

THE PECULIAR GEOGRAPHY OF DIRECT DEMOCRACY: WHY THE INITIATIVE, REFERENDUM AND RECALL DEVELOPED IN THE AMERICAN WEST

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I. Introduction

In a rare decision striking down a measure directly legislated by an electoral majority, last year the United States Supreme Court invalidated a citizen-initiated amendment to the Colorado Constitution that prohibited any state action entitling homosexuals to a "protected status or claim of discrimination." In *Romer v. Evans*,¹ Justice Anthony Kennedy's majority opinion found that the initiative ("Amendment 2") legislated by 53 percent of Colorado voters in 1992 violated the Equal Protection Clause of the Fourteenth Amendment. Citizen-sponsored laws, like those enacted by representatives in the state legislature, he argued, must conform to the baseline requirements of equal treatment outlined in the Federal Constitution. "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else." Explained Kennedy for the Court, "This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."²

According to Justice Antonin Scalia in dissent, the majority was insulting Colorado's voters by supplanting its elitist political preferences for those of an electoral majority. "[Amendment 2] put directly to all the citizens of the State, the question: Should homosexuality be given special protection? They answered no. The Court today asserts that this *most*

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1. *Romer v. Evans*, 116 S. Ct. 1620 (1996).

2. *Id.* at 1629. Amendment 2 reads as follows:

Neither the State of Colorado through any of its branches or departments, nor any of its agencies, political divisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Id. at 1620 (quoting Colo. Const., Art. II, § 30b).

democratic of procedures is unconstitutional.”³ He concluded, “The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals . . . Striking it down is an act, not of judicial judgment, but of political will.”⁴

While the Court’s decision in *Romer v. Evans* stands out as an exceptional example of a judicial check upon direct democracy, it may signify a new class of cases spawned by the increasing use of citizen-sponsored legislation in American states.⁵ In addition to the Arkansas Congressional term limits initiative the Supreme Court struck down in 1995, federal courts will soon confront high profile cases challenging popular initiatives passed in the last two elections.⁶ Increasingly frustrated with the static and cumbersome institutions of the American separation-of-powers system, interest groups and candidates “let the voters decide” difficult and politicized questions at the ballot box.⁷ Owing to the system of state political institutions outlined in the Progressive Era, the courts stand as the singular check against electoral majorities for legislation passed by referendum or initiative. The renewed use of the tools of direct democracy in the 1990s portends even more frequent clashes between the ultra-democracy of direct legislation and the ultimate anti-democracy of an unelected and, at the federal level, virtually unremovable judiciary.

3. *Id.* at 1634 (Scalia, J. dissenting) (emphasis added).

4. *Id.* at 1637.

5. For two significant, earlier examples of judicial checks on direct democracy, see *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (striking down a statewide initiative prohibiting the mandatory busing of students to achieve racial integration in public schools); *Hunter v. Erickson*, 393 U.S. 385 (1969) (striking down amendment to Akron, Ohio city charter that required that any fair housing ordinances be put to a city-wide vote before they could take effect). The Court in *Hunter* noted: “Nor does the implementation of . . . change through popular referendum immunize it [from constitutional scrutiny]. The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.” *Hunter*, 393 U.S. at 393.

6. *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995). See, e.g., *Bates v. Jones*, 1997 WL 199477 (N.D. Cal. 1997) (striking down California’s lifetime term limits for state legislators); *Gregorio T. v. Wilson*, 54 F.3d 599 (9th Cir. 1995) (challenge brought against California’s Proposition 187, the “Save Our State” initiative that prohibited the distribution of all non-emergency public services to undocumented aliens); *Coalition for Economic Equity v. Wilson*, 1997 U.S. App. LEXIS 6512 (9th Cir. 1997) (removing the preliminary injunction of a federal district court that enjoined the implementation of the California Civil Rights Initiative that dismantled the state’s affirmative action programs). The initiative, which amended the California Constitution, provided that “[t]he State shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting.” CAL. CONST. art. 1, § 31(a).

7. See David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13 (1995).

This article seeks to explain how and why the institutions of American democracy at the state level evolved toward the plebiscitary forms they exhibit today. American politicians and citizens, particularly in western states, have come to take for granted the existence of these mechanisms that translate electoral preferences into public law. Yet, as this article points out, their appearance on the American political landscape is relatively recent—less than a century old. With reference to the Progressive Era in particular, most of this article will explore the unique conditions that helped give birth to and entrench an ideology of direct democracy sorely at odds with the Madisonian philosophy of America's founding. While these early twentieth century institutional changes were concentrated in the western states, the ability of high profile initiatives and referenda to elevate issues to the national agenda has allowed these states to exercise disproportionate influence in framing national and state priorities. Finally, this article evaluates the claims of the Progressive advocates of direct democracy in light of a century of evidence since the first American state adopted the referendum. While the objects of scorn have changed from corporate trusts and party machines to special interests and PACs, present day reformers continue to look to the ballot box to cure the inconvenience of a separated system of checks and balances.

*A. The Institutions of Direct Democracy—Referendum,
Initiative and Recall*

The structural reforms proposed by one school of Progressive politicians at the turn of the century had as their common denominator the delegation of political decisions to the ordinary voter. Several other electoral devices, such as direct primaries, proportional representation and non-partisan elections found their way into this section of the Progressive "platform," but the referendum, initiative and recall were perhaps the most emblematic.

The referendum, according to the Progressive magazine, *The Arena*, which promoted it at the turn of the century, entails "the referring of a law or ordinance or any specific question to the people for decision at the polls."⁸ Most state constitutions require a referendum for Constitutional amendments and for legislation in certain issue areas, such as chartering a new city, expanding suffrage, exceeding the debt limit or changing the location of a state capital. In addition to these "mandatory referenda," legislators, depending on the state, may choose to delegate in an "optional

8. FRANK PARSONS ET AL., A PRIMER OF DIRECT-LEGISLATION 3 (1906), reprinted from THE ARENA, May, June and July 1906.

referendum" any given issue or policy choice to the electorate for either a binding or merely advisory poll. Finally, a provision enabling a referendum specifies a certain percentage of the electorate (usually between 5 and 15 percent of those voting in the previous election) needed to demand a referendum within a certain period of time (usually 90 days) after the legislature has passed judgment upon the law. As one writer during the Progressive era described it, the referendum allows the voters to correct legislative "sins of commission" while the initiative remedies "sins of omission."⁹

Whereas the format and language of a referendum originate in the state's legislative body, an initiative comes directly from the "people."¹⁰ Between 5 and 10 percent of the electorate turning out in the previous election may "propose a law, ordinance or constitutional amendment for action by the legislature or decision at the polls or both."¹¹ Initiatives can be "indirect," wherein legislative inaction on a voter proposed bill causes the measure to be decided at the next election, or "direct," in which citizen-sponsored legislation appears unhindered and unfiltered on the ballot.

The recall is perhaps the most drastic and the most cumbersome method by which voters check their legislators at the polls. Quite simply, it is the implementation of the "guaranteed right of the people to discharge their public servants when these public servants cease to be satisfactory to them."¹² Unlike articles of impeachment, which usually require that the official commit a named crime, recall provisions are silent as to the reasons why citizens may throw their representative out of office. Signature requirements usually approach 25 percent of those voting in the district from which the official is to be recalled. Given the expense of having a special recall election at the state level, voters have successfully recalled only a handful of legislators.¹³ The more frequent arena for a successful recall is at the municipal level where voters have recalled approximately two thousand mayors, council members and other local

9. LEWIS JEROME JOHNSON, *Direct Legislation As an Ally of Representative Government*, reprinted in *THE INITIATIVE, REFERENDUM, AND RECALL* 139, 142 (William Munro ed., 1912).

10. Exactly who the "people" are who get propositions on the ballot, as well as who turns out to vote for initiatives present interesting questions, though not ones finding answers in this article. See generally DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 59-100 (1984) (noting the bias toward highly organized and well-funded interest groups of what can be very costly initiative campaigns).

11. PARSONS ET AL., *supra* note 8, at 8.

12. DELOS F. WILCOX, *GOVERNMENT BY ALL THE PEOPLE* 169 (1912).

13. Two in California in 1913, two in Idaho in 1971, two in Michigan in 1983, and one in Oregon in 1988. See THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM AND RECALL* 127 (1989).

officials since the Progressive Era.¹⁴

One can draw several distinctions between each of the three instruments of direct democracy, but those distinctions are not relevant to our present inquiry, which is to examine why and how these measures appeared where and when they did. Table I, on the following page, outlines the twenty-five states that have the referendum, twenty-three having some form of the initiative, and fifteen with the recall. As explained below, twenty-two of the twenty-five states allowing for referenda enacted those provisions into their state constitutions during the Progressive Era (1898–1918). States west of the Mississippi river account for seventeen of those with either the initiative or referendum and all states west of the Mississippi except for Texas, Kansas, Minnesota, Iowa and Wisconsin have one or the other. Indeed, the regionalism and time-boundedness of the development of direct democracy in America recast our original question in the form: Why did direct democracy appear predominantly in western states during the Progressive Era? The complicated answer includes an examination of the timing of states' admission to the Union, the fear of new state legislators to pass the controversial legislation needed to set up a state, and the changing dynamic of interest group politics in western states at the turn of the century.

