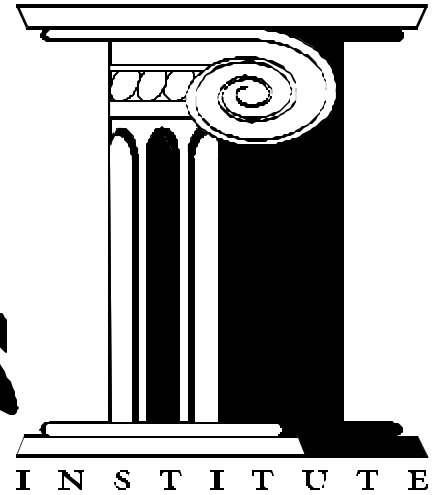


LIMITS



On Power and the Use of Power

Lawmakers or the people: Who is better informed?

by M. Dane Waters

I will be the first to say that the initiative process isn't a perfect lawmaking mechanism – it has its strengths and weaknesses – but lawmakers who oppose the process tend to use the argument of voter incompetence as the main reason they oppose it. They believe that voters aren't competent enough to make an intelligent and informed decision on the initiatives they place on the ballot.

That's an interesting statement.

When I go to the polls and see a ballot question I am uncertain about or can't fully understand – I vote no. I would rather maintain the status quo than vote for a law that I don't fully understand. I am not alone. According to academic research on this topic most voters are cautious when voting – if they don't understand something, they simply vote no.

So what about Legislators?

Are they competent enough to pass laws that are complex? I couldn't tell you how many times State Legislators or members of Congress told me that they didn't know all the details about a certain piece of legislation before voting on it.

Think about it – the average State Legislature passes – not considers – almost 1,000 laws a year. They have to know enough to vote yes on 1,000 laws yet they voice concern when the voters have to decide on three initiatives (the average number of initiatives that appear on a state's ballot each election cycle).

The voters who vote on these initiatives are also the same voters who have to decide which candidates get elected. In any given election, the voters must sift through dozens of candidates for a variety of offices and try and remember what each candidate stands for and how they would vote on

certain issues. Legislators never claim that the voters are incompetent when it comes to casting a vote for dozens of candidates, but they claim that the voters aren't smart enough to decide on an initiative.

Additionally, Legislators never seem to say that the voters aren't competent enough to vote on the issues that they themselves place on the ballot. In almost every election cycle the number of referred measures from the State Legislatures is three times more than what the citizens place on the ballot.

The citizens were casting votes on referred measures for more than 125 years before the first initiative ever made it to the ballot. So does that mean that the citizens who voted prior to the establishment of the initiative process were more competent than the voters of today? Are we to believe that

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Lawmakers or the people: Who is better informed? continued from page 1

in an era of mass communication, e-mail, television, 24-hour news, and voter pamphlets that the voters of today are less informed about ballot measures than they were 200 years ago?

I also find it ironic that Legislators in states without the initiative process oppose its implementation on the grounds that the voters shouldn't be voting on complex issues at the ballot box. Are we to believe that once a state like Texas gets the initiative process that the voters will suddenly be incapable of making an informed decision at the ballot box?

Texans have been voting on referred measures since statehood was granted and lawmakers haven't tried to take that right away, nor have they voiced concern that the voters are making uninformed decisions on these issues. So why would they believe that their fellow Texans couldn't make an informed decision on citizen initiatives?

The reality is that voters do their best when deciding what becomes law and what doesn't. If they are uncertain, they vote no. But do the voters truly understand every aspect of every law that appears on the ballot? – of course not – just as State Legislators don't understand every nuance of laws that they vote on.

But the problem is that Legislators want to abolish and/or limit the initiative process because of the possibility that the voters might pass a law that they don't fully understand.

If we allow that logic to prevail, then we would have to take away the lawmaking ability of State Legislators, for there is no doubt that they pass laws that they don't fully understand.

M. Dane Waters is President of Initiative and Referendum Institute, a non-profit, non-partisan, educational and research organization that does what no other national group does – analyze, promote, and defend the initiative and referendum process.

The mission of the Initiative and Referendum Institute is to research and develop clear analysis of the initiative process and its use; to inform and educate the public about the process and its effects on the political, fiscal, and social fabric of our society; and to provide effective leadership in litigation – defending the initiative process and the right of citizens to reform their government from career legislators who want to take it away.

For more information, visit the I&R Institute's web site at www.iandrinstute.org, or contact the I&R Institute at 1825 I Street NW, Suite 400, Washington, D.C. 20006.

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Initiative and Referendum in the States

by Amy K. Frantz

A few states asked the voters to consider ballot measures at the November 6, 2001 election.

