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INITIATIVE AND REFERENDUM IN WASHINGTON: A SURVEY

Philip A. Trautman*

Provisions for direct legislation by the people through the initiative and/or the referendum exist in at least twenty-two states at the state level, the local level or both.1 The initiative enables the people to propose and enact laws independently of the legislature. The referendum empowers the people to approve or reject laws passed by the legislature.

The original Washington State Constitution, as adopted in 1889, made no mention of either device and provided simply that the legislative powers should be vested in "a senate and house of representatives."2 The first provision of the original state constitution recognized, however, that all power derived from the people.3

During the latter part of the nineteenth and first part of the twentieth century, provisions for direct legislation were adopted in many jurisdictions. This trend towards restrictions upon representative government and increase of direct government culminated in Washington in 1912 with the adoption by the people of the seventh amendment to the state constitution.4 It was provided therein that the legislative authority should be vested in the legislature, consisting of the senate and house of representatives, but that the people reserved the power to propose laws, and to enact or reject the same, and to approve or reject laws passed by the legislature.5

This constitutional framework has remained basically the same for over sixty years though changes have occurred by constitutional amendment and in the enabling legislation thereunder. As might be

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2. WASH. CONST. art. II, § 1.
3. WASH. CONST. art. I, § 1: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."
4. The vote was 110,110 in favor of the amendment and 43,905 against. See Gottstein v. Lister, 88 Wash. 462, 153 P. 595 (1915).
5. WASH. CONST. amend. VII.
expected, difficult problems have arisen in determining the scope of the people’s direct power, and the extent of the consequential limitations upon the executive, judicial and particularly the legislative branches of government. It is the purpose of this article to analyze some of the more perplexing problems, both at the state and local level, and to provide a better understanding of the initiative and referendum as they presently exist in Washington.

I. CONSTITUTIONAL PROVISIONS

Detailed constitutional provisions authorize direct legislation at the state level. As originally provided by the seventh amendment, signatures of ten percent, but in no case more than 50,000, of the legal voters were required to propose an initiative through the filing of a petition. Art. II, § 1(A), as adopted by the thirtieth amendment in 1956, now requires signatures equal to eight percent of those voting for governor at the last preceding regular election. If the initiative is intended directly for the people (a direct initiative), the petitions must be filed with the Secretary of State at least four months before the election at which it is to be voted upon. If directed to the legislature (an indirect initiative), the petitions must be filed not less than ten days before any regular session of the legislature.

An indirect initiative takes precedence over all other measures in the legislature except appropriation bills and must be enacted or rejected without change before the end of the regular session. If enacted, such a measure is subject to a referendum petition, or the legislature, after enactment, may refer the matter to the people for approval or rejection at the next regular election. If the measure is rejected by the legislature or if no action is taken, it must be submitted to the people at the next regular general election. The legislature may reject the measure presented by the initiative petition and propose a different one. In such event both measures must be submitted to the people with two votes taken; first, as between either measure and neither, and second, as between one and the other. If the majority of those voting on the first issue votes for neither, both fail; if a majority votes for either, then the measure receiving a majority on the second issue is adopted.6

6. *Id.*
The referendum, the second power reserved by the people, may result from a petition signed by the required percentage of voters or by reference from the legislature itself. Originally, six percent, but in no case more than 30,000, of the legal voters were required to sign a referendum petition. The thirtieth amendment changed this to four percent of those voting for governor at the last regular election. A referendum petition against a measure passed by the legislature must be filed with the Secretary of State not later than ninety days after the adjournment of the legislative session in which the measure was passed. Elections on measures referred to the people take place at regular general elections unless the legislature orders a special election.

Some constitutional provisions apply to both the initiative and the referendum. First, any measure initiated by the people or referred to the people takes effect if it is approved by a majority of the votes cast thereon, provided the vote cast upon the question equals one-third of the total votes cast at such election. The effective date of the measure is the thirtieth day after the election at which it is approved. Second, no law approved by the people may be amended or repealed by the legislature for a period of two years, except by amendment during that time upon a vote of two-thirds of all the members elected to each house. The ramifications of this provision will be more fully developed later.

7. Not all laws are subject to the referendum. WASH. CONST. art. II, § 1(b), excludes from the referendum power "such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions." These exceptions are discussed in section VII infra.

8. WASH. CONST. amend. VII (d). See Gottstein v. Lister, 88 Wash. 462, 153 P. 595 (1915), to the effect that "votes cast at such election" means "number of voters voting at such election."

9. WASH. CONST. amend. VII (d). See also Berndson v. Graystone Materials Co., 34 Wn. 2d 530, 209 P.2d 326 (1949) (held, an action under the declaratory judgment act would lie to prevent state officers from enforcing a statute whose operation had been suspended because portions of it had been referred to the people); Wynand v. Dept. of Labor & Industries, 21 Wn. 2d 805, 153 P.2d 302 (1944) (held, a workman injured on June 27, 1941, was not entitled to compensation under the scale of awards provided by ch. 209 [1941] Wash. Laws, effective June 11, 1941, since a referendum petition was filed which prevented the particular chapter from becoming effective until December 3, 1942); Skidmore v. Clausen, 116 Wash. 403, 199 P. 727 (1921) (held, a soldiers' compensation act, approved by popular vote on November 2, 1920, did not go into effect until December 2, 1920, and thus the death of a soldier entitled to a bonus, four days prior to the date of taking effect of the measure, did not entitle his estate to take thereunder).

10. The seventh amendment, passed in 1912, allowed for no amendment or repeal
Third, the constitution expressly provides that the veto power of the Governor shall not extend to measures initiated by or referred to the people.11 The effect of this provision is illustrated by State ex. rel. Lofgren v. Kramer.12 A bill providing for the reapportionment and redistricting of the state’s congressional districts was passed by both houses of the legislature and filed with the Secretary of State for submission to the people without being presented to the Governor. An action was brought to prevent the bill’s submission to the people because of a provision in art. 3, § 12, that every act which shall have passed the legislature shall be presented to the Governor before it becomes law. The court held, however, that this original constitutional provision, requiring every bill passed by the legislature to be presented to the Governor, was impliedly changed by the initiative and referendum amendment (seventh amendment). The result is that this amendment prevents the exercise of the gubernatorial veto power before or after referendum measures are submitted to the people by the legislature.13 To be compared with the Lofgren case, in which a bill was referred directly to the people by the legislature, is the situation in which a referendum is sought by virtue of a petition of the voters. In that situation a referendum may not be instituted until after the bill is signed by the Governor.14

In addition to detailed provision for initiatives and referendums, the constitution also provides for further clarification by legislation. Thus, the legislature is directed to provide methods of publicizing all laws referred to the people with arguments for and against the laws.15 Further, though the constitutional section is stated to be self-execut-

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11. WASH. CONST. art. II, § 1(d). The veto power of the Governor is a legislative and not an executive power and thus the clause restricting its use may be included in a constitutional provision relating to legislative powers. See Gottstein v. Lister. 33 Wash. 462, 153 P. 595 (1915).
13. As to the situation after measures are submitted to the people, WASH. CONST. art. II, § 1(d), provides: “Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon . . . .”
15. WASH. CONST. art. II, § 1(e), as added by the thirty-sixth amendment in 1962. That subsection further provides that the Secretary of State shall send one copy of the publication to each individual place of residence in the state and shall make such additional distribution as he shall deem necessary.
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...ing, it provides that legislation may be enacted to facilitate its operation.\textsuperscript{16} Such legislation and its construction and interpretation warrant comment.\textsuperscript{17}

II. STATUTORY PROVISIONS

Any legal voter or organization of legal voters desiring to petition the legislature to enact a proposed measure, to submit a proposed initiative measure to the people or to order that a referendum of a bill passed by the legislature be submitted to the people, must file copies of the measure or act with the Secretary of State.\textsuperscript{18} Proposed initiative measures to the people must be filed within ten months prior to the election at which they are to be submitted for a vote, and initiative measures to the legislature must be filed within ten months prior to the next regular session of the legislature.\textsuperscript{19}

