

Statewide Ballot Initiatives: Is it Time for a Change? **By Rep. Mike Ball**

It doesn't take a political scientist to sense the swelling distrust and disillusionment toward the political process and elected government officials. Many citizens are convinced the process is controlled by big-moneyed special interests having little concern for the common person with every day struggles. It is within this context that an increasing interest in the initiative process, one of three basic forms of direct democracy, has emerged. Direct democracy is a general term that applies when anything is placed on a ballot other than the election of a candidate. Initiatives, referendum, and recall are all separate and distinct forms of direct democracy. A brief understanding of all three would probably be helpful before we begin our examination of the initiative process.

Recall is the least common of the three basic forms of direct democracy. It is the means by which elected officials can be removed from office before the end of their term. Citizens collect the required number of signatures to call a popular vote on whether to remove the official from office. Californians utilized this process in 2003 when they removed Governor Gray Davis from office. It marked the first time a statewide official in California faced a recall election since 1911, when the reform-minded Governor Hiram Johnson put the process in place. It is not uncommon for local officials in California to be removed via the recall process. (Recall in California)

Referendum is the most common of the three, practiced throughout the United States in three basic forms: legislative referendum, advisory referendum, and popular referendum. All of the states allow legislative referendum in which the legislature or

other public official can submit a proposition to a vote of the people. With the exception of Delaware, all of the states require a referendum to amend their respective constitutions. Advisory referendums are items placed on the ballot by the legislature or a public official to gauge popular sentiment, without requiring legislative action in response to the results. Popular referendum, available in 24 states, is when citizens are allowed to collect petitions and accept or reject specific legislation previously enacted by the legislature.

This paper will focus upon the third form of direct democracy, the initiative process. In contrast to referendums, initiatives are not limited to allowing voters to approve or reject previous legislative action because they are originated by means of a citizens' petition. There are two basic categories of initiatives, direct initiatives and indirect initiatives. A direct initiative is when a ballot measure is originated by the people by petition and placed directly on the ballot, while an indirect initiative must be submitted to the legislature before being placed on the ballot (Waters, I and R for Alabama). If a proposition originates from a petition by the people, it's an initiative; if it originates from a legislative body or public official, it's a referendum. The initiative process gives more power to citizens because the referendum process limited to only allowing voters to respond to legislative action or inaction.

The concept of popular sovereignty is not new to political thought in the United States. Its traditions are evident throughout the history of our nation. In New England during the 1600's, settlers placed issues and ordinances on the agenda for debate, followed by a vote in town meetings. A proponent of popular sovereignty, Thomas Jefferson wrote, "Men by their makeup are naturally divided into two camps: those who fear and distrust the people and wish to draw all powers from them into the hands of

higher classes; and those who identify themselves with the people, have confidence in them, cherish and consider them the most safe and most honest, although not the most wise repository of the public interest.” (Jefferson)

The founding fathers of the United States did not create a democracy, but a republic, where the nation’s leaders derived their power from the approval of the people. While there was hope that the actions of the leaders would reflect the will of the people, there was concern among them that the chosen rulers would become consumed with power and cease to act in the interest of the people. It is because of this concern that a system of checks and balances was placed upon the federal government, dividing power among branches of government, in addition to provisions limiting the powers of the federal government.

Although it is apparent the founding fathers of our nation believed political power should rest with the people, they did not implement direct democracy into the Constitution of the United States. The initiative process was not a viable option to empower the people on the federal or even the state level, largely because transportation and communication limitations in combination with a mostly illiterate citizenry during the first century of our existence as a nation. Those limitations began to disappear as the 20th century approached.

A groundswell of interest in the initiative process emerged in the late 1800’s and early 1900’s as the populist movement grew from widespread dissatisfaction with government controlled by wealthy special interest groups. Reforms advocated by the populists included women’s suffrage, secret ballots, direct election of U.S. Senators, recall, primary elections, and the citizen initiative process. Because many of the reforms

were blocked by state legislatures, the populists believed the key to implementing them was in establishing the initiative process. In 1898, South Dakota, copying parts of the 1848 Swiss Constitution, became the first state to implement a statewide initiative referendum process. (Waters, Handout)

There are three distinct periods of interest in statewide initiatives during the 20th century. A period of great interest in the process occurred between 1900 and 1918. Utah, Oregon, Montana, Oklahoma, Missouri, Maine, Michigan, Colorado, Arkansas, California, Arizona, Nebraska, Idaho, Nevada, Ohio, Washington, North Dakota, and Massachusetts followed South Dakota by adopting the initiative process. By 1918, nineteen states had adopted the initiative process. Proponents of the initiative movement were not very successful in the southern and east coast states, largely because of the concerns by powerbrokers that masses of blacks, immigrants, and lower classes would utilize the process.

