The Ballot Initiative in Massachusetts: The Fallacy of Direct Democracy

At the start of a new century—and millennium—a new form of government is spreading in the United States. It is alien to the spirit of the Constitution and its careful system of checks and balances. Though derived from a reform favored by Populists and Progressives as a cure for special-interest influence, this method of lawmaking has become the favored tool of millionaires and interest groups that use their wealth and achieve their own policy goals—a lucrative business for a new set of political entrepreneurs . . . . The initiative process, an import now just over one hundred years old, threatens to challenge or even subvert the American system of government in the next few decades.

I. INTRODUCTION

In 1918, citizens of the Commonwealth of Massachusetts voted to amend the Massachusetts Constitution by approving Article Forty-Eight, thereby creating the right for citizens to enact a law through the initiative process. An initiative proposal to change an existing law or create a new law, if properly qualified, would be put on the statewide ballot and voted on by the citizens. If a majority approves of an initiative, the proposal becomes law, and is equal in weight to laws that the Legislature passes and the Governor signs.

South Dakota was the first state to create an initiative process in 1898. Since that time, eighteen other states have created a process whereby citizens create laws by submitting measures for a popular vote. Only two northeast

2. MASS. CONST. art. XLVIII (creating process for initiative petition for law, constitutional amendment, and referendum).
3. Id. (describing process of initiative petition for law and detailing procedure for placing initiative on ballot).
4. Id. (giving State Secretary and Legislature right to regulate initiative petition process and asserting initiative petition passed by voters has force of law). “If it shall be approved by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such law, it shall become law . . . .” Id.; see Alexander G. Gray, Jr. & Thomas R. Kiley, The Initiative and Referendum in Massachusetts, 26 NEW ENG. L. REV. 27, 28 (1991) (describing Constitutional Convention leading to adoption of initiative process).
6. See Ernst, supra note 5, at 2-5 (detailing states with forms of voter initiatives); The Initiative and Referendum Institute, at http://www.iamdrinstitute.org/statewide_idx.htm (last visited Apr. 27, 2004) (showing
states, Massachusetts and Maine, joined what was essentially a phenomenon of the central and western United States.\(^7\)

States throughout the country have exercised this powerful initiative right with greater frequency in the past twenty to thirty years.\(^8\) Supporters of the ballot initiative argue that this increased frequency has facilitated the will of the people in the states that allow a ballot initiative.\(^9\) Critics of the ballot initiative process argue, however, that the growing influence of money and business interests on the initiative process has corrupted direct democracy.\(^10\)

The Massachusetts Constitution provides citizens with the right of initiative petition for a law, a constitutional amendment, and for the repeal of a law through a referendum, however, this Note will examine only the initiative petition for a law, or the ballot initiative.\(^11\) Part I of this Note provides an overview of the arguments for and against the initiative petition. Part II will detail the forces that led to states’ adoption of the initiative process, and chronicle the history of the ballot initiative process and the growing use of ballot initiatives throughout the country, particularly in Massachusetts.\(^12\) This Note will then look at the modern-day initiative industry and discuss court decisions regarding state lawmakers’ attempts to curb the initiative industry.\(^13\) This Note will establish that these courts’ decisions have rendered the initiative process particularly vulnerable to the influence of money.\(^14\) This Note will then describe proposals for reform of the initiative process on a national and state level.\(^15\)

Part III of this Note will analyze the initiative process and detail the flaws of

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\(^7\) See The Initiative and Referendum Institute, supra note 6 (listing Massachusetts and Maine among states with initiative process).

\(^8\) See BRODER, supra note 1, at 6 (discussing increased use of ballot initiatives since 1978); Mass. Sec’y of Commonwealth, Overview of Ballot Initiatives [hereinafter Mass. Sec’y of Commonwealth Website] (detailing number and types of initiative petitions for law and showing dramatic increase since 1976), at http://www.state.ma.us/sec/e/election/balnpdf/balntype.pdf (last visited Apr. 27, 2004); Maine State Law and Legislative Reference Library, at http://www.state.me.us/legis/legislib/inivot.htm (last visited Apr. 27, 2004) (showing increased use of initiatives since 1971).


\(^11\) MASS. CONST. art. XLVIII (creating right of initiative and referendum). Article Forty-Eight provides citizens with the ability to submit constitutional amendments to a popular vote and to overturn or ratify legislation already passed by the Legislature. Id.

\(^12\) See infra Part II.A-D (discussing creation of ballot initiative).

\(^13\) See infra Part II.E (reviewing initiative industry).

\(^14\) See infra Part II.E (discussing role of money in initiative process).

\(^15\) See infra Part II.F (discussing initiative reform proposals).
the current system. Part III will also show that attempts to reform the initiative industry are insufficient, and what Justice Scalia hailed as “this most democratic of procedures” has become an unsuitable method of providing people with a voice in government. Finally, this Note will recommend that the Commonwealth of Massachusetts consider doing what no state has done before: repeal the initiative from the Constitution and restore the representative government that the founding fathers created.

II. HISTORY

A. The Adoption of the Initiative in the United States

The concept of direct democracy embodied in the ballot initiative is an anathema to the representative form of government the founding fathers guaranteed in the federal Constitution. The founding fathers believed that their chosen form of representative government would protect minority rights from the “tyranny of the majority.” The Supreme Court has declined to clarify whether direct democracy violates the Constitution. Instead, the Court

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16. See infra Parts III.A-C (commenting on initiative process).

17. Romer v. Evans, 517 U.S. 620, 647 (1996) (Scalia, J., dissenting) (disagreeing with majority holding Colorado amendment unconstitutional). In a 1992 referendum, Colorado citizens voted in favor of a constitutional amendment that prohibited special protection for homosexuals. Id. at 623-24. The Court held that the content of the amendment, not its manner of passage, was unconstitutional. Id. at 635-36; see infra notes 111-16; infra Part III.D (discussing deficiencies in reform proposals).

18. See infra Part IV (recommending repeal of ballot initiative).

19. U.S. CONST. art. IV, § 4 (guaranteeing “every State in this Union a Republican Form of Government”).

20. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 258 (Henry Reeve et al. eds., 1980) (discussing perils of unlimited majority power). De Tocqueville argued that representative government embodied in the legislature was itself easily swayed by the will of the majority. Id. at 254-55. De Tocqueville further criticized majority rule by asserting:

A majority taken collectively is only an individual, whose opinions, and frequently whose interests, are opposed to those of another individual, who is styled a minority. If it be admitted that a man possessing absolute power may misuse that power by wronging his adversaries, why should not a majority be liable to the same reproach? Men do not change their characters by uniting with one another; nor does their patience in the presence of obstacles increase with their strength.

