality or extending equal rights to homosexuals.<sup>153</sup> A coalition of churches, labor unions, medical doctors, businesses, community leaders, state political leaders from both sides of the political spectrum, and public figures such as Jesse Jackson and William F. Buckley opposed Measure 9.<sup>154</sup> Combined, these groups raised \$2.2 million to combat the initiative,<sup>155</sup> a huge sum compared to the \$582,000 raised by Mabon and his allies.<sup>156</sup> The OCA avoided traditional media, focusing rather on flyers, mass mailings, cheaply produced videos, and small town meetings.<sup>157</sup> In the end, Measure 9 garnered only 43% of the statewide vote, although it passed in twenty-one counties and was popular among rural residents, Christians, Republicans, and parents.<sup>158</sup>

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(same). In addition to anti-homosexual initiatives, Mabon has sponsored several other initiatives closely aligned with his religious beliefs, such as measures that would have made abortion illegal. Basic Rights Oregon, History of the Oregon Citizens Alliance, at <http://www.basicrights.org/aboutbro/ocahistory.asp> (last visited Apr. 15, 2005); see also *infra* notes 168 and 274.

148. Douglass, *supra* note 147, at 17-18.

149. *Id.* ("This success has been achieved in the face of unified, high-profile opposition and sharply disproportionate funding. The OCA has been outspent, outnumbered, and seemingly overmatched from the onset of its first campaign."). More than \$7 million has been spent fighting Mabon's initiatives. Basic Rights Oregon, *supra* note 147.

150. Basic Rights Oregon, *supra* note 147.

151. *Id.*; Merrick v. Bd. of Higher Educ., 841 P.2d 646 (Or. Ct. App. 1992).

152. Douglass, *supra* note 147, at 18.

153. *Id.* In 1996, the U.S. Supreme Court struck down Colorado's Amendment Two because singling out homosexuals is not rationally related to a legitimate government interest. *Romer v. Evans*, 517 U.S. 620 (1996).

154. Douglass, *supra* note 147, at 118-19.

155. *Id.* at 19.

156. *Id.* at 19, 25.

157. *Id.* at 19.

158. *Id.*; Basic Rights Oregon, *supra* note 147.

Measure 9's partial success led one political scientist to declare that a similar initiative "drawn less restrictively and with less inflammatory language might do significantly better or even pass."<sup>159</sup> Mabon heeded that insight, successfully promoting softer initiatives in several cities and counties in the ensuing years.<sup>160</sup> In response, "the Oregon legislature passed House Bill 3500 prohibiting local governments from enacting or enforcing laws that single out groups or individuals on the basis of sexual orientation, effectively nullifying OCA victories around the state."<sup>161</sup> Mabon counterattacked by challenging the constitutionality of the state statute, attempting to recall legislators who voted for it, and pressing on with his initiatives in more localities.<sup>162</sup>

In 1994, Mabon brought Measure 13, the "Minority Status and Child Protection Act," before the voters.<sup>163</sup> The initiative would have amended the state constitution to prohibit governments from approving or creating classifications based on homosexuality or spending public funds in a manner deemed to express approval of homosexuality.<sup>164</sup> The initiative would have also limited use of public library books on homosexuality to adults.<sup>165</sup> Measure 13 was therefore akin to Measure 9, although Measure 13 lacked the inflammatory language and provisions for active governmental discouragement of homosexuality. Like Measure 9, Measure 13 created a firestorm. The debate took a turn for the absurd when one state legislator pointed a gun at his colleague in a self-described "preventative measure" and another "was challenged to take a polygraph test to prove his heterosexuality."<sup>166</sup> In the end, only 51.5% of Oregonians rejected Measure 13, prompting Mabon to announce that he would succeed next time with more money and a yet milder initiative.<sup>167</sup> It took him six years to put that next initiative, again called Measure 9, on the ballot.<sup>168</sup> In contrast to previous OCA initiatives, 2000's Measure 9 would have merely prohibited public

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159. Douglass, *supra* note 147, at 19.

160. *Id.* at 19-20.

161. *Id.* at 20.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* Oregon newspapers called Measure 9 a "pogrom;" "the worst witch-hunt and bigotry the state has experienced this century;" an "abomination;" "hatred and discrimination, pure and simple;" "homophobic;" "draconian;" "bizarre, demeaning;" and "hateful and poisonous." *Id.* at 21. They deemed the OCA "Oregon's linear descendant of the Ku Klux Klan" and its members "the bedroom police," "peeping toms," "redneck jingoists," "gay bashers," "fascists," and "the kind of people who are the underbelly of the worst that is in America." *Id.* The OCA, in turn, claimed that the mainstream media "reflected the official party line of the homosexual movement." *Id.*

167. *Id.* at 20-21. Measure 13 had majority support in twenty-five of thirty-six counties. Basic Rights Oregon, *supra* note 147.

168. Basic Rights Oregon, *supra* note 147. In the meantime, Mabon failed to qualify four initiatives for the ballot: two prohibiting abortion, one prohibiting same-sex marriage, and another again outlawing bans on discrimination based on sexual orientation. *Id.*

schools from “promoting” or “sanctioning” homo- and bisexuality.<sup>169</sup> However, Mabon was again defeated; the initiative attracted only 47% of the vote.<sup>170</sup>

Anti-minority initiatives have met with more success in California, playing an important role in state politics. In 1986, petitioners gathered enough signatures to put Proposition 64 on the ballot, which would have required all AIDS victims to be quarantined.<sup>171</sup> Although the proposition failed, it paved the way for other initiatives aimed at politically vulnerable minorities.<sup>172</sup> In 1994, Californians approved Governor Pete Wilson’s Proposition 187, which excluded illegal immigrants from public services.<sup>173</sup> In 1996, they passed Ward Connerly’s Proposition 209, which banned affirmative action.<sup>174</sup> In 1998, California voters dismantled bilingual education programs and mandated teaching English to all students.<sup>175</sup> The most recent manifestation of anti-minority bias in the direct democracy context was, of course, the tremendous success of conservatives in 2004, when thirteen statewide initiatives banning same-sex marriage, including Oregon’s, passed overwhelmingly.<sup>176</sup>

### III

#### RECENT REFORMS OF DIRECT DEMOCRACY

##### *A. The Possibility of Reform*

Turn of the century reformers hoped that initiatives would be the products of grassroots efforts and that they would lead to better government and progressive policies. Yet “[f]rom the beginning, direct democracy manifested itself as a deeply flawed process that did not fulfill any of the hopes reformers had invested in it.”<sup>177</sup> The story of Bill Sizemore is

169. *Id.*

170. *Id.* It had majority support in twenty-seven counties. *Id.* In 2002, Mabon was jailed for willfully failing to attend court hearings related to his refusal to pay a 1992 civil judgment levied against him and the OCA; the judgment was for damages arising from Mabon’s use of unreasonable force to eject an equal rights protestor from an OCA meeting. Dave Hogan, *Judge Orders Jail for Leaders of OCA*, OREGONIAN, Feb. 21, 2002, at B1. Nonetheless, Mabon has remained active in Oregon’s direct democracy scene. See *infra* note 274 (describing Mabon’s recent attempts to place initiatives on the ballot).

171. David B. Magleby, *Direct Legislation in the American States*, in REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY 218, 241 (David Butler & Austin Ranny eds., 1994).

172. University of California, San Francisco, Chronology of AIDS in San Francisco, 1986, at <http://www.library.ucsf.edu/collres/archives/ahp/chron1986.html> (last visited Apr. 15, 2005).

173. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786-94 (C.D. Cal. 1995) (reprinting the measure, striking down parts of it, and issuing a preliminary injunction to enforce the rest).

174. SCHULTZ, *supra* note 91, at 88.

175. ZIMMERMAN, *supra* note 36, at 116-17.

176. See Zernike, *supra* note 18 (noting margins of victory ranging from a low of 57% in Oregon to a high of 86% in Mississippi).

177. GOEBEL, *supra* note 1, at 144.

proof that *faux* populist rhetoric coming from a few well-heeled activists can hamstring state finances and throw local politics into turmoil. Lon Mabon's career demonstrates how easily discriminatory initiatives can draw on popular prejudices to garner votes, despite opposition from established political and social leaders. Thus, even states where direct democracy is most widely used have sought ways to reform it.

However, not all means of amending the system are constitutional. The United States Supreme Court has indicated that petitioners enjoy First Amendment rights that cannot be curtailed by state statutes unless they pass "exacting scrutiny."<sup>178</sup> Indeed, the Court has described as "well-nigh insurmountable" the burden states would have to meet to save statutes that limit signature gathering, because direct democracy "trenches upon an area in which the importance of First Amendment protections is at its zenith."<sup>179</sup>

In 1988, the Court held in *Meyer v. Grant*<sup>180</sup> that Colorado's ban on paid signature gathering unconstitutionally violated petitioners' free speech rights by impermissibly limiting the number of people petitioners could reach with their speech.<sup>181</sup> The Court rejected Colorado's argument that its statute ensured sufficient grassroots support for petitions and the integrity of the petition process because the state had not shown any evidence that paid signature gatherers were actually more likely than volunteers to commit fraud.<sup>182</sup> Further, the Court found adequate anti-fraud measures in Colorado's prohibitions on petition forgery, false and misleading statements related to petitions, and payment for citizen signatures.<sup>183</sup>

178. *Meyer v. Grant*, 486 U.S. 414, 420 (1988). As Mark Hatfield, a former U.S. Senator from Oregon, stated, "the initiative is an actualization of the citizens' First Amendment right to petition the Government for redress of grievances." ZIMMERMAN, *supra* note 36, at 133.

179. *Meyer*, 486 U.S. at 425 (punctuation omitted). According to Justice Thomas, "When a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest; lesser burdens trigger less exacting review, and a State's important regulatory interests are typically enough to justify reasonable restrictions." *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 206 (1999) (Thomas, J., concurring) [hereinafter *ACLF*]. The Court has cited the first part of Thomas' formulation approvingly. *Id.* at 192 n.12.

180. 486 U.S. 414 (1988).

181. *Id.* at 422-23.

182. *Id.* As the Court stated:

Colorado argued that the petition circulator has the duty to verify the authenticity of signatures on the petition and that compensation might provide the circulator with a temptation to disregard that duty. No evidence has been offered to support that speculation, however, and we are not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.

*Id.* at 426.

183. *Id.* at 426-27. The Court also noted that Colorado law requires petitions to clearly state that forgery is a crime, that citizens must be qualified to vote in order to sign petitions, and that signatories should read and understand the petition before signing. *Id.* at 427.

In 1999, the Court in *Buckley v. American Constitutional Law Foundation*<sup>184</sup> applied the framework established in *Meyer*, holding that Colorado's requirement that signature gatherers be registered voters was not narrowly tailored to the state's interest in preserving the integrity of the ballot measure process.<sup>185</sup> Accordingly, the Court struck the law down.<sup>186</sup> The Court also struck down Colorado's requirement that signature gatherers wear a badge stating their name because it violated the signature gatherers' right to anonymity.<sup>187</sup> Finally, the Court struck down Colorado's requirement that petitioners report the names of and payments made to each signature gatherer.<sup>188</sup> For each of these statutes, the Court noted that other Colorado laws satisfied the state's interest in maintaining the integrity of the initiative process.<sup>189</sup> Thus, while states have "considerable leeway" to protect direct democracy's integrity and reliability,<sup>190</sup> the Court has not upheld many state regulations.<sup>191</sup>

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184. 525 U.S. 182 (1999).

185. 525 U.S. at 194. The Court stated, "Colorado's registration requirement drastically reduces the number of persons, both volunteer and paid, available to circulate petitions" because less than 65% of the voting age population was registered to vote. *Id.* at 193. The Court rejected Colorado's defense that the requirement proved a signature gatherer's "commitment to Colorado's law-making process" and facilitated verification of the gatherer's residence. *Id.* (citations and internal quotation marks omitted). *But see* Initiative & Referendum Inst. v. Sec'y of Me., No. 98-104-B-C, 1999 U.S. Dist. LEXIS 22071 (D. Me. Apr. 23, 1999) (upholding Maine's similar statute, which triggered and passed a lower level of scrutiny because more than 98% of the state's voting age population was registered to vote).

186. *ACLF*, 525 U.S. at 194. The Court did not rule, however, on the constitutionality of Colorado's requirements that signature gatherers be state residents and eligible to vote. *Id.* at 197. In *Initiative & Referendum Institute v. Jaeger*, the Eighth Circuit upheld North Dakota's state residency requirement because the state "has a compelling interest in preventing fraud and the regulation does not unduly restrict speech." 241 F.3d 614, 616-17 (8th Cir. 2001). The court noted examples of fraud by out-of-state signature gatherers, a lack of evidence that the requirement actually made it more difficult for petitioners to gather signatures, and two federal district court decisions that reached the same conclusion. *Id.* *But see* Chandler v. City of Arvada, 292 F.3d 1236 (10th Cir. 2002) (holding city's requirement that signature gatherers be city residents unconstitutional because it was not narrowly tailored to the city's interest in preventing fraud); Frami v. Ponto, 255 F. Supp. 2d 962 (W.D. Wis. 2003) (striking down a state statute requiring signature gatherers for political candidates to be state residents).

187. *ACLF*, 525 U.S. at 199-200. The Court did not rule on the state's requirement that the badge also indicate whether signature gatherers are volunteer or paid workers, and if the latter, who pays them. *Id.* at 200.

188. *Id.* at 204.

189. Particularly, the Court held that the state's requirements that signature gatherers sign an affidavit stating their name and residence, that they understand the pertinent law, and that their name and address appear on the petitions for which they seek signatures, bolstered the integrity of the process. *Id.* at 196, 198, 204 n.24. *But see* Wash. Initiatives Now v. Ripple, 213 F.3d 1132 (9th Cir. 2000) (holding Washington's requirement that petitioners identify the names and addresses of their paid signature gatherers unconstitutional because, unlike Colorado's affidavit requirement in *ACLF*, Washington's requirement was not narrowly tailored to meet the state's interest in preventing fraud and informing voters through campaign finance disclosure).

190. *ACLF*, 525 U.S. at 191.

191. The Court did not address squarely the constitutionality of Colorado's requirement that petitioners, upon submitting their final petition to the state, disclose their identities and per-signature



Another line of cases limits what can be done to control the problematic consequences of big money in initiative campaigns. Caps on initiative campaign expenditures are unconstitutional,<sup>192</sup> as are caps and limits on contributions to initiative campaigns.<sup>193</sup> While the Court's recent decision in *McConnell v. Federal Election Commission*,<sup>194</sup> which upheld the McCain-Feingold campaign finance reform law, might hint at future acceptance of limits on initiative financing, the Court is unlikely to consider the issue for some time given the fragmented opinions and unlikelihood of similar near-term attempts at reform. Still, to the degree that states could entice the Court to allow caps and limits on initiative campaign finances, such efforts should be encouraged in order to ensure the system's openness, fairness, and integrity.

Currently, the only avenue open to the states for controlling initiative finances is to require strict accounting of all contributions and expenditures.<sup>195</sup> Unfortunately, the Court has also stripped states of the best method of informing voters about who finances initiative campaigns: mandatory disclosure of sponsors' identities in initiative advertising.<sup>196</sup> In 1995, the Court in *McIntyre v. Ohio Elections Commission*<sup>197</sup> held that prohibitions on anonymous speech in the initiative context are unconstitutional.<sup>198</sup> Thus,

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spending on paid signature gatherers. *Id.* at 201-03. Still, the Court referred to the requirement approvingly and noted that it would help to reveal the aggregate spending on signature gathering. *Id.*

192. *Buckley v. Valeo*, 424 U.S. 1 (1976).

193. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (caps); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (limits). Nonetheless, California caps contributions to candidate-controlled ballot measure committees. CAL. CODE REGS. tit. 2, § 18530.9 (2004).

194. 540 U.S. 93 (2003).

195. *Buckley v. Valeo* held this practice constitutional. 424 U.S. at 66-67. In 2002, the Ballot Initiative Strategy Center Foundation, a progressive think tank, gave Oregon an "F" grade in making campaign finance information available to voters because it had not yet mandated online disclosure (Oregon started doing so in 2004), individual donor data and third party expenditures were not available online, there was no search option for linking campaign committees to their respective initiatives, searching was awkward, campaign committees were not described for quick identification, out-of-state groups were not required to report unless they spent more than two-thirds of their total funds in Oregon, and information was updated slowly. BALLOT INITIATIVE STRATEGY CENTER FOUNDATION, THE CAMPAIGN FINANCE REFORM BLIND SPOT 24 (2002). Nine other states and the District of Columbia also received "F" grades, two states received a "D," four states received a "C," two states received a "B," two states received an "A," and four states earned an "Incomplete." *Id.* at 8. California and Washington each received an "A" grade because their campaign finance websites were well-organized, informative, allowed for multiple search options and information downloading, and because electronic filing was mandatory for most campaign committees. *Id.* at 17.

196. The problem of initiative sponsors hiding behind misleading names is as old as the initiative itself. *See* BARNETT, *supra* note 15, at 14 (describing a group of grafters who identified themselves as "A Committee of Farmers" and a group opposed to university expenditures that identified itself as "The Oregon Higher Education Institutions Betterment League" in 1906).

197. 514 U.S. 334 (1995).

198. *Id.* at 357. Oddly, the Court denied *certiorari* in an appeal of a California Supreme Court decision upholding the constitutionality of the state's disclosure law four days after publishing *McIntyre*. *Griset v. Fair Political Practices Comm'n*, 514 U.S. 1083 (1995), *denying cert.* 884 P.2d 116 (Cal. 1994). The California statute required initiative campaign committees to disclose their names and

to the extent that a state could convince the Court to allow mandatory disclosure of the sponsors of mass advertising for or against initiatives, such efforts should also be encouraged.<sup>199</sup>

### B. Non-Judicial Reforms in Oregon

Given the Court's tight restrictions on direct democracy reform, states have limited themselves, for the most part, to the most reasonable and defensible changes. In 2002, for instance, Oregon voters overwhelmingly passed Measure 26, the Initiative Integrity Act, which prohibits petitioners from paying signature gatherers on a per signature basis.<sup>200</sup> The strong popular support resulted primarily from findings that signature gatherers for Bill Sizemore had engaged in voter fraud and that Sizemore himself was guilty of racketeering, including signature forgery and using tax-exempt donations for political purposes.<sup>201</sup> After passage, a federal district court upheld Measure 26 against a First Amendment challenge brought by Oregonians in Action, another anti-tax group.<sup>202</sup> The court held that the

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addresses on all mass mailings they sent. CAL. GOV'T CODE § 84305 (West 2003). Whatever the Court's reasons may have been, four years later a California appellate court held that, in light of *McIntyre's* broad holding, California's statute was unconstitutional. *Griset v. Fair Political Practices Comm'n*, 82 Cal. Rptr. 2d 25 (Cal. Ct. App. 1999), *rev'd on other grounds*, 23 P.3d 43 (Cal. 2001).

199. See CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *supra* note 75, at 197-226 (describing the importance of tracking money in initiative campaigns). After all, almost every state had disclosure laws at the time of the *McIntyre* decision, 514 U.S. at 371 (Scalia, J., dissenting), and there are important differences between the facts of *McIntyre* and the states' disclosure laws. *DUBOIS & FEENEY*, *supra* note 3, at 192-221. The plaintiff in *McIntyre* was an ordinary citizen who, unaffiliated with any organization, stood outside a middle school distributing homemade leaflets regarding a tax levy. 514 U.S. at 337. California's disclosure law applied only to mass mailings from initiative campaign committees and only required disclosure from the top two funders of the advertisement. CAL. GOV'T CODE § 84305. Other states' statutes applied only to radio and television advertisements, or only to top funders. *DUBOIS & FEENEY*, *supra* note 3, at 193. Further, the Court misunderstood the degree to which money plays a role in initiative campaigns; had it understood, it might have ruled differently. See *id.* at 198-205. Again, given *McConnell*, perhaps the Court will revisit these issues and either reach a different result or encourage lower courts not to read *McIntyre* too broadly.

200. Press Release, Oregon AFL-CIO, Court Upholds Voter-Approved Initiative Integrity Act (Feb. 12, 2004), at [http://www.orafcio.unions-america.com/Measure26\\_PressRelease.htm](http://www.orafcio.unions-america.com/Measure26_PressRelease.htm). Specifically, the measure amended the state constitution to make it "unlawful to pay or receive money or other thing of value based on the number of signatures obtained on an initiative or referendum petition." OR. CONST. art. IV, § 1b (codifying the measure).

201. Primarily to stop Bill Sizemore, Oregon unions founded the Voter Education Project in 2001 to monitor signature-gathering efforts conducted by Sizemore and other conservatives. Dietz, *supra* note 92. The unions presented county officials with evidence of duplicated signatures, which caused the county to reverse its earlier finding that one Sizemore measure had enough signatures to make the ballot; thus, for the first time in ten years, Sizemore failed to place an initiative on the Oregon ballot. Hogan & Mapes, *supra* note 121. Voter Education Project evidence and labor helped secure two fraud convictions and a \$2.5 million verdict against Oregon Taxpayers United. *Id.* This verdict and a subsequent injunction effectively shut down Sizemore's organization, as well as its successor, the Oregon Taxpayers Union. Dan Hortsch, *Judge's Orders Limit Sizemore*, OREGONIAN, June 19, 2004, at D1.

202. The court stated: "The irony of plaintiffs' lawsuit is not lost on the court. Plaintiffs seek to hold unconstitutional a measure enacted by citizens of the State of Oregon through the initiative

“limited burdens imposed by Measure 26 are far outweighed by [the] need to protect the integrity of the electoral process and to restore the public’s confidence in its government.”<sup>203</sup> Not everyone, however, believes that banning per signature payments will clean up the initiative process. Bill Sizemore has argued that signature gatherers will still “have the same motivation they [had before Measure 26]—the same motivation to work hard, or if they are unscrupulous or lacking in character, the same motivation to cheat.”<sup>204</sup> Sizemore is not the only one to doubt Measure 26’s value. Oregon progressives have complained that it will effectively end grassroots efforts by raising the cost of placing initiatives on the ballot and thus limiting access to direct democracy to corporations and unions.<sup>205</sup> Further, the secretary of state has interpreted Measure 26 to ban only payment per signature, but not termination of unproductive signature gatherers, minimum signature requirements, hourly wages or salaries, or productivity bonuses.<sup>206</sup> Thus, Measure 26 may have more bark than bite.

The Oregon state legislature and secretary of state have also actively considered reform proposals. In 2000, the legislature considered a bill that would have barred signature gatherers from filling in signatories’ required

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process, so that plaintiffs may resume the very payment practice prohibited by the measure when gathering signatures for initiative petitions they support.” Oregon AFL-CIO, *supra* note 200. Additionally, a state court upheld Measure 26 in the face of state constitutional challenges. *Ban on Petition Signature Bounties Upheld: A Welcome Ruling*, REGISTER-GUARD (Eugene, OR), Nov. 3, 2003, at <http://www.registerguard.com/news/2003/11/03/ed.edit.sigs.1103.html>.

203. *A Small Step Toward Reclaiming the Initiative Process*, DAILY NEWS (Longview, WA), Feb. 20, 2004, at <http://www.tdn.com/articles/2004/02/20/editorial/editorial.txt>. The court held that Measure 26’s opponents had failed “to present persuasive evidence that Measure 26 imposes severe or substantial burdens on the circulation of initiative and referendum petitions.” Oregon AFL-CIO, *supra* note 200. The Eighth Circuit upheld North Dakota’s similar law as a constitutional response to evidence of actual voter fraud caused by payment per signature. *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001). In *Jaeger*, students, who were paid twenty-five cents per signature, were fraudulently “taking names out of the phone book,” and more than 17,000 signatures were invalidated due to irregularities. *Id.* at 618 (internal quotation marks omitted). The court also found a “lack of any evidence from the appellants showing that the ban on commissioned payment burdens their ability to collect signatures.” *Id.* In contrast, courts have struck down similar statutes when there is no evidence that actual voter fraud is linked to per signature payment. *See, e.g.*, *On Our Terms ‘97 PAC v. Sec’y of Me.*, 101 F. Supp. 2d 19, 26 (D. Me. 1999) (finding “no evidence” of fraud); *Term Limits Leadership Council v. Clark*, 984 F. Supp. 470, 473 (D. Miss. 1997) (finding the state had “not even remotely approached demonstrating a compelling state interest” for the statute); *LIMIT v. Maleng*, 874 F. Supp. 1138, 1140 (W.D. Wash. 1994) (finding “no actual proof of fraud”).

204. Dietz, *supra* note 92.

205. *Id.* The Pacific Green Party of Oregon opposed Measure 26, fearing it “would have no practical effect” except to “vastly increase costs for grassroots initiative efforts.” Hope Marston, *Argument in Opposition to Measure No. 26*, in OFFICIAL 2002 GENERAL ELECTION ONLINE VOTERS’ GUIDE (STATE OF OREGON), at <http://www.sos.state.or.us/elections/nov52002/guide/measures/m26opp.htm>. Anti-tax activists objected for the same reason. Hogan & Mapes, *supra* note 121.

206. OR. ADMIN. R. 165-014-0260 (2003).

personal information.<sup>207</sup> Another bill would have required petitioners to file 10,000 signatures with the secretary of state before their measure could receive a title from the attorney general.<sup>208</sup> Additionally, a 2000 directive from the secretary of state limited access to the ballot by ordering county clerks to disregard the signatures of inactive voters when determining whether a petitioner had gathered enough signatures to place a measure on the ballot.<sup>209</sup> Inactive voters include those who have not voted in the last five years, a group that sometimes constitutes a significant percentage of those signing initiative petitions.<sup>210</sup> The secretary of state now also uses a new statistical sampling method to discover and discard duplicate signatures that has sometimes doubled the number of discarded signatures compared to previous years.<sup>211</sup> These changes can make a big difference: four of the eleven petitions submitted for the 2002 ballot were either less than 1,000 signatures shy of the minimum threshold or equally narrowly above it.<sup>212</sup> Yet these reforms do not alter the fundamental structure of direct democracy in Oregon; rather, they only seek to make slight procedural alterations. The secretary of state's actions, for instance, require petitioners to gather more signatures to ensure their measures a place on the ballot, but the changes stem from an interpretation of existing law, not the creation of new law. Thus, although such reforms have real effect on ballot measure campaigns, they do not represent the sort of far-reaching reform proposals discussed later in this Comment.

### C. Judicial Reforms

In 1948, California voters faced a 2,100-word initiative known as the California Bill of Rights that regulated pensions, gambling, taxes, oleomargarine, the healing arts, civic centers, the legislature, hunting and fishing, surface mining, printing, and amendments to the constitution.<sup>213</sup> Although the California Supreme Court held that the initiative did not

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207. See Hogan & Mapes, *supra* note 121. Because petitioners often ask citizens to sign multiple petitions, this law would have prohibited petitioners from transferring a signatory's personal information from one petition to another. *Id.* The bill passed in the Senate but failed in the House. *Id.*

208. H.B. 3560, 70th Leg., Reg. Sess. (Or. 1999); Hogan & Mapes, *supra* note 121.

209. *Id.* A state court upheld the secretary's directive. *McIntire v. Bradbury*, A0006-06252 (Multnomah County Cir. Ct. (OR) 2000). The logic of the directive followed from two Oregon statutes: "Any elector may sign an initiative or referendum petition for any measure on which the elector is entitled to vote." OR. REV. STAT. § 250.025(1) (2003). But "[t]he inactive registration of an elector must be updated before the elector may vote in an election." § 247.013(8). Thus, inactive voters may not sign petitions because "eligibility to vote is a requirement that must exist at the time a voter signs a petition." *State ex rel. Sajo v. Paulus*, 688 P.2d 367, 376 (Or. 1984).

210. Hogan & Mapes, *supra* note 121. This and other factors have increased the number of signatures rejected from 17% in 1998 to 31% in 2002. *Id.*

211. ELLIS, *supra* note 3, at 242-43 n.12. The new method was mandated by the state supreme court, authorized by the legislature, and shaped by the secretary of state. *Id.*

212. Hogan & Mapes, *supra* note 121.

213. See *McFadden v. Jordan*, 196 P.2d 787, 789-93 (Cal. 1948) (describing the initiative).

amend the constitution, but rather unconstitutionally revised it,<sup>214</sup> the next year an initiative amendment limited future initiatives to one subject only.<sup>215</sup> Despite this powerful restriction, the California Supreme Court has struck down an initiative for violating the single-subject rule only once.<sup>216</sup>

Article IV, section 1(2)(d) of the Oregon constitution also requires that each initiative amendment embrace “one subject only.”<sup>217</sup> This single-subject rule was added by legislative referral in 1968 to prohibit logrolling measures together to garner support for an initiative whose parts would not pass by themselves.<sup>218</sup> Similarly, Article IV, section 20 requires that every legislative act “embrace but one subject, and matters properly connected therewith.”<sup>219</sup> The Oregon Supreme Court interprets both provisions identically, analyzing whether “the provisions of the enactment at issue facilitated a single goal and were pertinent and germane to one overall

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214. *Id.* at 799. A revision involves changes to the constitution that are so substantial or numerous that they are no longer mere amendments. *Id.* at 796-97.

215. CAL. CONST. art. II, § 8(d) (codifying the initiative); *see also* Perry v. Jordan, 207 P.2d 47 (Cal. 1949) (reprinting and discussing the initiative). California, Oregon, and fifteen other states have single-subject requirements for initiatives. DUBOIS & FEENEY, *supra* note 3, at 81, 128. Generally, the provisions apply only to statutory initiatives, although some states apply it to initiative amendments as well. *Id.*

216. Senate of Cal. v. Jones, 988 P.2d 1089 (Cal. 1999) (prohibiting election officials from placing proposed Proposition 24, an election reform initiative, on the ballot because it both transferred the reapportionment power to the state supreme court and altered the compensation of elected officials). Additionally, California appellate courts have struck down only two other initiatives for violating the state’s single subject rule. Cal. Trial Lawyers Ass’n v. Eu, 245 Cal. Rptr. 916 (Cal. Ct. App. 1988) (striking down the Insurance Cost Control Initiative of 1988 because it would have both controlled the cost of insurance and exempted insurance companies from campaign contribution regulations); Chem. Specialties Mfrs. Ass’n v. Deukmejian, 278 Cal. Rptr. 128 (Cal. Ct. App. 1991) (striking down Proposition 105, the Public’s Right to Know Act, because it reduced toxic pollution, protected the elderly from fraud, improved the standards of nursing homes, preserved the integrity of elections, and fought apartheid). In contrast, California courts have held that many initiatives are in compliance with the single subject rule. *See, e.g.,* Fair Political Practices Comm’n v. Superior Court, 599 P.2d 46 (Cal. 1979) (upholding Proposition 9, the 1974 Political Reform Act); Brosnahan v. Brown, 651 P.2d 274 (Cal. 1982) (upholding Proposition 8, the Victim’s Bill of Rights); Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990) (upholding Proposition 115, the Crime Victims Justice Reform Act); Legislature of Cal. v. Eu, 816 P.2d 1309 (Cal. 1991) (upholding Proposition 140, the Political Reform Act of 1990); Manduley v. Superior Court, 41 P.3d 3 (Cal. 2002) (upholding Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998). The court has consistently examined each initiative to see whether, “despite its varied collateral effects, all of its parts are reasonably germane to each other, and to the general purpose or object of the initiative.” *Jones*, 998 P.2d at 1098 (emphasis and quotation marks omitted) (rejecting the “functional relationship” test); *see also* DUBOIS & FEENEY, *supra* note 3, at 129-36 (discussing California’s approach).

