



Ballot Measures and Tobacco Control: Lessons Learned and Strategic Considerations

Ballot measures have become an increasingly popular method for passing laws. This fact sheet provides an overview of what they are, how they have been used in tobacco control, and some of the legal and strategic considerations related to using them.

Q: What are ballot measures?

A: Ballot measures are a way to enact laws by direct, popular vote. They can be used to pass statutes and amend state constitutions. In some situations (and depending on the jurisdiction), laws created through ballot measures may bypass the legislative process entirely; in others, legislative bodies still play a role in passing the law. Ballot measures can be used to pass local or state laws, but cannot be used to pass federal laws. Many local governments also allow ballot measures.¹



There are two main types of ballot measures—*initiatives* and *referenda*.

Q: What is an initiative?²

A: Initiatives are measures proposed by citizens. Initiatives can be *direct* or *indirect*. Direct initiatives are brought directly to voters for consideration through a citizen-sponsored petition process (see below). They do not go through a legislative body before appearing on the ballot. In contrast, indirect initiatives must first be brought to the legislature or city council, as applicable. Typically, if the legislature passes the measure, it becomes law. If the legislature rejects it or fails to act on it within the required time period, only then is the proposed measure placed on the ballot. In some states, the legislature can amend the initiative's proposed language and pass the amended version without placing it on the ballot. In other states, the legislature may amend the initiative, but the amended version must go on the ballot for voter approval, or the legislature may pass an alternate version of the initiative, which must then go to voters for consideration along with the original version at the next election.

Q: What is a referendum?

A: A referendum gives voters the opportunity to approve or reject laws or constitutional amendments passed by a legislative body. Situations where citizens initiate the approval or rejection process are commonly referred to as *popular referenda*. In addition, almost every state allows for some kind of measure where the legislature or another government entity submits a law, bond issue, constitutional amendment, etc. for voter approval. These are sometimes called *referred measure* or *legislative referenda*. They tend to be more common than popular referenda or initiatives.

Q: Are ballot measures permitted by every state?

A: No. Twenty-four states allow legislative or constitutional initiatives.³ Popular referenda are allowed in 23 states.⁴ Legislative referenda are allowed in 49 states.⁵

Q: Are there special requirements for or limitations on ballot measures?

A: Yes. Legal requirements or limitations on ballot measures can be found in state constitutions, state statutes, local government charters, ordinances, state Attorney General opinions, and case law, among other sources. Also, ballot measure campaigns should comply with applicable campaign finance laws. Each jurisdiction has its own requirements and limitations so consulting with an attorney familiar with those laws is important.

As part of the early planning process, advocates considering a ballot measure campaign may find it useful to gather answers to questions such as:

- What types of ballot measures are permitted?
- What is the legal effect of the ballot measure? In some jurisdictions, an initiative or referendum may only be advisory; or it may be advisory under certain circumstances but binding under others.⁶
- Are there limitations on what kinds of laws can be passed using ballot measures, or what provisions can be included in the law? For example, some jurisdictions do not allow laws to be passed by initiatives that call for an appropriation or tax. Many jurisdictions impose a single-subject rule on initiatives, so that an initiative can address only one topic. Other jurisdictions may limit how often a measure can appear on the ballot, or the number of ballot measures that can be decided during an election.

Q: How have ballot measures been used in tobacco control?

A: At the state level, ballot measures have been used in tobacco control primarily to pass three types of laws: tobacco excise tax increases, smoke-free laws, and laws to decide how tobacco settlement funds (e.g., from the 1998 multistate Master Settlement Agreement with the major tobacco companies)⁷ are to be used.

Table 1 below provides information about tobacco-control related ballot measures brought during state-wide elections from 1988 to 2011. While for all types of statewide tobacco control ballot measures, the success rate has been higher than the failure rate, measures relating to allocation of tobacco settlement funds have the highest rates of passage (71 percent), followed closely by excise tax increases (68 percent), with smoke-free laws having the lowest rate (but still over 60 percent).⁸

Table 1. Statewide Tobacco-related Initiatives and Referenda, 1988-2011⁹

Issue	Initiative	Referendum	Total	Passed?	
				Yes	No
Smoke-free laws ¹⁰	7	1	8	5	3
Excise tax increase ¹¹	19	6 ¹²	25	17	8
Allocation of tobacco settlement funds ¹³	7	7	14	10	4
Other—law to preempt local clean indoor air regulations ¹⁴	1	0	1	0	1
Totals	34	14	48	32	16

Ballot measures have also been used at the local level to pass tobacco control laws, such as smoke-free laws and local cigarette tax laws.¹⁵

Q: Are ballot measures common in tobacco control?

