Keeping the People's Liberties
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Legislatures were viewed throughout the nineteenth century with a certain degree of distrust, and in fact as the century progressed, legislators who had once been constrained only by their capacity for self-restraint were increasingly hemmed in by a series of procedural and substantive restrictions. In the last decade of the nineteenth century and the first two decades of the twentieth century, this existing distrust of representative institutions was elevated to a qualitatively different level. Social, economic, and political reformers became increasingly frustrated by the defeat of their proposals in the legislatures and, occasionally, in the courts, and they concluded that these institutions had become more responsive to particular interests than to the public interest.

Confronted with a choice between restoring the original character of these institutions and redesigning them according to a new model, leaders of intellectual opinion chose to reconstitute these institutions on a foundation other than republicanism. Accordingly, a series of constitutional conventions that were held between 1900 and 1920 established populism rather than republicanism as the measure of institutional legitimacy, and they restructured governing institutions to conform to the view that the people were the best keepers of their liberties. The overall effect was to limit representative institutions and to empower the collective citizenry, whose voice would now be expressed through direct democratic institutions.

CRITIQUE OF THE OLD REGIME

The impulse to reform institutions has been present in virtually every era in American history, and calls for reform have generally been greeted more favorably than arguments for conservation. At the turn of the twentieth century, however, a new
set of social and economic conditions provided a particularly fertile reception for proposals to reform existing political institutions. Foremost among these changes was an increase in the number and size of corporations and the growing corruption of the political parties.²

These new conditions suggested that the existing conception of rights was outdated and would have to be revised. In the view of J. Allen Smith, one of the intellectual leaders of this reform movement, the founders’ conception of liberty “was a purely negative conception. It involved nothing more than the idea of protection against the evils of irresponsible government.”³ Accordingly, political institutions had been designed with an eye toward preventing government action, thereby reducing the chance that this action would be irresponsible. In the twentieth century, however, irresponsible actions and threats to individual liberty were likely to emanate not so much from political institutions as from economic entities. As Walter Weyl argued: “The political weapons of our forefathers might avail against political despotism, but were farcically useless against economic aggression. The right of habeas corpus, the right to bear arms, the rights of free speech and free press could not secure a job to the gray-haired citizen, could not protect him against low wages or high prices, could not save him from a jail sentence for the crime of having no visible means of support.”⁴

The rights that people were now concerned with protecting—“rights, for instance, of labor, women, children, and of electorates in respect to their definite control over all governmental agencies”⁵—were of an entirely different character than those that preoccupied previous generations. As Arthur Holcombe argued, what was needed was “a more positive conception of liberty. It is coming to mean more than the mere absence of physical restraint upon the physical person. Real liberty is not the antithesis of social control. Rather, rightly directed and effective social control is the condition of such liberty.”⁶ In particular, securing liberty in the early twentieth century required that the government take action. Government action was needed to secure the right to safe working conditions, which meant in practice the elimination of the fellow-servant, contributory-negligence, and assumed-risk doctrines on which corporate counsel had relied to prevent workers from receiving compensation for on-the-job injuries. Steps would also have to be taken to limit the number of hours that an employee could be required to work in a day or week. Finally, it was thought to be incumbent on government to provide pensions to those who were widowed, disabled, or unemployed.

Existing governmental arrangements were deficient, in the view of the populist reformers, not only because they were ill-designed to secure these rights in a timely fashion but also because special interests had grown so numerous and party bosses had become so powerful that they made passage of these laws nearly impossible. The populists were aware that theirs was not the first generation to complain about the capacity of party bosses and economic interests to corrupt the political process. In their view, however, the corruption that pervaded the system in the early twentieth century was different in kind from that of previous eras.
Legislatures were considered to be particularly susceptible to corruption by special interests. According to Sherman Whipple, a delegate to the Massachusetts Convention of 1917–1918:

There exists a belief that special privileges and special favors have been granted to those who have had the influence to get them; a belief that much of our legislation has been framed by lobbyists in their own offices or by skilled and trained lawyers in the offices of the corporations or the offices of the attorneys themselves, and that that legislation has been directed not to promoting the general public welfare of all the people alike, but has been for the purpose of promoting the interests of those who stood behind—secretly stood behind—the measures and the legislators who put them through.\(^7\)

To be sure, legislators in the nineteenth century had been subjected to the same kinds of pressures from special interests, and the response at that time had been to impose certain requirements on the legislative process to ensure that the majority will would prevail. In the view of the populist reformers, however, special-interest pressures were growing in scale. Lawton Hemans, a delegate to the Michigan Convention of 1907–1908, argued:

The time was when the right of petition was considered sufficient to keep the member in the legislative branch of the government in close touch and responsibility with his constituency. . . . This relationship has in a large measure been lost or destroyed, and to my mind there are two great factors that have entered into the question as to why this relation has been lost or no longer obtains. One of them is in the growth of great political parties, which hold over the imagination and the wills of men a power and an influence unknown in the earlier days of the state of Michigan and this republic. The other is the great growth of commercial and industrial things throughout this great country of ours.\(^8\)

