

FACT SHEET

LWVMD STUDY ON INITIATIVES AND REFERENDUMS

INTRODUCTION

In 2019, LWVMD decided to undertake a study of the initiative and referendum (I&R) process and in the fall of 2019, a study committee was formed. The purpose of this study is to help members determine whether LWVMD should support a position for Maryland to allow citizen initiatives. The study committee examined how initiatives and referendums have been used in other states, the features commonly found in them, and the advantages and disadvantages of the approach. Approximately half the states allow at least one of these ballot processes. Maryland currently permits only referendums. As a result, most of this study focuses on the other process, known as initiatives.

BACKGROUND & DEFINITIONS

Initiatives and referendums have been used for more than 100 years in some states and allow citizens to place proposed statutes or constitutional amendments on a ballot so they can be voted on directly by citizens.¹ Two goals are often stated for using them: (1) improve citizen participation and power in making laws, and (2) diminish the influence of special interests so politicians are more responsive to citizens.²

The first state to adopt an initiative process was South Dakota in 1898. Since then, interest in ballot initiatives has grown and ebbed at various times. In the early 1900s, the use of initiatives grew out of the progressive movement due to dissatisfaction by the citizens with government corruption and the influence of big business, particularly the railroads. The use of initiatives generally declined until the late 1970s when California passed Proposition 13 to cut taxes. After that, the use of initiatives grew steadily and nationally reached a peak of 382 in the 1990s. From 2000-2010, there were a total of 375 initiatives, but since then, fewer initiatives have been proposed. The number of approved state-level initiatives reached a historic high in 2016; during 2020, 29 initiatives were approved that proposed new laws.³ In the early years, successful initiatives allowed women to vote, abolished poll taxes, restricted the sale of liquor, funded public infrastructure, and ended child labor. Today, initiatives continue to focus on issues that elected officials are reluctant to address, such as marijuana legalization, the minimum wage, animal rights, capital punishment⁴ and redistricting.

Definitions

Ballot measures are questions that appear on the ballot and do not relate to a candidate for office. Ballot measures are broken down into two distinct categories – initiatives and referendums.

¹ Ballotpedia, https://ballotpedia.org/Initiative_and_referendum

² David D. Schmidt, *Citizen Lawmakers, The Ballot Initiative Revolution*, Temple University Press, Philadelphia, PA, 1989. See also “Do Ballot Initiatives Undermine Democracy,” Policy Forum, Cato Policy Report, July/August 2000.

³ Initiative & Referendum Institute, Ballotwatch, <http://www.iandrinstute.org/docs/BW-2020-2-Results.pdf>

⁴ Matsusaka, John G., *Public Policy and the Initiative and Referendum: A Survey With Some New Evidence*, Public Choice (21018) 174:107-143]

Initiatives allow citizens to propose statutes or constitutional amendments that are to be placed on the ballot for consideration by voters following a process of gathering signatures. Initiatives are further characterized as “direct” or “indirect.” A Direct Initiative is presented directly to voters and takes effect without legislative or gubernatorial actions if it is passed by popular vote. In contrast, an Indirect Initiative is submitted first to the legislature, which has an opportunity to act on it. If the legislature rejects it, submits a different proposal or takes no action, the original proposal may then be placed on the ballot for voter approval or rejection.

Although direct and indirect initiatives are the most frequently used and studied, two other types of initiatives may also be referenced. The first is the General Policy Initiative in which proposed statutes or constitutional amendments are general and lack specific constitutional or statutory language. If passed by the voters, the legislature is required to develop the laws to implement the policy. The second type is an Advisory Initiative in which a popular vote is taken on a proposed statute or constitutional amendment, but if passed, the legislature is not required to adopt the measure. Its value is in assessing voter opinion on an issue.

