Chapter 1

Citizen Lawmaking

The initiative is a petition process allowing voters to place one or more propositions on the referendum ballot by collecting a specified minimum number of certified signatures of registered voters for each proposition. The origin of this participatory device is a voter-approved 1898 South Dakota constitutional amendment that also established the protest referendum allowing voters by petition to place on the referendum ballot the question of repealing a specified state law(s). Our primary focus is the initiative that continues to be a controversial mechanism raising fundamental questions about the nature of representative government and the role of voters in state and local government lawmaking in the twenty-four states and numerous general purpose local governments that adopted the device in the United States. The value of an active citizenry in ensuring the health of the polity was recognized in ancient times. Aristotle, for example, placed greater faith in the collective wisdom of citizens than in the sagacity of any individual.[1] Political theorists and elected officers nevertheless have different views of the proper role of voter participation in the law-making process.

Direct democracy advocates favor the traditional New England town meeting in which assembled voters enact all bylaws after discussion of each article in the warrant (fixed meeting agenda) issued by the elected selectpersons who are the town's plural executive.[2] This type of lawmaking is traceable in origin to the Athenian *ecclesia* of the fifth century B.C. Advocates of representative lawmaking, on the other hand, confine the voters to periodic election of legislators who lead public opinion by advancing proposals and soliciting feedback on them from the citizenry prior to voting on the proposals. This leadership-feedback theory is premised on the belief elected officers will consider seriously the views of the people on legislative proposals and will follow the wishes of the majority.

Populist proponents of the initiative in the latter part of the nineteenth century were dismayed with state legislatures controlled by special

interests, including major railroads and trusts, and were convinced the legislatures were only pseudo-representative institutions that did the bidding of special interests and refused to enact bills into law favored by the majority of the citizens. One of the populists' cardinal solutions was the initiative supplemented by the protest referendum allowing voters by petition to call a referendum to repeal statutes enacted by the legislature and the recall authorizing voters by petition to call a special election for the purpose of determining whether a named elected officer should be removed from office.[3] The initiative is a logical extension of the mandatory referendum—for the adoption of proposed constitutions, constitutional amendments, and pledging the "full faith and credit" of the state government as support for bond issues—that had become well established by the latter half of the nineteenth century.

The populists were successful in amending the South Dakota Constitution on November 8, 1898, by adding the initiative and the protest or petition referendum activated by petitions signed by 5 percent of the registered voters of the state. The amendment provides:

> The legislative power shall be vested in a legislature which shall consist of a Senate and House of Representatives. Except that the people expressly reserve to themselves the right to propose measures, which measures the legislature shall enact and submit to a vote of the electors of the state, and also the right to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect (except such laws as may be necessary for the immediate preservation of the public peace, health, or safety, support of state government and the existing public institutions).[4]

This provision explicitly stipulates it cannot be construed to deny a member of the state legislature of the right to propose a bill and exempts initiated measures from the gubernatorial veto

San Francisco freeholders in the same year adopted a new city-county charter, providing among other things, for the initiative and the protest referendum.[5]

Origin and Spread of the Initiative

The origin of the legislative initiative generally has been attributed to Swiss cantons in the nineteenth century and an 1898 South Dakota constitu-

tional amendment. The reader should note that voters in Massachusetts towns were empowered by the General Court (provincial legislature) on December 22, 1715, to require the selectmen (plural executive) to include in the warrant calling a town meeting any article accompanied by a petition signed by ten or more voters.[6] Voters in all New England towns with an open town meeting currently possess this power of initiative.

A second eighteenth-century example of an authorization for voter employment of the initiative is found in the Georgia Constitution of 1777, framed and adopted by a convention but not submitted to the electorate for ratification. The amendment article of this fundamental law provided for the calling of a constitutional convention to revise the organic law only on receipt of "petitions from a majority of the counties and the petitions from each county . . . signed by a majority of voters in each county . . ."[7]

Several Swiss cantons, subsequent to the revolutionary movement of 1830, drafted constitutions authorizing the employment of the constitutional initiative, and the federal constitution of 1848 required all cantons to adopt the initiative that also could be utilized to place proposed national constitutional amendments on the ballot.[8] The statutory initiative first was authorized by the Vaud cantonal constitution of 1845, and subsequently was authorized by the cantonal constitutions in Aargau in 1852, Baselland in 1863, and Solothrun, Thurgau, and Zurich in 1869. The initiative in Switzerland is referred to as the "Imperative Petition" of the voters.

The California State Legislature in 1883 enacted "An Act to Provide for the Organization, Incorporation, and Government of Municipal Corporations" to implement the home rule provision of the 1879 state constitution and authorized incorporation of a city by petitions, signed by 100 registered voters within the limits of the proposed city, filed with the county board of supervisors and subsequent voter approval of a charter incorporating the new city and providing for its governmental structure and power.[9]

Citizens who feared a strong governor drafted the early state constitutions and placed great trust in legislative bodies, provided for a limited suffrage despite the emphasis on the equality of all men in the Declaration of Independence, and limited the role of the electorate primarily to the periodic selection of representatives. The constitution drafters divided political power among three branches of government and instituted a system of checks and balances to protect the public against capture of the government by a faction and to ensure governmental policies were in accord with the desires of the majority of the citizens. This governance system, according to the populists, had broken down and the farmers and industrial workers were at the mercy of an economic oligarchy.

