THE INITIATIVE AND REFERENDUM: STATE LEGISLATION

C. H. TALBOT

MADISON, WISCONSIN
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INTRODUCTION

The great agitation throughout the country on the subject of "Initiative and Referendum" has brought many demands from the people of this state and others for our bulletins on this subject. This bulletin has been out of print for some time and we have deemed it wise to have it revised and brought up to date to meet the increasing demand. The work has been done by Mr. C. H. Talbot.

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PEOPLE'S PROGRESSIVE GOVERNMENT LEAGUE OF OREGON. Introductory letter containing proposed initiative measures for 1910, with explanations of same. Portland, Ore., Aug. 1909.
Explains the desirability of presenting initiative measures to the legislature for consideration and the framing of competing measures (p. 6); and proposes an amendment making this change (pp. 11–12).
Also recommends the requirement of a vote of three-fourths of all the members elected to each house, on a separate roll-call, for the passage of "emergency" measures (pp. 6, 12, 13).

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HISTORY

The "Initiative" and the "Referendum" are new terms for old institutions.

The initiative[1] may be defined as the power the people reserve to themselves to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislature.

The referendum[1] may similarly be defined as the power the people reserve to themselves to approve or reject at the polls any act passed by the legislative assembly.

The forms of the initiative and the referendum may be described as obligatory or as optional in their operation upon the electorate, and as advisory or mandatory in their operation upon the legislature.

The referendum is obligatory when a law must be submitted to the people, and optional when a law is submitted only upon petition by a certain number of voters.

Under the mandatory initiative and referendum,

[1] Compare the definitions in the constitutions of Me., Const. (Amend. 1908) art. 4, part 1, sec. 1; Mo., Const. (Amend. 1908) art. 4, sec. 1; Mont. Const. (Amend. 1906) art. 5, sec. 1; Okla. Const. 1907, art. 5, sec. 1; Ore. Const. (Amend. 1902) art. 4, sec. 1; S. D. Const. (Amend. 1898) art. 3, sec. 1; and in the proposed amendments for Ark. Acts, 1909, p. 1238; and Nev. Statutes, 1908-9, p. 347.

the direct vote of the people is conclusive in the enactment of legislation. Under the advisory system, the voters can instruct their representatives by direct ballot. To make the system effective it is necessary to pledge representatives to obey the will of their constituents when expressed by referendum vote.

Public opinion laws merely secure the expression of public opinion on questions of public policy.

Early Uses of Direct Legislation

Local legislation

The Swiss Landsgemeinde illustrates an early use of direct legislation in local affairs. The old New England town meeting, where measures were proposed and adopted or rejected at the will of the electors, affords another typical example.

The state-wide initiative and referendum

The state-wide referendum for the adoption of state constitutions is a familiar institution in the United States.

The first constitution submitted to a direct vote of the people was that proposed by the General Court of Massachuetts in 1778.

At the present time Delaware is the only state in the Union in which a referendum is not required for the adoption of constitutional amendments.

The state-wide initiative for constitutional amendments was first provided for in the Georgia Constitution of 1777, in the following language:—

"Art. LXIII. No alteration shall be made in this constitution, without petitions from a majority of the counties, and the petition from each county to be signed by a majority of voters in each county within this state; at which time the

assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid. Thorpe, American Charters, Constitutions and Organic Laws, vol. 2, p. 785.

For other instances of direct legislation in our early history see Connecticut (Fundamental Orders of Connecticut, 1638–39), Thorpe, (American charters, constitutions, etc., vol. 1, p. 522); and Rhode Island (Charter of Rhode Island and Providence Plantations), vol. 6, pp. 3214–16.

The right to instruct

The right to instruct representatives was commonly exercised in the early constitutional history of this country.

The constitution of Massachusetts, adopted in 1780, expressly asserts the right of the people "to give instructions to their representatives." In 1783 the instructions from Boston ran: "It is our unalienable right to communicate to you our sentiments; and when we shall judge it necessary or convenient, to give you instructions on any special matter, and we expect you will hold yourselves at all times bound to attend to and to observe them."

For other instances of the express reservation of the right to instruct, see the Const. of Pa., 1776, art. XVI. (Thorpe, American charters, constitutious, etc., vol. 5, p. 3084); the Const. of N. C., 1776, art. XVIII. (id., vol. 5, p. 2788); and the Const. of N. H., 1784, art. XXXII. (id., vol. 4, p. 2457).

The reference of acts by legislatures

After the adoption of written constitutions, a number of judicial decisions were handed down which held that the reference of an act to a vote of the people of a state was a delegation of legislative power and therefore unconstitutional.

For early decisions putting forth the above doctrine, see the following cases directly in point: Rice v. Foster, 4 Har-

ring. (Del.), 479 (1847); Thorne v. Cramer, 15 Barb. 112 (1851); Bradley v. Baxter, 15 Barb. 122 (1853); and Barto v. Himrod, 8 N. Y. 483 (1853); and Santo v. State, 2 Ia. 165 (1855). See also *dicta* in the following cases: Parker v. Commonwealth, 6 Pa. St. 507 (1847); State v. Copeland, 3 R. I. 33 (1854); Stein v. Mayor, 24 Ala. 591 (1854); State v. Swisher, 17 Tex. 441 (1856); State ex rel. Dome v. Wilcox, 45 Mo. 458 (1870); and State ex rel. Sandford v. Court of Common Pleas, 36 N. J. Law, 72 (1872).

For the contrary doctrine, and sustaining of such acts, see Johnson v. Rich, 9 Barb. 680 (1851); State v. Parker, 26 Vt. 357 (1854), and Smith v. Janesville, 26 Wis. 291 (1870), cases directly in point. Also *dicta* in Wales v. Belcher, 20 Mass. 508 (1827); People v. Reynolds, 5 Gilman (Ill.) 1 (1848); L. & N. R. R. Co. v. County Court, 33 Tenn. 637 (1854); State v. Noyes, 30 N. H. 279 (1855); Bull v. Read, 54 Va. (13 Grat.) 78 (1855); Manly v. Raleigh, 57 N. C. 370 (1859); Alcorn v. Hamer, 38 Miss. 652 (1860), and Locke's Appeal, 72 Pa. St. 491 (1873).

