SYMPOSIUM

THE INITIATIVE PROCESS IN WASHINGTON: IMPLICATIONS AND EFFECTS

Introduction
Initiative Process in Washington

*Philip A. Talmadge**

I am honored to write this Introduction to the *Seattle University Law Review*'s Symposium on the initiative process in Washington. In recent years, the people, exercising their basic constitutional right to legislate, have proposed and enacted—or rejected—a smorgasbord of initiative measures, ranging from public disclosure to denture regulation. The Washington Supreme Court, however, has found some of those initiative measures to violate the Washington Constitution and has thus invalidated them.[1]

In this Symposium, the authors address a variety of issues associated with the initiative process in our state. They examine the specific case of Initiative 695, the role of the courts in reviewing initiatives, the application of the Republican Government Clause in the United States Constitution to Washington's initiative process, and the larger question of whether the entire initiative process is unconstitutional. These articles are timely analyses of a pressing public issue.

---

* J.D., University of Washington; B.A., Yale University. The author was a member of the Washington State Senate from 1979 to 1995 and a Justice of the Washington Supreme Court from 1995 to 2001.

1. The Washington Supreme Court reviews initiative measures just as it would legislatively enacted bills and finds such enactments unconstitutional where necessary. *See, e.g.*, Limstrom v. Ladenburg, 136 Wash. 2d 595, 606, 963 P.2d 869 (1998) (traditional rules of statutory construction apply to initiatives); Culliton v. Chase, 174 Wash. 363, 373-74, 25 P.2d 81 (1933) (initiatives subject to constitutional mandates). The Supreme Court has found term limits unconstitutional, Gerberding v. Munro, 134 Wash. 2d 188, 949 P.2d 1366 (1988), as well as tax limitation measures like Initiative 695, Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d 183, 11 P.3d 762 (2000).

Virtually no one interested in public affairs in this state lacks an opinion on initiatives. I am no exception. From my perspective as a former legislator and Supreme Court Justice, I have concerns about the initiative process.

In 1912, the people adopted the initiative process;[2] it is a legitimate form of expression for the people's will, particularly where the traditional branches of government fail to act. I am concerned, however, that the initiative process has become a substitute for thoughtful legislation, particularly on budget issues. I decry the lack of public

---

2. The Washington Constitution states with respect to initiatives:

> The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or party of any bill, act, or law passed by the legislature.
>
> (a) Initiative: The first power reserved by the people is the initiative. Every such petition shall include the full text of the measure so proposed. In the case of the initiatives to the legislature and initiatives to the people, the number of valid signatures of legal voters required shall be equal to eight percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing of the text of the initiative measure with the secretary of state.
>
> Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall certify the results within forty days of the filing. If certification is not complete by the date the legislature convenes, he shall provisionally certify the measure pending final certification of the measure. Such initiative measures, whether certified or provisionally certified, shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measures shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law.

WASH. CONST. art. II, § 1. *See generally* Philip A. Trautman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55 (1973).

process on most initiatives. Instead of open public hearings, debate, and careful amendments to a bill, we have an undeliberative process often characterized by secret and malevolent purposes.[3]

The development of a cottage industry on initiatives is troubling. Today, we have consultants who go from state to state to enact initiative measures for special interest groups with the money to support their effort. These consultants pay signature gatherers[4] to assist them in gathering signatures to advance a special interest agenda. Instead of the initiative process being a mechanism for action where the governor and legislature have failed to act, the initiative process has become a separate governing process unto itself. Instead of being a citizen's constitutional right to compel government action in the face of a legislative failure to act *because* of special interests, the initiative

