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A Century Later—The Experiment With Citizen-Initiated Legislation Continues

By M. Dane Waters

It was 100 years ago last November that the statewide initiative and popular referendum processes were first adopted in the United States. A vital and thriving example of citizen participation and self-governance, the initiative process has become one of the most important mechanisms for altering and influencing public policy at the local, state, and even national levels. Changes made possible include women's suffrage, the direct election of US senators, direct primaries, term limits, tax reform, and much more. In 1998 alone, citizens utilized the initiative process to voice their opinions on affirmative action, educational reform, term limits, taxation, campaign finance reform, and environmental issues.

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Initiatives and Referenda, 1998: A Little Something for Everyone

As in previous elections, citizens used the initiative process in 1998 to place issues on the ballot that elected officials typically had been unwilling or unable to deal with. The issues addressed ranged across the political spectrum. There were initiatives that limited government as well as ones that expanded it, ones that increased taxes and ones that lowered them, ones that empowered government and ones that empowered citizens. Ballots in 1998 had a little something for voters of every political persuasion.

Although most initiatives and referenda appear on general election ballots, in each election cycle a few are decided in primaries. During the 1998 election cycle there were five initiatives on California's primary ballot, two of which deserve special attention: Propositions 226 and 227.

Proposition 226, commonly referred to as the “paycheck protection” initiative, was designed to limit the use of mandatory union dues for political purposes. It would have required unions to obtain an annual authorization from their members before dues could be used for political campaign activities. Strongly supported by Republicans who had wanted it passed in time to stop the unions from spending in the 1998 general elections and the 2000 presidential elections, it had tremendous support among the voters in early polling. However, through a major “get-out-the-vote” effort by the unions, who used over \$23 million (financed by mandatory dues) to defeat the measure, it failed 53 to 47%.

Proposition 227, another controversial initiative, called for all public school instruction to be in English. It was conceived and championed by Ron Unz, a Silicon Valley self-made millionaire who had seen first-hand the lack of qualified candidates to fill the abundant jobs in the high-tech industry. He attributed this shortage to the fact that many immigrants who might possess the technical skills he was looking for weren't able to excel academically in the United States because they were being taught only in their native tongues. He galvanized the immigrant population in California, as well as business leaders, and won easily, 61 to 39%. This strong success spawned grassroots activities in other states, and will most likely lead to similar initiatives.

The Number of Initiatives Was Down in '98

In the 1998 general election there were 235 statewide ballot questions in 44 states. (The exceptions were Connecticut, Delaware, Kansas, New York, Texas, and Vermont.)

The 55 initiatives on the ballot this past year represented a decrease of 35% from 1996. The number of initiatives considered in 1998 was the lowest in a decade as the result of three factors. First, fewer people could get initiatives on the ballot because state legislatures had made the process more difficult to use. Second, fewer people were inclined to use the process because of the tremendous likelihood their measure would end up in litigation. Third, many potential initiative propo-

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nents waited for the mid-term election results to decide whether they should push their reforms through state legislatures or turn to the ballot in 2000. In all, voters adopted 35 of the 55 proposed initiatives in 1998, for a passage rate of 64%.

Besides initiatives, popular referenda—in which a law passed by the legislature is set before the voters, who can reject it—are permitted by 24 states. In 1998, there was a total of six such popular referenda in five states, the same number as in 1996. Of these, half were adopted—that is, the voters rejected the laws previously passed by the legislature.

There were 174 legislative referenda on statewide general election ballots in 43 of the 49 states that allow them. The voters passed legislative referenda at a much higher rate than initiatives—139 of the 174 legislative referenda were adopted, a passage rate of 80%. In all, voters approved 177 of the 235 statewide ballot questions (initiatives, popular referenda, and legislative referenda)—a passage rate of 75%. And an unusually high percentage of initiatives and popular referenda were adopted in the general election—62% compared to 49% in 1990 and 1992, 40% in 1994, and 41% in 1996. The adoption rate was also well ahead of the 100-year average (40%). The 1998 election also set a record for the most money ever spent on initiative campaigns, with estimates as high as \$300 million, of which \$200 million was spent in California alone.

Winning Propositions

The big winner among all these efforts was the medical use of marijuana; it had a clean sweep. The citizens of Alaska, Nevada, Oregon, and Washington voted to allow its use for medicinal purposes. Citizens were also successful in striking down a law adopted by the Arizona legislature that would have prohibited the medical use of marijuana. With these successes, there is no doubt that this movement is headed to more states in 2000.

