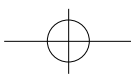
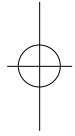
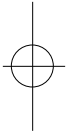
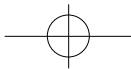
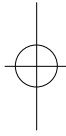
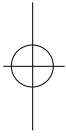


# The Battle Over Citizen Lawmaking





# The Battle Over Citizen Lawmaking

A Collection of Essays

*An In-depth Review of the Growing Trend  
to Regulate the People's Tool of Self-Government:  
The Initiative and Referendum Process*

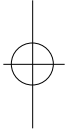
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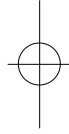
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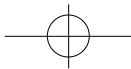
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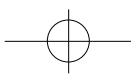
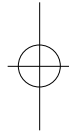
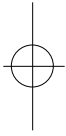
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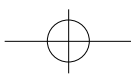
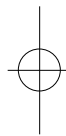
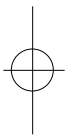
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## What Is the Initiative & Referendum Institute?

In 1998, in recognition of the initiative and referendum process' influence on America, the Initiative & Referendum Institute was founded. The Institute, a 501(c)(3) non-profit non-partisan research and educational organization, is dedicated to educating the citizens about how the initiative and referendum process has been utilized, bringing litigation when necessary to protect it, and in providing information to the citizens so they understand and know how to utilize the process. No other organization does what we do.

The Initiative & Referendum Institute extensively studies the initiative and referendum process and publishes papers and monographs addressing its effect on public policy, citizen participation and its reflection of trends in American thought and culture. We also research and produce a state-by-state guide to the initiative and referendum process that can be used by activists, and we work to educate and update the public on how the process is being utilized across the country. We analyze the relationship between voters and their elected lawmakers and when and why the people turn to initiative and referendum to enact changes in state and local law. Already, the Initiative & Referendum Institute has garnered significant media attention. We have been interviewed or cited by numerous media outlets including, ABC News, Voter News Service, CBS Radio, Pacific Radio Network, CNN, *The Washington Post*, *The New York Times*, *The Chicago Tribune*, Fox News Channel, *The Christian Science Monitor*, The News Hour with Jim Lerher, *The National Journal*, *The Wall Street Journal*, *Governing Magazine*, *USA Today*, Court TV's "Supreme Court Watch" and "Washington Watch," *The Economist*, National Public Radio, *Campaigns and Elections Magazine*, *U.S. News and World Report*, *Congressional Quarterly*, and dozens of other publications, newspapers and radio stations around the world.

The Institute is uniquely qualified to undertake this mission. Comprising the Institute's Board of Directors, Advisory Board and Legal Advisory Board are some of the world's leading authorities on the initiative and referendum process, including prominent scholars; experienced activists—who know the nuts and bolts of the process and its use; skilled attorneys;

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and political leaders—including six governors—who have seen first hand the necessity of having a process through which citizens can directly reform their government.

Visit our two award winning websites at <http://www.iandrinstitute.org> and <http://www.ballotwatch.org> for additional information or contact Dane Waters, President of the Initiative & Referendum Institute via email at [mdanewaters@iandrinstitute.org](mailto:mdanewaters@iandrinstitute.org) or by calling 202.429.5539.

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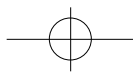
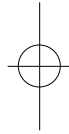
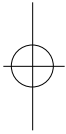
## Acknowledgments

In 1998, the Initiative & Referendum Institute was founded to educate the citizens about the initiative and referendum process. The Institute's success in accomplishing this goal has been possible because of the strong interest of the citizens in this wonderful tool of self-government and due to the strong support of a handful of individuals who believed in this organization in its early days and gave selflessly of their time, energy and financial resources. I would like to personally thank Karen Connell, Jeff Oldham, Angelo Paparella, Bill Piper, Dennis Polhill and Mary Waters who first pushed me to start the Institute and who believed in the goals of the organization. I would also like to thank David Keating for providing hours of advice on how the Institute should operate as well as Paul Jacob and Howie Rich who gave me the opportunity to experience first hand the importance of the initiative and referendum process.

Throughout the last three years numerous people have stepped forward at critical times to help the Institute and to them words of gratitude aren't enough. They include Ed Meese, Governor Kirk Fordice of Mississippi, Wayne Pacelle and Ted Weill.

Additionally, I owe a tremendous debt of gratitude to the contributing authors who made this book possible. They include Anne Campbell, Jennie Drage, Beth Garrett, Liz Gerber, Paul Grant, Paul Jacob, Bill Jones, Kris Kobach, Rob Natelson, Wayne Pacelle, Angelo Paparella, Dennis Polhill, Mads Qvortrup, Peter Schrag, Dan Smith, Don Stenberg and Caroline Tolbert.

