Keeping the People's Liberties

Dinan, John J.

Published by University Press of Kansas

Dinan, John J.
Keeping the People's Liberties: Legislators, Citizens, and Judges as Guardians of Rights.

For additional information about this book
https://muse.jhu.edu/book/81020

For content related to this chapter
https://muse.jhu.edu/related_content?type=book&id=2765733

This work is licensed under a Creative Commons Attribution 4.0 International License.
Populist Institutions as Keepers of the People’s Liberties

There has been no shortage of efforts to evaluate the capacity of populist institutions to protect rights. In fact, the initiative and referendum have been evaluated in the infant, middle, and mature stages of their development; on the basis of individual and multistate analyses; and through empirical and public-choice analyses. The difficulty is that these studies have produced a variety of conclusions.

Early scholarship, although not unanimous in its approval, could be said up until the middle of the twentieth century to have generally endorsed direct democracy. As Arthur Holcombe wrote in 1926: “There is as yet no convincing evidence that the initiative has tended to demoralize the electorates by exposing casual majorities of voters to the temptation of abusing the rights of helpless minorities under the lead of irresponsible and reckless agitators. Either there have been legislative precedents for the radical measures submitted by means of the initiative, or they have been rejected at the polls.” James Pollock reached a similar conclusion in 1940: “[T]here is quite as likely to be a judicious and rational decision on popular votes as on legislative votes,” and on the larger questions, “the people have been much more likely [than the legislature] to arrive at an acceptable conclusion.” With the exception of several early setbacks in Oregon, the view predominated that voters had “stood the test remarkably well.”

The scholarly consensus shifted in the second half of the twentieth century, primarily in response to a series of ballot propositions that sought to regulate civil rights. Beginning in the 1960s, scholars took note of several initiatives, primarily in California, that had the effect of reversing fair-housing and busing measures. Populist institutions were now deemed to “present a threat to minority rights,” to “commonly usurp minority rights,” and to “provide a procedure whereby legislative decisions can be made exclusively along the lines of racial prejudice.” In the early 1990s a series of anti-gay-rights measures, some of which were approved, led to another reassessment of populist institutions. More
scholars joined the discussion, and many now concluded that plebiscites "pose a
greater threat to minorities than laws enacted by legislatures."\textsuperscript{11}

Although the capacity of populist institutions to protect rights is therefore
now generally held in low esteem,\textsuperscript{12} a fair number of scholars interpret the record
in a different manner. Ronald Allen concludes, "The history of the initiative is
remarkably free of the enactment of abusive legislation."\textsuperscript{13} David Butler and
Austin Ranney contend that "[i]f elected representatives are more protective of
minority rights than popular majorities voting in referendum elections, the differ­
ence is at most marginal."\textsuperscript{14} Additionally, as Janice May pointed out, "the fact that
the device has been used to promote rights has been overlooked."\textsuperscript{15} Furthermore,
it has been noted that the initiative has "provided a valuable political tool to force
the enactment of laws that the elected legislature has been unwilling to adopt" and
"has protected the voters from laws that they were unwilling to accept."\textsuperscript{16} On this
reading of the evidence, then, representative institutions are not clearly superior to
direct democracy. In fact, some scholars go even further and conclude that, "at
least in certain situations, direct legislation may be more ameliorative than harm­
ful,"\textsuperscript{17} and "that the work-product of the initiative process overall is at least the
equal of, and often superior to, that of the legislative process."\textsuperscript{18}

It would be fair to say that "[t]he social science literature furnishes no defin­
itive resolution of the controversy,"\textsuperscript{19} and on the question of whether the initia­
tive and referendum are more likely to secure or to endanger rights, "[r]eliable
empirical studies do not exist."\textsuperscript{20} What is needed, then, is an empirical study that
can address the deficiencies in the unit of analysis, as well as in the scope and
framework, of previous studies.