Referendums can apply to either constitutional amendments or statutes. Constitutional amendments are generally required by state constitution to be approved or rejected by the voters. For statutes, legislators can require the voters to decide whether to uphold or repeal a law they have passed. This is known as a Legislative Referendum (or legislative referral). No signature collection is required. Another type of referendum is a Veto Referendum. In this case, the legislators have passed a law and the citizens collect signatures to place that law on the general election ballot so that the voters can decide whether to keep it or nullify it.

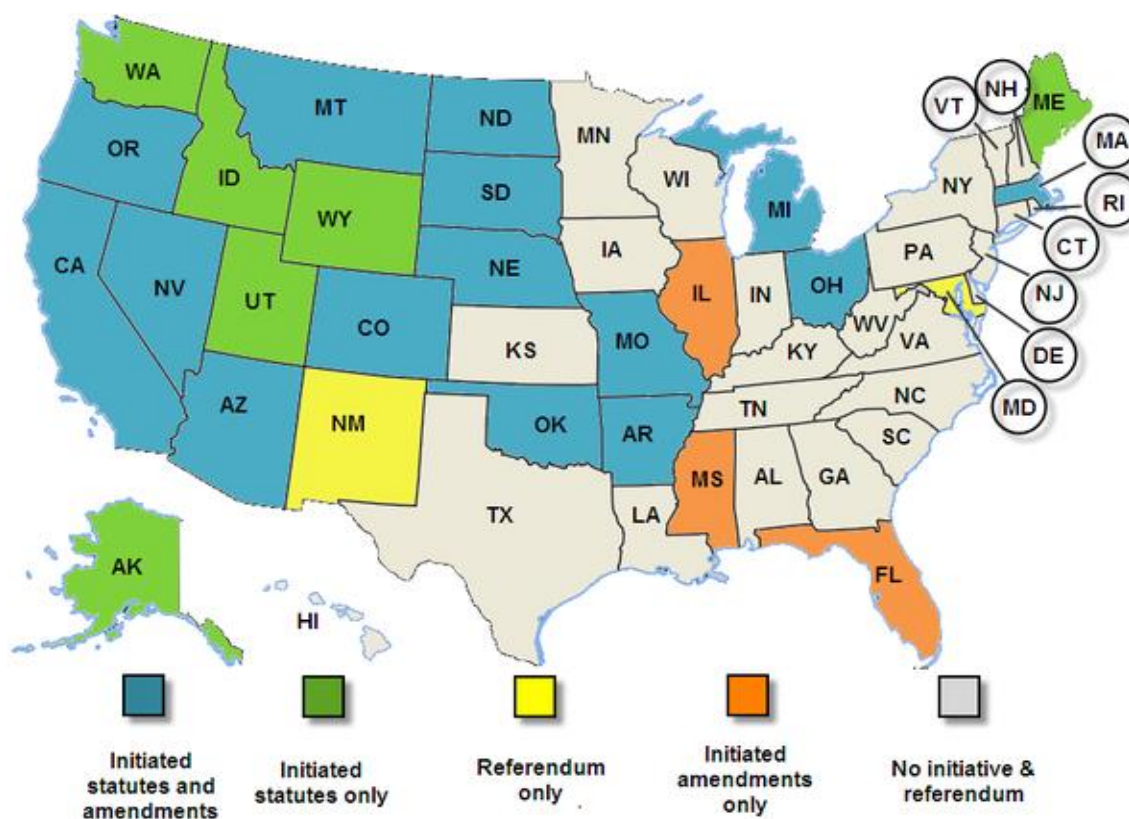
The similarities and differences between initiatives and referendums can be briefly summarized in this table:

Table 1: Basic Characteristics of Initiatives and Referendums				
Proposal Type	Propose a Statutory Change	Propose a Constitutional Change	Role for Legislature To Get on the Ballot?	Require Citizen Signatures To Get on the Ballot?
Initiative				
Direct	✓	✓		✓
Indirect	✓	✓	✓	✓
Referendum				
Legislative	✓	✓	✓	
Veto	✓			✓