B. Historical Antecedents to Progressive Direct Democracy

The Progressive pamphleteers who sought to spread the word about the virtues of direct legislation in the 1900s peppered their literature with references to the successful working of direct democracy at home and abroad. In particular, they pointed to the American legacy of town meetings¹⁵ and the experience of the Swiss cantons.¹⁶ The romance of pure participatory democracy in the small towns of eighteenth-century New England or the cloistered canton of rural Basle provided the idyllic, even

14. *Id.* at 128. Two notable early examples of the use of the recall are the overthrow of the mayors of Los Angeles (1909) and Seattle (1911). See ELLIS PAXSON OBERHOLTZER, *THE REFERENDUM IN AMERICA* 465–66 (1911).

15. See PARSONS ET AL., *supra* note 8, at 3; J.W. SULLIVAN, *DIRECT LEGISLATION BY THE CITIZENSHIP THROUGH THE INITIATIVE AND REFERENDUM* 72 (1892); *THE NATIONAL ECONOMIC LEAGUE, THE INITIATIVE AND REFERENDUM* 21 (1912); EDWIN M. BACON & MORRILL WYMAN, *DIRECT ELECTIONS AND LAW-MAKING BY POPULAR VOTE* 2–13 (1912).

16. SULLIVAN, *supra* note 15, at 16. See generally A. LAWRENCE LOWELL, *Referendum in Switzerland and in America*, *ATLANTIC MONTHLY*, Apr. 1894, at 517 (survey of the 122 measures referred to the ballot between 1864 and 1884). Among other examples in his critique of Swiss direct democracy, Lowell notes the anti-Semitic 1893 referendum banning the kosher method of killing beef.

TABLE I. THE GEOGRAPHY AND TIMING OF THE ADOPTION OF DIRECT DEMOCRACY*

STATE (YEAR OF ADMISSION TO UNION)	REFERENDUM (year of adoption)	INITIATIVE (year of adoption)	RECALL (year of adoption)
SOUTH DAKOTA	1898	1898	
UTAH (1896)	1900	1900 ^a	
OREGON (1859)	1902	1902	1908
NEVADA (1864)	1904	1904	1912
MONTANA (1821)	1906	1906	1976
OKLAHOMA (1907)	1907	1907	
MAINE (1820)	1908	1908 ^c	
MICHIGAN (1837)	1908	1908	1913
MISSOURI (1821)	1908	1908	
ARKANSAS (1836)	1909	1909	
ARIZONA (1912)	1910	1910	1912
COLORADO (1876)	1910	1910	1912
CALIFORNIA (1850)	1911	1911	1911
NEW MEXICO (1912)	1911		
IDAHO (1890)	1912	1912	1933
NEBRASKA (1867)	1912	1912	
OHIO (1803)	1912	1912	
WASHINGTON (1889)	1912	1912 ^a	1912
NORTH DAKOTA	1914	1914	1920
MARYLAND (1788)	1915		
KENTUCKY (1792)	1917		
MASSACHUSETTS	1918	1918 ^c	
ALASKA (1959)	1959	1959 ^a	1959
WYOMING (1890)	1968	1968 ^{a,c}	
ILLINOIS (1818)	1970	1970 ^b	
FLORIDA (1845)		1978 ^b	
KANSAS (1861)			1914
LOUISIANA (1812)			1914
WISCONSIN (1848)			1926
GEORGIA (1788)			1978

^a Initiative only for statutes not Constitutional amendments.

^b Initiative only for Constitutional amendments not statutes.

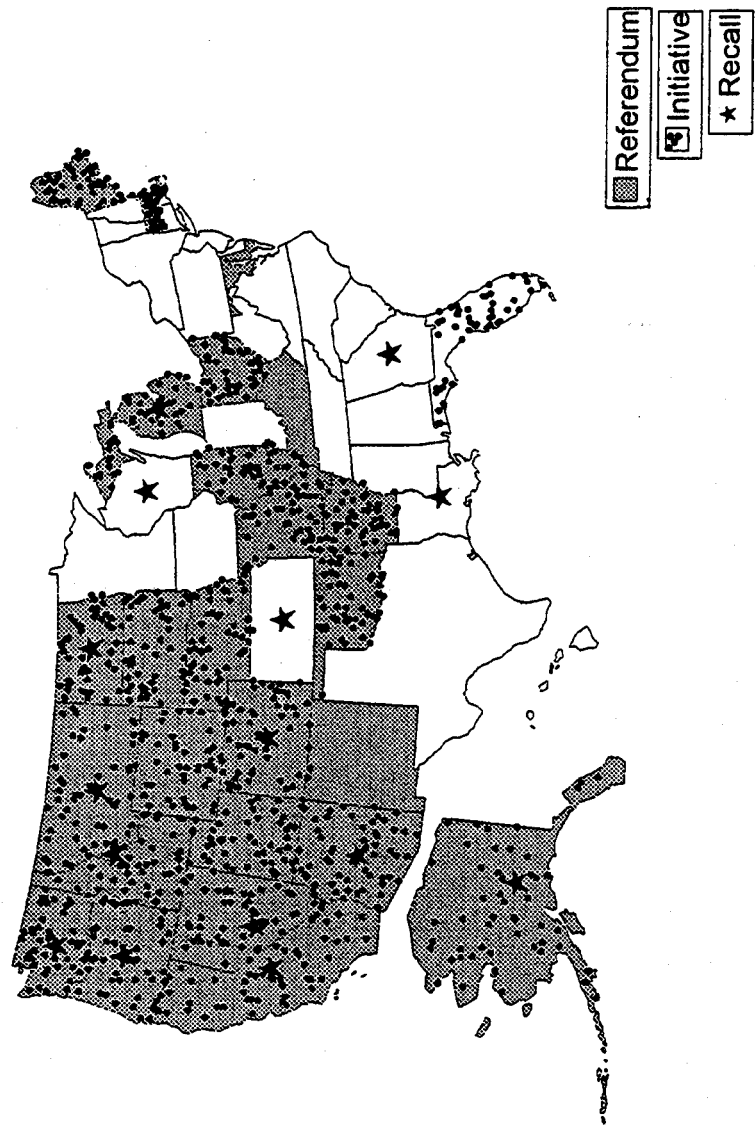
^c Indirect Initiative only.

* Source: DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 38 (1984) and THOMAS E. CRONIN, DIRECT DEMOCRACY 126-27 (1989).

CT DEMOCRACY*

RECALL (year of adoption)
1908
1912
1976
1913
1912
1912
1911
1933
1912
1920
1959
1914
1914
1926
1978

Figure A. The Geography of Direct Democracy



if misplaced, paradigm for the institutional development of the tools of Progressive democracy.

Indeed, much of the Progressive literature was more backward looking than it was "Progressive," as it sought a return to a state of political life where individual political influence went unfettered by parties and corporate interests. Describing the thrust of Progressivism, Richard Hofstadter explains:

Its general theme was the effort to restore a type of economic individualism and political democracy that was widely believed to have existed earlier in America and to have been destroyed by the great corporation and the corrupt party machine; and with that restoration to bring back a kind of morality and civic purity that was also believed to have been lost.¹⁷

A return to America's mythic roots in the town halls of Plymouth and Massachusetts Bay colonies was as potent an image for Progressive reformers as it is for those of the present day.¹⁸ Yet at the time of the Progressive Movement, the areas with the greatest ability to achieve a statewide New England town meeting were far from New England. The states of the Northeast and South already had entrenched constitutional traditions by the 1890s. The West, on the other hand, was virgin political territory where Congress was creating new states and citizens were crafting new constitutions.

Most states in the 1800s, except for those that had established colonial charters and capital cities at the time of the Revolution, originally adopted their constitutions by popular votes or used the referendum to call for a convention to amend or replace them. While most legislatures of the original thirteen states adopted their constitutions by way of convention during the Revolutionary War, Massachusetts (1780) and New Hampshire (1783) submitted their constitutions to direct popular vote. That practice then became the rule as the referendum was employed to approve every constitution adopted between 1840 and 1890.¹⁹ Congress itself gave

17. RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 5-6 (1955).

18. Ross Perot advocated an electronic "town meeting" in his failed 1992 campaign for the presidency. ROSS PEROT, *UNITED WE STAND* 32 (1992). For current advocacy of a national referendum, see JACK KEMP, *AN AMERICAN RENAISSANCE: A STRATEGY FOR THE 1980S*, at 187-89 (1979); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 54-56 (1991).

