

Direct Democracy: The Right of the People to Make Fools of Themselves;[†] The Use and Abuse of Initiative and Referendum, A Local Government Perspective

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[†] Attributed to Mark Twain.

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I. INTRODUCTION

The Framers of the United States Constitution did not embrace direct, populist democracy. They rejected the Swiss model of direct legislation¹ and chose a system of representative—republican, not democratic—government that would, as James Madison wrote, “enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial [partisan] considerations.”²

Representative democracy presumes that an informed electorate will choose wise legislators. Direct democracy, by extension, demands that citizens themselves demonstrate wisdom enough to “discern the true interest of their country”³ as opposed to their self-interest, and that they love justice enough to eschew mere partisanism. One form of direct democracy is direct legislation—legislation by initiative and referendum. Today, direct legislation is increasingly popular—and

1. See *infra* note 6 and accompanying text.

2. THE FEDERALIST No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961). Madison defined a republic as “a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior.” THE FEDERALIST No. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

3. THE FEDERALIST No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

increasingly destructive,⁴ as serious proposals have been made to adopt and implement it at the federal level.⁵

This Article addresses the problems of direct legislation, focusing on two general themes. First, it briefly traces the history of the initiative and referendum in the United States, addressing problems with the process, particularly with the local-government exercise of the process, and proposing reforms that might improve the quality of citizen-made legislation. Second, the Article examines some fundamental causes for and difficulties with the use of direct legislation. The experience of Whatcom County, Washington, is considered throughout as an illustrative case study of the enthusiasm for and the failure of direct democracy. The experience of other jurisdictions is also considered and compared to this local experience.

II. A BRIEF REVIEW OF THE DIRECT LEGISLATION MOVEMENT

A. *Revolutionary-Era Background*

In the United States, the push to adopt the initiative and referendum was part of the Progressive Movement of the late nineteenth century. The philosophical underpinnings, however, came from the French Enlightenment.⁶ Jean J. Rousseau's *Social Contract* was based on the concept that government existed to serve its people.⁷ Taking the concept to its logical conclusion, the people would be the government:

The sovereign having no other force but the legislative power, acts only by the laws; and the laws being only the authentic act of the general will . . . the sovereign can never act but when the people are assembled. Some will perhaps think that the idea of the people assembling is a mere chimera, but if it is so now it was not so two

4. See, e.g., Peter Schrag, *California's Elected Anarchy: A Government Destroyed by Popular Referendum*, HARPER'S, Nov. 1994, at 50.

5. Ross Perot's 1992 presidential campaign touted the "electronic town hall," a system of direct democracy using sophisticated video and data transmission technology to allow voters nationwide to debate and then vote on legislation. See, e.g., *In Search of a 'Perot Platform': The Man and the Issues*, WASH. POST, May 24, 1992, at C3. Former U.S. Senator Mike Gravel has proposed "Philadelphia II," a method of adopting identical state initiatives that would result in "a federal law empowering [citizens] to make federal initiative laws." THE PHILADELPHIA II INITIATIVE 641 (newspaper flyer, undated, spring 1995).

6. The French were influenced by the Swiss "folk-mote," a type of initiative that was in common use by 1650; the concept was enshrined in the Swiss Constitution in 1891. LAURA TALLIAN, DIRECT DEMOCRACY: AN HISTORICAL ANALYSIS OF THE INITIATIVE, REFERENDUM AND RECALL PROCESS 12-14 (1977).

7. See ELLIS P. OBERHOLTZER, THE REFERENDUM IN AMERICA 2-3 (rev. ed. 1971).

thousand years ago; and I should be glad to know whether men have changed in their nature.⁸

Rousseau damned representative government as an evil necessity, and legislatures as a mark of political degeneracy. The happiest people in the world, he said, were "a company of peasants sitting under the shade of an oak," conducting their government affairs.⁹

Benjamin Franklin became acquainted with Rousseau's thoughts through Thomas Paine, who Franklin met in England during the Revolutionary War. Paine's pro-democracy writings, *Common Sense*,¹⁰ influenced developing political thought in the nascent United States, encouraging a heavy deference to popular will. Franklin was instrumental in drafting the Pennsylvania Constitution of 1776, which called for a unicameral legislature with an executive council, and a judiciary with seven-year terms removable at any time by the assembly for "misbehavior."¹¹

By 1784, the Executive Council had thirteen members, and there was much popular and political dissatisfaction with the Pennsylvania experiment in democratic rule. A new constitution was adopted in 1789 similar to the now-traditional model.¹²

Oberholtzer summed up a study of direct democracy in the United States:

It would be difficult . . . to overestimate the service which Adams, Hamilton, and the fathers of the American constitutional system performed in saving us from unchecked popular rule, by leading the people away from the consequences of such teachings as Rousseau's [the excesses of the First French Republic] We did not . . . commit our political fortunes to a single body of deputies, as they soon did in France; we retained the English system of checks, balances, vetoes and negatives born not of a belief that all men were equally capable as social and political beings, but of one quite different, that they were unequal indeed, many being capricious, passionate, hasty, irrational, ambitious, egoistic.¹³

8. *Id.* Rousseau was apparently not familiar with the Swiss folk-mote or the New England town meeting.

9. *Id.* at 4.

10. THOMAS PAINE, *COMMON SENSE, AND OTHER POLITICAL WRITINGS* (Nelson F. Adkins ed., Liberal Arts Press 1953) (1776).

11. OBERHOLTZER, *supra* note 7, at 57.

12. Notably involved in the criticism of the 1776 Pennsylvania Constitution were John Adams and Alexander Hamilton, who argued for its revision. *Id.*

13. *Id.* at 66-67.

The Constitution of the United States, which was submitted to a rigorous ratification process by specially elected state conventions,¹⁴ and which was not directly voted upon by the people, is not a heavily democratic document. Although the House of Representatives is popularly elected, as is the Senate since adoption of the Seventeenth Amendment, the President is indirectly chosen through the "Electoral College" (a term not found in the Constitution). "The Framers envisioned independent electors, beholden to no one, not even the people, in choosing the president."¹⁵ Further, the judiciary is appointed, as are members of the cabinet and the federal bureaucracy in general.

B. *Progressive-Era Reforms*

As the history of the Constitution's adoption and its construction make clear, the Framers were wary of popular democracy. But eighty years after its adoption, social conditions of post-Civil War capitalism in the United States caused unrest and pressure for reform. Some people, like Rockefeller, Carnegie, Hill, and Hearst, had become very rich, while conditions for the urbanizing working class deteriorated.¹⁶

Deteriorating working conditions for the urban laborers and growing slums alarmed many observers of the American social scene.

14. See JETHRO K. LIEBERMAN, *THE EVOLVING CONSTITUTION: HOW THE SUPREME COURT HAS RULED ON ISSUES FROM ABORTION TO ZONING* 131-32 (1992).

15. *Id.* at 176. Of course now the electors, chosen by their political parties, are expected to cast presidential ballots in accordance with the popular vote. It is possible, however, for a candidate to win the popular vote and lose the electoral-college vote. Rutherford B. Hayes (1876) and Benjamin Harrison (1888) were so elected president. *Id.* at 177.

16. Burton Bernstein (Leonard Bernstein's brother) described his mother's employment in a textile mill in Lawrence, Massachusetts, in 1910:

The textile mills were hiring fourteen-year olds, and Jennie . . . was fifteen. . . . Her childhood had ended.

She awakened at 5 a.m. every working day and helped her mother wash diapers and cook breakfast and feed the babies. Starting time at the mill was 6:30 a.m.; from that hour until 5 p.m. she wheeled wagons full of large thread spools to the weavers at their looms. "The sound of those machines going all day was earsplitting . . . [a]nd you could hardly breathe for all the dust in the air. It was freezing cold in winter, and in the summer it was boiling hot. Most of the windows didn't even open. I remember how once, during a lunch break, I tried to open a window, so I could see outside. I couldn't budge it. So with my fingernail I scraped the dirt from the windowpane and looked out. I saw down below on a little bit of grass the Yankee owners and managers of the mill playing golf—practicing their putting or whatever—during their lunch break. Did that make me mad! There they were, the rich men, the bosses, playing golf while the rest of us—just kids, some of us—were slaving in the heat and the noise and the dirt, our fingers bleeding all over the place. And such terrible accidents, too!"

Burton Bernstein, *Sam and Jennie (Chronicles of the Bernstein Family)*, *THE NEW YORKER*, Mar. 22, 1982, at 53, 77.

Frederic C. Howe described corruption, bossism, bribery, and waste in *The City: The Hope of Democracy*¹⁷ in 1905, at the same time Upton Sinclair's *The Jungle*¹⁸ exposed scandalous cheating of employees and shocking disregard for the consumer in the big slaughter houses and meat packing plants. For farmers in the rural areas, capitalistic abuses centered on the railroads. Where they competed, the railroads engaged in cut throat competition and bribery of local officials to get lucrative franchises. Because capital requirements precluded competition, gross abuses of price discrimination developed.¹⁹

At the same time, industrialization was causing a great social transformation characterized by the decline of farmers and the rise of the blue-collar worker. With this transformation came unsettling dislocations: urbanization over rural life, factories over farms, big business over small business.²⁰ The Progressive's solution to some of the economic problems presented by this transformation, particularly to the problem of corrupt state legislatures, was a hark back to Rousseauian democracy—a reinvigoration of the New England town meeting on a new scale. Writing in 1905, Howe observed

a growing sentiment for direct legislation through the initiative and referendum. This is but a further expression of the spirit of democracy. It is a movement for government by public opinion. The referendum is being applied to an increasing extent in the matter of public borrowing; in passing upon the question of municipal ownership; in the granting of franchises; in amendments to city charters; in constitutional changes and the like. In Oregon and South Dakota the referendum has been extended to all matters of state legislation . . . Its purpose is to democratize legislation, to enable the people to assume control of affairs, and insure responsible as well as responsive government. It provides a secure defence [sic] against corruption. For lobbyists will not buy legislation that cannot be delivered, or which is subject to veto by the people. The

17. FREDERIC C. HOWE, *THE CITY: THE HOPE OF DEMOCRACY* (Univ. of Wash. Press 1967) (1905).

18. UPTON SINCLAIR, *THE JUNGLE* (1906).

19. The railroads charged strapped farmers ruinously high rates for shipping produce, engaged in price-fixing pools, and gave secret rebates to powerful shippers. The railroads were corrupt, excessively capitalized, overloaded with debt, controlled by out-of-state interests . . . [and] [a]mong themselves they were vicious and quarrelsome. They were weak in the infant skills of public relations, but big in manipulation of state governments, in the black arts of lobbying, and the seduction of men in public office. They cheated each other, their contractors, and their stockholders.

LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 389 (1973).

20. Transformation brought unsettling dislocations, but not destabilization. Peter F. Drucker, *The Age of Social Transformation*, ATLANTIC MONTHLY, Nov. 1994, at 53, 59.

referendum will reestablish democratic forms, which have been lost through the complexity of our life, the great increase in population, the misuse of federal and state patronage, and the illegal combination of the boss with the privileged interests.

The initiative carries this reform one step further on. It enables the people to originate legislation and secure an expression of opinion upon it. It involves the right of the people to demand the submission of any ordinance which may have been passed by the council to the final consideration of the public.²¹

Thus, the general initiative and referendum were first adopted, as Howe noted, in South Dakota, in 1898. Other states soon followed.²² California, the home of numerous occurrences of ballot-box legislation,²³ adopted direct democracy in 1911 in response to the perception that the state legislature had been corrupted by lobbyists, especially by the Southern Pacific Railroad.²⁴ Enthusiasm for direct democracy waxed during periods of major social change.²⁵

The history of Washington State's adoption, considered next, is typical of those states that approved the initiative and referendum in the early twentieth century.²⁶

21. HOWE, *supra* note 17, at 171-72.

22. Twenty-six states have direct or indirect statutory or constitutional initiative or popular referendum: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. See DAVID B. MAGLEBY, *DIRECT LEGISLATION* 36-40 (1984).

23. The 1990 election in California was described as "the most extensive and complicated list of ballot propositions in the history of electoral politics—more and more various items . . . than the Framers were asked to consider at the Constitutional Convention." *Election Excess*, 1990-Style: *The Issues and the Dangers*, L.A. TIMES, Oct. 8, 1990, at B4 (Editorial).

24. The Progressives, California's populist political party, were primarily responsible for the movement of direct democracy against the Southern Pacific Railroad and other strong interest groups in California. Historians generally agree that the Progressives' platform consisted of "expanding citizen participation in politics (initiative, referendum, recall, and . . . the direct primary), [t]aming unrestrained corporate influence . . . [p]rotecting the environment . . . [and] [i]mproving adverse living and working conditions." Advocates believed the initiative process would allow the poor and other minority groups some access to the state legislative process.

Stephen H. Sutro, *Interpretation of Initiatives*, 34 SANTA CLARA L. REV. 945, 948 n.18 (1994) (alterations in original) (citation omitted).

25. For a valuable—and entertaining—history of direct democracy in Oregon, see David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System,"* 67 TEMPLE L. REV. 947 (1994).

26. See, e.g., Richard A. Chesley, *The Current Use of the Initiative and Referendum in Ohio and Other States*, 53 U. CIN. L. REV. 541, 545 (1984) (describing the history of direct legislation in Ohio); see also Schuman, *supra* note 25.

C. *Direct Legislation in Washington State*

In 1907, a group of Washington State trade unionists, farmers, and urban progressives formed the Direct Legislation League of Washington. The group's purpose was to push the legislature for a law putting the initiative, referendum, and recall before the voters as an amendment to the state constitution. These advocates were dissatisfied with the "machine-controlled legislature."²⁷

The farm and labor organizations worked diligently. In February of 1911, the legislature, not without argument, approved the measure.²⁸ That September, the Direct Legislation League formed a permanent committee to gain popular approval of the constitutional amendment.²⁹ Although the campaign for its approval was lackluster—only 45% of the voters cast ballots on the issue—it passed, two to one.³⁰

As a means of exploring modern experience with direct legislation, the next section discusses the experience of Whatcom County, Washington.

III. A LOCAL GOVERNMENT EXPERIENCE WITH DIRECT DEMOCRACY

A study of direct democracy in Whatcom County is, of course, in danger of being a merely parochial review of one locale's peculiarities. However, the issues that have engaged the attention of county residents are not merely local peculiarities. The urge to be free from the threat of things nuclear, problems concerning solid waste, worries about high-voltage power lines, and disagreements about people's right to do what they want with their real estate are familiar issues. Further, the County is typical of many northern, nonurbanized U.S. communities. Its population in 1993 was 140,900: 91% white, .5% black, 3% American Indian, 1.7% Asian-Pacific-Islander, and 2.9% Hispanic. Approximately 40% of the population lives in Bellingham, the county seat and its largest city, which had a 1993 population of 55,480. And, because of the close locations of the greater Seattle and Vancouver, B.C., metropolitan areas, more than three million people live within a

27. Information on the history of the direct legislation movement in Washington State is from Robert C. Benedict, *Some Aspects of the Direct Legislation Process in Washington State: Theory and Practice, 1914-1973*, at 70-78 (1975) (Unpublished Ph.D. dissertation, University of Washington).

28. *Id.*

29. *Id.*

30. *Id.*

ninety minute freeway drive from the greater Bellingham area.³¹ The City of Bellingham is home to a major regional state university, Western Washington University, with a student population of about 10,000. In short, Whatcom County is typical, normal.

Whatcom County's exercises in direct democracy, moreover, may be examined with certain "laboratory controls" automatically in place. Television does not play a role in county politics,³² and neither proponents nor opponents need to raise large amounts of money for advertising.³³ Nor have there been reports of paid signature gatherers to alter the political dynamic.³⁴ The number of initiatives and referenda that have confronted Whatcom County voters is also limited; there have been only seven, so it becomes possible to examine the entire experience with some care.³⁵

The universality of the issues, the typicality of the community, the insignificance of big money, and the limited number of ballot issues make it possible to carefully examine direct democracy at the local level. Analyses of problems with the initiative and referendum at the state level are not scarce in the literature,³⁶ but extensive review has revealed no comparable analysis of the process at the local level.³⁷ It is not, in general, a pretty sight.

