
ARTICLES

“BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA . . .” A PRACTITIONER’S GUIDE TO ALASKA’S INITIATIVE LAW

M. KATHERYN BRADLEY*
AND DEBORAH L. WILLIAMS**

I. INTRODUCTION

What do marijuana, tort reform, telephone competition and legislative ethics have in common? Each of these issues has been the subject of an initiative in Alaska.

In the State of Alaska, the people’s right to initiate law is guaranteed by the Constitution.¹ This right, however, is a limited one.² Not

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* Attorney, Condon, Partnow and Sharrock, P.C., Anchorage, Alaska; J.D., Northwestern School of Law, Lewis and Clark College, 1986; B.A., Scripps College, 1983.

** Attorney, Condon, Partnow and Sharrock, P.C., Anchorage, Alaska; J.D., Harvard Law School, 1978; B.A., Pomona College, 1975.

1. ALASKA CONST. art. XI, § 1 (“The people may propose and enact laws by the initiative . . .”). Many municipal charters, such as the Municipal Charter for Anchorage, also guarantee the right to initiate law. *See, e.g.*, ANCHORAGE MUNICIPAL CHARTER art. II(1), art. III, § 3.02(a).

2. ALASKA CONST. art. XI, § 7; ALASKA STAT. § 15.45.010 (1988). Pursuant to the Alaska Constitution, an initiative may not dedicate revenue, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe court rules, or enact local or special legislation. Many local governments also provide for the right to initiate local legislation and place similar limitations on that right. *See, e.g.*, ANCHORAGE MUNICIPAL CHARTER art. III, § 3.02(a).

surprisingly, questions concerning the proper scope of initiatives have made and continue to make fertile ground for litigation.

Initiative law has become increasingly relevant to practitioners in Alaska. Initiatives are an important option for clients who are unable to achieve changes through normal administrative or legislative channels.³ Clients also may be faced with an undesirable initiative sponsored by a competitor or adverse interest group. Understanding the initiative process and initiative law, therefore, is an important tool for every practitioner.

This article provides an overview of the legal grounds upon which an initiative may be instituted, challenged and defended. Part II describes the initiative process. Part III addresses the rules of construction applied in reviewing an initiative and the scope of pre-election judicial review of an initiative measure under Alaska law. Part IV surveys the various restrictions on the use of initiatives that have been set forth in the Alaska Constitution or adopted by the Alaska Supreme Court. Part V analyzes the test to be applied for determining whether the required initiative summary adequately describes the legislation sought. Finally, Part VI reviews the circumstances under which the legislature can remove an initiative from the ballot by passing a substantially similar law.

II. THE INITIATIVE PROCESS

A. The Pre-Circulation Process: Steps One through Five

The process for state initiatives in Alaska consists of ten steps. The initial five steps occur before the general signature-gathering effort

3. The telephone competition initiative sponsored by General Communication Inc. ("GCI") is a prime example of the usefulness of initiatives. For over seven years, GCI sought to have the Alaska Public Utilities Commission ("APUC") open the in-state telecommunications market to competition. Affidavit of Ronald A. Duncan at 2, *Clarke v. McAlpine*, No. 3AN-89-7403 Civil (Alaska Super. Ct. Oct. 17, 1989). The APUC refused to do so. Believing that the public wanted in-state telephone competition, GCI turned to the initiative process. Within a few months, GCI gathered over 50,000 signatures – far more than enough to place the initiative on the ballot. Affidavit of Ronald A. Duncan at 2, *Clarke v. McAlpine*, No. 3AN-89-7403 Civil (Alaska Super. Ct. Nov. 10, 1989).

Another recent example of the efficacy of the initiative process is the initiative to "recriminalize" marijuana in Alaska. A group that disagreed with the Alaska Supreme Court's decision in *Ravin v. State of Alaska*, 537 P.2d 494 (Alaska 1975), which held that possession of marijuana by adults at home for personal use is constitutionally protected, succeeded in placing the issue on the statewide ballot and in obtaining a reversal of the law. See ALASKA STAT. § 11.71.060 (Supp. 1992); ALASKA STAT. § 11.71.190(b) (1989). Litigation was commenced soon after the election to challenge the substantive law enacted by that initiative, although not on the ground that it violated the restrictions against the use of initiatives as discussed in this article. See *Complaint, Alaskans for Privacy v. State*, No. 3AN-91-1746 Civil (Alaska Super. Ct. March 4, 1991).

commences.⁴ To begin, the initiator must draft the proposed bill in accordance with statutory requirements regarding form.⁵ Next, the initiator must form a three-member initiative committee, circulate the proposed bill, and obtain at least 100 signatures from qualified voters.⁶ Third, the initiator must submit an application to the lieutenant governor.⁷

The fourth step consists of the lieutenant governor's review of the initiative.⁸ The lieutenant governor must either certify the initiative or notify the initiative committee in writing of the denial and the grounds therefor.⁹ There are three bases for denial by the lieutenant governor: (1) the proposed bill is not in "the required form" because, for example, it contains prohibited subjects; (2) the *application* is not substantially in "the required form"; or (3) there are not enough qualified sponsors.¹⁰

The review by the lieutenant governor's office is quite thorough. However, certification by both the attorney general's office and the lieutenant governor's office does not, by any means, make an initiative litigation-proof. Even after approval, the practitioner needs to be prepared for litigation.

Approval or disapproval of the application by the lieutenant governor triggers the primary opportunity for litigation. Anyone who disagrees with the lieutenant governor's determination must file a lawsuit in superior court within thirty days of the date on which notice of the determination was

4. Cf. ANCHORAGE MUNICIPAL CODE § 2.50.050 (1980) (failing to provide any pre-screening steps by the local government).

5. According to Alaska Statutes section 15.45.040, the proposed bill must: (1) be confined to one subject; (2) have a title that expresses the subject of the bill; (3) have an enacting clause that states, "Be it enacted by the people of the State of Alaska"; and (4) be free of any subjects prohibited by Alaska Statutes section 15.45.010. ALASKA STAT. § 15.45.040 (1988); see also ALASKA STAT. § 15.45.010 (1988). In drafting the initiative, it is important to prepare a marketable title -- one that will be appealing to potential subscribers to the initiative.

6. ALASKA STAT. § 15.45.030 (1988). The initiative committee consists of three sponsors, all of whom are qualified voters and all of whom must sign the application with the proposed bill attached. The three sponsors "shall represent all sponsors and subscribers in matters relating to the initiative." *Id.* The other 100 or more signatories (which may include the original three sponsors) are designated as sponsors. *Id.* § 15.45.060. Additional sponsors may be designated upon notifying the lieutenant governor. *Id.*

7. ALASKA CONST. art. XI, § 2; ALASKA STAT. § 15.45.020 (1988). The precise form of the application is specified by Alaska Statutes section 15.45.030. ALASKA STAT. § 15.45.030 (1988). A deposit of \$100 must accompany the application; this deposit is refundable, however, if the application is properly filed. *Id.* § 15.45.020.

8. ALASKA STAT. § 15.45.070 (1988). The lieutenant governor sends a copy of the initiative to the attorney general's office for legal review.

9. *Id.* §§ 15.45.070-.080.

10. *Id.* § 15.45.080.

given.¹¹ This is a strict deadline, applying to all persons, not just the initiative committee.¹²

The fifth and final pre-circulation step is the preparation of the petitions for circulation. The lieutenant governor is responsible for preparing the petitions, including "an impartial summary of the subject matter of the bill."¹³ As discussed in more detail in Part V of this article, the "impartial" summary may be controversial and often serves as a ground for litigation.¹⁴ If possible, it is important for the sponsors to work with the lieutenant governor's office at this stage to ensure that a proper and legally defensible summary is prepared.

