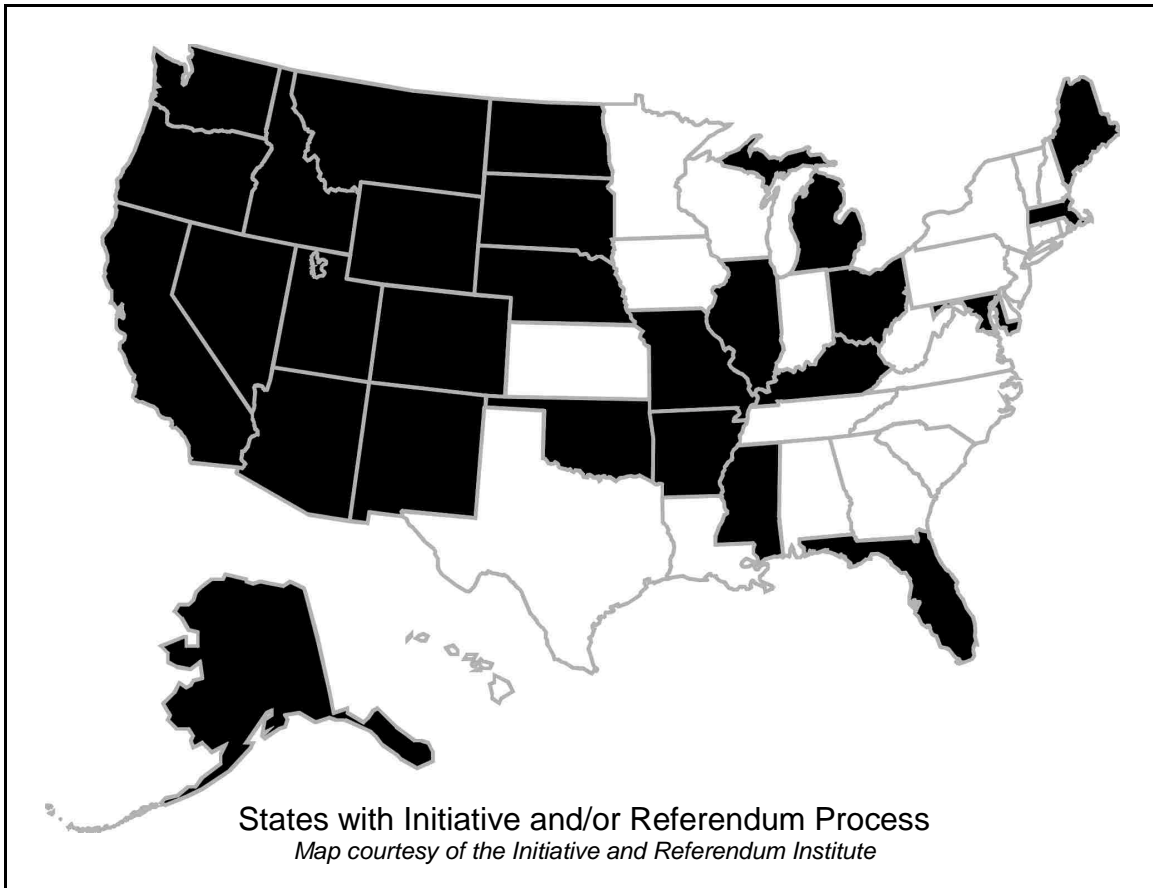


DIRECT DEMOCRACY:

The Initiative and Referendum Process in Washington



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The League of Women Voters of Washington
Education Fund

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Published by
The League of Women Voters of Washington Education Fund
October 2002



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Education Fund, LWV Washington: "Government by Initiative," November 8, 2001

Seattle University Law Review: Symposium on Law and Public Policy: "The Initiative Process in Washington," September 14, 2001

DIRECT DEMOCRACY

The Initiative and Referendum Process in Washington State

Introduction

Although a clear majority of Washington citizens support keeping the initiative process, there is growing frustration over several aspects: the increasing use of the process, its encroachment into areas previously thought by some to be the prerogative of the legislature, the use of paid signature gatherers, and the growing number of voter-passed initiatives that the Washington State Supreme Court has ruled unconstitutional. Many who have always supported the people's right to initiate legislation have begun to wonder if it isn't time to make changes in the process. Others believe the fewer restrictions the better, and that nothing should interfere with the right of the people to exercise this constitutionally protected form of "direct democracy."

Other concerns include the impact on the budget process, and for some voters, the recognition after-the-fact of the unintended consequences

of undercutting services they actually want. Legislators are finding it increasingly difficult to manage a budget that is impacted not only by a down turn in the economy, but also by the passage of ballot measures that increase spending and reduce revenue in the same election.

What follows is a revised and updated look at what has happened since the League's 1994 study. Although many of the ideas for change voiced then are included, a few new ones have emerged. Law Professor Kris Kobach notes some suggestions are "sincere efforts to improve the legitimacy of the process, while others have been thinly-disguised attempts to hobble it."¹ We hope this report helps readers draw their own conclusions as to which is which. You will find references to recent court decisions, comparisons to other states that have the initiative process, and updated charts. A bibliography and other references are also provided.

The Initiative and Referendum in the United States

The initiative and referendum (I&R) process is called "direct democracy" by political scientists. Direct democracy is an old concept, practiced in ancient Greece and in the town meetings of colonial New England. It differs from the current definition in that everyone knew each other and usually could see how they voted. Our founding fathers concluded that direct democracy was impractical in a country containing 13 states with 13 different sets of attitudes and interests, and chose to establish a representative form of government ("indirect democracy") with a system of checks and balances. The U.S. Constitution makes no provision for initiatives or referenda at the federal level.

Author David Magleby² sees direct democracy (the initiative process) as valuing participation, open access and political equality, while tending to

de-emphasize compromise, continuity and consensus. It encourages conflict and competition and attempts to expand the base of participants. On the other hand, indirect democracy (the legislative process), he says, values stability, consensus and compromise, and seeks to insulate fundamental principles from momentary passions and fluctuations of opinion.

While the Tenth Amendment to the Constitution leaves to the states all legislative powers not granted to Congress, it also guarantees to every state a republican (representative) form of government.³ It is based on this "guarantee clause" that some legal scholars have argued that the use of initiatives and referenda is unconstitutional. The United States Supreme Court, however, has held in a case challenging their use that the issue is a

– Table 1 –

States with Direct (DA)^a and In-direct (IDA)^b Initiative Amendments; Direct (DS)^c and In-direct (IDS)^d Initiative Statutes and Popular (PR)^e Referendum^f

States where some form of Initiative or Popular Referendum is available	Date Process was adopted	Type of process available		Type of Initiative process available		Type of Initiative process used to propose Constitutional Amendments		Type of Initiative process used to propose States (Laws)	
		<i>Initiative</i>	<i>Popular Referendum</i>	<i>Constitutional Amendment</i>	<i>Statute</i>	<i>Direct (DA)</i>	<i>In-direct (IDA)</i>	<i>Direct (DS)</i>	<i>In-direct (IDS)</i>
Alaska	1956	X	X	O	X	O	O	X	O
Arizona	1911	X	X	X	X	X	O	X	O
Arkansas	1910	X	X	X	X	X	O	X	O
California ^g	1911/66	X	X	X	X	X	O	X	O
Colorado	1912	X	X	X	X	X	O	X	O
Florida	1972	X	O	X	O	X	O	O	O
Idaho	1912	X	X	O	X	O	O	X	O
Illinois ^h	1970	X	O	X	O	X	O	O	O
Kentucky	1910	O	X	O	O	O	O	O	O
Maine	1908	X	X	O	X	O	O	O	X
Maryland	1915	O	X	O	O	O	O	O	O
Massachusetts	1918	X	X	X	X	O	X	O	X
Michigan	1908	X	X	X	X	X	O	O	X
Mississippi	1914/92	X	O	X	O	O	X	O	O
Missouri	1908	X	X	X	X	X	O	X	O
Montana ⁱ	1904/72	X	X	X	X	X	O	X	O
Nebraska	1912	X	X	X	X	X	O	X	O
Nevada	1905	X	X	X	X	X	O	O	X
New Mexico	1911	O	X	O	O	O	O	O	O
North Dakota ^j	1914	X	X	X	X	X	O	X	O
Ohio	1912	X	X	X	X	X	O	O	X
Oklahoma	1907	X	X	X	X	X	O	X	O
Oregon	1902	X	X	X	X	X	O	X	O
South Dakota ^k	1898/72/88	X	X	X	X	X	O	X	O
Utah	1900/17	X	X	O	X	O	O	X	X
Washington	1912	X	X	O	X	O	O	X	X
Wyoming	1968	X	X	O	X	O	O	X	O
<i>Totals</i>	<i>27 states</i>	<i>24 states</i>	<i>24 states</i>	<i>18 states</i>	<i>21 states</i>	<i>16 states</i>	<i>2 states</i>	<i>16 states</i>	<i>7 states</i>

Legend

O = process not currently allowed by the state constitution
X = process currently allowed by the state constitution

