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City Club Report on Reforming the Initiative, Referendum and Referral Systems in Oregon

City Club of Portland (Portland, Or.)

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Making the Initiative Work for Oregon

**A City Club Report on Reforming the Initiative,
Referendum and Referral Systems in Oregon**

City Club members will vote on this report on Friday, January 11, 2008. Until the membership votes, City Club of Portland does not have an official position on this report. The outcome of the vote will be reported in the City Club Bulletin dated January 25, 2008 and online at www.pdxcityclub.org.

The mission of City Club is to inform its members and the community in public matters and to arouse in them a realization of the obligations of citizenship.

Additional copies of this report are available online at www.pdxcityclub.org or by contacting the City Club office:

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Foreword

Every time an Oregon voter signs a petition proposing a new law by initiative, or votes on an initiative that has qualified for the ballot, or on a referendum of an act by the Legislature, or on a referral by the Legislature, that voter is participating in direct democracy — the consideration of proposed law by the people rather than by the Legislature.

Oregonians have long taken great pride in this process and have used it to pursue changes in statutory and constitutional law by majority vote on issues such as women's suffrage (1912), mandatory use of seat belts (1990), physician-assisted suicide (1994), and embedding a definition of marriage in the state constitution (2004). Direct democracy can be a powerful instrument of lawmaking when used to resolve political questions important to the people.

City Club of Portland published the results of a study of the initiative and referendum process in Oregon in 1996. Many individuals and organizations throughout the state have referred to this report for its analysis of the initiative and referendum system. The findings, conclusions and recommendations from that report are presented in Appendix H.

Despite the compelling arguments and analysis in the 1996 report, few if any of its recommendations have been enacted. Voter initiatives continue to be widely used in Oregon, and debate about their contributions to the democratic process (or lack thereof) persist. Initiatives backed by interest groups continue to change

— some would say undermine — the republican form of government in Oregon. Use of the initiative process appears to be an even more hotly contested and important issue now than it was in 1996.

In the more than 10 years since City Club last studied this topic, little has changed to allay concerns expressed by the Club. In fact, the initiative system is now a year-round business fueled by more money coming from fewer people and costing Oregon taxpayers even more to administer.

In light of these and other considerations, City Club's Research Board and Board of Governors convened a committee of City Club members, all screened for conflict of interest, to take a contemporary look at Oregon's system of citizen initiatives, referenda and legislative referrals. Recognizing that the "I&R" system is widely criticized by many Oregonians while at the same time held inviolable by many others, a wide cross-section of initiative practitioners, legislators and other interested parties was invited to share their experiences and opinions with your committee. This report is a product of that process and has been written with the hope that it will inspire productive thought and dialogue — among City Club members, the population at large, elected officials and the media — about the meaning, propriety and efficacy of direct voter participation in lawmaking.

Executive Summary

In 1996, City Club of Portland published a study of the initiative and referendum system in Oregon. In the decade that followed, direct democracy — the consideration of proposed law by the people rather than by the Legislature — continued to play a significant role in shaping public policy in the state. In fact, twice as many petitions were filed in 2006 as in 1996, and among those approved by voters, some had profound (and controversial) financial and social consequences. Among the measures adopted in 2004, two were particularly emblematic of the extraordinary power entrusted in Oregon voters. One measure amended the constitution by defining marriage as the union of one man and one woman (Measure 36) and the other radically impacted Oregon's pioneering set of land-use laws (Measure 37).

Of the 24 states that allow some form of direct democracy, Oregon's system is the most prolific and among the least restrictive. Extensive use of citizen initiatives and referenda, and legislative referrals, coupled with a nascent awareness among the general public about the seemingly incompatible and sometimes antagonistic relationship between representative government and direct democracy, prompted City Club of Portland to undertake a close look at what was once known as "The Oregon System."

Some Oregonians believe that the state has not been well served by direct democracy and would like to see the initiative system eliminated. However, most witnesses interviewed

by your committee would rather improve the system than abolish it. At the heart of the matter is finding agreement on an appropriate balance between the role of elected lawmakers and the citizenry at large in shaping Oregon's statutory and constitutional landscape.

Oregonians have reportedly lost confidence in their Legislature, and lawmakers are seen by many as vulnerable to control by special interests, preoccupied with reelection, overly partisan and unresponsive to voters. These weaknesses foster frustration with government's failure to grapple with major statewide issues. Unfortunately, this dissatisfaction with the legislative process contributes to the ease with which interest groups use the initiative and referendum system to advance their political agendas.

Some Oregonians, including a number of legislators, see the initiative, referendum and referral system as an important and sometimes attractive alternative to a deliberative legislative process. They argue that the initiative system enables citizens to propose statutes and constitutional amendments that the Legislature has been unable or unwilling to enact. However, the system has its drawbacks. In contrast to legislative lawmaking, initiatives do not require voters to consider the effects of proposed measures on the overall functions and responsibilities of government or on public resources generally, nor do they allow for compromise among conflicting points of view and interests. Initiatives, with

their singular focus, inherently ignore both competing and complementary interests.

In some states, but not in Oregon, statutory initiatives are integrated with legislative processes in ways that allow broad debate and public input before a measure is placed on the ballot. Such debate and input provides opportunities for deliberation and clarification of proposed initiatives.

Oregon voters have been reluctant to restrict their access to and use of the initiative and referendum system, but they have approved some measures intended to improve the system. In fact, Oregon leads the way when it comes to attempts to alter its initiative and referendum system. Between 1999 and 2007, 148 bills related to the system were introduced in the Legislature, 14 of which passed.*

For many Oregonians, concern about how initiatives and referenda have affected and could again affect the state's financial health is of utmost importance. Over the years, voters have adopted measures that mandate large state expenditures without providing revenue to fund them, and conversely, have adopted measures that reduce revenue without specifying commensurate reductions in expenditures. These measures have been enacted irrespective of the provisions of the Oregon Constitution that require the Legislature to balance the state's budget. In addition, because ballot measures can mandate state revenue and expenditure levels independent of the legislative process, the initiative and referendum system creates uncertainty about Oregon's

ability to pay its debts due to future initiatives and referenda that could affect state revenue or appropriations. This uncertainty increases the cost of servicing state debt by lowering state government bond ratings and negatively affects the government's ability to finance public projects. Local governments are similarly affected.

For others, the cumulative effect of sometimes-haphazard lawmaking at the ballot and its effect on the state constitution is the paramount issue. Constitutions are intended to create the machinery of governments, assign powers and duties to the entities created, and set limits on governmental power. However, due to the small difference between the number of signatures required for constitutional amendments and that required for statutory measures, chief petitioners sometimes pursue constitutional amendments for what are in effect statutory matters in order to insulate new laws from amendment or repeal by the Legislature. Largely through the initiative process, Oregon's constitution has come to include extensive matters not related to governmental structure and functions. Because, in most cases, amending the constitution is more difficult than passing statutory law, the Legislature's ability to improve, adapt or otherwise change constitutional law adopted through the initiative process is limited.

The Oregon Supreme Court, in deciding *Armatta v. Kitzhaber* in 1998, invalidated a victims' rights initiative on the principle that an amendment to the constitution can amend only one provision at a time. This principle is known as the "separate-vote requirement" to ensure separate votes on separate amendments.

* Statistics from the National Conference of State Legislatures include bills related to the recall process, which is not addressed in this report.

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Since *Armatta*, there has been a noticeable trend toward fewer *proposed* constitutional amendments. In 1998, there were twice the number of *proposed* constitutional amendments compared to proposed statutory enactments. The trend was nearly the opposite in 2006 with twice as many proposed statutory as constitutional changes. Still, the number of constitutional and statutory initiatives that have actually *qualified* for the ballot has remained relatively constant immediately before and after *Armatta*.

Your committee also heard considerable testimony about the cost to taxpayers of administering the initiative and referendum system and responding to uncoordinated decisions made by voters. A practice known as “ballot title shopping” is now central to many campaign strategies and comes at a significant cost to taxpayers. Aware that the exact wording of ballot titles is a major factor affecting the success of ballot measure campaigns, petitioners often submit multiple variations of their initiatives and “shop” for the ballot title most attractive to voters. In doing so, they increase the administrative burden and costs for the secretary of state, attorney general and Supreme Court. Taxpayers also absorb the cost when ill conceived or poorly drafted measures cannot be implemented without legislative or administrative repair or judicial interpretation.

Other elements of ballot measure campaigns, particularly the signature gathering phase of campaigns, also have drawn considerable public criticism. Use of paid signature-gatherers allows the initiative process to be employed with increasing success by individuals and groups with access to substantial financial resources. This has tainted the idyllic vision of

Oregon’s grass-roots citizen initiative process, whether or not it ever existed. More importantly, your committee found that, in most cases, today’s signature-gathering operations have more in common with commercial moneymaking operations than grass-roots political activities.

In addition, media reports have portrayed signature-gathering operations as highly susceptible to forging signatures on initiative petitions, as well as bending, if not breaking, laws that regulate other elements of the process. Your committee found that paid signature gatherers operate with little oversight by the state and that prosecutions of alleged misconduct are rare.

In spite of the significant shortcomings identified by your committee, we believe Oregon’s system of initiatives, referenda and referrals has a rightful place as a means of lawmaking that is secondary to the Legislature. It is imperative that Oregonians retain for themselves a direct democratic path when the Legislature is unable or unwilling to act on critical issues. At the same time, the many concerns with the direct democratic process summarized here and discussed more thoroughly in the body of this report have contributed to unacceptable levels of governmental inefficiency and financial uncertainty, as well as a cluttered constitution and a pervasive distrust of representative government. Your committee concludes that Oregon’s initiative system, as it currently operates, is not serving the state well. Oregonians have ample reason to be wary of — and weary from — this state’s system of direct democracy. Reforming the system should be a high priority for every Oregonian.

Conclusions

1. Oregon's initiative system, as it currently operates, is on balance a negative for the state. However, it is important that Oregonians retain for themselves an initiative pathway when the Legislature is unable or unwilling to act on critical issues.
2. Oregon's Legislature has always been and rightly continues to be the state's principal means to lawmaking. However, relatively easy access to the initiative and referendum system has weakened the state's legislative process and lessened public appreciation for that process. In particular, the initiative and referendum system has decreased the will and the ability of legislators from both major parties to resolve significant policy and budget matters, which in turn leads to ever more reliance on initiatives and legislative referrals.
3. Use of indirect initiative systems in other states reflects the widely held view that state Legislatures ought to be involved in the initiative process. While the indirect initiative could delay a vote, the delay would create opportunity for more careful and informed deliberation and clarification of proposed initiatives. This is especially important for initiatives that have a material impact on state finances, either by reducing income or mandating expenditures.
4. Current law requires a three-fifths majority of the Legislature to enact statutory revenue measures. By some legal interpretations, the same threshold is required to refer statutory revenue measures to voters. This super majority requirement creates an inappropriate incentive for legislators to refer to voters as constitutional amendments revenue bills that failed in the Legislature, since the referral of constitutional amendments requires only a majority vote of the Legislature.
5. Poorly drafted measures produce unintended consequences, such as higher than anticipated costs to taxpayers as well as litigation to resolve ambiguities, inconsistencies and overlooked contingent circumstances.
6. To preempt the possibility of repeal by the Legislature, the Oregon Constitution has been amended repeatedly in ways that would have been more appropriately addressed by legislative statutory enactment. As these amendments accumulate, the role of the Legislature as the principal lawmaking body of the state is diminished because initiatives placed in the constitution are effectively beyond the control of the Legislature.
7. Mandating changes in revenue and expenditures through the initiative system disrupts the state's budgeting process, confounds the Legislature's constitutional requirement to balance the state's budget and negatively affects state and local bond ratings. Furthermore, a degree of inherent unreliability and lack of context for financial impact statements limits voters' ability to make informed choices about ballot measures with significant fiscal impacts.

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8. The process commonly known as “ballot title shopping,” which involves using government resources to review multiple substantially similar initiatives and to hear challenges to the wording of each ballot title for the purpose of gaining political advantage, requires an unacceptable use of public funds.
9. Violations, including illegal payments and forged signatures, occur frequently in the signature-gathering phase of Oregon’s initiative and referendum system, and oversight by the state is inadequate.
10. The statistical sampling process used by the secretary of state to verify signatures is an appropriate method for verifying signatures on petitions. Your committee found no reason to suggest or support changes to the current statistical sampling system.
11. Oregon’s official voters’ pamphlet is a valuable forum for political communication. It allows proponents and opponents of a measure to publish their views to every mailing address in the state for a modest fee, and it allows voters to identify the proponents and opponents of a measure. On the downside, the value of the voters’ pamphlet is lessened when it includes inaccurate or misleading paid statements. Efforts to manage the content of such statements are likely to collide with the free speech rights of political activists.



Recommendations

The following recommendations could be implemented by legislative action, by initiative or, in some cases, by administrative rule changes. The first three recommendations, at least, would require constitutional amendment given the present state of the law. Such amendment could be initiated either by the Legislature or citizen initiative, but would require approval from the electorate. Oregon also has a process for wholesale constitutional revision whereby changes to the initiative system could be proposed in the context of a complete rewrite of the state's constitution to be presented to the voters. All of these options should be considered.

1. Limit initiatives proposing constitutional amendments to matters involving the structure, powers, and limitations of government or the rights of the people with respect to their government.
2. For any amendment to the Oregon Constitution, require approval by a three-fifths majority of votes cast, whether proposed by initiative or by legislative referral.
3. For revenue measures proposed by the Legislature, so long as state law requires a three-fifths majority to directly enact a statutory revenue measure or refer a statutory revenue measure to voters, require the same three-fifths voting requirement of the Legislature when referring revenue measures as constitutional amendments.
4. Implement an indirect initiative system. In order to enhance public debate, consideration and study prior to a vote of the people, require legislative deliberation with attendant public hearings for all citizen initiatives after they have qualified for the ballot. If the Legislature accepts a statutory initiative as proposed, the Legislature enacts it into law. If the Legislature accepts a constitutional initiative as proposed, the constitutional change must still be referred to the voters for adoption. Any initiative the Legislature rejects, regardless of subject, would be submitted to the voters in the next general election. In that case, the Legislature could take no further action, could enact its own law on the subject, or could refer a competing alternative to the voters.
5. The Legislature should strike *Or. Rev. Stat.* 250.035(6) and make clear that the Oregon Attorney General should assign the same ballot title to substantively identical proposed measures.
6. Assign retired senior judges (under Plan B of the judicial retirement system) to assume the current responsibility of the Oregon Supreme Court to review challenges to ballot measure titles. Their decisions should be final and binding.
7. Require that all proposed ballot measures be submitted to Legislative Counsel for assistance in clarifying and drafting prior to the circulation of measures.
8. Direct additional financial and personnel resources to proactive and vigorous enforcement of the regulations that govern signature gathering.
9. Require chief petitioner committees to meet the same financial disclosure requirements as political action committees.

Background

HISTORICAL BACKGROUND OF LAWMAKING

Before examining the strengths and weaknesses of Oregon's system of initiatives, referenda and legislative referrals, and the debate between advocates of representative government and proponents of direct democracy, a brief look at the historical development of lawmaking is in order. We begin this discussion by distinguishing between two types of law: constitutional law and statutory law.

In the United States, **constitutional law** provides the structure of government, defines its powers, and sets forth the rights of its citizens with respect to government. It is the supreme law of the land. It was created by constitutional convention and is amended in accordance with the process stipulated in the constitution.

Statutory law is promulgated by a legislature and signed by the chief executive or vetoed by the chief executive and enacted by legislative veto override. Statutory law is written in response to a perceived need to clarify the functioning of government, improve civil order, answer a public need, codify existing law or to obtain special treatment for an individual or company.

The Constitution of the United States establishes the structure, powers and limitations of the federal government. The delegates to the Constitutional Convention of 1787 thoroughly explored the various theories of government at that time. They intended to guard against any revival

of monarchical government against which they had just successfully revolted, and, at the same time, guard against the “tyranny of the majority” in a government based upon a popular electorate. The U.S. Constitution is replete with checks, balances, powers and limitations that reflect this clear intention.

Both the U.S. and Oregon constitutions establish governments with three branches: legislative, executive and judicial. The legislative or lawmaking branch consists of two chambers: the House of Representatives and the Senate. Both are elected by popular vote. Political systems with representatives elected to make law are called “representative democracies.” Representative democracy is a form of republican government. The U.S. Constitution in Article IV, Section 4 guarantees each state a republican form of government.

The meaning of representation was thoroughly debated at the U.S. Constitutional Convention and during state ratifying conventions. James Madison argued that elected representatives should be chosen for their ability and concern for the nation's broad interests rather than the local interests of their constituents. In other words, these representatives should be free to vote their consciences. Other delegates argued in favor of a mandate concept — that representatives should vote as their constituents directed. The views of Madison prevailed at the time, but the mandate concept has echoed throughout our history, as incumbents remain mindful that they are accountable to their constituents when they seek reelection.

Origins of Direct Democracy in the United States

In addition to its system of representative government, the United States also has a tradition of direct democracy. New England colonies developed town meetings in which adult males met not only to elect town officials, but also to deliberate and enact local laws. The town meeting process, while workable at the village level, was soon deemed impractical for the governance of large, sparsely populated areas and densely populated urban settings. Large assemblies were cumbersome, and ordinary citizens had neither the time nor the expertise for direct government.