---

3. As one recent scholarly analysis of initiatives opines:

> The proliferation of issue balloting . . . together with the objectives sought by many of the proposals, places minority rights and individual liberties in serious jeopardy. While the original advocates of American direct democracy may have emphasized progressive governmental reforms, such applications are less common in modern practice than are measures by which civil rights, and personal lifestyle and moral choices, are threatened by an amorphous, anonymous majority. In the Sixties efforts to repeal fair housing laws reached epidemic proportions. In the Seventies desegregative busing and antidiscrimination ordinances protecting homosexuals have fallen prey to this "tyranny of the majority." Even facially neutral measures such as California's Proposition 13 may adversely affect the poor by curtailing government services on which the poor, and hence minorities, are disproportionately dependent. In addition to discrimination against minorities, the list of personal liberties sought to be regulated or constrained by initiative is both voluminous and alarming.
>
> Compounding this threat is the lack of procedural safeguards governing initiative and referendum use. Ballot certification can easily be obtained by a well-financed interest group. "Tumultuous, media-oriented" campaigns often replace legislative hearings and debate, reducing sensitive, complex political questions to simplistic moral judgments and depriving a reviewing court of a coherent legislative history. Once enacted, a ballot proposition may be more difficult to amend or repeal than a legislative enactment, either because of statutory restraints or because of legislators' pragmatic reluctance to defy the vox populi. While this lack of procedural safeguards facilitates enactments hostile to minorities and individual liberties, the victim seeking judicial redress is likely to encounter judicial deference, or paralysis, in dealing with direction legislation.

Marc Slonim & James H. Lowe, *Judicial Review of Laws Enacted by Popular Vote*, 55 WASH. L. REV. 175, 181-83 (1979) (Footnotes omitted). *See also* Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993). Justice Linde contends that certain initiatives fail of the Republican Government Clause of the United States Constitution when they have a malevolent or stigmatizing intent aimed at identified groups. He might be concerned with a measure like Initiative 200, aimed at eliminating affirmative action.

4. *See, e.g.*, Waremart v. Progressive Campaigns, Inc. 139 Wash. 2d 623, 989 P.2d 524 (1999) (for-profit signature gathering organization sought access to private premises of grocery store to gather signatures).

process has instead become a tool of those special interests or people with agendas not always fully revealed.[5]

The initiative process fails to secure public involvement in the development of the proposed law. Once the measure is on the ballot, it is all or nothing. Our constitution limits the ability of the legislature to fix such measures, as they can only be amended by a two-thirds vote of both houses for two years after their enactment.[6] A small group of willful people can develop and effectively enact an initiative without any other consultation of the public, except perhaps the assistance of the consultants mentioned above.

In contrast to the efforts of such modern, narrowly-focused groups, the proponents of Initiative 276, the Public Disclosure Act, actually toured the state of Washington and held public hearings and broadly disseminated information on the proposed initiative, gathering public input before they placed the measure on the ballot for consideration.[7] The process utilized by the proponents of Initiative 276 had its analog in the legislative hearing process, where all views on issues may be expressed and problems in measures identified and addressed by decision makers. In sad contrast to the initiatives proposed of late, this kind of community deliberation and decision-making enriches our system of government as an appropriate supplement to legislative action.

Finally, I am concerned about the initiative process as an alternative to the traditional legislative process, particularly with respect to budget matters. It is incredibly difficult for legislative bodies to develop and enact budgets. It is nearly impossible to accomplish budgetary decisions when so much of the budgetary process has been affected by initiative measures.[8] The people in 1978 adopted Initiative 62, which limited revenues and the growth of state government. In 1993, the people enacted Initiative 601, which limited state government expenditures. When that measure proved too restrictive in its policy for

---

5. For example, what is the hidden agenda of Tim Eyman's Washington organization, Permanent Offense, or Bill Sizemore in Oregon? We know of the agenda of George Soros—liberalization of drug laws. *See* David Broder, "*The Ballot Initiative Battle*" (visited on Nov. 8, 2000) <http://www.washingtonpost.com/wp-dyn/articles/A4256-2000Nov2.html>. *See generally* DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY (2000).

6. WASH. CONST. art. II, § 1(c).

7. *See* Washington Fed'n of State Employees v. State, 127 Wash. 2d 544, 574, 901 P.2d 1028 (1995) (Talmadge, J., concurring in part and dissenting in part).

8. The people have acted frequently to revise Washington's tax structure, usually diminishing available revenues. The people passed an income tax by initiative (Initiative 69), effectively eliminated the state inheritance tax (Initiative 402), and removed the sales tax on trade-ins such as automobiles (Initiative 464), just to mention a few.

transportation funding, the people voted in favor of Referendum 49 in 1999. In turn, that measure was substantially contradicted by Initiative 695 in 1999. How can any rational policymaker function when fiscal policy in the transportation arena lurches from one standard to the next?

The culmination of this phenomenon of "budget by initiative" was the 2000 election. The people enacted (simultaneously): Initiative 722 (limiting property and other taxes); Initiative 728 (mandating education spending increases); and Initiative 732 (providing cost of living adjustments (COLAs) for teacher salaries). All have serious and contradictory implications for the state general fund and transportation budgets.

