

## OUT OF THE BOTTLE: THE GENIE OF DIRECT DEMOCRACY

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There is a radical difference between a democracy and a representative government. In a democracy, the citizens themselves make the law and superintend its administration; in a representative government, the citizens empower legislators and executive officers to make the law and carry it out. . . . In other words, democracy is direct rule by the majority, while in a representative government rule is by a succession of quasi-oligarchies, indirectly and remotely responsible to the majority.<sup>1</sup>

In the late 1800s, the Progressives unleashed the genie of direct democracy—the citizen-initiated referendum or initiative<sup>2</sup>—as an alternative method of amending a state constitution or creating state-level legislation. South Dakota became the first state to allow statewide initiatives,<sup>3</sup> and between 1898 and 1918,<sup>4</sup> over half of the

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<sup>1</sup> THOMAS GOEBEL, *A GOVERNMENT BY THE PEOPLE: DIRECT DEMOCRACY IN AMERICA, 1890–1940*, at 55 (2002) (quoting JAMES W. SULLIVAN, *DIRECT LEGISLATION BY THE CITIZENSHIP THROUGH THE INITIATIVE AND REFERENDUM* 5, 100 (1892)).

<sup>2</sup> Throughout this Article, I will use “initiative” as the term for citizen-initiated referendums to avoid confusion with government-initiated referendums. Many states have different terms for these type of proposals that create direct law by citizen vote. Among terms used are ballot initiatives, plebiscites, propositions, amendments, etc. Also, I will use “referendums,” not referenda, “on the advice of the editors of the *Oxford English Dictionary*: ‘Referendum is logically preferable as a plural form meaning ballots on one issue (as a Latin gerund referendum has no plural). The Latin plural gerundive referenda, meaning ‘things to be referred,’ necessarily connotes a plurality of issues.’” David Butler & Austin Ranney, *Practice, in REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY* 1 n.1 (David Butler & Austin Ranney eds., 1994). Despite debate, other authors have followed Butler and Ranney’s lead and used “referendums” instead of “referenda” as the plural. See, e.g., Michael Gallagher & Pier Vincenzo Uleri, *Preface to THE REFERENDUM EXPERIENCE IN EUROPE*, at viii (Michael Gallagher & Pier Vincenzo Uleri eds., 1996).

<sup>3</sup> INITIATIVE & REFERENDUM INST., *A BRIEF HISTORY OF THE INITIATIVE AND REFERENDUM PROCESS IN THE UNITED STATES* 2, <http://www.iandrinstitute.org> (use “I&R Quick Facts” dropdown menu, select “History of the initiative process”). (last visited June 15, 2007) [hereinafter IRI BRIEF HISTORY].

<sup>4</sup> In the late 1890s, the Progressives introduced the initiative process in the United States

states in the Union at the time followed South Dakota's lead and adopted similar initiative and referendum processes.<sup>5</sup> Currently, every state except Delaware provides for some form of state-level direct citizen voting in addition to the election of representatives,<sup>6</sup> and twenty-four states offer their citizens the citizen initiative method of bypassing their legislatures completely in creating new laws.<sup>7</sup>

When they introduced the initiative process, the Progressives believed that representative government had failed because legislatures were controlled by special interests.<sup>8</sup> Through the initiative genie, citizens hoped to flex their muscle and regain control of their governments. Because the initiative process allowed citizens to register their opinions by direct votes, it promised to be a valuable alternative to representative government, which had become tainted by the influences of privileged interests and partisan politics.

Genie magic, however, tends to come with unintended

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as part of their reform platform. See THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 50–51 (1989). Massachusetts was the last state to adopt the process during this initial era. Howard R. Ernst, *The Historical Role of Narrow-Material Interests in Initiative Politics*, in *DANGEROUS DEMOCRACY?: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* 11 tbl.1.3 (Larry J. Sabato et al. eds., 2001) (discussing creation of initiative process throughout the United States and showing Massachusetts' creation of ballot initiative in 1918).

<sup>5</sup> IRI BRIEF HISTORY, *supra* note 3, at 3. These were Arizona, Arkansas, California, Colorado, Idaho, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Utah, and Washington. INITIATIVE & REFERENDUM INST., I&R HISTORICAL TIMELINE 1–3, available at <http://www.iandrinstute.org> (use "I&R Quick Facts" drop-down menu, select "Initiative process historical timeline").

