

## NOTES

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# NOTES

## SERVING THE PEOPLE: EVALUATING INITIATIVE 1183 & LIQUOR PRIVATIZATION IN WASHINGTON STATE

Alex P. Ferraro \*

### I. INTRODUCTION

While campaigns to privatize or reform state-run liquor distribution and sale systems have recently emerged in several states, the results have been mixed, at best. In Pennsylvania, even with strong support from then-Governor Tom Corbett, legislation to privatize the Commonwealth's complete monopoly on the distribution and sale of wine and spirits passed the state House of Representatives only to stall in the state Senate, though some chance for privatization remains.<sup>1</sup> Liquor privatization efforts in Virginia came to a complete halt in January of 2012, when then-Governor Bob McDonnell abandoned his proposal to do so after legislation failed in the state legislature without a vote.<sup>2</sup> Governor "Butch" Otter effectively squelched the hopes of privatization advocates in Idaho when he announced that liquor privatization would not happen "as long as I'm governor."<sup>3</sup>

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<sup>1</sup> Angela Coulombis, *Lawmakers Again Look at Liquor Laws*, PHILA. INQUIRER, Jan. 9, 2014.

<sup>2</sup> Anita Kumar, *McDonnell may abandon his proposal to privatize liquor stores*, WASH. POST (Jan. 13, 2012, 8:57 AM), [http://www.washingtonpost.com/blogs/virginia-politics/post/mcdonnell-may-abandon-his-proposal-to-privatize-liquor-stores/2012/01/08/gIQAWMrxvP\\_blog.html](http://www.washingtonpost.com/blogs/virginia-politics/post/mcdonnell-may-abandon-his-proposal-to-privatize-liquor-stores/2012/01/08/gIQAWMrxvP_blog.html).

<sup>3</sup> Betsy Russell, *Otter on Liquor Privatization: 'Not as Long as I'm governor.'* SPOKESMAN-REV. (Oct. 9, 2013, 10:03 AM), <http://www.spokesman.com/blogs/boise/2013/oct/09/otter-liquor-privatization-not-long-im-governor>.

In Ohio, while state officials leased the state-run liquor system to a private economic development corporation, that agreement could be changed or overridden by the state legislature at any time.<sup>4</sup> Only in the State of Washington (“Washington”) have liquor privatization advocates seen real success.<sup>5</sup>

Initiative 1183 (“I-1183”)—a citizen-proposed ballot initiative approved on November 8, 2011 by almost 59 percent of Washington voters<sup>6</sup> and subsequently upheld by the Washington Supreme Court<sup>7</sup>—privatized the State’s monopoly on the distribution and sale of spirits. On June 1, 2012, private entities holding state-issued spirits retail licenses were authorized to begin operations.<sup>8</sup> Since that date, the people of Washington have experienced the benefits, and a few drawbacks, of liquor privatization. On the positive side, consumer convenience and access have prevailed, as Washington consumers can now purchase alcoholic beverages at supermarkets and other large retail outlets alongside their usual grocery purchases.<sup>9</sup> State and local government treasuries have also come out ahead: One year after privatization, state officials expected to “collect around 37 percent more from liquor taxes and fees in this current fiscal year compared to the final year under state control.”<sup>10</sup>

However, free-market systems will naturally be accompanied by some challenges and difficulties. In Washington, for example, “[t]he average retail price per liter sold, including tax, was \$23.87 in May 2013, up from \$21.07 the year

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<sup>4</sup> Jim Provance, *Ohio Leaders Reach Agreement to Privatize Profits from Liquor Sales*, BLADE (Jan. 23, 2012), <http://www.toledoblade.com/State/2012/01/23/Ohio-leaders-reach-agreement-to-privatize-profits-from-liquor-sales.html>.

<sup>5</sup> Melissa Allison, *Voters Kick State Out of Liquor Business*, SEATTLE TIMES (Nov. 9, 2011, 8:29 AM), [http://seattletimes.com/html/localnews/2016720231\\_elxliquor09m.html](http://seattletimes.com/html/localnews/2016720231_elxliquor09m.html).

<sup>6</sup> *November 08, 2011 General Election Results Initiative Measure 1183 Concerning Liquor: Beer, Wine, and Spirits (Hard Liquor)*, WASH. SEC’Y STATE, <http://results.vote.wa.gov/results/20111108/Initiative-Measure-1183-Concerning-liquor--beer-wine-and-spirits-hard-liquor.html> (last updated Dec. 6, 2011) [hereinafter *General Election Results: Initiative Measure 1183*].

<sup>7</sup> Wash. Ass’n for Substance Abuse & Violence Prevention v. State, 278 P.3d 632 (Wash. 2012).

<sup>8</sup> WASH. SEC’Y OF STATE, INITIATIVE MEASURE NO. 1183, at 2, 4 (2011).

<sup>9</sup> Allison Steele, *How Washington Fared When State Stores Died*, PHILA. INQUIRER (June 19, 2013), [http://articles.philly.com/2013-06-19/news/40050596\\_1\\_liquor-privatization-liquor-system-post-privatization](http://articles.philly.com/2013-06-19/news/40050596_1_liquor-privatization-liquor-system-post-privatization).

<sup>10</sup> Tom Banse, *Liquor Privatization in Washington State, One Year Later*, OR. PUB. BROADCASTING (May 30, 2013, 5:34 PM), <http://www.opb.org/news/article/npr-liquor-privatization-in-washington-state-one-year-later>.

before.”<sup>11</sup> Small liquor stores in Washington have had a difficult time competing against large retailers and paying the license fees brought about by I-1183.<sup>12</sup> Finally, and most unfortunately, hundreds of former state-store employees remained unemployed almost a year after privatization.<sup>13</sup>

This Note argues that Washington’s experience with I-1183 provides several important lessons to citizens and legislators in other states seeking to reform or privatize state-run liquor systems. First, this note briefly discusses the origins of Washington’s state-run liquor system, a key lawsuit against the Washington State Liquor Control Board (“WSLCB”), and two privatization initiatives that failed at the ballot box in 2010. Second, this Note examines the I-1183 campaign, its key provisions, and the Washington Supreme Court’s decision to uphold its constitutionality. Third, this note examines the transition to a privatized system following the voters’ ratification of I-1183, including regulatory and legislative action(s) mandated by, or taken because of, the initiative itself. Finally, this Note offers several recommendations to privatization advocates for crafting initiatives or legislation drawing on the successes of I-1183 while avoiding some of its failures and disappointments.

## II. I-1183

### A. *Washington’s State-Run Liquor System and Failed Privatization Attempts*

#### 1. The End of the “Noble Experiment”<sup>14</sup>

The story of I-1183 begins with the Twenty-First Amendment to the United States Constitution,<sup>15</sup> which went into effect upon ratification by state conventions

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<sup>11</sup> Editorial, *Liquor Privatization a Year Later*, SEATTLE TIMES (July 29, 2013, 5:47 PM), [http://seattletimes.com/html/editorials/2021500350\\_editliquorprivatizationinwashington30xml.html](http://seattletimes.com/html/editorials/2021500350_editliquorprivatizationinwashington30xml.html).