B. Circulation and Review of the Petitions: Steps Six and Seven

The objective of the signature-gathering stage is to have the petitions signed by "qualified voters equal in number to [ten] percent of those who voted in the preceding general election and resident in at least two-thirds of the election districts of the state."¹⁵ These signatures must be obtained within one year from the time that the sponsors receive notice from the lieutenant governor that the petitions have been prepared.¹⁶ The petitions may be circulated only by a sponsor, appearing in person.¹⁷

After gathering the necessary number of signatures, the next step is to file the petitions with the lieutenant governor for his or her review.¹⁸ The lieutenant governor has a maximum of sixty days to determine whether a sufficient number of qualified voters have signed the petition and whether

11. *Id.* § 15.45.240.

12. *McAlpine v. Univ. of Alaska*, 762 P.2d 81 (Alaska 1988). The Alaska Supreme Court initially construed Alaska Statutes section 15.45.240 to apply only to the initiative committee. *Boucher v. Engstrom*, 528 P.2d 456, 459 (Alaska 1974). In *University of Alaska*, the court overruled that portion of the *Engstrom* holding. *University of Alaska*, 762 P.2d at 85.

13. ALASKA STAT. § 15.45.090 (1988); *see also* ALASKA CONST. art. XI, § 3.

14. *See infra* Part V (discussing the initiative petition summary).

15. ALASKA STAT. § 15.45.140 (1988); *see also* ALASKA CONST. art. XI, § 3. When asked by the initiative committee, the lieutenant governor must provide the number of persons who voted in the preceding general election. ALASKA STAT. § 15.45.090 (1988).

16. ALASKA STAT. § 15.45.140 (1988).

17. *Id.* § 15.45.110. The sponsor must accordingly certify each petition by an affidavit. *Id.* § 15.45.130. Extensive coordination and an ample sponsor base are needed to meet this signature-gathering requirement. Some initiators hire sponsors to gather signatures and compensate them on a per signature basis. This technique was used by GCI for the telephone competition initiative discussed above. *See supra* note 3.

18. ALASKA CONST. art. XI, § 3; ALASKA STAT. § 15.45.150 (1988). It bears repeating that the signatures must be gathered and filed within twelve months of the preparation of the petition. If this deadline is not met, the petition will have no force or effect. ALASKA STAT. § 15.45.140 (1988).

the signers resided in at least two-thirds of the election districts in the state.¹⁹ Once the petitions are approved, the lieutenant governor, with the assistance of the attorney general, prepares an initiative title and proposition that will appear on the ballot.²⁰ As with the petition summary, the initiator should work with the lieutenant governor and the attorney general's office to prepare the most litigation-proof ballot title and proposition possible.²¹ Doing so also provides the initiative sponsors with an opportunity to ensure that the title and proposition accurately and persuasively present the content and goals of the proposed law.

C. The Last Hurdles: Steps Eight through Ten

Before the director of elections can place the initiative proposition on the ballot, the Alaska State Legislature must have convened and adjourned once since the initiative petition was filed.²² This requirement gives the legislature the opportunity to pass a "substantially similar" law.²³ If the lieutenant governor, with the attorney general's formal concurrence, determines that the legislature has passed a substantially similar law, the initiative petition becomes void.²⁴

In order to clear the next to the last hurdle, the initiative petition must withstand any legal challenges that are brought. The time frame for such

19. ALASKA STAT. §§ 15.45.150-160 (1988). The initiative committee does have the opportunity to cure a *latent* defect in the number of qualified voters' signatures obtained. This may be done by circulating and submitting a supplementary petition within 30 days of the date the lieutenant governor notified the committee that the petition was improperly filed. *Id.* § 15.45.170.

20. ALASKA STAT. § 15.45.180 (1988). In six words or less, the ballot title shall indicate "the general subject of the proposition." In 100 words or less, the proposition shall "give a true and impartial summary of the proposed law." *Id.* The ballot proposition must also meet a "readability" standard designed to ensure that it can be easily understood by a voter who reads at approximately the eighth grade level. *Id.* § 15.60.005; see Memorandum from Mike Davis, Representative, Alaska State Legislature, to the House Judiciary Committee (Apr. 27, 1987) (on file with the *Alaska Law Review*) (explaining the purpose of the statute's requirements).

21. See *infra* Part V (discussing summaries and ballot titles).

22. ALASKA STAT. § 15.45.190 (1988); 1984 Alaska Op. Att'y Gen. 139. In addition, a period of at least 120 days must have expired between the adjournment of the legislative session and the first available statewide general, special, or primary election. *Id.*

23. ALASKA CONST. art. XI, § 4.

24. *Id.*; ALASKA STAT. § 15.45.210 (1988); see *infra* Part VI (discussing the issue of substantially similar legislation).

challenges is notably short.²⁵ Legal and client resources must therefore be readied for an intense battle.

Obtaining a majority of the votes cast at the election is the final step before an initiative can become a new state law. For some initiatives, this has proven to be the most difficult hurdle.²⁶ Once all ten steps have been taken, the lieutenant governor must certify that the law has been enacted; the initiative becomes effective as law ninety days after this certification.²⁷

III. LEGAL STANDARDS FOR REVIEW

A. Rules of Construction

Because the right of the people to enact law through the initiative is guaranteed by the Alaska Constitution,²⁸ the Alaska Supreme Court has mandated that "the people's right of initiative should be liberally

25. Any litigation challenging a statewide initiative must be resolved within the time constraints imposed by Alaska Statutes section 15.45.190. ALASKA STAT. § 15.45.190 (1988); see *supra* note 22 and accompanying text. In some instances, depending upon factors such as when the legislature will next meet and when the next general election will be held, this time frame may allow only several months for an initiative challenge to be litigated and finally resolved in the courts.

For initiatives not subject to pre-circulation review, such as those for the Municipality of Anchorage, time frames may be even more compressed. For example, in the *Keep ATU Alaskan* case, the Municipality refused to place the initiative on the ballot just 51 days prior to the election. Letter from Lejane Ferguson, Municipal Clerk, Municipality of Anchorage, to Mary Frohne, Organizer, Authority Initiative (Aug. 10, 1991) (on file with the *Alaska Law Review*). Four days after the refusal, the plaintiffs brought suit, and five days later filed a motion for a preliminary injunction requiring that the defendants take all necessary steps to place the initiative on the ballot. Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction, *Keep ATU Alaskan v. Municipality of Anchorage*, No. 3AN-91-6958 Civil (Alaska Super. Ct. Aug. 14, 1991). After full briefing and oral argument, the superior court granted the preliminary injunction -- only nine days after the motion was brought. Order on Plaintiffs' Motion for a Preliminary Injunction, *Keep ATU Alaskan v. Municipality of Anchorage*, No. 3AN-91-6958 Civil (Alaska Super. Ct. Aug. 29, 1991). The Municipality of Anchorage subsequently filed an emergency petition for review with the Alaska Supreme Court, and the court denied the petition before the election. Order, *Municipality of Anchorage v. Keep ATU Alaskan*, No. S-4725 (Alaska Sept. 16, 1991).

26. For instance, Alaskan voters have rejected initiatives: (1) repealing limited entry in commercial fisheries (1976); (2) establishing refundable deposits on certain beverage containers (1978); (3) limiting state funding of abortions (1983); (4) regulating gambling and establishing an Alaskan Gambling Board (1990); (5) enacting laws relating to personal consumption of fish and game (1982); and (6) amending laws relating to the Alaska Railroad (1990). See ALASKA DIVISION OF ELECTIONS, REPORT OF INITIATIVES APPEARING ON THE BALLOT IN ALASKA (Apr. 19, 1991) (on file with the *Alaska Law Review*).