The initiative, as developed outside of the New England towns, generally is rooted in agrarian discontent following the Civil War; a period when railroads often had a monopoly on bulk transportation, particularly in the west.[10] The agitation for governmental control of railroad monopolies and reform of state legislatures started with the granger movement and associated greenbackism in the Midwest in the 1870s, and continued with the emergence of the populist movement. George McKenna explained, "the farmers and their champions turned back to the vast literature of rural romanticism, the eulogies of decentralized government, the methods of Andrew Jackson and Thomas Jefferson—turned to them not for solace but for strength, which they then mixed with their own evangelical Protestantism to create a powerful fighting faith."[11] Populist leaders were aware of the use of the constitutional and statutory initiative in Switzerland.

Populists maintained institutional arrangements stressed the wrong values and charged that too much emphasis was placed on centralization of political power in the state legislature, while too little attention was paid to responsiveness as a criterion of democratic government. They were convinced that the supercentralization of power resulted in the enactment of policies favoring special economic interests and alienation of many citizens.

Populists in effect were preaching a type of political fundamentalism and calling for institutional and procedural changes that putatively would maximize citizen participation and neutralize the nefarious influences of the "invisible government," that is, the economic special interests. Populist advanced the argument that citizen government will be restored only by embodying the initiative, the protest referendum, and the recall in the state constitution. The protest referendum allows voters by petition to place on the ballot the question of the repeal of a state law, and the recall allows voters by petition to place on the ballot the question of the removal from office of an elected officer. Populists argued that political realities, as reflected in legislative abuses of the public trust, necessitate a new procedural system permitting a redistribution of political power revitalizing legislative decision-making and invigorating citizen participation.

The populists were convinced that the grassroots citizenry have the capacity to make sound political decisions often superior to those made by legislatures, and it is an undemocratic system that deprives voters of the opportunity to make important policy decisions. The mechanisms advocated by the populists furthermore will maximize vox populi by giving citizens a greater "stake" in and enhance the legitimacy of the governmental system.[12] Several studies indicated the initiative enhances the

political efficacy of voters, but Joshua J. Dyck and Edward L. Lascher Jr. reported in 2009 the results of their research on the subject: "We find no empirical evidence of a connection between the use of direct democracy and the respondent's sense of political efficacy."[13] Although the populists placed great faith in the direct initiative and its obligatory referendum, they did not advocate the replacement of a representative democracy with a plebiscitarian democracy.

The National People's Party (Populist), an amalgam of the Farmers' Alliance and a number of urban labor organizations, recommended at its first national convention on July 4, 1892, the adoption of the initiative and the protest (petition) referendum as correctives for the problems of state legislatures.[14] The American Federation of Labor in the same year officially recommended the adoption of the initiative and the referendum. The National People's Party gained control of the South Dakota Legislature as a result of the 1896 elections, and in 1897 the legislature proposed a direct legislation constitutional amendment that was ratified by the voters in 1898. San Francisco freeholders in the same year adopted a new city-county charter providing, among other things, for the initiative and the petition referendum.[15] South Dakota voters, however, were not the first ones to utilize the initiative. Oregon, which adopted the device in 1902, holds that honor; voters on June 6, 1904, approved a direct primary proposition and a county local option liquor proposition. The initiative in Oregon was promoted actively by labor unions, Henry George's single-taxers, and the Grange, a farmers' organization.[16] South Dakota voters first employed the initiative in November 1908.

The progressive movement developed at the turn of the century as the populist movement declined, and the two movements to an extent blended into one reform movement. Whereas the populist movement was agrarian based, the progressive movement had two bases—agrarian and urban. Richard Hofstadter explained: "Progressivism differed from populism in the fact that the middle classes of the cities not only joined the trend toward protest but took over its leadership."[17] The progressives generally were led by "Yankee-Protestants" who placed great emphasis on the responsibilities of citizenship to ensure the public good was promoted. Amy Bridges and Thad Kousser investigated the adoption of the initiative by states and in 2011 concluded: "Elites gave up power to voters when they could expect those voters to share their policy preferences and when empowering voters advanced a policy agenda that had been blocked in the legislature."[18]

The direct legislation drive gained important support from the progressive movement during the first two decades of the twentieth century.

