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21ST CENTURY VOTER INITIATIVES IN SOUTH DAKOTA: THE GUN BEHIND THE DOOR

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*South Dakota voters adopted the citizen statutory initiative and referendum in the 1898 election to amend the legislative article of the constitution so that the people would share the legislative power with the Legislature. The South Dakota Supreme Court in *Byre v. City of Chamberlain* succinctly identified the role of the legislature and the citizenry, noting “[t]he purpose of the initiative is not to curtail or limit legislative power to enact laws, but rather to compel enactment of measures desired by the people, and to empower the people, in the event the legislature fails to act, to enact such measures themselves.” Loren Carlson, the first full-time director of the Legislative Research Council, noted that this power constituted the “gun behind the door” for the citizenry to ensure the laws followed the will of the people. The tension between the Legislature and the citizenry regarding the initiative and referendum over the years led to the citizenry proposing an increasing number of initiatives and attempting to place some traditionally statutory language in the Constitution. The Legislature, from the perspective of some of the citizenry, has worked to make it more challenging to initiate laws by instituting “so-called” reforms to the process that both inhibited the initiation of proposed laws. From their perspective, the Legislature clarified the process and increased transparency. The 2020 election brought these issues together as many citizens felt that the legislature was not only failing to enact laws the people wanted but, in fact, repealing laws the people enacted. Groups had begun to initiate constitutional amendments drafted by petitioners, including Constitutional Amendment A, to “legalize, regulate and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use”—later found to be unconstitutional by the South Dakota Supreme Court as it contained multiple subjects, a violation of a 2018 legislatively initiated constitutional amendment requiring constitutional amendments to have one subject, similar to the constitutional limitation on the Legislature. To resolve this tension, this article describes the initiative process and offers suggestions to enable the citizenry to maintain its power to legislate as well as improve the processes.*

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I. INTRODUCTION

In 1898, South Dakota became the first state in the union to grant legislative powers to the citizenry.¹ South Dakota citizens have initiated measures for enacting and the veto referendum for nullifying ordinary legislation.² However, both the initiative and the referenda had been considered well before South Dakota's statehood.³ These two forms of direct legislation rest on the belief that the legislature was not to be trusted because it was beholden to corporate interests;⁴ if the legislature did not pass laws that reflect public opinion, the people should be able to pass laws they desire and nullify laws they oppose.⁵ These are the initiative and referendum, respectively.⁶ More recently, South Dakota voters gave themselves the right to petition to initiate amendments to the state constitution.⁷

This paper reviews the legislative attempts over the last ten years to limit the initiative process via legislative and constitutional changes to the initiative processes.⁸ The legislature has taken steps that many consider to be limiting voter initiatives by creating procedural challenges to putting issues on the ballot, while prominent Democrats have resorted to initiating measures to achieve policy goals.⁹ Professor Loren Carlson referred to the process by which voters could, by petition, propose laws where the legislature did not represent the will of the people and, by petition, refer laws passed by the legislature to a vote of the citizenry as the “‘guns behind the door’ to be used when needed to correct legislative and constitutional sins both of omission and commission.”¹⁰ The paper concludes by discussing reforms to the process that might offer citizens access to the ballot while maintaining the strengths of the representative or republican form of government.¹¹

1. H. Roger Grant, *Origins of a Progressive Reform: The Initiative and Referendum Movement in South Dakota*, 3 S.D. HIST. 390, 390 (1973).

2. *Id.* at 394.

3. *See id.* at 391-92 (discussing the likely origins of the initiative and referendum movement).

4. *Id.* at 393-94, 398.

5. *Id.* at 391, 394.

6. *Id.* at 391.

7. S.D. CONST. art. XXIII, § 1 (amended 1972).

8. *Infra* Parts II-X.

9. Seth Tupper, *5Qs with Rick Weiland about his 'trifecta' of ballot measures*, RAPID CITY J. (Oct. 7, 2017), https://rapidcityjournal.com/news/election/5qs-with-rick-weiland-about-his-trifecta-of-ballot-measures/article_7fad2b2e-d33d-5e85-9d0e-603f323b2fbb.html.

10. WILLIAM O. FARBER, THOMAS C. GEARY & LOREN M. CARLSON, GOVERNMENT OF SOUTH DAKOTA 80 (3d ed. 1979). Loren M. Carlson was the state's first full-time director of the Legislative Research Council (1955-1959) and the first Director of South Dakota's unified budget (1963-1968). He was a staff member for Senators Francis Case, Joe Bottum, and U.S. Congressman Larry Pressler. He was also the University of South Dakota's Dean of Continuing Education (1968-1989) and Professor of Political Science, from 1968 to his retirement in 2001.

11. *Infra* Part X.

II. BRIEF HISTORY OF THE VOTER INITIATIVE IN SOUTH DAKOTA

In the 1885 Dakota Territory Constitutional Convention,¹² a “Dakota Plan” was considered and was also considered in the 1889 constitutional conventions of North Dakota and South Dakota.¹³ The 1885 Constitutional Convention of Dakota Territory considered a petition by delegate W. H. Lyon for direct legislative power by the people. The petition read:

I respectfully request that this Convention incorporate a provision in this constitution, that all appropriation bills for new public institutions, and permanent improvements to existing institutions, and all laws of general interest to the people should be drafted by the Legislature, and submitted for the people to enact or reject, at annual or biennial elections, and that the Legislature be given only the power to pass appropriation bills for the ordinary running expenses of the State, and to enact the necessary laws of a local, special and private nature, that can not well be provided for by general acts.

Respectfully, W.H. Lyon.¹⁴

The petition was referred to the convention’s Legislative Committee and was not contained in the Legislative Committee report, ending its consideration.¹⁵

12. The convention involved many committees, and there is no public record of the committees’ discussions. See Catherine Lucie Zumpano Chicoine & Patrick M. Garry, *The 1885 and 1889 Constitutional Convention Debates*, 59 S.D. L. REV. 179, 181 (2014).

13. R. ALTON LEE, *PRINCIPLE OVER PARTY: THE FARMERS’ ALLIANCE AND POPULISM IN SOUTH DAKOTA, 1880-1900*, at 19-20, 54 (2011). The origin myths of the South Dakota voter initiative are many and varied. Alternative explanations for the origin are possible. Ballotpedia credits three individuals. *History of Initiative & Referendum in South Dakota*, BALLOTPEDIA (citing *Initiative and Referendum Institute: South Dakota*, UNIV. S. CAL., <http://www.iandrinstute.org/states/state.cfm?id=24> (last visited Mar. 2, 2022)), https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_South_Dakota (last visited Mar. 2, 2022). The origin within South Dakota centered on Walter E. Kidd of Brown County. *Id.* Kidd spent “half his mature years” in farming and the other half in “newspaper work” as publisher of the *DAKOTA RURALIST*, and as the chairman of the Populist Party Central committee. *Id.* Ballotpedia’s second origin myth credits an article by a Doane Robinson, originally published in the *ST. PAUL PIONEER PRESS* and reprinted in the October 1910 *Equity Series, I&R*

“originated in the fertile mind of Rev. Robert W. Haire, a Catholic clergyman of Aberdeen . . . With him the plan was pure invention, for he had not heard of the Swiss I&R when in 1885 he proposed a people’s legislation embodying the features of the present constitutional provision. Father Haire was active in the Knights of Labor and he exploited his scheme widely through the literature of that organization.”
Later the Farmers’ Alliance took it up.

Id. South Dakota historians (e.g., Grant and others) credit delegate Lyon for bringing the idea to the attention of the 1885 Constitutional Convention. This convention was not authorized by Congress as part of any statehood enabling legislation.

14. 1 DOANE ROBINSON ET AL., *Fifth Day*, in *DAKOTA CONSTITUTIONAL CONVENTION* 111, 113 (1885).

15. See *id.* at 129, 138-43. See generally *Brendtro v. Nelson*, 2006 SD 71, 720 N.W.2d 670 (discussing a history of South Dakota’s initiative and referendum process); David Gilbertson & David A. Barari, *Indexing the South Dakota Constitutional Conventions: A 21st Century Solution to a 125 Year Old Problem*, 53 S.D. L. REV. 260 (2008) (discussing South Dakota’s Constitutional Conventions). Former Chief Justice David Gilbertson and David A. Barari note the convention kept a detailed record of proceedings and debates. Gilbertson & Barari, *supra* note 15, at 261 (citing 1 *Constitutional Debates of South Dakota* 54 (1907)).

Still, these provisions were quite similar to those of the “Dakota Plan” in that all general laws and appropriations for new public institutions and permanent improvements to existing institutions were to be drafted by the legislature and submitted to a vote of the people at the next annual or biennial election.¹⁶ The legislature was to have the power to appropriate monies for the ordinary expenses of the state and its existing institutions and necessary laws of a local, special, and private nature.¹⁷ Essentially, under this plan, all laws of any importance were to be subjected to popular vote.¹⁸

To implement the “Dakota Plan,” it was proposed that the legislature would be denied any important lawmaking powers.¹⁹ Laws concerning corporations, railroads, appropriations, and similarly essential statutes should be formulated by the legislature but only adopted by a majority vote of the people at special elections.²⁰ The idea was to separate the deliberative function from the enacting function and to separate the enacting function from the deliberative function.²¹

Father Robert Haire, a Catholic priest from Aberdeen, proposed replacing the state legislature with a plan for each county to elect a “state’s committee man” to draft bills for his home-county voters.²² At the point at which twenty-five percent of the counties agreed on a measure, it would be printed and distributed to the voters.²³ The measure would then be subject to a voter referenda at the next general election.²⁴ The movement for voter-initiated legislation did not die in 1885 but continued as the Farmer’s Alliance, the Knights of Labor, the Initiative

16. *Brendtro*, 2006 SD 71, ¶ 21, 720 N.W.2d at 677.

17. *Id.*

18. *Id.* ¶ 22.

19. *Id.*

20. 2 DOANE ROBINSON ET AL., *Twenty-Third Day*, in DAKOTA CONSTITUTIONAL CONVENTION 358-59 (1889).

21. JOHN D. HICKS, THE CONSTITUTIONS OF THE NORTHWEST STATES 18, 40 (1923), <https://digitalcommons.law.uw.edu/selbks/1>.

22. Grant, *supra* note 1, at 394. See also Brad Tennant, *People’s Democracy: The Origins of the Initiated Measure in South Dakota*, in 2 PLAINS POLITICAL TRADITION: ESSAYS ON SOUTH DAKOTA POLITICAL CULTURE 8-29 (2014) (discussing Father Haire). Father Robert Haire (1845-1916) was a Roman Catholic Priest who after his ordination, relocated to Dakota Territory in 1879 to serve mission churches in Southeast Minnesota, and what would become Northeast South Dakota and Southeast North Dakota. Robert W. Galler Jr., *Haire, Robert (1845-1916)*, ENCYCLOPEDIA OF THE GREAT PLAINS, <http://plainshumanities.unl.edu/encyclopedia/doc/egp.pd.027> (last visited Mar. 9, 2022). Haire supported the Presentation Sisters establishing St. Luke’s Hospital and an associated school in Aberdeen, SD, campaigned for women’s suffrage, worker’s rights and increased voter participation. *Id.* Haire’s activism led Bishop Martin Marty to suspend him from parish work, but Haire continued to lead services and his fluid party membership in the Populist, Republican, and later Socialist parties helped the cause of the initiative and referendum in South Dakota. *Id.*

23. LEE, *supra* note 13, at 155.

24. Tennant, *supra* note 22, at 8-29; Patrick Gallager, *Faith in the Voters*, 25 S.D. MAG. 60, 60-65 (Sept./Oct. 2009) (noting that the vote would take place on the first Monday after July 4 to confirm or reject the proposed law). See also Grant, *supra* note 1, at 394 (addressing that “[w]hen a bill had been demanded by more than 25 percent of the counties in the state, it would be printed in cheap pamphlet form and distributed to the voters.”); Steven L. Piott, *The Origins of the Initiative and Referendum in South Dakota: The Political Context*, 12 GREAT PLAINS Q. 181, 181-93 (1992), <http://www.jstor.org/stable/23531563> (discussing that “[w]hen more than 25 percent of the counties supported any one bill, copies of the measure would be printed and circulated in the pamphlet form to the voters, particularly workers and farmers, who would accept or reject the proposals at the general election.”).

and Referendum League, and the Populist Party kept the issue before the people through a non-partisan educational campaign that turned into a political movement.²⁵ The movement was spurred by economic unrest, the complacency and alleged corruption of political leaders and state and local officials, as well as a spirit of political independence.²⁶ Direct democracy was seen as a way to “cleanse the legislative process.”²⁷ The Sioux Falls Convention of 1885 concluded that:

“[T]he ordinary form of local government has proved a failure”; that it has yielded everywhere in this republic “the most corrupt government on the face of the earth”; that there is not a local legislature in the country which does not “refuse to enact just laws that are demanded by the people”; . . . “practically they are our masters, and have almost unlimited power over our lives, liberty, and property”; that while they are beyond the reach of their constituents; that while, for years, constitution makers have been devising ways and means to restrain them, they have steadily grown worse, “until the sitting of an average legislature is becoming a public calamity”; that “representative law making is one of the worst evils of the age”; and that the evil cannot be remedied “until deputized law making is abolished from the face of the earth.”²⁸

Haire was attracting little support until economic conditions “worsened” in the 1890s.²⁹ Haire argued that the process would prevent the “skullduggery and passing bills at the last hour of the legislature.”³⁰ Henry L. Loucks also promoted the initiative and referenda in the *Dakota Ruralist*. Loucks provided this explanation of the reforms:

The Referendum and Initiative will make Legislative Corruption ALMOST IMPOSSIBLE, BY Making legislators The SERVANTS and not the MASTERS of the people. NECESSARY BEFORE WE ATTEMPT THE NATIONALIZATION OF TELEGRAPHS, RAILROADS AND MINES, And the Municipalization of Street Cars, Water and Gas Works, Telephones and Electric Lights. THE ONLY EFFECTUAL METHOD OF CONTROLLING Monopolies,

25. ROBINSON, *supra* note 14, at 351-54; Grant, *supra* note 1, at 390. See also BURTON ELLSWORTH TIFFANY, THE INITIATIVE AND REFERENDUM IN SOUTH DAKOTA 12 (1924) (discussing how the idea of voter-initiated legislation moved through different political groups).

26. HERBERT S. SCHELL, HISTORY OF SOUTH DAKOTA 223-38 (John E. Miller, 4th ed. 2004).

27. Grant, *supra* note 1, at 394.

28. HICKS, *supra* note 21, at 39 (citing CHICAGO TIMES, Sept. 14, 1885, at 2; CHICAGO TIMES, Sept. 17, 1885, at 4). Note that deputized law making is a “republican” or representative form of government, required by the U.S. Constitution. See *id.*

29. LEE, *supra* note 13, at 155. See also Grant, *supra* note 1, at 394-97 (discussing the rise in popularity of the initiative and referendum processes). See generally *infra* note 46 (listing the states that have initiatives and referendums, which includes South Dakota).

30. LEE, *supra* note 13, at 155.

Trusts and other Gigantic Corporations. Will PREVENT Class legislation, Subsidies, Land Grants, Credit Mobilizers, Special Privileges, Fat Contracts. Will Make the Producer and not the Parasite (sic) THE CAPITALIST. Will Put Legislation, and, therefore, the whole Government, in the Hands of the People.³¹

The people of Dakota had taken the motto suggested by Joseph Ward, “Under God the People Rule,” and had convinced themselves that the only way the people could rule was to vote on all laws.³² This provision was for a very brief constitution or a very large one as the people voting on the acts would exercise the same power as they did in adopting the constitution, and every measure contrary to that instrument would rate as an amendment.³³

Popular support was increasing outside the Republican Party.³⁴ The People’s Party adopted the initiative and referenda in a party platform: “Believing that all laws should emanate (sic) from the people, and that they alone should have the veto power, we demand that the voters of South Dakota be given absolute control of all legislation by means of the initiative and referendum at the earliest possible date.”³⁵

The election of Governor Andrew E. Lee of Vermillion in 1896 and his slim re-election, but with a legislative majority of the fusion of Populists and Democrats in 1898, offered an opportunity for the legislature to move on the measure.³⁶ Governor Lee noted, “I can see the occupation of the lobbyist will be gone under direct legislation.”³⁷ By the mid-1890s, Republicans were beginning to “come around.” Some of this movement came as a result of the defalcation of state treasurer Thomas Taylor who absconded with much of the state treasury.³⁸ A coalition of Populists, Democrats, and “Silver Republicans” passed the joint resolution in the Senate.³⁹ But getting the proposed amendment through the legislature and onto the ballot was only the first step.

As the electoral fusion of the Democratic Party and the Populists was “breaking down,” Haire kept after the initiative.⁴⁰ Haire rejoined the Republican Party in 1898, providing an “insider” to push the resolution to amend the constitution.⁴¹ Haire and some other supporters argued that neither the initiative

31. *Id.* at 156.

32. *Id.*

33. *Id.*

34. *Id.*

35. BASFORD, SOUTH DAKOTA POLITICAL HAND BOOK AND LEGISLATIVE MANUAL: COMPILED FROM THE RETURNS OF 1892 AND 1894, at 8-9 (1894).

36. LEE, *supra* note 13, at 156-57.

37. *Id.* at 157.

38. See C. Perry Armin, *A State Treasurer Defaults: The Taylor Case of 1895*, 15 S.D. HIST. 177, 177-99 (1986) (discussing the Taylor case); SCHELL, *supra* note 26, at 238. See generally SOUTH DAKOTA LEGISLATURE, REPORT OF JOINT COMMITTEE TO INVESTIGATE THE DEFALCATION OF W. W. TAYLOR LATE TREASURER OF SOUTH DAKOTA (1895) (detailing the investigation into Treasurer Taylor).

39. SCHELL, *supra* note 26, at 240-41.

40. LEE, *supra* note 13, at 150-51.

41. *Id.* at 150-55.

nor the referendum would replace representative government.⁴² Instead, the people would be put on equal standing with the legislature to create laws when the legislature refused to act and to reserve the right to sanction or veto acts of the legislature by putting a measure to a vote of the people.⁴³ J. E. Stahl, the proprietor of the *Daily Leader* (Madison, SD), claimed:

It keeps a check upon the schemes, jobs or vagaries of the legislature, destroys the work of the paid lobbyist, the hired legislator or the influence of the corporation or its boss. Any legislation that passes a legislature by corruption and duress of its members or a portion of them and is likely to work injury to the people can be headed off by the referendum of the iniquitous law to a vote of the people, and vice versa, any good law the people want and a legislature will not pass the people can demand and obtain by invoking the initiative. . . . It awakens an intelligence and interest in state affairs and government, electors feel more the responsibility of their suffrage, honesty is raised to its proper throne as a virtue and public service is then recognized as a public trust⁴⁴

At the 1898 general election, voters adopted the amendment by a vote of 23,816 to 16,483 (fifty-nine percent), though the right was not exercised until 1908 to enact referred laws for “actions for divorce,” “protection of quail,” and “Against Sunday Performance” and the first initiative put to a vote of the people allowing “Local Liquor Option” failed.⁴⁵ In 2022, South Dakota is one of twenty-six states that allow voters to initiate their own laws or refer acts of the legislature to a vote of the people.⁴⁶

III. CHANGES TO THE INITIATIVE IN ANOTHER EARLY-ADOPTER STATE: OREGON

In 1902, Oregon adopted the initiative, referendum, and recall, permitting voter initiatives for statutory changes and constitutional changes, veto referendum,

42. *Id.* at 155.

43. *Id.* at 156-57. Populist Henry L. Loucks announced by letter he was rejoining the Republican Party in 1898, providing an “insider” to try to convince Republicans to vote to amend the constitution. Tennant, *supra* note 22, at 8, 17.

44. J. F. Stahl, THE DAILY LEADER (Madison, S.D.), Oct. 15, 1898, <https://chroniclingamerica.loc.gov/lccn/sn99062034/1898-10-15/ed-1/seq-2/>.

45. S.D. SEC’Y OF STATE, BALLOT QUESTION TITLES AND ELECTION RETURNS 1890-2020 [hereinafter SOUTH DAKOTA BALLOT QUESTION TITLES AND ELECTION RETURNS 1890-2020], <https://sdsos.gov/elections-voting/assets/BallotQuestions.pdf> (last visited Feb. 21, 2022). See also Clarence A. Berdahl, *The Richards Primary*, in *Legislative Notes and Reviews*, 14 AM. POL. SCI. REV. 93, 93-94 (Charles Kettleborough ed., 1920) (discussing the “Richards Primary,” which was passed through the initiative process).

46. NAT’L CONF. OF STATE LEGISLATURES, *Initiative and Referendum States*, <https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> (last visited Mar. 23, 2022); *States with initiative and/or veto referendum processes*, BALLOTPEdia, https://ballotpedia.org/Ballot_initiative (last visited Mar. 23, 2022).

and recall.⁴⁷ Oregon scholars noted that the drive toward the initiative, referendum, and recall began in 1892 in Oregon.⁴⁸ Like South Dakota, Oregonians had multiple organizations supporting the campaign, the Direction Election League as well as labor unions, the Populist Party, and eventually, the Republican and Democratic Parties.⁴⁹ Again, they too believed that the government was getting away from them and desired more direct control, both in the making of the laws and their enforcement: “More potent, however, . . . was the failure of the legislature to respond to the demand of the people for the enforcement of laws respecting control of corporations, taxation, and kindred subjects affecting public interests.”⁵⁰

This is contrasted with an account shortly after the election creating this right for citizens:

Although it was adopted by a majority of eleven to one, a great many people did not know what they were voting for. The friends of the measure had been working judiciously for it for years, had secured the endorsement of the newspapers, many of the leading men of the state, and had by shrewd management got possession of the political parties, to the extent, at least, that all candidates “vote for the initiative and referendum” on their election cards and bill posters and were all lined up to advocate the measure during election . . . many did not know what they were voting for, simply following the rest.⁵¹

In South Dakota, the discussion of the Australian (secret) ballot was enabled through the constitutional convention, whereas Oregonians, which achieved statehood in 1859, were forced to resort to lobbying their legislature to enact the Australian ballot law.⁵² This is an example of a law the people wanted and which

47. JAMES D. BARNETT, *THE OPERATION OF THE INITIATIVE, REFERENDUM, AND RECALL IN OREGON* 6-7 (1915).

48. *Id.* at 3.

49. Oregonians seem to forget that South Dakota was the first state to formally adopt the initiative and referendum. In a state and local government textbook, three Oregon State University professors insist that the system be called the “Oregon System.” CHRISTOPHER A. SIMON ET AL., *STATE AND LOCAL GOVERNMENT AND POLITICS: PROSPECTS FOR SUSTAINABILITY* 206, 213, 574 (Oregon State Univ., 2d ed. 2018).

50. BARNETT, *supra* note 47, at 4 n.1 (citing J. N. Teal, *Practical workings of the Initiative and Referendum in Oregon*, in CINCINNATI CONFERENCE FOR GOOD CITY GOVERNMENT 309, 310 (1909)).

51. BARNETT, *supra* note 47, at 4 n.1 (citing *Testimony of Citizens of Oregon*, 38 ARENA 83, 83-84 (1907) (Statement of H. Denglinger)). Barnett cites H. Denlinger’s statement in the ARENA apparently to note that “Such statements are repeated by Oregonians again and again, both in regard to the members of the legislature and the people and are widely believed to be true.” *Id.* The Australian ballot is often referred to as a secret ballot, where voters mark their choices in privacy on uniform ballots printed and distributed by the government. Prior to this time, political parties often distributed ballots, with different colored paper designating the political party which distributed the ballots. The Australian ballot curbed the power of intimidating landlords and vote-buying by the wealthy and political party machines. Eldon Cobb Evans, *A History of the Australian Ballot System in the United States, Chapter 1*, WIKISOURCE, https://en.wikisource.org/wiki/A_History_of_the_Australian_Ballot_System_in_the_United_States/Chapter_I (last visited Mar. 30, 2022).