During this period in Delaware and Illinois, an advisory referendum was held in which voters approved the initiative process by a large margin, but the respective legislatures refused to obey the mandate. Also during this period New Mexico implemented popular referendum. Mississippi voters twice approved the initiative process, although opponents prevented its implementation. We will later delve deeper into Mississippi's struggle for the initiative. In Wyoming, 86% of those voting on a referendum to adopt the initiative process approved, but it failed because of a provision in the state constitution requiring a majority of all those voting in an election, making blank votes count on the "no" side. Of the 38 popular votes proposing whether to adopt the

initiative process in various states between 1898 and 1918, only in three instances did those voting to support the proposal fail to outnumber those in opposition.

During the period between 1904 and 1940, a total of 790 statewide initiatives were placed on the ballot. In 1904, Oregon became the first state to pass a statewide initiative, a direct primary nominating convention law. Oregon has remained the most prolific of all the states in utilizing the initiative process, followed by California, and Colorado. During this growth period, initiatives placed on the ballot had success rate of about 40%, although during the 1920's the rate dropped to 23%. This drop in initiative activity could have been a reflection of the general feeling of satisfaction due to the prosperity enjoyed during the roaring twenties. During the 1930's, initiative usage and success rates returned to pre-1920 levels.

The initiative movement seemed to lose momentum and during the period ranging from 1941 through 1970. Interest in the initiative process waned as the nation recovered from the Great Depression and national threat of World War II loomed. Between 1941 and 1970 a total of 346 statewide initiatives were placed on the ballot, with the 1960's ranking as the decade with lowest number of statewide initiatives. Although fewer statewide initiatives were placed on the ballot during this period, the success rate of ballot initiatives remain constant at about 40%.

While the initiative movement seemed stagnant during this period, there were some advances. Upon being granted statehood in 1959, Alaska adopted a state constitution that allowed the initiative process for statutes. In 1968 Florida and Wyoming adopted the process followed by Illinois in 1970.

A new period of interest in the initiative process has emerged during the 1970's, a period of disillusionment fed by the Vietnam War and the Watergate scandal. In 1977, Washington DC adopted the initiative process with a vote of 83%-17%. In 1978, when California voters approved Proposition 13 slashing property taxes 60%. The Proposition 13 vote seemed to awaken citizens to the potential of the process to have substantive change and lead to a marked increase in the use of the citizen initiative process during the 80's and 90's.

Between 1971 and 2000 citizens placed 861 statewide initiatives on the ballot, passing 45% of them. Not only has the number of initiatives has increased during each decade, but the approval rate has increased as well. During the 1990's statewide initiatives on the ballot totaled 389 making it the most active decade for initiatives with an approval rate of 48%, the highest ever. (Waters, History)

Five states, Oregon, California, Colorado, North Dakota, and Arizona have been active in utilizing the process and account for over half of all initiative activity; although, the passage rate of ballot initiatives in those states is less than 40%. An explanation for the activity in those states could be the petition requirements for those states. Of the five, Colorado has the lowest threshold in the number of signatures required, with 5% of those who voted in the last Secretary of State election. Arizona is on the other end of the spectrum in signature requirements, with 15% of gubernatorial voters for a constitutional amendment and 10% of gubernatorial voters for a statute (Waters, Primer). While the five states may have differing requirements to get an initiative on the ballot, none of them have a geographical distribution requirement for the petition signatures, leading one to

suspect that geographical distribution requirements may be one way to prevent one overuse of the process.