Another item that passed was measure I-200 in Washington State which effectively ends the use of racial preferences in the hiring of state workers, the issuance of state contracts, and the admission of students to state-funded colleges and universities. This win was a major victory for conservatives. Coupled with California's 1996 ban on the use of racial preferences, it guarantees that the issue will continue to be hotly debated elsewhere.

Term-limit initiatives were passed in Alaska, Idaho, Colorado, and Nevada. The term-limit movement's new strategy, called the "Self Limit Law," allows congressional candidates to pledge to limit their service. It also places a voluntary designation on the ballot next to the candidate's name to inform voters of the pledge. Given the past court challenges to term-limit initiatives, it is safe to say that litigation to try to strike down this latest strategy will be forthcoming.

Animal rights activists had victories in Arizona, California, and Missouri. But they suffered losses with the defeats of a trapping ban in Alaska and a ban on hunting mourning doves in Ohio. Regardless, the Humane Society and the rest of the animal rights movement continue to be prominent actors in the initiative process.

Supporters of campaign finance reform also had a big year with victories in Arizona and Massachusetts. The initiatives in these two states will establish publicly-funded campaigns for future elections. These wins have added steam to campaign finance reformers who—after failing thus far to achieve changes nationally—will try to institute these reforms incrementally at the state level.

The gaming industry had victories in California and Missouri. Of course, many people in Nevada's gaming industry don't see Proposition 5 in California as a victory. They spent close to \$50 million to defeat the initiative and, like most opponents who don't prevail, they are planning a court challenge claiming Proposition 5 violates the California Constitution. Apparently, the proponents were in such a hurry to get this measure on the ballot that they forgot it needed to be a constitutional amendment and not a statute—the courts will have to sort it out.

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Losing Issues

Then there are the losers. A ban on partial-birth abortions was rejected in Colorado and Washington. Income tax credits for educational expenses were defeated in Colorado, as was physician-assisted suicide in Michigan. But don't count these issues out; they will likely be fine-tuned and back before voters in 2000.

Another loser was the “paycheck protection” initiative in Oregon—the sister to Proposition 226 in California that was defeated last June. Once the darling of the conservative movement, this reform has not fared well at the ballot box. One reason for its lackluster showing is that the huge amount of money spent for and against it made voters uncomfortable. Therefore they took the cautious route—as is usually the

case—and voted it down. However, it is likely conservatives will resurrect this issue in the future.

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Tax Questions

What about the tax movement? Is the anti-tax fervor of the 1980s and '90s over? The short answer is no, although the issue has taken some hits. Voters defeated the tax cap initiative in Nebraska and an initiative in South Dakota that would have banned the use of property taxes for educational purposes. However, voters also defeated a legislative referendum in Arkansas that would have made it easier for the legislature to raise and lower taxes. In Colorado, citizens kept the legislature from circumventing the state's landmark tax reform, which had previously been passed by initiative. Voters simply made the statement that they want to maintain their power to vote on major tax issues, but they don't want to adopt laws that tie the hands of the legislature.

Then there's Proposition 10 in California, which places a 50-cent per pack tax on cigarettes. California is now one of the most expensive places in the nation to “light up.” The passage of the tax may indicate that Californians see the tobacco industry as a “cash cow” that will pay for other reforms.

Other Outcomes

Other interesting legislative referenda include bans on same-sex marriages, which were adopted overwhelmingly in Hawaii and Alaska. In Alabama, voters struck down a measure that would have allowed the state in some

instances to burden the free exercise of religion.

Floridians decided to preserve the death penalty, made it easier for third party candidates to get on the ballot, and closed a legal loophole that allowed guns to be sold at open-air markets without being subject to a waiting period. Voters in Idaho told their legislature that they want to keep legislative term limits, and voters in South Carolina approved revisions to their constitution to remove a phrase stating that interracial marriages are illegal, although almost 40% of South Carolinians voted to keep the language of their constitution unchanged. A similar measure is being considered by the Alabama legislature for the 2000 ballot.

Unfortunately for the initiative and popular referendum movement, voters in Mississippi, Missouri, Utah, and Wyoming voted to make it more difficult for people to utilize this tool. Many experts believe this occurred not because of the people's dislike for initiative and popular referendum but because citizen-initiated measures have rarely appeared on the ballots in those states. Unable to see first hand the value and importance of this democratic tool, voters adopted new restrictions.

A Liberal or Conservative Year?

So what does all of this mean? Who won, the Republicans or the Democrats, the right or the left? Each in fact came away with victories. There is a tendency to put voters into boxes and label them conservative or liberal, but the problem is that voters aren't always conservative or liberal on every issue. The beauty of the initiative process is that it provides citizens the opportunity to vote for issues that cut across philosophical lines. The Washington State election provides a telling example: Voters approved a liberal issue (an increase in the minimum wage), a conservative issue (the end of racial preferences), and a libertarian issue (the medicinal use of marijuana). If this election has taught us anything, it is that voters, when given

choices on initiatives, will transcend party lines and vote their consciences on the issues.