As a result, existing procedural restrictions on the legislature were increasingly seen as inadequate to promote responsive lawmaking. Rules forbidding inaccurate titles, dual subjects, and late-session amendments enabled representatives who desired to legislate in the public interest to do so, by providing a way to fend off the advances of the special interests. But once the character of the legislators declined, as many reformers believed it had, these provisions were less effective. Accordingly, in 1914 Alabama Governor Emmet O’Neal took note of the “open contempt for our lawmaking bodies. In many, if not a majority, of the States, a session of the Legislature is looked upon as something in the nature of an unavoidable public calamity.” He argued: “It is claimed that there has been a steady decline in the average standard of ability, independence, and intelligence of the membership of our State legislatures. That this is true, students of our government all agree.”\(^9\) Charles Beard concurred: “It is incontrovertible that the popular estimate of the ability and common honesty of legislators is by no means
high. That the popular judgment is often unjust and based upon an exaggeration of the facts in any particular case will be conceded. It is needless, however, to argue the point as to whether the judgment is altogether just and righteous; it stands nevertheless.\textsuperscript{10} Thus the view took hold, in the words of James Dealey, that the sheer complexity of modern problems “demands more wisdom and knowledge than is usually found in legislatures, which are often incompetent and sometimes venal.”\textsuperscript{11}

Populist reformers were no more sanguine about the capacity of courts to secure rights. Even when the public interest did prevail over particular interests in the legislature, and the passage of appropriate legislation was achieved, the courts posed an additional obstacle to the operation of these laws. Judges were roundly and repeatedly criticized during this era as being captive to special interests or to out-of-date constitutional doctrines, and in fact, it was difficult to determine in some states whether the judiciary or the legislature was viewed as the more corrupt institution.\textsuperscript{12}

By the early twentieth century, reformers could point to a number of state court rulings that stood in the way of legislative efforts to secure the rights of working men, women, and children.\textsuperscript{13} Herbert Kenny, a delegate to the Massachusetts Convention, complained that the “[s]tate courts, by their ultra-conservative interpretation of the police power, are preventing the enforcement of many progressive industrial and social laws.” He noted: “When our State Constitution was adopted the factory system and other products of capital were in an embryonic condition. Now times have changed. . . . Yet our courts are basing many of their opinions which determine the constitutionality of social legislation upon instruments which in their inceptions of social justice are now obsolete.”\textsuperscript{14} Kenny was particularly troubled, as were many of his contemporaries, by two decisions—\textit{Ritchie v. The People}, an 1895 Illinois Supreme Court ruling that struck down a maximum-hours-for-women law, and \textit{Ives v. South Buffalo Railway Co.}, a 1911 New York Court of Appeals ruling that invalidated a workmen’s compensation act—that were universally regarded as instances of knight-errantry. He made it clear, however, that these were only two of a number of egregious examples. Louis Boudin therefore concluded in 1911: “We have thrown to the winds all those great limitations, embodied in principles and rules of interpretation, which the earlier judges imposed upon their own power—a power which they deemed necessary for our orderly development, but the danger of which, when not properly limited, they clearly foresaw. One cannot read the latest decisions of our courts, either state or federal, without being forced to admit that they have usurped supreme legislative power, and that we have reached the condition of ‘judicial despotism.’”\textsuperscript{15}

In general, then, republican institutions were no longer thought to be capable of securing the people’s most important liberties. Legislatures were frequently indifferent to efforts to secure popular rights, and overzealous judges occasionally posed an obstacle to the enforcement of rights. In his presidential
address to the American Political Science Association in 1908, Professor Frederick Judson therefore alerted the members of the profession to the significant loss of confidence in representative institutions: “Our citizens are realizing that the representation provided by our existing conditions is not true representation, and as they feel their inability to control these tendencies they are prepared to welcome any remedy.”

The remedy for this state of affairs was not readily apparent, however. More precisely, there were several courses of reform that could be pursued. In one view, which was implicit in some of these critiques, representative institutions had at one time served to secure rights, but circumstances now rendered them incapable of performing their intended function. According to this line of reasoning, the failure of representative institutions could be attributed to a temporary disjunction between the theory and the practice of republicanism. Insofar as the flaw was identified in this way—that representative institutions had deviated from their true purpose—the appropriate remedy would be a return to fundamental principles.

Some public officials adhered to the logic of this position. They contended that the failure of representation could be attributed to particular circumstances, such as the corruption of the political parties and the predominance of special interests. Accordingly, they delivered a moderate critique of republican institutions and sought primarily to restore these institutions to their original purpose. Woodrow Wilson, for instance, made it clear that he proposed reforms not so much “as a substitute for representative institutions, but only as a means of stimulation and control.” He desired to find “a means of bringing our representatives back to the consciousness that what they are bound in duty and in mere policy to do is to represent the sovereign people whom they profess to serve, and not the private interests which creep into their counsels by way of machine orders and committee conferences.” He sought therefore to provide “a sobering means of obtaining genuine representative action on the part of legislative bodies.”

Another group of populist reformers went even further in its critique of republicanism and maintained that existing difficulties were not the product of particular circumstances but were indicative of the poverty of republican principles. According to this line of reasoning, the current state of affairs could be attributed not so much to the corruption of republican institutions but rather to their design. In this view, which eventually provided the intellectual grounding for the populist reforms, the principles of the republican regime were faulty at their core, and rights could be secured only by restructuring institutions on a foundation other than republicanism.

