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Christopher A. Coury

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STUDENT NOTES

DIRECT DEMOCRACY THROUGH INITIATIVE AND REFERENDUM: CHECKING THE BALANCE

CHRISTOPHER A. COURY*

I. INTRODUCTION

One desire in American democracy — to live in a society in which the government is not absolute, but rather subject to a system of checks and balances — lives as robustly today as it did when this nation was founded. Many state constitutions embody this principle by reserving for the people methods of direct legislation through the referendum and the initiative. The drafters of these constitutions, concerned with corrupt legislators and their agendas, intended to empower the people to introduce, consider, and vote upon issues themselves.¹

There are two different forms of direct legislation. The first of these is the initiative. Initiatives are proposed laws which not only are drafted by citizens, but which can be enacted by the voters without the state legislature.² The other form of direct legislation is the referendum. A referendum empowers citizens to place a law passed by the state legislature on the ballot, where it may be overturned.³ For both initiatives and referenda, citizens place the proposals on the ballots by obtaining and submitting a fixed number of signatures, and complying with other statutory requirements.

* B.A., 1991, University of Notre Dame; J.D., 1994, Notre Dame Law School; Thos. J. White Scholar, 1992-1994. This article is dedicated to my parents with gratitude for their love, guidance, and support.

1. John McFarland, *Politics and Sin: Today's Initiatives the Product of Yesteryear's Abuses*, L.A. DAILY J., Oct. 2, 1984, at 4.

2. Dan Walters, *Is It Time to Retake the Initiative?*, L.A. DAILY J., Apr. 5, 1989, at 6.

3. *Id.* Another form of direct democracy is the recall. Whereas in initiatives and referenda, citizens are voting on legislation, in a recall election, by comparison, voters have the power to remove a public official from office in the middle of a term. *Id.* This discussion will not examine the recall.

In recent years, voters have begun taking matters into their own hands more frequently by introducing proposed legislation, not to the legislature, but to the citizens of the state by way of the ballot.⁴ Moreover, an increased number of legislative acts have been channelled to the citizens through referenda.⁵ Accordingly, it is fair to describe direct legislation through initiatives and referenda as a prolific part of the political landscape in the many parts of the United States.

As the referendum and initiative have become "a fourth branch of government" in many states, several problems have surfaced as well.⁶ Most problems of direct legislation result from the lack of regulation of this process. This article will examine five problematic aspects of referenda and initiatives. It will then propose several reforms to address the excesses previously identified. This discussion will reveal that fine tuning the process of direct legislation through increased regulation not only would preserve this check on state government, but also would enhance the ability of the referendum and initiative effectively to gauge and to implement the will of the voting population.

II. FIVE PROBLEMS OF DIRECT DEMOCRACY

An analysis of modern initiatives and referenda in the United States reveals five problematic aspects of direct legislation. First, the procedures regulating initiatives and referenda may fail to protect voters adequately against poor drafting, multiple propositions on one issue, and late legal challenges. Second, ballot measures may contain provisions which invidiously discriminate or deny civil or human rights, yet legal attacks on the substance of the propositions generally are not engaged until the law is enacted. Third, the quantity of propositions in elections can confuse voters. Fourth, educating voters about an increased number of ballot measures has become increasingly difficult and decreasingly effective. Finally, voters may fail to account for the effects which may arise from the enactment or defeat of ballot measures. This section will examine each of these aspects individually, both by discussing the problem in the abstract and by presenting case studies from recent elections.

4. See generally Michael deCoursey Hinds, *Frustrated Governors Bypass Legislators With Voter Initiatives*, N.Y. TIMES, Oct. 16, 1992 (National Edition) (page and column unavailable); James W. Sweeney, *Ballot Measures Can Circumvent Stalled Assembly—Breaks the 'Lobby-Lock'*, L.A. DAILY J., Jan. 1, 1990, at 1; Ronald A. Zumbun, *Courts Can Bring Sanity to the Process*, L.A. DAILY J., July 18, 1990, at 6.

5. Hinds, *supra* note 4; Sweeney, *supra* note 4, at 1.

6. Hinds, *supra* note 4.

A. *Procedural Problems*

Three procedural problems have surfaced in recent elections. First, poor drafting of ballot measures in conjunction with the inability to compromise often defeats worthy initiatives and referenda. Second, ballot measure sponsors often include multiple issues in one ballot proposition in an attempt to log-roll the weaker provision past the electorate. Finally, opponents to propositions often plan their legal challenges to ensure that there is not ample time for the merits of the issues to be completely adjudicated before the printing of the ballots and/or the election. As the following discussion indicates, minor regulations in each of these areas would sufficiently remedy the problems.

1. Poor Drafting of Ballot Propositions

In 1992, Arizona's Proposition 200 was an initiative measure which proposed to regulate the taking of wildlife on public lands.⁷ In the initiative's Declaration of Policy, the drafters stated "[i]t is the intention and desire of the people of Arizona to make our public lands safe and humane for all creatures found on Arizona's public lands. We desire to manage our wildlife and protect our property by humane and NON-LETHAL METHODS. We, therefore, propose the following initiative."⁸ The actual text of the statute which followed proceeded to outlaw such devices as leghold traps, conibear style traps of the instant kill or body-gripping type design, snares, explosives and poisons.⁹ It expressly allowed the use of such devices where necessary to protect human life, and it did not restrict the use of guns.¹⁰

In the analysis of Proposition 200, the Legislative Counsel stated that the restriction "should not prohibit . . . [r]egulated hunting or fishing with guns or other 'implements in hand'."¹¹ Nevertheless, opponents of the measure focused upon the phrase "non-lethal" in the Statement of Policy and launched an intensive media blitz that Proposition 200 would ban all fishing and hunting on public lands.¹² This proposition was soundly defeated by a 62.1 percent to 37.9 percent margin.¹³

7. See ARIZONA SECRETARY OF STATE, ARIZONA PUBLICITY PAMPHLET, GENERAL ELECTION 84-92 (Nov. 3, 1992).

8. *Id.* at 84 (Text of Proposition 200) (emphasis added).

9. ARIZONA SECRETARY OF STATE, ARIZONA PUBLICITY PAMPHLET, GENERAL ELECTION 84-92 (Nov. 3, 1992).

10. *Id.*

11. *Id.* at 85.