With respect to the unit of analysis, there are a number of capable studies of
the constitutional initiative, the statutory initiative, \textit{or} the popular referendum. But
few studies have considered in a comprehensive manner the way in which all these
direct democratic institutions have been used to regulate rights. Nor has adequate
attention been given to the way in which the \textit{presence} of these institutions has con­
tributed indirectly to the security or insecurity of individual rights. After all, the
founders of these institutions thought that their utility would be demonstrated "in
the long run, not in the legislation placed by its use directly upon the statute books,
but in the improvement of the legislation placed there by the legislatures."\textsuperscript{21}

With respect to the scope of analysis, this study is both more broad and more
narrow than existing accounts. It is more expansive in that it considers the record
of populist institutions across several states and time periods. Because institu­tional
tendencies are sometimes revealed only by analyzing a wide range of cases
and situations, studies that focus on the record of direct democracy in a particu­
lar state or period are of limited utility. It is important, therefore, to examine the
record of populist institutions in several states (Massachusetts, Michigan, Ore­
gon, and Virginia) over an extended period (from 1900 until 1970).\textsuperscript{22} Evidence
from other states and other periods is considered insofar as it can shed light on
the general tendencies of these institutions.
Although it is expansive in this sense, the project is necessarily confined to cases in which populist institutions were used to protect rights. Accordingly, this study does not discuss the various other innovations that have been enacted through direct democratic procedures, including the Missouri judicial selection system, which was adopted by initiative in 1940 and then copied by numerous other states; bottle-deposit laws, which were passed by initiative in Michigan in 1965 and proposed in numerous other states; California's influential Proposition 13 tax-limitation measure, which passed in 1978 and inspired countless other tax-cutting measures; Arizona's motor-voter bill, which was enacted in 1982 and then adopted by a number of other states as well as by the U.S. Congress; and legislative term limits, which have been enacted almost entirely through the initiative procedure.

Finally, the framework of this analysis is designed to achieve greater clarity than previous studies. Whenever one encounters such dramatically divergent assessments in the literature as in this case—with some scholars concluding that populist institutions pose a grave threat to rights, and others maintaining that they actually safeguard rights—there are two possible explanations. These scholars could either be talking past one another, by ostensibly referring to the same kinds of rights but actually speaking of different sets of rights, or be relying on different standards to evaluate the same data. To guard against the first possibility, this study examines a broad array of rights. This permits us to test the possibility that populist institutions may be quite effective in protecting certain rights but less effective in other cases, and in a patterned and predictable manner. Second, to provide a reasonably clear and consistent standard of measurement, it is advisable to compare the results of initiatives and referendums with the outcomes achieved through legislatures. Previous studies have not always undertaken such a comparison; consequently, they have been unable to address the question of the relative capacities of populist versus republican institutions.23

FREEDOM TO WORSHIP

The critics of direct democratic institutions at the time of their inception were perhaps most fearful for the fate of religious liberty. Henry Campbell argued in 1912, in comments that were echoed in a number of early-twentieth-century constitutional conventions: "In times of excitement, when the passions of the populace are aroused and those disposed to conservative views are intimidated by popular clamor, almost any measure might be adopted, which perhaps many of its supporters in their more sober moments would afterwards regret."24 In one important religious freedom case, these predictions proved to be quite accurate. In addition, in several instances the initiative provided slightly less protection than representative institutions. At the same time, however, voters rejected most of the ballot measures that would have encroached on religious freedom, and in several cases the people secured religious liberty more effectively than the legislature.
Schools were the primary battleground for religious liberty in the populist era, and the early 1920s featured several controversies over the proper means of securing this right. The First World War, which inspired numerous efforts to distinguish American culture from that of its foreign combatants, combined with an influx of immigrants to produce a nationwide movement to "Americanize" the foreign-born. Many of these efforts were genuinely designed to help newcomers assimilate. Massachusetts, among other states, appropriated funds for night classes to teach adult immigrants the English language and basic civic skills. Several states also directed their school systems to strengthen the American history curriculum and require students for the first time to recite the National Anthem and Pledge of Allegiance. Compulsory-schooling laws were also enacted to require that all children receive some form of public or private education.

At a certain point, "a change in the approach to Americanization was taken by many in the movement. A definite emphasis was assumed which sought to stamp out the remnants of foreign culture still in existence in America." This latter movement sought to instill American and Protestant values into the public-school curriculum in ways that occasionally infringed on the rights of religious minorities. In particular, because many Catholic immigrants attended parochial schools and therefore were deprived of the benefits of these measures, the Americanization movement next turned to regulating the private schools. "Not all children went to public schools where they could be shaped to fundamentalist specifications. Nativists wondered what went on in Catholic parochial schools, in German Lutheran classrooms, in elite academies." Thus in 1921 the Michigan Legislature made the state superintendent of education responsible for regulating both the public and the private schools, and several other state legislatures acted to permit public inspection of private schools.