In particular, those who leveled this strong critique challenged the wisdom of institutional arrangements such as constitutionalism, separation of powers, checks and balances, and bicameralism, on which the republican regime had chiefly relied for the protection of rights. Whereas constitutions had once been thought to impose limits on popular majorities, the populist reformers argued that
this unduly restricted the popular will. Thus Theodore Roosevelt argued in an
address to the Ohio Constitutional Convention of 1912 that he was “emphatically
a believer in constitutionalism,” but he also believed that “[i]t is impossible to
invent constitutional devices, which will prevent the popular will from being
effective for wrong without also preventing it from being effective for right.”19
The principle of separation of powers was criticized on similar grounds, because
it was thought to thwart rather than secure the public interest. *Equity* magazine
therefore lamented that the founding fathers had been “misled into adopting
Montesquieu’s mischievous theory of the separation of the legislative, executive
and judicial functions of government,” and furthermore, “that this restrictive and
faulty theory of government, like grandfather’s overcoat, which was ill-fitting at
best, has been imposed on all our states!”20 As for institutional arrangements that
sought to secure the proper exercise of powers through a system of checks and
balances, the populist reformers followed California Governor Hiram Johnson in
contending that “The historic system of checks and balances guarded against the
old danger of governmental aggression, but not sufficiently against the new dan­
ger of aggression, and because that old system did not guard it sufficiently in the
West against private aggression, we found it necessary that the system of checks
and balances that some view with such idolatry and with such pride, should be
eliminated in our constitution.”21 In addition, bicameralism was now viewed as
advancing the cause of particular interests rather than securing the deliberative
sense of the community. In fact, many came to believe that “the bicameral sys­
tem is somewhat or even largely responsible for the inefficiency and corruption
of many states.”22

In short, whereas the founders of the republican regime contended that the
majority should rule but that it must be reasonable, the populist reformers
detected in every institution that sought to obtain this reasonable expression of
public opinion an attempt to limit the majority in favor of the minority. “There
is, in fact, no middle ground,” J. Allen Smith argued. “We must either recognize
the many as supreme, with no checks upon their authority except such as are
implied in their own intelligence, sense of justice, and spirit of fair play, or we
must accept the view that the ultimate authority is in the hands of the few. Every
scheme under which the power of the majority is limited means in its practical
operation the subordination of the majority to the minority.”23

**ADVENT OF THE POPULIST REGIME**

This dissatisfaction with the existing model of representation coalesced into a
nationwide movement that sought a national audience and highlighed the short­
comings of national institutions. The reformers therefore reserved their strongest
rhetoric for the federal Constitution, which was thought to contain “the political
wisdom of dead America,” as well as for national institutions such as the Senate,
the Supreme Court, and the presidential selection process. At the same time that the populists highlighted national institutions in their critiques, they concentrated on reforming state constitutions, which were more flexible and therefore more susceptible to change. As Smith argued: "It is through our state governments that we must approach the problem of reforming the national government. Complete control of the former will open the door that leads to eventual control of the latter."25

Smith was perhaps the most articulate proponent of the populist reform program. He argued that the first step toward reconstituting governing institutions, which had already been taken, was to deprive the legislature of "its power to enact constitutional legislation." The next step was "to diminish the power of the legislature by including in the constitution itself much that might have taken the form of ordinary statutory legislation." Another step was to "requir[e] that some of the more important acts passed by the legislature should receive the direct assent of the voters." Finally, "the initiative combined with the referendum would make the majority in fact, as it now is in name only, the final authority in all matters of legislation." He concluded: "The logical outcome of this line of development is easily seen . . . [C]onstitutional development first limits and eventually destroys irresponsible power, and in the end makes the responsible power in the state supreme."26

The populist reformers sought first to limit the irresponsible power of the legislature. As Amasa Eaton noted in 1892 in a review of the work of several late-nineteenth-century conventions: "One of the most marked features of all recent State constitutions is the distrust shown of the legislature."27 He argued that the delegates to these conventions had thus rejected the advice of Thomas Cooley and James Bradley Thayer to refrain from legislating too much in their constitution making. "It would seem instead as if the theory underlying [these constitutions] were that the agents of the people, whether legislative, executive, or judicial, are not to be trusted; so that it is necessary to enter into the most minute particulars as to what they shall not do."28 The delegates to these conventions considered, and in a number of cases enacted, a variety of proposals to reduce legislative power, ranging from limiting the length of legislative sessions to reducing the frequency of legislative meetings to limiting dramatically the discretion of legislative assemblies.29

Populist reformers also sought to limit the irresponsible power exercised by the judiciary. A number of delegates to these conventions searched for ways to prevent the judiciary from exercising any check over the people or their representatives. The proposals included abolishing judicial review altogether; requiring a unanimous bench to declare a statute unconstitutional; requiring the votes of all but one of the justices, or a supermajority of the justices, to invalidate a statute; and stipulating that all sitting justices be present before such a decision could be issued (which was adopted in the Virginia Constitution of 1870 and remained in effect in the Constitution of 1902 and was the only one of these proposals to be
implemented by any of these particular states). Another group of proposals, which were not ultimately enacted in any of these states, sought to ensure that the judiciary was more responsive to the popular will by providing for popular selection of the judges (where this was not already in effect), permitting the people to recall judicial decisions, or providing for recall of the judges themselves.

Although the populist reformers were unable to secure the enactment of many of these proposals, they had more success in their efforts to implement the second prong of their reform program, which centered on increasing popular participation in lawmaking. In addition to enacting the statewide legislative referendum, which would permit the legislature to obtain the judgment of the people on controversial legislation, convention delegates introduced the popular referendum and initiative, as well as the constitutional initiative.