52. 2 ROBINSON ET AL., *supra* note 20, at 297-300, 312-13, 317-27. See BARNETT, *supra* note 47, at 4; Chicoine & Garry, *supra* note 12, at 198.

was enacted grudgingly after long-continued agitation.⁵³ The threat of the initiative served as both a mechanism to get a recalcitrant legislature to consider legislation that they would not have otherwise considered and, if strong enough feelings persisted, to create the law the legislature would not enact.⁵⁴

The concept behind the voter initiative is simple in concept. The initiative is the right of an individual or group of voters to draw up a completely formulated bill and to require, upon validated petition of an established percentage of the electorate, that the measure without amendment be submitted to popular vote.⁵⁵ If accepted by a majority of the voters, the bill becomes law.⁵⁶ The South Dakota Supreme Court in *Byre v. City of Chamberlain*⁵⁷ succinctly distinguished an initiative from a referendum:

Initiative is the constitutional reservation of power in the people to propose bills and laws and to enact or reject them at the polls independent of the legislative assembly. Referendum, on the other hand, is a right constitutionally reserved to the people of the state or local subdivisions thereof to have submitted for their approval or rejection any act, or part of any act, passed by the legislature, which in most cases would, without action on the part of the electorate, become law.⁵⁸

IV. POPULAR OR “VETO” REFERENDUM

Much of the early *usage* of the direct legislation in South Dakota involved the “popular referendum” or “veto referendum,” which allows voters to approve or repeal an act of the legislature.⁵⁹ This is distinct from a legislative referendum where a legislative body can directly refer a law to a vote of the people.⁶⁰

53. BARNETT, *supra* note 47, at 3-4.

54. *Id.*

55. See TIFFANY, *supra* note 25, at 27-32 (discussing the initiative in operation); see also Grant, *supra* note 1, at 391 n.2 (noting that Tiffany’s study is “weakened by numerous factual errors and omissions of key source materials.”). See generally S.D. DEP’T OF HIST., DIV. OF LEGIS. REFERENCE, HISTORY OF THE INITIATIVE AND REFERENDUM IN SOUTH DAKOTA: LEGISLATIVE REFERENCE BULLETIN NO. 3 (1918) (giving a general overview of the history of the initiative and referendum process in South Dakota).

56. Grant, *supra* note 1, at 391.

57. 362 N.W.2d 69 (S.D. 1985).

58. *Id.* at 79.

59. Grant, *supra* note 1, at 391; BARNETT, *supra* note 47, at 5. “The referendum is a plebiscite by which the people as a whole approve or reject any measure previously adopted by the legislature, or referred to them directly by the legislature.” BARNETT, *supra* note 47, at 5. The first is a veto referendum and the second is a legislative referendum.

60. Grant, *supra* note 1, at 391. See C. KENNETH MEYER, MITCHEL J. BEVILLE, TERRENCE L. BERENDS & JULIA M. SMENDZUIK, DIRECT DEMOCRACY IN SOUTH DAKOTA: THE PEOPLE CONDUCTING THEIR OWN BUSINESS 1-6 (1979). Observation by author.

Twenty-three states have popular referendum processes.⁶¹ By delivering signed petitions bearing the signatures (among other identification) of five percent of the votes cast for governor at the most recent gubernatorial election, the voters cast yeas and nays to determine the fate of a bill enacted by the legislature.⁶² Governor Peter Norbeck, who had supported the initiative and referendum, thought differently by the time he was elected Governor. He noted in his 1917 message to the Legislature,

Much was hoped for from the referendum feature, which contains a provision under which those who are dissatisfied with the law passed by the legislature may upon the filing of a petition signed by five per cent of the votes suspend the operation of the law until the next election, at which time the voters may either ratify or defeat it. It was believed that this would be a convenient weapon in the hands of the people to defeat legislation detrimental to the interests of the people and of the state. In actual practice it is proved a disappointment to its most enthusiastic champions, of which I was one, for it has failed of its purpose, but it has actually become an instrument in the hands of special interests, and especially corporate interest to whom it is no hardship to secure the necessary signatures to a referendum petition.⁶³

Governor Norbeck went on to recall some of the most unfortunate uses of the referendum.⁶⁴

The first use of the referendum feature was the suspension of chapter 132 of the laws of 1907 relating to divorces. South Dakota was at that time the mecca for the divorce business of the United States owing to the short term of residence required. In response to public demand the above law was passed, which required a longer term of residence and posted on the granting of divorces. Opposition to this law came from those deriving revenue from the business. They raised a small fund and had no difficulty in securing the necessary signatures to a referendum petition. This suspended the operation of the law until the next general election and the inequity continued in spite of the action of the legislature. In 1909, at the suggestion of train men, as well as the traveling public, enacted a law requiring electric headlights for locomotives. The headlights then in use were the old kerosene lamps, entirely inadequate for the purpose. Wrecks frequently

61. NAT'L CONF. OF STATE LEGISLATURES, *Initiative and Referendum Processes* (Jan. 4, 2022) [hereinafter *Initiative and Referendum Processes*], <https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx#/>.

62. *State v. Summers*, 144 N.W. 730, 731 (S.D. 1913) (noting this is, in effect, the exercise of veto power).

63. William O. Farber, *Constitutional Revision Comments in Gubernatorial Messages and Party Platforms*, PUB. AFFS. 1, 5 (1969).

64. *Id.* at 5.

occurred, resulting in the loss of life and property. But after the law had been passed the referendum was invoked. It was very convenient and comparatively inexpensive for the railroad companies to secure signatures to the necessary referendum petition, which suspended the operation of the law and by the repeated use of this method delayed the installation of electric headlights for a period of four years.⁶⁵

Governor Norbeck provided additional examples of what he considered misuse of the referendum petition process to delay the implementation of laws for the betterment of society rather than to veto laws objectionable to the public.⁶⁶ This charge follows the claim that special interests may commandeer the Initiated Amendment and Initiated Measure and Popular Referenda to the detriment of the general interest for which it was designed as a “safety valve” to act in a manner that the legislature does not act.⁶⁷

A citizen or group of citizens who do not like a legislative act can prevent the act from becoming law by gathering the signatures of registered voters equal to five percent of the total vote for governor in the last gubernatorial election (16,961, which constitutes five percent of all votes cast for all gubernatorial candidates in the 2018 general election for governor).⁶⁸ Petitions must be filed within ninety days of adjournment of the legislative session in which the measure was passed.⁶⁹ The process is similar to the initiative, but the Attorney General explanations and comments are not controversial in that a popular referenda is truly for the citizens to act as the final vote on legislation.⁷⁰

Once a referendum petition is filed and signatures validated, the subject of the legislation cannot take effect prior to the referendum election.⁷¹ “[A]n initiative election may be avoided if the appropriate [legislative] body enacts the proposed measure prior to the election date”⁷² and may be withdrawn 120 days prior to the election.⁷³

The acceptance and validation of a referendum petition by the Secretary of State prevents the law from taking effect until the voters have rendered their verdict at the subsequent general election.⁷⁴ Referenda that have been approved

65. *Id.* at 5-6.

66. *Id.*

67. *Id.*

68. S.D. SEC’Y OF STATE, *Signature requirements and general ballot question information*, <https://sdsos.gov/elections-voting/upcoming-elections/ballot-question-information/signature-requirements-ballot-question-petitions.aspx> (last visited Mar. 24, 2022). *See also* SDCL § 2-1-3.1 (2021) (codifying this practice).

69. *Brendtro v. Nelson*, 2006 SD 71, ¶ 23, 720 N.W.2d 670, 678 (quoting *Hodges v. Snyder*, 178 N.W. 575, 577 (S.D. 1920)).

70. *See State v. Summers*, 144 N.W. 730, 733 (S.D. 1913).

71. S.D. CONST. art. III, § 1.

72. PATRICK M. GARRY, *THE SOUTH DAKOTA STATE CONSTITUTION 56* (G. Alan Tarr ed., Oxford Univ. Press 2014) (citing *State v. Hahn*, 9 N.W.2d 502 (S.D. 1943)).

73. SDCL § 2-1-2.2 (2021) for withdrawal of initiated constitutional amendments and SDCL § 2-1-2.3 (2021) for withdrawal of initiated measures.

74. S.D. CONST. art. III, § 1.

by the voters take effect “on the first day of July after the completion of the official canvass by the State Canvassing Board.”⁷⁵ If the canvass reveals a majority vote “no,” the law does not go into effect.⁷⁶

The state constitution (Article III, section 1) exempts from the referendum process those legislative acts which are “necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions.”⁷⁷ Whether a law falls within these definitions is a question to be determined finally by the courts.⁷⁸ The Legislature cannot prevent the operation of the referendum by arbitrarily declaring it to fall among the exempted classes of legislation,⁷⁹ though the courts seem to liberally apply this requirement and usually defer to the legislature.⁸⁰

A. RECALL

South Dakota does not have provisions for recall or ouster of elected officials at the state government level. A state official can be removed from office by the voters at the next election, term limits of office, or an impeachment. The South Dakota House of Representatives impeached Attorney General Jason Ravnsborg on April 12, 2022, for a Senate trial.⁸¹

V. INITIATED AMENDMENT

The meaning of constitutions may change because of new interpretations given by the United States or South Dakota Supreme Court or through various actors ignoring constitutional provisions.⁸² The formal method of amending the state constitutions and ensuring the organic law is adapted to new conditions is through amendment of the language.⁸³ The framers of the South Dakota Constitution borrowed heavily from the constitutions of the states from which they left to come to the Dakota Territory.⁸⁴ This left a variety of provisions, some of

75. SDCL § 2-1-12 (2021).

76. *See id.*

77. S.D. CONST. art. III, § 1.

78. *State v. Van Loh*, 191 N.W.2d 294, 295 (S.D. 1971) (quoting *State ex rel. Flanagan v. Taylor*, 178 N.W. 985, 986 (S.D. 1920)).

79. *See id.* at 296 (quoting *Engelcke v. Farmers State Bank of Canistota*, 264 N.W. 288, 291 (S.D. 1932)).

80. GARRY, *supra* note 72, at 57.

81. In the Second Special Session, 2021, South Dakota Legislature, the House of Representatives, adopted HR 7002, H.J. 31. The senate trial was held on June 21, 2022, where the Senate passed Senate Resolution 703 S.J. 18 removing Ravnsborg from office and prohibiting him from holding an office of profit or trust in the future. *But see* Seth Tupper & Joshua Haiar, *No, this isn't South Dakota's first impeachment process*, S.D. PUB. BROAD. (Feb. 10, 2022, 7:42 AM), <https://listen.sdpb.org/crime-courts/2022-02-10/no-this-isnt-south-dakotas-first-impeachment-process> (discussing that South Dakota has twice initiated impeachment proceedings).

82. KEVIN B. SMITH & ALAN GREENBLATT, *GOVERNING STATES AND LOCALITIES* 73-75 (6th ed. 2018).

83. *See* S.D. CONST. art. XXIII, § 1.

84. *See* HICKS, *supra* note 21, at 15.

which were in conflict with each other and others unenforceable because the provisions were the enumerated province of the national government in the constitution of 1787.⁸⁵

At the time, constitutional amendments required a two-thirds majority of the membership of each chamber of the legislature to put the proposed amendment to the voters. Constitutional amendments in the state's early history involved the fields of temperance; women's, Native American's, and non-citizen's suffrage; and primary election reform, accounting for ten referendum proposals.⁸⁶ There were sixty-eight proposed amendments in the first thirty years of statehood, with thirty-five adopted by popular vote.⁸⁷ Eventually, the large number of attempts to amend the constitution gave rise to calls to revise the entire document by calling for a constitutional convention.⁸⁸ "Twice, legislative proposals to hold conventions were turned down, in 1914 and again in 1924."⁸⁹ The survey of South Dakota's government by the New York Bureau of Municipal Research proposed sweeping changes to make state government more efficient in light of the depression caused by the rapid and great decline in farm commodity prices after the end of World War I.⁹⁰ The situation worsened as the mismanagement of the Rural Credits program was discovered, as mismanagement often occurs when there is an attempt to get governmental money "out the door."⁹¹ By 1924, the state had outstanding general obligation debt of forty million dollars (almost \$634 million in terms of 2021 buying power).⁹² Still, the voters rejected the call for a constitutional convention. In addition to Governors Robert S. Vessey (1909) and Frank Morris Bryne (1913), who had called for a constitutional convention in their respective messages to the legislature,⁹³ Governors Sigurd Anderson (1951), Joseph Jacob Foss (1955), Ralph E. Herseth (1959), and Archibald M. Gubbrud (1961) called for a convention in each of their initial messages to the legislature to no avail.⁹⁴ While Governor Gubbrud's successor, Nils Boe, did not push for a convention, Governor Frank Farrar, in his 1969 message to the Legislature, noted: "[w]e also must get on with the business of constitutional revision. . . . We

85. *Id.*

86. ALAN L. CLEM, *SOUTH DAKOTA POLITICAL ALMANAC* 36-37 (1962).

87. *Id.*

88. FARBER, *supra* note 63, at 5.

89. FARBER ET AL., *supra* note 10, at 24.

90. See N.Y. BUREAU OF MUN. RSCH., *GENERAL REPORT ON THE ADMINISTRATIVE ORGANIZATION AND MANAGEMENT OF THE GOVERNMENT OF THE STATE OF SOUTH DAKOTA: PART I* 2-3 (1922).

91. See *id.*; Gerald W. Wolff & Joseph H. Cash, *South Dakotans Remember the Great Depression*, 19 S.D. HIST. 226, 228 (1989), <https://www.sdhspress.com/journal/south-dakota-history-19-2/south-dakotans-remember-the-great-depression/vol-19-no-2-south-dakotans-remember-the-great-depression.pdf>.

92. Gilbert C. Fite, *South Dakota's Rural Credit System: A Venture in State Socialism, 1917-1946*, 21 AGRIC. HIST. 239, 242 (1947). Buying power calculated through conversion tables provided by the Minneapolis Federal Reserve Bank, using October 24, 2021 data. *What is a Dollar Worth?*, FED. RSRV. BANK OF MINNEAPOLIS, <https://www.minneapolisfed.org> (last visited Oct. 24, 2021).

93. FARBER, *supra* note 63, at 1.

94. *Id.* at 3-4.

cannot run government in 1969 on the rule book of 1889 and you cannot continue with a patch-work job on the leaky roof of our basic law.”⁹⁵

Governor Farrar and the Legislature’s solution was to charge a commission to study the constitution and make recommendations.⁹⁶ The Constitutional Revision Commission (created by 1969 Senate Bill 1) first decided not to propose a convention, but to set about studying the government to let the electorate express itself on individual issues rather than on an entire revised constitution.⁹⁷ The political and economic costs would be considerably less, as later evidenced by North Dakota spending over three hundred thousand dollars to hold a convention to develop a constitution that was voted down in 1972.⁹⁸ After two failures, North Dakota’s experience, the successes of forming commissions to review constitutional provisions, and having much of their work result in amendments, it seems there was little appetite for revising the constitution through a convention, despite its availability.⁹⁹ At the time, it was becoming abundantly clear that the constitution could only be adopted amendment by amendment, not by constitutional convention, although this was theoretically possible.¹⁰⁰

The revised amendment process to enable citizens to initiate proposals to amend the constitution was approved in the 1972 general election.¹⁰¹ Since that time, the people or the legislature may propose amendments through initiative or by a majority vote of all members of each house of the legislature.¹⁰² Initiated amendments require petition signatures of ten percent of the total votes cast for governor in the last gubernatorial election, with the petition containing the text of the proposed amendment and the names and addresses of its sponsors so long as the petitions containing valid signatures are filed with the Secretary of State at least one year prior to the next general election at which the proposal is submitted to the voters.¹⁰³ The final sentence noted that “[a] proposed amendment may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment.”¹⁰⁴ A constitutional convention

95. S. JOURNAL, 44th Sess. 31 (S.D. 1969) (quoting Governor Frank L. Farrar).

96. FARBER ET AL., *supra* note 10, at 24.

97. *Id.*

98. *Id.* The buying power of three hundred thousand dollars in 1972 would be \$1.95 million in 2021. *What is a Dollar Worth?*, *supra* note 92.

99. SMITH & GREENBLATT, *supra* note 82, at 71.

100. See Johnathan Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 1, 77 (2019). The U.S. Constitution has been amended seventeen times since 1791, indicating the difficult process to amend the constitution, despite calls for an “Article V convention.” Sarah Pruitt, *How the U.S. Constitution Has Changed and Expanded Since 1787: Through amendments and legal rulings, the Constitution has transformed in some critical ways*, HIST. (Sept. 16, 2020), <https://www.history.com/news/constitution-amendments-changes>. See also FARBER ET AL., *supra* note 10, at 24 (discussing both the proposal and rejections of those proposals to hold constitutional conventions).

101. SOUTH DAKOTA BALLOT QUESTION TITLES AND ELECTION RETURNS FROM 1890-2020, *supra* note 45. Amendment E passed by a vote of 173,541 to 84,939. *Id.*

102. See S.D. CONST. art. XXIII, § 1.

103. *Id.*

104. *Id.*; H.R.J. Res. 1006, 93rd Leg., Reg. Sess. (S.D. 2018). The amendment added the following italicized language to the last sentence of Article XXIII, § 1: “however no proposed amendment may embrace more than one subject. *If more than one amendment is submitted at the same election, each*

to amend the state's organic law became the only mechanism to amend several sections of the constitution with one ballot question when the voters approved amendment Z in 2018, requiring proposed constitutional amendments to embrace only one subject and, if more than one amendment is submitted at the same election, each amendment should be prepared and distinguished so that it could be voted upon separately.¹⁰⁵

The standards for initiated constitutional amendments are higher than initiated measures (which amend statutes) as the petition must have signatures of registered voters equal to ten percent of the total vote for governor in the last gubernatorial election (33,921 signatures through 2022) for a statewide election and must be filed in the Secretary of State's office one year before the general election.¹⁰⁶ In 1988, voters approved a measure to remove the legislature from the petition process once the signatures had been verified.¹⁰⁷ Voters approved Amendment A with an affirmative 52.2% of the vote.¹⁰⁸ The 1988 measure removed the requirement that the legislature enact and submit a measure proposed by the voters before it could be placed on the ballot.¹⁰⁹ This may have eliminated discretion that the legislature may have previously held regarding submission of a voter-proposed measure to the electorate as they had attempted to exercise in 1905 with the primary election law.¹¹⁰ It did not, however, prohibit the possibility of the legislature to hold hearings and deliberate on the merits of the issue.¹¹¹

South Dakota's petitioners may gather signatures beginning twenty-four months preceding the election date designated on the petition.¹¹² The rationale for the minimum one-year delay between filing petitions and the election is to allow the Legislature an opportunity to examine the proposal and perhaps to

amendment shall be so prepared and distinguished that it can be voted upon separately." H.R.J. Res. 1006 (emphasis added).

105. H.R.J. Res. 1006 (codified as S.D. CONST. art. XXIII, § 1). The House's Joint Resolution 1006 was approved by voters 195,790 to 117,947. SOUTH DAKOTA BALLOT QUESTION TITLES AND ELECTION RETURNS 1890-2020, *supra* note 45, at 26. One might consider whether a petition drive could involve separate amendments each to be voted upon separately and meet constitutional muster. However, the text of the existing sentence in Article XXIII section 1 speaks to the singular for petition and proposed amendment. S.D. CONST. art. XXIII, § 1 ("The petition containing the text of the proposed amendment and the names and addresses of its sponsors shall be filed at least one year before the next general election at which the proposed amendment is submitted to the voters.").

106. S.D. CONST. art. XXIII, § 1; S.D. SEC'Y OF STATE, *supra* note 68.

107. SOUTH DAKOTA BALLOT QUESTION TITLES AND ELECTION RETURNS 1890-2020, *supra* note 45, at *11 ("Constitutional Amendment A: . . . Removes the legislature from the initiative process."). Amendment A passed 153,168 to 140,188. *Id.*

108. *Id.* See also *South Dakota Removes Legislature from Initiative Process, Amendment A (1988)*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Remove_Legislature_from_Initiative_Process,_Amendment_A_\(1988\)](https://ballotpedia.org/South_Dakota_Remove_Legislature_from_Initiative_Process,_Amendment_A_(1988)) (last visited Mar. 28, 2022) (calculating percentage of results).

109. *South Dakota Removes Legislature from Initiative Process, Amendment A (1988)*, *supra* note 108.

110. See Berdahl, *supra* note 45, at 93-94. The author noted that the Legislature's failure to put this issue on the ballot led to the election of Coe Crawford and a progressive Legislature in the 1906 election, and the passage in 1907 of the first primary election law. *Id.* at 94.

111. See generally S.D. CONST. art. III, § 1 (leaving discretion for how the "[l]egislature shall make suitable provisions for carrying into effect the [initiative or the referendum] provisions of this section.").

112. SDCL § 2-1-1.1 (2021).

submit a different amendment to the voters.¹¹³ If two-thirds of the sponsors of an initiated amendment desire, they may withdraw their proposal any time prior to 120 days preceding the general election.¹¹⁴ This procedure, found in the *Model State Constitution*, had not been used as late as 1979.¹¹⁵ Through 2020, twenty of twenty-three proposed constitutional amendments were initiated by the people, with seven of these twenty initiated constitutional measures approved by the voters.¹¹⁶

VI. INITIATED MEASURES

The relative popularity of the people's ability to create laws was based on the belief that it would help resolve "defects in the republican form of government."¹¹⁷ The proponents noted the danger that representatives may fail to enact laws that are desired by the people, or that they pass undesirable laws was "undemocratic."¹¹⁸ To remedy this defect, the solution was for the people to reserve for themselves the right to legislate directly on occasions when their chosen representatives fail to follow the wishes of the citizens—this, too, is "the gun behind the door."

The voter initiative enactment described above was designed to enact laws.¹¹⁹ The initiative can also be used to repeal laws passed by the legislature.¹²⁰ The initiative was not used from its approval in 1898 until 1905 when a group of citizens presented the legislature with a petition asking that a "primary election" bill be submitted to the voters.¹²¹ As the petition contained the signatures of five percent of the total electors, "the legislature violated the spirit of the constitution and law, and at the time, refused to order the bill to be placed on the ballot."¹²² The issue was eventually placed on the ballot in 1907 and approved by the voters.¹²³

113. FARBER ET AL., *supra* note 10, at 79.

114. SDCL § 2-1-2.2.

115. FARBER ET AL., *supra* note 10, at 79.

116. See generally SOUTH DAKOTA BALLOT QUESTION TITLES AND ELECTION RETURNS 1890-2020, *supra* note 45 (noting all South Dakota ballot questions and their status as passed or failed).

117. 5 George M. Smith & Clark M. Young, *History and Government of South Dakota*, in STATE GOVERNMENT SERIES 98 (B.A. Hinsdale ed. 1904). See also J. A. ROSS, SOUTH DAKOTA CIVIL GOVERNMENT WITH BRIEF TREATISE ON THE CONSTITUTION OF THE UNITED STATES 91 (1910) (discussing how the legislature can previously acted in violation of "the spirit of the constitution and the law . . .").

118. See ROSS, *supra* note 117, at 90-91 (discussing how the legislature can previously acted in violation of "the spirit of the constitution and the law . . .").

