

Initiatives—Enemy of the Republic

*Brewster C. Denny**

The United States shall guarantee to every State in this Union a Republican Form of Government¹

The Seattle University Law Review's Symposium on the initiative process in Washington State addresses an issue of both transcendent importance to the health of the Republic and immediate challenge to the welfare of the children of this state. This discussion could not be more timely, and not just locally. Here's why. Devolution, tax cuts for the rich and the super rich, welfare reform, and a more conservative, market-oriented philosophy of government lay on the states and low income parents and children the burden of meeting the most critical needs of children—from prenatal care through college. With twenty percent of our children living in poverty and that many or more living in dysfunctional families, or in no families at all, the situation has reached crisis proportions.

Enter the initiative. All along the West Coast, ill advised and ill intentioned initiatives have produced a severe crisis, albeit one obscure to many citizens. Initiatives have effectively, and in my view unconstitutionally, taken the appropriation and revenue raising responsibilities away from the legislature and passed them not to the people, as initiative supporters argue, but to special interest groups, just as James Madison predicted.² David Broder, in his masterful study of the damage done to California by initiatives, concludes:

Admittedly, representative government has acquired a dubious reputation today. But as citizens, the remedy to ineffective representation is in our hands each election day. And whatever

* Brewster C. Denny is Professor and Dean Emeritus of Public Affairs at the University of Washington. He is Trustee and former Chairman of The Century Foundation (formerly the Twentieth Century Fund) and has served in a number of major ballot issue campaigns in Seattle, King County, and the state. For the last ten years he has been Co-Chair of the Children's Budget Coalition of the State of Washington.

1. U.S. CONST. art. IV, § 4.

2. THE FEDERALIST NO. 10 (James Madison).

its flaws, this Republic has consistently provided a government of laws. To discard it for a system that promises laws without government would be a tragic mistake.³

The crisis that faced Washington's Governor and legislature in the 2001 session illustrates both the immediate problem and the pernicious role of initiatives and their threat to representative government. Throughout the session, the Governor and the legislature accepted and incorporated the severe fiscal limitations that initiatives adopted over the last several years and the threat of more have placed on the ability of the state government to meet its obligations. For children alone, by way of example, the most important unmet or postponed needs, prenatal through college, were shortchanged by at least two billion dollars⁴—the initiative-produced shortfall in state and local revenues. To conform to this artificial and distorted ceiling, the government reduced present budgets for children and families by \$91 million, proposing to fund less than 7% of the nearly half billion dollars of the most urgent needs for new money in the coming biennium.⁵ While some high priority improvements survived, particularly with respect to foster care, immunization, and child welfare services, the list of vital children's programs cut or grossly under-funded is awesome. A few examples: The Basic Health Program plan sustained over \$29 million in cuts, reducing slots by 8,000 people and increasing cost-sharing for enrollees.⁶ People leaving TANF⁷ will be made to share in the cost of their Medicaid coverage.⁸ The state did not expand health care coverage to youth leaving the foster care system, even though the federal government now provides a 50% match to state funds used for this purpose.⁹ Teen pregnancy grants were reduced.¹⁰ Only 17 more beds were funded for the nearly 2,000 youths living on the streets connected to the highly successful

3. DAVID S. BRODER, *DEMOCRACY DERAILED* 243 (2000).

4. *See generally* Capital Budget, ch. 8, 2001 Wash. Laws 2d Spec. Sess. 1413; Fiscal Matters, ch. 7, 2001 Wash. Laws 2d Spec. Sess. 1289; Fiscal Matters – Supplemental Operating Appropriations, ch. 117, 2001 Wash. Laws 337.

5. *See generally id.*

6. *See generally id.*

7. Temporary Assistance for Needy Families (TANF) is the federal program that replaced the Aid to Families with Dependant Children (AFDC) program under federal welfare "reform" legislation. Pub. L. No. 104-193 (1996) (codified as amended at 42 U.S.C. § 600 et seq. (Supp. 1998)).

8. *See generally* Capital Budget, ch. 8, Wash. Laws 2d Spec. Sess. 1413; Fiscal Matters, ch. 7, 2001 Wash. Laws 2d Spec. Sess. 1289; Fiscal Matters – Supplemental Operating Appropriations, ch. 117, 2001 Wash. Laws 337.