12. Richard Lessner, *Razing Arizona: Proposition 200 Meets the Heritage Fund*, ARIZ. REPUBLIC, Oct. 18, 1992, at C4.

13. *Proposition Results*, ARIZ. REPUBLIC, Nov. 5, 1992, at AA5.

Arizona's experience in 1992 with Proposition 200 illustrates one common procedural problem with initiatives and referenda—namely, how poor drafting can doom an otherwise beneficial piece of legislation. While a legislature can clarify ambiguous language through discussion and compromise, this avenue is not available with direct legislation. For example, had Arizona's Proposition 200 contained one sentence which expressly exempted hunting and fishing from the scope of this policy, or had the word "non-lethal" been deleted, as the drafters intended, it might have passed. Clarifying the intent and effect of this initiative was impossible. Consequently, Arizona voters were presented with an all or nothing decision on their ballots, despite the ambiguous language contained in the initiatives.¹⁴

2. Logrolling Multiple Issues¹⁵

In the election of June 5, 1990, California voters considered Proposition 115, the Crime Victims Justice Reform Act.¹⁶ This initiative measure covered the following issues: postindictment preliminary hearings; independent construction of state constitutional criminal rights; due process and speedy, public trials; joinder and severance of cases; hearsay testimony at preliminary hearings; discovery procedures; voir dire examinations; the felony-murder statute; special circumstances statutes; the torture statute; appointment of counsel; trial dates and continuances; the severance clause; and the requirement of a super-majority for amendment by the legislature.¹⁷

In *Raven v. Deukmejian*,¹⁸ Proposition 115 was challenged as violating the single-subject rule under the California Constitution.¹⁹ The California Supreme Court stated that "an initiative measure does not violate the single-subject requirement 'if, despite its varied collateral effects, all of its parts are "reasonably germane" to each other' and to the general purpose or object of

14. For a discussion of potential reforms for this and other problems identified in this section, see *infra* notes 80-100 and accompanying text.

15. "Logrolling" is defined as the "practice of including in one statute or constitutional amendment more than one proposition, inducing voters to vote for all, notwithstanding they might not have voted for all if amendments or statutes had been submitted separately." BLACK'S LAW DICTIONARY 942 (6th ed. 1990).

16. A brief summary of the numerous provisions contained within this initiative is contained in *Raven v. Deukmejian*, 801 P.2d 1077, 1079 (Cal. 1990).

17. *Id.* at 1080-83.

18. 801 P.2d 1077 (Cal. 1990).

19. The California Constitution states: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." CAL. CONST. art. II, § 8(d).

the initiative.”²⁰ Remarkably, Proposition 115 withstood this constitutional challenge under the single-subject rule because its provisions involved a “common concern, ‘general object’ or ‘general subject’.”²¹ The court expressly rejected the argument that logrolling existed in Proposition 115, despite the large number of provisions. It stated that the risk of logrolling

is inherent in the passage of most laws, whether enacted by the Legislature or by initiative, in which benefits and burdens must be evaluated. . . . ‘The decision to enact laws, whether directly by the people or through their representatives involves the weighing of pros and cons.’²²

The court concluded that voters “duly considered and comprehended” the nature of the initiative’s provisions, because the proposition was subjected to intense public focus and the voters themselves received an official election pamphlet which contained the text, analysis, and arguments favoring and opposing the propositions.²³ In short, the court stated that because voters had ample opportunity to understand the nature of the proposition, the provisions of Proposition 115 were valid even if logrolling did occur.

In essence, the California Supreme Court adopted the view that logrolling is as palatable in citizen-initiatives as in legislative bills. This standard of review of ballot measures is troublesome for two reasons. First, it ignores the essence of the “all or nothing” decision which voters must make. Legislators can debate, modify, and attempt to tailor a particular bill if so inclined, but voters must vote for a ballot measure as it comes to them or reject it in its entirety. For this reason, logrolling is much more troublesome in direct legislation than it is in legislative law-making. The second troubling aspect of the California Supreme Court’s position is its willingness to allow logrolling given the complexities of ballot propositions, the possibility of deceptive advertising, and the lack of understandable objective information that is made available for the electorate. Whether voters can decipher and comprehend enough information about an initiative or referendum to consider the issue meaningfully should be questioned when evaluating single-subject rule challenges; it cer-

20. *Raven*, 801 P.2d at 1083 (quoting *Brosnahan v. Brown*, 651 P.2d 274, 279 (Cal. 1982)).

21. *Id.* at 1083.

22. *Id.* at 1085.

23. *Id.*

tainly should not be assumed solely because information is available to the general public.²⁴

As *Raven* demonstrates, California's "reasonably germane" standard of review provides little protection for voters against parties placing an initiative containing multiple, loosely-related issues on the ballot. In Arizona, courts apply a preferable standard of review that substantially inhibits logrolling.²⁵ Arizona courts examine the provisions contained within ballot measures to determine whether "logically speaking, they should stand or fall as a whole."²⁶ This test also examines the purpose of the ballot measure to determine whether voters should reasonably favor or oppose all of the provisions contained within the proposition. If voters could reasonably be expected to split between the provisions, the proposition would violate the single-subject rule.²⁷

The Arizona standard hinders logrolling much more than does the California standard. Moreover, given the lack of compromise inherent to ballot measures and the common difficulty of understanding the effects of these propositions, the Arizona judicial standard provides greater protection to voters against hidden provisions which would not pass on their own. Finally, the Arizona standard holds the state accountable only for those ballot proposals to which the electorate validly consents.

3. Lack of Timely Challenges

Proposition 110 on Arizona's 1992 General Election Ballot demonstrates the need for regulation of pre-election challenges. This initiative proposed: (i) to prohibit the use of public funds to pay for abortions; and (ii) to restrict the number of instances in which abortions would be legally permissible within Arizona.

The sequence and timing of events related to Proposition 110 illustrate another concern with initiatives. On August 7, 1991, the text of the initiative became available to the public when proponents submitted it to the Arizona's Secretary of State

24. See *infra* part II.D for a complete discussion of voter education through official election publicity pamphlets.

25. The Arizona Constitution provides: "If more than one proposed amendment shall be submitted at any election, such proposed amendments shall be presented in such a manner that the electors may vote for or against such proposed amendments separately." ARIZ. CONST. art XXI, § 1.

