

DIRECT DEMOCRACY IN THE UNITED STATES

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Introduction

As the notion of referendums in Catalonia becomes more and more important, even historical, for the people of Catalonia and of Europe more broadly, it may be instructive to learn more about the process by which direct democratic measures are used in other jurisdictions. This article takes on the task of describing the role of referendums and initiatives in the United States, and the procedures by which such ballot measures are undertaken.

Part I of this article presents an overview of direct democracy in the United States, presenting definitions of initiatives, referendums, and recalls to guide the discussion. It also indicates some of the advantages and disadvantages of ballot measures that have informed the debate about these measures. Part II discusses the notion of federalism generally and how it operates in the United States, showing why there is no direct democracy in the United States at the national level and why the issue of direct democracy in the states is a matter of an individual state's law. Part III focuses on state referendums and initiatives, looking broadly at the types of referendums and initiatives that are found in the various states and also at a number of matters as to which state laws differ.

I. Direct Democracy in the United States: An Overview

The United States, one of the oldest of modern democracies, is primarily a representative democracy, meaning that the people do not govern themselves but vote for elected officials who, in turn, make governance decisions on their behalf. At the federal, state, and even local levels, nearly every governmental entity in the United States operates in representative form.

However, there are three forms of direct democracy that can be found in some form in a number of US states: The referendum, the initiative, and the recall. Although, as will be explored below, there are substantial variations among the states with respect to each of these forms of direct democracy, it is useful to begin with a general definition of these terms: «Initiative» refers to a process by which citizens can create law through a popular vote; «Referendum» refers to a process by which citizens can veto a law by a popular vote; and «recall» refers to a process by which citizens can call back an elected official by popular vote, essentially retracting their votes from the last that placed the official in the position of power. Taken together, these forms of direct democracy may be known as ballot measures, initiatives, or propositions. Often, the term referendum is used to embrace initiatives and recalls, as well.

The relative merits of the various forms of direct democracy have been much debated in the United States. In short, one may say that direct democracy values participation, access to decision-making, political equality and conflict and competition above compromise, continuity, and consensus. Those who favor representative democracy over direct democracy more greatly value stability, consensus and compromise, and the need to insulate certain decisions from the momentary passions and fluctuations of public opinion over broad participation by the electorate.

Direct democracy has been said to offer three main benefits: First, decisions reached as a result of direct democratic measures carry a higher level of legitimacy. Second, direct democracy offers a greater form of civil political participation, which allows citizens to feel empowered. This, in turn, encourages people to participate more robustly in political affairs and creates a more dynamic situation in which social and political changes are more likely to occur. Third, direct democracy provides an important check on elected representatives, which will imbue them with greater accountability and greater responsiveness to the needs of the electorate. It also helps to overcome legislative paralysis. One of America's greatest political thinkers, Thomas Jefferson, said this about the value of democracy: «I know of no safe repository of the ultimate power of society but the people, and if we think them not enlightened enough, the remedy is not to take the power from them, but to inform them.»¹ Years later, Franklin Delano Roosevelt said this: «I believe in the Initiative and the Referendum, which should be used not to destroy representative government, but to correct it whenever it becomes misrepresentative.»²

Others, however, have noted certain drawbacks presented by direct democracy. First, detractors have a certain distrust of the citizenry, and argue that ordinary citizens are insufficiently informed and insufficiently competent and therefore not capable of making important decisions on complicated issues. The argument continues that ordinary voters are driven more by transient whims than by careful deliberation. As a related argument, opponents of ballot measures argue that citizen-written initiatives may be poorly drafted and may lead to unintended consequences. It is also argued that measures of direct democracy may result in decisions in which the majority undermines the rights of the minority.

A second disadvantage associated with direct democracy is the role that special interests may play in the process. In particular, ballot measures have been viewed as tools of special interest groups who use money to unduly influence campaigns on ballot initiatives, and even the signature gathering phase of such measures.

Perhaps the most serious of charges levied against referendums, initiatives, and recalls is that these devices undermine established political systems and institutions – and that they do so in a number of ways. First, they may be used by legislators to postpone or avoid important legislation. For hard or controversial questions, the argument goes, politicians may find it expedient to «pass the buck» to voters rather than making difficult decisions themselves. Second, voter initiatives lack the deliberate quality that we expect of representative government. One more specific concern is that such measures may undermine the ability of the governments to pursue coherent policies, something that voters may be less aware of and concerned about than would be state legislators. At times voter ballot measures may have an impact on the state or local budget that may leave the government unable to govern effectively.³ Third, although this is a concern that is less practical, some have noted that voter initiatives subvert the normal checks and balances that have been carefully crafted into our legal systems.