A: No. The vast majority of tobacco-control related laws have not been passed through ballot measures. For example, the American Lung Association (ALA) reported that in 2008, nearly 130 tobacco-control related state laws were passed across the 50 states and Washington D.C., addressing issues ranging from tobacco control program funding, fire-safe cigarettes, tobacco tax increases, allocations of tobacco settlement funding, youth access, smoking in cars, and other topics.¹⁶ Out of all of these laws, only one was passed through a ballot measure.¹⁷ A similar pattern occurred in 2009, with well over 150 state tobacco control laws passed, none of which were passed by ballot measure.¹⁸

Although data about local ballot measures are not readily available, the data that has been gathered indicate that as with state laws, local tobacco laws passed by ballot measure make up a minority of local tobacco control laws. For example, according to Americans for Nonsmokers Rights (ANR) data, out of 1,117 local 100 percent smoke-free laws passed between 1990 and the end of 2011, 1,072 were passed by local governments, and only 45 were passed through ballot initiatives.¹⁹ Similarly, ANR reports that out of 94 local cigarette excise tax laws passed since 1947, only 4 were passed by ballot.²⁰

Q: Are there potential advantages to using a ballot measure process over the regular legislative process to pass tobacco control laws?

A: Ballot measures can be a useful tool for passing tobacco control laws. In fact, according to internal tobacco industry documents, restricting the ability of citizens to bring statewide ballot measures was a major state policy objective of the tobacco industry in the 1990s.²¹ Whether a ballot measure approach would be better than going through the state or local legislative body, however, depends on the type of law and the circumstances of the situation.

Ballot measures have been most useful in tobacco control in providing a way to bypass roadblocks in the legislative process. Generally speaking, ballot measures may be an option in situations where there is public support for a law, but legislators are unable or unwilling to act. For example, politicians are often reluctant to pass tax increases. Thus, supporters of laws that involve tax increases, including tobacco taxes, have often turned to ballot measures when faced with barriers in the legislative process.²²

Another potential advantage of initiatives is that they may allow advocates to have more control over how the proposed law is worded and structured. This is especially true for direct initiatives, which usually avoid the “sausage-making” of the legislative process. On the other hand, the legislative process also can help to refine and improve a proposed law’s language, clarify important questions of authority, and promote planning for implementation. This can result in a better law with stakeholders primed to implement it on its effective date. It is possible for ballot measure proposals to go through a similar kind of refining and planning process, but doing so takes strategic preparation and forethought by proponents.

Essentially, for tobacco control, the ballot measure approach can be an effective strategy when the legislative process has broken down.

Q: Are there any potential disadvantages to using ballot measures to pass tobacco control laws?

A: In general, the ballot measure process has been criticized as presenting opportunities for abuse that outweigh its advantages, being subject to exploitation by special interests, and being vulnerable to unintended consequences.²³ The tobacco control experience with ballot measures demonstrates that these critiques frequently are justified.

Ballot measures have been a double-edged sword for tobacco control. The tobacco industry and its allies have used them to try to repeal, weaken, or delay tobacco control laws, particularly in the smoke-free context. Specifically, legislative referenda can be used by ambivalent legislators to avoid their decision-making responsibilities, and to delay or prolong final passage of tobacco control laws.²⁴ Popular referenda have been used to challenge smoke-free laws passed by lawmakers—since 1983, at least 50 smoke-free laws (almost all at the local level) have been challenged by referenda, with about 14 percent of these laws being repealed.²⁵ The tobacco industry also has exploited the

initiative process to undermine tobacco control measures. For example, one industry strategy has been to sponsor weaker initiatives to compete with smoke-free initiatives brought by advocates.²⁶ These competing initiative campaigns can be very expensive, straining the limited resources of public health advocates.²⁷ They also can promote voter confusion and can lead to legal uncertainty.²⁸

Finally, specific legal requirements apply to ballot measures, which can limit their impact as well as making them vulnerable to legal challenges alleging that these requirements weren't properly followed. For example, ballot measures may be merely advisory, so that the legislative body can choose to disregard it.²⁹ Some of the legal challenges that have been brought against tobacco control measures are described below.

