HISTORY OF THE
INITIATIVE AND REFERENDUM
IN THE
UNITED STATES

HISTORY OF THE INITIATIVE AND REFERENDUM IN THE UNITED STATES

BY

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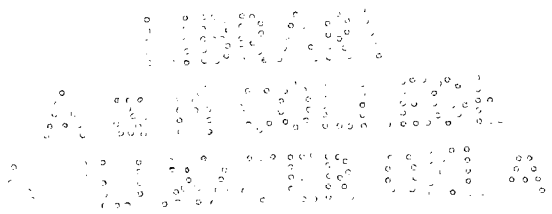

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PREFACE

It is the conviction of the author of this study that persons working in institutions of learning in the United States, especially those working in the social sciences, should make detailed investigations and reports upon the formation and development of our commonwealth. The present study has grown out of that deep-seated belief. This manual is hereby presented with the hope that it may serve to induce others to understand and utilize in a just and rightful manner this great field of self-government which lies before us, and to secure the benefits which this type of government presents to us.

R. K. A.

ACKNOWLEDGMENT

For encouragement, guidance and assistance during the preparation of this study, the writer wishes to acknowledge his indebtedness to his wife and sister without whose aid it could not not have been completed. He also wishes to extend his thanks and appreciation to the Attorneys General and Secretaries of State, and others too numerous to mention, who so generously have given of their time to impart aid and information in the preparation of this thesis.

R. K. A.

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CHAPTER I

INTRODUCTION

The right of the people to alter or abolish, and to institute new forms of government on such principles and with such powers as might seem to affect their safety and happiness was laid down in the Declaration of Independence.[1]

This theory indicates that there should be some simple method by which the people might alter or reconstruct their government from time to time as there is need for it.

By the initiative is meant the right of a stated percent of the voters, in any state or municipality, to propose both constitutional and ordinary laws, and to require that they be submitted for ratification to the whole body of voters.[2]

By the referendum is meant the right of a stated percent of the voters to demand that measures passed by the legislative bodies of the state or municipality shall be submitted to the voters for acceptance or rejections.[3]

The exact date at which agitation for the initiative and referendum began in the United States is somewhat uncertain. The first record of it, is that of a paper in

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1. William D. Mackenzie, Direct-vote System, Arena, 39, February, 1908, pp. 131-41.

2. Edwin E. White, Initiative and Referendum. Bulletin of the University of Wisconsin, (1926).

3. Ibid., p. 23.

Portland, Oregon, called the Vidette, which advocated the measure from 1885 to 1888. The first legislative assembly to which it was introduced was Oregon. A senator by the name of Vanderburh introduced the bill in the form of a resolution. The bill was in the form of a demand for a constitutional convention, but was defeated by one vote.

In 1899 the amendment was passed for submission to the people by a large majority, and in 1901 it was passed for the second time and was submitted almost without opposition in the legislature. Two years before this, in 1899, South Dakota had adopted a constitutional amendment providing for the employment of these institutions in both constitutional and statutory law.[4]

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4. William Bennett Munro, The Initiative, Referendum and Recall, 1920, p. 278-79.

CHAPTER II

REFERENDUM OF CONSTITUTIONS AND AMENDMENTS

Even the principle that state constitutions should be subject to popular ratification was not accepted by our first law-makers. Only four of the constitutions adopted before 1800 were submitted to the voters for their direct approval or rejection.

The constitutions of Massachusetts in 1792,[1] Vermont in 1793,[2] and New Hampshire in 1783[3] were submitted to direct popular vote. In drafting her new constitution in 1792, New Hampshire followed the earlier precedent.[4]

Connecticut, 1818,[5] and Maine, 1819,[6] followed the New England principle of submitting the constitution to the voters for popular approval.

In spite of these examples, however, the idea of popular ratification was slow in taking root outside of New England. The reason for it being received favorably in New England was probably because of the practical experience

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1. Frederic W. Cook, Secretary of the Commonwealth of Massachusetts to R. K. Ausley, ms., April 5, 1938.
2. Lawrence C. Jones, Attorney General of Vermont to R. K. Ausley, ms., April 6, 1938.
3. Thomas P. Cheney, Attorney General of New Hampshire to R. K. Ausley, ms., February 17, 1938.
4. Ibid.
5. James Brewster, State Librarian, Connecticut to R. K. Ausley, ms., April 7, 1938.
6. Fredrick Robie, Secretary of State of Maine to R. K. Ausley, ms., April 6, 1938.

which the people had gained in law-making in town meetings.

It was not until 1815, when New York submitted her constitution to popular approval, that the referendum appeared in any state outside of New England. This constitution was refused by the people, and a new one was submitted in 1821, which was adopted.[7] But in the meanwhile the constitution of Indiana in 1816, and that of Illinois in 1819, had been submitted to and adopted by the people.[8] These acts established the referendum on a firmer base, for the referring of the constitution to popular approval could not longer be considered a rarity, but an ever-growing part of the American political system.

Every constitution, adopted between 1840 and 1860, with the exception of Kentucky's in 1850[9] and Rhode Island's in 1842,[10] was submitted to popular approval. The principle was also accepted by Congress in readmitting the states of the Southern Confederacy.[11]

Of the forty constitutions adopted since 1860 only five were not submitted to popular approval--South Carolina, 1868,

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7. John J. Bennett, Jr., Attorney General of New York to R. K. Ausley, ms., April 4, 1938.

8. Otto Kerner, Attorney General of Illinois to R. K. Ausley, ms., April 4, 1938. (Charles Kettleborough, Director, Indiana Legislature Bureau, April 5, 1938).

