

INITIATIVE AND REFERENDUM REVISITED 2003

BACKGROUND

In 1977 the League of Women Voters of Hawaii studied and reached a consensus to support adding provisions to our state constitution to provide for both **direct initiative** and **petition referendum**.

The study was done in advance of the Constitutional Convention of 1978. The League, along with other organizations lobbied and testified at the Con-Con, but the provisions were defeated by a narrow margin. To this day, the legislature has never voted to place the issue on the ballot even though every year such bills have been introduced.

In recent years the frequent use of initiative and referendum (I & R) and the amount of money spent in collecting signatures and waging campaigns both for and against measures has increased dramatically in some states. Because of this we are taking another look at I & R. to determine if we should continue to support their adoption by the state of Hawaii.

PRESENT POSITION

Our consensus is limited to the support of statewide **direct initiative** and **petition referendum for statute law only**. Direct initiative is a method for citizens to propose legislation by gathering a specified amount of signatures to put an issue on the ballot to be voted on at a regular election. **Petition referendum** works in much the same way, but allows citizens to require a vote on a law that the legislature has just passed. The law does not take effect while the process is going on.

We were unable to reach a consensus on whether we should be able to **amend the constitution by initiative**. Therefore, we did not address that aspect of initiative when testifying on bills. States that allow constitutional initiatives have stiffer requirements for ballot qualification.

We also did not support **legislative referendum**, which is also called **optional referendum**. This type of referendum is placed on the ballot by the legislature to let the people decide an issue. Our members felt that the legislature should not be able to shirk its duty by referring controversial decisions to the people. In California and other states, a large percentage of ballot measures are usually legislative referendums.

We did not support **advisory referendums**, which are not binding and can be placed on the ballot either by a legislature or by citizen referendum, depending on state laws.

Although members favored **direct initiative over indirect**, we were not opposed to indirect initiative. Eight states use varying forms of **indirect initiative** in which a qualifying measure is sent first to the legislature. The legislature can then pass the measure, which then becomes law; or amend the measure, in which case both versions go on the ballot; or do nothing, which means the measure automatically goes on the ballot. In some cases, if the legislature advises a change to the original initiative, it is possible for the originators of the initiative to agree to the changes before the measure goes on the ballot, or the legislature can pass the revised initiative. Fewer signatures are required to qualify indirect initiatives.

In any case, it appears that the state constitution must contain a provision for initiative and/or referendum specifying what type of initiative and/or referendum will be allowed. In our previous study we learned that the legislatures of other states have tried to put referendums on their ballots when their constitutions did not specifically allow referendum by the legislature. Those courts did not allow it. (Most recently, the Supreme Court of South Carolina struck down a video poker referendum that the General Assembly had hoped to have the people decide.) Based on this type of decision, the Attorney General of Hawaii gave the opinion that our state legislature may not refer legislative measures to the people. This ruling was given in the 1960's but has never been tested in a Hawaii court.²

BRIEF HISTORY OF INITIATIVE AND REFERENDUM

Several countries put measures before their citizenry to vote on, the most notable example being Switzerland, whose diverse linguistic, religious and ethnic groups are divided into political subdivisions called cantons. Most countries only have legislative referendum, not initiative.

The real impetus to install initiative and/or referendum (I & R) in the United States started in the late 19th century and reached its peak in the early 1900's. This movement, was led by the Populist and Progressive parties and had strong support of labor and farmers. Young states that did not have entrenched political machines to fight the movement were most successful in adopting some form of direct legislation as well as recall. These states were mainly in the West, except for some New England states that had a tradition of town hall meetings where citizens voted on issues. In fact, every western state except for Hawaii, Texas and New Mexico have both I & R. New Mexico has referendum only.²

According to David Schmidt, author of *Citizen Lawmakers, The Ballot Initiative Revolution*, the South was particularly unreceptive to having direct legislation in their constitutions because those states were controlled by “Democratic aristocrats”. Many people in the South were illiterate and ballot box stuffing was rampant when the power of the ruling class was threatened.

There was fear that African Americans would be able to use initiatives to wrest control from the white power structure. In 1911, this statement appeared in the national initiative and referendum periodical “*Equity*”: “Many conscientious Southerners oppose direct legislation because they fear that this process of government would increase the power of the Negro, and therefore increase the danger of Negro domination.” Mississippi did have I & R from 1914 to 1922 when their supreme court abolished it on a legal technicality. There were very few non-white voters at that time.

The Northeast had a high proportion of immigrants in the cities. In 1890 first generation immigrants made up four-fifths of New York City’s population. Between 1900 and 1910 nearly nine million people arrived mostly from southern and eastern Europe. They were poorer and less educated than their northern European predecessors. They worked for less pay and were seen as a threat by the already established Americans. Direct legislation was not adopted in these areas.

Some of the early initiatives passed by various states that adopted direct legislation were revolutionary and came to be adopted by other states in later years. Examples are: primary elections, Presidential preference primaries, direct election of senators, home rule for municipalities, permanent voter registration, reapportionment according to population, line-item veto power for a governor, restricting child labor, job safety, workmen's compensation, banning poll taxes, establishing a juvenile court system, abolishing a sales tax on food, giving women the vote, and granting government aid for the poor, disabled and elderly.³

The early days of direct legislation were quite extraordinary in what was accomplished. It is hard to imagine a time when these things that we take for granted did not exist.

By the end of World War II voters had passed pension and welfare initiatives, established a state bank for farm loans, and a farm tax to insure crops against weather damage.

Initiatives were passed to raise taxes on large companies that had virtual monopolies on various parts of the economy in those days, such as railroads, mining, and telephone and telegraph companies.

During World War I there was a sharp decline in initiative use. During World War II it dropped again. However, during the Depression years, when there was much citizen dissatisfaction, initiative use rose. In 1932 there were 75 initiatives nationwide. In 1942 there were 13.³ In the elections of the year 2000, according to columnist Steve Love in the Akron Beacon Journal, voters in 42 states would vote on 204 initiatives and referendums; an average of five per state, but some states have none and others have many.

