

Initiative and Referendum in the United States

A presentation by M. Dane Waters
to the Democracy Symposium
February 16 - 18, 2002
Williamsburg, VA

Introduction/Background

In many states, citizens have the ability to adopt laws or to amend the state constitution. This is commonly referred to as the initiative process (possible in 24 states). In many of the same states, as well as others, the citizens have the ability to reject laws or amendments proposed by the state legislature. This process is commonly referred to as the referendum process. There are two types of referendum in this country — popular and legislative. Popular referendum (possible in 24 states) is when the people have the power to refer, through a petition, specific legislation that was enacted by their legislature for the people to either accept or reject. Legislative referendum (possible in all states) is when the state legislatures, an elected official, state appointed constitutional revision commission or other government agency or department submits propositions (constitutional amendments, statutes, bond issues, etc.) to the people for their approval or rejection. This is either constitutionally required, as in proposing constitutional amendments, or because the legislature, government official or agency voluntarily chooses to submit the proposal to the people (however, not all states allow their state legislature to place statutes on the ballot for voter approval or rejection). Every state but Delaware requires that constitutional amendments proposed by the legislature be submitted to the citizenry via legislative referendum for approval or rejection. The initiative process is used much more frequently than the referendum process and is considered by many the more important and powerful of the two processes. Additionally, there is no national initiative or referendum process in the United States.

The local initiative process is available in thousands of counties, cities and towns across the country and is utilized far more frequently than statewide I&R. Almost every major city in the country has this process including New York City, Houston, Philadelphia and New Orleans. Many states, like Louisiana and New York, have the initiative process at the local level but not statewide and 356 home rule cities in Texas have the process but the state as a whole does not.

History of the Process

Initiative and referendum (I&R) has existed in some form in this country since the 1600s. Citizens of New England placed ordinances and other issues on the agenda for discussion and then a vote utilizing town meetings. Thomas Jefferson first proposed Legislative Referendum for the 1775 Virginia State constitution. The basis of his support was simply that, " [t]he people are the only sure reliance for the preservation of our liberty" and that they, the people,

should be the ones to agree to and approve any change to the one document that dictated the laws in which they would have to live by.

The first state to hold a statewide Legislative Referendum for its citizens to ratify its constitution was Massachusetts in 1778. New Hampshire followed in 1792. Today, every state but Delaware requires a final vote of the people before their constitution can be amended.

Jefferson was a strong and vocal advocate of the Referendum process, which in his view recognized the people to be the sovereign. Whereas the King of England spoke of his power to govern being derived from God, Jefferson knew that those chosen to represent the citizenry as envisioned in a republican form of government were only empowered by the people. This was the core principal in which our Federal Constitution was based upon.

State constitutions mirror the Federal Constitution. In state constitutions a series of checks-and-balances were created to take into account the possible abuse of power by elected representatives and to protect the people from an out of control government - when and if that were to happen. But what the people began to realize in the late 1800s was that no matter what checks-and-balances existed, the people had no direct ability to reign in an out of touch government or government paralyzed by inaction.

Then came the Populist Party of the 1890s. Their members had become outraged that moneyed special interest groups controlled government, and that the people had no ability to break this control. They soon began to propose a comprehensive platform of political reforms. They advocated women's suffrage, secret ballots, direct election of U.S. Senators, primary elections and the initiative process.

The initiative is based on a theory of trusting the individual. The movement to establish initiative was not intended to change our system of government – **but to enhance it**. Our Founding Fathers at the federal and state levels created wonderful documents, but they were documents based on compromise. They realized that constitutions would need to be changed which is why they created mechanisms to alter them when necessary. The system of checks and balances that they created were established as a theoretical system based on how to check the power of one branch of government with another – but it was an unproven system. As time progressed, the citizens discovered that this theoretical system of checks and balances worked – but not good enough – for there were times when elected officials chose not to act in the people's best interest. As citizens of this great nation, the Populists and Progressives saw that it was their duty to try and **perfect** our system of government so that it would accomplish the true intent of our Founding Fathers both at the state and federal

level – which was ensuring that the people were the ultimate sovereigns and that the government was there for the people and not that the people were there for the government. James Madison said it best in Federalist 49 when he stated: "[a]s the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to recur to the same original authority... whenever it may be necessary to enlarge, diminish, or new-model the powers of government."

There is little doubt that in recent years the initiative process has become one of the most important mechanisms for altering and influencing public policy at the local, state and even national level. In the last decade alone, utilizing the initiative process, citizens were heard on affirmative action, educational reform, term limits, tax reform, campaign finance reform, drug policy reform and the environment.