The logic underlying these institutions was that the popular referendum would permit the people to overturn oppressive laws, the popular initiative would permit the people to enact laws independently of the legislature, and the constitutional initiative would give the people the independent means to repeal oppressive statutes, constitutional provisions, or judicial decisions. To the extent that individuals had in previous years relied on legislatures or judges to overturn oppressive acts, they could now rely on the initiative and referendum to secure their rights. As delegate Charles Morrill of Massachusetts argued, the principle of popular sovereignty required that “the people [should] be the ones to say whether or not a law shall remain in force[,] They should give their consent, either by acquiescence or through a referendum if they are not satisfied to silently consent to a law becoming operative or remaining so.”

A number of individuals played prominent roles in securing the enactment of these direct democratic institutions in the various states, but none was more influential than William Simon U’Ren of Oregon. In 1891, as a member of the Milwaukie Alliance, U’Ren read a study by J. W. Sullivan on the operation of the initiative in Switzerland, and he became an instant convert to the direct democratic movement. In the belief that his favorite economic reforms could be achieved only through the initiative, U’Ren formed the Direct Legislation League and was instrumental in persuading the Oregon Legislative Assembly to adopt direct democracy. U’Ren explained:

I went just as crazy over the single tax idea as any one else ever did. I knew I wanted single tax, and that was about all I did know. . . . I learned what the initiative and referendum is, and then I saw the way to single tax. So I quit talking single tax, not because I was any the less in favor of it, but because I saw that the first job was to get the initiative and referendum. . . . All the
work we have done for direct legislation has been done with the single tax in view, but we have not talked single tax because that was not the question before the house.36

As a result, although South Dakota was the first state to adopt direct democracy, the movement enjoyed its most significant early success in Oregon.37 In 1902, as a result of the political maneuvering of U’Ren, whom the Portland Oregonian referred to as the fourth branch of Oregon’s government, Oregon voters ratified an amendment that introduced the popular initiative and referendum, as well as the constitutional initiative.38

Michigan was the next of these states to adopt direct democracy. The delegates to the Michigan Convention of 1907–1908 were determined to transform the character of their governing institutions. Delegate Frederick Ingram argued that there was no need to “go into detail regarding present political evils, they are known of all men. The remedy is always the same—more democracy.”39 Similarly, William Manchester argued that the question of whether to adopt the initiative was “the only question of real interest that we have before this body.”40 The convention delegates adopted the constitutional initiative, and four years later, the citizens made use of this power to enact the statutory initiative.41

In addition, direct democracy was one of two issues (the other concerned public aid to religious institutions) that dominated the proceedings of the Massachusetts Convention of 1917–1918. In fact, Governor Samuel McCall noted in his opening address to the convention that: “The democratic idea will be, I think, the animating principle in your deliberations.”42 The popular initiative and referendum enjoyed the overwhelming support of the delegates, and their passage was virtually assured from the start. The only questions left to be determined were whether the constitutional initiative would be adopted and what form these institutions would take. In the end, the convention decided that the initiative should apply to statutory as well as constitutional matters, but that it would be adopted in a modified form. In particular, Massachusetts decided to enact an indirect initiative, in that propositions would first be considered by the legislature, and it stipulated that the people would be prohibited from voting on propositions that were, among other guarantees, “inconsistent” with “the rights of the individual as at present declared in the Declaration of Rights.”

Only Virginia failed to adopt any form of direct democracy. The initiative was not at the top of the agenda of the Virginia Convention of 1901–1902, which, delegate Joseph Stebbins argued, was “called into being primarily for the specific purpose of disfranchising a large number of voters.”43 In addition, although several initiative and referendum proposals were introduced into the General Assembly over the next several years,44 Virginia, much like the rest of its southern neighbors, remained impervious to the movement toward direct democracy.45
PRINCIPLES OF THE POPULIST REGIME

The institutional reforms of this period can be attributed in part to social and economic conditions that led to a reassessment of existing political institutions, and in part to the public officials who secured the enactment of the appropriate constitutional changes. But these reforms could not have been enacted, much less sustained, without a corresponding change in the norms of institutional legitimacy. As Eldon Eisenach has written:

On both sides of this conflict competing interests and values had to legitimate the power and purposes of their respective institutions and practices. But the only way justification or legitimation of these institutions and practices can take place in a democratic political forum is in the form of a coherent “discourse” that mobilizes followers and empowers the leaders through their respective institutions. The creation and articulation of this institution-legitimating discourse . . . also serves to constitute or “found” these institutions.46

In this case, the justification and legitimation of these new institutional forms took place primarily through debates in state constitutional conventions. The advocates of populist reforms challenged the republican understanding of representation, deliberation, and compliance, and they undertook to redefine these terms. The critics sought to defend republican principles, and though they lacked the votes to defeat the proposed reforms, they succeeded in highlighting the contrast between republican and populist principles.

Representation

The populist reforms constituted a clear rejection of the republican view of representation. It fell to William Kinney of Massachusetts, a critic of the reforms, to articulate the extent of the disagreement between republican and populist views of representation.