Footnotes for Table 1

- a. Direct Initiative amendment (DA) is when constitutional amendments proposed by the people are directly placed on the ballot and then submitted to the people for their approval or rejection.
- b. In-direct Initiative amendment (IDA) is when constitutional amendments proposed by the people must first be submitted to the state legislature during a regular session.
- c. Direct Initiative statute (DS) is when statutes (laws) proposed by the people are directly placed on the ballot and then submitted to the people for their approval or rejection.
- d. In-direct Initiative statute (IDS) is when statutes (laws) proposed by the people must first be submitted to the state legislature during a regular session.
- e. Popular Referendum (PR) is the power to refer to the ballot, through a petition, specific legislation that was enacted by the legislature for their approval or rejection.
- f. This list does not include the states with Legislative Referendum (LR). Legislative Referendum is when a state legislature places an amendment or statute on the ballot for voter approval or rejection. Every state but Delaware requires state constitutional amendments to be placed on the ballot for voter approval or rejection.
- g. In 1996 California repealed indirect Initiative for statutes.
- h. In Illinois, the subject matter of proposed constitutional amendment is severely limited to legislative matters. Consequently, Initiatives seldom appear on the ballot.
- i. In 1972 Montana adopted a provision that allows for directly initiated constitutional amendments.
- j. In North Dakota prior to 1918, constitutional amendments could be initiated only indirectly.
- k. In 1972 South Dakota adopted a provision that allows for directly initiated constitutional amendments. In 1988 South Dakota repealed In-direct Initiative for States.

political question, not properly before the Court, and must be left to Congress.⁴

Conceived as an innovation in modern government allowing citizens to act when their elected representatives lose sight of the “public will,” Switzerland adopted the initiative and referendum system in 1874. It was 1898 before any states in the U.S. adopted the concept.

Near the turn of the century, populist, progressive and reform groups were agitating for more citizen control over their government. The populist I&R movement grew out of a general distrust of government. Many western voters believed that their legislators were only representing railroad, bank and timber interests. This led to many states forming chapters of The Direct Legislation League.

Through the years both the Populist and Progressive movements supported the initiative process, but from different perspectives. The early Progressives were middle class, more interested in reforming the system, while the Populist movement was a labor and farmer movement against powerful interests, and was much more radical. I&R was of common interest to both groups. Modern commentators make this distinction, as expressed by Dr. Kenneth Miller: “[N]eo-Progressives still seek to use the initiative to enhance the responsiveness, professionalism, and expertise of government, whereas neo-Populists seek to substitute the wisdom of the people for deliberations of elected officials.”⁵ In other words, Populists distrust government; Progressives seek to improve government.

The move toward direct citizen legislation started at the end of the nineteenth century. South Dakota led the “revolution” in 1898, with Oregon following in 1901. In Washington, after 10 years of lobbying and campaigning, a farm/labor coalition led by the Washington State Grange finally succeeded in getting the proposed I&R constitutional amendment on the ballot and passed in 1912. Montana included I&R in its constitution – the first and only state until Alaska, in 1959, to include the process in its original constitution.

Today, 27 states have either an initiative or referendum process, or both. Twenty-three states

have referendum measures, 17 states have initiatives to the people, and seven states permit initiatives to the legislature. Kentucky, Maryland and New Mexico allow referenda but not initiatives. Illinois and Mississippi allow initiatives but not referenda. Requirements differ from state to state. Twelve states, including Washington, limit initiatives to a single subject only, and nine states limit them to legislative matters only, as does Washington. Some states have fewer, and some, many more subject restrictions. Idaho has none at all while Alaska permits no revenue measures, no appropriations, no acts affecting the judiciary, or any local or special legislation and no laws affecting peace, health or safety. Eighteen states allow their constitutions to be amended by initiative. Nine states, including Washington, do not. Florida allows initiatives only for constitutional amendments.

Women’s suffrage was part of the Progressive and Populist movements. Initiatives in Oregon and Arizona gave women the right to vote. Interestingly, several attempts failed because liquor and saloon interests feared that women would vote for prohibition, which they did. The adoption and then the repeal of prohibition were initiative concerns in many states for years.

Washington is one of five states relying most heavily on the initiative process. California, Oregon and Colorado are the highest users; Arizona is the fifth. Between 1990 and 2000 there were 458 initiatives nationwide – more than three times the rate from the ‘40s through the ‘60s. In the 2000 election cycle, 90% of the initiative petitions failed to receive the required signatures; 350 were submitted in the 24 states; 76 made it onto the ballot and, of those, 36 were adopted, some of which were then challenged in court.

Oregon holds the record for the most initiatives on the ballot, some of which were groundbreaking. Oregon was the first state to adopt by initiative the popular election of U.S. Senators (1908), and to provide for a presidential primary (1910). In the election of 2000, it had 26 issues on the ballot. Also, many cities had local initiatives. One might

surmise that with so many issues on the ballot, voter turnout would be low. In this election, however, 81% of those eligible to vote were registered and 79% voted. How could this happen with so many issues on the ballot? In part, this may be explained by Oregon's use of the "vote by mail"(VBM) system. Created by the initiative process, spearheaded by the League of Women Voters of Oregon, AAUW and AARP and using 11,000 unpaid signature gatherers, it passed by more than a two to one margin in 1998, an "off year" election, with voter turnout similar to a Primary election.

In the 2002 election Washington voters will have two initiatives and two referenda, one referred by the legislature, on the ballot. Oregon voters will have seven initiatives and five legislative referrals

(referenda). The reduction in initiatives on Oregon's ballot matches a decrease nationally, according to M. Dane Waters, president of the Initiative and Referendum Institute in Washington, D.C. Nationally there were 55 statewide initiatives in 1998 and more than 65 in 2000, but Waters predicts as few as 40 in 2002. He believes we'll see the fewest number of initiatives on the ballot in 15 years, with Oregon having the sharpest drop-off.

In Washington State in the 1990's, 29 initiatives to the people were certified to the ballot, and 15 were approved. Only 15 made it to the ballot in the decade of the 1930's, but 11 were approved, which represents a higher percentage. It remains to be seen whether the few proposals on the 2002 ballot represents a trend, or merely a blip.

Creating Initiatives and Referenda in Washington

Initiatives –

Article II, Section 1 of the Washington State Constitution grants the right of initiative and referendum. Any registered voter in Washington, acting individually or on behalf of an organization, may file an initiative with the Secretary of State. There is a five-dollar filing fee for each initiative filed. In practice, the Secretary of State's office often assists the petitioner with the language and organization of the document.

Washington State's Public Disclosure law, adopted by initiative in 1972, stipulates that any individual or organization, which expects to receive funds or make expenditures in an effort to support or oppose an initiative, must register with the Public Disclosure Commission and file certain financial reports. The sponsor of an initiative should contact the Public Disclosure Commission in conjunction with the preliminary filing of the measure.

A copy of the text of every proposed initiative is then sent to the Legislative Code Reviser who reviews the draft for technical errors and style. He advises the sponsor of any potential conflicts be-

tween the proposal and existing statutes and puts the petition into legal language. The proposal is then returned to the sponsor with a "certificate of review" and any recommended changes. All changes recommended by the Code Reviser are advisory only and subject to approval by the sponsor. The sponsor has 15 working days after submission to the Code Reviser to file the final draft with the Secretary of State.

The final draft is then sent to the Attorney General. Legislation passed in 2000 requires the measure be given a ballot title of no more than ten words, a concise description of the measure, not to exceed 30 words and a summary not to exceed 75 words. The title question inquiring whether the measure should be approved or rejected must clearly define the intent of the initiative sponsor(s). Any person may challenge the ballot title or summary in Thurston County Superior Court within five days, and the court has another five days to announce its decision. Fewer than 25 percent of initiatives filed at the beginning of the process are ever printed or circulated by the sponsors. The sponsors pay the full cost of printing and circulating petitions.

Initiatives to the people must be presented to the Secretary of State not more than ten months prior to the next general election, and the signed petitions must be filed with the Secretary of State's office at least four months before the date of the election. To qualify for the ballot, the number of valid signatures must equal a minimum of eight percent of the votes cast for Governor in the last election. Approval by a simple majority of voters is required for passage unless it concerns gambling or lottery measures, which require 60 percent approval.

Initiatives to the legislature must be presented within ten months of the next regular session of the legislature, and the signed petitions must be turned in to the Secretary of State at least ten days before that session. If the signatures equal eight percent of the votes cast for Governor in the last election, the legislature must take one of the following actions.

- Adopt the initiative as proposed, in which case it becomes law without a vote of the people
- Reject or refuse to act on it, in which case the initiative must be placed on the ballot at the next general election.
- Approve an amended version, in which case both the new version and the original initiative must be placed on the next general election ballot.

Information about initiatives to be voted on is included in the state voters' pamphlet, along with arguments from the sponsoring committee and opponents. Once approved by the voters, initiatives cannot be changed by the legislature in the first two years, except by a two-thirds majority in both houses.

Referenda –

There are two types of referenda: the referendum bill and the referendum measure. The primary purpose of each is to give voters an opportunity to approve or reject laws either proposed or enacted by the Legislature.

Referendum bills are laws passed by the legislature which it chooses to refer to the electorate for approval or rejection. This process bypasses the Governor, denying him/her the opportunity to sign

or veto the bill. Most often these bills ask voter approval for new projects which will cost more money than the state has budgeted. Sometimes the bills represent "hot" issues such as a state position on transportation funding, nuclear waste repositories, expansion of public disclosure requirements, or changes in state abortion laws. Referendum bills have had a high success rate, with 38 of the 47 submitted to voters having passed.