The modern day movement to utilize the initiative process can be said to have begun in 1978 in California with the passage of Proposition 13 that cut property taxes from 2.5 percent of market value to just 1 percent. After Proposition 13 passed in California, similar measures were adopted through the initiative process in Michigan and Massachusetts. Within two years, 43 states had implemented some form of property tax limitation or relief and 15 states lowered their income tax rates.

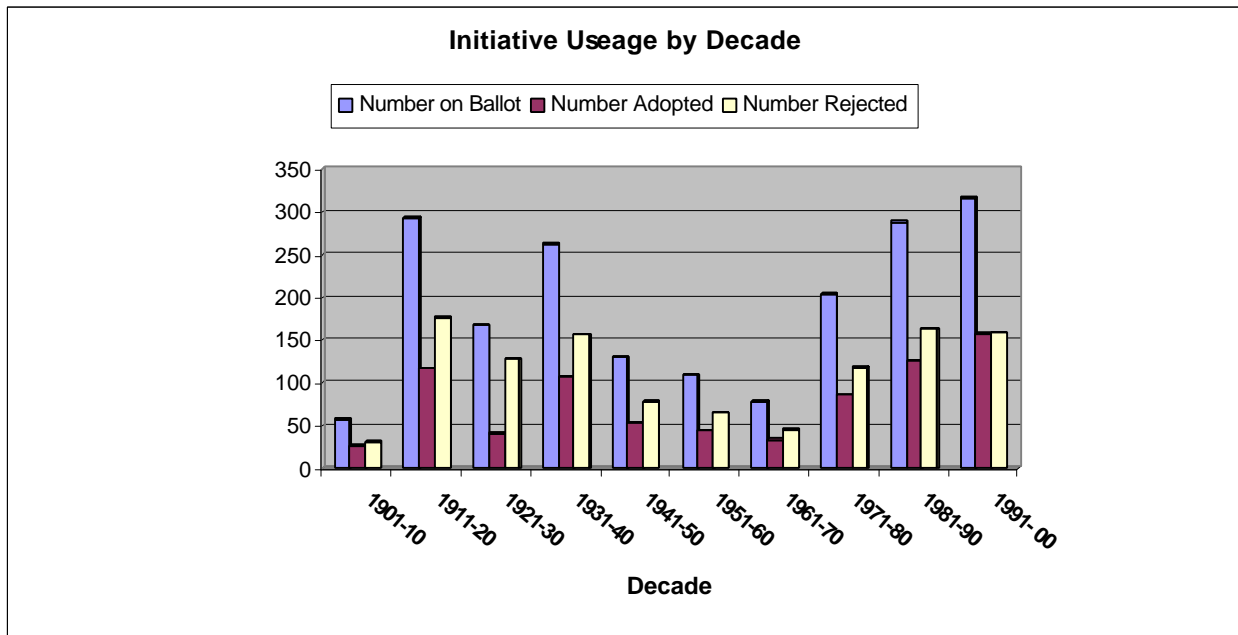
A report from the National Taxpayers Union makes the case that the tax revolt that began with Proposition 13 in the 1970s would never have occurred without the initiative process. The study's author, Pete Sepp, stated: "[w]ith I&R, citizens have created an innovative, effective array of procedural restraints on the growth of state and local government that have even awakened the federal political establishment. Without I&R, citizens almost certainly would be laboring under a more oppressive and unaccountable fiscal regime than they do today.... As Initiative and Referendum enters its second century of use in the United States, citizens should embrace and nurture this invaluable process. It has transformed the 'Tax Revolt' from a passing fancy to a permanent fixture in American politics."

In addition to the issues discussed above, what has been accomplished through the use of this process? The citizens utilizing the initiative have brought some of the most fundamental and controversial public policy decisions affecting our daily lives about. Here are a few examples:

STATEWIDE REFORMS MADE POSSIBLE THROUGH THE USE OF THE INITIATIVE PROCESS	
Women gained the right to vote	Ended bi-lingual education
Politicians are elected through direct primaries	Movie theatres and other stores can be open on Sunday
Yellow margarine can be sold	Poll taxes were abolished
States can't fund abortions	Parents must be notified prior to the performing of an abortion
The eight-hour workday was created	Medical marijuana was legalized
Physician-assisted suicide was legalized	The use of steel traps in hunting was outlawed
A vote of the people is required before any new tax increases can be adopted	A super-majority vote of both houses of state legislatures is required before any new tax increase can be adopted
Ended the use of racial preferences in government hiring and contracting	Bottle taxes to protect the environment were adopted
Placed term limits on elected officials	Campaign finance reform was adopted
Prohibition was adopted and abolished	The death penalty was adopted and abolished