In 1978, the voters of Whatcom County, Washington, approved a ballot measure adopting home rule and changing the county government from the three commissioner form to the council-executive form.³⁸ Although dissatisfaction with the three commissioner

31. FOURTH CORNER DEVELOPMENT GROUP, WHATCOM COUNTY, WASHINGTON, 1994-95 INDUSTRIAL DIRECTORY 11 (1994).

32. See Benedict, *supra* note 27, at 70-78.

33. In California, the average cost for an initiative to qualify for the ballot was \$1 million in 1990. Sutro, *supra* note 24, at 950 n.24.

34. This is not to say, however, that the signature gathering process is enlightened, as discussed later. See *infra* text accompanying notes 183-85.

35. During the 1980s in California, the average election presented the voter with forty-six initiatives on each ballot! In November of 1990, there were eighteen initiatives on the ballot. Sutro, *supra* note 24, at 951 n.30.

36. Notes herein contain useful references to books and articles discussing the use of the initiative and referendum at the state level. A comprehensive examination of the Colorado system is found in Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47 (1995).

37. Some aspects of the problems associated with local zoning by initiative in California are discussed in Mark A. Nitikman, *Instant Planning—Land Use Regulation by Initiative in California*, 61 S. CAL. L. REV. 497 (1988).

38. The Washington State Constitution authorizes counties to adopt home rule charters. WASH. CONST. art. XI, § 4. Freeholders are elected to draft the document, which is then submitted to the voters for approval. *Id.* Whatcom County's freeholders were elected November 8, 1977. The Charter was adopted by the freeholders on August 21, 1978, and approved by the

government was clearly the reason for the agitation to change,³⁹ availability of the initiative and referendum, which were unavailable in the three commissioner form of government, played a prominent role in the campaign for home rule approval.⁴⁰ This feature was highly touted by proponents of the Home Rule Charter. For example, during a debate on the Charter on October 11, 1978, one proponent urged approval, emphasizing that it would provide voters "the power of initiative and referendum."⁴¹ An editorial-page article explained the Charter's direct-legislation provisions:

The charter . . . grants to the citizens the power of initiative and referendum. Under the initiative, a group of voters can petition to have a new county ordinance placed on the ballot for the people to vote on at the next general election. Under the referendum, a group of voters may petition to have a law recently passed by the county council placed on the ballot of the next general election for adoption or rejection by the voters.⁴²

Pro-Charter arguments prevailed: Whatcom County citizens adopted the Charter on November 7, 1978.⁴³ Five years passed from

electorate on November 7, 1978. It became effective May 1, 1979.

39. One community leader recalled popular dissatisfaction with the commissioners who were "acting like children":

Each commissioner had his own road district, each had his own bulldozers and dump trucks, and they refused to consolidate into one. There was a lot of silly squabbling. One guy ran his bulldozer up to the fence surrounding the other's [yard equipment] fence—it was just embarrassing and awful.

Interview with Don Hansey, former Chairman of the Whatcom County Board of Freeholders (Apr. 5, 1994).

Home rule was promoted as more efficient with a "professional" separation of legislative and executive functions. *Id.*

40. The Home Rule Charter sets out the initiative procedure: Any legal voter or organization of voters may file an initiative proposal with the Auditor, who assigns it a number. After the prosecuting attorney, in consultation with the proponent, has formulated a positive question for the ballot title, the proponents have 120 days "to collect the signatures of the registered voters in the county equal in number to not less than 15 percent of the votes cast in the county equal [sic] in the last election." Referendums are subject to a similar procedure: Within 45 days after an ordinance is passed by the County Council, any legal voter or organization of voters may file a referendum proposal "against any enacted ordinance or portion thereof" with the Auditor. After referral to the prosecuting attorney, the proponents have 120 days to collect signatures of 15% of the number of votes cast in the last gubernatorial election. See WHATCOM COUNTY, WASH., CHARTER §§ 5.40, 5.60 (1986).

41. Rory Marshall, *Opposing Sides Argue Merits of Home Rule*, BELLINGHAM HERALD, Oct. 12, 1978, at A1 (quoting Tim Douglas, a Whatcom County citizen who later became mayor of the City of Bellingham).

42. Jim Van Andel, *New Charter Seeks Greater Citizen Role*, BELLINGHAM HERALD, Nov. 4, 1978, at A11.

43. Of 51,509 registered voters, 22,927 voted on home rule; 59% (13,695) voted yes, 41% (11,232) voted no. WHATCOM COUNTY AUDITOR, ELECTIONS DIVISION, COUNTY

the adoption of home rule in 1978 to the appearance of the first initiative.

A. *The First Initiative*

The first initiative to appear on the ballot in Whatcom County was County Initiative I-83. The initiative was an early attempt to deal with Whatcom County's solid waste problem. It was titled:

Shall the Whatcom County Council reject Thermal Reduction Corporation's proposal to dispose of solid waste, and accept the proposal of Olivine Corporation?⁴⁴

The County's single remaining antiquated landfill was approaching capacity.⁴⁵ Two incinerator firms responded to the County's desperate request for proposals: Olivine, headed by a local entrepreneur "Corky" Smith, and Thermal Reduction Corporation (TRC), owned by out-of-state interests. Olivine built an incinerator with a unique air pollution control system using olivine rock. The system's main flaw was that it did not work very well. Thus, the County planned to award the contract to TRC, which had an already proven and functioning system. What TRC did not have, however, was the friendly ambiance of the neighborhood dump where locals could happily heave trash out the back of their pickups and station wagons into a hole in the ground and watch it tumble away.

Smith's success in convincing the public that he had been wronged was remarkable. Jim Anderson, the former manager of TRC, explained it this way:

Corky was a *character*. He was in his mid-seventies then, [and had] been a local fellow all his life. He had a lot of friends in the County—friends in the Grange, grass roots stuff, he knew everybody. In his homespun way he convinced people that he had built a better mousetrap, and people came to think that "we ought to give the local boy a chance." On the other side, Chuck Wilder, owner of TRC, was seen as a rich construction baron, not viewed in such a friendly way.⁴⁶

REFERENDUMS AND INITIATIVES FILED SINCE THE FORMATION OF THE HOME RULE CHARTER 3 (1994). Four other Washington State counties are home rule counties: Snohomish, King, Pierce, and Thurston.

44. Office of the Whatcom County Auditor, ballot title, general election ballot (Nov. 1983).

45. Leo Mullen, *Olivine Gets OK to Burn More Trash*, BELLINGHAM HERALD, Aug. 9, 1989, at A4.

46. Telephone Interview with Jim Anderson, Comptroller, Thermal Reduction Company (Apr. 5, 1994).

Smith had not "built a better mousetrap." It was not until 1989, six years later, that Olivine's incinerator was given final approval to operate by the county land use hearing examiner upon a showing that it burned trash reasonably free of odors, smoke, fumes, steam, noise, glare, and dust.⁴⁷ And it was not until February 1994 that the Northwest Area Pollution Control Authority granted a permit for the Olivine facility.⁴⁸

Notwithstanding the facts that there were no newspaper advertisements and there was almost no other campaign, the pro-Olivine forces garnered 52.6% of the vote in the November 1983 general election.⁴⁹ County government was directed by the voters to award a trash-disposal contract to the Olivine firm, a company whose disposal facilities were experimental and whose operating permits were temporary.⁵⁰ By then, however, the question was moot because the County had transferred garbage disposal authority to the City of Bellingham.

The 1983 initiative vote was branded by one county councilman as "an outright abuse of public funds and public interests."⁵¹ Moreover, the Whatcom County Prosecuting Attorney's office determined that the initiative itself was invalid as an administrative matter.⁵² Initiatives and referenda may be applied only to acts that are legislative in nature, not administrative,⁵³ and whether a contract should be awarded to one vendor or another is clearly an administrative

47. Mullen, *supra* note 45.

48. Telephone Interview with Jack Weiss, Assistant Manager, Whatcom County Solid Waste (Apr. 5, 1994).

49. WHATCOM COUNTY AUDITOR, *supra* note 43, at 4.

50. See *supra* notes 47-48 and accompanying text.

51. Steve Valandra, *Garbage Vote Effect Unclear*, BELLINGHAM HERALD, Nov. 6, 1983, at D24 (quoting Councilman Craig Cole). The County spent between \$5,000-10,000 to put the initiative on the ballot. These expenses included the cost of checking the validity of signatures and the cost of "ballot placement," which included printing and distributing the paper sheets, operating the polls, counting the ballots, and the like. Telephone Interview with Pete Griffen, Director, Whatcom County Elections Division (Apr. 5, 1994).

52. Steve Valandra, *Garbage Vote Effect Unclear*, BELLINGHAM HERALD, Nov. 6, 1983, at D24.

53. The Washington Supreme Court has affirmed this common-law rule:

Administrative acts of municipal legislative bodies are not subject to referendum. The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.

Durocher v. King County, 80 Wash. 2d 139, 154, 492 P.2d 547, 556 (1972) (citations omitted).

issue. Of course, it is no criticism of the voting public that an invalid initiative was placed before it for consideration, but perhaps the voters' faith in their own ability to resolve a very complex issue simply by the punch of a voter card was misplaced.

In sum, Whatcom County's first experiment in direct democracy was far from successful. The people's law resolved nothing. Rather, it delayed and frustrated the County's efforts to resolve its solid waste problem for at least a decade. In 1989, incoming councilmembers still faced garbage as "a major issue."⁵⁴ In 1990, the County adopted a flow control ordinance,⁵⁵ mandating that solid waste be delivered only to disposal facilities meeting county standards. The only facility meeting these standards was TRC (then called "Recomp").⁵⁶ Thus, the county government did just what the people did *not* want it to do in the 1983 initiative: It removed solid waste disposal from the familiar, local, and entirely comprehensible dumping of garbage in a neighborhood hole in the ground, and sent it off to a big out-of-town business whose technology was unfamiliar and whose ambiance could not compare to the neighborhood dump.

With the County's adoption of the flow control ordinance, things finally improved.⁵⁷ Yet some citizens did not like the change, and their dissatisfaction fueled two more exercises in direct democracy.

B. *The Second Initiative*

Whatcom County's second initiative, Initiative I-84, was introduced in response to national concerns about nuclear weapons. The initiative attempted to establish the County as a nuclear free zone. It was titled:

Shall Whatcom County be Declared a Nuclear Free Zone and Penalties Established for Violation Thereof?⁵⁸

54. Andy Norstadt, *Focus to Be on Garbage, Land Use*, BELLINGHAM HERALD, Dec. 29, 1989, at B1.

55. WHATCOM COUNTY, WASH., ORDINANCE 90-96 (1990).

56. Some of the trash that Recomp cannot handle is subcontracted for disposal by Olivine. Leo Mullen, *Trash Firm, County Discuss New Pact*, BELLINGHAM HERALD, Mar. 23, 1994, at B1.

57. In discussions about negotiating a final agreement with Recomp, Councilman Al Starkenburg, who backed the current trash disposal methods, "not[ed] that recent garbage handling has been relatively hassle-free after years of problems." *Id.* The "hassle free" status was the result of consignment of disposal to Recomp via adoption of a flow control ordinance. Andy Norstadt, *County OKs Tax-Free Garbage Plan*, BELLINGHAM HERALD, June 26, 1991, at B1.

58. Office of the Whatcom County Auditor, ballot title, general election ballot (Nov. 1984).

The initiative qualified for the ballot⁵⁹ and read as follows:

Whatcom County shall be and is declared a nuclear free zone in which no nuclear weapons or their components shall be manufactured, assembled, researched or stored, no nuclear energy shall be produced for commercial or military purposes, and no nuclear wastes resulting from the above activities shall be stored.⁶⁰

Little debate about the initiative was reported in the newspaper. Although Mark Nelson, who later became head of the County Republican Party, claimed the initiative would "disarm the country" and leave the United States at the mercy of the Soviet Union,⁶¹ the *Bellingham Herald* itself editorialized in favor of the initiative:

Few people, including proponents, believe the citizens initiative that would declare Whatcom County a nuclear free zone will withstand a court challenge to its legality. That alone, suggests some who are opposed philosophically, is reason to vote against it. We disagree. The threat of nuclear war is both terrifying and bizarre. It is also becoming obvious that the benefits of peaceful nuclear uses, other than medical, have been exaggerated, and the costs underestimated. The signal that would be sent by declaring Whatcom County a nuclear free zone in which penalties would be established for any nuclear related activity, other than medical, is reason enough to vote "yes" on Citizen Initiative No. I-84. Whether or not it turns out to be unconstitutional will not dilute that signal.⁶²

The initiative was approved by 64.6% of the voters: a landslide. Its constitutionality has never been tested, as there are no nuclear related activities in Whatcom County that would generate a case or controversy, and no business has proposed to introduce any such activities.

In fact, the constitutionality of nuclear free zones has not been definitively tested anywhere. However, it is easy to make legal arguments against such legislation based on obvious problems of federal preemption, the Commerce Clause, and conflict with the federal government's power to provide for the national defense.⁶³

59. Over 9,000 signatures were submitted to qualify the initiative for the ballot, comfortably over the 7,043 needed. WHATCOM COUNTY AUDITOR, *supra* note 43, at 3.

60. *Vote Yes I-84*, BELLINGHAM HERALD, Nov. 4, 1984, at A2 (Advertisement).

61. Andy Fernando, *Candidates Spar at Lynden Forum*, BELLINGHAM HERALD, Oct. 28, 1984, at A6.

62. *A Signal Worth Sending*, BELLINGHAM HERALD, Oct. 31, 1984, at B4 (Editorial).

63. An examination of these issues is beyond the scope of this paper, but Lori A. Martin, in a well-researched article published by the University of Chicago Law Review, has examined

The Whatcom County nuclear free zone was not primarily directed at local health risks. Its purpose was to "affirm our desire as citizens to preserve the quality of life in the county,"⁶⁴ to "give validity to [citizens'] feelings about peace," and to "affect national policy at a local level."⁶⁵

C. *The Third Initiative*

The third exercise in direct democracy was a 1988 initiative to repeal home rule and return to the three commissioner form of government.

Those who had a vested interest in the old system were not expected to give it up gladly when the Home Rule Charter was adopted in 1978, yet one might have hoped they would do so gracefully. It was not so. By 1983, four years after the change to home rule, grumbling about home rule government could still be heard. The *Bellingham Herald* editorialized against this lingering grumbling:

Whatcom County's home rule charter has been in effect for more than four years now, but echoes of the fight are still being heard in the County Council and executive election. There is a certain nostalgia on the part of some for the old three-commissioner government. It was a comfortable, easy-to-get-to form of government for insiders. It would not be a very effective form of government for the general public in today's complex society In the tight little world of county politics, old wounds are slow to heal. But after four years it should be recognized that the county has a council-executive form of government. It is time to put the not-so-good old days behind, and start looking for ways to prepare county government for the future.⁶⁶

Nevertheless, those stalwarts who were unable to put the not-so-good old days behind them mounted a campaign to bring them back. This was their right. Their arguments focused on fiscal responsibility,

them. Her 100-page article concludes that most such nuclear free zone legislation is unconstitutional: "[M]any of the recent Nuclear Free Zone ordinances are invalid as unconstitutional intrusions on the federal power to provide for national defense and to conduct foreign affairs. However, the analysis [here] does uphold some local enactments that respond to peculiarly local health risks." Lori A. Martin, Comment, *The Legality of Nuclear Free Zones*, 55 U. CHI. L. REV. 965, 1009 (1988).

64. Fernando, *supra* note 61.

65. Joan Connell, *Nuclear-Free Zones: Proponents of I-84 Think It Will Help Stop the Arms Race*, BELLINGHAM HERALD, Oct. 14, 1984, at D1 (quoting Whatcom County Councilmember Mary Kay Becker, now a Washington State appellate court judge).

66. BELLINGHAM HERALD, Oct. 12, 1983, at A6 (Editorial).

responsiveness to the citizens, and aggrandizement of power in the person of the county executive. However, blatant misrepresentations characterized their campaign.