119. SDCL §§ 2-1-1 to -1.1 (2021).

120. *Brendtro v. Nelson*, 2006 SD 71, ¶ 39, 720 N.W.2d 670, 683. See also S.D. ADMIN. R. 5:02:08:07 (Form of initiative petition); S.D. ADMIN. R. 5:02:08:09 (Form of initiated constitutional amendment petition or initiated petition for repeal of constitutional petition).

121. ROSS, *supra* note 117, at 90-91; Berdahl, *supra* note 45, at 93-94.

122. ROSS, *supra* note 117, at 90-91.

123. *Id.*; Berdahl, *supra* note 45, at 94. Professor Clarence A. Berdahl notes that the Legislature in 1913, repealed the law and instituted the "so-called Coffey law, which had for its purpose the repeal of the Richards law and was itself a reversion to the more orthodox type of primary." Berdahl, *supra* note 45, at 94. This was referred to a vote of the people and defeated. *Id.* In 1915, the Legislature instituted a

One fear is that there are too many initiatives to keep track of which does what. “In some states, like California, the sheer number of initiatives is starting to get out of hand, which worsens all of the other problems with ballot initiatives, as it’s easier for voters to see through one misleading proposition than through [ten].”¹²⁴ At the state level, only nineteen initiated measures have become law through the 2020 election.¹²⁵ Laws the Legislature has passed upon which a referendum petition was circulated with enough signatures to place the measure on the ballot have resulted in the electors defeating three of every four measures (thirty-six of forty-eight) through 2020.¹²⁶ Both initiative and referendum procedures have been extended to municipalities and counties.¹²⁷ Between 2000 and 2020, one-half of the constitutional amendments, 38.9% of the initiated measures, and twenty-five percent of the referred laws have been approved by the voters.¹²⁸ Since 2010, 42.8% (approximately three of seven) initiated constitutional amendments, and fifty percent of the initiated measures have achieved fifty percent of the vote, the margin required for passage.¹²⁹ There have been five referred laws on the ballot since 2010, of which four out of the five have failed.¹³⁰

Figure 1, located on page 358, indicates that ballot measures tend to come and go in waves, with peak years being driven primarily by citizen-initiated measures.¹³¹ The legislature has tended to place about two measures on the ballot each cycle.¹³² Citizens tend to place around three, on average, with some “outlier years” such as 2006, which included a tobacco tax increase, an attempt to repeal the video lottery, a restriction on the use of state-owned airplanes for official use, and a referendum on a statute to make performing an abortion a felony were on the ballot.¹³³

The most citizen-initiated amendments seen on the ballot in the past two decades was 2016, which had proposals for prohibiting certain money lenders

traditional primary election law and attached an emergency clause based on a Supreme Court decision forbidding voter referendum on a bill with an emergency clause. *Id.* See *State ex rel. Lavin v. Bacon*, 85 N.W. 605, 608-09 (S.D. 1901). The Court, in what this reader views as an unusual opinion, passes on the question of whether the constitutional requirements were sufficiently met. It seems likely to this author if Richards has appealed the matter of the Secretary of State not accepting the referendum petitions, it would have ruled that the emergency clause was unlawful as it was only designed to prohibit the referendum petition. See *State ex rel. Lavin*, 85 N.W. at 609-10 (deciding not to resolve “the question of whether or not the various requirements of the constitution have been complied with . . .”).

124. Kelsey Piper, *California’s ballot initiative system isn’t working. How do we fix it?*, VOX (Nov. 6, 2020), <https://www.vox.com/future-perfect/2020/11/6/21549654/california-ballot-initiative-proposition-direct-democracy>.

125. See generally SOUTH DAKOTA BALLOT QUESTION TITLES AND ELECTION RETURNS 1890-2020, *supra* note 45 (noting all South Dakota ballot questions and their status as passed or failed).

126. *Id.*

127. S.D. CONST. art. III, § 1.

128. See generally SOUTH DAKOTA BALLOT QUESTION TITLES AND ELECTION RETURNS 1890-2020, *supra* note 45 (listing all South Dakota ballot questions and whether they passed or failed).

129. *Id.*

130. *Id.*

131. See *infra* note 136.

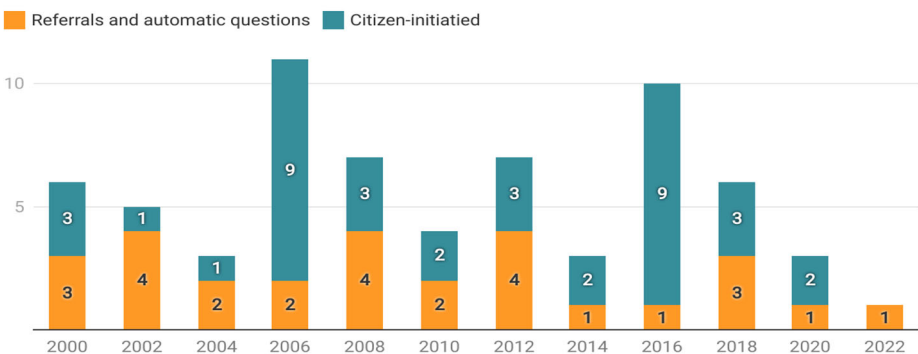
132. *Id.*

133. *Id.*

from charging more than thirty-six percent interest (Initiated Measure 21), revising campaign finance and lobbying laws, among other topics (IM22), allowing certain organizations the right to charge fees (IM23), and constitutional amendments amending statutory rights of victims and placing those rights in the constitution (Amendment S), providing for state legislative redistricting by a commission (Amendment T), limiting the ability to set statutory interest rates for loans (Amendment U), establishing nonpartisan elections (Amendment V).¹³⁴ In cycles where citizen-initiative petitions peak, there seems to follow a wave pattern—decline followed by a relative increase in legislatively-referred measures.¹³⁵

Total S.D. statewide ballot measures in even-numbered years since 2000

This chart shows the total number of statewide measures in South Dakota states from 2000 through 2020 broken down into citizen-initiated measures and referrals or automatic questions.



Not shown: two legislatively referred constitutional amendments in 2001

BALLOTPEDIA

Figure 1: Total South Dakota Statewide Ballot Issues in Even-numbered years 2000-2020¹³⁶

Figure 2, located on page 359, displays the same results a bit differently.¹³⁷ The orange portion of the vertical bar (bottom) reflects constitutional amendments placed on the ballot by the legislature.¹³⁸ Citizen-initiated measures are now broken down between initiated statutes, initiated amendments, and veto referendums.¹³⁹ As you can see, in the past twenty years, voters have not placed many amendments on the ballot in South Dakota, especially when the number is compared to those placed by the legislature.¹⁴⁰

134. *Id.*; SOUTH DAKOTA BALLOT QUESTION TITLES AND ELECTION RETURNS 1890-2020, *supra* note 45, at 25 (listing all South Dakota ballot questions and whether they passed or failed).

135. *See infra* note 136.

136. Doug Kronaizl, Total South Dakota Statewide Ballot Issues in Even-numbered years 2000-2020 (graph) (2022). Graphic provided with permission of Doug Kronaizl, Ballotpedia, with attribution.

137. *See infra* note 145.

138. *Id.*

139. *Id.*

140. *Id.*

The voters typically see initiated measures on the ballot, which require one-half the total number of signatures required for an initiated constitutional amendment.¹⁴¹ Referred laws are the rarest.¹⁴² They require the same signatures as an initiated measure, but on an abbreviated time period to gather signatures, ninety days after the end of the legislative session.¹⁴³ Voters typically see petition drives to refer legislation to a vote of the citizens if a bill gets a lot of attention during session, such as the bill outlawing abortions in 2006, the act reducing the youth minimum wage in 2016, and so forth.¹⁴⁴

Total S.D. statewide ballot measures in even-numbered years since 2000, by type

This chart shows the total number of statewide measures in South Dakota states from 2000 through 2020 broken down into citizen-initiated measures and referrals or automatic questions.



Not shown: two legislatively referred constitutional amendments in 2001

BALLOT PEDIA

Figure 2: Total South Dakota Statewide Ballot Measures, Even Numbered Years 2000-2020, by Type of Referendum¹⁴⁵

VII. THE SOUTH DAKOTA INITIATIVE PROCESS

South Dakota's initiative and referendum are not self-executing, and the legislature has established statutory procedures in line with Article III, section one

141. *See id.* (showing no referred laws).

142. *Id.*

143. SDCL § 2-1-3.1. The South Dakota Constitution contains the language, “[n]ot more than five percent of the qualified electors of the state shall be required to invoke either the initiative or the referendum.” S.D. CONST. art. III, § 1. South Dakota Codified Law also provides “[t]he petition shall be filed with the secretary of state within ninety days after the adjournment of the Legislature which passed the referred law.” SDCL § 2-1-3.1.

144. Author observation also based on MEYER ET AL., *supra* note 50, at 1-6.

145. Doug Kronaizl, Total South Dakota Statewide Ballot Measures, Even Numbered Years 2000-2020, by Type of Referendum (graph) (2021). Graphic provided with permission of Doug Kronaizl, Ballotpedia, with attribution. Note the multiple subjects in this legislation, prohibited by South Dakota Constitution, Article III, Section 1.

to provide a process to empower people in the event the legislature fails to act in accordance with the desires of the people.¹⁴⁶

Under the initiative process in 2021, any person or group may draft a proposed law. The law must have a single subject expressed in the title of the proposed measure.¹⁴⁷ As both the legislature and the people share the legislative power,¹⁴⁸ the limits on the legislature also apply to the people in terms of legislation. In general, the prohibition is on private and special laws in eleven instances, and “[i]n all other cases where a general law can be applicable no special law shall be enacted.”¹⁴⁹

Initiators must draft the full text of a petition to be circulated, including the names and addresses of the petition sponsors and a short title intended to be used by the petition sponsors during the circulation process.¹⁵⁰ The proposed language and title are submitted to the Director of the Legislative Research Council (“LRC”), who has fifteen days to recommend changes in language to clarify the meaning.¹⁵¹ The comments include suggesting language regarding the substantive content of the initiated measure or initiated amendment to minimize conflicts with existing law and to ensure the measure’s or amendment’s effective administration.¹⁵² If the petition is presented to the LRC between December 1 and the adjournment of South Dakota’s forty-day legislative session, the LRC Director must provide the written comments no later than fifteen days after adjournment of the session.¹⁵³

The Secretary of State may not accept a petition for placement on the ballot unless the following procedure is followed.¹⁵⁴ The sponsors of the petition shall

146. See GARRY, *supra* note 72, at 56; see also SDCL §§ 9-20-1 to -19 (2004 & Supp. 2019) (addressing the initiative and referendum process within a municipal government).

147. SDCL § 2-1-11.1 (2021) (codifying 2018 S.D. Sess. Laws ch. 23 § 1).

148. S.D. CONST. art. III, § 1.

149. S.D. CONST. art. III, § 23. John D. Hicks notes that

Earlier constitutions had left little room for originality when it came to restrictions of a purely negative character. Limitations upon the length of legislative sessions, and upon the extent to which a legislature might incur indebtedness were by no means new. Likewise, the enactment of many kinds of local and special laws had been forbidden by nearly every constitution adopted since the middle of the century, and in this connection the framers of these new constitutions could do nothing more novel than to specify a few more cases where the inhibitions should operate. Their opportunity lay not so much in express prohibitions as in taking a large share of the legislation into their own hands. It was in this manner that the most radical action was to be taken.

HICKS, *supra* note 21, at 25.

150. S.D. SEC’Y OF STATE, HOW TO SUBMIT AND CIRCULATE A 2022 STATEWIDE INITIATED MEASURE OR CONSTITUTIONAL AMENDMENT PETITION 1, 2-3 (Jan. 18, 2022) [hereinafter HOW TO SUBMIT AND CIRCULATE A 2022 STATEWIDE INITIATED MEASURE OR CONSTITUTIONAL AMENDMENT PETITION], <https://sdsos.gov/elections-voting/assets/HowToCirculate2022BQPetition.pdf>.

151. SDCL § 12-13-25 (2021).

152. *Id.*

153. SDCL § 12-13-25.2 (2019).

154. HOW TO SUBMIT AND CIRCULATE A 2022 STATEWIDE INITIATED MEASURE OR CONSTITUTIONAL AMENDMENT PETITION, *supra* note 150, at 1-3. See also SDCL §§ 2-1-1.1 to -1.2 (2021) (providing what must be contained in an initiated petition and the manner in which it must be submitted).

submit a copy of the measure or amendment in final text form to the Attorney General and the Director of the LRC.¹⁵⁵ The petition form must also contain the full and final text of the measure submitted to the Attorney General's office, a copy of the prison/jail population cost estimate and/or fiscal note, the campaign finance statement of the organization, and an original paper copy of a notarized form that includes the names and addresses of each petition sponsor is to be contained in a circulator handout.¹⁵⁶

If the LRC indicated in its written comments that a fiscal note is necessary, the LRC will provide a copy of the fiscal note within sixty days of receipt of the final text of the measure or amendment to the sponsor and the Secretary of State.¹⁵⁷ The fiscal note will outline, in no more than fifty words, the estimated impact of the proposal on revenues, expenditures, or fiscal liability of the state or its agencies and subdivisions, and any impact on the prison or county jail populations.¹⁵⁸

If the wording of the proposed text of the initiated measure or proposed initiated amendment changes after the initial LRC written comments to the Secretary of State and to the petition sponsors or the delivery of the Attorney General's proposed title of the measure and its explanation, the sponsor will submit the new text to the Director of the LRC, and the process begins anew.¹⁵⁹

Following receipt of the LRC's written comments, the sponsors submit the final initiative measure petition language to the Attorney General, who will prepare a title and ballot explanation within sixty days.¹⁶⁰ The Attorney General prepares a title statement (ensuring the single subject) and a concise explanation of the proposal for inclusion on the petition to be circulated.¹⁶¹ "The attorney general shall include a description of the legal consequences of the proposed initiated measure or initiated amendment to the Constitution, including the likely exposure of the state to liability if the proposed initiated measure or initiated amendment to the Constitution is adopted."¹⁶²

155. HOW TO SUBMIT AND CIRCULATE A 2022 STATEWIDE INITIATED MEASURE OR CONSTITUTIONAL AMENDMENT PETITION, *supra* note 150, at 1.

156. *Id.* at 2.

157. SDCL § 2-9-30 (2021).

158. *Id.* See SDCL §§ 2-9-33 to -34 (2020) (explaining prison or jail cost estimate requirements).

159. SDCL §§ 12-13-26 to -26.1 (2019 & Supp. 2021).

160. SDCL § 12-13-25.1 (2019 & Supp. 2021).

161. SDCL § 2-1-1.2(3) (2021); SDCL § 12-13-9 (2019). Little has been said about the failure of neither the Secretary of State's nor Attorney General Ravnsborg's accepting a proposal that included more than one subject under South Dakota Codified Law section 12-13-26.1, second paragraph (2018 S.D. Sess. Laws ch. 106 § 3). Jason R. Ravnsborg, Attorney General, *Attorney General's Statement for Constitutional Amendment A* (Aug. 16, 2019), <https://atg.sd.gov/docs/AG%20Explanation%20SD%20Constitution%20to%20Legalize%20and%20tax%20marijuana%208.19.2019.pdf>. In Attorney General Ravnsborg's letter to the Secretary of State providing the title and the explanation of the proposal dated August 16, 2019, the final paragraph noted, "Judicial clarification of the amendment may be necessary. The amendment legalizes some substances that are considered felony controlled (sic) substances under current State law. Marijuana remains illegal under Federal law." *Id.* No mention is made of the proposal possibly having more than one subject. See *id.* However, the Attorney General's statement is not to educate the voters, but to identify the contents of the initiated measure or referred law. *Hoogestraat v. Barnett*, 1998 SD 104, ¶ 11, 583 N.W.2d 421, 424.

162. SDCL § 12-13-25.1.

This explanation is then incorporated into the petition packet—the full text of the petition to be circulated in fourteen-point font,¹⁶³ the title and explanation provided by the Attorney General, the date of the general election at which the question is to be submitted, and the names and addresses of the petition sponsors are filed with the Secretary of State prior to circulation for signatures.¹⁶⁴ If the Director of the LRC has indicated in their written comments that a fiscal note is necessary, the LRC will provide a copy within sixty days of receipt of the final form of the petition to the ballot question sponsor(s) and the Secretary of State.¹⁶⁵ The fiscal note will outline the impact of the measure on revenues, expenditures, or fiscal liability of the state or its agencies and subdivisions and may include any impact on the prison or county jail population.¹⁶⁶

Petition sponsors may seek resolution of differences between the Attorney General's wording and the petition sponsor's desired wording of the title and explanation to the voters by filing a challenge within seven days of the Secretary of State's receipt of the language from the Attorney General in state circuit court.¹⁶⁷ Challenges take precedence over other cases and can be appealed to the South Dakota Supreme Court.¹⁶⁸ If the petition sponsor disagrees with the wording of the title and explanation, the sponsor may take that to circuit court for resolution on an expedited basis.¹⁶⁹ Petition circulation may begin after approval is granted by the Secretary of State of the petition packet containing the full and final text of the measure that was submitted to the Attorney General's office and in the exact format as prescribed in the Administrative Rules of South Dakota for petition forms.¹⁷⁰ In both the initiative and referendum, no signatures obtained before that filing date will be counted as valid signatures.¹⁷¹

VIII. CIRCULATING PETITIONS AND GATHERING SIGNATURES

Petitions for initiated measures and veto referendums require signatures totaling five percent of the votes cast for governor in the most preceding general election (16,961, representing five percent of all votes cast for all gubernatorial candidates in the 2018 general election for governor).¹⁷² The final step is approval by the Secretary of State of the handout to ensure the paper copy of the handout

163. SDCL § 2-1-1.1.

164. *Id.* See SDCL § 2-1-1.2 (initiated measures); SDCL § 2-1-1.1 (initiated constitutional amendments).

165. SDCL § 2-9-30.

166. *Id.*

167. See SDCL § 2-1-18 (2021).

168. SDCL § 12-13-9.2 (2019).

169. See *id.*; SDCL § 2-1-18.

170. SDCL § 2-1-3.1; S.D. ADMIN. R. 5:02:08:08 (2020).

171. S.D. ADMIN. R. 5:02:08:00 (2020); SDCL § 2-1-1.1; SDCL § 2-1-3.1. These statutes are currently enjoined in The Federal District Court in the District of South Dakota, Northern Division. *SD VOICE v. Noem*, No. 1:19-cv-01017-CBK (D.S.D. 2021) (on file with author <https://drive.google.com/file/d/1uwyshO9wxtieUy0DDERgfeZ8zsa8kJGX/view>).

172. SDCL § 2-1-5 (2021).

available to petition signers is in a format of an 8.5 x 11 inch sheet of paper with text printed in fourteen-point type font.¹⁷³

Unpaid or volunteer circulators are not required to register or receive a circulator ID from the Secretary of State.¹⁷⁴ Volunteer circulators may begin collecting signatures as soon as the petition sponsors have completed the steps through the approval of the circulator handout by the Secretary of State.¹⁷⁵ Paid petition gatherers must complete a paid circulator registration application and obtain a Circulator Identification number before the paid circulator circulates petitions.¹⁷⁶ The application system is online or through a paper application.¹⁷⁷ South Dakota prohibits paying by the number of signatures collected but may permit employers to set minimum standards of performance-productivity and pay discretionary bonuses based on productivity.¹⁷⁸ All petition circulators must be residents of South Dakota, and all signatures must be collected in person, taking reasonable steps to ensure the signer is a qualified voter of the state and county on the signature line.¹⁷⁹

In 2022, South Dakota law requires petition sponsors to file a statement with the Secretary of State indicating whether the petition sponsor is a volunteer or a paid petition circulator and, if a paid circulator, the amount the circulator is being paid.¹⁸⁰ Paid circulators must submit a paid circulator registration application and obtain and display a paid circulator badge and identification number.¹⁸¹

173. SDCL §§ 2-1-1.1 to -1.2.

174. HOW TO SUBMIT AND CIRCULATE A 2022 STATEWIDE INITIATED MEASURE OR CONSTITUTIONAL AMENDMENT PETITION, *supra* note 150, at 3. *But see* SDCL § 2-1-1.5 (2021) (discussing paid circulators).

175. HOW TO SUBMIT AND CIRCULATE A 2022 STATEWIDE INITIATED MEASURE OR CONSTITUTIONAL AMENDMENT PETITION, *supra* note 150, at 3.

176. SDCL § 2-1-1.5.

177. *See id.*

178. SDCL § 12-13-28 (2019).

179. SDCL § 2-1-7 (2021). *See* SDCL § 2-1-6 (2021) (stating all qualified voters are qualified to sign a petition).

180. SDCL § 2-1-1.5. Paid circulators in 2021 are being paid between fifteen and twenty-two dollars per hour. Cory Allen Heidelberger, *Medicaid, Redistricting Initiatives Paying Circulators \$15/Hour; Pot Petitioners Offer \$22/Hour*, DAKOTA FREE PRESS (Oct. 24, 2021), <https://dakotafreepress.com/2021/10/24/medicaid-redistricting-initiatives-paying-circulators-15-hour-pot-petitioners-offer-22-hour/>.

181. SDCL §§ 2-1-1.5, -1.8 (2021). Litigation is expected as this may be seen as onerous and thus prevent free political speech similar to Jim Crow efforts to suppress voting in the pre-Voting Rights Act south through administration of “literacy tests.” *See* Cory Allen Heidelberger, *SB 180 Removes ID Number from Circulator Badge, Heads to House Floor*, DAKOTA FREE PRESS (Mar. 6, 2020), <https://dakotafreepress.com/2020/03/06/sb-180-removes-id-number-from-circulator-badge-heads-to-house-floor/>. Litigation pending (12/1/2021) and the Secretary of State’s web page contains information noting:

A preliminary injunction has been granted by the U.S. District Court – District of South Dakota – Southern Division enjoining enforcement of Senate Bill 180 passed during the 2020 Legislative Session. In accordance with this order, the blank requesting a Circulator ID Number for paid circulators need not be completed on the petition sheet.

S.D. SEC’Y OF STATE, *Ballot Question Information*, <https://sdsos.gov/elections-voting/upcoming-elections/ballot-question-information/default.aspx> (last visited Apr. 7, 2022).

Registered Sex offenders are prohibited from seeking signatures on ballot petitions in most circumstances.¹⁸²

A completed petition for an initiated measure or referendum contains the valid signatures of a minimum of five percent of the votes cast for governor in the previous gubernatorial election (16,961),¹⁸³ and an initiated Constitutional amendment must have valid signatures of a minimum of ten percent of the votes cast for governor in the last gubernatorial election (33,921).¹⁸⁴ Signatures for initiated measures may be collected two years prior to the election date on the petition.¹⁸⁵ Sponsors of initiated constitutional amendments may collect signatures for two years prior to the election date noted on the petition.¹⁸⁶ Petition signatures for a veto referendum (to approve or disapprove legislation passed by the Legislature) must be collected within ninety days after the legislative session in which the bill at issue was enacted.¹⁸⁷

All petitions for a particular measure must be submitted to the Secretary of State at the same time with a sworn affidavit(s) signed by two-thirds of the petition sponsors.¹⁸⁸ Signatures are verified using a random sample method of at least five percent of the signatures.¹⁸⁹ Mere technicalities cannot invalidate a petition, and when petition signature gatherers note a faulty signature, they must cross out the entire row (line) to ensure the signature is not counted as part of the sample for verification.¹⁹⁰

IX. CAMPAIGN FINANCE AND BALLOT ISSUES.

Campaign finance laws for groups in support of opposition to ballot issues are treated differently than other political committees. In general, there are no state contribution limits to a ballot question from individuals, PACs, political parties, entities, statewide candidate committees, legislative candidate

182. SDCL §§ 12-1-32 to -34 (2019). These laws provide that the sex offenders may gather petition signatures if the offender is in the employ of, and under immediate supervision of, another person and where the circumstances preclude any contact with children. *Id.*

183. SDCL §§ 2-1-1, -5. See *South Dakota Governor Election Results*, N.Y. TIMES (Jan. 28, 2019), <https://www.nytimes.com/elections/results/south-dakota-governor>.