David Schmidt, a staunch initiative supporter, who wrote *Citizen Lawmakers* and David Broder, an initiative opponent, who wrote *Democracy Derailed*, agree that voters are distrustful of politicians. Schmidt says that when initiative use dropped from 40 to a paltry 18 nationwide in 1954, more initiatives were passed concerning government reform than on any other issue. Education also merited ten initiatives in six states, mostly increasing government spending.

The passage of time created new areas of concern. In 1982 ten states voted on a freeze on the nuclear arms race that was part of the Reagan administration policy. They were successful in nine states and in 34 of 37 cities. A vote on the nuclear freeze could not make U. S. policy, but was meant to influence President Ronald Reagan and Congress. In 1987 the U. S. and Soviet Union signed a nuclear weapons treaty.

Even though many states did not adopt direct legislation, especially initiative, many major cities in those states did, such as Albuquerque, Dallas, Houston, New Orleans, Atlanta, Nashville, Washington, D.C., Baltimore, Pittsburgh, New York City, Newark, N. J., Milwaukee, Honolulu and others.⁴

The only states which have adopted some type of direct legislation since the early 1900's are Wyoming, initiative and referendum for statute law only (1968); Florida, initiative to amend the constitution only (1972); and Mississippi, initiative for constitutional amendments only in 1992.⁵ In 1980 Minnesotans voted on a constitutional amendment to adopt the initiative. The amendment was defeated although a majority of those voting on the measure voted for it. Their constitution, like Hawaii's needs a majority of all those voting in the election to vote "yes". Abstainers are, in essence, being counted as "no" votes.

HAWAII HISTORY

Since this study involves the state of Hawaii, it may be of interest to examine some of the reasons why our state did not incorporate direct legislation in the constitution, whereas Alaska, which was admitted to the union one year earlier, did.

The 1977 study did not include some of the information which came from documents in the Legislative Reference Bureau at the state capitol and the Hawaii State Archives; plus some opinions given by *kamaaina* (native born residents) who were influential in Hawaii economics and politics during the 1950's.

In addition to the traditional disagreement on the merits of direct democracy versus a solely representative form of government, there were other factors involved in how our state constitution differs from other states.

First of all, an earlier draft version of our constitution did contain I & R. This version was supported by the fledgling labor unions and the Democratic Party. The opposition was centered more with Republican Party leaders who controlled the political and economic scene at the time. All but one of the appointed Territorial governors of Hawaii had been Republican.

Moreover, the U. S. Congressional leadership, which delayed statehood for Hawaii, was composed of many Southern Democrats. These "Dixiecrats", as they were called, strongly opposed giving so much potential power to a citizenry whose majority was not Caucasian.

If this were not enough, another bugaboo of the era was the tremendous controversy on the Mainland and in Hawaii about the loyalty of some of the labor union leaders. Some were viewed as being Leftists or out-and-out Communists. This was especially true for the Longshoremen's union, the ILWU, which was beginning to feel its oats in Hawaii as well as on the West Coast. Organizing dock and plantation workers, and striking were considered almost un-American. This was at a time when any taint of being a "Red" or a "Pinko" could ruin a person or a cause.

People who were involved in the statehood process at the time also told us that they felt the majority of people in Hawaii were not ready for the responsibility of voting on issues. In the end, the version presented to and accepted by Congress was a "top down" constitution based more on the U.S. Constitution than those of other states. For example, we do not have an elected Secretary of State, Attorney General, or Treasurer. All power derives from the Governor and the Legislature.

We do not have municipalities, except for the City *and* County of Honolulu. We do not vote on tax or bond issues at the state or local level as is done elsewhere. We only have elections once every two years, which is most unusual. We have a centralized school system. And, we do not have any form of direct legislation. Our constitution is indeed different.

By the time the Constitutional Convention (Con-Con) of 1978 came along, Republicans had lost control of state government. They then supported adding I & R to the constitution. Many Democrats in positions of leadership, most major union leaders and leaders of large corporations opposed I & R. The traditional kamaaina owned companies as well as the influential tourism-based industry were strongly opposed to I & R. Art Rutledge, the powerful head of the Teamsters Union, was the only major labor leader who publicly supported initiative.

At that time the usual arguments were given for and against I & R. Race, ethnicity and labor again figured in the debate, but this time the people to fear were not the non-Caucasian majority and the unions, but the mainland transplants (*haoles*). A clandestine position statement, called “*Palaka Power*”^{*} was circulated to “Local” Con Con delegates citing the dangers of I & R.

Not knowing, or perhaps not caring about why Hawaii did not have any form of direct legislation, they urged defeat of proposed constitutional measures being submitted to the electorate. Fear was engendered that residents originating on the mainland would be able to wrest political control from local people by use of initiative in particular. How this feat was to be accomplished by this minority group was never explained, but the tactic worked. Lobbyists for organizations such as the League of Women Voters and Common Cause were called racist for supporting I & R. At one point a fistfight was narrowly averted during a Con Con hearing when tempers flared over the issue. This lapse in civility was captured on videotape. In the end, the initiative measure was defeated by eight votes on the Convention floor. Referendum fared worse.

^{*} Palaka is the Hawaiian rendition of “plaid”. Plaid shirts and scarves were common attire of plantation workers. Palaka Power was a call for unified action on several convention issues (not only I & R) by delegates many of whom were descendants of plantation workers.

THE PRESENT

Initiative Use

In reading various critiques on the use of initiative there is wide spread belief that there were fewer initiatives years ago than today, so it was interesting to learn that in 1912 there were twenty eight initiatives on the Oregon ballot. In fact the heaviest use of initiative in most states occurred soon after adoption of the process. Initiative use then tapered off until the 1970's when the process again became very popular.³ That trend may still be continuing, although recent figures show that in the last two years there were fewer initiatives in the various states. In the 2002 elections nationwide there were 202 ballot measures in 40 states. Only 53 measures were initiated by the people; the other 149 were by state legislatures. This time Oregon had only seven initiatives. Nationwide this was the least number of initiatives since 1986.

