



The Florida Senate

Interim Project Report 2007-134

November 2006

Committee on Judiciary

OPTIONS FOR AUTHORIZING CITIZENS TO PROPOSE AND ADOPT STATUTES

SUMMARY

Constitutional and statutory initiative processes have been in use in this country for more than 100 years. During that time, initiative processes have been used to pursue a wide variety of policies by virtually every segment of the political spectrum.

In Florida, constitutional initiatives have addressed many issues that could have been addressed as statutes. As a result, some believe that the Florida Constitution is cluttered with statutory matters. The availability of a statutory initiative process, according to some commentators, would reduce this occurrence.

Data supports the claim that a statutory initiative process can reduce the number of constitutional initiatives. However, the addition of a statutory initiative process may increase the overall number of initiatives.

Many arguments can be made for and against the adoption of a statutory initiative process. If a statutory initiative process is adopted, however, it should be a process that places proposed statutes before the Legislature for consideration before they may be placed on a ballot.

BACKGROUND

The current version of the State Constitution has been amended more than 100 times since its adoption in 1968. A number of these amendments address issues that could have been addressed by statutory law. Some believe that the inclusion of these legislative matters in the Constitution denigrates its purposes and undermines its integrity.¹ The availability of a statutory

¹ Daniel R. Gordon, *Protecting Against the State Constitutional Law Junkyard: Proposals to Limit Popular Constitutional Revision in Florida*, 20 NOVA L.

initiative process, according to some commentators, would uphold the integrity of the Constitution by diverting legislative matter to a statutory initiative process. This interim project examines:

- whether a statutory initiative process can reduce the number of constitutional initiatives;
- whether a statutory initiative process is a good way to make policy; and
- how a statutory initiative process can be structured.

Consequences for Including Legislative Matter in a State Constitution

When a measure is placed in a state constitution, it cannot be changed by ordinary lawmaking processes.² Further, the measure is placed at the highest level of the state's legal authority.³ However, the inclusion of legislative matter, especially provisions that are poor policy or too detailed, can have negative consequences. Specifically, the existence of legislative matter in a state constitution may:

- “delay or prevent the change to a new and better policy” when the measure is “no longer responsive to current needs”;⁴
- nullify inconsistent laws regardless of their merit;
- reduce government flexibility as the result of unforeseen circumstances and diminish government power to act responsibly; and

REV. 413, 414 (1995) (stating that the Florida Constitution is becoming a “constitutional junkyard” due to the inclusion of legislative matter); Robert M. Norway, *Judicial Review of Initiative Petitions in Florida*, 5 FLA. COASTAL L.J. 15, 37 (2004).

² Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 946 (1968).

³ *Id.*

⁴ *Id.*

- cause the high regard in which a state constitution is held to be lessened due to the need for frequent amendments.

Initiative Processes Defined

Initiative processes allow voters, by collecting a sufficient number of signatures on a petition, to propose and adopt statutes or constitutional amendments.⁵ In Florida, only constitutional initiatives are authorized. Statutory initiative processes typically are similar to constitutional initiative processes except that fewer signatures are required.⁶

Statutory initiative processes in use across the nation are either direct or indirect processes.⁷ A direct process allows proposed statutes to be placed directly on the ballot for approval or rejection by the voters. An indirect process requires proposed statutes to be placed before a legislature for consideration before they may be placed on the ballot for voter approval or rejection.

Currently, statutory initiatives are authorized in 21 states, most of which are in the West.⁸ Seven of the 21 states have an indirect process.⁹ However, two of the states with an indirect process also have a direct process.¹⁰ Most states with a statutory initiative process also have a constitutional initiative process.¹¹

⁵ INITIATIVE & REFERENDUM INSTITUTE, WHAT IS THE INITIATIVE AND REFERENDUM PROCESS?, at <http://www.iandrinstute.org>.

⁶ Colorado and Nevada, however, have the same signature thresholds for constitutional and statutory initiatives. Additionally, a greater percentage of their initiatives follow the constitutional initiative process than in most other states having constitutional and statutory processes.