26. *Tilson v. Mofford*, 737 P.2d 1367, 1370 (Ariz. 1987) (quoting *Kerby v. Luhrs*, 36 P.2d 549, 554 (Ariz. 1934)).

27. It is interesting to note, however, that Arizona's Supreme Court limited the application of this standard to initiatives proposing constitutional amendments. It does not apply for ballot measures proposing statutes. See *Tilson*, 737 P.2d 1367.

in exchange for an application to place the measure on the November 1992 ballot.²⁸ Eleven months later, on July 2, 1992, the proponents filed Proposition 110 and the statutory number of signatures with the Secretary of State.²⁹ On July 10, 1992, the League of Women voters submitted an argument against this initiative for insertion into the Arizona Publicity Pamphlet.³⁰ Over two months later, on September 15, 1992, the League of Women Voters and other Plaintiffs filed a complaint and application for a permanent injunction against Proposition 110, alleging that it violated Arizona's single-subject rule.³¹ The complaint was served to the Defendants on September 16, 1992.³² Not only did the Defendants have to respond on September 17, but the trial was also held that same morning.³³

At the trial, defense counsel objected to expert testimony being entered into evidence, stating

I would like to state for the record that I did not find out what the testimony of the witness was going to be until I heard it. I just received [the expert's] affidavit today, and consequently I'm really not prepared to cross-examine the witness. . . .³⁴

Even though the trial judge admitted, but did not consider, the expert testimony, she ruled that Proposition 110 violated the single-subject rule and granted the Plaintiffs' motion for an injunction.³⁵ On September 18 — the same day as the trial court granted the injunction — the Defendants filed an appeal with the Arizona Supreme Court. On September 22, the Supreme Court not only heard oral arguments, but it also reversed the trial court's judgment.³⁶ Thus, in order to meet the September 23 deadline for submitting the general election ballots to the printer, this case moved from its pleadings through its appeal in one week.

In its opinion reversing the trial court, the Arizona Supreme Court was disturbed by this challenge which did not allow time for proper and deliberate adjudication. Using the equitable doc-

28. *Mathieu v. Mahoney*, 851 P.2d 81, 82 (Ariz. 1993).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 83.

35. *Id.*

36. *Id.*

trine of laches,³⁷ the court held that the challenge to Proposition 110 was not timely because it was filed only one week prior to the deadline for printing the ballots.³⁸ The court found

this delay both unreasonable and prejudicial because it strains the quality of decision making and is ultimately unfair to all involved. It prejudiced defendants in the preparation of their defense. Less than 24 hours passed from the time the complaint was served until the time the matter was litigated on the merits in the trial court. In 24 hours, defendants had to retain counsel; marshal their witnesses, facts and legal arguments; analyze the challenge; research and brief the issues; and prepare for a trial on the merits to defend against undisclosed evidentiary materials presented by plaintiffs.³⁹

This was ample justification for the court to apply the equitable doctrine of laches.⁴⁰

The court also indicated that it was persuaded by the fact that this was public litigation involving an election. It stated that "[t]he ultimate prejudice in election cases is to the quality of decision making in questions of great importance. . . . [P]ublic litigation, such as election contests and challenges to ballot propositions, implicates interests well beyond the parties to the case."⁴¹ The court, however, noted that this decision was not only about "hardship on the lawyers" or "judicial inconvenience" but rather

about simple fairness, nothing more nor less. It concerns fairness to those who invested countless hours and substantial funds for almost a year in order to get Proposition 110 on the ballot for a public vote; fairness to the quarter of a million citizens who signed the initiative petitions, as well as those who labored to collect the signatures; and fairness to a judicial process that earns public respect and support by producing careful, well-reasoned decisions after a com-

37. Laches "is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to [an] adverse party, operates as [a] bar in [a] court of equity." BLACK'S LAW DICTIONARY 875 (6th ed. 1990).

38. *Mathieu*, 851 P.2d at 84. The court also noted a previous decision that a challenge to a ballot measure was deemed timely when it was brought over six weeks before absentee voting was to begin. *Id.* (citing *Kromko v. Superior Court*, 811 P.2d 12, 18 (Ariz. 1991)).

39. *Id.* at 84.

40. *Id.* at 85.

41. *Id.*

plete exposition of the issues. Simple fairness is the real basis for applying the equitable doctrine of laches here. . . .⁴²

Proposition 110 remained on the November 3, 1993 Arizona General Election ballot, and was ultimately defeated, 68.5 percent to 31.5 percent.⁴³

B. *Substantive Problems*

In almost every state which allows initiatives and referenda, there are few, if any, restrictions on the substance of propositions which will appear on the ballot for consideration by the general public. Anything is fair game. The following analysis will suggest that, in at least two areas, some substantive issues do not belong on the ballot. Although caution should be exercised when recommending substantive controls, the need for such controls increases with each modern application of direct democracy.

1. Local or Low Profile Issues

Proposition 101 on Arizona's 1992 General Election Ballot was a referendum from the state legislature which proposed to increase the term of the State Mine Inspector from two to four years.⁴⁴ The publicity pamphlet contained the legislative counsel's brief arguments for both sides of the issue. These presentations were, at best, facial attempts to comply with the statutory requirement.⁴⁵ Moreover, no additional arguments were pub-

42. *Id.*

43. *Id.* at 83 n.3.

44. ARIZONA SECRETARY OF STATE, ARIZONA PUBLICITY PAMPHLET, GENERAL ELECTION 9-11 (Nov. 3, 1992).

45. ARIZ. REV. STAT. ANN. § 19-124 (Supp. 1992) provides:

B. Not later than sixty days preceding the regular primary election the legislative council, after providing reasonable opportunity for comments by all legislators, shall prepare and file with the Secretary of State an impartial analysis of the provisions of each ballot proposal of a measure or proposed amendment. The analysis shall include a description of the measure and shall be written in clear and concise terms avoiding technical terms wherever possible. The analysis may contain background information, including the effect of the measure on existing law, or any legislative enactment suspended by referendum, if the measure or referendum is approved or rejected.

