



South Dakota Legislative Research Council

Issue Memorandum 98-10

INITIATIVE AND REFERENDUM

South Dakota in 1898 became the first state in the nation to provide for both the initiative and referendum as means for enacting or nullifying legislation. Both grew out of the populist movement that was a potent influence at that time and out of public frustration with the influence of railroads and other big businesses over the legislatures of that era. They rest on the theory that since the Legislature may not always reflect their views, the people should be able to pass laws they desire and nullify laws they oppose. Today about half the states have adopted these forms of direct legislation.

South Dakota's authority for the initiative and referendum is contained in Section 1 of Article III and Section 1 of Article XXIII of the South Dakota Constitution. (A copy of these sections is contained in Attachment #1.) The statutory provisions which have been passed by the Legislature to implement these sections of the Constitution are found in SDCL chapters 2-1 and 12-13.

General Information

Initiatives come in two different forms, an initiated measure and an initiated constitutional amendment. An initiated measure is a petition to add to, amend, or repeal existing state statutes. Petitions for an initiated measure must be filed with the Secretary of State prior to the first Tuesday in May of a general election year. The petition must have signatures of registered voters equal to five percent (currently 15,581) of the total vote for Governor in the last gubernatorial election

obtained within one year following the filing of the full text of the petition. An initiated constitutional amendment proposes to amend, repeal, or add to provisions of the South Dakota Constitution. The petition must have signatures of registered voters equal to ten percent (currently 31,162) of the vote for Governor in the last gubernatorial election and must be filed with the Secretary of State one year before the general election. The sponsors of any initiated measure or constitutional amendment must submit that text to the director of the Legislative Research Council for a review of its style and form. The director must within fifteen days provide written comments on the measure to the sponsors and the Secretary of State. The comments must be received by the Secretary of State prior to filing the measure's full text. The comments are only recommendations and the sponsors do not have to implement them if they so choose. The full text of any petition must be filed with the Secretary of State prior to circulation for signatures.

Thirty-eight initiatives have been on the statewide ballot since the inception of initiatives. Fifteen of these have passed (39.5% success rate). Since an initiated constitutional amendment has only been authorized since 1972, there have been only eight proposed amendments initiated by the people to date. Two of these initiated amendments will appear on the ballot in 1998. Three of the previous six passed.

A referendum is the process by which a law

passed by the Legislature can be forced to a popular vote where a majority determines whether it will be sustained or nullified. For a law to be referred, a petition containing signatures of registered voters equal to five percent (15,581) of the total vote for Governor in the last gubernatorial election must be filed with the Secretary of State within ninety days of adjournment of the legislative session in which the measure was passed. Measures which are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions cannot be referred. This has generally been construed to mean that emergency bills and revenue measures may not be referred.

Forty-one laws have been referred in the state in the past. Thirty-four of these laws were rejected, for a 82.9% success rate. Two laws have been referred to appear on the ballot in 1998.

History

The movement for the initiative and referendum began back in the late 1880s and early 1890s. At that time railroad construction was not keeping pace with agricultural expansion. Rate discrimination by the railroads and inadequate railroad rolling stock led to bitter feelings between the farmers and the railroads. Farmers, through the Farmer's Alliance, failed in the late 1880s in their attempt to involve farmers and laborers more in the political process. This further enhanced the perception, which also existed at the national level, that the government was controlled by the railroads and other powerful business interests. Consequently, as early as 1889, the Farmer's Alliance and the Knights of Labor began advocating independent party action since their concerns were ignored by both the Republican and Democratic parties and discussion began soon thereafter about direct

legislation in the form of the initiative and the referendum. In 1890, these two groups were instrumental in the formation of the Populist Party in South Dakota, and in 1891 the Populist Party adopted a plank indicating support for a constitutional amendment incorporating the initiative and referendum in the state constitution. The Populist sentiment continued to grow over the next few years, resulting in the 1896 election of a Populist governor, Andrew E. Lee. In the 1897 legislative session, the Legislature passed a joint resolution to put to a vote of the people an amendment to the state constitution providing for an initiative and a referendum. In 1898, the Democratic and Republican parties joined the Populist party in endorsing the initiative and referendum, and the amendment was finally adopted in the 1898 election. (A copy of the section as it read then is contained in Attachment #2.)

Soon thereafter other states adopted the initiative and referendum. Theodore Roosevelt expressed the logic for this widespread desire for the initiative and referendum when he said "The opponents of the initiative and referendum would do well to remember that the movements in favor of the two were largely due to the failure of the representative bodies really to represent the people."

The initiative and referendum were first used in the state in 1908. That year one initiative and three referred laws were on the ballot. The initiative failed in the general election and the three referred laws were approved.

An initiative was not approved by the voters until 1912 and that initiative was later repealed by the Legislature. The first proposed change to the initiative and referendum to be considered by the people occurred in 1914. That year the people overwhelmingly rejected an amendment to the constitution which would

have given the Legislature the power to establish the percentage of electors required to invoke the initiative or the referendum in municipalities.