Some states do not have many initiatives due to the stringent rules in place to qualify a measure for the ballot. Wyoming had no initiative on the ballot for years. In 1985 the legislature made some amendments to the rules for using I & R. Perhaps this accounts for initiatives appearing on the ballot in the 1990's. The number of initiatives a state has on the ballot does not necessarily correlate to how easy it is to qualify a measure. (Although in Wyoming's case, it may have been). South Dakota has fewer initiatives yet has lenient rules for qualification.

Mississippi has a unique method for limiting the number of initiatives on its ballot. The first five initiatives that qualify for the ballot in a general election year are those that are allowed.

Many states also have some time frame in which a defeated initiative or one that has the same intent can be placed on the ballot again.

What People Vote On

The subject of measures that do and do not qualify for the ballot vary as much as the times, the interests of the people and what state laws allow.

Some legislation may be seen as self-serving, such as a referendum in Washington State sponsored by a wealthy individual to build a stadium in which his team would play. It passed. Other proposals could be viewed as more of a general interest. A few years ago an Oregon initiative passed which outlawed nuclear power plants. The League of Women Voters led a drive to allow voting by mail in Oregon. The

initiative passed by a decisive margin. States have voted on affirmative action, fair housing, hunting, fishing, etc.

The elections of 2000 saw voters in Montana, Oklahoma, Arkansas, Utah, Oregon and Arizona voting on various ways to use the money allotted their states by the tobacco settlement suit. Californians killed school vouchers and Coloradans and Oregonians approved background checks at gun shows.⁶

The subject matter for initiatives can vary from the seemingly ridiculous to the sublime, depending on one's point of view. There have been initiatives passed calling for tough campaign spending laws, limits on terms of office, veterans benefits, school vouchers, the lottery, etc. Measures that target a certain class of people usually end up in court, such as affirmative action and fair housing. If there is a flaw in a measure that has popular support, it is possible for a legislature to pass a similar bill that *can* pass judicial review.

California has the reputation of having the most ballot issues of any state, but actually Oregon has had the most for many years. And although there are usually several initiatives on the ballot, we also note that many ballot issues are legislative referendums or other issues that require a vote of the people. Citizens are asked to decide many issues that the legislature will not take a stand on. Divisive or controversial issues are often put to the voters. (In Hawaii, the "hot potato" issue of same sex marriage was put to the voters as a constitutional amendment.) Taxation and bond measures also are voted on in most states, counties and towns. This can make for a very long list of ballot measures.

Some states restrict the subject that people are allowed to vote on; others have no restrictions. Taxes are fair game in some states and not in others. Kentucky allows the use of the referendum on tax measures only; Arkansas for legislative measures only. Some states allow initiatives for constitutional amendments only and others do not allow initiatives to amend the constitution.

Tennessee just passed a legislative referendum to establish a state lottery. This was to avoid having a state income tax.

The use of the petition referendum to overturn legislation passed by the legislature seems to be falling out of use. Perhaps it is because of the short time period allowed to collect enough signatures to prevent a measure from taking effect. Initiative seems to be the preferred way to affect state law.

Voter Education

There are various ways states use to present information on ballot issues to their voters. First, the measure is given a title and a brief summary to be put on the ballot. In many states this is the job of the Secretary of State who usually oversees elections. Or it can be by the Attorney General or another official agency. The wording of the ballot title and summary is a ticklish business and can lead to controversy when one side or the other feels that the measure has been incorrectly defined.

As for the pros and cons found in official voter information pamphlets, originators of an initiative or referendum may write the “pro” and the main opposition leaders write the “con”. Or the statements may be written by one of the aforementioned officials. Some states do both. Oregon allows paid pros and cons, but because the charge is so small (\$500 or 2500 valid signatures in support of the argument) the voter information “pamphlets” have become phone book size. There is also no check on the validity of the paid arguments. Some states have limited pros and cons and give a listing of who supports or opposes the measures.⁷

According to the Initiative and Referendum Institute, the 2002 election saw thirty percent fewer initiatives than in the year 2000 and fewer than any year since 1986. Nationwide there were 53 measures initiated by the people, but 149 by state legislatures.⁸ How does the electorate deal with all the conflicting statements that are given by the proponents and opponents of all these issues? This is a very important subject, especially for us in Hawaii because we have never been successful in having the state put out voter information pamphlets.

If the people of Hawaii decide they want some form of direct legislation, good voter information will be imperative. But even with good voter information many people have difficulty deciding which way to vote. The League of Women Voters of California in its study *Initiative and Referendum in California: A Legacy Lost?* quoted one critic who described the California voter “pamphlet” as 50 or 60 pages of “absolutely impenetrable prose.” A study done between 1974 and 1980 by political scientist David Magleby found that the wording was beyond the understanding of most voters. The education required to understand it required from two years of college to two years of graduate school.⁹

Phil Keisling, ex-secretary of state of Oregon and an initiative supporter, is quoted by Broder as saying the 1996 voter pamphlet “was almost as long as War and Peace, but with less discernible plot.”⁴

Information needs to be understandable, but some would say that it is difficult to accurately explain complicated legal concepts in simple language. However, the League of Women Voters' information pamphlets from various states do a good job at cutting through the "fog" index.

Besides the state sponsored literature which may be published in newspapers, there are newspaper articles, news reports, advertisements, and statements from organizations that oppose or support measures. The latter two may be misleading, however.

The League of Women Voters is a respected source of information in many locales where it supplements voter information sent out by state, county or municipal sources. Leagues who have positions on various referendums also try to get their message across either with, or in addition to, that information.