<sup>6</sup> "At present forty-nine of the fifty states require that amendments to state constitutions be submitted to a statewide vote." *New Progressive Party v. Colon*, 779 F. Supp. 646, 659 (D.P.R. 1991); see also DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 36 (1984) (noting that Delaware is the one state that does not require statewide voting for state constitution changes).

<sup>7</sup> The following states allow some form of initiative: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. Initiative & Referendum Institute, State I&R, [http://www.iandrinstute.org/statewide\\_i&r.htm](http://www.iandrinstute.org/statewide_i&r.htm); see also Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POLY REV. 11, 15 (1997) ("[T]wenty-five states . . . have the referendum, twenty-three having some form of the initiative . . .").

<sup>8</sup> See, e.g., James E. Castello, Comment, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 CAL. L. REV. 491, 503 (1986) (citing Hiram Johnson, Governor of Cal., Inaugural Address (Jan. 3, 1911), reprinted in FRANKLIN HICHBORN, *STORY OF THE SESSION OF THE CALIFORNIA LEGISLATURE OF 1911* app., at ii–iii (1911) (noting that as a candidate, Johnson promised to stop the corruption "of the former political master of this State, the Southern Pacific Company"))).

consequences, and modern initiative practice has not lived up to the promise of being corruption free. Because initiatives are drafted by individuals or small groups, rather than by bodies of representatives elected by the people, they are often controlled by special interests.<sup>9</sup> Some examples from Colorado include gambling investors drafting initiatives legalizing “gaming” in specific locations throughout the state<sup>10</sup> and the religious group Focus on the Family’s drafting of Amendment 2, which passed in 1992 and prohibited rights for gays.<sup>11</sup>

Similarly, the 2006 election could be viewed as a victory for suburban developers nationwide.<sup>12</sup> In *Kelo v. City of New London*, the United States Supreme Court upheld the authority of governments to condemn land for urban renewal projects.<sup>13</sup> The most common topic for initiative measures in the 2006 election was eminent domain. Nine states passed initiatives that prevented

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<sup>9</sup> See, e.g., MAGLEBY, *supra* note 6, at 5; Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don’t Work*, 66 U. COLO. L. REV. 47, 59 (1995); David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 19 (1995).

<sup>10</sup> For example, Wembley, a London-based company, promoted an unsuccessful initiative bid in 2003 to allow video lottery terminals at the dog and horse racing tracks it owns in Colorado. M.E. Sprengelmeyer, *Nuh-uh, Nix, Nay, No Way: Voters Keep Thumbs Down*, ROCKY MOUNTAIN NEWS (Denver), Nov. 5, 2003, at 12A. Colorado voters passed an amendment in the early 1990s, which legalized gambling in Black Hawk, Central City, and Cripple Creek, but initiatives since 1990 to expand casino-style gambling have failed. Michele Ames, *The Race Is On; A Fierce, High-Stakes Competition to Woo Colorado Voters Has Erupted Between Supporters and Opponents of a Video Lottery Ballot Initiative*, ROCKY MOUNTAIN NEWS (Denver), Sept. 6, 2003, at 1C.

<sup>11</sup> Focus on the Family, a religious group in Colorado Springs, is credited with drafting Colorado’s anti-gay rights amendment that passed in 1992. See Erin Emery, *Colo. Springs’ Evangelical Image Out of Focus, Officials Believe*, DENVER POST, Aug. 2, 2005, at A1. Also, Douglas Bruce is credited with individually drafting Colorado’s Taxpayers’ Bill of Rights (TABOR) Amendment that passed in 1992, which contained provisions favorable for his real estate business. Steve Lipsher, *Bruce Pushes 20 New Ballot Titles*, DENVER POST, Mar. 11, 1995, at B4.