217. Thus, as in California and other states, initiatives may not seek to enact constitutional revisions. *Holmes v. Appling*, 392 P.2d 636 (Or. 1964); *see also* DUBOIS & FEENEY, *supra* note 3, at 81, 136-40 (discussing use of the single-subject rule in various jurisdictions).

218. *Armatta v. Kitzhaber*, 959 P.2d 49, 60-63 (Or. 1998). For a description of early problems in Oregon stemming from logrolling measures together, *see* BARNETT, *supra* note 15, at 42-46.

219. Many other states also have a single-subject rule for legislative acts. *See, e.g.,* CAL. CONST. art. IV, § 9.

subject.<sup>220</sup> But, as in California, the court applies the single-subject rule so liberally that it rarely strikes down initiatives for failure to comply with it.<sup>221</sup>

The Oregon Supreme Court recently rediscovered another provision of the state constitution. Article XVII, section I requires that any “two or more amendments” must be “separately” submitted to the voters. Prior to 1998, the court had never actually analyzed the separate-vote requirement. Then, in *Armatta v. Kitzhaber*,<sup>222</sup> the court used it to strike down an anti-crime initiative, 1996’s Measure 40.<sup>223</sup> The court found that Measure 40 made multiple “substantive” changes to the constitution that were not “closely related.”<sup>224</sup> The court held that it could not cure the initiative’s defects, but must strike it down “in its entirety” because it violated the separate-vote requirement.<sup>225</sup> Since then, the court has struck down several other initiatives under the rule.<sup>226</sup>

In deciding whether an amendment makes multiple substantive changes to the state constitution, the court examines both explicit and implicit changes, regardless of whether they are additions, modifications, or

220. *Armatta*, 959 P.2d at 62. The court has also described the test as allowing initiatives containing “a wide range of connected matters intended to accomplish” the subject’s goal, *State ex rel. Caleb v. Beesley*, 949 P.2d 724, 729 (Or. 1997), and those containing “a unifying principle logically connecting all principles in the act, such that it can be said that the act embraces but one subject,” *McIntire v. Forbes*, 909 P.2d 846, 856 (Or. 1996) (internal quotation marks and brackets omitted).

221. See *State v. Fugate*, 26 P.3d 802 (Or. 2001) (upholding an anti-crime law); *Beesley*, 949 P.2d at 730 (upholding another anti-crime law). *But see Forbes*, 909 P.2d at 856-59 (striking down a bill that regulated light rail, confined-animal feeding, and shooting ranges, among other things); *Holmes v. Appling*, 392 P.2d 636 (Or. 1964) (striking down an initiative that would have instituted a wholly revised state constitution).

222. 959 P.2d 49 (Or. 1998).

223. *Id.* at 290.

224. 959 P.2d at 64-68. In *Fugate*, the Oregon Supreme Court upheld the subsequent statutory version of Measure 40 against a single-subject rule attack. 26 P.3d 802. Former Justice of the Oregon Supreme Court Hans Linde and former Attorney General David Frohnmayer first pushed the idea of beefing up the separate-vote requirement. David B. Frohnmayer & Hans A. Linde, *Initiating “Laws” in the Form of “Constitutional Amendments”*: An Amicus Curiae Brief, 34 WILLAMETTE L. REV. 749, 770-72 (1998). They persuaded Justice Fadeley to dissent in *Atiyeh v. State*, 918 P.2d 795 (Or. 1996). Fadeley argued that 1994’s Measure 8, concerning public employee retirement benefits, violated the rule. *Id.* at 428. Although the Oregon Supreme Court subsequently adopted much of Justice Fadeley’s test and reasoning, no court has ever cited his dissent.

225. *Armatta*, 959 P.2d at 68.

226. *Lehman v. Bradbury*, 37 P.3d 989 (Or. 2002) (1992’s Measure 3 on term limits); *Swett v. Bradbury*, 43 P.3d 1094 (Or. 2002) (1998’s Measure 62 on campaign reform); *League of Or. Cities v. Kitzhaber*, 56 P.3d 892 (Or. 2002) (2000’s Measure 7 on land use). The Oregon Court of Appeals has also used the state supreme court’s analysis to strike down several other initiatives. *Dale v. Keisling*, 999 P.2d 1229 (Or. Ct. App. 2000) (proposed Measure 2000-15 on sales tax); *Sager v. Keisling*, 999 P.2d 1235 (Or. Ct. App. 2000) (proposed Measure 2000-12 on sales tax); *Lincoln Interagency Narcotics Team (LINT) v. Kitzhaber*, 72 P.3d 967 (Or. Ct. App. 2003) (2000’s Measure 3 on civil forfeiture), *rev. granted*, 84 P.3d 1080 (Or. 2004). The secretary of state has prohibited several other initiatives, including some drafted by Bill Sizemore, from circulating because they violated the separate-vote requirement. Philip Bentley, Note, *Armatta v. Kitzhaber: A New Test Safeguarding the Oregon Constitution from Amendment by Initiative*, 78 OR. L. REV. 1139, 1154-56 (1999).

deletions of constitutional provisions.<sup>227</sup> While the court has not defined “substantive,” it likely means that the changes must be “real,” not “merely possible or speculative,” and that they amount to more than “formal changes involving, for example, changes to numbering, modernization of spelling, and the like.”<sup>228</sup> In determining whether two substantive changes are “closely related,” the court looks both at the relationship between the amendment’s provisions and between the constitutional provisions that the amendment affects.<sup>229</sup> The less related the various provisions are, the more likely it is that the amendment violates the separate-vote requirement.<sup>230</sup> In *Armatta*, the court found that although “[m]any of the constitutional provisions affected by Measure 40 are related in the sense that they pertain to constitutional rights that might be implicated during a criminal investigation or prosecution, . . . not all . . . share even that relationship.”<sup>231</sup> The court also found that the related constitutional provisions were “not related closely enough” because they affected, among other things, “separate constitutional rights[] granted to different groups of persons.”<sup>232</sup> In subsequent cases, the court found that term limits for federal elected office were not closely related to term limits for state elected office,<sup>233</sup> and that a “contribution-disclosure requirement” for candidates and a “voter-registration for signature gatherers requirement . . . could not be

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227. *Armatta*, 959 P.2d at 64.

228. *Dale*, 999 P.2d at 1233.

229. *Lehman*, 37 P.3d at 998; *Swett*, 43 P.3d at 1100 (clarifying that, if either of those relationships is too distant, the substantive changes are not closely related).

230. *Lehman*, 37 P.3d at 998. In *Lehman*, the court rejected as “unnecessarily restrictive” a test formulated by the Court of Appeals that would strike down any initiative for which “a vote in favor of one amendment does not necessarily imply a vote in favor of another.” *Id.* at 995-96 (discussing *Dale*, 999 P.2d at 1233-34). The court also rejected a test proffered by the defendant that would have defined as “closely related” any provisions that “are so logically interrelated as to present one specific, discrete, cohesive policy choice.” *Id.* at 996. Steven Novick, a Democratic party activist, attempted to institute the latter test through a ballot measure in 2001. *Novick v. Meyers*, 36 P.3d 486 (Or. 2001) (reprinting the measure and referring the proposed ballot title to the attorney general for modification); *Novick v. Meyers*, 37 P.3d 986 (Or. 2002) (certifying the attorney general’s modified ballot title). The measure failed to qualify for the ballot. OREGON BLUE BOOK, *supra* note 11.

231. 959 P.2d at 67. Specifically, the court referred to “the requirement that the jury pool in criminal cases be drawn from registered voters.” *Id.*

232. *Id.* The court stated that the measure’s changes to the right of Oregonians to be free from unreasonable searches and seizures (Article I, section 9) had “virtually nothing to do with” changes to their right to have a unanimous verdict in murder cases (Article I, section 11). *Id.* As the court explained, “The two provisions involve separate constitutional rights, granted to different groups of persons.” *Id.*

233. *Lehman*, 37 P.3d at 992, 1000 (reprinting and striking down the measure). The *Lehman* court stated that the eligibility of Oregonians to run for Congress was “a topic found nowhere else in the Oregon Constitution [except in the new section added by Measure 3].” *Id.* “The problem was not necessarily that the provision was new. Newness, in and of itself, may be a neutral factor,” the court declared. *Id.* The problem the court found was that eligibility for federal office “had little or nothing to do with term limits for the Oregon State Treasurer, for example, as those limits were established in [Article II,] section 19.” *Id.*

submitted to the voters in a single measure.”<sup>234</sup> Similarly, an explicit expansion of property rights could not be paired in an initiative with an implicit reduction of the right to free speech.<sup>235</sup>

The court’s recent application of Article XVII, section 1 has greatly affected direct democracy in Oregon.<sup>236</sup> Since 1998, the court has upheld only one challenged amendment. In a 2001 case, *Hartung v. Bradbury*,<sup>237</sup> the court upheld Measure 2, a 1986 referral that amended Article IV, section 6’s reapportionment provisions.<sup>238</sup> The court reasoned that the referral’s changes were “relatively modest” compared to the changes to Article IV, section 6 wrought by 1952’s Measure 18,<sup>239</sup> which the court upheld in 1954 in *Baum v. Newbry*.<sup>240</sup> Yet in *Baum*, the court was not certain whether Article XVII, section 1 applied to initiatives.<sup>241</sup> The *Baum* court assumed that it did, finding it “immaterial” whether the reapportionment amendment affected “more than one section of the constitution.”<sup>242</sup> In addition, the court never analyzed whether the amendment’s changes to Article IV, section 6 were closely related. Measure 18 addressed such disparate issues as the timing of reapportionment, in whom the reapportionment power would be vested (the secretary of state), and judicial review.<sup>243</sup> Under *Armatta* and its progeny, these provisions are not closely related. Thus, had the court

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234. *Swett*, 43 P.3d at 1095-96, 1101 (reprinting and striking down the measure). The court stated that rules concerning how elected officials must act (Article II) were “not closely related” to limits on the initiative power (Article IV, section 1(2)). *Id.*

235. *League of Or. Cities v. Kitzhaber*, 56 P.3d 892, 905-06, 910 (Or. 2002) (reprinting and striking down the measure). The court stated that an expanded compensation requirement for regulatory takings (Article I, section 18) was “not closely related” to a restricted right to free expression (Article I, section 8). *Id.* In 2004, Oregonians approved a statutory version of Measure 37. Measure 37 (2004), Text of Measure, at [http://www.sos.state.or.us/elections/nov22004/guide/meas/m37\\_text.html](http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html); see also Bill Graves, *Oregonians Vote Against Land Rules, Gay Marriage*, OREGONIAN, Nov. 3, 2004, at A1 (describing the measure).

236. See *Hogan & Mapes*, *supra* note 121. The court is currently reviewing *LINT v. Kitzhaber*, 72 P.2d 967, 974 (Or. Ct. App. 2003), *petition for rev. granted*, 84 P.3d 1080 (Or. 2004), in which the Court of Appeals held (a) that in “requiring criminal conviction as a condition to civil forfeiture and, further, in imposing restrictions on the use of forfeiture proceeds, [2000’s] Measure 3 made at least two substantive changes to Article XV,” and (b) that “[t]here is little, if any, logical relationship between” the two changes. *Id.* at 974. The court did not allow another proposed measure to make the ballot at all because it would have repealed “the authority of state and local governments to raise revenues except by means of the gross receipts tax . . . and affect[ed] the extent to which the people, in the exercise of their initiative power, could alter the nature of the tax.” *Dale v. Keisling*, 999 P.2d 1229, 1235 (Or. Ct. App. 2000).

237. 33 P.3d 972 (Or. 2001).

238. See OR. CONST. art. IV, § 6 (codifying the measure).

239. *Hartung*, 33 P.3d at 976.

240. 267 P.2d 220 (Or. 1954).

241. *Id.* at 223.

242. *Id.*

243. *Id.*



applied its current analytical framework, in place since *Armatta*, it would have reversed *Baum* and struck down Measure 2 in *Hartung*.<sup>244</sup>

The court nonetheless opted not to apply its reasoning from *Armatta* to its analysis of Measure 2.<sup>245</sup> The reason why remains unclear. Perhaps the court did not think that it could reconcile *Armatta* and *Baum* but did not wish to overrule *Baum* and strike down the reapportionment measures.<sup>246</sup> In contrast to the controversial, mostly conservative measures struck down by *Armatta* and its progeny,<sup>247</sup> the *Baum* amendment was exactly the kind of citizen-instigated legislation envisioned by direct democracy's creators. Specifically, the *Baum* amendment came as a response to the legislature's failure to reapportion "the state's legislative and congressional districts, whose boundaries had not been redrawn" for almost twenty years.<sup>248</sup> Fortunately for the court, the *Hartung* amendment affected the exact same constitutional provision as the *Baum* amendment, which allowed the court to ignore *Armatta* and skirt a doctrinal contradiction, upholding the amendment in light of *Baum*.

The court could have sidestepped this problem by holding that the *Armatta* test does not apply retroactively, grandfathering the *Hartung* amendment and all those passed before 1998.<sup>249</sup> Alternatively, the court

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244. The *Armatta* court rejected this conclusion, stating that *Baum* only stood for the propositions that (a) "the purpose of the separate-vote requirement is to allow the voters to decide upon separate constitutional changes separately"; (b) "a single constitutional amendment may affect one or more constitutional provisions without offending the separate-vote requirement"; and (c) "the separate-vote requirement encompasses, to some extent," the single-subject rule. 959 P.2d 49, 59-60 (Or. 1998).

245. 33 P.3d 972, 976 n.5 (Or. 2001) (declining to revisit *Baum* in light of *Armatta* as "nothing in *Armatta* suggests that *Baum* was decided incorrectly").

246. The Oregon Court of Appeals found it "difficult to reconcile the [Supreme] Court's decisions in *Baum* and *Hartung* with its reasoning in *Armatta*, *Lehman*, *Swett*, and *League of Oregon Cities*." *LINT v. Kitzhaber*, 72 P.3d 967 (Or. 2003). The court found that "*Baum*, in particular, presents an analytical challenge" because it "blur[red] the line between the single-subject and separate-vote requirements" by upholding changes that were "connected only by a broad unifying subject matter, that is, reapportionment." *Id.* Moreover, the court noted that those changes "arguably conferred rights on at least two different groups of people, namely, persons of color and persons who, regardless of race, are residents of the various geographical areas affected by the redistricting inherent in reapportionment." *Id.* In contrast, Judge Armstrong wrote in dissent that *Baum* could be harmonized with the *Armatta* line of cases by focusing on an amendment's changes to constitutional structure. *Id.* at 978 (Armstrong, J., dissenting).

247. Issues such as term limits, property rights, and anti-crime measures are all key parts of the current conservative agenda. See, e.g., REPUBLICAN NATIONAL COMMITTEE, 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA (2004), available at <http://www.gop.com/media/2004platform.pdf>.