The U.S. Constitution was drafted by delegates elected by state legislatures and was ratified by state conventions composed of delegates elected by the people. An alternative practice of asking citizens to vote directly on the adoption and amendment of fundamental law had long been the practice in some nations, and by the middle of the nineteenth century, it was also common for states in the U.S. to submit their proposed constitutions and constitutional amendments drafted by conventions to voters for approval. Oregonians followed this procedure in 1857 when they voted to join the Union.

Introduction of the Modern Initiative and Referendum

The initiative as a device to place constitutional questions before voters appeared first in the Swiss Constitution of 1874. The American Populist movement followed the Swiss experience in the last two decades of the nineteenth century. Farmers in Oregon, like those in many parts of the country, became increasingly dissatisfied with the state Legislature's response to demands for reform. They perceived both the Legislature and the political parties as corrupt and especially unwilling to pass laws regulating corporations. A badly depressed economy sharpened the demand for change. Farmers formed political coalitions with other dissident groups. They viewed direct legislation as the only way to redress the shortcomings of the political status quo.

As described by professor (now Oregon Court of Appeals judge) David Schuman in a 1994 law review article and more recently quoted by the Oregon Court of Appeals, "[t]he initiative process was — as every Oregon school child once learned — adopted in 1902, as a feature of 'the Oregon system,' to remedy legislative fraud and corruption... By the 1880s, Oregon politics had a national reputation for corruption and inefficiency... At least in the yellow press, the story dealing with the frauds, the bribery, the abuse of power, and misuse of money in Oregon politics, [was] a very long one, and as full of local color as any western state could ask... The legislature consisted of 'briefless lawyers, farmless farmers, business failures, bar-room loafers,

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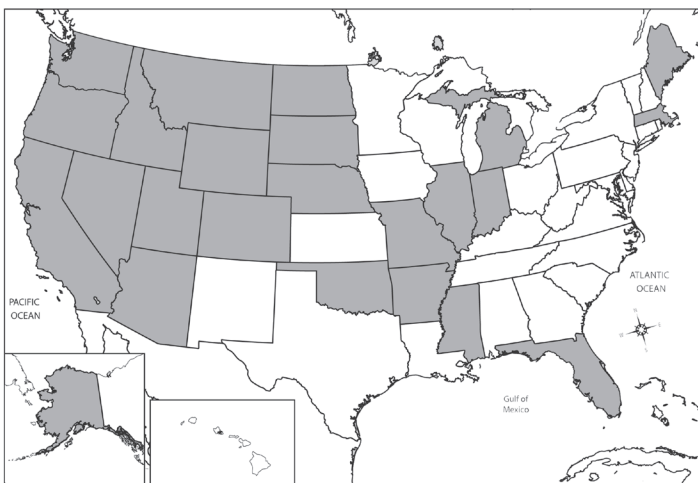
Fourth-of-July orators, [and] political thugs.”*

Two men, Seth Lewelling and William U'Ren, led the Oregon movement to write an initiative and referendum system into the Oregon Constitution. They formed political alliances, developed grass-roots organizations and persuaded the 1899 Legislature to approve an amendment creating Oregon's initiative and referendum system. At that time, the process for amending the Oregon Constitution required passage by two successive Legislatures and approval by a majority of voters in the next election. Accordingly the amendment was

resubmitted to, and adopted by, the 1901 Legislature. The amendment was then referred to the people, who approved it in 1902 by a 78 percent majority. At the time, Oregon was thought by many to be the first state to adopt the initiative and referendum, and the two procedures (and provisions for recalling elected officials) were known for many years as “The Oregon System.” South Dakota was in fact first, having adopted these processes in 1898. Utah followed in 1900 and then Oregon in 1902. Today, 24 states have the initiative in some form. Six (Alaska, Idaho, Maine, Utah, Washington and Wyoming) allow only statutory initiatives. Florida, Illinois and Mississippi allow only constitutional initiatives.

* The Oregon Court of Appeals recently reviewed the history and the context for the development of the initiative process in Oregon in *American Federation of Teachers v. Oregon Taxpayers United*, 208 Or. App. 350, 371 (2006). The opinion cited Judge Schuman's article, among other sources.

Figure 1: States with the Initiative System



Source: David Kehler and Robert M. Stem, "Initiative in the 1980s and 1990s," *The Book of the States 1994-1995*, The Council of State Governments, Vol. 30, 1995, p. 294.

EVOLUTION OF THE INITIATIVE AND REFERENDUM IN OREGON

Changes in Law through Legislative and Initiative Processes

The state's original initiative law, adopted in 1902, was first amended in 1906. A constitutional amendment clarified that legislation could be enacted by (a) referral from a single legislative session and approval by the people or (b) by initiative petition

and approval by the people without legislative review. The initiative was then extended to all municipal and district legislation by a separate constitutional amendment in 1906 and then to county legislation by another amendment in 1909. All of these options remain available today.

Over the years the Legislature has made other changes in the implementing legislation. (See Appendix C for a detailed chronology.) Notable changes include the following:

A 1903 act provided that the secretary of state should decide in the first

DEFINITIONS

Initiative:

The initiative (also known as popular or citizen's initiative) provides a means by which a petition signed by a minimum number of registered voters can force a public vote on a proposed statute, constitutional amendment, charter amendment or ordinance. It is a form of direct democracy. Article IV, Section 1 of the Oregon Constitution permits a registered voter to request that a proposed statute or constitutional amendment be placed on the ballot by filing with the secretary of state a petition signed by a minimum number of registered voters. Thereafter, additional petitioner signatures are required for ballot qualification — by a number equal to 8 percent of the votes cast for governor at the preceding general election in the case of a proposed constitutional amendment or equal to 6 percent in the case of a proposed statute.

Referendum:

(pl. referendums or referenda) An attempt by the public to repeal enacted legislation by subjecting a law to a vote of the people. To qualify for the ballot, proponents of a repeal effort must obtain a minimum number of signatures from registered voters equal to 4 percent of the votes cast for all candidates for governor at the general election preceding the filing of the petition.

Referral:

The submission of a law, proposed by a legislature or already in effect, to a direct vote of the people. In Oregon, a majority of both houses of the Legislature must vote to refer a statute or constitutional amendment for a popular vote. The governor cannot veto such referrals.

Ballot Measure:

The general term applied to all initiatives, referenda and referrals once qualified for placement on a ballot.

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instance whether a petition satisfied the constitutional provision for an initiative. However, a 1907 act repealed the 1903 law and stipulated that if the secretary of state refused to accept a petition, the courts would determine its legality.

In 1935 the Legislature prohibited paid signature-gathering for petitions, but the prohibition was repealed in 1983. Still, the 1983 act requires a measure's chief petitioners to declare whether anyone would be paid for gathering signatures.

In 1992 the Legislature also required that if signature gatherers were being paid, each signature page must display a notice to that effect.

The Legislature has also responded to concerns over how best to inform voters about the legal and financial impacts of initiatives. Today, impartial descriptions of the content of ballot measures are prepared by appointed committees for publication on the ballot and in the official voters' pamphlet. (See section entitled "State Voter's Pamphlet" for more discussion of explanatory and financial impact statements).

Changes to the initiative and referendum system itself have also been enacted through the initiative system, most notably in the following manner:

In 2002, Ballot Measure 26 prohibited payment per signature on initiative petitions. That law survived a First Amendment challenge that was resolved in 2006 by the Ninth Circuit Court of Appeals decision in *Prete v. Bradbury*.¹

Constitutional Limits on the Initiative System

Judicial rulings have also shaped and reshaped Oregon's initiative and referendum system. In 1998, in *Armatta v. Kitzhaber*, the Oregon Supreme Court considered a state constitutional challenge to Measure 40, which proposed a crime victims' bill of rights.² The court held that the measure, which indirectly amended several sections of the Oregon Constitution, violated the separate-vote requirement of the state's constitution in Article XVII, Section 1, which provides that two or more constitutional amendments must be voted on separately. The import of this decision is addressed several times later in this report.

Another major case was decided in 2002 when the Oregon Supreme Court reversed a nine-year-old precedent and held that petitioners have no right to gather signatures at shopping centers and public malls.³ The precedent had been to treat such locations as public fora even if they were privately owned. Since 2002, signature gatherers effectively have been forced to concentrate on publicly owned high-traffic sites and other venues to obtain sufficient signatures to qualify their initiatives for the ballot.

Several attempts have been made in Oregon courts to open the door to pre-election judicial review of measures with the hope of avoiding the costs of campaigns and elections on measures that may be overturned by the courts. The prospect for such review is limited by the long-standing legal principle that a proposed law is not "justiciable" — that any court test before

enactment would simply amount to an advisory opinion.* Oregon's courts are required to consider the justiciability of such cases whether or not the parties raise the issue, and they have generally declined cases seeking pre-election review of measures. There is precedent for a broad spectrum of review in other states — Oklahoma and Kansas among them.⁴ Oregon's position in this area is still developing. In an April 2006 opinion in *Meyer v. Bradbury*, the Oregon Court of Appeals provided a lengthy discussion of the few earlier opinions accepting pre-election challenges based on “the legal sufficiency” of the subject measure and concluded that the question whether a proposed initiative violated the separate-vote requirement was justiciable.⁵ The Court of Appeals in *Meyer* held that the initiative, on campaign finance reform, did indeed violate the rule of *Armatta* that multiple constitutional amendments proposed by initiative must be subject to separate votes. Later in 2006, the Oregon Supreme Court overruled the Court of Appeals on the compliance of the initiative with the separate-vote rule, but accepted the lower court's reasoning on justiciability without discussion. Given the uncertainty in this area, Oregon Attorney General Hardy Myers told your committee that, should an appropriate case develop, he would support a petition seeking U.S. Supreme Court review of an Oregon Supreme Court ruling

* Justiciability is the term used to describe the legal question of whether a matter is appropriate to be decided by a court. Federal court jurisdiction is limited by the U.S. Constitution to “cases or controversies” and does not reach inherently political questions or matters that are not ripe and so do not reflect active controversies but would only result in advisory opinions. Many state courts are similarly limited.

that pre-election review of a proposed measure was not justiciable in the initiative or referendum context. Myers left open what position the state would take on the merits of such a case should the U.S. Supreme Court accept one for review.

Guarantee of a Republican Form of Government

The Guarantee Clause of the U.S. Constitution (Article IV, Section 4) requires that Congress guarantee every state “a Republican Form of Government.” Over the years, the initiative process has been challenged as an affront to this principle. The adoption of Oregon's initiative and referendum system in 1902 was first challenged in court on that basis in *Kaddery v. City of Portland*.⁶ The plaintiff in the case contended that a republican form of government meant a government in which laws are made exclusively by elected representatives and not directly by a vote of the people. The Oregon Supreme Court held that the power to enact statutes independently of the Legislature did not violate Article IV, Section 4. The U.S. Supreme Court subsequently held, in *Pacific States Telephone and Telegraph Co. v. Oregon*, that *whether* a state statute adopted by the initiative violated Article IV, Section 4 was not justiciable, holding it to be a “political question” to be left to Congress.⁷ For that reason, the court did not rule on the merits of the case that involved a tax imposed on the telephone company by the initiative.

The propriety of direct lawmaking in an otherwise republican form of government and the utility of judicial review are both as hotly debated by

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some scholars today as they were one-hundred years ago. Some take the position that direct democracy is antithetical to representative democracy and destructive to it, and they believe the drafters of the U.S. Constitution knew this to be the case. This point of view holds that the initiative is anti-republican, at least to the extent it is employed: (a) to adopt statutory matters as constitutional amendments, thereby placing those matters beyond amendment by the Legislature and review by Oregon's courts for compliance with the Oregon Constitution; or (b) to arouse public passions on issues that the drafters of the Federal Constitution intended the legislative process to resolve.

USE OF INITIATIVES, REFERENDA AND REFERRALS IN OREGON AND OTHER STATES

Between 1902 and 2006, Oregon petitioners placed 340 initiatives on the ballot. The *Oregon Blue Book* identifies 188 of those as statutory initiatives. Of those 188 statutory initiatives, voters approved 70 (37%) and rejected 118. The *Blue Book* also identifies 151 constitutional initiatives of which voters approved only 46 (30%) and rejected 105.* Thus, historically, statutory initiatives are slightly more likely to pass than

constitutional amendments. Since the introduction of the referral process, the Legislature has referred 408 ballot measures to voters. Again using data from the *Blue Book*, 331 of those were constitutional and 69 were statutory. Of the 331 identified as constitutional referrals, 191 passed (58%) and 140 failed. Of the 69 identified statutory referrals, there is a nearly even split of 34 passing and 35 failing.

The referendum process has been used the least, only 62 times in the history of the state, with 21 (34%) of those passing.

The table on the following page sets forth in summary the statistics described above.

* Total initiatives (n=340) is one greater than the sum of 188 statutory initiatives and 151 constitutional initiatives. According to the *Oregon Blue Book*, one of the initiatives is not designated as either statutory or constitutional. Total referrals identified by the *Oregon Blue Book* is slightly more than the combined sum of statutory and constitutional referrals because not every referral is identified as such.

Figure 2: Historical Results of Ballot Measures Since 1902

Type	Total	Approved	Rejected	Approved	Rejected
Initiatives	340	119	35%	221	65%
Referrals	408	232	57%	176	43%
Referenda	62	21	34%	41	66%
Statutory Initiatives	188	70	37%	118	63%
Constitutional Initiatives	151	46	30%	105	70%
Constitutional Referrals	331	191	58%	140	42%
Statutory Referrals	69	34	49%	35	51%
Statutory Referenda	62	21	34%	41	66%

Source: Oregon Blue Book

Legislative referrals historically have outnumbered citizen initiatives. However, since November 1996, qualified initiatives have outnumbered referrals 65 to 49. The initiative had been heavily used in Oregon during its first thirty years after adoption. Use of the initiative subsided between 1935 and 1983, during which time paid signature-gathering was prohibited. Since the early 1980s the initiative has been again employed extensively (see Figure 3). This pattern of use is similar to that in California (see Appendix F), but not to that in Washington (see Appendix G). Unlike many other states, Oregon has no restrictions on initiative subject matter. Oregon and California also allow both constitutional amendments and statutes to be enacted by citizen initiative; Washington allows only statutes. Washington also allows petitioners to submit initiatives to the Legislature prior to submission to the

public, but this indirect initiative route is not widely used.

In Oregon's 2006 general election, 10 statewide measures (all initiatives) appeared on the ballot. In November 2004, the number was 8 (6 initiatives and 2 legislative referrals) and, in 2002, voters were faced with 17 measures (7 initiatives and 10 legislative referrals). These numbers appear fairly modest when compared with the 2000 election, when 32 statewide measures (18 initiatives, 12 legislative referrals and 2 referenda) were on the ballot.

The 2000 figure is not the highest total ever. That distinction dates back to the 1912 election, when 37 measures were put to voters. But 32 measures still represents a volume that prompts concern about the wisdom of direct lawmaking. Each election with a high number of measures generates

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recurring discussions about the sheer volume of questions presented. This volume of information exceeds even the most responsible voter's capacity to make well-informed decisions.

For observers of the system who are critical of the relative lack of sophistication of the voting public compared to legislators, the higher the volume of measures presented, the more the process is impaired. Voters may simply make less-informed decisions on all the measures, or they

may prioritize their research on some and leave others alone.

Figure 3: Statewide Initiatives Certified for Ballot (1904-2006)

Decade	Total	Constitutional Amendments	Statutes
1904-1909 ¹	23	11	12
1910-1919	82	32	50
1920-1929	28	11	17
1930-1939	25	13	12
1940-1949	14	5	9
1950-1959	14	7	7
1960-1969	7	3	4
1970-1979	18	7	11
1980-1989	31	10	21
1990-1999 ²	56	31	25
2000-2006 ^{1 3}	41	21	20
Total	339	151	188

¹ Fewer than 10 years

² In 1990, five "advisory" initiatives (Measures 5A through 5E) and one not-categorized measure (Measure 3) were on the ballot. In 1998, the tally for Measure 61 was prevented by court order.

³ In 2002, Measure 12 was removed from the ballot.

Discussion

Oregon's state government was designed similarly to that of the federal government; both are intended to vest principal lawmaking authority in a bicameral legislature populated by democratically elected members. These forms of government rest on the principle that political power ultimately derives from the people, while assuring that the work of making law is done by people with some recognized qualifications for the task. Presumably, Oregonians value expertise in lawmaking — some combination of ability, training and experience that enhance elected officials' capacity to cope with complex questions of governance.

Lawmaking by an elected legislature is subject to checks and balances designed to encourage deliberation and discourage imprudent laws. In Oregon, as in most states, a bill must first be approved by a majority of both chambers and then presented to the governor for signature or veto. When signing a bill into law, a governor, as the state's chief executive, is expected to exercise judgment in a manner informed by a sense of responsibility to carry out the law and oversee the overall operation of state government. The Legislature may override a governor's veto by a two-thirds vote of both houses. A further check occurs when the independently elected judiciary is called upon to determine whether a law is constitutionally valid.

During a regular biennial session, roughly 3,000 bills are introduced in the Oregon Legislature, of which about 1,000 become law. The

legislative process generally provides opportunities for multiple points of view to be considered by elected lawmakers who have committed to working full time on these questions while in session, as well as substantial time between sessions. Bills are analyzed and debated in a structured committee process. The Office of Legislative Counsel, which provides legal advice to the Legislature and provides a nonpartisan, disinterested review of bills.* Proponents and opponents of bills often share their concerns through public testimony and private meetings with legislators and staff. As a result of input from multiple sources, bills are generally amended. At least in theory, the outcome of this process is a body of thoughtfully considered and prudent law.