Referendum measures are laws recently passed by the legislature that are placed on the ballot because of voter petition. The purpose of such a referendum is to stop a recently passed state law from going into effect. All or part of a law may be subjected to a referendum. Of the 49, which have been filed, 28 have succeeded in nullifying legislation.

Referendum measures differ from initiatives in the following ways:

- A referendum may be filed after the Governor has signed the act that the sponsor wants referred to the ballot. Signed petitions must be filed no later than 90 days after the final adjournment of the legislative session at which the act was passed. Once certified, the referendum is submitted at the next state general election.
- Petitions may be certified with a minimum of four percent of the votes cast for Governor in the last election.
- Emergency Clause – The power of referendum is given and partially taken away in the same sentence of Article II of the State Constitution:

"The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law or any part thereof passed by the legislature, *except such laws as may be necessary for the immediate preservation of the public peace, health or safety; (or) support of the state government and its existing institutions...*" (italics ours, the (or) above has been assumed by courts to have been inadvertently omitted by the framers.)

The italicized part in the above bullet is commonly known as the emergency clause. This clause

is included in state legislation where there is a genuine emergency, or when the legislature wants the legislation to take effect at the start of the new fiscal year, July 1. An emergency clause provides a date certain for legislation to take effect. It is the only constitutional authority to deviate from the mandate of the seventh amendment, which provides that “no act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted.” For many years no one knew when the Legislature would finally adjourn. With the passage of a constitutional amendment in 1979, special sessions, as well as regular sessions, now have a time certain for adjournment.

There is a growing belief that the emergency clause is often included in a bill to discourage a voter-initiated referendum. As early as 1945, the State Supreme Court chided the legislature for what it perceived was an attempt to thwart the people’s right of referendum.

“With all due respect, and with the earnest desire not to seem either censorious or facetious, we feel that we must say frankly and in all seriousness that the custom of attaching emergency clauses to all sorts of bills, many of which cannot by any stretch of the imagination be regarded as actually emergent...has become so general as to make it appear, in the light of recent experience, that a number of (formerly established presumptions indulged in favor of

legislative declarations of emergencies) can no longer be deemed controlling. It, of course, will never be presumed that the legislature deliberately intended to infringe upon a constitutional right.”⁶

In the past, courts have ruled that the presence of the emergency clause would not protect legislation from referendum, but in recent years increasing weight is being given to its existence. The emergency clause has been credited by some for the passage of only one citizen-initiated referendum since 1977. Some believe 90 days leaves too little time to collect signatures, even though only half as many are required as for an initiative; however, some feel a change in court attitude may have made the biggest difference.

When the Washington Supreme Court cited the emergency clause to disallow a referendum nullifying the bill to fund the Mariner’s baseball stadium, attorney Shawn Newman, co-founder of CLEAN,⁷ reacted this way:

“In memory of the citizen referendum. On December 20, 1996, the citizen’s referendum power, age 84, suffered an untimely death with the State Supreme Court’s decision in CLEAN et al v. State (the Mariners stadium case). The majority of the court, citing such learned authorities as Vincent “New York Vinnie” Richichi, a Seattle sports radio talk show host, on the ‘value of M’s’ was not only in the public interest

– Table 2 –
Summary of Initiatives and Referenda: 1914-2001

	Number Filed	Number Certified	Number Approved	Number Rejected
Initiatives to the People	775	116	57	59
Initiatives to the Legislature	260	27	17 ^B	10
Referendum Measures (Referred by petition of voters)	49	32	4	28 ^C
Referendum Bills (Referred by the Legislature)	49	47 ^D	38	9

Note B – In five cases, the initiative was approved by the Legislature without being referred to the ballot. In two other cases, an alternative to the initiative was approved by voters.

Note C – In this instance, rejected means a majority of votes were cast in opposition to the measure referred and the sponsors of the referendum were able to prevent newly-enacted legislation from going into effect.

Note D – In two instances, referendum bills did not appear on the ballot.

(despite the fact the people of King County voted against it) but that it was also a constitutional ‘emergency’ (necessary for the ‘public peace, health or safety’) thereby avoiding the people’s right to Referendum. The citizen referendum process is essentially a check and balance on the legislature ... The majority opinion means the death of citizen initiated referenda. Memorial services to be announced.”⁷

Fiscal Impact Statement –

Recent legislation, applying to both initiatives and referenda, requires the Office of Financial Management (OFM) to prepare a fiscal impact statement for each of the following state ballot measures:

- an initiative to the people that is certified to the ballot;
- an initiative to the legislature that will appear on the ballot because the legislature did not pass it;
- a measure appearing on the ballot that the legislature proposes as an alternative to an initiative to the legislature;
- a referendum bill referred to voters by the legislature; and
- a referendum measure certified to the ballot by petition.

A fiscal impact statement must describe any projected increase or decrease in revenues, costs,

expenditures, or indebtedness that the state or local governments will experience if the ballot measure is approved. Where appropriate, the statement may include both estimated dollar amounts and a description placing those amounts in context. The statement must include a summary of not more than 100 words, and a more detailed statement that includes the assumptions that were made to develop the fiscal impacts. These statements must be available online and included in the state voters’ pamphlet.

Requirements for passage are the same for both the initiative and referendum – a simple majority.

The Local Level –

Cities and counties in Washington do not automatically have initiative or referendum powers. It takes action on the part of each jurisdiction to grant its citizens these powers. The kind of action depends on the size and class of the city as well as the city or county’s form of government. The state authorizes cities and counties to have the initiative by legislation that allows them to adopt their own charter, sometimes referred to as home rule.

Five of Washington’s 39 counties have home rule charters, as do ten cities, but that does not necessarily mean that they have chosen to adopt I&R or extend the process to charter changes. For example, the city of Seattle has included the right to amend its charter by initiative, but King County has not. Limited purpose governments, such as school districts, do not have the power of initiative or referendum at all.

The Role of Money

One element of concern raised by many is the role money may play in an election. The arguments, proposed remedies and constitutional issues surrounding campaign finance are similar for candidates and ballot issues. Many studies have been done in other states attempting to find a statistical relationship between the money spent on a ballot issue and the percentage of votes gained in victory or defeat. Conflicting conclusions have been reached. In Washington, of the 37 initiated meas-

ures enacted since 1975, seven were passed even though advocates were outspent by opponents.

In his book, Democracy Derailed: Initiative Campaigns and the Power of Money, syndicated columnist David S. Broder writes:

“Money does not always prevail in initiative fights, but it is almost always a major – even dominant factor. Like so much else in American politics, the costs of these ballot battles

have escalated enormously in the past decade. To a large extent, it is only those individuals and interest groups with access to big dollars who can play in the arena the Populists and Progressives created in order to balance the scales against the big-bucks operators.” He goes on to say, “ ... millionaires have ... found the initiative handy for ‘empowering’ voters to endorse the initiatives’ sponsors’ agendas.”⁸

Perhaps the most striking example of “empowerment” occurred in Washington State in 1997. The owner of the Seattle Seahawks football team wanted a new football stadium for his team, and he wanted the taxpayers to pay some of the estimated \$425 million cost. The Legislature approved a bill to that effect and referred it to the people as a referendum bill. The owner provided the \$3,998,284 cost of running the special election, and spent a good deal of money campaigning for the measure. It passed with 51% of the votes, in June of 1997.

The California Commission on Campaign Financing, a high profile, private, non-profit, bipartisan organization produced a two-year study of the initiative process in the early nineties called, Democracy by Initiative-Shaping California’s Fourth Branch of Government. The study commented that a very large campaign fund for opposing an initiative seemed to be more effective than a

large fund supporting a measure. In other words, there is some evidence that it may be possible to “buy” a “No” vote, but little evidence that it may be possible to “buy” a “Yes” vote. The rationale is that a very large war chest may be used either to circulate a competing initiative or to conduct a last minute negative advertising blitz, either of which could be designed to confuse the voter. The more unbalanced the campaign spending between the two sides, the easier it was to draw statistical relationships. However, the report was careful to point out that a multitude of other factors can intervene and create exceptions to these generalities.

Since 1990, states have increasingly regulated and restricted the use of the initiative process. According to M. Dane Waters, these regulations and restrictions have made the process so costly and difficult that citizens have been forced to seek money and support from national groups and to purchase the help of the “initiative industry.”⁹

No state restricts the flow of dollars into ballot measure campaigns. Several have tried to limit contributions or impose spending ceilings, but in each case the courts have declared such laws unconstitutional. The U.S. Supreme Court ruled that the expenditure of money was tantamount to “speech” and, therefore, restrictions on campaign expenditures violate the First Amendment to the Constitution.¹⁰

Signature Gathering

The number of signatures needed to qualify an initiative varies from three and a half to 15 percent of the votes cast for Governor in the last election – Washington’s is eight percent. One state requires ten percent of the registered voters and another, four percent of the population.

Ten states, including Washington, place no geographical requirements on signature gathering; eleven states do. Requirements vary widely, from Nebraska’s requirement of five percent of the voters in 38 of 93 counties, to 10 percent in 20 of 29 counties in Vermont. Wyoming’s strenuous petition requirement of 15 percent of the votes cast in

the last governor’s election, from two-thirds of the counties, effectively keeps the process from being used very often. Alaska requires at least one signature in two-thirds of the election districts.