California progressives were upset greatly by what they perceived to be control of the state legislature by corporations, and concluded the initiative and petition referendum could break monopoly control and machine politics.[19] Robert M. LaFollette, a leading progressive in Wisconsin, wrote:

> For years the American people have been engaged in a terrific struggle with the allied forces of organized wealth and political corruption. . . . The people must have in reserve new weapons for every emergency, if they are to regain and preserve control of their governments.
>
> Through the initiative, referendum, and recall the people in any emergency can absolutely control.
>
> The initiative and referendum make it possible for them to demand a direct vote and repeal bad laws which have been enacted, or to enact by direct vote good measures which their representatives refuse to consider.[20]

Public enthusiasm in favor of law making by unassembled citizens was strong in the period from 1898 to 1918, as nineteen states adopted the initiative as part of their respective state constitution. All the states were west of the Mississippi River except Maine, Massachusetts, and Ohio. No state subsequently adopted the initiative until 1959, when Alaska entered the Union with a constitutional initiative provision. Wyoming adopted the initiative by a constitutional amendment in 1968, Illinois voters in 1970 ratified a proposed constitution providing for the initiative relative to the legislative article only of the constitution, and Florida adopted the constitutional initiative in 1972. The Illinois Supreme Court ruled in 1976, only voter-approved initiated constitutional amendments proposing structural and procedural changes in the legislative article of the constitution are valid.[21] Mississippi readopted the initiative in 1992, after its 1916 adoption was invalidated by the state Supreme Court in 1922.[22] The *Utah Code* (consolidated statutes) first authorized the initiative in 1900.

The initiative, protest referendum, and the recall also were promoted by the municipal reform movement, and the three participatory mechanisms were incorporated in the commission form of municipal government commencing in Des Moines in 1907, and subsequently in council-manager charters. Richard S. Childs, originator of the council-manager plan of municipal government and cofounder with Woodrow Wilson of the National Short Ballot Organization, was convinced in 1916 elected officers were irresponsible and that "our representative system is mis-representative."[23]

The Initiative

The initiative today is authorized by state constitutional and/or statutory provisions varying in terms of authorized types of initiatives, restrictions on use, petition signature requirements, ballot title preparation, system of verifying signatures, voter information pamphlets, approval requirements, and legislative amendment or repeal. The petition requirements may be easy or difficult to meet, thereby determining to an extent the frequency with which the initiative will be employed.

The constitutions of twenty-three states and the *Utah Code* contain provisions authorizing state voters to use one or more types of initiatives (see chapter 2). Constitutional provisions for direct legislation in some states—Idaho and South Dakota are examples—are brief and implementation of the provisions is the responsibility of the state legislature. In contrast, the constitutional provisions for the initiative and protest referendum in nine states are self-executing; that is, no implementing legislation is required.

The initiative authorizing constitutional provision may contain a single subject provision stipulating an initiative measure may embrace only one subject.[24] The purposes of the requirement are to avoid confusing voters and to prevent logrolling. Courts, except those in Colorado and Florida, generally did not enforce strictly the requirement provided the act's sections are reasonably germane to the goal of the initiative.

Daniel H. Lowenstein in 2002 reviewed court enforcement of the single subject rule, particularly the dramatic changes in enforcement of the rule by courts in California, Montana, and Oregon. He reported the Oregon Supreme Court in *Armatta v. Kitzhaber* in 1998 invalidated a 1996 voter ratified constitutional amendment on victims' rights, and explained the initiative "contained a variety of provisions affecting numerous aspects of criminal procedure."[25] In 1999, the Montana Supreme Court in *Marshall v. Cooney* overturned its precedents by strictly enforcing the single subject rule.[26] Lowenstein observed that the California Supreme Court "applied the single subject rule with deference" for half a century, but ejected from the ballot in 1999 Proposition 24, which "would make the state supreme court responsible for legislative redistricting."[27] He concluded that "the application of the single subject rule to initiatives has become significantly more aggressive in many states . . . and this development places a discretionary veto power over initiatives in state supreme court judges that cannot be justified by the purposes the rule is intended to serve or, especially, by the rule's fitness to serve those purposes."[28]

The initiative in eighteen states may be employed in the process of amending the state constitution. The Florida and Mississippi constitutions

permit use of the initiative to amend only the constitution and the Illinois constitution restricts use of the device to amendment of the legislative article of the constitution. The initiative in twenty-two states may be utilized to enact ordinary statutes. The veto power of the governor does not extend to voter approved initiated measures. As authorized by the state constitution, a state statute, or a local government charter, the initiative may be employed in most states to adopt and amend local government charters and ordinances.

The initiative may be direct, indirect, or advisory. Under the former, the entire legislative process is circumvented as propositions are placed directly on the referendum ballot if the requisite number and distribution of valid signatures are collected and certified. The direct initiative may be employed in sixteen states to amend the constitution and in seven states to enact statutes. The direct initiative commonly is employed to place local government charters or charter amendments on the referendum ballot. Although the *New York City Charter* authorizes the use of the initiative to propose charter amendments, the initiative has not been employed to date.[29]

The indirect statutory initiative, employed in nine states, involves a more cumbersome process as a proposition is referred to the legislative body on the filing of the required number of certified signatures. Failure of the legislative body to approve the proposition within a specified number of days, varying from forty days in Michigan to adjournment of the Maine state legislature, leads to the proposition appearing automatically on the referendum ballot. Additional certified signatures must be collected in three states to place the proposition on the ballot as follows: one-half of 1 percent and 10 percent of the votes cast for governor in the last general election in Massachusetts and Utah, respectively, and 3 percent of the registered voters in Ohio.