19. CHARLES A. BEARD & BIRL E. SHULTZ, *DOCUMENTS ON THE STATE-WIDE INITIATIVE REFERENDUM AND RECALL* 16 (1912). The referendum on the 1777 Massachusetts Constitution, described as the first referendum in world history, was, in fact, rejected by the citizenry assembled in their town meetings and only with a referendum on a second version in 1780 did the state adopt what has emerged as the most enduring state constitution in America.

implicit sanction to the ideals of direct democracy with the passage of Enabling Acts for new states in the mid-1800s. In 1857, Minnesota became the first state required by Congress to submit its constitution for popular approval. In fact, after 1840, only southern states with potentially large black voting blocs adopted their new constitutions without direct popular vote. Since the southern constitutions themselves contained provisions directed toward the disenfranchisement of newly freed slaves, a truly popular referendum would have been a risky means by which to ratify the Post-Civil War constitutions. Choosing a more secure method to guarantee ratification, southern state legislatures and constitutional conventions imposed these new constitutions, along with literacy tests, grandfather clauses and other voting requirements, on their populations.²⁰

Several eighteenth-century constitutions, including those of Georgia, Massachusetts, Pennsylvania, and New Hampshire, also required a referendum for constitutional amendments proposed by a convention. However, few amendments were proposed before the 1890s. Instead of frequently amending their constitutions as has become the tradition since the Progressive Era, most states adopted completely new constitutions on one or more occasions in the mid-1800s.²¹ Some early constitutions, however, mandated the popular referendum for certain policy areas, most frequently, raising the debt ceiling, expanding suffrage, and deciding on a location for the state capital.²²

In particular, the early votes taken for locating state capitals may explain the peculiar rise of direct democracy in the American West. The western states began their political history with referenda, and the practice on a statewide level was more familiar to both politicians and citizens than it was in the South and East. The location of state capitals was usually the first order of business for a new state government, but a decision on placing the state capital could prove to be politically dangerous for whichever party had control at the time. Recognizing this dilemma, the govern-

OBERHOLTZER, *supra* note 14, at 103–05.

20. OBERHOLTZER, *supra* note 14, at 120–27. Mississippi, South Carolina, Louisiana, Virginia and Delaware passed constitutions without popular vote, as did the seceding states in the Civil War, which used state conventions. Also, one should note that state conventions passed the constitutions of the seceding states in the Civil War. J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE PARTY SOUTH, 1880–1910* (1974). BEARD AND SHULTZ, *supra* note 19, at 17. On racism in the referendum process generally, see Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978).

21. Janice C. May, *State Constitutions and Constitutional Revision: 1990–91*, in *THE BOOK OF THE STATES: 1992–93 EDITION* 20 (1992)

22. OBERHOLTZER, *supra* note 14, 176–77, 182–86.

ments of Texas in 1850, Oregon in 1857, Kansas in 1859, Colorado in 1881, South Dakota in 1889, and Montana in 1892, all submitted the question of state capital location to the voters.²³ Those states that arose from the original thirteen colonies or were settled at the time of the revolution already had capital cities developed under British rule and specified in the colonial charters. Outside the East and the South though, the first elections taken in the new states, sometimes even before the election of candidates, were referendums concerning the ratification of the new constitutions and location of the state capital.

A large part of the explanation of why direct democracy took hold where and when it did comes from the timing of a state's admission into the union.²⁴ (See Table I). With the exception of Hawaii, every state that was admitted to the Union after 1870 has instituted the referendum, and all of those, excepting New Mexico, have instituted the initiative. By 1907, when Oklahoma entered the Union at the height of Progressivism, that state began its existence with a constitution that provided for the referendum and initiative for statutes and constitutional amendments. And one of the first votes delegated to Oklahomans by their buck-passing representatives was whether to use state funds to build a new capital city (called a "New Jerusalem") apart from any already established city.²⁵ The voters defeated that proposition in the general election of 1910, along with proposals to extend women's suffrage and give local governments the option of prohibiting liquor, but they approved regulations regarding railroad regulation and corporate taxation, and earlier that year in a special election, several measures designed to disenfranchise blacks.²⁶

This "origination hypothesis" does not provide the entire explanation for the widespread use of direct democracy in the West. However, it does explain how the malleable political cultures of the states developing at the turn of the century provided fertile ground for political institution-building.²⁷ During the "constitutional moment" of the founding of new

23. *Id.* at 176-78. Similarly, referenda were often ordered in the mid-1800s by the constitutional conventions taken for the placement of other state facilities such as universities, prisons or insane asylums. *Id.* at 179-82.

24. Charles M. Price, *The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon*, 28 W. POL. Q. 243, 248 (1975).

25. The advocates of this scheme, which was passed only as an advisory referendum but later defeated in a binding vote, contended that "no city is entitled to any special privileges over any other city of the State at the hands of the State," therefore as with the founding of Washington, DC, Oklahoma felt they should establish a "model community." *Quoted in OBERHOLTZER, supra* note 14, at 416-17.

26. *Id.* at 418-19.

27. The same phenomenon holds true for the western provinces of Canada that developed

states, creative, new ways of legislating were codified in state constitutions emerging from the political flux.²⁸ The temporal distance from the Madisonian fear of "rule by the mob" presented opportunities for political creativity that were absent a century earlier. The history of the founding of direct democracy in America suggests that in politics, as in comedy and real estate, success is often determined by timing and location. But what explains the widespread use of direct democracy in other states, such as California and Oregon, that entered the Union in the 1850s? Like the other western states, these states experienced immense growth in the 1890s. However, the puzzle of their institutionalization of direct democracy is incomplete without an investigation of the interest group dynamics in those states during the Progressive Era. As the forthcoming examples illustrate, the story of the rise of direct democracy is largely one of the formation of new interest groups along multiple issue dimensions during a period of great change in and challenges to the economic and social order.²⁹

II. Progressivism and The Rise of Direct of Democracy

Most histories of the Progressive Era merely assert that direct democracy was somehow a natural consequence of progressive philosophy. But in many respects, Progressivism and direct democracy were diametrically opposed. In particular, the Progressive emphasis on public administration by unelected, nonpartisan civil servants seems to contradict the "power to the people" ideology of those fighting for the initiative, referendum and recall. (See Table II.) Even more striking, in hindsight, was the Progressive emphasis on short ballots (i.e., reducing the number of elected positions) alongside a move for placing as many propositions on the ballot as could garner the requisite number of signatures.³⁰ Indeed, the compo-

in the Progressive Era and continue to use the institutions of direct democracy while New Brunswick and, until recently, Quebec have never had a referendum. AUSTIN RANNEY, *The United States of America*, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 67, 73-74 (Austin Ranney & David Butler eds., 1978).

28. See BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 48-50, 54 (1992) (explaining "constitutional moments" as small windows of opportunity when revolutionaries can codify fundamental principles in texts and institutions that survive well beyond the founding generation).

29. See generally Lloyd Spoonholtz, *The Initiative and Referendum: Direct Democracy in Perspective 1898-1920*, 14 AMER. STUD. 43, 60 (1973) ("The IR [Initiative and Referendum], then, appears as an adaptation to shifts in the political and economic sectors induced by industrial and urban growth."). "Demand for IR in Arizona was intertwined with the question of statehood, with mine and railroad employers satisfied with the advantages they enjoyed under territorial status." *Id.* at 47.

30. For Woodrow Wilson, the short ballot was "the key to the whole problem of the restoration of popular government in this country." AUSTIN F. MACDONALD, *AMERICAN CITY GOVERNMENT AND ADMINISTRATION* 279 (1945). On the contradictions between direct democ-

nents of the Progressive program were as diverse (and inconsistent) as the individuals who claimed the Progressive label. They were united, it seems, more by common enemies—party machines and corporate trusts—than by common priorities.

**TABLE II. THE INTERNAL CONTRADICTIONS
OF PROGRESSIVE POLITICAL REFORM**

<i>"DEMOCRATIC" REFORMS</i>	<i>"ANTI-DEMOCRATIC" REFORMS</i>
referendum, recall and initiative direct primary direct election of senators Home rule for cities anti-party machine Australian ballot campaign finance reform	civil service short ballot fewer elected positions stronger executive branch of state government commission government

A. The Progressive Program Generally

One cannot understand the place of direct democracy in the Progressive movement without understanding Progressive ideology (or ideologies) generally. Indeed, a clear "philosophy" is difficult to unearth from a movement dedicated to such disparate goals as prohibition, women's suffrage, trust-busting, muckraking, economic populism, Yankee-Protestantism, trade unionism, party reform and direct democracy.³¹ "It was, to be sure, a rather vague and not altogether cohesive or consistent movement," explains Hofstadter, "but this was probably the secret of its considerable successes as well as its failures."³²

In addition to their common enemies of party machines and corporate trusts, however, the Progressives shared a style and worldview that underlay their varied commitments to social, economic and political transformation.³³ The almost millenarian zeal with which they spoke of public policy

racy and Progressive public administration, see THOMAS K. MCCRAW, *The Progressive Legacy in Lewis Gould, THE PROGRESSIVE ERA* 187 (1974).

