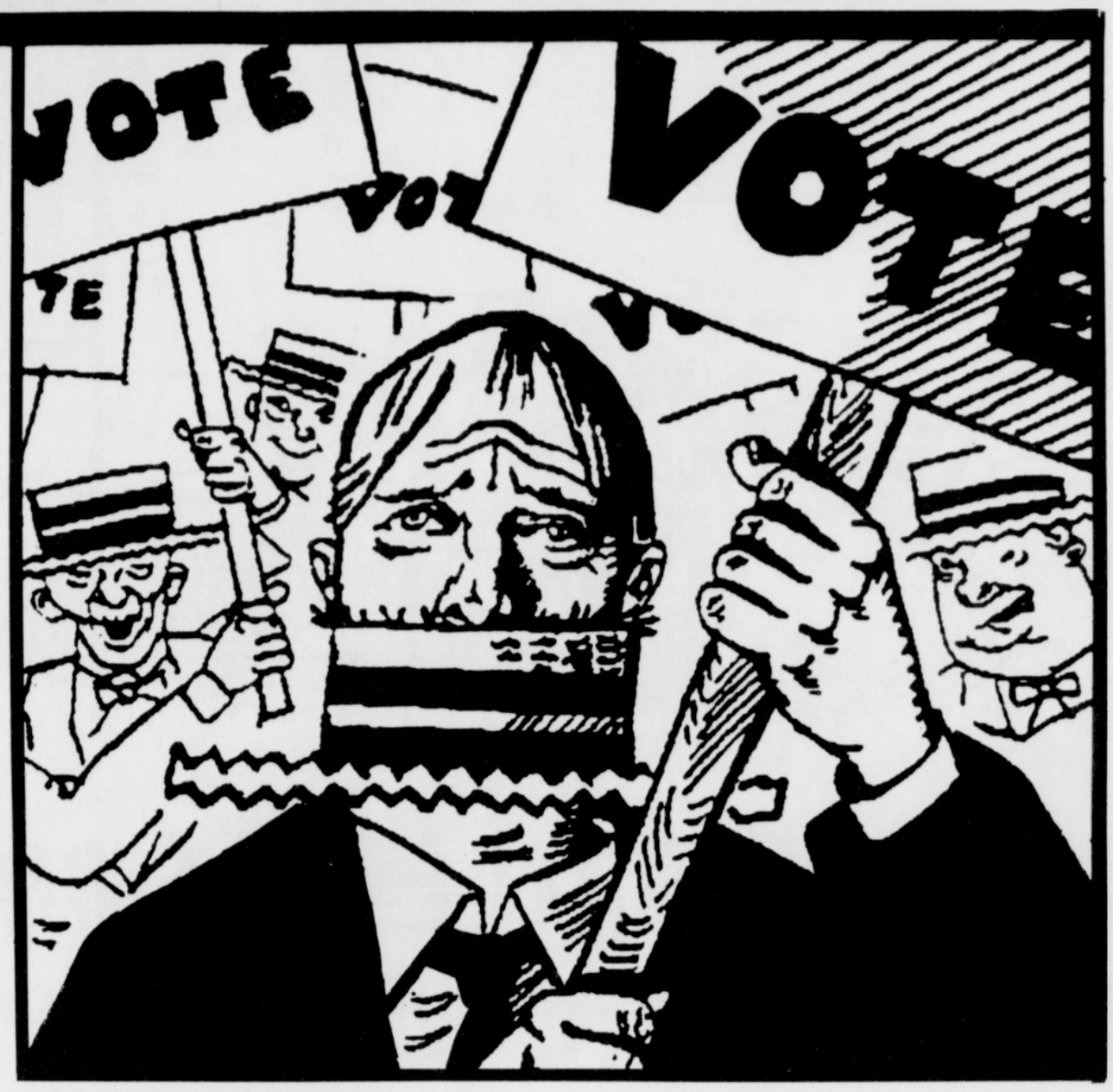
INITIATIVE UNDER ATTACK

"Oregon and Oregonians have earned a nationally recognized reputation for government innovation. The initiative and referendum began here."
—J.W. FORRESTER

Initiative: A proposed law initiated by the citizens by petition.

Referendum: A passed law submitted to the ballot by citizen petition.