Paying for collecting signatures has become more common in recent years. While the use of unpaid signature gatherers is still possible, qualifying for the ballot is not as likely. Extensive organization and paid staff usually are required to be successful. Often a campaign that began as a volunteer effort has had to add paid petitioners as the deadline approached. Between 1992 and 2000, 30 Washington initiatives were on the ballot. Only six

reached the ballot without paid signature gatherers. The six issues were an anti-tax measure, a ban on late-term abortions, a raise in the minimum wage, a roll-back of the motor vehicle excise tax and voter approval for any tax or fee increase, a ban on bear or cougar hunting with dogs or bait, and a ban on certain animal traps.

In Washington in 2002, the rate for collecting signatures ranged from 60 cents to two dollars per signature, depending on how much time was available before the deadline. In some states, the rate has been known to go as high as four dollars per signature.

Qualifying a ballot measure in California cost \$69,000 in 1976. That figure grew as high as two million dollars in the '90s. However, spending a lot of money to qualify a ballot issue does not necessarily guarantee its success on election day. "Voters are smarter than you think," said Dr. Todd Donovan, a Western Washington University political science professor, speaking at a meeting of the League of Women Voters in Bellingham. "If they see special interests supporting an issue, they will vote against it. Also, too many initiatives on a ballot turns people off, and they tend to vote against everything or not vote at all."

Legal Efforts to Restrict Usage –

Efforts have been made in this state and others to place restrictions on signature gatherers. Many of these efforts have been found to violate the United States Constitution. When a state gives its citizens the right to the initiative process, the United States Supreme Court regards this right as falling under the protections of the first amendment. It is "core political speech," and any restrictions are subject to strict scrutiny by the Court. *Meyer v. Grant*.¹¹ In *Meyer*, the Court held Colorado's prohibition against payment to signature gatherers to be unconstitutional. The Court observed that a state's interest in preventing fraud could be accomplished in other less restrictive ways.

In 1993, a law passed by the Washington Legislature made it a gross misdemeanor to pay signature gatherers by the signature, but did permit payment by the hour. Relying on the *Meyer* case, this statute was challenged in Federal District Court.¹²

The Court concluded on the evidence presented that the law was not necessary to prevent fraud – there was no significant difference between the validity of signature campaigns which used paid gatherers and those that relied on volunteers.

A more recent attempt by the Colorado Legislature to place restrictions on signature gatherers also ran afoul of first amendment protections.¹³ The U.S. Supreme Court held that a state cannot require 1) that a signature gatherer be a registered voter, 2) that a signature gatherer wear an identification badge while soliciting signatures, and 3) that proponents of an initiative report the names and addresses of the signature gatherers and the money paid to each. Despite the state's argument that these restrictions were necessary to prevent fraud, the Court held that they were "undue hindrances to political conversations and the exchange of ideas."

A recent case out of North Dakota upheld state restrictions, but this case was not reviewed by the U.S. Supreme Court.¹⁴ The Court of Appeals held that the requirement that 1) signature gatherers be residents of the state and 2) that they not be paid by the signature did not violate the constitution. The court based its decision on clear evidence that fraud had occurred, and the requirements were necessary to prevent future fraud and to give the state subpoena powers over signature gatherers. Further, the requirements were narrowly drawn to accomplish the state's goals. The Eighth Circuit distinguished the North Dakota case from the Washington case based on the latter's lack of evidence of fraud.

It is always risky to predict how a future court will respond to specific limitations on the initiative process. Past opinions have emphasized the significance of unfettered political speech to the democratic process. Any interference with the free exchange of ideas between signature gatherers and potential signers would be viewed with suspicion. However, based on the cases to date, some believe it might be possible to place some restrictions.

The Supreme Court has not ruled on the specific issue of payment per signature, or on a residency requirement. Some people believe that a provision for a geographical distribution might survive a constitutional challenge. The geographical

distribution, of course, would have to comply with the one-person-one-vote mandate of earlier decisions.¹⁵ The use of counties for example, would not comply because Washington's counties vary dramatically in size and population.

Where Signatures May Be Gathered –

A major factor in initiative and referendum campaigns is determining where signatures can be collected legally. In a series of cases, the Washington Supreme Court has affirmed the right to collect signatures on private commercial property which has the earmarks of a town center, community business block or other public forum, subject to reasonable time, place and manner restrictions.¹⁶ The court uses a balancing test to determine the right of a property owner to exclude signature gatherers against the right to collect signatures as provided in the state constitution. This test relies on such factors as the nature and use of the property, the scope of the invitation that the owner has made to the public, and the impact that denial will have on the initiative process. Under this test, shopping malls are generally accessible for signature gather-

ers, but grocery stores are not.

Some petition gatherers complain that shopping mall requirements of a long lead-time to sign up for space, and million dollar bonds are not reasonable restrictions. One example cited was a rule used by the Bellevue Square Mall: Petitioners are assigned a "box" outlined by red tape on the floor. They must stay within these boundaries and are not allowed to attract potential signers with a greeting such as inquiring if passers-by were registered voters. That would be deemed "hawking," which is not allowed.

One of the reasons for the drop in the number of initiatives on the 2002 ballots may be the increasing number of prohibitions at sites popular for circulators to meet potential signers. In recent years tighter restrictions have also been placed on "public spaces." A recent regulation by the U.S. Postal Service prohibiting signature gathering on Postal Service property has been challenged by the Initiative & Referendum Institute and is scheduled to be tried before the U.S. District Court in October 2002.¹⁷

Constitutional Issues after Passage

Laws passed by initiative or referendum must comply with the federal and state constitutions, as must laws passed by the legislature. The chart on page 11 lists initiatives invalidated by state and federal courts after passage by the voters. The recent application of the single subject rule has generated considerable criticism. Some voters don't understand the court's right and responsibility to rule on constitutional issues regarding voter-passed measures; others believe the single subject rule is misapplied, or applied unevenly.

The single subject rule –

The Washington Constitution provides in Art. II, sec.19 that "no bill shall embrace more than one subject and that shall be expressed in the title." Up until recently, the single subject rule challenge to initiatives has been rare in Washington and other states, but its use has been growing. In 1995, the Washington Supreme Court concluded that the sin-

gle subject rule would apply to initiatives as well as laws passed by the legislature, but held in the case of I-134 (campaign reform) that it complied with the rule.¹⁸

The first time the court applied the single subject rule to strike down an initiative was in 2000 when I-695 was invalidated. The court concluded that the two parts of the initiative – 1) reduction of motor vehicle taxes and 2) requirement of a public vote on most tax and fee increases – were not rationally related and thus covered two distinct subjects. The court also held that the initiative violated the title requirement in sec.19, as well as two other provisions of the state constitution.¹⁹

One local scholar, James Bond, former Dean of the University of Puget Sound and Seattle University School of Law, criticizes the Washington Supreme Court for its decisions on the constitutionality of I-695. He contends that in these decisions the court has applied a more stringent test of con-

Figure 1 Initiatives Found Unconstitutional

- | | |
|--|---|
| <p>#69 (1932) <i>ADOPTION OF GRADUATED INCOME TAX.</i>
Did not meet constitutional requirement that taxes be uniform upon same class of property.</p> <p>#169 (1948) <i>PAYMENT OF VETERANS BONUS, AUTHORIZING BONDS.</i>
The amount (\$100,000,000) exceeded constitutional debt limit (\$400,000).</p> <p># 276 (1972) <i>PUBLIC DISCLOSURE.</i>
The part that limited campaign spending was declared unconstitutional on the basis of being vague and of infringing on freedom of speech.</p> <p># 316 (1979) <i>MANDATORY DEATH PENALTY.</i>
Violated eighth and fourteenth amendments of U. S. Constitution.</p> <p>#335 (1977) <i>REGULATION OF MORAL NUISANCES (OBSCENITY).</i>
The statute was based on prior restraint and restricted freedom of speech; also it had no standards for judicial determination of obscenity.</p> <p>#350 (1979) <i>PROHIBITION OF MANDATORY SCHOOL BUSING.</i>
Impermissible legislative classification was based on racial criteria.</p> | <p>#383 (1981) <i>BAN ON IMPORT OF RADIOACTIVE WASTE INTO WASHINGTON.</i>
The statute did not recognize supremacy of federal law over state law and infringed on freedom of commerce.</p> <p>#394 (1981) <i>WASHINGTON STATE ENERGY FINANCING ACT (WPPS).</i>
Statute impaired contractual obligations.</p> <p>#573 (1998) <i>TERM LIMITS.</i>
Limitation of terms which certain elected officials could serve required constitutional amendment.</p> <p>#695 (2000) <i>LICENSE TABS LIMITED TO \$30, AND CERTAIN TAXES AND FEES REPEALED.</i>
Violated constitutional requirement of single subject and title reflecting subject.</p> <p>#722 (2001) <i>LIMITING PROPERTY TAX GROWTH TO 2% PER YEAR, AND REFUNDING TAX AND FEE INCREASES IMPOSED IN THE SECOND HALF OF 1999.</i>
Violated single subject rule.</p> |
|--|---|

From the Office of the Secretary of State

stitutionality than to bills passed by the legislature. He takes the court to task for what he sees as a failure to develop a coherent rationale for the different standards it applies. He notes the likely political fallout from the court's invalidation:

“Progressives will doubtless applaud the court’s decision as preserving the government’s authority to tax so that it can generate revenues, which they believe are desperately needed to fund government programs. Populists will simply wonder who they need to throw out – the justices or the legislators – if they are ever going to get control of what they (quaintly?) think of as ‘their’ government.”²⁰

Another legal scholar, Richard J. Ellis, expresses a contrary point of view in arguing that there is justification for applying a stricter rule to initiatives than bills passed by the legislature:

“Without a strict single-subject rule, it is

generally impossible to know which if any parts of a successful initiative express the majority view. The rationale behind a law produced by the legislature is more complex than simple majority rule. Legislatures are designed to produce compromises among competing interests. The final law may well be nobody’s first choice yet be preferable because it represents a consensual second choice with which most everybody can live.”²¹

Appropriation Clause –

It has been suggested that initiatives with a fiscal impact could be challenged under the Appropriation Clause – Article VIII, Section 4 of the Washington State Constitution . It provides as follows: “No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law” The Washington Supreme Court has affirmed that the object of the appropriation article is to preclude

Limitations Governing Public Officials

Public Officials enjoy free speech when it comes to ballot issues as long as they are not using public resources. As a general rule, the Washington State Ethics Law of 1994 prohibits the use of public resources by state officers or state employees to support or oppose a ballot measure. However, since ballot measures are matters of public policy, several exceptions are allowed to permit comment on ballot measures (to the right).