<sup>12</sup> Tom Sowa, *Liquor Law Taxing Small Stores*, SPOKESMAN-REV., Oct. 28, 2013, at A1; John Gillie, *Owners of Former State Liquor Stores Struggle to Stay in Business*, NEWS TRIB. (Dec. 7, 2013), <http://www.thenewstribune.com/2013/12/07/2936674/owners-of-former-state-liquor.html>.

<sup>13</sup> Steele, *supra* note 9.

<sup>14</sup> Gordon Eng, Note, *Old Whine in a New Battle: Pragmatic Approaches to Balancing the Twenty-First Amendment, the Dormant Commerce Clause, and the Direct Shipping of Wine*, 30 FORDHAM URB. L.J. 1849, 1860 (2003) (noting that President Herbert Hoover “coined this expression for National Prohibition”).

<sup>15</sup> U.S. CONST. amend. XXI.

in three-quarters of the states, the only Amendment ratified in such a manner.<sup>16</sup> While Section 1 of the Twenty-First Amendment ended Prohibition by repealing the Eighteenth Amendment, Section 2<sup>17</sup> “explicitly gave the states power to regulate alcohol distribution,”<sup>18</sup> possibly in response to the “failure of the federal government and the [Supreme] Court to deal with its regulation in a satisfactory manner.”<sup>19</sup> Prohibition opponents hoped that by granting the states power to regulate the distribution and sale of alcohol,<sup>20</sup> states would be well suited to combat organized crime that had flourished during Prohibition, while raising revenues at the height of the Great Depression.<sup>21</sup>

After Prohibition, states passed legislation that created either a complete state-run monopoly over the distribution and sale of liquor, or a “three-tier” system.<sup>22</sup> Under the “three-tier” system, “producers are required to sell alcoholic beverages to wholesale distributors who in turn may sell to retail stores,” and “[p]articipants at each level must secure a state license.”<sup>23</sup> The objective of such a system is to “keep manufacturing, wholesale, and retail interests segregated, preventing tied-house practices and the environment that bred social discord in the pre-Prohibition era.”<sup>24</sup> “Tied-house practices” were those by which “large manufacturers and distillers [were] able to control the entire distribution process from production

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<sup>16</sup> Harris Danow, *Recent Developments, History Turned “Sideways”*: *Granholm v. Heald and the Twenty-First Amendment*, 23 CARDOZO ARTS & ENT. L.J. 761, 769 (2006).

<sup>17</sup> U.S. CONST. amend. XXI § 2 (“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”).

<sup>18</sup> Kristin Woeste, Comment, *Reds, Whites, and Roses: The Dormant Commerce Clause, The Twenty-First Amendment, and the Direct Shipment of Wine*, 72 U. CIN. L. REV. 1821, 1821 (2004).

<sup>19</sup> Danow, *supra* note 16, at 769.

<sup>20</sup> *Granholm v. Heald*, 544 U.S. 460, 484 (2005) (“The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use.”).

<sup>21</sup> Amy Murphy, Note, *Discarding the North Dakota Dictum: An Argument for Strict Scrutiny of the Three-Tier Distribution System*, 110 MICH. L. REV. 819, 821 (2012).

<sup>22</sup> Eng, *supra* note 14, at 1863; *cf.* *North Dakota v. United States*, 495 U.S. 423, 431 (1990) (“[W]ithin the area of its jurisdiction, the State has ‘virtually complete control’ over the importation and sale of liquor and the structure of the liquor distribution system.”).

<sup>23</sup> Benjamin Grubb, Note, *Exorcising the Ghosts of the Past: An Exploration of Alcohol Beverage Regulation in Oklahoma*, 37 OKLA. CITY U. L. REV. 289, 299 (2012).

<sup>24</sup> *Id.*

down to the neighborhood bar.”<sup>25</sup> While the Twenty-First Amendment permanently ended the “Noble Experiment” of Prohibition, its ratification eventually brought about fifty mini-“experiments,” as each state developed a unique system to maintain varying degrees of control over the distribution and sale of liquor.

## 2. Washington’s “Three-Tier” System Before I-1183

After ratification of the Twenty-First Amendment, the Washington legislature created its version of the “three-tier” system with the Steele Act, by which “the State retained exclusive control over the sale of packaged spirits through state and contract stores, but regulated the sale of beer and wine through a three-tier system that separates manufacturers from retailers.”<sup>26</sup> Under the Steele Act, all spirits were “sold at retail at state-run liquor stores and at contract liquor stores, [which were] private businesses that [sold] spirits and other liquor under a contract with the state.”<sup>27</sup> In addition, “manufacturers and suppliers of spirits [could] only sell spirits to the Board[,] [which] acts as the sole distributor of spirits sold in the state liquor stores and contract liquor stores, and sold by restaurants and certain other licensed sellers.”<sup>28</sup> Consequently, manufacturers sold spirits to the WSLCB, which then distributed them from a central warehouse in South Seattle to state-run or state-contracted liquor stores at uniform prices,<sup>29</sup> onto which retailers added the appropriate spirits sales tax (“SST”) and spirits liter tax (“SLT”).<sup>30</sup> Before the ratification and implementation of I-1183, 165 state liquor stores and 160 contract liquor stores operated in Washington.<sup>31</sup>

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<sup>25</sup> Eng, *supra* note 14, at 1863.

<sup>26</sup> Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 881 (9th Cir. 2008).

<sup>27</sup> Attorney General Rob McKenna, *Online Voters’ Guide: Initiative Measure 1183*, WASH. SEC’Y STATE, <https://weiapplets.sos.wa.gov/MyVote/OnlineVotersGuide/Measures?electionId=42&countyCode=xx&ismyVote=False#ososTop> (last visited Nov. 6, 2014).

<sup>28</sup> *Id.*

<sup>29</sup> *I-1183 Transition: Three-Tier Changes*, WASH. STATE LIQUOR CONTROL BD., <http://liq.wa.gov/transition/three-tier-changes> (last visited Nov. 6, 2014).

<sup>30</sup> *Privatizing Spirits Sales in Washington State*, DEPT. REVENUE WASH. ST., <http://dor.wa.gov/Content/GetAFormOrPublication/PublicationBySubject/TaxTopics/SpiritsSales> (last visited Nov. 6, 2014).

<sup>31</sup> McKenna, *supra* note 27.

### 3. Costco's Failed Lawsuit Against the WSLCB

In 2004, national retailer Costco (which has its corporate headquarters in the Seattle suburb of Issaquah) brought suit against the WSLCB in the United States District Court for the Western District of Washington, alleging that Washington's "three-tier" system and related regulation of the distribution and sale of spirits violated federal antitrust laws, thereby inhibiting Costco's business model.<sup>32</sup> The trial court ruled largely in favor of Costco.<sup>33</sup> On appeal, the United States Court of Appeals for the Ninth Circuit held that only the "scheme of requiring the posting of wholesale prices and adherence to those prices for at least [thirty] days is a hybrid restraint of trade, subject to preemption by the Sherman Act."<sup>34</sup> The court also noted: "The central warehousing ban may well be inefficient and it may decrease competition, but [Washington], through its officials, has opted for such inefficiency. Relief from such choices is properly achieved not through Sherman Act preemption, but through political will."<sup>35</sup> Essentially, the Ninth Circuit told Costco that if it did not like Washington's state-run liquor system, it had to find a way to change it through the political process.