The following are leading cases on the two sides:

Holding state-wide reference of an act to the people unconstitutional: Rice v. Foster, Thorne v. Cramer, Bradley v. Baxter, Barto v. Himrod, and Santo v. State, all cited above; State v. Hayes, 61 N. H. 264 (1881); and opinions of the Justices, 160 Mass. 586 (1894). Also indicating such reference to be unconstitutional in *dicta:* Parker v. Commonwealth, State v. Copeland, State ex rel. Dome v. Wilcox, and State ex rel. Sandford v. Court of Common Pleas, all cited above; and Wright v. Cunningham, 115 Tenn. 445 (1905).

Holding state-wide reference of an act to be constitutional and valid: Johnson v. Rich, State v. Parker, Smith v. Janesville, all cited above, and State ex rel. Van Alstine v. Frear (Wis) 125 N. W. 961 (1910). Also indicating such reference to be constitutional in *dicta:* Wales v. Belcher, People v. Reynolds, L. & N. R. R. Co. v. County Court, Bull v. Read, Manly v. Raleigh, Alcorn v. Hamer, and Locke's Appeal, all cited above; Fell v. State, 42 Md. 71 (1875); Clarke v. Rogers, 81 Ky. 43 (1883); and Rutter v. Sullivan, 25 W. Va. 427 (1885).

The present status of the question is as follows:

Holding it unconstitutional: Del., Ia., Mass., N. H., N. Y.

Holding it constitutional: Vt., Wis.

Not adjudicated, but with dicta indicating such reference to be unconstitutional: Md., N. J., Tenn., Tex., Utah, Wash.

Not adjudicated, but with dicta indicating it constitutional and valid: Ala., Ark., Cal., Ga., Ill., Kan., Minn., Miss., N. C., Pa., R. I., S. C., Va., W. Va.

Reference prohibited by express constitutional provision: Ind., Ohio, and Ky. (except in certain specified cases).
Reference expressly permitted by constitutional provision: Me., Mich., Mo., Mont., Okla., Ore.

Special constitutional provisions

The adoption of constitutional provisions which expressly require the reference to a vote of the people of legislative acts on specified questions, is the next step in the history of direct legislation in the United States.

Provisions for the obligatory state-wide referendum on special questions are found quite generally in our state constitutions. They cover a variety of questions including suffrage, state boundaries and annexations of territory, the location of the seat of government and of state institutions, apportionment, the incurring of state indebtedness, the loaning of the state credit, banks and banking, state aid to railways, taxation, appropriations, sale of school lands, and provisions for education.

For typical illustrations of the obligatory referendum compare the following constitutional provisions:
Suffrage. Colo. Const. 1876, art. 7, sec. 2; N. D. Const. 1889, art. 5, sec. 122; S. D. Const. 1889, art. 7, sec. 2, Wis., Const. 1848. art. 3, sec. 1.
State boundaries and annexations of territory. W. Va. Const. 1872, art. 6, sec. 11.
Location of seat of government. Colo. Const. 1876, art. 8, sec. 2; Kan. Const. 1859, art. 15, sec. 8; Mont. Const. 1889, art. 10, sec. 2; Ore. Const. 1857, art. 14, sec. 1; Pa. Const. 1873, art. 3, sec. 28; S. D. Const. 1889, art. 20; Wash. Const. 1889, art. 14, sec. 1.
Location of state institutions. Tex. Const. 1876, art. 7, secs. 10 and 14; Wyo. Const. 1889, art. 7, sec. 23.
Apportionment. W. Va. Const. 1872, art. 6, sec. 50.
Public Credit. Cal. Const. 1879, art. 16; Colo. Const. 1876, art. 11, sec. 5; Idaho Const. 1889, art. 8, sec. 1; Ill. Const. 1870, art. 4, sec. 18; Ia. Const. 1857, art. 7, sec. 5; Kan. Const. 1859,

art. 11, sec. 6; Ky. Const. 1891, sec. 50; Mo. Const. 1875, art. 4, sec. 44; Mont. Const. 1889, art. 13, sec. 2; N. J. Const. 1844, art. 4, sec. 6; N. Y. Const. art. 7, sec. 4; R. I. Const. 1844, art. 4, sec. 13; S. C. Const. 1895, art. 10, sec. 11; Wash. Const. 1889, art. 8, sec. 3; Wyo. Const. 1889, art. 16, sec. 2.

Banks and banking. Ill. Const. 1870, art. 11, sec. 5; Ia. Const. 1857, art. 8, sec. 5; Kan. Const. 1859, art. 13, sec. 8; Mo. Const. 1875, art. 12, sec. 26; and Wis. Const. 1848, art. 11, sec. 5. Wisconsin provided for a double referendum, first, to determine whether a law should be submitted, and then by a second referendum, whether the law submitted should be adopted. (Changed by the amendment of 1902.)

State aid to railways. Minn. Const. (Amend. 1860) art. 9, sec. 2.

Taxation. Colo. Const. 1876, art. 10, sec. 11; Idaho Const. 1889, art. 7, sec. 9; Ill. Const. 1870, art. 4, sec. 33; Mont. Const. 1889, art. 12, sec. 9; Utah Const. 1895, art. 13, sec. 7.

Appropriations for public buildings. Colo. Const. 1876, art. 11, secs. 3–5; Ill. Const. 1870, art. 4, sec. 33.

Sale of school lands. Kan. Const. 1859, art. 6, sec. 5.

Provisions for education. Tex. Const. 1876, art. 7, secs. 10 and 14.

Recent constitutional amendments

Within recent years a number of states have adopted constitutional provisions establishing the initiative and referendum for general state legislation. These amendments provide for the optional initiative and referendum, whereas the older constitutional provisions for the referendum on special state questions are obligatory.