27. ALASKA STAT. § 15.45.220 (1988).

28. ALASKA CONST. art. XI, § 1.

construed."²⁹ The Alaska Supreme Court has established two primary rules governing judicial review of initiatives. First, constitutional and statutory provisions relating to initiatives should be liberally interpreted. The court has stated that "[i]n reviewing an initiative prior to submission to the people, the requirements of the constitutional and statutory provisions pertaining to the use of initiatives should be liberally construed so that 'the people [are] permitted to vote and express their will on the proposed legislation'"³⁰ Second, if an initiative can be interpreted in a manner consistent with the constitution, that interpretation must prevail. Specifically, the court has held that "[w]hen one construction of an initiative would involve serious constitutional difficulties, that construction should be rejected if an alternative interpretation would render the initiative constitutionally permissible."³¹

Consistent with these primary rules of construction, the Alaska Supreme Court has established three corollaries. First, "all doubts as to technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor [of allowing the people to vote on the initiative]."³² Second, the court's inquiry must not be directed to the wisdom of the goals or approaches embodied in the initiative, for those decisions rest with the voters.³³ Third, courts should adopt a deferential attitude toward initiatives.³⁴ In short, the Alaska Supreme Court has steadfastly defended the right of Alaskans to enact law through initiative as "an act of direct democracy guaranteed by our constitution."³⁵

However, a recent case suggests that the pendulum may be swinging toward a more restrictive approach in interpreting initiatives. In *Citizens*

29. *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 91 (Alaska 1983); *Thomas v. Bailey*, 595 P.2d 1, 3 (Alaska 1979).

30. *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974) (quoting *Cope v. Toronto*, 332 P.2d 977, 979 (Utah 1958) (alteration in original)), *overruled on other grounds* by *McAlpine v. Univ. of Alaska*, 762 P.2d 81 (Alaska 1988).

31. *Engstrom*, 528 P.2d at 462.

32. *Id.* at 462 (quoting *Cope v. Toronto*, 332 P.2d 977, 979-80 (Utah 1958)).

33. *Id.* at 463. Furthermore, a court should not consider the legality of the legislation proposed by initiative prior to the election. The court is authorized to consider only whether the initiative relates to a prohibited subject (i.e., any of the subjects prohibited by the state constitution or municipal charter), or whether the initiative complies with the legal requirements for placing it on the ballot. *University of Alaska*, 762 P.2d at 87 n.7; *Engstrom*, 528 P.2d at 460 n.13.

34. *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985) (holding that courts should be reluctant to invalidate initiatives).

35. *Yute Air*, 698 P.2d at 1181. As one of Alaska's constitutional framers stated, "[o]n the story of the initiative and referendum, [the people] have passed more good laws than they have bad laws and that is as good as you can say for any legislature." *Proceedings of the Alaska Constitutional Convention*, pt. 2, at 1179 (Jan. 4, 1956) (remarks of Delegate Marston).

Coalition for Tort Reform, Inc. v. McAlpine,³⁶ the Alaska Supreme Court invalidated a proposed initiative aimed at limiting contingency fee agreements. The court based its decision on the prohibition against using an initiative to prescribe a rule of court.³⁷ In reaching this result, the court appeared to revise its approach to construing initiative rights. According to the court,

[I]t does not necessarily follow that a liberal construction of the people's initiative power requires a narrow construction of the limits that define the power. On the contrary, the mandate for liberal construction of the initiative right in article XII, Section 11 concludes with a qualifying, cautionary clause: "subject to the limitations of Article XI." This reiterative warning underscores *the importance of the restrictions*. Additionally, we must never lose sight of another important right of the people implicated in all cases of constitutional construction, namely the right to have the constitution upheld as the people ratified it. . . . *We must interpret all constitutional provisions -- grants of power and restrictions on power alike -- as broadly as the people intended them to be interpreted.*³⁸

The tenor of the court's decision in the *Citizens Coalition for Tort Reform* opinion may be explained by the court's distaste for the issue involved: the imposition of a rule of court by initiative. However, lower courts may view the opinion as an invitation to more closely scrutinize whether an initiative violates the subject-matter restrictions for initiatives.

In the most recent decision on initiative law, the Alaska Supreme Court returned to a more liberal view of the rules of construction for initiatives. *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*³⁹ involved a city code section designating hotel bed tax revenues for purposes of tourist and entertainment activities, as well as other economic development.⁴⁰ The initiative at issue in that case repealed that city code section and set aside hotel bed tax revenues for deposit in the city council discretionary fund.⁴¹ The court first announced that "[t]he usual rule applied by this court is to construe voter initiatives broadly so as to preserve them whenever possible."⁴² The court then stated that

36. 810 P.2d 162 (Alaska 1991).

37. *Id.* at 167; *see also* ALASKA STAT. § 15.45.010 (1988).

38. *Citizens Coalition for Tort Reform*, 810 P.2d at 168 (footnotes omitted) (emphasis added).

39. 818 P.2d 1153 (Alaska 1991); *see infra* pp. 14-16 for a full discussion of this case.

40. *Fairbanks Convention and Visitors Bureau*, 818 P.2d at 1156.

41. *Id.* at 1155, 1157.

42. *Id.* at 1155 (citation omitted). Notably, in discussing the standards of interpretation for initiatives, the court cited *Thomas v. Bailey*, not *Citizens Coalition*

“initiatives touching upon the allocation of public revenues and assets require careful consideration because the constitutional right of direct legislation is limited by the Alaska Constitution.”⁴³ The *Fairbanks Convention and Visitors Bureau* court adhered to the “general rule that the initiative power will be construed broadly,”⁴⁴ and held that the initiative did not violate the restriction against dedicating funds.⁴⁵

B. The Scope of Pre-Election Judicial Review of an Initiative Measure under Alaska Law

The Alaska Supreme Court has recognized a distinction between constitutional challenges that may be asserted prior to an initiative’s passage and those that may be asserted only after an initiative’s passage. According to the court, “[g]eneral contentions that the provisions of an initiative are unconstitutional are justiciable *only after* the initiative has been enacted by the electorate.”⁴⁶ The scope of review prior to the enactment of an initiative is limited to the scope of the lieutenant governor’s pre-election review.⁴⁷ Under the Alaska Supreme Court’s interpretation of the pre-election review statutes,

The lieutenant governor is charged with initially determining whether an initiative application is in the “proper form.” His determinations include whether the sponsors and subscribers complied with the legal procedures for placing an initiative on the ballot, and whether the initiative contains statutorily or constitutionally prohibited subjects which should not reach the ballot.⁴⁸

Thus, a pre-election suit can be brought to determine only whether the initiative relates to a prohibited subject (i.e., any of the subjects prohibited

for Tort Reform. *Fairbanks Convention and Visitors Bureau*, 818 P.2d at 1155; see *supra* notes 29, 36-38 and accompanying text.

43. *Fairbanks Convention and Visitors Bureau*, 818 P.2d at 1155 (emphasis added).

44. *Id.* at 1157.

45. *Id.* at 1159.

46. *Boucher v. Engstrom*, 528 P.2d 456, 460 n.13 (Alaska 1974) (emphasis added); *Whitson v. Municipality of Anchorage*, 608 P.2d 759, 762 (Alaska 1980). As a general proposition, courts will refuse to pass on the constitutionality of *proposed* legislation. “Only after legislation becomes law will its constitutionality be tested.” *Engstrom*, 528 P.2d at 460 (quoting *Iman v. Bolin*, 404 P.2d 705, 709 (Ariz. 1965)).