COLORADO

Colorado voters chose a tax refund over a proposed monorail system in the November 6 election. Amendment 26, a Constitutional initiative to spend \$50 million of the state's surplus revenue to determine the feasibility of building a high-speed monorail system between Denver International Airport and Eagle County Airport near Vail, Colorado, was rejected by 66 percent of the voters. With the rejection of Amendment 26, the surplus should be returned to the state's taxpayers under the Taxpayer Bill of Rights (a Constitutional amendment adopted by voters in 1992). The total cost of the monorail system, if built, is estimated to be more than \$4 billion.

WASHINGTON

Washington voters approved two tax-related statutory initiatives on November 6.

Measure 747 limits property tax levy increases to one percent per year, unless the voters approve a greater increase. Fifty-nine percent of voters cast a yes vote on this measure, despite recent ads by opponents

claiming the property tax limit would put firefighters' lives at risk. Tim Eyman, sponsor of Measure 747, said taxing districts are allowed to go to the voters each year to request a greater increase, but governments will have to justify larger budget increases to the voters to gain approval. (*State Tax Notes*, October 29, 2001, p. 366)

A second measure approved on November 6 increases the state's tax on tobacco products, making it the highest tax on tobacco in the nation. Measure 773 increases the cigarette tax by 60 cents per pack, and increases the tax on other tobacco products. The revenue raised by the additional tax will be used for health care services for low-income individuals and tobacco prevention programs. Nearly 65 percent of the voters approved this measure.

Voters in other states will consider measures next year.

CALIFORNIA

Proposition 918, a Constitutional initiative, would allow Legislators to extend their stay in office beyond the voter-approved term limits established in 1990. State Legislators are currently permitted to serve six years in the Assembly and eight years in the Senate. Proposition 918 allows voters to file a petition to allow Legislators who are term-limited to run for re-election and if successful, serve an additional four years.

NEVADA

Nevada voters will again consider a Constitutional initiative banning same-sex marriage the state's voters approved in 2000. Nevada law requires Constitutional Amendments to be approved by the voters twice.

Amy K. Frantz is a Research Analyst with Public Interest Institute.

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School Funding: Lack of Money or Lack of Money Management?

by Matthew J. Brouillette

In 1994, Michigan citizens approved a constitutional amendment that dramatically altered the way public schools are funded. Known as Proposal A, the amendment delivered much-needed tax relief to overburdened property owners in exchange for a sales-tax increase — and a significant shift in control of the education purse-strings from the local to the state level.

Now, seven years later, some officials are saying it's time to let districts again tap local property owners for more school taxes. Do these officials have a case, or are schools missing opportunities to better use the resources they already have?

First, a brief history lesson is in order. Prior to 1994, Michigan's property tax burden was 35 percent above the national average, thanks in large part to irregular millage elections that depressed turnout and ensured narrow special interests would always get the tax increases they wanted. Proposal A cut property taxes by one-third, but increased sales and use taxes by 50 percent. It also dedicated 4.2 cents of the now 6-cent sales tax to the state School Aid Fund and established a minimum "foundation grant" — a per-pupil allotment allocated by the state to schools based on

their enrollment.

Public school funding, meanwhile, has become a top state priority. Revenues for public schooling since 1995 have increased by more than 50 percent, from \$4,200 to \$6,500 per student — double the inflation rate. The National Education Association says Michigan outspends 43 other states in this area.

Nevertheless, some school officials claim that a dearth of dollars resulting from Proposal A is forcing them to lay off teachers, close schools, and cut student programs. Paul Bosquette, a school board member in Wayne County's Redford Union School District, says that a lack of "proper funding" is to blame for his district's \$1.3-million deficit.

Is Bosquette right? It's hard to think so when per-pupil revenues in Redford Union are up nearly 40 percent since 1994. Redford's — and other districts' — problem is not so much a lack of revenue but rather that large amounts of education dollars continue to be consumed by unreasonable collective bargaining agreements, costly non-instructional services, and inefficient management practices. (The National Center for Education Statistics reports that Michigan ranks below only two other states in the percentage of

education dollars it spends on bureaucracy vs. classroom instruction.) The result is that no amount of taxpayer money is ever deemed to be "enough" to fund public schools.

Redford officials know how to cut unnecessary costs and fix the district's financial problems; they're just unwilling to make the tough decisions necessary to do it. Earlier this year, the Mackinac Center for Public Policy met with officials to discuss their options — including competitively bidding out performance of non-instructional services to private firms. The officials agreed that quality services at significant cost savings were readily available. But they also know the powerful school employee union, the Michigan Education Association, opposes any move that would lessen its annual revenue stream of over \$700 million in dues and premiums from school employees and districts. The result: Criticize Proposal A, because that's politically easier than risking a highly public union protest.