Initiatives and Referenda: In Fact, Three Different Processes

In 24 states, citizens can craft and then adopt laws or amend their state constitution, actions commonly referred to as the initiative process. In most of the same states, as well as others, citizens can reject laws or amendments proposed by their state legislatures. This is commonly referred to as the referendum process.

There are two types of referenda—popular and legislative. A popular referendum (possible in 24 states) is when the people have the power to refer, through a petition, specific legislation that has been enacted by their legislature to a popular vote. A legislative referendum (possible in 49 states) is when the state legislature, an elected official, state-appointed constitutional revision commission, or other government agency or department submits propositions (such as constitutional amendments, statutes, or bond issues) to the people for their approval or rejection. This is either constitutionally required, as in the proposition of constitutional amendments, or

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it occurs because the legislature, government official, or agency voluntarily chooses to submit the proposal to the people. Every state but Delaware requires that constitutional amendments proposed by the legislature be submitted to the citizenry via legislative referendum for approval or rejection.

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Initiative and referendum in this country were never perceived or recommended as a replacement for our representative democracy; they simply provide an additional check and balance on those in power at the state level. There is no national initiative or referendum process in the United States. The processes were proposed and supported by notables such as Thomas Jefferson, Theodore Roosevelt, Woodrow Wilson, and William Jennings Bryan.

Colonists, Populists, Progressives

Initiative and referendum have existed in some form in this country since the 1600s, when the citizens in New England placed ordinances and other issues on town meeting agendas for discussion and then voted on them. Thomas Jefferson first proposed legislative referendum for the 1775 Virginia State Constitution. The first state to hold a statewide legislative referendum for its citizens to ratify its constitution was Massachusetts in 1778. New Hampshire followed in 1792.

Jefferson was a strong and vocal advocate of the referendum process because it recognized the people as sov-

eign. He knew that those chosen to represent the citizenry in a republican form of government were empowered only by the people. Like Jefferson, James Madison knew too well the possibility that those chosen to rule in a republic could and would on occasion become consumed with their power and take actions inconsistent with the Constitution—actions that represented their self-interest and not the interest of the people. For this reason, a series of checks and balances were placed in the Constitution.

State constitutions, which mirror the federal Constitution, also contained checks and balances. But in the 1800s, people began to realize that no matter what checks and balances existed, citizens had no direct ability to rein in an out-of-touch government or a government paralyzed by inaction.

Then came the Populist Party of the 1890s. Its members had become outraged that special interest groups controlled government and that the people had no ability to break this control. They began to propose a comprehensive platform of political reforms, advocating women's suffrage, secret ballots, direct

election of US senators, and primary elections. Difficult as it is to envision modern political systems without these reforms, they were considered extreme in the 1890s.

Perhaps the most revolutionary Populist reforms were initiative and popular referendum. These processes, as well as the already established legislative referendum, acknowledged that the authority to legislate and govern was delegated by the people. Populists believed that initiative and referendum provided checks and balances on the power of government that the people could use directly.

In 1897, Nebraska became the first state to allow cities to place initiative and referendum in their charters. The next year, South Dakota became the first state to adopt statewide initiative and popular referendum. Other states soon followed.

The path to enabling initiative and referendum was not smooth everywhere. In Texas, for example, the people voted on initiative and popular referendum in 1914 but defeated them because the measure included a provision requiring that

Table 1: In Various States, A Diverse Array of Policy Changes Has Come Through

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| <ul style="list-style-type: none">•Women gain the right to vote•Direct primaries nominate political candidates•States can't fund abortions•The eight-hour workday is created•Physician-assisted suicide is legalized•Tax increases can be adopted only after a vote of the people•The use of racial preferences in government hiring and contracting ends•Term limits are placed on elected officials•Campaign finance reform is adopted•US Senators are directly elected by the people instead of the state legislature | <ul style="list-style-type: none">•Movie theaters and other stores can be open on Sunday•Poll taxes are abolished•Parents must be notified before a minor obtains an abortion•Medical marijuana is legalized•Hunting with steel traps is outlawed•A super-majority vote of both houses of state legislatures is required before any new tax increase can be adopted•Numerous reforms to protect the environment are adopted |
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signatures be gathered from 20% of the state's registered voters—twice what any other state had required. Proponents felt it was more important to get a usable process than one that would have main-

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tained the status quo and provided no benefit to the citizenry. But the legislature claimed this defeat meant that the people didn't want initiative and popular referendum, and therefore the movement in Texas effectively died.