C. The analyses and arguments shall be included in the publicity pamphlet immediately following the measure or amendment to which they refer. . . .

Id.

lished in the publicity pamphlet.⁴⁶ The coverage in Arizona's largest paper, *The Arizona Republic*, was equally conclusory.⁴⁷

The treatment of Proposition 101 suggests at least two possible conclusions about this ballot measure. On one hand, the lack of arguments on both sides may indicate that the term of the State Mine Inspector was a non-controversial matter.⁴⁸ If that were the case, this issue should not have appeared on the ballot. It could have been resolved by the legislature without much concern. On the other hand, the issue may have generated a good deal of concern, but only to a minority within the state. In Arizona's 1992 general election, approximately seventy percent of the total vote came from the counties in which metropolitan Phoenix and Tucson lie.⁴⁹ These counties do not contain mines, nor are most of their voters exposed to the daily concerns of the mining industry. Thus, it is possible (and indeed probable) that a large percentage of the votes on Proposition 101 were cast with little information, little concern, or both. Voters in mining communities may have had informed, strong opinions about this referendum and its effects on their daily lives, yet they were likely outnumbered by the State's uninformed, urban majority. Ultimately resolving this issue in the legislature would have provided, at a minimum, the opportunity for a minority with strong opinions both to present its positions and to lobby a good portion of those making the final decision. By contrast, it is unlikely that these groups possess the economic resources that would allow them to voice their concerns and educate the ultimate decision makers — the voters — in a similarly effective manner in statewide initiatives and referenda. Thus, resolving these types of issues in the state legislature actually prevents these minority groups from exposure to the potential apathy and ignorance of the general electorate.

Proposition 101 demonstrates why ballot measures which are either non-controversial or of local interest only properly

46. ARIZONA SECRETARY OF STATE, ARIZONA PUBLICITY PAMPHLET, GENERAL ELECTION 9-11 (Nov. 3, 1992).

47. In its recommendations for the ballot propositions, the paper stated the following in reference to Proposition 101: "Although all other state officials serve four or six-year terms, the state mine inspector stands for election every two years. This makes little sense. The mine inspector should be on the same footing as other elected officials, as this amendment provides. We recommend a 'yes' vote." *Ballot Propositions: Our Recommendations*, ARIZ. REPUBLIC, October 31, 1992, at A22.

48. Indeed, this appears to be the case as the original bill passed easily in both houses of Arizona's Legislature. See ARIZONA SECRETARY OF STATE, ARIZONA PUBLICITY PAMPHLET, GENERAL ELECTION 9 (Nov. 3, 1992).

49. *Election '92*, ARIZ. REPUBLIC, Nov. 5, 1992, at AA4-5.

belong in the legislature. Propositions of little public concern actually injure the public good, because they clutter the ballot and risk that people may vote without giving due attention to the proposal and its effects. On the other hand, ballot measures which affect only a few communities create the risk that an ignorant and apathetic majority might unintentionally thwart their cause. The legislature can give due attention to the concerns of the minority and respond through negotiation and compromise.

2. Ballot Measures Depriving Human or Civil Rights, or Fostering Invidious Discrimination

To date, there have been no issues designated as unsuitable for popular vote. Rather, citizen-groups have the ability to single out a class of individuals and place discriminatory propositions on the ballot. Moreover, voters can place issues implicating constitutional or human rights on the ballot as easily as they can issues of minimal importance. The only limitations on the power of the voters to present issues to their fellow citizens are the personal protections of the Federal and State Constitutions, and the procedural requirements imposed by the state on direct legislation. But, as Colorado's experience with Amendment 2 indicates, sometimes increased protection is desirable.

In the November 3, 1992 election, Colorado voters passed Amendment 2, which essentially constituted a ban on anti-discrimination laws protecting homosexuals.⁵⁰ After the amendment was approved by voters, a lawsuit was filed on November 12, 1992; it alleged that the amendment was unconstitutional, and it sought an injunction against its enforcement.⁵¹ The Plaintiffs argued that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. After conducting an evidentiary hearing, a Colorado District Court Judge issued a preliminary injunction enjoining the

50. *Evans v. Romer*, 854 P.2d 1270, 1272 (Colo. 1993). Amendment 2, which passed 53.4% to 46.6%, provides:

NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. at 1272.

51. *Evans*, 854 P.2d at 1272.

enforcement of Amendment 2 until the outcome of a trial on the merits.⁵² The Defendants appealed the issuance of the preliminary injunction in that case to the Colorado Supreme Court.⁵³

In its *de novo* review of the facts of this case, the Colorado Supreme Court affirmed the trial court's order.⁵⁴ It said that the

"ultimate effect" of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures. . . . Thus, the right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment.⁵⁵

The court held that "the Equal Protection Clause guarantees the fundamental right to participate equally in the political process, and [that] any legislation or state constitutional amendment which infringes on that right by 'fencing out' and independently identifiable class of persons must be subject to strict judicial scrutiny."⁵⁶ As the defendants failed to proffer a compelling state interest on behalf of Amendment 2, the court concluded that issuance of a preliminary injunction was proper.⁵⁷ It affirmed⁵⁸ the Colorado District Court Judge's order enjoining the enforcement of Amendment 2 pending the trial on the merits of the alleged constitutional violations.⁵⁹

Colorado's experience with Amendment 2 illustrates how provisions which are arguably unconstitutional can appear on

52. *Id.* at 1273.

53. *Id.* at 1274.

54. *Id.* at 1286.

55. *Id.* at 1285.

56. *Id.* at 1282.

57. *Id.* at 1286.

58. *Id.*

59. Amendment 2 was subsequently determined to be unconstitutional by a Colorado District Court Judge because it deprived "the fundamental right of an identifiable group to participate in the political process." *Evans v. Romer*, No. CIV.A.92CV7223, 1993 WL 518586 at *9 (Colo. Dist. Ct. Dec. 14, 1993).

the ballot, and occasionally, even be approved by voters. Even if courts ultimately strike down the law, many of the same issues identified by the Arizona Supreme Court in *Mathieu v. Mahoney* — money, time, and effort — are wasted because the provision is not kept off the ballot.