9. Hubert Meredith, Attorney General of Kentucky to R. K. Ausley, ms., February, 17, 1938.

10. Louis W. Cappelli, Secretary of State, of Rhode Island to R. K. Ausley, ms., March 7, 1938.

11. J. C. Randall, The Civil War and Reconstruction. D. C. Heath and Co., New York, 1937, p. 753.

and 1895, Mississippi, 1890, Delaware 1897, and Louisiana, 1920.[12]

At the beginning of the twentieth century only three states still gave the constitutional convention complete power to frame and adopt a new constitution. Mississippi contended that "Ratification of the constitution by the people was unnecessary to its validity".--Sproule V. Fredericks, 69 M. 898. 11 So. 472.[13] The Attorney General of Delaware, 1938, states:

> The constitution was passed and adopted by a constitution convention, the representatives there to be elected at special elections. Therefore the constitution was not referred back to the people.[14]

In the Louisiana constitution, part 4, section 1, of the act authorizing the holding of a constitutional convention states:

> The said convention shall have full power to frame and adopt, without submission to the people, a constitution for the state.[15]

Delaware is the only state in the Union which still amends her fundamental law without directly consulting the people on the amendment.[16]

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12. John M. Daniel, Attorney General of South Carolina to R. K. Ausley ms., May 2, 1938; Greek L. Rice, Attorney General of Mississippi, April 4, 1938; P. Warren Green, Attorney General of Delaware, February 24, 1938; E. A. Conway, Secretary of State.

13. Greek L. Rice, Attorney General of Mississippi to R. K. Ausley, ms., April 4, 1938.

14. P. Warren Green, Attorney General of Delaware to R. K. Ausley, ms., February 24, 1938.

15. E. A. Conway, Secretary of State, Compiler of the Constitution of the State of Louisiana, p. ii.

16. P. Warren Green, op. cit.

In South Carolina the amendment is referred to the people, not as the last ratifier, but as a mere adviser after the amendment has once passed the legislature, and before it has yet gone to that body a second time.[17]

The provision for referring an amendment to the people first appeared in Connecticut in 1818.[18] Since then the referendum for enacting organic laws has become almost universal. In only one state, Delaware, is the constitutional amendments not referred back to the people. In twenty-seven it is sufficient if the amendment pass a single legislature before they are voted on by the people.

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17. John M. Daniel, Attorney General of South Carolina to R. K. Ausley, ms., May 2, 1938.

18. James Brewster, State Librarian, Connecticut to R. K. Ausley, ms., April 7, 1938.

CHAPTER III

STATE-WIDE INITIATIVE AND REFERENDUM

The initiative and referendum is in force today in every American state, but five, in which they have been proposed. Those in which the amendment was not adopted are: Mississippi, Iowa, Indiana, Wisconsin and Wyoming.[1]

In two other states the measures have been enacted in a special form. In Delaware, the initiative and referendum are advisory only, the legislators being at liberty to heed the popular expression of opinion or to ignore it as they choose.[2] In Texas the initiative may be used by any political party at the direct primaries for the purpose of securing a vote on party policies.[3]

1. Arkansas---A constitutional amendment providing for the initiative and referendum was proposed by the general election of 1919 and submitted to the people in the general election of November, 1920. The vote was: for the amendment--86,360; against the amendment

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1. Greek L. Rice, Attorney General of Mississippi, April 4, 1938; John H. Mitchell, Attorney General of Iowa, February 9, 1938; Charles Kettleborough, Director, Indiana Legislative Bureau, April 5, 1938; Orland S. Loomis, Attorney General of Wisconsin, May 13, 1938; and Ray E. Lee, Attorney General of Wyoming, April 5, 1938, to R. K. Ausley, Ms.,

2. Warren Green, Attorney General of Delaware, to R. K. Ausley, ms., February 24, 1938.

3. Edward Clark, Secretary of State of Texas to R. K. Ausley, ms., March 14, 1938

43,662; on the amendment itself, but was declared lost by the Speaker of the House of the 1921 general assembly, on the assumption that adoption would require a majority of all the votes cast at that election. Later, however, with the appointment of a special Supreme Court (in the case of Brickhouse vs. Hill, Ark. Report #167, p. 513) the opinion was reversed and the court declared that majority vote on the measure itself was all that was necessary for the adoption of any measure, therefore the initiative and referendum amendment submitted at the 1920 election was duly adopted. The decision of the Supreme Court was rendered February 16, 1925.[4]

2. Arizona---Complete system of initiative and referendum was included in the constitution under which admission to the Union was sought.[5]

3. California---A constitutional amendment providing for the initiative, referendum, and recall was submitted to the voters at a special election on October 10, 1911, and adopted.[6]

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4. Jack Holt, Attorney General of Arkansas to R. K. Ausley, ms., April 4, 1938.

5. Joe Conway, Attorney General of Arizona to R. K. Ausley, ms., March 2, 1938.

6. U. S. Webb, Attorney General of California to R. K. Ausley, ms., May 17, 1938.

4. Colorado---The initiative and referendum was placed in the state constitution November 8, 1910.[7]

5. Idaho---The initiative and referendum clauses were placed in the Idaho constitution in 1912.[8]

6. Maine---The initiative and referendum amendment was voted on in the general election of September 14, 1908, and adopted January 6, 1909.[9]

7. Maryland---Referendum amendment was adopted November 2, 1915.[10]

8. Massachusetts---The initiative and referendum was adopted by a constitutional convention in 1917 and was ratified by thepeople November 5, 1918.[11]

9. Michigan---The initiative and referendum amendment was added to the state constitution at the April, 1913 election. Vote was: for, 219,057; against, 152,388. The new Michigan constitution which went into effect in 1909 included a system of initiative and referendum applicable only to constitutional amendments and subject to such restriction as to be

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7. Bryon G. Rogers, Attorney General of Colorado to R. K. Ausley, ms., April 16, 1938.