31. Daniel T. Rodgers, *In Search of Progressivism*, 10 REVIEWS IN AMER. HIST. 113, 115-19 (Dec. 1982) (describing both the historical and historiographic difficulty in delineating a consistent theory permeating through a Progressive agenda). "[T]hose who called themselves progressives did not share a common creed or a string of common values, however ingeniously or vaguely defined." *Id.* at 123. See also Don S. Kirschner, *The Ambiguous Legacy: Social Justice and Social Control in the Progressive Era*, 2 HIST. REFLECTIONS 88 (1975) (describing Progressivism as a "middle-minded" jumble of oppositions).

32. HOFSTADTER, *supra* note 17, at 5.

33. Rodgers, *supra* note 31, at 123 (describing Progressivism as having three distinct

goals permeated the Progressive rhetoric irrespective of the particular issue. "Though they might agree on little else," explains one historian of the era,

progressives shared the view that the social order could and must be improved and that such change must not await God's will, natural laws, including the laws of the marketplace, or any other beneficent force [Progressivism] meant to face squarely the social problems left in the wake of the industrial revolution and solve them with the inventiveness characteristic of industrial society.³⁴

In their rejection of the inherent fatalism of classical liberalism and social Darwinism, the Progressives sought to use the instruments of the state and civil society to remedy the socioeconomic and cultural ills plaguing America at the turn of the century. Alongside minimum wage and maximum hour laws, social reformers such as Jane Addams sought to create institutions, such as settlement houses "to relieve, at the same time, the overaccumulation at one end of society and the destitution at the other."³⁵ Moreover, Progressive muckrakers, such as Upton Sinclair, exposed the dangerous consequences of an unregulated market as Progressive politicians helped pass the Meat Inspection and Pure Food and Drug Acts.³⁶

The common denominator to the multitude of programs proposed during this era was an open-mindedness to avenues of reform previously seen as off-limits. As the foundations of economic liberalism tended to prohibit regulation of industry, for example, so did the ideological rigidities of American constitutionalism seem to stand in the way of electoral reform in the direction of direct democracy. The litany of Progressive tactics and programs is too long to describe here, but the important nexus between the Progressive social agenda and the political reforms should be kept in mind. To achieve the social reforms of regulating industry, creating progressive taxation, and enacting programs to combat poverty, the Progressives felt they could not work within the static party and political

"languages of discontent": antimonopolism, an emphasis on social bonds, and a language of social efficiency. "Together they formed not an ideology, but the surroundings of available rhetoric and ideas . . .").

34. CARL RESEK, *THE PROGRESSIVES* xi-xii (1967).

35. JANE ADDAMS, *TWENTY YEARS AT HULL HOUSE* 125-26 (1961).

36. See generally ARTHUR A. EKIRCH, JR., *PROGRESSIVISM IN AMERICA: A STUDY OF THE ERA FROM THEODORE ROOSEVELT TO WOODROW WILSON* 50-63 (1974); LOUIS FILLER, *THE MUCKRAKERS: CRUSADERS FOR AMERICAN LIBERALISM* (1976) (noting the Progressive Era's ambivalence toward industrialism); DAVID M. CHALMERS, *THE SOCIAL AND POLITICAL IDEAS OF THE MUCKRAKERS* (1964) (on the exposure of industrialism's sins by the Muckrakers).

system they inherited.³⁷ Some Progressives treated the virtues of the referendum, initiative and recall as ends in themselves. However, all recognized them, at least, as means toward the end of removing the corrupting influences that straitjacketed the political system into acquiescence to the social afflictions accompanying industrialization.³⁸

The devastating depression of 1893 and the inflation that followed it focused Westerners' attention for the next decade on who was controlling their economy, and all fingers pointed to the rising corporate trusts. Between 1898 and 1904, 235 trusts formed with a capitalization of over six billion dollars.³⁹ Their inordinate power often dwarfed that of the state governments, and Progressive politicians found in them the enemy they needed in their argument for removing power from the legislatures. As one writer in *The Arena* preached:

[T]here has arisen in our midst in recent years a powerful plutocracy composed of the great public-service magnates, the trust chieftains and other princes of privilege who have succeeded in placing in positions of leadership political bosses that are susceptible to the influence of corrupt wealth . . . [I]n this manner the government has become largely a government of privileged wealth for privileged interests, by the lawlessness of the privileged ones and their tools, with the result that the people are continually exploited and corruption is steadily spreading throughout all ramifications of political life. Against these evils the Referendum is a powerful weapon. It brings the government back to the people.⁴⁰

While the Jane Addamses and Upton Sinclairs of the movement could continue to promote social justice and expose rampant corruption in pursuit of Progressive values, their efforts would prove ephemeral without political reform. To uproot the corrupting influences of wealth on state power, the radical tools of direct democracy needed to ascend the Progressives' list of priorities. This was the argument of only one school of Progressives, but they just happened to dominate in the western states.

37. Spoonholtz, *supra* note 29, at 60 ("[T]he aim [of the initiative and referendum] was to circumvent the political 'ins,' whether they be executives, legislators, or judges, who thwarted the aims of a particular group.").

38. *See id.*

39. *See* JOHN MOODY, *THE TRUTH ABOUT THE TRUSTS* 486 (1904). On development of corporate trusts at the turn of the century, see generally MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM 1890-1916* (1988); NAOMI LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS 1895-1904* (1985); ALFRED DUPONT CHANDLER, *THE VISIBLE HAND* (1977).

40. *See* PARSONS ET AL., *supra* note 8, at 7.

B. The Place of Direct Democracy in the Progressive Agenda

As briefly explained above, the place of direct democracy in the Progressive program was not foreordained and, in certain respects, it contradicted other objectives. The diversity of a movement that could accommodate Senator Robert LaFollette of Wisconsin, Governor Hiram Johnson of California as well as Presidents Theodore Roosevelt and Woodrow Wilson, quite naturally resulted in a patch-work quilt of programs (and the political reform component was no exception) that formed the Progressive agenda.⁴¹ While much has been written on their shared animosity toward party machines and corporate trusts, linked with these suspicions was a deep contempt for legislatures, in general.⁴² The two camps of political reformers of the era may have approached the evils of legislative government from opposing sides, but their ultimate goal was the same. The common element in the fight to achieve Progressive legislation, then, evolved into a fight to reduce the relative power of state assemblies vis-a-vis governors, for one group of Progressives, and vis-a-vis the "people," for the other.

1. The Mugwumps and the Populists

While recent scholarship has eroded the earlier consensus of American historians as to the "status" or "class" based explanation for the rise of Progressivism, the economic position of different factions in the Progressive coalition does help explain their contradictory program of political reform.⁴³ Richard Hofstadter recognized two camps—the Mugwumps

41. See Peter G. Filene, *Obituary for the Progressive Movement*, 22 *AMER. Q.* 20, 20–34 (1970); John D. Buenker, *The Progressive Era: A Search for a Synthesis*, 51 *MID-AMERICA* 175–93 (1969) (challenging the notion that the Progressive movement was even a "movement" in the strict sense of the term).

42. See RICHARD L. MCCORMICK, *THE PARTY PERIOD AND PUBLIC POLICY: AMERICAN POLITICS FROM THE AGE OF JACKSON TO THE PROGRESSIVE ERA* 275 (1986) (noting the decline in the power of legislatures during the Progressive Era). Woodrow Wilson might be an exception to this general rule, as he vacillated between touting the virtues of legislatures, the role of direct democracy and the need for expert administrators. See WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* (1885) (discussing virtues of legislatures); Woodrow Wilson, *The Issues of Reform*, in *THE INITIATIVE, REFERENDUM, AND RECALL* 69–91 (William Bennett Munro ed., 1912) (discussing the role of direct democracy); WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (1908) (discussing need for expert administrators). See also Spoonholtz, *supra* note 29, at 44 (explaining the "gradual erosion of the dominant nature of legislative authority" in the 19th Century).

43. Advocates of the status revolution thesis, "contended that a loss of status by the displaced professionals and business men of the "Mugwump type" impelled them to turn toward

and the Populists—in the Progressive movement for institutional reform. The former class, including Theodore Roosevelt and Henry Stimson, Hofstadter characterized as “old gentry, the merchants of long standing, the small manufacturers, the established professional men, the civic leaders of an earlier era.”⁴⁴

The Mugwumps’ chief goal in institutional reform, symbolized by a more effective and powerful executive branch of government,⁴⁵ was derived from a discomfort with the new forms of wealth and political organization, namely, the trusts and party machines.⁴⁶ Seeking a return to

reform of the political and economic system which had brought about the upheaval in status.” Roger E. Wyman, *Middle-Class Voters and Progressive Reform: The Conflict of Class and Culture*, 68 AM. POL. SCI. REV. 488, 488 (1974). See GEORGE E. MOWRY, *THE CALIFORNIA PROGRESSIVES* (1951) for the original advocacy of the status hypothesis. For additional critiques, see ROBERT WIEBE, *THE SEARCH FOR ORDER 6-7* (1967) (arguing contra Hofstadter that Progressivism was really a movement of bureaucratization wherein organizations of middle class professionals drove the social order toward new levels of rationalization); Samuel P. Hays, *The Politics of Reform in Municipal Government in the Progressive Era*, 55 PAC. NORTHWEST Q. 157-69 (1964) [hereinafter Hays, *Politics of Reform*] (describing the capture of urban politics by an upper class elite of progressives); Samuel P. Hays, *The New Organizational Society*, in AMERICAN POLITICAL HISTORY AS SOCIAL ANALYSIS (1980) (describing Progressivism as mainly an organizational revolution arising from a growth in scientific and bureaucratic values that emphasized the technical and systematic organization of the social system); see also MICHAEL PAUL ROGIN & JOHN L. SHOVER, *POLITICAL CHANGE IN CALIFORNIA: CRITICAL ELECTIONS AND SOCIAL MOVEMENTS 1890-1966*, at 35-61 (1970).