The governor has a unique role under the Constitution, which allows him/her to communicate with the Legislature and to recommend measures as shall be deemed expedient for their action. This mandate allows the governor to communicate with the people, so long as the expense is for a reasonable communication and not an extensive lobbying campaign.

Figure 2 Allowable Actions for Public Officials and Employees

Legislators, state officers and public employees may:

- make a statement in support of or in opposition to any ballot proposition at an open press conference, provided the press conference was not called to launch or actively and directly assist or oppose the initiative;
- respond to a specific inquiry regarding a ballot proposition;
- make incidental remarks concerning a ballot proposition in an official communication or may otherwise comment on a ballot proposition if done without the actual, measurable expenditure of public funds;
- make very minimal use of public facilities to initiate "permissible" communications, written or verbal, concerning ballot propositions that fall within their statutory or constitutional responsibilities;
- respond to questions about their view of an initiative and provide their positions to staff who can, with the legislator's permission, pass them on to people who inquire;
- choose how to address an initiative in a newsletter by either encouraging people to vote and including a balanced and objective description of the initiative, **or** including direct comment on the merits making no reference to voting, provided there was a bill on the same subject matter in the preceding session. If legislators choose to comment on the merits of the initiative in a newsletter, those comments must be within the context of a larger message. Therefore, it would not be proper to devote all or most of the newsletter to advocacy; and
- prepare a guest editorial on the initiative using factual, non-partisan information, which does not take the form of an argument for or against the measure;
- promote or oppose any ballot measure as long as there is no use of public resources.

Ideas for Change

Many proposals have been made that would change the initiative process in response to the concerns of its critics and supporters. These include changing signature gathering procedures, providing more information to voters, restricting the subjects that can be addressed by initiative and combining advantages of a direct initiative process (initiatives to the people) with an indirect initiative process (initiatives to the legislature) which would include the advantages of a representative form of government.

- **Require prior review of constitutionality** to avoid later invalidation of an initiative passed by the voters. Suggestions have been made for

constitutional review prior to collecting signatures. Such consideration could be performed by a court, the attorney general, or a special agency or commission. Several states require such reviews. The Florida Supreme Court, for example, reviews initiatives for constitutionality (including compliance with the single subject rule) after petitioners gather 10 percent of the signature requirements.

Courts in Washington are generally averse to making any decision until an issue is ripe, i.e., until the issues are fully developed and argued by plaintiff and defendant, which can oc-

cur only after an initiative is adopted by the voters. A further argument against any court review prior to submission is that the courts are the ultimate decision makers on the legality of law. It's possible the judges or justices may be in conflict with an earlier advisory opinion they had participated in. In Washington, the attorney general is responsible for defending an initiative once passed. Thus, there could be a conflict were she or her office designated to review an initiative prior to submission.

- **Require that an initiative be reviewed by a court** as to its constitutionality before it is placed on the ballot. A negative opinion would not block an initiative but the opinion would appear in the voters' pamphlet.
- **Create a commission for non-binding review.** Hugh Spitzer, attorney in private practice and an affiliate professor at the University of Washington School of Law, argues against any advisory opinion by the courts—either early or late in the initiative process. Rather, he proposes creation of a small, non-partisan, unpaid commission, with a paid staff. Commissioners would be appointed by the governor and confirmed by the senate—possibly utilizing former judges. The commissioners would be available to review draft initiatives and offer non-binding advice on potential legal problems. “[S]uch a commission might give both proponents and voters an earlier perspective on constitutional issues that could later cause an initiative’s demise.” The findings would be advisory only and could be published in the voters’ pamphlet.”²³
- **Provide for citizen initiative review following certification.** Initiatives would be submitted to a representative citizen review panel whose views would appear in the voters’ pamphlet. A citizen review concept, called Citizen Jury, developed by political scientist Ned Crosby and the Minneapolis based Jefferson Center for New Democratic Processes has been used to provide an informed citizen process on public policy matters, including ballot measures. As proposed for Washington State in a

program called Citizens Initiative Review, this technique could be used with a panel made up of Washington “jurors” selected from around the state to reflect the state population in terms of gender, race, age, education, geographic location and political identification. The panel of citizens would be convened for a five-day period to review a proposed initiative. Panelists would be paid for their time (average Washington wage, currently \$130 per day), transportation, and housing. They would take testimony from expert witnesses and supporters and opponents of the initiative, ask questions, seek additional information, if needed, and deliberate carefully. At the end of the review, the panelists would indicate how they would vote on the initiative if the election were held that day, and the reasons for their decisions. Panelists would also oversee publication of a report outlining their reasons for supporting or opposing the initiative or remaining undecided. The report would then be published in the state voters’ pamphlet. The estimated cost of this program is between \$700,000 and \$1,450,000 per year, depending on the number of initiatives to be reviewed, which would average out to a maximum of 25 cents a year per Washington resident. Proposers recommend that the funds come from interest earned by the state's general fund.

Those in favor of the project see it as a source of sound information for voters about the possible effects of initiatives, and a way to insert an informed citizen voice into a highly politicized discussion. Although some media do attempt to analyze these measures objectively, others only inundate voters with campaign sound bites that deliver contradictory messages. The state voters’ pamphlet offers pro and con statements written by the campaigns with no comment on the veracity of the information.

Some people are opposed to publicizing any special group’s judgment or opinion at state expense, (this jury process as well as the voters’ pamphlet). Others challenge the concept that a representational panel could be as-

sembled. Nor could their report reflect new information developed during the campaign. Other people oppose the idea because of the high cost. The interest from the general fund is already being used.

- **Allow for public hearings by the legislature and/or forums held by the Secretary of State.** Initiatives often reflect a narrow, self-interest of the sponsors that is not always apparent to the public. Public hearings would provide an opportunity for comment from various sectors of society and from various regions of the state on the broader effects of an initiative. Some people worry that this would infringe on the peoples' independence to propose legislation as provided in the Washington State Constitution. The Supreme Court has never considered this issue.
- **Allow perfection of the text at some point in the campaign.** The California Commission recommended that a public hearing be conducted on the merits of an initiative once 25% of the necessary signatures have been obtained, and that the proponents be allowed to amend their proposal within seven days after the hearing as long as the changes are consistent with the initiative's original purposes and intent.
- **Encourage public officials to comment on ballot issues.** All legislators do not take a uniform view of the allowances and restrictions on their speech. They have different views of what is objective, balanced, measurable, etc. As a result, they have different levels of comfort about communicating on ballot measures. Real or perceived infractions can be the subject of complaints to the Legislative Ethics Board, in which case the Board will make a determination as to whether the legislator has overstepped the boundaries of the law. Legislators would wish to avoid such complaints, and some would use the law to avoid making comments on the measure.
- **Relax restrictions on public officials.** Allow state and local elected officials to use public facilities to prepare and deliver self-initiated communications of information on the impact

that any ballot proposition foreseeably may have on matters that fall within their responsibilities. The exception could apply to all ballot measures, not just those that go through the legislature.

- **Require the full text** of laws, or parts of laws, to be repealed to be displayed in the initiative. It is very confusing not to know just what change in an existing law is being proposed. Such a requirement should make it clear. It might, however, make the initiative excessively long and considerably more expensive to print and circulate.
- **Require personal financial disclosure** by initiative and referendum sponsors. This would be similar to the disclosure required by candidates and public officials. It could clarify the intent and interest behind the proposed law, but some feel it would be an unacceptable infringement of personal rights with no public benefit.
- **Restrict subject matter:**
 1. Prohibit initiatives that affect the use of public funds.
 2. Require that a source of revenue be identified in the initiative, either an increase in an existing state revenue source or a new tax or fee, if a proposed initiative needs public funds for its implementation.
 3. Require that specific language be included specifying how reductions are to be reflected in state budgets, either direct reductions for a specific function or agency, or amend a current budget if an initiative repeals or restricts taxes or fees.