Initiative proponents contended that the home rule government was much more expensive than commissioner governments in counties of comparable size, and they produced statistics to show it. Unfortunately, in raising alarms about Whatcom County's comparative standing, they did not make accurate comparisons,⁶⁷ and their advertisements were, quite simply, untrue. They claimed, for example, that "the charter prohibit[s] response from your councilmen [in] section 2.4."⁶⁸ In fact, section 2.4 of the Charter prohibits the Council from interfering in administrative affairs, "except in the performance of its legislative functions." It does not limit "response" from councilmembers (unless "response" is construed to mean directives from councilmembers to administrators in response to citizen inquiries or complaints). Similarly, proponents claimed that the Charter "gives all power to the county executive,"⁶⁹ when, of course, it does not. Legislative power, which includes the powers to raise taxes, establish compensation for all employees, and reorganize the government, among others, is vested in the Council.⁷⁰

The *Bellingham Herald* editorialized tellingly against the repeal movement, opining that the old system was "broke" and that its return would subject the citizens to "disgust[ing] bumbling inefficiencies . . ."⁷¹ "Proponents of Initiative I-86 say that county government is no longer responsive to individuals, what they mean is that county government now doesn't favor a select few with political favors. Private driveways of commissioners' friends don't get graveled any more."⁷²

The attempt to repeal, by initiative, the very charter that gave its opponents the power of initiative itself was not without irony. The

67. For example, they ignored the fact Whatcom County listed the \$102,000 spent on contracts and services for assigned counsel (court-appointed lawyers) as an administrative expense, while other counties categorized the same type of expense differently. Similarly, salaries for the budget director and related secretarial help were listed in Whatcom County's budget as "administration," but were categorized differently in other counties, making Whatcom County's administrative expenses seem high by comparison. John Stark, *Debate Continues Over Home Rule Charter, Government Costs*, BELLINGHAM HERALD, Oct. 20, 1986, at B1.

68. *Citizens for Responsible Government*, BELLINGHAM HERALD, Nov. 2, 1986, at C6 (Advertisement).

69. *Id.*

70. WHATCOM COUNTY, WASH., CHARTER § 2.20 (1986).

71. *Keep County Home Rule*, BELLINGHAM HERALD, Oct. 26, 1986, at B2 (Editorial).

72. *Id.*

public, to its credit, was not impressed with the proponents' effort. In the election on November 4, 1986, the effort failed: of 34,000 votes, 40.5% were in favor of repeal, 59.5% were against.⁷³ The public did not make a fool of itself, but the tactics of the initiative's proponents—alarm and misrepresentation—embarrassed the advocates of direct democracy.

Of course, if initiative proponents lie, it is fair to observe, too, that politicians misrepresent facts.⁷⁴ But, as noted below,⁷⁵ we elect politicians into office, not into law. The potential damage caused by a bad law "elected" into the statute books by misrepresentative campaigning is much greater than the potential damage caused by a bad politician elected into office. The latter will have to deal with a legislative process designed to force compromise and conciliation; the former springs to life with no such protections.

The impetus for the back-to-the-three-commissioners campaign was more than merely a selfish desire of the "outs" to get back "in." There was an almost overt nostalgia on the part of some for the days when government was comfortable and easy-to-get-to, and a corresponding dissatisfaction with changes necessary to run a government in "today's complex society."⁷⁶ When people complained that government was "not responsive," their complaint was only partly that their driveways did not get graveled. Their complaint was that government was no longer friendly, understandable, neighborly, and immediately graspable.

D. The Fourth Initiative

Several years passed before the next exercise in direct legislation was undertaken in Whatcom County. The fourth initiative, which arose in 1989, concerned the importation of medical waste.

The campaign was lead by "citizen activist" Barbara Brenner, who thought the County should ban the importation of medical waste for local disposal (disposal of locally generated medical waste would not be affected). Brenner worried that medical waste, primarily from the Vancouver, B.C., area, "contains high levels of plastic that produce acid gas when burned."⁷⁷ She was also concerned about sloppy

73. See WHATCOM COUNTY AUDITOR, *supra* note 43, at 3.

74. Anthony Lewis, *Living with Lies*, N.Y. TIMES, Oct. 30, 1992, at A19.

75. See *infra* text accompanying note 173.

76. See *supra* text accompanying note 66.

77. Dean Kahn, *Activist Announces Initiative to Ban Medical Waste Imports*, BELLINGHAM HERALD, Feb. 14, 1989, at B1. Two to four tons of medical waste were incinerated daily at TRC's Whatcom County plant.

handling of medical waste, unburned medical waste accumulating in ash piles, and hazardous waste being sealed inside boxes of medical waste destined for incineration.⁷⁸

Armed with a sandwich board reading, "Prohibit Imported Infectious Waste,"⁷⁹ and with leaflets decrying, "imported infectious waste," Brenner had no difficulty collecting the signatures necessary to qualify the initiative, titled "Shall Medical Waste be Banned from Coming into Whatcom County for Disposal?," for the ballot. "I think it sells itself," said Brenner. "It was so easy. People were standing in line to sign this thing."⁸⁰

The groundswell of popular opinion against the importation of "infectious medical waste"⁸¹ convinced the County Council that the initiative would be approved if put on the ballot, so the Council adopted the ordinance immediately, notwithstanding its reservations about the ordinance's prudence and constitutionality. The Council's legal advisor informally opined that the measure was unconstitutional,⁸² but the Council wanted a prompt court determination.⁸³ A few days later, the *Herald* editorially approved of the Council's action:

If the court kills the initiative, the measure should be buried without mourning. At best the initiative amounts to meddling in an already complex and overlegislated environmental milieu. Thermal Reduction Co., the incinerator which is the immediate target of the initiative, already is subject to emission standards and is being compelled by environmental regulators to meet them. Citizens who signed the initiative doubtless did so because of honest concern about air quality and health, but there's little evidence that burning medical waste harms either.⁸⁴

A lawsuit challenging the constitutionality of the ordinance was filed on December 7, 1989. On January 23, 1991, United States

78. *Id.*

79. Dean Kahn, *Officials Deny County is Lax on Medical Waste*, BELLINGHAM HERALD, Apr. 20, 1989, at B1.

80. Andy Norstadt, *Medical Waste Ban Likely to Be on Ballot: More Than 10,000 Backing Initiative*, BELLINGHAM HERALD, May 16, 1989, at B1.

81. In fact, there was no evidence presented by any proponent of the initiative that any aspect of the disposal of medical waste was hazardous.

82. Andy Norstadt, *Options Reviewed on Medical Waste: County Concerned About Legal Liability*, BELLINGHAM HERALD, Aug. 9, 1989, at A1.

83. Councilman Don Hansey said, "I would rather pass it now and get the judicial process done between now and January 1." Fellow Councilman Will Roehl added, "Let's get it in front of a judge and find out if its legal . . . and the sooner the better." Andy Norstadt, *County Adopts Medical Waste Ban: Question for Court: Is It Legal?*, BELLINGHAM HERALD, Aug. 11, 1989, at A1.

84. *Court Test Good Idea*, BELLINGHAM HERALD, Aug. 14, 1989, at B4 (Editorial).

Magistrate Weinberg granted summary judgment for the plaintiff waste management companies, finding that the ordinance was unconstitutional. Ninth Circuit Court of Appeals Judge Farris affirmed the district court.⁸⁵ Relying on a 1992 Supreme Court decision,⁸⁶ the court of appeals found the ban on importation of medical waste "per se unconstitutional" unless Whatcom County could

demonstrate that its discrimination is "justified by a factor unrelated to economic protectionism." Whatcom County contends that Ordinance 98-61 protects its residents from the hazards of transporting and disposing of medical waste but fails to establish that medical waste from outside the county is more dangerous than medical waste generated inside Whatcom County. That defect is fatal.⁸⁷

The initiative had no effect on the importation of medical waste for incineration, nor, with the proponents' accompanying inflammatory reference to "infectious waste," did it promote thoughtful discussion by a populace "sitting under the shade of an oak," conducting its government affairs.⁸⁸ Rather, the initiative played on xenophobia and the ignorant public's fears and prejudices about the spread of disease.

It also cost money. In the process of obtaining judicial confirmation that the ordinance was unconstitutional, Whatcom County paid \$8,522.40 in costs to the law firm that represented it.⁸⁹ Moreover, the real cost to the County came in the hours the County Prosecuting Attorney's office and the County Council's office spent on the issue.

E. The Fifth Initiative

In April of 1990, a group calling itself Neighbors Opposing Power Encroachment (NOPE) began circulating petitions in Whatcom County to gain support for an initiative that would restrict new high-voltage power transmission lines⁹⁰ to areas zoned industrial. The initiative was introduced in response to Puget Power & Light Company's proposal to build a pair of 230,000-volt power transmission lines in a new corridor running from British Columbia, through Whatcom County, south to California. NOPE contended that the

85. *BFI Medical Waste Sys. v. Whatcom County*, 983 F.2d 911 (9th Cir. 1993).

86. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992).

87. *BFI Medical Waste Sys.*, 983 F.2d at 913.

88. See *supra* note 9.

89. The firm generously donated its time. Interview with Ramona Reeves, Clerk of the Whatcom County Council (Apr. 12, 1994).

90. Those carrying more than 115,000 volts.

transmission lines could be a health hazard and "a damaging intrusion into a rural and scenic area of Whatcom County."⁹¹

NOPE collected sufficient signatures to qualify the initiative for the ballot.⁹² One of the County Council's reviewing committees felt the issue was moot, as it had been reported that Puget Power no longer intended to run transmission lines along a new route.⁹³ But NOPE members were not mollified, noting that although the new proposal obviated the need for a new corridor for much of the project, one-third of the route still involved an upgrade to 230,000 volts along an existing route in residential areas.

Initiative proponents also raised repeated concerns about the aesthetics and health hazards of high-voltage transmission lines.⁹⁴ That high-voltage transmission towers and lines are unattractive is not disputable; that they are health hazards is disputable.⁹⁵

Proponents of this initiative did not exactly claim high-voltage power transmission lines were health hazards. They said such lines "raise concerns" about impacts on health.⁹⁶ The statement is not

91. Andy Norstadt, *Power Line Opponents Say Issue Will Go to Voters*, BELLINGHAM HERALD, July 9, 1990, at A1.

92. WHATCOM COUNTY AUDITOR, *supra* note 43, at 5.

93. Andy Norstadt, *New Route for Puget Power Lines*, BELLINGHAM HERALD, Aug. 17, 1990, at A1.

94. Proponents' advertisements included the following: "Studies have shown that there is a higher chance of leukemia in children when they are exposed to high voltage power lines. DON'T TAKE A CHANCE!" *Health Hazard in Local Parks*, BELLINGHAM HERALD, Nov. 5, 1990, at B2 (Advertisement). And, "I take pride that I can look my customers in the eye and say my product is safe. Can Puget Power look me in the eye and say the same? With the increased chance of leukemia in children living under or near large power lines, I am glad my children are no longer living at home." *Joe's Gardens for Initiative 4-90*, BELLINGHAM HERALD, Nov. 4, 1990, at A2 (Advertisement).

95. The case for human health hazards associated with exposure to ELF [extremely low frequency] fields is less than compelling.

... [I]t is impossible to conclude that any given level of exposure will be harmless, no matter how precisely its frequency, intensity and duration are regulated, nor can it be established that any given level of exposure is definitely harmful. Consequently, it is impossible at this time to prescribe alterations in electric transmission and distribution systems that are likely to significantly reduce the risks, if any, of exposure to ELF fields.

At present, the scientific evidence regarding the possibility of adverse biological effects from exposure to power-frequency fields, as well as the possibility of reducing or eliminating such effects, is inconclusive.

...
A review of the existing scientific evidence suggests that the risks posed by exposure to ELF, if any, are very small.

Sherry Young, *Regulatory and Judicial Responses to the Possibility of Biological Hazards from Electromagnetic Fields Generated by Power Lines*, 36 VILL. L. REV. 129, 148-50, 189 (1991).

96. Andy Norstadt, *Power-Line Initiative to be on Ballot*, BELLINGHAM HERALD, Sept. 5, 1990, at B1.

untrue. The proponents did not stoop to the outright falsehoods used by those who wanted to repeal home rule,⁹⁷ nor did they make any claims about health hazards that were unsubstantiated.⁹⁸ They did, however, distort facts by failing to mention that health-hazard studies on electromagnetic fields (EMFs) are inconclusive and that, at worst, any risks associated with EMFs are very small. Further, they did not engage in or encourage a thoughtful analysis of the trade-offs.⁹⁹ Proponents played on the xenophobia theme, observing that 230,000-volt distribution lines "are not used in Seattle, Tacoma, or Snohomish County! Why should [they be used in] Bellingham?"¹⁰⁰ "The power is not for Bellingham . . . [it is] heading south!"¹⁰¹

On August 8, 1990, the *Bellingham Herald* reported that Deputy Prosecuting Attorney Watts had determined that zoning amendments cannot be enacted by initiative.¹⁰² Mr. Watts was correct; the initiative was illegal.¹⁰³ Yet this determination did not impress initiative proponents or "deter supporters from pushing for its passage."¹⁰⁴ There is no mechanism in the initiative process to keep facially illegal measures off the ballot.

The measure was adopted by the people on November 6, 1990, with 64% of the voters favoring it.¹⁰⁵ Adoption notwithstanding, one might observe two problems with this initiative: It was illegal and, ironically, it may have led to more EMF exposure in the County rather than less.¹⁰⁶

97. See *supra* text accompanying notes 63-70.

98. See *supra* text accompanying notes 91, 96.

99. See *infra* note 106.

100. BELLINGHAM HERALD, Nov. 7, 1990, at A7 (Advertisement).

101. BELLINGHAM HERALD, Nov. 5, 1990, at B4 (Advertisement).

102. Eric Jorgensen, *Initiative to Halt Power Line May be Illegal*, BELLINGHAM HERALD, Aug. 8, 1990, at A1.

103. "[T]he legislature granted the zoning power to the legislative body of the city, the council, and not to the city as a corporate entity. . . . Washington's general law grants and limits the zoning power to the legislative body of . . . cities." *Lince v. City of Bremerton*, 25 Wash. App. 309, 312, 607 P.2d 329, 331 (1980). Further, zoning amendments cannot be adopted or changed by initiative or referendum. *Leonard v. City of Bothell*, 87 Wash. 2d 847, 852, 557 P.2d 1306, 1310 (1976). While the zoning code itself is a "legislative, policy-making" action, "[a]mendments of the zoning code or rezones usually are decisions by a municipal legislative body implementing the zoning code and a comprehensive plan. The legislative body essentially is then performing its administrative function." *Lince*, 25 Wash. App. at 311, 607 P.2d at 330.

104. Jorgensen, *supra* note 102.

105. See WHATCOM COUNTY AUDITOR, *supra* note 43, at 4.

106. Illegality aside, the ordinance was fraught with unintended ironies. First, as Whatcom County's population was growing steadily, it needed increased electrical capacity with new high-voltage lines. (The Fourth Corner Development Group, a Whatcom County resource for businesses considering locating in the County, estimates that the County's population will increase by as much as 50% between 1993 and 2010. FOURTH CORNER DEVELOPMENT GROUP,

*F. The First Referendum: The Sixth Exercise of
Direct Democracy*

Referendum 90-1, appearing on the ballot in November of 1991, sent a law adopted by the County Council to the public for review. Again the issue was garbage, this time a solid waste tax.