Although legislatures of this period were not particularly solicitous of religious minorities, their superiority to the initiative and referendum is evident when we examine the most extreme Americanization measure: the movement to ban private schools altogether. No legislature came close to adopting such a drastic law, but private-school bans were proposed through the initiative process in Michigan in 1920 and 1924, Oregon in 1922, and Washington in 1924. Although these measures were portrayed by their supporters as being neutral toward religion, they were clearly targeted against Catholics. In Oregon, the Ku Klux Klan initiated and campaigned strongly for the measure. In Michigan: "All the old arguments based on bigotry were collected and used against the Catholic church and the parochial school. Slander and vilification came from platform and pamphlet. 'Ex-nuns' and 'ex-priests' were utilized to spread the propaganda. Absurd appeals to prejudice and sectarian hate were shouted abroad." Both Michigan measures were defeated soundly, as was the Washington proposition, but the voters in Oregon approved a ban on private schools by a relatively comfortable margin.

Although direct democracy served as a vehicle for limiting the free exercise of religion in this case, as well as in several others, the initiative was occasionally
used to a different effect. Perhaps the most notable case involved a constitutional amendment initiated and ratified by the citizens of Michigan. In its 1970 session, the Michigan Legislature resolved that the state’s private schools contributed significantly to the state’s educational goals and should therefore be entitled to public assistance. In November 1970, however, the citizens ratified an initiated amendment that prevented the use of any public money to support private education, except in the case of transportation. Initiatives were also used during this period to secure the repeal of Sabbatarian legislation, including in Oregon, which in 1917 abolished its ban on Sunday amusements, and in Massachusetts, which in 1928 voted to permit Sunday sporting events. In addition, North Dakota voters permitted Sunday baseball in 1920 and movies in 1934, and Washington repealed its blue laws altogether in 1966.

FREEDOM OF EXPRESSION

Free-speech controversies flared up on a number of occasions during this period, but direct democratic institutions played a relatively minor part in these deliberations. In the few cases in which initiatives were employed, they generally provided less protection than the legislative process.

Several initiatives were enacted that curtailed the right of association of members of labor unions. In 1938 the citizens of Oregon voted to impose numerous restrictions on picketing and to prohibit any form of picketing “unless there is an actual bona fide existing labor dispute between said employer or employers and his or their employees.” Then in 1946 Massachusetts voters approved a ballot proposition that banned unions from operating unless they provided, for the public record, the names of all officers and their salaries, as well as all sorts of information about the internal operation of the union.

It should be noted, however, that although these initiatives were not particularly favorable to the right of free expression, they were not significantly more restrictive than measures adopted by legislatures and upheld by a number of state courts. In addition, a number of oppressive initiative proposals were defeated at the polls. Thus a proposition to abolish boycotting was defeated in Oregon in 1912, as was a California initiative that sought to impose significant limits on picketing in 1938. Also defeated were a pair of measures on the ballot in Massachusetts in 1948 that sought to regulate internal union rules governing election procedures and strike votes.

Initiatives were also used sparingly in a second area in which populist-era legislatures were quite active: to restrict the activities of anarchists, communists, and members of other political movements. North Dakota voters enacted a ban on the display of red and black flags in 1920, but although this measure was not particularly protective of free-speech rights, it was not markedly different from restrictions imposed by numerous other legislatures during the period.
Additionally, the people rejected the more oppressive ballot measures, as in 1912, when Oregon voters rejected a proposal to give mayors the power to license street speeches, and in 1962 when California voters disapproved an initiative that would have banned the Communist Party.

Finally, on one occasion, direct democracy secured free-speech rights more effectively than did representative institutions. At the beginning of the twentieth century, a number of legislatures enacted statutes to require licensing of motion pictures, and the courts routinely ruled that these measures constituted reasonable protections against indecency. In Massachusetts, however, the people relied on the referendum process to disapprove such a measure. In 1921 the Massachusetts General Court enacted a law providing that no film could be shown in the commonwealth unless it was first submitted to a commissioner of public safety, who could "disapprove any film or part thereof which is obscene, indecent, immoral, inhuman or tends to debase or corrupt morals or incite to crime." A sufficient number of signatures was obtained to force a referendum on the law. During the ensuing campaign, "[s]carcely a paper failed to condemn the proposed law editorially," and in the 1922 election, Massachusetts voters rejected the censorial law by an overwhelming margin.