Id. at 259; THE FEDERALIST NO. 10, at 20-21 (James Madison) (Roy P. Fairfield ed., 1966) (arguing merits of representative government over pure democracy). Madison wrote:

The two great points of difference between a democracy and a republic are: first, the delegation of the government in the latter, to a small number of citizens elected by the rest; Secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of 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. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for that purpose.


has determined the constitutionality of direct democracy to be a nonjusticiable “political question,” and left it to the individual states to settle on the wisdom of adopting this form of making laws.\(^\text{22}\)

South Dakota became the first state to create the right for citizens to place initiatives for a popular vote when it adopted the initiative process in 1898.\(^\text{23}\) Many western states such as Utah, Oregon, Nevada, and California soon followed.\(^\text{24}\) Massachusetts was the last state to adopt the ballot initiative in 1918.\(^\text{25}\)

The initiative began as a radical left-wing movement in the last decade of the nineteenth century, but by the dawn of the twentieth century it evolved into a mainstream tool for progressives and populists to bring about government reform.\(^\text{26}\) The Swiss system of direct legislation, introduced in Zurich in the 1860s, provided the model for the system that initiative proponents advocated in the United States.\(^\text{27}\) A growing disillusionment with government in general, and politicians in particular, fueled the popularity of this Swiss system in the United States.\(^\text{28}\)

Proponents of the initiative envisioned a government in which the people took an active part in making laws and governing themselves.\(^\text{29}\) They foresaw that the initiative would ensure that the government served the interests of all citizens, rather than corporate and special interests.\(^\text{30}\) Many also foresaw that

\(^\text{22}\) Id.; see Robert G. Natelson, A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause, 80 Tex. L. Rev. 807, 810 (2002) (citing Supreme Court’s determination of political question). The author writes that the Supreme Court essentially erased the issue from its docket based on the prevailing doctrine of the nonjusticiability of Guarantee Clause claims. Natelson, supra, at 810.

\(^\text{23}\) See Ernst, supra note 5, at 11 (listing South Dakota as first state to adopt ballot initiative).

\(^\text{24}\) See Ernst, supra note 5, at 11 (chronicling adoption of ballot initiative by Utah, Oregon, Nevada, and California).

\(^\text{25}\) See Ernst, supra note 5, at 11 (showing Massachusetts creation of ballot initiative in 1918).

\(^\text{26}\) See Broder, supra note 1, at 23-41 (discussing origins of direct legislation movement); Richard J. Ellis, Democratic Delusions: The Initiative Process in America 26-35 (2002) (analyzing forces behind states’ adoption of direct legislation).

\(^\text{27}\) David D. Schmidt, Citizen Lawmakers: The Ballot Initiative Revolution 5 (1989) (noting United States initiative based on Swiss system introduced in Zurich in 1860s); see Broder, supra note 1, at 26 (describing introduction of initiative and petition by those witnessing Swiss system); Ellis, supra note 26, at 28-29 (discussing Swiss initiative model as basis for United States system).

\(^\text{28}\) See Broder, supra note 1, at 23-41 (describing voter disillusionment with politicians); Ellis, supra note 26, at 33 (discussing anti-business attitudes of direct-legislation advocates in early twentieth century).

\(^\text{29}\) David B. Magleby, Governing by Initiative: Let the Voters Decide? An Assessment of the Initiative and Referendum Process, 66 U. Colo. L. Rev. 13, 16 (1995) (referring to proponents’ argument initiatives allow citizens to set agenda); see Broder, supra note 1, at 34 (quoting reform-minded novelist William Dean Howells). Howells endorsed the initiative and referendum as “the only means of allowing the people really to take part in making their laws and governing themselves.” Broder, supra note 1, at 34. Howells was one of many prominent supporters of the initiative and referendum movement. Id. Others included Samuel Gompers, President of the American Federation of Labor, as well as future President of the United States, Woodrow Wilson. Id. at 30-35.

the initiative would be used only sparingly, and that its specter alone would spur the political reform they sought.31

B. The Initiative in Massachusetts

South Dakota, Oregon, and California led the country in adopting the ballot initiative.32 Maine, which adopted the initiative in 1908, and Massachusetts, which adopted the initiative in 1918, were the only states in the Northeast to be swept up in the tide of direct democracy.33 In Massachusetts, the concept of the initiative and referendum hailed back to the direct democracy already enjoyed in the form of town meetings in Plymouth and across the commonwealth.34 The forces that brought about the adoption of the initiative process in Massachusetts were similar to those in other states, and Massachusetts proponents raised a similar argument: that the initiative and referendum would bring the government back to the control of the people.35 This progressive, democratic argument struck a chord with Massachusetts legislators, who approved the initiative process at the 1917 Constitutional Convention, as well as with citizens, who ratified the measure by popular vote in 1918.36

Article Forty-Eight of the Massachusetts Constitution contains the initiative and referendum process.37 Article Forty-Eight details the issues excluded from the initiative process, and requires that an initiative contain only subjects that are “related or mutually dependent.”38 Massachusetts courts have construed the

31. See ELLIS, supra note 26, at 30-35 (discussing proponents’ argument that initiatives would serve as “gun behind the door” to effect reform).
32. See supra notes 5-7 and accompanying text (detailing states with ballot initiative process).
33. See supra notes 5-7 and accompanying text (showing Massachusetts and Maine as only northeast states with initiative process).
34. See J OSEPH F. Z IMMERMAN, T HE REFERENDUM:  T HE PEOPLE DECIDE PUBLIC POLICY 139 (2001) (referring to Massachusetts Bay Colony town meeting as model of “democracy in action”); Ernst, supra note 5, at 2 (discussing Massachusetts tradition of direct democracy).
35. See CRONIN, supra note 30, at 41 (commenting on forces behind initiative movement); II D EBATES IN THE CONSTITUTIONAL CONVENTION:  I NITIATIVE AND REFERENDUM 17 (Wright & Potter Printing Co. 1918) [hereinafter DEBATES] (arguing citizens’ desire to bring government back to “real control” of people).
36. M ASS. C ONST. art. XLVIII; DEBATES supra note 35, at 17 (chronicling debate surrounding constitutional convention). The debate over the initiative and referendum fills an entire volume. See generally DEBATES, supra note 35. Joseph Walker, a member of the Initiative and Referendum Committee, summarized the spirit which led to the debate over the initiative and referendum:

This Convention is here, Mr. Chairman, I take it, in response to the progressive spirit that is surging in this Commonwealth of Massachusetts, and not here alone but throughout the country. It is felt not merely among those who call themselves Progressives, it is felt in all of the great parties, especially in the Democratic and Republican parties. We all know it. It is in response to that feeling, that progressive spirit, that this Convention is called.

Id. at 17; see also Gray & Kiley, supra note 4, at 28 (detailing adoption of Article Forty-Eight).
37. M ASS. C ONST. art. XLVIII (creating initiative right).
38. Id. (detailing matters excluded from initiative process and requiring initiatives include related subjects). Excluded matters include measures that relate to:

religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or to the operation of which is restricted to a particular town, city or
excluded-subjects provision narrowly, refusing to strike down initiatives tangentially related to those specifically excluded from the initiative process and enumerated in Article Forty-Eight. Likewise, Massachusetts’ highest court has given broad latitude to petitioners when determining whether an initiative meets the Article’s relatedness requirement, rendering this requirement a minor hurdle.

The Massachusetts initiative is an “indirect” initiative because petitioners must submit a proposal to the Legislature before it qualifies to be placed on the ballot. This indirect method is unlike most states, which allow a petitioner to

other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money.

Id. § 2. Article Forty-Eight also excludes measures related to the Eighteenth Amendment, Article Forty-Eight, and rights guaranteed under the Massachusetts Declaration of Rights. Id.