Others complain that Proposal A hurts districts facing declining enrollment. Holland Public Schools claim that Proposal A helped force the closure of a popular elementary school. Officials there argue that a loss of students, without a corresponding

reduction in “fixed” costs, is causing financial troubles — even though Holland receives over \$2,000 more per student in 2001 than it did in 1994. In other words, Holland’s budget is \$10 million larger than it was before Proposal A, while at the same time the district has to educate fewer students.

Declining enrollment does make certain budgetary decisions difficult, but what enterprise is immune to fluctuations in the marketplace? Every operation — including schools — must consider and plan for future changes in its customer base. This is simple economic reality. The fact is that most districts — including many that have received smaller funding increases than have Redford and Holland — are able to balance their budgets. Trenton Public Schools, for example, has not felt it necessary to ask for a single tax increase in over 30 years.

Our schools need to learn the same lesson parents hope their children will learn: You can’t spend all your money irresponsibly and expect your allowance to increase.

Former teacher Matthew J. Brouillette is Director of Education Policy with the Mackinac Center for Public Policy, a free-market research and educational organization in Michigan.

For more information visit Mackinac Center's web site at www.mackinac.org or contact the Center at 140 West Main Street, P.O. Box 568, Midland, MI 48640.

LIMITS Question of the Quarter:

**Should Iowa consider implementing a
school funding plan like Michigan’s
Proposal A?**

Send your thoughts on this issue to us at
public.interest.institute@limitedgovernment.org.

We will publish some of your ideas in the next issue
of *LIMITS* in March 2002 and on our web page
at www.limitedgovernment.org.

Here are some excerpts from the responses we received to the Question of the Quarter in our September issue of *LIMITS* – Do you think we need term limits for our elected officials in Iowa?

“We as Americans have no one to blame but ourselves if we think politicians have been at the public trough too long. We have the power to make the selection as to who represents our needs, and it’s that fundamental underpinning of our political system that set the United States apart from every other great nation that ever survived on this planet. If Americans would just get out and vote instead of throwing up their hands and claiming that an individual’s vote doesn’t make a difference, I truly believe the term limit discussion would go away and we’d get exactly what we deserve.”

Dennis Malloy
West Des Moines, IA

“I don’t think we need term limits for our elected officials in Iowa or elsewhere for that matter. The main reason I am opposed to term limits is because it doesn’t tackle the main problems, which are incompetence and corruption in government....Besides, we already have term limits in place. It’s called voting.”

Thomas Lindaman
Des Moines, IA

Thank you to all of our readers who responded to the Question of the Quarter!

Initiative under assault: A power struggle between branches

by Eric Winters, J.D.

As the 19th century drew to a close, a group of progressive political reformers in Oregon decided that government did not adequately represent the interests of the people. Thanks to their efforts, Oregon became one of the first of many states to adopt a system of direct democracy. One hundred years later, Oregon's Initiative system routinely attracts national interest as it places political hot potatoes in the hands of the first branch of government, the people.

Whether it's death with dignity, tax reform, medical marijuana, or (most recently) property rights, Oregonians have shown a willingness to consider controversial issues that, more often than not, reduce the size and influence of government. Unfettered by the pull of professional lobbies, or the strength of certain loud interest groups, Oregon voters are free to consider the merits of a proposal without worrying about who gets offended. For nearly a hundred years, the Initiative has meant one thing: the people are the government in Oregon.

However, a recent line of legal cases suggests that Oregon's dynamic laboratory of democracy has been emasculated. In 1998 the Oregon Supreme Court overturned the

"Crime Victims' Bill of Rights" in *Armatta v. Kitzhaber*. Passed in 1996 as Measure 40, it was submitted to voters as a single package that affected a number of existing Constitutional provisions, all loosely tied together under the subject of criminal procedure. It had the effect of ruffling many feathers in the judiciary.

Relying on Article XVII, Sec. 1 of the Oregon Constitution, a provision dormant for 92 years, the *Armatta* case held that Measure 40 made substantive changes to multiple portions of the Constitution that were not closely related. The *Armatta* Court used this reasoning to throw out Measure 40 under a newly recognized "Separate Vote" test.

This was the first time an Oregon court threw out a voter-approved Constitutional Amendment. It was also the first time the Court ruled that initiated amendments were subject to the Separate Vote test; the weight of earlier cases, the historical use of the Initiative (and a common sense reading) should have suggested otherwise. Concerns over "constitutional logrolling" convinced the *Armatta* Court to re-evaluate and re-construe old portions of the Constitution, giving the Court a new and powerful check upon the

Initiative.