THE GUARANTEE OF A FAIR TRIAL

The initiative was also used for multiple purposes and with mixed effect in regard to the right to a fair trial. The most significant initiative in this area sought to regulate the grand jury, an institution whose utility was the subject of much debate in the late nineteenth and early twentieth centuries. The grand jury had originally been viewed as a significant source of protection for individual rights, because it prevented state officials from undertaking arbitrary prosecutions. By the latter half of the nineteenth century, however, the grand jury had come to be viewed in some quarters as a source of unaccountable power rather than as a guarantor of individual liberty. Therefore, when in 1899 the Oregon Legislative Assembly permitted district attorneys to proceed to trial by filing information instead of having to obtain an indictment through a grand jury, it was not clear whether this would be viewed by the citizens as having secured or violated rights. A majority of legislators undoubtedly believed that in bypassing the grand jury they were securing rights, but as it turned out, a significant percentage of the Oregon populace still looked upon the grand jury as an institution that protected its rights.

These conflicting views of the grand jury were initially brought before the Oregon Supreme Court in 1900, when a defendant challenged the new procedure on the ground that it violated his fair-trial rights. The court rejected his claim and argued that:
[The Bill of Rights] has secured to the accused the right of public trial by an impartial jury; to be heard by himself and counsel; to demand the nature of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; and to have compulsory process for requiring the attendance of witnesses in his favor. This constitutes the chief palladium of civil liberty under the constitution. The manner of preferring the accusation is of preliminary import, and whether it shall be done by a grand jury or by a public prosecutor, or concurrently by both, has, whether wisely or not, been left to the wisdom of the legislature to determine.59

Justice Charles Wolverton concluded that, “while the wisdom of the law may be a subject of dispute, the authority to enact it cannot be gainsaid.”60 In previous years, citizens would have had no other means of redressing their grievance, short of calling a constitutional convention. But the advent of the initiative offered the people another opportunity to implement their view of the grand jury independently of the legislature or the judiciary, and in 1908 Oregon voters relied on the initiative procedure to enact a constitutional amendment that reinstated the requirement of a grand-jury indictment.61

The only other fair-trial right that was regulated through the initiative procedure was the privilege against self-incrimination, which had also been secured in several ways throughout the nineteenth century. Initially, defendants were protected by not being permitted to testify in their own defense. Then, midway through the century, legislatures changed course and permitted the accused to testify but stipulated that his refusal to do so could not be held against him. In the early twentieth century, this arrangement came under attack, and a number of proposals were advanced to permit prosecutors to comment on a defendant’s failure to testify.

This criticism became particularly intense in the 1930s. Roscoe Pound argued in a 1934 law review article that the privilege had become “of little or no use to the innocent and is one of too many advantages of which the habitual defender of professional and organized criminals and the malefactors of means know how to avail themselves.”62 He argued that this bred disrespect for the privilege among law-enforcement officers, which in turn led to “a systematic development of extra-legal or downright illegal examinations by officials, with every external appearance of legality.”63 Pound, among others, recommended as an alternative that “[t]here should be express provision for a legal examination of suspected or accused persons before a magistrate; that those to be examined should be allowed to have counsel present to safeguard their rights; that provision should be made for taking down the evidence so as to guarantee accuracy.”64 The initiative was the vehicle by which the citizens of California enacted such a plan in 1934. The voters permitted prosecutors to comment on the failure of a defendant to testify,65 but they secured the defendant’s rights by directing that he be examined immediately after his arrest, before a magistrate, in the presence of counsel, and with all the guarantees that Pound envisioned.66
Significantly, these four states do not yield a single example of an initiative or referendum that violated the right to equal treatment under the law. When we broaden the study to include all the states, we are generally confirmed in our judgment that the initiative has been employed infrequently in order to encroach on minority rights. This broader sample does suggest, however, that in certain circumstances, the right to equal protection has been placed at greater risk in the initiative procedure than in the legislative process.