The Secretary of State transmits one copy of the initiative or referendum measure to the Attorney General for the purpose of preparing a concise statement posed as a question, which shall express impartially the purpose of the measure and shall constitute the ballot title of the measure.\textsuperscript{20} If the proponents of the measure are dissatisfied with the ballot title, an appeal may be taken to the Superior Court of Thurston County, the decision of which is final.\textsuperscript{21}

\begin{enumerate}
\item WASH. CONST. art. II, § 1(d).
\item Two other constitutional provisions might be noted. First, provision is made in WASH. CONST. art. VIII, § 3, for a vote of the people to authorize special indebtedness of the state. Second, an amendment to WASH. CONST. art. II, § 24, was adopted at the 1971 legislative session and approved by the voters on November 7, 1972. The amendment provides in part: Lotteries shall be prohibited except as specifically authorized upon the affirmative vote of sixty percent of the members of each house of the legislature or, notwithstanding any other provision of this Constitution, by referendum or initiative approved by a sixty percent affirmative vote of the electors voting thereon.
\item WASH. REV. CODE § 29.79.010 (1963).
\item WASH. REV. CODE § 29.79.020 (1963).
\item WASH. REV. CODE §§ 29.79.030-.060 (1963).
\item Ch. 122 [1973] Wash. Laws directs the Secretary of State to submit a copy of any proposed initiative to the office of the code reviser for his recommendations as to form, style and "such matters of substantive import as may be agreeable to the petitioner." Such recommendations are advisory only and need not be accepted by the proponent. The stated purpose is to avoid duplication and confusion of laws. The submission to the code reviser apparently is to occur before the transmittal of a copy to the Attorney General as described in the text.
\item The possible importance of the ballot title is shown by the fact that resort may later be had to the title to determine legislative intent. State ex rel. Seymour v. Superior Court, 168 Wash. 361, 12 P.2d 394 (1932). While important, minor irregularities in the
\end{enumerate}
Once the ballot title is established, the proponents prepare and circulate petitions to obtain the required number of signatures. When the proponents have secured the signatures, which for an initiative measure is a number equal to eight percent and for a referendum a number equal to four percent of those voting for governor at the last election, the petitions may be filed with the Secretary of State. The petitions must be accompanied by a statement of the contributions and expenditures relating to the preparation and circulation of the petitions. Petitions must be submitted to the Secretary of State not more than ninety days after the adjournment of a legislative session for a referendum petition directed at an act passed in such session, not less than four months prior to an election at which an initiative to the people is to be submitted for a vote and not less than ten days before the commencement of a legislative session for an initiative directed to the legislature.

It will be noted that the statute requires that a proposed initiative measure to the people be filed within ten months prior to the election, while the constitution requires that petitions be filed at least four months before the election. In *State ex rel. Kiehl v. Howell*, it was contended that the legislature was prohibited from setting any such time limit in addition to that stated in the constitution, and that in any event, the time allowed for circulating petitions was unreasonably short. The court held to the contrary upon the basis of the constitutional pro-
vision authorizing implementing legislation, the desirability of having the petitions signed as near to the election as practical and the finding that six months was not an unreasonably short time for the preparation and circulation of petitions.

The grounds upon which the Secretary of State may refuse to file petitions submitted to him are specifically prescribed by statute. They are that the verified statement of contributions and contributors has not been filed, that the petitions are not in proper form, that the petitions clearly bear insufficient signatures, and that the time within which the petitions may be filed has expired. If none of these defects exist, the Secretary of State must accept the petitions.

If the Secretary of State refuses to file a petition, the persons submitting it may seek a writ of mandate from the Superior Court of Thurston County and, if denied, may sue out a writ of certiorari to the supreme court.

If the Secretary of State accepts a petition for filing or if he is required to do so by a court order, he then proceeds to canvass and count the names of the voters thereon. A statistical sampling technique may be used with the proviso that no petition may be rejected on the basis of such a statistical method, and further that no petition may be accepted on the basis of any statistical method employed if such method indicates that the petition contains less than one hundred ten percent of the requisite number of signatures of legal voters. If the same name is signed to more than one petition, it must be rejected as often as it appears. If any citizen is dissatisfied with the Secretary's determination that the petition does or does not contain the requisite number of signatures, review may be sought from the superior court and then the supreme court. If the petition is found to be sufficient, the proposed measure is sent to the legislature in the case of an initiative directed thereto or to the County Auditors in the case of referendum and initiative measures to be voted on by the people. The County Auditors are then responsible for the

28. Wash. Rev. Code §§ 29.79.160 (1963) and 29.79.170 (1963). Interestingly, the statute provides that if it is determined that the petition is in legal form and apparently contains the requisite number of signatures and was submitted for filing within the prescribed time, a writ of mandate shall issue from either the superior or supreme court. Nothing is said about the possible effect of a failure to file a verified statement of contributions and contributors.
printing of the initiative and referendum measures on the official ballots.30

To aid the voters, the Secretary of State prints and distributes a voters' pamphlet containing, among other things, an explanatory statement prepared by the Attorney General of each measure to be voted upon and arguments for and against each measure prepared by designated committees.31 Such arguments are of consequence not only for the purpose of persuading the people, but also for the reason that the Washington court has held that in determining the purpose and effect of initiative and referendum measures courts may consider the arguments in the pamphlets.32

While the pamphlets are of considerable practical importance, the failure of the Secretary of State to comply with the statutory procedure does not per se defeat the measure. In Randles v. Washington State Liquor Control Board33 it was alleged, and admitted by a demurrer, that the Secretary of State had not mailed the pamphlets to the voters within the statutory time. The court held it could not consider the allegation after the initiative was approved by the voters. The court conclusively presumed that the Secretary of State had complied with the law since to do otherwise would permit a careless, inefficient or corrupt official to nullify legislation by his failure to carry out a ministerial duty.

When a referendum or initiative is submitted to the people, the votes are counted and canvassed and eventually the Governor declares the result.34 However, as previously noted, if the vote cast upon an initiative or referendum measure is equal to less than one-third of the

33. 33 Wn. 2d 688, 206 P.2d 1209 (1949).
total vote cast at the election, the Governor shall proclaim the measure to have failed for that reason.  

Finally, it might be noted that several statutes make it a crime to interfere with the initiative and referendum process. These include prohibiting the signing of a petition with other than one's true name, signing more than one petition, signing a petition knowing that one is not a legal voter, making a false statement as to residence and soliciting signatures on a petition for a consideration.

III. COURT REVIEW

With the many detailed constitutional and statutory provisions relating to initiatives and referendums, a problem arises as to when and on what bases court review may be had. Of course, once a measure has been approved by the people, it is generally subject to the same possibility of constitutional attack as a law enacted by the legislature. But proceedings prior to the measure's enactment pose special problems.

The court has stated that it cannot pass on the constitutionality of proposed legislation, whether bills introduced into the legislature or measures proposed as initiatives, until the legislative or initiative process is complete and the bill or measure has been enacted into law. It has further been said that judicial interference with the Secretary of State in the performance of the duties imposed upon him by the constitution and statutes relative to the handling and processing of ini-

35. See note 7 supra.
For an appeal from a conviction under one of the statutes, see State v. Patric, 63 Wn. 2d 821, 389 P.2d 292 (1964). WASH. REV. CODE § 29.79.240 (1963), which imposed a duty upon the Secretary of State to keep a record of all names appearing on a petition which were not registered voters and appearing more than once and to report the same to prosecuting attorneys, was repealed in 1969.
State v. Conifer Enterprises, Inc., 82 Wn. 2d 94, 508 P.2d 149 (1973) held that WASH. REV. CODE § 29.79.040(4), which prohibits giving or offering payment to persons to solicit or procure signatures upon an initiative or referendum petition, is a constitutional exercise of the state's police power, is not violative of freedom of speech or the right of assembly and facilitates rather than restricts the initiative and referendum process.
37. This principle was enunciated in State ex rel. O'Connell v. Kramer, 73 Wn. 2d 85, 436 P.2d 786 (1968), in which a proposed initiative measure called for the establishment of a state constitutional convention. The Secretary of State rejected the proposed initiative on the basis that the state constitution provided the exclusive method for calling a constitutional convention and therefore the initiative measure would be invalid if enacted by the people. The supreme court held that a writ of mandamus should
tiatives can be justified only by express statutory or constitutional authority, or if the Secretary acts without authority or in an arbitrary and capricious manner inconsistent with the spirit and intent of the statutes or the constitutional provisions.\textsuperscript{38}

An excellent illustration of the application of this principle is \textit{Hanson v. Meyers}.\textsuperscript{39} Petitions for an initiative to the legislature were submitted to the Secretary of State who canvassed and counted the signatures and announced his intention to certify the initiative to the legislature. An action was brought to enjoin such certification upon the claim that the Secretary's determination as to the signatures was erroneous. The superior court sustained a demurrer by the Secretary and a writ of certiorari was then granted by the supreme court. During the interim the Secretary certified the measure to the legislature. The supreme court then held for the Secretary on the basis that no statutory authority exists for interference with an initiative measure after the Secretary has certified it to the legislature.

