



Initiative and Referendum: Background and Study Overview

As we are often reminded, the Founding Fathers created not a pure democracy but a republic: a representative democracy. Moreover, our government was in its early years, a fairly elitist body. Suffrage was far from universal. Many of the original states restricted voting rights to landowners; only after 1865 were former slaves enfranchised, and women did not get the vote until in 1920

Direct democracy originally implied the coming together of citizens to make their own laws by a vote of the majority, presumably they way it was in ancient Athens. But a relatively small proportion of the residents of Athens were voting citizens, and even there, direct democracy had a short life. . In this country “direct democracy” in its purest form was practiced in a few New England town meetings; the Founders understood that such a system would not be feasible for an expanding nation.

The Founders were realists. They recognized that a majority could itself become a tyranny. They constructed a system of checks and balances. This included a bicameral legislative body with representation in the House of Representatives based on population and direct election by the people. The original Senate represented the states, and its members were chosen by the state legislatures. Even the chief executive was not to be elected directly by the people. An independent judiciary was appointed by the president and confirmed by the Senate. With a few fumbles along the way, the system has worked pretty well.

In the last decades of the nineteenth century – a time noted for boss rule in cities and monopolies and trusts trampling on the interests of farmers and industrial laborers – several states in the west, first South Dakota, then Utah and Oregon, got enabling legislation through their legislatures allowing them to try a new approach to direct democracy, the initiative and referendum process. Essentially, this is a process whereby citizens can bypass the elected legislative body and get the measures they want to enact put on the ballot for a statewide vote of the people. According to Thomas E. Cronin (1) the push for direct democracy came from what he calls the “populist impulse” of the late nineteenth century which arose among farmers subject to an economic roller-coaster of prices and costs that left them feeling that bankers and railroaders, land speculators and business monopolies, not to mention government through its tax structure, were out to get them. State legislatures especially were seen as made up of men who were either corrupt or ignorant of their plight or both. Labor unions were quick to adopt the idea as well. (Some writers distinguish two motives for I&R. The early “populist” supporters, who wanted to bypass legislators, and “progressive” supporters who sought reforms through citizen participation. [Sabato (2), pp. 33-35]).

By the first decade of the twentieth century, the three states mentioned above and Oklahoma had initiative and referendum, although Utah did not use it until the 1950s. Fourteen more states added it between 1910 and 1920. The next addition was Alaska when it became a state. In the ‘70s, three more states adopted I&R legislation, and Mississippi added a somewhat restricted form in 1992. (Twelve of these states also provide for the recall of state officials by an initiative process.) As of 2002 [Richard J. Ellis (3)] usage of I&R ranged from one time by Illinois, which adopted it in the 1970s, to 318 times by Oregon. In all, as of the end of 2001, there had been 2002 measures presented to the voters of 22 states as initiatives. California, with 277 issues on the ballot since 1910, has gained the most notoriety because of the widely publicized tax cutting measures introduced in the 1970s [Broder (4)]. By the end of 2006, 24 states had initiative and 24, not all the same, had referendum (that is, the voters might be able to vote on measures directly, but could not introduce them).

Alabama has referendum in a way, in that the 1901 constitution is so constructed that it contains matters that would be simple legislation in other states. Since all amendments are subject to either a local or a statewide vote, this constitutes “referendum” of a sort.

Sooner or later, Alabamians will write a new constitution, and a decision will be made as to whether or not to include I&R provisions. The League of Women Voters of Alabama wishes to be prepared to have a say on the issue, hence this study: Is the initiative and referendum process a governmental tool that needs to be included in a new constitution, or are we better off without it? This study is intended to give us enough insight into the operation of the process elsewhere and the pros and cons that have been observed to enable us to take a considered and defensible position.

THE CASE FOR INITIATIVE AND REFERENDUM

Direct democracy in the form of the initiative and referendum process first became popular as a way to bypass unresponsive legislatures. Theoretically, one person or a few people could, by collecting the signatures of a substantial number of those who agreed with them, bring their cause, in the form of a statute or a constitutional amendment, up for a vote of the entire electorate. Depending on the enabling legislation (how long a time was allowed for collecting signatures, how many were required, etc.) this could accomplish the desired result in a shorter time than it would take to persuade legislators or elect those favorable to the cause.