8. Ira H. Master, Secretary of State of Idaho to R. K. Ausley, ms., April 6, 1938.

9. Frederic Robie, Secretary of State of Maine to R. K. Ausley, ms., April 6, 1938.

10. E. Ray Jones, Secretary of State of Maryland to R. K. Ausley, ms., April 4, 1938.

11. Frederic W. Cook, Secretary of the Commonwealth of Massachusett to R. K. Ausley, ms., April 5, 1938.

well-nigh unworkable--referendum on laws at the option of the legislature.[12]

10. Missouri---Adopted November 3, 1908.[13]

11. Montana---Adopted November, 1906.[14]

12. Nebraska---The initiative and referendum amendment was added to the constitution in November, 1912.[15]

13. Nevada---The referendum amendment was proposed and passed at the twentieth session of the legislature, March 15, 1901, agreed to and passed at the twenty-first session of the legislature, March 5, 1903, and approved and ratified by the people at the general election of 1904. Initiative was proposed and passed at the twenty-fourth session of the legislature, March 22, 1909, agreed to and passed at the twenty-fifth session, February 1, 1911 and approved and ratified by the people at the general election of 1912.[16]

14. New Mexico---The constitution under which New Mexico sought admission to the Union makes provision for the

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12. Raymond W. Starr, Attorney General of Michigan to R. K. Ausley, ms., April 8, 1938.

13. Dwright H. Brown, Secretary of State of Missoure to R. K. Ausley, ms., April 2, 1938.

14. Harrison J. Freebourn, Attorney General of Montana to R. K. Ausley, ms., February 7, 1938.

15. Richard C. Hunter, Attorney General of Nebraska to Richard K. Ausley, ms., April 7, 1938.

16. Malcolm McEachin, Secretary of State of Nevada to R. K. Ausley, ms., April 5, 1938.

referendum only.[17]

15. North Dakota---Initiative, referendum, and recall passed by the legislature in 1911, and re-submitted to the 1913 session for approval. It was approved by the people and placed in the constitution in 1918.[18]

16. Oklahoma---System embodied in the constitution under which the state was admitted to the Union, in 1907.[19]

17. Ohio---These provisions were incorporated in the constitution of Ohio in the 1912 constitutional convention and adopted by the people.[20]

18. Oregon---Its first introduction into the legislative assembly was in 1893 in the form of a resolution. At the demand for a Constitutional Convention in the session of 1895, a vote was taken and the measure was defeated by one vote. In 1899 the amendment was passed for submission to the people by a large majority, and in 1901 it was passed for the second time and was submitted to the people in June 1902 and passed.[21]

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17. Mrs Elizabeth F. Gonzales, Secretary of State of New Mexico to R. K. Ausley, ms., April 5, 1938.

18. Alvin C. Strutz, Attorney General of North Dakota to R. K. Ausley, ms., April 5, 1938.

19. Mac Q. Williamson, Attorney General of Oklahoma to R. K. Ausley, ms., January 13, 1938.

20. Herbert S. Duffy, Attorney General of Ohio to R. K. Ausley, ms., February 18, 1938.

21. Earl Snell, Secretary of State of Oregon to R. K. Ausley, ms., March 2, 1938.

19. South Dakota---The initiative and referendum amendment to the constitution of South Dakota was passed by the legislature in 1897, and adopted by the people in November, 1898. Machinery was finally constituted on March 3, 1899.[22]

20. Utah---An amendment establishing the initiative and referendum was submitted by a fusion legislature and adopted on November 6, 1900. Machinery was not constituted by the legislature until the 1917 session of the state legislature.[23]

21. Washington---Constitutional amendment passed in January, 1911, was submitted to the people in 1912 and passed.[24]

Up to 1938 nineteen states had secured state-wide initiative and referendum measures. The constitution of two other states, Maryland and New Mexico, had provided for the referendum. Seventeen states had secured the measures by amendments to their constitutions. Two states had been admitted to the Union with a complete system of initiative and referendum included in the constitution under which they were admitted to the Union. Two states, Ohio, and Massachusetts have adopted the measures in a constitutional convention. New Mexico was also admitted with the referendum measure in her consitution.

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22. Goldie Wells, Secretary of State of South Dakota to R. K. Ausley, ms., March 14, 1938.

23. Joseph Chez, Attorney General of Utah to R. K. Ausley, ms., April 11, 1938. E. E. Monson, Secretary of State of Utah to R. K. Ausley, ms., April 4, 1938.

24. G. W. Hamilton, Attorney General of Washington to R. K. Ausley, ms., April 7, 1938.

The initiative and referendum amendment was proposed in Indiana in the following years: 1897-Senate resolution was introduced which was reported unfavorably; 1899 same resolution was introduced and indefinitely postponed; 1911-Senate adopted bill amending constitution (Marshall Constitution) but law was declared unconstiutional in 1912; 1913-Senate resolution was adopted; 1915-Pending amendment was indefinitely postponed; 1933-Bill was introduced, but never passed the house in which it originated.[25]

A comprehensive measure proposing initiative and referendum was introduced into the forty-sixth regular session of the general assembly of the state of Iowa. The measure was reported without recommendation by the house of representatives, and failed to pass in that branch of the legislature.[26]

The initiative and referendum were proposed in Mississippi in 1914. However, they did not receive the required popular vote to amend the constitution.[27]

In 1912 Wyoming defeated a proposed measure over-burdened with restrictions by a vote of nearly six to one. The voters went on record in favor of the principle of the

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25. Charles Kettleborough, Director, Indiana Legislative Bureau to R. K. Ausley, ms., April 5, 1938.