We believe to a certain point together, that is, that the final test upon constitutional and upon legislative matters is the convictions of a majority of the people of Massachusetts. We differ as to the method of ascertaining that will. We believe, and the framers of the Constitution of Massachusetts believed, that the system of government which we have adopted, with all its checks and balances, is the system which in the long run and in the majority of cases will secure the expression, in constitutional provision and in legislation, of the settled, well-founded, well-considered views of the people of Massachusetts. We believe that the adoption of the initiative and referendum in any form is the taking away of those safeguards, and substituting for the old system a system by which there may be enacted into law, or into constitutional provision, the hasty, the intemperate, the ill-considered, the temporary and
not the permanent, convictions of the people of Massachusetts. We believe that this change will result in the destruction of our institutions. We believe that it is opposed to, and cannot exist in connection with, the system which I have outlined.47

Although the populists naturally took issue with Kinney’s critique, they did not necessarily disagree with his characterization of the differences between the two groups. In particular, they agreed that the crucial difference between populism and republicanism centered on the best method of ascertaining the popular will: whereas republicanism assumed that the public will was obtained through representative elections, populism sought to obtain a more direct expression of public opinion.

Accordingly, one group of populist reformers supported the initiative and referendum on the ground that this represented the most effective way to restore indirect representation. This group of delegates argued that, at least in the early part of the twentieth century, the representative principle could be upheld only by adopting the institution of direct democracy. As Michigan delegate Floyd Post argued, “It is not representation, but misrepresentation that is being complained of.”48 Similarly, Walter Creamer of Massachusetts argued that it was possible to adopt populist reforms without departing from the representative principle. “[I]s our General Court as at present constituted really representative of the public will or sufficiently responsive to it? It is because some of us believe that it is neither of these things that we look with so much favor on the initiative and referendum, and that we are willing to consider the somewhat radical changes therein involved in order that we may get representative government.”49

According to this view, the presence of the initiative and referendum would restore representation by forcing legislators to take account of public opinion in their deliberations, out of a fear that unrepresentative legislation would be overturned by the people. The existence of direct democratic procedures would also help legislators to fend off groups and individuals who advocated measures adverse to the public interest. In addition, by providing a forum for resolving particularly controversial questions independently of representative elections, the initiative would permit these elections to focus on a wider array of issues, thereby increasing the quality of representation across the board. As Joseph Walker argued in the Massachusetts Convention: “I have seen some of the best legislators in Massachusetts defeated because they opposed a certain law. They might have been wrong on that, but on all other matters they were strong and stalwart and good. Have you got to defeat such men as that in order to bring the will of the people to bear in favor of one particular measure or another? How much better to take that measure out of the Legislature, submit it to the people, let them pass upon it, and then they can express their will.”50

A number of populist reformers went even further, however, and challenged the representative principle itself. Several delegates acknowledged that they were
advocating a departure from the founding view of representation, but they con­
tended that they were merely following the founders in spirit, if not in form. According to this group of delegates, the founders had chosen to adopt republican institutions in the 1780s largely because existing conditions rendered direct democ­racy an implausible choice. Now that public schools, newspapers, and civic asso­ciations had produced a well-informed community of citizens, the descendants of the framers were free to make the decisions that their forefathers would have made if not constrained by circumstances. Massachusetts delegate Gerry Brown there­fore “desired to impress upon this Convention, and more particularly upon those who are opposed to the initiative and referendum . . . that when the Constitution was adopted representation was from the town; it was a direct democracy.”

Still other delegates made no apologies for their preference for direct rather than indirect representation. They argued that indirect representation was as ill suited in the early twentieth century as it had been for the founding generation in the late eighteenth century. In a speech that was in one sense reminiscent of Alexander Hamilton’s address to the federal convention of 1787, Brooks Adams of Massachusetts articulated the most extreme form of the populist position, and thereby expanded the spectrum of reforms that could be considered reasonable. In his typically colorful manner, Adams urged his fellow delegates: “[W]e have got to get rid of all this old, elaborate, complicated theory of representative gov­ernment with its dry-nurse of courts and lawyers which everybody knows is exploded. Everybody knows that the thing is dead; we cannot get along with it. It will not move, it cannot march. . . . The legislature is like a dying animal. Rep­resentative government with grandmother courts is like an agonizing animal, and it has got to be replaced by something with vitality in it.”

Although few of the populist reformers adopted such forceful rhetoric, a number of delegates shared Adams’s view that direct representation secured rights more effectively than indirect representation. For one thing, direct democ­racy could more effectively prevent public officials from encroaching on the rights of the citizens. David Walsh of Massachusetts argued: “We are not opposed to representative government, but when organized human selfishness controls representative government then we demand the right of appeal to the people for the judgment of a majority of the citizens of the State. . . . As an addi­tional protection, as another safeguard to our inalienable rights, when we are deserted or betrayed by our public officials we will rest content and satisfied only with the verdict of a majority of our fellow citizens.” Second, the populists con­fronted Publius’s argument in Federalist No. 10 that a republic was better suited than a democracy to control the effects of factions. The populist reformers con­tended, to the contrary, that a direct democracy actually offered more protection against factions. John Bodfish of Massachusetts argued:

It cannot be denied that we are all of us selfish, that we all of us approach every question from our own selfish viewpoint or from the viewpoint of the
particular group in which we live and move and have our being. And the safety of democracy lies in keeping the laws out of the hands of any of these groups, and how shall you keep them out of the hands of these groups except you place them in the hands of the majority? So, Mr. Chairman and gentlemen, I call to your attention the fact that the representative system has failed at the very point where it became representative, at the very point where the people lost control; at that very point the selfish,—I will not call them sinister,—influences gained control.54

Direct democracy would be at least as effective as a republican government, therefore, in preventing factions from forming. Moreover, it would provide a more effective mechanism for ensuring that legislation conformed to the public interest rather than to individual or special interests. Justin Sutherland of Michigan believed that the public interest was more likely to emerge from direct democracy than from indirect representation, because initiative and referendum proposals would have to obtain numerous signatures before they could even appear on the ballot.