47. See *McAlpine v. Univ. of Alaska*, 762 P.2d 81 (Alaska 1988); see *supra* notes 8-12 and accompanying text.

48. *University of Alaska*, 762 P.2d at 87 n.7 (citing ALASKA CONST. art. XI, § 2; ALASKA STAT. §§ 15.45.070-080 (1988)).

by the state constitution) or whether the initiative complies with the legal requirements for placement on the ballot.⁴⁹

IV. SUBJECT MATTER LIMITATIONS

The Alaska Constitution sets forth specific limitations on the subject matter of initiatives. Specifically, the constitution prohibits the use of an initiative: (1) to make or repeal appropriations; (2) to dedicate revenues; (3) to enact local or special legislation; or (4) to create courts, define the jurisdiction of courts or prescribe their rules.⁵⁰ Each of these limitations will be discussed in turn.

A. Appropriations

In four significant cases, the Alaska Supreme Court reviewed and defined what constitutes an impermissible appropriation by initiative: *Thomas v. Bailey*,⁵¹ *Alaska Conservative Political Action Committee ("ACPAC") v. Municipality of Anchorage*,⁵² *McAlpine v. University of Alaska*,⁵³ and *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*.⁵⁴ In two of those cases (*Bailey* and *ACPAC*), the court determined that "give-away" programs constituted impermissible appropriations. The *Bailey* court determined that the Alaska Homestead Act⁵⁵ was an appropriation because it gave away state land.⁵⁶ Similarly,

49. The Alaska Supreme Court has deviated from this general rule in two cases, both of which involved local, rather than state initiatives. See *Whitson v. Municipality of Anchorage*, 608 P.2d 759 (Alaska 1980); *Municipality of Anchorage v. Frohne*, 568 P.2d 3 (Alaska 1977). In *Whitson* and *Frohne*, the court held that an initiative may be reviewed to determine whether the legislative body to which the initiative is directed has the power to enact such legislation. In both cases, the court held that the initiatives sought legislative ends that the municipal assembly could not lawfully accomplish. *Whitson* dealt with an initiative to amend the municipal charter to require voter ratification of new taxes or tax increases. The court held that the initiative conflicted with state statutes giving broad taxing authority to the assembly. *Whitson*, 608 P.2d at 761. In *Frohne*, an initiative to limit the assembly's choice of district apportionment was held to conflict with state statutes dealing with the unification of local governments. *Frohne*, 568 P.2d at 8.

50. ALASKA CONST. art. XI, § 7. Similar restrictions may be found in city charters in Alaska. For instance, the Anchorage Municipal Charter restricts the use of initiatives for the purposes of: (1) establishing budgets; (2) fixing mill levies; (3) authorizing the issuance of bonds; or (4) appropriating funds. ANCHORAGE MUNICIPAL CHARTER art. III, § 3.02(a); see also ANCHORAGE MUNICIPAL CODE § 2.50.020 (1980).

51. 595 P.2d 1 (Alaska 1979).

52. 745 P.2d 936 (Alaska 1987).

53. 762 P.2d 81 (Alaska 1988).

54. 818 P.2d 1153 (Alaska 1991).

55. See ALASKA STAT. § 38.09.010-900 (1989 & Supp. 1991) (setting forth the

in *ACPAC*, the court ruled that the sale of a municipally-owned electric company to Chugach Electric for one dollar was clearly a give-away program.⁵⁷

It was against this legal background that *McAlpine v. University of Alaska*⁵⁸ was decided. This case addressed the validity of the Community College Initiative. After the State of Alaska merged the community colleges into the University of Alaska, a group of citizens circulated a petition to require the state to reestablish and fund a separate independent community college system.⁵⁹ The lieutenant governor approved the initiative for placement on the ballot.⁶⁰ Subsequently, the University of Alaska and others sued to remove it from the ballot, arguing primarily that it constituted an impermissible appropriation.⁶¹

The Community College Initiative petition consisted of four sentences.⁶² The Alaska Supreme Court carefully analyzed each sentence of the petition to determine whether any one sentence constituted an impermissible appropriation.⁶³ The original Community College Initiative stated:

BE IT ENACTED BY THE PEOPLE OF THE STATE OF
ALASKA:

There shall be established a separate independent Community College System in the State of Alaska. The University of Alaska shall transfer to the Community College System of Alaska such real and personal property as is necessary to the independent operation and maintenance of the Community College System. The amount of property transferred shall be commensurate with that occupied and operated by the Community Colleges on November 1, 1986. Properties created for the purpose of joint use by the University and Community College System shall continue to be jointly used.⁶⁴

The supreme court took issue with the third sentence of the original initiative: "The amount of property transferred shall be commensurate with that occupied and operated by the community colleges on November 1, 1986."⁶⁵ Ultimately, the court struck this sentence from the original

current version of the Alaska Homestead Act).

56. *Bailey*, 595 P.2d at 9.

57. *ACPAC*, 745 P.2d at 938.

58. 762 P.2d at 81.

59. *Id.* at 83.

60. *Id.*

61. *Id.* at 84.

62. *Id.* at 83.

63. *Id.* at 89-91.

64. *Id.* at 96.

65. *Id.* at 90.

initiative and directed the superior court to order the lieutenant governor to place the remaining three-sentence initiative on the ballot.⁶⁶ The court reasoned that the initiative sponsors had intended to dictate the scale of the operation of the new community college entity, thereby eliminating the legislature's discretion over appropriations.⁶⁷ The court found that this sentence mandated a community college operation on the same scale as the one in place two years earlier, prior to a period of serious cuts in the university budget.⁶⁸ Thus, the provision would have significantly altered the allocation of assets to community colleges, and it would have required the legislature to spend a specifically defined amount of money.⁶⁹

In concluding that the Community College Initiative, once redacted, *did not* constitute an appropriation, the court returned to the *ACPAC* and *Bailey* decisions. The court noted that "in neither *ACPAC* nor *Bailey* did we [the court] conclude that the term appropriation includes the setting aside of property (other than money) *outside the context of give-away programs.*"⁷⁰

In analyzing the Community College Initiative, the court expressly observed that the initiative, as redacted by the court, did, in fact, remove some appropriation discretion from the legislature: "The community college initiative . . . *require[s]* that the state property *be devoted* to community colleges."⁷¹ Nevertheless, the court followed the rule of liberal construction and concluded that the redacted initiative did not constitute an appropriation.⁷² The precise holding of *University of Alaska* is straightforward; the court stated that an appropriation problem exists only where an initiative "designate[s] *the use* of state assets in a manner that is executable, mandatory, and reasonably definite *with no further legislative action.*"⁷³ The court's holding in *University of Alaska* is appropriately narrow, given the constitutional right of the people to initiate law.

The court further clarified its analysis of appropriations in *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*,⁷⁴ which distinguished between initiatives that make appropriations and those that repeal appropriations. With respect to the former, the court concluded that

66. *Id.* at 96.

67. *Id.* at 90-91.

68. *Id.* at 90.

69. *Id.*

70. *Id.* at 38 (emphasis added).

71. *Id.* at 91 (emphasis added).

72. *Id.*

73. *Id.* (emphasis added).