Washington's legislature is charged with approving a balanced budget to run the state government and provide the services required and desired by the state's citizens. According to Marty Brown, Director of the Office of Financial Management, "89% of the current budget goes to educate, medicate, and incarcerate." Initiatives that remove or limit sources of revenue or increase spending undermine the ability of the legislature to carry out this primary duty.

Those opposed to such restrictions believe that

reducing revenue by initiative has become the only way to force the legislature to rein in state spending. They expect legislative compromise in making hard choices between many competing interests. Others believe the legislature's hands are already tied with "earmarked" funds. Some of these suggestions would further remove legislative flexibility.

- **Increase the cost of filing an initiative.** The filing fee has been five dollars since 1912. Since there are costs borne by the state to process initiatives from the moment they are filed, some believe the fee should be increased. Suggestions run from \$100 to \$500. The Secretary of State has urged that the fee be \$100 in order to discourage frivolous filings. Some people, however, believe that processing initiatives is a normal function of state government and citizen participation shouldn't be discouraged by raising the fee.
- **Provide that the filing fee be refunded** if enough signatures are collected to certify the initiative for the ballot.
- **Require that signatures be collected on a proportional, geographical basis in order to qualify for the ballot.** This could be done by requiring:
 1. an equal number of signatures from each Congressional or Legislative district,
 2. a minimum number from each district, or,
 3. a percentage from each district of those who voted in the last election.

Such changes could also increase the difficulty (and expense) of gathering enough signatures, depending upon the requirements. They might also give a disproportionate number of voters veto power over a ballot issue that was supported by a majority of the state's voters.

- **Change the number of signatures required to qualify any initiative.** Those interested in making the process easier to get on the ballot suggest a lower signature requirement. Those interested in making the process more difficult would support increasing the signature requirement.
- **Lengthen the time allowed for collecting signatures.** Most states allow more time than

does Washington. An owner of a signature gathering firm suggests that reducing the number of necessary signatures to four or five percent, and allowing a year to collect signatures could almost eliminate the need for professional signature gatherers.

- **Allow constitutional amendment by initiative.** Two-thirds of the 27 I&R states allow constitutional changes. Supporters argue that since the legislature has this power, the people should also. Right now the people can institute such changes only by calling a constitutional convention by initiative. Those opposed consider the constitution too basic to our freedoms to be changed by a simple majority of the voters. As it stands now, the legislature requires a super majority to pass a constitutional amendment, and then it must be submitted to a vote of the people.
- **Extend the I&R process** to single purpose governments. The people should have the same ability to exert change in the legislation of bodies such as port and school districts. Opponents say that initiatives are not needed for single purpose districts since they are so close to the people already.
- **Amend the Constitution to permit only initiatives to the legislature.** In order to take advantage of the opportunity to deliberate, debate and compromise when tackling a governmental issue, direct initiatives would be abolished and all initiatives would be initiatives to the legislature. Some people believe this change would combine the advantages of both types of initiative. It would protect an individual's right to propose legislation, and provide a way to adjust for unintended consequences. A certified initiative would be either passed into law by the legislature without the need for an election, or it would go on the ballot either alone or along with a legislative alternative. Voters' choices would not be diminished and the sponsors of an initiative would still be assured that their initiative would be on the ballot unless passed by the legislature without change.

Several suggestions have been made to im-

plement this proposal:

1. reduce the number of signatures required to qualify an initiative to the legislature, perhaps to four percent of those voting in the last gubernatorial election, or perhaps six percent, somewhere between the requirement for referenda and the current initiative requirement.
2. limit this proposal only to those initiatives dealing with expenditures and revenue, those initiatives that bump up against the legislature's constitutional directive to appropriate funds.
3. incorporate a dollar limit. An initiative increasing or reducing revenue by a specified amount could only be an initiative to the legislature.
4. lengthen the time allowed for collecting signatures when an initiative is one to the legislature.

Each of these suggestions could be adopted as an incentive to persuade initiative sponsors to use the indirect initiative procedure.

Law making by the people provides an opportunity for the public to address issues which the legislature cannot or will not address. While some people feel that it encourages the legislature to tackle problems it otherwise would not address, others contend that it permits legislators to dodge dealing with hard divisive issues. Law making by the legislature involves a deliberative process that includes

committee work, often public hearings, compromises and checks and balances. Initiatives that undergo both processes would benefit from both, but, unless the legislature passed the initiative as is, it would take longer to see the law changed.

Opponents point out that it would remove the most popular type of initiative. Until now 774 initiatives to the people have been filed, as opposed to 258 initiatives to the legislature. At a recent symposium on I&R, Shawn Newman offered his opinion as to why most initiative filers have chosen not to use the indirect method:

“It provides for de facto use of state resources to fight the initiative as it makes its way through the legislative sausage machine. Historically, the reason behind direct initiatives in this state was because the people distrusted the legislature and the special interests that controlled it. Those reasons remain true today as they did nearly 100 years ago. Anything that dilutes, reduces or burdens the I&R power should be opposed.”

- **Require a higher percentage of voter approval** for initiatives to the people to compensate for the lack of involvement by any elected body.

Conclusion

Washington State voters have used the initiative system for many issues since its advent in 1912. It's been used to create the Public Disclosure Commission and to effect redistricting. It's been used to bring about social change with the passage of the state Equal Rights Amendment and attempts both to expand and restrict abortion rights. It's also been used to influence tax policy and restrict government spending.

Stuart Elway, in reporting in his monthly publi-

cation The Elway Poll in March of 2000, made the following comments on research he'd done on Washington voters' attitudes about the initiative process:

“The public debate about the initiative process – reinvigorated by the passage of I-695 – is largely about trust. Critics of the process don't trust the voters to know what they are doing, and defenders of the process don't trust elected representatives

to always act in the best interests of 'the people'.

“Large majorities of those who were polled favored more disclosure, not barriers. For instance, they wanted the state attorney general to review initiatives for constitutionality, the budget office to review financial impacts and initiative campaigns to disclose if they are using paid signature gatherers. At the same time, they opposed raising the number of signatures required to qualify a measure for the ballot.”

Elway concluded:

“Successful reform strategies would therefore look first to making more information available to voters before trying to make it

more difficult to qualify initiatives for the ballot. Washington voters are not in any mood to give up political power.”

Several initiatives have been on the ballot and passed since 2000, resulting in increasingly difficult budget decisions for lawmakers. At the same time the economy has weakened and government surpluses have disappeared. Are voters ready to take another look at the initiative process? Is it possible or even desirable to try to bridge the gap between the initiative process and the legislative process?

League members, through this study, have an opportunity to decide if the system is working as it should, or if some changes might make it work better.



Endnotes

1. Taking Shelter Behind the First Amendment: The Defense of the Popular Initiative, THE BATTLE OVER CITIZEN LAWMAKING, A Collection of Essays, M. Dane Waters, ed. Carolina Academic Press, at 168 (2001).
2. DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES, Baltimore: Johns Hopkins University Press (1984)
3. U.S.CONST. Article IV, Section 4.
4. The United States Supreme Court held that a challenge under the guarantee clause was a nonjusticiable political question, which must be left to congress. *Pacific States Telephone and Telegraph Co. v. Oregon*, 223 U.S. 118, 150-51 (1912). Similarly, the Washington Supreme Court has ruled in two cases that the issue was nonjusticiable. *Hartvig v. City of Seattle*, 53 Wa. 432, 102 P. 408 (1909); *State v. Manussier*, 129 Wa. 652, 921 P.2d 473 (1996). Despite the recent ruling, opponents of the initiative point out that the ruling was mere dicta, unsupported by legal reasoning, and a properly researched and argued case could persuade the Washington Court. See Brewster Denny, "Initiatives – Enemy of the Republic," 24 SEATTLE U. L. REV. SYMPOSIUM at 1023 (Spring 2001); Steven William Marlowe, "Direct Democracy Is Not Republican Government," id. at 1044-48. But see Kenneth P. Miller, "Courts as Watchdogs of the Washington State Initiative Process," id. at 1071-72 (pointing out how unlikely it would be for a court today to restrict "the ability of the people to exercise a legislative function they have utilized for nearly a century," quoting Jeffrey T. Even, Wash. Ass't Att'y Gen).
5. 24 SEATTLE U. L. REV. supra at 1059.
6. *Kennedy v. Reeves*, 22 Wash.2d 677, 683-84 (1945).
7. WATCH, monthly newsletter published by CLEAN (Citizens for Leaders with Ethics and Accountability Now), Jan. 1997, referring to *CLEAN v. State*, 30 Wash.2d 782, 928 P.2d 1054 (1996).
8. DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY, Harcourt, Inc. 2000, at 163-171.
9. THE BATTLE OVER CITIZEN LAWMAKING, supra.
10. *Buckley v. Valeo*, 424 U.S. 1, 1976.
11. 486 U.S. 414 (1988)
12. *L.I.M.I.T v. Maleng*, 874 F.Supp. 1138 (W.D. Wash. 1993).
13. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1988).
14. *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir.2001).
15. *Moore v. Ogilvie*, 394 U.S. 814 (1969).
16. See e.g. *Walmart v. Progressive Campaigns, Inc.*, 139 Wash. 2d 623 (1999), 989 P.2d 524 (1999) and cases cited therein. Previously, the U. S. Supreme Court recognized that a state's constitutional provision for free speech and the initiative as extended to a shopping center did not violate the U.S. constitution's protection of private property. *Pruneyard Shopping Center v. Robbins*, 447 U. S. 74 (1980).
17. *Initiative & Referendum Institute v. U.S. Postal Service* (Fed. District for the District of Columbia,) 1:00CV01246.
18. *Washington Federation of State Employees v. State of Washington*, 901 P.2d 1028 (Wash. 1995).
19. *Amalgamated Transit v. State*, 142 Wash.2d 183, 11 P.3d 762 (2000).
20. "The Initiative Process: The Supreme Court Versus the People," 56 WASH. STATE B.NEWS at 44 (June 2002).
21. DEMOCRATIC DELUSIONS, THE INITIATIVE PROCESS IN AMERICA at 144, Univ. Press of Kansas, 2002.
22. *Peel v. Clausen*, 94 Wash. 166 (1917). See Philip A. Talmadge, Introduction, Seattle U. L. Rev., supra at 1020-23, discussing the effect of contradictory initiatives on the budget actions of the legislature.
23. "Take the Initiative on Constitutionality," WASH. STATE B. NEWS, at 37-38 (Oct. 2000).