26. John H. Mitchell, Attorney General of Iowa, to R. K. Ausley, ms., February 9, 1938.

27. Greek L. Rice, Attorney General of Mississippi to R. K. Ausley, ms., April 4, 1938.

initiative and referendum.[28]

A constitutional amendment providing for an initiative and referendum as applied to the legislative and constitutional amendment has been proposed many times in the legislature of Wisconsin. The first proposal for the initiative and referendum in state affairs was in 1897, the year before it was adopted in South Dakota. It was defeated and did not come up again until 1907, when it was again defeated. It had the same fate in 1909. It was not until 1911 that a joint resolution to add it to the constitution passed the legislature. The same resolution passed the legislature of 1913. It was submitted to the people in 1914, but was rejected 148,536 against, and 84, 934 for. Since that time the proposition has come up two or three times, but was rejected upon final vote.[29]

The state of Illinois has adopted a system which is intended to secure the advantages of direct legislation while preserving the actual law-making functions of the legislature. Measures may be initiated by popular petition, and when so originated, go to the voters at the polls, but acceptance at the polls does not, as in the other states, enact the measure into law. The action of the voters is merely advisory in effect, and operates as an instruction

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28. Ray E. Lee, Attorney General of Wyoming to R. K. Ausley, ms., February 18, 1938.

29. Theodore Dammann, Secretary of State of Wisconsin to R. K. Ausley, ms., April 5, 1938. Orland S. Loomis, Attorney General of Wisconsin to R. K. Ausley, ms., May 13, 1938.

to the legislature, which alone retains the power of actual enactment.[30]

30. Otto Kerner, Attorney General of Illinois to R. K. Ausley, ms., April 4, 1938.

CHAPTER IV

SIGNATURES

The most important problem that the advocates of direct government have to deal with is that of signatures. The growth of direct government has been due to the theory that if the people are in favor of a measure for which there is a popular demand, then let them vote for it at the polls.[1] The only way that this fact can be ascertained is by the original petition. Therefore, the gathering of signatures has become the basis problem of direct legislation. On this question is where most of the states differ. This issue presents three problems to the law-makers.

1. If the percentage of necessary signatures be set too low, the initiative is in danger of becoming an agency of hobby-riding at the expense and inconvenience of the public.[2]
2. If the percentage of necessary signatures be set too high, the measure will become a dead issue as the necessary petitions could never be secured.
3. The promotion of laws in the interest of the unaffiliated citizen is likely to become nobody's business.[3]

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1. Ellis Paxson Oberhotzer, The Referendum in America. Charles Scribner's sons, 1920, p. 159.
2. William Bennett Munro, The Initiative, Referendum and Recall, p. 29.
3. Ibid., p. 30.

The number of signatures for the initiative and referendum petitions differ widely in the states. They range from five to fifteen per cent, and in some special cases the number is as high as twenty-five per cent of the legal voters. The methods of designating legal voters differ, but in most states it is based on the number of votes cast for some elective office at the general election last preceding the filing of the initiative or referendum petition. Following is a list of the states whose constitutions contain the initiative or referendum provision, and the number of petitioners necessary in each state:

1. Arizona---Ten per cent of the legal voters may initiate a statute, fifteen per cent may initiate a constitutional amendment, and not less than five per cent may order a referendum.

   The number of legal voters is based on the whole number of votes cast for all candidates for Governor at the general election last preceding the filing at any initiative or referendum petition on a state or county measure.[4]

2. Arkansas---Eight per cent to initiate any statute, ten per cent to initiate a constitutional amendment, and not less than six per cent to order a referendum.

   The number of legal voters in the state is based on the votes for Governor at the last election preceding

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4. A Study of the Constitution, State Board of Education, 1936, p. 37.

the filing of the petition.[5]

3. California---Eight per cent to initiate a statute to be voted on by the people, five per cent to bring the statute before the people, and not less than five per cent to propose a referendum.

The number of legal voters is based on the votes for Governor at the last election preceding the filing of the petition.[6]

4. Colorado---Eight per cent to initiate a statute or constitutional amendment, and not less than five per cent to propose a referendum.

The number of legal voters is based on the vote for Secretary of State the last election preceding the filing of the petition.[7]

5. Idaho---The question of the number of signatures was left for the legislature to decide, but that decision has not yet been made.[8]

6. Maine---Not fewer than twelve thousand electors may initiate a measure, and not fewer than ten thousand electors may propose a referendum. A constitutional amendment cannot be initiated. Any other bill may be initiated,

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5. C. G. Hall, Secretary of State, Compiler, Constitution of the State of Arkansas, (1938) Amendment 7, Sec. V, pp. 61-62.

6. Fred B. Wood, Legislative Counsel, Compiler, Constitution of the State of California, (1938), Art. IV, Sec. 283.

7. George E. Saunders, Secretary of State, Compiler, Constitution of the State of Colorado, (1937), Art. V, Sec. I p. 18.

8. Robert O. Jones, Secretary of State, Compiler, Constitution of the State of Idaho, (1936), Art. III, Sec. I p. 43.

and all measures can be referred to the people.[9]

7. Maryland---The referendum petition requires the signature of ten thousand qualified voters. Maryland does not have the initiative provision in it's constitution.[10]

8. Massachusetts---In Massachusetts ten qualified voters must sign a petition and present it to the Secretary of State. The Secretary of State then issues blanks on each of which is stated the law in full. Fifteen thousand qualified voters of the commonwealth must then sign for either an initiative or referendum measure.[11]

9. Michigan---Eight per cent may initiate a measure, and five per cent may propose a referendum. The number of legal voters is based on the vote for governor.[12]

10. Missouri---Eight per cent of the legal voters in each of at least two-thirds of the congressional districts may initiate a measure, and five per cent of the legal voters in each of at least two-thirds of the congressional districts may propose a referendum.

The number of legal voters is based on the vote

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9. Honorable John Appleton, Justice of the Supreme Court, Compiler, Constitution of the State of Maine, (1936), Art. 21, p. 28.

10. E. Ray Jones, Secretary of State, Compiler, Constitution of the State of Maryland, Maryland Manual, (1937), Art. 14, p. 72.