Further curtailing the likelihood of success in obtaining judicial review to halt an initiative or referendum before the measure is enacted is a principle which calls for a liberal construction in favor of facilitating initiatives and referendums. In an oft-quoted passage, enunciated shortly after the enactment of the seventh amendment to the state constitution, the court said:\textsuperscript{40}

\begin{quote}
\textit{issue requiring the Secretary of State to accept the measure and that the Secretary of State had no discretion “to test the validity, effect, purpose or constitutionality of the proposed measure.”}
\end{quote}

The difference of opinion as to the meaning of this case is illustrated by Ford \textit{v. Logan}, 79 Wn. 2d 147, 483 P.2d 1247 (1971). The majority stated:

Our holding in that case [\textit{Kramer case}] related solely to the scope of the secretary's authority prior to the circulation of petitions for signatures and not to the ground asserted by the secretary for his refusal to file the proposal, which was that a constitutional convention cannot be called or established by initiative.

\textit{Id. at 152, 483 P.2d at 1249.} The dissent said:

\begin{quote}
[T]his court ruled categorically that the courts would not enjoin an initiative measure from the ballot because of its suspected unconstitutionality [citing \textit{Kramer case}]. . . . It is thus the rule in this jurisdiction that the courts will not pass upon the constitutionality of proposed or espoused legislation.
\end{quote}

\textit{Id. at 166-67, 483 P.2d at 1258} (Hale, Rosellini & Hunter, JJ., dissenting).

\textsuperscript{38} \textit{State ex rel. Donohue v. Coe}, 49 Wn. 2d 410, 302 P.2d 202 (1956). In an action to prohibit the Secretary of State from certifying an initiative measure to the ballot, the court did not consider whether the measure would be valid if approved by the people.

\textsuperscript{39} \textit{State ex rel. Logue v. Coe}, 54 Wn. 2d 272, 344 P.2d 513 (1959).

\textsuperscript{40} \textit{State ex rel. Case v. Superior Court}, 81 Wash. 623, 632, 143 P. 461, 464 (1914). See also \textit{State ex rel. Howell v. Superior Court}, 97 Wash. 569, 166 P. 1126 (1917):

Whatever divergence of opinion there may be among the courts touching the
Thus there is strongly suggested, in the language of the constitution and this law, a required liberal construction, to the end that this constitutional right of the people may be facilitated, and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right.

Perhaps one might generalize by saying that only a serious breach of statutory requirements will warrant injunctive proceedings against a proposed initiative or referendum.41

In a few instances such serious breaches have been found. Thus, it has been held that a writ of prohibition would issue to prevent the Secretary of State from certifying an issue to the County Auditors for printing upon the official ballot where there was no showing that the requisite number of legal voters had signed petitions for the initiative,42 that prohibition would issue to prevent the Secretary of State from accepting the withdrawal of signatures from an initiative petition after it had been filed with him43 and that an order would issue to enjoin the filing of an initiative measure which improperly included an argument on behalf of its enactment.44

Nevertheless, the court has been reluctant to interfere with the direct legislative process. Thus, in an action to enjoin the Secretary of State from certifying an initiative measure for submission to the voters, the court held that a statutory provision forbidding the employ-

Id. at 577, 166 P. at 1129.


42. State ex rel. Evich v. Superior Court, 188 Wash. 19, 61 P.2d 143 (1936).


As to the right of the signer of a petition to withdraw his signature, see State ex rel. Mohr v. Seattle, 59 Wash. 68, 109 P. 309 (1910) and Parish v. Collings, 43 Wash. 392, 86 P. 557 (1906). The right to withdraw a signature from an initiative petition is a personal right of the signer and cannot be exercised by one who circulated the petition. State ex rel. Hindley v. Superior Court, 70 Wash. 352, 126 P. 920 (1912).

44. State ex rel. Berry v. Superior Court, 92 Wash. 16, 159 P. 92 (1916); State ex rel. Griffiths v. Superior Court, 92 Wash. 44, 159 P. 101 (1916). In the latter case the court did say:

With the ultimate question of the validity of this proposed legislation, we have no present concern. Courts will not determine such questions as to contemplated legislation which may, perchance, never be enacted.

Id. at 47, 159 P. at 102.
ment of paid workers to secure signatures on a petition and making it a criminal offense to hire or be hired for that purpose, did not invalidate the signatures of legal voters thereby secured. Further, the fact that those signing might have been deceived by the practices of the sponsors did not invalidate their signatures. The requested injunction was thus denied.\footnote{45}{Edwards v. Hutchinson, 178 Wash. 580. 35 P.2d 90 (1934).}

Perhaps an even better illustration of the court's desire to preserve the right of initiative and referendum through a liberal construction is the well known case of \textit{Rousso v. Meyers}.\footnote{46}{64 Wn. 2d 53, 390 P.2d 557 (1964).} Petitions for a referendum were filed with the Secretary of State. The petition sheets were bound into volumes and the number of signatures counted. Before the actual canvass of signatures was made, however, the petition sheets were stolen from the Secretary's office. The Secretary nevertheless certified the measure, and an action was brought to restrain the placement of the measure on the ballot. The supreme court held that the Secretary's determination that the petition contained enough valid signatures for placement on the ballot was justified by the inference of validity of the signatures drawn from the criminal sanctions upon placing an improper signature on such a petition, the probabilities favoring validity based upon the highest previous signature-rejection rate and the rate permitting survival of the present petition and the fact that no irregularities had been discovered in the preliminary processing performed by the Secretary's office.

Once an initiative or referendum measure has been enacted, the important thing to note is that its passage as a law is an exercise of the same power of sovereignty as that exercised by the legislature in the passage of a statute.\footnote{47}{Love v. King County, 181 Wash. 462. 44 P.2d 175 (1935); State v. Paul, 87 Wash. 83, 151 P. 114 (1915). \textit{See also} Hempelmann, \textit{Convening Constitutional Convention in Washington Through the Use of the Popular Initiative}, 45 \textit{WASH. L. REV.} 535. 545-51 (1970).} Thus, while such a measure is subject to the possibility of constitutional attack after enactment, it is presumed to be constitutional.\footnote{48}{State \textit{ex rel.} O'Connell v. Meyers, 51 Wn. 2d 454, 319 P.2d 828 (1957).} If anything, the legislative power of the people is superior to that of the legislature itself in the sense that there are certain restrictions against legislative repeal of an act passed by the people, a point more fully discussed later.

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IV. TYPES OF LEGISLATIVE ACTIVITY

Another manifestation of the breadth of power reserved by the people in Washington derives from the subject matter to which the initiative and referendum relate. Art. 2, § 1, of the state constitution speaks of the people's power to propose "bills, laws" and to approve or reject "any act, item, section or part of any bill, act or law" passed by the legislature. Not all state constitutions are worded so broadly; for example, some speak only of acts.49

Generally the Washington court has broadly construed these terms. When an action was brought to compel the Secretary of State to accept and file a petition for an initiative to the people proposing the redistricting and reapportioning of the state for purposes of representation in the state legislature, it was contended that redistricting and reapportionment were a prerogative of the legislature itself. The court held to the contrary and that under art. 2, § 1, the people have a right to initiate legislation concerning the legislative reapportionment of the state.50

The eighteenth amendment to the United States Constitution (prohibition) served to raise a somewhat similar problem. Most states ratified the amendment by concurrent resolutions of their two houses, and several states refused to allow a referendum on such resolutions upon the basis that they were not "acts" for the purpose of a referendum.51 The Washington Supreme Court held to the contrary, however, and concluded that the joint resolution was subject to referendum.52 In so doing it refused to give a restricted meaning to the words "act, bill or law" and instead effectuated what it conceived to be the purpose of the seventh amendment to the state constitution—namely, providing a broad base for the exercise of power by the people.