<sup>12</sup> For example, in the 2006 election, New York real estate investor Howie Rich gave millions to eminent domain initiative drives in up to nineteen locations in a dozen states. Patrick Hoge, *Campaign 2006: Proposition 90; Scope of Property Rights Issue Debated*, S.F. CHRON., Sept. 13, 2006, at B1. *But see* Phyllis Myers, *Direct Democracy and Development*, URB. LAND, June 2006, at 130 (noting that some of the initiatives were generated by “grass-roots group[s] . . . [seeing eminent domain] as an assault on the city’s suburban character” and that the building industry and Sierra Club joined to oppose some of the restrictions on the use of eminent domain); Ballot Initiative Strategy Center, *Initiative Myths and Facts 2006*, Feb. 1, 2007, [http://www.ballot.org/index.asp?Type=B\\_PR&SEC={AE1E33E7-19A6-4DE9-8520-3A0AD7FB5EF1}&DE={AEA2B59D-5013-4C99-B055-009FFE58CE2E}](http://www.ballot.org/index.asp?Type=B_PR&SEC={AE1E33E7-19A6-4DE9-8520-3A0AD7FB5EF1}&DE={AEA2B59D-5013-4C99-B055-009FFE58CE2E}); [hereinafter BISC] (“[T]he straight anti-Kelo measures passed by wide margins. . . . [while the] regulatory takings measures . . . funded by radical conservative real estate investor Howard Rich . . . all were defeated except for Arizona’s measure.”).

<sup>13</sup> 545 U.S. 469, 472, 489–90 (2005).

redevelopment by local governments through such condemnations, effectively transferring future growth to suburban locations.<sup>14</sup>

Money may also play at least as corrosive a role in initiative campaigns as it does in representative elections.<sup>15</sup> Well-funded individuals or organizations that do not have enough voluntary support to qualify an initiative for the ballot may pay petitioners to gather signatures. The use of paid petitioners to collect signatures dates back to the first state-level initiative in the United States in 1904.<sup>16</sup> Although states have tried to restrict paid signature collection,<sup>17</sup> the United States Supreme Court reinforced the practice when, in *Meyer v. Grant*, it struck down as a violation of the First Amendment a Colorado law that criminalized all payment for petition circulators.<sup>18</sup>

Furthermore, initiatives are susceptible to lobbyist influence. A California study showed that sixty-eight percent of all initiative campaign contributions come from lobbying interests.<sup>19</sup> Although there is no guarantee that the party contributing the most money will prevail in an initiative campaign,<sup>20</sup> additional resources play a

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<sup>14</sup> Eleven eminent domain measures were on the ballots in 2006. Nine states approved the measures: Arizona, Florida, Georgia, Michigan, Nevada, New Hampshire, North Dakota, Oregon, and South Carolina. Similar measures did not pass in California, Idaho, and Washington perhaps because they “included a regulatory takings component that would have required governments to compensate owners when their property values were reduced by land use regulations.” INITIATIVE & REFERENDUM INST., ELECTION RESULTS 2006, at 1 (2006), available at [http://www.iandrinstitute.org/BW%202006-5%20\(Election%20results\).pdf](http://www.iandrinstitute.org/BW%202006-5%20(Election%20results).pdf).

<sup>15</sup> See, e.g., Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1849 (1999); Clayton P. Gillette, Essay, *Is Direct Democracy Anti-Democratic?*, 34 WILLAMETTE L. REV. 609, 622–24 (1998); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 517–19 (1982); Randy M. Mastro et al., *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It*, 32 FED. COMM. L.J. 315 (1980); John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377 (1985); Daniel Smith, *Campaign Financing of Ballot Initiatives in the American States*, in DANGEROUS DEMOCRACY, *supra* note 4, at 71, 71; BETTY H. ZISK, MONEY, MEDIA AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS 108–09 (1987).

<sup>16</sup> ANDREW M. GLOGER, INITIATIVE & REFERENDUM INST., PAID PETITIONERS AFTER *PRETE* 2 (2006), available at <http://www.iandrinstitute.org/REPORT%202006-1%20Paid%20Petitioners.pdf> (citing JAMES D. BARNETT, THE OPERATION OF THE INITIATIVE, REFERENDUM, AND RECALL IN OREGON 54–77 (1915)).

<sup>17</sup> *Id.* at 2 (referencing Ohio, South Dakota, and Washington laws in 1913 and 1914 that banned payment of petition circulators).

<sup>18</sup> 486 U.S. 414, 415–16 (1988).

<sup>19</sup> ELISABETH R. GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION 94 tbl.5.8 (1999).

<sup>20</sup> K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 246 (2005) (citing Al Knight, *Do*

significant role in exposure and how the public perceives an issue.