Whatcom County's state-mandated review¹⁰⁷ of its solid waste plan began in 1989. Early on, the County proposed mandatory garbage collection in the unincorporated areas and the imposition of a 10% excise tax on trash-collection bills to fund administration, recycling, and education programs.¹⁰⁸ In January 1990, the County Council held "a lengthy public hearing" on the proposal and approved, in concept, the ordinance as proposed by the executive.¹⁰⁹ In February, the first citizen rumblings against the tax surfaced.¹¹⁰ "Taxes never go away," one citizen complained.¹¹¹

Some people thought taxing garbage would dampen recycling efforts because citizens would be charged for pick-up even if they had no garbage, and might as well "fill that bugger up."¹¹² Others thought that a surcharge on trash taken to disposal sites would be better than a tax.¹¹³

On March 14, the Council approved the tax.¹¹⁴ Within a week, opponents organized to mount a referendum campaign against the tax,

WHATCOM COUNTY, WASHINGTON, 1994-95 INDUSTRIAL DIRECTORY 11 (1994)). Under the ordinance, such capacity could not be accommodated *except* by rezoning areas as industrial. Thus, to achieve the plan's result, such new areas would be strip-zoned, a means hardly conducive to promoting the aesthetic interest that was urged by proponents of the initiative.

Second, given the prohibition against new 230,000-volt lines in Bellingham, Puget Power's only method of increasing electrical capacity, absent rezoning, would be to "loop" 130,000-volt lines off the 230,000-volt lines. This solution would require more wiring, and with more wiring comes an increase in the very EMFs that concerned initiative proponents. Although Puget Power could have challenged the initiative (and they felt they would have prevailed), the company—mindful of the bad public relations that would have followed—declined to do so. Telephone Interview with Ray Trzynka, Director of Public Relations, Bellingham office of Puget Sound Power and Light (Apr. 14, 1994).

107. WASH. REV. CODE §§ 70.95.080, .110 (1994).

108. Andy Norstadt, *Garbage Bill in County Could Soar*, BELLINGHAM HERALD, May 3, 1989, at A1-A2.

109. Andy Norstadt, *County OKs Trash Pick-Up Idea: Garbage Collection and Excise Tax Would be Mandatory in County*, BELLINGHAM HERALD, Jan. 5, 1990, at B1.

110. Andy Norstadt, *Garbage-Tax Plan 'Makes Me Sick'*, BELLINGHAM HERALD, Feb. 16, 1990, at B1.

111. *Id.*

112. *Id.*

113. *Id.*

114. Andy Norstadt, *Council OKs Garbage Excise Tax*, BELLINGHAM HERALD, Mar. 14, 1990, at A1.

claiming it was "untested, too broad, poorly conceived, and a disincentive for waste reduction."¹¹⁵ They named their group "Citizens Against Non-Representation," or CAN.

CAN's most common and general argument against the excise tax was that county officials showed "a lack of response to concerns expressed at public hearings, workshops and meetings."¹¹⁶ These officials were "not listening to the concerns and reservations of the public who attended hearings on the tax."¹¹⁷

CAN also had some specific complaints. First, it claimed that the tax money raised under the new law could be used for purposes other than solid waste disposal programs. This was not true. The ordinance specifically limited the use of tax proceeds to "landfill closure and construction, recycling programs, education programs, and collection activities."¹¹⁸ Second, it claimed the program would encourage people to generate garbage. This was not true. The ordinance put a 25% premium on collection of the second and third trash cans.¹¹⁹ Third, CAN representatives hammered on the lack of public input. In response, one councilmember "acknowledged that those who attended public meetings opposed the tax"; however, he noted that the opponents "numbered less than two dozen people," while the Council "represent[ed] 120,000."¹²⁰

The assertion that the tax was imposed without adequate public input puzzled some members of the County Council, who noted that from December 1989 to January 1990 there were eight meetings of the Solid Waste Advisory Committee at which this item was on the agenda. Additionally, there were ten meetings of the full County Council at which this item was on the agenda.¹²¹

115. Andy Norstadt, *Challenge to Trash Tax in the Works*, BELLINGHAM HERALD, Apr. 26, 1990, at B1.

116. *Id.*

117. Andy Norstadt, *Trash-Tax Enemies Happy with Support So Far*, BELLINGHAM HERALD, May 16, 1990, at B1.

118. WHATCOM COUNTY, WASH., ORDINANCE 90-9 (1990).

119. Andy Norstadt, *County Puts Premium on Extra Trash*, BELLINGHAM HERALD, Mar. 14, 1990, at A1.

120. Andy Norstadt, *Both Sides Agree: Trash Tax Unpopular. But There, Agreement Ends; Arguments Abound Over Whether Levy Is Appropriate*, BELLINGHAM HERALD, June 17, 1990, at B1.

121. Minutes of relevant meetings show that Solid Waste Advisory Committee meetings were held on March 16, April 16, August 17, and December 7 of 1989; and January 4 and 8, February 15, and July 10 of 1990. County Council meetings were held on May 2, June 15, and December 7 of 1989; and January 18, March 6 and 13, May 22, June 5, July 10, and September 25 of 1990. Interview with Ramona Reeves, *supra* note 89.

Sufficient petitions were not validated until September of 1990, which was too late for the measure to appear on the November 1990 ballot. The measure would appear in 1991.

Meanwhile, because filing the referendum stayed execution of the ordinance, the County was without revenue to fund its solid waste program.¹²² Thus, during the months that followed, county administrators and the County Council worked with CAN in drafting a "letter of intent," which detailed a negotiated agreement as to how two ordinances dealing with trash collection and recycling would be administered.¹²³ Changes from the original plan seemed modest: Residents who could demonstrate through an application procedure that they could dispose of garbage safely could obtain exemptions from the pick-up requirement. For those individuals, once-a-month collection would be available. Further, the 10% excise tax would be replaced by a 10% surcharge.¹²⁴

The agreement among the parties, memorialized in a "letter of agreement," resulted in CAN not actively seeking approval of its referendum. And then, "Surprise! The garbage tax survives!";¹²⁵ the referendum failed 52% to 48%. This seemingly impossible result may have resulted from voter confusion. Because the tax had already been replaced by a surcharge, some voters may not have understood that if the referendum failed, the tax could still be levied. Some observers actually thought that the wording on the ballot may have confused voters.¹²⁶ In any event, the Council had no intention of imposing the tax, as it was unnecessary with the surcharge in place.¹²⁷

This exercise in direct democracy struck those who had labored to develop a rational solution to the County's solid waste problem as particularly frustrating because it accomplished nothing except to delay the organization of funding mechanisms necessary to pay for county solid waste programs.¹²⁸ From August of 1990 to January of 1992, the County had no adequate solid waste funding. The referendum process had, in effect, held the County hostage.

122. Andy Norstadt, *Garbage Tax Initiative May Reach Ballot*, BELLINGHAM HERALD, Aug. 21, 1990, at B1.

123. Andy Norstadt, *County May End Trash Dispute: Van Zanten, Citizens Group Sign Letter of Intent*, BELLINGHAM HERALD, Dec. 5, 1990, at A1.

124. *Democracy and Garbage*, BELLINGHAM HERALD, Dec. 10, 1990, at B2 (Editorial).

125. Andy Norstadt, *Surprise! Garbage Tax Survives!*, BELLINGHAM HERALD, Nov. 8, 1991, at B1.

126. *Id.*

127. *Id.*

128. See *supra* text accompanying note 122.

The difference between the 10% "tax" and the 10% "surcharge" appeared to be merely semantic, except that the "surcharge" was subject to Washington State sales tax and the "tax" was not.¹²⁹ CAN's delaying tactics;¹³⁰ the months of negotiations among disposal companies, haulers, county officials, and private citizens; and the committee meetings and council meetings in every city and in the County resulted only in cost to Whatcom County and its citizens of enormous amounts of staff time and money.¹³¹ And again, one is hard-pressed to find any substantive difference between the final result and the plan proposed eighteen months earlier.¹³²

*G. The Second Referendum: The Seventh Exercise of
Direct Democracy*

The final example of Whatcom County direct legislation involves an issue even more volatile than solid waste disposal: land use.

The Washington State Legislature's 1991 adoption of the Growth Management Act¹³³ was intended to slow the degradation of the quality of life in Washington State caused by poorly planned population growth, and to encourage orderly growth and development in certain counties in the state.¹³⁴ The Act requires that affected

129. The surcharge was imposed as a "tipping fee" that would be charged to haulers when dumping solid waste at the disposal sites; it would not show as a "tax" on residents' bills. Although the county Solid Waste Manager suggested that "ratepayers should not be affected by the surcharge" because the disposal facility did not plan to raise its rates to cover the surcharge, it was highly unlikely that the disposal facilities would not seek to pass through this expense. Leo Mullen, *Waste Efforts to be Funded by Trash Tax*, BELLINGHAM HERALD, Dec. 11, 1991, at B1. It is notable that Leo Mullen here called the surcharge a "tax."

130. Perhaps CAN did not in fact recognize that failure to submit sufficient signatures early in the summer of 1990 would mean the referendum would not be on the ballot for a year and one-half; meanwhile, there was no funding for solid waste programs.

131. According to the county executive, the cities in the County would all have to agree to the surcharge, as they had to the excise tax, by vote of the city councils. Some of the cities wanted to wait until the November election to decide on funding mechanisms. Andy Norstadt, *County Council Seeks Surcharge on Garbage*, BELLINGHAM HERALD, Feb. 6, 1991, at B1.

132. The "letter of intent" signed by the County Council Chairman made these changes: Efforts will be made to recycle plastics; county residents will be charged equitable fees; penalties will be increased for littering; no special personnel will be hired specifically to enforce this ordinance; no tax will be imposed unless the citizens approve it in the referendum; exemptions from universal coverage shall be continually available by mail; fair procedures shall be established to notify residents of non-compliance with disposal requirements; and more funding will go toward education and to obtain compliance by commercial recyclers. Whatcom County Council, *Letter of Intent* (Jan. 24, 1991).

133. WASH. REV. CODE §§ 36.70A.010-.902 (1994).

134. The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development,

counties adopt regulations to conserve and protect critical and natural resource areas.¹³⁵

In January of 1992, Whatcom County began the process of defining and, by ordinance, limiting the use of, intrusion into, and exploitation of wetlands, steep slopes, alluvial plains, and other critical areas within the County. County staff worked with a technical advisory committee and a citizens' advisory group to develop proposed regulations.¹³⁶ By May of 1991, town meetings were beginning.¹³⁷

In late May 1992, a huge storm of protest erupted over the proposed Critical Areas Ordinance (CAO) "as if out of nowhere."¹³⁸ A previously unknown group calling itself "CLUE" (Coalition for Land Use Education) imported a land-rights activist named Chuck Cushman¹³⁹ who "electrified" a crowd of 300 at a rural meeting hall. He urged them to make a show of force at the County Council meeting—to pack the house—telling them that if hundreds and hundreds showed up, "they'll have to schedule more hearings, won't they?"¹⁴⁰

Cushman ridiculed wetlands protection regulations by comparing wetlands to aspirin: "Two are good for you. A hundred will put you in the hospital."¹⁴¹ He called regulators "career climbers who get ahead by deceiving property owners." He shouted at the crowd, "Have you ever seen a regulator who said, 'We've got to have less regulations?'" He called environmentalists devotees of "a new paganism that worships trees and sacrifices people" and who want to usurp private property bit by bit. "What do you do when they keep asking for more?" he asked the crowd. 'You shoot 'em' a man in the audience said."¹⁴²

and the health, safety, and high quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning. Further, the legislature finds that it is in the public interest that economic development programs be shared with communities experiencing insufficient economic growth.

WASH. REV. CODE § 36.70A.010 (1994).

135. *Id.* § 36.70A.060.

136. Andy Norstadt, *County Dives in Wetlands Rules: Hearings Begin to Shape Regulations*, BELLINGHAM HERALD, May 15, 1991, at A1.

137. *Id.*

138. Ben Santarris, *County Land-Rights Fight Turning Hotter*, BELLINGHAM HERALD, May 31, 1992, at A1.

139. A former Los Angeles insurance executive and a resident of Battle Creek, Washington.

140. Ben Santarris, *Landowners Get Sharp Call*, BELLINGHAM HERALD, May 22, 1992, at A1.

141. *Id.*

142. *Id.*

The crowd cheered, applauded, stamped its feet, and laughed as he suggested disrupting meetings by parking trucks of noisy cattle outside meeting halls. A crowd of Cushman-inspired citizens stormed a County Council meeting, hurling contempt as it heckled the Council. The heckling included scattered violent taunts, "shouts and boos, causing a delay in the hearings."¹⁴³ Members of the audience waved signs with slogans such as, "Our Land, Our Rights," and some wore yellow ribbons symbolizing their "fears that county officials are holding private land hostage to environmental rules."¹⁴⁴ Over and over they complained that they had not had adequate input into the proposed regulations.

At another meeting, over 800 people showed up to give and listen to over six hours of testimony for and against the regulations. "Many speakers made rhetorical flourishes. They quoted from the Bible. They likened the council to the politburo of the now-defunct Soviet Union. They recounted U.S. history."¹⁴⁵ This meeting was the one-hundredth public meeting in the County to consider aspects of the CAO.¹⁴⁶

On June 23, 1992, the County Council unanimously adopted a revised CAO. Some people thought it had been watered down excessively.¹⁴⁷

Land-rights advocates immediately began a signature gathering campaign to submit the revised CAO to a referendum. The signature gatherers carried with them a copy of the law as referendum proponents had interpreted it. Referendum proponents had rewritten sections of the CAO by crossing out sentences, paragraphs, and sections they found objectionable, and spliced pieces of the original language together.¹⁴⁸ More readily readable were fliers screaming, "You CAN'T DO ANYTHING WITH YOUR PROPERTY without their approval"; a false statement, but not subject to much debate in the parking lot of a supermarket.¹⁴⁹ The sufficiency of the

143. Santarris, *supra* note 140.

144. Ben Santarris, *Land Rights Crowd Stalls County Meet*, BELLINGHAM HERALD, May 27, 1992, at A1.

145. Ben Santarris, *Crowd Packs Land-Use Forum*, BELLINGHAM HERALD, June 2, 1992, at A1.

146. *Id.*

147. Ben Santarris, *Sensitive-Lands Law Passes*, BELLINGHAM HERALD, June 24, 1992, at A1.

148. "Any legal voter . . . may file a referendum proposal, against any enacted ordinance or portion thereof . . ." WHATCOM COUNTY, WASH., CHARTER § 5.60 (1986). Proponents could not, by referendum, add any language.

149. See *infra* text accompanying note 185.

signatures was established on January 4, 1993,¹⁵⁰ staying the effectiveness of the CAO as adopted.¹⁵¹ And the campaign began.

Considering the tactics of alarm-raising and rabble-rousing practiced by the "land rights" proponents during the late stages of adoption of the CAO,¹⁵² it was not surprising that the new campaign partook of the same flavor. Referendum supporters so egregiously misrepresented the effect of the CAO that the *Bellingham Herald* took notice outside the editorial page. Staff reporter Rachel Prentice wrote, in mid-October, that statements made by proponents "are exaggerated, taken out of context, or wrong."¹⁵³ She cited several examples. Referendum supporters claimed that the wildlife buffer-zones (designed to preserve animal breeding and nesting areas) were "so prohibitive they would encourage residents to defy the buffers, or even kill protected animals."¹⁵⁴ They would, according to CAO foe Skip Richards, be "a death warrant for every one of those species . . . catastrophic . . . for wildlife, not just people."¹⁵⁵ But in fact, as Prentice noted, "The buffers were not areas where development was prohibited. They were areas where the county had jurisdiction to review and modify development plans. The original law says, 'development may occur in such areas' subject to some conditions, such as imposition of 'a reasonable buffer.'"¹⁵⁶ Prentice noted that fliers to the effect that "YOU CAN'T DO ANYTHING WITH YOUR PROPERTY" notwithstanding, there were in fact many exemptions in the law adopted by the County Council. "And construction of small structures—sheds, cabins, duckblinds—was allowed without a building permit in sensitive areas, including the most sensitive type of wetland."¹⁵⁷

Referendum supporters also misrepresented the costs of administering the new law. They claimed in their flier "that the law will allow creation of 'an unnecessary and costly new CAO administration which reviews every permit applied for in Whatcom County.'"¹⁵⁸ County

150. See WHATCOM COUNTY AUDITOR, *supra* note 43, at 7.

151. "Upon registration and validation of a referendum petition, the measure will be ineffective pending the outcome of the referendum procedure." WHATCOM COUNTY, WASH., CHARTER § 5.50 (1986).