V. LIMITATION ON AMENDMENT OR REPEAL

As originally adopted by the seventh amendment in 1912, art. 2, § 1(c), provided:

49. Ark. Const. amend. VII.
No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted. No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment. But such enactment may be amended or repealed at any general regular or special election by direct vote of the people thereon.

A major purpose of this provision was to protect laws resulting from the direct action of the people from interference by the legislature for a period of two years, while still enabling the people to amend or repeal such laws during that time. This provision further illustrated the general intent of the 1912 amendment to provide maximum power to the people in relation to the legislature.

The provision did not preclude all legislation upon the same subject matter dealt with by an initiative. Thus, in 1932, an initiative measure was passed which repealed the "bone dry" prohibition law, but which contained no provisions for the regulation of liquor sales. In 1933, the legislature enacted a statute establishing a liquor control board and otherwise regulating liquor sales. An attempt to enjoin enforcement of the statute on several grounds of unconstitutionality failed. As pertinent here, the court concluded that while the prohibition and regulation of the sale of liquor related to the same subject matter, the constitution did not prohibit the regulatory legislation since it did not amend or repeal the people's action.53 An act of the legislature can treat the same subject matter as that dealt with in an initiative without constituting an amendment or repeal.

The period of "two years following such enactment" begins to run from the time the power bringing the law into existence was exercised rather than from the time the law is by its terms to take effect. Thus, an initiative measure approved by the people in November, 1914, and proclaimed adopted by the Governor in December, 1914, could be amended by the legislature in 1917, despite the fact that by its own terms the law was not effective until January, 1916.54

The protection afforded to initiatives and referendums by the two-year period of immunity was relaxed in 1952 with the adoption

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of the twenty-sixth amendment, which added § 41 to art. 2 and superseded § 1(c). Section 41 provides:

No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted. No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: Provided, That any such act, law or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III of the Washington Constitution, [which provides for the veto power of the Governor] and no amendatory law adopted in accordance with this provision shall be subject to referendum. But such enactment may be amended or repealed at any general, regular or special election by direct vote of the people thereon. . . .

The section thus allows for legislative amendment of direct legislation by the people under the prescribed circumstances and then protects such legislative amendment from referendum by the people. This is a considerable change in spirit and fact from the original approach towards direct legislation adopted in this state forty years earlier.

*State ex rel. O'Connell v. Meyers*\(^5\) strikingly points up the effect of the change. In 1956 the people by initiative reapportioned and redistricted the legislature, the legislature having failed to do so since 1901. By a vote of more than a two-thirds majority in each house, the legislature in its next session, 1957, enacted a statute which reapportioned and redistricted by a different method.\(^6\) An action was brought to compel the Secretary of State to act in accordance with the initiative measure on the basis that the statute constituted a repeal of the initiative measure and thereby violated art. 2, § 41. By a five to four vote the Washington Supreme Court held the statute valid as being only an amendment.

In reaching its conclusion the majority stated that since the statute dealt with the same subject matter as that contained in the initiative, namely, redistricting, the legislature had the unlimited power to estab-

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55. 51 Wn. 2d 454, 319 P.2d 828 (1957).
56. Whereas the initiative provided a method of redistricting by census tracts, the legislature substituted a method based upon precinct boundaries.
lish methods of redistricting and to alter, modify, take away, add to or change the various districts in such manner as it saw fit. Thus, the fact that the statute had repealed the method of redistricting set forth in the initiative was not controlling. For the purposes of the constitutional section, such action constituted an amendment. In reaching this conclusion, the majority reasoned that by adopting the twenty-sixth amendment the people had decided to allow the legislature to amend an initiative and had determined that their rights were adequately protected by the requirement that such an amendment could be effected only by a two-thirds vote of all members of each house.

The four dissenting judges stressed that while the twenty-sixth amendment granted the legislature the right to amend, it said nothing about repeal, whereas the majority opinion was such as to allow the right to amend to include the right to repeal. The majority's conclusion was deemed to fly in the face of the usual approach of the court towards the initiative and referendum—namely, a liberal construction to preserve and render them effective and to facilitate rather than hamper them.

Whether one agrees with the majority or the dissent in the interpretation of the purpose of the twenty-sixth amendment, certainly the dissent is correct that the result is a drastic change in the power of the people to exercise their right of the initiative and, presumably, the referendum. The people's power is limited by the power of the legislature to take subsequent action.

For the most part, this article to this point has emphasized the breadth of power reserved to the people through the use of the initiative and referendum. We have just examined one limitation thereon and now turn to a treatment of others.

VI. CONSTITUTIONAL LIMITATIONS

While the power of direct legislation is reserved to the people in the constitution itself, the exercise of that power is subject to other pertinent limitations.

57. "[W]e must hold that the people, by granting to the legislature the right to amend, authorized it to change the law completely, within the realm of the subject matter contained in the act." 51 Wn. 2d at 464. 319 P.2d at 836.

58. The case is commented upon in Note. 34 WASH. L. REV. 150 (1959).
Two situations will illustrate the point.

An initiative measure was passed providing for a graduated state income tax. The measure was successfully attacked upon the basis that it violated the fourteenth amendment to the state constitution which requires that all taxes be uniform on the same class of property. In reaching its result the court said that the fact that the income tax was passed as an initiative measure was not of controlling importance in determining its constitutionality, since an initiative measure is subject to constitutional restrictions just like any act of the legislature.

A similar approach was taken when a question was raised about the constitutionality of an initiative measure relating to the state public assistance program. Among other claims was the contention that the measure did not establish sufficient standards for the guidance of the Department of Social Security in fixing the amount of the respective aid grants to be allowed to applicants. The court started with the proposition that the power to make substantive law cannot be delegated and that this principle applies whether the law in question is enacted by the legislature or by the people through the passage of an initiative measure. In this case, the court concluded there was not an unconstitutional delegation of legislative power.

The same case points out that all of the constitutional limitations on the exercise of power by the legislature do not apply to the people's exercise of legislative power. The initiative measure was challenged as violative of art. 2, § 19, of the state constitution which provides that "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." The constitutional provision was held to be appli-

59. "The people in their legislative capacity are not, however, superior to the written and fixed constitution." State ex rel. Berry v. Superior Court, 92 Wash. 16, 26, 159 P. 92, 94 (1916).
cable only to proposed laws pending in the legislature.\textsuperscript{63} Again, this points up the necessity of carefully distinguishing between those constitutional provisions and doctrines pertinent to all legislation, those pertinent only to legislation by the legislature and those pertinent only to legislation by the people.

VII. EMERGENCY DOCTRINE

Rather commonly, state constitutions authorizing referendums prohibit their use in certain emergency situations. Different state courts have reacted to legislative declarations of emergency in different ways. These reactions have included treating the legislative declaration as final and binding, creating a rebuttable presumption of emergency, allowing a complete re-examination of the question of the existence of an emergency and allowing a presumption that there is no emergency.\textsuperscript{64}

The pertinent Washington constitutional provision states: \textsuperscript{65}

The second power reserved by the people is the referendum, and it may be ordered on an act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions . . . .

The court has interpreted this provision in a series of not always consistent cases.

\textit{State ex rel. Humiston v. Meyers}\textsuperscript{66} involved a statute in which the legislature allowed certain gambling games and devices and declared the statute effective immediately by invoking the above constitutional provision. The court struck down the “emergency clause” and held the statute to be subject to referendum. The court quoted with approval the rule from earlier cases regarding the weight to be given to the legislative declaration of emergency: \textsuperscript{67}

\footnotesize
\textsuperscript{63} Senior Citizens League, Inc. v. Dept' of Social Security, 38 Wn. 2d 142, 228 P.2d 478 (1951). The ballot title requirements for an initiative or referendum measure are set forth in \textsc{wash. Rev. Codex} § 29.79.040 (1963).
\textsuperscript{64} See Comment, Limitations on Initiative and Referendum, 3 Stan. L. Rev. 497. 499-502 (1951), for a discussion of the various approaches.
\textsuperscript{65} \textsc{wash. Const.} art. II, § 1(b) (emphasis added).
\textsuperscript{66} 61 Wn. 2d 772, 380 P.2d 735 (1963).
\textsuperscript{67} \textit{id.} at 778, 380 P.2d at 739.
Such legislative declaration of emergency and necessity for the enactment is conclusive and must be given effect, unless the declaration on its face is obviously false; and, in determining the truth or falsity of the legislative declaration, we will enter upon no inquiry as to the facts, but must consider the question from what appears upon the face of the act, aided by the court's judicial knowledge. . . . We must give to the action of the legislature and its declaration of an emergency every favorable presumption.