39. See Albano v. Attorney Gen., 769 N.E.2d 1242, 1245-46 (Mass. 2002) (holding that initiative affecting court not prohibited as excluded matter). The Court held that when an initiative alters the courts’ powers, it must be intended as “main feature” of initiative in order to be excluded from the initiative process. Id.; see Mazzone v. Attorney Gen., 736 N.E.2d 358, 367 (Mass. 2000) (holding expenditure through trust fund not excluded from initiative). The Mazzone Court explained that an initiative requiring expenditures from a trust fund is not excluded from the initiative process as an appropriation because it included no legislative requirement to appropriate funds. Mazzone, 736 N.E.2d at 367, see Mass. Teachers Ass’n v. Sec’y of the Commonwealth, 424 N.E.2d 469, 479 (Mass. 1981) (finding no violation of excluded-matters provision where initiative had different effect on different communities). The Mass Teachers Association Court held that an initiative that limited property tax increases was not excluded as restricted to a particular district or locality although is did affect communities differently. Mass. Teachers Ass’n, 424 N.E.2d at 479; see Cohen v. Attorney Gen., 237 N.E.2d 657, 660 (Mass. 1968) (holding initiative providing representative district apportionment not excluded matter). The Cohen Court held that although the initiative did affect the courts, it did so only tangentially, and was therefore not an excluded matter. Cohen, 237 N.E.2d at 660.

40. Mass. Teachers Ass’n, 424 N.E.2d at 476 (requiring all initiative components related to general subject). The court held that the relatedness requirement would be met if “one can identify a common purpose to which each subject of an initiative can reasonably be said to be germane.” Id. The court noted that drafters of Article Forty-Eight added the relatedness requirement in response to concerns about logrolling. Id. at 477 n.9. Logrolling is “[t]he legislative practice of including several propositions in one measure . . . so that . . . voters will pass all of them, even though these propositions might not have passed if they had been submitted separately.” BLACK’S LAW DICTIONARY 953 (7th ed. 1999).

41. MASS. CONST. art. XLVIII (detailing procedure for placing initiative on ballot); Gray & Kiley, supra note 4, at 28-30 (describing Massachusetts’ indirect initiative process). In Massachusetts, a petitioner must gather the signatures of ten registered voters and submit the proposal to the Attorney General for certification by the first Wednesday in August of the year prior to the biennial election. MASS. SEC’Y OF THE COMMONWEALTH, STATE BALLOT QUESTION PETITIONS 5 (2003). The Attorney General certifies that the measure and title are in order, that the measure is not an excluded matter, and that a substantially similar measure has not been the subject of an initiative in the two preceding biennial elections. Id. After the Attorney General certifies the initiative, he provides a “fair and concise” summary of the proposed law. Id. Next, a petitioner must file the summary with the Secretary of the Commonwealth, who prints the petition forms and makes them available to the petitioner. Id. at 6. The petitioner must gather enough signatures to equal three percent of the total votes cast for gubernatorial candidates in the last election, and submit these certified signatures to the Secretary by the first Wednesday in December. Id. In the 2004 election, this number will be 65,825 signatures. Id. No more than one quarter of the signatures may come from any one county. Id. After the petitioner submits the required number of certified signatures to the Secretary, and the Secretary has verified these signatures, the Secretary submits the proposal to the Legislature on the first day of the Legislative session. Id. If the Legislature has not approved the proposal by the first Wednesday in May, the petitioner may request additional petition forms from the Secretary. Id. at 7. If the petitioner submits certified signatures of a number equal to one half of one percent of the number of gubernatorial votes cast in the last state election by
place a proposal on the ballot without first submitting the proposal to the Legislature. This distinction renders it a more difficult and lengthier process for Massachusetts proponents to place an initiative on the ballot, as the Legislature has an opportunity to act on a proposal prior to its submission for a popular vote.

The complicated ballot-qualification requirements have resulted in significant litigation in Massachusetts courts. Courts have addressed many challenges dealing with the Attorney General’s certification of an initiative, whether proponents have achieved the signature requirements, and whether the proposal is constitutional. In determining the constitutionality of an initiative that the Attorney General has certified, Massachusetts courts look only to the Massachusetts Constitution, and will not address a proposal’s federal constitutionality.

C. Evolution of the Use of the Initiative Petition Throughout the United States

The speed with which states adopted the ballot initiative in the early 1900s was accompanied by an equal zeal in their citizens making use of the power to create direct legislation. In the 1910s, the states with the initiative power placed an average of fifty-four initiatives on the ballot each two-year election cycle. In the 1920s, that number fell to thirty-seven, only to rebound in the 1930s to fifty-one. During the next three decades, that number continued to fall, reaching its low of nineteen in the 1960s. Petitioners have steadily
increased their use of initiatives since that time, bringing average initiative use to its current peak of seventy-six in the 1990s, as well as in the 2000 election.50

D. Evolution of the Use of the Initiative Petition in Massachusetts

Massachusetts petitioners used the ballot initiative sparingly in the years after its passage, while petitioners in other states used their newfound power prodigiously.51 Massachusetts has essentially mirrored national trends in its use of the ballot initiative since those early years, with a like resurgence of its use in the 1990s.52 Petitioners placed the first Massachusetts initiative, a proposal to define beer and cider as non-intoxicating, on the 1920 ballot.53 Voters approved the measure by a one percent margin, with a total of forty-three percent in favor to forty-two percent against.54 Over the years, Massachusetts citizens have used the initiative petition for a wide range of measures, from authorizing Sunday sporting events and repealing prohibition, to banning handguns and limiting property taxes.55

California’s Proposition 13, a 1978 property tax-cut initiative that brought renewed attention to the power of direct democracy, has earned credit for the resurgence of the ballot initiative in recent years in Massachusetts and in many states around the country.56 Proposition 13 demonstrated that voters could transform their disillusionment into action and, ultimately, into change.57 Since

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50. ELLIS, supra note 26, at 35 (outlining increase in average initiative use in 1970s, 1980s, 1990s, and in 2000); see also Robert Pear, The 1990 Campaign: Number of Ballot Initiatives is the Greatest Since 1932, N.Y. TIMES, Nov. 5, 1990, at B10 (describing resurgence of ballot initiative usage).
51. See ELLIS, supra note 26, at 206 (listing initiative use by decade and state); MASS. SEC’Y OF THE COMMONWEALTH, STATEWIDE BALLOT MEASURES: 1919 THROUGH 1998 4-9 (1998) [hereinafter MASS. SEC’Y OF COMMONWEALTH] (showing Massachusetts initiative subjects and voting results). In the 1920s, there were three initiative petitions for a law, while there were five in the 1930s, seven in the 1940s, and four in the 1950s. MASS. SEC’Y OF COMMONWEALTH, supra, at 4-6.
52. See ELLIS, supra note 26, at 206 (showing initiative use by decade and state); MASS. SEC’Y OF COMMONWEALTH, supra note 51, at 6-9 (listing Massachusetts initiative subject and voting results from 1960s through 1990s). In the 1990s, there were seventeen initiative petitions for a law on the Massachusetts ballot, compared to nine in the 1980s, five in the 1970s, and two in the 1960s. MASS. SEC’Y OF COMMONWEALTH, supra note 51, at 6-9. The disparity in the numbers among the sources is due to the fact that some sources, like the Massachusetts Secretary of State, distinguish between an initiative petition for a law and an initiative petition for a constitutional amendment, while others count them both under the term “initiative.” Id.
53. MASS. SEC’Y OF COMMONWEALTH, supra note 51, at 4 (showing 1920 initiative subjects).
54. MASS. SEC’Y OF COMMONWEALTH, supra note 51, at 12 (detailing voting results on beer and cider ballot initiative).
56. See BRODER, supra note 1, at 45 (describing Proposition 13’s impact on initiative popularity); ELLIS, supra note 26, at 36 (crediting Proposition 13 with renewing popularity of initiatives). Proposition 13 severely limited property taxes after a housing boom that caused property values to rise dramatically. BRODER, supra note 1, at 45.
57. See BRODER, supra note 1, at 45-53 (arguing Proposition 13 gained revolutionary status); ELLIS, supra note 26, at 36 (calling Proposition 13 dramatic illustration of direct democracy’s power). Robert Kuttner, a liberal journalist, called the passage of Proposition 13 “the rarest of political events, an authentic mass protest
the passage of Proposition 13, initiative use in Massachusetts and many states throughout the country has grown dramatically.58