Oregon's initiative and referendum system is the electorate's check on the Legislature's power. The referendum, which is a proposal to repeal a law, is less frequently used than the initiative. The initiative enables voters to put measures on the ballot that the Legislature has been unable or unwilling to enact. In the case of legislative reapportionment, for example, the Oregon Legislature is required by the state constitution to reapportion itself following each census. The Legislature failed to do so

* The Office of Legislative Counsel provides legal services to the Legislative Assembly and its members. The office drafts measures and amendments for legislators, legislative committees and state agencies; provides legal advice to legislators and legislative committees; and at the direction of the Legislature, reviews state agency rules for legal sufficiency.

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“The legislative process does... allow for deliberation and public hearings of competing viewpoints before laws are enacted — a critical weakness of Oregon’s initiative and referendum system.”

in 1921, 1931, 1941 and 1951, so, in 1952, voters required the Legislature to do so with an initiative. Repeated refusal by the Legislature to enact property tax relief was also finally addressed by Ballot Measure 5, a landmark citizen initiative that passed in 1990. More recently, passage of Measure 37 in 2004 may have been a popular response to pent-up demand for changes to Oregon’s land-use laws.

While the initiative system provides voters with some direct control over lawmaking, your committee believes the results of ballot measure campaigns produce an incomplete portrait of the electorate’s wishes. When voters adopt an initiative, they are expressing support for that measure only over the status quo. They have no opportunity to express the view that option A may be preferable to option B, which is the status quo, but is not as attractive as option C, an idea that is not on the ballot. Consequently ballot measures that pass do not necessarily reflect the

ultimate preference of voters. Again, 2004’s Measure 37 may be an example of this. For the third time in seven years, voters were asked to vote on a variation of this measure (Measure 49) in November 2007 — possibly indicating that the initiative system is not the best vehicle for developing highly complex laws.

At the same time, your committee acknowledges that the legislative process is not perfect. Legislation widely considered to be reasonable and beneficial to the state is sometimes blocked by political maneuvering, and bills with little apparent public support sometimes become law. The legislative process does, however, allow for deliberation and public hearings of competing viewpoints before laws are enacted — a critical weakness of Oregon’s initiative and referendum system.

Your committee presents the following list of leading arguments for and against Oregon’s system of initiative and referendum. Notably, most contemporary arguments for and against the system also were made in 1996.

Principal arguments for the system

- Direct democracy, as exemplified in the initiative and referendum, is democratic government in its purest and highest form and is superior to a purely representative government.
- Oregon's initiative and referendum system is an integral part of the state's political process and should not be weakened or abolished.
- The modern electorate is equally capable of understanding ballot measures and acting upon them as members of the state Legislature are when considering proposed legislation.
- An initiative and referendum system is essential to controlling the Legislature, which is subject to influence by campaign contributions and lobbyists for special interests.
- An initiative and referendum system offers citizens a means to impose fiscal restraint upon the Legislature.
- An initiative system is the only way voters can adopt laws that the Legislature refuses to enact or refer.

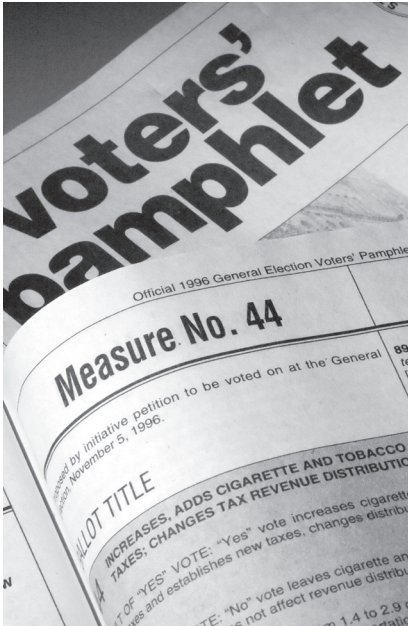
Common criticisms of the system

- Oregon's initiative system limits opportunity for deliberation of the subject matter and efficacy of a proposed law, as well as its place in the context of existing law.
- The present system lacks a mechanism for meaningful review of the text of proposed laws to remedy careless language and to avoid unintended consequences.
- Legislators, other elected officials, interest groups and lobbyists use the initiative system to evade the deliberative legislative process, thus sapping the vitality of representative government and weakening political leadership.
- The initiative system is used to embed what should be statutory measures, as well as other matters generally considered to be inappropriate for a state constitution, in the Oregon Constitution.
- Oregon's initiative and referendum system has unintentionally weakened the financial stability of the state, resulting in lower bond ratings and increased borrowing costs.
- Voters do not receive enough accurate information about the financial impact of initiatives and referenda and their effect on governmental functions and responsibilities.

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- Ballot measures sometimes eliminate substantial revenue or require substantial expenditures from the state general fund without providing a revenue source to finance those expenditures and without regard for the effect on other state general fund programs.
- Circulation of initiative and referendum petitions has become a business rather than a grass-roots expression of concern about a public issue. The use of paid signature gatherers has made it possible for interest groups to buy their way onto the ballot.

The remainder of this report reflects the synthesis of your committee's investigation and analysis of these and other points of view.



CONFIDENCE IN GOVERNMENT AND USE OF THE INITIATIVE AND REFERENDUM SYSTEM

Witnesses interviewed by your committee generally perceive Oregonians' interest in state politics and confidence in government to be low, and they lamented a perceived decrease in civic involvement. In addition, national polling supports the view that a large segment of Americans has lost confidence in federal and state lawmakers and legislative processes. Your committee was further persuaded by witness testimony and media reports that legislators are seen by the public at large as concerned primarily about reelection, vulnerable to control by interest groups and unresponsive to their constituents.

In this climate of political distrust, activists all along the political spectrum — including some legislators and other public officials — are sometimes tempted to use the initiative and referendum system to achieve their goals. For reasons that are generally strategic and pragmatic, they sometimes see the initiative system as the most likely or most expedient path to political success. This inclination is tempered somewhat by concern among citizens who believe that the system is being exploited by politically sophisticated interest groups — often with strong ties outside Oregon. Despite this concern, Oregon voters maintain a sense of ownership in and entitlement to their initiative and referendum system.

In response to concerns that the credibility of the Legislature is low and that Oregonians view it as largely

unresponsive and inaccessible, the 2005 Legislature organized the 30-member Public Commission on the Oregon Legislature. The commission was charged with reviewing the Legislature's operations and making recommendations to the next Legislature when it convened in January 2007. The commission's final report was approved on November 13, 2006 and includes recommendations similar and complementary to those made by your committee (see Appendix D).

VARIATIONS IN INITIATIVE SYSTEMS IN OTHER STATES

Laws governing initiative systems differ from state to state. The information in Figure 4 has been extracted from a 2002 report published by the National Conference of State Legislatures. It summarizes restrictions on initiative systems in other states, Oregon having one of the least restrictive systems in the nation.* Several states restrict the ability of initiatives to affect revenues and expenditures in order to minimize, if not eliminate, the kinds of unpredictable financial impacts Oregon has experienced. Other states also impose restrictions on other types of subject matter that may be introduced into law by citizen initiatives. Oregon, by contrast, imposes no restrictions on subject matter.

Legislatures in several states are permitted to place an alternative version of the same proposal on the ballot alongside the original citizen-initiated proposal. Two states, Washington and Utah, give citizens a

* Restrictions were enacted, for the most part, at the time of the initial adoption of the initiative process in the affected states.

choice of sending initiatives directly to the ballot or to the legislature. Few chief petitioners choose the legislative option. From 1990 to 2006, the Washington Legislature received 9 initiatives for consideration while 44 were referred directly to the ballot (see Appendix G).

Eight states employ an indirect initiative system: Massachusetts, Maine, Utah, Washington, Michigan, Mississippi, Nevada and Ohio. As stated above, Washington and Utah give citizens the option to send initiatives directly to the ballot or to the legislature. In the other six states, the subject matter of an initiative must be considered by the state legislature before the initiative is presented to voters. Like a bill initiated in the legislature, the subject matter of a citizen initiative is a matter of legislative debate. The citizen initiative is considered and can be reworked to suit the context of other laws and limit unintended consequences. Its impact, if any, on the state's financial planning can also be anticipated. If the legislature adopts the initiative as written by its chief petitioners, it becomes law without a vote of the people. If the legislature does not adopt the initiative, it qualifies for the ballot at the next election. In several states, when an initiative is not adopted by the state legislature, the legislature has the option of putting an alternative version of the proposed initiative on the ballot alongside the original citizen-initiated proposal. If both pass, the one receiving the larger number of votes becomes law.

Alaska and Wyoming use a system known as the "legislature's option," which is sometimes cited as indirect. In these two states, instead of requiring that an initiative be submitted to the legislature, they

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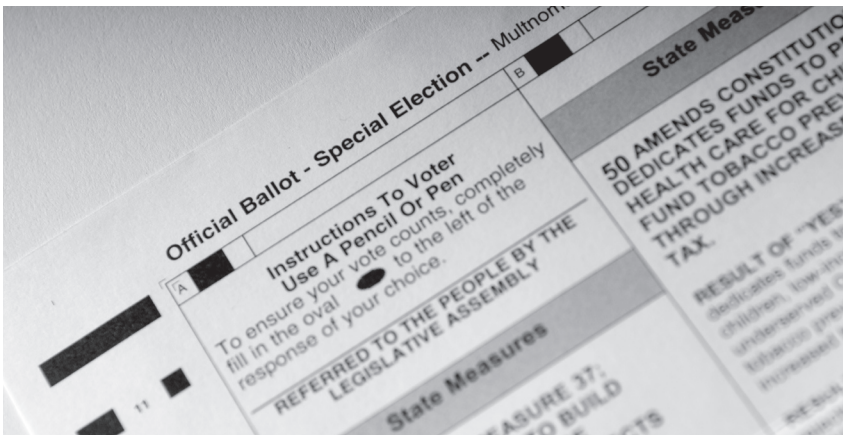
“ ...unlike many other proposals to improve direct democracy, an indirect initiative process imposes no new barriers to a petitioner’s ability to qualify a proposal for the statewide ballot.

”

require only that an initiative not be placed on the ballot until after the next legislative session has adjourned. Doing so provides the legislature with the opportunity to address the issue. If the legislature adopts the measure, or a measure that is substantially similar, the initiative does not appear on the ballot.

Of the various configurations of initiative systems used in other states, your committee was most attracted to the indirect initiative. The

indirect initiative process addresses oft-repeated criticisms of Oregon’s current process by creating time for legislative debate about intended and unintended consequences of proposed measures. More specifically, indirect systems allow time for public work on the text of initiatives and to consider potential impacts on the state’s budget. Moreover, unlike many other proposals to improve direct democracy, an indirect initiative process imposes no new barriers to a petitioner’s ability to qualify a proposal for the ballot. Indirect systems do, however, postpone a vote of the people. In the event that the Legislature fails to approve a measure, a vote would be held on the original citizen initiative, but with the presumed benefit of prior scrutiny. This model has been recommended by panels seeking to improve the quality of direct citizen-initiated lawmaking, including the National Conference of State Legislatures (2002), the Washington League of Women Voters (2002), the League of Women Voters of Oregon (1988, 1996 and 2001), and most recently, the Public Commission on the Oregon Legislature (2006).



DEFINITIONS

Direct Initiative: proposals that qualify appear directly on the ballot. Oregon has a direct initiative system.

Indirect Initiative: proposals are submitted to the legislature, which has an opportunity to act on the proposed legislation. Depending on the state, the initiative question may appear on the ballot if the legislature rejects it, submits a different proposal or takes no action. Oregon does not have an indirect initiative system.

Figure 4: State-by-State Variations in Initiative Systems

State	Statutory	Constitutional	Single Subject	Other Restrictions
AK	Direct*	None	Yes	No revenues, no appropriations, no acts affecting judiciary, no local or special legislation.
AZ	Direct	Direct	Yes	None.
AR	Direct	Direct	No	None.
CA	Direct	Direct	Yes	May not include or exclude any political subdivision from application or effect. May not contain alternative or cumulative provisions wherein one or more of those positions become law, depending upon the casting of a specified percentage of votes for or against the measure.
CO	Direct	Direct	Yes	None.
FL	None	Direct	Yes	May not include limitations on the power of government to raise revenue.
ID	Direct	None	No	None.
IL	None	Direct	Yes	Allowed only for amendment of constitutional Article IV, relating to structural and procedural subjects concerning the legislative branch.
ME	Indirect	None	No	Any measure providing for an expenditure of funds in excess of those appropriated becomes inoperative 45 days after the Legislature convenes.
MA	Indirect	Indirect	No	No measures relating to religion, the judiciary, specific appropriations, local or special legislation, the 18th Amendment of the constitution or anything inconsistent with the rights of individuals enumerated in the constitution. A measure cannot be substantially the same as any measure that has been qualified for the ballot or appeared on the ballot in either of two preceding general elections.
MI	Indirect	Direct	No	The initiative power only extends to laws that the Legislature may enact.

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State	Statutory	Constitutional	Single Subject	Other Restrictions
MS	None	Indirect	No	The initiative cannot be used to amend/repeal the Bill of Rights, public employees' retirement system, right-to-work provisions or the initiative process. Only the first five initiatives may go on the ballot. If voters reject a measure, no identical or substantially similar measure may go on ballot for a minimum of two years. If an initiative requires a reduction in government revenue or a reallocation from currently funded programs, the initiative text must identify the program or programs whose funding must be reduced or eliminated to implement the initiative.
MO	Direct	Direct	Yes	No appropriations of money other than new revenues created and provided for by the initiative. Cannot be used for any purpose prohibited by the state's constitution.
MT	Direct	Direct	Yes	No appropriations. No local or special laws.
NE	Direct	Direct	Yes	Limited to matters that can be enacted by legislation and cannot interfere with the Legislature's ability to direct taxation for state and governmental subdivisions.
NV	Indirect	Direct	No	No appropriations. Cannot require an expenditure unless a sufficient tax is provided as part of the initiative proposal.
ND	Direct	Direct	No	No emergency measures. No appropriation measures for the support and maintenance of state departments and institutions.
OH	Indirect	Direct	No	May not be used to pass laws authorizing any classification of property for the purpose of levying different rates of taxation thereon; or authorizing the levy of any single tax on land, land values or land sites at a higher rate or by a different rule than is applied to improvements thereon or to personal property.
OK	Direct	Direct	Yes	Initiatives rejected by the voters cannot be proposed again for three years by less than 25 percent of the state's legal voters.
OR	Direct	Direct	Yes	None.
SD	Direct	Direct	No	No private or special laws.
UT	Direct & Indirect	None	No	None.
WA	Direct & Indirect	None	Yes	None.
WY	Direct*	None	Yes	Cannot be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts, prescribe court rules, enact local or special legislation, enact legislation prohibited by the Wyoming constitution. The same measure cannot be initiated more often than once in five years.

* As described above, Alaska's and Wyoming's initiative processes exhibit characteristics of both the direct and indirect initiative.

Source: National Conference of State Legislatures, January 2002

DRAFTING INITIATIVE PROPOSALS

Measure 47, a 1996 constitutional amendment that reduced and limited property taxes, is regularly cited as a “poster child” for poorly drafted measures allowed by Oregon’s initiative system. After being approved by voters, the measure was found to have internal inconsistencies that made it difficult, if not impossible, to implement. Ultimately, Oregon’s Legislature drafted a new package to accomplish the same substantive intent. The Legislature referred its reworking of Measure 47 — known as Measure 50 — to the ballot in May 1997, where voters approved it.

Given the easy accessibility of the initiative process, the inferior quality of initiative language is regularly raised as a weakness of the system. Ballot measures sometimes produce what are widely regarded as negative and often expensive consequences for the state. Sometimes these consequences are intentional and consistent with the sponsors’ ideology, and sometimes they are unintended and due to incompetent or careless drafting. None of the required steps to qualify for the ballot are specifically intended to ensure a well-drafted law (as opposed to the ballot title), and state law prohibits changes to measures after they have been certified for the ballot.

Your committee believes that better drafting would almost certainly lead to better public policy, but some witnesses expressed concern that providing drafting assistance for measures that ought never be enacted would be a mistake. The crux of their position is that, for those who oppose

“ Given the easy accessibility of the initiative process, the inferior quality of initiative language is regularly raised as a weakness of the system. ”

the subject matter of an initiative, a poorly written measure is more vulnerable to defeat at the polls than a well-written measure. Put another way, state revenue should not be spent “dressing up” a bad idea.

Your committee also believes that, with well-drafted measures, public debate is more focused on the substance of the measure. One of the more promising suggestions for improving the quality of drafting was a process for early-stage review (some time before qualification) by the Office of Legislative Counsel. Legislative Counsel presently is available to consult with drafters of initiatives upon their request, but petitioners rarely use the service. In contrast, Legislative Counsel reviews all bills before the Legislature.

Your committee also considered use of senior-status state court judges to review content of proposed measures and provide guidance to chief petitioners. Upon retirement, trial and appellate judges in the Oregon courts are available for continuing assignment as senior judges if they opt for a retirement plan known as “Plan B.” Under Plan B, retired judges agree

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to perform 35 hours of service per year for five years for compensation at a proportion of their pre-retirement salary and extended benefits. Unlike sitting judges in Oregon, retired senior judges are not required to stand for re-election.

The use of Plan B judges for this purpose has support from court administration and some Plan B judges interviewed by your committee. Proposals of this nature have been submitted to the Legislature in recent legislative sessions, where they found insufficient support for enactment. One drawback is that such a process would require an entirely new implementation plan. Further, the fiscal impact of senior judges used in this capacity is unknown (and beyond the scope of this study). By contrast, your committee concluded that mandatory review by Legislative Counsel would be relatively easy to implement given that the office and the expertise for drafting assistance are already in place. Although petitioners would not be obligated to accept language proposed by the Legislative Counsel, this review by disinterested legal counsel would be of value to the petitioners in detecting and correcting unintended problems, which otherwise become apparent only later in the process when petitioners have no means for changing the language.