STATES THAT ALLOW CITIZEN INITIATIVES

In total, 26 states have some form of citizen-driven initiatives.⁵ The map shows that (15) states allow initiatives for both statutory changes and constitutional amendments (shaded in blue), and 6 allow initiatives for statutory changes only (shaded in green). For these 21 states, 12 have a direct initiative process, 7 have an indirect process and 2 have both (not shown on the map).⁶ The remaining 5 states allow initiatives for constitutional changes only or allow referendums. Many of the states that allow initiatives are located in the west and Midwest. The belief is that powerful elected officials in the south and east pushed back against attempts to allow them.⁷ Mississippi was the last state to adopt an initiative process, having done so in 1992. In 2019-2020, bills to allow initiatives were introduced, but not passed, in Hawaii, New York, Tennessee, Wisconsin, and New Jersey.⁸

FIGURE 1: MAP OF STATES THAT ALLOW CITIZEN INITIATIVES



Source: Ballotpedia, downloaded 11/12/20.

[https://ballotpedia.org/States that allow initiated constitutional amendments](https://ballotpedia.org/States_that_allow_initiated_constitutional_amendments)

⁵ Ballotpedia, https://ballotpedia.org/States_that_allow_initiated_constitutional_amendments

⁶ Ballotpedia, https://ballotpedia.org/States_with_initiative_or_referendum

⁷ Theodore, Nicholas R., *We the People: A Needed Reform of State Initiative and Referendum Procedures*, Missouri Law Review, 78:4, 2013, <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=4069&context=mlr>

⁸LWVMC Interview on July 28, 2020 with Amanda Zoch, Policy Specialist, National Conference of State Legislatures.

ADVANTAGES AND DISADVANTAGES OF INITIATIVES

A primary benefit of ballot initiatives is providing citizens with the ability to pursue an action supported by a majority of voters, bypassing or putting pressure on legislators who are reluctant or unable to pay attention and take action on issues that are important to the people. Initiatives also have the potential to help citizens connect to an issue and increase their participation in civic life; encourage people to vote; and forge community partnerships and consensus as citizens work together to mobilize for or against a ballot measure.

However, concerns have also been voiced in having initiatives. They require significant amounts of time and money, and citizens may face a strong and well-funded opposition. Voters are typically asked for a conventional “yes or no” vote, which could put additional pressure on competing needs and limited public resources. In any ballot question, disinformation can spread (especially on social media) if voters are unable to access reliable and objective information.

As noted, direct and indirect initiatives are structured differently and as a result, they also bring forward slightly different issues. Specifically:

Direct initiative:

- Advantages include the potential to be faster at resolving a question than the legislative process required of indirect initiatives.
- Disadvantages include lack of critical elements that are in the typical legislative process (see indirect initiative advantages below) and a lack of objectively and professionally prepared legislative and fiscal impact analyses to consider before adopting. There can also be a risk of court challenges. These and other disadvantages of direct initiatives can be potentially mitigated with the use of key practices (see page 6) or through the use of an indirect initiative process.

Indirect Initiative:

- Advantages include an explicit role for the legislature in the process, including hearings, open debate, and the potential for amendments by legislators. Such steps can help ensure that minority views have the opportunity to be heard and recognized.
- Disadvantages include evidence that legislatures rarely enact the action desired through indirect initiatives and may even decline to consider the issue. Additionally, citizens behind an initiative may ultimately have to turn to a direct process (if available) but will have lost time and resources in the process.

