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## ENVIRONMENT, ENERGY, AND RESOURCES LAW: Citizen Initiatives: Power to the People or More of the Same?

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Considering today's dysfunctional Congress, it does not take much of a cynic to question James Madison's faith in representative democracy to cure "the mischief of faction" inherent in pure democracy. Today, many see the citizen initiative as a much-needed corrective to our 21st-century democracy—the voice of the people without a legislative filter. But is the citizen initiative an improvement, or does it contribute to the breakdown of political discourse?

In 2014, voters will face more than 125 ballot questions in 41 states. In Arkansas and Alaska, voters will decide whether the minimum wage should be increased. Mississippi voters will consider a constitutional amendment to guarantee the right to hunt and fish, while Maine voters will decide whether to outlaw the use of dogs in bear hunting. A California initiative is requesting that voters raise the limit of non-economic damages in medical malpractice cases. Marijuana is on the ballot in Florida, and GMO labeling and personhood in Colorado. Only a last-minute deal by the governor kept anti-fracking initiatives off the 2014 Colorado ballot. The 2014 campaign spending on all these initiatives is expected to exceed \$1 billion.

Citizen initiatives can impact entire industries. In 1998 a citizen initiative in Montana banned the use of cyanide heap leach mining. Montana mining exploration permits dried up overnight, companies left the state, and the mining economy in this once-active mining state dwindled down to a few grandfathered mines. In sum, the

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people of Montana outlawed an industry.

In the 2013 term, the U.S. Supreme Court struck down a California citizen initiative that outlawed same-sex marriage in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). In the majority opinion, the Justices refused to “question California’s sovereign right to maintain an initiative process” but found the initiative proponents lacked standing to defend the law in federal court when the state declined to do so. In a harshly worded dissent, Justice Anthony Kennedy argued that the majority failed to address “[t]he essence of democracy [which] is that the right to make law rests in the people and flows to the government, not the other way around.”

The reach of the *Hollingsworth* decision extends much further than marriage equality; it will have a significant impact on all future citizen-enacted laws that may be challenged in federal court as unconstitutional or in violation of federal law. Same-sex marriage, like fracking, minimum wage, abortion, and hunting evoke strong emotions in individuals and concern subjects that elected officials do not want to address for either political or economic reasons. Consequently, proponents attempt to bypass government representatives and bring these issues directly to the people through a citizen initiative. The *Hollingsworth* holding on standing will circumscribe the initiative process.

**A history of the citizen initiative process.** The modern use of the initiative process began in the 1970s with the passage of Proposition 13 (People’s Initiative to Limit Property Taxation) in California. Since then, the use of the ballot initiative has grown, for several reasons. First, there is public cynicism and distrust of elected officials, political parties, and big money interests. The citizen initiative offers a promise of power-to-the-people and corruption-free legislation. Second, the topics addressed in initiatives feed into special-interest politics and attract significant media attention. Initiatives frequently offer a simple solution—ban X—for a complex problem. Third, both the left and the right have used initiatives to serve partisan ends, to bring their base voters to the polls. Fourth, politics is big business, and statewide initiative campaigns generate lots of money for political consultants and media outlets.

**Common components of initiative law.** The procedures for direct legislation are not uniform throughout the states. Each state has its own individual law that is often a maze of contradictory provisions resulting from attempts to improve or limit the process. Nonetheless, some common components of the initiative process can be highlighted.

Many states require the secretary of state, the attorney general, a state political practices agency, and county election officials to be involved in administering the initiative process. The legislature is,

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for the most part, kept out of the initiative process.

All states prescribe the format for initiative propositions and require executive branch review and approval of the ballot title or other summary statements. The content of the ballot title is critical; typically only the title appears on the ballot. States provide for review of the petition form by the secretary of state and/or the legislative drafting staff and/or the attorney general.

The critical step for ballot initiative proponents is collecting enough signatures to qualify the initiative for the ballot. Almost all states require signatures from “qualified electors” or registered voters only. Typically, an analysis and comparison of the collected signatures with those of registered voters is conducted by county election officials. This signature verification process can be challenged. The initiative text is printed, and arguments for and against the initiative are prepared by proponents and opponents for an official summary circulated to voters. These arguments are not checked for accuracy by any state official.

Most states provide for initiatives to be voted on at general elections. In most states a simple majority of those voting on a particular initiative can enact citizen initiative proposals. The subject matter of initiatives is restricted in most states. The majority of states also impose a single-subject limitation on initiatives to prevent voter confusion. Most states do not permit pre-election challenge of the substance of an initiative but do permit pre-election judicial review of the initiative’s procedural compliance. Opponents typically challenge the official summary, ballot title, and compliance with the procedural requirements for certification. Initiatives are frequently challenged on substantive state and federal constitutional grounds. Roughly half of the states either do not permit the legislature to amend initiative-enacted law or require a two- or three-year cooling-off period before the legislature can act.

**Pros and cons of the initiative process.** Scholars who support the initiative process point to several benefits. Initiatives encourage individual participation in our democracy by encouraging the people to enact laws directly. Initiatives are useful in areas of social experimentation because they “afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt” (*Hollingsworth*, 133 S. Ct. at 2671).

But do initiatives live up to their promise to improve the democratic process? There are several criticisms. First, citizen initiatives undermine the framers’ vision of a representative body with the capacity to deliberate over legislation. Second, initiatives may threaten minority rights through majoritarian rule. Third, while legislators are supported by a variety of different, and

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sometimes competing, interest groups that can force some balancing of issue positions, the citizen initiative is typically financed by a particular special interest group or, increasingly, the very rich. Fourth, it often seems that the only individuals who directly benefit from the citizen initiative are political and media consultants. Fifth, and perhaps counterintuitively, initiatives largely are voted on by middle- and upper-class voters. Voter confusion with ballot initiatives is a problem.

The promise of the initiative process to deliver power to the people is less than advertised. Big money and political business as usual drive a process that can result in ill-considered laws with unintended consequences.

### **ABA Section of Environment, Energy, & Resources**

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