For recent constitutional provisions for direct state legislation, see S. D. Const. (Amend. 1898) art. 3, sec. 1; Utah, Const. (Amend. 1900) art. 6, secs. 1 and 22; Ore. Const. (Amend. 1902) art. 4, sec. 1; Nev. Const. (Amend. 1904) art. 19, secs. 1 and 2, (provides referendum only); Mont. Const. (Amend. 1906) art. 5, sec. 1; Okla. Const. 1907, art. 5, secs. 1–4, 6–8, and art. 24, sec. 3; Me. Const. (Amend. 1908) art. 4, part 1, sec. 1; id., part 3, sec. 1, and secs. 16–22; Mo. Const. (Amend. 1908) art. 4, sec. 1.

For proposed constitutional amendments, see Ark., Acts, 1909, p. 1238; Nev., Statutes, 1908–9, p. 347.

Advisory systems

The difficulty of securing constitutional amendments for the initiative and referendum has led to the development of other methods for securing at least partial systems of direct state legislation.

Public opinion laws. A public opinion system was enacted in Illinois in 1901. The electors of that state have voted upon a number of legislative questions; but as the candidates for the legislature were not pledged to obey the wishes of their constituents, these expressions of opinion have not been very effective in securing the legislation desired.

See Ill. Rev. Stats., 1905, c. 46, secs. 428, 429, p. 967 (Ill. Laws, 1901, p. 198).

The advisory system within parties. The advisory system within the parties at primary elections was adopted in Texas in 1905.

See Tex. Laws, 1905, First called session, c. 11, sec. 140.

Validity of the initiative and referendum.

The validity of state constitutional amendments reserving to the people the right of the initiative and referendum is firmly established.

The clause in the Federal Constitution which has been used as the basis for attack upon such provisions is art. 4, sec. 4: "The United States shall guarantee to every state in this union a republican form of government . . ."

In this connection the courts have held,

1. (a) That the jurisdiction over, and enforcement of, the above guaranty belongs to Congress.

"When the senators and representatives of a state are admitted into the councils of the union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority, and its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." Luther v. Borden, 7 How. (48 U. S.) 1, 42 (1849). Re-affirmed in Texas v. White, 7 Wall. (74 U. S.) 700 (1869), and Taylor v. Beckham, 178 U. S. 548 (1900). And

(b) It is a matter of public record that senators and representatives from S. D., Utah, Ore., Mont., Okla., Me., and Mo., (all states having the initiative and referendum) have all been, and are, "admitted into the councils of the union."

2. (a) "The state constitutions in force at the time of the adoption of the federal constitution afford unmistakeable evidence of what was republican in form, within the meaning of that term as employed in the constitution," and were guaranteed as republican in form by that instrument. Minor v. Happersett, 21 Wall. (88 U. S.) 162 (1875).

(b) The initiative powers upon constitutional amendments was expressly provided in the constitution of Georgia of 1777 (art. LXIII), (which was in force as the organic law of that state at the time of adoption of the federal constitution.)

3. "The initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. . . . The people have simply reserved to themselves a larger share of legislative power." Kadderly v. Portland, 44 Ore. 118 (1903), re-affirmed in Oregon v. Pacific States Telephone and Telegraph Co., 53 Ore. 162

(1909), and followed in Ex parte Wagner, 21 Okla. 33 (1908). Also, see State ex rel Lavin, et al. v. Bacon, et al., 14 S. D. 394 (1901), upholding the S. D. amendment.

"For additional decisions on direct legislation, see Hopkins v. Duluth, 81 Minn. 189 (1900); *in re* Pfahler, 150 Cal. 71 (1906); and Eckerson v. Des Moines, 137 Ia. 452 (1908).

For further references upon this matter, see The Federalist, No. 21 (by Hamilton) and No. 43 (by Madison); James Wilson, Works, vol. 1, p. 544 ("A Republic or Democracy, where the people at large retain the supreme power, and act either collectively or by representation.") Montesquieu, Spirit of Laws, vol. 1, Book 3, chapters 1–4; Story on the Constitution, 4th ed., vol. 2, c. 41, pp. 567–574; and Cooley, Const. Lim., 7th ed., c. 2, pp. 42–45. Compare also Lincoln's "Government of the people, by the people, for the people." (Gettysburg Address.)

The federal constitution of Switzerland, c. 1, art. 6, guarantees to every canton (state) a republican form of government, "representative or democratic."

LAWS AND JUDICIAL DECISIONS[2]

Foreign countries

Switzerland.[3] Fed. Const. 1874, art. 89. Federal laws, enactments, and resolutions are to be passed only by the agreement of the two councils. Federal laws must be submitted for acceptance or rejection by the people if the demand is made by 30,000 voters or by 8 cantons. The same principle applies to federal resolutions which have a general application, and which are not of an urgent nature.

art. 120. Whenever either council of the Federal Assembly passes a resolution for a complete revision of the federal constitution and the other council does not agree, or when 50,000 voters demand a complete revision, the question whether the federal constitution ought to be amended is, in either case, to be sub-

[2] The present study concerns itself only with the initiative and the referendum for general state legislation. Constitutional provisions for the obligatory referendum on special state questions, and state legislation relating to the initiative and referendum in local affairs, are not considered.

[3] See United States, 57th Cong., 2nd sess., House of Rep. doc. no. 1 (in serial no. 4440), p. 981-94, for an excellent account of the Swiss referendum and initiative, by Arthur S. Hardy, formerly U. S. minister to Switzerland. See, also, the recent report to the Department of State by Leo J. Frankenthal, American vice-consul, Berne, Switzerland, May, 1908, on "The Initiative in Switzerland," (found in United States, 61st Cong., 1st sess., Senate doc. no. 126.)

mitted to a referendum vote, and if the majority of the citizens who vote pronounce in the affirmative, there must be a new election of both councils for the purpose of undertaking the revision.

Fed. Law, June 17, 1874. This law provides the procedure for referendums.

Fed. Const. (Amend. 1891) art. 121. Partial revision may take place by popular initiative or in the manner provided for the passage of federal laws. The initiative may be invoked by the petition of 50,000 voters asking for the enactment, the abolition, or the amendment of certain articles of the federal constitution. When several subjects are proposed for amendment or for enactment in the federal constitution by means of the initiative, each must form the subject of a special petition. Petitions may be presented in general terms or as a completed proposal of amendment. When a petition is presented in general terms and the Federal Assembly is in agreement therewith, it is the duty of that body to draw up a project of partial revision in accordance with the sense of the petitioners, and to submit it to the people and the cantons for acceptance or rejection. If the Federal Assembly is not in agreement with the petition, the question of revision must be submitted to the vote of the people, and if the majority of those voting express themselves in the affirmative, the Federal Assembly must proceed with the revision in conformity with the popular decision.