44. HOFSTADTER, *supra* note 17, at 137. See, e.g., Stimson’s letter to Roosevelt in 1911 where he explains,

To me it seems vitally important that the Republican party, which contains, generally speaking, the richer and more intelligent citizens of the country, should take the lead in reform If, instead, the leadership should fall into the hands of . . . a party composed, like the Democrats, largely of foreign elements and the classes which will immediately benefit by the reform, . . . I fear the necessary changes could hardly be accomplished without much excitement and possibly violence.

Quoted in HENRY L. STIMSON & MCGEORGE BUNDY, *ON ACTIVE SERVICE IN PEACE AND WAR* 22 (1947). See also SHELDON HACKNEY, *POPULISM TO PROGRESSIVISM IN ALABAMA* xiii (1959) (dividing up the Progressives into western democratic Bryanites and eastern elitist Rooseveltians).

45. BRADLEY R. RICE, *PROGRESSIVE CITIES: THE COMMISSION GOVERNMENT MOVEMENT IN AMERICA 1901-1920* (1977) (explaining the rise of unelected civil servants during the Progressive Era).

46. LEON EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 170 (1986) (“Against the corporation and the political machine, progressives were willing to apply the power of the state as their regulatory instrument.”). On party machines, see, e.g., RICHARD L. MCCORMICK, *FROM REALIGNMENT TO REFORM: POLITICAL CHANGE IN NEW YORK STATE, 1893-1910* (1981) (describing how the anti-party crusaders and muckrakers helped unseat the urban party bosses in New York); AUSTIN RANNEY, *CURING THE MISCHIEFS OF FACTION: PARTY REFORM IN AMERICA* 17-18, 80-81, 119-21 (1976) (describing the party reforms of the Progressive era and

the era of their political and economic dominance prior to the industrialization and immigration of the late 1800s, the Mugwumps wanted, in the least, to eliminate the corrupting influence of shady, urban political partisans and the amassed wealth of the new corporations. They appreciated direct democracy only to the extent that it could be used as a means to remove power from the new organizations of wealth and political influence. "[E]ach device is a device and nothing more, is a means and not an end."⁴⁷ Explained Theodore Roosevelt in 1911:

The end is good government, obtained through genuine popular rule. Any device that under given conditions achieves this end is good for those conditions, and the value of each device must be tested purely by the answer to the question, does it or does it not secure the end in view?⁴⁸

While the Eastern Progressives desired direct democracy as a means toward checking the power of new social forces, Progressives in the West saw direct democracy as a governmental ideal.⁴⁹ The heyday of "Populism" passed with the divisive 1896 election, which produced Republican party dominance in all three branches of government.⁵⁰ However, the

providing cites).

On corporate trusts, see, e.g., Luis Galambos, *The Emerging Organizational Synthesis in Modern American History*, 44 *BUS. HIST. REV.* 279-90 (1970) (describing the battle between the new corporations and an activist regulatory state in the Progressive Era); Richard L. McCormick, *The Discovery That Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 86 *AMER. HIST. REV.* 247-74 (1981) (describing the anti-railroad and anti-corruption scandals of 1905-1908); DAVID P. THELEN, *THE NEW CITIZENSHIP: ORIGINS OF PROGRESSIVISM IN WISCONSIN, 1885-1900* chs. 11-12 (1972) (describing how urbanites during the Progressive Era finally began to understand and experience the vulnerability of monopolies that only Populist farmers had experienced previously). *But see* JAMES WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE 1900-1918* (1968) (arguing that the Progressive Era actually resulted in the rise of "corporate liberalism" wherein the Progressive bureaucratic state actually aided in solidifying corporate influence over political decisions).

47. THEODORE ROOSEVELT, *Nationalism and Popular Rule* (1911), reprinted in *THE INITIATIVE, REFERENDUM, AND RECALL*, *supra* note 42, at 52.

48. *Id.* at 52, 65. *See also* THEODORE ROOSEVELT, *The Radical Movement under Conservative Direction*, in *THEODORE ROOSEVELT: WORKS* 86-99 (1926).

49. Spoonholtz, *supra* note 29, at 43-64.

50. *See generally* DAVID W. BRADY, *CRITICAL ELECTIONS AND CONGRESSIONAL POLICY MAKING* 50-83 (1988). Brady notes, in particular, the significance of two issues—the gold standard and the protective tariff—that realigned the Democratic and Republican parties and led to the death of the short-lived Populist Party led by William Jennings Bryan. *See also* WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* chs. 4-5 (1970) (describing the weakening of party ties and decline in voting turnout during the Progressive Era).

animosity of that movement toward the corporate trusts manifested itself in the version of Progressivism appearing in the American West. While urban reformers in the East sought to clean up municipal government by immunizing officials from the influence of party bosses,⁵¹ Progressives in the new states of the West sought to divest their legislatures of their monopoly on policy-making authority. Moreover, with the advent of the recall, progressives held in their hands a tool to threaten state or, more frequently, local officials who capitulated to the powerful western interest groups.⁵²

Western ideologues, such as William S. U'Ren, leader of the "People's Power League" in Oregon⁵³ and Dr. John R. Haynes, leader of the "Direct Legislation League" of California,⁵⁴ saw in direct democracy both a liberation from the railroad trusts that dominated their states' politics and the statewide realization of the dream of "government of, by and for the people."⁵⁵ For these Progressives, America was entering a new stage of political development, and their characterization of these changes was downright messianic.⁵⁶ These Progressives portrayed the referendum and the initiative as the final steps in the perfection of democratic utopia. Noting the ability of the referendum and initiative to correct legislative "sins" of commission and omission, respectively, one advocate at the time described:

Supplemented by the initiative and referendum, . . . the representative system will gradually but surely enter upon a period of honor and usefulness hitherto never surpassed and probably never equaled.

51. Hays, *Politics of Reform*, *supra* note 43, at 157 (cited in Spoonholtz, *supra* note 29, at n.1).

52. See *supra* notes 13-14.

53. When Woodrow Wilson toured the West in 1911, he "found that Oregon had two capitals, one at Salem and the other 'under the hat of Mr. U'Ren.'" OBERHOLTZER, *supra* note 14, at 406 n.22.

54. As the "apostle of the new democracy," Dr. Haynes, an immigrant to California from Philadelphia, worked tirelessly at the local and then the state level to institute direct democracy measures and remove the influence of the Southern Pacific Railroad from California politics. See V.O. Key, Jr. & Winston W. Crouch, *The Initiative and The Referendum in California* 424-31 (1938); S. Doc. No. 738, 64th Cong., 2d Sess. (1917) (Dr. Haynes address, "Direct Government in California," delivered at the National Popular Government League Convention on July 5 and 6, 1916).

55. Spoonholtz, *supra* note 29, at 46 (describing the history of the development of Direct Legislation Leagues in the late 1800s).

56. See, e.g., WILLIAM ALLEN WHITE, *THE OLD ORDER CHANGETH: A VIEW OF AMERICAN DEMOCRACY* (1910) (author ends almost every chapter with a Biblical quote); OTIS L. GRAHAM, JR., *AN ENCORE FOR REFORM: THE OLD PROGRESSIVES AND THE NEW DEAL* 11-12 (1967 (noting the zealous tone of Progressive writings and preachings)).

Relieved of the unnatural excesses of power[,] . . . legislative bodies will cease to be attractive objects for bribery and secret influence. Log-rolling will greatly diminish. The power of bosses and rings will be undermined. Seats in the legislatures will then begin to be unattractive to grafters. At the same time they will become more attractive to high-minded, public-spirited citizens. There will be a fairer chance that a man clean when elected will stay clean The party machines and bosses once permanently out of control, we may reach the point of competing successfully with the corporations in attracting the best young talent to the public service.⁵⁷

Such utopianism among this faction of Progressives was not, in the least, atypical, and it was rivaled only by their apocalyptic forecasts of what would happen if government succumbed to the financial interests. "Money in politics was there for the purpose of protecting the rights of property under the law, as against the rights of men."⁵⁸ Wrote William White, "The greed of capital was rampant, the force of democracy was dormant; 'and the fool said in his heart there is no God.'"⁵⁹

At the turn of the century, western legislatures, like those in the East, confronted new issues and new interest groups spawned by industrialization and internal migration. The pressures for social reform came from all walks of life—prohibitionists, feminists, socialists, unionists, and farmers' organizations, to name just a few.⁶⁰ As a front for the ruling plutocracy, the legislature and party system, displaying characteristic complacency, eventually could not withstand the onslaught of the new groups that rapidly diversified the political economy of the era.⁶¹ While the expansion of the United States westward provided a fertile historical context for

57. JOHNSON, *supra* note 9, at 142, 147.

58. WHITE, *supra* note 56, at 21.

59. *Id.*

60. "While the silver man, the flat money man, the sound money man, the civil service reformer, the socialist, the prohibitionist, the single taxer, etc. may each think his own special reform the most important and needed, they are all beginning to see that they cannot even get a hearing without Direct Legislation It is thus proving a real bond of union between heretofore waning economic beliefs." Eltweed Pomeroy, *The Direct Legislation Movement and Its Leaders*, 16 ARENA 29, 42 (June 1896) (*cited in* Spoonholtz, *supra* note 29, at 46, 61 n.6). Spoonholtz notes three groups in particular who were active in the fight for direct democracy: advocates of Henry Georges' "single tax" on unused land, organized labor and the Grange. *Id.* at 46.