DECIDING THE CONSTITUTIONALITY OF INITIATIVES

Many witnesses who appeared before your committee expressed frustration that measures adopted by voters are too often determined by the courts to be unconstitutional or otherwise unworkable, as described above. Similarly, organized opposition to initiatives frequently claim that the initiative they oppose is unconstitutional, in an effort to foster concern that the measure, if adopted, would be struck down.

While the secretary of state may reject a petition that is “legally insufficient” to qualify for the ballot, he or she cannot, by law, reject a petition on the grounds that it is substantively unconstitutional. For instance, if the petition violates the single-subject requirement for proposed constitutional amendments, it will be procedurally deficient and will not qualify for the ballot. In 1968, the state’s constitution was amended to the effect that Article IV, Section 1(2) (d) requires that any proposed law or amendment to the constitution deal with one subject only. In 1986, the state Supreme Court interpreted that provision to authorize the secretary of state to reject a petition that violates this rule.*

Oregon courts have struck down measures as unconstitutional after adoption by voters — an expensive and frustrating experience that affects

* See *OEA v. Roberts*, 301 Or. 228 (1986), which confirmed the secretary of state’s authority to reject a request by the Oregon Education Association to prohibit circulation of a petition proposing a constitutional amendment limiting pay to government employees.

voters' perceptions about the initiative process and the courts. Measure 7, which was passed by voters in 2000, was later overturned by the Oregon Supreme Court on the grounds that it made at least two substantive changes to the existing constitution.⁸ Measure 7 would have required state and local governments to pay landowners the amount of reduction in market value if a law or regulation reduced the value of real property. The accompanying financial impact statement estimated direct annual costs to state and local governments at \$1.6 and \$3.8 billion per year, respectively. Following the overturning of Measure 7, the related Measure 37 passed in 2004 and continues to be subject to litigation and reform proposals. The recent passage of Measure 49, which modified Measure 37, is unlikely to end all uncertainty in land-use planning at the state and local levels.

Some witnesses who believe that voters should not be asked to vote on unconstitutional measures argued that judicial review of measures for constitutionality should occur before elections. As noted earlier in this report, courts in some states are authorized to render advisory opinions on the constitutionality of ballot measures; Oregon courts are not so authorized. The Oregon Supreme Court has held repeatedly that deciding constitutional issues that do not involve application of law to an actual dispute between adverse parties is beyond the judiciary's power. Many legal scholars and judges agree that constitutional issues are generally best decided in actual cases, rather than on general legal principle. Some measures may be invalid on their face; others may be invalid only as construed and applied in particular circumstances after the measure has

been approved and implemented. To require the Oregon Supreme Court to issue general advisory opinions on constitutionality in the interval between qualifying for the ballot and printing ballots would violate this principle.

BALLOT TITLE CERTIFICATION PROCESS

The ballot title certification process begins when a petition naming up to three chief petitioners, who must be registered to vote in Oregon, is signed by the required number of registered voters (25 prior to January 2008, 1,000 as of January 2008) and is filed with the secretary of state. For petitions, the secretary of state first determines whether the measure meets the procedural requirements of the Oregon Constitution. For all proposed measures, the attorney general assigns a ballot title and returns the draft ballot title to the secretary of state, who publishes a notice with the proposed language announcing a ten-day period for filing written comments. The ballot title for a state measure contains a brief caption that summarizes the subject matter of the measure, a question that phrases the chief purpose of the measure and a concise statement summarizing the measure and its major effect.⁹ After considering written comments, the attorney general forwards the original draft title or a revised title to the secretary of state for certification and distribution to the chief petitioners and persons who commented on the petition.

Persons who submitted written comments on the draft ballot title and remain dissatisfied with the certified title may file a petition for

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review by the Supreme Court, naming the attorney general as respondent. The court must review the petition expeditiously and then certify a ballot title, with or without change. Only at this point may petitioners begin to circulate their petitions and gather signatures.

The exact wording of ballot titles has a significant effect on the success or failure of a measure. Most observers agree that campaigns have become more aware of the importance of ballot titles, prompting them to file multiple petitions with minor differences in wording, in order to secure the ballot title deemed most likely to draw an affirmative vote from the voters. For instance, in 2006, a number of nearly identical sets of proposed initiative measures included 12 on school finance, 11 on minimum corporate taxes, 7 on land-use and 4 on property condemnation. Several witnesses, including both conservative and progressive sponsors of ballot measures who use these tactics, testified that “ballot title shopping” is done so proponents can pick the ballot title that tested most favorably in polling and focus groups. Proponents then gather signatures only on the initiatives with ballot titles that tested well with potential voters. For the November 2008 election, as of early September 2007, 133 initiatives had been proposed. Of that number, 45 (or over one-third) were sponsored or co-sponsored by the same individual.

A number of witnesses argued that the current level of ballot title shopping is unreasonable and that too many government resources are being used to resolve ballot title disputes. Your committee also heard testimony, most notably from government officials, that the process for assigning

ballot titles to initiatives allows for too many obstructionist challenges concerning the wording of ballot titles. Reportedly, opponents often object to ballot titles and initiate judicial review proceedings simply to delay the gathering of signatures. Moreover, because the Supreme Court reviews ballot titles on appeal before initiatives qualify for the ballot, considerable court resources are spent on initiatives that never appear on the ballot. In 2004, for example, 90 ballot titles were reviewed by the Oregon Supreme Court. The entire process, from petition filing to Supreme Court decision, spanned an average of 56 days per measure. Ultimately only eight of the 90 measures appeared on the general election ballot. Your committee shares these concerns, but could not quantify the cost to the court system.

An Oregon statute provides that “to avoid confusion” the attorney general may not assign identical ballot titles to multiple proposed measures.¹⁰ This statute created some uncertainty as to whether there are circumstances under which the attorney general may assign identical ballot titles to nearly identical proposed measures — i.e., where the proponent appears to be ballot title shopping. The Oregon Supreme Court then held that the attorney general has discretion to certify identical, similar or different ballot titles depending on the circumstances.¹¹ In fact, the court later stated that the attorney general would often avoid confusion by assigning the same ballot titles to substantively identical measures.¹² Therefore, the attorney general often does assign identical ballot titles to substantively identical proposed measures. Some witnesses proposed transferring this responsibility for drafting ballot titles from the

attorney general to an independent committee. Witnesses also proposed eliminating the use of the Supreme Court to resolve ballot title disputes. As discussed above, Plan B judges are available for assignment, and their substitution for Supreme Court ballot title review would make effective use of this resource, particularly if their review decisions were final.

In 2007, the Legislature passed the Initiative Reform and Modernization Act. Among other things, it increased the required number of signatures to obtain a ballot title from 25 to 1,000. These 1,000 signatures may be used again as part of the total signatures necessary to later qualify the measure for the ballot. Your committee believes that this was a positive development that may help reduce the practice of ballot title shopping. Your committee is hopeful that the higher number of signatures will help dissuade some petitioners from using public resources to market-test ballot titles.

CONSTITUTIONAL AMENDMENTS VIA CITIZEN INITIATIVE AND LEGISLATIVE REFERRAL

The U.S. Constitution is intentionally difficult to amend. Congress, by a vote of two-thirds of both houses, may propose amendments for approval by state legislatures or state conventions, and a proposed amendment must be ratified by three-fourths of the state legislatures or conventions. Alternatively, Congress, upon application of the legislatures of two-thirds of the states, is required to call a convention for the purpose of proposing amendments that take effect upon ratification by the legislatures or conventions of three-fourths of the states. As a result, the U.S. Constitution has been amended only 27 times in more than two hundred years. The Oregon Constitution has been amended 234 times since 1902 — 189 times by legislative referral and 45 times by initiative.*

The Oregon Supreme Court commented in a fall 2006 opinion on the “unfortunate practice, sometimes questioned, of inserting provisions in the state constitution that have more in common, both in appearance and in substance, with legislation than with Constitutional amendments.”¹³ The U.S. Constitution and most state constitutions are limited to defining the powers of government, creating their most important institutions and

* Source: Oregon Blue Book; these totals include all voter-approved amendments to the Oregon Constitution. In a few instances, particularly since 1998, the Oregon Supreme Court later rejected amendments to the state constitution on procedural grounds.

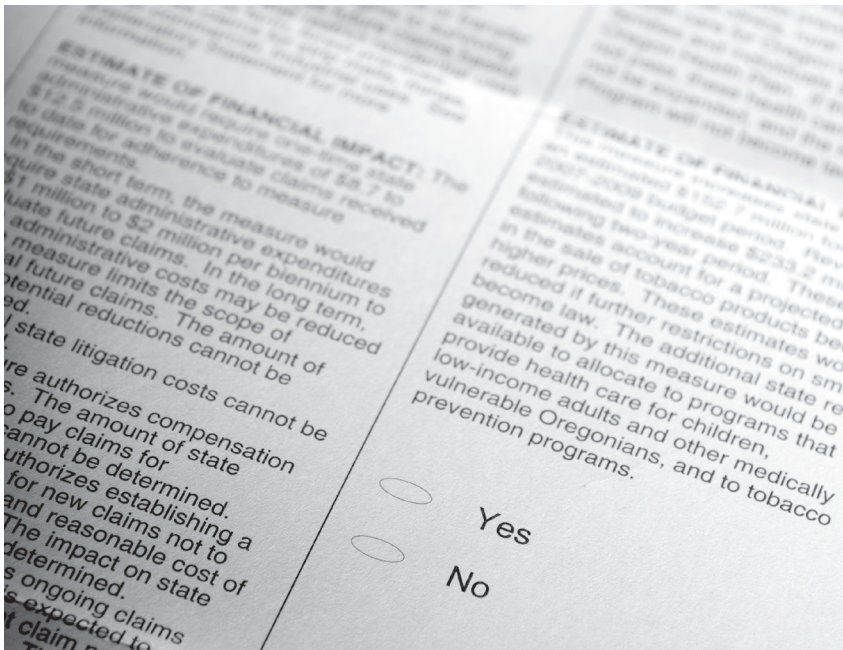
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protecting civil liberties. This is not so in Oregon. From 2000 to 2006, 21 of 37 initiatives that qualified for the ballot were proposed constitutional amendments. Of those 21, only a few were related to the structure of state government or broadly stated fundamental rights similar to those set forth in the Bill of Rights of the U.S. Constitution.

One of the consequences of placing essentially statutory material in the constitution is that unintended results of such constitutional amendments can only be rectified through statewide votes on further constitutional amendments. In 2002 voters were presented with Measure 77. Although it did not pass, Measure 77 was designed to fix an unanticipated result of Measure 50 on the tax structure of two counties and one city, even though Measure 50 itself had been a

legislative referral to remedy technical problems with earlier Measure 47. In a short span of a few years, voters were thus asked to decide three related constitutional amendments, all of which were essentially statutory in nature.

At present, there are only two procedural distinctions for qualifying constitutional and statutory initiatives. The first is the number of signatures necessary to earn a spot on the ballot. Qualifying a statutory measure for the ballot requires obtaining signatures from registered voters totaling 6 percent of the number that voted in the most recent gubernatorial election. Qualifying a proposed constitutional amendment requires 8 percent. The second is that an initiative proposing a constitutional change must comport with the single-subject rule. When it does not, it



may be rejected by the secretary of state or struck down by the courts following passage.

Over time, these differences have not often deterred initiative drafters from proposing statutory matters as constitutional amendments. Petitioners may propose constitutional amendments for statutory subject matter because doing so precludes conflict with existing constitutional provisions and insulates measures from easy amendment or repeal by the Legislature. Your committee finds that the effect of this practice circumvents an important safeguard of the legislative process. That is, no legislature has the power to limit a subsequent legislature to enact, amend or repeal laws to meet the changing needs of the state and its people. Yet, constitutional initiatives pertaining to statutory matters, if passed by voters, have precisely this effect.

Several witnesses asserted that the 1998 *Armatta* decision created a higher hurdle for proposed constitutional initiatives, which was expected to discourage constitutional amendments when statutory enactments would otherwise be appropriate. A prominent

practitioner of the initiative system interviewed by your committee shared this view and stated that, after *Armatta*, his organization focused its efforts on statutory initiatives. That being said, a downward trend is not reflected in the number of measures that *qualify* for the ballot, in spite of a substantial increase in *proposed* statutory initiatives compared to proposed constitutional initiatives since 1998. *Proposed* constitutional initiatives outnumbered proposed statutory initiatives in 1998 by a 2 to 1 ratio. By 2006, however, that ratio was reversed, with proposed statutory initiatives outnumbering proposed constitutional initiatives by a ratio greater than 2 to 1 (see Figure 5).

As mentioned earlier, Oregon's constitution has been amended most often by legislative referrals, as should be expected. State law requires that constitutional amendments and revisions that originate in the Legislature be referred to voters for approval.* However,

* Whereas a constitutional amendment must be limited to a single subject and separate vote on each amendment, a constitutional revision may alter multiple provisions of the constitution.

Figure 5: Proposed Statutory and Constitutional Initiatives after *Armatta* (1998)

Year	Statutory		Constitutional		Total
1998	28	33%	56	67%	84
2000	61	37%	105	63%	166
2002	82	45%	101	55%	183
2004	91	60%	61	40%	152
2006	118	72%	47	28%	165

Source: Oregon Blue Book

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the Legislature is also guilty of referring to voters constitutional amendments that are essentially statutory in nature. In fact, Oregon voters faced such a decision in November 2007 with Measure 50.

One controversial outcome of the 2007 legislative session was the referral of Measure 50, which, had it been adopted by voters, would have enshrined a cigarette tax in the state constitution. Democratic caucus leaders chose to refer the bill to voters after earlier attempts to pass it were defeated during the session. In doing so, the Legislature exploited a questionable provision of state law that requires a three-fifths majority to directly pass or refer a statutory tax increase, whereas referring a constitutional amendment — even if it proposes a tax increase — requires only a simple majority of the Legislature to approve.* Your committee believes the process of amending the constitution should be substantially more difficult than adopting, repealing or amending a statute. In this case, the opposite is true. The Oregon Legislature, in a bold attempt to pass a bill, chose an option that should not exist.

Cleaning up Oregon's Constitution

With so many statutory matters inappropriately enshrined in Oregon's Constitution, your committee gave some attention to undoing past decisions. Your committee concluded that removing statutory matters from the Oregon Constitution could not be efficiently accomplished through the initiative process due to the single-subject rule. Wholesale constitutional revision, as opposed to incremental amendment, may not be proposed by a citizen initiative.¹⁴ Rather, purging the constitution of inappropriate matters would require wholesale constitutional revision. City Club has previously supported constitutional revision ("Report on Constitutional Revision Review," February 10, 1967). If such an effort were initiated, the Oregon Constitution would require that a proposed constitutional revision be approved by two-thirds of the members of both houses of the Legislature and referred to the people for approval by a majority of the votes cast. Your committee is in general agreement that the Oregon Constitution contains a very large number of amendments that should properly have been adopted as statutes rather than as constitutional amendments, but recommendations regarding how to "clean up" the Constitution are outside the scope of this study.

* While unresolved by the courts, the Oregon Constitution appears to require a three-fifths legislative majority to directly enact statutory revenue measures or to refer statutory revenue measures to the people.

EFFECT OF INITIATIVE AND REFERENDUM SYSTEM ON OREGON'S BUDGET

The Oregon Constitution requires the Legislature to balance the state's budget each biennium, operating on a pay-as-you-go system. If the Legislature decides to increase funding for schools or to impose mandatory prison terms, for example, the Legislature also must increase revenue or impose cost-saving measures to balance the budget. Through a complex deliberative process that weighs projected revenues against projected expenses, the House Revenue Committee, the Senate Committee on Finance and Revenue, the Legislative Revenue Office, the Legislative Fiscal Office and the Joint Ways and Means Committee ensure that a balanced budget passes.

Oregon's initiative system imposes no such discipline on a measure's proponents or voters. Voters are allowed to mandate expenditures and revenue reductions without responsibility for the financial consequences. Proponents of such mandates have taken advantage of the relative ease of proposing constitutional amendments for this purpose, in order to place measures with significant budgetary consequences beyond the reach of the Legislature. Initiatives can — and do — affect the state general fund in a number of ways: (1) directly increasing or reducing revenue, (2) mandating tax credits or other tax expenditures, (3) creating new programs or altering programs without corresponding revenue generation, (4) requiring funding of existing programs regardless of financial constraints, and (5) overriding local control of budgetary decisions. Then, regardless

“ Oregon’s initiative system imposes no...discipline on a measure’s proponents or voters. Voters are allowed to mandate expenditures and revenue reductions without responsibility for the financial consequences. ”

of the financial impacts of adopted ballot measures, the Legislature remains bound by the state constitution to balance the budget.

For example, two constitutional initiatives, Measures 5 (1990) and 47 (1996), implemented significant reductions in property tax levels and restricted the rate of growth for future property tax revenue. These initiatives also placed statewide limits on property tax levels which previously had been administered at the local level. Other constitutional initiatives, such as Measure 1 (2000), required the Legislature to appropriate sufficient money each biennium to ensure that public education met quality goals established by law, even though the standards to which the appropriations were held were also set by the Legislature; and Measure 66 (1998) dedicated a portion of lottery revenues to parks and environmental projects, albeit with a 15-year sunset provision. Measure 1 (1986), a legislative referral that amended the constitution, banned state income taxes on social security benefits.