A final critique of voter initiatives involves the process itself and is best summed up by the term, «never-end-um,» used to refer to the repeated submissions over a period of time that lead to public fatigue until a measure finally passes.

¹ Thomas Jefferson to William C. Jarvis, 1820.

² Theodore Roosevelt, Charter of Democracy Speech to the 1912 Ohio Constitutional Convention.

³ California's Proposition 13, discussed *infra* Part III.C.

II. Federalism and Direct Democracy in the United States

A. Federalism in the United States

The United States is a nation built on principles of federalism, the sharing of power between sovereign governmental entities over the same populace. In the case of the United States, the federal or national government shares power with each of the 50 states.

Federalism is one of the most important of the organizational precepts established by the Constitution of the United States. The US brand of federalism calls for a national/central government of substantial but limited powers, with residual governmental powers residing in the states. The powers of the national government are limited to those that are enumerated, or listed, in the Constitution, and are essentially those as to which national uniformity was viewed to be crucial (for example, immigration policy or copyright law), or as to which for other reasons power needed to be vested in a national government (for example, taxing and spending power, interstate commerce, and foreign relations). As to other matters as to which a national policy is less important, states retain power. Today, the individual states have the power to control such matters as contract law, corporate law, criminal law, employment law, family law, real property law, the laws of inheritance and succession, and tort law.

Each state has its own Constitution. Each state's constitution establishes the governmental structure of that state, and sets up the legislative, executive, and judicial branches. A state's constitution and the laws enacted pursuant to that constitution are a matter of state law, subject only to the requirement that no state law be inconsistent with valid federal laws, *i.e.*, laws that Congress has the authority to enact. The question which powers properly fall within the enumerated powers of the federal government and which reside with the states has been a vexing problem in US Constitutional law, but fall outside the scope of this paper.

B. No Direct Democracy at the National Level

In the federal or national government, there could not be a national referendum or initiative. Such forms of direct democracy would be precluded by specific provisions for the enactment of legislation set forth in the Constitution. The Constitution simply leaves no room for lawmaking by referendum or initiative. Likewise, Articles I, II, and III establish procedures for the election or appointment and for the removal of members of the national legislative, executive, and judicial branches. The possibility of a recall of elected federal officials would be inconsistent with the terms of the Constitution. This was not an accident; to the contrary, there is ample evidence to show that the Founding Fathers¹ considered the masses unreliable and unfit to govern other than through elected representatives.

The so-called Petition Clause of the First Amendment to the Constitution⁴ suggests that a non-binding initiative or referendum could be invoked if Congress provides for such through legislation. Nevertheless, Congress has not done so; this may be because of any number of reasons, including the sheer size of the nation and the difficulties – both practical and political -- attendant to such a national poll. In any case, even if Congress were to call for such a vote, there would be no corresponding requirement on the part of the government to reply or even consider the results.

The Constitution does permit Constitutional amendments through referendums or initiatives, but these have not been successful. As a general matter, Constitutional amendments have been approved only when done through state constitutional conventions.

C. Direct Democracy in the States: A Matter of State Law

In the individual states, however, the question of whether any of the various forms of direct democracy are implemented is a question of state constitutional and/or statutory law. The validity of state forms of direct democracy have been challenged as being inconsistent with a provision of the US Constitution that guarantees to the States a «Republican form of Government.»⁵ This provision, however, been held not to be a bar state laws permitting referendums, initiatives, or recalls.

The states, as a rule, have proven to be far more receptive to notions of direct democracy than has the federal government. Indeed, many state constitutions provide for one form or more of direct democracy. In short, 23 states have provision for referendum and initiative. All of the 50 states except Delaware require that state constitutional amendments be approved by referendum.

In terms of other forms of referendum and initiatives and recalls, the western states have been most vigorous in their adoption of laws permitting forms of direct democracy. In addition, the people use this power more frequently in the western states; more than 60% of the initiative and referendum activity in the nation takes place in the states of Arizona, California, Colorado, North Dakota, Oregon, and Washington. This has been explained by the less stringent signature requirements imposed in these states.