184. S.D. CONST. art. XXIII, § 1. See *South Dakota Governor Election Results*, *supra* note 183. Note that the statute requires signatures no more than five percent of the votes cast for an initiated measure while the Constitution calls for ten percent. See SDCL §§ 2-1-1, -5; S.D. CONST. art. XXIII, § 1.

185. SDCL § 2-1-1.2. An order filed by the United States District Court for the District of South Dakota, Northern Division ruled that the requirement that petitions be submitted one year before the election date violated the First Amendment of the U.S. Constitution and ordered that, for measures amending or adding a state law (initiated measures), the signature deadline shall be the first Tuesday in May of an election year (essentially six months prior to the election date) for 2022 initiated measures. Mem. Op. & Order at *13, *SD VOICE v. Noem*, No. 1:19-CV-01017 (D.S.D. July 29, 2019).

186. SDCL § 2-1-1.1.

187. SDCL § 2-1-3.1.

188. SDCL §§ 2-1-1.1 to -1.2, -3.1. See S.D. ADMIN. R. 05:02:08:07.01 (2022) (providing a form affidavit).

189. SDCL §§ 2-1-16 to -17 (2021). See S.D. ADMIN. R. 05:02:08:00.05 (2022) (providing a form certificate).

190. See SDCL § 2-1-18.

committees, and ballot question committees.¹⁹¹ Corporations and labor unions can donate to groups supporting or opposing ballot issues.¹⁹² In 2018, voters approved Initiated Measure 24, banning contributions to ballot measure committees from outside the state, but the statute was overturned by a court ruling in May 2019 that prevented the law from going into effect.¹⁹³ Corporations and labor unions who plan to donate to a ballot issue committee must file a series of statements with the Secretary of State that certifies them to be in good standing in order to donate to groups supporting or opposing ballot issues.¹⁹⁴ “Any entity making expenditures, equal to or exceeding fifty percent of the entity’s annual gross income, for the adoption or defeat of one or more ballot measures is a ballot question committee.”¹⁹⁵ South Dakota requires reporting all advertisements over one hundred dollars made by independent expenditure groups within forty-eight hours after the advertisement was first disseminated.¹⁹⁶

X. ONGOING PROBLEMS WITH THE INITIATIVE.

The framers and proponents of the 1789 U.S. Constitution considered only a republican form of government.¹⁹⁷ At the time, the framers were reeling from the quelling of “Shays’ Rebellion,” where citizens were struggling to pay taxes to support their state’s commitments to the Continental Congress for the revolutionary war effort.¹⁹⁸ They were aware that taxes were not uniformly distributed among the citizenry; farmers and small merchants had fought the war and believed they were now paying again for that war, and were further justified by the later misnamed “Whiskey Rebellion” in the Northwest Territories.¹⁹⁹ The framers were afraid of mob rule ending the great experiment, and did not want a pure democracy, but a democratically elected set of representatives to make policy. Yet many citizens, including many of the delegates to the Dakota and South Dakota constitutional conventions, considered the faults of republican government because of the dominance of special interests.

191. SDCL § 12-27-18.1 (2019); S.D. SEC’Y OF STATE, *Contribution Limits* [hereinafter *Contribution Limits*], <https://sdsos.gov/elections-voting/campaign-finance/contribution-limits.aspx> (last visited Apr. 7, 2022).

192. SDCL § 12-27-18.1.

193. On May 9, 2019, Judge Kornmann ruled that Measure 24 violated the First Amendment and the Commerce Clause of the U.S. Constitution by impeding political free speech rights and interfering with the transfer of money from one state to another. *SD VOICE v. Noem*, 380 F. Supp. 3d 939, 954 (D.S.D. 2019).

194. SDCL § 12-27-3 (2019).

195. SDCL § 12-27-18.

196. *Contribution Limits*, *supra* note 191.

197. See ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 11, 15-18 (2001) (addressing the Framers considering solely a republican form of government and describing undemocratic elements of slavery, suffrage, and representation of small states in the Senate, as well as the tendency of democracies to replace authoritarian forms only to devolve back into monarchies or dictatorial forms).

198. *Id.* at 125-26.

199. ALAN TAYLOR, *AMERICAN REVOLUTIONS - A CONTINENTAL HISTORY, 1750-1804*, at 383-93, 413-14 (2016).

Territorial delegates to the 1885 Constitutional Convention identified several problems with the initiative and referenda in their discussion of the “Dakota Plan.”²⁰⁰ First, there would be no limit to the power of the people to legislate.²⁰¹ One could have a policy established in one legislative session, have it reversed by a vote of the people, and have the legislature reverse it again the following month. That is, fundamental policies could be voted up at one election and down at another or by the Legislature according to the mood of the day. Under such a system, popular whims and caprices could often be voiced instead of the “sober second thought and deliberate judgment which alone are to be regarded as expressing the will of the people.”²⁰² Such problems remain endemic in a system in which the legislature and the people share the right to propose and enact legislation or when party control of the legislature changes. More to the point, however, is that a legislature is not bound by the decisions of a prior legislature regarding statutes—the South Dakota legislature has often amended the state aid to education formula, reducing and increasing the rates according to legislative priorities. Regarding the Dakota plan for state-sized direct democracy following the Dakota Plan, delegate Lyon reminisced that “the principle was regarded as too novel and experimental at that time to be incorporated into the proposed Constitution.”²⁰³

In more recent times, there are other criticisms. Perhaps the most worrisome area is the dramatic rise of “special interest” group²⁰⁴ involvement in the process—both in terms of expending large amounts of money for petition gathering and in making claims to a broad audience through mass media outlets about what the proposals will and will not do. As critics noted in response to an initiated measure out of California in 1978 regarding property taxes, “Proposition 13 changed political culture. Up to this point, the initiative process had been described as a ‘safety valve.’ Now it became an industry and a circus[.]”²⁰⁵

Further, Proposition 13 was put forth as a mechanism to lower property taxes, and voters were unaware that the bulk of property taxes were paid by corporations who supported the ballot initiative to accomplish that result.²⁰⁶ In a similar vein, voters in South Dakota repealed an inter-generational wealth transfer tax, helping to create in the lexicon a cry to “repeal the death tax,” although relatively very few

200. HICKS, *supra* note 21, at 18.

201. In effect, there are other limits on what people can refer. At the local level, in addition to the limitations mentioned above, the referenda can be used for policy decisions, and not for administrative decisions—decisions to put previously established policy decisions into effect.

202. HICKS, *supra* note 21, at 19.

203. Grant, *supra* note 1, at 394 (quoting *The Initiative and Referendum: A Symposium*, 1 MONTHLY S. DAKOTAN 72 (Sept. 1898)).

204. “Special interests” have been variously defined but the term seems to refer to those who push for their personal interests against the majority opinion. This pejorative definition is somewhat controversial because special interests may be protecting minority rights against majority “tyranny.”

205. *War by Initiative; Proposition 13*, ECONOMIST (Apr. 23, 2011), <https://www.economist.com/special-report/2011/04/23/war-by-initiative> (quoting a sentence from a “call out box” in the Special Report section of the print edition under the headline).

206. George Lakoff, *Why Are So Many Ballot Measures So Confusing?*, N.Y. TIMES (Nov. 8, 2016), <https://www.nytimes.com/interactive/projects/cp/opinion/election-night-2016/why-are-many-ballot-measures-so-confusingly-worded>.

citizens had estates that qualified for the tax.²⁰⁷ Mechanisms were available at a relatively low cost to pay the taxes of those few whose estates were of sufficient value to be subject to the inheritance tax.

It has become rare for individual petition sponsors to have the time and resources to gather petition signatures sufficient to ensure ballot access.²⁰⁸ This has led to the need to raise money from sources who do not fear retribution or neglect from state officials for sponsoring such political activity. This, in turn, has led to seeking out-of-state interests with “deep pockets” to finance signature collection and the election industry, which collects signatures for a price.²⁰⁹ However, even some critics argue that paid signature gatherers promote democracy by increasing the involvement of a wider diversity of groups, even if only for “chipping in” to the cost of gathering signatures.²¹⁰

While the origin of voter initiatives was to enable a group of committed citizens to pressure a recalcitrant legislature to action or to become citizen legislators by putting measures on the ballot independent of the legislature, this is the use of the “gun behind the door” to directly create laws the people, or as we have seen, a group of people want when the legislature would not.

The lack of funds for initiating lawmaking has other consequences. Being under-resourced often leads to poor drafting as drafting legislation requires thorough knowledge of the style and format in which statutes are constructed or access to bill drafting software and a trained operator of that software.²¹¹ Further, even well-drafted legislation is difficult to understand at times; poorly drafted legislation makes it nearly impossible for a citizen or an expert in the field to comprehend its intent or the potential consequences.²¹²

Yet, the measures that argue to drive money out seem to force new money into the process. The alternative is to have organized groups or wealthy domestic organizations devote resources for signature gathering. “Even in the rare instance when the process works as intended — when citizen activists, through a true volunteer effort, put a proposal on the ballot — the result is usually laws so poorly written as to be unworkable.”²¹³

207. Chuck Collins, *She’s the Poster Child for Estate Tax Repeal, But Her Sad Family Saga Doesn’t Add Up*, USA TODAY (Dec. 11, 2017, 4:49 PM), <https://www.usatoday.com/story/opinion/2017/12/11/kristi-noem-poster-child-estate-tax-repeal-but-sad-tale-doesnt-add-up-chuck-collins-column/930472001/>.

208. See RICHARD BRAUNSTEIN, *INITIATIVE AND REFERENDUM VOTING: GOVERNING THROUGH DIRECT DEMOCRACY IN THE UNITED STATES* 147-49 (2004).

209. RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 49-62 (2002).

210. *Id.* at 54.

211. See BRAUNSTEIN, *supra* note 208, at 19; Elisabeth R. Gerber, *The Logic of Reform: Assessing Initiative Reform Strategies*, in *A DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* 143, 148-56 (Larry J. Sabato, Howard R. Ernst & Bruce Larson, eds., 2001).

212. Gerber, *supra* note 211, at 148-56.

213. Rob Port, *The Check Against Dumb Ballot Measures Is More Responsive Legislating*, F. COMM’NS BLOG (Mar. 31, 2021, 5:00 AM), <https://www.inforum.com/opinion/columns/6958210-Port-The-check-against-dumb-ballot-measures-is-more-responsive-legislating>.

Volunteers often have no training, and the legislation often has serious errors. One example from our sister state, North Dakota, involved legalizing medicinal marijuana.²¹⁴ When enacted by a vote of the people, North Dakota did not decriminalize medicinal marijuana.²¹⁵ The Legislature then had to work for months to turn the poorly written initiated measure into a policy that accomplished what it intended to accomplish. During the interregnum between the passage of the initiative and enactment of laws that accomplished the purposes of the initiative, voters “belly ached” about the legislature slow-walking the process.²¹⁶ Sound familiar?

Voter initiatives were designed to empower grassroots political movements. The system to put an initiative on the ballot is much easier for large lobbying groups to navigate, and special interest groups drive many initiatives. In 1978, Proposition 13 in California reduced property taxes and created a fiscal crisis.

What Howard Jarvis discovered in 1978 with Proposition 13 was that the public’s distrust of government was a kind of electoral rocket fuel that could carry almost any payload into orbit. It no longer took haggling with legislators in Sacramento to write a law. It took only a popular concept and — over the last two decades — enough money to wage a nonstop blitzkrieg of TV commercials and mailbox fliers.²¹⁷

When legislatures do not do as citizens wish and the citizens respond with an initiative that has strong support, initiatives result. And the initiatives may not be “workable.” So, what is a legislature to do? Perhaps there is room for democracy. With respect to medicinal marijuana, there is ready access to unregulated marijuana through “black market” sources.²¹⁸ The same is true with respect to sports betting—go into any small-town bar and try to find someone who has not bet on a game. If the people are already doing it, it is likely there will be an initiative to legalize it. In a short legislative session, there may not be time in the session to give full study to all bills. Still, it seems that when there is a bill that has popular support, even with negative consequences, the legislature might consider going through the deliberative process to identify and examine the positive aspects and negative consequences of enacting and implementing the law. Legislatures must be future-oriented, looking at the implications of legislative proposals. Ensuring there is a standard procedure for reviewing legislation might ensure a lesser hearing on bills that have been introduced in prior sessions.

214. *Id.*

215. *Id.*

216. *Id.*

217. John Meyers, *Powerful, Wealthy Interest Groups Keep Tight Grip on California Proposition System*, L.A. TIMES (Nov. 5, 2020, 6:43 AM), <https://www.latimes.com/california/story/2020-11-05/analysis-ballot-initiatives-system-california-spending>.

218. Joseph Detrano, *Cannabis Black Market Thrives Despite Legalization*, CTR. ALCOHOL & SUBSTANCE USE STUD., <https://alcoholstudies.rutgers.edu/cannabis-black-market-thrives-despite-legalization/> (last visited Apr. 12, 2022); Natalie Fertig, *How Legal Marijuana is Helping the Black Market*, POLITICO (July 21, 2019), <https://www.politico.com/magazine/story/2019/07/21/legal-marijuana-black-market-227414/>.

Without the standard procedure, there is a semi-legitimate claim about perfunctory hearings, deferring a bill to be considered on a day that does not exist (forty-first legislative day), or voting to table the other party's bills on a party-line basis only strengthens the resolve of those who want the policy, whether it would have positive or negative aspects. This has led to the minority party pursuing choosing the initiative as a mechanism—pulling out the “gun behind the door.”²¹⁹

The goal of stopping the voter initiative is unlikely. The people will not give up the right to initiate laws since they currently share that right with the legislature. Metaphorically, if you are playing poker, can you name anyone who will call a “misdeal” who holds four aces in their hand? Measures such as Initiated Measure 24, which desired to limit out-of-state campaign funds for petition drives, violated the U.S. Constitution's provision that specifies Congress regulates interstate commerce as well as the First Amendment post-recent campaign finance legislation.²²⁰ Initiated Measure 24 was struck down by a federal district court in 2019.²²¹

A. ARE VOTERS COMPETENT TO KNOW WHAT THEY ARE VOTING FOR OR AGAINST?

One major criticism of citizen initiative petition processes is that the voter does not possess the information necessary to evaluate the proposed initiative. This might result from a lack of information as to what the proposal would accomplish and the likely unintended outcomes resulting from the measure. The claim is that there may be too many issues for the voter to keep track of which measure does which.

The scope of any initiative process involves a couple of different levels. The first level is whether citizens may exercise the initiative to affect statutes and/or constitutional amendments. A good number of initiative states allow citizens to enact both statutes and constitutional amendments through the initiative process.²²² Seven states permit citizens to propose only statutes through the

219. Tupper, *supra* note 9.

220. See *Buckley v. Valeo*, 424 U.S. 1, 41-42 (1976) (noting that limits on expenditures violate the First Amendment but allowing limits on contributions or their committees to be restricted in order to prevent corruption or its appearance); *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 775-95 (1978) (applying that campaign finance limits on expenditures violate the first amendment as applicable to the states by the fourteenth amendment); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294-300 (1981) (holding that the restraint imposed by the city ordinance on the right of association, and in turn, on individual and collective rights of expression contravenes both the right of association and the speech guarantees of the first amendment). In the absence of corruption, “there is no significant state or public interest in curtailing debate and discussion of a ballot . . .” *Citizens Against Rent Control*, 454 U.S. at 295-99.

221. Lisa Kaczke, *Federal judge strikes down IM 24 as unconstitutional*, ARGUS LEADER (Sioux Falls, S.D.) (May 9, 2019, 4:31 PM), <https://www.argusleader.com/story/news/politics/2019/05/09/federal-judge-strikes-down-im-24-unconstitutional/1156064001/>.

222. States with voter initiatives and the year established include Alaska: 1956, Arizona: 1911, Arkansas: 1910, California: 1911, Colorado: 1912, Florida: 1972, Idaho: 1912, Illinois: 1970, Maine: 1908, Massachusetts: 1918, Michigan: 1908, Mississippi: 1914, Missouri: 1908, Montana: 1904,

initiative, and three states limit the initiative power to constitutional amendments only.²²³ Petition referenda always apply only to statutes as opposed to popular referenda placed on the ballot by the legislature, which frequently deal with constitutional amendments. Altogether, twenty-four states permit citizens to initiate referenda.²²⁴ Every state but Delaware requires voters to ratify proposed state constitutional amendments, and Delaware is a state that does not have initiative and referenda, but does have advisory referenda, where the legislature can gauge the support for a particular measure.²²⁵ Sixteen of the eighteen states that permit initiative constitutional amendments also impose a single-subject requirement.²²⁶ Eight states do not have a single subject rule as of 2021.²²⁷

Nearly all states place some restriction on the subject matter of referenda. Usually, referenda cannot be invoked to challenge emergency legislation or laws designed to protect the public peace. Frequently, budget bills and appropriations are exempted from the veto referendum: laws necessary for (1) “the immediate preservation of public peace, health or safety;” and (2) “support of state government and its existing public institutions.”²²⁸ These two exceptions do not apply to initiated measures.²²⁹

Oregon, in considering their 1902 amendment to enable voter initiatives, noted that voters could express their preferences by a single “yes” or “no.”²³⁰ The challenge was that there was no “guarantee that the measure will be read, or fully comprehended in all its bearings.”²³¹ The people were not considered to “vote intelligently on any but clear-cut, briefly stated questions.”²³² One purpose of the single subject rule is primarily to ensure that voters are aware of the issue upon which they are voting. This is often voiced as preventing logrolling in legislation and making legislation easier to understand for the citizenry, despite the evidence

Nebraska: 1912, Nevada: 1905, North Dakota: 1914, Ohio: 1912, Oklahoma: 1907, Oregon: 1902, South Dakota: 1898, Utah: 1900, Washington 1912, Wyoming: 1968. *Initiative And Referendum Processes*, *supra* note 61.

223. *Id.*

224. *Id.*

225. *Amending state constitutions*, BALLOTPEdia, https://ballotpedia.org/Amending_state_constitutions (last visited Apr. 12, 2022); *Delaware*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstute.org/states/state.cfm?id=30> (last visited Apr. 12, 2022).

226. *Initiative And Referendum Processes*, *supra* note 61.

227. States which do not have a single subject rule for initiated measures and initiated constitutional amendments include Arkansas, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, and North Dakota. *Id.* Note, South Dakota was not listed as having a single subject rule on this webpage, even though the legislature passed a single subject rule on initiated measures, and voters passed Amendment Z limiting constitutional amendments to have a single subject. *South Dakota Constitutional Amendment Z, Single-Subject Rule for Constitutional Amendments (2018)*, BALLOTPEdia, [https://ballotpedia.org/South_Dakota_Constitutional_Amendment_Z_Single-Subject_Rule_for_Constitutional_Amendments_\(2018\)](https://ballotpedia.org/South_Dakota_Constitutional_Amendment_Z_Single-Subject_Rule_for_Constitutional_Amendments_(2018)) (last visited Apr. 12, 2022); H.B. 1007, 93rd Legis. Session (S.D. 2018).

228. *State ex rel. Lavin v. Bacon*, 85 N.W. 605, 607 (S.D. 1901). *See also* GARRY, *supra* note 72, at 57 (discussing exemptions from the veto referendum).

229. *Christensen v. Carson*, 533 N.W.2d 712, 715 (S.D. 1995). *See also* GARRY, *supra* note 72, at 57 (citing *Christensen v. Carson*).

230. BARNETT, *supra* note 47, at 37.

231. *Id.*

232. *Id.*

provided by political scientists that this is the mechanism most often used to pass legislation.²³³ The goal is to make it easier for the citizenry to understand the measure upon which they are voting and what it would do.

Initiative states often have substantive subject requirements beyond the single subject rule. . . . Many of these subject limitations are modest, such as Nevada’s requirement that initiatives may not propose new appropriations unless the initiative also includes new taxes to finance the appropriations. Wyoming prohibits initiatives from creating courts and affecting the judicial process. Ohio does not permit initiatives to address property taxes. Alaska and Massachusetts prohibit initiatives outright from dedicating revenues or making or repealing appropriations. Illinois limits initiatives to those addressing the structure of the legislature. The District of Columbia allows its board of elections to refuse certification of any initiative that authorizes discrimination prohibited under the Human Rights Act of 1977.²³⁴

There has been anecdotal evidence in South Dakota’s 2020 ballot issues regarding IM26 and Amendment A suggesting there was some confusion about the two measures dealing with marijuana.²³⁵ Public meetings and forums sometimes saw individuals referring to initiated measure 26 as “legalizing recreational marijuana” and to Amendment A as only “legalizing medicinal marijuana.” Other anecdotes involve people wanting to vote for IM26, but since Amendment A appeared first on the ballot, they checked that affirmative box but did not want to request a new ballot because of the length of the ballot.²³⁶ Again, anecdotes are not evidence but do provide clues from which one might seek interview data to verify as evidence. Else, anecdotes are only a rumor.

The single subject requirement is also designed to prevent “logrolling,” defined as “the trading of votes by legislators to secure favorable action on projects of interest to each one.”²³⁷

233. Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, UNIV. OF PITTSBURGH L. REV. 803, 813-14 (2006).

234. Craig B. Holman, *An Assessment of New Jersey’s Proposed Limited Initiative Process*, BRENNAN CTR. FOR JUST. N.Y.U. SCH. L. 1, 8-9, <http://www.iandrinstitute.org/docs/Holman-Review-of-Proposed-NJ-Initiative-Process-IRI.pdf>. See also *Initiative and Referendum Processes*, *supra* note 61 (describing Subject Matter Restrictions and Repeating a measure).

235. Several individuals noted to the author that they ended up voting for legalizing marijuana (Amendment A) as it was the first measure on the ballot when they really wanted to vote for medicinal marijuana (IM26). These are anecdotes, and not facts.

236. Author’s personal observation moderating ballot issue forums.

237. *Logrolling*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/logrolling> (last visited Apr. 13, 2022). The quote is the specific example given by the dictionary. Some irony exists as this is a common mechanism for legislators to obtain votes ensuring passage while it is prohibited by single subject rules as evidenced in *Thom v. Barnett*. See generally *Thom v. Barnett*, 2021 SD 65, 967 N.W.2d 261 (holding Amendment A violated the single subject rule).