Legislators serving on budget committees find that the procedures for enacting a budget have been affected by initiatives: available revenue has been affected, and the direction for expenditures has been controlled as well. This is an irrational process for budgeting that no sensible organization would tolerate. As the *Seattle Times* cogently commented editorially:[9]

> Like shoppers on a spending spree, voters on Election Day bought themselves smaller classes in public schools, better teacher pay and limits on property taxes. Now the Legislature gets to figure out how to pay the bills.
>
> If you thought last year's budgetary fallout from the car-tab initiative turned a supposedly short legislative session into an ungainly endurance contest, wait till you see the challenging budget work that lies ahead next year in Olympia.
>
> Three initiatives passed that together reflect $1 billion worth of decisions voters made for lawmakers. The costliest measure is Initiative 728, which spends roughly $500 million on class-size reduction, extended learning time and school construction. Though smaller, Initiative 732, the teacher-salary boost, creates the biggest squeeze on competing programs paid for by the general fund—over $400 million. Initiative 722, the property tax cap, will cost the state an estimated $24 million, with much larger impacts on local governments. Reconciling initiatives will be a giant challenge.

The initiative process should be available for citizens when the traditional branches of government fail to respond. The initiative process should not be available as an end run around the deliberative

9. Editorial, *Heavy Lifting: Reconciling Initiatives in Olympia*, SEATTLE TIMES, Nov. 19, 2000, at D2.

legislative process, or to short circuit policy-making in the regular legislative arena.

While the initiative power is broad,[10] it is not all-encompassing. It does not extend, for example, to administrative actions.[11] Perhaps the initiative power does not,[12] and should not, extend to budget-related issues. Rational fiscal policy cannot be established when the fiscal situation is buffeted by a constant barrage of initiative measures adding or subtracting revenues and dictating expansion or contraction of expenditures. If the initiative power actually extends to budget matters, perhaps 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. For example, the Washington Attorney General could screen such proposals for constitutionality and the voters could be apprised of the state and local fiscal impact of such measures. A supermajority vote

---

10. Trautman, *supra* note 2, at 67. *See* State v. Davis, 133 Wash. 2d 187, 190-02, 943 P.2d 283 (1997) (rejecting challenges to initiatives based on the federal Republican Government Clause); State v. Manussier, 129 Wash. 2d 652, 669-72, 921 P.2d 473 (1996).

11. Ruano v. Spellman, 81 Wash. 2d 820, 505 P.2d 447 (1973); Durocher v. King County, 80 Wash. 2d 139, 492 P.2d 547 (1972).

12. Arguably, Article 8, section 4 of the Washington Constitution entrusts the appropriation power exclusively to the legislature:

> No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within one calendar month after the end of the next ensuing fiscal biennium, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.

WASH. CONST. art. VIII, § 4. As the Washington Supreme Court stated in *State ex rel. Peel v. Clausen*, 94 Wash. 166, 173, 162 P. 1 (1917):

> The object of Article 8, section 4, of the Washington constitution and the statute cited, is to prevent expenditures of the public funds at the will of those who have them in charge, and without legislative direction.
>
> > Its object is to secure to the legislative department of the government the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government (2 Opinions Attorneys-General, 670). It had its origin in Parliament in the seventeenth century, when the people of Great Britain, to provide against the abuse by the king and his officers of the discretionary money power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriations therefor made by Parliament.
>
> Humbert v. Dunn, 84 Cal. 57, 59, 24 P. 111 (1890).
>
> It is well understood that these provisions—and they are common to most, if not all, of our written constitutions—are mandatory, and that no moneys can be paid without the sanction of the legislative body. The legislative intent must be certain. It is not to be disclosed by a construction of doubtful acts or ambiguous language. But it does not follow that an appropriation need be in any particular form or words.

would also be appropriate for measures that dramatically affect the budgetary process such as votes on school levies, for example.[13]

This *Seattle University Law Review* Symposium on initiatives will highlight difficult issues facing the initiative process in Washington and will offer substantive and sensible ways of interpreting and dealing with initiatives in our state. All who value our democratic system will look forward to the thoughts of the many fine authors writing for this Symposium.

13. WASH. CONST. art. VII, § 2 (a sixty percent favorable vote required to pass various levies such as school levies).