The greater prevalence of direct democracy in the western states is tied to the history of the movement toward direct democracy, which can be traced to the progressive era of the 1880s. Many people during this time viewed their state legislators as being out of touch with the interests of the people and too closely aligned with special interests. At the same time, there was a general feeling that state legislatures had become paralyzed by inaction. Popular forms of democracy were used to force action where there was none, to revoke legislation that was geared toward the people but toward special interests (in the west, especially the railroad, banking, and timber interests), and to recall legislators who were not seen as serving the needs and interests of the electorate.

⁴ The First Amendment to the US Constitution provides, among other things, that «Congress shall make no law... abridging ... the right of the people ... to petition the Government for a redress of grievances.»

⁵ «The United States shall guarantee to every State in this Union a Republican Form of Government.» US Constitution, Art. IV, sec. 4, cl. 1.

III. State Referendums and Initiatives

State referendums and initiatives⁶ take on many shapes and sizes but there are several major forms of each. These are discussed in the sections that follow.

A. State Referendums

As noted above, referendums allow citizens to vote on whether a proposed or recently enacted measure should become law. There are, however, myriad variations among referendums. The most important distinctions involve (a) who initiates the referendum; and (b) whether the referendum is binding or non-binding. Each form of referendum is discussed below.

1. State-Initiated or Citizen-Initiated Referendums

Referendums may be initiated by the government or by the citizens.

Government-initiated referendums, also referred to as legislative referendums, are drafted and placed on the ballot by the state or local legislature. In doing so, the legislative body seeks popular approval or rejection of a measure it has proposed or passed. A legislature may initiate a referendum for any number of reasons. These include the desire to seek validation of a measure; to seek guidance on controversial issues; or to break a legislative deadlock on an issue. The legislature may also initiate a referendum to avoid making a politically-charged decision, by placing responsibility with the electorate rather than on themselves; or because an initiative is required in specific instances by the state constitution.

Citizen-initiated referendums occur when citizens, through the use of the petition process, place recently approved legislative acts or legislative proposals on the ballot for popular approval or rejection. Citizen-initiated referendums are known as «the people's veto» because they allow the electorate to in essence veto proposals or measures passed by the legislature. These types of measures may be used for any number of reasons, including to legitimize strong leadership and favorable decisions made by the legislature; to overcome legislative paralysis and force governmental action on a particular matter; and to reject legislative measures proposed or passed that are inconsistent with the wishes of the people.

2. Binding or Non-Binding Referendums

Referendums may be binding or mandatory on the one hand or they may be non-binding.

A binding or mandatory referendum, as its name suggests, binds the government and produces positive law. Non-binding referendums, also referred to as advisory, voluntary, informational, facultative, or consultative

⁶ Recalls will not be discussed in this article because they are less relevant to the Catalan experience.

referendums, are so termed because the government has the authority to ignore the results or otherwise retains discretion over any implementation of the referendum. Consultative referendums are useful nonetheless because they may assist legislatures either in agenda-setting or in decision-making.

B. State Initiatives

As noted above, initiative is the process by which citizens can initiate laws if they accumulate sufficient petition signatures to place the measure on the ballot. Depending on state law, initiatives can be applied to organic laws (the state constitution or the local charter) or to ordinary laws (state statutes or local ordinances).

Some of the major differences among initiatives in various states include (a) whether the initiative is considered to be direct or indirect; and (b) whether the initiative is binding or non-binding. These distinctions are discussed below.

1. Direct or Indirect Initiatives

Initiatives may be direct or indirect.

Direct initiatives bypass the state or local legislature by allowing the proponents of the initiative to go directly to the voters without the requirement of any prior legislative action. In the case of an indirect initiative, some legislative action is part of the process.

Indirect initiatives involve the legislature in the process. Generally speaking, in the case of indirect citizen-initiated initiatives, a proposal is first submitted to the legislature, which has the opportunity to act on the proposal. If the legislature does not take action on the proposed measure, or rejects it, the initiative question may be placed on the ballot. The indirect initiative has the benefits of public debate and public hearing, compromise, professional drafting, in-depth consideration of the merits and intended and unintended impacts of consequences, and consensus building, most of which are absent in the case of the direct initiative.

2. Binding or Non-Binding Initiatives

As is the case in referendums, initiatives may be binding or non-binding.

Binding initiatives become law upon passage. As with the referendum, a binding initiative becomes law upon passage, or automatically within a certain period of time as prescribed in the initiative measure.

The general policy initiative is a variation on the binding initiative. This is a citizen-initiated proposal for a statute and/or constitutional amendment that is general in nature, and does not contain specific constitutional or statutory language. If voters pass a general policy initiative, the legislature is required to take action to develop and implement the policy.