Without saying anything more about the presumption, the court concluded that neither the act on its face, nor any factors of which the court could take judicial notice, justified an "emergency clause."68

Four judges dissented,69 arguing, inter alia, that the majority, while stating otherwise, had actually placed the burden of proof upon those urging the validity of the legislative declaration instead of upon those attacking the validity of the "emergency clause." Further, the dissent argued that the majority had ignored the point that the statute need not be "emergent," in an immediate sense, in order to be "necessary for the support of the state government and its existing public institutions." This latter point derived from the court's earlier holdings that the word "or" was apparently inadvertently omitted after the word "safety" and before the word "support" in the constitutional provision, and therefore the provision should be read as if the word "or" were included. Thus, the laws excepted from the referendum are those necessary for the (1) "immediate preservation of the public peace, health or safety" or (2) "support of the state government and its existing institutions." The word "immediate" thus does not qualify the words "support of the state government and its existing public institutions."70

State ex rel. Hoppe v. Meyers,71 upon which the dissent relied for

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68. The case illustrates that whether or not laws passed by the state legislature are "emergent" as exceptions to the referendum provisions of the state constitution is a judicial question. The courts likewise have the power to determine whether a specified ordinance is "emergent" within the provisions of a city charter in which the right of referendum is reserved to ordinances that are not emergent. State ex rel. Gray v. Martin, 29 Wn. 2d 799, 189 P.2d 637 (1948) held that an ordinance providing for the condemnation of property for an airport was not exempt from the referendum, despite a declaration of emergency.

69. 61 Wn. 2d at 780-87, 380 P.2d at 740-44 (Finley, Rosellini, Donworth & Hunter, JJ., dissenting).

70. A Note in 39 WASH. L. REV. 155 (1964) is also critical of the majority opinion.

the above propositions, reaffirmed several other basic points. The word "support" is to be interpreted in its fullest sense, thereby restricting the power of referendum. A "public institution" is any organized activity created or established by law or public authority and includes not only those institutions of a physical character, but also, all branches and departments created by law which exercise any activity or function defined by the legislature and which existed at the time the seventh amendment was adopted, or which, if newly created by the legislature, have not been rejected by referendum.\footnote{22} The court has used these guidelines to determine the availability of a referendum in the face of an "emergency clause." Thus, in the Hoppe case itself the court held that a statute which increased the motor fuel tax, a portion of which increase was to be used for refinancing outstanding bonds of the state ferry system and a bridge, was a law directed to the support of an existing institution of state government and was thus not subject to referendum.\footnote{23} In the other instances in which the possible preclusion of the use of the referendum was raised because of the legislature's declaration of necessity and emergency, the court has divided about evenly in allowing and disallowing the referendum.\footnote{24} Those cases disallowing the

\footnote{22} See also State ex rel. Blakeslee v. Clausen, 85 Wash. 260, 148 P. 28 (1915).

\footnote{23} The majority opinion in State ex rel. Humiston v. Meyers, 61 Wn. 2d 772, 380 P.2d 735 (1963) summarized the earlier cases.

\footnote{24} Instances in which the court has upheld emergency clauses include the following: State ex rel. Pennock v. Coe, 42 Wn. 2d 569, 257 P.2d 190 (1953) (appropriation for Department of Public Assistance was for the support of a public institution); State ex rel. Pennock v. Reeves, 27 Wn. 2d 739, 179 P.2d 961 (1947) (appropriation for old-age and general assistance programs was for the support of an existing state institution); State ex rel. Hamilton v. Martin, 173 Wash. 249, 23 P.2d 1 (1933) (bonds to alleviate state-wide unemployment and poverty); State ex rel. Reiter v. Hinkle, 161 Wash. 652, 297 P. 1071 (1931) (statute requiring distributors to pay excise tax on sale of butter substitutes was a revenue measure for the "support of the state government and its existing public institutions"); State ex rel. Short v. Hinkle, 116 Wash. 1, 198 P. 535 (1921) (adoption of administrative code was within support provision as purpose was to consolidate and coordinate administrative agencies and thereby bring cost of government within revenue of the state; State ex rel. Robinson v. Reeves, 17 Wn. 2d 210, 135 P.2d 75 (1943) stated that the Short case should be overruled); State ex rel. Anderson v. Howell, 106 Wash. 542, 181 P. 37 (1919) (statute providing for a motor vehicle fund for the support of highways of the state was an act for the support of a public institution); State ex rel. Case v. Howell, 85 Wash. 294, 147 P. 1159 (1915) (statute providing for regulation of common carriers on streets and highways); State ex rel. Case v. Howell, 85 Wash. 281, 147 P. 1162 (1915) (statute enacted to prevent depletion of funds collected by cities from sale of bonds for local improvements); State ex rel. Blakeslee v. Clausen, 85 Wash. 260, 148 P. 28 (1915) (appropriations for the highway department were for the support of an existing public institution).
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referendum have more often involved statutes necessary for the support of the state government and its existing public institutions than those necessary for the immediate preservation of the public peace, health or safety; of the former cases the most common have involved appropriation and taxation laws. In cases allowing a referendum despite an "emergency clause," the court, aided by its judicial knowledge, was able to conclude that on the face of the act the legislature’s declaration of emergency and necessity was false.

The above discussion is not meant to suggest that the cases fit clearly into a pattern and that predictability of result is easy. To the contrary, each statutory declaration of emergency raises its individual and peculiar problems of "immediacy" and/or "support." This difficulty is borne out by the nearly even split in the cases allowing and disallowing the referendum, the fact that in many instances the court itself is divided and the fact that even among those judges voting on the same side there is often a concurring opinion based on reasons different from those expressed by the majority opinion. This result is to be expected because, as the court has recognized, what is involved is

Instances in which the court has struck down emergency clauses include the following:

State ex rel. Kennedy v. Reeves, 22 Wn. 2d 677, 157 P.2d 721 (1945) (statute providing for administration of state timber resources while perhaps "beneficial" was not for "support" of state government); State ex rel. McLeod v. Reeves, 22 Wn. 2d 672, 157 P.2d 718 (1945) (statute providing for appointment of state game commissioners was not within "support" clause since that clause has reference to financial support); State ex rel. Robinson v. Reeves, 17 Wn. 2d 210, 135 P.2d 75 (1943) (statute authorized the acquisition and operation of public power resources and public utilities by certain public authorities and municipal corporations; Robinson case overruled in part in State ex rel. Hoppe v. Meyers, 58 Wn. 2d 320, 363 P.2d 121 (1961)); State ex rel. Burt v. Hutchinson, 173 Wash. 72, 21 P.2d 514 (1933) (statute providing for horse racing under the pari-mutuel system of betting was not within "support" clause even though proceeds from the fees were to be paid into old-age pension fund since that fund was not an "existing institution," the law therefore not being then in effect); State ex rel. Satterthwaite v. Hinkle, 152 Wash. 221, 277 P. 837 (1929) (statute relating to the substitution of a Director of Highways for the Department of Highways); State ex rel. Brislawn v. Meath, 84 Wash. 302, 147 P. 11 (1915) (statute relating to a change in the personnel of the Board of State Land Commissioners).

74. The most recent case is State ex rel. Helm v. Kramer, 82 Wn.2d 307, 510 P.2d 1110 (1973). A referendum was sought on a part of the general fund appropriation statute which provided for the increase of salaries of elected state officials. It was held that the enactment was not subject to referendum because it was for the support of state government and its existing public institutions and was thus within the exception to Wash. Const. amend. VII (b), "irrespective of the existence of an emergency."