Proposition 2½, a 1980 ballot initiative restricting the growth of local property taxes, was the Massachusetts equivalent to Proposition 13.59 Like Proposition 13, Proposition 2½ was the product of voter anger and disgust over constantly-rising property taxes.60 Massachusetts voters, like the California voters who passed Proposition 13, demonstrated their anger by voting overwhelmingly in favor of the tax-limiting measure.61

Since voters passed Proposition 2½, Massachusetts ballots have included twenty-eight initiatives.62 Among these initiatives, nine have related to taxes, five to campaigns and elections, and three to nuclear and hazardous waste.63 Unlike the grassroots effort of Proposition 2½, proponents of more recent measures have relied increasingly on money, rather than grassroots efforts, to ensure their success.64

brought on by economic grievances.” BRODER, supra note 1, at 52.

58. See supra notes 47-50 and accompanying text (detailing recent rise of ballot initiatives in Massachusetts and around country).

59. See MASS. SEC’Y OF COMMONWEALTH, supra note 51, at 42 (showing Proposition 2½ on 1980 ballot).

60. SCHMIDT, supra note 27, at 139-42 (referring to Proposition 2½ as “tax revolt in Massachusetts”). At the time that Proposition 2½ was on the ballot, Massachusetts property taxes were seventy percent higher than the national average. Id. at 141. Proposition 2½ proponents promised an estimated forty percent reduction in property taxes. Id.

61. See MASS. SEC’Y OF COMMONWEALTH, supra note 51, at 42 (showing passage of Proposition 2½ by fifty-six to forty percent vote).

62. See Mass. Sec’y of Commonwealth Website, supra note 8 (listing number of ballot initiatives).

63. See MASS. SEC’Y OF COMMONWEALTH, supra note 51, at 8-9 (detailing initiative subjects from 1982 to 1998). The 1982 ballot included a proposal to restrict low-level radioactive waste disposal in nuclear power plant construction. Id. at 8. The 1986 ballot included proposals to repeal the surtax, to require the identification of hazardous waste sites, and to allow mail-in voter registration. Id. The 1988 ballot included proposals to repeal the prevailing wage, to regulate the treatment of farm animals, and to stop electric power plants that produce nuclear waste materials. Id. The 1990 ballot included proposals to limit the state use of consultants, to change the income tax rate and regulate state agency fees, to change the law governing the establishment of political parties and nomination of candidates, and to regulate the local aid fund. Id. at 9. The 1992 ballot included proposals to institute a cigarette tax and create a Health Protection Fund, to make certain corporate tax information available to the public, to make all packaging recyclable or recycled, and to tax hazardous materials. Id. The 1994 ballot included proposals to regulate spending on ballot campaigns, to impose term limits, to open retail stores on Sunday mornings, to change the personal income tax, to change the State Highway Fund, and to prohibit rent control. Id. The 1996 ballot included a proposal to change hunting and trapping laws. Id. The 1998 ballot included a proposal to publicly finance campaigns and to change the tax rate on interest and dividend income. Id. The 2000 ballot included proposals to reduce the income tax rate, to create a tax deduction for charitable contributions, to reform health care and health insurance, and to ban greyhound dog racing. Mass. Sec’y of Commonwealth Website, supra note 8. The 2002 ballot included proposals to repeal the income tax and to end bilingual education. Id.

64. See infra notes 66-67 and accompanying text (discussing increasing importance of funding for ballot initiatives).
E. Democracy at a Price: The Growing Importance of Money in the Ballot Initiative Process

The ballot initiative industry has become increasingly sophisticated in the years since the initiative’s creation.\(^{65}\) Today, ballot initiatives are a big business in the United States, accounting for hundreds of millions of dollars in nationwide spending every election year.\(^{66}\) As compared with spending for candidate elections, for example, total spending in California initiatives in the 1998 election equaled approximately fifty percent more than the spending of California federal candidates in the same election.\(^{67}\) This spending is concentrated in two areas: gathering a sufficient number of signatures to qualify a proposal for the ballot, and running a sophisticated media campaign to successfully persuade the public to vote the proposal into law.\(^{68}\)

1. The Signature Drive

State requirements for the number of signatures necessary to qualify a proposal for the ballot vary widely, but are generally based on population or number of voters in the previous gubernatorial election.\(^{69}\) In the 2000 and 2002 election cycles, the signature requirements ranged from as few as 13,000 in South Dakota, to as many as 420,000 in California.\(^{70}\) Early proponents of the ballot initiative envisioned legions of committed volunteer activists taking to the streets to collect the requisite number of signatures.\(^{71}\) In current practice,

\(^{65}\) See Schmidt, supra note 27, at 42-43 (describing innovation in signature gathering methods). This signature-gathering innovation, known as the “tabling method,” is characterized by signature gatherers setting up tables to attract petition signers. Id. at 43. Prior to this innovation, the creation of California initiative activist Ed Koupal in the late 1960s, signature-gatherers generally went door-to-door or worked crowds with a clipboard in search of signatures. Id. This method allowed signature-gatherers to collect up to one hundred signatures per hour, far greater than the number they had collected using earlier methods. Id.

\(^{66}\) See Broder, supra note 1, at 163-97 (referring to “money game” initiatives created). The author notes that in the 1997-98 election cycle, total spending for and against ballot initiatives equaled $257,053,852. Id. at 163. A 1998 California ballot campaign to allow Indian gaming cost the victorious Indian tribes $66,257,088, and the defeated casino interests $25,756,828. Id. at 164.

\(^{67}\) Elizabeth R. Gerber, The Logic of Reform: Assessing Initiation Reform Strategies, in DANGEROUS DEMOCRACY?: THE BATTLE OVER INITIATIVES IN AMERICA, supra note 5, at 145 (detailing expenditures in 1998 California elections). Spending on initiatives totaled more than 200 million dollars, while spending for candidates for California’s U.S. House and Senate elections totaled 137 million dollars. Id.

\(^{68}\) See infra Parts III.E.1, III.E.3 (outlining areas of initiative expenditures).