Only the Massachusetts and Mississippi constitutions authorize the indirect initiative for constitutional amendments. To appear on the Massachusetts referendum ballot, the initiative proposal must be approved by each of two successive joint sessions of a successively elected General Court (state legislature) or receive the affirmative vote of 25 percent of all members in each of two successive joint sessions.[30]

The state legislature in Maine, Massachusetts, Michigan, Nevada, and Washington is authorized to place a substitute proposition on the referendum ballot whenever an initiative proposition appears on the ballot.[31]

Relative to proposed statutes, Alaska, Maine, Massachusetts, Michigan, and Wyoming provide only for the indirect initiative. Nevada, Ohio, Utah, and Washington authorize employment of both the indirect and the direct initiative.

The initiative also can be employed by voters in numerous general purpose local governments to place propositions on the referendum ballot. Eight state constitutions and statutes in six additional states authorize such use. Furthermore, "home rule" constitutional provisions in several other states allow voters to adopt charters or charter amendments providing for this participatory device (see chapter 2).

The advisory initiative allows voters to circulate petitions to place nonbinding questions on the ballot at an election and is a mechanism voters and groups can employ to pressure legislative bodies to take a certain course of action. If petition circulators are successful in collecting the required number of verified signatures for a referendum, a large favorable vote on the question exerts great pressure on the legislative body to accede to the desires of the electorate.

Until the late 1970s, the advisory initiative was employed relatively infrequently and generally attracted only local notice. The growth of the environmental and nuclear freeze movements, along with movements opposing United States involvement in Central America resulted in media attention being focused on advisory referenda as national and regional groups employed the initiative to place questions on the election ballots. For example, voters in 1983 approved Proposition 9 directing the mayor and the board of supervisors of the City and County of San Francisco to notify President Ronald Reagan and Congress the voters favor the repeal of the provisions of the federal Voting Rights Act requiring the city and county to provide ballots, voter pamphlets, and other materials on voting in Chinese and Spanish as well as in English.[32]

Where authorized at the state level, the use of the initiative varies greatly from one state to another. California voters employ the initiative most often. California Assembly Speaker Robert Hertzberg in 2002 explained that the initiative in his state "has evolved into a virtual fourth branch of government. There is hardly any aspect of daily life for any Californian that is unaffected by voter-approved initiatives."[33]

The reader should be aware that there currently is a campaign for a national initiative sponsored by the Democracy Foundation. Former U.S. Senator Mike Gravel of Alaska proposed such an initiative in his 1972 book titled *Citizen Power*.[34]

Views of Advocates and Critics

The initiative was controversial in 1898 when adopted by South Dakota and San Francisco, but currently has wide acceptance in many general purpose local governments and in a number of states. The device is a

populist extension of the constitutional referendum first authorized by the Massachusetts state constitution of 1780, which also directed the General Court (state legislature) to issue precepts to selectmen of towns and plantations directing them to hold town and plantation meetings of voters in 1795, to decide whether a convention should be called to revise the constitution.[35] New Hampshire followed Massachusetts's lead in submitting its proposed constitution to the voters in 1783, and Maine adopted the same practice when it entered the Union as a state in 1820. Subsequently, other states adopted the principle that changes proposed by constitutional conventions or state legislatures do not become effective unless adopted by a majority of voters casting ballots on the question of ratification.[36] By 1860, the principle was well-established in most northern states. Subsequently, the constitutional referendum spread to all states except Delaware, whose constitution may be amended by a two-thirds vote of the members elected to each house of the state legislature in two consecutive sessions separated by an election.[37]

As noted, there are two profoundly different views relative to lawmaking by citizens. While the populists and progressives hailed the initiative as an effective device to make legislative bodies more responsive to the will of the popular majority, elected officers and a number of political observers condemned the initiative on the grounds that it effectively destroys representative lawmaking and replaces it with whimsical and emotional lawmaking. Several observers viewed the initiative as reactionary, since it appears to be a return to the ancient Greek and New England town meetings of assembled voters. The arguments of the proponents and opponents are evaluated in chapter 5.

Advocates

The populists and other advocates of the initiative advanced proposals that followed in the Jeffersonian and Jacksonian traditions. Jefferson opposed a strong national government and placed his faith in the common citizens who must be educated. He stressed:

> In every government on earth is some trace of human weakness, some germ of corruption and degeneracy, which cunning will discover, wickedness insensibly open, cultivate, and improve. Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe, their minds must be improved to a certain extent.[38]

Andrew Jackson similarly distrusted government officers and recommended their frequent election, often annually, as a guard against unethical behavior. He was convinced:

> There are perhaps few men who can for any great length of time enjoy office and power, without being more or less under the influence of feelings unfavorable to the faithful discharge of their public duties. Their integrity may be proof against improper considerations immediately addressed to themselves; but they are apt to acquire a habit of looking with indifference upon the public interests, and of tolerating conduct from which an unpracticed man would revolt. Office is considered as a species of property, and Government rather as a means of promoting individual interests than as an instrument created solely for the service of the People. Corruption in some and in others a perversion of correct feelings and principles divert Government from its legitimate ends, and make it an engine for the support of the few at the expense of the many.[39]

Richard Hofstadter attributed the "agrarian myth" to the Revolutionary War farmer soldiers and Jefferson's faith in the yeoman farmer, and maintained that the myth "encourages farmers to believe they were not themselves an organic part of the whole order of business enterprise and speculation that flourished in the city, partaking of its character and sharing in its risks, but rather the innocent pastoral victims of a conspiracy hatched in the distance."[40]

The conspiracy theory influenced populist thinking and their efforts to improve the economic condition of farmers and to establish governments controlled by the citizenry rather than the special economic interests. Albert M. Kales, in 1914, wrote, "unpopular government is, and indeed always has been a government of the few, by the few, and for the few, at the expenses and against the wish of the many."[41] There was general agreement among populists legislative dominance of the citizenry must be ended.