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Your committee believes that one of the biggest drawbacks of Oregon’s initiative and referendum system is the financial impact that can result from voters wanting both greater services and lower taxes without being responsible for reconciling these two objectives. To avoid this paradox, some states limit or prohibit initiatives that affect revenue and appropriations. Alaska is one example. When enacting its initiative law in 1955, Alaska included the following restrictions: “The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. The referendum shall not be applied to dedication of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety.”¹⁵

Other states have constitutional restrictions on the application of the referendum power regarding appropriations. The Missouri Constitution prohibits initiatives from proposing laws that call for “the appropriation of money other than new revenues created and provided for thereby.”¹⁶ The Montana Constitution similarly precludes “appropriations of money” from the initiative.¹⁷ Your committee found no state that had amended its initiative process to impose a financial impact restriction after the enactment of its original initiative process, which is an indication that enacting financial impact restrictions in Oregon today would be difficult. City Club’s 1996 report on the initiative and referendum system called for Oregon’s process to be changed so that statutory initiatives that dedicate revenue or require appropriations in excess of \$500,000 per year be

required to provide new revenue. More than ten years later, no such change has been made. Your committee instead recommends an indirect initiative system, which would create opportunity for more careful and informed analysis. Your committee further believes a deliberative process is especially important for initiatives that have a material impact on state finances, either by reducing income or mandating expenditures.

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EFFECT OF INITIATIVE AND REFERENDUM SYSTEM ON OREGON'S BOND RATING

The state of Oregon issues bonds to finance a wide range of public projects. For example, lottery revenue bonds are issued to finance transportation projects, state veterans welfare bonds are issued to finance veteran home loans, higher education bonds may be issued to build dormitories and community college bonds are sometimes issued to improve or replace infrastructure. Numerous bonds are issued annually, with total state-issued bonds standing at more than \$6 billion.¹⁸

Bond rating agencies evaluate the financial risk associated with the purchase of bonds and assign a rating to government bond issues. Ratings are based on the likelihood that the bond issuer — in this case, the state of Oregon — will make interest payments on schedule and pay the bondholders when the bonds reach maturity. The rating given to a bond affects the interest rate applied to the bond. Lower bond ratings result in higher interest rates.

Bonds issued by Oregon generally carry a lower rating than bonds from other state governments. Bond rating agencies and underwriters have taken the position that Oregon voters can too easily create havoc with the state budget, thereby affecting the state's ability to meet its financial obligations to bondholders. Oregon bonds are rated in the bottom quartile among state governments (as of spring 2006, AA- by Standard and Poor's), in part because of the initiative and referendum system. Moody's,

Legislative Update

The 2007 Legislature canceled nearly \$300 million in corporate tax rebates, or "kickers," to establish a "rainy day" fund. The bill also required the Legislature to set aside 1 percent of all future state budgets for the new savings account. As a result, Oregon is projected to build a fund approaching half a billion dollars by 2010.

Though both the corporate and personal "kickers" will remain in place after this one-time diversion, Standard and Poor's revised Oregon's General Obligation bond rating outlook in April 2007 from "stable" to "positive" and cited the establishment of a reserve fund as the reason.

In July 2007, Moody's Investors Service upgraded Oregon's general obligation bond rating from Aa-3 to Aa-2. Moody's cited as long-term challenges Oregon's unusual kicker law, which puts cash flow pressure on the budget, and the state's "unusually high reliance" on personal income taxes.

a bond rating agency, "consistently identified voter initiatives as a credit negative for the state due to the fact that previously adopted initiatives have placed constraints on financial operations, and the threat of potential initiatives injects an element of uncertainty into future operations."¹⁹ Notably, the state's rating is negatively influenced by the inability of the state to accrue substantial reserves due to the "kicker" law, which became

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constitutional law through a legislative referral.*

If Oregon's bond ratings were closer to the average among state governments, its general obligation bonds would carry lower interest rates. Consequently, Oregon pays a price for the historic and potential effects of the initiative and referendum system. As of December 2006, Oregon had \$2.6 billion of debt supported by general fund revenues. A reduction in interest rates of 12 basis points (0.12%) on these bonds would save the state approximately \$3.1 million per year in interest payments. However, since the effect of an improved credit rating would apply only to interest payments on future bond issues, the full benefit of a credit upgrade could take up to 20 years to realize.

Local governments in Oregon also likely would see an improvement in bond ratings as a result of changes to the initiative and referendum system. The Oregon State Treasury estimates that a 12-basis-point reduction in interest rates experienced by the state could result in a 3-basis-point (0.03%) reduction to interest rates paid by local governments. Since local governments have outstanding bond issues several times larger than state bond issues, the combined potential local government savings could match the potential savings estimated for state government.

* The "kicker" law was voted into the state's constitution by legislative referral in 2000. It requires the state to estimate future general fund revenues from corporate and personal income taxes, which it does on a biennial basis, and to issue a refund to taxpayers in the respective categories whenever revenues received exceed the estimate by 2 percent or more. With respect to the state's credit rating, the kicker is frequently cited as a major impairment on the state's ability to accumulate excess funds for a rainy day.

INFORMATION IN THE CAMPAIGN ENVIRONMENT

Advertising and Media Coverage

Media coverage of ballot measures, including news stories and editorials, is an important element of the political information landscape for voters. Advertising and other forms of marketing by ballot measure campaigns also significantly influence voters' consideration of and eventual voting decisions on ballot measures. Generally speaking, voters are exposed to more paid advertising on ballot measures than to objective news coverage or editorial commentary by professional journalists. In addition, the repetitive nature of advertising reinforces any specific message to a far greater extent than does a one-time news article or editorial. Catchy slogans such as "Beware of tricks in Measure 6" are common and often memorable, but do not provide substantive information to help voters make an informed decision.

A multitude of new media also competes for the attention of potential voters. In the years since City Club's 1996 report on the Oregon's initiative and referendum system was published, the Internet has come to offer an extraordinary amount of information about government, candidates, and issues of the day. This political-information environment is fast-paced and extremely appealing to wide segments of the population. It is also laden with biased messages, untrue "facts" and intentional distortions. The distinction between independent, objective news sources and opinion is becoming increasingly blurred.

Chief among the few exceptions in

this confusing and often misleading environment is information published in the state voters' pamphlet. Oregon's official voters' pamphlet contains an impartial explanatory statement about each ballot measure, an estimate of the financial impact of each measure, and arguments for and against each measure. The explanatory statements and fiscal impact statements are written by qualified persons chosen according to procedures prescribed by law; arguments for and against measures are submitted by the general public with essentially no content restrictions imposed by the state.

State Voters' Pamphlet

Explanatory Statement

The explanatory statement is a 500-word description of each measure prepared by a committee organized according to state statute, and published on the ballot and in the state's voters' pamphlet. The explanatory statement committee consists of two supporters and two opponents of the initiative who jointly select a neutral fifth person. If the appointed committee fails to produce a statement, legislative counsel is responsible for doing so. After a draft statement is prepared, the secretary of state holds a hearing to listen to objections and suggestions. These comments are forwarded to the committee for consideration as it prepares the final statement. Dissatisfied persons who present timely objections to the secretary of state may petition the Supreme Court for changes. Like everyone else, they also may purchase space for an argument in the voters' pamphlet.

Financial Impact Statement

The intent of the official financial impact statement is to enable voters to

make informed decisions on proposed ballot measures in light of their estimated financial consequences. The secretary of state forms the financial estimate committee, which includes the secretary of state, state treasurer, director of the Department of Revenue, director of the Department of Administrative Services, and a representative of a city, county or district government. The expert committee prepares draft financial estimates and narrative statements for public review. After soliciting and considering public input, the committee prepares final statements for publication. If a majority of a committee cannot reach consensus on a statement, the secretary of state prepares and files a statement. In the rare cases when the state does not produce a financial impact statement, the measure still appears on the ballot.* The amount of an estimate is not subject to judicial review; review is limited to compliance with the procedural requirements of preparing the statement.**

* *Bassien v. Buchanan*, 310 Or. 402 (1992) was the second Oregon Supreme Court opinion on this subject in 1992. State officials had failed to complete estimates of financial impact for Measures 5, 8 and 11 on a timely basis. A group of citizens won a judgment prohibiting printing of the statements in *Dennehy v. Roberts*, 310 Or. 394 (1990). In *Bassien*, the same group sought to prohibit a vote on the measures in the absence of the financial estimate. The state Supreme Court overturned the trial court, holding that voting should proceed.

** In *Marbet v. Keisling*, 314 Or. 223 (1992), citizens mounted a court challenge to the accuracy of the estimate of financial impact of Ballot Measure 5 to close the Trojan nuclear power plant. The court held that the estimate was not a subject for judicial review. Despite the precedent, a similar challenge was asserted in 2004 against a measure pursuing dissolution of the State Accident Insurance Fund. In *Oregonians for Accountability v. Bradbury*, 2004 WL 1969405 (D. Or. 2004), as with the previous case, the court again held that the estimate was not a subject for judicial review.

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While financial impact statements offer important information and are the official estimates of a panel of experts authorized by the state, they are limited in scope and utility. For example, statements do not consider the effect of a measure on the functioning of government operations, nor do they commonly express financial impacts in comparison to the size of affected revenues or expenditures — information that could be helpful to voters. Financial impact statements also are limited by the challenges associated with forecasting future events, as demonstrated by the following two examples:

Ballot Measure 11 (1994) imposed mandatory prison sentences above and beyond then-current sentencing guidelines on certain classes of offenders. The measure's financial impact statement estimated an increase in the state's annual prisons operating expenses of \$101 million by 2001. According to data from the Department of Corrections, the annual operating expenses as a result of Measure 11 for fiscal year 2001-02 appeared significantly lower than was projected in the 1994 statement of financial impact.

Ballot Measure 37 (2004) provided that property owners be allowed to develop property under land-use laws in effect when the property was purchased, or to be compensated for loss of value from subsequent restrictions. The financial impact statement for Measure 37 projected that the annual administrative costs would be \$18 to \$44 million per year for the state, and \$46 to \$300 million per year for local governments. It was further stated that the measure might require compensation to landowners, but that the amount of state and local expenditures for this compensation could not be determined. Since the

adoption of Measure 37, estimates of its financial impact have run from zero in very small, rural counties, to \$1.6 billion in one large county alone.²⁰ In addition, several witnesses noted that even if local or county governments grant land-use waivers to applicants, they may still be liable for economic claims from those same applicants, and also for claims by neighboring property owners whose land values are asserted to be diminished by their neighbors' exercise of waivers. In the case of Measure 37, the financial impact committee was unable to provide meaningful estimates of the size and scope of the measure's potential cost to state and local governments.

In response to concerns about the state's financial impact statements, the 2005 Legislature passed legislation intended to improve the quality of information provided by the committee. Estimates may now include the effects of failing to enact a measure, a description of indirect but measurable effects, and an explanation of the financial estimate. However, no amount of reform can eliminate the inaccuracy inherent in forecasting complex systems. Such limitations reflect the difficulty of predicting administrative and judicial interpretations prior to enactment of a measure and reasonable differences in opinion over appropriate forecasting models and assumptions.

Your committee believes that the limited reliability of financial impact statements offers support for the position that the Legislature is a better venue for deliberating measures that affect revenue and appropriations. The Legislature considers the financial impact of an issue in the context of the budget as a whole and ideally seeks to balance priorities, while financial impact statements regarding an initiative give voters information about that initiative's impact in a vacuum.

Arguments For and Against Measures

The state's official voters' pamphlet, which includes official explanatory and financial impact statements for every measure on the ballot, is mailed to every household having a registered voter. Any individual can place an argument for or against a measure in the pamphlet upon payment of \$500 or submission of a petition signed by 2,500 registered voters eligible to vote on the measure. By contrast, in the state of Washington, the speaker of the House of Representatives, the president of the Senate and the secretary of state select the persons to write supporting, opposing and rebuttal statements on each measure for publication in their voters' pamphlet.

Unlike Washington, Oregon makes no effort to determine the accuracy of the arguments submitted. Election laws do not prohibit publication of false statements, nor do they ensure opportunity to rebut statements made in the pamphlet. As it is now, ill-informed voters making laws is the only consequence for incomplete or inaccurate information in the state's official voters' pamphlet.

Your committee believes Oregon's official voters' pamphlet is a valuable forum for political communication; however, its value is diminished by inaccurate or misleading paid statements. How to address this concern is unclear; efforts to manage the content of such statements are likely to collide with the provider's right to free speech.

SIGNATURE-GATHERING PROCESS

The traditional ideal of an initiative system is one in which petitions would arise from grass-roots efforts to address important issues of the day. Critics of Oregon's system argue that the availability of paid signature gatherers has undermined this process. Yet, in fact, paid signature gathering is not a recent phenomenon. William S. U'Ren, a major figure in the enactment of the initiative in Oregon, used paid signature-gatherers as early as 1902. Their use became illegal in 1935, but the prohibition was repealed in 1983 in conjunction with enactment of a requirement that the chief petitioner disclose whether paid gatherers would be or had been used. In practice, this requirement was confusing to petitioners so, in 1992, the Legislature added a requirement that campaigns using paid signature-gatherers disclose that arrangement on each signature page circulated by their gatherers.

Historically, money has been collected and spent in political campaigns in a variety of ways to obtain public support. Many witnesses told your committee that paid signature gatherers could be tempted to misrepresent the wording or intent of their measure in order to influence the public vote. Even so, courts have repeatedly ruled that limits proposed for paid signature-gathering impinge on protected free speech. As the use of paid signature-gatherers has become more common, access to money has become increasingly important in determining whether citizen initiatives or referenda obtain sufficient signatures to qualify for the ballot. Your committee heard testimony that amounts spent to qualify measures

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in recent elections have ranged from \$250,000 to \$1 million. With enough money, paid gatherers make it possible for a single individual or interest group, without a broad base of support but sufficient economic resources, to qualify almost any measure for the ballot. Former Oregon resident Loren Parks and New York financier Howard Rich have figured prominently in Oregon politics in recent years as a result of their extraordinary financial contributions to initiative campaigns. In addition, Measure 38 (2004) was seen by a City Club committee as a self-financed attempt by Liberty Northwest Insurance Corporation to eliminate its competition and, in 2006, a pair of campaign finance reform measures (Measures 46 and 47) were financed largely by one person.

All that being said, some campaigns can still be run, or at least advanced, with volunteer signature-gathering efforts. Some campaign watchers testified to the success of particular groups — churches being a common example — already organized around a particular subject or activity and with an established communication network. The Internet has made it particularly easy to organize groups to participate in signature-gathering campaigns. Without a pre-existing communication network, several witnesses indicated that volunteer signature gathering could actually be more expensive to manage and coordinate than paying experienced signature gatherers. In addition, those witnesses expressed the view that paid signature-gatherers make fewer errors than volunteers.

Your committee finds it unlikely that significant constitutional restrictions can be placed on paid signature

“ With enough money, paid gatherers make it possible for a single individual or interest group, without a broad base of support but sufficient economic resources, to qualify almost any measure for the ballot. ”

gathering apart from requirements to disclose the source and amounts of funding for proposed measures. Even the public's right to that information is subject to some limits if the disclosure requirements are viewed as infringing on free speech. In *Riley v. National Federation of the Blind*, the U.S. Supreme Court struck down a North Carolina statute requiring disclosure by petitioners of amounts raised by professional fundraisers that would have included the percentage of fundraisers' funds going to charitable activities.²¹

Recent Efforts to Reform Signature-Gathering Process

An effort to reform the signature-gathering process in Oregon was made in 2002 when voters approved Measure 26. Measure 26 amended the state constitution to make it “unlawful to pay or receive money or other thing of value based on the number of signatures obtained on an initiative or referendum petition.”²² In short, while Measure 26 did not prohibit paid signature gathering, it did prohibit payment per signature. By prohibiting payment per signature, supporters of the measure hoped to remove the incentive to obtain signatures through improper means or to fabricate signatures. The act survived judicial review when, in 2006, the U.S. Court of Appeals for the Ninth Circuit decided that the act did not infringe on free speech.²³ The law imposes a civil penalty of \$100 per signature page when a petitioner has improperly paid for signatures on a per signature basis.²⁴

In addition to the prohibition on payment per signature on an initiative petition, Oregon law contains additional tools for managing the signature-gathering process. Forgery of signatures on an initiative petition is a felony.²⁵ Additional civil penalties of up to \$250 per violation may be imposed for forgeries and other knowing violations of the initiative laws.²⁶ Oregon law also requires that signature gatherers make certain disclosures if they are paid for gathering signatures and also requires the secretary of state to verify signatures through statistical sampling.²⁷ (See section titled “Signature-Verification Process” for more discussion of the statistical sampling process.)

The 2006 general election season was marked by a flurry of accusations that some commercial signature-gathering firms were violating Measure 26. The coalition that sponsored Measure 26 in 2002 filed complaints with the state elections division against nine groups circulating petitions alleging violations of the law restricting payment by signature. The complaints were referred to the state’s Department of Justice, but corrective action has not been taken. Your committee heard testimony from a number of participants in the signature-gathering industry as well as several observers of the process. At least one witness stated that Measure 26 worked well in the 2002 election cycle, but believed that some firms have since found ways to work around the payment limitations. News media reports, substantiated by oral testimony to your committee, charged that some signature-gathering firms have attempted to evade the hourly wage requirement to maximize signature-gathering productivity.