On several occasions the initiative provided diminished protection for the rights of aliens. Arizona voters limited the right of aliens to work by enacting an initiative in 1914 that required that at least 80 percent of an employers’ workforce be composed of naturalized citizens.67 The most notorious initiative affecting aliens concerned their right to own land. At the height of anti-Japanese sentiment in 1920,68 California voters approved an initiative that “declare[d] that an alien ineligible to naturalization shall have no rights whatsoever with respect to ‘real property’ in California other than those secured to him by a ‘now existing treaty’ between the United States and his country.”69 The right of aliens to vote was also limited by an initiative that was enacted in California in 1920 and imposed a $10 poll tax on all aliens.70

Initiatives were introduced to regulate the rights of African Americans in two kinds of cases. In Oklahoma in 1910, an initiated amendment was the vehicle for the disenfranchisement of African American voters. The amendment, which was approved by a significant margin, instituted a universal literacy test for voting but then “grandfathered” virtually all white residents. Although this amendment, which was declared unconstitutional by the U.S. Supreme Court in 1915,71 clearly oppressed African Americans, there is reason to be cautious about drawing any general conclusions about the tendencies of direct democratic institutions. According to David Schmidt: “[R]acist state officials, instead of printing ‘yes’ and ‘no’ on ballots, printed in small type: ‘For the amendment.’ Anyone wishing to vote against it was supposed to scratch out those words with a pencil. If they left their ballot as it was, it was counted as a vote in favor. In some precincts voters were not even provided with pencils. Casting further doubt on the accuracy of the 1910 vote count was a ‘literacy’ test measure placed on the ballot by the legislature in the 1916 primary, six years later: voters rejected it by a 59 percent margin.”72 It is also noteworthy that in states such as Virginia, where constitutional conventions were the agents of disenfranchisement, the delegates to these conventions frequently declined to submit these measures to the people for ratification, and instead declared them to be immediately operative.73 This would suggest that the people could not be counted on to vote for these measures, and therefore that the general citizenry was not ordinarily disposed to approve limitations on the franchise.
Initiatives were also introduced later in the century to regulate the right of African Americans to equal treatment in employment, schooling, and housing. In the 1940s the voters of California rejected a ballot proposition that sought to prohibit all racial discrimination in employment.\textsuperscript{74} Then, in the 1950s, Arkansas voters approved an initiative that urged the legislature to resist \textit{Brown v. Board of Education} by all legal means. The 1960s was the occasion for the only successful statewide initiative of any practical importance. In 1964 California voters enacted an initiative to disapprove the 1962 Rumford fair-housing law.\textsuperscript{75} According to Raymond Wolfinger and Fred Greenstein, the “disparity in the outcomes” of the legislature and the initiative in this case was “remarkable.”\textsuperscript{76} In 1964 “there were no signs that either the governor or the legislature was giving serious consideration to repealing the Rumford Act.”\textsuperscript{77} Yet later that year the repeal initiative prevailed by a two-to-one vote at the polls.\textsuperscript{78}

**THE RIGHT OF THE ELECTORATE TO CONTROL GOVERNING INSTITUTIONS**

The chief concern of the populist reformers was not so much to protect existing rights as to secure recognition of a new set of rights. The populists were perhaps most concerned with securing the right of the electorate to exercise effective control over governing institutions, which could be frustrated in several ways: by the self-interested actions of legislators, the disproportionate influence of certain groups, and the absence of institutional mechanisms for enforcing the majority will. The initiative process provided a means to overcome each of these deficiencies, first, by enabling the people to limit the influence of individual and special interests, and second, by ensuring that the popular will would be implemented more immediately and concretely.

In the first place, populist institutions were believed to “open the way for dealing with constitutional and political questions directly and effectively, without the necessity of reversing the laws of human nature in order to compel the legislature to act unselfishly in matters peculiarly affecting its members.”\textsuperscript{79} As Delos Wilcox argued: “How can we appeal to a state legislature to divest itself of the powers of interference in municipal affairs? How can legislators and aldermen be expected to forbid themselves to use railroad passes?”\textsuperscript{80} The logic of the populist regime was that on most questions, representatives could act reasonably, but on certain issues, their particular interests rendered them incapable of deliberating reasonably.