While the ballot measure approach has been used successfully by tobacco control advocates, experience indicates that ballot measures should not be undertaken lightly.

Q: What is the process for passing a law by ballot measure?

A: Where ballot measures are allowed, the process for bringing them varies across jurisdictions, and by type of ballot measure. Thus, it would be important to research the specific legal requirements in the relevant jurisdiction.

Nonetheless, laws governing ballot measure processes generally share the following common elements:³⁰

- Proposed petitions for ballot measures often must be pre-filed with a designated government official for preliminary review; in some situations, pre-filing is recommended but not required.
- The language of proposed measures may be subject to review for statutory compliance before circulation through a petition.
- Signatures must be verified by designated government officials. The required number of signatures for successful petitions, and any requirements for eligibility, such as time limits or geographic distribution requirements, vary across jurisdictions and may depend on the type of measure.³¹
- The measure is placed on the ballot and voted on.

Q: Can laws passed by ballot measures be vetoed by the governor or amended or repealed by a state legislature?

A: According to the Initiative and Referendum Institute, no state allows the governor to veto laws passed by initiative. Several states, however, allow the legislature to amend or repeal laws passed by initiatives with varying degrees of flexibility. For example, some states allow legislatures to amend or repeal such laws at any time,³² or only after a certain amount of time has passed,³³ and/or with a supermajority vote.³⁴

Q: Can ballot measures be invalidated or overturned by a court?

A: Yes. Legal challenges to ballot measures generally have fallen into three categories: (1) failure to meet the procedural requirements for placing the measure on the ballot; (2) the measure's subject matter did not comply with constitutional or statutory limits on the use of ballot measures; and (3) the measure would violate substantive federal or state constitutional law, if passed.³⁵

Challenges that fall within the first two categories are specific to the ballot measure process. These challenges usually allege that some procedural or formatting requirement was not properly followed,³⁶ or that the ballot measure process cannot be used to pass the kind of law in question.³⁷ For example, in Wisconsin, a group of restaurant owners sought to invalidate a successful, local smoke-free initiative on the basis that the ballot language did not accurately summarize the ordinance.³⁸ In Alaska, a city's smoke-free ballot measure was challenged on the basis of allegations that the economic impact statement prepared and published by city staff was improper lobbying.³⁹ Smoke-free initiatives have also been challenged as requiring appropriations or taxes in jurisdictions that prohibit or restrict initiatives from doing so.⁴⁰

The third kind of challenge, however, is the kind of challenge that could be brought against any law, regardless of whether it was passed by the legislature or as a ballot measure. For example, a lawsuit could allege that the law violates someone's free speech rights, or treats one group unfairly relative to another. Typically, courts should refuse to take these kinds of cases until after the ballot measure has been passed into law.⁴¹

Q: What are some lessons that have been learned about using ballot measures to pass tobacco control laws?

A: Tobacco control advocates have had over twenty years of experience with the ballot measure process. This experience has generated several strategy recommendations relating to ballot measure campaigns.⁴² These recommendations include:

- Legal counsel should be involved from the early stages, to help facilitate compliance with legal requirements, good legislative drafting, and to promote buy-in.
- Polls and focus groups should be used not just during a media campaign, but also beforehand to help draft the law and build support for it.
- The media campaign should be started early, *before* most voters form an opinion.
- In media campaigns, use information “shortcuts” and “signals” by associating with high credibility public health groups, and frame the matter as a direct competition against pro-tobacco groups or initiatives.⁴³
- Tax increase proposals that call for substantial revenue to be used for tobacco control and prevention are more likely to succeed.
- Particularly for smoke-free campaigns, anticipate that the tobacco industry and its allies will bring a competing initiative.