Gallup, a national polling firm based in Omaha, Nebraska, first began surveying Americans about legalizing marijuana use in 1969.²³⁸ At that time, only twelve percent of all adults supported legalization.²³⁹ Since then, support for legalization has increased significantly. Approval reached a majority of U.S. adults in 2010, up from thirty-six percent in 2005.²⁴⁰ Approval was over two-thirds (sixty-eight percent) of all adults surveyed in 2020.²⁴¹ This suggests that South Dakotans followed national trends toward marijuana legalization. By the end of 2020, thirty-five states had legalized or decriminalized marijuana for medicinal and non-medicinal uses.²⁴²

Seven states impose explicit limits on the amount of time that must pass before a measure is re-attempted, ranging from twelve months to five years.²⁴³ Restricting the continued access to the ballot is often seen as reducing the possibility that awareness of the issues would lead to voter approval. South Dakota has no provision limiting repeating a ballot measure other than obtaining ballot access for a second election.²⁴⁴

One of the most common criticisms of the initiative process is that voters are not competent to sufficiently decide complex matters of public policy.²⁴⁵ Often, the evidence used to support this claim involves citing opinion poll questions asking, “Who is the Chief Justice of the Supreme Court?” or questions asked by medical providers testing the community awareness of patients when asking for the name of the President of the United States, or the member of Congress representing their district, etc. The answers are often incorrect. However, this does not provide sufficient evidence to support the claim that all voters are incompetent.²⁴⁶ First, a fair number of citizens do not vote and so knowledge of political figures of the day is not meaningful for them.²⁴⁷ If these citizens do not vote, their ability to influence elections on voter initiatives seems to be trivial.

One key insight of decision-making literature in cognitive and social psychology and in political science is that people base most of their choices, even complex and important ones, on very simple heuristics because we have to make thousands of choices every day, and recognize that this leaves us in a position to make many mistakes.²⁴⁸ Research on political decision-making argues that voters

238. Megan Brenan, *Support for Legal Marijuana Inches up to New High of 68%*, GALLUP NEWS (Nov. 9, 2020), <https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx>.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Initiative and Referendum Processes*, *supra* note 61 (Ballot Access and Preparation).

244. No statute nor South Dakota Secretary of State publication seemed to provide for prohibitions of nor permissions needed to repeat the same ballot measure as of October 25, 2021.

245. Gerber, *supra* note 211, at 156-57.

246. Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463, 467 (2004). *See also* Gerber, *supra* note 211, at 156-61 (discussing voter competence).

247. Susan Davis, Juana Summers & Domenico Montanaro, *Why People Don't Vote*, NPR (Dec. 16, 2020, 4:45 PM), <https://www.npr.org/2020/12/16/947182471/why-people-dont-vote>.

248. Lupia & Matsusaka, *supra* note 246, at 468-69.

use readily available indicators of performance, such as retrospective evaluations of the economy, to reward or punish incumbent politicians.²⁴⁹ The use of heuristics such as “party registration” often allows voters to identify and predict a candidate’s policy position.²⁵⁰ The suggestion is that getting detailed policy-specific information is irrational for busy voters—the heuristic is a good but not perfect predictor.²⁵¹

Voters can employ three strategies to cope with information shortfalls: (1) abstaining from voting altogether if they wish to vote on other candidates or issues on the ballot or voting “no” on this issue; (2) using low-cost information sources such as decisions short-cuts or heuristics; and (3) relying on elite or trusted endorsements.²⁵² In the first strategy, voters who lack important information know they lack this information and either stay home, skip the issue or “roll-off” issues upon which they are unsure, or vote “no.”²⁵³ It is intuitively obvious to a casual observer that when voters find they have insufficient information, they do not vote in favor of the issue at hand and let other voters decide the issue. Misinformation is another issue, so the best information is that which is provided by a neutral party who is recognized as trustworthy to provide that information.²⁵⁴ Voters often find information from a ballot issue pamphlet, newspaper editorials, television advertisements, trusted friends, and neighbors. These information sources may provide less complete information than that of a well-informed policy wonk but are likely to provide sufficient information to allow voters to make reasonable decisions. Political participation, such as attending or viewing broadcasts of public meetings, watching public television and listening to radio programs, and reading ballot issue pamphlets offering opposing views by supporters and opponents as well as the Attorney General’s explanation of the issue, would greatly minimize the number of false statements made about a particular initiative.²⁵⁵

Voters in all states receive substantial election information about initiatives from news reports, campaign advertisements, and discussions among friends and colleagues. Some states require publication of the full text of the initiative in newspapers, and increasingly, this publication is provided through signature gatherers; every state that utilizes the ballot initiative process requires some form of public notice.²⁵⁶ About one-half of ballot initiative states disseminate election

249. See V. O. KEY, JR., *THE RESPONSIBLE ELECTORATE; RATIONALITY IN PRESIDENTIAL VOTING 1936-1960*, at xii, 61, 77 (1966).

250. See SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* 51 (Univ. of Chi. Press, 1991) (providing that “party identification, like reliance on informal opinion leaders, was an information shortcut to the vote decision.”).

251. *Id.*

252. Lupia & Matsusaka, *supra* note 246, at 469-70.

253. SHAUN BOWLER & TODD DONOVAN, *DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY* 43 (1998); Gerber, *supra* note 211, at 160.

254. Lupia & Matsusaka, *supra* note 246, at 469.

255. See *id.* at 467.

256. *Initiative and Referendum Processes*, *supra* note 61 (Petition Review, Creation and Public Notice). Note, this page incorrectly indicates that South Dakota has no single subject rule for initiated measures. *Id.*

information through newspapers, while the other half distribute ballot initiative pamphlets.²⁵⁷

Thirteen states require a voter pamphlet or booklet, usually mailed to every voter or household, provided at no cost to the residents, through public libraries and government offices, such as county offices in: Arizona, Colorado, Idaho, Illinois, Maine, Massachusetts, Mississippi, Montana, Nebraska, Oregon, South Dakota, Utah, and Washington.²⁵⁸ Twelve states require publication in a newspaper: Arkansas, Florida, Illinois, Maine, Michigan, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, and Utah.²⁵⁹ These requirements vary widely and most often include newspaper publications, other public displays such as posting on the internet, or public comment periods.²⁶⁰ As newspaper circulation declines, ballot initiative pamphlets seem to reach more individuals, but a marketing strategy must be developed to determine optimal distribution channels to be available to the most people.²⁶¹

Empirical evidence suggests that voters who participate in voter initiative elections can, and do usually, overcome their informational shortcomings and make good decisions.²⁶² Of course, there are examples of what many consider to be bad decisions based on the information presented to the voters: establishing term limits on members of Congress,²⁶³ 2016's Amendment S (Marsy's Law),²⁶⁴ 2016's Initiated Measure 22 (revising provisions concerning campaign finance and lobbying among several other topics),²⁶⁵ Initiated Measure 24 (prohibiting contributions to ballot question committees by non-residents, out-of-state political committees, and entities that are not filed with the Secretary of State),²⁶⁶ and several others over the years. The South Dakota legislature has also put several issues in front of voters that were ruled unconstitutional under the liberty and freedoms provided by the U.S. Constitution, including one to restrict marriage to

257. Holman, *supra* note 234, at 24.

258. *Initiative and Referendum Processes*, *supra* note 61 (Petition Review, Creation and Public Notice).

259. *Id.*

260. *Id.*

261. Holman, *supra* note 234, at 24.

262. Lupia & Matsusaka, *supra* note 246, at 469.

263. *South Dakota Set Term Limits, Amendment A (1992)*, [BALLOTPEDIA](https://ballotpedia.org/South_Dakota_Set_Term_Limits,_Amendment_A_(1992)), [https://ballotpedia.org/South_Dakota_Set_Term_Limits,_Amendment_A_\(1992\)](https://ballotpedia.org/South_Dakota_Set_Term_Limits,_Amendment_A_(1992)) (last visited Apr. 13, 2022).

264. *South Dakota Marsy's Law Crime Victim Rights, Constitutional Amendment S (2016)*, [BALLOTPEDIA](https://ballotpedia.org/South_Dakota_Marsy%27s_Law_Crime_Victim_Rights,_Constitutional_Amendment_S_(2016)), [https://ballotpedia.org/South_Dakota_Marsy's Law Crime Victim Rights, Constitutional Amendment S \(2016\)](https://ballotpedia.org/South_Dakota_Marsy%27s_Law_Crime_Victim_Rights,_Constitutional_Amendment_S_(2016)) (last visited Apr. 13, 2022).

265. *South Dakota Revision of State Campaign Finance and Lobbying Laws, Initiated Measure 22 (2016)*, [BALLOTPEDIA](https://ballotpedia.org/South_Dakota_Revision_of_State_Campaign_Finance_and_Lobbying_Laws,_Initiated_Measure_22_(2016)), [https://ballotpedia.org/South_Dakota_Revision_of_State_Campaign_Finance_and_Lobbying_Laws, Initiated Measure 22 \(2016\)](https://ballotpedia.org/South_Dakota_Revision_of_State_Campaign_Finance_and_Lobbying_Laws,_Initiated_Measure_22_(2016)) (last visited Apr. 13, 2022).

266. *South Dakota Initiated Measure 24, Ban Out-of-State Contributions to Ballot Question Committees Initiative (2018)*, [BALLOTPEDIA](https://ballotpedia.org/South_Dakota_Initiated_Measure_24,_Ban_Out-of-State_Contributions_to_Ballot_Question_Committees_Initiative_(2018)), [https://ballotpedia.org/South_Dakota_Initiated_Measure_24, Ban Out-of-State Contributions to Ballot Question Committees Initiative \(2018\)](https://ballotpedia.org/South_Dakota_Initiated_Measure_24,_Ban_Out-of-State_Contributions_to_Ballot_Question_Committees_Initiative_(2018)) (last visited Apr. 13, 2022).

be between a man and a woman²⁶⁷ and a statute outlawing abortion (which was the subject of a veto referendum by a vote of the people) in the past thirty years.²⁶⁸ Voters are best able to make good decisions when they have easy access to useful information.²⁶⁹ However, well-financed campaigns can stimulate support or opposition to good measures. The antidote to misinformation is good information.

Dr. John G. Matsusaka claims that establishing the criteria for who should decide is imperative in determining the appropriate process for making a decision regarding public policy.²⁷⁰ For a representative or republican government to be effective, representatives of the people must also be willing to choose the right policy once they determine it. However, representatives might not act in the manner favored by the majority of the people because the representatives have a self-interest in the outcome. Representatives might be able to discover what length of term of office or what the appropriate legislator salary the voters would like them to have, but the representatives may be tempted to not limit their terms and be more likely to vote themselves higher salaries. Another possibility is that representatives might be influenced by vocal minorities or interest groups, which might offer them rewards, campaign contributions, future employment, and the like.²⁷¹ Simply put, representatives might not choose the people's preferred policy on issues that present a "conflict of interest" or that impact powerful or vocal interest groups. Effective delegation from the people to their elected representatives occurs when all three conditions are present: (1) representatives understand voter preferences on the issue, and those preferences are homogenous, (2) representatives do not have a stake or conflict of interest in the issue, and (3) representatives are not beholden to powerful interests concerned with the issue.²⁷² Of course, representatives may not believe voters have the appropriate information at their disposal or have similar self-interests as representatives are charged with having.

The conditions for voters to make effective voting decisions are simpler than they are for representatives, as voters are aware of their preferences but are not likely to have technical knowledge on the subject.²⁷³ Some issues do not require technical knowledge to make the decisions that the voters would prefer if they had all the information. Information shortcuts or decision heuristics, when available, can overcome the lack of technical information.²⁷⁴ A decision process involving

267. *Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 862, 865, 877 (D.S.D. 2015).

268. *South Dakota Abortion Ban, Referendum 6 (2006)*, BALLOTPEEDIA, [https://ballotpedia.org/South_Dakota_Abortion_Ban,_Referendum_6_\(2006\)](https://ballotpedia.org/South_Dakota_Abortion_Ban,_Referendum_6_(2006)) (last visited Apr. 13, 2022).

269. Lupia & Matsusaka, *supra* note 246, at 468-69; Gerber, *supra* note 211, at 161, 171-72.

270. See generally JOHN G. MATSUSAKA, LET THE PEOPLE RULE: HOW DIRECT DEMOCRACY CAN MEET THE POPULIST CHALLENGE 217-20 (2020) (discussing processes for making public policy).

271. The framers of the South Dakota Constitution and other constitutions drafted during the latter quarter century of the 19th century wrote several provisions into their constitution to prevent conflicts of interest between and among legislators, as noted earlier. See Francis Newton Thorpe, *Recent Constitution-Making in the United States*, in 2 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 145, 161-62 (Edmund J. James ed., 1891); HICKS, *supra* note 21, at 26-27.

272. MATSUSAKA, *supra* note 270, at 220.

273. Lupia & Matsusaka, *supra* note 246, at 468.

274. MATSUSAKA, *supra* note 270, at 172, 218.

voters acting directly can be effective if either of two conditions is present: (1) the issue is non-technical, or (2) information short-cuts or decision heuristics are present.²⁷⁵ This situation can be problematic when there are powerful interest groups involved sufficient to sway legislators, and the issue is sufficiently technical that voters are not likely to easily comprehend the effect of the initiative and there are no easily understood information shortcuts or decision heuristics.²⁷⁶

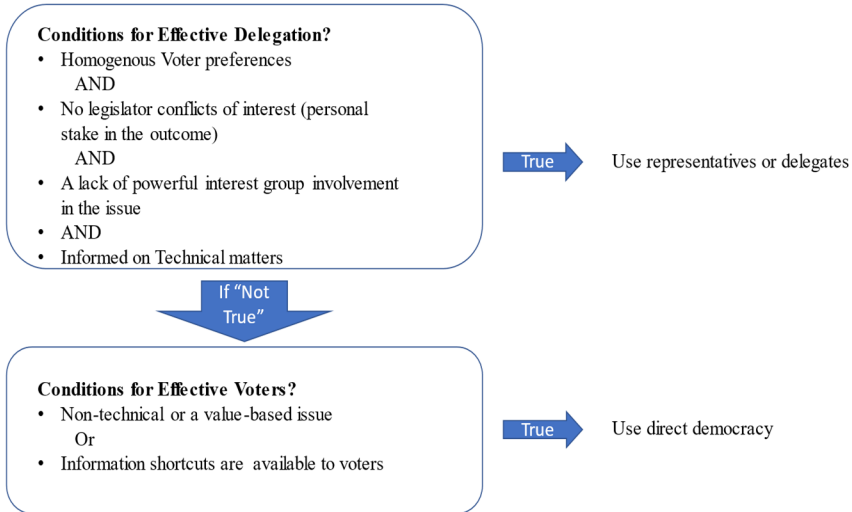


Figure 3: *Modified Matsusaka Framework for Choosing Initiative Decision Process*²⁷⁷

A major premise behind this reasoning is that a popular referendum reveals the voters' preferences if the voters have enough information to cast a vote that reveals their interests or that sufficient information short-cuts (heuristics) are available and accessible to voters to weigh the evidence. Initiated Measures and Initiated Amendments should ask a specific question. Voters should be provided information about the individuals and groups that support and oppose a referendum, and the government should ensure voters know the mechanics of elections.²⁷⁸

A ballot question should ask a specific question—whether to approve a specific law. Voters or delegates should be able to parse the details and evaluate exactly what a specific proposed law will do either through consulting trusted friends and associates or that the ballot explanation clearly identifies the

275. See *id.* at 170-74.

276. See *id.* at 172.

277. See *id.* at 220.

278. See MATSUSAKA, *supra* note 270, at 217.

consequences of passage. This follows the thinking in *Hoogestraat v. Barnett*,²⁷⁹ where the majority cited a Nebraska opinion: “It is up to the people of the State of Nebraska, not the courts, to weigh the evidence and decide on the wisdom and utility of the measures adopted through the initiative and referendum process.”²⁸⁰ The recommendation might be counterintuitive as one of the named failings of voter initiatives is that few voters will read the initiative at all, much less the legal fine print.²⁸¹ In 1915, Oregon scholars noted that measures with intricate and involved provisions, coupled with no provision to amend the voter initiative, also provided no “guarantee that the measure will be read, or fully comprehended in all its bearings.”²⁸² Further, most voters will not study a law that is of abstract interest or of great length and high legal technicality.²⁸³ However, people can make good decisions if they can obtain good information, and if they rely on good information from trusted sources (information shortcuts), they can determine if the proposed law meets their preferences. Further, interest groups and neutral officials with technical expertise can read the text on behalf of voters and communicate what the proposal will produce in terms of outcomes if implemented appropriately. A lesser system provides information by proponents and opponents of the measure, but the South Dakota Codified Law notes that, although the ballot question pamphlet is compiled by the Secretary of State, “[t]he secretary of state is not responsible for the contents, objectivity, or accuracy of the statements written by the proponents and opponents.”²⁸⁴ Further, ensuring the language of the petition is available for voters to study before entering the voting booth is essential.

Elected officials may have a particular self-interest, motivated reasoning, or powerful interest group involvement in explaining the ballot measure; the title the elected official gives to the measure may also serve as a descriptor.²⁸⁵ Language matters. For a potentially telling example, if I were to tell my wife that she looks “as beautiful and refreshing as the first day of spring,” or choose to say she looks “like the first day after a long, cold, hard winter,” we are referring to the same calendar-date, but the meaning taken will be quite different should someone use the latter set of words (which are potentially hazardous to their health). Imagine if a measure’s purpose was to repeal the sales tax on food items; it could also be titled as a measure to reduce expenditures for state aid to education to replace the revenue lost to eliminating the sales taxes on food. While there is a mechanism to appeal the South Dakota Attorney General’s titling of an initiated measure or amendment, this litigation adds additional costs to the proponents, and this may lead proponents to seek more funds from out-of-state patrons to pay for legal fees

279. 1998 SD 104, 583 N.W.2d 421.

280. *Hoogestraat*, 1998 SD 104, ¶ 20, 583 N.W.2d at 425 (quoting *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991)).

281. NAT’L CONF. OF STATE LEGISLATURES, *Overview*, <https://www.ncsl.org/research/elections-and-campaigns/preparation-of-a-ballot-title-and-summary.aspx> (last visited Apr. 14, 2022).

282. *BARNETT*, *supra* note 47, at 37.

283. *Id.*

284. SDCL § 12-13-23 (2019 & Supp. 2020).

285. SDCL § 12-13-25.1.

and representation.²⁸⁶ Initiated Measure 24, an initiated measure sponsored by the (then) Speaker of the South Dakota House of Representatives, Mark Mickelson, faced what turned out to be successful constitutional challenges.²⁸⁷ Here, a citizen had to solicit funds that came from national voting rights organizations (out-of-state) to obtain funds to successfully sue the state for violating First Amendment rights.²⁸⁸

Ballot information packets currently provide two views—one supporting the issue and one opposing it.²⁸⁹ Competing explanations should help voters parse their values and vote for their preferences. Technical information could also be provided; however, the opinions of technical experts may be seen as non-neutral, and voters are expected to be cautious of expert analysis. Information from proponents and opponents may be more salient to voters.

B. SINGLE SUBJECT REQUIREMENTS

The most common subject limitation for ballot initiatives is the single subject requirement. Sixteen of the twenty-four states that permit voter initiatives to propose statutes impose a requirement for the initiated measure to have a single subject.²⁹⁰

C. PETITION SIGNATURE REQUIREMENTS

Petition signatures are designed to ensure a minimal level of support for an initiative. Seven states (Alaska, Idaho, Maine, Massachusetts, North Dakota, Ohio, and Oregon) require filing an initial number of signatures before preparing a petition, and four states (Alaska, Ohio, Washington, and Wyoming) require a nominal filing fee.²⁹¹

South Dakota requires no less than five percent of the votes for governor at the prior election to pass initiated measures and veto referendums.²⁹² Initiated amendments require a petition signed by qualified voters equal in number to at

286. Personal communication with Cory Heidelberger (Dec. 1, 2021).

287. *South Dakota Initiated Measure 24, Ban Out-Of-State Contributions to Ballot Question Committees Initiative (2018)*, *supra* note 266.

288. *Id.*

289. SDCL § 12-13-23. Note that the statute provides no verification of the objectivity or accuracy of the statements written by proponents or opponents. *Id.*

290. *Initiative and Referendum Processes*, *supra* note 61 (Signatures). Note that this page does not identify South Dakota as a single subject law state. See 2018 H.B. 1007; 93rd Legis. Session (S.D. 2018), S.D. Sess. Laws ch. 23 § 1 for the language of the statute: “No initiated measure may embrace more than one subject, which shall be expressed in the title.” SDCL § 2-1-11.1.

291. *Initiative and Referendum Processes*, *supra* note 61.

292. S.D. CONST. art. III, § 1. Cf. SDCL § 2-1-1 (providing “[t]he petition shall be signed by not less than five percent of the qualified electors of the state.”). The 1885 Constitutional Convention considered enshrining the “Dakota Plan” into the state’s constitution. HICKS, *supra* note 21, at 18. If delegates from a sufficient number of counties indicated the desire for a law, the process would bypass the legislature for a vote by the people. *Id.* at 18-19. The current process indicates sufficient support where signatures equaling five percent of the total votes for gubernatorial candidates in the most recent election are required to indicate the degree of support needed to pursue the election. S.D. CONST. art. III, § 1.

least ten percent of the total votes cast for governor in the last gubernatorial election.²⁹³ A constitutional convention may be called by a three-fourths vote of all members of each chamber or initiated and submitted to the voters in the same manner as an initiated amendment.²⁹⁴ Constitutional amendments and revisions require a majority vote of the electorate at an election specified by law as of 2022.²⁹⁵

D. IDENTIFICATION AND PAYMENT FOR SIGNATURE GATHERERS

Many ballot initiative states have established requirements for circulators operating in the state.²⁹⁶ The most common requirements are that they be: at least eighteen years old, a citizen, a registered voter, and/or a resident of the state.²⁹⁷ Some states prohibit circulators from having a civil or criminal penalty, having lost civil rights which have not been restored, or convictions for fraud, forgery, or identity theft.²⁹⁸ In a similar vein, South Dakota requires petition circulators to be at least eighteen years old and a state resident.²⁹⁹ The state prohibits individuals who are registered sex offenders from acting as circulators under most conditions.³⁰⁰ Twenty-two states, including South Dakota, require affidavits or sworn oaths declaring the accuracy or authenticity of the petitions.³⁰¹

Several states have banned payments to petition circulators on a commission or per-signature basis. In 2022, nineteen of twenty-six states with statewide processes for initiatives or veto referendums allow payment on the basis of signatures collected.³⁰² Ballotpedia reports as of 2021, Arkansas, Arizona, Florida, Montana, North Dakota, Oregon, South Dakota, and Wyoming prohibited paying petition circulators on a per-signature basis.³⁰³ South Dakota has a unique statute regarding pay. One cannot pay, reward or compensate any person for circulating an initiative or referendum based on the number of registered voters who sign the petition.³⁰⁴ The state does not prohibit employing a petition circulator based on an hourly wage or salary, expressed or implied minimum

293. S.D. CONST. art. XXIII, § 1.

294. S.D. CONST. art. XXIII, § 2.

295. S.D. CONST. art. XXIII, § 3.

296. *Petition Circulator*, BALLOTPEDIA, https://ballotpedia.org/Petition_circulator (last visited Apr. 14, 2022).

297. *Residency requirements for petition circulators*, BALLOTPEDIA, https://ballotpedia.org/Residency_requirements_for_petition_circulators (last visited Apr. 14, 2022). *See also Initiative and Referendum Process*, *supra* note 61 (Circulators).

298. *Initiative and Referendum Process*, *supra* note 61 (including Oregon, Missouri).

299. *Id.*

300. SDCL § 2-1-1.5.

301. *Initiative and Referendum Process*, *supra* note 61. *See also* SDCL § 2-1-1.2 (requiring a sworn affidavit); SDCL § 2-1-10 (2021) (requiring verification of petition circulator).

302. *Pay per Signature*, BALLOTPEDIA, <https://ballotpedia.org/Pay-per-signature> (last visited Aug. 24, 2022). *See also* 42 AM. JUR. 2D *Initiative and Referendum* § 25 (2022) (discussing signature gathering and petition circulation).

303. *Pay per signature*, *supra* note 302.