When a petition is presented in the form of a completed project of amendment, and the Federal As-

sembly is in agreement therewith, the project must be referred to the people and the cantons for acceptance or rejection. In case the Federal Assembly is not in agreement with it, that body may prepare a project of its own, or recommend the rejection of the proposed amendment, and it may submit its own counter-project or its recommendations for rejection at the same time that the initiative petition is submitted to the vote of the people and the cantons.

art. 123. The amended federal constitution, or the revised portion thereof, is in force when it has been adopted by a majority of the citizens voting thereon, and by a majority of the cantons. In making up a majority of the cantons the vote of a half-canton is counted as half a vote.

Fed. Law, June 27, 1892. This law provides the mode of procedure for the initiative.

The Cantons. All the cantons have the initiative and referendum upon constitutional amendments; and all except Fribourg, upon statutes.

Great Britain. The question of introducing the referendum to settle disputes between the two houses has been discussed in the British Parliament.

See the Parliamentary Debates for June 24, 1907, p. 911, 924–5.

The question was somewhat widely debated in the recent budgetary conpaign (1909–10).

Commonwealth of Australia. Const. 1900. This constitution was ratified by referendum vote taken in the separate colonies in Australia from 1899 to 1900. Under chapter 8, section 128, of the constitution, proposed amendments must be submitted to a referendum vote. A double majority is required for ratification

namely, a majority of all the electors voting and also a majority vote in more than half of the states.

Norway. An interesting use of the referendum was made by the people of Norway in their separation from Sweden. A Resolve of the Storthing on July 28, 1905, provided for a referendum vote of the electors of the whole country to decide the question of the dissolution of the union. The referendum took place on August 13, 1905, and resulted in a practically unanimous vote for the dissolution.

United States

Arkansas. (Proposed Const. Amend.) Acts of Ark., 1909, pp. 1238–1240. The initiative and referendum apply to both statutes and constitutional amendments. Emergency acts are excepted from the application of the referendum.

Initiative petitions must be signed by 8 per cent of the legal voters, must include the full text of the measure proposed, and be filed with the secretary of state not less than four months before the election at which they are to be voted upon.

Referendum petitions must be signed by at least 5 per cent of the voters, and must be filed not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The legislative assembly may order a referendum on any act. The veto power of the governor does not extend to measures referred to the people.

Any measure referred to the people shall take effect and become a law when it is approved by a majority of the votes cast thereon.

Illinois. Rev. Stats., 1905, c. 46, Secs. 428–9, p. 967. (Laws, 1901, p. 198.) Under this law the submission of any question for an expression of public opinion may be secured on a written petition signed by 10% of the registered voters of the state. The petition must be filed with the proper election officers not less than sixty days before the election at which the question is to be considered. Not more than three propositions may be submitted at the same election and they are to be submitted in the order of filing.

Maine. Const. (Amend. 1908) art. 4, part 1, secs. 1 and 16–22. Resolves, 1907, c. 121, pp. 1476–81. This amendment applies to statutory but not to constitutional law. Certain specific exemptions are also made for statutory law.

Emergency bills are not subject to the referendum. Such bills may include measures immediately necessary for the preservation of the public peace, health, or safety, but may not include (1) an infringement of the right of home rule for municipalities; (2) a franchise or license to a corporation or an individual, extending longer than one year; or (3) provision for the sale, or purchase, or renting for more than five years of real estate. The emergency and also the facts creating the same must be set forth in the preamble of the act. A two-thirds vote of all the members elected to each house is necessary to pass an emergency measure.

Initiative bills may propose any measure, including bills to amend or repeal emergency legislation, but not to amend the state constitution. The petition must

set forth the full text of the measure proposed and be signed by not less than 12,000 electors, and be filed with the secretary of state or presented to either branch of the legislature at least 30 days before the close of its session. Proposed measures must be submitted to the legislature, and unless they are enacted without change, they must be submitted to the electors together with any amended form, substitute, or recommendation of the legislature, in such a manner that the people can choose between the competing measures, or reject both. When there are competing bills and neither receives a majority of the votes given for and against both, the one receiving the most votes is to be resubmitted by itself at the next general election, to be held not less than sixty days after the first vote thereon; but no measure is to be resubmitted unless it has received more than one-third of the votes given for and against both. An initiative measure enacted by the legislature without change is not to be referred unless a popular vote is demanded by a referendum petition. The veto power of the governor does not extend to any measure approved by vote of the people, and if he vetoes any measure initiated by the people and passed by the legislature without change and his veto is sustained by the legislature, the measure is to be referred to the people at the next general election.

The legislature may enact measures expressly conditioned upon the people's ratification by referendum vote.

Petitions for a reference of any act or any part or

parts thereof, passed by the legislature must be signed by not less than 10,000 electors, and be filed within ninety days after the recess of the legislature. The governor is required to give notice of the suspension of acts through referendum petitions and make public proclamation of the time when the referred measure is to be voted upon. Referred measures do not take effect until thirty days after the governor has announced their ratification by a majority of the electors voting thereon. If so requested in any initiative or referendum petition, a special election shall be held upon the act to be referendumed or the act initiated but not enacted without change by the legislature.

Missouri. Const. (Amend. 1908) Art. 4, Sec. 1. Laws 1907, p. 452–3. The initiative and referendum apply to both statutory law and to constitutional amendments. Initiative petitions require not more than 8% of the legal voters in each of at least two-thirds of the congressional districts in the state. Every petition must include the full text of the measure proposed, and must be filed not less than four months before the election at which it is to be voted upon.

The referendum may be ordered upon a petition signed by 5% of the legal voters in each of at least two-thirds of the congressional districts, or by the legislative assembly. Emergency measures are exempt from the referendum. Laws making appropriations for the current expenses of the state government, for the state institutions, and for the public schools are also exempt. Referendum petitions must

be filed not more than ninety days after the final adjournment of the legislative session. The veto power of the governor does not extend to measures referred to the people. A referred measure becomes a law when approved by a majority of the votes cast thereon.