The United States differs from most modern democracies in that we have never held a national election on a question of public policy. The United States Constitution does not provide the opportunity for initiatives in federal elections; however, almost all of the European nations as well as Canada, Australia, and New Zealand have referred major policy issues to voters in recent years. Great Britain utilizes regional referendums rather than national elections in an effort to decentralize the scope of its national government. In spite of the tendencies of other most modern democracies toward national referendums, the initiative and referendum process in the United States is limited to state and local governments. One should note that the initiative and popular referendum process is more common on the county and municipal level than the state wide level. Almost all of the major cities practice it in some form. (Donavan)

The citizens of the United States consistently support the concept of ballot initiatives. Since 1898, there have been 47 statewide popular elections on adopting the initiative process. Of those voting on the issue in the elections, 62% have given approval to the process, in most of the elections by a margin of over 2 to 1. Those opposing the process outnumbered those voting for approval in only 3 of those 47 elections. (Waters, History)

A Rasmussen Research Portrait of America poll was conducted from 1999 to early 2000 in which voters in all of the states except Maine were asked, "In many states, citizens can place initiatives on the ballot by collecting petition signatures. If a majority of voters approve the initiative on Election Day, it becomes law. Is this a good idea?"

The poll, with a 3% margin of error, yielded surprising results. In every state, voters approved the initiative process 2 to 1 over those opposing it. It is also relevant to note that in states with initiatives, support was consistently higher and opposition consistently lower than in non-initiative states. In Alabama, 57% percent of respondents favored the initiative process while only 18% opposed it (Portrait of America).

In a nation such as ours where political power is believed to ultimately lie in the will of people, one would expect that a concept with so much public support would be easy to enact, but that is not the case. The legislative process often allows interest groups to override public support. The traditional legislative process has many steps in it that tend to make the passage of legislation difficult requiring broad support in the governing body. Preventing the passage of legislation is usually much easier, requiring the opposition of only a few key legislators, such as the presiding officer, the chairman of the appropriate committee, or enough members to sustain a filibuster. Having no desire to surrender their power to block legislation adverse to their interests, well-funded special interest groups team with legislators to oppose the initiative process.

One reason for the interest group opposition could be that the decentralizing effect of the initiative process tends encourage citizen interest groups of citizens rather more than economically-motivated special interest groups. Frederick Boehmke has conducted extensive research on the effect of direct democracy upon state interest groups. His findings reveal that the initiative process can lead to an increase of 17% in interest group population; however, citizen's interest groups show an increase of 29% while economically motivated special interest only increase 12%. Because citizen interest

groups are traditionally under represented, their disproportional increase could lead one to conclude that the initiative process leads to a more balanced representation (Boehmke).

There are concerns that the initiative process can lead to passage of laws that cannot pass constitutional muster. About half of the initiative states require some form of review for form, language, and constitutionality of a measure before the petition is circulated. The review is most often only advisory and is made by the Secretary of State, Attorney General, or a legislative council. Another method to review the initiative could be a requirement that the sponsor of be directed to an agency such as the Legislative Reference Service, the Alabama Law Institute, or other non-partisan legal entity for assistance in preparing the initiative. It is important the safeguards be placed in the initiative process to minimize the prospect that the judicial branch would override successful initiatives on constitutional grounds. Of course, no system is perfect and it is not uncommon for laws enacted via traditional legislative methods to be declared unconstitutional.

There are also concerns about the economic and fiscal effects of the initiative process. Research by John Matsusaka examined the economic and fiscal effects of the initiative process by comparing states that have it and those who do not. He concludes that states with the initiative process have lower combined state and local government spending than the non-initiative states and the spending in the initiative states is systematically decentralized. Local government spending is higher and state government spending is lower in the initiative states. It is clear that when given the initiative, voters have a preference for spending decisions to be made close to home. He found evidence that indicates initiative states tend to raise more revenue by charging those who utilize the

government services. Matsusaka also concludes that initiative states with lower petition signature requirements have a greater difference in fiscal outcomes with the purely representative states. (Matsusaka).

In 2001 S. Brock Bloomberg expanded Matsusaka's work to consider if voters used statewide initiatives to allocate government resources in a more productive manner. He discovered that initiatives can lead state to more efficient economies, with findings to suggest that states with initiatives waste between 20 – 30 percent fewer resources. He also discovered that initiatives accelerate economic convergence by about a third. (Bloomberg).