75. But see State ex rel. Robinson v. Reeves, 17 Wn. 2d 210, 214, 135 P.2d 75, 77 (1943), wherein the court said, "In its decisions, this court has very consistently and clearly (except in one instance) marked the cleavage between acts which are and those which are not subject to the referendum."
"a most delicate balance between the emergent powers of the legislature and the people's right of referendum."\(^{76}\)

One final point might be noted. Art. 2, § 1 (b), of the state constitution provides for a referendum "on any act, bill, law, or any part thereof" with the exceptions previously discussed. At one time this clause was interpreted to mean that the constitution authorized a referendum on a part of a law which is subject to referendum, but did not contemplate a law partially subject to referendum and partially not subject to referendum.\(^{77}\) Following from this, it was said that a partial referendum could not be had on a law which contained emergent matter.\(^{78}\) More recently, however, the court has overruled the earlier decision insofar as it held that there can never be a referendum of a part of a law which obviously contains any emergent matter.\(^{79}\)

VIII. LOCAL GOVERNMENT LEVEL

In contrast to the situation at the state level, the state constitution contains nothing relating specifically to initiatives or referendums at the local level of government. However, the home rule provision of the state constitution authorizes any city of 10,000 or more to adopt a charter for its own government, consistent and subject to the constitution and state laws.\(^{80}\) Such charters may, and often do, contain provisions for initiatives and referendums.\(^{81}\) That such provisions are proper is reinforced by R.C.W. § 35.22.200, which, after providing that the legislative powers of a charter city shall be vested in a mayor and city council, states that "the charter may provide for direct legislation by

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\(^{77}\) State ex rel. Pennock v. Reeves, 27 Wn. 2d 739, 179 P.2d 961 (1947).

\(^{78}\) Id.


\(^{80}\) WASH. CONST. art. XI, § 10. The fortieth amendment, approved in 1964, authorized a charter for cities of 10,000 or more: prior to that time, only cities of 20,000 or more were so authorized.


\(^{81}\) See Walker v. Spokane, 62 Wash. 312, 113 P. 775 (1911) to the effect that the provisions in a charter for initiative and referendum were "within the realm of local affairs, or municipal business," as provided in what is now WASH. REV. CODE § 35.22.120 (1963) and thus were proper under art. XI, § 10. The same case held that such provisions for direct governmental power in the people of a municipality do not violate the
the people through the initiative and referendum upon any matter within the scope of the powers, functions, or duties of the city."\(^{82}\)

While R.C.W. § 35.22.200 has had the most significant practical impact in authorizing direct legislation by municipalities, the most comprehensive state statutory provisions relate to cities operating under the commission form of city government. Detailed provision is made for the filing of petitions to initiate an ordinance or to obtain the referral of an ordinance to the people, for obtaining court review if necessary and for the conduct of elections.\(^{83}\) Finally, statutes scattered throughout the code authorize the initiative and referendum for particular subjects.\(^{84}\)


83. The nature of the provisions is suggested by the title headings: WASH. REV. CODE § 35.17.230 (1963), Legislative—Ordinances—Time of going into effect (not for 30 days to allow for referendum, except for ordinances initiated by petition, certain emergency ordinances passed by unanimous vote of all the commissioners and ordinances providing for local improvement districts); .240, Legislative—Referendum—Filing suspends ordinance; .250, Legislative—Referendum—Petitions and conduct of elections; .260, Legislative Ordinances by initiative petition; .270, Legislative—Initiative petition—Requirements; .280, Legislative—Initiative petition—Checking by clerk; .290, Legislative—Initiative petition—Appeal to court; .300, Legislative—Initiative—Conduct of election; .310, Legislative—Initiative—Notice of election; .320, Legislative—Initiative—Ballots; .330, Legislative—Initiative—Effective date—Record; .340, Legislative—Initiative—Repeal or amendment (ordinance initiated by petition cannot be repealed or amended except by vote of the people); .350, Legislative—Initiative—Repeal or amendment—Method; 360, Legislative—Initiative—Repeal or amendment—Record. Also relating to commission form cities is WASH. REV. CODE § 35.17.220 (1963) which provides for a referendum for certain franchises to use public streets.

84. WASH. REV. CODE § 80.32.040 (1963) provides that all grants of franchises for electric energy within any city or town by the legislative body thereof shall be subject to referendum under the general laws of the state or as provided by charter provisions. WASH. REV. CODE § 41.44.030 (Supp. 1972) provides that cities or towns of the first, second, third and fourth class may participate in the "State-wide City Employee's Retirement System" and that such participation may result from an ordinance enacted by the legislative body of the city or as a result of the vote of the people through an initiative or referendum. WASH. REV. CODE ch. 35.95 (1963), providing for financing of public transportation systems in cities and metropolitan municipal corporations, specifically allows for the right of referendum. WASH. REV. CODE ch. 66.40 (1963) establishes the mechanism for an election upon the question of whether the sale of liquor in general or under class H licenses should be permitted within certain local units. Other examples are to be found in WASH. REV. CODE §§ 36.13.080 (1963) and 54.12.010 (Supp. 1972).

Just as constitutional and statutory provisions determine when and how direct legislation may be invoked at the state level, so charter and statutory provisions control at the local level. Many of the problems, and resolutions thereof, are similar to those previously discussed for state-wide propositions and need only to be briefly noted.

Thus, the charter may provide for the referral of proposed legislation to a vote of the people either upon a petition by the people or at the direction of the legislative body itself; pending such submission, the operation of the ordinance is suspended. The charter may except certain types of ordinances or certain subjects from a general provision for direct legislation. Ordinances subject to referendum do not become effective for a prescribed period, such as thirty days, to allow for a petition. The court has interpreted time and filing requirements for such petitions to be mandatory and has required strict compliance.

Once an initiative or referendum petition has been filed, a check of the sufficiency of the signatures will be made by a designated officer. The stage at which signers of a petition may withdraw their signatures varies, depending upon charter provision, from the time before the determination of the sufficiency of the signatures until final action on the petition. If the signatures are found to be sufficient, the petition will be forwarded to the local legislative body for action in the case of an initiative directed to the legislative body, or to a designated officer

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86. Ordinances of an emergency nature are commonly excepted from the referendum, though the power rests with the courts to determine if an emergency actually exists. State ex rel. Gray v. Martin, 29 Wn. 2d 799, 189 P.2d 637 (1948). See also Arnold v. Carroll, 106 Wash. 241, 179 P. 801 (1919), to the effect that where a charter required an emergency ordinance to state the emergency, the courts would not usurp the legislative function and declare an emergency when the city council failed to do so. An attempt to construe a charter amendment has been said not to be a proper subject for initiative or referendum. State ex rel. Pike v. Bellingham, 183 Wash. 439, 48 P.2d 602 (1935).
88. The filing of a petition on the thirtieth day after the enactment of an ordinance was too late when the charter provided for filing "before the day fixed for the taking effect of the ordinance, which shall in no case be less than thirty days after action by the mayor." Romerein v. Erlandson, 70 Wn. 2d 932, 425 P.2d 911 (1967). Where the charter required filing with the city clerk, an attempt to file on a day that his office was closed or to deliver to the city manager was insufficient. State ex rel. Uhlman v. Melton, 66 Wn. 2d 157, 401 P.2d 631 (1965).
for submission to the people in the case of a referendum or direct initiative. The legislative body cannot, of course, defeat the proposal by delay or inaction.\textsuperscript{90}

If a measure is approved by the people, it has the same general effect as an ordinance enacted by the City Council or Commission. As a limitation, the charter sometimes provides that if the measure involves an expenditure exceeding the amount provided for that subject in the current budget, such expenditure shall not be valid until the effective date of the next succeeding budget.\textsuperscript{91} On the other hand, unless the charter otherwise provides, the legislative body of the city cannot repeal or amend an initiative ordinance; only the voters may do so.\textsuperscript{92}

As is readily apparent, many of the local problems and principles are similar to those of a state-wide nature. There are, however, some matters peculiar to the local level, and the remainder of the article will primarily analyze those.

It will be recalled that the courts are reluctant to determine the validity, and particularly the constitutionality, of proposed state-wide initiatives and referendums prior to their enactment.\textsuperscript{93} While there is a similar hesitancy to make a prior-to-enactment determination of the validity of local measures, there are numerous instances in which this determination has been made. Two cases will illustrate the problem.