Appendix

Table 3 – Reported Expenditures Supporting and Opposing Statewide Initiatives, 1975-2001

Election Year	Initiative Number	Subject	Expenditures	
			For	Against
1975	314	Corporate franchise tax	\$ 106,506	\$ 474,309
1975	316 *	Mandatory death penalty	14,006	970,588
1976	322	Outlawing fluoridation of public water supplies	33,424	80,302
1976	325	Regulating nuclear power facilities	117,740	
1977	335 *	Prohibiting obscene films & publications	84,995	
1977	345 *	Eliminating sales tax on food	20,865	103,994
1977	348	Repealing variable gasoline tax	43,130	418,868
1977	59	Limiting use of public irrigation water	78,412	64,536
1978	350 *	Prohibiting mandatory busing	150,266	14,624
1979	61	Beverage container deposits	71,762	967,758
1979	62 *	Limiting state tax revenues	170,351	52,913
1980	383 *	Banning importation of radioactive wastes	75,742	76,696
1981	394 *	Requiring voter approval of major energy project bonds	203,998	1,220,928
1981	402 *	Abolishing inheritance and gift taxes	225,335	823
1982	412	Setting a maximum rate of interest on retail sales	278,203	1,557,987
1982	414	Beverage container deposits	247,547	952,361
1982	435	Corporate franchise tax to replace sales tax on food	24,503	398,336
1984	456 *	Indian Fishing rights	167,580	249,517
1984	464 *	Excluding trade-in values from sales tax computations	90,832	--
1984	471	Prohibit public funding of abortions	113,026	155,363
1986	90	Funding comprehensive fish and wildlife conservation and recreation programs	165,325	--
1987	92	Limiting physicians' charges for Medicare patients	215,443	736,463
1988	518 *	Increasing minimum wage	178,276	16,432
1988	97 *	Taxing hazardous substances to finance waste cleanup	316,105	--
1988	97 B	(Legislature's alternative hazardous waste cleanup)	1,264,409	--
1989	102	Children's Initiative	629,987	134,575
1990	547	Growth Management	311,186	1,674,757
1991	119	Death with dignity	1,734,100	516,562
1991	120 *	Abortion	1,451,954	407,496
1991	119 & 120	Additional expenditures opposing both issues		1,072,794
1991	553	Term limits	719,445	363,875
1991	559	Property tax revision	39,708	254,636
1992	134 *	Campaign contribution limits	222,149	194,155
1992	573 *	Term limits	405,967	190,322
1993	593 *	Three strikes, you're out (Sentencing reform)	210,593	--
1993	601 *	Limit tax increases	46,433	--
1993	602	Limit revenue collections	1,557,056	1,555,600
1994	601 & 602	Additional expenditures opposing both of above two issues		2,050,779
1994	43	Extend tax on cigarettes, etc. to fund violence reduction and drug enforcement programs	76,574	120,000
1994	607 *	Freedom of choice for denture care	339,199	57,282
1995	45 *	Appointment of Fish and Wildlife Director	99,549	14,828
1995	48	Land use regulations	1,168,234	969,413
1995	640	State fishing regulations	421,620	955,408
1995	651	Gambling on Indian lands	1,360,024	439,997
1996	173	School vouchers	20,045	--
1996	177	Independent school districts	1,016,948	--
1996	173 & 177	Additional expenditures opposing both issues		1,126,562
1996	655 *	Bear baiting ban	507,731	225,485
1996	670	Term limits supporters	218,065	--
1996	671	Tribal slot machines	2,128,081	156,545
1997	48 *	Sports stadium/Exhibition center	6,259,692	729,747
1997	673	Health insurance	500,473	1,716,350
1997	676	Handgun device	1,153,763	3,406,425
1997	677	Sexual orientation	925,974	77,675
1997	678	Dental hygienists	502,065	685,085
1997	685	Drug policy	1,563,672	111,853
1997	47 *	Property tax reform	651,863	
1997	4208 *	School district levies	113,324	
1998	200 *	Race, gender	505,491	1,680,752
1998	49 *	Transportation funding	804,829	274,603
1998	688 *	Increase minimum wage	585,294	
1998	692 *	Medical use of marijuana	786,310	15,810
1998	694	Prohibiting partial birth abortions	195,644	792,588
1999	695 *	Repeal existing vehicle taxes; \$30 vehicle license tabs	284,910	2,207,740
1999	696	Prohibiting certain methods of commercial fishing	232,344	506,698
2000	713 *	Animal trapping	927,455	381,014
2000	722 *	Tax repeal/limits	544,293	580
2000	728 *	School class sizes	1,186,338	--
2000	729	Charter schools	3,250,513	11,157
2000	732 *	Teacher salaries	1,570,665	--
2000	745	Transportation funding	2,750,015	1,282,243
2000	8214 *	State trust fund investment	--	--
2001	747 *	Limiting property tax increases	663,308	917,175
2001	773 *	Additional tobacco taxes	1,442,256	136,377
2001	775 *	Long-term in-home care services	1,292,243	--
2001	8208 *	Use of temporary superior court judges	15,561	--
2001	4202	Investment of state funds	--	--

* Measure adopted by majority vote of the people

Appendix

– Table 4 –
Yearly Summary of Initiatives to the People: 1914 through 2001

Year	No.	Subject	Result
1914	3	Statewide Prohibition	Approved
	6	Blue Sky Law	Rejected
	7	Abolishing Bureau of Inspection	Rejected
	8	Abolishing Employment Offices	Approved
	9	First Aid to Injured	Rejected
	10	Convict Labor Road Measure	Rejected
	13	Eight Hour Law	Rejected
1916	18(1A)	Brewers' Hotel Bill	Rejected
1922	40	Relating to the Poll Tax	Approved
	46	"30-10" School Plan	Rejected
1924	49	Compulsory School Attendance	Rejected
	50	Limitation of Taxation	Rejected
	52	Electric Power Measure	Rejected
1930	57	Redistricting	Approved
1932	58	Permanent Registration	Approved
	61	Relating to Intoxicating Liquors	Approved
	62	Creating Department of Game	Approved
	64	Limiting Taxes	Approved
	69	Income Tax Measure	Approved
1934	77	Fishing & Fish Traps	Approved
	94	40-Mill Tax Limit	Approved
1936	101	Civil Service	Rejected
	114	40-Mill Tax Limit	Approved
	115	Old Age Pension	Rejected
	119	Production for Use	Rejected
1938	126	Non-Partisan School Election	Approved
	129	40-Mill Tax Limit	Approved
	130	Regulation of Labor Disputes	Rejected
1940	139	P.U.D. Bonds	Rejected
	141	Old Age Pension	Approved
1942	151	Old Age Assistance	Rejected
1944	157	Old Age Assistance	Rejected
	158	Old Age Assistance	Rejected
1946	166	Public Utility Districts	Rejected
1948	169	Bonus to World War II Veterans	Approved
	171	Liquor by The Drink	Approved
	172	Social Security Laws	Approved
1950	176	Public Assistance Grants	Rejected
	178	Citizens' Security Act	Approved
1952	180	Colored Margarine	Approved
	181	Observance of Standard Time	Approved
	184	Old Age Pension Laws	Rejected
1954	188	Chiropractic Examinations	Rejected
	192	Commercial Salmon Fishing	Rejected
	193	Daylight Saving Time	Rejected
	194	Television Alcoholic Beverage Ads	Rejected
1956	198	Employer-Employee Relations	Rejected
	199	Redistricting	Approved
1958	202	Labor Agreements	Rejected
1960	205	Liquor Licenses	Rejected
	207	Civil Service for State Employees	Approved
	208	Joint Tenancy	Approved
	210	Daylight Saving Time	Approved
1962	211	Redistricting	Rejected
1964	215	Marine Recreation Land Act	Approved
1966	226	Cities Sharing Sales-Use Taxes	Rejected
	229	Sunday Activities Blue Law	Approved
	233	Freight Train Crew Law	Approved