⁷ INITIATIVE & REFERENDUM INSTITUTE, *supra* note 5.

⁸ *Id.* A statutory initiative process is authorized in the following 21 states: Alaska, Arkansas, Arizona, California, Colorado, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming.

⁹ NATIONAL CONFERENCE OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY: FINAL REPORT AND RECOMMENDATIONS OF THE NCSL I & R TASK FORCE 8 (July 2002). An indirect statutory initiative process is authorized in the following seven states: Maine, Massachusetts, Michigan, Nevada, Ohio, Utah, and Washington.

¹⁰ *Id.* Washington and Utah authorize both direct and indirect statutory initiative processes.

¹¹ INITIATIVE & REFERENDUM INSTITUTE, I & R FACTSHEET NUMBER THREE, WHICH STATES HAVE THE INITIATIVE AND REFERENDUM PROCESS?, at <http://www.iandrinstute.org>.

History of Initiative Processes

Many of the existing statutory initiative processes originated in the late 1890s through the early 1900s from the Populist and Progressive movements. At that time, “citizens believed that their state governments were controlled and corrupted by special interest groups, such as land speculators, bankers, railroads, and ‘robber barons.’”¹²

In 1898, South Dakota became the first state to authorize a statutory initiative process.¹³ “Over the next twenty years, eighteen other states enacted similar laws to give their citizens direct lawmaking authority.”¹⁴

Florida’s Constitutional Initiative Process

Florida’s constitutional initiative process is a direct process, through which proposed amendments bypass the Legislature. This process was first authorized in Florida in 1968. Since then, 21 amendments have been adopted through the process.

Initiative Procedures

A proponent of a Florida constitutional initiative begins the initiative process by registering as a political committee and submitting the proposed amendment to the Secretary of State.¹⁵ Before signature gathering may begin, the Secretary of State must review and approve the petition form. The petition form must include a title of the proposed amendment and a summary of the amendment. The title may not exceed 15 words, and the summary may not exceed 75 words.¹⁶

[iandrinstute.org](http://www.iandrinstute.org).

¹² Jeffrey Allan Kilmark, *Government Knows Best? An Analysis of the Governor’s Power to Veto and the Legislature’s Power to Repeal or Amend Voter-Enacted Initiative and Referendum Petitions in Arizona*, 30 ARIZ. ST. L.J. 829, 832 (1998).

¹³ INITIATIVE & REFERENDUM INSTITUTE, A BRIEF: THE HISTORY OF THE INITIATIVE AND REFERENDUM PROCESS IN THE UNITED STATES 3 available at <http://www.iandrinstute.org>.

¹⁴ Joseph Lubinski, *The Cow Says Moo, the Duck Says Quack, and the Dog Says Vote!: The Use of the Initiative to Promote Animal Protection*, 74 U. COLO. L. REV. 1109, 1112-1113 (2003).

¹⁵ Section 100.371(3), F.S.

¹⁶ Section 101.161(1), F.S.; FLORIDA DEPARTMENT OF STATE, DIVISION OF ELECTIONS, INITIATIVE PETITION PROCESS: INITIATIVE PROCEDURES, at <http://election.dos.state.fl.us>.

The number of signatures needed to place a constitutional initiative on a ballot must equal 8 percent of the votes cast in the last presidential election.¹⁷ For the 2006 General Election, 611,009 signatures were needed.¹⁸ The signatures must be geographically distributed through at least half of the congressional districts in the state.¹⁹ In those districts, the number of signatures gathered must also equal at least 8 percent of the votes cast in the last presidential election. Signatures are valid for four years. When a sufficient number of signatures have been verified, the Secretary of State will issue a certificate of ballot position.²⁰

When 10 percent of the required signatures have been gathered, the Attorney General must seek an advisory opinion from the Florida Supreme Court.²¹ The Supreme Court review is limited to whether the proposed constitutional amendment complies with the single subject requirement and the ballot summary and title requirements.²²

The single subject requirement limits measures to “one subject and matter *directly connected* therewith.”²³ In contrast, bills are limited to “one subject and matter *properly connected* therewith.”²⁴ The single subject requirement for constitutional initiatives, thus, is narrower than the single subject requirement for bills.²⁵ The purpose of the requirement is to prevent cataclysmic changes and logrolling.²⁶

METHODOLOGY

Committee staff reviewed information on statutory initiative processes in other states, reviewed scholarly

¹⁷ Article XI, s. 3, FLA. CONST.