There are mixed views on the extent to which initiatives hinder or facilitate efforts by special interests to influence legislation. Some assert that a direct initiative may help citizens overcome the influence that special interests may have in the legislature by taking a question directly to the people. It is more difficult for special interests to influence an entire electorate compared to influencing a smaller group of legislators.⁹ However, others suggest that special interests

⁹ LWVMC Interview on May 26, 2020 with John Matsusaka, University of Southern California Marshall School of Business, Charles F. Sexton Chair in American Enterprise, Professor of Finance and Business Economics, & Executive Director of Initiative and Referendum Institute.

may be more likely to have the time and resources to mount a sustained effort around a ballot question, especially if it is introduced more than once. Ballot initiatives are not subject to campaign finance rules so there are no limits on financial contributions to them (including from out-of-state). The influence of money may vary by type of ballot question but may have greater influence for questions where voters may not have well-formed opinions, such as a new issue or a highly technical one.¹⁰

There is limited evidence on the extent to which citizen initiatives are more effective in reflecting citizen preferences in state policy than laws generated by state legislatures. One expert analysis notes that one of the more robust findings is that initiative states are more likely to impose term limits on elected officials and that the threat of a proposition can result in legislators choosing a different policy. In other words, the initiative can influence legislators simply by being available even if it is not used.¹¹

MARYLAND LAWS

Maryland law does not provide citizens the power of initiative. In order to establish this option, the state constitution would have to be amended. Changes to the state constitution require that an amendment be passed by a 3/5 vote in each chamber and then passed by a simple majority of voters in the next general election.¹²

However, since 1915, the Maryland constitution has provided the mechanism of veto referendum, allowing citizens to repeal any legislative act or part of any act.¹³ Certain requirements and limitations are imposed, such as:

- a limit on the ability to repeal an appropriation for State Government or a public institution.
- a requirement for a certain number of signatures to be collected to get on the ballot.¹⁴ The signatures must be collected after the bill has been approved by the legislature and before it takes effect. State officials must verify that requirements are met and that fraudulent signatures are excluded.
- The Secretary of State provides a ballot title “in such form as to present the purpose of said measure concisely and intelligently.”
- A simple majority of the votes cast on the referendum determines the outcome.

Many Maryland counties and all cities and towns permit citizen initiatives to be placed on the ballot. Nine of eleven charter counties in Maryland have an initiative process for charter

¹⁰ Issenberg, Sasha, “Ballot Measures Don’t Tell Us Anything About What Voters Really Want,” Washington Post, November 25, 2020.

¹¹ Matsusaka, John G, *Public Policy and the Initiative and Referendum: A Survey With Some New Evidence*, Public Choice (2018) 174:107-143 <http://www.iandrinstitute.org/index.cfm>

¹² <https://msa.maryland.gov/msa/mdmanual/43const/html/14art14.html> - Article XIV - Amendments to the Constitution

¹³ <https://msa.maryland.gov/msa/mdmanual/43const/html/16art16.html>. Article XVI of the Maryland Constitution.

¹⁴ The number of signatures needed to place a veto referendum for a state law on the ballot is equal to 3 percent of the total number of votes cast for the governor in the preceding election (based on the number of such votes cast in 2018, the required number of petition signatures is currently 69,135).

amendments.¹⁵ Furthermore, all 157 cities and towns also have an initiative process for charter amendments. As a result, citizens in Maryland are accustomed to voting on ballot questions that may have been proposed by citizens. However, at the state level, this option is not allowed; only legislators can place statutes or constitutional amendments on the ballot (except for veto referendum).

The process of legislative referendum is often used in Maryland. For example, in the 2020 general election, the ballot question to legalize sports betting was a legislative referendum. The process is not codified in the MD constitution, rather the requirement for a referendum on a specific statute is stipulated in the statute itself when passed by the legislature.

There have been multiple efforts over the years to enable citizen initiatives in Maryland. All were introduced by the minority party. Starting in 1996 and 1997, bills were introduced but did not get out of committee. More recently, a bill was introduced in 2006 to propose a constitutional amendment that would allow citizen initiatives to make statutory and constitutional amendments. It contained several provisions that would have offered checks on the process, such as requiring: (a) approval of the Attorney General of any text; (b) the number of petition signatures be at least 10% of votes cast in the last gubernatorial election and that no more than 50% of signatures come from Baltimore City or any county; (c) a 50% vote to approve statutory proposals and a 66% vote to approve constitutional amendments; and (d) possible repeal of an approved proposal if 66% of legislators in both chambers vote to repeal within two years of an initiative's approval. It did not get out of committee and was re-introduced in 2007 with modest changes, but again, died in committee.