304. SDCL §§ 2-1-1.5, 12-13-28.

signature requirements for the circulator to meet, terminating the circulator's employment if the petition circulator does not meet "certain productivity requirements," and may pay "discretionary bonuses based on reliability, longevity, and productivity."³⁰⁵ A violation is a class 2 misdemeanor. South Dakota maintains a registry for certificated paid petition circulators.³⁰⁶ Before 2020, South Dakota required registration of out-of-state signature gatherers, including identifying the current state in which the petition circulator is licensed to drive, their driver's license number and its expiration date, their current state of voter registration, the length of time at their current physical street address and two previous addresses and whether the addresses are in South Dakota, and more identifying personal information.³⁰⁷

E. CAMPAIGN FINANCE

Information on campaign expenditures for elected office or for ballot issues suggests that a group cannot buy the outcome it wants by outspending its opponents, although there is an advantage to those who spend more.³⁰⁸ Money is necessary to be competitive, but money does not guarantee success.³⁰⁹ This is an issue in ballot initiative campaigns where large amounts of money opposing very popular initiated measures and initiated amendments might not be successful; "[i]f voters do not like what they are hearing, telling them more of the same will not change their opinion."³¹⁰

Campaign spending limits do not seem to be needed unless one side does not advertise or campaign at all, in which case, there is assumed homogeneity of preferences, and, in keeping with democratic intent, the legislature should enact the proposal if no conflict of interest is present.³¹¹ It is important that a list of individuals and organizations supporting and opposing ballot issues is provided to voters to determine interest group involvement—disclosure of monetary and in-kind contributions is essential to ensuring effective decision-making. Do citizens deserve to know who is trying to influence their vote so they can vote accordingly? Money seems necessary to amplify one's message to reach voters and motivate people to take an interest and get out and vote.

305. SDCL § 12-13-28.

306. SDCL §§ 2-1-1.5 to -1.6

307. SDCL § 2-1-1.4 (repealed 2020).

308. Maggie Koerth, *How Money Affects Elections*, FIVETHIRTYEIGHT (Sept. 10, 2018, 5:56 AM), <https://fivethirtyeight.com/features/money-and-elections-a-complicated-love-story/>.

309. *Id.*

310. *See id.*; *see also* Gerber, *supra* note 211, at 153-55 (discussing how financing affects initiated measures).

311. *See* Koerth, *supra* note 309.

F. THE ELECTION PERCENTAGE AND EFFECTIVE DATE

The requirements for an election with statewide ballot measures vary greatly by state.³¹² States have statutes covering conflicting or competing measures, the percent of the vote needed to pass a measure, and repeal or change restrictions. Seventeen states have a statute in place where if two or more conflicting measures are on the same ballot, the measure receiving the most votes is considered to have passed.³¹³

Thirteen states require a simple majority to pass statewide ballot measures: Alaska, Arizona, Arkansas, California, Idaho, Maine, Michigan, Missouri, Montana, North Dakota, Ohio, Oklahoma, and South Dakota.³¹⁴ Some states have a simple majority for initiated measures (Colorado and Nevada).³¹⁵ Some states require a super majority to pass constitutional amendments (Colorado and Florida), and Utah requires three-fifths for laws that alter hunting and fishing.³¹⁶ Washington requires a three-fifths majority for laws authorizing gambling or lotteries.³¹⁷ Massachusetts, Mississippi, Nebraska, Oregon, and Wyoming require a majority of voters in the election, but also a certain percentage of the total voters in the election due to low turnout or ballot drop-off (voting for more popular races (“top of the ticket”) and near the end of the ballot).³¹⁸ Requiring a minimum percentage of participation effectively encourages parties from discouraging citizens from exercising the franchise—a procedure that discourages democracy in that “not voting is a no vote.” The rationale for such a policy is to ensure “measures will not be passed by a small minority of voters, either because of low turnout or ballot-drop-off (where voters only vote partway through a ballot).”³¹⁹

The 2021 South Dakota Legislature placed a constitutional amendment on the June 2022 primary election ballot to add a new section to Article XI of the Constitution.³²⁰ If this measure passes, it will require a three-fifths majority vote for constitutional amendments, initiated amendments, and initiated measures that raise taxes or fees or that obligate the state to appropriate funds of ten million

312. See generally *Initiative and Referendum Process*, *supra* note 61 (detailing requirements for citizen initiatives and popular referenda in a state-by-state manner).

313. *Initiative and Referendum Process*, *supra* note 61 (The Election and Effect). South Dakota and five other states (Florida, Illinois, Montana, Oregon, and Wyoming being the others) do not have a law covering conflicting measures. *Id.* The Chair of the South Dakota Code commission letter requested members of the bar for suggestions on how to handle this situation as well as when the legislation amends the law prior to a vote of the people. Letter from Margaret Gillespie, Chair, S.D. Code Comm’n, to Members of the South Dakota State Bar (Feb. 20, 2020), <https://mylrc.sdlegislature.gov/api/Documents/128520.pdf>.

314. *Initiative and Referendum Process*, *supra* note 61 (The Election and Effect).

315. *Id.* (Colorado and Nevada).

316. *Id.* (Colorado, Florida, and Utah).

317. *Id.* (Washington).

318. *Id.* (Massachusetts, Mississippi, Nebraska, Oregon, and Wyoming).

319. *Initiative and Referendum Process*, *supra* note 61 (The Election and Effect: Majority to Pass?).

320. H.J.R. 5003, 96th Legis. Session (S.D. 2021).

dollars or more in any of the first five years after enactment, to be annually adjusted for inflation as determined by the Legislature.³²¹

Sponsors of the resolution indicated that they were choosing to place this initiative measure on the ballot during the primary election to get more Republican votes because there are fewer expected primary voters and fewer voters overall.³²² Resolution sponsors have also indicated that they would prefer to have the law in effect when the initiated measure expanding Medicaid is voted on in the general election.³²³ Other proponents claim that they are fighting back against those who want to bypass the legislature.³²⁴ In the 2020 primary election, just over twenty-eight percent of registered voters cast a ballot, whereas nearly seventy-four percent of voters participated in the November general election.³²⁵ Republican Representative Tim Goodwin was quoted as noting, “[i]f they don’t think that’s sacred and they don’t go vote, they get what they deserve,”³²⁶ seemingly indicating that if this issue is important to Democrats, they need to get out the vote.

In South Dakota, “[e]ach constitutional amendment, initiated measure, or referred law that is approved by a majority of all votes cast is effective on the first day of July after the completion of the official canvass by the State Canvassing Board.”³²⁷ “If two or more initiated measures or amendments to the Constitution are approved by the voters during the same election, each initiated measure shall be given effect, unless the initiated measures or amendments conflict or a contrary

321. *Id.*

322. See Jay Davis, *Schoenbeck’s amendment aimed as possible Medicare expansion*, WATERTOWN PUB. OP. (Mar. 24, 2021, 5:00 PM), <https://www.thepublicopinion.com/story/opinions/2021/03/24/schoenbecks-amendment-aimed-at-possible-medicare-expansion/43705377/>. Representative Jon Hansen claimed the vote on Amendment C was “an opportunity for citizens to have more control of how their government operates, not less.” Joe Sneve, *Top South Dakota lawmakers organize to support three-fifths rule on financial ballot initiatives*, ARGUS LEADER (Sioux Falls, S.D.) (Jun. 21, 2021, 4:55 PM), <https://www.argusleader.com/story/news/2021/06/21/south-dakota-republicans-hansen-schoenbeck-lead-effort-limit-citizen-led-ballot-measures-amendment/7771476002/>. However, Hansen was not cited as responding to the claim made by Senator Lee Schoenbeck. See *id.*

323. Sneve, *supra* note 322. See also Associated Press, *Lawmakers push 60% vote threshold on tax ballot measures*, KOTA TERRITORY (Mar. 5, 2021, 11:13 AM), <https://www.kotatv.com/2021/03/05/lawmakers-push-60-vote-threshold-on-tax-ballot-measures/> (“[Senator Schoenbeck] acknowledged that his expedited push was motivated by the Medicaid expansion campaign, . . .”).

324. See Davis, *supra* note 322.

325. S.D. SEC’Y OF STATE, *2020 Election History*, https://sdsos.gov/elections-voting/election-resources/election-history/2020_Election_History.aspx (last visited May 4, 2022).

326. Associated Press, *supra* note 323.

327. SDCL § 2-1-12. Voters will determine the fate of a Legislatively proposed amendment to the South Dakota Constitution, Article XI, a new section 16, reading as follows:

Any initiated constitutional amendment, initiated measure, constitutional amendment proposed and submitted to the people by the Legislature, or measure referred to the people by the Legislature that imposes or increases taxes or fees, and any initiated constitutional amendment, initiated measure, constitutional amendment proposed and submitted to the people by the Legislature, or measure referred to the people by the Legislature that obligates the state to appropriate funds of ten million dollars or more in any of the first five fiscal years after enactment, to be annually adjusted for inflation as determined by the Legislature, shall become part of the Constitution or statute only if approved by three-fifths of the votes cast thereon.

S.D. H.J.R. 5003 (enrolled). The election will be held at the June 2022, primary election. *Id.*

intent plainly appears.”³²⁸ “For purposes of any conflict or determination of intent under this section, the initiated measure or amendment receiving the greatest number of affirmative votes at the election will go into effect.”³²⁹

Some petition sponsors wish for the passage to continue to remain effective at the date of the official canvas. The more complicated the initiated measure or initiated constitutional amendments, the more time the legislature needs to appropriately affix authority—especially rule-making authority—to agencies to whom the initiated measure may not have appropriately granted that authority to an agency charged with implementing the provisions of the initiated measure. The delay in implementation of the initiated measure may result from the lack of an appropriate timeline for rule-making under South Dakota Codified Law Chapter 1-26.³³⁰

The legislature is enabled to repeal an initiated measure passed by the voters.³³¹ Voters approved Initiated Measure 22 (revising campaign finance and lobbying laws) by a margin of about 11,500 votes.³³² Circuit Court Judge Mark Barnett issued a preliminary injunction putting the measure’s provisions on hold temporarily after a group of legislators and a few others filed suit.³³³ A group of legislators introduced House Bill 1069 (HB 1069), designed to declare an emergency (to prevent Initiated Measure 22’s sponsors from filing a referendum petition), repealing Initiated Measure 22.³³⁴ The Sioux Falls *Argus Leader* reported:

“Judge us on the outcome of this legislative session,” Rep. Larry Rhoden, R- Union Center, asked of constituents listening to the hearing. “Give us a chance to honor the will of the voters, because IM 22 didn’t.”

328. *Laws governing the initiative process in South Dakota*, BALLOTPEdia, https://ballotpedia.org/Laws_governing_the_initiative_process_in_South_Dakota (last visited May 4, 2022) (citing S.D. CONST. art. XXIII, §§ 1-3; SDCL § 2-1). Ballotpedia seems to indicate this language is quoted from the South Dakota Constitution and Codified Law, however, the exact language does not appear, instead it is simply the portions of the South Dakota law that deals with amendments, referenda, and initiative measures. However, the language does appear later in South Dakota Codified Law. SDCL § 2-14-16.2 (2021).

329. SDCL § 2-14-16.2. Margaret Gillespie, Chair of the South Dakota Code Commission sent a letter on February 20, 2020, to the members of the State Bar asking for their input on how to handle bills passed between the time an initiated measure or initiated amendment is circulated for review in the process described above, as there is ample room for the legislature to act on the substance of the proposal. Letter from Margaret Gillespie, *supra* note 313.

330. *South Dakota House passes bill that would delay medical marijuana implementation*, DAKOTA NEWS NOW (Feb. 25, 2021, 3:32 PM), <https://www.dakotaneWSnow.com/2021/02/25/south-dakota-house-passes-bill-that-would-delay-medical-marijuana-implementation/>.

331. *State ex rel. Richards v. Whisman*, 154 N.W. 707, 711 (S.D. 1915). See generally Wenzel J. Cummings, *Initiatives and Referenda: Issue Memorandum 2017-02*, S.D. LEGIS. RSCH. COUNCIL (2018), <https://mylrc.sdlegislature.gov/api/Documents/IssueMemo/124657.pdf?Year=2017> (discussing initiatives and referenda). Footnote 4 also suggests that the decision requires a statement in the bill justifying an emergency clause. Cummings, *supra* note 331, at 1 n.4.

332. S.D. SEC’Y OF STATE, *Unofficial 2016 Election Results* (2016), <http://electionresults.sd.gov/resultsSW.aspx?type=BQ&map=CTY&eid=178>.

333. *South Dakota Revision of State Campaign Finance and Lobbying Laws, Initiated Measure 22 (2016)*, *supra* note 265.

334. *Id.*

...

“I firmly believe we need to get rid of this, start over. It’s better to throw it all out, start over so it’s something done by South Dakotans for South Dakotans and not from anybody else,” said House Majority Leader Lee Qualm, R-Platte.

...

“The answer is to fix it,” [Rep. Spencer] Hawley said. “We need to respect the intent of the voters.”

...

“The problem with repeal and replace is, what we’ve said from the beginning, that it repeals what the voters asked for and replaces it with something we didn’t have a direct say in,” Doug Kronaizl, spokesman for Represent South Dakota, said.³³⁵

In 2019, HB 1094 was challenged in federal court by South Dakota Voice and Cory Heidelberger.³³⁶ The legislation could be described as a “hoghouse” bill with the original one line of text reading: “Programs and policies regarding transparency of petition circulators are revised.”³³⁷ The eventual bill that passed the legislature required a paid petition circulator to register with the Secretary of State by providing certain information, established a petition circulator registration and fee system, required petitioners to wear a badge identifying the sponsoring committee and ballot measure for which they are collecting signatures, and their paid or volunteer status in addition to making a few other changes to the process.³³⁸ Judge Charles B. Kornmann ruled that the bill was sufficiently broad to apply to anyone who publicly advocated for the signing of an initiated measure petition and that the outlined disclosure requirements violated the First Amendment to the United States Constitution, restricting the freedom of speech.³³⁹

South Dakota Speaker Mickelson sponsored Initiated Measure 24 which was also challenged in court by South Dakota Voice and Heidelberger.³⁴⁰ Judge Kornman also ruled that this initiated measure violated the First Amendment, a suggestion which was noted in the Attorney General’s statement that the measure would likely face a constitutional challenge if passed; in 2018, no states regulated

335. Dana Ferguson, *Lawmakers vote to gut ethics law, call on voters to ‘give us a chance’*, ARGUS LEADER (Sioux Falls, S.D.) (Jan. 23, 2017, 12:46 PM), <https://www.argusleader.com/story/news/politics/2017/01/23/lawmakers-prepare-gut-voter-approved-ethics-law/96940990/>.

336. See generally *SD VOICE v. Noem*, 380 F. Supp. 3d 939 (D.S.D. 2019) (discussing the challenge to House Bill 1094).

337. See Rep. Hansen & Sen. Stalzer, *House Bill No. 1094*, STATE OF S.D. NINETY-FOURTH SESSION LEGIS. ASSEMBLY (2019), <https://sdlegislature.gov/Session/Bill/9982/52277> (stating the original language of House Bill 1094); S.D. LEGIS. RSCH. COUNCIL, *House Bill 1094* [hereinafter *HB 1094*], <https://sdlegislature.gov/Session/Bill/9982> (last accessed May 7, 2022).

338. *HB 1094*, *supra* note 337.

339. Josh Altic, *Judge strikes down South Dakota initiative petition circulator disclosure requirements*, BALLOTEDIA (Jan. 15, 2020, 11:07 AM), <https://news.ballotpedia.org/2020/01/15/judge-strikes-down-south-dakota-initiative-petition-circulator-disclosure-requirement/>.

340. *South Dakota Initiated Measure 24, Ban Out-of-State Contributions to Ballot Question Committees Initiative* (2018), *supra* note 266.

out-of-state contributions to ballot measure campaigns, likely due to a 1981 U.S. Supreme Court opinion.³⁴¹ “Strange bedfellows” combined to oppose the measure, including the Koch Brothers’ funded Americans for Prosperity joining Heidelberger, who pointed out the large amount of out-of-state campaign contributions for electoral offices.³⁴²

G. PUBLIC SUPPORT FOR THE INITIATIVE

According to a recent statewide South Dakota News Watch and the Chiesman Center for Democracy at the University of South Dakota poll, a wide majority of South Dakota residents support the citizen-led ballot-initiative process to make laws or change the state constitution, and a significant majority said they do not want the state Legislature to make the process more difficult.³⁴³ Nearly three out of every four respondents from a random sample agreed or strongly agreed that “citizen ballot initiatives are an important part of the democratic process.”³⁴⁴ On a follow-up question, nearly two out of every three respondents (62.8%) said they disagreed or strongly disagreed that “the South Dakota Legislature should make it more difficult for citizen initiatives to get onto the ballot.”³⁴⁵

Political scientists and journalists tend to express lesser degrees of favor with voter initiatives.³⁴⁶ One purpose of the voter initiative is to supplement representative democracy-in-government with democratic government by allowing voters an opportunity to participate in the policy-making arena when legislatures are unwilling or unable to address issues of great concern to the public.³⁴⁷ Since voter initiatives are not self-executing, the state legislature, or appropriate legislative body for the political jurisdiction, must provide a process for voter initiatives to proceed.³⁴⁸ There is an inherent risk that the legislature will make the process so difficult that the ability of the voters to proceed with

341. *Id.* See also *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 290 (1981) (granting an injunction against Florida Senate Bill 1890 which limited contributions to ballot measure committees to three thousand dollars until the measure is certified for the ballot).

342. *South Dakota Initiated Measure 24, Ban Out-of-State Contributions to Ballot Question Committees Initiative* (2018), *supra* note 266. A contemporary example involves Governor Kristi Noem, who has raised over ten million dollars and has over \$6.5 million on hand as of November 12, 2021. *Governor Kristi Noem Announces Re-Election Campaign; \$10M raised, and over \$6.5M cash on hand*, S.D. WAR COLL., <http://dakotawarcollege.com/governor-kristi-noem-announces-re-election-campaign-10m-raised-and-over-6-5m-cash-on-hand/> (last visited May 8, 2022).

343. Bart Pfankuch, *NewsWatch poll: South Dakotans Back Ballot Initiative Process, Oppose Interference*, ABERDEEN NEWS (May 29, 2021, 6:01 AM), <https://www.aberdeennews.com/story/news/2021/05/29/south-dakota-news-watch-opinion-poll-medical-marijuana-voting/7457895002/>; Bart Pfankuch, *Poll Part 3: South Dakotans support ballot initiative process and oppose lawmaker interference*, S.D. NEWS WATCH (May 26, 2021) [hereinafter *Poll Part 3*], <https://www.sdnewswatch.org/stories/poll-part-3-south-dakotans-support-citizen-led-initiative-process-and-oppose-lawmaker-interference/>.

344. *Poll Part 3*, *supra* note 343.

345. *Id.*

346. See generally DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2001) (noting the different impressions people have about the initiative process).

347. Holman, *supra* note 234, at 4.

348. See S.D. CONST. art. III, § 1 (outlining process for initiative and referendum).

meaningful legislation is effectively stymied. Citizens tend to favor voter initiatives, while “lawmakers often feel differently, since it circumvents the legislature.”³⁴⁹ Stated more appropriately, the initiative and referendum process was enacted over a century ago to supplant the legislature who would not enact citizen preferences. So, what can we do to balance the desire of the majority of voters to keep the initiative and referendum with the problems identified?

Since there is popular support for direct democracy in the form of the Initiative and Referendum in South Dakota, the question turns to the more pragmatic but normative questions. What issues should be decided by the people and which by their elected representatives? What should be the procedural or structural requirements that maintain ballot integrity and popular sovereignty as provided for by Article III, section 1 in the sharing of legislative power between the people and the legislature?

H. SINGLE SUBJECT RULES

Sixteen of the twenty-six states that provide a process for citizens to initiate laws, constitutional amendments, or refer acts of the legislature to a vote of the people provide a limit on the subject matter of voter initiatives.³⁵⁰ South Dakota voters passed Amendment Z in 2018, requiring a single subject for legislatively referred constitutional amendments or initiated constitutional amendments.³⁵¹ The ostensible purpose of single subject rules are to prevent log-rolling in legislation and to make legislation easier for the voters to understand.³⁵² Log rolling is a vote-trading technique used in legislatures and any governing board to obtain passage of actions of interest to each party.³⁵³ The idea is that by limiting the subjects of voter issues, then the voter is more likely to understand the issue upon which they are voting. This provision, to some degree, duplicates the South Dakota provision

349. Kelley Griffin, *Election Perfection: You be the Judge*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 13, 2021), <https://www.ncsl.org/research/elections-and-campaigns/election-perfection-you-be-the-judge-magazine2021.aspx>.

350. *States with Single-Subject Rules*, BALLOTPEDIA, https://ballotpedia.org/Single-subject_rule (last visited Aug. 25, 2022).

351. S.D. CONST. art. XXIII § 1 (2018). The last sentence of Article XXIII, section 1, reflects that the text of the ballot issue was to read as follows:

A proposed amendment may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment, *however no proposed amendment may embrace more than one subject. If more than one amendment is submitted at the same election, each amendment shall be so prepared and distinguished that it can be voted upon separately.*

Id. (emphasis added).

352. A nonprofit voter information portal, Ballotpedia, provides reading age and grade level scores for ballot issues. *South Dakota Constitutional Amendment A, Marijuana Legalization Initiative (2020)*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Constitutional_Amendment_A,_Marijuana_Legalization_Initiative_\(2020\)](https://ballotpedia.org/South_Dakota_Constitutional_Amendment_A,_Marijuana_Legalization_Initiative_(2020)) (last visited May 12, 2022). Ironically, the Attorney General's title was written at a grade level of twenty while the text of the Attorney General's Ballot Summary was written at a grade level fifteen. *See id.*

353. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULOUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 274-75 (1962).

that the Attorney General write a brief description of what a voter initiative would accomplish. Ballotpedia publishes recognized and accepted readability indices to determine the readability of the language and content of the title, content, and the issue explanation of each ballot issue is provided as part of the requirements of the Attorney General.³⁵⁴

XI. PETITION BLOCKING MEASURES

There are a variety of organizational ways to attempt to prevent voter initiatives from meeting ballot access requirements. Collectively these are identified as “petition blocking measures.”³⁵⁵ Of course, establishing additional criteria for petition signature gathering may have nefarious intent, but may also be warranted as an effort to promote the sanctity of the petition process. Determining which of these criteria are nefarious and which are legitimate is often a matter of perspective. The purpose of discussing these criteria here is to identify procedures that are anti-democratic in effect, not necessarily, but possibly, in intent. Delegates to the 1885 South Dakota Constitutional Convention noted that delegates sought to curtail the powers of the legislature: “Few members, however, seriously questioned the necessity of curtailing the powers of the legislature. ‘The object of Constitutions,’ declared one South Dakota delegate, ‘is to limit the legislature.’”³⁵⁶ Similar quotes are scattered throughout the convention’s journals.

All petitions must follow procedural guidelines, which vary by state. Petitions always include a title and/or summary of the proposed measure, although who writes this information varies.³⁵⁷ Washington is, in 2021, the only state that does not allow petition sponsors to draft the actual text of a ballot initiative.³⁵⁸ Seventeen states have at least one government official draft or review the petition title and/or the summary of the proposal.³⁵⁹ Several states require two officials to write or review the title and/or summary, given their importance to a ballot measure.³⁶⁰

At best, legislatures stress the need to strike a balance between the rights of citizens to amend the constitution through the ballot and the need to ensure citizen-led initiatives are properly vetted. As the issue progresses toward the ballot, every change to the proposed wording requires the process to begin anew, leading proponents to stick with the original language so they can begin to collect signatures to get the issue on the ballot. Still, as most states provide only basic

354. See, e.g., *South Dakota Constitutional Amendment A, Marijuana Legalization Initiative (2020)*, *supra* note 352 (discussing Amendment A).