Dr. John R. Haynes—a prominent promoter of the initiative, protest referendum, and recall in the City of Los Angeles—reflected on the initiative in a 1917 speech in Washington, DC that was published by the U.S. Government Printing Office. He stated that the initiative and the protest referendum, "by bringing the people's servants under a more strict responsibility and a more direct control, has greatly improved the work of representative assemblies."[42] Haynes provided evidence, based

on California experience, that voters did distinguish carefully between the initiated measures on the referendum ballot and made sound decisions. He added:

> From an educational standpoint the initiative and referendum have been worth their cost a thousandfold. They have acted as a sort of great popular university to stimulate the intellectual faculties of the people. They have made the individual less selfish, more thoughtful of the welfare of others; they have given him a new feeling of social solidarity.[43]

Delos F. Wilcox, in 1912, explained, "representative assemblies have become so unwieldy as deliberative bodies that they have been driven to harness themselves with iron rules and submit themselves to guidance by tyrants whose powers Pisistratus himself would have envied."[44] He was convinced voters were less likely to take "ruinous action" than a legislative body, since the issue would have been framed and discussed in the newspapers and at meetings for weeks prior to referendum day.[45]

He advanced four major arguments in favor of the initiative. First, the popular device "would utilize the individual in politics" by tapping their respective wisdom and employing their energies to solve governmental problems directly.[46] Second, bills would be drafted by individuals desiring the bills to succeed in achieving their goals, and the bills would be submitted unamended to the voters.[47] He specifically noted measures sponsored by reformers typically are amended by hostile legislators to ensure that the measures will be defeated or not achieve their respective goals.

Third, Wilcox argued that the initiative enables the sovereign people to exercise their right to make laws without the need for approval by the legislature or other intermediaries. He elaborated that the initiative would free citizens "from the domination of our representatives and it would be possible by direct action to solve" major problems.[48]

Wilcox's fourth argument stresses that the initiative "would provide an orderly means for the restrictions or the extension of the suffrage in accordance with the will of the majority and free from the interference of elected persons whose representative function makes it particularly inappropriate for them to tamper with the suffrage. . . ."[49] This argument, of course, was a potent one during the period when women generally were denied the right to vote and questions were raised with respect to the desirability of lowering the voting age below twenty-one.

William B. Munro commented in 1912 on the ineffectiveness of constitutional restrictions placed on the discretion of state legislatures in the nineteenth century, and concluded that the restrictions in general

resulted in less competent individuals being elected to serve in these bodies.[50] He identified two major arguments in favor of the initiative and referendum. The first argument is based on the contention that citizens are not represented properly by elected legislators. Munro wrote that in the decade prior to the constitutional adoption of direct legislation in California, "it would be a gross perversion of obvious facts to allege that the voters of the state got what they wanted in the way of legislation."[51]

Munro also explained the educational value of the initiative in promoting "a spirit of legislative enterprise . . . among the voters" who are able to develop proposed legislation with a guaranty that the proposal will receive careful consideration by the voters if the requisite number of petition signatures is obtained.[52] The civic education of the voters also is promoted by the distribution at public expense of informational pamphlets containing the proposed statute and pro and con arguments.

Theodore Roosevelt, a leading progressive, was an advocate of the New England open town meeting, the initiative, and the referendum. He referred to the latter two as "merely the next stage" of the former and added: "Personally I should like to see the initiative and referendum, with proper safeguards, adopted generally in the states of the Union, and personally I am sorry that the New England town meeting has not spread throughout the Union."[53] Roosevelt was a pragmatist and favored the adoption of every participatory device that is theoretically good, provided experience supports the theory.[54]

Woodrow Wilson, a second prominent progressive contended that the legislative initiative and the referendum would restore representative government by abolishing secret decision making under the control of economic interest groups.[55] He emphasized that these participatory devices would ensure that legislators would be "bound in duty and in mere policy to . . . represent the sovereign people whom they profess to serve and not the private interests which creep into their counsels by way of machine orders and committee conferences."[56]

Richard S. Childs, in 1916, reflected the popular suspicion of the quality of representative government, and noted, "[i]t often fails to register the will of the people and in fact may brazenly and successfully defy the people on a given issue."[57] He highlighted the fact the Oregon electorate overwhelmingly approved propositions the state legislature had scorned. Referring specifically to municipal governments, he wrote that the people's "nominal agents and servants in the representative system will frequently maintain a successful indifference or resistance election after election."[58] Childs, however, did not call for the abandonment of representative government, but advocated a number of reform measures, including the initiative, protest referendum, recall, and short ballot.