248. Oregon, *supra* note 13; *Baum v. Newbry*, 267 P.2d 220 (Or. 1954). The legislature was thus neglecting its constitutional duty to reapportion itself after every federal census. *Baum*, 267 P.2d at 223 ("It appears that the legislature complied with such constitutional pronouncement periodically up to 1933, from which time on no reapportionment by it has been made."). The *Baum* amendment passed by a two-to-one margin. Oregon, *supra* note 13.

249. Instead, the court assumed, without deciding, that it could hear challenges to old amendments. *Hartung*, 33 P.3d at 976 n.3. Similarly, in 1952 in *State v. Payne*, the court considered, and then rejected a separate-vote challenge to a thirty-two-year-old amendment. 244 P.2d 1025, 1030-

could have declined to hear the case on account of laches.<sup>250</sup> The court's failure to take either of these approaches forced it to confront *Hartung* squarely. Given that, the outcome makes sense for the simple reason that had the court struck down the then-fifteen-year-old *Hartung* amendment under the *Armatta* test, the validity of all amendments approved by voters since 1904 would have been called into question. Clearly, the court did not want to reach that result.

Should the court adhere to *Armatta* and its reasoning, most initiative amendments are likely to fail.<sup>251</sup> Perhaps that is a good thing. One view of good government is that constitutions should be enduring documents that seldom require amendment. The U.S. Constitution has only been amended fifteen times in the last 200 years. In contrast, Oregon voters approved fourteen amendments to their constitution between 2000 and 2002 alone.<sup>252</sup> A stable constitution exposit greater principles of government, leaving details to statutes and future interpretation, while an unstable constitution requires frequent amendment because its excessive detail does not allow for future technological or societal change. Those seeking to change the law can always avail themselves of statutory initiatives. While, unlike amendments, those statutes remain alterable by the legislature in Oregon and many other states,<sup>253</sup> legislators are loath to repeal or alter statutes approved by the voters.<sup>254</sup>

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31 (Or. 1952). While the court in both *Hartung* and *Payne* allowed the suit and upheld the amendment, the results would have been the same had the court dismissed the suits. Moreover, neither case applied the *Armatta* test.

250. More recently, the court suggested that the state's ten-year statute of ultimate repose may constitute a bar to separate-vote challenges brought more than ten years after an amendment's enactment. *See, e.g., Lehman v. Bradbury*, 37 P.3d 989, 993-94 (Or. 2002) (refusing to bar the suit based on unique statutory grounds). If that were so, amendments adopted before 1995 would be unassailable, and by 2008 the question whether *Armatta* applies retroactively would become moot. Regardless, the legislature could create a specific statute of limitations for separate-vote challenges. Given that the vast majority of such cases have been decided within two years of an amendment's enactment, a short statute of limitations, perhaps as little as six months, would make sense.

251. Indeed, opponents of 2004's Measure 36, the same-sex marriage ban, filed suit claiming that the initiative amendment violates the separate-vote requirement. Ashbel S. Green, *Gays Take New Tack for Right to Marry*, OREGONIAN, Feb. 1, 2005, at A1. Measure 36's only sentence states that "only a marriage between one man and one woman shall be valid or legally recognized as a marriage." Measure 36 (2004), Text of Measure, at [http://www.sos.state.or.us/elections/nov22004/guide/meas/m36\\_text.html](http://www.sos.state.or.us/elections/nov22004/guide/meas/m36_text.html). The suit argued that Measure 36 not only excluded same-sex couples from marriage, it also changed several sections of the constitution regarding contracts and religion. Green, *supra*. Yet, as an attorney for Measure 36 proponents said, if Measure 36 cannot pass the separate-vote test, "then you cannot amend the Oregon Constitution via the initiative any more, and I don't think that's where the Supreme Court intends to go." *Id.*

252. OREGON BLUE BOOK, *supra* note 11. As of 1998, South Carolina and Alabama had each amended their constitutions more than 450 times, while nineteen states had never amended their constitutions. DUBOIS & FEENEY, *supra* note 3, at 72.

253. DUBOIS & FEENEY, *supra* note 3, at 79. In 1996, Oregon voters rejected an initiative amendment that would have required an initiative to change or repeal a previously enacted statutory initiative. *Id.* In contrast, California initiatives can only be altered by future initiatives, unless they expressly allow otherwise. CAL. CONST. art. 2, § 10(c). This makes a statutory initiative much like a

Much of the heat generated by post-passage scrutiny of initiatives has been borne by the courts. In particular, the Oregon Supreme Court's recent separate-vote jurisprudence has angered many career petitioners and made them wary of wasting time and resources on initiatives that ultimately will be struck down.<sup>255</sup> Petitioners have begun to fight back. A failed 2000 initiative, Measure 96, would have prohibited most efforts to rein in direct democracy.<sup>256</sup> A 2001 initiative that failed to make the ballot would have undone the *Armatta* line of cases.<sup>257</sup> Then, to the further dismay of petitioners, the court overruled its nine-year-old precedent in 2002, holding that petitioners have no right to gather signatures at shopping centers and public malls,<sup>258</sup> a right that California petitioners enjoy.<sup>259</sup>

Oregon conservatives reacted by launching an assault on the state judiciary. They put two measures on the ballot in 2002 in an attempt to break what they perceive as the state supreme court's liberal bent. Measure 21 would have amended the constitution to allow voters to mark "None of the Above" when voting for judges, thus making it more difficult for judges to gain enough votes for reelection.<sup>260</sup> Measure 22 would have amended the constitution to require all state appellate judges to be elected by geographic district, presumably to limit the number of judges coming from the more liberal Willamette Valley.<sup>261</sup> Both measures failed.<sup>262</sup> Still, the justices of

constitutional amendment. In other states, the legislature must wait a proscribed period or pass changes by a supermajority before it can alter initiative statutes. *See, e.g.*, N.D. CONST. art. III, § 8 (legislature must wait seven years or pass changes by two-thirds vote of each house); DUBOIS & FEENEY, *supra* note 3, at 79 (describing practice in other states).

254. *See* BARNETT, *supra* note 15, at 145-56 (describing this reluctance). Legislative efforts to repeal 2002's Measure 25, which raised the Oregon state minimum wage and tied it to inflation increases, failed despite the sour economy. Richard R. Aguirre, *Voters are Right—Unless Lawmakers Disagree*, STATESMAN JOURNAL (Salem, OR), Mar. 30, 2003, at 1C; Press Release, Northwest Labor Press, Minimum Wage Under Attack in Oregon House (Apr. 4, 2003), at <http://www.nwlaborpress.org/2003/4-4-03Minimum.html>; *see also* DUBOIS & FEENEY, *supra* note 3, at 80 (stating that legislatures are more likely to embrace statutory initiatives than repeal them).

255. James Leuenberger, Justice Rives Kistler's competitor in the May 2004 primary, ran partly on a related platform, claiming that the "Oregon Supreme Court has systematically subverted the people's constitutionally-reserved initiative power. Such subversion must stop." OREGON SECRETARY OF STATE, VOTER'S GUIDE FOR MAY 18, 2004 PRIMARY ELECTION, NONPARTISAN CANDIDATES: JUDGE OF THE OREGON SUPREME COURT: JAMES E. LEUENBERGER, available at [http://www.sos.state.or.us/elections/may182004/guide/np/leuen\\_j.htm](http://www.sos.state.or.us/elections/may182004/guide/np/leuen_j.htm).

256. OREGON BLUE BOOK, *supra* note 11.

257. *See supra* note 235.

258. *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228 (Or. 2000), *rev'g* *Lloyd Corp. v. Whiffen*, 849 P.2d 446 (Or. 1993). Petitioners do not enjoy this right under the U.S. Constitution, either. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

259. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980). This is because such places are "freely and openly accessible to the public." *Cf. Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 29 P.3d 797, 813 (Cal. 2001) (holding that an apartment complex can prohibit citizens from distributing unsolicited pamphlets on its property).

260. OREGON BLUE BOOK, INITIATIVE, REFERENDUM, AND RECALL, 2000-2004, available at <http://bluebook.state.or.us/state/elections/elections22a.htm>.

261. *Id.*

the Oregon Supreme Court might want to be more cautious in their rulings, lest they be recalled or voted out of office in the next election. In a state where judges are subject to voter approval, they often have less freedom to reach results at odds with the popular will, regardless of the reasoning behind their decisions. In 1986, Californians, fed up with what they viewed as their state supreme court's softness on crime, voted three justices out of office.<sup>263</sup> In the May 2004 primary, two Oregon Supreme Court justices and one Court of Appeals judge faced intense opposition from conservative candidates.<sup>264</sup> The sitting judges defeated their opponents,<sup>265</sup> but they can expect more challenges in the future.

#### IV

#### FUTURE DIRECT DEMOCRACY REFORM

Not only are vested interests mounting pressure against direct democracy reform, they continue to intensify its problems. Not eighteen months after Measure 26's passage, Oregon anti-tax groups that opposed the state legislature's 2003 bipartisan revenue plan collected more than enough signatures to force a statewide referendum, Measure 30.<sup>266</sup> The ban on per-signature payment did not slow down the collection of signatures; it only changed the way in which signatures were gathered. Oregonians in Action (OIA), an anti-tax group, bypassed Measure 26 by eschewing the use of sidewalk petitioners in favor of direct mail: OIA simply sent petitions to persons on its and several other anti-tax groups' mailing lists so that recipients could sign and return them.<sup>267</sup> While the direct mail method of

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262. Measure 21 gained only 44% of the vote, but Measure 22 came close to passing, garnering 49.4% of the vote. *Id.* Loren Parks, an Oregon businessman and significant source of money for conservative political causes in the state, provided nearly all of the funding for both measures. Jeff Mapes & Dave Hogan, *Parks, a Major Donor in Conservative Issues, Buys Home in Nevada*, OREGONIAN (Portland, OR), May 15, 2003, at C1; see also ELLIS, *supra* note 3, at 111-13 (describing Parks's involvement in Oregon initiative politics); MPRAP, *supra* note 110.

263. Cain & Miller, *supra* note 144, at 58. Chief Justice Rose Bird had voted four years prior to strike down Proposition 8, a "victim's bill of rights" amendment. *Brosnahan v. Brown*, 651 P.2d 274, 290 (Cal. 1982) (Bird, C.J., dissenting). The other ousted justices were Cruz Reynoso and Joseph Grodin. Cain & Miller, *supra* note 144, at 58.

264. See *Judicial Incumbents Deserve Re-election*, STATESMAN JOURNAL (Salem, OR), Apr. 18, 2004, at 10C. Oddly, there is evidence that federal judges, who enjoy life tenure, are not more likely to strike down initiatives than state court judges who are subject to reelection. Kenneth P. Miller, *The Role of Courts in the Initiative Process: A Search for Standards* 16 (Sept. 2-5, 1999) (unpublished working paper), at <http://www.iandrinstitute.org/Studies.htm>.

265. OREGON SECRETARY OF STATE, OFFICIAL RESULTS: MAY 18, 2004, PRIMARY ELECTION, at <http://www.sos.state.or.us/elections/may182004/p04abstract.html>. Conservative challenges to sitting Oregon judges are not, however, entirely new. See Peter Farrell, *Judicial Race Blurs Traditional Rules on Campaigning*, OREGONIAN, Oct. 11, 2000, at A8.

266. Measure 30, at <http://www.sos.state.or.us/elections/feb032004/guide/m30.htm> (last visited Apr. 15, 2005). Voters had rejected a similar tax measure in 2003 through another referendum, Measure 28. Green, *supra* note 251.

267. See Sinks, *supra* note 121.

signature gathering is significantly more expensive than traditional sidewalk efforts,<sup>268</sup> its signature validity rates are closer to 90%, far better than the usual 70% that teams of sidewalk signature gatherers achieve.<sup>269</sup> In the battle to win the hearts and minds of voters, proponents and opponents of Measure 30, primarily local unions and national anti-tax groups, respectively, raised just over \$1 million each.<sup>270</sup> Ultimately, Measure 30 proponents (supporters of the tax increase) lost by less than 1% of the vote.<sup>271</sup> The very existence of the initiative on the ballot prompted one Oregonian to lament that “[w]e have taken the direct democracy experiment too far.”<sup>272</sup> Yet, in the fall of 2004, Oregon voters passed two more conservative initiatives: a constitutional ban on same-sex marriage<sup>273</sup> and a statute requiring the state to either compensate a property owner for any reduction in property value caused by land use regulations or to exempt the property owner from the regulation.<sup>274</sup>

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268. OIA paid a signature collection firm \$275,000 to put Measure 30 on the November 2004 ballot. *Judge Upholds Restrictions on Petition Signatures*, DAILY NEWS (Longview, WA), Feb. 13, 2004, available at <http://www.tdn.com/articles/2004/02/13/oregon/news01.txt>.

269. SCHULTZ, *supra* note 91, at 34-35. Direct mail has thus become the preferred method of signature collection in California. CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *supra* note 75, at 140-54 (describing its success).

270. Christopher Stollar, *Measure 30 Campaigns Raised \$2 Million*, SPRINGFIELD NEWS (Springfield, OR), Mar. 26, 2004, available at <http://www.springfieldnews.com/articles/2004/03/26/local/news05.txt>. Because referenda are citizen-forced votes on legislatively enacted laws, opponents of the law place the referendum on the ballot and then campaign for its defeat, while proponents of the law campaign for its passage. Four public employec unions, representing 127,000 Oregonians, contributed almost two-thirds of all pro-Measure 30 money. *Id.* Oregon Citizens for a Sound Economy, an anti-tax group, raised almost half of the money for the anti-Measure 30 campaign, 25% of which came from its Washington, D.C. parent headquarters, the rest from five major Oregon businesses. *Id.*; Press Release, Money in Politics Research Action Project, Ballot Measure 30 Campaign Contributions, Dec. 31, 2003, at [www.oregonfollowthemoney.org/Press/2003/123103BM30.pdf](http://www.oregonfollowthemoney.org/Press/2003/123103BM30.pdf) (last visited Apr. 15, 2005); see also Steve Law, *Activist Group Brings Money, Draws Concern*, STATESMAN JOURNAL (Salem, OR), Nov. 1, 2003, at A1 (describing Oregon Citizens for a Sound Economy).

271. Stollar, *supra* note 270.

272. Brian Wagner, *We Take Democracy Too Far*, PORTLAND TRIBUNE, Feb. 3, 2004, available at <http://www.portlandtribune.com/archview.cgi?id=22790>.

Despite the Oregonian emphasis on direct democracy in the past decades, when the use of the initiative system has soared, confidence in our government has plummeted. If we are trying to fix a supposedly broken system, but we approve of it less and less as we get more involved, that does not say that the system is broken. It is saying that our alternatives are not the complete answer.

*Id.*

273. See *supra* notes 18 and 251.

274. Graves, *supra* note 235. The Oregon Supreme Court had struck down an initiative amendment version of the anti-land use statute in 2002. *League of Or. Cities v. Kitzhaber*, 56 P.3d 892 (Or. 2002); see also *supra* note 235 and accompanying text. The passage of the anti-land use measures reversed a long trend of voter rejection of measures designed to repeal or diminish Oregon's progressive land use laws. OREGON BLUE BOOK, *supra* note 11.