EXAMPLES OF KEY PRACTICES USED IN OTHER STATES

While we have noted some of the advantages and disadvantages of initiatives, experiences in other states show that it is possible to build steps, or key practices, into the process that can help strengthen the advantages and mitigate the disadvantages. Such key practices can include the following:

- a) **Signature requirements:** The number of signatures required for an initiative to be placed on the ballot ranges from 3 to 10% of the number of voters in the previous election or, most often, the number of voters who voted for governor in the previous election. The aim of this practice is to discourage placing questions on the ballot that do not have at least some level of support. North Dakota requires signatures to be 2% of the population of the state. Utah requires 10% of votes for governor for direct initiatives and 5% for indirect initiatives. Many states have geographic distribution requirements as well. For example, in Massachusetts, no more than 25% of the signatures may be from one county and Montana requires at least 5% of the voters in at least 34 of the 100 legislative districts.

¹⁵ The counties are Anne Arundel, Baltimore, Dorchester, Harford, Howard, Montgomery, Prince George's, Talbot, and Wicomico. <https://msa.maryland.gov/msa/mdmanual/01glance/html/county.html>. Cecil and Frederick counties are charter, but do not specify the use of initiatives for charter amendments. See Ballotpedia, https://ballotpedia.org/Counties_in_Maryland.

- b) **Single Subject:** In some states, the subject matter of an initiative must be limited to a single subject. The aim of this practice is to make it easier for voters to understand the initiative and to prevent an “unpopular” issue from being paired with a “popular” issue in order to get on the ballot.¹⁶ Concerns can arise if the practice results in only the most narrow subjects getting on the ballot.¹⁷ It can also result in competing questions being placed on the ballot.
- c) **Fiscal Analysis:** In some states, a fiscal analysis is required for the proposed initiative. The aim of this practice is to have an estimate prepared by a state official or government agency to predict how the approval of a ballot measure would affect state finances.¹⁸ Responsibility for such analyses may be assigned to the Secretary of State or nonpartisan legislative services.
- d) **Approval of Initiative Wording:** In some states, the state’s Attorney General and/or Secretary of State must approve the wording of an initiative on the ballot. The aim of this practice is to ensure that the initiative is sufficiently described so voters will not be misled and the initiative is not subjected to challenge after a vote.¹⁹ Judicial reviews may also be sought to help ensure constitutionality.²⁰
- e) **Writing the Initiative Title & Summary:** Typically, the Attorney General and/or Secretary of State write the title of the initiative for the ballot. The aim of this practice is to ensure the clarity and accuracy of the title so it is seen as fair. It may be accompanied by a summary that explains the meaning of a “yes” or “no” vote.²¹
- f) **Requirement for Passage:** Most states require a simple majority by voters to pass an initiative, whether it’s a statutory change or a constitutional amendment.²² However, some states require a super-majority (something greater than a simple majority, such as 55%, 60% or 66.67% (2/3) vote) for both types of legislation. In some states, statutory changes may pass with a simple majority but constitutional amendments require a super-majority.²³ If a measure passes with just a bare majority (e.g., 50.2%), neither legislators nor opponents of the initiative may see it as a clear consensus from voters.²⁴

Other practices can include restrictions that prohibit initiatives from dedicating revenues or making appropriations, require a funding source to be identified for initiatives that direct appropriations, or prohibit certain issues from being the subject of initiatives (such as religion in Massachusetts).

¹⁶ LWVMC Interview on July 28, 2020 with Amanda Zoch, Policy Specialist, National Conference of State Legislatures.