61. Rodgers, *supra* note 31, at 116 (listing the variety of new organizations suddenly appearing on the political scene during the Progressive Era). "This was the context within which maverick politicians could vault into office and 'reform' [and 'anti-reform'] coalitions of all sorts could blossom. Progressive politics—fragmented, fluid and issue focused—was, in short, part of a major, lasting shift in the rules of the political game." *Id.*

direct democracy's growth and Progressivism provided an ideological push, the interest group dynamics of the era made direct democracy necessary.

2. Plutocracy Versus Popularchy⁶² in the American West

Before the early 1900s, legislatures in the undeveloped West needed only to worry about a few, consistently powerful interest groups. Whereas on the east coast, immigration and urbanization had pluralized local governments somewhat earlier, new "issue publics" sprung up in western state capitals only at the turn of the century.⁶³ Stymied by the captive politicians, these interest groups had no hope of achieving their policy goals through normal means. In addition, their experience with the puppet legislatures convinced them of the inherent shortcomings of representative government.

In California, the legislature was controlled by the Southern Pacific Railroad and the Knights of the Royal Arch (brewers and distillers). Fearing the "new fangled ideas" of Progressive corporate regulation and prohibition, these interest groups, who held "California in fief," blocked any attempt at amending the constitution to provide for direct democracy.⁶⁴ Only after Dr. Haynes kept the "legislative lieutenant" of the Southern Pacific Railroad, Walter Parker, up half the night did he then acquiesce and allow the assembly to pass a bill instituting the referendum by a vote of 65 to 1 in 1903. But, as if to mock the Progressives and erase any doubt as to who controlled the California legislative process, Parker later used his influence to kill the measure in the State Senate.⁶⁵

62. No existing term, such as ultra-democracy, Progressivism or egalitarianism, captures the ideology of direct democracy of the Progressive era. By the unwieldy term "popularchy", I mean the belief system that emphasizes direct rule by the people over themselves. Those adhering to this belief system see representation, at best, as an unfortunate necessity of modern government that inevitably obscures the translation of popular will into public policy.

63. See generally Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, in IDEOLOGY AND DISCONTENT 206, 245-46 (David E. Apter ed., 1964) (defining issue publics as groups of people interested in particular issues rather than situated along the liberal-conservative continuum).

64. One newspaperman of the era described the power of the Southern Pacific in 1896: "In those days there was only one kind of politics and that was corrupt politics. It didn't matter whether a man was a Republican or Democrat. The Southern Pacific controlled both parties, and he either had to stay out of the game altogether or play it with the railroad." *Quoted in CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT* 37 (1992).

65. Key & Crouch, *supra* note 54, at 424-27. The authors also note the vigorous opposition to the statewide initiative of the editorial boards of the two powerful newspapers in California, *The Los Angeles Times* and *The San Francisco Chronicle*. See also LAURA TALLIAN,

The road to success for the Progressives in California was through the transformation of municipal governments. The state legislature passed a constitutional amendment in 1902 allowing certain cities to amend their charters by initiative. All over the state, citizens quickly employed the referendum, and initiative to control the graft of local political machines, and they threatened capitulating local law makers with the recall.⁶⁶ Aided by writers from the Los Angeles Express, one of the few newspapers not dominated by the railroads, the Progressives, through an organization they named the Lincoln-Roosevelt League, launched a methodical campaign both in the press and in the courtroom to expose corruption inherent in every railroad-dominated city government. Eventually, the League gained sufficient power to gamble on fielding a candidate, Hiram Johnson, for the Republican primary.⁶⁷ Canvassing the state unlike any prior candidate, he campaigned on one issue: "Kick the Southern Pacific out of politics in the state of California." This message resonated with the Republican primary voters and later with those in the 1910 general election, which Johnson and the Lincoln-Roosevelt ticket won comfortably.⁶⁸

In his inaugural address, Hiram Johnson asked the rhetorical question: "How best can we arm the People to protect themselves hereafter?" The answer, he said, was the initiative, referendum and recall, and he quickly pushed through the now friendly legislature the proposed constitutional amendments. In a special election held in 1911, the voters passed all but one of the twenty-three amendments comprising the Progressive program, including a grant of women's suffrage and the recall. Once released from the stranglehold of "misrepresentative government" by the Southern Pacific, Californians, at least for one election, had convinced themselves that the majority actually ruled in their state.⁶⁹

While the personalities and pressure groups differed, a similar history unfolded in Oregon. The legislature in that state, if and when it functioned, was captured by several corporations: Standard Oil, the Pullman company, several large telegraph and express companies, as well as the railroads. One newspaperman described the legislature of the time as filled with "briefless lawyers, farmless farmers, business failures, bar-

DIRECT DEMOCRACY: AN HISTORICAL ANALYSIS OF THE INITIATIVE, REFERENDUM AND RECALL PROCESS 34-44 (1977).

66. See CRONIN, *supra* note 13.

67. The direct primary was the earliest victory for the League in the legislature of 1908. At the time, it seemed a institutional bone thrown to them by the weak legislature; it proved to be the crucial tool in unseating the railroad from politics. See Key & Crouch, *supra* note 54, at 433-34.

68. *Id.*

69. *Id.* at 440-41.

room loafers, Fourth of July orators [and] political thugs. The larger part of these men were ignorant, illiterate, lazy, politically and personally immoral."⁷⁰ Oregon's analog to Dr. Haynes was William S. U'Ren, a state legislator, originally from Wisconsin, who migrated to Oregon in 1889 because his doctor recommended a milder climate for his tuberculosis.⁷¹

The story of the achievement of direct democracy in Oregon is a long and interesting one, replete with crooks, broken deals and even new age mysticism.⁷² The most notable events for our purposes occurred when, after failing to achieve approval of the referendum in the Oregon legislature, U'Ren led a walk out of his Populist bloc and prevented the legislature from convening a quorum. This "Hold-up Legislature" of 1897 proved the Progressive argument as to legislative incompetence (caused by themselves in this instance), and this news, combined with the 400,000 pieces of literature disseminated by advocates to Oregon's mere 80,000 voters, eventually convinced the Republican Party bosses that they had more to lose in future electoral support than to gain from obstruction of the direct democracy amendments.⁷³ With permission granted by the bosses, the measure sailed through two consecutive legislative sessions and the voters passed the constitutional amendment by an 11-to-1 margin in 1902.⁷⁴

As explained further below, of the sixty-four measures passed by Oregonians in the first eight years of direct democracy, several regulated and taxed the large corporations in that state. Consequently, the Pacific States Telephone and Telegraph Company challenged the initiative process itself, eventually arguing before the United States Supreme Court that the system violated the "Guarantee Clause" of the United States Constitution.⁷⁵

70. Burton Hendrick, *The Initiative and Referendum and How Oregon Got Them*, 37 MCCLURE'S MAG. 235, 240 (1911).

71. Bradley Avakian, *Where Shall We Take The Initiative? Oregon's Initiative Process is Alive, but it's not Necessarily Well*, 56 OR. ST. B. BULL. 9 (1996).

72. Several Oregon populists, including U'Ren, formed a group called "the Milwaukie Alliance," which, in addition to hosting visiting dignitaries such as Henry George and Susan B. Anthony, would hold seances to speak with the dead. Milwaukie, Oregon, was a center for many of the state's Swiss immigrants who were well acquainted with the experience of their homeland with the initiative and referendum. David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System"*, 67 TEMP. L. REV. 947, 949-50 (1994).

73. *Id.* at 953-55.

74. *Id.* at 956.

75. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). Art. IV, § 4 of the U.S. Constitution provides in relevant part: "The United States shall guarantee to every State in this Union a Republican Form of Government . . ."

Writing for a unanimous Court, Chief Justice Edward White rejected the company's argument and reemphasized the precedents declaring the Guarantee Clause to be a non-justiciable political question.⁷⁶ The decision erased any doubt as to the constitutional status of direct democracy. To this day, the constitutional challenges open to plaintiffs seeking federal invalidation of initiatives are identical to those for judicial review of ordinary state legislation.⁷⁷ And as Justice Scalia's dissent in *Romer*⁷⁸ further suggests, at least some members of the Supreme Court continue to share the Progressives' view that the initiative and referendum are the paradigmatic expression of popular will.