Between 1898 and 1918, 24 states adopted initiative or popular referendum—mostly in the West, as befitted Westerners' populist beliefs. Unfortunately, this was not the case early on in the East and South. Those in power were opposed to the expansion of initiative and popular referendum because they were concerned that blacks and immigrants would use the processes to enact reforms the ruling class didn't want.

The credit for making initiative and popular referendum fixtures in this country belongs with the Progressives. They dismantled the political machines and bosses that controlled American politics by pushing reforms to minimize the influence of special interests. Their goal, as is the goal of proponents today, was to ensure that elected officials remained accountable to the electorate.

A Popular Process

There is a long and rich history of Americans using the initiative process (see Table 1). There have been nearly 1,900 initiatives on statewide ballots in the past 100 years, 40% of which have been adopted. This amounts to approxi-

mately 15 of every 38 proposed items being adopted each election cycle, supporting the notion that citizens are discriminating and cautious. Moreover, a total of 15 new laws every two years is minuscule compared to the number of laws proposed and adopted each year by state legislatures. It is estimated that 5,000 laws will be proposed in the Texas legislature alone this year.

Since the first statewide initiative appeared on the ballot in Oregon in 1904, the initiative process has been through periods of inactivity as well as periods of tremendous use. After the turn of the century, the use of the initiative steadily declined from a peak of 290 during the period 1911 to 1920 to a low of 79 for the years 1961 to 1970. Many factors contributed to this reduction, but the occurrences of two world wars, the Great Depression, and the Korean War were largely responsible. In 1978, with the passage of California's Proposition 13 (an initiative that cut state property taxes by nearly 60%), people began to realize the power of the initiative process once again and its use began to rise. Indeed, the last two decades have seen the most widespread use of initiative in the nation's history. However, even though 24 states have some form of statewide initiative, approximately 56% of all initiative activity has taken place in just five states (see Table 2).

But what has been accomplished through the use of this process? In short, it has brought about some of the most fundamental and controversial public policy decisions affecting our daily lives.

Clearly, reforms have been enacted to foster all manner of programs and causes. This typifies the initiative process—it is used by individuals of all political persuasions. Furthermore, because the process encourages voter consideration of issues, citizens in states with initiatives on the ballot have been more likely to go to the polls than those in states without initiatives. No matter what election cycle is analyzed, voter turnout in states with initiatives on the ballot has usually been 3 to 7% higher

than in states without them. This tendency can be attributed to the fact that people believe their votes make a difference when it comes to initiatives. The key distinction between voting on an initiative and voting for a candidate is that there are no guarantees the candidate will keep his or her promises.

The Future

It is hard to predict the future of initiative and popular referendum. We do know that legislative referendum is here to stay—primarily because federal law mandates that states have it. But the focus should be on initiatives and popular referenda. They are central to the direct democracy idea.

It's evident that many elected officials want to make the processes more difficult to use. Their efforts could be

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given a tremendous boost if the US Supreme Court rules in *Buckley v American Constitutional Law Foundation*—which is currently before them—that Colorado can regulate the collection of signatures on initiative petitions by requiring signature collectors to be registered voters in the state. The Tenth Circuit US Court of Appeals struck down this requirement as being an unconstitutional infringement on political speech. A Supreme Court ruling overturning

Table 2: The Initiative Process Has Been Utilized More Often in the 1990s Than During Any Previous Decade

Decades with the highest number of statewide initiatives on the ballot	Number Proposed	Number Adopted	Passage Rate
1991-1998	323	149	46%
1911-1920	290	110	38%
1981-1990	276	121	44%
Decades with the lowest number of statewide initiatives on the ballot			
1941-1950	133	51	38%
1951-1960	108	43	40%
1961-1970	79	32	41%
States with the highest number of statewide initiatives on the ballot			
Oregon	314	105	33%
California	260	92	35%
Colorado	174	72	41%
North Dakota	165	77	47%
Arizona	144	58	40%

this decision could give state legislators across the country the green light and political cover they need to adopt similar restrictions.

But on a more positive note, the people can turn their attention to Minnesota and Louisiana, where the governors

have made it clear that giving citizens the power of initiative and popular referendum is a priority. Governors in other states, such as Texas and New York, have made similar promises to their constituents but have yet to take any serious steps in pushing for initiative and popular referendum.

After 100 years of this great American experiment in direct democracy, what have we learned? We've learned that citizens don't support initiative and referendum as a way to destroy or abolish our representative democracy. They support them to ensure that they, the people, are the ultimate sovereigns, as envisioned by our Founding Fathers.