Clearly, reforms have been enacted that represent different ideologies - conservative, liberal, libertarian and populist agendas. This typifies the initiative process - individuals of all different political persuasions use it. Furthermore, because of the diversity of issues that have been placed on the ballot, voters in states with an initiative on the ballot have been more likely to go to the polls than voters in states without an initiative on the ballot. In election after election, no matter what election cycle is analyzed, voter turnout in states with an initiative on the ballot has been usually 3% to 7% higher than in states without an initiative on the ballot. In 1998 voters in the 16 states with an initiative on the ballot went to the polls at a rate of almost 3% greater than voters in the states without an initiative on the ballot. This can be attributed to the fact the people believe that their vote can make a difference when voting on initiatives. They realize that when they vote for an initiative, they get what they voted for. They get term limits, tax limits, and educational or environmental reform. That is the key distinction between voting on an initiative and voting for a candidate. With a candidate there are no guarantees - you can only hope that the candidate delivers on his or her promises.

Since the first statewide initiative on Oregon’s ballot in 1904, citizens in the 24 states with the initiative process have placed approximately 1,987 statewide measures on the ballot and have only adopted 821 (41%). Even though 24 states have the statewide initiative process, almost 60% of all initiative activity has taken place in just five states – Oregon, California, Colorado, North Dakota and Arizona.



Additionally, it is important to point out that very few initiatives actually make it to the ballot. In California, according to political scientist Dave McCuan, only 26% of all initiatives filed have made it to the ballot and only 8% of those filed actually were adopted by the voters. During the 2000 election cycle, over 350 initiatives were filed in the 24 initiative states and 76 made the ballot – about 22% ⁱⁱ.

DECADES WITH THE LOWEST NUMBER OF STATEWIDE INITIATIVES ON THE BALLOT	NUMBER PROPOSED	NUMBER ADOPTED	PASSAGE RATE
1941-1950	131	53	40%
1951-1960	109	44	41%
1961-1970	78	33	42%

The initiative process has been through periods of tremendous use as well as periods in which it was rarely utilized. From 1904 to 1970, the use of the initiative steadily declined from its peak of 291 from 1911-1920 to its low of 78 in 1961-1970. Many factors contributed to this, but the distraction of two World Wars, the Great Depression and the Korean War are largely responsible. However, in 1978, with the passage of California’s Proposition 13 (an initiative that cut state

property taxes by nearly 60%), the people began to realize the power of the initiative process once again and its use began to climb. Since 1978, the two most prolific decades of initiative use have occurred 1981-90 (289 initiatives) and 1991- 2000 (396 initiatives **CHECK FIGURE**).

DECADES WITH THE HIGHEST NUMBER OF STATEWIDE INITIATIVES ON THE BALLOT	NUMBER PROPOSED	NUMBER ADOPTED	PASSAGE RATE
1991-2000	396	194	48%
1911-1920	291	117	40%
1981-1990	289	127	44%

In 1996, considered by scholars to be the “high water mark” for the initiative process, the citizens placed 102 initiatives on statewide ballots and adopted 45 (44%). In contrast, that year, state legislatures in those same 24 states adopted over 14,000 laws and resolutions ⁱⁱⁱ.

Since 1996, the number of initiatives actually making the ballot seems to be decreasing. In 1998, only 66 statewide initiatives actually made the ballot - the lowest in a decade. In 2000 a total of 76 initiatives (four were on primary ballots and 72 were on the general election ballot) found their way to statewide ballots, though more than 1998, this number is still off pace with previous election cycles in the last decade. In 2001 there were four initiatives on statewide ballots. The reason for the low number is that the constitutions of only five states allow initiatives in the odd years – Colorado, Maine, Mississippi, Ohio and Washington State.

STATES WITH THE HIGHEST NUMBER OF STATEWIDE INITIATIVES ON THE BALLOT (1904 – 1998 ONLY)	NUMBER PROPOSED	NUMBER ADOPTED	PASSAGE RATE
Oregon	314	105	33%
California	260	92	35%
Colorado	174	72	41%
North Dakota	165	77	47%
Arizona	144	58	40%

The Reality

The simple truth is, major reform in this country is not possible without the initiative process. Many argue that career politicians are not going to put limits on their

own time in office or limits on the amount of other people's money they can spend. Nor are they going to do anything that might rock the 'special interest boat'. The initiative process is vital to reforming our country.