The primary issue that legislators were deemed incompetent to regulate concerned the electoral process itself. When the Oregon Legislative Assembly declined in its 1907 session to enact a law for the regulation of campaigns and elections, the people in the next year initiated and approved a corrupt practices act that limited campaign expenses, required full disclosure of all candidate
expenditures, and prescribed a comprehensive set of rules to govern campaign and election behavior. Allen Eaton concluded that “of all the measures passed by the people it is without doubt one of the best.”

Another issue that legislators were deemed incapable of regulating is one to which Wilcox alluded but whose significance may no longer be apparent. In an era when the railroads constituted one of the most powerful special interests, the free rail pass was one of the chief means of wielding influence in the political process. Not surprisingly, one of the chief populist reform goals was to abolish the free pass. As William Allen White noted:

[T]he anti-pass movement was based, not on economics, but upon politics. The movement was really connected with the growth of fundamental democracy. For the pass of the politician gave him power. He could run on errands against free government, and he became by reason of his pass the political agent, not merely of the railroad, but of all the foes of progress in the community. Railroad passes packed conventions, corrupted legislatures, colored the view of administrative officers, and biased courts. The pass was one of the most formidable weapons of the aristocracy of politics against the democracy.

A number of state legislatures moved to ban the free pass during the first decade of the twentieth century, but where legislators declined to ban rail passes, as in Oregon, the people resorted to the initiative to eliminate them.

The initiative was also used to overcome the improper influence of special interests. In particular, populist institutions were employed to ensure that “[t]he clamor of loud-voiced minorities would have less effect upon the people at large than it now has upon their representatives. From the eye of the legislator at the state capital prevailing sentiment is often hidden by the mist arising from the fierce breath of the militant few who fill the corridors. . . . The Referendum removes the ultimate control of legislation from the artificial storm center at the capital to the wider fields of common life where average weather conditions prevail.” In a broad sense, of course, the initiative and referendum performed this checking function in ways that cannot accurately be detected or measured. U’Ren, for one, thought that these institutions had such an influence on the 1903 session of the Oregon Legislative Assembly, which was the first to be held after the adoption of the initiative. He thought that this session was the first one in a long time that reflected the majority will rather than that of special interests, because of the representatives’ “fear that the referendum would be demanded on any legislation obtained by [improper] methods.”

The initiative also performed this checking function in several specific ways, two of which are only marginally related to rights. First, Oregon and Michigan were two of many states where voters living in the fields battled those residing closer to the legislative corridors over the merits of daylight versus standard time. After the Oregon Legislative Assembly adopted daylight saving
time in 1949, citizens resorted to the initiative process and in 1952 forced the state to revert to standard time. In Michigan, it was the partisans of daylight saving time who relied on the initiative to effect a change from standard back to daylight time. Second, geographic splits were responsible for the efforts in some states to physically move the capital in order to bring it closer to the fields.

In addition to using the initiative to reduce the power of particular interests, populist reformers secured popular rights by transferring governing powers from the legislatures to the electorate. In 1908, for instance, the citizens of Oregon used the initiative to obtain the power to recall public officials, and in 1939 Michigan voters relied on the initiative to obtain the power to select their judges, through nonpartisan elections. The initiative was also the means by which the electorates of several states secured the direct election of U.S. senators. In 1904 Oregon voters required state legislators to pledge to vote for the Senate candidate of the people’s choice, and in 1908 they approved an initiative that formally instructed legislators to honor the results of the popular vote.

The direct primary, another favorite Progressive reform, was also adopted in a number of states through the initiative. Oregon voters adopted the direct primary for state officeholders in 1904, and then extended this to national offices in 1910; Massachusetts voters in 1932 enacted an initiative that reformed party nomination procedures.

The initiative also transferred control of the constitutional revision process from the legislators to the citizens. In Oregon, the people feared that the legislature might call a constitutional convention without first obtaining their approval. Thus in 1906 Oregon voters approved an initiative that required that the legislature hold a popular referendum before it could hold a constitutional convention. In Michigan, the voters feared just the opposite—that the legislature would not permit a convention to be held, even when this was supported by a majority of the people. Thus, after the Michigan Legislature rejected repeated calls for a constitutional convention throughout the 1950s, Michigan voters in 1961 approved a constitutional initiative that required a popular referendum to be held the following year, and every sixteenth year thereafter, on whether or not to hold a constitutional convention. In 1968 Massachusetts voters approved a similar initiative to force a popular vote on holding a constitutional convention.