\(^{69}\) See Magleby, supra note 29, at 22 (detailing states’ varying signature requirements). Wyoming, one of the highest signature threshold states, requires a number of signatures equal to fifteen percent of the number of votes cast in the preceding general election. Id. North Dakota, one of the most lenient states, requires a number of signatures equal to two percent of the population. Id. Massachusetts requires a total number equal to three and one-half percent of the votes cast in the previous gubernatorial election. See supra note 41 and accompanying text (describing signature requirements for Massachusetts initiative).

\(^{70}\) See Ellis, supra note 26, at 46 (discussing wide disparity in signature requirements); Mass. Sec’y of the Commonwealth, State Ballot Question Petitions 6 (2001) (showing Massachusetts signature requirement for 2002 election at 57,100).

\(^{71}\) Ellis, supra note 26, at 44 (describing signature gathering as among “most romantic features” of
however, professionals, earning a living by gathering signatures for an array of initiatives, dominate this scene.\footnote{Andrew DeMillo, Your Name’s Worth $1-$2 to Signature Gatherers, SEATTLE TIMES, June 27, 2000, at A1 (detailing signature-gathering business); Ellis, supra note 26, at 44-45 (discussing business of signatures). Ellis notes that “[t]he great majority of those people behind petition tables are not idealistic volunteers but interested mercenaries and bounty hunters who are paid by the signature and remain largely indifferent to the subject of the petition.” Ellis, supra note 26, at 44.}

In contrast to proponents’ early ideal of the initiative, petitioners began to use paid signature gatherers soon after proponents won the initiative right.\footnote{See Broder, supra note 1, at 52-54 (dating paid signature gatherers to first decade of initiative era); Ellis, supra note 26, at 47-48 (discussing use of paid signature gatherers in Oregon in 1904).} Many states have attempted to hamper this practice by placing restrictions or bans on paid signature gatherers.\footnote{Meyer v. Grant, 486 U.S. 414, 428 (1988) (striking down statutory limitations on paid signature gatherers). A Colorado statute made it a felony to pay signature gatherers for their work. Id. at 416. The Supreme Court held that this prohibition “place[d] a burden on political expression that the state has failed to justify.” Id. at 428.} In 1988, the Supreme Court held that outright bans on paid signature gatherers violated the First Amendment right to free speech, and initiative campaigns have since enjoyed the ability to hire professional signature gatherers.\footnote{Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 203-05 (1999) (finding limitations on signature gatherers unconstitutional).} The signature-gathering process has been relatively free from any restrictions since 1999, when the Supreme Court struck down requirements that signature gatherers be registered voters, wear name tags, and file detailed financial reports.\footnote{Ellis, supra note 26, at 49-50 (noting growing reliance on professional signature gatherers). The author comments that most states do not collect data on whether ballot campaigns employ paid or volunteer signature gatherers. Id. at 49-50. States that keep such records, however, demonstrate a growing reliance on paid signature gatherers. Id. at 50. For instance, in Oregon, sixty-nine of the eighty initiatives that qualified for the ballot from 1988 to 2000 relied on paid signature gatherers. Id. at 50-51. In Washington, paid signature gatherers collected signatures for twenty-four of the thirty initiatives to reach the ballot from 1990 to 1996 were reliant upon paid signature-gathering staff. Id. at 52-53.} Many ballot campaigns have taken advantage of the Court’s opposition to limitations on paid signature gatherers, and, as a result, a great majority of ballot campaigns now rely on paid signature gatherers to qualify their proposal for the ballot.\footnote{Mass. Const. art XLVIII (giving legislature right to regulate signature gatherers). Article XLVIII provides, in relevant part: The General Court may provide by law that no co-partnership or corporation shall undertake for hire or reward to circulate petitions, may require individuals who circulate petitions for hire or reward to
Massachusetts Legislature has attempted to place only minor restrictions on signature gatherers by requiring the person circulating the initiative to sign as having witnessed personally every signature on the petition.\textsuperscript{79} The Legislature repealed this law in 1985 after a court decided that even a forged signature of a purported witness would not invalidate the otherwise valid signatures on the petition.\textsuperscript{80} Free from restrictions, the use of paid signature gatherers in Massachusetts is now the rule rather than the exception.\textsuperscript{81}

The cost associated with a paid signature-gathering campaign varies widely depending on the state in which proponents wage the campaign.\textsuperscript{82} In California, the median expenditure for a campaign to qualify for the ballot is now between one and two million dollars.\textsuperscript{83} In states with a smaller signature requirement than California, this cost can be as little as sixty to one hundred thousand dollars, but still a substantial sum of money for a grassroots initiative.\textsuperscript{84}

\section*{2. Money in the Initiative Process}

The effect of money in the initiative process is seen both in initiative expenditures and initiative funding.\textsuperscript{85} The 1976 Supreme Court holding in \textit{Buckley v. Valeo} rendered expenditures on ballot initiatives essentially unrestricted.\textsuperscript{86} The Court addressed the funding side of the initiative process in \textit{First National Bank of Boston v. Bellotti} in 1978, holding that a Massachusetts statute prohibiting banks and business corporations from spending to influence certain initiatives violated the First Amendment.\textsuperscript{87} In 1981, in \textit{Citizens Against

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\textsuperscript{80} Id. (allowing signatures on petition despite invalidity of witness’ signature).

\textsuperscript{81} Steve LeBlanc, \textit{Ballot Initiatives Newest Shortcut}, \textit{DAYTON DAILY NEWS}, July 25, 2000 (stating in last four election cycles, eighty-five percent of ballot initiatives used paid help) (on file with author).

\textsuperscript{82} See infra notes 83-84 and accompanying text (reviewing different initiative costs in different states).

\textsuperscript{83} See \textit{Ellis}, supra note 26, at 59 (detailing qualification expenditures in California during 1990s).

\textsuperscript{84} See \textit{Ellis}, supra note 26, at 59 (discussing cost of qualification segment of initiative petition). Initiative proponents pay signature gatherers upwards of a dollar for each signature, and even more as the deadline grows closer. \textit{Id.} This figure reflects only the money that signature gatherers earn, and does not include the money that proponents pay to the organizers of the signature drive and any consultants they hire during the process. \textit{Id.;} see DeMillo, \textit{supra} note 72, at A1 (discussing per signature price signature gatherers charge).

\textsuperscript{85} See infra notes 86-88 and accompanying text (highlighting court decisions on funding and spending in initiative campaigns).

\textsuperscript{86} 424 U.S. 1, 14 (1976) (holding limits on campaign expenditures violate first amendment free speech rights). While this decision did not directly address ballot initiatives, the Court considered “political contributions and expenditures that apply broadly to all phases and participants in the election process.” \textit{Id.} at 12-13.