Additionally, Lon Mabon unsuccessfully attempted to put three measures on the fall 2004 ballot: one prohibiting judges from “creat[ing] law from the bench”; one like his previously rejected Measure 9 of 2000; and one prohibiting abortion, physician-assisted suicide, and certain forms of

Despite the problems of the initiative process, voters hold it dear. A 1989 poll of Californians found that 73% still thought of direct democracy as a good thing; only 7% disagreed.<sup>275</sup> Yet a 1995 poll of Oregon voters found that people are open to, and even desire, some basic reforms.<sup>276</sup> In reference to the then-upcoming vote on Measure 26, one Oregon political scientist stated: "If it's seen as an attack on the initiative process, voters will vote no. If it's seen as restoring the original purity and integrity of the initiative and getting rid of fraud, they may vote yes."<sup>277</sup>

How then can direct democracy, particularly the initiative process, best be reformed? Desirable reforms must satisfy a few requirements. First, reforms must increase the quantity and quality of voter deliberation. One of the problems of initiatives is that they offer voters an easy up-or-down choice, rather than forcing voters to consider all of the impacts of their decisions.<sup>278</sup> This problem is exacerbated by simplistic public discussions of complex issues such as unfunded voter mandates and voter-approved tax cuts that do not specify which programs are to be cut.<sup>279</sup> Second, reforms must limit which kinds of initiatives can become law; those limiting minority rights must be precluded.<sup>280</sup> This is because initiatives easily inflame

contraception. Oregon Secretary of State, Initiative, Referendum & Referral Search, at [http://egov.sos.state.or.us/elec/wcb\\_irr\\_search.search\\_form](http://egov.sos.state.or.us/elec/wcb_irr_search.search_form) (last visited Apr. 15, 2005). Bill Sizemore, along with his new organization, Oregon Taxpayers Union, also failed to put his three initiatives on the ballot: one that would have completely abolished public employee unions and two that resurrected failed past initiatives. Dave Hogan, *Many Initiatives Circle; Few Expected to Land*, OREGONIAN, Mar. 26, 2004, at A1; Oregon Secretary of State, *supra*.

275. THE FIELD INSTITUTE, CALIFORNIA OPINION INDEX: A DIGEST ON PUBLIC ATTITUDES TOWARDS STATEWIDE PROPOSITION ELECTIONS (1989).

276. CITY CLUB OF PORTLAND, *supra* note 143, at 61-68. The Club's report was commissioned "because of increasing concern with the initiative process and its effects on state and local government." *Id.* at 1. The authors of the report were not "committed to a specific position with respect to the initiative and referendum process in Oregon." *Id.*

277. Dietz, *supra* note 92 (quoting Richard Ellis).

278. In a 1995 poll, 69% of Oregonians said they did not trust that people "had time to really study each measure." CITY CLUB OF PORTLAND, *supra* note 143, at 61.

279. See SMITH, *supra* note 17, at 157-67; DUBOIS & FEENEY, *supra* note 3, at 83. For instance, 1996's Measure 47 offered Oregonians

the choice between a large rollback in taxes or no change in their taxes. [Oregonians] were not allowed to choose between a large and a more moderate rollback, or between the proposed measure and a system of rebates for low-income or fixed-income property owners. Nor was the alternative of differential tax rates for businesses and homeowners put to the voters. So while the vote on Measure 47 reflected the majority's preference for lower property taxes, . . . the precise policies that were enacted . . . did not reflect the will of the voters so much as the will of the measure's author, Bill Sizemore.

ELLIS, *supra* note 3, at 79. Kevin Mannix, a prominent Oregon initiative activist and the 2002 Republican gubernatorial candidate, stated that the beauty of the initiative process is that it "enables you to get through the crap of the legislative system." *Id.* at 87; see also Lisa Grace Lednicer, *Mannix a Maverick in Governor's Field*, OREGONIAN, Apr. 29, 2002, at A1 (describing Mannix's approach to government). For an example of how Mannix utilized the Sizemore approach on a prison work initiative, see ELLIS, *supra* note 3, at 87-88.

280. In a 1995 poll, 71% of Oregonians said it was dangerously easy to amend the constitution to "tamper with the basic rights of citizens." CITY CLUB OF PORTLAND, *supra* note 143, at 61. While this

popular prejudices and it is the duty of the judiciary to protect minorities from the majority.<sup>281</sup> The argument that direct democracy provides the public with a check on discriminatory judges and legislatures is unpersuasive, because if the judiciary and legislature are discriminatory, it is likely that the majority of the voters are discriminatory as well.<sup>282</sup> Third, from a good government perspective, reforms must seek to bring sense and order to the initiative process, by, for instance, reducing the number of initiative amendments, especially those dealing with matters that more appropriately belong in statutes.<sup>283</sup> Finally, reforms must seek to reduce, or at least control, the influence of money in the initiative process. As Congress found in enacting the Bipartisan Campaign Reform Act of 2002,<sup>284</sup> allowing uncontrolled, unlimited amounts of money in the election process brings into question the fairness and integrity of elections.<sup>285</sup> With these principles in mind, the remainder of this Comment analyzes the potential benefits of several reform proposals: proposals that seek to limit access to the ballot procedurally, proposals that seek to do so substantively, and proposals that seek to raise the standards for passage of ballot measures.<sup>286</sup> This Comment

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would still leave the legislature free to pass discriminatory statutes, the institutional checks and balances inherent in the legislature make it less likely that any legislation will be passed, let alone discriminatory laws.

281. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that courts must protect “discrete and insular minorities” from legislation “which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”).

282. In such a case, allowing voters to override laws and judicial decisions would probably not protect minorities. It is also unlikely that the voters in such a situation would vote discriminatory judges out of office. See Todd Donovan & Shaun Bowler, *Direct Democracy and Minority Rights: Opinions on Anti-Gay and Lesbian Ballot Initiatives*, in ANTI-GAY RIGHTS, *supra* note 36, at 107.

283. Initiatives that constitutionalize matters more appropriately left to statutes were recognized as a problem in Oregon as early as 1915. See BARNETT, *supra* note 15, at 37-41, 112-13. In 1996, the Portland City Club described it as the biggest problem with the initiative system. CITY CLUB OF PORTLAND, *supra* note 143, at 29-30, 43-44; see also DUBOIS & FEENEY, *supra* note 3, at 71-72 (describing the number of amendments various state and national constitutions have seen).

284. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2 U.S.C.).

285. In the 1995 poll, 77% of Oregonians said they were concerned about the ease with which interest groups can “buy their way on to the ballot.” CITY CLUB OF PORTLAND, *supra* note 143, at 61. This industrialization of the initiative process has long been decried by those who want to reform the system. See, e.g., BARNETT, *supra* note 15, at 54-77 (doing so as early as 1915). The use of paid signature gatherers has been a common cause of concern among these reformers, from the early days through the passage of Measure 26. See *id.* However, the real root of the problem lies more generally with the uncontrolled financing of initiative campaigns. The United States Supreme Court should allow states to regulate contributions to and expenditures made by initiative campaigns and to require greater financial and identity disclosure by those campaigns. This problem transcends progressive-conservative ideology: just as anti-taxers brought in millions of dollars from nationwide groups to defeat 2004’s bipartisan tax increase (Measure 30), see *supra* note 270 and accompanying text, so too did the unsuccessful opponents of 2004’s Measure 36, the same-sex marriage ban. Steve Law, *Campaign-Finance Reports Detail Funds Raised for the Election*, STATESMAN JOURNAL (Salem, OR), Sept. 28, 2004, at 1C.

286. The majority of these proposals have been described and considered by others, and where that is so I have cited to the sources where I first discovered them.

then identifies those reforms that would provide the most benefit to direct democracy and recommends their adoption.

*A. Procedural Limits on Ballot Access*

Many reform proposals seek to make it more difficult to place an initiative on the ballot. The most common of these is to raise the number of signatures petitioners must gather before they can place their initiative on the ballot, either through increasing the percentage of votes to which the signature threshold is tied or choosing a larger base from which to measure that threshold.<sup>287</sup> This can be done, for instance, by raising the threshold number of signatures from 6% to 8% of the number of votes cast in the last gubernatorial election, or by changing the base measure from the number of gubernatorial votes to the number of registered voters or state residents.<sup>288</sup> As it is, no more than 26% of all California initiatives qualified for the ballot between 1974 and 1996.<sup>289</sup> It is uncertain, therefore, whether current signature thresholds are in fact such weak obstacles to ballot access, at least in states with thresholds of 5% or more and especially for truly grassroots campaigns. Grassroots campaigns already face enough difficulties attempting to place measures on the ballot without increased signature thresholds. Another proposal, requiring initiative campaigns that pay signature gatherers to turn in more signatures than campaigns that use volunteers, would perhaps discourage paid signature gathering and increase the desirability of utilizing grassroots campaigns.<sup>290</sup> Nonetheless, merely requiring more signatures or “punishing” paid signature gatherers would still allow most interest groups to raise enough money to place any measure on the ballot. Raising signature requirements beyond certain levels would do nothing to increase the quality of public discourse on initiatives, nor would it affect the quality of the initiatives that reach the ballot in any significant way. Once a state has established reasonable signature thresholds, such as those adopted by Oregon,<sup>291</sup> raising them would primarily serve to increase the influence of money in the initiative process, cutting out even more

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287. States with higher signature thresholds for initiative amendments see fewer amendments than states with lower thresholds. DUBOIS & FEENEY, *supra* note 3, at 74-75.

288. Oregon voters rejected an attempt to increase the signature threshold as recently as 2000. OREGON BLUE BOOK, *supra* note 11. That referral, Measure 79, would have increased the number of signatures that must be gathered for initiative amendments from 8% to 12% of the number of votes cast at the last gubernatorial election. *Id.* Given this result, Oregon voters would also likely reject tying the signature threshold to a higher base measure than the number of votes at the last gubernatorial election. Some commentators, however, argue that increasing the base would provide a more stable basis from which to measure the threshold number of signatures, because, for instance, the number of state residents fluctuates less than the number of votes cast in a particular election such as a gubernatorial contest. DUBOIS & FEENEY, *supra* note 3, at 109-11.

289. See DUBOIS & FEENEY, *supra* note 3, at 98.

290. See *id.* at 104-06.

291. See *supra* notes 47-49 and accompanying text.



grassroots efforts without deterring a significant number of well-funded interest groups.<sup>292</sup>

It nonetheless remains important for states to require petitioners to collect more signatures for initiative amendments than for statutory initiatives in order to ensure some greater degree of difficulty in forcing a vote on amendments. One might conclude that higher signature thresholds for initiative amendments will not actually increase the relative number of statutory initiatives, given the ability of well-funded interest groups to place initiatives on the ballot no matter how high the threshold and the existence of higher passage standards for initiative amendments relative to statutory initiatives.<sup>293</sup> Yet while higher standards for amendment passage make statutory initiatives more attractive, because they are more likely to succeed once on the ballot, they do not make it more difficult to place initiative amendments on the ballot in the first place. Coupling a higher signature threshold with a higher passage rate for initiative amendments makes the initiative process a far less desirable forum for constitutional change, which is generally a good thing. Moreover, it leaves grassroots groups free to pursue statutory initiatives. Even though highly motivated interest groups will still be able to “buy” initiative amendments a place on the ballot, they will be less likely to do so if it both costs more money and involves greater risk of failure.

Other reform proposals would change the procedure by which signatures are gathered. For instance, petitioners could be allowed a limited amount of time in which to gather all of the necessary signatures.<sup>294</sup> If a petitioner did not meet the deadline, the petitioner would have to start all over again. This approach would, however, only raise the cost of gathering signatures because direct democracy firms would simply charge higher rates to guarantee an initiative’s placement on the ballot. Even if a petitioner conducts an all-volunteer effort, the challenge of meeting the threshold number of signatures with volunteers is difficult enough without added time pressure. Thus, most commentators have actually recommended the elimination of time constraints on signature gathering.<sup>295</sup>

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292. A similar problem exists with a proposed reform known as the “cynic’s choice,” under which petitioners could opt to forgo signature requirements and simply pay a set amount of money to place their initiative on the ballot. See DUBOIS & FEENEY, *supra* note 3, at 102-04; Elisabeth R. Gerber, *The Logic of Reform: Assessing Initiative Reform Strategies*, in DANGEROUS DEMOCRACY?, *supra* note 5, at 149-50. The cynic’s choice acknowledges that campaigns can pay firms to guarantee placement of their initiative on the ballot, but embraces that problem instead of trying to solve it. Similarly, Gerber advocates public financing of initiative campaigns, see Gerber, *supra*, but this reform would only serve to subsidize paid signature gathering by interest groups with taxpayer dollars.

293. The latter is a reform proposal that I discuss more thoroughly below, but which is not currently the law in any state.

294. Many states have such a period. See *supra* note 56 and accompanying text.

295. See DUBOIS & FEENEY, *supra* note 3, at 101-02; Gerber, *supra* note 292, at 149. Oregonians in 2000 eliminated the state’s deadline. OREGON BLUE BOOK, *supra* note 11.

Many states require petitioners to gather signatures from a set number of counties or other political districts.<sup>296</sup> This ensures that merely parochial issues are not brought before the entire state and that issues that are only important to urban voters are not imposed on rural voters. Yet some courts have correctly held that these requirements unconstitutionally violate the one person, one vote rule.<sup>297</sup> Because counties have widely varying populations, the rule makes the votes of some citizens (rural residents) count more than those of others (urban residents). Furthermore, not every initiative negatively affects rural citizens, and the rule only raises the cost of traditional signature gathering through, for example, increased travel expenses.<sup>298</sup>

Another proposal, requiring signatures to be gathered at the county clerk's office, would reduce fraud, but it would also unduly hamper petitioners' ability to put initiatives on the ballot.<sup>299</sup> While voters have time to sign a petition on the sidewalk or at home, most are not able or willing to drive to the county clerk's office just to sign a petition to place an initiative on the ballot. Finally, allowing petitioners to gather signatures over the Internet would make it easy to fill petitions,<sup>300</sup> but would likely lead to fraud, security, and accuracy problems as well.<sup>301</sup>

In order to improve the wording of initiatives, some states offer petitioners the nonbinding advice of state officials on the drafting of initiatives.<sup>302</sup> Although the idea is a good one and is relatively inexpensive to

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296. See DUBOIS & FEENEY, *supra* note 3, at 100-01; MAGLEBY, *supra* note 21, at 39-41. Indeed, Alaskans just strengthened their requirement through an initiative in 2004. Timothy Inklebarger, *Voters OK Initiative Amendment*, Nov. 4, 2004, at <http://aklegislature.com/stories/110404/amendment.shtml>. Now, signatures must be gathered from thirty of Alaska's forty state House districts in a number equal to 7% of the number of votes in the last gubernatorial election in that district, instead of one signature from each of twenty-seven state House districts. *Id.*

297. See, e.g., Moore v. Ogilvie, 394 U.S. 814 (1969) (striking down under the Equal Protection Clause an Illinois requirement that signatures be gathered from at least fifty counties to nominate a candidate from a new political party); Idaho Coalition United for Bears v. Cenarrussa, 342 F.3d 1073 (9th Cir. 2003) (striking down under the Equal Protection Clause Idaho's requirement that petitioners gather signatures from each of the state's twenty-two counties). *But see* Libertarian Party v. Bond, 764 F.2d 538 (8th Cir. 1985) (upholding distributional requirement because the districts contained roughly equal populations); Mass. Pub. Interest Research Group v. Sec'y of the Commonwealth, 375 N.E.2d 1175 (Mass. 1978) (upholding Massachusetts's requirement that signatures be gathered from each of the state's counties).

298. Of course, signature gathering drives that utilize direct mail would see less of a difference, so long as proponents have enough supporters in the rural parts of the state.