Since anyone could initiate a petition drive to get an issue on the ballot, this was potentially a way for every citizen to participate in making the laws that would govern them. Everyday citizens were perceived to be more honest and less selfish than their elected representatives.

Governments can get distanced from the people. Direct democracy would allow the people who were intimately aware of their own needs to bring the solutions to them before the electorate for approval. The very existence of the possibility of solving a problem by the I&R process can jog a legislature into solving it on its own, within the checks and balances system that usually works well.

THE CASE AGAINST INITIATIVE AND REFERENDUM

One of the objections to the enactment of law by the initiative and referendum process is that laws so written often have consequences that are either unforeseen or ignored at the time of passage. For example, a number of the successful initiatives in recent years have cut property taxes without making any provision for the replacement of lost revenue, leaving the state to raise other taxes or cut services.

A process designed to give the average citizen access to government – direct democracy – can be and has been used by wealthy individuals or very powerful groups to enact laws strictly for their own benefit. This brings up the major question of the role of money in the process. This will be examined later.

Although many initiative-enacted laws end up in court, the process at its outset is a way of avoiding the checks and balances built into our three-part system. Judicial action after the fact can be costly and take years to resolve the issue.

IN REACHING A POSITION ON I&R THE LWVAL MUST WEIGH THE ADVANTAGES OF DIRECT DEMOCRACY AGAINST THE POSSIBILITIES OF ITS ABUSE.

Once in a while, there is a success story that can be told to show that the I&R process works as it should, but even a success story can have negative repercussions, as the following account shows.

In the late 1990s, Helen Hill, a resident of Oregon, learned that both she and the man she had assumed to be her biological father were adopted. Her father, who had grown up in an Italian-

American family, learned that his birth family was actually Native American. Learning late in life that he was not at all who he had thought he was apparently had a devastating effect on him. Helen, already determined to find her own birth mother, used her inheritance from her (adoptive) father to finance her initiative to require that any adopted person could obtain his/her original “uncorrected” birth certificate. The measure got on the ballot, passed – and caused considerable distress to an older generation of birth parents who had been assured that their secrets were eternally safe. The system worked, but there were unforeseen consequences – unforeseen at least by the initiator of the act.

It seems likely that a convention or commission charged with writing a new constitution for Alabama will be asked to consider including a provision for the I&R process. In order to decide whether or not to support its inclusion, we must look not only at the theoretical advantages of the process but also at the way it might operate in practice. Following is a list of questions about the details of its implementation and some comments on how it has worked in other states.

FACTORS TO BE CONSIDERED

1. Who may initiate an initiative?

Theoretically, any citizen of the state. In practice, getting beyond the mere idea is complicated, time consuming, and costly.

2. How many signatures will be required to get a measure on the ballot?

The number of signatures required to get a measure on the ballot is usually a small percentage of the voters. It is usually calculated as a percentage of those who voted in the last general (presidential or gubernatorial) election. The number is usually ten per cent or less. A low percentage makes meeting the requirement easier; a high percentage may be taken as a way of preventing frivolous issues or those of very restricted application from getting on the ballot.

3. Will initiatives be presented only on general election ballots or will special elections be allowed?

Usually, referenda appear on the ballot of the next statewide election. Students of the process do not agree on how much difference the number of items or their placement on the ballot makes, but all agree there is “drop off;” that is, voters seem to get tired and fail to vote on items at the end of the ballot. In states (e.g., Oregon and California) which may have several referenda on any given ballot, voters may get bored with the process and not bother to mark those items one way or the other.

4. Who will collect the signatures?

This is the \$64, 000 – or more – question. Theoretically, signatures are collected by volunteers who are “true believers” in the cause. This is almost never the case. Most states specify a time limit within which the signatures must be collected, a period that may be as little as three months. The number of hours required is great, and there is usually a requirement that the geographical distribution of signers approximate the distribution of population in the state – and volunteers may not be so distributed. That means that almost any person or group that hopes to put a measure on the ballot must hire professional signature collectors. Because of the large number of initiatives undertaken in the western states in recent years, several thriving businesses have sprung up to do just that. Signature collectors are paid by the signature, usually at least a dollar apiece. A catchy slogan may mislead the prospective signer, or the persistence of the collector may lead someone to sign just to get away from him or her. Who wouldn’t sign a proposition that insures everyone the right to a good job – unless he had reason to suspect it was just a union –breaking measure. Several states tried to require hourly payment for collectors instead of per item payment, but, comparable to attempts to cap campaign

contributions, this has been ruled by the Supreme Court to be a muffling of free speech. There are a number of cases (especially in Colorado, where a few developers used this method) in which a single wealthy individual simply bought a place on the ballot by hiring an efficient collection agency. Other states limit signature gathering to their citizens, but that does not prevent paid signature gathering.