Before the March 2000 primary election, the League of Women Voters of California published pros and cons on the state ballot issues. They managed to concisely and clearly outline 20 issues—initiatives, legislative referendums and legislative bond acts—in 16 pages.¹⁰

Some states require that voter information include how much money it would take to implement a proposed measure. This information is usually worked out with the help of the budget office of a state. When this is not done, voters may be in for an unpleasant surprise if such an initiative is passed.

Money and Signature Collecting

Paid signature collectors were common in the early days but many states outlawed the practice in later years. The U. S. Supreme Court overturned those laws in 1988. (*Meyer v Grant*)¹¹ Two of the most troubling aspects of using any type of direct legislation are the amount of money needed to qualify a measure for a vote and the money needed to have a chance at passage. In states with large or even medium-sized populations it takes thousands or hundreds of thousands of signatures to qualify a proposal for the ballot. Groups with money or good organization have learned how to use the initiative and sometimes the referendum process to push for legislation that might otherwise not be passed by their legislatures.

Organizations that have thousands of members such as churches or labor unions can sometimes accomplish this with volunteers, especially if they concentrate on major

population centers. Some states require that a certain percentage of signatures be collected from different counties of the state to mitigate the fear that a large metropolitan area could overwhelm more rural areas. Sometimes an initiative is backed by one or more wealthy individuals or by large corporations. In this case signature gatherers will almost certainly be hired.

There are no restrictions on the amount of money that can be spent on a ballot issue. The courts have ruled that restricting spending on issues would violate First Amendment rights protecting free speech. The most that can be done is to let the public know who supports an issue and who is supplying the money. Tight campaign spending laws that require timely reporting are a must when there are ballot issues. This is also true in Hawaii because we do vote on amendments to the state constitution.

One problem cited about paid petition circulators is the charge that they often give false or erroneous information on the measure. Another is that they encourage people to sign more than one petition. There have been cases where they have actually falsified and forged signatures. Names have been gleaned from phone books or from voter registration roles. Volunteer workers have also been known to cheat when it comes to gathering signatures. When the Assistant Secretary of State of Washington did an analysis of invalid signatures dating back to 1965, the conclusion was that there was no statistical relationship between campaigns which had used paid gatherers and those that relied on volunteers¹²

States and other jurisdictions have found it very difficult to prosecute anyone when violations occur because they have found that these workers many times have left the state.

Not everyone criticizes paid signature collectors. In 1999, the governor of Mississippi (whose state was new to the initiative experience) was quoted by Broder: "Thank God for California and those raggedy-looking California kids who came in here and gathered signatures." He was against trying to make it more difficult for paid collectors. Mississippi and Oregon both passed laws requiring that petition gatherers be residents. Oregon's Court of Appeals overturned the law but a Federal District judge in Mississippi let theirs stand.¹³ Unless a case is heard before the United States Supreme Court the decisions of the various state courts stand.

In order to combat abuses, some states have made it illegal for workers to be paid by the signature. They must be paid by the hour. They also require that workers must be considered employees of whoever hires them rather than contract workers. This

places more responsibility on the employer to oversee and discourage cheating. It also raises the cost of mounting a campaign, however. In Florida gambling interests paid signature collectors \$2.50 a name. It has been said that some signature collectors have made as much as a \$1000 in a day.⁴

California has the shortest time limit on collecting signatures (150 days) and the most signatures to collect of any state (about a million) of any state. This makes it nearly impossible for volunteer effort to be successful. The last time an initiative qualified for the ballot using volunteers in California was 1990. Two thousand volunteers were organized by a signature gathering firm and the coordinators were paid staff.⁴

Volunteers in Seattle collected 1500 signatures in five days by leaving the petitions on unmanned tables. They thought people would like it better than the high pressure approach.

Another strategy used in California in 1980 on Proposition 13, a citizen tax initiative, was to send out a mass mailing to a predetermined group of people. Over 800,000 signatures were collected and about \$1.8 million dollars donated. On the other hand, the same year, proposition 10 opposing rent controls and sponsored mainly by the building industry, spent \$1.8 million using paid signature gatherers. Both measures failed.⁹

A suggestion for the future is to use the internet for signature gathering, thus eliminating the need for paid signature gatherers; making it possible to put the initiative process back in the hands of the grass roots.

It is not legal to outlaw paid workers for a ballot measure. They have the same status as paid workers for a candidate for public office.

Some state court decisions have it made much harder for signature gatherers by declaring that shopping centers need not grant access to petitioners whether they be volunteer or hired. Again this varies from state to state, but in September 2000 the Oregon Supreme Court so ruled in the case *Stranahan v Fred Meyer, Inc.*¹³ In *Pruneyard Shopping Center v Robins* the U. S. Supreme Court (1980) ruled that state constitutional provisions that permit political activity at a privately owned shopping center does not violate federal constitutional private property rights of the owner.⁸

The Role of Money in a Campaign

As with campaigns for candidates, the side that spends the most money has the advantage. This is especially true if the money is spent against the issue. Studies have shown that if voters are not sold on the merits of an issue, a well conducted, negative campaign can sway them to reject the measure. Voters tend to be very cautious about initiating legislation when confronted with information, true or false, that casts doubts on its merits. Some seemingly very good initiatives that had a large percentage of people saying they would vote for them have been defeated by large amounts of negative campaigning.⁹

On the other hand, an issue of general interest can be passed without spending huge amounts of money if it has widespread support from the press, respected individuals and organizations. This was true in Oregon when the League of Women Voters, the governor, secretary of state and county clerks were able to qualify and have passed the initiative for voting by mail.

Several years ago Oregonians supported a state lottery. David Broder quotes the President of the University of Oregon, David Frohnmeyer, as saying that when he was a member of the Oregon legislature he “never saw a vote change hands for money. But the gambling interests came in here, spent \$184,000, and bought themselves a lottery off which they’ve made millions.”