299. This idea has been around for more than fifty years. See CALIFORNIA STATE CHAMBER OF COMMERCE, INITIATIVE LEGISLATION IN CALIFORNIA 15-16 (1950).

300. See Gerber, *supra* note 292, at 149.

301. Electronic voting has already caused a great deal of alarm due to questions regarding the system's accuracy and security. Tom Zeller, Jr., *Ready or Not (and Maybe Not), Electronic Voting Goes National*, N.Y. TIMES, Sept. 19, 2004, at A1. Similarly, an online signature gathering system would likely be vulnerable to fraud by individuals with the capability of cracking into the system to add, forge, alter, or remove signatures. At least for now, reliance on electronic systems is premature.

302. See, e.g., WYO. STAT. ANN. § 22-24-105 (Michie 2003).

implement, it is uncertain how much it accomplishes given most petitioners' typically anti-government sentiments.<sup>303</sup> Mandating a conference with experienced government officials before an initiative gets its ballot title would likely prove more beneficial, as all initiatives would have to go through the process and officials would thus have a chance to improve the government's goodwill, as well as the initiative's language.<sup>304</sup> State officials are well-versed in the requirements initiatives must meet to withstand legal challenges, and their drafting experience can clear up confusing language to ensure that initiatives, if passed, achieve their proponents' aims.<sup>305</sup> Of course, the officials would only be able to make nonbinding recommendations.<sup>306</sup> Otherwise, the direct initiative would become an indirect initiative, thereby stripping direct democracy of most of its power and usefulness.<sup>307</sup> Furthermore, it is unlikely that voters in states like California and Oregon, who have a long history of using the direct initiative process, would relinquish their right to take issues straight to the people.

Limiting the use of signatures on petitions to certification of the ballot measure, however, would probably prove popular in every direct democracy state. California does this already to protect the privacy of petition signatories,<sup>308</sup> who might have only signed to help "qualify the measure for

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303. See, e.g., CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *supra* note 75, at 91-109, 112-14 (describing the lack of use of California's voluntary initiative drafting service).

304. California requires such a procedure after an initiative qualifies for the ballot and allows for optional legislative hearings beforehand. CAL. ELEC. CODE § 9034 (West 2003); CAL. ELEC. CODE § 9007 (West 2003). In 1992, the California Commission on Campaign Financing recommended a mandatory administrative hearing once petitioners had gathered 25% of the needed signatures and a mandatory legislative hearing after the initiative qualified for the ballot; petitioners could then amend their initiatives in light of these hearings. CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *supra* note 75, at 112-19. However, it seems more appropriate to conduct the conference before the ballot title is written and signatures are collected because the title and text of the initiative are the basis on which voters decide whether or not to sign. Additionally, changing the text of the initiative might cause some signers to wish they had not signed the petition, but by then most will not know enough about the changes to remove their name.

305. 2002's Measure 37, which restricted Oregon land use laws, has caused much consternation among state officials because of its unclear language. *State Must Stay Ahead of Measure 37's Curves*, STATESMAN-JOURNAL (Salem, OR), Nov. 14, 2004, at 10C.

306. This is the law in California. CAL. ELEC. CODE §§ 9007, 9034 (West 2003). Miller states that this proposal would "just create a pro forma exercise" unless the legislature or officials can make amendments without the petitioner's consent. Miller, *supra* note 144, at 1065-66; see also DUBOIS & FEENEY, *supra* note 3, at 42 (noting that California's meetings result in little change). However, this would turn the direct initiative into an indirect initiative. The basis of Miller's assertion, then, is his belief that allowing only indirect initiatives would make direct democracy more progressive. Miller, *supra* note 144, at 1066-67.

307. In the two states with both the indirect and direct initiative, use of the direct initiative far surpasses use of the indirect initiative. DUBOIS & FEENEY, *supra* note 3, at 87. Through 1992, Utah had never seen an indirect initiative, although it had seen fourteen direct initiatives. *Id.* Eighty percent of Washington's initiatives are direct, and for the fifty-four-year period in which California had the indirect initiative, 94% of all initiatives were direct. *Id.*

308. CAL. ELEC. CODE § 18650 (West 2003).

the ballot so that the voters may decide."<sup>309</sup> The statute thus prevents petitioners from using signatures to create a database of potential future supporters and reduces the possibility of fraud.<sup>310</sup> Certainly, the law should at least require a signatory's consent before his or her name and address is added to a database or sold to a campaign firm or interest group.

### *B. Substantive Limits on Ballot Access*

A second set of proposals seeks to limit the kinds of initiatives that petitioners may legally place on the ballot. For instance, in order to reduce the number of complex and potentially deceptive initiatives, a state could establish a word limit for them.<sup>311</sup> Such a reform would arguably force petitioners to reduce the scope of their initiatives and make them more comprehensible to voters. The bar could be set high enough to allow somewhat complicated initiatives, but low enough to achieve the reform's purposes.<sup>312</sup> Nonetheless, it is unlikely that a word limit would add much of value. First, even without word limits, the media usually picks up on hidden or dubious provisions and alerts voters. Second, any reasonable word limit would nonetheless allow many complicated and far-reaching measures to reach the ballot, because even a brief measure can affect many laws.

Instead, states should strengthen their single-subject and separate-vote requirements to ensure that initiatives do not force voters to choose undesirable logrolled provisions along with desired changes. Already, several state courts have followed the Oregon Supreme Court's lead in *Armatta* in interpreting their own constitutions.<sup>313</sup> This improvement renders a word limit redundant, achieving the true aims of word limits in a manner that is both more accurate and less obstructive to lengthy but narrow initiatives. Oregon has sounded the call for greater judicial scrutiny of ballot

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309. *Bilofsky v. Deukmejian*, 177 Cal. Rptr. 621, 626-27 (Cal. Ct. App. 1981) (upholding the statute).

310. See *OEA Urges Oregonians to VOTE "YES" on Measure 30*, TODAY'S OEA (Oregon Education Association, Portland, OR), Dec. 2003, at [http://www.oregoned.org/oea\\_publications/12-03\\_measurc30.pdf](http://www.oregoned.org/oea_publications/12-03_measurc30.pdf) (describing anti-taxers' use of petition signatories' personal information to create mailings lists for future campaigns).

311. See CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *supra* note 75, at 84-87, 111-12 (describing word counts for various California initiatives and recommending a word limit).

312. For instance, in 1990, Californians faced eight initiatives of more than 5,000 words, including one with more than 15,000 words. *Id.* at 86. Five more initiatives contained between 3,000 and 5,000 words. *Id.* The other five contained between 95 and 1,811 words. *Id.* The California Commission on Campaign Financing advocated a 5,000-word limit on initiatives. *Id.* at 111-12.

313. See *Californians for an Open Primary v. Shelley*, 121 Cal. App. 4th 222 (Cal. Ct. App. 2004) (adopting the *Armatta* test), *petition for rev. granted*, 95 P.3d 810 (Cal. 2004); *Marshall v. State ex rel. Cooney*, 975 P.2d 325 (Mont. 1999) (same); *Cambria v. Soaries*, 776 A.2d 754 (N.J. 2001) (same); *Pa. Prison Soc'y v. Commonwealth*, 727 A.2d 632 (Pa. 1999) (adopting a similar test), *rev'd on other grounds*, 776 A.2d 971 (Pa. 2001). Additionally, the Florida Supreme Court reversed course in 1984 by putting teeth into its single-subject rule. *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984). For a description of *Armatta's* influence on these courts, see Cullen M. Grace, *Developments in State Constitutional Law: 1999: Judicial Branch—Process of Amendment*, 31 RUTGERS L.J. 1482 (2000).

measures, eschewing the excessive deference shown initiatives in the past. While this turn of events may instigate a dangerous anti-judicial backlash, the benefits far outweigh the potential harms.

Another method of reducing voter confusion and fatigue is to limit the number of initiatives that may appear on the ballot in any one election. Mississippi, for instance, sets its limit at five.<sup>314</sup> Yet throughout the years, Oregonians have voted on an average of six initiatives per general election without apparent difficulty.<sup>315</sup> Further, there is no satisfactory way to decide which initiatives will make the ballot. Mississippi's method of "first come, first served" does nothing more than encourage the speedy gathering of signatures, which only increases the influence of money in direct democracy.<sup>316</sup> To decide on the basis of an initiative's content would be an unconstitutional violation of petitioners' free speech rights. Thus, this approach seems unnecessary, unworkable, and undesirable.

To prevent voters from having to face the same issue repeatedly, Nebraska and Wyoming will not allow an initiative on the ballot if it is substantially similar to one that was already rejected by the voters within the previous three or five years, respectively.<sup>317</sup> But Oregon's history is rife with examples of initiatives that succeeded after repeated failures: women's suffrage and 1990's tax-cutting Measure 5 are just two examples.<sup>318</sup> If an issue is so volatile that it continues to resurface, then the public should be permitted to continue to discuss it. Even if voters do not change their minds, as in the case of Oregon and the single tax, then the

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314. MISS. CODE ANN. § 23-17-39 (Supp. 2004).

315. Oregon, *supra* note 13. Oregonians voted on a modern-day record of twenty-six initiatives on the November 7, 2000 ballot. OREGON BLUE BOOK, *supra* note 11; Dave Hogan, *Back So Soon? By Any Measure, Oregon Shows it Still Has the Initiative*, OREGONIAN, May 27, 2001, at A1. For example, 1,450,073 Oregonians voted on the first initiative, Measure 83, relating to veterans' benefits, 1,477,176 voted on Measure 95, which would have tied teacher pay to student performance, and 1,491,263 voted on the last initiative, Lon Mabon's Measure 9. OREGON BLUE BOOK, *supra* note 11. Thus, voter fatigue is not a phenomenon from which Oregonians seem to suffer. At any rate, Oregonians have approved only 32% of all initiatives on which they have voted. MAGLEBY, *supra* note 21, at 230-31. Furthermore, the presence of initiatives on the ballot generally increases voter turnout. CRONIN, *supra* note 5, at 227.

316. See *supra* notes 294-295 and accompanying text.

317. NEB. CONST. art. III, § 2; WYO. CONST. art. 3, § 52(d); see also WINSTON W. CROUCH, *THE INITIATIVE AND REFERENDUM IN CALIFORNIA* 37-38 (1950) (discussing this reform); DUBOIS & FEENEY, *supra* note 3, at 81 (listing three other states with similar requirements).

318. Women's suffrage failed twice in Oregon before it was adopted. OREGON BLUE BOOK, *supra* note 11. The single taxers of direct democracy's early days placed their initiatives on the Oregon ballot seven times. *Id.* In the last seventy years, Oregonians have rejected every general tax increase that has come before them, and they have rejected the imposition of a sales tax nine times. Jeff Mapes & James Mayer, *Voters Reject Tax Increase No: 55% Yes 45%*, OREGONIAN, Jan. 29, 2003, at A1 (general tax increase); Peter Wong, *District 22 a Battleground in Partisan Battle for House Control*, STATESMAN JOURNAL (Salem, OR), Oct. 13, 2004, at 3C (sales tax). Between 1978 and 1990, Oregonians rejected sixteen anti-tax measures before passing 1990's Measure 5, which limited property taxes and created an equitable funding scheme for rural and urban schools. OREGON BLUE BOOK, *supra* note 11.

idea will eventually lose support and fail to make the ballot.<sup>319</sup> Thus, this measure is also unnecessary and undesirable.

Another possibility is to limit the subjects that may be affected by initiatives.<sup>320</sup> Twelve states prohibit initiatives that create laws the legislature could not adopt.<sup>321</sup> Nevada requires initiatives that appropriate funds to also raise taxes to support the appropriation, and nine other states have similar provisions.<sup>322</sup> Other restrictions prohibit local and special legislation and changes to the judicial branch, fundamental rights, and the initiative process itself.<sup>323</sup> The Massachusetts Constitution contains the longest list of excluded matters, prohibiting initiatives that affect dozens of subjects including everything from religious practices and the right of peaceable assembly to the appointment of judges and Prohibition.<sup>324</sup>

Lengthy lists of exceptions to the initiative power like Massachusetts's are unnecessary and unlikely to pass in states where initiatives are widely used. It is difficult to justify why certain issues, such as certain individual rights, should be held immune from initiatives and others should not. The Massachusetts Constitution does not prohibit initiatives that affect the right to remain silent, but does prohibit those that affect the right to receive just compensation for the taking of one's property.<sup>325</sup> This indicates, without justification, that the former right is not as deserving of protection as the latter right. Furthermore, the people should retain the right to amend the constitution if a sufficient number of them disagree with a judicial decision; because courts eventually review most every constitutional provision, Massachusetts's bar on initiatives that would reverse court decisions<sup>326</sup> would probably bar almost all initiatives.

However, some exceptions are warranted. Fiscal initiatives have long brought instability and inefficiency to government. Large portions of the budget in many states are locked into specific appropriations, and revenues can only be increased in most states through the greatest difficulty.<sup>327</sup> As in

319. Proponents of a failed initiative can take a lesson from the failure and re-tool future initiatives to focus on those parts of the failed initiative that *were* popular. That is what Lon Mabon did, although still without success, with 1994's Measure 13 and 2000's Measure 9.

320. A federal court upheld Utah's supermajority requirement for initiatives affecting wildlife against a First Amendment challenge. *Initiative & Referendum Inst. v. Walker*, 161 F. Supp. 2d 1307 (D. Utah 2001). Another federal court recently upheld Massachusetts's prohibition on initiatives affecting religious matters against free speech and free exercise challenges. *Boyette v. Galvin*, 311 F. Supp. 2d 237 (D. Mass. 2004).

321. DUBOIS & FEENEY, *supra* note 3, at 81.

322. NEV. CONST. art. 19, § 6; DUBOIS & FEENEY, *supra* note 3, at 81.

323. See DUBOIS & FEENEY, *supra* note 3, at 81 (listing the states with these provisions).

324. MASS. CONST. art. 48, pt. 2, § 2.

325. MASS. CONST. art. 48, pt. 2, § 2.

326. MASS. CONST. art. 48, pt. 2, § 2.

327. See DUBOIS & FEENEY, *supra* note 3, at 83 (noting that in California "a large proportion of the state's budget is now permanently subject to control by initiatives adopted in the past"); see also *supra* notes 142-44 and accompanying text.

Nevada, it would be beneficial to require those initiatives that appropriate funds to also provide for a way to raise sufficient funds to support the appropriation.<sup>328</sup> Furthermore, those initiatives that reduce state funds should delineate the programs for which funding is to be cut.<sup>329</sup> This change would encourage greater fiscal stability because it would prohibit initiatives from forcing the legislature to suddenly raise unpopular taxes or cut popular programs.<sup>330</sup> It would also instigate more deliberation on the part of voters because they would not be faced with abstract, one-sided choices between cutting taxes and keeping them the same—an easy choice for many voters when presented without additional information.<sup>331</sup> Voters would instead face concrete, difficult choices between reducing taxes and cutting a particular program, or leaving taxes and the program alone.<sup>332</sup> *Faux* populist rhetoric such as what Bill Sizemore employs would be more difficult to utilize because the perceived choice would not be between reduced taxes versus no change but, for example, between reduced taxes with less health-care versus no change.<sup>333</sup> On the other hand, educators, for instance, could not mandate that a certain portion of state funds go to education (generally a popular measure) without forcing voters to simultaneously choose to either raise taxes or cut other programs. Thus, the quality of public debate over initiatives would necessarily improve.