C. *Quantity of Ballot Measures*

The third problematic aspect of modern direct democracy involves the quantity of propositions. Concerns arise not only from the sheer number of ballot measures in one election, but also from multiple propositions covering one issue. Voter confusion, frustration, and apathy are common results. The following analysis will examine both of these problems.

1. Multiple Propositions Covering One Issue in One Election

One of the most publicized examples of this problem occurred in Arizona in 1990 with the two proposals—Propositions 301 and 302—to establish a state Martin Luther King (MLK) holiday. Proposition 301 preserved the existing number of paid holidays by: i) establishing a paid holiday honoring Dr. King; and ii) eliminating Columbus Day as a paid holiday.⁶⁰ Proposition 302 proposed to create an additional paid holiday in honor of Dr. King.⁶¹ Voters rejected both referenda in the election.⁶²

The interplay between the propositions is a textbook example of the age-old maxim “divide and conquer.” Both the Arizona Publicity Pamphlet, and the state’s largest newspaper suggested the following vote combinations:

If you favor both a (Martin Luther) King Day and a Columbus Day holiday, vote No on Proposition 301 and Yes on Proposition 302.

If you support a King Day but would eliminate Columbus Day, vote Yes on Proposition 301 and No on Proposition 302.

60. ARIZONA SECRETARY OF STATE, ARIZONA PUBLICITY PAMPHLET, GENERAL ELECTION 153-63 (Nov. 6, 1990).

61. ARIZONA SECRETARY OF STATE, ARIZONA PUBLICITY PAMPHLET, GENERAL ELECTION 154-56 (Proposition 301) (Nov. 6, 1990).

62. See THE ARIZONA YEARBOOK: A GUIDE TO GOVERNMENT IN THE GRAND CANYON STATE 156 (1991); see also OFFICE OF THE ARIZONA SECRETARY OF STATE, STATE OF ARIZONA OFFICIAL CANVASS, GENERAL ELECTION 12 (1990).

If you oppose a King Day, but support a Columbus Day, vote No on both propositions.⁶³

Voters who filled out their ballots as instructed would cast a "No" vote on either Proposition 301 or Proposition 302. The end result is that two proposals divided the vote of the Martin Luther King holiday supporters, thereby enabling a minority of their opponents to prevail in the election.⁶⁴

In addition to causing skewed results, another potential problem may arise when multiple propositions dealing with the same issue appear on one ballot. In some cases, opponents of an initiative or referendum may place on a ballot a "rival" proposition which deals with the same issue, partially to attract some of the vote, and partially in an attempt to confuse voters. Consider in this regard the four Propositions on Arizona's 1984 General Election Ballot proposing the regulation of hospital costs, the four Propositions on Arizona's 1986 ballot involving tort and insurance reform, and the five Propositions on California's 1988 ballot relating to auto insurance.⁶⁵ In these instances, many benefits of direct democracy were undermined by gamesmanship. Some sponsors of these ballot measures might not have had a serious hope of passing their propositions, but introduced their measures anyway in an attempt both to confuse voters (in part, by cluttering the ballot) and to solicit "No" votes on all the related proposals.⁶⁶

2. Too Many Propositions on the Ballot Overall

Another problem involves the sheer quantity of measures which voters are asked to resolve on a ballot. In recent years, the number of propositions in many states has been staggering. In California, for example, there have been 167 Propositions since

63. *All Those Propositions: Some are Major, Some Less So; All Of Them Deserve an Informed Vote*, PHOENIX GAZETTE, Nov. 5, 1990, at A11; see also ARIZONA SECRETARY OF STATE, ARIZONA PUBLICITY PAMPHLET, GENERAL ELECTION 156 (Nov. 6, 1990).

64. The elections results paint a startling picture. Proposition 301 received 768,763 "No" votes to its 251,308 "Yes" votes. Proposition 302 received 535,151 "No" votes and 517,882 "Yes" votes. Thus, the two Propositions combined received nearly 750,000 affirmative votes in an election in which just over 1 million voters participated. Based on the reasonable assumption that most voters followed the voting scheme suggested by the Publicity Pamphlet and newspapers to alleviate their confusion, it becomes obvious that a minority of voters dictated policy over the majority.

65. See Paul F. Eckstein, *Direct Democracy Alive and Generally Well in Arizona*, ARIZ. REPUBLIC, Oct. 28, 1990, at C1; see also Walters, *supra* note 2, at 6.

66. Eckstein, *supra* note 65, at C1.

the 1982 General Election.⁶⁷ Twenty-eight of these were presented to voters in 1990.⁶⁸ Arizona has faced a similar, though not as severe, glut of direct legislation in recent years. In eight of the last ten elections, Arizona voters have decided thirteen or more ballot propositions.⁶⁹

An excessive quantity of ballot propositions causes several problems. First, voters are exposed to more material and an increased number of arguments. Not only may the sheer amount of objective information overwhelm voters, but the biased arguments may confuse them as well. It is estimated that "in 1990 it would have taken a high school graduate roughly twenty-four hours to read the 222 page description of the twenty-eight measures on the [California general election] ballot."⁷⁰ Secondly, when presented with a glut of propositions, it is argued that people have a tendency to reject everything and preserve the status quo.⁷¹ If this is the case, the advantages of direct legislation are undermined when voters categorically reject all propositions.

D. *Educating Voters Through Official Publicity Pamphlets*

One method of educating citizens about ballot measures is through the use of official publicity pamphlets. As more and more propositions appear on the ballot, this avenue of information becomes increasingly important to voters and to each measure's proponents and opponents. There is, however, reason to question whether this resource is as effective as it could be, or for that matter, whether it is effective at all.

In 1990, California Secretary of State March Fong Eu distributed two pamphlets to educate voters on the state's twenty-eight ballot measures.⁷² Citizens had 224 pages of single-spaced print to read and understand in order to cast educated votes.⁷³ While this was extraordinary, even elections with fewer ballot measures require a good deal of reading. The publicity pamphlet for the 1992 California general election (which had thirteen proposi-

67. CALIFORNIA SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 2 (NOV. 3, 1992).

68. Hinds, *supra* note 4.

69. See Eckstein, *supra* note 65, at C1.

70. Hinds, *supra* note 4.

71. Hinds, *supra* note 4. Indeed, in California's 1990 election, "more than forty percent of the voters responded to the cluttered ballot by voting 'no' on all proposals that year." *Id.*

72. The first pamphlet covered Propositions 124 to 140. The "sequel" covered Propositions 141 to 151. See Debra J. Saunders, *Too Many Initiatives: Crass Politicians Have Co-Opted the Process*, L.A. DAILY J., Oct. 30, 1990, at 6.