The populist theme of the need to break the stranglehold of the plutocrats on governments was echoed by Robert M. LaFollette, a leading progressive, who explained:

> For years the American people have been engaged in a terrific struggle with the allied forces of organized wealth and political corruption. . . . The people must have in reserve new weapons for every emergency, if they are to regain and preserve control of their governments. . . .
>
> Through the initiative, referendum, and recall the people in any emergency can absolutely control.
>
> The initiative and referendum make it possible for them to demand a direct vote and repeal bad laws which have been enacted, or to enact by direct vote good measures which their representatives refuse to consider.[59]

LaFollette was convinced only a united people using the instruments of direct democracy could regain popular control of governments.

John D. Hicks identified, in 1931, two key populist propositions: The need to "restrain the selfish tendencies of those who profited at the expense of the poor and needy" and to replace a plutocracy by a democracy.[60] According to Hicks, populists accepted as reality the ability of voters to draft, enact, and implement statutes "to redeem themselves from the various sorts of oppression that were being visited upon them."[61]

The most common themes of the populists and progressives were empowerment of the people and the educative value of the initiative and associated referendum. Lewis J. Johnson provided a third theme; that is, direct legislation offers "an attractive field of usefulness for such of her citizens as do not care to give up their whole time to public life."[62] Johnson, of course, was referring to the fact that the initiative allows voters on occasion to become legislators without serving as elected lawmakers on a full- or part-time basis. If the potential use of the initiative encourages legislators to enact bills desired by the majority of their respective constituents, the affirmative forcing mechanism will not be employed by the voters.

A most interesting justification of the initiative was made by U.S. Senator Mark O. Hatfield of Oregon, who in 1979 argued, "the initiative is an actualization of the citizens' first amendment right to petition the Government for redress of grievances. . . ."[63] Of course, this statement could not have been made by the populists or the progressives, because the First Amendment to the U.S. Constitution, which specifically was designed to limit the powers of Congress, had not yet been incorporated

into the Fourteenth Amendment by the U.S. Supreme Court. Hatfield's statement is related more directly to the indirect initiative than to the direct initiative.

Critics

The political theory of the direct initiative and obligatory protest referendum challenges the fundamental assumptions of the theory of representative government, and suggests that elected officers are little more than delegates to legislative assemblies with detailed instructions on how to vote on bills. Not surprisingly, the emergence of the direct democracy movement sparked a spirited response and attack by defenders of the institutional status quo. A. Lawrence Lowell argued, in an 1895 article, for example, that the initiative "has not been a success in its native country, and there is no reason to suppose it would work any better elsewhere."[64] The more extreme opponents of direct democracy clearly were fearful these participatory instruments would lead to a most undemocratic result: an ochlocracy.

One of the most vitriolic attacks on direct democracy was published in 1912. James Boyle, a former consul of the United States in Liverpool, England, wailed that direct legislation was "impracticable, revolutionary, and reactionary, and that it would be followed by a train of evils greater than those of which they complain. . . ."[65] In his view, any evil in the system of representative government is attributable to the failure of the voters to assume fully their civic responsibilities. He justified his description of the participatory democracy as "revolutionary" on the grounds that proponents are opposed to the current representative system and as "reactionary" because they want to retrogress to town meeting government, which he asserted is "unsuited to the conditions of today."[66]

Boyle particularly resented the inability of the voters or the legislature to amend propositions placed on the referendum ballot by only 8 percent of the registered voters that are approved, and observed that the initiative is inferior to town meeting government, in which the majority can make the decisions.[67]

The dulling of the sense of responsibility of legislators was another major argument advanced by Boyle who elaborated: "The people can initiate laws; the people can pass laws; therefore let the people be responsible;—and the argument is sound. But who will 'Referendum' or 'Recall' the people? Yet the people sometimes make mistakes,—though it is almost rank treason in these days of cheap fawning demagogy to say so—God's truth though it be!"[68]

Boyle was convinced that initiative propositions never would draw a majority of the registered voters to the ballot box and hence would result

in minority rule. Although admitting there has been a high percentage of voters turning out to make decisions on initiated propositions in Oregon, he dismissed the turnout on the grounds that the initiative was a novelty, public interest was generated by the women's suffrage campaign, and several leaders of the national movement for the initiative and referendum were residents of Oregon.[69]

The national and state platforms of the Socialist Party called for the adoption of the initiative and protest referendum. Building on this fact and the general aversion to socialism in the United States, Boyle labeled direct legislation "the Gate-Way to Socialism."[70]