¹⁸ FLORIDA DEPARTMENT OF STATE, INITIATIVE PETITION PROCESS: FREQUENTLY ASKED QUESTIONS, at <http://election.dos.state.fl.us>.

¹⁹ Article XI, s. 3, FLA. CONST.

²⁰ Section 100.371(5), F.S.

²¹ Article IV, s. 10, FLA. CONST.; s. 16.061, F.S.; s. 15.21, F.S.

²² *Advisory Opinion to the Attorney General Re: Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts which Replaces Apportionment by the Legislature*, 926 So. 2d 1218, 1223 (Fla. 2006).

²³ Article XI, s. 3, FLA. CONST.

²⁴ Article III, s. 6, FLA. CONST.

²⁵ *Fine v. Firestone*, 448 So. 2d 984, 988-989 (Fla. 1984).

²⁶ *Advisory Opinion to the Attorney General Re: Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts which Replaces Apportionment by Legislature*, 926 So. 2d at 1224.

literature on initiatives, reviewed state constitutional provisions authorizing initiatives, communicated with experts on statutory initiative issues, and communicated with interested parties.

FINDINGS

Will the Existence of a Statutory Initiative Process Reduce the Number of Constitutional Initiatives?

Many commentators have stated that the existence of a statutory initiative process will reduce the number of citizen initiative proposals to amend the State Constitution.²⁷ The fact that constitutional initiatives in this state appear as statutory initiatives in others tends to validate the belief of those commentators.

For example, the following statutory initiatives, which are similar to past Florida constitutional initiatives, appear on the 2006 Arizona General Election ballot:

- A general ban on smoking in indoor public places and places of employment;²⁸
- A measure to increase the minimum wage and to adjust the minimum wage for inflation;²⁹ and

²⁷ Norway, *supra* note 1, at 38; Ryan Maloney, *Smoking Laws, High-Speed Trains, and Fishing Nets A State Constitution Does Not Make: Florida's Desperate Need for a Statutory Citizens Initiative*, 14 U. FLA. J.L. & PUB. POL'Y 93, 121-123 (2002); John B. Anderson & Nancy C. Ciampa, *Ballot Initiatives: Recommendations for Change*, 71 FLA. BAR J. 74 (April 1997); Joseph W. Little, *Does Direct Democracy Threaten Constitutional Governance in Florida?*, 24 STETSON L. REV. 393, 412 (1995); P.K. Jameson & Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 445 (1995); and *see also* FLORIDA SENATE COMMITTEE ON GOVERNMENTAL REFORM AND OVERSIGHT, A REVIEW OF THE CITIZEN INITIATIVE METHOD OF PROPOSING AMENDMENTS TO THE FLORIDA CONSTITUTION 72-73 (March 1995); FLORIDA HOUSE OF REPRESENTATIVES, COMMITTEE ON ETHICS AND ELECTIONS 22 (November 1994).

²⁸ This statutory initiative is listed as ballot measure 201 on the Arizona 2006 General Election ballot. The statutory initiative is similar to Article X, s. 20, Fla. Const., which resulted from a constitutional initiative. Additionally, a smoking ban will appear on the Nevada 2006 General Election ballot as a statutory initiative.

²⁹ This statutory initiative is listed as ballot measure 202 on the Arizona 2006 General Election ballot. The statutory initiative is similar to Article X, s. 24, Fla. Const. Additionally, similar minimum wage statutory

- A requirement that pigs during pregnancy and calves raised for veal be given a certain amount of space.³⁰

Arizonans also appear to have two strong incentives to use the statutory initiative process over the constitutional initiative process. First, the Arizona statutory initiative process has a significantly lower signature threshold than the constitutional initiative process. Second, enacted statutory initiatives are largely immune from amendment or repeal by the Arizona Legislature.