### 4. Washington's Citizen-Led Initiative Process

The Washington Constitution reserves to the people "the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature [and] to approve or reject at the polls any act, item, section, or part of

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<sup>32</sup> Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 882–83 (9th Cir. 2008).

<sup>33</sup> In *Costco Wholesale Corp. v. Hoen*, the court held that:

(1) The following state restraints are preempted by the federal Sherman Act and are not shielded by the Twenty-first Amendment: (a) Policies that require beer and wine distributors and manufacturers to "post" their prices with the state and to "hold" those prices for a full month; (b) Policies that require beer and wine distributors to charge uniform prices to all retailers; (c) Prohibitions on selling beer and wine to retailers on credit; (d) Prohibitions on volume discounts for beer and wine; (e) Policies that require beer and wine distributors to charge the same "delivered" price to all retailers, regardless of the actual delivery costs; (f) Prohibitions on central warehousing of beer and wine by retailers; and (g) Policies that require a 10% minimum mark-up on sales of beer and wine . . . from distributors to retailers.

No. CO4-360P, 2006 WL 1075218, at \*1 (W.D. Wash. Apr. 21, 2006), *aff'd in part, rev'd in part*, 522 F.3d 874 (9th Cir. 2008).

<sup>34</sup> *Maleng*, 522 F.3d at 895.

<sup>35</sup> *Id.* at 892.

any bill, act, or law passed by the legislature.”<sup>36</sup> To exercise this power, a citizen or group of citizens must submit a petition that includes the “full text of the measure so proposed” accompanied by a number of signatures equal to “eight percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing of the text of the initiative measure with the secretary of state.”<sup>37</sup> Initiative measures may be submitted directly to the people or to the legislature, and in either case, they “must be filed with the [state] secretary of state within ten months prior to the election at which they are to be submitted.”<sup>38</sup> Washington is one of only twenty-four states that provides for a citizen-led initiative process.<sup>39</sup>

### 5. Failed Initiatives: I-1100 and I-1105

Failing to overturn Washington’s “three-tier” system through litigation, Costco, and its allies turned to the aforementioned initiative process. In 2010, Costco was the principal sponsor of I-1100,<sup>40</sup> which would have closed all state liquor stores and shut down the state’s spirits distribution system; created a “general liquor retailer’s license” that “would allow the license holder to sell spirits, beer, and wine at retail”; and reduced state revenues by \$76 million to \$85 million and local revenues by \$180 million to \$192 million.<sup>41</sup> On November 2, 2010, fifty-three percent of Washington voters rejected I-1100.<sup>42</sup> I-1100’s opponents—including beer distributors, manufacturers, and unions for state liquor workers—raised \$9.1 million to defeat it, more than the supporting campaigns for both I-1100 and its companion privatization measure (I-1105) combined.<sup>43</sup>

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<sup>36</sup> WASH. CONST. art. 2, § 1.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; see also WASH. REV. CODE § 29A.72.030 (2012).

<sup>39</sup> *Initiative, Referendum and Recall*, NAT’L CONF. ST. LEGIS., <http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx> (last visited Nov. 6, 2014).

<sup>40</sup> Melissa Allison, *Costco Backs Liquor Protection*, SEATTLE TIMES, May 25, 2010, at A10.

<sup>41</sup> Washington State Secretary of State, *Voters’ Guide: Initiative Measure 1100*, <https://weiapplets.sos.wa.gov/MyVote/OnlineVotersGuide/Measures?electionId=37&countyCode=xx&ismyVote=False#ososTop> (last visited Nov. 6, 2014).

<sup>42</sup> *November 02, 2010 General Election Results: Initiative Measure 1100 Concerning Liquor (Beer, Wine, and Spirits)*, WASH. SEC’Y STATE, <http://vote.wa.gov/results/20101102/Initiative-Measure-1100-Concerning-liquor-beer-wine-and-spirits.html> (last updated Nov. 29, 2010) [hereinafter *General Election Results: Initiative Measure 1100*].

<sup>43</sup> Melissa Allison, *I-1100 Liquor-Sales Measure Defeated*, SEATTLE TIMES (Nov. 3, 2010, 8:55 AM), [http://seattletimes.com/html/localnews/2013340418\\_elxliquor04m.html](http://seattletimes.com/html/localnews/2013340418_elxliquor04m.html).



The second measure, I-1105, was backed by prospective private spirits distributors in Washington.<sup>44</sup> Like I-1100, I-1105 would have “close[d] all state liquor stores and license[d] private parties to sell or distribute spirits”; “eliminate[d] existing taxes on the retail sale of spirits”; created a “spirits retailer license”; and established “a three-tier system for the spirits industry”—actions collectively predicted to decrease state revenues by \$486 million to \$520 million and local revenues by \$205 million to \$210 million over five fiscal years.<sup>45</sup> Sixty-five percent of voters rejected I-1105.<sup>46</sup> Whether because of the text of I-1100 and I-1105 themselves, the dramatic decline in funding for state and local governments they would bring about,<sup>47</sup> the make-up of the electorate, or the failures of privatization advocates in financing their campaigns, hope for liquor privatization in Washington seemed dim after the November 2010 elections.

*B. The Campaign for I-1183 and Key Provisions of the Initiative*

1. “The Costco Initiative”<sup>48</sup>

Undeterred, Costco and its allies learned from the failures of I-1100 and I-1105 and embarked on a campaign to secure ratification of I-1183 in the November 2011 general election. Costco itself contributed \$22.5 million<sup>49</sup> to the campaign, while Trader Joe’s<sup>50</sup> and Safeway<sup>51</sup> also made substantial financial contributions. Other supporters included the President of the Washington Restaurant Association,

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<sup>44</sup> *Id.*

<sup>45</sup> McKenna, *supra* note 27.

<sup>46</sup> *General Election Results: Initiative Measure 1100*, *supra* note 42.

<sup>47</sup> See Wash. Ass’n for Substance Abuse & Violence Prevention v. State, 278 P.3d 632, 649 (Wash. 2012) (“I-1183 was designed to address the primary concerns that its supporters felt had impeded prior attempts to reform Washington’s liquor laws, such as maintaining tax levels and revenue streams . . . for related public health and safety efforts . . . and limiting the number and type of retail outlets that would sell spirits. . .”).

<sup>48</sup> Jim Camden, *It’s No Longer Just Costco Money on I-1183*, SPOKESMAN REV. (Aug. 9, 2011, 3:00 PM), <http://www.spokesman.com/blogs/spincontrol/2011/aug/09/its-no-longer-just-costco-money-i-1183/>.

<sup>49</sup> Allison, *supra* note 5.

<sup>50</sup> Camden, *supra* note 48.