9. *See generally id.*

10. *See generally id.*

HOPE act, far short of the 75 new beds contemplated in the Act.¹¹ And there is no new funding for childcare and early childhood education, a rapidly growing need.¹²

These and dozens of other severely under-funded forms of assistance to families and children are essential if we are to meet the challenges posed by the recent attention being given to education. Teachers will tell you that the failure to fund such programs as those noted above sharply limits their ability to achieve the increasingly publicized needs of our schools. There is some important, initiative-produced, targeted new funding for K-12 education, but pressure continues for new and vitally needed support for schools.¹³ But such vital needs as increased enrollment, early childhood education, higher teacher pay, and teacher recruitment, as well as the system for funding education more generally, are still hurting badly. The current, much publicized federal interest in education includes little new money for the most vital needs of schools—teachers and buildings. Instead, Washington proposes to help schools by increasing “accountability” through tests—seen by most educators as of very little help and by some as downright harmful and no substitute for desperately needed federal funding.

And finally, for higher education, state funding will continue the slide of the last number of years.¹⁴ This slide has already caused major losses in quality and access; it will produce devastating effects on work force composition and the leading edge research so vital to our technology-based economy. By sharply increasing tuition, the budget addresses, but not does not reverse, the steady decrease in college and university funding.¹⁵ This increasing cost to students will deny both the promise and the opportunity for higher education to children in low income families, further eroding state support of public higher education, now at less than 15% of, for example, the University of Washington budget.¹⁶

But the complexity of and limitations on legislative action wrought by initiatives are not their only problems. Fairness is another major downside to the ballot issue process. For, throughout the history of their use, ballot issues have often been about taxes, not only reducing revenue and capping spending, but also moving the tax burden from one group of taxpayers to another. For the most part,

11. *See generally id.*

12. *See generally id.*

13. *See generally id.*

14. *See generally id.*

15. *See generally id.*

16. *See generally id.*

initiatives from lotteries to motor vehicle excise taxes have made one of the country's most regressive tax systems even more regressive. According to the Citizens for Tax Justice and the Institute on Taxation & Economic Policy, the top 1% of earners in the state pay 3.6% of their income in state and local taxes; the poorest 20% pay 17%.¹⁷ Ballot issues are largely responsible for this steadily increasing unfairness. Fairness has been another major casualty of the initiative process as it relates to bringing minorities into mainstream society, particularly in education. In California, Washington, and Oregon, anti-affirmative action initiatives and related attitudes have done tragic harm, particularly in higher education, to economic and social opportunity for minorities, to the economic need for an educated diverse workforce, and to the quality of education for all students.

While legislators are slowly beginning to recognize hard fiscal realities, the heavy hand of the initiative process continues to weigh on vital needs for the future. These restraints are increasingly praised by the anti-government forces in the country who will continue to use the initiative as a way to keep government from doing its job and, while they are at it, to get some special largesse for their own benefit. James Madison identified "factions" who would substitute ballot legislation for the representative legislative system his Constitution decrees as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."¹⁸

California, where much of the origins and the contemporary ravages of the "plebicitis"¹⁹ disease originated, is a case in point. Two of America's best public policy journalists, David Broder and Peter Schrag, have written seminal books on the great risks to the Republic that the California experience portends, as well as some of the price it has already exacted.²⁰ Both titles, Broder's *Democracy Derailed* and Schrag's *Paradise Lost*, signal the gravity of their findings about the contemporary impact of the state initiative process on the future of the Republic. Schrag describes how Governor Ronald Reagan began the downward slide (which has been recently arrested) of the University of California, perhaps our greatest public University, and how Reagan

17. Citizens for Tax Justice & The Institute on Taxation & Economic Policy, *Who Pays? A Distribution Analysis of the Tax Systems in All 50 States*, App. I 48 (1996).

18. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

19. Black's Law Dictionary defines plebiscite as "[a] binding or nonbinding referendum on a proposed law, constitutional amendment, or significant public issue." BLACK'S LAW DICTIONARY 484 (pocket ed. 1996).

