The Initiative

Citizen Lawmaking

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Joseph F. Zimmerman

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For Peggy

Illustrations

Figures

Tables

Preface

Voter dissatisfaction in the 1890s with the representativeness of many state legislatures and city councils, attributable primarily to public exposure of corruption in the law-making process, led to amendment of state constitutions and city charters or ratification of new ones to provide for three correctives—the initiative, the protest or citizen referendum, and the recall activated by voter petitions. The first two correctives were incorporated into the South Dakota state constitution by a constitutional amendment in 1898, and all three correctives were included in the new charter for the City and County of San Francisco ratified by voters in the same year.

The initiative allows voters by petitions to place proposed constitutional amendments and/or statutes on the state ballot and proposed charters, charter amendments, and ordinances on the local ballot. The protest referendum authorizes the electorate by petition to suspend implementation of a newly enacted statute or ordinance and to vote in a referendum on the question of repealing the statute or ordinance. The recall is a petition process for placement of the question of the immediate removal from office of an elected officer on the referendum ballot. These three participatory devices were unconventional when adopted, but have become important reserved powers of voters in the state and local governments where the devices are authorized and may be exercised whenever elected officers fail to be responsive to the will of the people.

The direct initiative, an affirmative forcing mechanism, challenges the fundamental theory of representative lawmaking by allowing voter lawmaking whenever a majority of those participating in a referendum decide to supersede the representative law-making body relative to establishing a specific public policy embodied in the proposition. The filing of a large number of petition signatures in favor of a proposition may persuade the legislative body to enact the proposition or a similar bill into law, thereby obviating the need for a referendum.

Defenders of representative lawmaking not surprisingly advanced numerous arguments against the initiative since it first was proposed. Lawmaking in the United States, except in New England towns, historically was predicated on the leadership-feedback theory, under which elected officers propose new governmental policies, receive feedback from individuals and organizations, and may revise their original proposals to reflect these views prior to enacting a statute or ordinance.

In theory, this process assumes elected officers in proposing a new policy are genuinely interested in obtaining the views of the citizenry and will consider such views carefully in drafting or revising bills for enactment. The failure of many legislative bodies to live up to democratic ideals led to the public's loss of confidence in these bodies in the United States. The solution, according to populist and progressive reformers, involved voters taking into their own hands the responsibility for determining public policies on important issues in the event that a legislative body failed to establish a policy favored by a majority of the voters.

The initiative is authorized by the constitution in twenty-three states and a Utah statute for state use, and by local government charter or state constitutional and/or statutory provisions in numerous local governments. The fact each state, by its constitution or statutes, may determine the features of the initiative has produced great variation in the degree of difficulty and frequency of use of this popular device. The practical political workings of the device also vary and result in criticisms that differ between individual initiative state and local government.

This book describes the origin and spread of the initiative, its legal foundation, the role of the judiciary in interpreting constitutional and statutory initiative provisions, and initiative proposition campaigns; evaluates the arguments of the proponents and opponents of this popular law-making device; draws conclusions about its desirability and effectiveness; and offers a model to guide state and local governments considering adoption of the initiative or revision of current constitutional or statutory provisions.

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Contents

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.