11. Irving N. Hayden, Clerk of the Senate, Compiler, Constitution of the Commonwealth of Massachusetts, (1936), Art. 48, Sec. 3, p. 54.

12. Leon D. Case, Secretary of State, Compiler, Constitution of the State of Michigan, (1937), Art. 5, Sec. 1, pp. 10-11.

cast for justice of the Supreme Court.[13]

11. Montana---Eight per cent may initiate a measure and five per cent may propose a referendum. The number of legal voters is based on the votes for Governor.[14]

12. Nebraska---Five per cent for both measures.

The number of legal voters is based on the votes for Governor.[15]

13. Nevada---Ten per cent for both measures.

The number of legal voters is based on the votes cast for Justice of the Supreme Court.[16]

14. New Mexico---Not less than ten per cent of the votes cast at the last election for the referendum. New Mexico does not have the initiative.

The number of legal voters is based on the total number of votes cast at the last election.[17]

15. North Dakota---Not less than ten per cent of the legal votes for both the initiative and referendum.

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13. D. H. Brown, Secretary of State, Compiler, Constitution of the State of Missouri, (1935), Art. 4, Sec. 37, pp. 40-41.

14. Constitution of the State of Montana, State Publishing Co., (1934), Art 5, Sec. 1, pp. 5-6.

15. H. R. Swanson, Secretary of State, Compiler, Constitution of the State of Nebraska, (1937), Art. 3, Sec. 2-3, pp. 8-9.

16. Joe Farnsworth, Supt. of State Printing Office, Compiler, Constitution of the State of Navada, (1935), Art. 19, Sec. 3, pp. 64-65.

17. Mrs. Elizabeth F. Gonzales, Secretary of State, Compiler, Constitution of the State of New Mexico, (1936), Art. 4, Sec. 1, pp. 7-8.

The number of legal votes in the state is based on the votes cast for Secretary of State.[18]

16. Ohio---Not less than ten per cent may initiate a constitutional amendment; not less than three per cent may initiate a statute, and not less than six per cent may propose a referendum.

The number of legal voters is based on the vote cast for Governor.[19]

17. Oklahoma---Not less than eight per cent may initiate a statute, not less than fifteen per cent may initiate a constitutional amendment, and not less than five per cent may propose a referendum. If either of the above is rejected twenty-five per cent of the legal voters must sign a new petition before the measure can be considered again within three years.

The number of legal voters is based on the total number of votes cast at the last general election for the State Office receiving the highest number of votes at such election.[20]

18. Oregon---Not less than eight per cent can initiate a statute or Constitutional Amendment, and not less than five per cent can propose a referendum.

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18. Robert Byrne, Secretary of State, Compiler, Constitution of the State of North Dakota, (1933), Art. 15, Sec. 25, p. 71.

19. William J. Dennedy, Secretary of State, Compiler, Constitution of the State of Ohio, (1937), Art. 2, Sec. 1b-1c, p. 8.

20. R. A. Sneed, Secretary of State, Compiler, Constitution of the State of Oklahoma, (1935), Art. V, Sec. 2-3, p. 11.

The number of legal voters is based on the votes cast for Justice of the Supreme Court.[21]

19. South Dakota---The question of the number of signatures was provided by statute.[22]

20. Utah---The question of the number of signatures was left for the legislature to decide, but that decision has not been made.[23]

21. Washington---Not less than ten per cent, but in no case more than fifty thousand for the initiative, and six per cent, but in no case more than thirty thousand for the referendum. The number of legal voters is based on the general election preceding the filing of the petition.[24]

All of the states demand that the required number of the legal voters sign the petition and present them at a stated time to the Secretary of State or the Governor, generally ninety days.

Oklahoma is the only state which safeguards against abuses arising from the frequent re-submission of defeated proposals. A measure rejected by the voters of that state may not be again referred to them within three years, save

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21. Earl Snell, Secretary of State, Compiler, Constitution of Oregon, Oregon Blue Book, (1938), pp. 243-244.

22. Geo. W. Wright, Constitution of the State of South Dakota, South Dakota Legislative Manual, (1937), Art. 3, Sec. I, pp. 18-19.

23. E. E. Monson, Secretary of State, Compiler, Constitution of the State of Utah, (1937), Art. 6, Sec. 2, p. 11.

24. Earnest N. Hutchinson, Secretary of State, Compiler, Constitution of the State of Washington, (1938), Art. II, Sec. I, pp. 20-21.

on petition of twenty-five per cent of the voters.[25] There is sometimes a great difference in the number of signers required to initiate a measure and the number required to refer an act already passed by the legislature. A larger number may be required to initiate a constitutional amendment than is required to initiate an ordinary statute. For example, in Oklahoma, eight per cent of the voters may initiate a legislative measure, while fifteen per cent are required to propose amendments to the constitution by petition. The voters may be limited to ordinary statutes, as in Maine.

The greatest variety in the initiative and referendum acts appears in the working of the laws after the petitions have been gathered and presented to the proper person. In Michigan, constitutional amendments only may be initiated by petition and the referendum is only exercised when the legislature wishes to refer one of its acts to the voters.[26] In Oklahoma an initiative measure must be approved "by a majority of the votes cast in such election," and a act of the legislative body which is referred to the people must be approved "by a majority of the votes cast thereon and not otherwise."[27]

Powerful organizations such as state granges, farmers' unions, state federations of labor, chambers of commerce, business men's organizations, state committees of political

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25. Constitution of the State of Oklahoma, op. cit.