Another concern is the effect of direct democracy upon minorities. Many in Alabama, with a large African-American population and a history of racial discrimination, should be especially concerned about the effect of the initiative process upon rights of minorities. This concern seems ironic when placed in the historical context that during the early 1900's a primary motive of the ruling class opposition to initiatives in the East and South was to keep minorities disenfranchised. It was Alexander Hamilton's argument that tyrannical tendencies of the majority could be controlled by "enlargement of the orbit" (Hamilton), or spreading the process over a large geographical territory. James Madison warned that smaller areas, "more frequently will a majority be found of the same party" and "more easily will they concert and execute their plans of oppression" (Madison, Federalist 10) and agreed with Hamilton's suggestion to spread the process over a large geographical territory writing that, "society itself will be broken into many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority" (Madison, Federalist

51). The argument in favor of spreading the initiative process over a large geographical area to protect minorities was reinforced by a study conducted by Todd Donovan and Shaun Bowler in 1998. The results strongly suggest that initiative states are not likely to pass legislation adverse to minority groups and that adverse initiatives are more likely to occur on the local level.

In a study conducted for the Public Policy Institute of California, Zolton Hajnal and Hugh Louch concluded that in California initiative votes over the past 20 years where nonwhite voters indicate a clear preference, they voted on the prevailing side 59% of the time. A statewide survey conducted in January 2000 by Mark Baldassare for the Public Policy Institute asked if citizen's initiatives or the governor/legislature were the best way to address California's problems. Responses to the poll question indicated that 76% of Whites, 73% of Asians, 83% of Latinos, and 92% of African Americans preferred citizen's initiatives. Minorities do not often vote as a bloc on initiative; however, when they do vote as a bloc they usually win, because a substantial number of initiatives are decided by a margin of less than 10%. While California's initiative process is one of the most active in the nation, only 35% of initiatives placed on the ballot actually pass (Hajnal).

California has a direct initiative process that allows citizens to place both statutes and state constitutional amendments on the ballot, without submission to the legislature. Before a petition for an initiative is circulated, it must be presented to the Attorney General's Office. The Attorney General receives a fiscal analysis from the Department of Finance and the Legislative Budget Committee and prepares a title and a 100-word

summary to be printed on the top of each petition. After paying a \$200 filing fee the petition is circulated. After the initiative is filed, it cannot be altered.

A petition for a constitutional amendment must have at least 8% of the number of ballots cast in the last Governor's race, a statute requires at least 5%, a relatively low threshold when coupled with the lack of a geographical distribution requirement for the signatures. Petitioners must gather the required signatures within 150 days. County Clerks validate the signatures and may use random samples of at least 500 or 3% of the signatures whichever is greater. If an initiative conflicts with another initiative on the same ballot, the one receiving the most votes prevails. (Simmons)

There is also a requirement that an initiative can only deal with a single subject. The purpose of the single subject rule is to prevent "logrolling" by inserting multiple unrelated items within an initiative in an attempt to obtain a majority vote. Logrolling is undesirable because it tends to confuse voters and makes the choices murky.

According to Robert Hertzberg, Speaker of the California Assembly, the initiative process has evolved into a virtual fourth branch of government in California. In January 2002, Speaker Hertzberg authorized a commission to examine California's initiative process and recommend ways to improve upon it. The commission recommended the establishment of an indirect process in addition to the existing direct process. The commission also recommended improvement in initiative proponents' financial disclosures, tightening the single subject rule, and a requirement that petition signature gathering be permitted in large public spaces such as shopping centers and large retail establishments. (Speaker's Commission)

In contrast with California's established and active initiative process is Mississippi's process. In 1912, Mississippi voters who supported the process outnumbered opponents 65% to 35%, but it was not implemented because of a requirement for a majority of those voting in the election rather than a majority of those voting on the issue. Two years later, 69% of Mississippi voters were able to narrowly overcome the supermajority requirement and implement a process that only needed 7,500 signatures to place a constitutional amendment or statute on the ballot. Legal challenges led to a 1917 ruling by the Mississippi Supreme Court upholding the initiative and referendum amendment; but the triumph of the initiative proponents was short-lived as the court reversed itself in 1922 finding it to be "unconstitutional and void". Attempts to have the court revisit the issue have since proven unsuccessful.