Finally, I would like to thank my son Mason, whose love for his father brings joy to me every day and to whom I dedicate this book.



## Introduction

Much has been written and spoken about the initiative and referendum process over the years. Many believe, as do I, that much of this rhetoric has been based on misinformation and has been disseminated primarily by people who do not believe in the people's right to self govern as envisioned by our Founding Fathers at the state and federal level. However, one thing that both opponents and proponents of the process agree on is the impact the initiative and referendum process has had on our daily lives.

There is little doubt that in recent years the initiative process has become one of the most important mechanisms for altering and influencing public policy at the local, state and even national level. In the last two years alone, utilizing the initiative process, citizens were heard on affirmative action, educational reform, term limits, tax reform, campaign finance reform, animal protection, drug policy reform and the environment.

But as the authors of this book will make clear, the initiative process has fallen prey to its own success. Lawmakers who have been most affected by this citizen's tool have struck back by imposing new regulations on the process—regulations that can be argued serve no purpose but to deprive the citizens of the only avenue available to them to reign in unresponsive government. Even though it can also be argued that the initiative process is in need of review and possibly reform—state legislators seem to be acting in a vacuum and have not taken the time to truly understand the effects of their attempts at reform.

William Jennings Bryan said it best in 1920 when he stated: “[w]e have the initiative and referendum; do not disturb them. If defects are discovered, correct them and perfect the machinery . . . make it possible for the people to have what they want . . . we are the world's teacher in democracy; the world looks to us for an example. We cannot ask others to trust the people unless we are ourselves willing to trust them.” This statement couldn't be truer today than it was 80 years ago.

When the initiative process was established, many of the initiative states provided that these reserved powers to the people would be “self-executing.” In other initiative states, the legislature was entrusted with creating procedures by which the people could exercise the initiative. Citizen concern about the legislature's efforts to limit initiative rights was the primary reason that in some initiative states, the legislature is specifically instructed to enact laws designed to only facilitate, not hinder, the initiative process.

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However, despite the fact that the citizenry adopted the initiative to ensure citizen government, most of the states where the citizens provided that they retain initiative rights have seen the legislature enact legislation that restricts rather than facilitates the use of these powers by the people. The legislatures' regulation of the initiative and referendum have often violated the citizenry's First Amendment rights as articulated by the U.S. Supreme Court in *Meyer v. Grant*, 486 U.S. 414 (1986)—as pointed out in the chapters by Kris Kobach and Paul Grant. Furthermore, the restrictions imposed on the citizenry are typically not imposed on other individuals seeking to use a state's electoral processes to invoke changes in state government, whether it be through lobbying, legislating, or running for political office.

As Secretary of State Bill Jones of California points out in Chapter 14, states do have a compelling interest in ensuring that all elections, including those on initiatives, are conducted in a non-fraudulent manner. However, if the state legislatures wish to regulate lawmaking by the people they should impose the same restrictions on their own powers. Lobbyists, for example, who seek to have the legislature enact new laws or propose amendments to the state constitution typically have no voter registration or residency requirements imposed on them—but signature collectors for initiatives do. The purported purpose behind legislatively imposed limitations on the citizenry in the initiative process should be viewed skeptically in the absence of evidence of unique voter fraud during these processes.

A variety of legislative enactments in various states demonstrate how the legislatures have reacted to the use of the initiative process. Many argue that their response appears based on self-interest rather than an interest in protecting a system of government where the citizens are an independent branch of government. A review of the various legislatures' responses, many argue, reveals that control of a distinct branch of government, the people, by legislative action is not about fraud but about raw political power.

As the chapters in this book point out, many, if not most, of the regulations on the process were enacted or proposed during the recent wave of term limit, animal protection, tax limitation and campaign finance initiatives enacted by the citizenry. However, legislatures have always vigilantly inhibited the people's right to the initiative and referendum. Regulations imposed on the people's use of these powers have typically been direct responses by the legislature to the people's use of these powers.

Numerous examples could be cited if more space were available. In 1998 and 1999 alone, seven states—Arizona, Idaho, Mississippi, Missouri, Montana, Utah and Wyoming—tightened procedural restrictions on initiatives. These seem extreme when one considers that only 134 laws have been adopted in those states using the initiative process in over eighty

years. Since the first statewide initiative on Oregon's ballot in 1904, citizens in the 24 states with the initiative process have placed approximately 1,900 statewide measures on the ballot and have only adopted 787 (41%). In 1996, considered by many to be the "high water mark" for the initiative process, the citizens placed 102 measures on statewide ballots and adopted 45 (44%). In contrast, in 1996, the state legislatures in those same 24 states adopted over 17,000 laws. Furthermore, very few initiatives actually make the ballot. In California, according to political scientist Dave McCuan, only 26% of all initiatives filed have made it to the ballot and only 8% of those filed actually were adopted by the voters.