26. Constitution of the State of Michigan, op. cit., Art. 5, Sec. I, pp. 10-11.

27. Constitution of the State of Oklahoma, op. cit.

parties, direct primary leagues, Anti-Saloon Leagues, suffrage associations, liquor associations, educational societies, good roads organizations, etc., have secured most of the positions necessary to submit questions. Nearly all of these organizations attempted to get the required number of signatures by volunteer effort. Except in a few cases the effort failed and the petition had to be completed with the aid of solicitors who were employed and paid to gather signatures.[28]

The problem facing the states which have adopted the measures is how to control this practice. Charges are sometimes made that selfish interests spend large sums of money to secure a favorable vote on initiative and referendum measures. It is acknowledged that the money is spent mostly for educational purposes,[29] but it is still looked on with disfavor.

Oregon has a law covering this kind of practice. It forbids forgery and false swearing, by making it a penitentiary offence to commit either act.[30] California requires that all persons, and organizations expending money for or against referred measures, shall file a statement within twenty days after the election.[31] These statements are to be made public.

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28. The National Popular Government League. Bulletin, No. 4, p. 11.

29. Ibid.

30. Constitution of the State of Oregon, op. cit, Art. 2, Sec. 8, p. 241.

31. Constitution of the State of California, op. cit., p. 9.

A number of states are passing corrupt practice acts. Other are enacting laws prohibiting the hiring of solicitors, in any case and making all petitions dependent upon volunter effort alone. In line with this practice, there was planned in Oklahoma a law which would prevent contests on the sufficiency of signatures and the question of illegal signers. It proposed that the county clerk be deputized as custodian of the petitions after the Secretary of State had certified them. Persons desiring to sign petitions would be required to come to a central place and sign the petitions. Each signature would have to be certified by the official in charge. This law was never enacted.

Experience has demonstrated that it is impracticable to secure sufficient petitions in most states at the present percentages without the aid of paid solicitors. Citizens should be permitted to show their patriotism by contributing money as well as time. The question is should men who are unable to leave their business or regular employment to go out and solicit signatures be allowed to donate money for the purpose of enacting laws that they are interested in?[32]

A proper remedy is the inclusion in the corrupt practices acts provisions, imposing heavy penalities for misrepresentation, intimidation, bribery, forgery, or other wrongful practices, in the securing of petitions for the initiative and referendum.

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32. The National Popular Government League. Bulletin, No. 4.

CHAPTER V

LOCAL REFERENDUM

The practice of referring matters to a popular referendum has made its most steady progress in the realm of local government. It is in the local districts of the states such as; the counties, cities, towns, and school districts that the referendum has reached its fullest development in the United States. There is not a state in the Union in which the referendum is not used in some local form. Many states which do not have state-wide initiative have extensively instituted the local initiative.

Rhode Island and Michigan were possible the first to use this type of referendum. Rhode Island amended her constitution in 1842 with the following terms:

> The general assembly shall have no power hereafter without the express consent of the people to incur state debts to an amount exceeding $50,000, except in time of war or in case of insurrection or invasion.[1]

Michigan, in 1843 placed a provision in her constitution which made it compulsory for all laws "authorizing the borrowing of money or the issuing of state stock, whereby a debt shall be created on the credit of the state", except for invasion, war, or insurrection, were to be submitted to the people.[2]

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1. Louis W. Cappelli, Secretary of State, Rhode Island to R. K. Ausley, ms., March 7, 1938.

2. Raymond W. Starr, Attorney General of Michigan to R. K. Ausley, ms., April 8, 1938.

This initiative and referendum in local government covers such problems as the voting of debts and franchises, the loaning of the public credit, the sale or lease of public lands and other public property, the location of county seats and city limits, the liquor problems, and Sunday shows and other activities.

Pennsylvania has a certain limited form of referendum. Sunday movies and certain Sunday sports are not permissible in the various localities through out the State until the inhabitants of that locality have voted upon the question. They also have local option on the question of the sale of liquor.[3] The initiative and referendum has never been passed in the state of Wisconsin for the enactment of state laws, but statutes have been passed permitting this in cities and counties.[4]

In New Jersey power is given to the municipalities by statute to initiative referendums on various questions with respect to the adoption of ordinances.[5] In Wyoming the law applied to cities governed by the commission form of government and to cities governed by the manager form of government.[6]

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3. Edward Friedman, Attorney General of Pennsylvania to R. K. Ausley, ms., April 7, 1938.

4. Orland S. Loomis, Attorney General of Wisconsin, op. cit.

5. David T. Wilentz, Attorney General of New Jersey to R. K. Ausley, ms., February 18, 1938.

6. Ray E. Lee, Attorney General of Wyoming, op. cit.

The measures as passed in other states follow the same line of thought as the preceding examples. By 1938 direct legislation in local matters had spread until it had become an essential feature of nearly all modern city charters and state constitutions.[7]

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7. Material gathered from the state constitutions.

CHAPTER VI

NATIONAL INITIATIVE AND REFERENDUM

Not until the last decade has there been much thought of a national initiative and referendum amendment. Between 1935 and 1938 there has been a score of resolutions of different types introduced in Congress.[1]

In 1935 a referendum bill was introduced by Representative Louis Ludlow of Indiana. It says:

> Except in the event of an invasion of the United States or its territorial possessions and attack upon its citizens residing therein, the authority of Congress to declare war shall not become effective until confirmed by a majority of all votes cast thereon in a nationwide referendum. Congress, when it deems a national crisis to exist, may by concurrent resolution refer the question of war or peace to the citizens of the states, the question to be voted on being: Shall the United States declare war on_____?[2]

It was referred to a Committee, and there it rested until 1938. In the early part of 1938, due to the troubled condition of the world and especially to the strained relation between the United States and Japan, a petition was signed by a quorum of representatives to bring it from its resting place in the committee room.[3] Again it was one of the major questions before Congress, and it appeared as if it would be passed, but as the war clouds cleared, it again gave way to more pressing problems.