152. See *supra* text accompanying notes 140-46.

153. Rachel Prentice, *Referendum Inflates Effects of Lands Law*, BELLINGHAM HERALD, Oct. 17, 1993, at A10.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

officials responsible for building-permit issuance simply disagreed; the county Building and Codes Department received \$105,000 to hire two staffers and buy equipment for the first year. It was anticipated the annual cost after start-up would be \$60,000 to \$70,000 out of a total department budget of \$2.3 million.¹⁵⁹ There was no new administration.

The referendum, as was intended, weakened protection of critical areas laws. Yet citizens certainly have the right to seek removal of burdensome regulation interfering with their property use.

Whatcom County's ordinance-induced referendum, challenged by the County,¹⁶⁰ was declared illegal by the Western Washington Growth Management Hearings Board,¹⁶¹ and, in December of 1994, by the Washington State Supreme Court.¹⁶² First, the court found the "power to act under the [state] Growth Management Act was delegated to the 'county legislative body,'"¹⁶³ and is not, therefore, subject to referendum. Second, the court found that the entire purpose of state-wide planning would be jeopardized by allowing counties to effectively repeal state law through referenda.¹⁶⁴ Third, the court held that the ordinance was adopted to promote "public health [and] safety," and such ordinances cannot, under the county charter, be amended by referenda.¹⁶⁵ Fourth, the court held that the process of adopting the amended ordinance did not comport with state law under the Planning Enabling Act,¹⁶⁶ which requires a whole process of

159. *Id.* Prentice also mentions, however, that opponents of the referendum misrepresented the effect of the referendum. Rachel Prentice, *Opponents Criticize Referendum-Law Use*, BELLINGHAM HERALD, Oct. 17, 1993, at A10.

160. Telephone Interview with Dan Gibson, Whatcom County Deputy Prosecuting Attorney (Apr. 18, 1994).

161. "In a decision signed Thursday, June 30th, the Western Washington Growth Management Hearings Board overturned Whatcom County's Referendum 92-3, on the grounds that the county did not go through the proper public process and review in enacting referendum 92-3." Sue Lorentz, *Referendum 92-3 Overturned*, WHATCOM WATCH, July 1994, at 1. The ruling stated, among other things, that "[t]he referendum ordinance constituted an amendment to the ordinance adopted by the county council and is not in compliance with the Growth Management Act." *Id.*

The Council, however, made no changes to the referendum-amended ordinance; it directed staff to examine the ordinance's illegal parts; staff recommended "minor modifications to the referendum version of the . . . ordinance." Whatcom County Council, Agenda Bill, Subject: Joint Public Hearing, Whatcom County Council/Planning Commission (Oct. 18, 1994).

162. *Whatcom County v. Brisbane*, 125 Wash. 2d 345, 884 P.2d 1326 (1994).

163. *Id.* at 349, 884 P.2d at 1329.

164. *Id.* at 351, 884 P.2d at 1330.

165. *Id.* at 353, 884 P.2d at 1331 (citing article 5, section 5.50 of the Whatcom County, Wash., Code).

166. WASH. REV. CODE § 36.70 (1994).

"commissions and planning agencies, and further describes the procedural functions of each" before adoption of any land-use planning law under the Act.¹⁶⁷

This last exercise in direct democracy was another example of voter reaction against change from a community in which citizens have fairly immediate control over decisions that affect them to a community where, according to opponents of the initiatives and referenda, overarching regulation is needed in the broader public good.

IV. REFLECTIONS ON THE SUCCESS AND EFFICACY OF DIRECT DEMOCRACY

A. *A Summary of the Local Exercises*

To review the initiatives and referenda that were adopted by the citizens of Whatcom County is, quite generally, although not completely, to catalogue a series of failures:

- (1) Reject TRC; accept Olivine: convulsed resolution of solid waste for a decade; ultimately overridden by the County Council; declared invalid as administrative.
- (2) Nuclear free zone: unchallenged, but apparently unconstitutional.
- (3) Repeal home rule: legal, but the campaign was marked by egregious misrepresentation on proponents' behalf.
- (4) Ban medical waste: unconstitutional.
- (5) Excise tax for garbage: legal, but without significant effect, save creation of delay and expense.
- (6) Restrict high-voltage power lines: unchallenged, but illegal as zoning by initiative.
- (7) Repeal portions of the County's CAO: illegal as contrary to mandates of state law; zoning by initiative; marked by egregious misrepresentation.

Supporters of repealing the excise tax on garbage, restricting high-voltage power lines, and repealing part of the CAO might, of course, claim success. The County made some changes in its solid waste disposal plan, Puget Power did not follow through with its original plan to construct a new high-voltage corridor, and changes were effected in the CAO¹⁶⁸ that may affect the final version of the law.

167. *Brisbane*, 125 Wash. 2d at 354, 884 P.2d at 1331.

168. "I've never seen a more conservative swing," said Mark Nelson, speaking about the results of the November 1993 election in Whatcom County. Andy Norstadt, *County Property Rights Activists Win*, BELLINGHAM HERALD, Nov. 3, 1993, at A1. Even if the court "tosses out" the referendum, its supporters "will push the county to adopt a permanent law that resembles the

Still, of seven exercises in direct democracy, five were manifestly illegal, unconstitutional, or invalid. The other two were, as previously noted, otherwise flawed. This is not a good record.

B. *Problems with Direct Democracy*

This local government review of direct democracy reveals a number of problems with the initiative and referendum similar to those that have been observed elsewhere by other commentators.¹⁶⁹ Three of these problems may be characterized as procedural: problems in the drafting stage, the voter approval stage, and the execution stage. The fourth problem may be characterized as political: Direct democracy returns the control of legislation to special interest groups and undercuts republicanism.

1. Problems In the Drafting Stage

The drafting stage presents two problems: The initiative process is not deliberative, and it tends to produce extreme and divisive legislation. The legislative process is deliberative. Even truncated, as it is in county councils (which amount to unicameral legislatures), the process is subject to open committee hearings, public hearings, debates on the floor of the legislature, and, at the county level, direct public participation during discussion prior to council voting. The process gives legislators an opportunity to read the bill and reflect on comments from citizens, affected parties, lobbyists, and other legislators. Even at the local level, such review may take months.

In contrast, the initiative is written by a small group without any process for debate or compromise.¹⁷⁰ It tends to produce divisive legislation. In the legislature, despite strong individual feelings, measures must receive a majority vote; thus, compromise is inherent

referendum version." Rachel Prentice, *County Scrutinizes Land-Use Ruling*, BELLINGHAM HERALD, Jan. 28, 1994, at A1.

169. MAGLEBY, *supra* note 22, at 180-99.

170. At the state-wide level, the dangers inherent in legislation proposed by a small, undeliberative group is compounded by the expense of getting measures on the ballot:

[T]he high cost of seeing an initiative to the ballot affects who sponsors initiatives. Well-financed individuals, lobbyists, and special interest groups proposed most of the initiatives for recent [California, state-wide] elections. Such a result is ironic, given the original goals of the initiative process. . . . Enacted to empower the under-represented members of society, it appears the initiative process now serves the heavily financed interest groups the system was hoping to bypass.

See Sutro, *supra* note 24, at 950-51.

in that process.¹⁷¹ But proponents of initiatives have no particular incentive to curb their legislation's extremism, especially considering that voters are not likely to read the proposal, either when they sign it or when it is on the ballot. Initiatives and referenda, then, appeal to "passions and prejudices, spotlight tensions, and result only in greater conflict and disagreement."¹⁷²

171. Opponents characterized the compromises as merely "minor concessions." Ben Santarris, *County Land-Rights Fight Turning Hotter*, BELLINGHAM HERALD, May 31, 1992, at A1.

172. MAGLEBY, *supra* note 22, at 185. Consider in this context the now-famous "three strikes you're out" legislation that mandates life in prison without parole for a person convicted of three felony offenses. Voters in Washington State approved the "Three Strikes" initiative in November of 1993. Initiative 593 (codified as WASH. REV. CODE § 9.94A.120 (1994)). In March of 1994, the California Legislature adopted a three strikes bill, A.B. 971, Ch. 12, 1994 Ca. Sess. Law., and in November of 1994, three strikes was again enacted in California, this time by voter initiative as Proposition 184. See Victor S. Sze, Comment, *A Tale of Three Strikes: Slogan Triumph's Over Substance as our Bumper-Sticker Mentality Comes Home to Roost*, 28 LOY. L.A. L. REV. 1047, 1048 n.1 (1995). Other states have followed, as has the federal government. The appeal of such legislation is understandable: Violent offenders have few defenders, and most people do not understand how a person convicted of two violent felonies can be allowed back on the streets to prey on innocent citizens. The legislation is, however, entirely unnecessary and, worse, a very bad law.

The law is unnecessary because Washington State and most other jurisdictions already had on the books "habitual offender" statutes, mandating long or lifetime prison terms for recidivists.

For example, Texas has had a Three Strikes law since the early 1970s that puts three-time felons in jail for twenty-five years to life. Also, West Virginia has a similar, but more stringent, version which incarcerates three-time felons for life without the possibility of parole. Twelve other states have habitual criminal laws similar to those of Texas and West Virginia, and at least twentyone [sic] more states have some type of increased penalty for multiple felons.

Even the Federal government makes use of recidivist statutes similar to the proposed Three Strikes legislation. The Armed Career Criminal Act provides that if a person uses a firearm during the commission of a violent crime and it is his second conviction under the Act, then the offender is automatically sentenced to prison for twenty years to life depending on the weapon used. There also currently exists the Controlled Substances Act which provides that a term of life imprisonment without parole shall be imposed after a third enumerated drug related conviction.

Robert Heglin, *A Flurry of Recidivist Legislation Means: "Three Strikes and You're Out,"* 20 J. LEGIS. 213, 215-16 (1994) (footnotes omitted).

Moreover, the legislation is based on a serious misapprehension, so often cited that it has become nearly unassailable: "[I]t remains a fact that a smaller percentage of criminals perpetrate a much greater percentage of the crimes. For example, a survey done in Philadelphia showed that two thirds of violent crime was committed by seven percent of the criminals." *Id.* at 214 (footnotes omitted). And again, "The premise that a smaller percentage of criminals commit a larger percentage of the crime underlies the Three Strikes legislation." *Id.* at 233. "President Bill Clinton, in his 1994 State of the Union address, claimed [the same thing,] that 'most violent crimes are committed by a small percentage of criminals.'" Marc Mauer, *Politics, Crime Control ... and Baseball?*, 9 CRIM. JUST. 30, 30 (1994).

These assumptions are really not demonstrable. The Philadelphia study, conducted by Marvin Wolfgang of the University of Pennsylvania, examined crimes committed by all boys born in the city in 1945 and in 1958. The study did not show that 66% of the crimes were committed

Appeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns. Of course, politicians, too, may offer quick cure-alls to gain electoral support and may spend millions on election campaigns that are as likely to obfuscate as to elucidate the issues. But we vote politicians into office, not into law. Once in office, they may become well-informed, responsible representatives; at the least, their excesses may be curtailed by the checks and balances of the political process.¹⁷³

Many proponents of initiatives not only have no particular incentive to curb legislative extremism, they often do not *want* reasonable legislation. These individuals have taken no oath to uphold

by 7% of the criminals; it showed that 66% of the crimes were committed by about 7% of *all boys*. "Expanding the definition slightly . . . fully 19 percent of all boys in the study population—almost one of every five—had been arrested at least twice by age 18." *Id.* at 32. In other words, 6% of all young men (not 6% of all criminals) were responsible for two-thirds of the violent crime, and nearly 20% of all young men were at risk for committing a third felony. And of course these figures are forty and fifty years old, and their relevance to today's circumstances, where guns and drugs plague inner cities, is certainly dubious. If we consider 6% of all young men as potential recidivists, we certainly have a huge prison-building spree ahead of us. Other studies cited by Mauer show that "high-rate offenders cannot be accurately identified, either prospectively or retrospectively, on the basis of their arrest records alone." *Id.* at 32 (citation omitted).

In his well-presented argument generally in favor of "three strikes" laws, the most that Robert Heglin could say about deterrence is that supporters of the law believe that deterrence is at least marginally present, while detractors say it is pure speculation. Heglin, *supra*, at 222. As to the cost of keeping inmates behind bars for long periods of time, Heglin observes that the increased costs are negligible because many of these criminals would be in prison anyway, either for new crimes or under already-existing habitual offender statutes. *Id.* at 224. And while it is true that keeping repeat offenders in prison prevents them from committing more crimes (again, we cannot really tell whether a person now in prison will commit a new crime or not, based only on past arrest records) and thus from inflicting economic injury upon victims or society, that cost is widely dispersed, while the cost of incarceration is specific, and necessarily requires allocation of expense from some other useful government function (education, for example).

The point here is not that criminals should not be punished; of course they should. The point is that the premise underlying the public's enthusiasm for three strikes laws are subject to much dispute and interpretation. It is entirely arguable that this exercise in direct democracy will not achieve its desired effect. Indeed, it may have all kinds of unanticipated consequences, such as more first and second-time offenders let out early, violent resistance by at-risk criminals, clogged courts, over-crowded and riotous prisons, decreased funding for education to fund more prison construction, and the like. The public's enthusiasm for this legislation is based on the catchy phrase, "three strikes, you're out!" like a baseball game, and on the shallow allure of a quick fix. Had the citizens carefully reviewed the literature on this issue and considered the implications of their actions, three strikes might not have been enacted into law at all. But, of course, in an initiative campaign there is no careful review of any literature; rather, there is mostly sound-bite advertising and sandwich-board sloganeering.

173. MAGLEBY, *supra* note 22, at 185 (quoting Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 19-20 (1978)).

the laws of the jurisdiction or the Constitution. They tend to be suspicious of government, and they are often contemptuous of the legislative process¹⁷⁴ and of legislators, who, they think, are and ought to be "running scared" because they have forgotten who elected them.¹⁷⁵

That this type of legislation is unreasonable, or even illegal, is often not of concern. Speaking about the famous 1994 California Initiative 187 to bar illegal immigrants from receiving state-supported social services, one commentator observed, "Proposition 187 is a classic message initiative Even supporters acknowledge its dubious constitutionality."¹⁷⁶ Similar observations were made about Whatcom County's nuclear free zone initiative. However, its supporters, who wanted to send a message, did not care.¹⁷⁷

The initiative process has, in the eyes of critics, "become a divisive device increasingly employed by the disenchanted to produce changes the legislature has been reluctant to make . . . that bitterly divides segments of society, devours large sums of money for campaigns for and against, and [leaves] legacies of anger and hostility."¹⁷⁸

Law made by initiative tends to be divisive and extreme. Even beyond that, it is usually bad law. The "legislators" here, who actually draft the laws, are not generally well informed. Thus, the same problem that produces divisive and extreme legislation also produces half-baked, simplistic legislation. Resolution of Whatcom County's solid waste problem was made very difficult when, via the first initiative, the people voted to give an incineration contract to one vendor over another.¹⁷⁹ The legislation provided them with no opportunity to engage in a sophisticated analysis of the vendors' respective qualifications for the job, and the "legislators" themselves certainly did not undertake such an analysis. Zoning, a complex process that ought, in view of its permanent effects, to consider the

174. See *infra* text accompanying note 243.

175. See *infra* text accompanying note 249.

176. Daniel B. Wood, *State Ballot Initiatives Place Hot-Issue Decisions in Laps of Electorate*, CHRISTIAN SCI. MONITOR, Nov. 3, 1994, at 3, 3.

177. See *supra* text accompanying notes 65-73.

178. Mike Flynn, *Unsound Initiatives Don't Deserve Ballot*, PUGET SOUND BUS. J., Apr. 22-28, 1994, at 10. Behind this increasingly bitter use of the initiative process is a larger, more alarming problem. That problem is the decline of the middle class and the rise of "populist anti-politics—programmatically inchoate, hostile to party and ideology alike, and profoundly cynical about government." Jack Beatty, *Who Speaks for the Middle Class?*, ATLANTIC MONTHLY, May 1994, at 65, 70. One does not need to listen to the conservative radio talk-show host Rush Limbaugh for fifteen hours a week to sense the abounding cynicism and hostility toward government that comes across the radio.