Last updated: February 2012

Notes

¹ The Initiative and Referendum Institute has a database of ballot measure provisions from city codes as of 2005, which covers the 1,000 largest cities and the ten largest cities in each state. The database is available at www.iandrinstute.org/data/htm.

² See also Nat'l Conf. of State Legislatures, Ballot Measures Database, <http://www.ncsl.org/legislatures-elections/elections/ballot-measures-database.aspx> (last visited Feb. 28, 2012) [hereinafter NCSL Ballot Measures Database] (explaining types of ballot measures).

³ See Nat'l Conf. of State Legislatures, Initiative and Referendum States, <http://www.ncsl.org/legislatures-elections/elections/chart-of-the-initiative-states.aspx> (last visited Mar. 1, 2012) [hereinafter, NCSL, Initiative and Referendum States].

⁴ INITIATIVE AND REFERENDUM INST., WHAT IS INITIATIVE AND REFERENDUM (FACT SHEET NO. 1) 2, available at <http://www.iandrinstute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Quick%20Facts/Handout%20-%20What%20is%20IR.pdf>.

⁵ *Id.*

⁶ For example, in 2006, the city council of Mankato, Minnesota placed a referendum on the ballot regarding whether the city's soon-to-be-implemented smoke-free law should be suspended. As the election drew near, confusion arose as to whether the referendum would be binding on the city council or merely advisory, requiring the city attorney to issue an opinion just before the election that the referendum was advisory. KERRY CORK, PUBLIC HEALTH LAW CENTER, GOING SMOKE-FREE IN THE LAND OF THE LAKES: LAW AND POLITICS IN MINNESOTA SMOKE-FREE CAMPAIGNS 76-77 (2010), available at <http://publichealthlawcenter.org/sites/default/files/resources/phlc-smokefree-minnesota.pdf>.

⁷ For more information about the Master Settlement Agreement (MSA) and a link to the MSA, see <http://www.publichealthlawcenter.org/topics/tobacco-control/tobacco-control-litigation/master-settlement-agreement> (last visited Feb. 28, 2012). Four states did not join the MSA but entered into separate settlement agreements.

⁸ The American Nonsmokers' Rights Foundation maintains a comprehensive database of state and local smoke-free laws, including those passed by ballot measures. Information from this database is used to create quarterly smoke-free lists, maps, and data. Americans for Nonsmokers' Rights, Smokefree Lists, Maps, and Data, (last visited Mar. 1, 2012), www.no-smoke.org/lists.html. No similar resource for other types of local tobacco control laws could be identified. The website Ballotpedia.com has limited information about local measures related to smoke-free laws and tobacco taxes.

⁹ Sources: Nat'l. Cancer Inst. et al., *Tobacco Industry Media Efforts to Defeat State Tobacco Control Ballot Initiatives and Referenda*, MONOGRAPH 19: THE ROLE OF THE MEDIA IN PROMOTING AND REDUCING TOBACCO USE, at 577–594 (2008) [hereinafter, *Tobacco Industry Media Efforts*], available at http://cancercontrol.cancer.gov/tcrb/monographs/19/m19_14.pdf; K.L. Lum et al., *Enacting Tobacco Taxes by Direct Popular Vote in the United States: Lessons from 20 Years of Experience*, 18 TOBACCO CONTROL 377 (Oct. 2009), available at

<http://tobacco.cleartheair.org.hk/wp-content/uploads/2009/10/tax-tobacco-popular-vote-us-tc-09-10.pdf>; and NCSL Ballot Measures Database, *supra* note 2.

¹⁰ This category includes a successful Arizona 2006 initiative that was a smoke-free measure, but also included a \$.02 tobacco tax increase for implementation and education (Arizona Proposition 201). Lum et al., *supra* note 9, at 380. It also includes tobacco-industry sponsored initiatives that were weaker than those supported by public health groups. According to ANR data, a total of 39 state smoke-free laws have been passed since 1995. ANR Foundation, U.S. Tobacco Control Laws Database©, Mar. 1, 2012.