Your committee found that paid signature gatherers operate with little oversight by the state. Violations, including cash payments per submitted signature page, have been repeatedly observed by members of the news media and political organizations, but prosecutions remain rare. Under current law, all signature-gatherers are to be paid on an hourly basis. However, some signature gathering firms increase the individual gatherers’ pay based on performance; they do not technically pay by the signature, but reward their best producers with non-retroactive pay increases. Others maintain a basically level pay scale for the duration of the campaign.

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Some witnesses testified that Measure 26 should be repealed in favor of a return to a well-enforced process that allows payment per signature. Among the reasons cited for this proposed change were that Measure 26 has failed to appreciably deter forgery or lower the level of invalid signatures. Your committee, on the other hand, believes that insufficient allocation of law enforcement resources — not the structure of the law itself — is responsible for the deterioration in compliance since 2002.

House Bill 2082 (2007), mentioned in a previous section, should help improve the integrity of the signature-gathering process. The secretary of state will now require formal applications and training for paid signature gatherers. The rules prohibit the secretary from certifying anyone who was recently convicted of fraud, forgery or identity theft. The paid signature gatherers will also now have to wear photo identification and follow other procedures. In addition, chief petitioners may now be liable for violations by signature gatherers, and contract vendors may be liable for the work performed by subcontracted workers. Your committee believes these reforms will increase accountability; however, greater enforcement of the existing and new rules will be the key to ensuring public confidence in this process.

Number of Signatures Required to Qualify for the Ballot

House Bill 2082 also provided that individuals may sign “electronic signature” sheets that may be distributed by e-mail or over the Internet. Your committee believes this

will substantially increase the ability of both paid and volunteer campaigns to obtain signatures.

To qualify for the ballot, a statutory initiative requires signatures equal to 6 percent of the total number of persons who voted in the last gubernatorial election. Eight percent is required to amend the state constitution. To qualify for the ballot in 2006, a statutory initiative petitioner had to obtain 75,630 valid signatures and a constitutional initiative petitioner 100,840 valid signatures.

Oregon’s signature requirement for initiating a constitutional measure is one of the lowest in the United States. Of the 17 states that allow constitutional amendments via an initiative system, 5 others require a number of signatures that equals 8 percent of votes cast in the most recent election, 10 require a greater number, and only one state requires fewer. Many witnesses asserted that a reduction in constitutional amendments is a worthwhile goal yet, at the same time, they acknowledged that raising the number of required signatures might not dampen interest in constitutional initiatives. Furthermore, Oregonians have been reluctant to vote for anything that appears to limit their access to the initiative process. In 2000, voters rejected Measure 79, an initiative that would have raised the signature requirement for constitutional initiatives from 8 percent to 12 percent.

SIGNATURE-VERIFICATION PROCESS

Initiatives qualify for the ballot when chief petitioners submit sufficient valid signatures according to state law. The secretary of state estimates the number of valid signatures out of the total submitted by conducting a selective review. The secretary's office evaluates individual signatures to determine if the signatories are registered voters, checks the signature pages for compliance with restrictions regarding the form and content of the petitions, and tracks the certification of the petition circulators.*

The secretary of state is authorized to conduct statistical sampling of submitted signatures to estimate the total number of valid signatures for ballot qualification.** This sampling procedure is designed to reduce the administrative burden of qualifying petitions. The procedure is first applied to a random sample of 1,000 signatures. The petition qualifies for the ballot, without further testing, if there is a 95 percent probability, based on the sample, that the total number of valid signatures submitted exceeds the minimum number of required valid signatures. The 95 percent confidence level also includes a conservative minimum estimate of the frequency of duplicate signatures.

* For an overview of signature validation rules, see the *State Initiative and Referendum Manual*, published by the elections division of the secretary of state's office.

** Signature verification for statewide petitions is governed under *Or. Rev. Stat.*, 250.105. The complete statistical sampling method and explanation may be found in the Appendix to *Or. Admin. Rules* 165-014-0030, currently available on the secretary of state's election division Web site.

Should the first sample fail to qualify a petition, a second sample is taken of at least 5 percent of the total signatures filed, including the signatures from the first sample. Based on the second sample, a petition qualifies if there is an estimated 50 percent chance that the total number of valid signatures submitted exceeds the minimum number of required valid signatures. If the second sample fails to qualify the petition, the petitioners may submit additional signatures. Sampled signatures from the second submission are combined with those from the prior samples to estimate the total number of valid signatures. Petitioners submitting additional signatures therefore have a reasonably certain target of additional valid signatures needed to qualify for the ballot.

In contrast to the opinion that signature-gathering rules are not strictly enforced, most witnesses reported a belief that the signature-verification process is very strictly enforced, though not always with an even hand. Witnesses' complaints about the signature-verification process primarily concerned the stringency with which signature-validation rules were applied. Some petitioners asserted that entire pages of signatures were invalidated for inconsequential mistakes made by individual petition circulators and signatories. They also complained that the validation criteria for signatures are applied subjectively and selectively, thereby allowing for the possible expression of political bias by the secretary of state's office.

Signature verification is conducted by permanent employees of the secretary of state's office in the open-

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meeting environment of the state Capitol. The conduct of the review is open for observation by any member of the public, and the regulations and procedures for invalidating signatures or whole pages are spelled out in administrative rules. Most of the signature gatherers employed in Oregon in recent elections were supplied to campaigns by commercial enterprises in the business of training and hiring out experienced signature gatherers. Based on witness testimony a high failure rate of petitions appears more likely to be a function of one signature gatherer's training than the sampling process itself. Your committee was not persuaded that the complaints regarding excessively stringent or biased reviews were or could be substantiated by objective evidence; rather, overall, the verification process appears adequate to its purpose.

EXPENDITURES ON BALLOT MEASURE CAMPAIGNS

The cost of sponsoring a ballot measure — from petitioning, through signature gathering and the campaign itself — has been rising steadily in Oregon. According to a summary by the secretary of state's office, average expenditures per measure committee in general elections increased from approximately \$211,000 in the 1990s to \$461,000 during 2000-2004. In one recent case, a political action committee spent in excess of \$2.4 million to qualify and pass a measure.* And even more recently, in 2007, two political

action committees spent a combined total of more than \$12 million to defeat Measure 50. Total expenditures by ballot measure committees totaled over \$31 million in the 2004 general election; by contrast, the combined expenditures by state representative and state senate candidates for that election totaled less than \$14 million. One expert witness noted that large ballot measure campaign expenditures had limited utility: large expenditures either usually were sufficient to get any plausible measure on the ballot or often could ensure a measure's *defeat*. However, large expenditures alone were not necessarily sufficient to ensure *passage* of a desired measure.

Extensive raw data on total campaign expenditures are available on the secretary of state's Web site. However, your committee found the information in the databases difficult to interpret. Fortunately, HB 2082, which passed in 2007, requires chief petitioners to report into an electronic user-friendly campaign finance database.

The amount of money involved, and an influx of out-of-state petitioners, has drawn attention to the efficacy of Oregon's financial reporting requirements, particularly while signature gathering is underway. Oregon is now considered by many interest groups outside the state to be a useful test market for measuring voter sentiment on issues of public policy and, if possible, creating momentum to pursue a particular issue on a multi-state or national basis. Oregon's utility as a test market is a function of the relatively modest size of its voting public (which affects the cost of running an effective campaign) and of the relative ease with which measures can be qualified for the ballot.

* As reported by the political action committee that successfully campaigned in 2004 to pass Ballot Measure 36, a constitutional amendment restricting the definition of marriage to the union of one man and one woman.

“ Oregon is now considered by many interest groups outside the state to be a useful test market for measuring voter sentiment on issues of public policy and, if possible, creating momentum to pursue a particular issue on a regional or national basis. ”

House Bill 3458 was enacted in 2005 as a series of amendments to Oregon statutes regulating elections. Among other things, the new law increases public access to campaign finance information through technological improvements. It left a gap, however, in financial disclosure requirements for chief petitioner committees, which are defined differently from most other political action committees. Candidate PACs must report financial information as frequently as every seven days during a campaign, but chief petitioner committees have been required to submit only periodic reports — in September, February and May — while signature gathering is underway.

In 2007, the Oregon Legislature made a positive step in amending the law to increase the frequency of financial disclosures by treasurers for initiative and referendum committees. With House Bill 2082, treasurers for initiative and referendum committees are now generally required to file electronic weekly campaign contribution and expenditure reports

during the approach to both the signature-filing deadline and the election. The new law adjusted the deadline for filing the reports to coincide with when they were most useful to the public. This addresses your committee's concern that petitioners were not required to disclose in a timely manner who was funding their campaign during the signature-gathering period. The new law provides those considering whether to sign petitions with more information about the political and economic interests behind the petition.

FINAL NOTE

Just prior to release of this report, two legislative referrals were sent to voters for decision in a special election in November 2007. In addition, to date 142 initiatives, 4 referenda and 6 legislative referrals have already been filed with the secretary of state for the upcoming elections in 2008. Signature gathering for some of the 2008 initiatives began before the November 2006 election had passed. This is Oregon, home of the nation's most prolific system of direct democracy.

Your committee expects that improvements to Oregon's system of citizen initiatives and referenda and legislative referrals will require a long-term process of civic engagement. We embrace the notion that an increased understanding of the roles of citizens and their government could increase appreciation for a representative system of lawmaking. Similarly, we believe a better understanding of the characteristics of statutes and of the constitution would foster an awareness of the complexities and problems created by direct democracy. Your committee offers the following conclusions and recommendations:

Conclusions and Recommendations

CONCLUSIONS

1. Oregon's initiative system, as it currently operates, is on balance a negative for the state. However, it is important that Oregonians retain for themselves an initiative pathway when the Legislature is unable or unwilling to act on critical issues.
2. Oregon's Legislature has always been and rightly continues to be the state's principal means to lawmaking. However, relatively easy access to the initiative and referendum system has weakened the state's legislative process and lessened public appreciation for that process. In particular, the initiative and referendum system has decreased the will and the ability of legislators from both major parties to resolve significant policy and budget matters, which in turn leads to ever more reliance on initiatives and legislative referrals.
3. Use of indirect initiative systems in other states reflects the widely held view that state legislatures ought to be involved in the initiative process. While the indirect initiative could delay a vote, the delay would create opportunity for more careful and informed deliberation and clarification of proposed initiatives. This is especially important for initiatives that have a material impact on state finances, either by reducing income or mandating expenditures.
4. Current law requires a three-fifths majority of the Legislature to enact statutory revenue measures. By some legal interpretations, the same threshold is required to refer statutory revenue measures to voters. This super majority requirement creates an inappropriate incentive for legislators to refer to voters as constitutional amendments revenue bills that failed in the Legislature, since the referral of constitutional amendments requires only a majority vote of the Legislature.
5. Poorly drafted measures produce unintended consequences, such as higher than anticipated costs to taxpayers as well as litigation to resolve ambiguities, inconsistencies and overlooked contingent circumstances.
6. To preempt the possibility of repeal by the Legislature, the Oregon Constitution has been amended repeatedly in ways that would have been more appropriately addressed by legislative statutory enactment. As these amendments accumulate, the role of the Legislature as the principal lawmaking body of the state is diminished because initiatives placed in the constitution are effectively beyond the control of the Legislature.

7. Mandating changes in revenue and expenditures through the initiative system disrupts the state's budgeting process, confounds the Legislature's constitutional requirement to balance the state's budget and negatively affects state and local bond ratings. Furthermore, a degree of inherent unreliability and lack of context for financial impact statements limits voters' ability to make informed choices about ballot measures with significant fiscal impacts.
8. The process commonly known as "ballot title shopping," which involves using government resources to review multiple substantially similar initiatives and to hear challenges to the wording of each ballot title for the purpose of gaining political advantage, requires an unacceptable use of public funds.
9. Violations, including illegal payments and forged signatures, occur frequently in the signature-gathering phase of Oregon's initiative and referendum system, and oversight by the state is inadequate.
10. The statistical sampling process used by the secretary of state to verify signatures is an appropriate method for verifying signatures on petitions. Your committee found no reason to suggest or support changes to the current statistical sampling system.
11. Oregon's official voters' pamphlet is a valuable forum for political communication. It allows proponents and opponents of a measure to publish their views to every mailing address in the state for a modest fee, and it allows voters to identify the proponents and opponents of a measure. On the downside, the value of the voters' pamphlet is lessened when it includes inaccurate or misleading paid statements. Efforts to manage the content of such statements are likely to collide with the free speech rights of political activists.

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RECOMMENDATIONS

The following recommendations could be implemented legislative action, by initiative or, in some cases, by administrative rule changes. The first three recommendations, at least, would require constitutional amendment given the present state of the law. Such amendment could be initiated either by the Legislature or citizen initiative, but would require approval from the electorate. Oregon also has a process for wholesale constitutional revision whereby changes to the initiative system could be proposed in the context of a complete rewrite of the state's constitution to be presented to the voters. All of these options should be considered.

1. Limit initiatives proposing constitutional amendments to matters involving the structure, powers, and limitations of government or the rights of the people with respect to their government.
2. For any amendment to the Oregon Constitution, require approval by a three-fifths majority of votes cast, whether proposed by initiative or by legislative referral.
3. For revenue measures proposed by the Legislature, so long as state law requires a three-fifths majority to directly enact a statutory revenue measure or refer a statutory revenue measure to voters, require the same three-fifths voting requirement of the Legislature when referring revenue measures as constitutional amendments.
4. Implement an indirect initiative system. In order to enhance public debate, consideration and study prior to a vote of the people, require legislative deliberation with attendant public hearings for all citizen initiatives after they have qualified for the ballot. If the Legislature accepts a statutory initiative as proposed, the Legislature enacts it into law. If the Legislature accepts a constitutional initiative as proposed, the constitutional change must still be referred to the voters for adoption. Any initiative the Legislature rejects, regardless of subject, would be submitted to the voters in the next general election. In that case, the Legislature could take no further action, could enact its own law on the subject, or could refer a competing alternative to voters.
5. The Legislature should strike *Or. Rev. Stat.* 250.035(6) and make clear that the Oregon Attorney General should assign the same ballot title to substantively identical proposed measures.
6. Assign retired senior judges (under Plan B of the judicial retirement system) to assume the current responsibility of the Oregon Supreme Court to review challenges to ballot measure titles. Their decisions should be final and binding.
7. Require that all proposed ballot measures be submitted to Legislative Counsel for assistance in clarifying and drafting prior to the circulation of measures.
8. Direct additional financial and personnel resources to proactive and vigorous enforcement of the regulations that govern signature gathering.
9. Require chief petitioner committees to meet the same financial disclosure requirements as political action committees.

City Club of Portland

Respectfully submitted,

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Acknowledgements

Your committee especially acknowledges the excellent cooperation and guidance from its predecessor 1996 study committee and expresses its particular appreciation to members of that committee and the extraordinary efforts provided by its former chair, vice-chair and secretary, Judge John C. Beatty, (now) Attorney General Hardy Myers and Judge Randall Kester.

Your committee also expresses its gratitude to Tony Iaccarino for his superb editing of our draft report.



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Appendices

APPENDIX A: WITNESSES

John C. Beatty, Senior Judge, Oregon Circuit Court
Ted Blaszak, President, Democracy Resources
Bill Bradbury, Secretary of State, State of Oregon
Ginny Burdick, State Senator, State of Oregon
Wallace P. Carson, former Chief Justice, Oregon Supreme Court
Adam Davis, Partner, Davis, Hibbitts & Midghall, Inc.
Judy Davis, member, League of Women Voters of Oregon
Ross Day, General Counsel, Oregonians in Action
Jackie Dingfelder, State Representative, State of Oregon
Kappy Eaton, Governance Coordinator, League of Women Voters of Oregon
Randall Edwards, State Treasurer, State of Oregon
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Treasury
Douglas McClain, Planning Director, Clackamas County
Anne Martens, Chief of Communications, Office of Secretary of State Bill
Bradbury
Jeff Merkley, State Representative, State of Oregon
Hardy Myers, Attorney General, State of Oregon
Tim Nesbitt, Past President, Oregon AFL-CIO
Laura Pryor, Judge, Gilliam County Court
Lane Shetterly, Director, Oregon Department of Land Conservation and
Development
Janice Thompson, Executive Director, Money in Politics Research Action Project
Timothy Trickey, President, Democracy Direct, Inc.
Paul Warner, Legislative Revenue Officer, State of Oregon
Ben Westlund, State Senator, State of Oregon
Sarah Wetherson, Research and Outreach Associate, Money in Politics Research
Action Project

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APPENDIX C: CHANGES IN OREGON'S INITIATIVE AND REFERENDUM, 1902-2007

The following timeline lists the principal changes made to the Oregon initiative and referendum process from its inception in 1902 until and including the 2007 Legislature.

Under the original Oregon Constitution, the procedure for amending the constitution requires passage by two successive legislatures and approval by a majority of the electors who voted in the election (Article 17, section 1).

1899

The amendment authorizing the initiative and referendum is first passed by the Legislature (HJR 1, *Or. Laws* 1899, p. 1129). It then passes the 1901 Legislature (*Or. Laws* 1901, pp. 4-5), and is submitted to the people, who approve it at a general election on June 2, 1902.

1903

The Legislature implements the amendment by establishing the forms for petitions and signature sheets and procedure for verification of signatures. The act provides that the secretary of state should decide in the first instance “whether or not the petition entitles the parties to have the measure referred to the people,” with an appeal to the Supreme Court from that decision. It also provides for a ballot title designated for that purpose by those filing the petition; and it allows the proponents and

opponents to furnish to the secretary of state, at their own expense, pamphlets advocating or opposing the measure, which would be delivered by the county clerks to each registered voter (*Or. Laws* 1903, pp. 244-249).