In \textit{Yakima v. Huza},\textsuperscript{94} the city brought a declaratory judgment action to determine the validity of a proposed initiative ordinance. The court determined that in the particular circumstances presented by the case, the question whether to submit the initiative to a vote had been rendered moot and further that the effect of the proposed ordinance, in calling for a refund of taxes validly collected, would be to violate the state constitutional provisions which prohibit making a gift of public money or credit.\textsuperscript{95}

In response to a contention that the court should not look into the validity of the refund provision in the proposed ordinance but should

\begin{itemize}
  \item \textsuperscript{90} State \textit{ex rel.} Hindley \textit{v.} Superior Court, 70 Wash. 352, 126 P. 920 (1912).
  \item \textsuperscript{91} State \textit{ex rel.} Thorp \textit{v.} Devin, 26 Wn. 2d 333, 173 P.2d 994 (1946).
  \item \textsuperscript{92} State \textit{ex rel.} Ausburn \textit{v.} Seattle, 190 Wash. 222, 67 P.2d 913 (1937); State \textit{ex rel.} Pike \textit{v.} Bellingham, 183 Wash. 439, 48 P.2d 602 (1935); State \textit{ex rel.} Knez \textit{v.} Seattle, 176 Wash. 283, 28 P.2d 1020 (1934); Stetson \textit{v.} Seattle, 74 Wash. 606, 134 P. 494 (1913).
  \item \textsuperscript{93} See text accompanying notes 37-41 \textit{supra}.
  \item \textsuperscript{94} 67 Wn. 2d 351, 407 P.2d 815 (1965).
  \item \textsuperscript{95} \textsc{wash. Const. art.} VIII, §§ 5, 7.
\end{itemize}
only determine the sufficiency of the initiative petition, the court said it had the responsibility of determining the validity of the ordinance "at least in so far as the validity or invalidity is apparent and obvious in the wording of the act." The court continued:

We wish to be very clear as to the application of this principle to the facts in this case. We are not holding that the city council could be enjoined from enacting this ordinance because of its potential invalidity. That is an entirely different question with different ramifications and considerations which are not present in this case. We are holding only that the city cannot be ordered to hold an election in this instance because it would be requiring the city to perform a useless act, and to expend public funds uselessly.

This suggests several relevant considerations. First, it indicates a general reluctance to interfere with the legislative process before it is completed. Second, there is the suggestion that the form or procedure by which the question is presented may affect the review. Third, a principal factor calling for an early review is the waste of public funds which would result from an election when the ordinance in question will be invalid even if approved.

A second, and more recent, case is Ruano v. Spellman. A suit was brought to enjoin a county executive from further expending funds on a stadium project until there had been a vote upon a proposed initiative which would terminate the stadium project. An intervenor, a holder of county general obligation bonds earlier issued in connection

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96. 67 Wn. 2d at 360, 407 P.2d at 821 (1965).
What these considerations are is another question. The courts have not discussed this point, but the unarticulated practice may be said to involve a balancing test—weighing the value of preventing waste on the one hand against the value of allowing the public vote on the other. If a measure is patently void or unconstitutional on its face, then the waste should be prevented. This is fairly clear. Beyond, however, lie the harder cases. If a close question is presented, a number of factors might come into play. The court could decide whether the issue raised is one of legal technicalities or one involving some public policy considerations. If the former, the court might choose to pass on the law prior to enactment, especially if the legal question is one that needs clarification. If the legal question is one rampant with implications the court would prefer to avoid, judgment might be withheld on the chance that the measure may fail in the vote. If public policy questions are presented, the court might defer judgment, pending the public's expression on the matter. Certainly though, this is an area where prediction will be difficult.
98. 81 Wn. 2d 820, 494 P.2d 990 (1972).
with the project, sought to prevent the submission of the initiative to
the people.

The trial court enjoined the submission of the initiative and in
doing so relied upon three principles: that only administrative deci-
sions remained to be made in connection with the project and there-
fore there was no legislative determination subject to initiative; that
the initiative would impair the obligation of contract embodied in the
already-issued stadium bonds; and that the initiative was in legal effect
a referendum which was prohibited under the particular circum-
stances by the county charter.

On appeal the state supreme court affirmed. The court agreed that
only administrative as contrasted with legislative decisions remained
and that such decisions were not subject to the initiative process, a
point more fully developed later in this article. The court went on to
decide that the proposed initiative, if adopted, would constitute an
impairment of the contractual obligations owed to the bondholders
and would thus be unconstitutional.

The difficult point is to determine why the court felt it necessary to
decide the impairment issue at all. The court stated initially that re-
versal of the trial court would be warranted only if the trial court was
wrong on all three of its determinations. Having concluded that the
trial court was correct in deciding that only an administrative decision
was involved, there was no need to decide anything more. This lack of
necessity is further pointed out by the fact that the court did not feel it
necessary to reach the third question of whether the initiative was in
legal effect a prohibited referendum.

Similarly, it was unnecessary to reach the second question, the con-
stitutional issue of impairment. Indeed, three justices in a separate
concurring opinion expressly stated the lack of any such necessity and
a fourth justice expressed concern that the holding as to impairment
“be construed narrowly in light of the facts of this case.”

This case, then, excellently illustrates the possibility of a court
making a prior-to-enactment determination of the validity of a pro-
posed local initiative or referendum, even on an issue of constitu-
tionality. Much more frequently, however, such determinations are
made when the contention is that proposed direct legislation violates
charter or statutory provisions or involves administrative rather than
legislative matters. The remainder of the article treats these subjects.
IX. STATE CONTROL OF LOCAL DIRECT LEGISLATION

City charter provisions are the principal sources for and limitations upon direct legislation at the local level. Such provisions define the circumstances under which direct legislation is available and the mechanism by which such legislation is to be accomplished. Nevertheless, whenever there is a relevant state statute, it is supreme. To the extent that a state statute and a charter provision are inconsistent, the former prevails. This supremacy results from the constitutional home-rule provision which authorizes charters, "consistent with and subject to the Constitution and laws of this state," and the judicial interpretation of the provision that complete supremacy of the legislature is intended. In State ex rel. Guthrie v. Richland, a mandamus proceeding was brought to compel the submission of an ordinance providing for additions to a municipally-owned waterworks to a referendum vote. A city charter provision stated that all legislative ordinances were subject to referendum. Nevertheless, the court held the ordinance not subject to referendum because the charter provision conflicted with a state statute establishing the procedure whereby a city might make additions to a public utility.

Similarly, a provision in a city charter authorizing a referendum of annexation ordinances was held to be without effect because the statute granting the power of annexation to the city did not authorize such a referendum. And the court has held that an ordinance should not be submitted for a referendum vote, even though authorized by the city charter, where an unfavorable vote would in effect legalize the owning and operating of pinball machines, since this would violate a state statute prohibiting gambling devices.

In determining whether use of the local initiative or referendum in a particular instance violates a state statute, the court at times has drawn a distinction between a grant of authority by the state legislature to the city as a corporate entity and to its legislative and other

101. 80 Wn. 2d 382, 494 P.2d 990 (1972).
corporate authorities. If the grant of power is to the city as a corpo-
rate entity, direct legislation is permissible insofar as the statute is con-
cerned.\textsuperscript{104} On the other hand, if the grant of power is to the legislative
authority of the city, the initiative and referendum are prohibited.\textsuperscript{105}

One wonders whether the state legislature in delegating certain
powers to local government is very often thinking of the initiative and
referendum when it authorizes the "city council" or the "legislative
body" rather than the "city" to do something, or whether the partic-
ular choice of words is happenstance.\textsuperscript{106} One wonders whether the
legislature is not more likely concerned with the subject matter of the
particular legislation and the felt need for delegation of authority to
the local level without thinking about who at the local level should
exercise the power. One further wonders whether the general predis-
position in favor of participation by the people should not lead the
court in doubtful cases to sustain the use of the initiative and referen-
dum, regardless of the particular language used in the delegation, un-
less there is something in the particular legislation which otherwise
suggests or calls for the denial of participation by the electorate.

If, in reality, the legislature did intend that only the municipal legis-
lation body should have power in a particular instance, that must con-
trol.\textsuperscript{107} The danger, of course, is that the wording in the statute will be
taken at face value and will substitute for reasoning in the particular
instance.