In California an Atlanta firm, Scientific Games spent \$2 million supporting a state lottery, passed. In the first 10 years after its passage the firm made \$108 million from state printing contracts. As David Broder states: “A good return on its investment.”⁴ Observers may well ask themselves how the companies who supported these measures just happened to get the lucrative contracts.

Sometimes millions of dollars will be spent on both sides of an issue. The Indian Casino measure in California was a case in point. The winners, who favored allowing Indian tribes to have casino gambling outspent their mainly Las Vegas opponents by about two to one. It seems that the majority of Californians thought that the Indians should rake in the gambling losses rather than the Nevada interests.

In spite of gambling interests lobbying to increase types of gambling, the Book of States 2000-2001 it says “During the past few years, however, legislators and voters in many states have been reluctant to legalize more games, and, as a result, most legislative efforts have been defeated either in legislative chambers or by referenda.”⁵ Almost all the gambling issues were referred to the people by the various legislatures.

Some initiatives are supported by overwhelming majorities with little opposition when people know and care about the issue. The subject matter of some of these has been on conservation issues such as the clean water act in Oregon or the coastal zone act in California, or governmental issues such as bottle bills. But of late, some bottle bills and other environmental measures have failed as industry dollars were poured into the races. The wording of the measure and attitudes of the time play a major role. As an example, citizens in Washington, Oregon and other states voted against nuclear power plants while those in Idaho voted for them.

Other more controversial and, perhaps, more personal initiatives or referendums have passed with much smaller amounts of money spent. When the issues concern traditions, rights or morals, the majority often opts to vote for the status quo, but not always. Subject matter can range anywhere from hunting and fishing rights to same sex marriage, fair housing, and recently the use of medicinal marijuana and physician assisted suicide.

An amusing example of too much money being spent on a negative campaign backfired when Oregonians were voting to allow people other than dentists to fit false teeth. It seems the dentists spent so much money trying to defeat the measure that people grew sick and tired of the campaign and overwhelmingly passed it.⁹ One might ask, why this strange issue went before the people in the first place. (It was on the ballot in Idaho, too). Probably the legislatures did not want to face the dentists' ire.

But there is no doubt about the serious business that has grown up to promote initiatives. California is the epicenter of companies who advise those who would hope to succeed in an initiative effort. David Broder's book goes into great detail outlining certain campaigns. The most successful companies actually tend to promote initiatives that are philosophically in tune with the owners of the companies. Some specialize in "liberal" causes, others in "conservative" causes. But not always. Some initiatives, such as the Indian Casino initiative, defy a label.

According to Broder, the first question a potential client in California will be asked is, do you have a million dollars? With the huge population of California that amount is considered a minimum to get started on a campaign. This turn of events has removed the initiative from its "grass roots". Instead it is often used by the same "special interests" that it was supposed to guard against.

Most states do not have as many problems with the initiative process as California. In states with smaller populations it is still possible for “grass roots” groups to have success in qualifying and actually passing a measure. But smart initiative promoters will hire a firm or knowledgeable individual to advise them from start to finish so as to get the most out of their resources. Amateurs may have good intentions but often go astray when trying to handle such a campaign. In a state like Oregon there can be hundreds of proposed initiatives that never go anywhere for innumerable reasons.

Broder points out that even altruistic issues such as the many Clean Elections, (campaign finance reform) Medical Marijuana, and Oregon Trout (where a percentage of lottery money would be used for environmental concerns) received large contributions from individual donors, such as Phil Knight of Nike.

Judicial Review

Laws initiated by the people can be quite controversial and sometimes poorly worded, and the courts are kept busy deliberating all the challenges. Even well worded measures face challenges if an interested party (including the state) does not like the law that has been passed. In some states a proposed initiative is subject to review by the attorney general’s office or some other office delegated to do this. This can be done before the initiative is circulated so problems can be worked out in advance. The originators of the initiative are not usually required to take legal advice, however.

When an initiative is required to pass judicial review before it is allowed on the ballot, politics might cloud the decision. In Mississippi, one county judge can prevent an initiative to amend the constitution from being placed on the ballot. This has happened twice on proposals to do away with legalized gambling in the state. The proposed constitutional amendments were declared defective; the reasons were not given in the information available.

Indirect Initiative

In states that allow or require indirect initiative, after the petitioners have gathered the required number of signatures, the measure is placed before the legislature. The legislature can then review it just like it would any other bill. Hearings can be held, testimony received, etc. Then the legislature can either place it on the ballot as is, recommend changes which the originators of the petition can accept or reject; or place the measure on the ballot with a counter measure. If the legislature takes no action, the measure must go on the ballot as originally written.

Massachusetts has a two part system. If the initiative backers are able to collect a fairly small percentage of signatures it goes to the legislature which may then pass it. If not passed, the backers must go out and gather another percentage of signatures to place it on the ballot.

Several states have some form of indirect initiative and some states allow either direct or indirect. Initiative forces sometimes reject the indirect initiative procedure because they want to have the issue voted on in the next election rather than face a possible delay while waiting for the legislature to act. Another reason for avoiding use of indirect initiative is that proponents may not want a counter proposal put on the ballot. When two similar measures are on the ballot people may get confused and vote “no” on both. State legislatures have put measures on the ballot to compete with direct initiative measures also.

The League of Women Voters of Oregon has taken a position that Oregon should allow both the direct and indirect initiative.⁹ Leagues that did not support initiative have said that if their states did adopt initiative it should be indirect initiative.

Presently, more studies indicate a preference for having indirect initiative rather than direct in order to make the process more deliberative. This may be one reason that some states have far fewer initiatives than others. If an initiative measure must go to the legislature first, there could be more discussion and deliberation. Potential legal problems might also be worked out.

Limiting Number of Initiatives

Another method of avoiding too many initiatives on a ballot could be patterned after the state of Mississippi. The first three initiatives that qualify are the only ones to be voted on in any one election. This makes voter education easier to accomplish, also. In states that have many ballot issues, be they initiatives or referendums, it is very time consuming and expensive for organizations such as the League to study and put out information on such a plethora of proposals.