In 1992, Mississippi finally joined the ranks of those with an initiative process, with voters approving 70% to 30%. The process adopted in Mississippi is one of the most stringent allowing only for indirect constitutional amendments. A signature requirement 12% of the all the voters in the previous gubernatorial election, geographical dispersion by congressional district, and a twelve-month time limit, does not make getting an initiative on the ballot either simple or easy. The process is also limited to constitutional amendments and cannot change the Mississippi Constitution's Bill of Rights, the Mississippi Public Employee's Retirement System, right to work laws, or the initiative process itself. Additionally, there is an additional requirement that the majority vote approving the initiative must be at least 40% of all votes in the election, resulting in ballot drop off giving favor to the no votes on an initiative (Mississippi's Initiative).

In 1995, after a term limits initiative was narrowly defeated, the Mississippi Legislature passed HB 472 with the effect of virtually insuring that such a measure would never reach the ballot again. The already stringent requirements were made even tighter, making it almost impossible to collect enough signatures to move an initiative through the system. The new law prohibited citizens from other states from circulating petitions, restricted signature gatherers from receiving pay based upon the number of petitions circulated or signatures gathered, and authorized the Secretary of State to refuse to file the petition if “one or more signatures” were found to be obtained in conflict with the law (Garriga). While there are still legal questions surrounding the more restrictive law, Mississippi voters were able to vote again on the term limits measure in 1999, utilizing signatures obtained before HB 472 took effect. The voters rejected the term limits proposal. Opponents of the initiative process have been successful in their efforts to restrict its use.

Ohio has been an initiative state since 1912, the result of a constitutional convention. The process allows for constitutional amendment via direct initiative and statutes via indirect initiatives. To qualify an initiative a committee of 3 to 5 people must be designated by the petitioners. A written petition signed by 100 electors is submitted to the Attorney General who reviews the full text and summary of the initiative. A copy of the initiative, summary, and Attorney General’s certification is then filed with the Secretary of State, who draws up the petition for circulation. The petition circulation period has no time limit.

In order to place a constitutional amendment upon the ballot, the petition must have the signatures of equal to 10% of the number of voters who voted in the previous

gubernatorial election. Ohio's process also has a geographical requirement. Signatures must be gathered in 44 of the 88 counties. In each of the 44 counties signatures must total 5% of the number of gubernatorial votes in the previous election in that county. When enough signatures are submitted and verified the constitutional amendment is then placed on the next ballot. The signatures must be submitted at least 90 days before the election.

For a statutory initiative the petition initially must contain 3% of previous gubernatorial voters with geographical distribution of 1 ½% in 44 of the 88 counties. When the signatures are submitted and verified, the measure is submitted to the state legislature, who may approve or reject it. If the legislature does not act up it, proponents may circulate a supplementary petition with the same requirements as the initial petition. After the supplementary petition is submitted and verified, the initiative is placed on the next ballot. (Blackwell)

Ohioans have proven to be judicious in their use of the initiative process, even though the requirements to place a measure on the ballot do not appear to be overly restrictive in comparison with other states. During the 20th Century 63 statewide initiatives were placed on the ballot in Ohio, but voters have only approved 16, an abnormally low success rate of only 25%. One explanation could be that many of the statutory initiatives that are likely to pass never make it to the ballot because are acted upon by the legislature first. Although reluctant to pass initiatives, 66% of Ohioans believe initiatives are a good idea and only 18% do not, according to the previously mentioned Portrait of America Poll completed in 2000 (Portrait of America). Successful Ohio initiatives include granting counties home rule, a 10 mill property tax limitation, a

sales tax prohibition on food, the elimination of straight party voting, term limits on certain elected officials, and a prohibition on wholesale taxes on carbonated non-alcoholic beverages.

We have discussed the initiative process and have examined differing applications of it in three culturally diverse states: California, Ohio, and Mississippi. While the process has obviously had a major impact upon the state government in California, its overt effects in Ohio and Mississippi appear minimal. While some of the effects of the initiative process are evident and quantifiable to some extent, there are latent advantages that are difficult to measure.