MARTIN KOZLOWSKI

BY GREG WASSON

Oregonians who take their intiative and referendum rights for granted do so at their own peril. Direct legislation — the voters writing and unwriting laws at the ballot box — depends on a judiciary ready to protect the petition process. Over the century, Oregon courts have been uncertain allies. Current cases before the courts call for a review of the history of the initiative in our state.

When Oregon borrowed the Initiative and Referendum from Switzerland in 1902, it borrowed a revolution. By using the initiative to enact laws the legislature wouldn't and the referendum to veto laws the legislature shouldn't, voters became part of an expanded system of checks and balances. The political crises of that era demanded no less.

In his 1898 retirement address, president of the Oregon Bar Association Judge Stephen Lowell, of Pendleton, lamented that local, state and national governments had become governments "of the people, by the politicians and for the corporations." At the time the legislature, not the people, selected Oregon's U.S. Senators. When it came time to choose the next U.S. Senator, Salem became the scene of barely-concealed bribery and shameless auctions. Turn-of-the-century magazines reported that one national corporation offered $25,000 for just two votes during the 1897 session.

The state legislature also controlled writing and amending local government charters. Legislators from Roseburg could trade votes with legislators from Portland to secure changes in local laws inimical to the interests of all but a few influential local citizens.

Armed with the initiative and referendum, the statewide electorate began to reform a government that had become too corrupt to reform itself.

In 1906 the initiative was used to:

—Extend to local voters the *exact same* petition rights as those available statewide.

—Forbid the legislature from amending local charters, thereby placing control over local laws in the hands of the people who had to obey them.

—Approve a primary system that allowed Oregon to become the first state in the Union to select its federal senators at the polls. (States across the country followed Oregon's lead and the 17th Amendment spread direct election of senators nationwide in 1913.)

Subsequent elections saw approval of initiative measures giving voters the right to recall elected officials, limiting the amount of money that could be spent in campaigns, and restricting the power of the legislature to impose new taxes.

Even though the initiative has been used many times since 1902 and Oregonians take its rights for granted, there have been no persistent champions to defend the people's rights as special interests opposed to public control of state law have sought to erode the initiative's impact.

In 1908, the Oregon Supreme Court first drew the crucial distinction between legislative actions (allowed by initiative) and administrative actions (not allowed by initiative). At various times through the decades that followed, the court has drawn on this distinction to limit subject matter of the initiative.

Court opinions limiting the initiative prevailed from 1913 into the 1920s. Two limitations put in place during this period were allowing the legislature control of the timing of statewide initiatives, and mandating that local voters could not initiate local laws without the legislature's permission.

In the late 1920s, the court flip-flopped and actually reversed some of its earlier rulings without comment. In the 1930s it flip-flopped back again, in favor of the rights of the initiative. During World War II it was again restrictive, and after World War II, more supportive of the initiative process.

This on-again, off-again support for the Initiative Amendment has left Oregon's initiative law confused and contradictory. Even when the petitioners have the money to hire a lawyer, there are no well-reasoned, consistent judicial theories to support the initiative process.

Accordingly, corporations and local governments are mounting an increasingly successful attack on the initiative process. The costs and difficulties in defeating these legal challenges threaten to leave the petition process available only to the wealthy.

Oregon courts, and various state and local officials, are increasingly invoking the "legislative/administrative" distinction, thus frustrating local petition drives.

At the state level the legislative/administrative distinction is the result of who makes a decision: the acts of the legislature are the former and the actions of the governor or state agencies are the latter. For counties and cities there is no such easy distinction. City councils and county commissioners take both legislative and administrative actions, and there is no neat way to separate them. The only reason to call an action "administrative" is to prevent the voters from acting on it.

In theory, this distinction does not represent a threat to the people's petition power. In practice, however, the courts are labeling more and more governmental decisions "administrative" and beyond control of the initiative and referendum. Several local battles illustrate the danger of this trend:

Foster v. Clark has led the attack on the local petition process. In 1990, the Portland City Council renamed Union Avenue in honor of the Rev. Martin Luther King, Jr. The council then adopted an ordinance governing future name changes. Citizens submitted enough signatures to force a vote on restoring the original name. The Multnomah County Circuit Court blocked the election.