\textsuperscript{87} 435 U.S. 765, 795 (1978) (holding prohibition on corporate funding of initiatives violates first amendment). A 1977 Massachusetts statute forbade expenditures by banks and business corporations for the

Rent Control v. City of Berkeley, the Court expanded on its Bellotti decision and invalidated any limits on contributions to ballot initiative campaigns, leaving no limits on contributions to and expenditures of ballot campaigns.88

Massachusetts voters expressed their view on the perceived influence of corporate money in initiative campaigns by rejecting a 1994 ballot initiative to regulate corporate spending on those campaigns.89 Activists sponsored the initiative hoping to limit the financial participation of corporations in the ballot initiative process, claiming it had changed the grass-roots character of the initiative process.90 Massachusetts voters rejected the proposal by a margin of eighteen percent after corporations in opposition to the measure raised approximately fifteen times the money that the proponents did.91

88. 454 U.S. 290, 303 (1981) (striking down limitations on donations to ballot initiative campaigns). The Court held that “curtailment of speech and association in a ballot measure campaign, where the people themselves render the ultimate political decision, cannot be justified” on the same basis as the Court justifies limitations on contributions to candidates. Id. at 302. While the Court, in a 1990 decision, curtailed the right of corporations to spend on candidate campaigns, the Court has not extended this holding to ballot initiatives. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 668-69 (1990) (upholding ban on expenditures from corporate treasuries in candidate elections). The Court has yet to decide the issue of a similar limitation on corporate expenditures in ballot questions, though litigation on the subject is pending. See Susan W. Dana, Restrictions on Corporate Spending on State Ballot Measure Campaigns: A Re-Evaluation of Austin v. Michigan Chamber of Commerce, 27 HASTINGS CONST. L.Q. 309, 334 (2000) (discussing litigation responding to Montana’s prohibition of corporate general treasury expenditures on ballot initiatives); see also Mont. Chamber of Commerce v. Argenbright, 226 F.3d 1049, 1057-58 (9th Cir. 2000) (upholding lower court’s decision striking down Montana law limiting expenditures on ballot initiatives). A Montana law prohibited corporations from spending general treasury money for ballot campaigns, though it allowed corporations to expend money from a political action committee. Argenbright, 226 F.3d at 1052-53. The Court upheld the lower court’s invalidation of the law, holding that it was “incompatible with the freedoms secured by the First Amendment.” Id. at 1057-58 (quoting First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 792 (1978) (quoting Thomas v. Collins, 323 U.S. 516, 537 (1945))).

89. See MASS. SEC’Y OF COMMONWEALTH, supra note 51, at 49 (showing 1994 initiative subjects and voting results).

90. Scott Baldauf, Ballot Initiatives for a Profit? Bay State Activists Urge Reform, CHRISTIAN SCI. MONITOR, Oct. 3, 1994, at 8 (noting corporate involvement in ballot initiatives tends to skew political process). The initiative proposed that groups financing state ballot campaigns must be formed for the purpose of promoting political ideas, have no shareholders and conduct no commercial activity, and receive no more than one percent of their funding from corporate sources. Id. A proponent of the initiative argued that corporations used ballot initiatives to circumvent the legislature and exploit the political process. Id. An opponent of the initiative argued that it unfairly discriminated based on corporate form, and that it would prevent a corporation, but not a partnership, from funding ballot initiatives. Id.

91. See MASS. SEC’Y OF COMMONWEALTH, supra note 51, at 49 (showing subjects and voting results of 1994 ballot measures). The measure lost after a vote of thirty-seven percent against and fifty-five percent in
Corporations and individuals alike have taken full advantage of their right to spend money to influence voters in ballot initiative campaigns. These expenditures generally support political consultants and media campaigns selling an initiative as a product. More importantly, the amount of money spent on initiative campaigns throughout the United States is the single most significant factor in their success at the ballot box. This is also true in Massachusetts, where over the last three elections, the party spending the most money in an initiative campaign has won in two-thirds of the cases.

Increasingly, corporations giving large contributions have provided millions of dollars to finance ballot campaigns each election year. Most state campaign finance laws, though unable to limit the amount, require campaigns to disclose the source of these donations. Individuals who wish to keep their contributions anonymous, however, have found ways to thwart even these favor. Id. The proponents of the initiative collected $153,850 in donations, while the opponents collected $2.36 million, approximately fifteen times the amount of the proponents. Chris Reidy, Ballot Questions: Groups Raised $10.1 Million for Their Campaigns, BOSTON GLOBE, Nov. 8, 1994, at 22 (analyzing fundraising for ballot initiative campaigns). The coalition opposing the ballot initiative called itself the “Committee to Defend First Amendment Rights.” Id.


94. Daniel Smith, Campaign Financing of Ballot Initiatives in the American States, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA, supra note 5, at 71 (stating campaign financing plays central role in ballot measures); see BRODER, supra note 1, at 163 (referring to money as “major-even dominant-factor” in success of initiative campaign). The author finds that a small number of major donors financed seemingly populist initiatives, like the Massachusetts and Arizona “Clean Elections” initiatives that created public financing of campaigns. BRODER, supra note 1, at 165-67.

95. COMMONWEALTH OF MASS. OFFICE OF CAMPAIGN AND POLITICAL FINANCE, CAMPAIGN FINANCE ACTIVITY FOR THE 2002 STATEWIDE BALLOT QUESTIONS (2002) (showing expenditures for 2002 ballot initiatives in Massachusetts). The party spending the greater amount of money prevailed in one of the three cases. Id. In the 2000 election, spending on statewide ballot measures exceeded fifteen million dollars. COMMONWEALTH OF MASS. OFFICE OF CAMPAIGN AND POLITICAL FINANCE, CAMPAIGN FINANCE ACTIVITY FOR THE 2000 STATEWIDE BALLOT QUESTIONS (2000). The party that spent more money prevailed in four of the six initiatives. Id. In the 1998 election, the parties spending the greater amount of money won in all three instances. COMMONWEALTH OF MASS. OFFICE OF CAMPAIGN AND POLITICAL FINANCE, CAMPAIGN FINANCE ACTIVITY FOR THE 1998 STATEWIDE BALLOT QUESTIONS (1998).


97. Larry J. Sabato et al., A Call for Change: Making the Best of Initiative Politics, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA, supra note 5, at 180 (discussing campaign finance rules requiring disclosure of donors).
minimal disclosure laws. In recent years, wealthy individuals have also provided significant financing to promote ballot measures. A Washington football team owner was one of the first to use this tool when in 1997, he single-handedly financed a successful ballot campaign to provide public financing for his team’s new stadium. Wealthy political activists across the country have since used the initiative as a tool to successfully promote their personal agendas and change the laws in several states, including a California businessman’s financing of a 2002 initiative in Massachusetts.

3. The Campaign

Initiative campaigns are increasingly dependent on television, radio, and print advertising to deliver their message. These campaigns frequently use slogans reducing complicated proposals to short, catchy phrases. For example, proponents of a 1996 measure to change hunting and trapping laws asked voters to “Ban Cruel Traps.” A 1998 campaign touted “Clean Elections” for a proposal to provide public financing for political campaigns. Proponents of a 2002 campaign to provide English immersion for non-English-

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98. Evan Halper, The State; Political Donors Shielded by Loophole; Election: A corporation whose officers are secret is a major contributor to California propositions, L.A. TIMES, Sept. 30, 2002, at 6 (describing corporation acting as front for private interest). A corporation contributing heavily to ballot initiative campaigns incorporated in Pennsylvania to avoid disclosing the names of its officers. Id. This allowed the corporation to evade California disclosure laws prohibiting anonymous donations. Id.