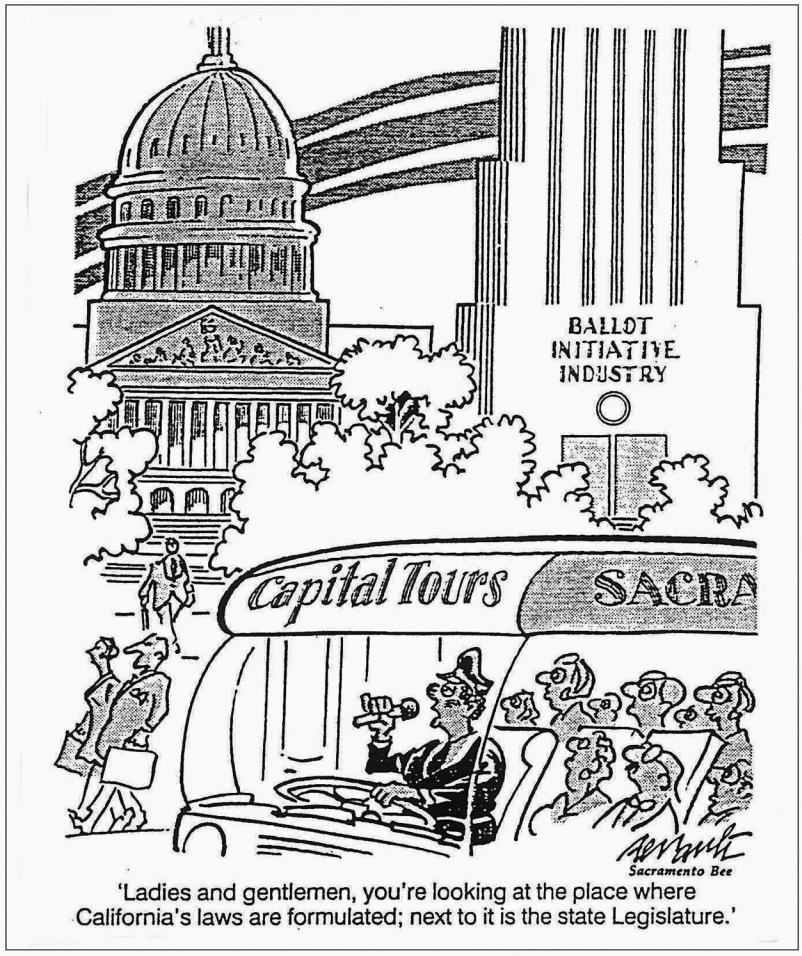
Recalling the colonists' cry of no taxation without representation, Boyle alleged that the initiative and the referendum "would place the tremendous power of taxation—the highest power any State can exercise, next only to that of imprisonment or inflicting the death penalty—in the hands of selfish groups and classes of organized minorities."[71] Boyle was not done with his litany of direct legislation defects. He asserted that such legislation would be "crude legislation" in need of amendment and would have to be accepted or rejected *en toto* without amendment.[72]

After citing the negative views of other critics of direct legislation and concluding, "the Swiss people are weary of their many elections under the initiative and referendum," Boyle ended his tirade with the statement that the direct legislation system "is not only a failure as an effective and satisfactory instrument of Democratic government, but that it is full of vicious possibilities."[73]

Walter E. Weyl noted in 1912, that the tendency of the initiative and the protest referendum to limit the discretionary authority of legislators, and maintained that the devices turned solons "into mere delegates; into mere mechanical forecasters and repeaters of popular deliverances; into parrot-like, political phonographs."[74] This theme occurs frequently in the writings of persons opposed to direct legislation.

In 1914, Albert M. Kales concluded that voters were burdened by a long ballot prior to the adoption of the initiative, which added to the length of the ballot possibly containing other propositions on the same subjects as the initiative propositions.[75] In addition, he believed "the power of the extra-legal government to advise and direct the politically ignorant voter how to vote will be just as effective in the normal election to carry or defeat an act of an initiative or referendum as it is to place men loyal to it in the offices of the legal government."[76] In essence, government will continue to be dominated by special interest groups regardless of whether the initiative is available to the voters.

James D. Barnett in 1915 reviewed Oregon's early experience with the initiative and the referendum, and wrote that it often was difficult for



Source: Denis Renault, Editorial Cartoon, October 29, 1996, *The Sacramento Bee*. Reprinted with permission of *The Sacramento Bee*.

Figure 1.1. California Legislature.

voters to determine who were the genuine authors of the initiative propositions, and special interests on a number of occasions were behind the propositions.[77] This theme also appears in the writings of other opponents.

Herbert Croly in 1915 explained the initiative grants a most important power—the ability to place a proposition without amendment on the

ballot—to a small group of voters who "might frequently be able to wear down or circumvent the opposition of a less able and tenacious majority."[78]

The most eminent early opponent of the initiative was former President William H. Taft who questioned in 1913 whether the voters possessed the ability to act on numerous initiative propositions on a single referendum ballot, and whether the failure of representative government is due to the inability of the electorate to choose representatives intelligently. He used strong words to describe the negative impact of direct legislation on legislative bodies.