There has been a trend by many sources to curb the number of initiatives on the ballot by making it harder to qualify them. As with almost everything else having to do with direct legislation, this has a good and bad side. The bad side being that the harder it is to qualify an initiative, the more it costs. This will most likely make it even harder for volunteer efforts to succeed.

One initiative supporter said there are so many initiatives because the legislature is not doing its job. They blame the taxpayer revolt initiatives on legislative inaction. Those who lived in California in the past might well agree with that assessment. Who can forget the many years of one party and practically one man rule from Sacramento. The state Assembly was unable to pass any legislation without his consent. After many years he was replaced by an equally powerful leader. Herb Caen, the late, syndicated San Francisco columnist, once commented on the state of the leadership in California during this time, saying any bill had better be accompanied by a check (\$5000 would be nice) or it would not see the light of day.

ARGUMENTS FOR AND AGAINST DIRECT LEGISLATION

Form of Government

In the past, arguments for and against initiative and referendum have been focused primarily on whether we should have a purely representative form of government or a more democratic form. Government that allows initiative and referendum is sometimes referred to as a populist form of democracy. A solely representative form of government is founded on the idea that the people elect representatives and they will make the decisions.

Direct initiative lets the people not only originate the proposal, but also affirm or reject it. The proposal is not subject to hearings and testimony, or to any changes. The proposal cannot be killed by a committee chair or by a majority on a committee. In most states, however, the legislature can repeal or amend a measure some time after passage, if it dares. The time period for when an initiative measure can be tinkered with varies among the states. Some have no such provision and others have years.

There are other arguments for and against I & R. Curiously, most of the arguments for direct legislation can be used against it.

The proponents of I & R contend that when legislators are unresponsive to the people, direct legislation is only the recourse. Why not just elect people who will be responsive goes the rebuttal. Because they are backed by big money, big labor, or big something else, might be the reply. Perhaps the committee chair bottles up legislation that most of citizens want, but he/she is from a district that would re-elect that person no matter what. What can be done? Nothing. Initiative supporters

would say that is exactly why it is needed. It was also was a major factor in instituting term limits by initiative.

There is concern that the majority of those who vote are in a higher socio-economic group than those who do not. Therefore, the people who vote on issues may represent a different interest group from those who do not vote on issues. Non-voters make up a tremendous part of our population. They now let others decide who governs them, so even the representative government ideal is vanishing.

The question is whether those that do vote should be penalized because others do not. Is direct democracy a bad idea because many people do not participate in even the republican ideal? In a recent election in Hawaii, only 49% of those eligible to vote voted. We were last in the nation when we used to be near the top. There was some disagreement among our sources as to whether more people vote when there are ballot issues. It may be true in some states but not in others or it may depend on the issue. What is true is that those states do have a higher percentage of voters than we now have.

What about the rights of the minority, will the majority trample on those rights? This is always a consideration when initiative or referendum is used. There have been initiatives that would seem to do so. Then the remedy must be the courts. The initiative passed in California that mandated that non-English speaking students be taught in English was very controversial and went to court. Because of that, a compromise position was reached that young children would be taught in English and older children would have dual classes to help them catch up.

An initiative to do away with affirmative action was even more controversial. Ironically, the man who spearheaded the battle to remove most affirmative action laws from California was an African American businessman and had the support of other prominent African Americans as well as a majority of white males. Enough women voted for the proposition that it readily passed. The judge who wrote the majority report upholding the passed measure was also African American.

Measures such as the Coastal Zone Management Act in California meant that some people lost the right to do as they wished with their property near the ocean. Legislation by its very nature many times restricts someone's perceived rights while granting rights to others. The old saying, "it depends on whose ox is being gored," is one to keep in mind when talking about any kind on legislation.

Money and Legislation

Direct legislation may be initiated by the very same “big” interests that I & R were supposed to thwart. In the last several years special interest groups with huge campaign chests sponsored many initiatives. Special interests have always sponsored initiatives but now some have millions to spend. Political writers such as David Broder say that big money and special interests have co-opted the initiative process.

Proponents of I & R respond that special interest groups have always been able to sway legislators by giving large campaign contributions, and spending millions of dollars on lobbying. They buy access that is not available to the average citizen. There have been many cases of legislation being passed that favors only a certain company or organization. By now we have all heard of how Enron and the “Baby Bells” were able to influence legislation at the national level. The laws meant to regulate certain corporations were, in large, dictated by the leaders of those corporations.

The same influence buying happens in state government as well. There are the legal associations, the AMA, the fishermen, the farmers, the travel industry, the carpenters, the architects, engineers, churchgoers, and so on. Each of us has some kind of constituency but all constituencies are not born equal in their ability to influence legislation. The Campaign Spending Commission reports show how affluent businesses and corporations give contributions to every Hawaii legislator. The tobacco lobby was one of them. Some legislators returned the contributions. A newly elected state Senator said she was astounded and dismayed at all the “perks” she received from so many sources, even free passes to all University of Hawaii football games.

The “gaming” industry has been treating legislators to lunches at the country clubs. Major players in Hawaii’s political world are under investigation for allegedly receiving illegal campaign contributions as this is written. Some folks have already been convicted. Dubious contracts issued by government agencies are also being looked into. Of course, none of this is new here or elsewhere. Time magazine reported how a bill was held up in Congress in order for the opponents to organize more media advertising against it. Millions of dollars were spent to persuade Americans that the measure was poor. It was defeated.¹⁰

This may help explain why people do not trust politicians and perhaps why many do not vote. One story goes that an elderly woman was asked why she never voted. Her reply was: “It just encourages them.”