[T]here is not a chance nor an opportunity for error or private interests to creep in where a matter is proposed by the electors of the state in a collective capacity, that there is in any small or appointed body from the people. We must remember this that truth is a unit, and that when a great aggregation of people pass upon a matter proposed and agree upon the exact words of that subject matter as it may be proposed in the amendment in that proposal, that there are from eighty to a hundred thousand qualified electors of the state in the very beginning who have agreed upon the principle of that proposal. That where there is that multitude of individuals who must agree, that there must be eliminated from that process of agreement, the errors of each individual and the private interests of each individual.55

The subsequent campaigns would also help to eliminate the possibility that particular interests would prevail. According to Jonathan Bourne of Oregon: “Where individuals act collectively or as a community,—as they must under the Initiative, Referendum, and Recall,—an infinite number of different forces are set in motion, most of them selfish, each struggling for supremacy. . . . No one selfish interest is powerful enough to overcome all the others; they must wear each other away until general welfare, according to the views of the majority acting, is substituted for the individual selfish interest.”56

In response to these arguments, the supporters of republicanism mounted a series of defenses of the virtues of indirect representation. They argued that although direct democracy might secure certain rights, it would place others at greater risk. Robert Luce reminded the Massachusetts Convention that, through the initiative, “in Switzerland the people passed a law in regard to the Jewish method of slaughtering cattle, that never could have received enough support in the Assembly.” He feared that similar initiative measures would be targeted in Massachusetts
toward “Christian Science” or “the negroes.” Measures would pass that “would appeal to the passion and to the prejudice of the people” but that would never prevail in “the cool, calm reasoning of our Legislature.” Benjamin Heckert of Michigan objected to the initiative on the ground that “history is full of instances where demagogues and walking delegates have fooled the people and led them on to untenable ground; led them into currents of thought which resulted in losses and injuries which they could not recoup or escape from.” Massachusetts delegate Albert Pillsbury also turned to the lessons of previous direct democracies.

“Will you not trust the people?” This has been the capital of every demagogue from Cleon of Athens down to this day and hour. I would trust the “sober second thought” of the people when they are not deceived or misled, but this we shall not have. I would trust the people if the demagogues would let them alone. I would not trust them when they are lied to, as they are and will be, and believe what they are told because it is their interest to believe it, though it may be the plainest falsehood or folly. . . . There is not a man among the loudest advocates of this scheme who, under popular attack, would trust his life, his liberty, his character or his property to the unbridled edict of the people at the polls if he could avoid it.

Arguments in defense of republicanism were advanced to no avail, however. The populists countered that the experience with the initiative and referendum in the American states disclosed no such occasions “where religious freedom has been attacked, where civil rights have been assailed, or where the rights of the minority have been ruthlessly sacrificed because of the rule of the majority.”

David Walsh, for one, argued: “I am willing to leave the protection of my religious convictions and my judicial rights to a majority of my fellow citizens. [Applause.] I am willing to trust the protection of our institutions to the fairness, the honesty, the integrity of the judgment of a majority of our fellow-citizens.”

According, then, to the populist view of representation that prevailed in each of these conventions, direct democracy would leave existing rights undisturbed. Moreover, it would better secure the popular will with regard to newly discovered rights. Joseph Walker of Massachusetts concluded: “[I]f you do not give this power into the hands of the people there is real danger in regard to the liberty and the property of the people of this Commonwealth. What restrictions on the liberty of men and women and children are feared by this appeal to the people? It is laws directly limiting the hours of labor for men and women and children. It is laws that provide that young girls shall not be employed in our factories and mills at a wage which will not support them and keep the life in their bodies.”

Deliberation

At one point in the Massachusetts Convention of 1917, Frances Balch argued: “Much has been said of representative government and the effect on it of these
proposed governmental innovations. Very little has been said of *deliberative* government. Now the real point to my mind is,—the real virtue of the present system is,—its *deliberative* character; and that is precisely what we are going to lose."\(^{63}\)

The populists contended that they were, in fact, intimately concerned with providing opportunities for deliberating over rights, and that they disagreed only on the best manner of providing this deliberation. Whereas republicanism placed a premium on providing a proper institutional forum for deliberation, the populists argued that deliberation could best take place among the collective citizenry.