III. The Progressive Legacy of Direct Democracy

A similar interest group dynamic as that described in Oregon and California happened throughout the West.⁷⁹ Progressives in other one-party Republican states, such as South Dakota, used direct democracy to reduce the influence of the railroads or, as in Colorado, the major utility companies that dominated the state legislature.⁸⁰ In a short burst of plebiscitary activity following the introduction of these methods, the Progressives threw any and every issue at the voters, often misjudging the political winds of the time. Several of the most notable measures are seen in Tables III–V on the following pages.

The data from the early elections reveal that the installation of direct democracy did not necessarily translate into promotion of the Progressive program.⁸¹ In fact, in Oregon where some advocates, including U'Ren, saw direct democracy as the key to enacting Henry George's populist

76. *Pacific States Tel. & Tel. Co.*, 223 U.S. at 142–43 (citing *Luther v. Borden*, 7 How. (48 U.S.) 1 (1849)).

77. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990). For a current critique of this jurisprudence, see Hans A. Linde *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993). State courts, however, will often strike down or modify initiatives and referenda. James D. Gordon, III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298 (1989).

78. *Romer*, 116 S. Ct. at 1634, 1637 (Scalia, J. dissenting).

79. See Spoonholtz, *supra* note 29, at 46–56 (describing the development of direct democracy in Ohio, Missouri, Washington, South Dakota, Oklahoma, Oregon and California).

80. MCCORMICK, *supra* note 42, at 334–36.

81. See Spoonholtz, *supra* note 29, at 51, n.22 (noting that initiatives dealing with issues of organized labor met with mixed success in California, Colorado and Washington during the 1910s).

TABLE III. RESULTS FROM THE 1906 OREGON ELECTION^a

	PERCENT FOR	PERCENT AGAINST	TOTAL VOTES CAST
<i>Constitutional Amendment to grant women's suffrage</i>	43.9	56.1	83,977
<i>Amendment of local option liquor law in favor of anti-prohibitionists</i>	36.2	63.8	76,052
<i>Prohibiting the issuing of free passes on Railroads and other public service corporations</i>	77.3	22.7	74,060
<i>Gross-earnings tax on sleeping and refrigerator car companies and oil companies</i>	91.5	8.5	76,076
<i>Gross-earnings tax on express, telephone and telegraph companies</i>	91.8	8.2	77,232

^a Entries in italics are initiatives, normal print for referenda. A total of eleven measures were presented: Four of the five Constitutional Amendments (all initiatives) and four of the six statutes (all but one initiatives) passed. Total voter turnout in the election was 99,445. Source: BARNETT, *supra* note 58, at 242.

TABLE IV. RESULTS FROM THE 1908 SOUTH DAKOTA ELECTION^b

	PERCENT FOR	PERCENT AGAINST	TOTAL VOTES CAST
			90,480

TABLE IV. RESULTS FROM THE 1908 SOUTH DAKOTA ELECTION^b

	PERCENT FOR	PERCENT AGAINST	TOTAL VOTES CAST
<i>Local Option Liquor law (sponsored by prohibitionists)</i>	48.6	51.4	80,480
Residency requirement for divorces (anti-divorce lawyers)	60.8	39.2	99,005
Law banning killing of Quail	66.9	33.1	97,614
Law banning theater on Sundays	50.2	49.8	96,384

^b Represents all votes in the election. Total vote for Governor in 1908 was 113,904. Source: OBERHOLTZER, *supra* note 11, at 394.

TABLE V. RESULTS FROM THE 1914 CALIFORNIA ELECTION^c

	PERCENT FOR	PERCENT AGAINST	VOTE TOTAL (APPROX.)
<i>Prohibition (Con. Amend.)</i>	40.4	59.6	879,000
<i>Abolition of Poll tax (Con. Amend.)</i>	52.0	48.0	779,000
<i>Eight hour labor law</i>	33.5	66.5	842,000
<i>Prohibit Prize Fights</i>	55.8	44.2	740,000
Act allowing injunction and abatement of Red-light (vice districts)	53.3	46.7	754,000

^c Twenty one measures total: Two of the eight Constitutional Amendments and three of the nine statutes (all initiatives) and three of the four referenda passed. Source: KEY & CROUCH, *supra* note 38, at 462, 475, 496.

"single tax" program,⁸² the voters rejected the measure in three consecutive elections between 1908 and 1912.⁸³ The same was true for women's suffrage in the 1906, 1908, and 1910 elections. Only in 1912 could the suffragists muster a majority to give women the right to participate in the new Oregon democracy.⁸⁴ Prohibition also received a mixed reception. South Dakotans rejected it in 1908 and 1910, as did Californians in 1914 and 1918, while 51.8 percent of Oregonians who cast a ballot (a slim 3,118 vote margin) approved a local option liquor initiative in 1904.⁸⁵

Although several measures taxing and regulating corporations passed quickly after the onset of direct democracy, the so-called "monied interests" originally attacked by the Progressives quickly learned to use direct democracy to their advantage. Among other tactics, they began to demand referendums on any piece of legislation hostile to their interests, thereby postponing enactment at least until the next general election.⁸⁶ From the Progressive Era to the present, more skillful corporate as well as other established interests have used the tools of direct democracy to secure the types of particularistic advantages that made men like William S. U'Ren and Dr. John Haynes cringe.⁸⁷

While the Progressives effectively addressed the corruption in the state governments of their era, the devices of direct democracy met with only partial successes as vehicles for achieving their social agenda. The Progressives tried to do the impossible, argues Hoftsader:

82. JAMES D. BARNETT, *THE OPERATION OF THE INITIATIVE, REFERENDUM, AND RECALL IN OREGON* 34-35 (1915).

83. *Id.* at 243, 244, 248. The defeated single tax would have applied only to owners of undeveloped land. Oregon did, however, pass in a 1910 initiative one of the first, liberal worker's compensation laws. *Id.* at 34, 246; see generally Spoonholtz, *supra* note 29, at 50 (describing the frequent if unsuccessful use of direct democracy by "single-tax" advocates).

84. BARNETT, *supra* note 82, at 247. Suffragists also lost by about 15% in Oklahoma in 1910. OBERHOLTZER, *supra* note 14, at 419. See also Spoonholtz, *supra* note 29, at 52 (discussing the twenty proposals related to women's suffrage submitted by initiative prior to the 19th Amendment's passage).

85. BARNETT, *supra* note 82, at 241; OBERHOLTZER, *supra* note 14, at 394. Oklahomans also rejected a similar law in 1910. *Id.* at 419; see Spoonholtz, *supra* note 29, at 51, 54-55, 58 (noting the process by which Prohibitionists exploited the initiative process to present twenty-nine proposals to voters and achieve statewide prohibition in ten states); PETER H. ODEGARD, *PRESSURE POLITICS: THE STORY OF THE ANTI-SALOON LEAGUE* 116-19 (1928).

86. For example, the railroads in South Dakota successfully defeated a regulation that would have required the placing of "head-lights of not less than 1500 candle power." OBERHOLTZER, *supra* note 14, at 395. See Spoonholtz, *supra* note 29, at 54 (describing how railroad and mining corporations used direct democracy to their advantage in Colorado, Arizona and Missouri).

87. See DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 145-65 (1984).

[They tried] to institutionalize a mood. When the mood passed, some of the more concrete reforms remained; but the formal gains for popular government . . . lost meaning because the ability of the public to use them effectively lapsed with the political revival that brought them in, and the bosses and the interests promptly filtered back.⁸⁸

In the long run, perhaps, what direct democracy may have institutionalized was a suspicion of legislatures. Writers soon after the onset of direct democracy noticed a reformulation of the legislative role. They observed a tendency toward buck-passing to the electorate,⁸⁹ a blurring of constitutional and statutory law,⁹⁰ and poor draftsmanship of laws.⁹¹ With a renewed distrust of the legislative process and a concomitant rise in direct democracy activity, these criticisms have become even more valid in recent years than they were at direct democracy's birth. The recent use of the initiative and referendum has, perhaps, proved the Mugwumps correct: Direct democracy is merely a tool used to take a poll of electoral majorities in a given year. It can be used for Progressive, conservative, or nefarious ends.⁹²

With the decline of Progressivism came a corresponding decline in the use of the initiative and referendum. The 1950s and 1960s marked a low ebb in the use of direct democracy with only 302 measures appearing on the ballot in those two decades. In the 1980s and 1990s, however, several scholars have noted the meteoric rise in the successful use of direct democracy—over 350 measures will likely appear on state ballots throughout the present decade.⁹³ Liberals and conservatives, politicians and

88. HOFSTADTER, *supra* note 17, at 266; *see also* George Kennan, *The Direct Rule of the People*, N. AM. REV. 157 (1913) ("The bosses as well as the people can initiate bills and make recalls, and they are far more shrewd and resourceful than the people are in the art of political manipulation.").