Laws, 1909, pp. 554–6. This act establishes the procedure to facilitate the operation of the initiative and referendum provisions of the constitution. It specifically provides for the form of initiative and referendum petitions; the verification of signatures; judicial proceedings; the duties of officials relating to petitions; the manner of voting on measures; what measure shall be paramount in case of conflict; the canvass and returns of votes on measures, and for proclamations on paramount measures; and the penalties for violation of this act.

Montana. Const. (Amend. 1906) art. 5, sec. 1. Direct legislation is established for statutory, but not for constitutional law. Certain specific exemptions are also made for statutory law. The referendum may not be invoked for emergency measures.

Initiative petitions require 8% of the legal voters from two-fifths of the whole number of counties of the state. They must include the full text of the measure proposed, and must be filed not less than four months before the election at which they are to be voted upon.

Referendum petitions require 5% of the voters from each of two-fifths of the counties and they must be filed not later than six months after the final adjourn-

ment of the legislative session. The legislative assembly may also refer any act.

Any measure referred to the people is to remain in full force and effect unless the referendum petition is signed by 15% of the legal voters of a majority of the whole number of the counties of the state, in which case, the law remains inoperative until it is passed upon at an election and the result has been determined as provided by law. The veto power of the governor does not extend to measures referred to the people.

Rev. Codes, 1907, vol. 1, part III, title I, c. II, art. X., secs. 106–115, (Laws, 1907, c. 62). This law establishes the procedure for carrying the direct legislation provisions of the constitution into effect. It definitely sets forth the requirements as to the form of petitions; the verification of signatures; the duties of officials in submitting petitions; the publication and distribution of the title and text of measures and of arguments; the manner of conducting the elections and of canvassing the vote; and the proclamation of the governor declaring the enactment of the approved measures.

Provision is made for the official distribution of the text of measures to all the electors in the state. In addition, arguments for or against any proposed measures may be supplied at the expense of the parties interested; and such arguments when printed in pamphlet form of specified size and style, will be mailed by the state bound in with the official copy of the measure to each voter.

Parties filing initiative petitions may supply argu-

ments for and opposing parties may supply arguments against the measures proposed. In the case of referendums, any person may supply arguments for or against the referred measures; but the secretary of state is not obliged to receive any pamphlets for distribution unless a sufficient number is furnished to supply one to every legal voter in the state.

Nevada. Const. (Amend., 1904) art. 19, secs. 1 and 2. A referendum may be ordered on petition of 10% of the voters. When a majority of the electors voting at a state election by their votes signify approval of a law or resolution, such law or resolution stands as the law of the state, and cannot be overruled, annulled, set aside, suspended, or in any way made inoperative except by the direct vote of the people. When such majority so signifies disapproval the measure is void and of no effect.

Statutes, 1908–9, c. 188. This law provides the procedure for submitting acts of the legislature to a vote of the people in accordance with the referendum provisions of the constitution. Petitions must be filed with the secretary of state not less than four months before the general election. The act provides for the verification of signatures; the duty of officials in submitting the question; and the counting and canvassing of the votes cast thereon.

(Proposed Const. Amend.) Statutes of Nev. 1908–9, Resolution No. XVI, part 347–349. The initiative and referendum power is reserved to the people, and applies to laws and constitutional amendments.

Initiative petitions require 10% of the qualified elec

tors and must be filed with the secretary of state not less than thirty days before any regular session of the legislature. The secretary of state transmits the same to the legislature as soon as it convenes and organizes. Such measures take precedence of all measures of the legislature except appropriation bills, and must be enacted or rejected without change or amendment within forty days. If it is enacted by the legislature and approved by the governor it becomes a law, but is subject to referendum petition.

If it is rejected by the legislature, or if no action is taken thereon within forty days, the secretary of state must submit the same to the voters for approval or rejection at the next general election; and if a majority of the votes cast thereon approve of it, it becomes a law and takes effect from the date of the official declaration of the vote. An initiative measure so approved by the voters cannot be annulled, set aside or appealed by the legislature within three years.

If the legislature rejects an initiative measure, it may, with the approval of the governor, propose a different measure on the same subject, in which event both measures must be submitted to the voters at the next general election. If the conflicting measures submitted shall both be approved by a majority of the votes severally cast for and against each of them the measure receiving the highest number of affirmative votes thereupon becomes a law as to all conflicting provisions.

This amendment is self-executing but legislation may be enacted especially to facilitate its operation.

Oklahoma. Const. 1907, art. 5, secs. 1–4, 6–8, and art. 24, sec. 3. The initiative and referendum apply to constitutional and to statutory law. Emergency measures are exempt from the referendum provisions.

Legislative measures may be proposed by 8%, and amendments to the constitution by 15% of the legal voters. Initiative petitions must contain the full text of the measure proposed.

A referendum may be ordered by 5% of the legal voters. Petitions for referred measures must be filed not more than ninety days after the final adjournment of the legislature. Petitions and orders for the initiative and referendum must be filed with the secretary of state and be addressed to the governor who must submit them to the people.

Initiative measures require a majority of the votes cast at the election, while only a majority of the votes cast on a referred measure are necessary to give it effect. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislature. The legislature may refer any act to a vote of the people. The veto power of the governor does not extend to measures voted on by the people.

The explicit statement is also inserted that "the reservation of the powers of the initiative and referendum shall not deprive the legislature of the right to repeal any law, or propose or pass any measure which may be consistent with the constitution of the state and the constitution of the United States."

In the light of the experience of older states that have adopted direct legislation in state affairs, this statement seems superfluous. The provisions of the state constitutions which reserve direct legislative power to the people do not contemplate the restriction of initiative power in the legislature; the power constitutionally delegated to representatives to initiate measures or to repeal laws still remains. The people merely reserve the right to propose measures and to enact or reject either initiative or legislative measures independent of the legislative assembly. For a discussion of this point, see Kadderly v. Portland, 44 Or. 118 (1903).