<sup>51</sup> Warren Kagarise, *Costco-Backed I-1183 Aims to Remove State from Liquor Business*, ISSAQUAH PRESS (Sept. 20, 2011), <http://www.issaquahpress.com/2011/09/20/costco-backed-i-1183-aims-to-remove-state-from-liquor-business/>.

a former Captain of the Washington State Patrol, the state Chair of the Northwest Grocery Association, and a board member of the Family Wineries of Washington State.<sup>52</sup> Opponents of I-1183 included an array of religious and substance abuse prevention groups, including the Washington Association for Substance Abuse and Violence Prevention, the Executive Director of the Greater Spokane Substance Abuse Council, the Co-Director of the Faith Action Network, and the President of the Washington State Council of Firefighters.<sup>53</sup> Despite the opposition, 59 percent of Washington voters approved I-1183 on November 8, 2011.<sup>54</sup>

## 2. Key Provisions of I-1183

I-1183 introduced monumental changes to Washington's state-run liquor system, with many of its provisions benefitting the large grocery retailers that financed the campaign to secure its ratification. The opening sentences of the sixty-page measure declared:

The people of the state of Washington . . . find that the state government monopoly on liquor distribution and liquor stores . . . and the state government regulations that arbitrarily restrict the wholesale distribution and pricing of wine are outdated, inefficient, and costly to local taxpayers, consumers, distributors, and retailers.<sup>55</sup>

This Note highlights four key provisions: (1) the closure and auctioning-off of state liquor stores; (2) the creation of a spirits retail license; (3) the creation of a spirits distributor license; and (4) the measure's revenue-raising provisions.

First, I-1183 mandated that the WSLCB close all state liquor stores by June 1, 2012 and "sell by auction open to the public the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon the premises."<sup>56</sup>

Second, I-1183 created a spirits retail license to allow the sale of such spirits for off-premises consumption, though the new license could only be issued to those with premises "comprising at least ten thousand square feet of fully enclosed retail

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<sup>52</sup> McKenna, *supra* note 27.

<sup>53</sup> *Id.*

<sup>54</sup> *General Election Results: Initiative Measure 1183*, *supra* note 6.

<sup>55</sup> WASH. SEC'Y OF STATE, INITIATIVE MEASURE NO. 1183, at 1 (2011).

<sup>56</sup> *Id.* at 4.

space within a single structure.”<sup>57</sup> This particular language had the dual effect of: (1) giving retailers with larger stores an explicit advantage in securing a retail spirits license; and (2) preventing gas stations, convenience stores and other small retail locations from securing a license. Spirits retail license holders are required to pay a “license issuance fee equivalent to [17] percent of all spirits sales revenues under the license,” in addition to an annual renewal fee.<sup>58</sup> On the enforcement side, license holders are required to develop and implement an employee-training program on the sale of alcohol.<sup>59</sup> In addition, I-1183 doubled penalties “relating to fines and suspensions . . . for violations relating to the sale of spirits by retail spirits licensees” and required the WSLCB to develop a responsible vendor program to reduce underage drinking and prevent the sale of alcohol to minors.<sup>60</sup> Some estimated that under I-1183, the new spirits retail license would produce 1,428 licensed liquor retailers.<sup>61</sup>

Third, I-1183 created a spirits distributor license to “sell spirits purchased from manufacturers, distillers, or suppliers . . . to spirits retailers. . . .”<sup>62</sup> Holders of spirits distributor licenses are required to pay: “in each of the first two years of licensure, [10] percent of total revenue from all the licensee’s sales of spirits made during the year for which the fee is due;” in the third year and for all years thereafter, license holders are only required to pay 5 percent of “total revenue from the licensee’s sales of spirits made during the year for which the fee is due.”<sup>63</sup> By March 31, 2013, if spirits distributor licensees had not collectively paid \$150 million in license fees, those holding such licenses would be required to make up the difference to the state.<sup>64</sup> This particular provision became the subject of

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<sup>57</sup> *Id.* at 5; *see also* WASH. REV. CODE § 66.24.630 (2012).

<sup>58</sup> WASH. SEC’Y OF STATE, INITIATIVE MEASURE NO. 1183, at 8 (2011); *see also* WASH. REV. CODE § 66.24.630 (2012).

<sup>59</sup> WASH. SEC’Y OF STATE, INITIATIVE MEASURE NO. 1183, at 8–9 (2011); *see also* WASH. REV. CODE § 66.24.630 (2012).

<sup>60</sup> WASH. SEC’Y OF STATE, INITIATIVE MEASURE NO. 1183, at 9 (2011); *see also* WASH. REV. CODE § 66.24.630 (2012).

<sup>61</sup> McKenna, *supra* note 27.

<sup>62</sup> WASH. SEC’Y OF STATE, INITIATIVE MEASURE NO. 1183, at 12 (2011); *see also* WASH. REV. CODE § 66.24.055 (2012).

<sup>63</sup> WASH. SEC’Y OF STATE, INITIATIVE MEASURE NO. 1183, at 13 (2011).

<sup>64</sup> *Id.* at 13–14.

litigation after the shortfall for the first year of privatization was announced as \$104 million.<sup>65</sup>

Finally, in addition to a number of technical changes and specifications with respect to the acquisition and maintenance of the types of licenses specified in the measure, I-1183 reiterated Washington's liquor tax provisions.<sup>66</sup> However, while I-1183 explicitly states, "This act does not increase any tax, create any new tax, or eliminate any tax,"<sup>67</sup> Washington's liquor taxes were (and still are) quite high. The state taxes both the retail sale of liquor to consumers (with taxes calculated both at a percentage of the sale price and by liter) and the sale of liquor from a distributor to restaurants and bars that then sell liquor to consumers.<sup>68</sup> Consequently, when revenue from new spirits retail and spirits distributor licenses were added to existing liquor taxes, I-1183's "fiscal impact statement" predicted an increase in state revenues of \$216 to \$253 million and a predicted increase in local revenues of \$186 million to \$227 million over six years, in addition to predicted revenue of \$28.4 million from the one-time sale of the state's sole liquor distribution facility.<sup>69</sup> Unlike I-1100 and I-1105—both of which would have resulted in a net revenue loss to state and local governments—I-1183 was designed to guarantee that state and local governments would see significant revenue increases.<sup>70</sup>

### 3. Constitutionality of I-1183

Because liquor privatization opponents lost at the ballot box in November 2011, the only way to stop I-1183 was to petition the courts to strike it down as a violation of Washington's Constitution.<sup>71</sup> Though Washington citizens are granted power to propose legislation, as discussed above, they nevertheless "exercise the same power of sovereignty as the Legislature when it enacts a statute."<sup>72</sup>

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<sup>65</sup> Ashley Watkins, *Liquor Privatization Battle in Washington Continues Over Shortfall Liability*, HOSPITALITY L. BLOG (Oct. 10, 2013), <http://www.dwthospitalitylaw.com/2013/10/articles/wine-beer-distilled-spirits/liquor-privatization-battle-in-washington-continues-over-shortfall-liability/>.

<sup>66</sup> WASH. SEC'Y OF STATE, INITIATIVE MEASURE NO. 1183, at 15–17 (2011).

<sup>67</sup> *Id.* at 59.

<sup>68</sup> *See, e.g.*, WASH. REV. CODE § 82.08.150 (2012); *see also* WASH. SEC'Y OF STATE, INITIATIVE MEASURE NO. 1183, at 15–17 (2011).

<sup>69</sup> McKenna, *supra* note 27.