The signature threshold for Arizona statutory initiatives is 10 percent of the votes cast in the last gubernatorial election.³¹ Whereas, the signature threshold for constitutional initiatives is 15 percent of the votes cast in the last gubernatorial election.³² The Arizona Legislature is not permitted to repeal enacted statutory initiatives.³³ Further, the initiatives may only be amended if an amendment furthers the purpose of the initiative and the amendment is approved by a three-fourths vote of both houses of the Legislature.³⁴

Historical initiative data shows that most states having both constitutional and statutory initiative processes had fewer constitutional initiatives than Florida.³⁵ According to the data, from 1990 to 2004, 12 of 14 states having both processes had fewer constitutional initiatives than Florida.³⁶ Florida had 19 constitutional initiatives during that time period. The average number of constitutional initiatives per state was 14.5, and the average number of statutory initiatives was 14.7. The states with the largest number of constitutional initiatives were Colorado and Oregon with 42 and 48

initiatives, respectively.³⁷ The states with the largest number of statutory initiatives were Oregon and California with 39 and 57 initiatives, respectively.

The National Conference of State Legislatures also analyzed the historical data to identify factors influencing an initiative proponent's choice between a constitutional or statutory initiative process.³⁸ The analysis concluded that the most significant factor was the limitations on a legislature's authority to repeal or amend a statutory initiative. A less significant factor was the amount of signatures required for ballot placement of a constitutional initiative.

Based on the foregoing, the availability of a statutory initiative process can reduce the number of constitutional initiatives placed on the ballot in Florida. However, availability of a statutory initiative process, in addition to the constitutional initiative process, could result in an increase in the total number of initiatives.

Is a Statutory Initiative Process a Good Way to Make Policy?

Many different theories or arguments address whether a statutory initiative process is a good way to make policy. This report does not attempt to evaluate these theories and arguments. Rather, the report summarizes the positive and negative aspects of initiatives identified by commentators to enable a reader to reach his or her own conclusions.

Positive Aspects

The positive aspects of initiative processes include the following.

- Initiatives allow the public to circumvent an unresponsive or ineffective legislature.³⁹
- The existence of initiatives on a ballot increases voter turnout.⁴⁰

initiatives will appear on the Missouri and Montana 2006 General Election ballots.

³⁰ This statutory initiative is listed as ballot measure 204 on the Arizona 2006 General Election ballot. The statutory initiative is similar to Article X, s. 21, Fla. Const.

³¹ ARIZ. CONST. art. IV, pt. 1, ss. 1.(2) and (7).

³² *Id.*

³³ ARIZ. CONST. art. IV, pt. 1, s. 1.(6)(B).

³⁴ ARIZ. CONST. art. IV, pt. 1, s. 1.(6)(C) and (D).

³⁵ This data was provided to committee staff by the National Conference of State Legislatures. See National Conference of State Legislatures, *Use of the Statutory Initiative vs. the Constitutional Initiative* (September 2006) (unpublished manuscript, on file with the staff of the Committee on Judiciary).

³⁶ Data from Massachusetts was not included because of its unique constitutional initiative process.

³⁷ Jennie Drage Bowser, an analyst for the National Conference of State Legislatures, attributes the high numbers of initiatives in part to state political cultures.

³⁸ National Conference of State Legislatures, *supra* note 35.

³⁹ Little, *supra* note 27, at 399; DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES* 3 (2004).

⁴⁰ SMITH & TOLBERT, *supra* note 39, at 39. However, the authors of the book acknowledge that previous studies reached an opposite conclusion. *Id.* at 34-35.

- The existence of initiatives on a ballot increases political knowledge and interest in politics.⁴¹
- Voters in states using initiatives have more confidence in government responsiveness.⁴²

Negative Aspects

The negative aspects of initiative processes include the following.