> The effect of the initiative and referendum upon the legislative branch of government, even if it be retained, is necessarily to minimize its power, to take away its courage and independence of action, to destroy its sense of responsibility and to hold it up as unworthy of confidence. Nothing would more certainly destroy the character of a law-making body. No one with just pride and proper self-respect would aspire to a position in which the sole standard of action must be the questions what the majority of the electorate, or rather a minority likely to vote, will do with measures the details of which there is neither time nor proper means to make the public understand. The necessary result of the compulsory referendum and following initiative is to nullify and defeat the very advantages of the representative system which made it an improvement upon direct government.[79]

Taft also objected to direct legislation because it removed the distinction between fundamental law, a constitution, and ordinary statutes since both receive the identical sanction of the voters.[80] In his view, this objection was the strongest objection to the use of the initiative and the referendum.

To many, direct legislation ran counter to the guaranty clause of the U.S. Constitution that provides "[t]he United States shall guarantee to every State in this Union a Republican form of Government, . . ."[81] A republic is a representative form of government and opponents of the initiative strongly believed direct legislation was facially unconstitutional. This question is examined in chapter 3.

The controversy over the desirability of the initiative has not died out with the passage of time. Professor Eugene C. Lee of the University of California, Berkeley, noted the paradox that this participatory device no longer is direct democracy in California.

> In 1990, representative government is threatened, not by a private monopoly, but by the initiative process itself. . . . It

> is a force that has produced occasional benefits but at an extraordinary cost—an erosion of responsibility in the executive and legislative branches of state government, a simultaneous overload in the judiciary, and an overamended state constitution alongside a body of inflexible "quasi-constitutional" law. At a time when the ultimate in statecraft is required to achieve even a minimum of coordinated public policies, the initiative offers the politics of simplification.[82]

Lee acknowledged approved initiative propositions in a number of instances have been beneficial to the public, but doubted whether these benefits outweigh the shortcomings of direct democracy. Although he recommended several actions to improve the existing process, he placed special emphasis on an option not available to California voters—the indirect initiative.[83]

Professor Preble Stolz of the School of Law of the University of California, Berkeley, in 1990 zeroed his criticism of the initiative to its effect on the courts. Stressing that the California Supreme Court can consider a maximum of approximately 140 cases a year, he noted that initiative cases occupy the time of the courts that could be devoted to other important issues.[84] He added: "The best way to fix the initiative process is to get rid of it. The Supreme Court could help by applying the single-subject rule more rigorously to initiatives than it has to statutes. Since legislative statutes are the product of extensive hearings and negotiations, the wording represents a compromise. That process is absent from initiatives, which are written by partisans and put before the voters on an all-or-nothing basis. Initiatives invite logrolling that the single-subject rule was intended to prevent."[85]

The widespread negative view of elected officers to the initiative is reflected in a 1997 e-mail message to the author from the executive director of a state association of counties: "Thank goodness we do not have initiative."

Daniel A. Smith and Joseph Lubinski conducted a study of the thirty-two initiative propositions on the 1912 Colorado general election ballot and concluded: "Ironically, the real populist paradox concerning direct democracy may be that the mechanisms of the initiative and popular referendum were easily manipulated during the Progressive Era by the same special interests they originally targeted."[86]

The Initiative and Democratic Lawmaking

The term *democracy* is derived from two Greek words that translate into English as "power of the people." Hence, it appears direct lawmaking

by citizens, whether in a New England open town meeting or by means of the initiative and its compulsory referendum, is the most democratic method for enacting statutes. The reader should be aware that the initiative is employed often in California, where each initiative is labeled a proposition, such as Proposition 8, and many of the same numbers appear year after year on the referendum ballot. Hence, sponsors add the year to the proposition number.

The views of the critics cited above suggest that initiated constitutional amendments and statutes may be the result of well-financed interest group action and not represent the views of the majority of voters, since the amendments and statutes may have been approved by a minority of the registered voters or by a majority of voters, including ones not well-informed or confused by the wording of the referendum questions. Critics also argue that bills that have passed through the legislative process are improved, thereby, in contrast to initiated measures placed on the ballot without the benefit of review and needed amendments.

The relatively widespread authorization for employment of the initiative, particularly by local government voters, and numerous uses of the device for more than a century provide a large body of evidence utilizable to evaluate the desirability of this participatory mechanism (see chapter 5). The thesis examined in this study is the belief of early proponents that voter employment of the initiative results in the enactment of *pro bono publico* constitutional amendments and statutes. Specifically, we examine whether special interests captured control of the initiative process as they captured control of legislative decision-making on certain subjects in certain states. We also seek to determine whether the initiative has helped to reinvigorate representative lawmaking by acting as a "Sword of Damocles" persuading legislators to enact all statutes desired by the majority of their constituents.[87]

Chapter 2 focuses on the legal foundations of the initiative, including state constitutional and statutory provisions and local government charters, restrictions on its use, preelection review of initiated propositions, conferences with sponsors, ballot titles, paid and unpaid petition circulators, petition signature requirements, approval requirements, legislative amendment or repeal of initiated statutes, and types of initiatives.

The initiative immediately raised a number of legal issues, including whether it violated the guarantee clause of the U.S. Constitution. Chapter 3 examines the major court decisions relating to the guarantee issue, number of propositions allowed on a single election ballot, solicitation of petition signatures on private property, use of paid circulators, constitutional single subject requirement, privacy of petitioners' signatures, validity of signatures, campaign finance, congressional preemption, civil