<sup>70</sup> *Id.*

<sup>71</sup> *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 278 P.3d 632, 639 (Wash. 2012) (citing *City of Burien v. Kiga*, 31 P.3d 659, 662 (Wash. 2001)).

<sup>72</sup> *Id.*

Consequently, citizen-proposed initiatives are bound by the same constitutional constraints on legislation as the legislature, including the Washington Constitution's requirement that, "No bill shall embrace more than one subject, and that shall be expressed in the title."<sup>73</sup> In addition, state law provides that the "ballot title for an initiative to the people" must consist of: "(a) [a] statement of the subject of the measure; (b) a concise description of the measure; and (c) a question in the form prescribed in this section for the ballot measure in question."<sup>74</sup> Consequently, "even if an initiative is approved by a majority of voters, it will be struck down if it violates Washington's constitution."<sup>75</sup> It was under the so-called "single-subject" rule that the plaintiffs-appellants, the Washington Association for Substance Abuse and Violence Prevention, brought suit against Washington, with I-1183 supporters Costco, the Washington Restaurant Association, the Northwest Grocery Association, Safeway, and Kroger intervening in the case.<sup>76</sup>

In analyzing whether I-1183 violated the "single-subject" rule, the Washington Supreme Court first asked whether the title is general or restrictive, and second, if the title is general, whether there is "some 'rational unity' between the general subject and the incidental subdivisions."<sup>77</sup> Plaintiffs-appellants' first argument was that "the challenged provisions [specifically, I-1183's public safety funding provisions] lack rational unity with the general topic—which they characterize as 'liquor privatization'—and with one another."<sup>78</sup> The court dismissed this argument, finding that the inclusion of public safety expenditures is rationally related to liquor-related legislation.<sup>79</sup> Plaintiffs-appellants' second argument against I-1183 was that the "privatization of the distribution and sale of spirits is not germane to its deregulation of the private distribution of wine," which the court dismissed because "spirits and wine share the common distinction of being liquor and have been governed as such by the same act for decades."<sup>80</sup> Finally, plaintiffs-appellants argued that the "license fees based on sales listed in

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<sup>73</sup> WASH. CONST. art. II, § 19.

<sup>74</sup> WASH. REV. CODE § 29A.72.050 (2012).

<sup>75</sup> *Wash. Ass'n*, 278 P.3d at 639 (citing *City of Burien v. Kiga*, 31 P.3d 659, 662 (Wash. 2001)).

<sup>76</sup> *Id.* at 632.

<sup>77</sup> *Id.* at 640 (citing *State v. Grisby*, 647 P.2d 632, 650 (Wash. 1982)).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 641.

<sup>80</sup> *Id.* at 641–42.

the ballot title are actually taxes and that I-1183 violates the subject-in-title rule because the title does not notify voters that the charges imposed are taxes.”<sup>81</sup> The court dismissed this argument as well, noting that it was not about to “void a law duly enacted by voters based upon ‘the technical significance of a word, where it can hardly be contended that anyone was likely to be deceived.’”<sup>82</sup> After years of effort and numerous failures by privatization advocates to change Washington’s state-run liquor system, voters approved—and the courts upheld as constitutional—a liquor privatization initiative.

### C. *The Transition to a Free-Market System of Liquor Distribution and Retail Sale*

#### 1. I-1183 Transition and Effects

The transition to a free-market system began the moment Washington voters approved I-1183. Since that date, while the WSLCB has taken the lead in interpreting and implementing I-1183,<sup>83</sup> the Washington legislature has twice stepped in (as of March, 2014) to address some of the initiative’s key provisions.<sup>84</sup> While later sections of this Note discuss some I-1183-related regulatory and legislative activity, this section discusses some of the effects of I-1183 and its transition on state finances, consumers, businesses, and stakeholders in the privatized liquor distribution and sale system.

Recognizing some of the concerns behind the failed I-1100 and I-1105, which would have dramatically decreased state and local revenues, I-1183 “was written to insure that the state came out ahead, and it did.”<sup>85</sup> One year after it went into full effect on June 1, 2012, “the state expect[ed] to collect around 37 percent more from liquor taxes and fees in this current fiscal year compared to the final year under state control,”<sup>86</sup> with anticipated revenue for fiscal year 2013 expected at \$425 million (including one-time gains such as those from the sale of the state’s liquor

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<sup>81</sup> *Id.* at 643.

<sup>82</sup> *Id.* at 644 (citing *Seymour v. City of Tacoma*, 32 P. 1077, 1080 (Wash. 1893)).

<sup>83</sup> WASH. REV. CODE § 66.08.030 (2012).

<sup>84</sup> H.B. 1124, 63d Leg., 2013 Reg. Sess. (Wash. 2013) (“An act relating to recommendations for streamlining reporting requirements for taxes and fees on spirits. . . .”); Engrossed Substitutes S.B. 5644, 63d Leg., 2013 2d Spec. Sess. (Wash. 2013) (“An act relating to license issuance fees of former contract liquor stores, former state store auction buyers, and spirits distributors. . . .”).

<sup>85</sup> Editorial, *supra* note 11.

<sup>86</sup> Banse, *supra* note 10.

distribution center), with \$369 million expected in fiscal year 2014, compared to \$309 million under the last year of state control.<sup>87</sup> The increase in state liquor revenues stemmed largely from the explosion in the number of liquor stores, from roughly three hundred thirty state-run or state-contracted liquor stores before I-1183 to fourteen hundred spirits retailers after.<sup>88</sup>

Despite the dramatic increase in the number of liquor retailers, liquor consumption rose only 1.5 percent in the first year of privatization, as measured by an increase in “state-taxed sales of liquor, including bars and restaurants.”<sup>89</sup> While I-1183’s opponents often predicted that more minors would be able to illegally purchase alcohol in a privatized system, WSLCB inspectors found that compliance rates during the first year of privatization stood at 92 percent, a slight drop from 94 percent in the last year under state control.<sup>90</sup> Fortunately, the number of driving under the influence (“DUI”) collisions has dropped from 2,576 during the 2011–2012 period (the last under state control) to 2,347 during the 2012–2013 period, and DUI arrests dropped from 21,577 to 19,703 during the same period.<sup>91</sup>

While I-1183 has been a boon to the state’s finances and public health and safety goals, the transition has been rockier for consumers and many small business owners. In the final days and weeks of the state-run system, many state-owned and state-contracted liquor stores simply closed early or drastically reduced their inventories.<sup>92</sup> Despite a dramatic increase in convenience and choice, some consumers faced slightly higher prices once the privatized system came into full force: “The average retail price per liter sold, including tax, was \$23.87 in May 2013, up from \$21.07 the year before. Bars and restaurants paid an average of \$18.77 in May 2013, up from \$18.09 a year earlier.”<sup>93</sup> In response to higher prices

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<sup>87</sup> Melissa Allison, *State Revenues Grow from Liquor Privatization*, SEATTLE TIMES (May 25, 2013, 9:01 PM), [http://seattletimes.com/html/localnews/2021059544\\_liquoryearxml.html](http://seattletimes.com/html/localnews/2021059544_liquoryearxml.html).

<sup>88</sup> *Id.*

<sup>89</sup> Editorial, *supra* note 11.