20. See generally BRODER, *supra* note 3; PETER SCHRAG, *PARADISE LOST* (1998).

was later aided and abetted by Howard Jarvis's Proposition 13.²¹ Schrag is particularly articulate in documenting how the initiative process has been transformed from a way that "the people" could "check the excesses" of interest groups to "the prevailing instrumentality of government itself."²² He recounts how the initiative process has, in effect, taken from the people the role contemplated for them by the plebiscite initiatives at the turn of the last century; handing that role to "interest groups, backed by media consultants, direct mail specialists, pollsters, and others, that usually finance the costly signature drives . . . to get measures on the ballot . . ." ²³ California was the scene of a devastating attack on affirmative action that has severely harmed higher education and has spread to the state of Washington. There, California's antiracial "preferences" guru, Ward Connerly, did huge harm to education; he mentored Washington State's own John Carlson's parallel sabotage of diversity in education here.²⁴

These illustrations of the havoc wrought by the runaway initiative process of recent years lead immediately to fundamental questions about the state of the Republic itself. The issue arises sharply in the context of a number of other worrisome signs. Voter participation is down sharply. Fewer and fewer of our ablest young people are selecting careers in public service and teaching. The teaching of civics and history in the schools has suffered severely in quantity and quality. The bottom line increasingly influences television news. Federal public interest requirements for the privilege of using the public's airways by radio and television have been largely eliminated, and what is left is ignored. The United States is the only major industrial democracy that does not have free television for political candidates. Television advertising represents well over half the cost of campaigns. Respect for and confidence in elected officials has increasingly declined, correlating closely to the growing role of campaign fundraising in their lives and ours. Campaign financing is seen by the public as nothing more than a corrupt scandal and, more importantly, as an indication that its vote and its input do not count and are not counted. And, while the Internet has vastly increased the quantity of information on public policy issues available to the public, there is still a serious "digital divide" and little evidence that the Internet has increased broad citizen interest in or knowledge of public

21. See generally SCHRAG, *supra* note 20.

22. *Id.* at 11.

23. *Id.*

24. See BRODER, *supra* note 3.

policy or of the performance of the people's elected representatives. Worse yet is the threat to the elective process itself by emerging technology. David Broder says it best:

I do not think it will be long before the converging forces of technology and public opinion coalesce in a political movement for a national initiative—to allow the public to substitute simplicity of majority rule by referendum for what must seem to many frustrated Americans the arcane, ineffective, out-of-date model of the Constitution.²⁵

From the contemporary context of these concerns, then, we turn to the fundamental question of the proper role of initiatives in our governmental system. It is important to understand exactly what that governmental system is. The central features of representative democracy are the lawmaking process and the selection of the representatives of the people, by the people, to make and administer those laws. It is this core meaning of representative government that initiatives severely impair. Jefferson and Madison both studied the history of self-government and were clearly instructed by Aristotle, who said well what Jefferson and Madison lived for—including their collaboration in founding public education in America. Hear Aristotle, who declared that the greatest task for a republic is “the education of the citizens in the spirit of the polity”²⁶ and “there are no more momentous duties than those of electing officers of State and holding them responsible”²⁷

In founding free public education as the wartime governor of Virginia, Jefferson put into that law the essential meaning of both education and republican government. The preamble to the law he wrote said that there are two great objectives to public education. First, “to illuminate . . . the minds of the people at large” and second, to ensure “that those persons, whom nature hath endowed with genius and virtue, should be rendered by liberal education worthy to receive, and able to guard the sacred deposit of the rights and liberties of their fellow citizens and that they should be called to that charge without regard to wealth, birth or other accidental condition or circumstance.”²⁸ Years later, in retirement, the man who founded free public higher education to nurture and sustain democratic government

25. *Id.* at 242.

26. ARISTOTLE, *THE POLITICS OF ARISTOTLE* 379 (J.E.C. Welldon, D.D., trans., Macmillan & Co. 1905).

27. *Id.* at 132.

28. MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY* 146 (1970).

asserted eloquently his commitment to representative government. As Jefferson said in a letter to John Adams:

[T]here is a natural aristocracy among men. The grounds of this are virtue and talents. . . . There is also an artificial aristocracy founded on wealth and birth, without either virtue or talents; . . . The natural aristocracy I consider as the most precious gift of nature for the instruction, the trusts and government of society. . . . May we not even say that that government is the best which provides most effectually for a pure selection of these natural aristoi into the offices of government?²⁹

And so our Republic was to be a place where an informed people chose a high quality group of public servants to make and carry out our laws. Our Constitution, in Article I, basically lists the powers and the scope of the powers of government as it describes the powers of the Congress.³⁰ The principle of checks and balances dominates the allocation of authority, both within the Congress and among the three branches.³¹ The executive's job is to administer the programs and follow the laws authorized by the Congress.³² Even in foreign and defense affairs, the executive's power is closely circumscribed by Congress's full role in the raising and support of armies and the provision and maintenance of a Navy and the War Power itself.³³ While we are not a parliamentary system where the prime minister is a creature of and member of the legislature, for us the legislative power is the essential power of making laws, establishing programs, and providing the means to get things done.³⁴