But because initiative and referendum is such an effective tool to curb the power of government, it is under heavy attack by career politicians who would like to see it destroyed. State legislators don't have the nerve to be honest about their intentions and openly take initiative and referendum away from the people; instead they take it away one small piece at a time. But as William Jennings Bryon said in 1920: "[W]e have the initiative and referendum; do not disturb them. If defects are discovered, correct them and perfect the machinery ... make it possible for the people to have what they want ... we are the world's teacher in democracy; the world looks to us for an example. We cannot ask others to trust the people unless we are ourselves willing to trust them." This statement couldn't be truer today than it was 80 years ago.

Unfortunately, it seems as though elected officials are ignoring Bryon. When the initiative process was established, many of the initiative states provided that these reserved powers to the people would be "self-executing." In other initiative states, the legislature was entrusted with creating procedures by which the people could exercise the initiative. Citizen concern about the legislature's efforts to limit initiative rights was the primary reason that in some initiative states, the legislature is specifically instructed to enact laws designed to only facilitate, not hinder, the initiative process.

However, despite the fact that the citizenry adopted the initiative to ensure citizen government, most of the states where the citizens provided that they retain initiative rights have seen the legislature enact legislation that restricts rather than facilitates the use of these powers by the people. The legislatures' regulation of the initiative and referendum have often violated the citizenry's First Amendment rights as articulated by the U.S. Supreme Court in ***Meyer v. Grant***, 486 U.S. 414 (1986).

Many, if not most, of the regulations on the process were enacted or proposed during the recent wave of term limit, tax limitation and campaign finance initiatives enacted by the citizenry. However, legislatures have always vigilantly inhibited the people's right to the initiative and referendum. Regulations imposed on the people's use of these powers have typically been direct responses by the legislature to the people's use of these powers.

Numerous examples could be cited if more time were available. In the last four years alone, eight states--Arizona, Idaho, Mississippi, Missouri, Montana, Oregon, Utah and Wyoming--tightened procedural restrictions on initiatives. These seem

extreme when one considers that only 134 laws have been adopted in those states using the initiative process in over eighty years.

Conclusion

It is hard to predict what will happen with the future of the initiative process. The expansion of this process seems to be an uphill battle. Due to the reforms that the citizens have been successful in promoting through the initiative process – reforms that have limited the power of government – legislators in states without I&R have been hostile to advocating it and unfortunately its expansion can only occur by legislators giving it to the people. This in itself is a perfect example of why we need I&R.

There is no doubt that you can find flaws with citizen lawmaking. No form of legislating is perfect. But in an era of growing government, the people need a mechanism to check government. Many claim that the people already have that check and it is called elections. But that is a fallacy. Most people who support the initiative process and who utilize the process only use it as a tool to address single issues – issues that their elected officials for whatever reason have chosen not to address. They want, for the most part, to keep a particular elected official and so electing them out of office for failing to deal with one specific issue is considered by many to be an extreme step – far more extreme than allowing the people to make laws on an occasional basis. In 100 years the people have made approximately 800 laws. That is not many considering that an average legislature passes over 1,000 laws a year.

After 100 years of this great American experiment we know the citizens don't support initiative and referendum as a way to destroy or abolish our representative democracy – they support it because it ensures that they, the people, are the ultimate sovereigns as envisioned by our Founding Fathers.

Our Founding Fathers dealt in theory, but we now must deal in reality – for in reality representative government is not always representative. It's full of imperfections of its own with legislators passing bad laws and ignoring important reforms. The truth is representative government and the initiative process is a perfect check-and-balance against each other. They're perfect complements – two imperfect systems of governance, each designed to help the people, and both carefully constructed to balance the weaknesses of one with the strengths of the other.

ⁱ All the statistical data and information contained in this article, unless otherwise noted, was independently gathered by the Initiative & Referendum Institute and can be verified by visiting the Institute's website at www.iandrinstitute.org.

ⁱⁱ A complete listing of all the initiatives that appeared on the ballot can be found in the Institute's historical database at www.iandrinstitute.org.

iii Numbers are approximate due to the fact that a comprehensive list of laws passed by state legislatures is unavailable. The numbers utilized in this article were arrived at utilizing information provided by the National Conference of State Legislatures.