<sup>90</sup> *Id.*

<sup>91</sup> Jason Mercier, *Alcohol-Related Arrests Continue to Decrease After Liquor Privatization*, WASH. POL’Y CTR. (Oct. 2013), <http://www.washingtonpolicy.org/publications/notes/alcohol-related-arrests-continue-decrease-after-liquor-privatization>.

<sup>92</sup> Kirk Johnson, *A Taste of Prohibition as Liquor Stores Go Private*, N.Y. TIMES, May 26, 2012, at A20, available at [http://www.nytimes.com/2012/05/27/us/in-washington-state-liquor-stores-are-about-to-go-private.html?\\_r=0](http://www.nytimes.com/2012/05/27/us/in-washington-state-liquor-stores-are-about-to-go-private.html?_r=0).

<sup>93</sup> Editorial, *supra* note 11.

in Washington, many of the state's residents have crossed the border into neighboring Oregon and Idaho, taking advantage of those states' flourishing border-store liquor business and generally lower prices.<sup>94</sup>

Small businesses operating former state-run and state-contracted liquor stores under rights sold at auction have faced significant challenges in the new free-market system—an unsurprising turn of events considering that large grocery retailers such as Costco led the charge to ratify I-1183. While some have dismissed the adverse effects on small businesses as natural consequences of a free-market system,<sup>95</sup> over twenty small liquor stores were “in danger of losing their licenses for failing to pay the required taxes and fees” at the end of 2013, mainly due to their inability to compete with large grocery stores that can offer volume discounts and greater selection.<sup>96</sup>

Finally, former employees of the WSLCB who lost their jobs as a direct result of I-1183, along with small liquor businesses, have been some of the clear losers of privatization. Of the “more than [seven hundred] laid off after privatization, [four hundred ninety] remained jobless by February” of 2013, according to a spokesman for the WSLCB.<sup>97</sup> In April of 2013, 458 former state-store employees “claimed at least one week of unemployment benefits, according to the Washington Employment Security Department.”<sup>98</sup> It is difficult to explain how private employers operating a significantly greater number of liquor stores could not accommodate roughly five hundred former state-store employees (who probably possess more than a sufficient amount of knowledge in the retail sale of liquor) in an effort to provide new liquor customers with the highest level of customer service.

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<sup>94</sup> Jim Camden, *I 1183 Boosts Liquor Sales—In Idaho*, SPOKESMAN-REV. (July 26, 2012, 5:10 PM), <http://www.spokesman.com/blogs/spincontrol/2012/jul/26/i-1183-boosts-liquor-sales-idaho/>; see also Cami Joner, *Liquor Sellers Pour It on for Holiday Shoppers*, THE COLUMBIAN (Nov. 24, 2013, 6:00 AM), <http://www.columbian.com/news/2013/nov/24/liquor-sellers-pour-it-on-for-holiday-shoppers/>.

<sup>95</sup> Editorial, *State Shouldn't Prop Up Small Liquor Stores*, WALLA WALLA UNION-BULLETIN (Oct. 31, 2013), <http://union-bulletin.com/news/2013/oct/31/state-shoudnt-prop-small-liquor-stores/>.

<sup>96</sup> Sowa, *supra* note 12; see also Shawn Vestal, *I-1183's Aftermath Leaves Big Hangover*, SPOKESMAN-REV. (Dec. 13, 2013), <http://www.spokesman.com/stories/2013/dec/14/shawn-vestal-privatized-liquor-leaves-little-guys/>.

<sup>97</sup> Steele, *supra* note 9.

<sup>98</sup> Allison, *supra* note 87.



## 2. WSLCB Regulatory Actions and Litigation

Before I-1183, state law gave the WSLCB broad discretion to promulgate a variety of regulations pertaining to the manufacture, distribution, and sale of liquor.<sup>99</sup> Though I-1183 greatly limited the powers of the WSLCB with respect to the distribution and retail sale of spirits, the WSLCB was nevertheless given wide latitude to implement the initiative.<sup>100</sup> Since ratification of I-1183, the WSLCB has promulgated numerous regulations addressing the distribution and sale of liquor.<sup>101</sup> However, this section discusses only two regulations that directly implicate the text of I-1183 and resulted in litigation over the WSLCB's implementation of its provisions: clarification over the payment of the shortfall in the fund created from spirits distributors' license fees and the interpretation of the twenty-four liter per transaction limitation in the spirits retail license provision.

First, as discussed above, I-1183 contains a provision specifying that by March 31, 2013, all holders of spirits distributor licenses must collectively pay \$150 million in license fees, and the holders of spirits distributor licenses must make up any shortfall.<sup>102</sup> The provision did not specify how the shortfall was to be allocated among license holders, aside from being "allocated among persons holding spirits distributor licenses . . . ratably according to their spirits sales made during calendar year 2012."<sup>103</sup> The WSLCB promulgated a final regulation requiring that each licensee's payment will be its "proportionate share of the remaining liability . . . calculated by dividing the total dollar amount of sales made by each distributor licensee by the total spirits sales made by each spirits distributor licensee by the total spirits sales made by all spirits distributor licensees combined."<sup>104</sup> In response, some industry groups noted<sup>105</sup> that while certain "direct-

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<sup>99</sup> WASH. REV. CODE § 66.08.030 (2012).

<sup>100</sup> WASH. SEC'Y OF STATE, INITIATIVE MEASURE NO. 1183, at 18–19 (2011) (noting the limitations on the WSLCB's powers and authorizing the WSLCB to "[p]erform all other matters and things, whether similar to the foregoing or not, to carry out the provisions of this title. . . ."); *see also* WASH. REV. CODE § 66.08.050 (2012).

<sup>101</sup> *See, e.g.*, 12-12 Wash. Reg. 065 (June 5, 2012), *available at* <http://apps.leg.wa.gov/documents/laws/wsr/2012/12/12-12-065.htm> (publishing permanent rules pertaining to, among other things, the spirits retail license, spirits distributor license, spirits importer license, and craft distillery licenses).

<sup>102</sup> WASH. SEC'Y OF STATE, INITIATIVE MEASURE NO. 1183, at 13 (2011); *see also* WASH. REV. CODE § 66.24.055 (2012).

<sup>103</sup> WASH. SEC'Y OF STATE, INITIATIVE MEASURE NO. 1183, at 13–14 (2011); *see also* WASH. REV. CODE § 66.24.055 (2012).