In the wake of the *Armatta* decision the Oregon Court of Appeals applied this new test on three separate occasions, and in each case existing or proposed amendments were found lacking. This is because the Court of Appeals defined the Separate Vote test in a manner that radically narrowed the possibility of making substantive changes to the Constitution. No challenged amendment has yet passed their test.

According to the Court of Appeals, the Separate Vote test holds that substantive changes are not closely related if one proposed change is not "necessarily implied" by another proposed change. The Court then attempts to peer into the mind of the hypothetical voter to determine what sorts of changes "necessarily imply" each other. The result so far, seems to be "none."

Measure 7 overturned

Measure 7, also known as the "Takings Amendment," was passed in November 2000. It required landowners to be compensated when a government regulation results in a loss of property value. It was immediately overturned and remains in limbo because the lower

court employed the same hair-splitting analysis employed by the Court of Appeals. The judge in the Measure 7 case actually speculated whether creating certain exceptions to the proposed takings clause (the measure exempted casinos and adult book stores) might have been weighed differently by a hypothetical voter. Would one voter want to exempt only casinos but not adult stores, or vice-versa? Under such an exacting analysis, it was doomed.

Term limits overturned

Legislators soon decided this new method for overturning Constitutional Amendments would come in handy in their struggle to avoid term limits. In 1992, Oregon voters passed term limits by a two-to-one margin. Since then, this amendment has resulted in no small amount of hand wringing by termed-out Legislators and interested lobbyists. Not wanting to bring the issue back before the voters (apparently term limits are still quite popular), the emboldened Legislature passed a law hastening a challenge to the term limits amendment under the "Separate Vote" test.

The challenge to term limits contends that when the initiative was passed it included several substantive changes that did not necessarily imply one another. The term limits amendment applied to all elected state policy makers: State and

federal Legislators, the Governor, the Secretary of State, and the Treasurer. Because each political office is substantively distinctive, the argument then followed that each office required a separate change that could be weighed differently by a hypothetical voter (e.g., one voter might want to limit only Legislators but not the Governor).

This argument carried the day and term limits were thrown out on July 21, 2001, nearly nine years after approval. The judge decided there was no applicable statute of limitations to challenging invalid Constitutional Amendments. The case will be considered on appeal by the Oregon Supreme Court this fall.

A Constitution covered in question marks

If amendments can be tossed out years after their adoption, a whole new can of legal worms is opened. Literally dozens of past amendments are vulnerable to challenge, some so fundamental that abolishing them would upset the entire structure of government. Already lawsuits or motions have been filed challenging the Lottery, Legislator pay, Legislator qualifications, and the jurisdiction of the Court of Appeals. Suits challenging property tax limitations (1990's Measure 5 and 1997's Measure 50) cannot be far away.

The Supreme Court has to

face tough issues. It is in this mess, in large part, because it overreached in developing the Separate Vote test. As defined in Armatta, the Separate Vote test gave the high court a great deal of flexibility in deciding which measures passed and which failed. Because the Armatta interpretation was subjective, no one could be sure how it would be applied. Many wondered whether the Court might use the test in a political manner, applying it only to amendments (such as Measure 40) that the justices disliked. The Court of Appeals remedied this concern by ensuring that no amendments could pass the test. The Court of Appeals transformed the Separate Vote test into an objective analysis that is so narrow it is hard to imagine a meaningful Constitutional Amendment passing it.

The stakes are extremely high. The Supreme Court is under enormous pressure to prevent the implementation of Measure 7 because of the high cost of compensating for burdensome regulations. However, if the Court chooses to apply the test retroactively on term limits, they will likely face a Constitutional crisis of their own making.

In 1910 the Supreme Court was fundamentally altered by an initiative that violated even the broadest application of the Separate Vote test. If the 1910 amendment(s) are overturned the Court of Appeals will cease

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**Initiative under assault:
A power struggle
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to exist and the election of each current Supreme Court Justice will have to be invalidated. Common sense suggests that the Court will do everything in its power to avoid such a result.

In the meantime there are a number of attorneys filing Separate Vote challenges against favored portions of the Constitution in order to keep our justices honest. It is to be hoped the Supreme Court will reconsider its Separate Vote test in the coming months, and

restore the right of the people to make meaningful changes to their Constitution.

Eric Winters is an attorney in private practice in Portland, Oregon, and an adjunct scholar with Cascade Policy Institute.

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Cascade Policy Institute is an independent, nonprofit public policy research and educational organization based in Portland, Oregon. Its mission is to explore and advance policy alternatives that foster individual liberty, economic opportunity and personal responsibility.

For more information on Cascade Policy Institute, visit its website at www.cascadepolicy.org or contact Cascade Policy Institute, 813 SW Alder, Suite 450, Portland, Oregon 97205, 503-242-0900, info@cascadepolicy.org.

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