Year	No.	Subject	Result
1968	242	Driver's Implied Consent	Approved
	245	Reducing Maximum Interest	Approved
1970	251	Regulate Imposition of Taxes	Rejected
	256	Bottle Bill	Rejected
1972	258	Dog Racing	Rejected
	261	Liquor Sales by Retailers	Rejected
	276	Disclosure	Approved
1973	282	Elected Officials Salaries	Approved
1975	314	Corporate Taxes	Rejected
	316	Mandatory Death Penalty	Approved
1976	322	Fluoridation	Rejected
	325	Nuclear Power Facilities	Rejected
1977	335	Pornography	Approved
	345	Exempt Food from Sales Tax	Approved
	348	Repeal Variable Fuel Tax	Rejected
1978	350	School Busing	Approved
1980	383	Ban Radioactive Waste Import	Approved
1981	394	Approval/Public Energy Projects	Approved
	402	Abolish Inheritance Tax	Approved
1982	412	Maximum Interest Rates	Rejected
	414	Bottle Bill	Rejected
	435	Sales Tax on Food	Rejected
1984	456	Fishing & Indian Rights	Approved
	464	Trade-Ins Tax Exempt	Approved
	471	Public Funding of Abortion	Rejected
1988	518	Raise Minimum Wage	Approved
1990	547	Growth & Environment	Rejected
1991	553	Term Limits	Rejected
	559	Property Taxes	Rejected
1992	573	Term Limits	Approved
1993	593	Sentencing of Criminals	Approved
	601	Tax & Spending Limits	Approved
	602	Tax & Spending Limits	Rejected
1994	607	Licensing of Denturists	Approved
1995	640	State Fishing Regulations	Rejected
	651	Gambling on Indian Lands	Rejected
1996	655	Bear-Baiting	Approved
	670	Ballot Notices/Term Limits	Rejected
	671	Gaming on Indian Lands	Rejected
1997	673	Health Insurance	Rejected
	676	Handgun Trigger Locks	Rejected
	677	Anti-discrimination/Sexual Orientation	Rejected
	678	Licensing of Dental Hygienists	Rejected
	685	Drug medicalization	Rejected
1998	688	Raise Minimum Wage	Approved
	692	Medical Use of Marijuana	Approved
	694	Late-term abortions	Rejected
1999	695	License Tabs/Tax Limitations	Approved
	696	Commercial Fishing Restrictions	Rejected
2000	713	Animal Trapping	Approved
	722	Tax Repeal/Limits	Approved
	728	School Class Sizes	Approved
	729	Charter Schools	Rejected
	732	Teacher Salaries	Approved
	745	Transportation Funding	Rejected
2001	747	Limiting Property Tax Increases	Approved
	773	Low Income Health Programs	Approved
	775	Long-term In-home Care Services	Approved

Appendix

– Table 5 –

Initiatives to the Legislature Approved/Rejected: 1914-2001

Approved by the Legislature:

Year	No.	Subject
1934	2	Blanket Primary
1942	12	Public Power Resources
1989	99	Presidential Primary
1994	159	Criminal Sentencing/Firearm Use
	164	Restricting Land Use Regulation

On the Ballot:

If the Legislature rejects or takes no action on an Initiative to the Legislature, the measure is automatically placed on the next general election ballot. The Legislature also has the option of placing an alternative proposal on the ballot with the original measure.

Year	No.	Subject	Result
1928	1	District Power Measure	Approved
1956	23	Civil Service for Sheriffs Employees	Approved
1958	25	Dam Construction/Water Diversion	Approved
1971	40	Litter Control Act	Approved Alternative
	43	Shoreline Use & Development	Approved Alternative
	44	Tax Limitation	Approved
1977	59	Public Water Appropriations	Approved
1979	62	Limit State Revenues	Approved
1988	97	Cleanup of Hazardous Waste	Approved
1991	120	Abortion-Pro Choice	Approved
1992	134	Limiting Campaign Contributions	Approved
1998	200	Employment Discrimination	Approved

Appendix

– Table 6 –
Referendum Bills Adopted
(Measures passed by the Legislature and referred to the voters)

Bill #	Definition	Referred to Voters
2	Soldier's Equalized Compensation	1922
5	40-Mill Tax Limit	1940
6	Taxation of Real and Personal Property	1942
7	\$40,000,000 Bond Issue to give State Assistance in Construction of Public School Plant Facilities	1950
8	\$20,000,000 Bond Issues to Provide Funds for Buildings at State Operated Institutions	1950
10	\$25,000,000 Bond Issue to Provide Funds for Buildings at State Operated Institutions and State Institutions of Higher Learning	1958
11	Outdoor Recreation Bond Issue	1964
12	Bonds of Public School Facilities	1964
13	Bonds for Juvenile Correctional Institution	1964
14	Bonds for Public School Facilities	1966
15	Bonds for Public Institutions	1966
16	Congressional Reapportionment and Redistricting	1966
17	Water Pollution Control Facilities Bonds	1968
18	Bonds for Outdoor Recreation	1968
19	State Building Projects; Bond Issue	1968
20	Changes in Abortion Law	1970
21	Outdoor Recreation Bonds; Sales; Interest	1970
23	Pollution Control Bonds; Sales; Interest	1970
24	Lobbyists – Regulation, Registration and Reporting	1972
25	Regulating Certain Electoral Campaign Financing	1972
26	Bonds for Waste Disposal Facilities	1972
27	Bonds for Water Supply Facilities	1972
28	Bonds for Public Recreation Facilities	1972
29	Health, Social Service Facility Bonds	1972
31	Bonds for Community College Facilities	1972
33	Shall personalized motor vehicle license plates be issued with resulting extra fees to be used exclusively for wildlife preservation?	1973
36	Shall certain appointed state officers be required to file reports of their financial affairs with the Public Disclosure Commission?	1976
37	Shall \$25 million in state general obligation bonds be authorized for facilities to train, rehabilitate and care for handicapped persons?	1979
38	Shall \$125 million in state general obligation bonds be authorized for planning, acquisition, construction and improvement of water supply facilities?	1980
39	Shall \$450,000,000 in state general obligation bonds be authorized for planning, designing, acquiring, constructing and improving public waste disposal facilities?	1980
40	Shall state officials continue challenges to the federal selection process for high-level nuclear waste repositories and shall a means be provided for voter disapproval of any Washington site?	1986
42	Shall enhanced 911 emergency telephone dialing be provided throughout the state and be funded by a tax on telephone lines?	1991
43	Shall taxes on sales of cigarettes, liquor, and pop syrup be extended to fund violence reduction and drug enforcement programs?	1994
45	Shall the fish and wildlife commission, rather than the governor, appoint the department's director and regulate food fish and shellfish?	1995
47	Shall property taxes be limited by modifying the 106 percent limit, allowing property valuation increases to be spread over time, and reducing the state levy?	1997
48	Shall a public stadium authority be authorized to build and operate a football/soccer stadium and exhibition center financed by tax revenues and private contributions?	1997
49	Shall motor vehicle excise taxes be reduced and state revenues reallocated; 1.9 billion for state and local highways?	1998

Appendix

– Table 7 –
Referendum Measures Which Succeeded in Nullifying the Law

Referendum #	Definition	Date
1	Teachers' Retirement Fund	1914
2	Quincy Valley Irrigation Measure	1914
3	Relating to Initiative and Referendum	1916
4	Recall of Elective Public Officers	1916
5	Party Conventions Act	1916
6	Anti-Picketing	1916
7	Certificate of Necessity Act	1916
8	Port Commission	1916
9	Budget System	1916
12B	Certificate of Necessity	1922
13B	Physical Examination of School Children	1922
14B	Primary Nominations and Registrations	1922
15	Party Conventions	1922
16	Butter Substitutes	1924
23	Providing for Legal Adviser for Grand Juries	1942
24	Prosecuting Attorneys; Providing that they shall no longer give advice to Grand Juries	1942
25	Relating to Public Utility Districts	1944
26	Relating to appointment of State Game Commissioners by the Governor	1946
27	Relating to the creation of a State Timber Resources Board	1946
28	Relating to accident and health insurance covering employees eligible for unemployment compensation	1950
30	Inheritance Tax on Insurance Proceeds	1958
32	Washington Stat Milk Marketing Act	1962
33	Private Auditors of Municipal Accounts	1962
34	Mechanical Devices, Salesboards, Cardrooms, Bingo	1964
36	Minimum Age – Alcoholic Beverage Control	1973
39	Shall certain changes be made in voter registration laws, including registration by mail and absentee voting on one day's registration?	1977
40	Shall a state Women's Commission be established by statute?	1977
48	Restricts land-use regulations and expands governments' liability to pay for reduced property values of land or improvements thereon caused by certain regulations for public benefit.	1995

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Websites for the Initiative Study

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<http://www.ballot.org>

Center for Voting and Democracy (non-profit, nonpartisan). Has a great on line library
<http://www.igc.apc.org/cvd/>

The Evans School of Public Affairs (U of W)
<http://www.evans.washington.edu/>

The Initiative and Referendum Institute (non-profit, nonpartisan). The web site has good library resources and a companion web site to track ballot measures around the country.
<http://www.iandrinstute.org/>

Municipal Research & Services Center of Washington
<http://www.mrsc.org/>

Public Disclosure Commission (PDC)
www.pdc.wa.gov

The Secretary of State
www.secstate.wa.gov

State of Washington, Office of Financial Management (OFM)
<http://www.ofm.wa.gov>

Sources for Tables

Table 1: Initiative and Referendum Institute

Table 2: Secretary of State

Table 3: Public Disclosure Commission

Tables 4, 5, 6, & 7: Secretary of State