89. *See* William Munro, *THE INITIATIVE, REFERENDUM, AND RECALL* 3 (1912). *See also* Spoonholtz, *supra* note 29, at 60.

90. *See* A. Lawrence Lowell, *The Referendum in the United States*, Q. REV. (June 1911), *reprinted in* *THE INITIATIVE, REFERENDUM, AND RECALL*, *supra* note 42, at 126, 138; OBERHOLTZER, *supra* note 14, at 476.

91. *See* John Bell Sanborn, *Popular Legislation in the United States: the Value of the System*, 23 POL. SCI. Q. 587-603 (1908) *reprinted in* *SELECTED ARTICLES ON THE INITIATIVE AND REFERENDUM* 149, 155-57 (Edith M. Phelps ed., 1914).

92. What might the Progressives say of the tax cutting scheme of the 1978 California Proposition 13 and the "tax revolt" that ensued in other states? Or of similar government spending limitations that accompanied that movement? *See* JOSEPH F. ZIMMERMAN, *PARTICIPATORY DEMOCRACY: POPULISM REVIVED* 85-88 (1986); Spoonholtz, *supra* note 29, at 60.

93. *See, e.g.,* ZIMMERMAN, *supra* note 92, at 159-182; David B. Magleby, *Direct Legislation in The American States*, in *REFERENDUMS AROUND THE WORLD* 218, 230-31

citizens have turned to the ballot to push through proposals they believe require a departure from the "normal" legislative process. A discussion of the causes of this increased use would note the rise of an initiative industry for collecting signatures and promoting measures, the growing manipulation of the initiative and referendum by politicians seeking to frame electoral issues,⁹⁴ and the expanded use of direct democracy by exactly those bodies who struck fear into the Progressive heart not long ago: corporations.⁹⁵

The analogy of the present era to the age of the Progressives is not difficult to draw. A similar dislike of legislatures has arisen in response to a new set of fears of interest group domination of the political process. In terms starkly similar to those of the Progressive *Arena* a century ago, *Time* magazine summarized the message of American public opinion in the 1990 election as "a blunt and resounding 'no'! No to the lies and intrigues of Washington, no to spending by politicians who can't be trusted with the public's dollars, no to a money-greased political system dedicated to self preservation rather than leadership."⁹⁶ While few pollsters measure opinion toward state legislatures, the low regard with which Americans view Congress is infamous. Seventy-five percent give Congress a "poor" rating in job performance, sixty percent say they are angry or disgusted with Members of Congress, and eighty-six percent feel "Congress is too heavily influenced by interest groups when making decisions."⁹⁷

Hating politics, some might argue, is an American tradition, but, as in the Progressive Era, this animosity toward institutions has led to substantive reforms. Twenty-two states, including the western states of California, Oregon, Washington, Oklahoma, Montana, Colorado, Nevada and South Dakota have instituted term limits.⁹⁸ And eleven percent of all

(Austin Ranney & David Butler eds., 1994).

94. In the 1990 race for governor of California, all three candidates—Diane Feinstein, John Van De Kamp and Pete Wilson—sponsored initiatives. "For a politician, the initiative process is a way to heighten visibility, appeal to issue constituencies that might otherwise not vote in an election, and raise money from issue activists." Magleby, *supra* note 93, at 234.

95. See Eugene C. Lee, *The American Experience*, in *THE REFERENDUM DEVICE* 46, 51 (Austin Ranney ed., 1981).

96. Nancy Gibbs, *Keep the Bums In*, *TIME*, Nov. 19, 1990, at 32; see also E.J. Dionne Jr., *WHY AMERICANS HATE POLITICS* (1991).

97. JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS* 54, 58, 64 (1995) (poll taken between July and October 1992). Similar figures for the Presidency are: 62% give a "poor" job approval rating, 32% are angry and disgusted; for the Supreme Court, the figures are 46% and 7% respectively. *Id.*

98. Linda R. Cohen, *Terms of Office, Legislative Structure, and Collective Incentives*, in *CONSTITUTIONAL REFORM IN CALIFORNIA*, 239, 241 (Bruce E. Cain & Roger G. Noll eds.,

initiatives (17 out of 155) in the 1990 and 1992 elections were on the subject of term limits.⁹⁹ Despite a Supreme Court decision declaring term limits for members of Congress unconstitutional,¹⁰⁰ a full eighty-three percent of Americans favor term limits for their senators and representatives.¹⁰¹ Americans express a similar preference in favor of a balanced budget amendment, campaign finance reform of whatever nature, and open primaries.¹⁰²

Political Action Committees (PACs), "special interests" and lobbyists serve the same rhetorical purposes of present-day reformers that the corporations and trusts did for the Progressives. But the sheer plurality of terms we use today to describe the "interests" looming behind the legislatures shows how the analogy breaks down in important respects. In current western legislatures, there is nothing on par with the "legislative lieutenants" of the Southern Pacific Railroad at the turn of the century. No longer can one point to "the" real power center behind the legislature. Certainly, powerful interest groups, such as the National Rifle Association, American Association of Retired Persons, as well as various economic, religious, or ethnic groups can bring inordinate pressure on legislators with funds and votes on their particular issue. But no oligarchy or monopoly interest has "controlled" the political process in any given state for some time.¹⁰³ To the degree that the Progressives "institutionalized a mood" by codifying the initiative, referendum and recall in state constitutions, the mood is a lasting suspicion of legislatures rather than a propensity to enact "Progressive" social policy.

IV. Conclusion

As the nation expanded toward the Pacific in the late nineteenth century, New Englanders left their town meetings behind and planted new

1995); TIMOTHY HODSON ET AL., *Leaders and limits: Changing Patterns of State Legislative Leadership Under Term Limits*, SPECTRUM: THE JOURNAL OF STATE GOVERNMENT, Summer 1995, at 6.

99. See MAGLEBY, *supra* note 87, at 238.

100. See *U.S. Term Limits, Inc. v. Thornton* 115 S. Ct. 1842 (1995).

101. See HIBBING & THEISS-MORSE, *supra* note 97, at 77-79; *U.S. Term Limits, Inc.*, 115 S. Ct. 1842.

102. In the most recent Republican primary, California voters passed an initiative allowing voters, regardless of party affiliation, to vote for candidates in either political party's primary.

103. See generally ROBERT DAHL, *WHO GOVERNS?* (1961); NELSON W. POLSBY, *COMMUNITY POWER AND POLITICAL THEORY* (1963) (early empirical research disproving Marxist stratification theory as applied to American cities).

democratic institutions in the fertile ground of the American West.¹⁰⁴ For many states, direct democracy was their mode of entry into the Union as they established constitutions and capital cities in their original referenda. In addition, the turbulence of the 1890s brought with it a pluralization of western America where new groups of suffragists, prohibitionists, farmers' organizations and other social and economic groups confronted the stagnant and sham political institutions controlled by the corporate trusts. With charismatic leadership from notable personalities, such as William S. U'Ren and Hiram Johnson, western Progressives sought, above all, to create the means by which "the people" could take back control of their government.

What began as tools for the majority to liberate its democratic institutions from the clutches of a few powerful corporations has evolved into a bludgeon used by interest groups to thwart the legislative process. These devices gained prominence when "minorities" claiming "rights" meant railroad interests trying to obstruct the "general will" through protection of their property. Today, with rallying cries such as "Save our State," "Three Strikes and You're Out," or "The California Civil Rights Initiative" interest groups in western states have used the initiative process both to target a whole different set of minorities and to reorganize priorities on the national agenda.¹⁰⁵

This potential did not escape the Framers of the United States Constitution who, fearing majority and minority tyranny equally, sought to create checks and balances against the aggrandizement of power by either. In particular, James Madison warned that "a pure democracy . . . can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole . . . and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual."¹⁰⁶ The proposed solution—a tripartite division of power wherein "ambition would counteract ambition"—was "Progressive," if not radical, for its time. However, the Framers admitted the inherent tension between representation and democracy—a tension that underlies the current and former waves of citizen-initiated legislation.

104. See OBERHOLTZER, *supra* note 14, at 225.

105. See Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. OF POL. SCI. 245, 245, 261–62 (1997) (concluding that "[c]itizen initiatives that restrict civil rights experience extraordinary electoral success: voters have approved over three-quarters of these, while endorsing only a third of all initiatives and popular referenda."); see also *supra* note 6 (citing cases).

106. THE FEDERALIST NO. 10 at 81 (JAMES MADISON) (Clinton Rossiter ed., 1961).

Madison wrote:

If men were angels, no government would be necessary. . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is no doubt the primary control of the government; but experience has taught mankind the necessity of auxiliary institutions.¹⁰⁷

Each election in which voters pass hurried judgment on a catalogue of citizen-sponsored propositions provides additional “experience” supporting the timeless validity of Madison’s original, truly progressive argument.

107. THE FEDERALIST NO. 51 at 322 (JAMES MADISON) (Clinton Rossiter ed., 1961).