179. See *supra* text accompanying notes 44-57.

needs of the entire jurisdiction over the long run, becomes very difficult when voters, given the chance to vote yes or no, directly legislate power line corridors or determine, without a technical basis, what lands should be protected for the future. In *Leonard v. Bothell*,¹⁸⁰ the Washington Supreme Court reflected upon this need for informed decisionmaking:

[R]ezone decisions require an informed and intelligent choice by individuals who possess the expertise to consider the total economic, social, and physical characteristics of the community. [City of Bothell's] planning commission and city council normally possess the necessary expertise to make these difficult decisions. . . . In a referendum election, the voters may not have an adequate opportunity to read the environmental impact statement or any other relevant information concerning the proposed land-use change.¹⁸¹

A good government attempts to act with at least *some* plan in mind. When the inevitable consequence of government without a plan, or with a poorly-thought-out plan, manifests itself, it is no wonder that people complain.¹⁸²

2. Problems In the Voter Approval Stage

Once direct legislation is written, usually by four or five disgruntled citizens, there are further difficulties in the voter approval stage. Citizens sign petitions putting direct democracy legislation on the ballot without understanding the meaning or importance of the document, and they are usually uninformed about the issues.

The signature gathering phase of the initiative and referendum is not a shining example of the people's democracy at work. Commentators have noted that "citizens are often purposely approached at inconvenient times, when they will sign the petition just to get on with their business."¹⁸³ Most often the signature gatherers approach people in shopping centers. They rely not on an explanation of the

180. 87 Wash. 2d 847, 557 P.2d 1306 (1976).

181. *Id.* at 854, 557 P.2d at 1311.

182. "California is now spending its scarce revenues not through a comprehensible legislative process in which priorities are evaluated against one another but through a crazy quilt of ad hoc decisions that frustrates healthy development and defies rational budgeting, intelligent policy formulation, and civic comprehension." Peter Schrag, *California's Elected Anarchy: A Government Destroyed by Popular Referendum*, HARPER'S, Nov. 1994, at 50, 55.

183. THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 63 (1989).

import of the petition, but on "slogans and a certain amount of 'hoopla.'"¹⁸⁴

First, you set up a table with six petitions taped to it, and a sign in front that says, "SIGN HERE." One person sits at the table. Another stands in front. That's all you need—two people.

While one person sits at the table, the other walks up to people and asks two questions. We operate on the old selling maxim that two yeses make a sale. First, we ask them if they are a registered voter. If they say yes to that, we ask if they are registered in that county. If they say yes to that, we immediately push them up to the table where the person sitting points to a petition and says, "Sign this." By this time, the person feels, "Oh goodie, I get to play," and signs it. If the table doesn't get 80 signatures an hour using this method, it's moved the next day.¹⁸⁵

It seems obvious that very few voters actually read the text of the proposal,¹⁸⁶ and they are unlikely to be very informed about it. Magleby reports that even when there was widespread media attention, such as the media attention associated with hotly contested initiatives in California, at least 20% of the voters said they knew little or nothing about the measure.¹⁸⁷ For less highly publicized issues, the figure rose to 35%. Robert Benedict, examining data relevant to Washington State initiative voters, concluded that most voters, particularly those in the middle and low income groups, do not make informed choices because they pay attention primarily to arguments supporting their pre-existing prejudices.¹⁸⁸

184. *Id.*

185. *Id.* (quoting Ed Koupal, a leader of California's neo-populist People's Lobby).

186. The referendum to repeal portions of Whatcom County's Critical Areas Ordinance was actually physically impossible to read. It was some thirty legal-sized sheets; on each page was reprinted four pages of the original ordinance, shrunk in size by photocopying to the point that some parts were simply not legible, and it was interlined with crossed-out words, sentences, and paragraphs.

187. MAGLEBY, *supra* note 22, at 129.

188. Benedict, *supra* note 27, at 162-63. The City of Bellingham includes Western Washington University, a masters-granting institution with about 10,000 students. It may be reasonable to assume that more highly-educated persons live in the City—given the draw of the University—than in the outlying unincorporated areas or smaller towns. Better-educated people, it is postulated, make more rational choices than less well-educated people because they understand the issues better and "appreciate where their economic advantage lies." *Id.* at 143. There was a marked difference between city and rural residents in voting on the CAO: rural residents voted strongly in favor of the ordinance, city residents against it. Andy Norstadt, *City, County Breach at Polls: Unincorporated Voters Critical to Success of Referendum, Candidates*, BELLINGHAM HERALD, Nov. 7, 1993, at A1. One would need to determine whether better-educated rural residents voted differently from less well-educated ones to know whether the difference in voting patterns was town-country or educated-less-educated.

The opportunity for voters to become informed is limited, especially in the local initiative campaign. There is no voters' pamphlet as there is at the state level.¹⁸⁹ Rather, citizens rely on other sources for information, including television, radio, newspapers, family, friends, and colleagues.¹⁹⁰ Further, initiatives and referenda do not contain party designations, thus voters cannot benefit from that identifying and sometimes-helpful clue. Some observations have already been made about initiative signature gathering, a process not designed nor intended to inform people about what they are signing.¹⁹¹ Most people¹⁹² simply sign the petition after hearing a catchy slogan such as, "Do you want to stop importing infectious waste into our county?" or, "Are you against having nuclear bombs made here and more Three Mile Islands?" or, "Do you think you should be able to develop your own land?"

Not only do voters receive limited information about initiatives and referenda, the information they do receive is often misrepresentative. This misrepresentation results from the lack of significant public input or opportunity for compromise that are normally available through the legislative process. Campaigns are marred, not only by oversimplification and appeals to prejudice during the signature gathering phase, but also by blatant misrepresentation of facts during the campaign—by lies.¹⁹³

3. Problems In the Execution Stage

If the direct legislation process is fraught with problems in creation and in adoption, it follows that it is usually fraught with

189. California, Massachusetts, Montana, Oregon, and Washington have voters' pamphlets prepared by the state. Even at the state-wide level, however, where people have state-printed voters' pamphlets to assist them in understanding the issues, the public is not well informed. The voters' pamphlets are too full of "impenetrable prose" and "most of the voters do not read the pamphlet or use it as a source for decisions on propositions." CRONIN, *supra* note 183, at 82. Sutro quotes "a noted California politician," who stated that "[s]ixty second commercials may be entertaining, but they shouldn't form the basis for policy decisions. If immensely complicated issues could be easily whittled down to four lines and a yes-or-no answer, there would be no need for a legislature." Sutro, *supra* note 24, at 954 n.42 (citing John Garamendi, *Insurers Lost the Battle, But Won the War*, L.A. DAILY J., May 16, 1990, at 6).

190. In Whatcom County there is essentially no television coverage of local events. See Benedict, *supra* note 27.

191. See *supra* text accompanying notes 183-85.

192. Fifty to seventy percent. CRONIN, *supra* note 183, at 64.

193. Stephen Sutro makes this observation about truth in initiative advertising: "In 1988, one group opposed to a [California] campaign finance reform initiative (Proposition 68) targeted voters by suggesting in an advertisement that Nazi storm troopers might receive public financing should the proposition pass. . . . The initiative itself, however, included multiple safeguards to protect public money from going to extremists." Sutro, *supra* note 24, at 952 n.35.

problems in execution. Once adopted, the direct legislation does not work, or it is invalidated by post election challenges. This logic held true in Whatcom County, as illustrated by Whatcom County's excise tax on garbage. Most frustrating was that the referendum was based on vacuous arguments that the county proposal was unnecessary;¹⁹⁴ that it would not provide incentives to reduce trash;¹⁹⁵ that it was too broad, open-ended,¹⁹⁶ limitless, and uncontrolled;¹⁹⁷ that it discriminated against senior citizens;¹⁹⁸ that it was counter-productive; that it would discourage recycling;¹⁹⁹ and most galling to those who sat through meeting after meeting after meeting, that it was conceived and imposed without representation or input from citizens.²⁰⁰

Further, an initiative or referendum that is unconstitutional, illegal, or invalid is not executable. That was the fate of five exercises in direct democracy from Whatcom County. The experience of other jurisdictions is similar. The morning after the recent California election in which voters approved Proposition 187, a number of lawsuits were filed challenging the constitutionality of the proposition's provisions, and at least two federal judges issued injunctions temporarily suspending the operation of the proposition.

A comprehensive study of state initiatives would be required to determine if other states' attempts in this area have had as baleful an influence as have these local exercises of direct democracy. One senses from a review of the literature that they have.²⁰¹

194. But state law mandated development of a new solid waste disposal plan, and Whatcom County had no landfill and a definite, even desperate, need for a comprehensive disposal, waste-reduction, and recycling program. WHATCOM COUNTY, WASH., CODE § 8.11.010(B) (1990).

195. As observed *supra* text accompanying note 119, the county plan imposed a surcharge of 25% on second and third cans set out for garbage collection.

196. In fact, the county proposal dealt only with disposal of solid waste (normal disposal and recycling) and with waste-reduction education plans. WHATCOM COUNTY, WASH., CODE § 8.10.010 (1990); WHATCOM COUNTY, WASH., ORDINANCE 90-95 § 1 (1990).

197. The governing state law requires periodic review. WASH. REV. CODE §§ 70.95.080, .094, .110 (1994).

198. There is no provision for giving senior citizens special treatment under the ordinance.

199. Recycling is included in the disposal service at no additional charge. WHATCOM COUNTY, WASH., CODE §§ 8.10.010(B)-(C), 8.10.050(F) (1990).

200. See *supra* note 121. All meetings of the County Council and its committees are open to the public unless qualifying as "executive sessions" under relevant, limited provisions of Washington State law.

201. Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 733 (1994).

Certain numbers strike terror in the hearts of Southern Californians. Having experienced a 6.8 in January, we worry about an 8.0 in our future. But even the horror that would be associated with such an event pales when compared with the devastation left in the wake of the 13 that occurred in June 1978. I refer, of course, to the infamous Proposition 13, freezing property taxes at one-percent of purchase price. Proposition

4. Problems In Returning Government to Special Interests

These problems in drafting, voter approval, and execution make it very difficult for direct legislation to accomplish its immediate goals at the local level²⁰² or at the state level.²⁰³ Advocates in the Progressive era had hoped that the initiative and referendum would be a

13 has left education, welfare, public safety, the economy, and the infrastructure in shambles. California, which once ranked as the nation's leader in primary and secondary education, now relishes a year in which it finishes forty-eighth rather than fiftieth.

Id.

However sympathetic one might be to the plight of California taxpayers who see their tax dollars going to support illegal immigrants, it seems clear that California's Proposition 187 (denying public services, health care, and education to illegal aliens) is fraught with problems. On its face, it appears unconstitutional as a denial of equal protection; even if it is constitutional, its execution is very problematic. How is a teacher in grade school to know if a child is an illegal immigrant? What is the teacher to do if a child is suspected of being an illegal immigrant? Kick the child out of school? What is a doctor or nurse to do if a person who "looks Hispanic" needs medical attention at a state-funded clinic? See 1994 Cal. Legis. Serv. Prop. 187, § 5, at A-79 (enacting Cal. Welf. & Inst. Code § 10001.5) (excluding illegal aliens from obtaining social services); *id.* § 6, at A-79 (enacting Cal. Health & Safety Code § 130) (prohibiting illegal aliens from publicly funded health care services); *id.* § 7, at A-80 (enacting Cal. Educ. Code § 48215) (excluding illegal aliens from attending public elementary and secondary schools); *id.* § 8, at A-80 (enacting Cal. Educ. Code § 6610.8) (denying admittance to illegal aliens from post-secondary educational institutions). None of these issues received appropriate scrutiny when Californians were asked to vote on the proposition to "Save Our State." Or perhaps these issues did receive scrutiny, and the public felt somebody else would deal with them, or, after all, the whole point was simply to send a message.

Consider, again, the effect of Washington State's Initiative 601, adopted by the people in November of 1993. The wording of the initiative suggested that it would limit the increase in government spending, not that it would, in overall terms, *decrease* government spending. But a careful analysis of I-601 shows that it will not achieve its desired purpose:

If Washington's voters thought that by voting for . . . Initiative 601 they were merely putting a "lid on" the size of state government, they were wrong. Under the [law] the size of state government as a fraction of personal income will decrease . . .

...

... [V]oters will at some point become dissatisfied with a stagnant or declining level of state-provided goods and services if the public considers [them] . . . normal goods. Therefore, Initiative 601 is unlikely to be a permanent, feasible fix to the perceived problem of uncontrolled state government spending.

David Eagle et al., *The Economics of an Inflation and Population-Based State-Spending Limit: The Case of Washington's Initiative 601*, 33 NORTHWEST J. BUS. & ECON. at 33, 42-43 (1995).

202. One of the arguments in favor of home rule for Whatcom County was that the initiative system would allow "people [who] are concerned about the escalating costs of government . . . to control them." BELLINGHAM HERALD, Nov. 2, 1978, at C3 (Advertisement quoting R. Frank Atwood, former state senator and respected local attorney). But direct democracy has not allowed people who are concerned about the costs of local government to control them. On the contrary, such people—whether they are citizen activists or administrators—cannot control the cost of government when every initiative is subject to legal challenges with all their attendant expenses. See *supra* text accompanying notes 51, 89, 131.

203. MAGLEBY, *supra* note 22, at 190.

mechanism to "democratize legislation, to enable the people to assume control of affairs, and to insure responsible as well as responsive government The referendum will reestablish democratic forms, which have been lost through the complexity of our life, the great increase in population, the misuse of [legislation by special interests]." ²⁰⁴ But rather than make government more responsive, direct democracy has made government even less responsive than it was in a republican democracy.

Direct democracy has given the control of government back to special, and frequently extreme, interests. This problem, as it is manifested at the local level, has already been discussed. ²⁰⁵ The problem is even more egregious at the state level where well-financed proponents work. ²⁰⁶ One commentator, reflecting upon the situation in Oregon, noted:

Today regulatory initiatives routinely succumb to corporate campaigns; recently in Oregon, massive infusions of corporate money from energy, tobacco, and trucking political action committees have financed media saturation campaigns, successfully defeating proposed limitations on nuclear power, cigarette smoking in public buildings, and unsafe but profitable trucking practices. . . . [A]lthough most of these examples are drawn from Oregon, our experience is typical. ²⁰⁷

Government by special interest groups tends to "foster conflict . . . [and] could well lead to an . . . ineffectual government." ²⁰⁸

204. HOWE, *supra* note 17, at 171-72.

205. See, e.g., *supra* text accompanying note 140.

206. Sutro, *supra* note 24, at 27. Sutro, reflecting on the ability of big-money special interest groups to make law via direct democracy, writes: "The influence of the Southern Pacific Railroad in Sacramento at the end of the 19th Century mirrors the modern-day lock well-financed parties have on the initiative process." *Id.* See also *supra* note 170.

207. Schuman, *supra* note 25, at 963.

208. MAGLEBY, *supra* note 22, at 190. As to effectual government, consider the following: In March of 1994, the California Legislature, inspired by the Washington State action, adopted a "three strikes you're out" law. It mandates life in prison without parole for people convicted of a third "serious" felony. The law—resoundingly reaffirmed by the California electorate in November 1994—appears to be unworkable. Judges "have found slick ways to short-circuit the law" because its application can often impose an unconscionable sentence. Prosecutors do not like the law because it pushes defendants to take their chances on a trial rather than go down on a third felony, thus increasing their caseloads. Accordingly, prosecutors undercharge felonies as misdemeanors. Marc Peyser, *Strike Three, You're Not Out: Justice: California Judges Revolt Against the Law*, NEWSWEEK, Aug. 29, 1994, at 53, 53. In general, the public's enthusiasm for incarceration may be misplaced. The United States has the highest incarceration rate in the world (450 per 100,000 people, compared to 81 per 100,000 in France), but the rate of violent crime in the U.S. remains steady. Putting people in prison is apparently not reducing crime. *Three Strikes You're Hoodwinked*, ECONOMIST, Feb. 5, 1995, at 16, 16; see also *supra* note 172.