74. 818 P.2d 1153 (Alaska 1991).

the term “appropriations” should be construed broadly, consistent with the intent of Alaska’s constitutional framers to avoid give-away programs.⁷⁵ For initiatives that repeal appropriations, however, the court concluded that “the purposes of the constitution are *not* met by construing the term ‘appropriations’ broadly.”⁷⁶

In recognizing this distinction, the court referred to the two primary purposes for restricting initiatives that constitute appropriations: (1) to prevent the enactment of give-away programs that would endanger the state treasury; and (2) to ensure that the legislature retains responsibility for the budget and control over state assets.⁷⁷ The court noted that “[i]n the context of an initiative that would *repeal* an appropriation, only the second of these purposes -- retention of control of the appropriation process in the legislative body -- is relevant.”⁷⁸ Thus, the court concluded that the term “appropriation” need not be construed broadly to accomplish this purpose.⁷⁹

B. Dedicated Revenues

The Alaska Constitution also specifically provides that an “initiative shall not be used to dedicate revenues.”⁸⁰ This prohibition is designed to ensure that the legislature be accorded the greatest flexibility and control in managing the state budget and annual expenditures.⁸¹ In *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*,⁸² the Alaska Supreme Court construed this restriction for the first time.

The court began its analysis by noting that a previous decision, *State v. Alex*,⁸³ had interpreted a similar constitutional provision prohibiting the legislature’s dedication of taxes to any special purpose.⁸⁴ In *Alex*, the court struck down a statute that imposed a mandatory tax on the sale of

75. *Id.* at 1156.

76. *Id.* at 1156-57 (emphasis added).

77. *Id.* at 1156.

78. *Id.* (emphasis added).

79. *Id.* at 1156-57.

80. ALASKA CONST. art. XI, § 7.

81. See *State v. Alex*, 646 P.2d 203, 209-10 (Alaska 1982) (discussing the dedicated revenue prohibition of article IX, section 7 of the Alaska Constitution); 1959 Alaska Op. Att’y Gen. No. 7, at 2 (“[T]he delegates were desirous of eliminating dedications so that the Legislature would have the greatest flexibility in allocating tax revenues on a basis of need.”).

82. 818 P.2d 1153 (Alaska 1991).

83. 646 P.2d 203 (Alaska 1982).

84. See ALASKA CONST. art. IX, § 7 (“The proceeds of any state tax or license shall not be dedicated to any special purpose . . .”).

salmon to fund regional aquaculture associations.⁸⁵ To analyze the dedicated tax prohibition, the court looked to studies prepared for use at the Alaska Constitutional Convention.⁸⁶ These studies indicated that dedicated taxes were popular because they reduced taxpayer resistance by guaranteeing that the tax would be used to benefit those who paid it. The studies also cautioned against permitting dedicated taxes on the ground that such earmarking curtailed the exercise of budgetary controls and amounted to an abdication of legislative responsibility.⁸⁷

In *Fairbanks Convention and Visitors Bureau*, the Alaska Supreme Court distinguished the hotel bed tax allocation initiative from the initiative in *State v. Alex*.⁸⁸ The court noted that in *Alex*, the allocation of revenues to the regional aquaculture associations was mandatory, "leaving no discretion to the legislature to spend the money in any other way."⁸⁹ Furthermore, the *Alex* legislation created something akin to a "right" to the taxes/assessments for the aquaculture associations.⁹⁰ The initiative in *Fairbanks Convention and Visitors Bureau*, on the other hand, did not create a "right" for any group or person, nor did it create any mandatory expenditures.⁹¹ The court concluded that the bed tax allocation initiative did not suffer from a dedicated fund infirmity because it did not infringe on flexibility in the budget process.⁹² Thus, under the standard employed by the court, an initiative will not violate the restriction against dedicated funds so long as the initiative does not unduly infringe on the government's discretion to allocate funds in the budget process.

C. Local or Special Legislation

The Alaska Constitution provides that an "initiative shall not be used . . . to enact local or special legislation."⁹³ *Boucher v. Engstrom*⁹⁴ is the only Alaska case to date that addressed the question of "local or special legislation" in the initiative context. *Engstrom* dealt with an initiative proposal to relocate the state capital to a location other than Anchorage or Fairbanks, the two largest population centers in the state. After the

85. *Alex*, 646 P.2d at 210.

86. *Id.* at 208-10.

87. *Id.* at 209 n.5 (citing ALASKA STATEHOOD COMMISSION, 3 CONSTITUTIONAL STUDIES, pt. IX, at 27 (1955)).

88. *Fairbanks Convention and Visitors Bureau*, 818 P.2d at 1158.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1159.

93. ALASKA CONST. art. XI, § 7.

94. 528 P.2d 456 (Alaska 1974).

sponsors obtained the requisite number of voters' signatures on the petitions and the lieutenant governor's office certified the initiative petition for placement on the ballot, Engstrom filed suit in state superior court.⁹⁵ Engstrom claimed that the subject of the proposed bill was fatally defective because, by excluding the Anchorage or Fairbanks areas from consideration as possible capital sites, the proposition constituted local or special legislation in violation of Article XI, section 7 of the Alaska Constitution.⁹⁶

The superior court agreed with Engstrom, and enjoined the lieutenant governor from placing the initiative on the ballot.⁹⁷ The State of Alaska appealed to the Alaska Supreme Court, and the supreme court reversed the decision.⁹⁸ The court held that the test for determining whether legislation is local or special is "whether the subject matter is of common interest to the whole state."⁹⁹ In other words, according to the court, "a law does not cease to be general, and become local or special, because it operates only in certain subdivisions of the state."¹⁰⁰ In adopting the "statewide interest" test, the court specifically disapproved of the definition of local legislation applied in *Walters v. Cease*.¹⁰¹ In *Walters*, the court observed that the legislation was local because it applied "only to a limited number of geographical areas, rather than being widespread in its operation throughout the state."¹⁰²

Under a simplified reading of *Engstrom*, an initiative that meets the statewide interest test should not be held to constitute local or special legislation.¹⁰³ The "statewide interest" test may be criticized as focusing only on the "local" aspect of the prohibition, and ignoring "special" legislation. *Engstrom* arguably supports the use of a broader test for special legislation.¹⁰⁴ Specifically, *Engstrom* may be read to require that

95. *Id.* at 458.

96. *Id.* at 459.

97. *Id.*

98. *Id.* at 464.

99. *Id.* at 461.

100. *Id.* at 461-62.

101. 394 P.2d 670 (Alaska 1964).

102. *Id.* at 672.

103. This position is supported by the decision in *State v. Lewis*, 559 P.2d 630, 644 n.49 (Alaska 1977), *cert. denied*, 432 U.S. 901 (1977), in which the Alaska Supreme Court noted that in *Engstrom*, it had found "that statewide interest in the location of a new capital was sufficient to validate an initiative relocation proposal which excluded Fairbanks and Anchorage as potential sites." *Id.* (emphasis added).

104. In a footnote, the *Engstrom* court indicated that the "test to be employed [for local or special legislation] is substantially the same as that which would be applied to legislative classifications challenged as being contrary to the equal protection clause." *Engstrom*, 528 P.2d 456, 463 n.25 (citations omitted).

a court review the initiative to determine whether there is "any conceivable factual basis" that would render the classification constitutional.¹⁰⁵

Parties opposing an initiative on special legislation grounds may contend that the court should adopt a "fair and substantial relationship" equal protection test¹⁰⁶ rather than an "any conceivable factual basis" test. Given the time constraints associated with pre-election initiative challenges and the mandated deference to the initiative process, the "fair and substantial relationship" test is unwieldy and constitutionally suspect.¹⁰⁷ In addition, litigants have the ability to fully challenge the initiative in question on equal protection grounds if and when it is passed.¹⁰⁸ Thus, determining whether there is "any conceivable factual basis" for the classification is more appropriate for a pre-election initiative challenge than a more rigorous "fair and substantial relationship" analysis, which would unduly burden the people's right to initiate law.