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1. Will Rogers, Congressman at large, Oklahoma to R. K. Ausley, ms., March 12, 1938.
2. War Referendum: Pro and Con. Literary Digest, Jan 1, 1938, pp. 6-8.
3. Will Rogers, op. cit., March 12, 1938.

On January 5, 1937, Mr. Lemke, of North Dakota (listed as a nonpartisan),[4] introduced a joint resolution proposing an amendment to the Constitution of the United States providing for the initiative of legislative measures by electors.[5] The resolution was referred to the Committee on the Judiciary and ordered to be printed. The bill is still before the Committee, but there has been no action taken on it.[6]

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4. Will Rogers, Congressman at large, Oklahoma to R. K. Ausley, ms., April 8, 1938.

5. Mr. Lemke, H. J. Res. 28, January 5, 1938. Joint Resolution before the House of Representatives.

6. Will Rogers, op. cit., April 8, 1938.

CHAPTER VII

CONSTITUTIONAL QUESTION

The only objection to the validity of state constitutions containing provisions, either requiring a referendum to make effective certain types of legislation or permitting the initiation of measures at the polls, would seem to be that it violates the federal guarantee to the states of a republican form of government.

By the Constitution a republican form of government is guaranteed to every state in the Union, and the feature of this form of government is the right of the people to choose their own officers for governmental administration and to pass laws by virtue of the legislative power vested in representative bodies whose legitimate acts may be said to be those of the people themselves.

An early view of the meaning of a "republican form of government" was clearly stated by John Adams. In an extensive country with a large society, it is impossible that the whole should assemble to make laws. The first step is to depute power from the many to a few of the good and wise.[1] A German jurist said that "a republic is a form of government in which the sovereignty resides in the whole people, but is represented by a central person or persons."[2]

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1. Ellis Paxson Oberholtzer, The Referendum in America, p. 486.

2. Ibid., p. 488.

The constitutional side of the question must be carefully considered. The founders of our government knew of direct government, but they rejected it as has been shown in the first part of this work. It has been concluded, therefore that direct government may be somehow in conflict with section 4 of Article 4 of the Constitution of the United States.

In Michigan all the judges concurred in the decision that the power of enacting general state laws could not be delegated by the representative body, even to the people themselves. But in Vermont the Supreme Court declared that a favorable vote of the people was good and sufficient reason for the going into effect of general state laws, as well as laws affecting local districts. No distinction was drawn between laws for the whole state and laws for the localities.[3] State V. Parker, 26 Vt. 357.

The courts frequently adopt the arguments that the general assembly, having been vested with the legislative power by the people through their constitution, can be divested thereof, if at all, only by a change in that constitution. The legislature has no power to make a statute dependent on some other power, because it would be confiding to others that legislative right which they are bound to exercise themselves, and which they cannot delegate or commit to any other body. The people are sovereign, but their sovereignty must be exercised in the mode which they have pointed out in their constitution. In the absence of con-

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3. Ellis Paxson Oberholtzer, The Referndum in America, pp. 213-14.

stitutional provisions the courts have generally held invalid the attempts of legislatures to enact statutes the execution of which is made contingent upon statewide popular approval. A referendum of this nature is questionable not only on the federal ground but also on the issue of its inconsistency with the definite principles of representative government as stated in most state constitutions.[4] For example in the Kansas constitution it is stated that "no special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency."[5]

The question remains for Congress to determine and has not been passed on. But in the light of history, and certain constitutions, the phrase "republican form of government" may be regarded as sufficiently elastic to admit of occasional instances of "direct" as opposed to "representative" government. Oklahoma, as well as Arizona, and New Mexico, can enforce its argument by the assertion that the provisions were a part of its constitution when the state was admitted to the Union. An enabling act was passed for the state on June 16, 1906.[6] Certain stipulations were made by Congress. It was required that the government to be established by

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4. The Yale Law Journal. Vol. 41, No. 1, p. 157.
5. Constitution of the State of Kansas, op. cit., p. 4.
6. United States Statutes at Large, 34, Part I, p. 15.

the Constitution should be "republican in form."[7] A convention met, a constitution containing the initiative and the referendum was adopted and on November 16, 1907, President Roosevelt, declaring the said constitution and government of the proposed State of Oklahoma to be republican in form, proclaimed Oklahoma a state of the United States. The States which passed initiative and referendum amendments, placed them in their constitution with the understanding that the measures did not abolish nor destroy a republican form of government or establish another in its place. The republican form of government remained; the people simply reserve to themselves a larger share of power.[8]

It appears certain that if the constitution does not authorize the legislature of the state to submit a subject to the citizens it is without the power to call for a referendum on a state law or to allow the initiative to be used in the state. If the people have delegated the law-making power to the legislature, the legislative body cannot re-delegate its authority to any other body.

There is nothing, it appears, that could prevent the legislature from asking the people for advice. In Delaware, which does not have the initiative and referendum amendment, the initiative and referendum is used in an advisory form only. The legislators being at liberty to heed the

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7. United States at Large, Vol. 34, Part I, p. 269.

8. The Yale Law Journal, Vol. 41, No. I, p. 150.

popular expression of opinion or to ignore it as they choose.[8] In 1929 the Illinois general assembly enacted a statute providing for the service of women as jurors which was "not to be in force unless the question of its adoption has been submitted to the legal voters of the state and approved by a majority of all the votes cast upon the proposition." The measure, approved in the specified method, was subsequently challenged as an attempt on the part of the legislature to delegate its legislative powers to the people. In Ito v. United States, however, the Federal District Court sustained its validity. But one month later, the Illinois Supreme Court, with one justice dissenting, held it unconstitutional as an improper "delegation of legislative power".[9]

As to the constitutionality or unconstitutionality of the initiative and referendum law-making power there seems to be some difference of opinion in the courts. The states desiring the measures are safe-guarding themselves by putting them in the form of a constitutional amendment.