The Constitution expressly leaves to the states all legislative powers not granted to the Congress,³⁵ and it is very plain about how those legislative powers shall be exercised.³⁶ Article IV, Section 4 of the Constitution guarantees a republican form of government to the states.³⁷ This is a clear instruction that the states must NOT use initiatives. I will leave the arguments as to the constitutionality of initiatives under this clause to learned colleagues in this Symposium, but I will make a few historical points in support of the proposition that Madison and his colleagues meant what they said. First,

29. DUMAS MALONE, *THE SAGE OF MONTICELLO* 239 (1977) (alteration in original).

30. See U.S. CONST. art. I, §§ 8, 9.

31. See generally U.S. CONST. art. I-III.

32. U.S. CONST. art. II, § 3.

33. U.S. CONST. art. I, § 8, cl. 11-13.

34. See generally U.S. CONST. art. I.

35. U.S. CONST. amend. X.

36. See generally U.S. CONST. art. I.

37. U.S. CONST. art. IV, § 4.

remember that the states in 1787 were essentially governed by colonial legislatures and the “national government” had no executive from 1776 to 1789. So, republican in form clearly meant that laws were to be made by elected legislatures, not plebiscites. It is also important to note that the United States Supreme Court has never ruled on the constitutionality of plebiscites, only letting them stand by insisting that the propriety of plebiscites is a political question not properly the subject of a Court action.³⁸ The political question doctrine has been somewhat eroded over the more than one hundred years since the landmark case establishing it.³⁹ One wonders what the effect on this doctrine, and thus the constitutionality of plebiscites, will be with the almost complete erosion by the action of the Rehnquist Court in the Florida Presidential vote count.⁴⁰ *Luther v. Borden* and the rulings that followed basically held that Congress, rather than the Courts, should judge the results of the elective process of the states.⁴¹ Perhaps the time has come to check the primacy of the political question doctrine over ballot issues. The last major check was in an Oregon case in 1912, where the political question doctrine again ruled supreme.⁴²

What to do?

In the State of Washington, the two ideal next steps to repair the havoc wrought by initiatives would be: (1) to rule out most ballot issues as unconstitutional in a republic, and (2) to establish by statute a graduated income tax to substitute for the unfair, dysfunctional system of taxation that currently exists as the most destructive legacy of the initiative system. While both of these steps are essential for our future, they are hardly likely to take place quickly—threatening though the current situation is. But they need to be seen as needed steps down the road. An excellent first step that would largely accomplish these purposes would be that suggested by Phillip Talmadge in his superb Introduction to this Symposium:

[P]erhaps the legislature should have the courage to seek a constitutional amendment from the people clarifying the appropriate scope of the legislature’s power to budget and the scope of the people’s power by popular measure to affect such fundamental policy-making.⁴³

38. See, e.g., *Luther v. Borden et al.*, 48 U.S. 1, 38-40 (1849).

39. See generally *id.*; *Powell v. McCormack et al.*, 266 F. Supp 354 (D.C. 1967).

40. See *Bush v. Gore*, 531 U.S. 98 (2000).

41. *Luther*, 48 U.S. at 38-40; *Powell*, 266 F. Supp. at 356-60; *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 148-51 (1912).

42. *Pacific States Tel. & Tel. Co.*, 223 U.S. at 148-51.

43. Philip A. Talmadge, *Initiative Process in Washington*, 24 SEATTLE U. L. REV. 1016,

Another approach to the same route might be to seek and obtain a state supreme court decision that using the initiative process to effectively write a budget or significant taxing and spending features thereof clearly takes away the basic constitutional power, to say nothing of responsibility, of the legislature.

It might be a good time to convene a group of good government advocates, such as the League of Women Voters, and other wise persons to review the crisis and make recommendations on improvements in the process. Such recommendations could range from significant incremental changes, such as more careful definitions of subject matter, an official review of wording and ballot titles, or getting sitting legislators on the record for their view of proposed initiatives, to the more formidable proposals suggested above. Phillip Talmadge's suggestion would be a wonderful place to start.

There is important work to be done. Thanks largely to the ballot issue process, we probably have the most regressive tax system in the country. Elected officials frequently use ballot issues as a way out of taking principled and courageous actions in the public interest. The tax system, and initiatives more generally, has severely harmed education, social programs, transportation, the environment, equality of opportunity, and the future of the children of this state. It is broke. Fix it!