D. The Restriction Against Creating Courts, Defining the Jurisdiction of Courts or Prescribing Court Rules

The Alaska Constitution sets forth the restriction against using an initiative to create courts, define the jurisdiction of courts, or prescribe court rules.¹⁰⁹ The Alaska Supreme Court broadly construed this restriction in *Citizens Coalition for Tort Reform, Inc. v. McAlpine*,¹¹⁰ which involved a tort reform initiative. As originally drafted, the initiative contained three sections.¹¹¹ One section set maximum allowable attorney's fees in personal injury cases.¹¹² The other two sections proposed to alter the statutory law governing apportionment of damages and contribution among tortfeasors.¹¹³

The lieutenant governor's office denied certification of the initiative on the ground that the regulation of attorney's fees constituted an attempt to

105. *Id.* at 463.

106. These parties would likely rely on *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976), which modified Alaska's equal protection analysis.

107. Furthermore, the footnote in *Engstrom*, see *supra* note 104, was rendered before the Alaska Supreme Court modified its equal protection analysis. Compare *Engstrom*, 528 P.2d at 463 n.25 with *Isakson*, 550 P.2d at 362.

108. Notably, *Isakson* and the subsequent equal protection cases that employed the "fair and substantial relationship" test involved enacted legislation — not pre-election initiative challenges. See *Isakson*, 550 P.2d at 360; *Principal Mut. Life Ins. Co. v. State*, 780 P.2d 1023, 1024 (Alaska 1989); *State v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 625-26 (Alaska 1989).

109. ALASKA CONST. art. XI, § 7.

110. 810 P.2d 162 (Alaska 1991).

111. *Id.* at 163.

112. *Id.*

113. *Id.*

prescribe a rule of court in contravention of article XI, section 7 and Alaska Statutes section 15.45.010.¹¹⁴ The group sponsoring the initiative filed suit in superior court and sought a temporary restraining order directing the lieutenant governor's office to certify the initiative and prepare the initiative petitions.¹¹⁵ The trial court denied the motion for a temporary restraining order, and the supreme court denied a petition for review.¹¹⁶

After the lieutenant governor denied certification of the initiative petition, the sponsors removed the section restricting contingency fee agreements and resubmitted the initiative. The initiative was certified in that form.¹¹⁷ The voters passed the revised version of the initiative in the 1988 general election.¹¹⁸ Following the election, the sponsors sought a ruling that the provision restricting contingency fee agreements did not violate the constitution or statute. The state and the Alaska Academy of Trial Lawyers ("AATL"), who had intervened, filed cross motions for summary judgment. The superior court agreed with the state and AATL that the proposed provision was an attempt to prescribe a rule of court.¹¹⁹

The Alaska Supreme Court affirmed.¹²⁰ According to the court, determining whether an initiative violates the constitutional and statutory restrictions against enacting a court rule by initiative required a two-step inquiry.¹²¹ The first inquiry addresses whether a limit on attorney contingent fees is necessarily classifiable as a rule of court. If a contingent fee limit is in fact a rule of court, the second question becomes whether article XI, section 7 of the constitution removes such a rule from the scope of the right to initiate law.¹²²

The court noted that the Alaska Bar Rules and the Code of Professional Responsibility contained court rules that regulated contingent fees,¹²³ and that courts in other jurisdictions had adopted court rules that imposed limits

114. *Id.* at 163-64; see ALASKA STAT. § 15.45.010 (1988) ("[A]n initiative may not be proposed to . . . create courts, to define the jurisdiction of courts or prescribe their rules, or to enact local or special legislation.").

115. *Citizens Coalition for Tort Reform*, 810 P.2d at 163-64.

116. *Id.*

117. *Id.*

118. *Id.*; see ALASKA STAT. § 09.16.010-.060 (repealed 1987); ALASKA STAT. § 09.17.080(d) (enacted 1987). For a discussion of the tort reform initiative as passed, see Laurence Keyes, *Alaska's Apportionment of Damages Statute: Problems for Litigants*, 9 ALASKA L. REV. 1 (1992).

119. *Citizens Coalition for Tort Reform*, 810 P.2d at 163-64.

120. *Id.* at 172.

121. *Id.* at 164.

122. *Id.*

123. See ALASKA BAR RULE 35; ALASKA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106, 5-103.

strikingly similar to that proposed by the initiative.¹²⁴ Thus, the court held that the initiative provision limiting attorneys' contingent fees was properly classifiable as a rule of court.¹²⁵

The court then examined whether the limit on contingent fees constituted a court rule within the meaning of the constitutional provision. The sponsors of the initiative argued that a rule on contingent fees would be promulgated by the court pursuant to its inherent authority to regulate the practice of law, rather than the court's explicit rule-making authority. Under this reasoning, such a rule could not be considered a court rule within the meaning of the constitutional restriction.¹²⁶ The court rejected this argument.¹²⁷

Looking to the purpose of the constitutional provision, the court indicated that the constitutional framers prohibited the use of initiatives to enact court rules because "they considered such rules far too sophisticated and sensitive to be left vulnerable to the reach of the popular initiative."¹²⁸ Similarly, the court stated that the "rules regulating the practice of law often are equally as sophisticated, technical, or sensitive as rules governing the administration, practice, and procedure in the courts."¹²⁹ Thus, the court concluded that the restriction in article XII, section 7 of the constitution extended to rules adopted by the court under its inherent authority to regulate the practice of law and the conduct of attorneys in the state. In light of the court's broad interpretation of the restriction against enacting a court rule by initiative in *Citizens Coalition for Tort Reform*, it will undoubtedly be difficult for any initiative relating to the regulation of the practice of law or the conduct of attorneys to withstand legal scrutiny.

E. Administrative Act

No constitutional or statutory provision exists to prohibit the enactment of an administrative act by initiative. However, in *Wolf v. Alaska State*

124. *Citizens Coalition for Tort Reform*, 810 P.2d at 165-66.

125. *Id.* at 165-67.

126. *Id.* at 168-69. The court acknowledged that there was a distinction between: (1) rules adopted by the court pursuant to its explicit rule-making authority to make and promulgate rules governing court administration and rules governing practice and procedure in civil and criminal cases; and (2) rules adopted by the court pursuant to its inherent authority to regulate the practice of law and conduct of attorneys. Compare ALASKA CONST. art. IV, § 15 with ALASKA CONST. art. IV, § 1. However, the court declined to apply the distinction to the restriction of article XI, section 7. *Citizens Coalition for Tort Reform*, 810 P.2d at 168.

127. *Citizens Coalition for Tort Reform*, 810 P.2d at 169.

128. *Id.* at 170 (citing *Proceedings of the Alaska Constitutional Convention*, pt. 4, at 2978 (Jan. 24, 1956) (remarks of Delegate Robertson)).

129. *Id.*

Housing Authority,¹³⁰ the Alaska Supreme Court stated in dicta¹³¹ that "the power of both initiative and referendum is restricted to legislative ordinances, and does not extend to administrative measures."¹³² More recently, the Alaska Supreme Court appeared to move away from the relatively restrictive language in *Wolf* by adopting a superior court opinion applying a more liberal approach to the enactment of administrative acts through initiative. In *Yute Air Alaska, Inc. v. McAlpine*,¹³³ one of the initiative's provisions required that the governor seek repeal of the federal statute known as the Jones Act,¹³⁴ which mandated that United States vessels be used only for shipping goods between United States ports. The opponents of the initiative argued that the provision was "not law but rather a plebi[s]cite directing administrative activities,"¹³⁵ and therefore was not a proper subject for initiative. The *Yute Air* court explicitly adopted the superior court's holding that the initiative proposition constituted "law" and was therefore a valid initiative.¹³⁶

The superior court had noted that the line of authority cited by the opponents of the initiative¹³⁷ was "analytically defective" because it

130. 514 P.2d 233 (Alaska 1973).