¹¹ Sixteen of the proposals to raise tobacco excise taxes included provisions that some or all of the revenue would be used to support tobacco prevention and/or control activities. Lum et al., *supra* note 9, at 380. Out of these 16 proposals, nine passed and seven failed.

¹² This includes a constitutional amendment (Amendment 1 in 2011) to make a temporary cigarette tax increase permanent referred by the Louisiana legislature after the governor vetoed legislation that would have accomplished the same goal. See Jan Moller, *Gov. Bobby Jindal Vetoes 4-cent Renewal of Tobacco Tax*, THE TIMES-PICAYUNE (June 13, 2011), http://www.nola.com/politics/index.ssf/2011/06/gov_bobby_jindal_vetoes_4-cent.html.

¹³ Six of these proposals provided that some or all of the funds would be used for tobacco prevention and/or control efforts (five passed).

¹⁴ California Prop. 188 (1994).

¹⁵ The Campaign for Tobacco-Free Kids reports that while most cities and counties do not have their own cigarette tax rates, usually because of state law prohibitions, more than 450 cities and counties (in about ten states) do impose cigarette taxes. ANN BOONN, CAMPAIGN FOR TOBACCO-FREE KIDS, LOCAL GOVERNMENT CIGARETTE TAX RATES & FEES (Oct. 7, 2011), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0304.pdf>.

¹⁶ AM. LUNG ASS'N, TOBACCO CONTROL LEGISLATION PASSED IN 2008 - BY STATE, available at <http://www.lungusa2.org/slati/reports/2008Passed%20Legislation.pdf>.

¹⁷ North Dakota Statutory Measure 3, effective December 2008, codified at N.D. Cent. Code § 23-42-01 *et seq.* (relating to tobacco control program funding).

¹⁸ AM. LUNG ASS'N, TOBACCO CONTROL LEGISLATION PASSED IN 2009 - BY STATE, available at <http://www.lungusa2.org/slati/reports/2009Passed%20Legislation.pdf>.

¹⁹ ANR Foundation, U.S. Tobacco Control Laws Database©, Mar. 1, 2012.

²⁰ *Id.*

²¹ Michael S. Givel & Stanton A. Glantz, *Tobacco Lobby Political Influence on US State Legislatures in the 1990s*, 10 TOBACCO CONTROL 124, 125 (June 2001).

²² See Lum et al., *supra* note 9.

²³ NAT'L CONF. OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY: FINAL REPORT AND RECOMMENDATIONS OF THE NCSL I&R TASK FORCE at vii (2002), available at http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/IandR_report.pdf.

²⁴ See the case studies described in AMERICANS FOR NONSMOKERS' RIGHTS, BALLOT MEASURES: OVERVIEW (Nov. 2004) [hereinafter ANR, BALLOT MEASURES OVERVIEW], available at <http://www.no-smoke.org/pdf/ballotinitiatives.pdf>; and in Kerry Cork & Carolyn Forman, *Legal and Political Obstacles to Smoke-Free Regulation in Minnesota Regions*, 35 AMER. J. PREV. MED. S508 (Dec. 2008), available at <http://publichealthlawcenter.org/sites/default/files/resources/article-cork-forman-ajpm-2008.PDF>.

²⁵ ANR FOUNDATION, BALLOT INITIATIVE AND REFERENDA OVERVIEW (Apr. 2011).

²⁶ See Gregory J. Tung et al., *Competing Initiatives: A New Tobacco Industry Strategy to Oppose Statewide Clean Indoor Air Ballot Measures*, 99 AMER. J. PUB. HEALTH 430 (March 2009); and AMERICANS FOR NONSMOKERS' RIGHTS, WHAT TO EXPECT FROM THE TOBACCO INDUSTRY (May 2006), available at <http://no-smoke.org/pdf/whattoexpect.pdf>.

²⁷ ANR, Ballot Measures: Overview, *supra* note 24; Tobacco Industry Media Efforts, *supra* note 9, at 585-589 (noting campaign costs for ballot measures to increase tobacco taxes); Tung et al., *supra* note 26, at 432 (noting costs for three smoke-free campaigns)

²⁸ See, e.g., *id.*; and CORK, *supra* note 6, at 14–15.