In addition to limiting initiatives that seek to commandeer state budgets, it is also important that direct democracy systems prohibit initiatives that reduce the rights of minorities. By definition, minorities do not comprise a majority of voters, and it is inherently difficult for them to protect their rights when faced with majoritarian discrimination.<sup>334</sup> While only one of Lon Mabon's four statewide anti-homosexual initiatives passed in

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328. For instance, an initiative requiring certain expenditures to protect the environment would need to describe what funding source, such as a gas tax increase, would pay for those expenditures.

329. For instance, a tax cut would have to be tied to cuts in healthcare spending.

330. DUBOIS & FEENEY, *supra* note 3, at 83.

331. According to Todd Donovan and Shaun Bowler,

[B]y facilitating responsiveness to public demands to lower taxes (or general increases in spending), the long-run operation of direct democracy constrains the revenue available to state legislatures. This process, while potentially effective in translating demands for lower taxes into policy, might be less effective in resolving conflicts about finding alternative, publicly acceptable tax sources that would fund programs—such as education—that voters might simultaneously support.

Todd Donovan & Shaun Bowler, *Responsive or Responsible Government?*, in *CITIZENS AS LEGISLATORS*, *supra* note 16, at 255-56.

332. See ELLIS, *supra* note 3, at 78-79, 87-88 (describing the lack of real choices in ballot measure votes).

333. "In 1996 Oregon voters were offered Measure 47, which dramatically rolled back property taxes. One critic complained that the measure was like 'killing ants with a bazooka.' The problem, as the reporter pointed out, is that for taxpayers 'a bazooka is the only weapon at their disposal at the moment.'" *Id.* at 79.

334. Donovan & Bowler, *supra* note 282, at 107-25; see also Douglass, *supra* note 147, at 17-32 (describing the ease with which anti-minority bias can be aroused by those who seek to discriminate against minorities).

Oregon, his losses were close, and he achieved great success with his municipal initiatives. The triumph of 2004's same-sex marriage bans show that even a well-organized, well-funded minority can fail to protect its members' rights.<sup>335</sup> That is why courts are charged with ensuring that legislation does not discriminate against minorities; they are the anti-majoritarian block when the majority seeks to wrongly take advantage of its greater political power.<sup>336</sup>

Some difficulties could arise in enforcing this inherently vague prohibition. For instance, defining "minority" may prove problematic. While classes based on race, national origin, religion, gender, and so forth would clearly be included, courts would need to craft a test to determine which future classes would also require protection.<sup>337</sup> Further, it may prove difficult to determine which measures actually restrict minority rights. For example, progressives describe affirmative action as a grant of rights to minorities to remedy past discrimination against them, while conservatives describe it as a limitation on the rights of those who were not discriminated against traditionally.<sup>338</sup> Despite these problems, a prohibition on initiatives that limit minority rights would still do more good, by protecting minorities, than harm, by forcing courts to create new legal rules.<sup>339</sup> At the

335. See *supra* notes 18, 105, 251, and 285, and accompanying text.

336. As U.S. District Court Judge Thelton Henderson, who struck down California's Proposition 209 banning affirmative action, declared:

The issue is not whether one judge can thwart the will of the people; rather, the issue is whether the challenged enactment complies with our Constitution and Bill of Rights. . . . Federal courts have no duty more important than to protect the rights and liberties of all Americans. . . . This duty is certainly undiminished where the law under consideration comes directly from the ballot box and without the benefit of the legislative process.

*Coalition for Econ. Equality v. Wilson*, 946 F. Supp. 1480, 1490 (N.D. Cal. 1996). Later, Judge Diarmaid O'Scannlain of the Ninth Circuit overturned Judge Henderson and upheld the initiative, writing: "A system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy." *Coalition for Econ. Equality v. Wilson*, 122 F.3d 692, 699 (9th Cir. 1997). For another example of Ninth Circuit judges debating the proper judicial role in examining initiatives, see *Jones v. Bates*, 127 F.3d 839 (9th Cir. 1997), *rev'd*, 131 F.3d 843 (9th Cir. 1997) (en banc).

337. As the Oregon Court of Appeals has phrased it, a person or class of persons is not a legally cognizable minority for equal protection purposes if it is "created by the challenged law or government action itself," but rather only if it is "defined in terms of characteristics that are shared apart from the challenged law or action." *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 445 (Or. Ct. App. 1998). Further, minorities are to be especially protected when those shared characteristics are "immutable" or reflect "invidious social or political premises, that is to say prejudice or stereotyped judgments." *Id.* at 446 (citations and quotation marks omitted). However, the focus in determining whether a group is a minority is "not necessarily the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice." *Id.*

338. In the case of the recent initiatives banning same-sex marriage, a court could only strike down the ban if it determined both that homosexuals are a legally cognizable minority and that they have the same right as heterosexuals to marry a person of their choice. Otherwise, the initiatives would not have discriminated against any legally cognizable minority.

339. In Massachusetts, for instance, the Supreme Judicial Court crafted a test for the similarly vague prohibition on initiatives relating to religion. *In re Opinion of Justices*, 34 N.E.2d 431, 432



very least, it would improve on the current condition of the initiative system.

Direct democracy systems should also contain a limitation on initiatives that affect the “appointment, qualification, tenure, removal, recall or compensation of judges” or “the powers, creation or abolition of courts.”<sup>340</sup> Given the increased judicial role in initiative politics, it is imperative to protect judges and courts from popular backlash. If they are to effectively fill their role as blocks to unconstitutional abuses of majority power, they must be shielded from the majority’s displeasure.<sup>341</sup> Many state judges must run for reelection periodically,<sup>342</sup> and in many states they may be recalled from office at any time for any reason.<sup>343</sup> This puts great pressure on judges not to rule against clear voter prerogatives and leaves them open to recall and failed re-election bids should they ignore the voters’ will.<sup>344</sup> Judges are thus more reluctant than they should be to strike down popular but unconstitutional initiatives.<sup>345</sup>

In response, states should do away with judicial elections and exempt judges from recall drives.<sup>346</sup> Rather than being elected, judges could, for instance, be appointed by the governor with the advice and consent of the

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(Mass. 1941). “The Constitution of the Commonwealth contains no definition of ‘religion,’ ‘religious practices’ or ‘religious institutions.’ But it contains provisions by which religious freedom is guarded and which furnish indications of the meaning of these words.” *Id.*

340. MASS. CONST. art. 48, pt. 2, § 2.

341. California’s experience illustrates this necessity. *See supra* note 263 and accompanying text.

342. Article VII, section 1 of the Oregon constitution provides for the election of all judges for six-year terms, with compensation not to “be diminished during the term for which they are elected.” Nineteen other states also require their state Supreme Court judges to run for reelection after a set number of years (from six to twelve), and seventeen states require them to run in retention elections, although they face no opposition. *See American Judicature Society, Judicial Selection in the States* (2004), at <http://www.ajs.org/js>.

343. Article II, section 18 of the Oregon constitution provides for the recall of “[e]very public officer in Oregon.” Judges may not be impeached but may be tried for “incompetency, corruption, malfeasance or delinquency in office” and removed for various offenses. OR. CONST. art. VII, §§ 6, 8. Nine states subject their judges to the possibility of being recalled. CRONIN, *supra* note 5, at 126-27.

344. *See supra* pp. 1213-14. In an attempt to minimize the politicization of judicial elections, most Oregon Supreme Court justices, aware that incumbents generally win elections, choose to retire before the end of their term so that the governor can fill the mid-term vacancy with a replacement who is then an incumbent when facing his or her first election. *American Judicature Society, Judicial Selection in Oregon: An Introduction* (2004), at <http://www.ajs.org/js/OR.htm>.

345. Joseph Grodin, one of the California Supreme Court justices ousted in 1986, admitted that his votes in high-profile cases were often affected by upcoming reelection campaigns. JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE 105 (1989). Similarly, former California Supreme Court Justice Otto Kaus compared trying to ignore elections when making decisions to “finding a crocodile in your bathtub when you go to shave in the morning. You know it’s there and you try not to think about it, but it’s hard to think about much else when you’re shaving.” Cain & Miller, *supra* note 144, at 58.

346. The American Bar Association has recently highlighted other problems caused by judicial elections, including the increasing politicization and cost of judicial campaigns. AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS (2002).

state senate<sup>347</sup> or a merit board.<sup>348</sup> Appointments could last for a fixed term,<sup>349</sup> until the judge reached the state's mandatory judicial retirement age,<sup>350</sup> or for life.<sup>351</sup> These changes would allow judges to remain free to make decisions based on an initiative's constitutionality, rather than its popularity. Popular election of the governors and state senators who, respectively, nominate and confirm judges would provide sufficient judicial accountability. If the electorate is intensely upset by a particular decision, it could amend the constitution to change the result, either through an initiative or by pressuring the legislature. Moreover, the legislature would remain free to amend the constitution to change any of these provisions according to standard state procedure for non-initiative amendments.<sup>352</sup> Finally, to protect the limited prohibitions on initiatives that commandeer state funding, restrict minority rights, and threaten the judiciary, states should prohibit, as Massachusetts does,<sup>353</sup> initiatives that would amend the list of prohibited subjects.

As an alternative to excluding certain subjects from the initiative, former Oregon Supreme Court Justice Hans Linde argues that courts should interpret the Guarantee Clause of the federal constitution to prohibit all initiatives that restrict minority rights and initiative amendments that more appropriately should be statutes.<sup>354</sup> The Clause, which charges Congress with guaranteeing the states a republican form of government,<sup>355</sup> is currently a dead letter. The U.S. Supreme Court has held that the Clause

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347. This is the manner by which federal judicial appointments are made. U.S. CONST. art. II, § 2, cl. 2. Further, ten states allow state supreme court judges to keep their seats based on renomination or reappointment. See American Judicature Society, *supra* note 342.

348. Many states involve merit boards or commissions in judicial appointments and retention. See American Judicature Society, *supra* note 342.

349. Judges of Germany's Constitutional Court (*Bundesverfassungsgericht*) are appointed to a single twelve-year term by a two-thirds majority of either the lower or upper parliamentary house. Edward M. Andries, *On the German Constitution's Fiftieth Anniversary: Jacques Maritain and the 1949 Basic Law (Grundgesetz)*, 13 EMORY INT'L L. REV. 1, 44 n.167 (1999).

350. In Oregon, the mandatory retirement age is seventy-five; in Massachusetts and New Hampshire, it is seventy. OR. CONST. art. VII (Amended), § 1a; American Judicature Society, *supra* note 342.

351. In Rhode Island and the federal courts, all judges enjoy lifetime tenure with no mandatory retirement age. American Judicature Society, *supra* note 342; U.S. CONST. art. III, § 1.

352. See DUBOIS & FEENEY, *supra* note 3, at 71-76 (describing the various state methods for amending the constitution with and without an initiative).

353. MASS. CONST. art. 48, pt. 2, § 2.

354. Hans A. Linde, *Who is Responsible for Republican Government*, 65 U. COLO. L. REV. 709, 710 (1994); see also Leroy J. Tornquist, *Direct Democracy in Oregon: Some Suggestions for Change*, 34 WILLAMETTE L. REV. 675 (1998). Ernest L. Graves has taken up this torch and argued that the Guarantee Clause should also be used to strike down constitutional revisions, as opposed to amendments, enacted by initiative. Ernest L. Graves, *The Guarantee Clause in California: State Constitutional Limits on Initiatives Changing the California Constitution*, 31 LOY. L.A. L. REV. 1305 (1998). To Graves, Proposition 13 marked one such revision that the California Supreme Court unconstitutionally upheld. *Id.* at 1307.

355. Specifically, the Clause states: "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art IV, § 4.

raises a nonjusticiable political question.<sup>356</sup> Linde argues that the Clause should be resurrected and used to preclude initiatives that would “place [statutory-type] laws beyond representative lawmaking by enacting them in the form of constitutional amendments.”<sup>357</sup> In addition, he argues that “the guarantee of republican lawmaking has special force when a statewide initiative stirs appeals to passion or to prejudice against an identifiable social group.”<sup>358</sup>

Linde’s proposal is intriguing. The City Club of Portland noted in 1996 that excessive use of initiative amendments, instead of statutes, to make technical policy choices as permanent as possible was one of direct democracy’s greatest flaws in Oregon.<sup>359</sup> In Florida, politicians are currently seeking to “make passage of citizen initiatives more difficult” out of frustration that recent initiatives, such as one preventing the keeping of pregnant pigs in cages, were passed as constitutional amendments instead of statutes.<sup>360</sup> Compounding the problem of cluttered constitutions in need of frequent amendment are laws in some states that prohibit the legislature from amending statutory initiatives without another initiative.<sup>361</sup> These laws make statutory initiatives like constitutional amendments, effectively lowering the bar to get an amendment passed.

However, even if a court were to adopt Linde’s approach,<sup>362</sup> it is possible that the U.S. Supreme Court would strike it down as incompatible with the Court’s holding that the Clause raises only a political question. And, even if the Court allowed the approach, it would ultimately take the issue out of the hands of state judges, whose rulings would be subject to the Court’s review.<sup>363</sup> Thus, Linde’s idea is unlikely to achieve real positive reform, especially in comparison to the restrictions advocated in this Comment.<sup>364</sup> Stronger judicial scrutiny of single-subject and separate-vote requirements, coupled with other reforms mentioned here, would solve the

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356. *Pac. Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 150 (1912).

357. Linde, *supra* note 354, at 730.

358. *Id.* at 728. Linde argues, for instance, that 1992’s Measure 9, one of Oregon’s anti-homosexual initiatives, violated the Guarantee Clause because it was one of those initiatives that “are by their terms directed against identifiable racial, ethnic, linguistic, religious, or other social groups. As a proposal asking voters to take sides for and against homosexuals, Measure 9 would have failed this test even without its epithets.” Hans A. Linde, *When Initiative Lawmaking is not “Republican Government”*: *The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 41 (1993).

359. CITY CLUB OF PORTLAND, *supra* note 143, at 30-31.

360. Abby Goodnough, *Florida Legislators Take on a Voter Right*, N.Y. TIMES, Apr. 26, 2004, at A14.

361. *See supra* note 253 and accompanying text.

362. While the Oregon Supreme Court, with Linde on it, subscribed to the possibility of utilizing Linde’s approach, it has never done so. *State v. Montez*, 789 P.2d 1352 (Or. 1990).

363. Linde admits this. Linde, *supra* note 354, at 710-12.

364. Linde’s idea is most likely a creative way of achieving the same end without having to obtain voter approval for the various proposals advocated in this Comment. Perhaps his idea would be more appealing if voters were to reject the proposals.

problem of cluttered constitutions. Most overly technical measures would either fail under this scrutiny or, hopefully, would either not be worth anyone's while to write into the constitution or be rejected by the voters. Those states with "super statute" provisions shielding statutory initiatives from amendment except by future initiatives should repeal those provisions and join the ranks of the majority of direct democracy states in allowing the legislature to amend any statute, whether enacted by initiative or not. The risk of having the legislature de-claw a statutory initiative is far outweighed by the evils of requiring frequent initiatives to make small but necessary changes in the statute books. Already, legislatures are generally loath to alter what the people have written into law.<sup>365</sup>

Given the level of substantive judicial review of initiatives, either under current law or with the proposals advocated above, the question arises whether review should occur before or after an initiative goes before the voters. Many have advocated pre-election judicial review of the substantive constitutionality of all initiatives.<sup>366</sup> For instance, review could take place once the threshold number of signatures has been gathered to place an initiative on the ballot. Pre-election review would spare judges from some of the majoritarian wrath created when they strike down voter-approved initiatives. It would save time and money that would otherwise go into placing unconstitutional initiatives on the ballot and campaigning for and against them. Further, many states already allow for pre-election procedural review, such as for compliance with Oregon's single-subject and separate-vote requirements.<sup>367</sup> One could argue that such powerful review is akin to substantive review and that allowing substantive review before the election would, therefore, not be much of a change.