- Voters may only vote yes or no or abstain from voting on initiative measures that address problems having multiple solutions.⁴³
- There is a widely held belief that a person or organization with sufficient funds can get just about any initiative on the ballot.⁴⁴
- A significant portion of a state's budget may be dedicated to funding initiatives.⁴⁵
- The initiative process bypasses the checks and balances of the legislative process.⁴⁶
- The initiative process does not measure the intensity of voter preferences.⁴⁷
- Initiatives may limit a legislature's power to respond to the changing needs of a state.⁴⁸
- Initiatives may create social programs or tax cuts without identifying funding sources.⁴⁹
- The initiative process was conceived in part as a method to break the power of moneyed

special interests controlling the legislative process; however, these same groups make use of initiatives.⁵⁰

Guarantee of a Republican Form of Government

In 1912, the U.S. Supreme Court first addressed whether law created through the initiative process violated the Guarantee Clause of the U.S. Constitution.⁵¹ The Guarantee Clause provides that "the United States shall guarantee to every State in this Union a Republican Form of Government"⁵² A republican government is a "government by representatives chosen by the people."⁵³ In contrast, initiative processes are a form of direct democracy or pure majority rule. The Court found that the issue was a political question that only Congress could resolve.

Nevertheless, many commentators assert that initiative processes are not consistent with the republican form of government contemplated by the framers of the U.S. Constitution.⁵⁴ For example, in Federalist No. 10, James Madison warned that pure democracies are "incompatible with personal security or the rights of property." In Federalist No. 51, Madison stressed the need to protect minority interests to prevent tyranny by the majority. In a republic, Madison explained, minority interests are protected by breaking government power and majority interests into parts.

Consistent with the concerns raised in Federalist No. 51, many commentators have stated that initiatives have been directed against the following minorities: rural residents, illegal immigrants, criminal defendants, gays and lesbians, and racial minorities.⁵⁵

⁴¹ *Id.* at 61-62.

⁴² *Id.* at 138.

⁴³ K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternate Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185, 1185 (1995).

⁴⁴ *See, e.g.*, Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?* 64 MONT. L. REV. 35, 49 (2003).

⁴⁵ John G. Matsusaka, *Direct Democracy and Fiscal Gridlock: Have Voter Initiatives Paralyzed the California Budget?*, at <http://www.iandrinstitute.org>. Professor Matsusaka concluded that about 32 percent of the appropriations in the 2003-2004 California budget were locked in by initiatives. Professor Matsusaka further argued that the claim that 70 percent of the budget was earmarked by initiatives was incorrect. *Id.* at 7.

⁴⁶ Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1051 (2001).

⁴⁷ Maimon Schwarzschild, *Popular Initiatives and American Federalism, or, Putting Direct Democracy in Its Place*, 13 J. CONTEMP. LEGAL ISSUES 531, 540 (2004).

⁴⁸ Miller, *supra* note 46, at 1055.

⁴⁹ 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, 187 (2002).

⁵⁰ SMITH & TOLBERT, *supra* note 39, at 110. For example, in 1996 the sugar industry largely funded an initiative, adopted as Article XI, s. 7, Fla. Const. *Id.* at 91. That initiative was designed to impose a supermajority passage requirement on another initiative to impose a penny per pound tax on sugar production. *See* Fee on Everglades Sugar Production 96-03 at <http://election.dos.state.fl.us>.

⁵¹ *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912).

⁵² U.S. CONST. art. IV s. 4.

⁵³ BLACK'S LAW DICTIONARY (8th ed. 2004).

⁵⁴ *See, e.g.*, Tedesco, *supra* note 49, at 193-195; *but see* ROBERT G. NATELSON, INDEPENDENCE INSTITUTE, ARE INITIATIVES AND REFERENDA CONTRARY TO THE CONSTITUTION'S "REPUBLICAN FORM OF GOVERNMENT" (July 9, 1999) (stating that the authors of the Federalist Papers lauded republics that had elements of direct democracy).