<sup>104</sup> WASH. ADMIN. CODE § 314-23-025 (2012).

to-retail” distillers are considered to be “operating as distributors”<sup>106</sup> for purposes of paying the spirits distributor license fee,<sup>107</sup> only those actually “holding a spirits distributor license” would be required to contribute to the shortfall within the aforementioned regulatory language.<sup>108</sup> A Washington trial court judge ruled in favor of the WSLCB and against the distributors who brought suit challenging the regulation addressing payment of the shortfall as “arbitrary.”<sup>109</sup>

Second, under I-1183, holders of spirits retail licenses are authorized to “[s]ell spirits in original containers to consumers for consumption off the licensed premises and to permit holders; sell spirits in original containers to retailers licensed to sell spirits for consumption on the premises, for resale at their licensed premises, . . . although no single sale may exceed twenty-four liters. . . .”<sup>110</sup> When the WSLCB promulgated regulations implementing the spirits retail license, however, it interpreted “no single sale may exceed twenty-four liters” to mean: “no single sale may exceed twenty-four liters, and single sales to an on-premises licensee are limited to one per day.”<sup>111</sup> The Washington Restaurant Association, the Northwest Grocery Association, and Costco challenged this regulation, claiming that it essentially forces “the high-volume restaurant and bar trade to distributors” rather than to holders of spirits retail licenses, such as Costco.<sup>112</sup> A Washington trial court judge declared the rule invalid, noting that “I-1183 included no temporal restriction on sales between retailers” and concluding that “the additional ‘per day’

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<sup>105</sup> Jeffrey Solsby, *Washington State Liquor Control Board Adopts Illogical and Inequitable Treatment of Distributors*, WINE & SPIRITS WHOLESALERS OF AM. (Sept. 27, 2012), <http://www.wswa.org/news.php?NewsID=20&ArticleID=54>.

<sup>106</sup> WASH. REV. CODE § 66.24.640 (2012).

<sup>107</sup> WASH. ADMIN. CODE § 314-28-070 (2012) (requiring spirits and craft distillers to pay “ten percent of their gross spirits revenue to the board . . . during the first two years of licensure and five percent of their gross spirits revenues to the board in year three and thereafter,” the same is expected of spirits distributor licensees according to I-1183); *see also* WASH. ADMIN. CODE § 314-28-080 (2013) (“Failure of a distillery or craft distiller to submit its monthly reports and payment to the board as required . . . will be sufficient grounds for the board to suspend or revoke the liquor license.”).

<sup>108</sup> WASH. ADMIN. CODE § 314-23-025 (2012).

<sup>109</sup> Watkins, *supra* note 65. The trial court opinion is unpublished and unavailable.

<sup>110</sup> WASH. SEC’Y OF STATE, INITIATIVE MEASURE NO. 1183, at 5 (2011); *see also* WASH. REV. CODE § 66.24.630 (2012).

<sup>111</sup> WASH. ADMIN. CODE § 314-02-106 (2012).

<sup>112</sup> Eric Smith, *Suit Filed Against State Liquor Board over Distribution Restrictions*, GOLDENDALE SENTINEL (July 4, 2012), <http://www.goldendalesentinel.com/story/2012/07/04/features/suit-filed-against-state-liquor-board-over-distribution-restrictions/1014.html>.

restriction substantively changes this original language. Accordingly, the [WSLCB] exceeded its authority in adding to these provisions in the statute.”<sup>113</sup>

### 3. Post-Privatization Legislative Adjustments

The Washington Constitution precludes the legislature from amending or repealing an initiative approved by a majority of electors for a period of two years after such approval, except where two-thirds of members in each house vote to do so.<sup>114</sup> In addition, no law amending an initiative approved by the voters may be subjected to a voter referendum.<sup>115</sup> Since the Washington Legislature is limited by the Washington Constitution to sessions of no more than one hundred and five consecutive days in “each odd-numbered year” and to sixty consecutive days in “each even-numbered year,”<sup>116</sup> only in January 2014 could the legislature begin amending or repealing portions of I-1183 with a simple majority vote. In addition, the part-time nature of the Washington legislature means there is a limited window of time for the legislature to act on liquor-related bills. Taking these constitutional and temporal limitations on the legislature’s ability to amend (or repeal) provisions of I-1183, only two liquor-related bills implicating I-1183 have been passed by the legislature and signed into law (as of March, 2014).

The first was House Bill 1124, in which “the legislature [found] that reporting requirements for all liquor taxes and fees are administratively complex and require payment and reporting to multiple state agencies” and directed the WSLCB and the Washington Department of Revenue to make, by September 30, 2013, “recommendations to the legislature that detail the statutory changes necessary to: [s]treamline the collection of liquor taxes, fees, and reports; and require a singular state agency to be responsible for the collection of this revenue and information.”<sup>117</sup> Though House Bill 1124 merely directs two state agencies to make recommendations, it demonstrates a concern about the inefficiencies brought about by I-1183’s new fees.<sup>118</sup>

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<sup>113</sup> *Costco Wholesale Corp. v. State Liquor Control Bd.*, at 6 (Wash. Super. Ct. 2013), available at <http://s3.documentcloud.org/documents/695015/sharpsupcrt-co-thurston-wa-us-10.txt>.

<sup>114</sup> WASH. CONST. art. II, § 41.

<sup>115</sup> *Id.*

<sup>116</sup> WASH. CONST. art. II, § 12.

<sup>117</sup> H.B. 1124, 63d Leg., 2013 Reg. Sess. (Wash. 2013).

<sup>118</sup> No information is available on whether such recommendations were ever made, and the legislature does not appear to have taken any actions to implement such recommendations even if they were made.

Second, the legislature made a minor change to I-1183's spirits distributor license with Engrossed Substitute Senate Bill 5644, which extended the period of time in which the license fee was equal to "[10] percent of the total revenue from all the licensee's sales of spirits," from two years to twenty seven months.<sup>119</sup> In addition, the legislature reduced the period during which the fee was equal to "[5] percent of the total revenue from all the licensee's sales of spirits" from three years to twenty-eight months and "in each month thereafter."<sup>120</sup> The Final Bill Report does not indicate the rationale behind such a change.<sup>121</sup> Notably, earlier versions of this bill would have legislatively overridden the WSLCB's regulation limiting a spirits retailer's sales to bars and restaurants to twenty-four liters per day, but such a provision was removed later in the legislative process.<sup>122</sup>

### III. LEARNING FROM I-1183: LESSONS FOR OTHER CITIZEN ADVOCATES AND LEGISLATORS SEEKING TO REFORM OR PRIVATIZE STATE-RUN LIQUOR SYSTEMS

Any attempt to draw conclusions about a piece of legislation, or to make recommendations based upon legislation in effect for only two years, will always be preliminary. Nevertheless, Washington's experience with liquor privatization is instructive for both private citizens and state legislators. This section attempts to evaluate I-1183 and liquor privatization in Washington by demonstrating several lessons concerning what has and has not worked well and by making recommendations on how I-1183's key provisions could, or should, be emulated, modified, or rejected.

#### A. *I-1183's Successes*

First, without question, the greatest success of I-1183 is that state and local governments in Washington have benefited greatly under a privatized system, as demonstrated above. To budget-conscious state legislators and citizens fearful of losing a valuable and stable revenue stream, Washington's experience has

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<sup>119</sup> Engrossed Substitute S.B. 5644, 63d Leg., 2013 2d Spec. Sess. (Wash. 2013).

<sup>120</sup> *Id.*

<sup>121</sup> Senate, *Final Bill Report ESSB 5644*, at 1 (Wash. 2013), <http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bill%20Reports/Senate/5644-S.E%20SBR%20FBR%2013%20E2.pdf>.