99. BRODER, supra note 1, at 168-97 (describing millionaires’ promotion of personal agenda through initiative use).

100. BRODER, supra note 1, at 171 (detailing campaign for Seattle stadium). Paul Allen, the owner of the team, spent $6,321,832 on his campaign to provide public financing, and $3,998,284 to pay for the special election. Id. The initiative survived a court challenge based on Allen’s paying for the election. Id.


102. See Donovan et al., supra note 93, at 133 (asserting campaigns dependent on paid media to disseminate message).

103. See ELLIS, supra note 26, at 77 (describing power bestowed on those framing initiative argument); Tricky Questions, Editorial, BOSTON GLOBE, Nov. 6, 2002, at A18 (commenting on difficulty of legislating complicated issues through initiative petition); infra notes 104-07 (showing examples of sloganeering in Massachusetts initiative campaigns).

104. Peter J. Howe, Animal Lovers Track the Voters; Master Ballot-question Politics, BOSTON GLOBE, Nov. 19, 1996, at B1 (quoting proponent of ballot measure). The vice president of the Massachusetts Society for the Prevention of Cruelty to Animals stated that proponents chose the slogan “Ban Cruel Traps” because it was “short, sweet, simple” and because “[i]t grabbed everyone.” Id.

speaking students promoted “English for the Children.”

Public teacher unions in opposition to this measure used an obscure provision of the proposed law to bolster their slogan “Don’t Sue Teachers.”

Ballot initiatives effecting statutory change have a high success rate—about forty percent nationwide. In Massachusetts, the success rate of initiatives’ is about forty-seven percent. In contrast, the success rate of bills that pass through the Legislative process is just a small fraction of those rates.

F. Proposals for Reform

The National Conference of State Legislatures (NCSL) recently issued a report on ballot initiatives. In it, the NCSL concluded that the opportunities for abuse of the initiative and referendum process outweigh its advantages, and recommended that states without an initiative process not consider its adoption. For states that already have the initiative, the NCSL task force recommended a series of minor changes to mitigate the possibility of abuse, while leaving the core of the system intact.

The Massachusetts Legislature, in its 2003-2004 Legislative Session, is considering two proposals to change the initiative system. One proposal would create a ballot title and summary commission, regulate signature-gatherers, and increase financial reporting requirements. Another proposal


107. Anand Vaishnav, Dissecting Bilingual Education’s Poll Defeat: Movement Lacked Money, Message, BOSTON GLOBE, Nov. 10, 2002, at B9 (detailing English immersion opponents’ slogan). The Committee for Fairness to Children and Teachers, which organized to oppose the English immersion ballot initiative, admitted that it employed the slogan because it tested well in focus groups. Id.

108. See LeBlanc, supra note 81 (reporting popularity of ballot initiatives due to high success rate).


110. See LeBlanc, supra note 81 (noting only “tiny percentage” of bills enacted through legislative route).


112. Id. at vii (summarizing findings of task force on initiative and referendum). The report acknowledged that “the initiative process has outgrown the existing laws that govern it.” Id.

113. Id. at ix-xii (outlining recommendations prepared by task force). The recommendations include requiring signature gatherers to reveal whether they are paid, providing additional information to voters, and requiring financial disclosures by individuals and organizations that fund ballot measures. Id.


would amend the Massachusetts Constitution to increase the number of signatures needed to qualify an initiative for the ballot.\textsuperscript{116}

III. ANALYSIS

The initiative process is rife with problems that initial proponents of the system did not anticipate.\textsuperscript{117} Minor reforms of the system have not succeeded in solving these problems, and reform proposals do not target the true sources of these concerns.\textsuperscript{118} In order for the initiative system in Massachusetts to fulfill its original purpose, Massachusetts citizens and legislators should undertake action to significantly reform the initiative system, and if significant reform is not possible, to repeal the system altogether.

A. The Ballot Initiative Fails to Reflect the True Voice of the People

The drafters of the United States Constitution believed in the superiority of representative democracy as a means of governing.\textsuperscript{119} Ballot initiative proponents, however, argue that the initiative is the best means for people to speak with their true voice.\textsuperscript{120} In reality, the results of a vote on a particular initiative do reflect general public opinion on a proposal, but the proposals themselves reflect the priorities of only the small number of proponents who drafted them.\textsuperscript{121}

\textsuperscript{116} Proposal for a Legislative Amendment to the Constitution Promoting the Representative Character of Ballot Questions, S. 362, 2003 Leg., 183rd Sess. (Mass. 2003) (proposing increase in initiative petition signature requirement). The proposal would change the requirement from three percent of voters in the prior election to three percent of all registered voters. Id. Finally, the proposal increases the financial reporting, requiring that contributor information be included in the information distributed to voters. Id.

\textsuperscript{117} See infra Parts III.A-B (outlining problems inherent in initiative process).

\textsuperscript{118} See infra Part III.D (explaining problems in reform proposals).

\textsuperscript{119} See supra notes 19-20 and accompanying text (discussing framers' belief in superiority of representative government).

\textsuperscript{120} See supra notes 9, 35-36 and accompanying text (describing proponents' arguments for direct democracy).

\textsuperscript{121} See Clark, supra note 10, at 434 (arguing initiatives distort democratic process and preclude voters' ability to express priorities among issues). Professor Clark contends that initiatives give people the false impression that they have input in the process, while in fact they are denied the opportunity to focus their attention on the issues of greatest concern to them. Id. As such, Clark argues, direct democracy does not reflect the voice of the people accurately or meaningfully, while representative democracy "permits, indeed
Wealthy political activists and interest groups have increasingly used initiative campaigns as a tool to serve their own interests. These groups use initiatives to circumvent the legislature because issues promoted by initiative find far greater success than those promoted through the legislative route. Massachusetts initiative topics frequently support the theory that they do not represent the priorities of most voters. In recent years, initiative subjects have included marginal issues such as regulating the treatment of farm animals, changing hunting and trapping laws, and banning greyhound racing. While initiatives have addressed seemingly more important issues like legislative term limits, income tax reduction, public financing for campaigns, and English immersion teaching, even these issues reflect the priorities of only the few who drafted the initiatives. Proposals to reform the initiative process do not address the fact that few initiative proposals spring from a groundswell of public support, but that those with the power and the resources to shepherd an initiative proposal into law conceived of these proposals.

B. The Power of the Slogan

The manner in which proponents market initiatives to voters further complicates the issue. Initiative campaigns attempt to boil down complex issues into slogans that capture the interest and support of the voting public. Such sloganeering does little to foster public debate and understanding of the laws an initiative proposes, but much to influence the outcome of the vote.

A comparison between a 1998 ballot initiative and a 2002 advisory question requires, that voters speak not only to the question of what they want, but also to the question of what they want most.” Id.; see Ellis, supra note 26, at 79 (asserting “passage of a measure reveals nothing about an issue’s salience to voters”).

122. See supra notes 99-101 and accompanying text (discussing wealthy individuals’ use of ballot initiative for personal interests).

123. See supra notes 108-10 and accompanying text (showing far greater rate of success for initiatives than bills promoted through legislature).

124. See supra note 63 and accompanying text; infra notes 125-26 and accompanying text (listing subjects of recent initiatives and discussing lack of voter input in initiative topics).

125. See supra note 63 and accompanying text (detailing subjects of Massachusetts ballot initiatives in last twenty years).