73. *Id.*

tions on the ballot) was ninety-six pages of single-spaced type. Likewise, Arizona's 1992 Publicity Pamphlet for an election with fourteen ballot propositions consisted of one-hundred twenty pages, also of single-spaced print.⁷⁴

It is unreasonable to think that voters can digest such large quantities of technical information in a cumbersome presentation. Yet, the publicity pamphlets often remain the lone source of objective information which voters receive. In order both to prevent voter reliance on newspaper editorials and partisan advertisements, and also to avoid further voter turn-off, reforming the complexity of publicity pamphlets is essential.

E. *Problems Controlling the Effects of Direct Democracy*

The final problem with direct legislation through initiatives and referenda involves the effects of the elections. Voters are frequently encouraged to examine the merits of proposed legislation. In doing so, the risk arises that they may fail to account for the results which enacting or defeating a certain proposition might cause.

Two recent examples clearly illustrate this point. The first involves Arizona's 1990 dual propositions on the Martin Luther King holiday. Prior to the election, the public's attention was focused, not on economics, but instead on civil rights and the character of Dr. King.⁷⁵ Yet, as a result of the holiday's defeat, Arizona lost an estimated \$500 million from roughly 165 groups which canceled events.⁷⁶ Whereas the public failed to account for the economic realities involved with the issue in 1990, it did so when the issue was presented again two years later. In fact, when the holiday measure passed in 1992 with sixty-one percent of the vote, approximately forty-one percent of the voters who supported it stated that economic pressures influenced their vote.⁷⁷

Another example of the voters' failure fully to recognize the effect of their vote is illustrated in Colorado's 1992 election on Amendment 2. Colorado officials estimate that the state lost in excess of \$10 million in just over one month from a nationwide

74. ARIZONA PUBLICITY PAMPHLET, GENERAL ELECTION (Nov. 3, 1992).

75. See ARIZONA SECRETARY OF STATE, ARIZONA PUBLICITY PAMPHLET, GENERAL ELECTION 156-63 (Of the eleven arguments favoring the holiday, only two presented economic arguments.) (Nov. 6, 1990).

76. Mark Shaffer, *Painful Parallel: Arizona's King Day Controversy*, ARIZ. REPUBLIC, Dec. 27, 1992, at A12.

77. See *King Holiday Vote Statistics*, ARIZ. REPUBLIC, Nov. 5, 1992, at A2; see also David Fritze, *Arizonans Bask In King Day Win*, ARIZ. REPUBLIC, Nov. 5, 1992, at A1, A2.

reaction to this initiative, which prohibited anti-discrimination laws protecting homosexuals.⁷⁸

Both of these cases demonstrate how the "law of unintended consequences" can sometimes plague direct legislation by initiative and referendum.⁷⁹ When this occurs, state officials are in a no-win situation. If, on one hand, they vote to ameliorate the adverse consequences of a given election, they are working against the expressed will of the people. If, on the other hand, they choose inaction and allow the consequences to unfold without correction, officials risk statewide economic losses, nationwide scorn, the wrath of their constituents for inaction, and another proposition amending the policy on the next general election ballot.

III. PROPOSED ALTERNATIVES

Many of the problems identified in the previous section can be addressed with legislation. This section will discuss various alternatives which state legislators should consider. Although the operational difficulty of these proposals varies, they nevertheless respond to issues which lawmakers need to address to correct the excesses of direct legislation.

Proposal One. States should require that all initiative petitions be submitted to legislative counsel for analysis and recommendations prior to distribution for signatures.

This reform addresses the problems arising from poor drafting of initiatives.⁸⁰ Although the legislative counsel's recommendations would be non-binding, this step would inevitably cure many ambiguities which otherwise would make their way to the ballot. Moreover, this process would occur before obtaining the signatures for initiative. To fund this reform, the sponsors of the ballot measure should pay a nominal fee to absorb some of the state's costs.⁸¹

78. Mark Shaffer, *Colorado Faces a Rocky Future: Anti-Gay Vote Spurs Potentially Expensive Backlash*, ARIZ. REPUBLIC, Dec. 27, 1992, at A1.

79. John Mark, *Reforms: Will they help, or will they hurt?*, PHOENIX GAZETTE, Oct. 24, 1992, at A13.

80. Note that this reform applies only to initiatives and not to referenda. This accounts for the different origin of these two forms of direct legislation. Because referenda have been considered by the state legislature, they generally have been amended, discussed, and clarified by legislative counsel and legislators.

81. Another reform, albeit dubious, would allow non-material changes to the text of the initiatives after the sponsors had obtained signatures. The advantage of such a policy is that clarifications could, in some cases, be easily

Proposal Two: State courts should strictly apply a single-subject rule for both proposed statutes and constitutional amendments.

This standard of review would address the problems created by logrolling in ballot measures. Courts should apply a test similar to that used by Arizona courts — namely, one which examines whether there is a reasonable expectation that voters will either approve or reject all of the provisions contained within a proposition.⁸² Moreover, this standard of review should be applied for both proposed constitutional amendments and statutes.

Proposal Three: States should enact statutory deadlines for challenges to ballot measures.

A deadline will effectively counter the ambush tactics which were displayed most clearly with Arizona's Proposition 110 in 1992. This proposal is simple, virtually cost-free, and will provide parties on both sides with the opportunity not only to present their legal and equitable arguments, but also to be given due consideration, full adjudication, and all appeals of right. Such a deadline should occur no later than one month before the ballots must be printed. After the deadline has passed, the statute should also divest the state courts of jurisdiction over ballot measure challenges until after the election. Finally, some states may need to establish earlier deadlines for the submission of signatures in order to effectuate this proposal.⁸³

Proposal Four: States should enact statutes that empower the Secretary of State to prohibit any initiative or referendum from being printed on election ballots if the proposition contains a provision that: i) invidiously discriminates against an

discerned by examining the literature and message which the initiative's sponsors distributed to the general public. The shortfall of this reform (one which I find persuasive) is that the provision would be changed AFTER signatures had been obtained. Although most non-material clarifications would not invalidate the consent of those who signed the petition, there may be some people who signed the initiative petition precisely because it was ambiguous, or because they read the ambiguous language differently from the way the legislative counsel read it. Therefore, I do not recommend this reform.