131. The court held that the issue of whether the urban renewal ordinance was a proper subject for referendum was moot because the same ordinance had been subsequently adopted at a second election by an initiative that had not been challenged. *Wolf*, 514 P.2d at 235.

132. *Id.* at 235 (citing EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 16.55 (3d ed. 1969)). McQuillin indicates that the following criteria should be considered in determining whether an initiative constitutes a legislative or administrative act:

[1] Actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative. [2] In this connection, an ordinance which shows an intent to form a permanent rule of government until repealed is one of permanent operation [3] The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum has further been said to be whether the proposition is one to make new law or to execute law already in existence. [4] The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it. [5] Similarly, an act or resolution constituting a declaration of public purpose and making provision for ways and means of its accomplishment is generally legislative as distinguished from an act or resolution which merely carries out the policy or purpose already declared by the legislative body.

EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 16.55, at 266 (3d ed. rev. 1989).

133. 698 P.2d 1173, 1175-77 (Alaska 1985).

134. 46 U.S.C. § 883 (1988).

135. *Yute Air*, 698 P.2d at 1175.

136. *Id.*

137. The superior court specifically referred to *Seattle Building and Construction Trades Council v. City of Seattle*, 620 P.2d 82 (Wash. 1980) (holding that a proposed

limited the use of municipal initiatives to adopt administrative acts but failed to recognize that local governing bodies generally are vested with "an admixture of both legislative and administrative powers," and that "[l]aws frequently reverse prior administrative decisions and set new policies for administrators to follow."¹³⁸

The superior court had also rejected the argument that the initiative provision was invalid because it established public policy on a subject outside the jurisdiction of state lawmakers.¹³⁹ The superior court noted that the state legislature "frequently enacts laws prescribing the conduct of officials or agencies of state government on matters over which the state has no legal jurisdiction," and therefore presumably the electorate also could do so by initiative.¹⁴⁰ The superior court went so far as to suggest that:

Analytically, laws may be enacted on any subject under the sun: They can command the tides to stand still for King Canute or the mountain to come to Mohammed. That they may or may not be effective is of no moment. It will hardly do to say that a law may not be enacted because it is silly -- not at least at this late date. Only if one can point to some prohibition expressed or implied in the state or federal constitutions can it be said that some proposed law would violate the constitution and may not, therefore, be the subject of an initiative.¹⁴¹

The opinion of the superior court in *Yute Air*, as adopted by the Alaska Supreme Court, represents the only published analysis of the administrative act restriction in Alaska and is indicative of the court's liberal attitude towards the use of initiatives. *Yute Air* indicates that an initiative will not run afoul of the administrative act restriction so long as it relates to any subject on which lawmakers could pass legislation.

V. THE INITIATIVE PETITION SUMMARY

The Alaska Supreme Court has addressed the adequacy of the lieutenant governor's initiative petition summary in only one case, *Burgess v. Miller*.¹⁴² In this case, the court reviewed a subsistence preference

city initiative was beyond the scope of initiative power in that the state had plenary control over the subject matter of the initiative and local governments had only those administrative rights and powers accorded them by the legislature).

138. *Yute Air*, 698 P.2d at 1176.

139. *Id.* at 1176-77.

140. *Id.* at 1177.

141. *Id.* at 1176.

142. 654 P.2d 273, 275 (Alaska 1982) ("[t]his appeal raises a question of first impression"). Cf. *Boucher v. Bomhoff*, 495 P.2d 77 (Alaska 1972) (concerning a successful post-election challenge to the prefatory language on the referendum

initiative petition entitled "Personal Consumption of Fish and Game." The trial court ruled on summary judgment that the initiative summary accurately stated the subject matter of the proposed law, and the Alaska Supreme Court affirmed.¹⁴³

The initiative summary in question stated that the proposed bill would "prevent classification of persons on the basis of . . . local residency, past use or dependence on the resource . . ." ¹⁴⁴ The appellants contended that this language was misleading because it falsely implied that the bill could eliminate those preferences required by federal law.¹⁴⁵ The supreme court rejected the appellants' challenge, reasoning that the lieutenant governor was not obligated in the summary to give a special reminder to the voters that the initiative could serve only to change state but not federal law.¹⁴⁶

In reaching this result, the court enunciated several principles to guide review of initiative summaries.¹⁴⁷ First, the court held that "[t]he burden is upon those attacking the summary to demonstrate that it is biased or misleading."¹⁴⁸ Second, in conducting their inquiry, courts should utilize "a deferential standard of review."¹⁴⁹ The court explained that:

"[A]ll legitimate presumptions should be indulged in favor of the propriety of the attorney-general's actions. Only in a clear case should a title so prepared be held insufficient. Stated another way, if reasonable minds may differ as to the sufficiency of the title, the title should be held to be sufficient."¹⁵⁰

Thus, according to the *Burgess* court, an initiative summary should not be invalidated simply because the court believes it could write a better

ballot).

143. *Burgess*, 654 P.2d at 277.

144. *Id.* at 274.

145. *Id.* at 274-75.

146. *Id.* at 276.

147. Under Alaska Statutes section 15.45.090, the lieutenant governor is required to prepare for the initiative petition "an impartial summary of *the subject matter of the bill.*" ALASKA STAT. § 15.45.090 (1988) (emphasis added). This summary is to be distinguished from the ballot proposition itself, which "shall . . . give a true and impartial summary of *the proposed law.*" *Id.* § 15.45.180(a) (emphasis added). In *Burgess*, both a petition summary and ballot proposition were in issue; the court, however, did not distinguish between the two. *Burgess*, 654 P.2d at 275-77.

148. *Burgess*, 654 P.2d at 276.

149. *Id.*

150. *Id.* at 276 n.7 (quoting *Epperson v. Jordan*, 82 P.2d 445, 448 (Cal. 1938)). The Alaska Supreme Court noted that this deferential standard was consistent with that applied by the California Supreme Court in *Epperson*, by the Colorado Supreme Court in *Say v. Baker*, 322 P.2d 317, 319 (Colo. 1958), and by the Arkansas Supreme Court in *Mason v. Jernigan*, 540 S.W.2d 851, 853 (Ark. 1976). The California court refers to this standard as simply requiring "substantial compliance" with the statutory requirements. *Epperson*, 82 P.2d at 450.

one.¹⁵¹ The *Burgess* court nonetheless emphasized that the summary must be true and impartial.¹⁵² The court also embraced the concept that the summary need only mention the main features of the bill, stating that "details may be omitted or in many instances covered by broad generalizations."¹⁵³

In applying the *Burgess* principles, a court should recognize that the lieutenant governor is constrained in two important ways. First, by definition, the summary must be short.¹⁵⁴ Second, the summary must be drafted in simple language.¹⁵⁵ These constraints necessarily require the

151. *Burgess*, 654 P.2d at 276 n.7.

152. *Id.* at 275. According to one authority cited by the *Burgess* court, an initiative summary must be "a fair, concise, true and impartial statement of the intent of the proposed measure. The summary may not be an argument for or against the measure, nor can it be likely to create prejudice for or against the measure." *Id.* (quoting *In re Second Initiated Constitutional Amendment Respecting the Rights of the Public to Uninterrupted Service by Public Employees of 1980*, 613 P.2d 867, 869 (Colo. 1980)). Moreover, according to another cited authority, the summary should be "complete enough to convey an intelligible idea of the scope and import of the proposed law, and that it ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and that it must contain no partisan coloring." *Id.* (quoting *Hope v. Hall*, 316 S.W.2d 199, 201 (Ark. 1958)).