Furthermore, it is dangerous. The well-known columnist David S. Broder opined that such governance

bypass[es] and neuter[s] legislative institutions—with all their protections and elaborate negotiating mechanisms. If you think this is exaggerated, let me just point out that last November [1991] the state of Washington—often a forerunner in political trends—attempted to settle two of the most tortuous and sensitive questions any society can face—the origin of life (abortion) and the end of life (assisted death) by popular vote. When simple majorities can impose their will on divisive questions of that character, the incipient totalitarianism of government by referendum is not just a bad dream.²⁰⁹

209. David S. Broder, *Politics with Parties*, WASH. POST, Jan. 5, 1992, at C7. James Madison recognized the potential for abuse of direct democracy by tyrannical majorities: "[A] pure democracy . . . can admit of no cure for the mischiefs of faction There is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies . . . have ever been found incompatible with personal security." THE FEDERALIST No. 10, *supra* note 2, at 77-84.

Broder's reference to Washington State's "Right to Die" Initiative, I-119, deserves some further analysis to examine its place in the initiative process here considered. The initiative and the campaign leading up to election day in November of 1991 (the initiative failed 54% to 46%) is carefully analyzed in Andrew M. Jacobs, *The Right to Die Movement In Washington: Rhetoric and the Creation of Rights*, 36 HOW. L.J. 185 (1993). General right-to-die legislation is also examined in Jody B. Gabel, *Release from Terminal Suffering? The Impact of Aids on Medically Assisted Suicide Legislation*, 22 FLA. ST. U. L. REV. 369 (1994).

After the famous Karen Ann Quinlan case, 355 A.2d 647 (N.J. 1976), which spanned the years 1976 to 1985 (from her injury in Missouri, to the Supreme Court case on her parents' right to disconnect life support, to her death in 1985), euthanasia advocates attempted and failed to get an initiative on the ballot in California that would legalize euthanasia. During 1990, the Nancy Cruzan case, 497 U.S. 261 (1990), attracted such attention that the Hemlock Society succeeded in getting the Right-to-Die Initiative on the Washington ballot. Jacobs, *supra*, at 185-86. Whether one wishes to characterize the Right-to-Die Initiative as "extreme," depends, of course, on one's philosophy or one's politics. Opponents—especially the Catholic Church—certainly characterized it as such. There can be no doubt that the initiative was divisive, nor that both sides appealed to passion.

What primarily defeated I-119 was the opponents' claim that "it has no safeguards." Jacobs, *supra*, at 209. This claim was not true. The proposal required the following: (1) written certification from two physicians (the patient's primary or attending physician and an additional physician) that the patient had a terminal illness; (2) the allocation of two disinterested witnesses that they believed the patient "to be of sound mind" and competent to execute a written directive requesting assisted suicide (the directive could be revoked at any time through physical, written, or verbal actions); and (3) a "reasonable effort" made by the attending physician to determine that the directive met the Act's procedural requirements. Gabel, *supra*, at 411-12. Whether these were adequate safeguards is arguable (California's unsuccessful and Oregon's successful right-to-die initiatives had more and different safeguards, *id.* at 413-14, 417-21), but clearly these cannot honestly be characterized as "no safeguards." The campaign against I-119 was misrepresentative in this instance.

Colorado's 1992 Amendment 2, which "essentially constituted a ban on anti-discrimination laws protecting homosexuals,"²¹⁰ and California's Proposition 187, which would deny illegal immigrants certain government services, are examples of incipient totalitarianism by majority rule. "One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to a vote; they depend on the outcome of no election."²¹¹ Ballot measures written by one special interest group that attempt to deny fundamental rights of another are, of course, unconstitutional; they should not be presented to voters at all.

In the course of delivering the law-making function over to special interests, direct democracy undercuts republican, representative democracy. It tends to dissuade competent, thoughtful people from becoming involved in government service. Politicians are not "running scared"²¹² from the initiative-wielding citizens. Rather, people who are sincerely interested in the general welfare are discouraged from participation in government when it appears that every suggestion for government action that might somehow burden some constituency is likely to be met with an initiative campaign spear-headed, mostly, by ill-informed malcontents with their own special interest to promote,²¹³ or by tenacious vested interests. The abuse of direct democracy has done more: "[E]specially in California but increasingly elsewhere, [it] has destroyed the status and the responsibility of legislatures and instead has turned elected officials into leaders of plebiscitary campaigns."²¹⁴

The problems of direct legislation, to recapitulate, include these: In the drafting stage, the process is undeliberative, and it tends to produce divisive, extreme, poorly thought out legislation. In the voter approval stage, the public generally votes without being well informed about what is in issue. In the execution stage, the legislation is ineffective, counter productive, illegal, or at worst, as Broder suggests,

210. Christopher A. Coury, *Direct Democracy Through Initiative and Referendum: Checking the Balance*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 573, 583 (1994).

211. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1954).

212. See *infra* text accompanying note 249.

213. Thoughtful observers at the federal level, for example, were dismayed during the 1994 campaign by the very negative reaction to President Bill Clinton's Director of Budget Alice Rivlin's suggestion for mild changes in Social Security to deal with that program's looming bankruptcy. See, e.g., Herbert Stein, *Don't Ask Alice: Budget Chief Rivlin is Apt to Tell the Truth—and Who Wants That?*, WASH. POST, Oct. 30, 1994, at C5.

214. Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government,"* 72 OR. L. REV. 19, 44 n.88 (1993).

totalitarian. Finally, and more generally, the initiative and referendum have turned legislation over to special interest groups.

V. SUGGESTIONS FOR IMPROVING THE PROCESS

Criticism of direct legislation, however, does not lead to the conclusion that the right of initiative or referendum should be abolished. Even if an initiative or referendum effort is not successful, the use of these systems of law-making serves to put an issue in the limelight. Constitutional or not, legal or not, valid or not, supporters of these laws often really do not care: They want to draw attention to their cause.²¹⁵ The usefulness of this function should not be discounted.

And beyond merely drawing attention to a cause, direct legislation is a cherished right.²¹⁶ The Washington State Supreme Court expressed this sentiment about direct legislation:

The people have a right to adopt any system of government they see fit to adopt. In its workings, it may not meet their expectations; it may be unwieldy and cumbersome; it may tend to inconvenience and prodigality; it may be the expression of passion or sentiment rather than of sound reason; but it is the people's government and until changed by them must be observed by the legislature and protected by the courts.²¹⁷

Although direct legislation is a cherished right, improvements can nevertheless be made to the process. David Magleby makes several good suggestions, some of which may be restated here.

First, all petitions should contain a statement in bold letters stating: "Before you sign it, *read it*. Before you sign it, *understand what it says*."²¹⁸ Such a statement may help to alter the usual attitude that "a person can sign the petition and let the voters decide on election day." Furthermore, it may help people understand the implications of their signatures.

215. See, e.g., *supra* text accompanying notes 62, 82, and 104.

216. The right of initiative is also "a constitutional right." *Schrempp v. Munro*, 116 Wash. 2d 929, 932, 809 P.2d 1381, 1382 (1991). In a well-reasoned and provocative article, Hans A. Linde, Senior Judge, Oregon Supreme Court, argues that at least certain uses of direct democracy (one might infer *all* uses) are contrary to the Constitutional guarantee (Article IV, section 4) of "a republican form of government." Linde, *supra* note 214.

217. *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 320, 147 P. 11, 17 (1915).

218. MAGLEBY, *supra* note 22, at 194.

Second, ballots should give a broader policy direction to the legislature.²¹⁹ For example, instead of "Shall the Stricken Portions . . . be Repealed?," a ballot should read something like this:

I favor greater freedom to use my land, and less protection of the environment, than the present law provides. Yes or No.

This would provide the legislature with some sense of the electorate's direction and the intensity of their preference.²²⁰ This change would, of course, significantly alter the tenor and purpose of the initiative; the people would no longer be adopting a specific law at all.

Third, courts should more readily allow challenges to the validity of direct legislation before it reaches the ballot. It is disheartening, and somewhat insulting, to the electorate when the prosecuting attorney's office invalidates an initiative as an administrative matter after it has been adopted, and after people have "a sense of ownership" in it.²²¹ The same is true when a court declares an initiative unconstitutional. Such invalidation exacerbates feelings of disenfranchisement and cynicism, feelings that fuel many direct-legislation campaigns.²²² In addition, of course, there is a great waste of time and money associated with proposing and contesting an issue that is later declared illegal.

Pre-election court review, however, is problematic. Generally the courts will "not render advisory opinions or decide purely theoretical controversies".²²³

Should the constitutionality of [a] proposed initiative be later challenged, and should it then be determined to be unconstitutional, unquestionably there would be those who would criticize the court

219. *Id.* at 195.

220. Magleby also suggests asking multiple-response questions. *Id.* In regard to critical areas, the questions could, perhaps, look something like this:

Landslides may occur on steep-slope areas, and houses fall down the slope. I favor

- a. a 50 foot buffer around very steep, unstable slopes
- b. no buffer around very steep, unstable slopes
- c. less than 50 feet, but some buffer

But it seems that a voter would need expert advice to make such a choice in order to understand the consequences of the alternatives.

221. Mike Flynn, *Unsound Initiatives Don't Deserve Ballot*, PUGET SOUND BUS. J., Apr. 22-28, 1994, at 10.

222. Carol S. Hunting, *Pre-Election Review of Voter Initiatives*, 60 WASH. L. REV. 911, 921 (1985):

Pre-election review would help convince voters of the efficacy and potency of their initiative mandates. Postelection determinations of invalidity tend to discourage confidence in the initiative process by creating a sense of futility among the frustrated majority. Further, they tend to denigrate legitimate uses of the initiative process, by allowing invalid measures equal standing on the ballot with valid ones.

223. *State ex rel. O'Connell v. Kramer*, 73 Wash. 2d 85, 87, 436 P.2d 786, 787 (1968).

for not having made that decision . . . before signatures were secured and an election held. We wish to forestall such criticism, if that be possible, by making it clear that we cannot pass on the constitutionality of proposed legislation, whether by bills introduced in the House or Senate, or measures proposed as initiatives, until the legislative process is complete and the bill or measure has been enacted into law. Then, and then only, can the constitutional issue . . . be properly considered.²²⁴

Not only can a pre-election challenge be construed as an advisory opinion, it also intrudes upon the fundamental right of direct legislation. This intrusion is not lightly undertaken. Shortly after the success of the direct legislation movement in Washington, the state supreme court opined that the relevant constitutional and statutory provisions should be given liberal construction so that this constitutional right of the people may be *facilitated*, not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to guard against fraud and mistake.²²⁵

Yet, it is not correct to say that the courts "cannot pass on the constitutionality" of initiatives before they are voted upon. "The right of the people to initiate laws is fundamental. When a public official attempts, albeit with good intentions, to thwart an effort to initiate, such a decision must be carefully scrutinized."²²⁶ Careful scrutiny obviously does not mean no scrutiny, nor does it preclude a finding of invalidity. If an initiative is, on its face, unconstitutional or illegal, the courts should not be reluctant to say so early on and save the time and expense of a campaign. Indeed, one commentator has suggested that the courts' general reluctance to avoid pre-election review of direct democracy should be discarded and recommends "overt abolition of the rule inhibiting pre-election review and acceptance of pre-election review as the convention."²²⁷

Courts in Washington and elsewhere *have* prevented initiatives and referenda from appearing on the ballot on a number of occasions, such as where the initiative deals with administrative, not legislative matters,²²⁸ where the state legislature has assigned the matter in issue

224. *Id.*

225. *State ex rel. Case v. Superior Court*, 81 Wash. 623, 632, 143 P. 461, 464 (1914).

226. *Save Our State Park v. Hordyk*, 71 Wash. App. 84, 93, 856 P.2d 734, 740 (1993).

227. *Hunting*, *supra* note 222, at 912.

228. An initiative to prohibit the King County executive from spending money on the already-contracted-for Kingdome was enjoined because the action was administrative only: "In the concept of direct [legislation] there is an inherent limitation that the power extends only to matters legislative in character as compared to administrative actions." *Ruano v. Spellman*, 81 Wash. 2d 820, 823, 505 P.2d 447, 449 (1973).

to a county legislative authority and not to a county as a corporate entity,²²⁹ or where the initiative would be unconstitutional.²³⁰ The reluctance of the courts, however, to declare an initiative invalid is due not only to a recognition that direct democracy is a cherished right, but also to political faint-heartedness. Here, the elected judges face "the political force of the electorate at large It is one thing for a court to tell a legislature that a statute it has adopted is unconstitutional; to do that to the people of a state who have indicated their direct support for the measure . . . is another."²³¹

As to the Whatcom County initiatives reviewed here, it was clear that the TRC initiative was an administrative, not legislative matter. It was also clear that the power line initiative was zoning by initiative. Further, it certainly seemed, although it was arguable, that declaring the County a nuclear free zone and banning the importation of medical waste into the County were unconstitutional. A justiciable case or controversy could be constructed if the prosecuting attorney's office was given authority to review initiatives, declare them invalid, and deny their appearance on the ballot. Proponents of the measure could then sue the prosecutor, challenging the decision. Courts could also simply "adopt pre-election review as a convention."²³²

Fourth, initiative reforms should address the problem of misleading campaigning. State or county public disclosure commissions, non-partisan groups such as the League of Women Voters, or, perhaps, representatives of interested entities, including political parties and the media, could review the claims of the proponents and opponents and, as a public service, discuss their validity in short newspaper and radio articles. During the 1992 presidential campaign, several prominent newspapers, including the *Los Angeles Times*, the *Miami Herald*, the *Washington Post*, and two news services (the Associated Press and Knight-Ridder) ran articles scrutinizing candidate's ads. These were called "ad-watch stories" or "truth boxes." Their purpose was not only to examine the truthfulness of the advertisements but also to

229. See *supra* notes 103 and 163; see also Phillip Trautman, *Initiative and Referendum in Washington*, 49 WASH. L. REV. 55, 83 (1973).

230. *Ruano*, 81 Wash. 2d at 825, 505 P.2d at 450. Because the County had already contracted for construction of the stadium, an initiative to prevent expenditure of the funds would impair the obligation of contract in the already-issued stadium bonds in violation of the federal and Washington State constitutions.

231. *Sutro*, *supra* note 24, at 946 n.7 (quoting former California Supreme Court Justice Charles Grodin).

232. *Hunting*, *supra* note 222, at 942.

analyze their effectiveness, to discern their actual and implied messages, and to point out negative advertising.

"Ads are political discourse, political dialogue," said Tom Rosensteel, *Los Angeles Times* media writer. "We cover them the way we cover a political speech and examine them for their veracity and accuracy."²³³

Such "truth boxes" are prophylactics, but not assurances, against falsehoods. Still, "candidates in California and Texas, in 1990 cited, in their own advertising, truth boxes that blasted opponents' advertising. In some cases, the ad-watch stories caused ads to be pulled off the air."²³⁴ It seems reasonable that disinterested analysis of campaign claims by a respected entity would encourage truthfulness and reduce factual distortion in an initiative or referendum debate.

VI. A LARGER PROBLEM

A. *Lack of Trust in Policy-Making Institutions*

These suggestions for improving the process—admonitions to read the document before signing, changes in the type of mandate given by the people, pre-ballot review, "truth squads" to police advertising—would help make the direct democracy process better. But they really only treat the symptoms of a larger underlying problem. It is not clear that any of these reforms would truly vindicate the direct democracy process and bring about its ideal usefulness. The problem is larger than this and will take longer to fix.

The problem involves, on one hand, the public's unwillingness to trust the institutions responsible for directing societal change and the risk that accompanies such change. On the other hand, the public's unwillingness to become discriminating, informed, capable, direct agents of change is central to the problem. In short, the public does not trust the legislature and is unwilling to or incapable of demonstrating the wisdom necessary to legislate for itself.