Non-binding initiatives, like non-binding referendums, may be of two specific types. The *advisory initiative* is a non-binding proposed statute and/or constitutional amendment that is initiated by citizens and placed on the ballot for a popular vote after a petition process. The *instructional initiative* is a citizen initiative to instruct legislators how to vote on an issue before them.

C. Issues Addressed via Referendums and Initiatives

There is no real limit to issues that may be addressed through the referendum and imitative process. History reveals, however, that there are three broad categories of issues that are likely to be addressed through voter initiatives: Social issues; governance policy; and tax policy.

In terms of social issues, matters that are likely to come before the electorate for a vote include education reform, affirmative action, environmental policy, health care, gay rights (including gay marriage⁷), reproductive rights, bilingual education, and the placement of nuclear facilities and halfway houses.

In terms of governance policy, issues that often appear on the ballot include legislative term limits, legislative redistricting, and campaign financing, including limits on spending and the public financing of candidates.

Finally, tax reform has proven to be a fertile area for referendums and initiatives. Often, voter initiatives based on tax policy require a supermajority in order to raise taxes. California's Proposition 13 – officially titled the People's Initiative to Limit Property Taxation – is an example. California voters in 1978 voted to amend the state constitution to limit increases on real estate taxes and to require a two-thirds majority in both chambers of the legislature for all future increases in state rates. Among the unfortunate consequences of Proposition 13 was the resulting and severe imbalance between state revenues and expenditures, leading California numerous times to the brink of bankruptcy.

D. State Variations in the Referendum and Initiative Process

1. Similar framework

The process for citizen-initiated referendums and initiatives follows a common pattern in all states that have them, although there are myriad and important variations in the details.

The general process for a citizen-initiated referendum or initiative is as follows: A petition is circulated for signatures among voters in the particular jurisdiction. The petition seeking a referendum or initiative states, among other things, the title and nature of the matter or legislative act that is sought to be submitted for a vote. The petition may be signed by eligible voters – even those who are not registered to vote. If and when the required number of signatures is collected, the petition is filed with the designated government official (*e.g.*, the state attorney general).

⁷ California's recent Proposition 8, the California Marriage Protection Act, is an example.

If the petition is certified as sufficient, the measure is placed on the election ballot for approval or rejection by the voters.

2. Many variations

Despite this common framework, referendums and initiatives vary widely in a number of important respects, including those described below.

a. Limits in referendum power

Referendum power in the states may be limited or unlimited. If the referendum power is unlimited, any law can be challenged by referendum. In a majority of states, however, the referendum power is limited and some types of legislation are not subject to referendums. For instance, numerous states exclude from the referendum power those laws that are necessary for the support of state government and state institutions, and in particular tax and appropriation measures and laws creating courts or affecting the judicial process. There are also often statutory limits on referendum when laws must go into effect for the immediate preservation of the public peace, health or safety or to support state government and its institutions.

b. Limits on number and frequency of ballot measures

Some states impose limits on the number and frequency of ballot measures. For instance, in some states a petition for a ballot measure may not be filed if it is substantially the same as one that failed on the ballot within the preceding specified number of years. In other states, ballot measures may be placed on the ballot in consecutive elections.

Likewise, some states limit the number of initiatives that can be placed on the ballot in any single election. Other states impose no such limits.

c. Fundraising

Most states require that sponsors or opponents of a ballot measure register with a specified public commission if the sponsors expect to receive funds or make expenditures in an effort to support or oppose measure. This ensures that funds that are contributed for the purpose of supporting or defeating an initiative or referendum.

d. Pre-circulation filing requirements and review

States differ with respect to the requirement that a proposed ballot measure be submitted to a designated public officer prior to circulating a petition. The designated public official may be the state's lieutenant

governor, the attorney general, or the secretary of state. The petition may be required to be reviewed for form, language, and/or constitutionality. State law may provide that the results of the review procedure may be binding or merely advisory.

e. Preparation of official title and summary

There is state-by-state variation in the preparation of an official title and summary of the official title and summary. Typically, there is an official title and summary for each ballot measure at the signature collection phase and one for the voter pamphlet (if there is one) and the actual ballot. Normally these are the same. In some states, the sponsors are permitted to write the title and summary. Other states require the appointment of a committee to prepare the title and summary. Some states require that a designated government official draft the title and summary. A few states provide for a procedure that permits court challenges to the circulation title and summary on an expedited basis.