¹⁷ https://ballotpedia.org/Single-subject_rule

¹⁸ https://ballotpedia.org/Fiscal_impact_statement

¹⁹ https://ballotpedia.org/Laws_governing_ballot_measures_in_Texas

²⁰ LWVMC Interview on July 28, 2020 with Amada Zoch, Policy Specialist, National Conference of State Legislatures.

²¹ https://ballotpedia.org/Laws_governing_the_initiative_process_in_Missouri#Ballot_title_and_summary

²² <https://www.ncsl.org/research/elections-and-campaigns/supermajority-vote-requirements.aspx>

²³ https://ballotpedia.org/Supermajority_requirement

²⁴ LWVMC Interview on July 28, 2020 with Amanda Zoch, Policy Specialist, National Conference of State Legislatures.

DISPOSITION OF INITIATIVES AFTER PASSAGE

In many cases, the successful passage of an initiative gives citizens a means for establishing public policy. However, even after an initiative passes, challenges can still arise that affect implementation.

Table 2: Examples of Initiatives That Passed and Faced Implementation Challenges		
YEAR	STATE	ISSUE
2018	Michigan	Initiatives passed to allow election day registration, create an independent redistricting commission and to legalize marijuana. The legislature imposed new requirements to make it more difficult to do citizen initiatives and introduced legislation to try to un-do the initiatives that passed.
2018	Ohio	An initiative to restrict gerrymandering passed by 80% of voters. New legislation was introduced (not enacted) to require initiatives to have 60% of voters sign onto it before being placed on the ballot.
2017	Maine	Medicaid expansion approved 59%-40%. Governor refused to sign. It was implemented in 2019 under a new Governor.
2016	South Dakota	Measure 22 addressed campaign ethics reform and financial reform. It was repealed in 2017 by the legislature. ²⁵
2016	Maine	Ranked Choice Voting (RCV) passed in the legislature, but the Governor refused to sign it. RCV was placed on the ballot to be enacted and passed.
2016	Oklahoma	Sought to reclassify some drug and property crimes as misdemeanors and directed savings from de-incarceration into rehabilitative services. In February 2017, the state legislature enacted laws to roll back the initiative.
1992	Colorado	TABOR (Taxpayers Bill of Rights) barred the state from raising taxes without voter approval. School and other infrastructure started to decline. The legislature has pursued work-arounds.
Multiple years	Multiple states	State legislatures avoid implementing passed initiatives citing financial hardships, backed up by a state budget office.

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²⁵South Dakota does not restrict repeal or amendment of initiatives by the legislature.

[https://ballotpedia.org/South_Dakota_Revision_of_State_Campaign_Finance_and_Lobbying_Laws,_Initiated Measure 22 \(2016\)](https://ballotpedia.org/South_Dakota_Revision_of_State_Campaign_Finance_and_Lobbying_Laws,_Initiated_Measure_22_(2016))

CONSENSUS QUESTIONS

1. Would you support amending the Maryland Constitution to provide the citizens of our state with a constitutional amendment initiative process?

- Yes _____
- No _____
- Unsure _____

2. Would you support amending the Maryland Constitution to provide the citizens of our state with a statutory initiative process?

- Yes _____
- No _____
- Unsure _____

3. Should LWVMD support an initiative process, which type of process would you prefer?

- Direct Initiative _____
- Indirect Initiative _____
- Unsure _____

4. In addition to the required number of signatures, which of the following elements of the process do you consider critical for any initiative process? Check up to three.

- Single subject _____
- Fiscal analysis _____
- Approval of the initiative wording
by State administration, e.g., Secretary
of State or Attorney General _____
- Approval of initiative title and summary
by State administration, e.g. Secretary of
State or Attorney General _____
- Higher requirement for passage of a
constitutional amendment _____
- Transparency _____

- Other ideas:

Please use other side or another page for comments on all questions.