The 1903 act does not specify the number of signatures required, but states only that petitions be “signed by the number of voters... required by the constitution.” The constitutional amendment, however, does not specify the exact number of signatures for an initiative, but instead, specifies the percentages: 5 percent of the legal voters for a referendum petition, and not more than 8 percent for an initiative. The basis on which the number of voters is determined is the whole number of votes cast for justice of the Supreme Court at the last preceding general election.

The 1902 amendment, which incorporates the initiative and referendum into the Constitution, only applies to statewide measures. By initiative petition adopted by the voters in 1906, the constitution is amended by adding section 1(a) to Article IV, which extends the initiative and referendum powers to the voters of “every municipality and district as to all local, special and municipal legislation.”

1906

Voters adopt by initiative petition an amendment to the constitution changing the manner of amending the constitution. The new method eliminates the second referral to the Legislature; so the constitution can now be amended either (1) by passage by the Legislature and approval by the voters, or (2) by initiative passed

by the voters without action by the Legislature. In either event only a majority of those voting is required.

1907

The Legislature repeals the 1903 act and enacts a revised procedure that specifically applies to cities as well as the state (*Or. Laws* 1907, Ch. 226). The 1907 act does not repeat the language in the 1903 act, which states that the secretary of state should decide whether or not the petition entitles the parties to have the measure referred to the people. Instead, it provides that if the secretary of state refuses to accept and file any petition, the courts should decide whether the petition is “legally sufficient.”

The 1907 act also provides that the attorney general (instead of the proponents) must prepare the ballot title of not more than 100 words, with an appeal to the Circuit Court to determine if the ballot title is “insufficient or unfair.” The decision of the Circuit Court is to be final. It also provides for a voters’ pamphlet with the proponents and opponents paying the cost of printing their arguments and the state paying the rest, including mailing to each voter. In the case of cities that had not adopted their own procedures, the procedure in this act is made applicable to the cities.

The 1907 act does not state the specific number of signatures required on a petition for a statewide initiative or referendum, but it does specify that signatures amounting to no less than 10 percent of the voters of a city are required to qualify a petition for a referendum on a city ordinance, franchise or resolution.

Also, with respect to an initiative petition for city action, the 1907 act sets up a two-step process. When the petition is filed with the city clerk, the clerk then transmits it to the city council, which may adopt or reject it. If the council rejects it, or takes no action, the clerk then submits it to the voters. The council may also submit a competing ordinance at the same election. If the council adopts the ordinance as originally submitted, it is still subject to a referendum. (This procedure is similar to that now in use in the state of Washington.)

1908

Voters adopt by initiative a comprehensive corrupt practices act which, among other things, limits the expenditures of candidates (*Or. Laws* 1909, Ch. 3). While the act does not impose limits on campaign expenditures for initiatives or referendums, it does prohibit paying any voter for giving or refraining to give his vote on any measure.

1909

The Legislature extends the referendum power to the people of any county or district (other than municipal corporations, which are covered by the 1907 act) with respect to any act of the Legislature that relates only to such county or district (*Or. Laws* 1909, Ch. 210). Ten years later this act is extended to “all local laws for their county” (*Or. Laws* 1919, Ch. 251).

1913

The Legislature provides that the ballot title, prepared by the attorney general, should contain: (1) the names of the persons or organizations under

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whose authority the measure is initiated or referred, (2) a short title not exceeding 10 words, and (3) a general title expressing its purpose in not more than 100 words. It retains the procedure for appeal to the Circuit Court, whose decision is final (*Or. Laws* 1913, Ch. 36). It also revises in minor respects the petitioning procedure and voters' pamphlets (*Or. Laws* 1913, Ch. 359). Additional minor changes are made in 1917 (*Or. Laws* 1917, Ch. 176).

1917

Voters approve a constitutional amendment requiring that city, town and state officers all be elected at the same time (*Or. Laws* 1919, p. 6); and, to implement that amendment, the 1919 Legislature adopts a comprehensive set of election laws, including provisions regarding initiative and referendum measures (*Or. Laws* 1919, Ch. 283). Insofar as is pertinent here, it makes no substantial change in the initiative or referendum procedure.

1921

Voters approve a constitutional amendment permitting the governor to veto any provision in a bill declaring an emergency, without affecting any other provision of such bill. The significance of that in this connection is that legislative enactments take effect 90 days after the end of the session, unless an emergency is declared, and a referendum petition can only be filed with respect to an act that does not become effective earlier than 90 days after the end of the session (i.e. that does not have an emergency clause). A referendum petition must be filed within 90 days

after the end of the session (i.e. before a non-emergency act takes effect). By vetoing an emergency clause, the governor can permit a referendum that would otherwise not be allowed.

1923

The Legislature defines certain offenses in connection with the initiative, referendum or recall, and makes them punishable as felonies (*Or. Laws* 1923, Ch. 247).

1927

The Legislature modifies the procedure for the initiative and referendum by eliminating the requirement that the ballot title contain the name(s) of the sponsoring person or organization; by providing for an additional ballot title of not more than 25 words whenever voting machines are used; and by providing an appeal from the attorney general to the Supreme Court (instead of to the Circuit Court) (*Or. Laws* 1927, Ch. 255).

1933

The Legislature requires the sponsors of an initiative or referendum petition to file a statement of contributions and expenditures at the time of filing their initial petition for a ballot title; a similar statement at the time of filing their completed petition; and a similar statement between 5 and 10 days before the election, including the maximum amounts they intend to expend before the election (*Or. Laws* 1933, Ch. 436).

The 1935 Legislature repeals the requirements for filing the statement of contributions and expenditures with the initial petition and before the election, leaving only the requirement

to file a financial statement with the completed petition (*Or. Laws* 1935, Ch. 160).

The 1933 act also provides that if no negative argument is submitted for the voters' pamphlet, the attorney general should file an impartial statement of the purpose and probable effect of the measure, to be printed in the pamphlet at state expense. This portion is repealed in 1935 (*Or. Laws* 1935, Ch. 160).

1935

The Legislature revises the provisions regarding the voters' pamphlet (*Or. Laws* 1935, Ch. 117); and these are again revised by the 1941 Legislature (*Or. Laws* 1941, Ch. 409).

The Legislature also, for the first time, prohibits paying for securing signatures on any petition for an initiative, referendum or recall (*Or. Laws* 1935, Ch. 41). This is continued in successive codifications until it is repealed in 1983 (*Or. Laws* 1983, Ch. 756, Sec. 13), forecasting the decision of the U.S. Supreme Court in *Meyer v. Grant*, 486 U.S. 414 (1988), which holds that a Colorado statute that prohibits paying circulators of initiative petitions is an unconstitutional infringement on freedom of speech.

1937

The Legislature amends the provisions for numbering local measures in respects not pertinent here (*Or. Laws* 1937, Ch. 140).

1945

The Legislature makes minor changes in the procedure for an appeal to the

courts from a refusal by the secretary of state to accept and file a petition for an initiative or referendum (*Or. Laws* 1945, Ch. 85).

1949

The Legislature makes minor changes in the printing of ballots (*Or. Laws* 1949, Ch. 55).

1951

The Legislature enacts the first requirement for a financial impact statement, providing that whenever an initiative or referendum involves the expenditure of public money by the state or the raising of funds by the state by imposing any tax or incurring any indebtedness, a three-person committee consisting of the secretary of state, the state treasurer and the governor's executive secretary shall estimate the amount of expenditure, tax revenue or indebtedness and interest required if the measure were to be enacted. Any person dissatisfied with the estimate could have it reviewed by the State Tax Commission. Unless the measure involves only administrative expenses not exceeding \$50,000 per year, the estimate shall be printed on the ballot and in the voters' pamphlet (*Or. Laws* 1951, Ch. 290).

The Legislature also provides for an impartial statement explaining the ballot measure, to be published in the voters' pamphlet. The statement is to be prepared by a three-person committee, of whom two are to be appointed by the governor, one from the proponents and one from the opponents, and they pick the third. If the first two fail to agree on the third, the governor appoints that one also (*Or. Laws* 1951, Ch. 546).

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1953

The Legislature passes a number of measures affecting the initiative and referendum. It amends the financial impact statement by including any measure that involves a reduction in state revenues (*Or. Laws* 1953, Ch. 150). It changes the ballot title to include a caption of not more than 6 words, an abbreviated statement of not more than 50 words of the chief purpose of the measure, and a descriptive summary of not more than 150 words expressing its purpose (*Or. Laws* 1953, Ch. 359). It provides for assistance from the Legislative Counsel for preparation of initiative measures (*Or. Laws* 1953, Ch. 492). It changes the numbering system for ballot measures (*Or. Laws* 1953, Ch. 632). And it provides for excluding from the voters' pamphlet certain types of offensive matter (*Or. Laws* 1953, Ch. 647).

The Legislature also proposes a constitutional amendment (SJR 6) that prescribes the number of signatures required on an initiative for a constitutional amendment at not more than 10 percent of the legal voters of the state. The original amendment of 1902 does not distinguish between statutory measures and constitutional amendments, requiring not more than 8 percent for both. The 1953 proposal retains the 8 percent requirement for statutory measures and 5 percent for a referendum petition. It also retains the last vote for Supreme Court justice as the basis for determining the necessary signatures. The proposed amendment is referred to the people and adopted in 1954 (*Or. Laws* 1955, p 5-6).

1957

The Legislature enacts a comprehensive revision of the election laws, and, with respect to the initiative and referendum, it provides for a ballot title of two parts: a caption not exceeding 6 words and an abbreviated statement of the chief purpose in not more than 25 words (thus eliminating the not-over-150 word statement required in 1953) (*Or. Laws* 1957, Ch. 608, sec. 170). The appeal from the attorney general to the Supreme Court is retained (*Id.*, section 171). The provision for a fiscal impact statement is retained, but the responsibility is placed on the secretary of state, with the assistance of the state treasurer, the director of the Department of Finance and Administration and the State Tax Commission (*Id.*, sec. 179). It also provides for a three-person committee to prepare an impartial explanation of the ballot measure, not exceeding 500 words with the secretary of state (instead of the governor) appointing two and they selecting the third (*Id.*, secs. 180-181).

The 1957 revision also clarifies and standardizes the initiative and referendum procedure as applied to counties, municipalities and districts (*Id.*, secs. 82-185). It continues the prohibition against paying for signatures (*Id.*, sec. 188). It continues the provisions for pro and con arguments in the voters' pamphlet (*Id.*, secs. 201-206) and it continues the secretary of state's power to exclude from the voters' pamphlet certain types of offensive material (*Id.*, sec. 204).

1950-1970

During the 1950s and 60s there are various proposals for a completely revised constitution for the state, principally for the purpose of eliminating provisions that were thought to be more of a statutory than constitutional nature. To accomplish this, the 1959 Legislature adopts HJR 5, which proposes a constitutional amendment permitting a revision (in addition to the previous method of amendment) by a two-thirds majority of each house and approval by a majority of the votes cast. HJR 5 is referred to the people and adopted, and it becomes effective December 6, 1960.

1961

The 51st Legislative Assembly passes SJR 20, providing for appointment of a Commission for Constitutional Revision; that commission reports to the 52nd Legislature on December 15, 1962, recommending a revised constitution. The proposed revision is embodied in HJR 1, which is introduced on January 18, 1963. It passes the House on May 6, 1963, but fails in the Senate on May 28, 1963 (*S and H Jnl.* pp. 173, 355, 872-3).

The Commission's proposal requires an initiative petition for a statute to be signed by a number equal to 6 percent of the votes cast for governor and for a constitutional amendment 8 percent of the votes cast for governor, whereas the former requirement for a statute is not more than 8 percent of the votes cast for justice of the Supreme Court, and for a constitutional amendment not more than 10 percent of the votes cast for justice of the Supreme Court. With respect to a referendum on a legislative act (not a constitutional

amendment, because that goes to the voters anyway), the required number of signatures on a petition is changed from 5 percent of the votes for a Supreme Court justice to 4 percent of the votes cast for governor. Otherwise, the changes in language with respect to initiative and referendum are largely cosmetic.

The commission explains its recommendation on the grounds that (1) the vote for governor is generally a more stable base than the vote for Supreme Court justice, and (2) under their proposed revision Supreme Court justices would be appointed and periodically confirmed, instead of elected by the people. The new percentages are intended to be mathematically equivalent to a small increase in the minimum numbers required.

1963

HJR 1 is introduced, containing the initiative and referendum provisions as recommended by the Commission for Constitutional Revision, but before final action it is amended so that an initiative petition for a constitutional amendment requires signatures equal to 10 percent of the number of votes cast for governor, instead of 8 percent as the commission had proposed. It is still defeated.

Following the defeat of the proposed constitutional revision an attempt is made to submit the same revision to the voters by initiative petition. The attorney general rules that the initiative power reserved to the people to amend the constitution does not permit submission of a revised constitution, as distinct from an amendment. Acting on that advice, the

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secretary of state refuses to furnish a ballot title for the measure. Two former governors, Hon. Robert D. Holmes and Hon. Charles A. Sprague, commence a mandamus proceeding to compel the secretary of state to furnish a ballot title, but the Oregon Supreme Court upholds the attorney general's position in *Holmes v. Appling*, 237 Or. 546, 392 P.2d 636 (1964).

1965

The proposed revision, with some changes (not involving the initiative), is proposed by HJR 1 and SJR 11, but neither passes. The interest in revision continues, however, and a City Club committee issues a report dated February 10, 1967 (Vol. 47, No. 37) recommending that the 1967 Legislature adopt and refer to the people a substantially revised constitution. The report is adopted by City Club on February 17, 1967. A supplemental City Club report is issued on May 5, 1967. Since the latter report is for information only, no action by the members is required.

1967

Separate versions of a constitutional revision are introduced in both the House and Senate, but neither of them pass. However, by a separate enactment, HJR 16 passes, which changes the signature requirements for a petition for a constitutional amendment to 8 percent of the votes for governor (instead of 10 percent of the votes for Supreme Court justice); for a statute to 6 percent of the votes for governor (instead of 8 percent of the votes for Supreme Court justice); and for a referendum to 4 percent of the votes for governor (instead of 5 percent of the votes for Supreme

Court justice). HJR 16 is referred to the people and adopted at a special election on May 28, 1968.

1969

Attempts at complete constitutional revision continue, and the Legislature refers SJR 23, which is rejected by voters. It however would have continued the 8 percent/6 percent/4 percent signature requirements adopted by the voters in 1968.

1979

The Legislature substantially revises the election laws (*Or. Laws* 1979, Ch. 190), but the changes with respect to initiative and referendum are largely cosmetic (*Id.*, secs. 140-171, 188-200). However, the Legislature alters the ballot title requirements to include (a) a caption of not more than 10 words, (b) a question of not more than 20 words phrased so that an affirmative response to the question corresponds to an affirmative vote on the measure and (c) a concise and impartial statement of the chief purpose of the measure in not more than 75 words (*Or. Laws* 1979, Ch. 675). It also introduces a standard of minimum readability (*Id.*, sec 3). Another new requirement is a statement of sponsorship, signed by at least 25 electors, to be filed with the prospective petition (*Or. Laws* 1979, Ch. 345).

The Legislature also permits an amendment of a proposed initiative measure, without filing another prospective petition, if the amendment does not change the substance of the measure, does not require a new ballot title, and if no petition is filed seeking a different title (*Or. Laws* 1979, Ch. 345).

While the 1979 Legislature continues the prohibition against paying for signatures on a petition for initiative, referendum or recall (*Or. Laws* 1979, Ch. 190, sec. 377), and the prohibition is repeated in 1981 (*Or. Laws* 1981, Ch. 234, sec. 18), the prohibition is repealed in 1983 (*Or. Laws* 1983, Ch. 756, sec. 13).

1983

In lieu of the prohibition, the 1983 act requires a statement to be filed with the prospective petition showing whether paid circulators will be used, and another statement showing any change in whether or not paid circulators were in fact used (*Or. Laws* 1983, Ch. 756, sec. 9). In 1992, a special session of the Legislature adopts the requirement that if the petition circulator is being paid, a statement to that effect shall be on each signature page (*Or. Laws* 1992, Spec. Sess., Ch. 1). The present law (*Or. Rev. Stat.* 250.045) requires that each signature sheet contain a statement if any circulator is being paid.

1985

The Legislature passes SJR 27, which proposes a constitutional amendment giving the Legislature power to provide by law for the manner in which the secretary of state determines whether a petition contains the required number of signatures. The amendment is adopted by the people in 1986, and a statistical sampling is authorized by *Or. Laws* 1989, Ch. 68, sec. 6.

1987

The Legislature amends the requirements for a ballot title to (1) a caption of not more than 10 words that reasonably identifies the subject

of the measure, (2) a question of not more than 20 words stating the chief purpose of the measure so that an affirmative response to the question corresponds to an affirmative vote on the measure and (3) a statement of not more than 85 words (instead of 75) summarizing the measure and its major effect (*Or. Laws* 1987, Ch. 556, Ch. 875).

1991

The Legislature amends the fiscal impact requirement by raising from \$50,000 to \$100,000 the threshold below which the fiscal estimate does not have to be published in the voters' pamphlet or printed on the ballot (*Or. Laws* 1991, Ch. 971).