Partisan politics also have become a part of the initiative experience. Once peripheral and separate from political races, initiatives now have become a tool for influencing candidate elections. The phenomenon has been labeled “ballot proposition spillover.”<sup>21</sup> Initiatives can “prime” the political agenda by forcing a candidate to state a position on an issue.<sup>22</sup> As an example in the 2006 election, Missouri Democrat Claire McCaskill’s support for a stem-cell research initiative may have helped her win a U.S. Senate race against incumbent Jim Talent who opposed it.<sup>23</sup>

In addition, political parties now see the initiative process as a tool for boosting turnout for their candidates. Research shows that initiative propositions increase turnout.<sup>24</sup> Although some dispute the effectiveness of the strategy,<sup>25</sup> pundits believe the Republican Right placed ballot measures prohibiting gay marriage on the ballot in 2004 to increase Republican turnout and help George W. Bush

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*Initiatives Still Work? Yes, But They Need Some Repair*, DENVER POST, Dec. 1, 2002, at E1 (“[B]ig money can kill a ballot measure. But the corresponding good news is that big money can’t always buy a ‘yes’ vote.”). For example, moneyed interests supporting election-related measures in Colorado’s 2002 election poured millions into the campaigns, yet the initiatives they supported “were defeated easily.” Knight, *supra* (“Millions were spent on some election-related issues this year . . . but those initiatives were defeated easily.”); see also DENNIS POLHILL, INITIATIVE & REFERENDUM INST., INITIATIVE AND REFERENDUM IN COLORADO 10 (2006), available at <http://www.iandrinstitute.org/REPORT%202006-4%20Colorado.pdf>.

<sup>21</sup> JEFFREY R. MAKIN, INITIATIVE & REFERENDUM INST., ARE BALLOT PROPOSITIONS SPILLING OVER ONTO CANDIDATE ELECTIONS? 2 (2006), available at <http://www.iandrinstitute.org/REPORT%202006-2%20Spillovers.pdf>.

<sup>22</sup> See, e.g., STEPHEN P. NICHOLSON, VOTING THE AGENDA: CANDIDATES, ELECTIONS, AND BALLOT PROPOSITIONS 70–77 (2005) (discussing the effect the nuclear freeze issue had on the 1982 mid-term elections).

<sup>23</sup> Emily Pierce & Susan Davis, *Lawmakers to Watch: Fresh Democratic Faces Ready for Their Star Turn: The Democrats’ Junior Members Will Play a Prominent Role on Iraq, Other High-Profile Issues*, ROLL CALL, Jan. 22, 2007, available at 2007 WLNR 1241242. But cf. BISC, *supra* note 12 (stating the stem cell issue actually motivated more conservative voters and only the minimum wage measure discussed below balanced out the votes to give McCaskill a majority).

<sup>24</sup> DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES 42 (2004) (finding an average increase during a midterm election of 1.2%); see also BISC, *supra* note 12 (“BISC research has shown that initiative campaigns focused on achieving larger electoral gains—targeted turnout, message framing opportunities for candidates, wedging political opponents based on past votes on the issue—have successfully changed the dynamic of state elections.”).

<sup>25</sup> See, e.g., Alan Abramowitz, *Terrorism, Gay Marriage, and Incumbency: Explaining the Republican Victory in the 2004 Presidential Election*, THE FORUM, 2004, at 1, available at <http://www.international.ucla.edu/cms/files/PERG.abramowitz.pdf>; see also Stephen Ansolabehere & Charles Stewart III, *Truth in Numbers: Moral Values and the Gay-Marriage Backlash Did Not Help Bush*, BOSTON REVIEW, Feb.-Mar. 2005, available at <http://www.bostonreview.net/BR30.1/ansolastewart.html>.

retain the presidency.<sup>26</sup> In a similar fashion, Democrats qualified a minimum wage initiative on the ballots of ten of the seventeen most competitive candidate races in an effort to “boost turnout of Democratic-leaning voters in 2006.”<sup>27</sup>

Although the initiative process may be tainted with some of the same shortcomings as the legislative process, there is one important distinction: unintended consequences arise from the genie master’s ignorance rather than greed. In other words, unlike legislators who may gain directly from lobbyist contributions, citizen voters generally receive no direct benefit by voting one way or another. Instead, they are more likely to vote their consciences on a topic and strive for ethical government.<sup>28</sup>

A good illustration of an Aladdin wish gone astray is Amendment 41 in the 2006 election. Colorado citizens passed Amendment 41 to address ethics in government.<sup>29</sup> In an effort to clean up government, Amendment 41 contained a ban on gifts of more than fifty dollars to public officers.<sup>30</sup> While acknowledging that “[t]he ultimate goal of this measure—to achieve high ethical standards and transparency in government—is commendable,”<sup>31</sup> the Colorado Attorney General recently issued an analysis concluding that the amendment created “an absurd result” because it would make it illegal for professors to collect Nobel Prize money or for children of state employees to accept scholarships.<sup>32</sup> The Attorney General’s