Additionally, many people try to make the case that new regulations need to be added since, in their minds, the initiative process in this country is unregulated and represents "laws without government." The initiative process in this country is one of the most regulated in the world. The government sets all the rules, including: telling you if you can or can't collect signatures on a specific issue, how many subjects the issue must be limited to, the size and font of the petition you circulate, how many signatures you must collect and from what areas, how long you have to collect signatures and who can and cannot collect those signatures, and the government ultimately decides if your issue can be on the ballot or not.

Regulation has also been proposed, as the chapters of this book will point out, because of concerns regarding the initiative process and the role of money in the process, the competence of voters when making decisions on initiatives, and the role the process has on minority rights. Numerous books addressing these issues have been written by leading academics and can far better address these topics than I can in a few pages. However, in short, many of these concerns seem unfounded and so regulation "addressing" them in turn seems unfounded as well.

For example, Professor Liz Gerber, arguably one of the top political scientists in the country, surveyed 168 different direct legislation campaigns in eight states and found that economic interest groups are "severely limited in their ability to pass new laws by initiative" and that "by contrast, citizen groups with broad-based support and important organization resources can much more effectively use direct legislation to pass new laws." She and Beth Garret discuss this issue in greater detail in Chapter 5.

Additional research by political scientists Todd Donovan, Shaun Bowler, David McCuan, and Ken Fernandez found that while 40% of ALL initiatives on the Californian ballot from 1986-1996 passed, only 14% of initiatives pushed by special interests were adopted. They concluded, "[o]ur data reveals that these are indeed the hardest initiatives to market in California, and that money spent by proponents in this arena is largely wasted." This research complements political scientist Anne Campbell's research

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on special interest-backed initiatives in Colorado from 1966 to 1994, which found that during those 28 years, only *ONE* initiative pushed by special interests was successful at the ballot box.

Many people are predisposed to believe that money influences elections—it is the conventional wisdom which is why the vast majority of Americans want campaign finance reform—but when it comes to initiative campaigns, the proof does not exist. But, even granting for a moment that money does influence the initiative process, why should the process be abandoned? If the influence of money is the litmus test to abolishing or over-regulating a legislative process, then the normal legislative process controlled by state and federal lawmakers should be abolished and/or stringently regulated as well.

Another argument for regulating and limiting the initiative and referendum process is the claim that the people already have the ability to check government through the existing electoral process and therefore the check and balance created by I&R is not necessary. However, most people who support the initiative process and who utilize the process only use it as a tool to address single issues—issues that their elected officials for whatever reason have chosen not to address. They want, for the most part, to keep a particular elected official and so electing them out of office for failing to deal with one specific issue is considered by many to be an extreme step—far more extreme than allowing the people to make laws on an occasional basis. In 100 years the people have made approximately 800 laws. That is not many considering that an average legislature passes over 1,000 laws a year.

There is no doubt that you can find flaws with citizen lawmaking. No form of legislating is perfect. But adding additional regulations to an already over-regulated process will do nothing—and has done nothing—but increase the cost of utilizing I&R and has precluded most citizens from using this important tool. A tool that the people need access to—a tool the people can use to check government in an era of growing government.

As you can see, the issue of regulation is complex. But one thing that is for certain, the regulation of I&R has generated a deluge of practical questions which thus far have remained either unanswered or have been confined to the pages of specialist journals. This makes it difficult for practitioners and citizens, who need to understand these new regulations and the rationale behind them, to get access to important information and valuable discussions. Regulation raises many questions: philosophical questions about freedom of expression, equality between different groups, legal questions about signature gathering, limits on campaign spending, etc, and political problems about implementing the statutes regulating I&R. This book will attempt to address these issues from the viewpoint of leading scholars, opinion-leaders, journalists, elected officials, activists involved



in pushing reform through the initiative process and attorneys that have been involved in fighting these regulations.

The contributors to this book represent both strands in the debate - those that oppose regulation and those that support it. Those that oppose regulation tend to believe that regulations and restrictions challenge—and undermine—the principle of government “by the people.” Those that support regulation believe that it ensures the fairness of the outcome, for, as noted philosopher John Rawls writes:

The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of the political debate. For eventually these inequalities will enable those better situated to exercise larger influence over the debate . . . compensating measures must, then, be taken to preserve the fair value for all of equal political liberties.

This book seeks to enlighten and broaden the debate by adding substance and depth to the discussion. I am quite aware that there are other words on subjects than last words. Yet I do entertain the immodest belief that this collection of essays will provide new departures for the ongoing debate.

M. Dane Waters  
President  
Initiative & Referendum Institute