Although the initiative has not been used in the Federal government, there has been instances of the referendum being used. An earlier precedent of Federal referendum is that dealing with the "school lands" which the Congress gave to the states for the benefit of education. Section

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8. Warren P. Green, Attorney General of Delaware to R. K. Ausley, Author, ms., April 6, 1938.

9. Otto Kerner, Attorney General of Illinois to R. K. Ausley, Author, ms., April 4, 1938.

No. 16 in each township was set aside as school land and when this section was not available for the grant equivalent transfers were made to the state. This land was given to the townships, and it was sometimes a condition of the grant that neither the section nor any part of it should ever be sold except with the consent of the inhabitants. In 1843 Congress provided that the land in any township "shall in no wise be sold without the consent of the inhabitants of such township or district to be obtained in such manner as the legislatures of said states shall by law direct".[11] Another example the return of Alexandria county to Virginia by the Federal government. Virginia had given this land to the Federal government to be used as a site for the national capital. When it was not used Virginia asked for it back. The legislature passed a law in 1846 stating that "this act shall not be in force until after the assent of the assent of the people of the county and town of Alexandria shall be given to it in the mode hereinafter provided." The vote was taken and the territory was returned to Virginia.[12]

The conclusion reached after the above study is that a government is republican in form if the decisions are left to the will of the people at the polls. That all the state governments, as widely different as they are in methods of

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11. United States Statutes at Large, 5, p. 600.

12. Ellis Paxson Oberholtzer, The Referndum in America, p. 486.

procedure are republican in form, and any government similarly organized will still be republican in form after it has been modified by the initiative and referendum.

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CONNECTICUT STATE LIBRARY

(copy) Hartford, Connecticut

April 7, 1938

Mr. Richard K. Ausley
. . . . . .
. . . . . .

Dear Sir:

. . . . . .

I am not sure just what you mean by "the initiative and referendum amendment", but, if you mean a proposal that legislation may be initiated by the people, such a plan has not been proposed in Connecticut. Of course, there is in force here the right of any citizen or group of citizens to petition the General Assembly for the passage of legislation which they fee necessary or desirable, but such legislation would have to be acted upon by the General Assembly in the form of a bill or bills the same as any other legislation considered by that body, and could not be considered initiated legislation in the usual sense.

Our present constitution was adopted in 1818, and was referred to the people and ratified by them.

Connecticut's first constitution was the so-called Fundamental Orders adopted in 1638-39, of which John Fiske said that it "Was the first written constitution known to history that created a government and it marked the beginning of American Democracy". Under the Fundamental Orders the government of the commonwealth was conducted until the grant of the Royal Charter of 1662. The provisions of the charter controlled the government of the Colony until the independence of this nation came, and for more than forty years after, until the adoption of the Constitution of 1818.

Yours very truly,

James Brewster
State Librarian

INDIANA LEGISLATIVE BUREAU

(copy) Charles Kettleborough, Director

State House, Indianapolis

April 5, 1938

Mr. Richard K. Ausley

. . . . . .

. . . . . .

Dear Sir:

. . . . . .

(1) The initiative and referendum amendment was proposed in this state in the following years:

1897. Senate Resolution introduced which was reported unfavorably.
1899 Same resolution introduced and indefinitely postponed.
1911 Adopted in Senate Bill amending constitution (Marshall Constitution), but law was declared unconstitutional in 1912.

1915 and 1923, bills introduced, but never passed house in which they originated.

Initiative, Referendum and Recall

1913 Senate resolution adopted
1915 pending amendment indefinitely postponed
1916 Incorporated in Progressive party platform

(2). Present Constitution was ratified at an election held August 4, 1851 and became effective November 1, 1851.

(3). The first Constitution of the State was adopted in 1816.

. . . . . .

Very truly yours,

Charles Kettleborough,
Director

COMMONWEALTH OF PENNSYLVANIA

(copy) Department of Justice

Harrisburg

February 24, 1938

Richard K. Ausley, Principal,
Achille High School,
Achille, Oklahoma

Dear Mr. Ausley:

. . . . . .

To the best of my knowledge there is no such procedure in this State as the initiative. Legislation can be originated only at a regular or special session of the General Assembly. We do, however, have a certain limited form of referendum. For example, certain statutes provide that Sunday movies and certain Sunday sports are not permissible in the various localities throughout the state until the inhabitants of that locality have voted upon the question. Similarly, provision is made for local option on the question of the sale of liquor.

There are various other isolated instances in which certain questions are presented to the voters of a particular locality. However there is no general referendum procedure in Pennsylvania. . . . . .

Very truly yours,

Edward Friedman,
Deputy Attorney General.

(copy)

STATE OF WYOMING

Legal Department

CHEYENNE

February 18, 1938

Mr. Richard K. Ausley
Principal of Achille High School
Achille, Oklahoma

Dear Sir:

We do not have any initiative and referendum law in this State and we do not have any initiative and referendum provision in the Constitution. When I say that we have no initiative and referendum law in this State, I am referring to State matters.

We do have a provision for the initiative and referendum in certain classes of cities. This law applies to cities governed by the commission form of government and to cities governed by the manager form of government.

. . . . . .

Yours very truly,

Ray E. Lee,
Attorney General

CONGRESS OF THE UNITED STATES

House of Representatives

Washington, D. C.

(copy)

April 8, 1938

R. K. Ausley
. . . . .
. . . .

Dear Mr. Ausley:

. . . . . .

(1) William Lemke, Fargo, North Dakota, listed as nonpartisan but elected to the House of Representatives on the Republican ticket.

(2) No action has been taken on the Initiative Amendment.

(3) It is still before the committee.

. .. .

(5) You are permitted to reproduce a copy of the proposed amendment in your thesis.

. . . . . .

Yours truly,

Will Rogers
Congressman at large