355. *Petition blocking*, BALLOTPEDIA, https://ballotpedia.org/Petition_blocking?_wscid=6C4AC1B27B4ABD2833A7491965D99D9C8B9AC234CCDAB80A (last visited Dec. 6, 2021).

356. HICKS, *supra* note 21, at 24 (citing South Dakota, *Debates*, I, p. 557).

357. NAT’L CONF. OF STATE LEGISLATURES, *Initiative and Referendum Procedures 24-25* (2021), <https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx#/>.

358. Holman, *supra* note 234, at 10.

359. *Id.* at 11.

360. *Id.*

drafting assistance to initiative proponents, problems that arise should come to no one's surprise.

Idaho House Speaker Scott Bedke said he would:

like to see [] a way to get a more thorough exploration of the proposals before they are voted on, such as being clear about the expected price tag of a measure . . . [U]nder the current system, when voters approve an initiative, the Legislature has to come in after the fact and add the details that make it a complete law.³⁶¹

One reform that would reduce the workload on the legislature to amend ballot initiatives is to have the LRC provide ballot question language to the petition sponsors in a reasonable period of time after receiving a petition's single subject intent. South Dakota's statutory process for ballot initiatives requires proposed Initiated Measures and Initiated Amendments to the South Dakota Constitution to be filed one year prior to the general election at which voters will decide the issue, creating the opportunity for the legislature to pass legislation on the same issues as those addressed by the ballot issue proposal.³⁶²

The timeline outlined above provides an opportunity to correct legal problems with the proposed legislation. However, delays in reviewing language, amending measures and amendments to meet the LRC's suggested language, and starting over may delay the time to gather signatures by up to four months and even longer due to the statutory provision extending the time to respond to the end of the legislative session. Petition sponsors who do not have their petition language clarified before the legislative session begins with the statutorily-required budget address in December, with a measure that requires no fiscal note, and who accept the Attorney General's language on the title and description could only have four to five months to gather signatures from registered voters before the general election date. This would require additional cost to obtain funds for a petition drive—a perverse incentive to seek more funds, which makes citizen petitions less possible.

A. LEGISLATIVE HEARINGS AND REPLACEMENT-TO-THE VOTE LEGISLATION

No legislation is protected from changing conditions and political winds. Legislation must be current for the times, and sometimes legislation is no longer appropriate. This leads one to observe that there must be a provision to amend statutes and even constitutions.

One method to ensure that the challenges faced by states which have limits on amendments is to keep some limitations, but also to provide a process for statutes to be amended or repealed. In New Jersey's proposed resolution of this

361. Griffin, *supra* note 349.

362. SDCL §§ 2-1-1.1 to -1.2. The process specifying petition signatures for an initiated measure must be presented to the Secretary of State one year prior to the general election at which the measure will be voted upon by the people is under order, pending review by the Eighth Circuit Court of Appeals to be the first Monday after the first Tuesday in May (2022)—roughly six months prior to the general election. See *SD VOICE v. Noem*, 557 F. Supp. 3d 937, 945-46 (D.S.D. 2021).

issue, the legislature must introduce a bill to that effect, and after twenty days, the legislative committee holds public hearings on the bill.³⁶³ The purpose is to provide public notice of this proposal, to give initiative proponents time to participate in the reconsideration legislation, and to mobilize public support for their position if the amending legislation is seen as an attack on the initiative rather than making better public policy by enacting the purpose of the bill.³⁶⁴

“We know how detailed legislation needs to be, and sometimes the things that come out of the initiative process are lacking those details,” Bedke said. He said it requires “a careful balance” when lawmakers put the nuts-and-bolts details into initiatives that citizens have passed. If they appear to modify the initiative too much, “There’s a hue and cry that we’re trying to strip the citizens of constitutional . . . process.”³⁶⁵

The South Dakota legislature and the people share the legislative power for the state, and either can add statutory law, amend previously passed legislation, or repeal legislation previously enacted, so long it this action does not violate federal constitutional or statutory law or the state’s constitutional provisions.³⁶⁶ As noted earlier, the challenge is to prevent the repeal of legislation in which the people or the legislature have a vested interest. This might be why initiating constitutional amendments has become so popular—partly so that the legislature does not repeal laws in which it or its members have a vested interest (i.e., term limits) or the legislature does not enact laws curtailing the initiative under the guise of making the process “safe from out-of-state money” when much candidate campaign cash is from out-of-state sources. Disclosure of campaign contributions to ballot measure committees seems to deal with this requirement, including nonprofit educational organizations as codified under the Internal Revenue Code.

Margaret Gillespie, Chair of the South Dakota Code Commission, asked members of the South Dakota Bar to address this timing:

Given the lengthy time frame during which ballot measures must be reviewed, circulated, and enacted, three Legislative sessions occur. During any of these Sessions, the Legislature may amend, repeal, or add new law that is either in direct conflict with the ballot measure or that is the subject of the ballot measure, leaving several avenues for conflict by the time the ballot measure is enacted.³⁶⁷

Gillespie’s note also suggests that the legislature could act before the vote.³⁶⁸ One proposal is to hold hearings on the voter initiative in the interim or legislative

363. Holman, *supra* note 234, at 26.

364. *Id.*

365. Griffin, *supra* note 349.

366. *See generally* State *ex rel.* Richards v. Whisman, 154 N.W. 707 (S.D. 1915) (“We are of the view that the initiative and referendum amendment was never intended as a means of so curtailing and limiting the constitutional power of the state Legislature, but was intended to preserve to the people a greater share of, and control over, the legislative power, but without taking away from any other constitutional department any of its powers, excepting the veto power of the state executive.”).

367. Letter from Margaret Gillespie, *supra* note 313.

368. *See generally id.* (discussing the time frame for ballot measures).

session immediately following the delivery of the proposed initiative.³⁶⁹ The starting point could be to have these hearings after the formation of the ballot issue committee or shortly after the date of delivery to the LRC.

South Dakota's mechanism to deal with this issue involves review by the LRC as well as the Attorney General.³⁷⁰ LRC assistance with drafting the amendments or initiated measures would help (1) identify the agencies of state government affected so that appropriate authority can be delegated for procedures implementing the provisions of the initiated measure should voters approve it and helps ensure that the language of the measure (2) achieves the purposes desired by the proponents of the initiative. Legislative hearings provide another opportunity to present experts on the issue, proponents and opponents, as well as those who wish to speak on the issue but are neither proponents nor opponents of the measure. Research evidence suggests that self-acknowledged uninformed voters choose one of three options—to not vote at all, to not vote on that issue (or race if an election for office), or to vote “no.”³⁷¹

A further step is to require the legislative amendment must also be consistent with or “germane to” the purpose and intent of the original initiative.³⁷² One might presume that the similar determination of “germaneness” as currently exists in the legislature, subject to court review.

Another alternative is to require a super-majority to amend a voter initiative in the first and second sessions after the people enact the law. There is criticism of this maneuver in states with super-majorities already dominating chambers of the legislature.³⁷³ That is, many of those initiating measures are members of the minority party, and the super majority could amend voter initiatives at any time.

Other provisions thought to ensure thoughtful legislative action is to require a super-majority vote by the legislature on the voter-enacted legislation but only after a period of time has passed.³⁷⁴ However, this may increase the tendency of the legislators to take the case to circuit court to enjoin the implementation of the act.

B. JUDICIAL REVIEW

South Dakota provides for expedited judicial review of several challenges in the voter initiative process.³⁷⁵ Most specifically, the Attorney General's title of the initiative, the Attorney General's explanation of the effect of the initiative in

369. Holman, *supra* note 234, at 17-18.

370. See S.D. LEGIS. RSCH. COUNCIL, 2022 *Interim Committees*, <https://sdlegislature.gov/Interim/Committees/64> (last visited May 16, 2022) (listing all 2022 interim committees); S.D. LEGIS. RSCH. COUNCIL, *Archived*, <https://sdlegislature.gov/Interim/Archived> (last visited May 16, 2022) (listing all previous interim committees and containing all documents of importance from these committees).

371. Gerber, *supra* note 211, at 160-61.

372. *Initiative and Referendum Processes*, *supra* note 61, at 24-25.

373. Personal communication with Cory Heidelberger (Dec. 1, 2021).

374. Holman, *supra* note 234, at 15.

375. SDCL § 12-13-9.2.

the statement to voters, and the Secretary of State's verification of petition signatures, are each provided with expedited review.³⁷⁶

The framers of the U.S. Constitution of 1789 favored a democratic republic because there were aware that people in a democracy were subject to vote for candidates who would serve their short-term interests or passions of the day.³⁷⁷ The constitutional convention was to revise the first Constitution of the United States, the Articles of Confederation and Perpetual Union.³⁷⁸ They met shortly after the so-called "Shays' Rebellion" and determined to resolve the many other issues of the Articles of Confederation.³⁷⁹ The danger lies in blaming external forces—intellectuals, the legislature, foreigners, judges, and the like—blaming others leads to the creation of demagogues.

Legislative deliberation is thought to protect democracy from demagoguery. By separating powers from each other and using representatives of the people to engage in the deliberative process, the framers of the U.S. Constitution designed political institutions to cool inflamed passions and to be slow so as to delay ill-informed plans. These institutions—separating the legislature from the executive, executive veto, bicameral legislatures selected with different constituencies (the people and the interests of the states), for different terms (two years for the House of Representatives and six years for the Senate) would express the needs and preferences of the majority while distinguishing temporal preferences from settled majority convictions. The notion was that by promoting deliberation, democratic political institutions could balance minority rights and majority preferences, democratic rule with individual liberties.³⁸⁰

Initiative legislation bypasses these separate representative institutions that the framers relied upon to safeguard our democratic republic. As a result of legislatures not passing legislation the people want and individual citizens and organized groups and coalitions pursuing direct law-making, there is an increasing reliance on the least democratically accountable branch of government—the judiciary. The courts are often placed in the glare of the populist spotlight when asked by those who oppose popular democracy to serve as the final check on the interests of the majority. Although the courts are well suited to protect constitutional rights and negative liberties, they are not well suited to the more

376. *Id.*; SDCL § 12-13-25.

377. See THEODORE J. LOWI ET AL., *AMERICAN GOVERNMENT: POWER AND PURPOSE* 38-41 (Laura Wilk, ed., 15th ed. 2019) (discussing development of the constitution through constitutional conventions).

378. *Id.* at 40.

379. *Id.* These included the requirement of unanimity required to amend the constitution, the lack of authority for the national government to levy taxes largely because of the fear of taxation without representation. See *id.* at 40-44. The requirement that legislation from the unicameral body required support from nine of the thirteen original states (former colonies) also led to inaction in the area of taxes. See *id.* Further a weak national government had no independent judiciary to resolve disputes between the states, and no coherent foreign policy. See *id.*

380. *Id.* Of course, state representatives often have similar constituencies, represent the people in the same legislative districts, hold the same terms of office, and so forth. These facts are present in South Dakota, making the legislature less like the national government institutions due to the Fourteenth Amendment's application in *Baker v. Carr* and *Reynolds v. Sims*. *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

subtle screening and filtering of popular interests and passions of direct democracy.

Judges are placed in an unenviable position: they can either fill the legislative role that has not been performed, thereby becoming liable to well-earned accusations of judicial activism and overreaching, or they can stick to a more limited constitutional role and allow poorly written, ill-conceived, and misleading initiatives to crowd the ballot, statute books, and state constitutions.³⁸¹

Fair or not, the branches have different roles, but when one branch fails to fulfill or is seen as failing to fulfill its constitutional duties, courts are asked to either fill the role of the legislature by ratifying or ruling a measure as unlawful or unconstitutional a law that the voters approved. For our democratic republic, this is an example of Joseph Heller's "Catch-22," where the courts must interpret public will often through contrived reasoning or rule specifically on whether the process established by the Legislature was followed appropriately.³⁸² Either the court's reputation suffers, or the legislature is left to try to limit popular will by making the initiative process more cumbersome, which provides support for the courts to support the legislature against the people. This will contribute to distrust in our government and its institutions.

Legal petition blocking occurs when opponents of a ballot measure use legal tactics such as lawsuits and complaints to block ballot access.³⁸³ Often these are delaying tactics that attempt to focus attention away from the signature-gathering campaign to focus on the lawsuit, taking attention, time, and resources from the process of gathering signatures.³⁸⁴ As noted earlier, there are several procedures that must be followed in order to circulate petitions as the constitutional provisions of the initiative and referendum are not self-executing, but rather "[t]he Legislature shall make suitable provisions for carrying into effect the provisions of this section."³⁸⁵

The South Dakota legislature has a constitutional requirement that no law shall embrace more than one subject, which shall be embraced in its title.³⁸⁶ For the legislature, this single-subject rule has existed since 2018, with the presumption that an act of the legislature is presumed to be constitutional.³⁸⁷ If an amendment is submitted to be voted on in the same election, each amendment is to be prepared and distinguished so that it can be voted on separately, similar to the provisions separated from the convention's presentation to the South Dakota Constitution on prohibition and minority representation on October 1, 1889.³⁸⁸

381. ELLIS, *supra* note 209, at 176.

382. See generally JOSEPH HELLER, CATCH-22 (1961) (detailing the paradox where a person cannot escape from a situation due to contradictory rules or limitations).

383. *Petition Blocking*, *supra* note 355.

384. See generally *id.* (discussing methods of petition blocking).

385. S.D. CONST. art. III, § 1.

386. S.D. CONST. art. III, § 21.

387. *Id.*

388. S.D. CONST. art. XXVI, § 23.

A proposed amendment may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment; however, no proposed amendment may embrace more than one subject. If more than one amendment is submitted at the same election, each amendment shall be so prepared and distinguished that it can be voted upon separately.³⁸⁹

However, voter referenda on constitutional amendments and initiated measures must have one single subject.³⁹⁰ This could be enforced to the same degree in the legislature also to avoid logrolling among legislators.

C. PETITION CIRCULATION

Physical petition blocking is a term that describes individuals interfering with the petition circulator's ability to solicit signatures for purposes of preventing the collection of signatures to qualify the question for the ballot.³⁹¹ This manner of physical petition blocking is also known as "decline to sign" campaigns.³⁹² The Legislature's effort to educate petition signers is to have the ballot petition be all-encompassing: the Attorney General's title and explanation are incorporated into the petition packet—the full text of the petition to be circulated in fourteen-point font.³⁹³ A question format that works best is a question for which there is a simple "yes" or "no" response to the question.³⁹⁴ Eliminating the requirement that the entire petition be on one sheet of paper in fourteen-point type when the ballot itself is not in fourteen-point type and is a much larger sheet of paper suggests this requirement has specious origins. Requiring ballot language to be provided to petition signers and not provide the language to voters at the time of voting suggests it is more important to educate the petition signers than the voters.

The 2017-2018 South Dakota Legislative Task Force reviewing the Initiative and Referendum after the passage of Initiated Measure 22 and Initiated Amendment "Marsy's Law" decided against the larger-type font as a petition would, when unfolded, appear as a "beach blanket."³⁹⁵ The legislature is not immune from specifying onerous requirements that have little effect on the education of the petition signer. One example is Representative Carl E. Perry's and Senator Al Novstrup's proposed 2021 SB 77 amending South Dakota Codified Law section 2-1-1.1 to require electronic and petition forms circulated for signature to have the full text of the proposed initiated amendment printed in

389. S.D. CONST., art. XXIII, § 1.

390. *South Dakota Constitutional Amendment Z, Single-Subject Rule for Constitutional Amendments*, *supra* note 227; S.D. CONST. art. XXIII, §§ 1-3; H.B. 1007, 93rd Legis. Session (S.D. 2018); SDCL § 2-1-11.1; SDCL § 12-13-25.

391. *Petition Blocking*, *supra* note 355.

392. *Id.*

393. SDCL § 2-1-1.1.

394. See MATSUSAKA, *supra* note 270, at 228 (discussing best practices for initiative and referendums). See generally BARNETT, *supra* note 47, at 37-39 (discussing what subjects are deemed "suitable and unsuitable" for direct legislation).

395. S.D. PUB. BROAD., *House of Representatives debate on 2021 SB 77*, at 55:10-55:40 (Mar. 1, 2021), <https://sdpb.sd.gov/SDPBPodcast/2021/hou29.mp3#t=3155>.

14-point type, and the requirement that the full text of the petition be provided on one page.³⁹⁶ Complaints were made about Initiated Measure 26 and using the cost of TV advertising to suppress criticism of the extra cost to petition signatures.³⁹⁷ Representative Perry noted the standard for readability of fourteen-point font for legal documents, although the ballot upon which voters cast their vote may not be required to be in that larger font.³⁹⁸ While this seems to be good policy to ensure that all voters as potential signatories to a ballot issue petition, the rationale seems to lack credibility because it still requires a proposed initiated measure or constitutional initiative to be on one page. Representative Erin Healy and Representative Tom Pischke (the latter a co-sponsor of the bill) noted that the handout to the legislature was on multiple pages and, if on one page, might look like a “beach blanket” in order to follow the proposed statute (now codified as South Dakota Codified Law section 2-1-1.2) requiring the proposal in its entirety to fit on one page.³⁹⁹ Representative Pischke noted one giant page itself is not readable or accessible.⁴⁰⁰ The intent, according to Representative Perry, was to make the text easier to read.⁴⁰¹ The intention seems to suggest that potential signers of a petition would read the full text of the measure before signing the petition. Clearly, if the bill is required to follow the “all 14-point text on one-page statute,” voters would benefit from a full accounting of the measure. However, the larger the sheet of paper and the smaller the type, it seems reasonable to assume potential petition signers are less likely to read the petition. Do voters who sign petitions agree that the law should be enacted as written, do they choose to sign the petition or not, as a response to the signature gatherer’s statement about what the bill is about, or that they like the idea and believe they should be able to vote on the issue?

Commenters requesting anonymity have noted that it is apparent many legislators do not read the bills under consideration but depend on lobbyists, citizens, or the caucus to inform them of what the bill would do. Part of this is a hazard resulting from the benefit of having citizen legislators and a small research staff. Logrolling is quite likely here as legislators seek out the advice of trusted advisors to determine how to vote. Legislators may also follow chamber leaders who control which bills are sent to a particular committee for a hearing and when the bills are heard, should the legislation get that far in the process.

States include a range of requirements for petition contents, including legal warnings, registration serial numbers provided by officials, notarization, date of the election the measure is to be voted upon, the measure’s full text, summary, the district or county where the signature was gathered, if the circulator is paid, fiscal statement abstract, affidavit of the circulator, circulator information, rights of the

396. *Id.* at 52:10-1:06:32.

397. *Id.* at 54:41.

398. *Id.* at 55:56.

399. *Id.* at 55:25.

400. *Id.* at 1:03:00.

401. *Id.*

potential signer, names of proponents or proponent organization, statement of the proponent organization, and deadline for signatures.⁴⁰²

Different initiative sponsors have unequal abilities to draft legislation. Providing assistance in drafting, such as offering “schools” to teach the drafting of legislation on a regular and systematic basis, would help those who do not know how to draft legislation. More direct assistance in reviewing the legislative delegation of authority to agencies of state government would also be useful in making the legislation more efficiently implemented should the measure be enacted by the people. Likewise, it should also make the proposal more understandable to those who do attempt to read the full text of the proposed measure.

Since the LRC reviews the proposed measure for clarity, coherence, and style, the Council, in their review or in providing drafting assistance, could provide the language regarding the appropriate agencies with current legislative authority to implement the actions specified in the proposed initiative. This could involve a requirement that, in this circumstance, the language be general, enabling the Code Counsel to identify the appropriate agency with legislative authority. The LRC could also provide specific drafting services for a fee.

Financial petition blocking involves opponents of a ballot measure using financial tactics, such as financial incentives for signature gatherers to forgo signature gathering or retaining petition collection companies so that supporters of a petition drive cannot use them.⁴⁰³ This makes gathering petition signatures much more difficult.⁴⁰⁴ Further, requiring paid petition signature gatherers to identify themselves as paid petition gatherers and to indicate how much they are paid increases the likelihood of potential harassment and abuse, increasing the cost.⁴⁰⁵

While the United State Supreme Court in *Buckley v. Valeo*⁴⁰⁶ said nothing regarding initiative campaigns, the campaign finance decision has had a tremendous effect on initiative campaigns.⁴⁰⁷ The Court distinguished between campaign contributions and expenditures, arguing that limits on expenditures reduce the quantity of expression by reducing the number of issues discussed, the depth of issue exploration, and the size of the audience reached, while contribution limits provide “only a marginal restriction upon the contributor’s ability to engage in free communication.”⁴⁰⁸

The desire of proponents to keep costs of ballot qualification costs low (drafting the measure, obtaining review and a title, arranging and organizing petition signature gatherers, etc.) have been opposed by a series of laws enacted

402. See *Initiative and Referendum Processes*, *supra* note 61 (clicking on each state allows you to see more in-depth analysis of the states additional requirements for initiatives and referendums).

403. *Petition Blocking*, *supra* note 355.

404. *Id.*

405. *Id.*

406. 424 U.S. 1 (1976).

407. See generally *id.* (discussing campaign finance limits).

408. *Id.* at 37.

by the legislature.⁴⁰⁹ Acts that require petition signature gatherer registration subject the signature gatherers to harassment or do not enable them to seek legal protection from harassment and increase the costs of gathering signatures to qualify the measure for the ballot.

D. THE IMPLEMENTATION PROBLEM

In South Dakota, laws enacted through the initiative process have no higher status than those laws enacted by the Legislature.⁴¹⁰ That is, since the legislative power is held by the legislature and the people,⁴¹¹ laws can be amended or repealed by either the people or the legislature.⁴¹² The legislature in 1915 amended the Richards primary law requiring candidates for a party nomination to adopt and run for election on specific principles and policies and to engage in a series of public debates.⁴¹³ In upholding the Legislature's action, the state supreme court reasoned that the adoption of the initiative and referendum did not reduce the power of the Legislature to legislate.⁴¹⁴ Although the Richards primary was again installed by initiative in 1918, the Legislature proceeded to eliminate it part by part between 1921 and 1929.⁴¹⁵ Between 1922 and 1948, no voter-initiated measures were introduced, and fifteen legislative enactments were referred to a vote through what scholars call a "veto-referendum."⁴¹⁶

A second example was the 2016 passage by a slim margin of The Revision of State Campaign Finance and Lobbying Laws, also known as Initiated Measure 22, on the November 8, 2016 ballot.⁴¹⁷ On November 23, 2016, state legislators and other individuals challenged Initiated Measure 22's constitutionality.⁴¹⁸ Circuit Court Judge Mark Barnett enjoined the measure temporarily.⁴¹⁹ House Bill 1069 was introduced to the 2017 legislative session to repeal IM22 in its entirety and "declare an emergency" to keep the measure from going into effect, and so petitioners could not file petitions for a veto referendum.⁴²⁰ Emergency declarations involve a two-thirds affirmative vote in each chamber for passage.⁴²¹ While there is considerable evidence, given Judge Barnett's order, that much of the law was unconstitutional, the legislators repealed the law and passed legislation enacting some of the reforms from the initiated

409. *Id.* at 48-50.

410. *Laws Governing the Initiative Process in South Dakota*, *supra* note 328.

411. S.D. CONST. art. III, § 1.

412. State *ex rel.* Richards v. Whisman, 154 N.W. 707, 709-10 (S.D. 1915).

413. *Id.* at 708.

414. *Id.* at 712.