1993

The Legislature makes another wholesale revision of the election laws, which, with respect to a statewide initiative or referendum, requires the chief petitioner to appoint a treasurer, file a statement of organization, a designation of the measure and a statement of how the petitioners intend to solicit funds with a supplemental statement showing the actual contributions and expenditures (*Or. Laws* 1993, Ch. 493, Sec. 70). It also revises the requirements for the voters' pamphlet, and provides for a public hearing on the fiscal impact estimate (*Or. Laws* 1993, Ch. 811).

1994

Voters enact Ballot Measure 9 (*Or. Laws* 1995, Ch. 1), a statutory enactment primarily focused on limiting campaign contributions and providing for voluntary campaign expenditure limitations. The enactment includes one provision

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that provides tax credits for certain contributions to ballot measure campaigns (*Or. Laws* 1995, Ch. 1, sec. 19). In *Vannatta v. Kiesling*, 324 Or 514 (1997), the Oregon Supreme Court holds that the campaign contribution limits are unconstitutional violations of free speech, but the court does not invalidate the tax credit provision.

1995

The Legislature refers a bill, later known as Measure 24, which would have amended the Oregon Constitution to require a minimum number of signatures on an initiative petition from each of Oregon's five congressional districts (SJR 4). Voters reject Measure 24 in 1996 by a wide margin.

The Legislature allows chief petitioners to withdraw a petition prior to its submission for signature verification; and it requires each sheet of signatures on a prospective petition and on a circulated petition to be attached to a full and correct copy of the measure. It maintains the requirement that if circulators are being paid, a statement to that effect must appear on each signature sheet (*Or. Laws* 1995, Ch. 607, secs. 25, 26).

The Legislature also prohibits paying anyone for signing or refraining from signing a petition, and it prohibits selling or purchasing signature sheets (*Or. Laws* 1995, Ch. 646). (Note that this applies to paying for signatures, and not to paying solicitors for obtaining signatures.)

The Legislature also changes ballot title requirements (*Or. Laws* 1995, Ch. 534).

1996

Voters pass Measure 47, which amends the constitution to require a "double majority" for certain property tax measures. The measure requires that certain property tax measures be passed by a 50 percent-plus majority in an election with at least a 50 percent turnout if the election occurs in a non-even year (essentially a non-presidential or congressional election year). The same measure, with some minor changes to other property tax provisions, passes again as Measure 50 in 1997. A later attempt to overturn the double majority requirement (Measure 53 in 1998) fails.

1997

The Legislature makes several noteworthy changes to the statewide initiative and referendum process. It requires that paid signature-gatherers include a statement that they are being paid for signatures (*Or. Laws* 1997, Ch. 846, sec. 1). In the same bill, the Legislature also requires that signature-gatherers carry one complete copy of the measure and provide the measure upon request (*Id.*). Finally, the Legislature makes the Marion County Circuit Court the exclusive jurisdiction for constitutional challenges of state measures and provides for direct review by the Oregon Supreme Court (*Or. Laws* 1997, Ch. 794, Secs. 2-3).

In *Huddleston v. Sawyer*, 324 Or. 597 (1997), cert. denied, 522 U.S. 994 (1997), the Oregon Supreme Court considers a challenge to Ballot Measure 11. This measure is a statutory enactment that provides certain minimum sentencing requirements for various crimes. The defendant argues that the initiative process by which

Measure 11 was enacted is a violation of the U.S. Constitution's guarantee of a republican form of government to the states. Citing law from both the U.S. Supreme Court and earlier Oregon Supreme Court opinions, the court holds that the guarantee clause challenge was not a "justiciable" issue that the court could address. This issue is more fully addressed in the body of this report.

1998

In *Armatta v. Kitzhaber*, 327 Or. 250, (1998), the Oregon Supreme Court considers a state constitutional challenge to Measure 40. This measure was put forth as a crime victim bill of rights that amended the state constitution. The court holds that the measure, which indirectly amended several sections of the Oregon Constitution, violates Article XVII, section 1, which provides that two or more amendments must be voted on separately (the "separate vote" requirement). After *Armatta*, as described in the text, it becomes much more difficult to amend the Oregon Constitution through initiative or referendum.

Voters pass Measure 63. The measure amends the constitution to require that any initiative that proposes to increase any voting requirement above a majority be approved by the same percentage of voters specified in the proposal (e.g., a proposal to require a 2/3 majority requirement for all new tax measures must itself pass by a 2/3 majority).

1999

The Legislature makes several minor technical and procedural changes to the initiative and referendum process. The principal amendments (1) increase the minimum number of words for the ballot title's caption, the "yes/no" explanatory statements and summary (*Or. Laws* 1999, Ch. 793, sec. 1); (2) give further direction to the secretary of state on the statistical sampling for verifying signatures (*Or. Laws* 1999, Ch. 1021, sec. 1); and (3) give directions on the timing of financial impact statements and administrative staff support for the preparation of such statements (*Or. Laws* 1999, Ch. 318, sec. 19; Ch. 844, sec. 1).

The Oregon Court of Appeals, in *Canvasser Servs. Inc. v. Employment Dept.*, 163 Or. App. 270 (1999), *rev. denied*, 329 Or. 650 (2000), affirms the state employment department's determination that Oregon law requires petitioners to pay signature gatherers as employees rather than as independent contractors. This decision results in petitioners having to provide certain benefits to signature gatherers at some increased expense to petitioners.

The Legislature requires that inactive voters, defined as ones who had not voted in five years, be taken off voter rolls (*Or. Laws*, Ch. 824, sec. 2). In 2000, the Oregon Elections Division directs county clerks not to count initiative signatures from such "inactive voters" because only current voters or "electors" may sign initiatives. The Election Division's position is upheld by the Multnomah County Circuit Court in *McIntire v. Bradbury*, A0006-06252 (Mult. County Cir. Ct. 2000).

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2000

In *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38 (2000), the Oregon Supreme Court reverses its own 1993 decision and holds that private commercial retailers, such as Fred Meyer, can ban signature gatherers from their property and seek to have them arrested for trespass without violating free speech rights under the Oregon Constitution.

Also in 2000, Oregon voters reject Measure 79, which seeks to increase the number of signatures required to place an amendment to the Oregon Constitution on the ballot. The measure proposes to increase the number from 8 percent of the voters in the last gubernatorial election to 12 percent.

2001

The Legislature makes minor procedural changes to the statewide initiative and referendum process. Among other things, the Legislature restores the requirement that the proposed petition for an initiative attach a complete copy of the measure to the signature page when being circulated to obtain the initial 25 signatures. (*Or. Laws* 2001, Ch. 964, sec. 4). It also clarifies and extends the timing that the secretary of state has for both receiving public comments and drafting the ballot title (*Or. Laws* 2001, Ch. 802, sec. 1). In addition, it clarifies the process for the Oregon Supreme Court either to redraft ballot titles itself or direct the secretary of state to do so (*Id.* at sec. 2). The Legislature also prohibits persons from knowingly obtaining signatures from persons not qualified to sign. It also makes the chief petitioner

responsible if that petitioner knows that a signature-gatherer knowingly obtained improper signatures. Punishment is up to five years in prison.

2002

Oregon voters overwhelmingly (75 percent to 25 percent) pass Measure 26, the Initiative Integrity Act, which prohibits paying signature gatherers on a per-signature basis. The measure amends the state constitution to make it “unlawful to pay or receive money or other thing of value based on the number of signatures obtained on an initiative or referendum petition” (*Or. Const.* Art. IV, sec. 1b). The Oregon secretary of state interprets this measure to ban payments per signature, but not to prevent termination of unproductive gatherers or to prohibit minimum signature requirements or productivity bonuses (*Or. Admin. R.* 165-014-0260, 2003). As described on page 58, the U.S. Ninth Circuit Court of Appeals, in *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006), later upholds a constitutional challenge to Measure 26.

2005

The Legislature makes a significant change that requires political committees that support or oppose initiatives or referenda to file electronic lists of campaign contributions and expenditures within seven days. The secretary of state is then required to post the information on a public Web site (*Or. Laws* 2005, Ch. 809, sec. 14). This process, which begins in 2007, provides the public easy and quick access to determine who is financing initiative campaigns.

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The Legislature also makes several changes concerning financial impact statements. The Legislature adds a provision that the committee drafting the financial impact statement shall also determine whether there are significant indirect costs of passing a measure (in addition to any direct costs) and, if so, provide an estimate of that indirect cost in the financial impact statement (*Or. Laws* 2005, Ch. 633, sec. 1). The committee may also estimate, under certain circumstances, the direct cost of not enacting a particular measure (*Id.*). The committee must also include a statement of any recurring annual costs imposed by an enacted measure (*Id.*).

2006

In *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006), the Ninth Circuit Court of Appeals rules that Ballot Measure 26's ban on paying signature gatherers by the signature does not violate the First Amendment's protection of free speech.

2007

The Legislature makes significant changes and also clarifies some perceived loopholes in the financial disclosure laws by passing the Initiative Reform and Modernization Act (HB 2082). The Legislature requires that petitioners obtain 1,000 signatures, up from 25 signatures, to obtain a ballot title and to approve the petition for additional signature-gathering necessary to qualify the measure for the ballot. It also moves up the timing for the filing of disclosure of contribution and expenditure reports so that the first disclosures occur earlier in the signature-gathering period and well before the election and continue weekly up to the election date. The new law also requires training and picture identification for signature gatherers and prohibits certain convicted forgers and identity thieves from obtaining signatures. The law also provides for standardized electronic signature forms that allow campaigns to obtain petition signatures over the Internet.



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APPENDIX D: RECOMMENDATIONS OF THE PUBLIC COMMISSION ON THE OREGON LEGISLATURE, 2006

1. Require citizen initiative or referendum chief petitioner(s) to be registered voters in Oregon.
2. Require that for each measure, a statement appear in the voters' pamphlet that lists the number of signatures gathered in each of Oregon's 36 counties, what percentage of signatures gathered are from each county, and what percentage of eligible voters in each county signed the petition.
3. Require a notarized statement indicating the identities and physical addresses of the top five contributors to a ballot measure signature-gathering effort to be disclosed in the voters' pamphlet.
4. Direct the secretary of state to publicize and explain the process for filing complaints about the initiative process and then insist that existing penalties for voters' pamphlet or other violations be imposed.
5. Establish a regular process for considering and possibly taking legislative action on initiative proposals.
6. Establish a process for providing timely advisory opinions on whether initiative proposals meet eligibility requirements.
7. Conduct a rigorous review of fraudulent or other irregular means to gather signatures.

APPENDIX E: OREGON: STATEWIDE INITIATIVES CERTIFIED FOR BALLOT, 1904-2006

Decade	Total	Constitutional Amendments	Statutes
1904-1909 ¹	23	11	12
1910-1919	82	32	50
1920-1929	28	11	17
1930-1939	25	13	12
1940-1949	14	5	9
1950-1959	14	7	7
1960-1969	7	3	4
1970-1979	18	7	11
1980-1989	31	10	21
1990-1999 ²	56	31	25
2000-2006 ^{1 3}	41	21	20
Total	339	151	188

¹ Fewer than 10 years

² In 1990, five "advisory" initiatives (Measures 5A through 5E) and one not-categorized measure (Measure 3) were on the ballot. In 1998, the tally for Measure 61 was prevented by court order.

³ In 2002, Measure 12 was removed from the ballot.

Source: Oregon Blue Book

APPENDIX F: CALIFORNIA: APPROVAL AND REJECTION OF INITIATIVES, 1912-2006

(Note: California allows statutory and constitutional initiatives.)

Decade	Qualified for Ballot	Approved by Voters	Rejected by Voters
1912-1919 ¹	31	8	23
1920-1929	34	10	24
1930-1939 ²	38	10	27
1940-1949	20	7	13
1950-1959	11	1	10
1960-1969	9	3	6
1970-1979	25	8	17
1980-1989 ³	54	24	27
1990-1999 ⁴	61	28	43
2000-2006 ¹	46	13	33

¹ Fewer than 10 years

² One indirect initiative was adopted by the California Legislature and is not included in either the "Approved" or "Rejected" totals.

³ Data lists three more initiatives qualified for ballot than were reported voted on (one in 1980; two in 1983).

⁴ One initiative that qualified was removed from the ballot by court order.

Source: California Secretary of State

APPENDIX G: WASHINGTON: BALLOT MEASURES, 1914-2006

(Note: Washington allows only statutory initiatives)

Decade	Total	Initiatives Submitted Directly to People	Initiatives Submitted First to the Legislature
1914-1919 ¹	9	8	1
1920-1929	6	5	1
1930-1939	15	15	0
1940-1949	10	9	1
1950-1959	14	12	2
1960-1969	12	11	1
1970-1979	20	14	6
1980-1989	14	10	4
1990-1999	29	23	6
2000-2006 ¹	24	21	3

¹ Fewer than 10 years

Source: Washington Secretary of State

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APPENDIX H: CONCLUSIONS AND RECOMMENDATIONS FROM CITY CLUB'S 1996 REPORT ON THE INITIATIVE AND REFERENDUM IN OREGON

Full report available at www.pdxcityclub.org

Conclusions

1. The Legislature has been, is and should continue to be the principal legislative mechanism of Oregon.
2. The initiative has been, is and should continue to be an important alternative in the legislative process.
3. The initiative process as applied to proposed constitutional amendments and statutes should be modified in the respects hereinafter recommended.
4. Amendments to the Oregon Constitution whether proposed by the initiative or by the Legislature should relate only to the structure, powers and limitations of government and the rights of the people with respect to their government. Initiative measures of less fundamental nature should be enacted as statutes. Initiated statutes that dedicate revenue, or which make or require appropriations in excess of \$500,000 per annum, or higher amount prescribed by the Legislature, should be limited to those measures which provide new revenues for such dedication or appropriation.
5. The process of amending the Oregon Constitution should be substantially more difficult than adopting, repealing or amending a statute.
6. Amendments to the Oregon Constitution, whether proposed by initiative or legislative referendum, should require the approval of more than a bare majority of those who vote on the amendment to insure that a change in Oregon's fundamental law is the considered choice of the people.
7. The initiative process should be integrated with the legislative process to allow consideration and study of the initiated measure in the legislative hearing process before constitutional amendments or statutes proceed to the general election ballot.
8. Campaign contributions and expenditures related to initiative measures and legislative referenda should be subject to the maximum disclosure requirement allowed by the Oregon and United States Constitutions.

Recommendations: First Priority

1. Amend the Oregon Constitution to require that initiated constitutional amendments relate only to the structure, organization and powers of government, and the rights of the people with respect to their government; and to provide further that the initiative power to amend the constitution shall not be used to dedicate revenue or to make or repeal appropriations, or to require state expenditures in excess of \$500,000 per annum or such higher limit as the Legislature shall provide by law.
2. Amend the Oregon Constitution to provide that an initiated constitutional amendment which qualifies for the ballot shall be referred to the Legislature at its next regular session. The Legislature shall consider the initiated proposed amendment before a standing committee of each house, or a joint committee of both houses. The Legislature need not take action upon the initiated proposed amendment, but may refer a proposed alternative amendment, identified as such, with the initiated measure to the people at the next general election. The secretary of state shall place the initiated amendment on the ballot at the next general election unless the chief petitioners request in writing that it be removed from the ballot. If an alternative proposed amendment is referred along with the initiated amendment, the proposed amendment which receives at least three-fifths and the greater number of votes shall be adopted.
3. Amend the Oregon Constitution to provide that approval of constitutional amendments initiated by the people or referred to them by the Legislature shall require a three-fifths majority of those voting upon the amendment.

Recommendations: Second Priority

1. Amend the Oregon Constitution to provide that the initiative power to enact statutes shall not be used to dedicate revenue, or to make or repeal appropriations, or to require state expenditures in excess of \$500,000 per annum or such higher limit as the Legislature shall provide by law, other than the dedication or appropriation of new revenues created and provided by the initiated statute.
2. Amend the Oregon Constitution to provide that an initiated proposed statute which qualifies for the ballot shall be referred to the Legislature at its next regular session. The Legislature shall consider the proposed statute before a standing committee of each house, or a joint committee of both houses. The Legislature need not take action upon the proposed statute, but may enact the initiated proposed statute, or may refer a proposed alternative statute, identified as such, to the people at the next general election. If the initiated proposed statute is not enacted by the Legislature, or does not become law, the secretary of state shall place the initiated proposed statute on the next general election ballot unless the

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chief petitioners request in writing that it be withdrawn within thirty-five days (Saturdays and Sundays excepted) following general adjournment of the Legislature. If an alternative proposed statute is referred along with the initiated proposed statute, the proposed statute which receives a majority and the greater number of votes shall be enacted.

Subsidiary Recommendations to the Legislature

1. Provide that the attorney general shall assign the same ballot title to essentially the same measures.
2. Provide that chief petitioners of a proposed amendment or statute shall submit a copy of the proposed petition to legislative counsel for technical review and non-binding advice before filing the petition with the secretary of state.
3. Provide that the scope of the financial impact statement required by *Or. Rev. Stat.* 250.125 be expanded to express the direct impact of a proposed measure as a percentage of the estimated general fund in subsequent biennia insofar as possible.
4. Provide that the secretary of state, in addition to the financial impact statement provided for each separate ballot measure, shall prepare a general statement in the Voters' Pamphlet at the head of the ballot measures listing the estimated financial impact of each ballot measure upon the general fund and the combined effect if all were to be approved.
5. Provide that initiated and referred constitutional amendments and statutes be clearly identified as constitutional amendments and statutes and be grouped separately in the Voters' Pamphlet and on the ballot.
6. Establish a constitutional review commission to consider whether a partial or entire revision is desirable, whether provisions essentially statutory in nature should be changed from constitutional to statutory form, and to make recommendations on revision to the Legislature.

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