In 1917, Governor Peter Norbeck, in his State of the State address to the Legislature, expressed his serious reservations about the value of either the initiative or the referendum. He commented on the fact that the highly-touted initiative process had resulted in the passage of only one bill in eighteen years and that initiative was later repealed by the Legislature. He had an even harsher opinion of the referendum. He stated:

It was believed that this would be a convenient weapon in the hands of the people to defeat legislation detrimental to the interests of the people and of the state. In actual practice it has proved a disappointment to its most enthusiastic champions, of which I was one, for not only has it failed of its purpose, but it has actually become an instrument in the hands of special interests, and especially corporate interests to whom it is no hardship to secure the necessary signatures to a referendum petition.

He went on to add:

It is sad to note that the referendum, which was intended to protect the public, has been the instrument used by selfish and unscrupulous interests to bring about the defeat of good laws.

He asked the Legislature to consider the matter and to try to work out a better plan.

While the 1917 Legislature failed to address any of Governor Norbeck's concerns and to propose any changes to the initiative and referendum process, the 1921 Legislature did propose an amendment to the voters. The amendment would have required a minimum of fifteen percent of the electors to invoke the initiative or referendum and would have prohibited the giving of consideration for signatures to petitions. That amendment was also overwhelmingly rejected by the voters and it was many years before another amendment was proposed.

The next proposed amendment to the initiative and referendum process did not occur until 1969. That proposal would have increased the number of electors required to invoke the initiative or the referendum from "not more than five per centum of the qualified electors of the state" to "not less than ten per centum of the qualified electors of the state who shall have voted at the last general election for Governor" and would have deleted the last paragraph of Section 1 of Article III. In the 1970 general election the voters once again, by a wide margin, rejected a change to the Constitution.

The Constitutional Revision Commission (CRC) recommended to the 1972 Legislature that the people be allowed to initiate a constitutional amendment. Section 1 of Article III provided that people reserved the right to propose "measures" which the Legislature must enact and submit to the electorate. Three opinions of the Attorney General had stated that "constitutional amendments" are not "measures"; therefore, an initiative had not been allowed for a constitutional amendment.

At that time fourteen states allowed initiatives for constitutional changes. The CRC in its report to the Legislature stated:

Allowing amendment by initiative reflects and places great confidence in the ability of the people, working at the grassroots level, to recognize and solve the problems of government. Since South Dakota was the first state to allow popular initiation of laws (as reflected in the present Constitution), it is natural that it allow the same procedure for amending its Constitution.

The CRC also indicated that their recommendation contained safeguards to prevent its abuse. To assure that any amendment has substantial backing, petitions initiating amendments must be signed by qualified voters equal in number to ten percent of the total votes cast for Governor in the last election. So that the signers are aware of the contents of the amendment and its sponsors, the petitions must contain the text of the proposed amendment and the names of its sponsors. And, finally, the petition must be filed one year before its submission, so that the people have an adequate opportunity to be informed about the proposed amendment. The CRC recommendation was approved by voters by a 2-to-1 margin in the 1972 general election. These provisions are now found in Section 1 of Article XXIII, which is contained in Attachment #1.

In 1974, as part of the CRC's recommended changes to Article III, a new section to the constitution was proposed which would have retained the basic requirements of initiative and referendum as found in Section 1 of Article III with minor modifications. The section would have provided for the direct form of the

initiative rather than the indirect form that existed at the time. It also would have done the following:

- Excepted appropriations from the initiative power;
- Changed the number of electors required to invoke the initiative or referendum from "not more than five per centum of the qualified electors" to "not more than five percent of the total votes cast for Governor in the last gubernatorial election";
- Required the initiative petition to contain the text of the proposed law;
- Required the initiative petition to be filed at least one year before the election;
- Authorized the Legislature to provide for withdrawal of an initiated measure by its sponsors;
- Deferred the effective date of an initiated measure until ninety days after the official canvass;
- Required filing of a referendum petition within ninety days after enactment of the referred measure;
- Extended the initiative and referendum to all units of local government.

The CRC indicated it was its desire to place the procedures for the initiative and referendum in the constitution so that each citizen would know that it is a most basic right. The commission in its report stated the following:

The initiative and referendum by which the voters write or pass detailed statutes has been criticized by many constitutional writers in that the power of the Legislature is weakened by allowing the people to fulfill some of the law making responsibilities. They say that this power can encourage a

representative body to abdicate the responsibilities to which it was elected. The Commission felt that this section was a basic element in traditional South Dakota law making and that the reasons of its retention greatly outweigh any deficiencies it may cause the Legislature.

A copy of the CRC recommended section regarding the initiative and referendum is contained in Attachment #3. The Legislature in 1974 made one change to the CRC proposal before it was submitted to the voters. They increased the number of electors required to invoke the initiative or referendum from five percent of the qualified electors to ten percent of those voting for Governor at the last gubernatorial election. That change has been cited as one of the reasons that the entire amendment was defeated in the 1974 election.