<sup>122</sup> Compare Senate, *Senate Bill Report SB 5644*, at 1–2 (Wash. 2013), <http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bill%20Reports/Senate/5644%20SBA%20CL%2013.pdf>, with Senate, *Final Bill Report ESSB 5644*, at 1 (Wash. 2013), <http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bill%20Reports/Senate/5644-S.E%20SBR%20FBR%2013%20E2.pdf>.

demonstrated that a privatized liquor system need not be equated with a loss of revenue, nor must it be accompanied by higher taxes. It is, therefore, strongly recommended that other liquor privatization legislation or initiatives emulate the revenue-raising provisions of I-1183 or otherwise attempt to ensure that state revenues under a privatized system are neither higher nor lower than under state control.

Second, in Washington, liquor privatization in general and I-1183 in particular have led to a dramatic increase in consumer convenience and access. Washington consumers who shop at large grocery stores or other large retail chains can now purchase spirits, beer, wine, and other alcoholic beverages in one location. From a consumer's perspective, increased convenience is quite possibly the single most attractive benefit of a privatized liquor system.

Third, the citizen-led initiative model of liquor privatization used to ratify I-1183 can be regarded as a significant success. Such a process permitted citizen advocates and industry groups to take control of the legislative process themselves rather than haggling with legislators and waiting for action from a wide variety of legislative and administrative bodies, committees, and panels. Privatization advocates in the twenty-three other states that permit citizen-led initiatives should, therefore, strongly consider this route over the traditional legislative process. However, those in states that do not permit citizen-led initiatives can also learn from I-1183, which demonstrates the importance of focusing on liquor privatization legislation as a separate issue with its own challenges and opportunities.

Fourth, and closely tied to the previous point, is the importance of having a dedicated group of privatization supporters with deep pockets, be they individuals, businesses, or industry groups that will have a stake in a privatized system. The importance of the multi-million dollar contributions of Costco and its allies to the ratification of I-1183 cannot be understated. Without such a significant stream of pro-privatization funds, the initiative probably would not have succeeded at the ballot box. Therefore, it is recommended that potential stakeholders commit both philosophically and financially to passing privatization initiatives or legislation.

Finally, I-1183's commitment to ensuring that public health and safety needs would be more than satisfied under a privatized system should be emulated by other privatization initiatives and legislation. As demonstrated above, I-1183 contained a number of provisions designed to ensure that spirits retail licensees would be subjected to strict enforcement guidelines and regulations. The effectiveness of I-1183's enforcement provisions is most strongly demonstrated by the fact that DUI-related collisions and arrests and compliance rates in preventing the sale of liquor to minors have remained largely unchanged post-privatization. Therefore, it is recommended that privatization initiatives and legislation be crafted to ensure that public health and safety needs will be adequately funded and that

strict enforcement of liquor control laws in the privatized system will continue unaffected.

*B. I-1183's Failures and Disappointments*

First, while Washington's citizen-led initiative process and the pro-privatization funding stream available to ratify I-1183 were two of its greatest assets, they were a double-edged sword. They allowed those who stood to benefit under a privatized system, like Costco, to draft an initiative favorable to their interests and contrary to the interests of their competitors. As demonstrated above, small liquor stores are struggling immensely under Washington's privatized system. While a citizen-led initiative process is quite susceptible to the influence of large businesses and industry groups that stand to benefit under a privatized system, the traditional legislative process allows for a multitude of voices and ideas in support of (or against) privatization, which may produce privatization legislation that is more reflective of the needs of all current and future stakeholders.

Therefore, it is recommended that privatization advocates make considerable efforts to ensure that businesses of all sizes have at least the opportunity to profit under a privatized system. For example, while privatization advocates may consider establishing a minimum retail space requirement for spirits retail licensees, they may want to choose a requirement more reflective of the size of potential liquor retailers in their state. In addition, they may want to consider a "progressive" system of license fees, where larger liquor retailers pay a higher license fee than smaller liquor retailers.

Second, I-1183 seems to have disregarded one key group: state liquor store employees for whom privatization means immediate unemployment. The continuing high unemployment rate among former state liquor store employees in Washington, and the corresponding drain on state finances through the provision of unemployment benefits, demonstrates this unfortunate consequence of privatization. Therefore, it is recommended that privatization advocates consider provisions designed to encourage the hiring of former state-store employees by private liquor stores, such as tax credits and other financial incentives. Advocates could also consider provisions that allow for the creation of an employee "bank" of former state liquor store employees to be offered as a first resource to private employers looking to serve new liquor customers by hiring knowledgeable and experienced liquor salespersons. This employee bank could also categorize former state-store employees by skillset, knowledge base, or geographic area, in an effort to best satisfy the employers' staffing and hiring needs.

Third, I-1183 blurred the distinction between "raising taxes," which it technically did not do, and "raising revenue," which it did do through the new spirits retail and spirits distributor license fees. Consequentially, Washington citizens voted for an initiative that they were told did not raise taxes but did raise

revenues in a way that consumers would, and did, see when they began shopping for liquor in the privatized system. Therefore, it is recommended that privatization advocates take great care to educate consumers about the costs of privatization and make a full and fair disclosure to the public about *any* revenue-raising provisions in the initiative or legislation. Privatization advocates should also ensure that while the state should not suffer financially under privatization, it probably should not incur a financial “windfall” at the consumer’s expense. One option to consider would be lowering spirits retail and distributor license fees to a balanced level that allows for continuing state revenues while minimizing the costs that will be passed on to consumers at the liquor store checkout counter.

Finally, citizens and legislatures should take great care to draft privatization initiatives and legislation that establish realistic financial goals and set forth key provisions in careful, precise, and consistent language. While the drafters of I-1183 were undoubtedly attempting to provide the state with some level of assured revenue with the \$150 million spirits distributor license fee fund, the fact that collective payments by spirits distributors fell over \$100 million short indicates that the financial goal was unrealistic from the outset. In addition, Washington’s experience with the sometimes unclear language of I-1183, such as the meaning of “no single sale may exceed twenty-four liters,” demonstrates the importance of careful drafting. If the drafters of similar provisions in future privatization initiatives and legislation actually intend, for example, to limit a single sale by spirits retailers to twenty four liters *per day*, they must say so explicitly. Drafters must also keep in mind that a change in meaning of certain key phrases may have a dramatic influence on the entire privatized system: While limiting sales by spirits retailers to twenty four liters *per day* may encourage restaurants and bars to patronize spirits distributors instead of spirits retailers, limiting sales by spirits retailers to only twenty four liters *per transaction* may encourage bars and restaurants to patronize spirits retailers over spirits distributors. With respect to key provisions in any piece of legislation, clarity and linguistic precision matters.

#### IV. CONCLUSION

While I-1183 is an imperfect piece of legislation that produced an imperfect privatized liquor system, it nevertheless has been a success for the reasons mentioned above. Consumers, most private businesses, and state and local governments have all come out ahead in Washington. Citizen advocates and state legislators should pay close attention to Washington’s experience with I-1183, emulating its successes while avoiding some or all of its failures and disappointments. By privatizing its state-run liquor system at a time when other states have been overwhelmingly unsuccessful in doing so, Washington has embarked on a “Noble Experiment” for the Twenty-First Century. It has demonstrated that large-scale privatization of an antiquated state-run liquor

distribution and sale system is possible—but not without a great deal of time and effort on the part of privatization advocates, stakeholders, and the government agencies responsible for implementing such changes.