⁵⁵ *See, e.g.*, Arne R. Leonard, *In Search of the Deliberative Initiative: A Proposal for a New Method of*

Crypto-Initiatives

Initiatives whose primary purpose is something other than changing public policy are known as crypto-initiatives.⁵⁶ These initiatives are often employed to further some sort of political strategy. People may debate whether the use of crypto-initiatives is a misuse of the initiative process.

Crypto-initiatives have been used to:

- boost candidate campaigns for political office;⁵⁷
- turn out partisan voters;⁵⁸
- split an opposing party's base of support;⁵⁹
- raise funds for political parties;⁶⁰ and
- drain the resources of political competitors.⁶¹

Policy Pursuits

Whether the policies pursued by the initiative process are good or bad is a subjective matter. Some policies addressed by initiatives include: abortion, taxes, term limits, campaign finance reform, environmental regulation, and education.⁶²

Some of the statutory initiatives on 2006 General Election ballots in other states:

- provide for random awards of \$1 million to voters who participate in elections;⁶³
- limit government eminent domain power;⁶⁴

Constitutional Change, 69 Temp. L. Rev. 1203, 1220 (1996); Owen Tipps, *Separation of Powers and the California Initiative* 36 GOLDEN GATE U. L. REV. 185, 196 (2006).

⁵⁶ Elizabeth Garrett, *Crypto-Initiatives in Hybrid Democracy*, 78 S. CAL. L. REV. 985, 985-986 (2005).

⁵⁷ SMITH & TOLBERT, *supra* note 39, at 117.

⁵⁸ Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1104 (2005). Garrett argues that the minimum wage amendment in Art. X, s. 24, Fla. Const., was used to boost the Democratic vote in the 2004 General Election. *Id.* At that time, Florida was a key presidential battleground. *Id.*

⁵⁹ SMITH & TOLBERT, *supra* note 39, at 122.

⁶⁰ *Id.* at 125.

⁶¹ *Id.* at 51. For example, one group spent \$441,000 in California in 1998 to sponsor an anti-union initiative measure. The unions spent \$23 million to defeat the measure.

⁶² Lubinski, *supra* note 14, at 1114; Peter Schrag, *The Fourth Branch of Government? You Bet.*, 41 SANTA CLARA L. REV. 937, 937 (2001).

⁶³ Arizona Ballot Measure 200.

⁶⁴ Arizona Ballot Measure 207.

- require school years to start no earlier than the last day of August;⁶⁵
- generally mandate joint custody of children after divorce and limit support payments to the actual cost of the basic needs of a child;⁶⁶
- legalize possession of small amounts of marijuana;⁶⁷
- repeal the video lottery operated by South Dakota, which funds 11 percent of the state budget;⁶⁸
- require utilities to use sources of renewable energy;⁶⁹
- prohibit insurance companies from using credit scores to calculate rates or premiums;⁷⁰
- require parental notice and a waiting period for abortions performed on minors.⁷¹

State Authority to Regulate the Initiative Process

State authority to regulate the initiative process is limited under the First Amendment to the U.S. Constitution. As such, states cannot limit statutory initiative processes to grass-roots efforts. Further, states have limited authority to regulate against petition fraud.

In *Meyer v. Grant*, the U.S. Supreme Court struck down a Colorado law banning the payment of compensation to petition circulators.⁷² The purpose of the law was to ensure that an initiative had sufficient grass roots support. The law was also intended to remove the temptation that paid petition circulators would pad their petitions with false signatures. In *Citizens Against Rent Control v. Berkley*, the U.S. Supreme Court ruled that limits on financial contributions to initiative campaigns are unconstitutional.⁷³

In *Buckley v. American Constitutional Law Foundation, Inc.*, the U.S. Supreme Court struck down laws requiring initiative-petition circulators to be

⁶⁵ South Dakota Initiated Measure 3.

⁶⁶ North Dakota Initiated Statutory Measure No. 3.

⁶⁷ Colorado Amendment 44.

⁶⁸ South Dakota Initiated Measure 7.

⁶⁹ Washington Initiative Measure No. 937.

⁷⁰ Oregon Ballot Measure 42.

