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PRESENTATION: THE PARADOXES AND POLITICS OF CITIZEN INITIATIVES *

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SUMMARY:

... The initiative and referendum, born in the Populist and Progressive eras, are here to stay. ... Not only do citizens in initiative states resist almost every measure that would seriously modify or dilute the initiative process, but polls in the mid-1990s tell us that between two-thirds to three-quarters of American voters favor allowing national issues to appear on ballots across the country, and favor a national referendum system. ... Special-interest groups are heavily involved in initiative politics. ... Ballot issues are often complex, and most voters are not motivated to study and debate the merits of most ballot issues. ... And if citizens have told pollsters they wish they were better informed than they are when they vote on ballot issues, nearly 60% of voters in 1988 also told a Los Angeles Times survey: "Sometimes I vote for a candidate (in state races) without really knowing enough about him or her." ... We need to recall, too, that citizen-initiative politics brought us women's suffrage, abolition of the poll tax, establishment of the eight-hour work day, open meeting laws, campaign finance and ethic laws, voter registration reforms; and they have strengthened the rights of crime victims - to mention just a few laudable measures that legislators sometime were slow to "get." ...

TEXT:

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Congratulations to the leadership of the Willamette University Law Review for their timely sponsorship of this much-needed symposium.

This is an appropriate location for these deliberations, for Oregonians have debated citizen initiatives for well over a hundred years. This was the third state to adopt citizen initiatives and one of the pace-setting states in putting them to use (or misuse, depending on your perspective).

It was here in this state that William S. U'Ren, a blacksmith, spiritualist, religious mystic, nutritionist, and, alas, an attorney as well, became one of the most colorful advocate - activists crusading for the adoption of direct democracy procedures. He helped form this state's Direct Legislative League in the 1880s and 1890s that brought together an alliance of single-tax advocates, Grange members, the Farmer's Alliance, the Knights of Labor, and Portland's Federated Trades movement.

After several years of zealous pamphleteering, lobbying, and political horse-trading, U'Ren and his colleagues won approval of the state legislature in 1899

and 1901 (as required by the state Constitution) and then Oregon voters approved it by an impressive eleven-to-one margin in 1902.

The initiative and referendum, born in the Populist and [*734] Progressive eras, are here to stay. They are used in about two dozen states and in hundreds of communities across the United States. These procedures may be flawed tools for making public policy, yet Americans view them not as any radical effort to subvert or alter the basic republican character of American government, but rather as a means to provide an occasional alternative voice of the people. The initiative and referendum are also a safety valve when elected officials become overly entrenched or overly beholden to narrow special interests, as they were in this state a hundred years ago when U'Ren devoted nearly a decade to getting the citizen initiative process adopted.

Citizen initiatives unquestionably place a burden on voters, and several noteworthy **paradoxes** have characterized their use over the past century since they were first adopted in 1898 in South Dakota. Consider the following:

Paradoxes of Citizen Initiatives

Paradox #1. Voters in states where initiatives are often on the ballot believe there are too many issues on the ballot and they worry about their ability to vote intelligently on them - and yet voters insist that they should have an occasional chance to vote on issues and have this procedure as a safety valve check on their legislators and governor. Citizens, in effect, agree with what Woodrow Wilson said in 1911: "[The initiative] is the safeguard of politics. It takes power from the boss and places it in the hands of the people."

Not only do citizens in initiative states resist almost every measure that would seriously modify or dilute the initiative process, but polls in the mid-1990s tell us that between two-thirds to three-quarters of American voters favor allowing national issues to appear on ballots across the country, and favor a national referendum system. They are joined in this sentiment by Jack Kemp, Richard Gephardt, and Ralph Nader, among others. Eighty-four percent in one national survey in 1992 favored giving citizens in every state the right to recall - which is allowed now in only 16 states.

Paradox #2. Citizens' initiatives were intended to reduce the role of special interests and liberate the voice of the people and the average citizen. This was pretty idealistic and in many [*735] ways a vain undertaking. Moreover, the citizen initiative process was advocated by special interests who had heretofore been ignored by political insiders.

Citizen initiatives plainly have not removed or minimized special interests from the legislative arena. Special-interest groups are heavily involved in initiative politics. Indeed, many of the special interests often develop proposals in private and, with questionable spending and signature campaigns, set out to confuse, rather than educate, the voters.

U'Ren, Hiram Johnson, and Woodrow Wilson would be appalled by how some of today's single-interest groups in practice have stirred racial, ethnic, religious, and class antagonisms, rather than rallied the citizens around unifying progressive policies.