153. *Burgess*, 654 P.2d at 275 n.6 (quoting *Sears v. Treasurer and Receiver General*, 98 N.E.2d 621, 631 (Mass. 1951)). The court further stated that the summary must give "a fair and intelligent conception of the main outlines of the measure. It must do more than merely indicate the field of human or government activity within which the measure falls. It must go beyond what would serve as the title to a statute." *Id.* (citation omitted) (emphasis added).

154. See ALASKA STAT. § 15.45.180 (1988) (requiring no more than six words for the ballot title and no more than 100 words for the summary of the proposition).

155. See *id.* § 15.60.005 (setting forth the formula for scoring readability of ballot proposition summary and voters pamphlet summary). Section 15.60.005 provides:

Readability of certain election materials.

(a) The policy of the state is to prepare a ballot proposition that is clear, concise, and easily readable. The form of each ballot proposition shall be scored under (c) of this section. The policy of the state is to prepare a ballot proposition that is scored at approximately 60.

(b) Each neutral summary prepared for the voter's pamphlet shall be scored under (c) of this section. The policy of the state is to prepare a neutral summary that is scored at approximately 60.

(c) A ballot proposition or neutral summary shall be scored using the following procedures:

(1) disregard numbers;

(2) multiply the average sentence length in words by 1.015;

(3) multiply the average number of syllables for each 100 words by .846;

(4) subtract the total of (2) and (3) from 206.835.

(d) A court may not enjoin the conduct or results of an election for a failure to comply with (a) or (b) of this section.

ALASKA STAT. § 15.60.005 (1988) (emphasis omitted).

Alaska Statutes section 15.60.010(23) defines "proposition" as "an initiative, referendum or constitutional amendment submitted at an election to the public for vote." ALASKA STAT. § 15.60.010(23) (1988).

Legislative history indicates that the intent of the above provision was to ensure that ballot propositions can be easily read by the average Alaskan. According to

lieutenant governor to exercise discretion as to which features of the proposed bill should be mentioned in the summary and how those features should be described.

Obviously, a short summary cannot describe in detail a complex initiative. Thus, courts in other jurisdictions have held that: (1) the lieutenant governor's duty is to summarize only the "central features" or the "primary purpose" of the proposed bill;¹⁵⁶ (2) the summary need not include "every effect that the proposed measure may have on the present statutory scheme";¹⁵⁷ and (3) the summary need not even mention the existence of other statutes addressing the same subject.¹⁵⁸ In assessing the sufficiency of summaries, at least one court has also recognized that the summaries generally are not the only source of voter information, especially with respect to controversial issues subject to extensive public debate and publicity.¹⁵⁹

VI. SUBSTANTIALLY SIMILAR ANALYSIS

Before an initiative can be presented to the electorate, the legislature must first be given the opportunity to remove the initiative from the ballot by passing a law that is "substantially the same."¹⁶⁰ In *Warren v. Boucher*,¹⁶¹ the Alaska Supreme Court explored the issue of how similar the initiative and the legislative act need to be in order to void the initiative. The court examined two legislative ethics measures: an initiative entitled "An Act relating to campaign contributions, expenditures, and their limitations," and an enactment of the legislature entitled "An Act relating to the election campaigns; and providing for an effective date."¹⁶²

statistics available to the legislature at the time, 14% of adults nationwide were functionally illiterate (i.e., reading below the fourth grade level), and 18% of Alaskans over 24 had not graduated from high school or received a General Equivalency Degree ("GED"). Memorandum from Mike Davis, Representative, Alaska State Legislature, to the House Judiciary Committee (Apr. 27, 1987) (on file with the *Alaska Law Review*). The provision provides a readability formula, based on the "Flesch test," designed to make all ballot propositions readable at approximately the eighth grade reading level. *Id.*

156. In the Matter of Increase of Taxes on Tobacco Products Initiative, 756 P.2d 995, 998-99 (Colo. 1988) (en banc).

157. *Id.* at 999.

158. In the Matter of the Proposed Initiative on Transfer of Real Estate, 611 P.2d 981, 983 (Colo. 1980) (en banc); *Massachusetts Teachers Ass'n v. Secretary of the Commonwealth*, 424 N.E.2d 469, 483 (Mass. 1981).

159. *Massachusetts Teachers Ass'n*, 424 N.E.2d at 485.

160. ALASKA CONST. art. XI, § 4.

161. 543 P.2d 731 (Alaska 1975).

162. *Id.* at 732.

In a split (3-2) decision, the court broadly defined the phrase "substantially the same." While conceding that there were many differences between the ethics initiative in question and the legislature's subsequent ethics act, the court found that they "accomplish[ed] the same general goals" and that they "adopt[ed] similar, although not identical, functional techniques to accomplish those goals."¹⁶³ An important factor in the court's analysis was the finding that "[t]he variances in detail between the measures are no more than the legislature might have accomplished through reasonable amendment had the initiative become law."¹⁶⁴ In general, the court concluded that "[i]f in the main the legislative act achieves the same general purpose as the initiative, if the legislative act accomplishes that purpose by means or systems which are fairly comparable, then substantial similarity exists."¹⁶⁵

The "substantially similar" analysis provides the sponsors of the initiative with an opportunity to achieve their goals without the time, expense, and uncertainty inherent in the initiative process. Once the legislature recognizes that there is a great deal of public support for a measure (as evidenced by a large number of initiative signatures), it may act on the proposal.¹⁶⁶

VII. CONCLUSION

To the practitioner, initiative law can be exciting and challenging. The pace of litigation is brisk, and the public policy stakes are usually high. Knowing the rules is essential, as is analyzing the advantages, disadvantages and risks inherent in the initiative process.

Initiatives have served as an important pressure valve for our democratic system in Alaska. Where the legislature has not acted, the people can do so. The broad interpretation of the people's right to initiate law is critical to the exercise of that right.

Many areas of initiative law, such as the scope of pre-election judicial review and the prohibition against using initiatives to prescribe court rules,

163. *Id.* at 739.

164. *Id.*

165. *Id.* at 736.

166. In the case of the telephone competition legislation sponsored by GCI, Alaska State Senator Pat Pourchot insisted that the major players (GCI, Alascom and the APUC) sit down in an attempt to negotiate legislation. David Postman, *Pourchot Scrambles to End Phone Wars*, ANCHORAGE DAILY NEWS, May 2, 1990, at A-1, Back Page. Ultimately, the negotiations were successful, and, less than two weeks later, the legislature passed the compromise legislation mandating telephone competition. See ALASKA STAT. § 42.05.880-.890 (Supp. 1991). GCI saved hundreds of thousands of dollars in campaign expenses as a result.

are well settled. Other areas of initiative law are not resolved, and will undoubtedly lead to further litigation. For example, there is a significant need to resolve the test applied to determine whether an initiative constitutes "special legislation." As discussed in this article, the Alaska Supreme Court should adopt either a "statewide interest" test or an "any conceivable factual basis" test for special legislation. Both tests are consistent with the Alaska Supreme Court's constitutionally-based deference to the initiative, can be readily applied within the time constraints of a pre-election challenge, and are preferable for other public policy and legal reasons. Similarly, the courts should continue to review initiative summaries liberally, recognizing that the electorate receives abundant information from many sources about initiatives on the ballot.

On the state level, the statutory procedure for instituting an initiative is appropriately straightforward, and, most importantly, properly requires a pre-circulation review of initiatives by the lieutenant governor. To minimize last-minute litigation and unnecessary expenditures, local governments such as the Municipality of Anchorage should adopt similar procedures providing for pre-circulation review. This will benefit all concerned: the initiative sponsors, the initiative opponents, the courts, and the electorate.

The courts in Alaska have generally defended and should continue to defend the people's right to initiate law. If they do so, the future exercise of the right to initiate law will remain bright.