The populists argued that the republican view of deliberation rested on an idealized notion of the legislative process. Even if the legislature had at one time been the scene of reasoned deliberation, Massachusetts delegate Francis Horgan argued, by the end of the nineteenth century, “The ‘calm deliberation’ of representative assemblies is a figment of the imagination.”\(^{64}\) Thus George Webster of Massachusetts recalled the exchange during which Thomas Jefferson asked George Washington why he had permitted the establishment of a bicameral system. “‘Why did you give your consent, and why did you adopt the bi-cameral system? Why did you have a Senate?’ Washington said—or so runs the story—‘Why do you turn your tea out into your saucer?’ . . . Jefferson of course naturally made the reply, the only reason a man could give for the practice: ‘To cool it.’ ‘That is just what we are going to do with our Legislature,’ said Washington. ‘We are going to furnish, in the senatorial saucer, the cooling.’” After recounting this tale, Mr. Webster pleaded with his fellow delegates: “The senatorial saucer, sir, has reached such a degree of refrigeration that it freezes every beneficial piece of legislation that is brought up in the Commonwealth.”\(^{65}\)

The populist reformers did not seek, however, to restore the traditional view of deliberation. Rather, they maintained that the republican understanding of deliberation had been flawed from its inception, and that the institutional devices that had been adopted for the purpose of securing the deliberative sense of the community had in fact had a quite different effect. Whereas the republican view held that these institutional arrangements created constitutional space between the people and their representatives out of which the public interest could emerge, the populists argued that these institutions served in practice to increase the influence of special interests and to reduce the likelihood that legislation would conform to the public interest. Consequently, they believed that republican institutions served more often to violate than to secure individual rights. Eugene Sawyer argued in the Michigan Convention:

[I]f a majority of the people shall not rule, then pray who will? Who shall be the high priest, who can enter the holy of holies and perform for us the sacrifice which shall take away our blindness and open our eyes that we may see what is good for us? Who is this high priest? Yonder he comes in his robe of office, dressed in purple and fine linen, faring sumptuously every day. He is the party boss, the political manager. He will show us the way. Danger in
majorities, gentlemen of the Convention, and yet no danger in party bosses? Oppressed by the majorities, but no fear of being oppressed by political leaders? The people must be protected from themselves, but no need of being protected from the party machine? This is absurd.66

For the populist reformers, the implication was clear: deliberation could no longer take place in representative assemblies. Willis Townsend of Michigan argued: “Now if you want deliberation, gentlemen, if that is an essential in order to permit these amendments, let us have deliberation, but do not in the name of reason and common sense leave it to one branch of the government to make these deliberations, and especially that branch of the government which we have spent half or two-thirds of our time in this Convention in considering measures of limitation upon.”67 Technological advancements now made it possible for deliberation to take place outside of formal institutions, among the general public. According to Herbert Croly:

[Citizens] have abundant opportunities of communication and consultation without any actual meeting at one time and place. They are kept in constant touch with one another by means of the complicated agencies of publicity and intercourse which are afforded by the magazines, the press and the like. The active citizenship of the country meets every morning and evening and discusses the affairs of the nation with the newspaper as an impersonal interlocutor. Public opinion has a thousand methods of seeking information and obtaining definite and effective expression which it did not have four generations ago. . . . Under such conditions the discussions which take place in a Congress or a Parliament no longer possess their former function. . . . Thus the democracy has at its disposal a mechanism of developing and exchanging opinions, and of reaching decisions, which is independent of representative assemblies, and which is, or may become, superior to that which it formerly obtained by virtue of occasional popular assemblages.68

The initiative and referendum would therefore actually provide more opportunities for deliberation, as well as a higher quality of deliberation, than would ordinarily take place in legislative assemblies. In the first place, deliberation would take place in the course of securing signatures for initiative and referendum petitions. “They say we need a deliberative body, that we need the great safeguard of a deliberative body, and in that connection they refer to this matter of initiative on constitutional amendments as though it were something that was going to be done quickly,” argued Frank Pratt of Michigan. “Now, we propose to circulate a petition—it is not going to be done in a week nor in two weeks, nor in a month . . . Where is the haste? Isn’t this deliberate? I submit to you gentlemen of the Convention, that it is very deliberate.”69 Deliberation would also take place in the meetings, associations, and conversations that would inevitably be held in the months leading up to the election. In the view of Michigan delegate Charles
Thomas, the typical citizen “thinks about [an initiative], he talks about it with his neighbors, or with the men who are working beside him, with the result that when the day of voting comes, the voters are not surprised by having something placed before them of which they never have heard, but are prepared to stamp upon it their approval or rejection after mature deliberation.” In fact, reports circulated from John Randolph Haynes in California that in the days leading up to a vote on an initiative or referendum, “school children talked about them on the playground, some of them saying that their parents spoke of nothing else at their meals.”

The defenders of republican institutions thought that these stories of citizen deliberation were “a Utopian dream.” Even if this discussion and education did take place as promised, these delegates still contended that this could never substitute for the type of deliberation in which legislators engaged in representative assemblies. As Henry Campbell of Michigan argued, the initiative process lacked any opportunity for compromise, because “[w]hatever is proposed must be voted upon precisely as presented, without modification or change.” Nor did press coverage of these initiatives provide an adequate forum for reflection. “With all that is proposed as a means of information, one great means is lacking, namely, real debate.” Charles Choate argued in the Massachusetts Convention: “We every one of us know the advantage which each of us individually obtains from the discussion of subjects on this floor. We know the reaction produced upon our own minds by the views of other men. We know the light that comes to any body like this by the presentation of the views of many minds which look at a subject from many different viewpoints. Now, it is perfectly obvious that the people, who are to be made the legislators by this measure, will have none of that benefit.” Walter Wilson of Michigan concluded, similarly, that although “it is somewhat in fashion nowadays with many upon every occasion to throw bricks at the legislature, . . . in some very notable and conspicuous instances at least, the criticised are entitled to far more commendation than are the critics.” He thought that there was much to be recommended in “a deliberative body whose business it is to consider carefully and calmly all the changes they will originate in the fundamental law and submit to the people for rejection or adoption. I say, gentlemen, carefully, deliberately, and calmly consider; not in the haphazard, careless, happy-go-lucky, devil-may-care sort of fashion, and with the alacrity with which most men sign petitions.”