Yet pre-election substantive review violates the judicial principles against issuing advisory and unnecessary opinions.<sup>368</sup> Substantive review is inherently different from procedural review. Procedural review occurs before a measure makes it to the ballot because compliance with procedure is a prerequisite for appearance on the ballot. Pre-election substantive review, on the other hand, is improper both because there is a smaller and murkier factual record before the election and because many initiatives will not

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365. See *supra* note 254 and accompanying text.

366. Miller advocates aggressive pre-election review of an initiative's constitutionality. Miller, *supra* note 144, at 1068-78. For further discussion, see Hans A. Linde, *Taking Oregon's Initiative Toward a New Century*, 34 WILLAMETTE L. REV. 391, 408-09 (1998); James D. Gordon III & David B. Magleby, *Pre-election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298 (1989); and Michael J. Farrell, Note, *The Judiciary and Popular Democracy: Should Courts Review Ballot Measures Prior to Elections?*, 53 FORDHAM L. REV. 919 (1985); see also *supra* notes 54-55 and accompanying text.

367. See *supra* notes 54-55 and accompanying text.

368. It would also place great pressure on the court to decide quickly so as to issue a ruling before state elections deadlines.

pass and thus not require judicial review at all.<sup>369</sup> Pre-election substantive review would likely also strike down many initiative amendments as unconstitutional under the current constitution without allowing those initiatives to amend the constitution and give it new meaning (thus rendering them constitutional).<sup>370</sup> Finally, judges would still face considerable pressure not to strike down proposed initiatives that have garnered tens of thousands of signatures. Judges would be derided not only for striking down voter choices, but also for withholding those choices from the people, even when all procedural requirements had been met.<sup>371</sup> For these reasons, the costs of pre-election judicial review of an initiative's substantive constitutionality outweigh the benefits.

### *C. Higher Standards for Passage*

A third category of reform proposals involves raising the bar for initiatives on the ballot to succeed. One such proposal would require all initiatives to be voted on in general elections only, instead of in general, primary, and special elections, unless there was a true need for an earlier vote, such as a genuine state of emergency or fiscal crisis.<sup>372</sup> Primary elections draw fewer voters than general elections and special elections even fewer than primary elections, so this proposal would ensure that initiatives have to garner more support to get passed.<sup>373</sup> Insofar as the number of votes on an initiative is never equal to the number of eligible or registered voters, this proposal would reduce the number of initiatives foisted upon the state by a minority of the state's citizens. Oregon currently holds special elections for measures referred to the people by the legislature.<sup>374</sup> If the legislature did its job well, it could hold off most initiatives until the next general election, when the level of voter interest and the quality of public debate is greater. Thus, every effort should be made to limit initiatives to general

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369. CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *supra* note 75, at 322-24.

370. For instance, the proposed ballot measure that would have undone Oregon's *Armatta* line of cases would probably be unconstitutional under the current separate-vote requirement, but constitutional if it passed and amended that requirement. See *Novick v. Myers*, 998 P.2d 1258, 1259-60 (Or. 2000) (noting that the measure would have amended the separate-vote requirement as well as the single-subject rule).

371. While this concern would be lessened if judges were no longer elected or subject to recall, the other concerns alone militate against pre-election substantive review.

372. This idea has been around for more than fifty years. CALIFORNIA STATE CHAMBER OF COMMERCE, *supra* note 299, at 17-18; see also CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *supra* note 75, at 186-90 (recommending voting on ballot measures only in general elections).

373. In 2002, for instance, only 47% of all registered voters in Oregon voted in the primary election; 69% voted in the general election. OREGON BLUE BOOK, VOTER PARTICIPATION 1970-2002, available at <http://bluebook.state.or.us/state/elections/elections04.htm> (last visited Apr. 15, 2005). In the September 17, 2002 special election, only 43% of all registered Oregon voters voted. *Id.*; OREGON BLUE BOOK, *supra* note 11.

374. For instance, two special elections were held in Oregon in 1997, one in May and one in November. OREGON BLUE BOOK, *supra* note 11.

elections, allowing them only when necessary during primary and special elections.

Another simple approach to reducing the number of initiatives that get passed is to raise the number of votes necessary for passage. Illinois requires either 60% approval from those voting on the initiative or an absolute majority (a majority of those voting in the election).<sup>375</sup> Similarly, Oregon requires initiatives that write a supermajority requirement into the constitution to pass by that supermajority.<sup>376</sup> In a related vein, Nevada requires an affirmative majority vote in two consecutive elections.<sup>377</sup> Both approaches achieve the same basic result: they allow citizens to amend their constitution but require a clear showing of strong voter demand for change. Illinois and Oregon require more voters to approve changes. Nevada allows for more extensive public debate and reflection, such that some voters who voted for an amendment in the first election might not do so in the second.

States should adopt either method, but only with regard to initiative amendments. Because the legislature can amend statutory initiatives in most states,<sup>378</sup> it is less troubling if one passes with a narrow majority. However, from a good government perspective, it is not desirable to have a constitution cluttered with technical matters more appropriately addressed by statutes. A supermajority or successive-vote requirement, or both, is a good way of minimizing constitutional clutter and ensuring that only truly popular amendments become law. Moreover, it would not excessively restrict the ability of initiative proponents to get their measures passed. "Between 1990 and 2000 only two out of twenty-seven successful initiatives would have lost if Oregon had [an absolute majority requirement] in place."<sup>379</sup> Between 1962 and 2000 in Nevada, only three out of nine initiatives that passed in the first election failed in the second one.<sup>380</sup>

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375. ILL. CONST. art. 14, § 3. Similarly, Wyoming requires that initiatives be approved by a majority of those voting in the election. WYO. CONST. art. 3, § 52(f). The Tenth Circuit upheld Wyoming's absolute majority requirement against First Amendment and Equal Protection challenges, stating that the state's interests in minimizing initiative abuse and interest group capture were valid. *Brady v. Ohrman*, No. 97-8081, 1998 U.S. App. LEXIS 16206, \*11-12 (10th Cir. July 15, 1998) ("If Wyoming wants to make it 'harder,' rather than 'easier,' to make laws by the initiated process, such is its prerogative, and, in our view, does not violate the First Amendment."); see also *Initiative & Referendum Inst. v. Walker*, 161 F. Supp. 2d 1307, 1314 (D. Utah 2001) (upholding Utah's supermajority requirement for wildlife initiatives).

376. See *supra* note 125 and accompanying text. Opponents of the double-majority initiative that Bill Sizemore put into the state constitution, which only applies to tax increases, pushed this law.

377. NEV. CONST. art. 19, § 2(4).

378. See *supra* note 253 and accompanying text.

379. ELLIS, *supra* note 3, at 128. "[B]etween 1980 and 2000 slightly under half of the 41 successful initiatives would have passed had a three-fifths majority been required for passage; had a two-thirds supermajority been required fewer than three in ten would have become law." *Id.* at 129.

380. *Id.* at 134-35.

A supermajority or successive-vote requirement would kill only initiatives supported by narrow majorities.<sup>381</sup> If an issue is particularly contentious, then a bare majority should not be able to write it into the constitution without thoughtful debate and compromise. Instead, such issues should be addressed by amendable statutes or constitutional amendments that are subject to legislative revisions and constitutional conventions before enactment, not a piecemeal up-or-down vote from the electorate.<sup>382</sup> One might oppose making it more difficult to amend the constitution because it would also become more difficult to remove the clutter that already exists, such as Florida's pig amendment. To resolve this problem, the heightened standard should apply only to initiatives, not to referrals.<sup>383</sup> This would allow the legislature to submit to the voters various amendments aimed at cleaning up constitutional clutter while still ensuring that it is more difficult for petitioners to reintroduce disorder.

Numerical thresholds are not the only obstacles to passage, however. A key element in a successful direct democracy scheme is effective voter education. In this regard, perhaps the most important step a state can take is to publish and make widely available a thorough voter's pamphlet describing and discussing every ballot measure.<sup>384</sup> Oregon's voter's pamphlet is clear, informative, and available on the Internet: it is a model to be followed.<sup>385</sup> Each state should also ensure that it is taking every possible constitutional step to track the true identities of initiative sponsors and those

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381. *Id.* at 129-30 (describing results).

382. Oregon's Constitution, like those of most states, allows for both constitutional revisions and conventions. *See* OR. CONST. art XVII, § 2.

383. Currently, Oregon's separate-vote requirement applies to initiative amendments as well as to legislative amendments referred to the people. *Armatta v. Kitzhaber*, 959 P.2d 49, 54 (Or. 1998). To the degree that that and similar requirements could be limited to initiative amendments, the prime goals of direct democracy reform would still be fully served, but state legislatures would have more freedom to clean up the clutter recent history has caused. Even if separate-vote requirements continue to apply to legislative amendments, legislatures should set about the task of reducing constitutional clutter soon by referring amendments to the voters one at a time.

384. *See* CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *supra* note 75, at 227-62 (recommending changes to California's voter's pamphlet to improve its usefulness). Key factors in creating a quality voter's pamphlet include visual appeal, font size, clarity, thoroughness, brevity, impartiality, user-friendliness, and simplicity. *DUBOIS & FEENEY, supra* note 3, at 169-78. However, cost must also be considered. The California pamphlet for the June 1988 election cost \$8.5 million, approximately \$30,000 per page, to prepare, print, and distribute. *Id.* at 172.

385. *See* OREGON SECRETARY OF STATE, VOTER'S GUIDE FOR MAY 18, 2004 PRIMARY ELECTION, at <http://www.sos.state.or.us/elections/may182004/guide/cover.htm>. For a description of all the elements comprising the Oregon voter's pamphlet, see *supra* notes 75-84 and accompanying text. Oregon first developed both the voter's pamphlet and the requirement that signature gatherers circulate the ballot measure along with the petition. *DUBOIS & FEENEY, supra* note 3, at 127 n.20. Further, compared to other states, "Oregon's voter pamphlet probably provides the most extensive information on the pros and cons of all ballot issues as well as on state and local candidates." *CRONIN, supra* note 5, at 81. In 1970, a poll showed that 79% of Oregonians found the voter's pamphlet "very" or "somewhat" useful in deciding how to vote on ballot measures, and 69% felt the quality of information it contained was "excellent" or "pretty good." *Id.*

who spend large amounts of money on initiative campaigns. To the degree that the U.S. Supreme Court might change its mind on this matter, to allow for more transparency and controls, the system would only be strengthened. Finally, each state should take all constitutional steps to detect and punish fraud at each stage of the process, especially in signature gathering, where the pressure to place measures on the ballot sometimes pushes people to lie, cheat, or otherwise degrade the value of open, robust, and honest direct democracy. Taking these steps would make it more difficult for industrialized direct democracy to drown out true grassroots efforts and bring some of the original reformers' ideal of integrity back to the system.

## V

### CONCLUSION

Allen H. Eaton's description of the stark dichotomy between the benefits and detriments of Oregon's direct democracy system holds as much truth today as it did in 1912:

How would you like to live in a state where the people can and do enact laws for the common good which their Legislature has failed to enact for them, where they can nullify any obnoxious measure passed by the Legislature, where they can nominate and elect, or defeat for public office, any man regardless of his party strength, and can recall any public officer, Supreme Judge included, whose acts they do not approve; a state where the party boss has been put out of business; a state in short where the people rule and of which Senator Jonathan Bourne says, "It is the best system of popular government in the world today"? Such a state is Oregon.

How would you like to live in a state where the people can and do amend their constitution in the most radical fashion by a minority vote, where one-third of the voters decides the fate of laws affecting the other two-thirds, where one-twentieth of the voters can and do cripple the state educational institutions by holding up their funds; where special interests hire citizens to circulate petitions asking for the recall of judges who have found them guilty; where men representing themselves as for the people, buy signatures with drinks, forge dead men's names, practice blackmail by buying and selling, for so much per name, signatures for petitions needed to refer certain measures to the people; a state where the demagogue thrives and the energetic crank with money through the Initiative and the Referendum, can legislate to his heart's content; a state of whose system of government Mr. Frederick V. Holeman, a prominent lawyer and writer says: "It is hoped that the time is not far distant when the legal voters of the



state will invoke the Initiative to abolish it"? Oregon is such a state.<sup>386</sup>

Those competing sentiments echo the calls for direct democracy reform sounded today by those who live with the system. Unfortunately, it may be difficult to implement the reforms suggested in this Comment, as most of them would require voter ratification through constitutional amendments. Voters are often reluctant to limit their power of initiative in any specific context, even when they desire reform generally. For example, Oregon's Measure 26, the Initiative Integrity Act, only passed after extensive evidence of fraud and corruption in other initiative campaigns convinced voters that reform of the signature gathering process was necessary; still, Measure 26 seems to have had limited, if any, effect. Thus, reforms such as limiting the subjects that initiative amendments can address could fail in initiative-happy states like Oregon and California. Yet other reforms, such as increased privacy protection for petition signatories, would probably pass in every state. At the very least, these reform proposals will encourage citizens to think more critically about the initiative process.<sup>387</sup>

In the end, states should adopt direct democracy systems that allow for referenda, referrals, recalls, and indirect and direct initiatives. States should allow for both statutory changes and constitutional amendments through initiatives; however, initiatives amending the constitution should require a supermajority or successive vote for passage and strictly adhere to single-subject and separate-vote requirements. More signatures should be required to place an initiative amendment on the ballot than to place a statutory initiative on the ballot. States should prohibit initiatives that limit minority rights, threaten the judiciary, reduce state funds without stating which state services are to be cut, appropriate state funds without stating where those funds will come from, or affect the prohibition on those subjects.

Legislatures should be permitted to amend any statutory initiative without resort to a referral, and to mandate early conferences between initiative proponents and government officials to improve the wording of initiatives and to give legislators a chance to pass the law without an initiative. All ballot measures should be voted on in general elections except in rare circumstances. State judges should be appointed instead of elected and should be exempt from recall. All fraudulent activity related to the direct democracy process, especially signature gathering, should be criminalized and prosecuted. States should strive to enact all laws that would help the public track the true identities of parties sponsoring and

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386. EATON, *supra* note 14, at v-vi.

387. As William Jennings Bryan noted, "[W]e have the initiative and referendum. . . . do not disturb them. If defects are discovered, correct them and perfect the machinery." 1 JOURNAL OF THE NEBRASKA CONSTITUTIONAL CONVENTION 326 (1919).

spending large amounts of money for and against initiatives. Finally, states should provide voters with a clear and thorough voter's pamphlet.

By adopting a system similar to that described above, states could reduce many of direct democracy's negative effects while still enjoying its many benefits. Citizens could utilize the indirect initiative if they so chose, but they would remain free to bypass the legislature and take measures directly to the people. Voters could still recall most publicly elected officials, but not judges who must remain free from majoritarian passions to faithfully discharge their duties. The state constitution would remain amendable, but only those initiatives that voters considered truly necessary would actually succeed. Even in those instances, voters would only be able to amend their constitution one step at a time, preserving its boundary-defining status and making it more than the easiest place for interest groups to lock in temporarily favored policy choices. Complicated initiatives would rarely make the ballot, the majority would not be able to discriminate against minorities, and state finances would remain flexible to adapt to changing economic circumstances. Voters would be well-informed and the process relatively free of fraud. In short, under such a system, direct democracy would be better positioned to live up to the ideals of its creators and the hopes of today's citizens.