This was not always so. In the early days of direct democracy, there was apparently a much greater commonality of interest and consensus that direct democracy government could solve problems. According to one study examining early initiatives in Oregon, of the first twenty-six measures that might be called progressive, the wealthy voted with the "laboring class" 80% of the time; urban workers agreed

233. Christy Fisher, *Pressing for Truth: Papers Put Politician's Ad Claims to Test*, ADVERTISING AGE, Feb. 3, 1992, at 40, 40.

234. *Id.*

with farmers 86% of the time; and city voters agreed with rural voters 94% of the time.²³⁵ Today it is almost beyond comprehension that any initiative would obtain such unanimity of approval by such widely divergent interests.

If direct democracy once served to curb the abuses of corrupt legislatures and give a voice to the disenfranchised, it is now used to "disempower, to marginalize, to create an economic and political elite . . . through term limits which restrict voters' options, workfare programs, anti-homosexual amendments, and attempts to limit fair housing legislation."²³⁶ While the initiative was once used to check the influence of big corporations,²³⁷ today big corporations write the checks that finance campaigns to defeat proposals they find objectionable.²³⁸

Of course, today, as was the case nearly a century ago, there is dissatisfaction with government. Hailing an apparent renewal of interest in direct democracy in 1977, a professor of political science wrote that there was "massive public dissatisfaction with the existing system and a growing loss of trust or confidence in political institutions."²³⁹ The dissatisfaction and loss of trust appears to be much more virulent and dangerous in 1995 than it was in 1977, the year that President Jimmy Carter talked about our "national malaise." One can hardly turn on AM radio now without hearing torrents of talk show abuse against government.²⁴⁰ Writing in the *Washington Post* about the conservative talk show phenomena, Richard Cohen observed,

A huge disaffected audience is making itself felt. It's talking back the only way it knows how. What this audience is saying is often simplistic, often downright mean and very often beside the point. . . . [W]hat talk show hosts have in common is a keen sense of their audience's alienation—and their disillusionment with the mainstream media.²⁴¹

235. Schuman, *supra* note 25, at 960.

236. *Id.* at 963.

237. *Id.* at 962. Frederic C. Howe, in his 1905 book, *The City, The Hope of Democracy*, noted: "But almost without exception the Northern States of the Union have come to be represented in the United States Senate by privileged interests, by the railway and transportation companies, by franchise corporations . . ." HOWE, *supra* note 17, at 108.

238. Schuman, *supra* note 25, at 962.

239. Harland Hahn, *Foreward* to LAURA TALLIAN, *DIRECT DEMOCRACY: AN HISTORICAL ANALYSIS OF THE INITIATIVE, REFERENDUM AND RECALL PROCESS* (1977).

240. See James Fallows, *Talent on Loan from the GOP: Why Rush Got Boring After June 3*, 1992, *ATLANTIC MONTHLY*, May 1994, at 133, 133.

241. Richard Cohen, *President Limbaugh?*, *WASH. POST*, Sept. 7, 1993, at A17.

David S. Broder wrote that there is "staggering public disillusionment with government and politics."²⁴² After a group of hecklers interrupted a speech by President George Bush, the *Wall Street Journal* editorially recognized the disillusionment and then reflected on some of its causes, commenting that such confrontation was a

primal scream session[] for the release of a wide range of aggressions and obsessions—directed at government.

The tendency to view the government as a vast conspiratorial power determined to conceal all manner of vital truths from the people now seems to have infected a wide variety of Americans.

. . . [This] reflect[s] a seriously warped view of reality. [It is] [t]he conviction that we live in a society continually threatened by plots against the public weal, perpetrated generally by government or business interests and on some level beyond mere bureaucratic slothfulness²⁴³

Indeed, it seems that a "warped view of reality" and sense of government conspiracy infected the proponents of the initiative to prohibit the importation of medical waste into Whatcom County when there was no evidence that such waste was harmful. The warped view also infected those who accused the government of "not listening" when it developed a solid waste disposal plan, when in fact the government held scores and scores of public meetings on the subject.²⁴⁴ Similarly, the warped view infected those who opposed Whatcom County's growth management plan and equated it with a Soviet-styled plot to take away all land use rights, who asserted that preservation of critical areas would in fact lead to the destruction of the very plant and animal species sought to be protected, and who complained that the government "failed to listen" because the law as adopted did not meet with their approval,²⁴⁵ although public testimony significantly affected the final version of the law.²⁴⁶

242. David S. Broder, *Politics without Parties*, WASH. POST, Jan. 5, 1992, at C7.

243. *The Confrontation Bandwagon*, WALL ST. J., Aug. 4, 1992, at A14 (Editorial).

244. Andy Norstadt, *County Council: Executive Says Work at Cedarville Unappreciated by General Public*, BELLINGHAM HERALD, June 2, 1989, at B1. (The Whatcom County executive, exasperated with critics of the County's solid waste efforts, observed that "there is an inaccurate and damaging impression among some in the public that [the County's action] is some kind of devious whim of the administration to keep the county's landfill operating.").

245. Rachel Prentice, *Results Cheer Land-Rights Backers*, BELLINGHAM HERALD, Nov. 3, 1993, at A1. It is apparently no solace to disgruntled voters for a politician to observe, "I did listen to what you said, I simply do not agree with you."

246. Some interested citizens, of course, complained that the Council had caved-in to "land-rights" advocates' pressure, and that the ordinance had been "watered down . . . in several places." Ben Santarris, *Sensitive-Lands Law Passes*, BELLINGHAM HERALD, June 24, 1992, at A1.

If activists want to fix a problem with their government, they certainly have the right, indeed the duty, to do that. But if the perception of a problem is based on "a seriously warped view of reality," on the bizarre impression that government's action is some kind of a "devious whim," part of some vast conspiracy to hoodwink the public, then the fix is likely to make things worse, not better. Indeed, as has been noted, most direct legislation does not fix the problem; rather, it often makes the problem worse.²⁴⁷

Those who initiate direct legislation may often have a warped view of reality.²⁴⁸ Moreover, as one might expect, they castigate those who have the temerity to criticize the direct democracy process:

I know that the initiative process is effective and valid because newspaper editors and government officials in this state are running scared and whining loud and clear against it.

. . . The initiative process is only unhealthy for elected representatives who forget who elected them. . . .

Is the sleepy citizenry waking up? . . .

Please, humor us citizens. . . . Let us think we should have some control over government by the people and for the people.²⁴⁹

It is fair to examine whether proponents or opponents of some of the other exercises in direct democracy examined here had a clear view of reality. In regard to Washington's I-119 (right-to-die), it is very interesting to note that "support for I-119 was strongest among those who had confronted terminal illness in their own lives or the lives of a loved one, while support was weakest among those who had never experienced the issue." See Jacobs, *supra* note 209, at 194. That is, those who had experienced the slow death of a friend or loved one—those who knew what it was like—tended to support the measure; those who had no real experience with the issue did not. Whose view of reality is more credible?

Regarding Proposition 187 to deny social services to illegal immigrants, one commentator opined:

Through the process of targeting and excluding the "illegal alien" as Other, Proposition 187 allowed many Californians to imagine themselves to be part of a community. Instead of examining the causes of economic stagnation and trying to create conditions in which people would experience less alienation from their fellow residents, citizens were encouraged to turn their anger against relatively defenseless targets and to feel superior to these targeted, objectified people.

Frances Olsen, *Nationalism and Feminism: A Conference on Women in Central and Eastern Europe*, 5 UCLA WOMEN'S L.J. 1, 2 (1994).

247. See *supra* text accompanying note 172.

248. The well-known German psychoanalyst Erich Fromm described psychological health as "characterized by the ability to love and to create, . . . by a sense of identity based on one's experience of self as the subject and agent of one's powers, by the grasp of reality inside and outside of ourselves, that is, by the development of objectivity and reason." ERIC FROMM, *THE SANE SOCIETY* 69 (1955).

249. Gregory P. Marshall, Sr., BELLINGHAM HERALD, Apr. 12, 1994, at B4 (Letter to the Editor).

The implication is that government officials and newspapers are conjoined in a conspiracy to dupe the public, a conspiracy that has been successful enough that the public is only slowly "waking up" to realize how it has been fooled. Proof that direct democracy is a success is found in the discomfort suffered by those traditional representatives of the establishment—government and newspapers—who apparently have something to lose by an awakened citizenry.

Obviously the writer does not trust them. But the writer touches, too, on a reason for his anxiety: He feels the people have no control over government and, by implication, over the decisions government makes that affect everyday life. He feels, in other words, that people, in general, do not have control over their lives; they are not "subjects and agents of [their own] powers";²⁵⁰ they are controlled by untrustworthy agents of an oppressive establishment.

B. *The Role of Trust in Society and Law*

It is now commonplace that the pace of change is quickening, that "change is now compressed into months rather than years."²⁵¹ Legislation is always a response to some perceived need arising because of a change in society. If women were not increasingly moving into the workplace, there would be no need for the Pregnancy Discrimination Act;²⁵² if air were not increasingly polluted, there would be no need for revisions to the Clean Air Act;²⁵³ and so on. Trust in government means people have faith that it can manage change successfully. Success becomes more difficult as the pace of change accelerates.

This Article suggests, based on the evidence found in one locality, the historical background of direct legislation, and the experiences of other jurisdictions, that direct democrats tend to be uncomfortable with the pace or direction of change and perceive a need to slow or change it.²⁵⁴ For example, the nuclear free zone, medical waste, and high-voltage electric line measures were meant to deal with perceived risks accompanying the change from a largely rural and locally-focused county to a more urban, international one. The first TRC initiative also dealt with change: No longer could trash be dumped in a

250. FROMM, *supra* note 248, at 69.

251. Stephen B. Shepard, *Editor's Memo*, BUS. WK., Nov. 18, 1994, at 8, 8.

252. 42 U.S.C. § 2000e(k) (1964) (amended 1991).

253. 42 U.S.C. § 7401 (1977).

254. A broader-based study of initiatives and referenda from a state where many have been proposed—California, for example—might substantiate the idea.

comprehensible hole in the ground; now garbage disposal was to be consigned to a large foreign corporation that would set rates and burn trash based on return-on-investment analyses and complex incinerator technology. The fear and risk that changing social conditions, such as urbanization and degradation of the environment, would cause people to lose control of their property were overt in the Critical Areas referendum debates.²⁵⁵ When the government refused to manage risk and change as they wished, direct democrats took action themselves. The same animus underlies the push for anti-immigration, anti-homosexual, and tax-limitation direct legislation, to name just three state initiatives.²⁵⁶

Each exercise in direct legislation reviewed here was a response to some action, or refusal to act, by government or business. Government and business made their decisions normally, with all the public input usually provided in such processes. Why were proponents of these initiatives and referenda unwilling or unable to accept the results of the normal processes? One answer is that the public lacks trust in government and business. This lack of trust is fundamental to the growth of the initiative and referendum movement.

In recent years, there have been numerous articles and surveys pointing out the importance of trust in risk management, and documenting the extreme distrust we now have in many of the individuals, industries, and institutions responsible for risk management.²⁵⁷ There is further evidence that this distrust is strongly linked to risk perception and to political activism to reduce risk.²⁵⁸

Trust is fragile. It is difficult to create, and it can be permanently destroyed in an instant. Recent psychological studies suggest why this is true.²⁵⁹ Negative, trust-destroying events are more noticeable than positive, trust-building ones. How many positive events are represented by the construction of a government building on time, within budget? One? Hundreds? There is no precise answer. But if the news reports that a government project is over budget or late, many members of the public conclude, "Government as usual: out of control, expensive, unresponsive." Also, negative events get much more attention than positive ones. It is no news that ten thousand airplanes

255. See *supra* text accompanying note 144.

256. California's Proposition 187, Colorado's Amendment 2, Washington's Initiative 601, respectively.

257. E.g., Paul Slovic, *Perceived Risk, Trust, and Democracy*, 13 RISK ANALYSIS 675 (1993).

258. *Id.*

259. Discussion of trust as a psychological phenomena is from Slovic, *supra* note 257, at 677-79.

land safely in any given time period; it is big news when one plane crashes. In addition, bearers of bad news are given more credibility than bearers of good news, and "distrust tends to reinforce and perpetuate distrust."²⁶⁰

Our tendency to distrust is psychological. Played out within our system of participatory government and amplified by technological and social change, such distrust becomes endemic.²⁶¹ Electronic and print media report news from all over the world immediately, and most of what they report is bad. Moreover, powerful special interest groups have grown up to promote their cause using experts to stir-up public fear and distrust. When experts contradict each other, public trust in experts is eroded and the worse-news expert seems more credible.²⁶²

If the public distrusts its government, there is, where available, an alternative method of legislation: direct democracy. Direct democracy was not the system favored by the Framers of the Constitution. Although it carries the concept of democracy to its logical extreme, its success requires a citizenry wise enough to make good decisions.²⁶³ The media do not generally encourage a thoughtful, rigorous analysis of public policy issues. People tend to like what they are conditioned to expect and can easily understand; the media strive to please, thus they serve up large doses of Tonya Harding and O.J. Simpson. Taxes, Social Security, the intricacies of wetland ecosystems, and the relative merits of incineration compared to landfill are much more complex and not very likely to get serious coverage.

Change from the familiar, comfortable, expected, and understandable is rarely welcome. As the population grows, rural areas become urbanized, and society becomes more "diverse," the familiar patterns of life are disrupted. Government reaction through legislation is often appropriate, yet understanding its appropriateness may require a fairly sophisticated analysis of issues; this analysis cannot occur in a ten second sound bite. Because many citizens do not have an in-depth understanding of the issues, it is not surprising that they do not trust the decisions made by their government.

260. *Id.* at 679.

261. William Burns, et al., *Incorporating Structural Models into Research on the Social Amplification of Risk: Importance for Theory Construction and Decision Making*, 13 RISK ANALYSIS 611 (1993).

262. Slovic, *supra* note 257, at 679.

263. The *Bellingham Herald*, to its credit, occasionally presents an in-depth analysis of the issues. On Sunday, October 17, 1993, it devoted significant space, with color graphics, to a discussion of the Critical Areas Ordinance and the proposed changes via referendum. No such analysis was undertaken for any of the solid waste issues or for the nuclear free zone.

If we cherish the fundamental virtues of a democratic society, we cannot simply assume that citizens who distrust the government are irrational, uneducated, or selfish; if we assume that, we really eschew democracy, based as it is on faith in the people. Rather, we must recognize that we have an unhealthy society, one that does not encourage citizens to be their best.²⁶⁴

It is beyond the scope of this Article to suggest ways to make society healthier, although working toward a healthy society is a necessary task, and one that should be promoted by government through its laws,²⁶⁵ and by other institutions, including business and non-government organizations. We may begin the process by recognizing citizens' real concerns, and by communicating to them the true risks and benefits of specific government legislation. Citizens will then have reason to trust their government and their chosen system of representative democracy.

VII. SUMMARY AND CONCLUSION

Direct democracy is a tool used by an electorate unhappy with its elected officials. It thrives in times of social change. A study of its use—and abuse—at the local level suggests that it has not been a success. In one county in Washington State, almost every exercise of the valuable right was fraught with campaign misrepresentations, and the legislation declared invalid, illegal, or unconstitutional. The initiative and referendum are not good vehicles for making specific law; they are non-deliberative systems tending to produce divisive legislation. They could be mechanisms by which citizens give policy direction to their legislators, but reforms are needed in several phases of the process: signature gathering, qualification for the ballot, and campaigning. The contemporary use of initiatives and referenda reflects an endemic distrust of government and other major institutions; it reflects an unhealthy society. If we value democracy, we must reflect upon ways to promote a healthy society; we cannot dismiss the public, exercising its fundamental right to make laws directly, as fools.

264. Eric Fromm characterized an unhealthy society as one that "creates mutual hostility, distrust, which transforms man into an instrument of use and exploitation for others, which deprives him of a sense of self, except inasmuch as he submits to others or becomes an automaton." FROMM, *supra* note 248, at 69.

265. See, e.g., Daniel Warner, *Caveat Spiritus: A Jurisprudential Reflection Upon the Law of Ghosts and Haunted Houses*, 28 VAL. U. L. REV. 207 (1993).