In the view of these defenders of republican principles, deliberation amounted to more than discussion, publicity, and education. Deliberation could take place only in an institutional setting that permitted the orderly exchange of views, the consideration of unintended consequences, the comparison of costs and benefits, and the forging of reasonable compromises. As Elihu Root argued: “[T]he only method by which intelligent legislation can be reached is the method of full discussion, comparison of views, modification and amendment of proposed legislation in the light of discussion and the contribution and conflict of many minds. This process can be had only through the procedure of representative legislative bodies.”
In the end, the populist view of deliberation prevailed. When the populists compared the respective abilities of the citizens and legislators, they determined that, “On the whole, laws enacted by the people are more carefully prepared, more widely discussed, and more thoroughly considered than are the acts of a legislature.”\textsuperscript{78} Moreover, insofar as deliberation consisted of providing sufficient time for reflection, due opportunity for discussion, and adequate education of the public, this could be achieved through the initiative procedure more effectively than through the legislature. Charles Thomas of Michigan therefore concluded, “The argument for conservatism and safety and intelligence is on the side of the initiative.”\textsuperscript{79}

Compliance

The populists undertook, finally, to challenge the republican understanding of the relationship between public opinion and the protection of rights. Individuals in the republican regime understood that legal guarantees were not self-executing, and they had been concerned to some extent with ensuring that legal guarantees were secured in practice. In their view, it was important that the people have an opportunity to participate in drafting the laws under which they were governed, but this requirement was fully satisfied by permitting the people to vote in representative elections and ratify constitutional amendments.

The populist reformers charged, however, that the republican view was insufficiently concerned with ensuring that legal guarantees were secured in practice. Moreover, the populists argued that to the extent that individuals in the eighteenth and nineteenth centuries had been concerned with the problem of compliance, they relied too heavily on formal institutional arrangements. According to the populists, republicanism failed to acknowledge that competing claims of right were resolved far more frequently through ordinary interactions among citizens than through institutions. As Brooks Adams argued: “It is not a scrap of paper that is going to make you safe. What does a scrap of paper mean, and who gives you the protection? Is it a bench of judges, who sit up in a lot of armchairs and go to sleep? Not a bit, you know. That is not what gives you safety. It is because your contemporaries do not want to have you injured. It is because public opinion will not permit that you shall be injured, and it does not make any difference whether you have got a lot of constitutional guarantees or not.”\textsuperscript{80}

When the question of securing rights was raised in a direct fashion, the populists argued that republican institutions were incapable of developing a level of public opinion that could support legal guarantees. It was not enough for the people merely to elect their representatives. In order for the people to have a stake in obeying the law, they would have to be afforded a more direct form of participation. According to Joseph Walker of Massachusetts: “[T]he real protection of the citizens of this Commonwealth does not lie in a written document, does not lie merely in a ‘scrap of paper.’ It lies in the fact that back of that ‘scrap of paper’ is
a contented people, a majority of the people approving of those restrictions, approving of that Constitution; and the minute the support of a majority of the people is withdrawn from the Constitution of this Commonwealth then indeed will it become a ‘scrap of paper.’”

The best way to produce this popular support for rights, according to the populists, was to adopt the initiative and referendum. According to Walker, once these measures were in place, “then you get a body of public opinion, enlightened, educated by discussion, back of our Constitution, that will indeed make it secure, and make the liberties of every one of us more secure than they are today.” At a basic level, individuals would be more likely to uphold legal guarantees that were secured through the initiative, because, as Robert Crosser of Ohio argued, “Any man has more pride in a thing which he has created than in that which someone else has created for him.” In addition, individuals would be more likely to comply with laws, because they would know that “the will of a real majority of the people is behind that law which gives it its force, and if for no other reason than the mere selfish one that they feel they are outnumbered they are inclined to respect it, which is not usually the case when the law is the result of some legislative action, always more or less the result of machination and tricks.”

Individuals would also respect rights secured through direct legislation because they would have benefited from “the discussion which has gone on before the people,” which is “bound to make the citizen understand the law better than he would if it were passed here by the general assembly. He knows the reason for it, and knowing the reason he sees the justice or what is claimed to be justice by the great majority who have approved it.” Finally, in response to those who argued that under a system of direct democracy, passion would prevail over reason, the populists argued that “where we have the people’s will expressed in the form of law as the direct initiative would permit it to be, we have the surest bulwark against anarchy and appeal to passion. How many men do you suppose are going to take chances in the violation of law if they know that the great majority of their fellow men have personally expressed their approval of that law instead of giving someone carte blanche to pass such a law without their knowing anything about it?”

CONCLUSION

The populist reform project sought, therefore, to supplant the governing institutions and principles that were central to the republican regime. Whereas republicanism held that the legislature best represented popular opinion with respect to rights, the populists advocated a more direct expression of the popular will. Whereas republicanism understood that the legislature provided the best opportunity for deliberating over rights, the populists thought that deliberation would take place through initiative and referendum campaigns. Finally, the republican
regime had operated on the view that compliance would be secured insofar as cit­
izens had an opportunity to participate indirectly in drafting the laws under which
they were governed. The populists held that people would be even more likely to
comply with legal guarantees when they had participated directly in approving or
rejecting them.