Broder reports that in 1964 poll showed that seventy percent of Americans thought they could trust their government; but in 1997 only thirty eight percent did. This lack of confidence works both ways. Another study in 1998 concluded that “public distrust of government is paralleled by a belief among members of Congress, presidential appointees, and senior civil servants that the American public is too ill-informed to make wise decisions about important issues.”³

So now we have a problem—the people who make government policy have little respect for the people and the people have little respect for politicians. When registering voters we hear from so many would-be voters that all politicians are crooks. This lack of confidence and respect on both sides may explain why initiatives are again so popular. It may reflect the same phenomena that led to widespread initiative use in the past. During the days of the Depression the beloved, folksy humorist, Will Rogers, was guaranteed a laugh when poking fun at politicians. Today’s humorists also help shape people’s attitudes by using humor to criticize government policy and other national scandals.

Philosophy of Government

Many political scientists as well as others who study government and politics oppose direct legislation because they say it subverts the whole idea of a republic. As stated earlier, many of the Founding Fathers were very much afraid of a pure democracy and did not think it could work. The republican form of government meant that the people could elect their representatives who could then formulate policy in an intelligent, deliberative manner. At that time only white, male property owners were allowed to vote so there were not that many people in the early states that could vote. The House of Representatives was popularly elected but the Senate was not. Presidential candidates were selected by small party caucuses. The President is not elected by majority vote even today.

Were wiser decisions made in those days than now? That is for each of us to judge. We seem to have had as many wars. Some of the wars we fought, besides those with Native Americans, most of us have never heard of or only vaguely. We no longer remember what they were about and when we do know what they were about, some wars appear to have been trumped up because of various political or economic interests of the time.

We certainly had some wonderful scandals back in the old days, so it seems our leaders were just as frail then as now. The belief that government was better before the advent of direct democracy may be just that—a belief.

In state government we entrust decisions to our legislators. They study proposed legislation and can make changes to the bills. One aspect of the republican form of government is the necessity to compromise. Compromise can be the key to legislators being able to have their legislation passed. Those unwilling to deal are not always very effective. Legislators cannot operate in a vacuum. They must consider the type of constituency they represent and try to benefit it. But there are also other factors at play.

In Hawaii all bills must pass through legislative committees on subject matter and then they must go to the judiciary committee and, perhaps, the finance committee before being enacted. The leadership of the house and senate assign bills to the committees and thus can manipulate their fate by assigning them to several committees or to a hostile committee. So in reality only a few people decide which laws will be passed.

Many bills originate with the administration and these bills are usually given priority consideration. The matter of priority is important because so many bills are introduced each session that it is impossible to hear them all. Bills with small constituencies most likely will be shelved unless the backers are influential. The passage of some bills is pretty much assured in advance no matter what takes place in a hearing. Capitol lobbyists get worried when a controversial bill is being heard and no members of the opposition (or only one) show up to testify. This usually means that the outcome was decided behind the scenes.

The governor is also a force in making policy because of the veto power and the ability to control appropriations that affect the various constituencies of the legislature. The governor, in particular, must be responsible for staying within the budget, whereas legislators may be more interested in bringing more projects and money to their home districts.

This process can provide more checks and balances to the legislative process than the take it or leave it process of direct initiative. But even here legislation can slip by that was not completely thought through. Last year's Traffic Cam law is a good example of a law that sounded good, but all the ramifications were not considered. It also ended up costing taxpayers a lot of money. A problem in Hawaii that has existed for years is appropriating money for construction of buildings but not appropriating money to equip or maintain them.

The principal problem with popular election campaigns, as well as initiative campaigns, is the media hype that now makes it difficult for voters to separate the wheat from the chaff. It is obvious that many people do not have a clue about many issues or candidates. They will probably depend on advertising and word of mouth to decide how to vote.

States that require full and timely disclosure of money spent on campaigns offer their citizens one of the best means of determining who is backing a candidate or ballot issue. The Ballot Issue Strategy Center Foundation gave California, Washington, Massachusetts and Illinois an “A” for having getting donor disclosure information to the people. Specifically mentioned as an excellent disclosure resource was the Cal-Access site which is a service of the California Secretary of State’s Political Reform Division.

It appears that states that are willing to put some money and effort into using the technology now available can do a good job in the modern age of I & R. Unfortunately many of the states with I & R were given “D’s” and “F’s” by the Foundation.

The phrase “double edged sword” has been used to describe initiative and referendum. Legislation has been passed by initiative that most of us would agree was outstanding; legislation that may never have been passed by a legislature because of special interest opposition. Many such laws dealt with environmental issues. In 1938 a measure to require sewage treatment was passed by initiative after a similar measure passed by the legislature was vetoed by the governor.¹² Others were on legislative concerns such as ethics, campaign finance laws or term limits or recall. One may not agree that these are all “good” laws, but most of us would agree that it is very difficult to get a legislature to restrict itself.

Legislation has been passed that is very controversial, such as to impose the death penalty, to allow legalized gambling, or to limit property taxes such as Propositions 13 and 5 did in California and Oregon. Oregon voters recently passed a constitutional amendment that required any state or local agency to pay 100 percent of the lost value of property that is caused by a regulation. It applied to all existing and future regulations. It gave the agency or municipality only 90 days to pay or repeal the regulation and allowed the property owner attorney fees. County governments said they would be bankrupted. The measure was overturned by a court decision.

In Hawaii we have had our own disagreements on constitutional amendments confirmed by the voters. A recent issue restricts marriage to a male and female. The

amendment establishing an Office of Hawaiian Affairs is being challenged on the basis that it is discriminatory. Our Supreme Court has ruled that anyone could vote for the OHA board, not just Hawaiians.

One of the most controversial uses of initiative and referendum is for taxation or revenue issues. In Oregon it is traditional for voters to vote down sales tax referendums. By now the legislature has given up on the idea. There have been cases where voters actually initiated legislation that would raise taxes. Those do not make the news. Any state considering a constitutional amendment to allow I & R may want to consider whether it is advisable to forbid its use for issues involving revenue. By doing so, it may be difficult to address many state issues since most involve money.