Gen. Stats., 1908, c. 36, (Laws, 1907–8, c. 44). This act carries into effect the initiative and referendum powers of the above constitutional provisions. It prescribes the forms of initiative and referendum petitions, and provides for the verification of signatures. Provisions are made for judicial proceedings; the wording of the ballot; title of the measure; proclamation by the governor giving the substance of the measure and the date of the referendum vote thereon; the publication and distribution to all the voters of the state of a pamphlet containing the text of the measures to be voted upon and arguments for and against the same; resubmission for a measure receiving the greatest number of votes, if it has received more than one-third of the votes cast for and against both bills, in the case of competing measures both of which were defeated; the canvass and return of votes and proclamation by the governor in the case of the adoption of conflicting measures; and penalties for violation of this act.

The procedure prescribed is not mandatory, but if substantially followed is sufficient.

The publication and distribution of the text of pro-

posed measures and of arguments favoring or opposing them is as follows: Arguments shall be prepared for and against each measure to be submitted to a vote of the people of the state, the length of arguments not to exceed 2,000 words for each side, of which one-fourth may be in answer to opponents' arguments. For one side the arguments shall be prepared by a joint committee of the house and senate, and for the other by a committee representing the petitioners. When the legislature submits a competing bill the argument against it is prepared by the committee that prepared the affirmative for the opposing bill. Where the legislature submits any other question the argument for the negative is prepared by a committee representing the members in the legislature who voted against the substance of the measure. The first part of each argument must be completed not later than two weeks after the governor's announcement of the submission of the measure. Twenty-five copies must be filed with the secretary of state who must at once deliver twenty–three copies to the chairman of the opposing committee. Each committee must file its answer within two weeks. In no case, however, shall the time be so great as to bring the completion of the argument nearer than 100 days before any regular election, or 40 days before any special election, at which the measure is to be voted upon. Where the time for preparing the arguments is less than four weeks, it is divided equally between the two parties.

Before the primary election held prior to the general

election the secretary of state must forward to the county clerk pamphlets containing copies of the measures, arguments, official ballot, (and a table of contents) in sufficient numbers to supply all the voters in all the counties of the state and an additional number equal to ten per cent of such number of voters. At the time of furnishing the primary election supplies, each county clerk must furnish each election inspector his quota for each precinct wherein a primary is to be held, and it is made the duty of the inspector to furnish every voter a copy of the pamphlet on the day of the primary election. All copies remaining, must be preserved by the inspector and be by him distributed to electors who are unsupplied with same. Provisions is also made for the distribution of pamphlets before a special referendum election.

Oregon. Const. (Amend., 1902) art. 4, sec. 1. The initiative and referendum apply to constitutional and to statutory law, but the referendum may not be invoked upon emergency measures.

Every initiative petition must contain the full text of the measure proposed, must be signed by at least 8% of the legal voters, and must be filed not less than four months before the election at which it is to be voted upon.

Referendum petitions must be signed by at least 5% of the voters, and must be filed not more than ninety days after the final adjournment of the legislative assembly. The legislative assembly may order a referendum on any act. The veto power of the

governor does not extend to measures referred to the people.

Any measure referred to the people becomes a law when it is approved by a majority of the votes cast thereon.

"The initiative and referendum amendment does not abolish or destroy the republican form of government or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power. . . .

"Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto bills passed and approved by the legislature and the governor; but the legislative and executive departments are not destroyed. . . . Laws proposed and enacted by the people under the initiative laws of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will." Kadderly v. Portland, 44 Or. 118 (1903).

Laws, 1907, c. 226. This act facilitates the operation of the initiative and referendum powers reserved by the people, regulates elections thereunder, and provides penalties for violations. The law definitely prescribes the form of initiative and referendum petitions; the manner of vertifying signatures; the duties of officials in submitting measures; the method of canvassing and making returns; and the declaration of the enactment of approved measures.

The following definite provision is made for the publication and distribution of the text of proposed measures and for arguments advocating or opposing the questions submitted:—Before any election at which any proposed law or amendment to the constitution is to be submitted to the people, the secretary of state is required to have printed in pamphlet form the text of

each measure to be submitted, together with the title as it will appear on the official ballot. Parties filing initiative petitions have the right to file any arguments advocating such measures. In the case of referendums, any person has the right to file arguments for or against the referred measures. The parties offering arguments for distribution must pay all the expense for paper and printing to supply one copy with every copy of the measure to be printed by the state. The cost of printing, binding, and distributing the measures proposed, and of binding and distributing the arguments, are to be paid by the state as a part of the state printing. Within a specified time before any election at which measures are to be voted upon, the secretary of state is required to transmit copies of each measure together with the arguments submitted, to the voters within the state.

See Stevens v. Benson, 50 Or. 269 (1907), and Palmer v. Benson, 50 Or. 277 (1907).

South Dakota. Const. (Amend., 1898) art. 3, sec. 1. Under this amendment the people expressly reserve the right to propose measures which the legislature is required to enact and to submit to a vote of the electors. They also serve the right to require a referendum on any law which the legislature may have enacted, except laws necessary for the immediate preservation of the public peace, health, or safety, and laws for the support of the state government and its existing public institutions.

Not more than 5% of the qualified voters are required to invoke either the initiative or the referendum.

Comp. Laws, 1908, vol. 1, Pol. Code, secs. 21–28. Initiative petitions must contain the substance of the law desired. Referendum petitions must describe the law to be submitted by setting forth the title together with the date of passage and approval; such petitions must be filed within ninety days after the adjournment of the legislature. Initiative or referendum measures approved by a majority of the votes cast thereon become law and are to be in force immediately after the result has been officially determined. The veto power of the executive shall not be exercised as to measures referred to a vote of the people. Petitions shall be liberally construed so that the real intention of the petitioners may not be defeated by mere technicality. (Laws, 1899, c. 93, as amended by c. 166, Laws, 1907, and c. 43, Laws, 1909).

The legislature having declared that an act is an emergency measure, such determination is final, and is conclusive upon the courts. See State ex rel. Lavin et al. v. Bacon et al., 14 S. D. 394 (1901).