126. See supra note 63 and accompanying text (listing Massachusetts ballot initiative subjects); Bruce E. Cain & Kenneth P. Miller, The Populist Legacy: Initiatives and the Undermining of Representative Government, in Dangerous Democracy?: The Battle over Ballot Initiatives in America, supra note 5, at 43-44 (arguing initiatives undermine democratic opportunities by bestowing power on small number of drafters).

127. See supra notes 111-16 and accompanying text (discussing proposals for reforming initiative process).

128. See supra notes 103-07 and accompanying text; infra notes 129-34 and accompanying text (recognizing problems with initiative marketing).

129. See supra notes 103-07 and accompanying text (providing examples of sloganeering in Massachusetts initiative campaigns).

130. See infra notes 131-34 and accompanying text (analyzing effect of slogans on outcome of initiative vote).
exemplifies how slogans sway voters. Massachusetts voters favored the 1998 “Clean Elections” initiative, which proponents marketed as a way to remove special interest money from politics, by a wide majority. In 2002, legislators placed an advisory question on the ballot that polled voters’ support of taxpayer funding of political campaigns, a major aspect of Clean Elections. This time, however, voters rejected the question by an overwhelming thirty-nine point margin, greater than the twenty-eight point margin by which they had favored Clean Elections in the 1998 election.

The results of these Clean Elections votes underscore the inconsistency of the voting public and the ease with which initiative campaign sloganeering influences public opinion. Proposals to reform the initiative process do not seek to regulate this aspect of the initiative campaign, because such regulations would undoubtedly violate the free speech the Buckley Court sought to protect.

C. The Power of Money

Campaigns by definition seek to achieve a particular end, and initiative campaigns are no exception. Proponents of initiatives exert significant control over the campaign process in deciding what issue will be the subject of the initiative, and in framing that issue to produce the desired result. Unlike in candidate elections, where voters might rely upon party affiliation and past history to make decisions, voters in initiative campaigns have no such barometer and often rely on information, framed by proponents, distilling a complicated issue to a sound bite. As a result, voters in initiative campaigns

131. See infra notes 132-34 and accompanying text (discussing votes on Clean Elections initiatives).
132. See Mass. Sec’y of Commonwealth, supra note 51, at 51 (showing public campaign financing on 1998 ballot). The “Clean Elections” petition passed by a vote of fifty-eight percent in favor and thirty percent against the initiative. Id.; see infra note 133 and accompanying text (referring to 1998 public financing initiative as “Clean Elections”).
133. Rick Klein, Voters Mix the Message on Clean Elections, BOSTON GLOBE, Nov. 12, 2002, at A1 (stating “heart of the Clean Elections Law is allowing candidates to run for office with public money”). The article notes that the 2002 vote on Clean Elections demonstrates that “you can get any result you want when asking voters about public campaign financing, depending on how the question is worded.” Id.
134. Mass. Sec’y of Commonwealth Website, supra note 8 (including legislative advisory question on taxpayer funding for political campaigns on list of 2002 initiatives). The advisory question failed by a vote of sixty-six percent against and twenty-three percent in favor. Id.
135. See supra notes 132-34 and accompanying text (showing dramatic difference in Clean Elections vote based on how question posed).
136. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (holding limits on campaign expenditures violates first amendment free speech rights); see supra notes 111-16 and accompanying text (discussing proposals to reform initiative process).
137. Merriam Webster’s Collegiate Dictionary 164 (10th ed. 1993) (defining campaign as “connected series of operations designed to bring about a particular result”).
138. See supra Parts III.A-C (discussing influence of those drafting and framing initiative issues).
139. See Gerber, supra note 67, at 147 (detailing factors making initiatives vulnerable to influence of money). The author explains that because initiatives contain complex issues, voters must rely on initiative proponents for information. Id. This reliance creates an opportunity for proponents to mislead voters. Id. The
are likely to make poorly-informed choices, and are more easily influenced by
the amount of money spent on a campaign.140

In Massachusetts, the amount of money that proponents and opponents
spend on an initiative campaign often influences the results.141 The Supreme
Court has held that states may not limit contributions to ballot initiative
campaigns.142 Similarly, the Court has held that states may not limit
expenditures in ballot campaigns.143 With these rulings, the Court has created a
system that allows unlimited contributions and unlimited spending, providing
only for minor reform proposals that increase disclosure of contributions and
expenditures.144

D. The Problem With Reform

Reform proposals are woefully inadequate to address the major problems of
the modern-day ballot initiative industry.145

Reforms that seek to increase the number of signatures necessary to qualify
an initiative for the ballot, while making successful initiative campaigns more
difficult, will only increase the important role of money in the initiative
process.146 While proposals to increase financial disclosures are helpful, they
will only be useful if voters actually pay attention to the information
disclosed.147 Even then, such reforms are merely band-aids for a system that is
broken.

IV. CONCLUSION

Despite the good intentions of proponents who brought the initiative to
Massachusetts over eighty years ago, a new reality has replaced their
progressive dream of grassroots democracy. These proponents would likely be

author also points out that, unlike voters in candidate elections, initiative voters do not have the benefit of a
voting record or partisan affiliation when making decisions about initiatives. Id.; see supra Parts III.A-C
(showing importance of drafting and sloganeering).

140. See supra notes 132-34 and accompanying text (discussing voter confusion over clean elections
question); supra note 95 and accompanying text; infra note 141 and accompanying text (demonstrating
influence of money on initiative campaign results).

141. See supra note 95 and accompanying text (detailing expenditures in last three Massachusetts
elections). The party that spent the most money won in two-thirds of the cases. Id.

on contributions to ballot initiative campaigns); First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 795
(1978) (disallowing ban on corporate contributions to ballot initiative campaigns).


144. See supra notes 111-16 and accompanying text (detailing proposals to reform initiative system).

145. See supra notes 111-16, 136 and accompanying text (explaining reform proposals’ inability to fix real
problems with initiative process).

146. See supra note 116 and accompanying text (discussing proposal to increase signature requirement for
Massachusetts initiative); supra notes 81-84 and accompanying text (noting campaigns’ reliance on paid
signature gatherers at cost up to two million dollars).

147. See supra notes 111-15 and accompanying text (detailing proposals for greater disclosure of financial
interests in initiative campaigns); supra Part III.C (discussing lack of voter attention to initiative issues).
disheartened by the fact that the groups they once railed against have commandeered the initiative to serve their own narrow interests. The initiative has become an industry in which money wields the greatest influence, and the people often vote on the best slogan rather than the merits of the proposal before them. As the system becomes increasingly resistant to regulation and meaningful reform, the solution requires more dramatic action.

The proponents of the initiative, who spoke so eloquently of “the progressive spirit that is surging in this Commonwealth of Massachusetts,” voiced only their hope that the initiative would empower the people to circumvent a recalcitrant legislature and create their own laws. Still, they recognized the dangers of the initiative, and attempted to craft a system that would be impermeable to manipulation. In this endeavor, they failed.

Current manipulation of the initiative, its resistance to reform, and the likelihood that the initiative will be used increasingly to further the interests of a powerful few leads to only one conclusion: the initiative experiment has failed. Massachusetts should lead the country in abolishing the initiative and making paramount the representative government that the founding fathers guaranteed. Its citizens deserve no less.

*Dina E. Conlin*

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