For instance, if Hawaii were to adopt some form of gambling either by direct legislation or by legislative action and the state depended on that gambling for income, would voters be able to repeal the legislation at a later date? If no initiative or referendum were allowed that affects revenue, that might be the effect. We noted earlier that initiatives have been proposed in Mississippi to eliminate gambling but so far have not been allowed on the ballot.

Perhaps a wiser way to limit initiatives that would affect spending or taxes would be to require that financial statements be part of the initiative process. The Budget Office would be delegated to work with the proponents of initiatives to analyze. The outcome of this study should be required to be displayed prominently, possibly as part of the ballot title, so that people cannot be misled by false claims from either side.

Should I & R be opposed because legislation that we personally do not like might be passed? Should we favor it because we might then be able to get legislation passed that we do want?

Should we oppose I & R because special interests will use it to have laws passed that they now cannot? Are most special interests inherently harmful to the public good?

If we now support the status quo will that status quo remain the status quo? How long will it be before the Democrats go the way the Republicans went in the 1950's? Then will those who are for and against initiative or referendum flip flop again? To decide to support or oppose direct legislation because of an immediate issue or power structure could prove to be as shortsighted or unrealistic as were the Republicans of Territorial Hawaii.

With initiative and referendum we could see a law passed that we fervently oppose. On the other hand, without initiative or referendum we may be powerless to repeal or pass new legislation that would undo what the legislature might do.

Even in the various state Leagues of Women Voters we find those for and against direct legislation. Leagues that have done recent studies on I & R have varied in their conclusions. Those in states which have some form of initiative or referendum continue to support it but recognize problems. They have made several suggestions on how to improve it in their states. In Connecticut and Minnesota, which do not have I or R, the Leagues opposed adopting it.

Whether one supports or opposes direct legislation, and especially initiative, seems to depend more on one's own personal philosophy on how government should function rather than on whether direct legislation is inherently good or bad. The old saying "it depends on whose ox is being gored" definitely applies here. As with most things in this world, nothing remains constant. In the days when I & R were being adopted by many states, the railroad magnates were the bad guys that the farmers were trying to protect themselves from. Now we have new bad guys. Your bad guys may not be the same as my bad guys.

Fortunately, really poor legislation of any type is usually argued in court, but only after a long expensive procedure. It does not take effect while cases are being adjudicated. A frequent criticism of initiative is that even well written measures will be challenged by someone. Legislation whether enacted by the legislature or the people can be altered or repealed. Some states allow immediate action by the legislature or governor but others have time limits set before a repeal or amendment is allowed.

The surprising fact is that no two states have the same methods of implementing direct legislation. It seems that each state reinvented the idea in its own image. But, on examining how the states differ, it appears that some procedures seem more workable than others.

Initiative for Amending the State Constitution

One of the more controversial issues is whether the state constitution should be subject to amendment by initiative. There has always been learned sentiment that a constitution should be a "framework" document which statute law complements. Therefore, the constitution should be concise and difficult to amend.

On the other hand, since many statutes derive legitimacy from the wording of the constitution, how can certain statutes be subject to initiative? For instance, if all land use laws derive ultimately from the wording of our constitution, how could people influence land use? If the people decided that the Attorney General should be elected or the Board of Education changed in some manner, how could this be done without constitutional amendments?

The Hawaii Supreme Court ruled that a Honolulu County ordinance that was passed by initiative and involved land use was not valid because our constitution designates land use decisions to an appointed Land Use Commission and then to the County Councils. The Court's decision was a blow to any use of County initiatives because so many issues in County government revolve around land use.

These rulings are interesting considering that our State Constitution says all power is reserved to the people and that the people have the right to petition their government. What does the "right to petition" really mean in historical context? Does it mean we should have advisory initiatives or referendums?

In Hawaii proposed constitutional amendments are referred to the people by the legislature or by the action of a constitutional convention. Such a convention must be okayed by the people in a plebiscite every ten years. In 1998 the people voted not to have the convention due to the expense, the controversial subjects that might be brought up, and the lingering disappointment about the previous constitutional convention.

States that allow amending the constitution by initiative set more stringent requirements than for statutes. Most political scientists favor a short basic document for a constitution. There is the fear that allowing amendments by initiative can make for a cluttered document that goes into too much detail.

The League of Women Voters of Oregon has taken a position strongly supporting initiative for legislation but thinks it should be discouraged for constitutional amendments. Their position statement recommends making constitutional amendment by initiative much more difficult than it now is. As mentioned previously, some states only allow initiative for constitutional amendments, not for legislation. Mississippi and Florida had years to examine how direct legislation worked in other states; they both opted for constitutional initiative only.

As with almost every aspect of direct legislation the good points and the bad points can be the same depending on one's point of view and experience with the subject. David Broder said that even though there was much criticism of direct legislation, no current office holder of either party in any of the states he covered argued for the abolishment of the initiative.

Careful study of the many forms of direct legislation would seem to be the wisest way for a state contemplating the issue to proceed. Other states have found it hard to amend their enabling legislation once enacted. There are many models to choose from and years of experience from which to learn.

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POINTS TO PONDER

Is there such a thing as too much democracy? Do we have too much now in Hawaii?

Can our state and local governments be compared to other states?

Would we wish to make any changes in our state or local governments*?

What changes would each of us like to see?

How could these changes be accomplished; would changes in statute or constitutional law be necessary?

In your opinion would direct legislation almost certainly needed to make such changes?

What changes would you not wish to see enacted by our state and local government?

Do you believe that these undesired changes most probably would be enacted by direct legislation?

If unwanted legislation is enacted by our legislature, how can we reverse it?

If unwanted legislation is enacted by direct legislation, how can we reverse it?

*Local government is included because state law supercedes county law and legislative action is needed in order for counties to have municipalities. State law also provides “umbrella” policy for county land use and other county functions such as revenue from traffic fines, etc.

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