Texas. Laws, 1905, First called session, c. 11, sec. 140. Under the primary election law, 10% of the voters in any political party may propose policies and secure a direct party vote thereon. Petitions are to be filed with the chairman of the county or precinct executive committee at least five days before the tickets are to be printed and the chairman may require a sworn statement that the names of the applicants are genuine.

The number of signatures required for a petition is to be determined by the votes cast for the party nominee for governor at the preceding election. It

is the duty of the chairman to submit any proposition for which a petition is filed, and the delegates selected at that time are to be considered instructed for whichever proposition a majority of the votes is cast.

Utah. Const. (Amend., 1900), art. 6, secs. 1 and 22. This amendment provides for direct legislation, but the amendment is not self-executing, and five successive legislatures have refused to put it in force.

SUMMARY

The leading provisions relating to direct state legislation may be summarized under six main headings, as follows:—(I) the scope of direct legislation, (II) limitations on the re-submission of measures, (III) procedure for initiative petitions, (IV) procedure for reference of measures, (V) enactment of referred measures, and (VI) penalties.

I. SCOPE OF DIRECT LEGISLATION

In the United States direct legislation has been applied to constitutional and to statutory law; it has also been employed to obtain expressions of public opinion on state affairs, and to secure instructions as to party policy within the political parties.

Constitutional law

The constitutional amendments for direct legislation in state affairs apply generally to constitutional law.

Exceptions. Some of the states exempt constitutional amendments from the operation of the initiative.

See Mont. Const. (Amend. 1906), art. 5, sec. 1; Me. (Amend. 1908) Resolves, 1907, c. 121, pp. 1476–1481.

Statutory law

As regards statutory law, some of the amendments provide for specific exceptions to the use of direct legislation, and nearly all provide for emergency measures.

Exceptions. The specific exceptions generally relate to appropriations for the current expenses of the state government, for the maintenance of the state institutions, and for the support of the public schools.

Compare the provisions of Me., Mo., Mont., and S. D.

Emergency measures. Laws necessary for the immediate preservation of the public peace, health, or safety, are generally exempt from the operation of the referendum.

See Ark. (Proposed Const. Amend.), acts, 1909, pp. 1238–40; Me. (Amend. 1908), Resolves, 1907, c. 121; Mo. (Amend. 1908), Laws, 1907, p. 452–3; Mont. Const. (Amend. 1906) art. 5, sec. 1; Okla. Const. 1907, art. 5, sec. 2; Ore. Const. (Amend. 1902) art. 4, sec. 1; S. D. Const. (Amend. 1898) art. 3, sec. 1.

A safeguard against the undue use of emergency measures is provided in some cases by requiring the declaration of the emergency and a two-thirds majority of all the members elected to each house, for the passage of such bills.

See the provisions of the Me. Amendment.

A further safeguard against the abuse of the emergency clause by the legislature is secured by an enumeration of laws which may not be enacted as emergency measures.

Thus, the proposed amendment for Maine provides that an emergency bill shall not include (1) the infringement of the right of home rule for municipalities; (2) a franchise or a license to a corporation or an individual to extend longer than

one year; or (3) provision for the sale or purchase or renting for more than five years of real estate.

The courts have uniformly held that the question as to whether a law is necessary for the immediate preservation of the public peace, health, or safety, is for the legislature to decide and is not subject to judicial review.

See State v. Bacon, 14 S. D. 394 (1901); and Kadderly v. Portland, 44 Ore. 118, 146–51 (1903).

Public opinion laws

Public opinion system. Under public opinion laws pressure may be brought to bear upon legislators in the enactment of law.

See Ill. Rev. Stats., 1905, c. 46, secs. 428–9, p. 967 (Laws, 1901, p. 198).

Advisory system. The advisory system goes farther in the same direction and instructs representatives as to legislative action.

Party policy laws

Advisory system within the parties. The use of the advisory system within the parties at primary elections enables the voters in any political party to propose policies and secure a direct party vote thereon.

See Tex. Laws, 1905, First called sessions, c. 11, sec. 140.

II. LIMITATIONS ON THE RESUBMISSION OF MEASURES

The possible abuse of direct legislation through a frequent resubmission of defeated propositions, is provided against in one instance.

In Okla. Const. 1907, art. 5, sec. 6, any measure rejected by the people cannot be again proposed by the initiative within three years by less than 25% of the legal voters.

III. PROCEDURE FOR INITIATIVE PETITIONS

The procedure for initiative measures varies in the several states. Differences exist in the requirements for publicity, the completion of the petition, the transmission of measures to the legislature, the provision for competing bills, and the reference of initiative and of conflicting measures.

Publicity

Publicity is secured through the publication of the text of initiative measures and the distribution of arguments for and against proposed bills.

Publication of text of measure. Most of the states require the publication of the full text of initiative and referendum measures.

Compare the provisions for Mont., Nev., Okla., and Ore.

Distribution of arguments. A number of states also make provision for the distribution of arguments.

For elaborate provisions for the distribution of arguments for and against proposed measures, see Mont. Rev. Codes, 1907, vol. 1, part iii., title 1, c. 2, art. x., secs. 106–115 (Laws, 1907, c. 62); Okla. Gen. Stats., 1908, c. 36 (Laws, 1907, c. 44); and Ore. Laws, 1907, c. 226.

Completion of petition

The percentage of voters required to sign petitions, the basis of the percentage, the verification of signatures, and the method of filing petitions, vary considerably with the different states.

Percentage of voters. The percentage ranges from 5% to 15%.

The percentages for the different states are as follows: 8 per cent for Ark., Mo., Mont., Okla., and Ore.; 5 per cent for

S. D., and 10 per cent for Nev. In Mo. 8 per cent of the legal votes in each of at least two-thirds of the congressional districts is required; and in Mont., 8 per cent in each of two-fifths of the whole number of counties of the state.

Oklahoma requires 15 per cent to propose constitutional amendments. Instead of requiring a certain percentage, Me. requires a fixed number of 12,000 signatures for initiative measures.

Basis of percentage. The percentage required is uniformly based upon the vote cast at the last preceding general election.

In Ark., Mont., and S. D., the per cent is based on the vote for governor; in Ore., Mo., and Nev., on the vote for justice of the supreme court; and in Okla., on the vote for the state office receiving the highest number of votes.