Among the most important of the hidden effects of the initiative process is the impact its very existence has upon the legislature. In his address to the Ohio State Constitutional Convention in 1912 Theodore Roosevelt explained, "I believe that the initiative and referendum should be used, not as substitutes for representative government, but as methods of making such government really representative. Action by the initiative or referendum ought not to be the normal way of legislation; but the power to take it should be provided in the constitution, so that if the representatives fail truly to represent the people on some matter of sufficient importance to rouse popular interest, then the people shall have in their hands the facilities to make good the failure." (Roosevelt)

A well-formulated initiative process can be utilized to encourage, rather than undermine, legislative action on issues of concern. An indirect initiative process with a provision requiring legislative action after a number of preliminary signatures could actually empower, rather than diminish, the ability of the legislature to address politically sensitive issues. As he encouraged the Ohio Constitutional Convention to adopt elements

of direct democracy, Theodore Roosevelt made evident his support for the empowerment of state legislatures when he told the delegates, “Give the legislature an entirely free hand; and then provide by the initiative and referendum that the people shall have power to reverse or supplement the work of the legislature should it ever become necessary.” (Roosevelt)

In addition to its effects upon the legislature, consideration should be given to the potential of the initiative process to generate interest and involvement of citizens with issue-oriented political activity. A traditional political campaign usually revolves around the personality, general ideas, and values of a candidate. Ballot measures are more likely to yield substantive discussion of an issue during both the petition phase and the election phase. In addition to the encouragement of issue oriented political dialogue, the likely consequence of an initiative is not as difficult to predict as when electing a candidate. Voters can only guess what a candidate will do, if elected. A ballot measure allows voters greater opportunity to know what law will be enacted (or not) as a result of their vote. In addition, there is evidence that ballot initiatives improve voter turnout (Tolbert). Having the opportunity to contribute to the implementation of substantive change can lead to improvement in the morale of a skeptical and often disillusioned electorate.

In 2002, a task force appointed by the National Conference of State Legislatures studied the initiative process and made several recommendations for reforms to make it more flexible and more transparent. As one would expect from an organization representing state legislators, the NCSL does not support the implementation of the initiative process in non-initiative states; however the study thoroughly examined the problems that have arisen in the states that actively utilize ballot measures. The reforms

recommended by the task force report could alleviate many of the concerns expressed by opponents.

The task force supported changes to the process that first provide legislatures the opportunity to act upon an issue, placing an initiative on the ballot as a last resort. The use of advisory ballot measures was suggested in order to allow legislatures some degree of flexibility in addressing the issue. There was a strong preference for the indirect initiative process over the direct initiative process. It was also hoped that states adopting an indirect initiative allow an opportunity for the legislature to offer an alternative for the voters to consider.

Statutory initiatives were preferred to constitutional initiatives. If a constitutional amendment process is adopted, a statutory process should also be adopted with a lower threshold to encourage statutory changes rather than constitutional amendments. The task force recommended that the single subject rule be applied. A draft, summary, and title of the initiative should be prepared by the legislature or a state agency and a fiscal statement attached.

Before gathering signatures, proponents should be required to file a statement of organization. To prevent fraud there should be a prohibition against pecuniary gain for signing or not signing a petition in addition to a signed oath by the circulators that the circulator witnessed each signature on the petition and that to the best of the circulator's knowledge, the signatures are valid. The task force also recommended that the circulators reveal whether they are paid or volunteer. A reasonable time limit and geographical distribution of the signatures was also preferred.

The task force recommended that states should also make the disclosure requirements for initiative campaigns consistent with the disclosure requirements for candidate campaigns. Public funds should not be used to support or oppose a ballot measure. Initiatives should only be voted on during a general election and a procedure should be adopted in the event there are two conflicting initiatives in the same election cycle. (Initiative and Referendum in the 21st Century)

Should more non-initiative states adopt the process? If there is enough interest and support for the process among the electorate, the answer is a resounding, “yes”; however, interest and support for the initiative process is a reflection of confidence in the legislature’s willingness to address issues of major importance to them. If citizens do not believe that the existing legislative process in their state yields results that represent an adequate reflection of their will, they need the power of the initiative. In order to receive trust from the people, legislators must first demonstrate willingness to give trust to the people and give them the power of the initiative.

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