415. Berdahl, *supra* note 45, at 95.

416. S.D. SEC'Y OF STATE, *supra* note 325.

417. SOUTH DAKOTA BALLOT QUESTION TITLES AND ELECTION RETURNS 1890-2020, *supra* note 45, at 25.

418. *South Dakota Revision of State Campaign Finance and Lobbying Laws, Initiated Measure 22 (2016)*, *supra* note 265.

419. *Id.*

420. *Id.*

421. GARRY, *supra* note 72, at 56-62.

measure, although many citizens seem to believe it was simply “repealed and not replaced.”⁴²² Despite these perspectives, the legislation established a limit on lobbyist gifts to legislators, which excluded food, beverages, entertainment, and advising and led to the creation of an Initiative and Referendum Task Force⁴²³ and a Government Accountability Task Force.⁴²⁴ Further, the legislature approved a bill barring elected officeholders, high ranking department/agency heads from lobbying work for two years after relinquishing their positions.⁴²⁵

In a more recent example, anecdotal arguments have circulated regarding South Dakota Governor Kristi Noem’s slow-walking the implementation of South Dakota’s 2020 Initiated Measure 26 regarding medicinal marijuana.⁴²⁶ Governor Noem was quoted as saying she is going to move forward with implementing both measures of cannabis legalization “because that’s what voters voted on.”⁴²⁷ Regarding Governor Noem’s opposition, in January, Governor Noem voiced her dislike of smoking marijuana in a *Rapid City Journal* story: “I don’t think anybody got smarter smoking pot. . . I think it’s a bad decision for the state of South Dakota.”⁴²⁸

Governor Noem requested a delay, coming after the state consulted with what the governor’s office identified as “industry experts,” but only one was named, Cannabis Public Policy Consulting (PPC), which noted in a February 9, 2021 letter to the South Dakota Department of Revenue:

Based on our experience with over 15 governments, the fastest timeline to create an effective, sustainable, and functioning medical marijuana system, without any existing licensing system, while balancing the need for patient access to safe marijuana with the need for public safety, preventing underage use and divergence into the illicit market, is between 14 to 20 months.

Medical marijuana systems are complicated to implement, as the formation and enforcement of the regulatory framework requires the involvement of multiple state agencies with shared responsibilities. In addition to state agencies, local governments with their own multiple agencies play pivotal roles in the establishment of a system, sharing concerns in public health and safety and implementing local procedures that best serve their

422. Dana Ferguson, *After promising to replace, did lawmakers deliver on IM 22?*, ARGUS LEADER (Sioux Falls, S.D.) (Mar. 11, 2017), <https://www.argusleader.com/story/news/politics/2017/03/11/after-promising-replace-did-lawmakers-deliver-im22/99014304/>.

423. H.B. No. 1141, 92nd Leg., Reg. Sess. (S.D. 2017).

424. S.B. No. 171, 92nd Leg., Reg. Sess. (S.D. 2017).

425. Ferguson, *supra* note 422.

426. See generally Bridget Bennett, *Implementing IM 26: Governor, author share different views on the timeline*, KELOLAND NEWS (June 21, 2021), <https://www.keloland.com/news/local-news/implementing-im-26-governor-author-share-different-views-on-the-timeline/> (discussing the implementation of Initiated Measure 26).

427. *Id.*

428. Steven Groves, *South Dakota GOP lawmakers continue recreational pot push*, AP NEWS (Feb. 9, 2021), <https://apnews.com/article/legislature-constitutions-south-dakota-recreational-marijuana-marijuana-c1c1877b1d9b263faf48bf0d1c4e0616>.

communities. Furthermore, our experience shows that engaging patients and public health groups in the development of the regulatory framework is a necessary best practice.⁴²⁹

The timeline has been exceeded. It would be no surprise to note that initiated measures on topics not favored by the Governor face more implementation challenges than do other acts of the legislature.⁴³⁰ The LRC, in their note to the sponsors of Amendment A, noted several challenges with the statutory language in the constitutional amendment, including noting the agency jurisdictions were improperly noted, that constitutions:

prescribe[] and limit[] the powers to be exercised by that government and set[] for the rights of the governed. The Constitution is not a compilation of policy statutes and as such, should not be amended to incorporate what ought to be statutory material.⁴³¹

Authors attempting to write statutory language into the constitution is not unusual as the framers of the South Dakota constitution also included much statutory language in the constitution, at the urging of the Territorial Governor Arthur C. Mellette and to further limit the legislature.⁴³² Authors of initiated amendments may prefer constitutional amendments because the legislature cannot by itself amend or repeal a constitutional amendment.

The advice given by Judge Charles M. Cooley before the North Dakota Convention represented the sentiment to not include statutory language into the constitution and was quoted in many places.⁴³³

“Don’t,” he said, “in your constitution making, legislate too much. In your Constitution you are tying the hands of the people. Don’t do that to any such extent as to prevent the Legislature hereafter from meeting all evils that may be within the reach of proper legislation. Leave something for them. Take care to put proper

429. CANNABIS PUB. POL’Y CONSULTING, *Letter to South Dakota Department of Revenue* (Feb. 9, 2021), https://governor.sd.gov/doc/CPPC_Letterto_SDDepartmentofRevenue.pdf.

430. Since the Governor controls the executive branch leadership, the Governor may direct agency directors to “be careful,” “Make sure you get this right,” or more directly slowly implement a policy. South Dakota’s Attorney General has been slow in 2021 and 2022 in implementing the implementation of a single person to investigate the disappearance and murder of indigenous people. *See generally* Shelly Conlon, *Private grant funds SD AG’s missing indigenous coordinator*, ARGUS LEADER (Sioux Falls, S.D.) (Feb. 16, 2022), <https://www.argusleader.com/story/news/2022/02/16/private-grant-funds-sd-ags-missing-indigenous-coordinator/6816946001/> (discussing the slow hiring of a coordinator to handle the investigations of missing and murdered indigenous people).

431. Letter from Legislative Research Council to Brendan Johnson (May 30, 2019), https://sdsos.gov/elections-voting/assets/2020_CA_LegalizeMarijuana_LRC.pdf. This letter also provides comments

. . . required by SDCL § 12-13-24 to review each initiated constitutional amendment for the purpose of determining whether the amendment is written in a clear and coherent manner that reflects the style and form of other legislation and for the purpose of ensuring that amendment is not misleading or likely to cause confusion among the voters.

Id.

432. HICKS, *supra* note 21, at 25.

433. *Id.*

restrictions upon them, but at the same time leave what properly belongs to the field of legislation, to the Legislature of the future. You have got to trust somebody in the future and it is right and proper that each department of government should be trusted to perform its legitimate function.”⁴³⁴

By contrast, Governor Mellette favored including statutory-type language into the constitution as he noted:

[T]he constitution framers should include in the fundamental law as much of the necessary legislation of the state as they could with safety. “[For] . . . if it is right, if you know what is the proper thing to embrace in your legislation, the more there is in the constitution the better for the people. One of the greatest evils is excessive legislation - the constant change every two years of the laws, and the squabbles and debates over the different questions that constantly arise.”⁴³⁵

The initiative process is a very expensive way to seek policy change and is cost-effective only for people who seek policy changes that the government refuses to provide or for wealthy sponsors of an initiative.⁴³⁶ Since the initiative was created to produce laws that the people wanted and would vote to support, but that the legislature would not enact, this creates the risk that wealthy individuals can impose their will on the population if they successfully engage in creating a policy narrative that the policy would benefit the citizenry.⁴³⁷ It should not be surprising that many initiatives propose policy changes that reflect dramatic shifts in policy from the current condition. These should sound familiar: overhauling a state’s property tax system (Proposition 13 in California, Proposition 2 ½ in Massachusetts, repealing the inheritance tax, etc.), enacting term limits, creating open primaries or nonpartisan primary and general elections, same-sex marriage, and most recently legalizing medicinal and, in many cases, recreational marijuana, etc. are issues that are considered “too hot to handle” for elected representatives.⁴³⁸

The initiative committee also has likely spent its resources getting the initiative passed and has few resources left to fight a legal battle to force implementation. The committee sponsors usually disband the organization after the election, leaving few resources to engage in a court battle to ensure that the legislature provides for the provisions of their initiated measure and to lobby for the resultant vote implementing those provisions.

434. *Id.* (citing North Dakota, *Debates*, p. 67).

435. *Id.*

436. Ballotpedia conducts a cost per required signature analysis. *Ballot measures cost per required signature analysis*, BALLOTPEDIA, https://ballotpedia.org/Ballot_measures_cost_per_required_signatures_analysis (last visited May 28, 2022). This analysis suggests a not committed volunteer rate of \$6.97 to \$32.49 per required signature for the year 2021. *Id.* For the minimum signatures required in 2022, this involves a minimum of \$118,217. Earlier citations in this paper note payment nearly twice the minimum wage to collect signatures in 2022.

437. *The withering branch: How the initiative process has redistributed power*, ECONOMIST (Apr. 23, 2011), <https://www.economist.com/special-report/2011/04/23/the-withering-branch>.

438. See Lupia & Matsusaka, *supra* note 246, 465-66 (listing examples).

XII. MODEST PROPOSALS: MODIFIED INDIRECT INITIATIVE AND FORMALIZED CITIZEN DELIBERATION

Broad questions may be appropriate if there is a two-step process in voting. The National Conference of State Legislatures identifies an “indirect initiative” as a process where ballot issue sponsors draft a measure and follow the current procedure to submit the draft to the Secretary of State and obtain feedback from the South Dakota LRC on language and potential fiscal impact.⁴³⁹ If the sponsors amend their proposal after this review, they resubmit the now-revised proposal and obtain further feedback.⁴⁴⁰ Once the sponsors determine the language meets their needs, the proposal is sent to a committee determined by the State Board of Elections to include a representative of the Attorney General, the LRC, a representative of the sponsor, and a neutral party to determine an appropriate title and to describe the measure accurately, but neutrally provide an explanation of the likely effects and outcomes of the proposal. The indirect nature enables legislative hearings, floor debate, and, if initiative proponents agree, amendment of an innated proposal before its passage by the legislature. As the title and description are assuredly neutral, there is a reduced need for lawsuits to ensure review by a court. The explanation should serve as a good decision heuristic, enabling the voters to cast a vote that reveals their preferences. Oregon noted early in its experience with the voter initiative that such measures should not be allowed until after citizens demonstrated a demand for legislation on a matter, and the legislature did not respond.⁴⁴¹ The citizens were assumed to not be able to effectively handle complicated matters except for clear-cut, briefly stated questions.⁴⁴²

Massachusetts, Ohio, and Utah use slight variants of the following process.⁴⁴³ Sponsors clarify ballot language with the LRC and prepare their ballot issue packet for the Secretary of State’s certification and gather a lesser-than-normal number of signatures—in some states, sufficient sponsorship is demonstrated by collecting one-half the currently required number of signatures to reach the first stage of qualification.⁴⁴⁴ Once enough valid signatures are gathered to meet this threshold, the initiative goes before the state legislature to be assigned to a committee, and legislative deliberation begins.⁴⁴⁵ If the legislature enacts the proposal, the need to collect the remaining signatures and place the issue on the ballot presents no

439. Pound, *supra* note 350, at 7. See also *Initiative and Referendum Processes*, *supra* note 61 (listing kinds and methods of passing initiatives). For description of the current process, see S.D. SEC’Y OF STATE, *supra* note 182.

440. See HOW TO SUBMIT AND CIRCULATE A 2022 STATEWIDE INITIATED MEASURE OR CONSTITUTIONAL AMENDMENT PETITION, *supra* note 150.

441. See BARNETT, *supra* note 47, at 37; NAT’L CONF. OF STATE LEGISLATURES, *The Indirect Initiative* [hereinafter *The Indirect Initiative*], <https://www.ncsl.org/research/elections-and-campaigns/the-indirect-initiative.aspx> (last visited May 29, 2022).

442. See BARNETT, *supra* note 47, at 26-30 (discussing the preparation of Measures).

443. See *The Indirect Initiative*, *supra* note 441; Pound, *supra* note 350, at 7.

444. See generally *The Indirect Initiative*, *supra* note 441 (discussing the different signature requirements for states that use indirect initiatives).

445. See *id.*

further need for a petition drive as the proposal becomes law.⁴⁴⁶ If the legislature fails to enact the proposal as written or adopts a measure that is unacceptable to the ballot issue sponsors, the sponsors then go through a second stage of signature gathering to place the issue on the ballot as an initiated measure or initiated amendment.⁴⁴⁷

If the legislature produces a document that does not meet the preferences of the ballot issue sponsors, the legislature may proceed with its proposal. If the ballot issue sponsors continue their process toward gathering signatures to place their proposal on the ballot, the result may involve two competing measures facing the electorate. While South Dakota Codified Law specifies how the competing proposals will be handled, there does not seem to be a procedure for identifying the similarity of measures.⁴⁴⁸ In 2022, two different ballot committees gathered and qualified signatures to place two Medicaid expansion measures on the general election ballot.⁴⁴⁹ The committee sponsoring the initiated measure withdrew their petition, leaving the Initiated Constitutional Amendment on the November ballot.⁴⁵⁰

The improvement over the direct initiative is that this proposal allows for legislative analysis, committee hearings, floor debate, and, if initiative sponsors agree, amendment before its enactment by the legislature. A significant difference from the current process is that the Governor is not prohibited from exercising veto power as this does not involve “measures referred to a vote of the people.”⁴⁵¹ The indirect measure could be accompanied by a joint resolution referring the measure to a vote of the people after a gubernatorial veto with or without a veto override.

This procedure assumes that a measure adopted by the legislature will be implemented by the executive branch in a timely manner. Oregon’s experience at the turn of the 20th century documents much discussion about the executive branch slow-walking the implementation of laws it does not desire to implement or enforce. While the press of the day called for avoiding administrative matters in voter initiatives, this did not become part of the limitations.⁴⁵² There is little to

446. *See id.*

447. *See id.*

448. For example, South Dakota Constitutional and statutory law specify that whichever measure garners the most votes of competing measures is the one to be certified. S.D. CONST. art. III, § 1; S.D. CONST. art. XXIII, §§ 1-3; SDCL § 2-1. However, there may be significant differences in the measures before the voters, and so a procedure is required to deal with these issues before they reach the court system.

449. Stu Whitney, “*There are 2 ballot measures seeking to expand Medicaid in South Dakota. Here’s how they’re different.*” ABERDEEN NEWS (July 7, 2022), <https://www.aberdeennews.com/story/news/2022/07/07/south-dakota-voters-find-2-medicaid-expansion-measures-ballot-election-2022-affordable-care/7825901001/>.

450. *South Dakota Initiated measure 28, Medicaid Expansion Initiative (2022)*, BALLOTPEdia, [https://ballotpedia.org/South_Dakota_Initiated_Measure_28,_Medicaid_Expansion_Initiative_\(2022\)](https://ballotpedia.org/South_Dakota_Initiated_Measure_28,_Medicaid_Expansion_Initiative_(2022)) (last visited Aug. 24, 2022).

451. S.D. CONST. art. III, § 1.

452. *See* BARNETT, *supra* note 47, at 10-25. The people did not trust the legislature or the governor to implement the will of the people to enact or to implement what would be considered “elemental law,” and this enabled the people to propose what would be statutory material in constitutional amendments. *Id.*

prevent this from occurring should there be a significant preference difference between the governor and the legislature or the governor and the voters. Typically, the legislature rejects the entire process, rarely do they negotiate with initiative proponents to craft a compromise, and critics suggest this only prolongs the process.⁴⁵³

An alternative process is used in Oregon. Mini-publics provide structured settings for public talk and debate and strive to meet normative standards for democratic deliberation.⁴⁵⁴ These are connected to specific issues before voters and “may influence decisions by inserting a venue by which broader public discourse on an issue” can occur.⁴⁵⁵ By creating these “spaces,” “minipublics can enhance a deliberative system by extending the impact of formal deliberation into the sphere of everyday opinion formation and voting.”⁴⁵⁶ Participants in mini-publics enhance participants’ confidence in their competence to make decisions based on their values and with the opportunity to ask questions of proponents can, if managed well, foster rigorous discussion, introduce detailed and relevant information into a policy debate, and reveal discrepancies or falsehoods in claims made by advocates and opponents.⁴⁵⁷ “Members of the public who utilize these statements, then, expose themselves to information and arguments they otherwise may have missed or disregarded.”⁴⁵⁸ These deliberative conversations may also enable those who do not directly participate to attend to media accounts of the group’s deliberations and make more informed decisions themselves.⁴⁵⁹ Oregon places a one-page analysis of statewide initiatives in the official voters’ pamphlet so voters can utilize this citizen-generated information when casting their ballot.⁴⁶⁰ It appears likely that this process would have to be institutionalized in statute in order to be effective.

A. VOTER INFORMATION

Providing useful information to voters extends beyond the currently provided voter information pamphlets identifying voting mechanics such as where to register, how to register, where to vote, what identifying information is required to vote, neutral summaries of proposals, and arguments by proponents and opponents. Added to this impressive listing would include listings of individuals

at 41. South Dakota, in its 1889 Constitutional Convention faced differing perspectives on this issue—legal scholars called for the delegates to “leave something for the legislature to do,” while at the same time, Territorial Governor and first South Dakota Governor Mellette argued for settling matters by including typical statutory matters in the Constitution. HICKS, *supra* note 21, at 25.

453. See HICKS, *supra* note 21, at 44-45; *The Indirect Initiative*, *supra* note 441.

454. Katherine R. Knobloch et al., *Emanating Effects: The Impact of the Oregon Citizens’ Initiative Review on Voters’ Political Efficacy*, in 68 POL. STUD. 426, 426-27 (2020).

455. *Id.* at 428.

456. *Id.*

457. *Id.* at 429.

458. *Id.*

459. *Id.* at 427.

460. *Id.* at 430.

and organizations taking a public stand on the measure and providing links to campaign donations that are readily searchable so voters could choose to know which individuals and organizations are attempting to influence their vote by supporting a campaign to support, oppose, or provide information on the measure are easily identifiable. This may take an appropriation to ensure all of these goals are accomplished.

XIII. CONCLUDING THOUGHTS

When majority rule is desired, we would be wise to temper our expectations by reviewing what President Thomas Jefferson, in his letter to Tadeusz Andrzej Bonawentura Kosciuszko, noted. President Jefferson suggested that while the popular will was to be followed, “great innovations should not be forced on slender majorities, and seeing that the public opinion is sensibly rallying to it, it was thought better to let it be over to the next session”⁴⁶¹

A process that had its beginnings with citizen distrust of legislatures is likely to be bound with conflict. This conflict is exacerbated when the legislature acts in a manner that proponents of voter initiatives see as restricting their access to a tool provided to them in the Constitution. We cannot expect petition sponsors to give up the initiative powers or the power to refer a legislative enactment to the citizenry of qualified voters. In describing the 2021 statutory process for creating a citizen-initiated ballot issue, this paper has identified some challenges that have the effect of reducing the ability of petition sponsors to initiate measures. It has also identified some provisions that slow the signature gathering process, creating a system where more money is required to follow the processes specified by the legislature for a voter initiative. More money in the process of ballot qualification creates a perverse incentive for ballot sponsors and the legislature in that it becomes less likely to have a citizen-driven process and one that involves “industrial signature gathering,” increasing the level of distrust between the two parties. The paper has also discussed some provisions that may increase the ability of voters to know the effects of the issue upon which they are casting their ballot and for an increase in public discourse on the merits of the measure. The metaphor of the “gun behind the door” is useful to describe situations where the threat of a ballot issue might force a recalcitrant legislature to act. If the legislature “calls their bluff” and does not act, then the incentive is to put legislation into the constitution so that it cannot be easily undone by the legislature.

Trust will always be suspect between the people and their government. Part of our founding mythology is enshrined in the Declaration of Independence from Great Britain—while the document begins with aspirational statements of equality, it also enumerates claims against the government that limited the colonists’ freedom and pursuit of happiness. Citizens should be a little suspicious

461. Letter from Thomas Jefferson to Tadeusz Andrzej Bonawentura Kosciuszko (May 2, 1808) (on file with NAT’L ARCHIVES, *Founders Online*, <https://founders.archives.gov/documents/Jefferson/99-01-02-7948>).

of the actions their government takes. Perhaps we should proceed with efforts to ensure that citizens are as suspicious of the citizen-initiated ballot issues as they are of the legislature. Better yet, more dialogue between the legislature and citizens is a good thing.

The paper concludes by proposing alternative indirect initiative processes in an attempt to increase the public and legislative deliberation of ballot issues in a venue that is likely to educate many voters. The media is likely to cover the legislature's processes, deliberations, and decisions and communicate them to the public. One of the great benefits of the COVID-19 pandemic is that the legislature has developed mechanisms for the citizenry to participate in legislative deliberative democracy through telecommunications. Enabling more participation in the political events of the day is likely to create more informed voters and enable negotiation between the legislature and the citizenry so that something reasonable comes out of the discussions. The goal is to move the state forward, even with competing visions of what the state should become. Finding common ground means talking about how we might move forward, with the people and the Legislature sharing the legislative powers.

Table 1: Parties Responsible for Drafting Petition Title, Ballot Title, and Where to file a challenge by Initiative State⁴⁶²

State	Party Responsible for Drafting Petition Title	Party Responsible for Drafting Ballot Title	Where to File Challenge
Alaska	Proponent (approved by Lt. Governor)	Lt. Governor and Attorney General	Superior Court
Arizona	Proponent	Proponent (approved by Attorney General)	Superior Court
Arkansas	Proponent (approved by Attorney General)	Proponent (approved by Attorney General)	Supreme Court
California	Attorney General	Attorney General	Sacramento County District Court
Colorado	Secretary of State and Ballot Title Board	Secretary of State and Ballot Title Board	Supreme Court
Florida	Proponent (approved by Secretary of State)	Proponent (approved by Secretary of State)	Supreme Court
Idaho	Attorney General	Attorney General	Supreme Court
Illinois	Proponent (approved by Board of Elections)	Proponent (approved by Board of Elections)	Not specified in law
Maine	Secretary of State	Secretary of State	Superior Court
Massachusetts	Proponent (approved by Attorney General)	Secretary of State (approved by Attorney General)	Supreme Judicial Court

462. NAT'L CONF. OF STATE LEGISLATURES, *Drafting the Initiative Title*, <https://www.ncsl.org/research/elections-and-campaigns/preparation-of-a-ballot-title-and-summary.aspx> (last accessed Feb. 22, 2022).

Michigan	Proponent	Director of Elections with the approval of the Board of State Canvassers	State District Court
Mississippi	Attorney General	Attorney General	Circuit Court of 1 st Judicial District of Hinds County
Missouri	Secretary of State	Secretary of State	Circuit Court of Cole County, appeal to Supreme Court
Montana	Attorney General	Attorney General	District Court in Lewis and Clark County
Nebraska	Same as summary by the proponent	Attorney General	District Court
Nevada	None (Full text only)	None (summary only)	N/A
North Dakota	Secretary of State and Attorney General	Secretary of State and Attorney General	Supreme Court
Ohio	Proponent (approved by Attorney General)	Proponent (approved by Attorney General)	Not specified in law
Oklahoma	No separate title; summary serves as the title	Proponent (approved by Secretary of State and Attorney General)	Supreme Court
Oregon	Attorney General	Attorney General	Supreme Court
South Dakota	None required	Attorney General	Circuit Court
Utah	None required	Office of Legislative Research and General Counsel	Supreme Court

		(approved by Lt. Governor)	
Washington	Attorney General	Attorney General	Thurston County Superior Court
Wyoming	Proponent	Secretary of State	District Court of Laramie County