²⁹ A recent example of this was a smoke-free ballot initiative brought in Webb City, Missouri, during an April 2011 election. Although voters approved it, it was non-binding and the city council subsequently failed to pass an ordinance. See Andra Bryan Stefanoni, *Webb City Council Rejects Smoking Ban*, JOPLIN GLOBE, April 12, 2011, <http://www.joplinglobe.com/local/x1278095975/Webb-City-Council-rejects-smoking-ban>.

³⁰ This information was synthesized from information from the Initiative and Referendum Institute. INITIATIVE & REFERENDUM INST., <http://www.iandrinstute.org> (last visited Feb. 28, 2012).

³¹ See *Initiative Petition Signature Requirements*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections-campaigns/signature-requirements.aspx> (last updated April 7, 2010).

³² See, e.g., Colo. Constitution, art. 5, § 1 (setting forth requirements and process for ballot measures); *McCaffrey v. Gartley*, 377 A.2d 1367 (Me. 1977) (holding that Maine legislature could pass an emergency measure that would amend provisions falling within the scope of an initiative).

³³ See, e.g., Nev. Const. art. 19, § 2, cl. 3 (legislature may not amend or repeal initiated law for three years from effective date); Wyo. Const. art. 3, §52 cl. f (legislature may not repeal initiated law for two years after its effective date but may amend at any time).

³⁴ See, e.g., Mich. Const. art. 2, § 9 (requiring three-fourths majority of both legislative houses to amend or repeal initiated measures, but allowing amendment or repeal of referred measures in any subsequent legislative session); N. D. Const. art 3, § 8 (requiring two-thirds majority in both

houses to amend or repeal ballot measures passed by voters for seven years from measure's effective date).

³⁵ *Herbst Gaming, Inc. v. Heller*, 141 P.3d 1224, 1228 (Nev. 2006) and cases cited therein.

³⁶ *See, e.g., State ex rel. Hazelwood Yellow Ribbon Comm. v. Klos*, 35 S.W.3d 457, 466 (Mo. Ct. App. 2004) (referendum was invalid because original petition lacked sufficient number of signatures); *W.. Devcor, Inc. v. City of Scottsdale*, 814 P.2d 767 (Ariz. 1991) (circulators' statements did not strictly comply with state law requirements for referendum petitions).

³⁷ *See, e.g., City of North Platte v. Tilgner*, 803 N.W.2d 469 (Neb. 2011) (referendum violated state's common law single-subject requirement for referenda); *Am. Traffic Solutions, Inc. v. City of Bellingham*, 260 P.3d 245 (Wash. Ct. App. 2011) (initiative to prohibit use of automated traffic safety enforcement cameras exceeded scope of local initiative power); and *Rest. Ass'n of Metro. Wash. v. D.C. Bd. of Elections and Ethics*, 2004 WL 2102203 (D.C. Super. 2004) (holding that board could not approve smoke-free initiative because it appropriated funds and thus could not be passed through the initiative process under D.C. law).

³⁸ *West et al. v. City of Oshkosh*, No. 04-632, slip op. (Wisc. Circ. Ct. May 23, 2005) (dismissing complaint for lack of subject matter jurisdiction).

³⁹ *Crawford v. City of Anchorage*, No. 3AN-07-05299 (Alaska Super. Ct. filed Mar. 6, 2007) (case was settled and dismissed).

⁴⁰ *See, e.g., Herbst Gaming, Inc.* 141 P.3d at 1233 (smoke-free initiative did not compel an appropriation or expenditure of money and thus did not need to include a tax provision); and *Rest. Ass'n of Metro. Wash.*, 2004 WL 2102203.

⁴¹ *Herbst Gaming*, 141 P.3d at 1229.

⁴² This list was synthesized from the following: AMERICANS FOR NONSMOKERS' RIGHTS, SMOKEFREE BALLOT INITIATIVES (Dec. 2006), available at <http://www.no-smoke.org/pdf/smokefreeballots.pdf>; *Tobacco Industry Media Efforts*, *supra* note 9; Lum et al., *supra* note 9; and Tung et al., *supra* note 26.

⁴³ Tung et al., *supra* note 26, at 438.