Paradox #3. State legislatures are in better shape today than in any previous era. They are better staffed, better educated, and have a plethora of conflict of interest and ethical standard laws. Campaign finance reform and questionable term limit provisions also are in place in a large number of states. And all kinds of direct democracy and other accountability measures are in place in a great number of states.

Still, Americans are just as distrustful today as they were when the Southern Pacific Railroad essentially controlled the California legislature. Most of us would have joined Mr. U'Ren and Woodrow Wilson in disgust at the state of fairness in legislatures at the turn of the last century. "Bills that the machine and its backers do not desire are smothered in committee; measures which they do desire are brought out and hurried through their passage," said Wilson at the time. "It happens again and again that great groups of such bills are rushed through in the hurried hours that mark the close of the legislative sessions, when everyone is withheld from vigilance by fatigue and when it is possible to do secret things."

Today, a great many voters are still not all that trustful of legislators - both at the state and national levels. Thus the groundswell of support for term limits. Thus the widespread support for trying to reduce the impact of money in our often-embarrassing money-chasing campaigns at state and federal levels.

Citizens doubtless believe that their legislators are still too cozy with lobbyists for major economic interests (tobacco, insur [*736] ance, trial lawyers, teacher unions, banks, and similar interests quickly come to mind). Citizens today appreciate the reality that money buys clout and that clout is exercised in

most legislative corridors - especially in the waning days of a legislative session when indeed, just as in Wilson's days, most legislation is rejected or approved.

Large legislative districts, the importance of money, and the way state and national legislators have crafted safe-districts and discouraged competition have all invited distance and fostered frustration. All of these have reinforced citizen support for direct democracy tools and term limits.

Paradox #4. Citizen initiative voting is clearly a difficult and taxing process for most voters. Ballot issues are often complex, and most voters are not motivated to study and debate the merits of most ballot issues. Political scientist David Magleby decries the problem of voter confusion. Indeed, voter confusion, he says, goes beyond uncertainty about the best policy option. In initiative campaigns voters typically decide their vote later in the campaign, and the most prevalent source of information is often highly emotional television advertising. On some propositions as many as a third state they neither saw nor heard anything about the measure before entering the voting booth.

On the other hand, American voters, as the late V.O. Key aptly noted, are not fools. All kinds of issues get talked about and countless petitions are circulated. But few get on the ballot. And the vast majority of citizen-initiated ballot measures get rejected. When in doubt, voters vote no - as they have on almost every issue put to them in the state of Washington in recent years. Voters are, to be sure, not as liberal, tolerant, and progressive as most law professors and elite academic scholars are, but they are generally as thoughtful as state officials such as California's Pete Wilson and Ronald Reagan, Washington's Dixie Lee Ray, Arizona's Evan Mecham, or Arizona's erstwhile governor Fife Symington (who is just about to begin a new term in another political institution).

The record in state after state suggests that most voters who vote on ballot measures do grasp the general meaning and importance of the issues on which they are asked to vote. Over the long haul, in fact, voters are unlikely to do anything more foolish than most legislators or governors are likely to do.

[*737] Critics of direct legislation regularly imply that voters are not bright enough or informed enough, and they would rather leave every decision to elected officials. These folks quote George Will approvingly: "The people are not supposed to govern; they are supposed to decide who will decide." But these critics frequently have a romanticized view of officeholders as extremely well-informed, highly motivated to deliberate on every issue, and completely independent, virtuous, and rational. Many legislators may be like this, but many are pretty representative and, like the rest of us, less virtuous, less informed, and less expert than the idealized mythical textbook legislator.

Indeed, many critics of citizen initiatives view the people as almost a "mob" unworthy of being trusted to make complex pol-icy decisions. Yet, paradoxically, the voters who vote on ballots are the same folks who elect legislators and governors. How is it they can choose between good and bad candidates yet cannot choose between good and bad laws?

And if citizens have told pollsters they wish they were better informed than they are when they vote on ballot issues, nearly 60% of voters in 1988 also told a Los Angeles Times survey: "Sometimes I vote for a candidate (in state races) without really knowing enough about him or her." Thus, most voters - and probably most of us here today - have cast a ballot in legislative races when we (a) know little or nothing about the candidates and (b) had to vote on the basis of little or even confused information.

Furthermore, UCLA scholar Christopher Blunt, in an exhaustive study of citizen ballot voting in Los Angeles County, finds that "voters use clear organizing principles to guide their vote patterns in proposition contests." Blunt adds: "Although recent scholarship has raised questions about the utility and fairness of proposition voting, my own analysis of California ballot patterns demonstrates a great deal of both representativeness and rationality."