Verification of signatures. The methods for verifying signatures are definitely prescribed in the laws enacted to facilitate the operation of the several amendments.

See Mo. Laws, 1909, pp. 554–558; Mont. Rev. Codes, 1907, pp. 27–33; Okla. Gen. Stats. 1908, c. 36 (Laws, 1907–8, c. 44); Ore., Laws, 1907, c. 226; and S. D. Pol. Code, 1908, pp. 8–10 (Laws, 1907, c. 62).

Filing. Provision is generally made that initiative petitions be filed with the secretary of state. The time for filing varies according to whether the petition is to be presented to the legislature, or is to be voted upon by the people without legislative consideration.

Time. The time for filing is not less than four months before the election in Ark., Mo., Mont., and Ore.; not less than thirty days before any regular session in Nev.; and at least thirty days before the close of the session in Me.

Transmission of measures to legislature

The requirement that all proposed measures be transmitted to the legislature gives opportunity for

public hearings, for testimony, for debate, and for deliberative consideration.

Compare the provisions of Me. (Amend. 1908), Resolves 1907, c. 121, and of Nev. (Proposed Const. Amend.) Stats. 1908–9, pp. 347–349.

Precedence of initiative measures. Provision is sometimes made that initiative measures take precedence over all other measures in the legislature except appropriation bills.

See the proposed amendment for Nev.

Limitations on legislative action. The provision that the legislature shall enact the measure submitted is a provision found in only one of the states.

S. D. Const. (Amend. 1898), art. 3, sec. 1.
The proposed Nevada amendment requires that the legislature enact or reject the initiative measure within forty days.

Provision for competing bills

An important feature in several states is the provision that the legislature may submit a competing bill if it disapproves of the initiative measure. This affords opportunity for deliberative consideration of conflicting measures, and gives the people a choice between the initiated bill and one submitted by the legislature.

This is provided for in Me. and in the proposed Nev. amendment.

Reference of initative measures and of competing bills

Competing bills are to be submitted with initiative measures so that the electors may choose between them or reject both.

See Me. (Amend. 1908), Resolves, 1907, c. 121, and Nev. (Proposed Const. Amend.) Stats. 1908–9, pp. 347–9.

IV. PROCEDURE FOR REFERENCE OF MEASURES

Measures may be referred either by petition or by legislative action.

Reference by petition

The requirements for reference by petition vary both as to the percentage of voters required and the manner of filing petitions.

Percentage of voters. The required percentage ranges from 5% to 10%.

The percentages are 5 per cent for Ark., Mo., Mont., Okla., Ore., and S. D., while Nev. requires 10 per cent. The requirements for two-thirds of the congressional districts in Mo., and for two-fifths of the counties in Mont. holds for referendum as well as for initiative petitions. Me. requires a fixed number of 10,000 signatures.

Mont. has a provision that any measure referred to the people is to remain in full force unless the petition is signed by 15 per cent of the legal voters of a majority of the whole number of counties of the state, in which case the law remains inoperative until it is passed upon at an election and the result is officially determined.

Basis of percentage. The basis of the required percentage is the same as for initiative petitions.

Filing. Petitions are to be filed with the secretary of state within a specified time.

Time. The time for filing is not less than ninety days after the legislative session in Ark., Ore., Okla., Mo., Me., and S. D.; not later than six months after the session in Mont.; and not less than four months before the general election in Nev.

Reference by legislative action

Legislatures are expressly authorized to enact measures conditioned upon their approval by the people, on a referendum vote.

Compare the constitutional provisions of Ark., Mo., Mont., Okla., and Ore.

Duty of officials

In submitting initiative and referendum petitions to a vote of the people, the secretary of state and all other officers are to be guided by the general laws until legislation is especially provided.

Compare the provisions of Ark., Me., Mo., Mont., and Ore.

V. ENACTMENT OF REFERRED MEASURES

Elections for submission of measures

Measures may be referred for enactment or rejection at general or at special elections.

General elections. The S. D. statute provides for the submission of measures at general elections only.

Special elections. Provision is made for special elections to be ordered by the legislature in Ark., Mo., Mont., and Ore.; by the legislature or the governor in Okla. and Me. Under the Me. provision the governor must order a special election, if so requested in the petition.

Veto power

The veto power of the governor does not extend to measures referred to the people.

See Ark., Me., Mo., Mont., Okla., Ore. and S. D.

The Me. amendment requires that if any measure initiated by the people and passed by the legislature without change, is vetoed by the governor, and if his veto is sustained by the legislature, the measure must be referred to the people at the next general election.

When operative

The amendments of the several states generally provide that any measure referred to a vote of the people is to become a law and be in force from the date of the official declaration that it has been approved by a majority of the votes cast thereon.

See Ark., Mo., Mont., Nev., Ore., and S. D. (statute).

In Okla. initiative measures must be approved by a majority of the votes cast at the election.

In Me. and Nev. provision is made that initiative measures enacted by the legislature without change, are not to be referred unless a referendum vote is demanded. In Me. when initiative and competing bills are submitted at the same election and neither receives a majority of the votes given for or against both, the one receiving the most votes is to be resubmitted by itself; but no measure is to be resubmitted unless it received more than one-third of the votes given for and against both.

Under the Nev. provision, if conflicting measures submitted at the same election are both approved by a majority severally cast for and against each, the one receiving the highest number of affirmative votes becomes a law as to all conflicting provisions.

VI. PENALTIES

The laws enacted to facilitate the operation of the direct legislation amendments provide penalties for the unlawful signing of petitions.

In Me., Mont., Okla., Ore., and S. D., the unlawful signing of initiative or referendum petitions is punishable by fine, or by imprisonment, or both, in the discretion of the court. In S. D. Comp. Laws, 1908, vol. 1, Pol. Code, secs. 21–28 (Laws, 1899, c. 93) the fine is not to exceed $500.00 nor the imprisonment five years. In Mo. (Laws, 1909, pp. 554–8), Mont. (Laws, 1907, c. 62), Okla. (Laws, 1907–8, c. 44), and Ore. (Laws, 1907, c. 226) the fine is fixed at the same limit and the imprisonment is not to exceed two years.

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