In the 1976 amendment that was considered by the voters, the proposal regarding initiatives and referendums was the same as the 1974 proposal, except that it reverted to five percent of the qualified electors for the number required to invoke the initiative or referendum. Of course, that also failed.

The next attempt to amend the initiative and referendum process occurred in 1980 when two amendments appeared on the ballot. The first was an initiated proposed constitutional amendment which would have prohibited the Legislature from repealing or substantially amending any law initiated. Any repeal or amendment would have to be submitted to the voters for their approval. This amendment was partly in reaction to the Legislature's recent repeal of the prohibition on the hunting of

mourning doves which had been enacted via the initiative process. In response to this initiated amendment, the Legislature passed a joint resolution and submitted a competing amendment to the voters. The Legislature's amendment provided that any initiated or referred law approved by the electors may not be repealed or amended by the Legislature for seven years from its effective date, except by a two-thirds vote of the members elected to each house. Both proposals were defeated. The initiated version was rejected by a vote of 126,181 for and 140,632 against and the Legislature's version fared worse, being rejected with 77,225 for and 140,406 against.

The last attempt to amend the initiative process in the constitution occurred in 1988. The Legislature proposed to remove itself from the initiative process and make the process a direct initiative process versus an indirect initiative process. Many legislators did not like the fact that they could not amend initiated measures brought to them to be enacted and to be submitted to the voters. They believed that the vote to place the measure on the ballot might be construed as their approval of the measure. That proposal

was approved by the voters by a vote of 153,168 for and 140,188 against.

The Debate Continues

After almost a century, the debate over the initiative and referendum process continues across the country. Some states are still debating if they should establish an initiative and referendum process. New Jersey, in 1992, seriously considered adopting an initiative process, but that effort failed. On the national level, the use of initiatives is on the upswing, according to an article in the September 1996 issue of *State Legislatures*. Since the mid-1980s when some forty measures made the

ballot each year, more and more are being circulated and larger numbers are qualifying. In 1994, citizens in twenty-four states voted on eighty initiatives. For 1996, there were at one time more than three hundred initiatives being pushed in twenty-two states by citizen and special interest groups. Consequently, the trend in many states, such as California, where voters can be faced with as many as eighteen ballot questions each election, is to look at ways to restrict the initiative process.

Supporters of the initiative process claim it continues to do the following:

- Allows the public to circumvent a recalcitrant Governor and Legislature;
- Makes governmental reforms (such as term limits) possible;
- Stimulates public involvement in state issues; and
- Exerts pressure on the Legislature to act responsibly.

Critics, on the other hand, note that initiatives can:

- Undermine legislative power and procedures;
- Generate poorly drafted and ill-conceived proposals;
- Encourage high-spending, deceptive campaigns;
- Encourage single-issue politics;
- Undermine the political parties and weaken the political process;
- Generate voter confusion and overload; and
- Discourage compromise.

Times have changed greatly since the initiative

and referendum were adopted almost a hundred years ago. As mentioned earlier, these concepts were championed then to counter the influence of the railroads and other powerful business interests. The intent was to reduce the significance of money in state lawmaking. However, over time in some states initiative campaigns have become very costly, undermining one of the key goals of Progressive reformers. Major contributors to these initiatives are more than likely “special interests.” These “special interests” being obvious circumstances where the passage of an initiative would provide a direct benefit or a clear harm to a contributor on one side or the other of a ballot question. These “special interests” are now using the initiative process to avoid the legislative process and to take their argument directly to the people. South Dakota is not immune from the influence of money on the initiative process. A review of ballot issues from 1984 to 1990 by the Legislative Research Council showed that, in general, those who spend the most money on a given issue were successful. (Issue Memorandum 91-1)

Technology has also made us a much more mobile society. Our population is also concentrated in urban areas. Consequently, it is much easier for petition circulators to obtain the required number of signatures. States have looked at increasing the number of petition signers to ensure a measure has widespread support. Ten states also require some form of geographic distribution of signatures on ballot measure petitions to ensure that a proposal has broad support across the state. However, as mentioned earlier, past attempts in this state to increase the number of required signatures have been overwhelming rejected.

Conclusion

South Dakota has had initiative and referendum

for almost a century now. During those almost one hundred years only thirty-eight initiatives and only forty-one referred laws have been voted on by the people. One could easily argue that they have served their intended purpose in this state. Other states, on the other hand, are beginning to question their initiative and referendum processes and the ease at which special interests, especially those well-financed, can avoid the legislative process and take their proposal directly to the people. Our state has not yet become one of the states facing

numerous ballot questions with only a couple of initiatives and a couple of referred laws currently scheduled to appear on the 1998 general election ballot. Whether or not our state will face these same problems is not yet known.

This issue memorandum was written by David L. Ortbahn, Principal Research Analyst for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.