All states require some form of official review and approval of the election-day ballot title, caption, and summary to ensure that these elements are not misleading or unfair. States differ as to who conducts this review and approval.

f. Drafting

Drafting procedures, too, differ among US jurisdictions. Typically, the secretary of state or other official office is to assist in the drafting and organization of the ballot measure. In most states, the legislative code reviser (or analogous officer) will then review the ballot measure for technical errors and style, as well as to identify any potential conflicts between the proposal and existing laws, to ensure that the ballot measure is consistent with constitutional and statutory requirements, and to put the statute into legal language.

g. Petition circulation and signature gathering

The petition circulation and signature gathering phase is critical in the process of preparing to place a measure on the ballot.

With respect to signature gathering, states differ in terms of the number of percentage of signatures that must be gathered; as well as how that number of percentage is calculated (for instance, from among registered voters, eligible voters, or even the number of voters in the last election for governor). A few states impose a geographic distribution requirement, requiring that a specific number or percentage of signatures be gathered from different regions of the state. The petition circulation period may be limited from anywhere from two months to an unlimited period.

Generally speaking, petition signatures can be gathered in public spaces and in certain private spaces, for instance those private spaces such as shopping centers that in some respects act like public spaces.

Most states impose deadlines for submitting initiative and referendum petitions so that officials have time to verify the signatures, publish the initiative, and prepare the ballot. There is also in some states a limit as to the time period during which petition signatures will be valid.

h. Involvement of state/local officials

The involvement of state and/or local officials in the ballot measure process is another feature that differs from state-to-state. In some jurisdictions, there is a requirement of a public hearing. Some jurisdictions also require or encourage specified state or local officials to express their views on the ballot measure. In some states, the office of financial management or an independent, non-partisan body is required to prepare a financial impact statement which would describe projected increases or decreased in revenues, costs, expenditures, or indebtedness that would be assumed by the government if the measure were approved.

i. Preparation and distribution of pamphlet

Traditionally, pamphlets have been prepared and distributed to voters to inform them of the pending ballot initiative. The question of who should prepare such pamphlets is of great concern because of the state's interest in ensuring that the presentation is both balanced and accessible to voters, *i.e.*, understood by the population-at-large. Today, the Internet is becoming a widely-used device in the ballot measure process.

j. When Vote Takes Place

States differ as to when the vote on a ballot initiative will take place. Typically, the vote will occur during the general election but special initiative or referendum elections may be called in some states.

Conclusion

The use of referendums and initiatives in the United States, as has been discussed, is a matter of state law. Various aspects of the Constitution of the United States preclude the use of the referendum recall, or initiative at the national or federal level. Although there are common features among the states' approaches to these ballot measures, there are also quite substantial differences in the implementation of such measures. Any entity considering the use of any of these ballot measures should consider these – and other elements – in creating forms of direct democracy that work best for them.

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Abstract

Although the United States is primarily a representative democracy, many of the states have provision for various mechanisms of direct democracy – initiative, recall, and referendum. This article discusses the use of these forms of direct democracy in the United States, focusing on the initiative and the referendum.

The article first introduces the notion of federalism as it applies in the United States, and discusses the impact of federalism on the use of voter initiatives. Specifically, under US federalism, each of the states has the ability to decide for itself whether to permit any of the forms of direct democracy and, if so, the ways in which initiatives, recalls, and referendum will be implemented. Various provisions of the Constitution of the United States essentially foreclose the possibility that these measures could be implemented at the federal or national level. The article goes on to discuss the various benefits and drawbacks that have been identified in connection with voter initiatives.

There are different types of referendums and initiatives. State referendums may be state-initiated or citizen-initiated and they may be binding or non-binding. State initiatives may be direct or indirect (which relates to whether the vote goes directly to the people or whether the legislature is first given the opportunity to consider the measure) and they may be binding or non-binding. State referendums and initiatives deal with a wide range of matters – from Constitutional amendments to tax matters to issues such as abortion and gay rights that lie at the heart of America's culture war.

The process for referendums and initiatives among the states share a common basic framework, yet there are substantial variations among states when it comes to a number of important issues, such as whether and the extent to which there are limits on voter initiative/referendum power; limits on the number and frequency of ballot measures; fundraising; pre-circulation filing requirements and review; preparation of an official title and summary; drafting issues; petition circulation and signature gathering; the involvement of state/local officials; the preparation and distribution of pamphlet; and when the vote takes place. These, among other issues, should be considered in any jurisdiction in which forms of direct democracy are being implemented.

Key Words: direct democracy; referendums; initiatives; federalism.