The supremacy of the legislature is further illustrated by the fact
that, not only may a charter not provide for an initiative or referen-
dum when a statute prohibits it, but the charter itself may not be

\textsuperscript{104} State \textit{ex rel.} Walker v. Superior Court, 87 Wash. 582, 152 P. 11 (1915). The
city charter would also have to authorize direct legislation in the particular instance.

\textsuperscript{105} State \textit{ex rel.} Bowen v. Kruegel, 67 Wn. 2d 673, 409 P.2d 438 (1965); State \textit{ex
343, 130 P. 353 (1913).

\textsuperscript{106} An interesting problem was created in Washington Water Power Co. v. Roo-
ney, 3 Wn. 2d 642, 101 P.2d 580 (1940). An ordinance granted two franchise rights, one
assumed to be vested exclusively by statute in the Mayor and City Council as consti-
tuting the legislative authority of the city and the other subject to referendum. A refer-
edendum petition was filed. The ordinance was held to be void as containing two incon-
gruous subjects.

\textsuperscript{107} State \textit{ex rel.} Guthrie v. Richland, 80 Wn. 2d 382, 494 P.2d 990 (1972) is a good
example of the court looking beyond mere words to the underlying legislative purpose.
In the particular instance the conclusion was that the ordinance was not subject to refer-
edendum.
amended by initiative to include a provision inconsistent with a statute. Thus, a charter amendment, passed by initiative, was invalid where it provided for the submission of disputes arising between city firemen and the city as to working conditions, wages and pensions, to a board of arbitrators and further provided that such board was given full power to fix wages, pensions or working conditions of city firemen and that its decisions were binding upon the city council and the firemen. The court held the charter amendment invalid because it was deemed to contravene and make ineffective a state statute vesting legislative powers in the city council.108

X. LEGISLATIVE V. ADMINISTRATIVE ACTION

In *Ford v. Logan*,109 the court stated one of the basic issues to be whether courts have jurisdiction to determine whether the subject of a proposed initiative is within the initiative power before the proposal is enacted by the electorate. The court responded that it could determine what it designated as the “threshold” question of whether a given proposal is legislative in character.

The court stated that a fundamental limit on the initiative (and referendum) power inheres in its nature as a legislative function reserved to the people. It was said to be “clear from the [state] constitutional provision” that the initiative process was limited in scope to subjects which are legislative in nature. Why this is clear was not spelled out, but authorities have suggested reasons such as the placement of the initiative and referendum provisions in the article delegating the state legislative powers, the doctrine of separation of powers and an arguable intent of the drafters of the constitution that the initiative and referendum were to apply only to broad policy decisions and not to administrative acts, because applying it to the latter would too seriously hamper the conduct of government.110

The particular question presented in *Ford v. Logan* was whether the repeal of a county home rule charter by an initiative was a legislative act. Over a vigorous dissent, and with only three justices concur-

109. *79 Wn. 2d 147, 483 P.2d 1247 (1971).*
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ring in the majority opinion (two others concurring in the result), the court held in the negative. Such an act was deemed to be of a “higher order” than the enactment of ordinary legislation, i.e., something akin to an amendment of the state constitution itself. To be contrasted is State ex rel. Linn v. Superior Court,111 which held that an amendment of a city charter could be accomplished by initiative because such an amendment was a legislative act. Whether the cases are consistent is questionable, but certainly in combination they illustrate the importance of a legislative act as a prerequisite to the availability of the initiative and referendum.

More typically, however, the distinction drawn for the purpose of determining the availability of an initiative or referendum is not between a legislative act and an act of a higher order, but rather between a legislative act and an administrative act. If legislative, direct legislation is permissible; if administrative, it is not.

An excellent example of the problem is Durocher v. King County,112 where the court concluded that the county council had the power in certain circumstances to act in an administrative as well as a legislative capacity. Whether the county council’s action in granting an “unclassified use permit” was subject to referendum was said to depend upon whether such action was legislative or administrative, which itself was said to be a judicial question.

Quoting from other sources the court stated the tests to be as follows:113

Actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative....

The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is admin-

111. 20 Wn. 2d 138, 146 P.2d 543 (1944). The actual holding of the case was that the constitutional home rule provision (WASH. CONST. art. XI, § 10), which required that notice be given upon the submission of a charter amendment to the voters, applied to a proposed amendment initiated by the people because such proposal was being submitted by the “legislative authority” of the city. In accord is Burns v. Alderson, 51 Wn. 2d 810, 322 P.2d 359 (1958).
112. 80 Wn. 2d 139, 492 P.2d 547 (1972).
113. Id. at 152, 492 P.2d at 555.
istrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.

The court concluded that the issuance of an "unclassified use permit" was an administrative act under these tests and thus not subject to referendum.\footnote{114. The opinion made two other matters clear: (1) whether the action is in the form of an ordinance or a resolution is not controlling; (2) a home rule charter cannot extend the power of referendum to other than legislative acts.} Though the court did not so state, one wonders whether the pragmatic reason for the result was that to allow a referendum in such an instance would unduly harass local government. The existence of this consideration in the background, despite the tests stated, is perhaps suggested by another case holding that the initiative and referendum procedures cannot be used to "interfere in the management of the state's school system."\footnote{115. Citizens Against Mandatory Bussing v. Palmason, 80 Wn. 2d 445, 495 P.2d 657 (1972). The court referred to the notion of administrative decisions of school district officers being subject to referendum as novel. Such a conclusion would constitute frustration and interference with the state's provisions for education.} Similarly, in Durocher, the court may not have wanted interference with the county's land-use controls. On the other hand, the court has held that the fixing of salaries is a legislative, and not an administrative, function and thus is subject to the initiative and referendum.\footnote{116. State ex rel. Payne v. Spokane, 17 Wn. 2d 22, 134 P.2d 950 (1943); State ex rel. Leo v. Tacoma, 184 Wash. 160, 49 P.2d 1113 (1935); State ex rel. Pike v. Bellingham, 183 Wash. 439, 48 P.2d 602 (1935).} A final example of the legislative-administrative distinction arose in the context of the construction of a multipurpose stadium. The voters of King County authorized the issuance of bonds for such a stadium. Subsequently, the County Board of Commissioners selected a site, upon recommendation of a special stadium commission, and commenced negotiations to purchase the site. At that point an initiative to prohibit construction at the selected site was proposed. An attempt to enjoin the submission of the initiative failed and the court held, \textit{inter alia}, that the selection of a site was a legislative act properly to be submitted to the people.\footnote{117. Paget v. Logan, 78 Wn. 2d 349, 474 P.2d 247 (1970).} The court, however, intimated that at some point in time a proposed project might progress to the point where only administrative decisions would remain.

That point was reached shortly thereafter when the county board selected another site and another initiative was proposed, this time to
terminate the entire stadium project. In ruling on the initiative, the court noted that an option to purchase the site had been exercised by the county, contracts had been entered into for architectural and engineering services, to provide soil testing and for independent cost estimates and construction scheduling, and certain bids had been advertised and issued to interested bidders. The court concluded that only administrative decisions remained and thus the initiative process was no longer available.  

Why did the first case involve a legislative decision and the second an administrative decision? The most obvious difference between the two situations is that the county had progressed further in making decisions and incurring obligations by the time of the second proposed initiative. As a result, if the second initiative had succeeded there would have been greater injury both to government and to those who had entered into relationships with government. Further, the first initiative was directed only to overturning a particular site selection, whereas the second, if passed, would have overturned the entire stadium proposal. This factor likewise would have caused greater impairment of expectations. Another consideration is simply that by the time of the second initiative a feeling may have developed that matters had to be brought to an end at some point and government allowed to function without endless debate and indecision. Finally, one wonders whether the political climate was not such as to almost demand an initiative in the first instance, whereas tempers had cooled a bit by the time of the second proposed initiative. In short, whether stated or not, the controversial nature of the particular issue may well bear upon the judicial determination of whether the matter is legislative or administrative. 

More broadly, the legislative-administrative dichotomy is representative of the judicial approach to problems of initiative and referendum at the state and local level—an attempt to balance what amounts to considerable interference with representative government with the benefits of direct participation in government by the people.

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