5. Will any legal decision as to the legality and constitutionality of the measure be required before it is put on the ballot?

Most states require some kind of vetting of the proposed initiative by a lawyer, a state agency, or a court to insure that the measure is constitutional and does not break existing laws that it was not intended to change. Often the ballot summary undergoes review as well. Here the goal is to insure that voters can understand the true intent of the measure and what a yes or no vote represents. Nonetheless, many referenda that are passed by the voters wind up spending a lot of time in court before being implemented – if they ever are.

6. What rules should apply to contributions/contributors?

As noted above, it is as difficult to place restrictions on the financing of initiatives as it has been to control campaign financing. Nevertheless, if popular perception of need rather than what some individual or interest group can afford is to be the reason for allowing I&R, a solution to the money problem needs to be found. Most states do have disclosure procedures, but often large gifts made to finance last day media blitzes are not reported until after the election, with the result that voters find out they voted for the interests of some group they never intended to support.

7. How is the legitimacy of signatures to be verified?

States do attempt to verify that the signatures on an initiative do belong to actual registered voters living in the places they claim as residences. This is obviously a task of substantial magnitude, especially if there is no statewide computerized data base of voters. Verification is an obviously necessary precaution. Another issue to be determined is how to pay for the verification process.

I&R IN ALABAMA

The above discussion leads to some questions Leaguers will want to consider before taking a position on I&R. They include the following. Others may come up as the study proceeds.

1. Is the “standard operating procedure” of the Alabama Legislature such that the will of the people is often thwarted by the inability to get needed legislation passed?
2. Is I&R a feasible alternative to working through a legislative delegation to get a measure considered?
3. Can the pitfalls that are apparent in other states’ systems be avoided? These include the problems mentioned above with respect to costs, volunteer versus professional signature gatherers, time constraints, constitutionality, and wording.
4. We often complain that the legislature is controlled by special interests. Can a system of I&R be constructed that will be less susceptible to such control?

5. Can I&R protect the citizens of the state from both potential tyrannies, majority and minority interests?

BIBLIOGRAPHY

(1) CRONIN, THOMAS E., *Direct Democracy: The Politics of Initiative, Referendum, and Recall*, Harvard University Press, Cambridge, MA, 1999

(2) SABATO, LARRY J., HOWARD R. ERNST, and BRUCE E. LARSON Editors, *Dangerous Democracy? The Battle over Ballot Initiatives in America*, Rowman and Littlefield Publishers, Lanham, MD, 2001

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(3) ELLIS, RICHARD J., *Democratic Delusion: The Initiative Process in America*, University of Kansas Press, Lawrence, KS, 2002

(4) BRODER, DAVID S., *Democracy Derailed: Initiative Campaigns and the Power of Money*, Harcourt Inc, New York, 2000

FURTHER READING

These resources are suggested for further reading about I&R. The first three are referenced by other papers in this packet. All are included here to provide a consolidated list.

SHAUN BOWLER AND TODD DONOVAN, *The Initiative Process*, Pages 129-156 from *Politics in the American States: A Comparative Analysis*. Edited by Virginia Gray and Russell L. Hanson. 8th Edition. Congressional Quarterly Press. 2004

NATIONAL CONFERENCE OF STATE LEGISLATURES: Initiative, Referendum and Recall. Available on line at: <http://www.ncsl.org/programs/legismgt/elect/initiat.htm>

ELIZABET R. GERBER, *The Logic of Reform: Assessing Initiative Reform Strategies*. Chapter 5.

CUMBERLAND LAW REVIEW, 2002-2003. Vol 33 no 2. The whole addresses how to reform const, and what needs changing.

JESSE BROWN, *Alabama's Legislative Article: Content, Comparison, and Pescription*, pp 594-596
Note about the author -- Brown teaches at Athens College/University. He is regarded as someone with experience in examining the Alabama Legislature. Brown's work might be useful because of his familiarity with Alabama.