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<sup>26</sup> See, e.g., James Dao, *The 2004 Elections: The Electorate – Gay Marriage; Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P4; TODD DONOVAN ET AL., DID GAY MARRIAGE ELECT GEORGE W. BUSH? (2005) (containing surveys of citizens in Arkansas and Ohio in 2004), available at [http://polisci.msu.edu/sppc2005/papers/fripm/dtsp\\_sppc05.pdf](http://polisci.msu.edu/sppc2005/papers/fripm/dtsp_sppc05.pdf).

<sup>27</sup> Rick Klein, *Democrats to Woo Voters on Wage Issue: Frozen Minimum Pay Seen as Spur*, BOSTON GLOBE, Dec. 25, 2005, at A1. Note also that some accused Democrats with proposing Colorado Amendment 36, which failed in the 2004 election because by changing the process for selecting presidential electors, it might have swung the vote toward Democratic presidential candidate John Kerry. See Susan Greene, *Company Officials Bankroll Both Sides of Electoral-Vote Issue*, DENVER POST, Sept. 29, 2004, at A1. *But cf.* BISC, *supra* note 12 (noting that the anti-gay strategy seemed to lose some of its power in the 2006 elections when Arizonans voted the “first-ever defeat of a [gay] marriage discrimination measure” reflecting “the real change in public opinion on the issue”).

<sup>28</sup> Some might argue that the initiative process allows the majority to repress minorities and to vote on the basis of hate. While it is important for governments to protect minority interests, an argument can be made that these voters are not motivated by self interest but instead by religious or moral beliefs.

<sup>29</sup> See Jennifer Brown & Karen E. Crummy, *Political Gift Ban’s Impacts “Absurd”*, DENVER POST, Dec. 29, 2006, at B1.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

office urged the Colorado legislature to send a corrective referendum to voters on the next ballot to amend the portions of Amendment 41 that were “‘internally inconsistent’ and ‘unclear.’”<sup>33</sup>

However, despite problems with getting the specifics right, citizens have effectively used the initiative process to motivate efforts in achieving one of its initial goals—making representative government more ethical. Legislatures are particularly poor at establishing “rules for their own competitive processes.”<sup>34</sup> Because the initiative vehicle creates a process that allows citizens to circumvent recalcitrant legislatures, it has proven beneficial in addressing term limits, campaign finance regulation, redistricting, and other election law proposals.

Overall direct democracy remains extremely popular in the states that have adopted it. A total of 204 initiative and referendum measures appeared on the ballots in thirty-seven states during the 2006 mid-term elections.<sup>35</sup> This number is an increase of 42 measures from the 162 measures on ballots during the 2004 election.<sup>36</sup> Furthermore, this trend is consistent with that of the last three decades: more citizen initiatives appear on the ballot than in each of the previous decades.<sup>37</sup>

Despite the growing popularity of direct democracy, citizen voters have been cautious about granting their genie too extensive powers. Instead, they have used initiatives to improve the initiative process itself. Two such measures in the 2006 election can serve as illustrations.

In Florida, voters passed a constitutional amendment adding restrictions to their initiative rights.<sup>38</sup> Amendment 3 required a

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<sup>33</sup> *Id.*

<sup>34</sup> See Richard L. Hasen, *Comments on Baker, Clark, and Direct Democracy*, 13 J. CONTEMP. LEGAL ISSUES 563, 564 (2004) (citing Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 482 (1998)).

<sup>35</sup> INITIATIVE & REFERENDUM INST., ELECTION RESULTS 2006, <http://iandrinstitute.org/ballotwatch.htm> (last visited Jan. 27, 2007) [hereinafter ELECTION RESULTS 2006].

<sup>36</sup> *Id.*

<sup>37</sup> INITIATIVE & REFERENDUM INST., OVERVIEW OF INITIATIVE USE, 1904–2006 (2006), available at [http://www.iandrinstitute.org/IRI%20Initiative%20Use%20\(2006-11\).pdf](http://www.iandrinstitute.org/IRI%20Initiative%20Use%20(2006-11).pdf).