Paradox #5. Finally, voters have been wrong on a number of occasions. So too, of course, have legislators been wrong. Legislatures have enacted poll taxes, sexist and racist legislation, and other regrettable measures. Indeed, legislatures spend a fair amount of their time in every legislative session revising and correcting defective legislation they or their colleagues passed just a few sessions earlier.

[*738] We need to recall, too, that citizen-initiative politics brought us women's suffrage, abolition of the poll tax, establishment of the eight-hour work day, open meeting laws, campaign finance and ethic laws, voter registration reforms; and they have strengthened the rights of crime victims - to mention just a few laudable measures that legislators sometime were slow to "get." And here in Oregon, the initiative process led to the enactment of pollution abatement in the Willamette River, legislative reapportionment reforms, the transfer of the major responsibility for funding schools to the state, and, of

course, property tax limitation measures and the "death with dignity" law.

Justice Hans Linde has suggested that many of the contentious issues, especially what we might call rights issues, should not even be allowed to get on the ballot; and he bases his opinion on his reading of the Guaranty Clause of the U.S. Constitution. He raises thoughtful points, and his interpretation and suggestions merit debate.

Yet, it is useful to note that controversial rights issues - such as affirmative action, gay rights matters, the right-to-die debate, "three-strikes and you're out," and related matters do get subject to extensive debate and deliberation. Voter pamphlets help a lot. Extensive media and talk show coverage help. It is also the case that the legislature and other statewide officials can hold hearings and do much more to heighten attention and deliberation about the merits of these kinds of issues.

One of the most disturbing aspects of the growing volume of initiatives in states such as Oregon is the very real problem that political scientist William Luch has discussed - namely that voters voting on ballot initiatives often greatly underestimate the impact their decisions will have on the state's budgeting process. This is a problem that can be addressed in a number of ways and will have to be treated in the reform and regulation of these direct democracy processes. Moreover, both the courts and, in most states, the legislature can usually get involved later on to modify, improve, or amend wrongheaded measures - just as they already do, through judicial review of misguided laws passed at the state or national levels of government.

Concluding Thoughts

The initiative process has most assuredly been an imperfect [*739] addition to our already imperfect legislative processes. It has not been a cure-all for most social problems, yet it has been an occasional remedy - and generally a moderate remedy for legislative lethargy and the misuse or nonuse of legislative power.

It was long feared that these devices would undermine representative government and somehow dull legislators' sense of responsibility. Little evidence exists for these fears. Legislatures are in better shape than ever. Good people run for state office.

Most legislators dislike direct democracy and are sometimes threatened by its potential use. This is not altogether a bad thing. For when popular demands for reasonable change are repeatedly ignored by elected officials, and when legislators or other officials ignore valid interest and criticism, the initiative and referendum (and the recall) can be a means by which the public may protect themselves in the very American tradition of self-government.

In my work on the American presidency, I sometimes like to note that we need a certain amount of Hamiltonian energy to make our complicated Madisonian system of checks and balances and separation of powers work in such a way as to help advance those widely desired Jeffersonian ends of freedom, liberty, and social justice. In like manner, our representative systems at the end of the Twentieth Century may need at least a few additional auxiliary precautions to add to Madison's old list; among these are measures such as the Twenty-Second Amendment and independent counsels at the national level, initiatives, recalls, and publicly financed campaigns at the state level in order for our system to serve the Jeffersonian and Rooseveltian interests of liberty, fairness, and political justice.

The initiative process is, as noted earlier, here to stay. Our debate today is not whether or not to have this process. It is, rather, how to make it work in this cyberspace age at the beginning of a new century. Our challenge is to modify and sensibly regulate the process - and most of the needed changes are obvious. But probably our biggest challenge is how to educate and motivate citizens to take their civic responsibilities seriously. Our schools, families, churches, and media have been inadequate to this challenge. And if there has been a glaring failure in the initiative process, it has been a failure of citizenship and civics. If the initiative process, paradoxically, ever leads to an immobilized and ineffectual government - the precise shortcom [*740] ings Oregon's U'Ren hoped it would correct - it will be a failure of leadership by those who should be civic educators. I agree with Professor Robin Charlow who wrote in his helpful 1994 Cornell Law Review essay that:

If the public is poorly informed, remedies should be aimed at educating the electorate. If drafting is hopelessly inaccessible, it requires plain language proposals. If voter apathy allows a small portion of the public to determine policy through the ballot, invalidate plebiscites unless a certain minimum

number of the electorate votes.