82. *Tilson v. Mofford*, 737 P.2d 1367 (Ariz. 1987).

83. For example, the last day to file initiative petitions with the Secretary of State's Office for the 1992 Arizona General Election was July 2, 1992. By moving this deadline for submission forward into early June, the state could have designated July 2, 1992 as the deadline for filing pre-election legal challenges. See OFFICE OF ARIZONA SECRETARY OF STATE, 1992 ELECTION INFORMATION FLIER 1 (rev. June 5, 1992).

identifiable class of people; or ii) curtails or deprives civil, human or constitutional rights.

Admittedly, this proposal would be difficult to administer on an ongoing basis. Such a statute would require the Secretary of State to interpret each ballot measure before placing it on the ballot. In addition to these subjective determinations, this proposal would also create the potential for increased pre-election litigation based upon the Secretary of State's construction of measures that are kept off of ballots.⁸⁴ Despite these difficulties, there are two considerations — one practical and one philosophical — that support the implementation of this reform.

The practical consideration involves one issue the Colorado Supreme Court considered in *Evans*, namely, the interplay between ballot measures and certain rights. In the conclusion of its opinion, the court noted:

That Amendment 2 was passed by a majority of voters through the initiative process as an expression of popular will mandates great deference. However the facts remain that "[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no election,"⁸⁵ and that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of people choose that it be."^{86, 87}

If it is likely that a provision will unconstitutionally implicate these rights, it is a matter of simple fairness to keep it off the ballot. This will save parties on both sides of an issue large expenditures of money, time and effort.

In addition to this practical consideration, another argument — namely that made by James Madison in *The Federalist*, No. 10 — supports this proposal as well.⁸⁸ In this essay, Madison notes that there are only two ways to control factions, namely to remove their causes or to control their effects.⁸⁹ After demonstrating the naivete of removing the causes, he concludes that

84. This also supports my proposal to establish an earlier deadline for filing ballot measure petitions. See *supra* note 83 and accompanying text.

85. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

86. *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736 (1964).

87. *Evans*, 854 P.2d at 1286.

88. *THE FEDERALIST* NOS. 10, at 53 (James Madison) (Bantam Books 1982).

89. A "faction" is "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent or aggregate interests of the community." *Id.* at 43.

society must control their effects.⁹⁰ Madison notes that it is the effect that must be controlled when a faction consists of the majority, as occurred in Colorado on Amendment 2. In this instance, Madison reasons that the faction "must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression."⁹¹ He concludes that only a republican form of government can control these excesses of democracy, as all public policies will pass through "a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations."⁹²

In sum, if our society does pass laws that appear to: i) discriminate against identifiable classes of people; or ii) endanger civil, human, and constitutional rights, such laws should not come from initiatives or referenda. Rather, they should be negotiated, tailored, and modified through the deliberate legislative process to minimize the risk of the appearance becoming a reality.

Proposal Five: State legislatures should consider statutory mechanisms that address the problem of multiple ballot measures involving the same issue.

Although difficult to implement, the problems created by multiple propositions on one issue might be solved by adopting an incremental process. One possible option is to enact a statutory scheme which requires the Secretary of State, upon presentation of a second ballot measure (initiative or referendum) addressing the same issue as a proposition already appearing on the ballot, to separate the policy and the procedures within the proposals. The Secretary of State would then place on the ballot one proposition that presents a general policy question to voters. Immediately thereafter, the Secretary of State would list the proposed methods of effectuating the policy. If one of these propositions received a majority vote, it would become the law of the state. If more than one received a majority vote (as voters could vote in favor for more than one), the proposal receiving the largest number of votes would prevail. If neither of these propositions received a majority vote, the voters will have passed a statute which (i) establishes a particular policy, and (ii) orders the state legislature to enact the means of enforcing the policy before the end of the ensuing legislative session.

90. *Id.* at 43-44.

91. *Id.* at 46.

92. *Id.* at 46-47.

Applying this reform to the 1990 Arizona Martin Luther King holiday vote demonstrates how it could operate effectively. With this reform in place, Arizona voters would have had to first answer Proposition 300 (i.e. "Do you favor a paid state holiday in honor of Dr. Martin Luther King?"). Voters would then choose the specific method of effectuating this policy from those proposals which had been introduced through initiatives or referenda. Thus, they would then vote on Proposition 301 ("Do you favor maintaining the existing number of paid state holidays by eliminating Columbus Day as a paid holiday, and replacing it with a paid Martin Luther King day?") and Propositions 302 ("Do you favor creating an *additional* paid state holiday on Martin Luther King day?"). Assuming that the election results were identical to those of 1990, neither Propositions 301 nor 302 would have obtained a majority. Thus, the voters would have (i) enacted a paid state holiday honoring Dr. King, and (ii) ordered the legislature to enact the details before the end of the 1991 legislative session.

Adopting an incremental reform has three advantages over the current system. First, it allows voters to approve understandable general policies, without the confusion of details. The people could reject all specific proposals, and yet resolve a policy question which the legislature refused to address. Second, it allows voters to approve a general policy without espousing poorly drafted statutes on either side. The legislature would be left to draft language which would pass Constitutional muster. Finally, gamesmen who introduce additional propositions with the intent of confusing voters with details may be discouraged from doing so.

Proposal Six: State legislatures should investigate ways to cap the number of ballot measures presented to voters in each election.

Three reforms are possible, although none appears promising. The first of these would establish an increased number of signatures for a proposal to be placed on the ballot. Practically speaking, this is naive, as petitions submitted generally contain more than the statutorily-required number of signatures. Ethically speaking, such a proposal is suspect, as it hinders and may prohibit small, under-funded groups—one of the intended beneficiaries of direct democracy—from placing propositions on the ballot.