A total of 2,231 state-level initiatives have been on the ballot since the first one went before the voters in Oregon in 1904, and 909 (41 percent) have been approved.

The modern initiative movement began in the last 1970s with California’s tax-cutting Proposition 13. Each decade since the 1970s has seen more initiatives on the ballot and more initiatives approved than the previous decade . . . .

*Id.*

<sup>38</sup> ELECTION RESULTS 2006, *supra* note 35. Ironically, Amendment 3 would not have passed if the supermajority requirement had been in effect: it only mustered 57.8% of the vote. Fred Brown, *Election Correction*, DENVER POST, Jan. 28, 2007, at E4.

supermajority of sixty percent approval to pass future citizen-initiated constitutional amendments.<sup>39</sup> This makes Florida “the only initiative state with a supermajority requirement (and one of only two states overall with such a requirement).”<sup>40</sup>

Similarly in the 2006 election, Colorado citizens could have seized an opportunity to expand their initiative powers. Amendment 38 proposed to extend the initiative process to every level of Colorado government and to eliminate some of the safeguards for allowing election officials to check petition signatures.<sup>41</sup> Perhaps more significantly, Amendment 38 would have restricted how the legislature could respond to initiative-created laws—prohibiting amendments and requiring voter approval before allowing the legislature to enact similar measures.<sup>42</sup> Colorado voters overwhelmingly rejected the measure.<sup>43</sup>

Finally, two recent circuit court decisions may help reduce the influence of money in qualifying initiatives for the ballot. In *Initiative & Referendum Institute v. Jaeger*<sup>44</sup> and *Prete v. Bradbury*,<sup>45</sup> both the Eighth Circuit and the Ninth Circuit upheld state statutes prohibiting payment for initiative petition signatures.<sup>46</sup> The courts distinguished the state statutes in these cases from the Colorado statute declared unconstitutional in *Meyer v. Grant* because these statutes did not completely prohibit payment of petition circulators.<sup>47</sup> Currently, only three of the twenty-four states that allow initiatives prohibit paying petition circulators by signature.<sup>48</sup> In the wake of *Jaeger* and *Prete*, however, the numbers may expand.<sup>49</sup> After the Ninth Circuit’s decision in *Prete*, Oregon Secretary of State Bill Bradbury noted, “[t]his decision strongly

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<sup>39</sup> ELECTION RESULTS 2006, *supra* note 35.

<sup>40</sup> *Id.*

<sup>41</sup> Kyle Henley, *Amendment Looks Familiar*, GAZETTE (Colo. Springs, Colo.), Sept. 30, 2006, available at <http://www.gazette.com/display.php?id=1322121&secid=31>.

<sup>42</sup> *Id.*

<sup>43</sup> Sixty-nine percent of Colorado voters rejected the measure. STATE OF COLO., CANVASS REPORT, GENERAL ELECTION, AMENDMENT 38 (2006), available at <http://www.sos.state.co.us/pubs/electionresults2006G/CO-RC-1126.htm>; see also BISC, *supra* note 12 (noting that the measure was “roundly defeated, not only because voters recognized the potential damage the law would do to a state’s ability to fund core services, but because they rejected the proponents’ attempts to undermine the lawful process of qualifying a ballot initiative—a real vote for responsible government”).

<sup>44</sup> 241 F.3d 614 (8th Cir. 2001).

<sup>45</sup> 438 F.3d 949 (9th Cir. 2006) (upholding Oregon’s Initiative Integrity Act).

<sup>46</sup> *Id.*; *Jaeger*, 241 F.3d at 618.

<sup>47</sup> *Prete*, 438 F.3d at 967; *Jaeger*, 241 F.3d at 617.

<sup>48</sup> GLOGER, *supra* note 16, at 4 (Oregon, North Dakota, and Wyoming).

<sup>49</sup> *Id.* (California, Maine, Missouri, and Michigan are all considering such measures).

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supports Oregon voters' judgment that we need to restore public confidence in our initiative and referendum system, and protect elections against fraud."<sup>50</sup>

In conclusion, the initiative process is out of the bottle, and it is unlikely that citizens will try to re-cork their genie anytime soon. While the process has proven to be subject to the same corrupting influences of money and special interests as the legislative process, citizen voters are motivated to begin using the initiative itself to regain its integrity.

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<sup>50</sup> *Id.* at 5 (internal quotation marks omitted) (alteration in original).