⁷¹ Oregon Ballot Measure 43.

⁷² *Meyer v. Grant*, 486 U.S. 414 (1988). More recently, however, a federal appellate court has upheld a law that prevents the payment of compensation to petition circulators on a per-signature basis. *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006).

⁷³ *Citizens Against Rent Control v. Berkley*, 454 U.S. 290 (1981).

registered voters and requiring circulators to wear a name badge.⁷⁴ Colorado argued that the purpose of the name badge was to help identify circulators engaging in misconduct. The purpose of the voter registration requirement was to help the state verify whether a circulator was a state resident.

How Should a Statutory Initiative Process be Structured?

If the Legislature determines that a statutory initiative process is warranted, it could structure the process in a number of different ways. As a beginning point, the Florida Constitution must authorize the creation of a statutory initiative process. Under the Florida Constitution, the legislative power of the state is vested in the Legislature. A statutory initiative process would be an exception to the Legislature's exclusive legislative authority. Thus, an amendment to the Constitution is needed to authorize a statutory initiative process. Additionally, the Legislature must make a number of other structural decisions.

Procedural Detail

The first structural decision is how much detail to place in the joint resolution authorizing a statutory initiative process. A joint resolution could be highly detailed, describing nearly all procedural aspects of the process. On the other hand, the joint resolution could provide that the Legislature has plenary authority to authorize, regulate, and place limits on a statutory initiative process by law. The former approach will give voters certainty on what to expect. The latter approach will give the Legislature flexibility to change the process if it does not live up to expectations.

Direct or Indirect Initiative Process

The Legislature must decide whether to have a direct or indirect process. A direct process could largely mirror the existing constitutional initiative process, but have a lower signature threshold. However, the consensus among the literature reviewed by committee staff is that an indirect initiative process is more advantageous by mitigating some of the negative aspects of initiatives.⁷⁵

⁷⁴ *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999).

⁷⁵ THE SPEAKER'S COMMISSION ON THE CALIFORNIA INITIATIVE PROCESS 9 & 12 (January 2002) (recommending that the indirect initiative process apply to both statutory and constitutional initiative processes); Richard B. Collins and Dale Oesterle, *Governing By Initiative: Structuring the Ballot Initiative: Procedures that Do and Don't Work*, 66 U. COLO. L. REV. 47, 107 (1995); NATIONAL CONFERENCE OF STATE LEGISLATURES,

Under a typical indirect process, a proposed statutory initiative proceeds to a state legislature for consideration. If the legislature fails to enact the initiative, the initiative is submitted to the voters. However, in some states additional signatures must be gathered before the statutory initiative may be placed on the ballot. In either case, a legislature can propose an alternative measure and allow voters to choose among the two measures or none at all.

Signature Threshold

A statutory initiative process must establish the number of signatures needed to place a measure on a ballot. "The signature requirement is . . . intended to weed out frivolous proposals and ensure the existence of an appropriate level of public support for a proposed measure."⁷⁶ The signature thresholds for statutory initiatives range from 2 percent of the resident population in North Dakota to 15 percent of the votes cast in the preceding general election in Wyoming. Constitutional initiatives typically require more signatures than statutory initiatives. High signature thresholds will harm grass roots efforts more than those with significant financial resources.⁷⁷ Low signature thresholds, however, may allow increased numbers of initiatives.⁷⁸

Related to the signature requirement is the length of time that signatures may be gathered. Signatures for Florida constitutional initiatives are valid for four years. However, a shorter signature gathering period for statutory initiatives may prevent ballot summaries from becoming inaccurate due to statutory changes during the circulation period. For example, if the Legislature changes a statute related to a statutory initiative petition in circulation, the ballot statement may become inaccurate. The signature gathering period in a number of other states is one year or less.⁷⁹

Subject-matter Limitations

Subject-matter restrictions on initiatives exist in a number of states. The academic literature on initiative processes has commented little on the merits of such restrictions. However, some restrictions prohibit

supra note 9, at ix.

⁷⁶ Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 424 (2003).