The second reform is constitutionally problematic. It arises as a response to an emerging trend. High-ranking state officials (legislators, governors, and attorney generals) sometimes choose

to pursue their agendas by means of direct legislation instead of through their official capacities.⁹³ Restricting or curtailing their ability to introduce initiatives or sponsor referenda is a possible response to this phenomena. However, this could invade their constitutional freedom of association and perhaps their constitutional freedom of speech. Thus, while this reform is well-intentioned, it would be constitutionally questionable.

The third attempt to limit the number of measures on the ballot would allow proposals to be submitted first to the legislature for consideration, and thereafter to the voters only if the legislature failed to enact it.⁹⁴ The impact of such a reform is questionable for two reasons. First, this would only apply to initiatives, as referenda already are considered and passed by the state legislatures. Second, given the increased use of direct democracy by state officials, their willingness to consider and enact initiative legislation is doubtful. Few, if any, ballot measures would be eliminated by this reform.

As this analysis indicates, controlling the quantity of propositions on the ballot will remain a perplexing problem. The solution, therefore, for resolving the problems of voter confusion and voter turnoff rests largely in the area of educating voters, a matter that I discuss in my next proposal.

Proposal Seven: States must enact more effective methods of educating voters both through publicity pamphlets and through other innovative methods.

California has taken several steps in this direction. First, its Ballot Pamphlet contains a summary of each proposition in the front of the publication. This consists of a description of the proposal, brief arguments for and against the measure, sponsors and opponents of the proposal, and organizations to contact for more information.⁹⁵ Second, the pamphlet now contains a Legislative Analyst's evaluation of each proposition, followed by up to one page of arguments and rebuttals by sponsors and opponents. Thus, California's printing format consolidates arguments. The third method California has used to disseminate the information contained in the publicity pamphlets involves cassettes. Voters can now request an audio version of the pamphlet

93. For excellent examples of this problem, see Saunders, *supra* note 72, at 6, and Hinds, *supra* note 4.

94. Sweeney, *supra* note 4, at 1.

95. CALIFORNIA SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 4-7 (Brief Summary of the Measures) (Nov. 3, 1992).

from most public libraries.⁹⁶ All of California's reforms assist voters in muddling through vast amounts of information. Other states should adopt these reforms, as they are methods of conveying information to voters in a simple, yet fair, format.

In addition to reviewing the contents of the ballot pamphlets, states should examine their distribution policies as well. Arizona's legislature addressed this problem in 1991, when it mandated that sample election ballots "include a statement that information on how to obtain a publicity pamphlet for general election ballot propositions is available by calling the county election office."⁹⁷ This reform does not go far enough to educate voters. Not only did Arizona voters have to muddle through the information contained in the publicity pamphlets, but they also were required to locate and to pick up these brochures for the 1992 general election.⁹⁸ Such a policy fosters ignorant voting, and enhances the influence of the media and the advertisements. Arizona and other states should, at a minimum, evaluate the costs and benefits of amending their publicity pamphlet distribution statutes so that one pamphlet is mailed to EVERY ADDRESS at which a registered voter resides.⁹⁹

One final reform that all states allowing direct legislation should consider is utilizing television as a supplement to the publicity pamphlet. By creating a videocassette which presents up to five minutes of legislative analysis, five minutes of arguments for, and five minutes of arguments against each ballot measure, the public could educate itself in a relatively brief period. Such a program would be available for voters on VCR tapes in much the same way as the audio-cassettes are distributed by California and could be broadcast repeatedly on public-access cable channels. Moreover, certain citizen groups or even the state could purchase air time and broadcast the program on public television. These Ross Perot-style "infomercials" would provide a "user-friendly" method of voter education. Such programs may enable the state eventually to revise and reduce its publishing of some ballot pamphlets.

96. *Id.* at 96.

97. ARIZ. REV. STAT. ANN. § 19-123(D) (1992).

98. Absentee ballots also did not include Publicity Pamphlets. Considering that the absentee ballot is used by people who are house ridden or institutionalized (such as the elderly—a sizable population in Arizona) and those who would be out of town, it is ludicrous for the Legislature to require these groups to locate and obtain Publicity Pamphlets.

99. CALIFORNIA SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 96 (Nov. 3, 1992).

Proposal Eight: States should consider enacting statutes which would permit its legislature and governor to suspend enforcement of a newly enacted law or constitutional amendment which arises from a ballot measure temporarily.

Admittedly, this is an extreme suggestion. Nevertheless, losses similar to those experienced by Arizona in response to the outcome of the 1990 Martin Luther King holiday referendum were also severe. By enacting back door procedures that would enable the legislature and the governor temporarily to suspend enforcement of a given law or constitutional amendment temporarily, citizens of a state would, in essence, issue themselves an insurance policy. After the state had experienced "severe consequences"¹⁰⁰ resulting from an initiative or referendum measure, the governor could order legislative leaders from both parties, as well as leading proponents and opponents of the troubling amendment to meet and negotiate how satisfactorily to amend the statute. If the parties agree on a change, the amended provision would be enforced until the next general election, at which time the voters would approve or reject the compromise. In the likely event that no agreement was forthcoming, however, the governor could continue suspending enforcement of the law until a special election for reconsideration was held. If such an election became necessary, the legislature could propose germane alternatives to the original provision for voter consideration as well.

Once again, this reform may prove to be difficult to implement. Nevertheless, it would provide two benefits which do not exist in the present system. First, it empowers state officials to remedy severely problematic statutes or constitutional amendments without allowing devastating losses to accrue until the following general election. Second, because the process is initiated by the governor, this "back door" would lend itself only to extreme situations, for fear of political backlash which could arise from both questioning the supremacy of voters and incurring needless expenses for the state.

100. This term could be interpreted using a "totality of the circumstances" standard, yet should remain undefined. Attaching dollar amounts to determine severity would be unwise, as the severe consequences may not be entirely economic.

IV. CONCLUSION

Direct legislation through initiatives and referenda is a feature of the American political landscape that has provided many positive contributions to our system of democracy, including a check on government. Several problems with direct legislation, however, have arisen in modern times. Reforming those problematic aspects of initiatives and referenda that I have focused upon would preserve and enhance the valuable contributions of these processes to our democracy. Doing so can only invigorate the voice that citizens have in their government.