According to the circuit court, when the city council adopted the ordinance governing the naming of streets, it transformed such efforts into *"administrative"* decisions not subject to the initiative. The Oregon Supreme Court affirmed this decision. In effect, by passing a local ordinance, a city council deprived local voters of their constitutional right to initiative and referendum.

Foster v. Clark set in motion a series of court and bureaucratic decisions giving government life and death control of the initiative process. What follows is a list, by no means exhaustive, of some of these decisions. Parenthetically, the author adds that he knows of just one dispute resolved in favor of petitioners.

—During the 1980s, the legislature enacted a statutory scheme for constructing sewers. Under this statute, local government decisions to construct sewers could not be referred. In other words, by passing this statute, the legislature deprived local voters of their constitutional right to initiative. The Court of Appeals endorsed this usurpation of power, holding that the legislature could give local government more power than the constitution gives to the local voters.

—In 1989, Metro signed a 20-year, $208-million contract with Jack Gray Transport to truck Metro's garbage to Arlington. A referendum petition garnered sufficient signatures within the 90-day timeline to be taken to the voters. The Multnomah County Circuit Court blocked the referendum drive, calling the decision *"administrative."* The Court of Appeals affirmed this decision and the Oregon Supreme Court refused to grant review. This case, *Gray Transport, Inc. v. Ervin*, is frightening for those who value participatory government. Metro sets the majority of its policies through awarding contracts. If the voters cannot refer contracting decisions, they have no power over the governing board.

—In 1990, Josephine County voters initiated an amendment to the county charter limiting the salaries of county commissioners. The local circuit court ruled that the setting of salaries is *"administrative"* and cannot be done by initiative. This decision, *Hudson v. Feder*, was reversed on appeal. However, the county has chosen to ignore the Court of Appeals, paying the commissioners thousands of dollars more than the level set by the people. The Oregon Supreme Court has been asked to intervene and order the county to obey the law.

—In 1992, the Corvallis City Council increased the franchise fee they charged Northwest Natural Gas. The gas company simply passed the increase through to its customers. Many citizens viewed this as nothing more than a tax, with the gas company playing the role of tax collector. When the citizens tried to amend the city charter to repeal the tax, the city recorder announced that franchise fees are an *"administrative"* matter, and refused to certify the initiative for circulation. The Benson County Circuit Court refused to order the recorder to accept the initiative. This failure was challenged in *Converse v. Mariner*, which was argued in June 1993, and awaits a decision.

—The Multnomah County Commissioners recently announced that benefits currently available to the spouses of county workers will also be available to domestic partners, with no marriage required. Certain citizens attempted to pass petitions to amend the county charter to repeal this action. The county elections officer announced that the setting of benefits is an *"administrative"* matter and refused to certify the initiative for circulation.

As these examples demonstrate, Oregon courts and local governments are, with greater frequency, thwarting local petition drives by invoking the legislative/administrative distinction. Simply put, local voters are being deprived of their constitutionally guaranteed right to initiative by the increasingly heavy-handed application of this distinction.

Oregon is experiencing an assault on the initiative, and unless this current trend is reversed, a meaningful petition right at the local level will not exist past the end of this century.

EDITOR'S NOTE:

Don't throw the baby out with the bathwater!

Cliches are so overused because they are so useful.

The baby here is the local initiative, which many libertarians feel is being abused by hate groups like the Oregon Citizens Alliance. The OCA muddies the bathwater, which some think dirties the baby. Legislative action to nullify local initiatives won by the OCA are cheered as would probably the same action to cancel OCA's petition drives. The problem, of course, is that the state will not stop its interference there.

The OCA represents an ancient prejudice using new methods to foster its intolerance. If, however, the state is allowed to use its muscle to prevent a popular vote, the people of Oregon will assuredly lose a precious right of determining their own governance. A powerful state government in the hands of rightwing conservatives might well later ban homosexuality and the people most affected will have nothing to say about it except grumble in bars or hide their identities in fear of repression.

As for popular election of federal senators, the present examples don't speak highly for the process. Perhaps if Oregon's referendum were extended to include removing tarnished or disgraced federal representatives the problem would be less critical.

—MPMc

Greg Wasson is a lawyer in Salem. He made the above presentation to a state board meeting of Oregon Common Cause in May.