⁷⁷ Richard J. Ellis, *supra* note 44, at 91-92.

⁷⁸ *See id.* at 91-92.

⁷⁹ INITIATIVE & REFERENDUM INSTITUTE, SIGNATURE, GEOGRAPHIC DISTRIBUTION AND SINGLE SUBJECT (SS) REQUIREMENTS FOR INITIATIVE PETITIONS, at <http://www.iandrinstitute.org>.

initiatives that address religion, make appropriations or dedicate revenues, address certain individual rights, or regulate hunting. The Legislature may wish to consider whether the negative aspects of initiative processes warrant any subject matter restrictions.

Pre-election Review

Florida's constitutional initiative process is unique among initiative states in that it allows for a pre-election review of a constitutional initiative by the Supreme Court. In other states, somewhat similar reviews are performed by an attorney general, the secretary of state, or a non-judicial entity. Also, legislative staff in other states provide drafting or other non-binding comments on initiative drafts.

Because of the short time periods involved in a statutory initiative process, pre-election judicial review may not be appropriate. Additionally, a process that can result in an increased number of initiatives risks overworking the courts. Accordingly, the Legislature may wish to structure pre-election review processes after processes in use in other states.

Executive Veto

In most statutory initiative states, the governor has no authority to veto initiative measures. On the other hand, a governor may be unlikely to veto a statutory initiative because of the likely political backlash.⁸⁰

Limits on Amendment and Repeal

Limits on the power of the Legislature to amend or repeal a statutory initiative encourage the use of the statutory initiative process over the constitutional initiative process. However, the Legislature should have the authority to amend or repeal statutory initiatives for the same reasons that constitutional initiatives can be problematic:⁸¹

- A statutory initiative may become obsolete due to changed circumstances;⁸²
- An initiative could have unintended negative consequences or warrant some limited exceptions;⁸³ and
- A statutory initiative may need corrections for drafting errors.⁸⁴

⁸⁰ Randall L. Hodgkinson, *Executive, Legislative, and Judicial Power Over Direct Legislation in Arizona*, 23 ARIZ. ST. L.J. 1111, 1135 (1991).

⁸¹ See Tipps, *supra* note 55, at 216.

⁸² Hodgkinson, *supra* note 80, at 1126.

⁸³ See *id.*

⁸⁴ See THE SPEAKER'S COMMISSION ON THE CALIFORNIA

Accordingly, the Legislature may wish to require that legislative amendments to statutory initiatives pass by a supermajority vote for three to five years.

Passage and Conflicting Measures

A statutory initiative process should have a way to deal with competing or conflicting measures. Several mechanisms are in use that the Legislature may wish to adopt. One mechanism would provide that both provisions would be given effect to the extent possible. Conflicts, however, could be resolved in favor of the measure receiving the most votes. However, this may be difficult to resolve if measures are fundamentally in conflict.

In Massachusetts, the Legislature may order that conflicting measures be grouped together on a ballot.⁸⁵ Voters are then able to vote against all measures or in favor of one or more. Of the grouped measures, only one can become law.

A third mechanism is available in Mississippi. If a legislative alternative to an initiative exists, voters are first asked whether either should become law. Then the voters are able to choose which of the measures should become law if either is to become law.

RECOMMENDATIONS

The availability of a statutory initiative process can reduce the amount of legislative matter flowing into the Florida Constitution. However, it may also lead to an overall increase in the number of initiatives. To prevent an increase, the constitutional initiative process could be modified in a manner that creates incentives to use the statutory initiative process instead of the constitutional process.

Many positive and negative aspects of a statutory initiative process exist. If the Legislature determines that a statutory initiative process is warranted, it should pursue an indirect process. The indirect process can involve the Legislature in a manner that minimizes the negative aspects of the initiative process. However, any initiative process should describe the degree of legislative involvement, signature thresholds, and limits on legislative authority to amend or repeal enacted initiatives.

INITIATIVE PROCESS, *supra* note 75 at 3.

⁸⁵ MASS. CONST. art. XLVIII, pt. VI.