Finally, the initiative was used to reduce the size of legislative assemblies, as well as the frequency and duration of their sessions. Reducing the size of the legislature by abolishing the state senate, as many citizens proposed during this era, was seen as not only cutting expenses but also increasing legislative responsiveness and therefore indirectly securing popular rights. But because this would naturally deprive many legislators of their seats, it was routinely rejected by state legislatures. Accordingly, Oregon voters went to the polls to vote on ballot measures to abolish the state senate in both 1912 and 1914, but the initiatives failed each time. These proposals were greeted more favorably in other states. Nebraska voters followed George Norris’s lead and approved a unicameral-legislature
initiative in 1934. In addition, when the citizens of Massachusetts in 1968 sought to reduce the size of their house of representatives from 240 to 160 members, they initiated a constitutional amendment that eventually provided the necessary spur for legislative action.

Legislators were equally chary of cutting the length or frequency of their sessions, in part because of the resulting reduction in their salaries. Therefore, when these changes were made, they were usually adopted in constitutional conventions or through initiatives, such as the 1938 ballot measure through which Massachusetts voters adopted biennial legislative sessions.

THE RIGHT TO VOTE

State governments in the nineteenth century had extended the suffrage in a variety of ways. Constitutional conventions had enfranchised African Americans, removed property and freehold requirements, and secured the right to an equal vote for residents of rural areas. The early twentieth century witnessed some of the same debates, including over the extension of the suffrage (to include women), the removal of exclusionary policies (the poll tax), and the passage of measures to ensure an equality of apportionment (to secure an equal right to vote for urban and suburban voters). Populist institutions were employed to secure voting rights in each of these cases.

The initiative served in the first place as the vehicle for extending the suffrage to women. It was one thing to permit women to vote in school board and municipal elections, as some states did in the late nineteenth century. This could be justified on the ground that women possessed expertise in these particular areas. Voting for state and federal officials was something else entirely, and it was only in the course of the populist regime that these rights were recognized. To be sure, the right was usually secured through constitutional amendments that were proposed by legislatures and approved by the people, but in several states women's suffrage was stymied in the legislature and could be obtained only through the constitutional initiative.

The problem was that the fate of the women's suffrage movement was so closely connected with other social reform efforts, such as Prohibition, that it provoked intense opposition from opponents of these policies, such as liquor companies and saloon keepers. These groups occasionally exerted such inordinate influence on the legislative process that legislatures failed to approve amendments, even when they were supported by a popular majority. In these cases, the initiative provided a way to bypass the special interests and to secure the right independently of the legislature. Whether because the suffragists had misjudged the strength of popular sentiment, or because the liquor interests had corrupted even the electoral process, these initiated measures were sometimes rejected at the polls, as was the case in Oregon in 1906, 1908, and 1910. In
1912, however, the voters of Oregon finally ratified an initiated amendment that secured for women the right to vote.\footnote{109}

In addition to removing the prohibition on women voting, the initiative served as the means of abolishing of the poll tax. The populist reformers neither expected nor desired that the initiative would remove all voting qualifications. Wilcox, for instance, was “reasonably certain that the majority of the present electorate in most American communities would vote for such moderate restrictions as would exclude from the suffrage the obviously undeserving and unfit,” including “those persons who cannot read and write.” But he thought that it was “not likely that a property qualification could be established by vote of the electors.”\footnote{110} Wilcox turned out to be prescient on both counts, in that voters generally retained literacy and citizenship tests but moved in certain cases to eliminate the poll tax. In 1910, for instance, the citizens of Oregon initiated and ratified a constitutional amendment that prohibited the poll tax.\footnote{111} Similar measures were proposed in other states and ratified every time they appeared on the ballot.\footnote{112}

Finally, voters relied on the initiative to secure the right to an equal vote, especially when legislative intransigence prevented a timely or equitable redistricting. The failure of legislatures to secure an equitable apportionment had been a long-standing problem, dating back to the early nineteenth century. Hence the occasional use of the constitutional convention to remedy extreme malapportionment. Citizens in the twentieth century faced the same problem, only in a more dramatic fashion, as some states failed to reapportion for nearly five decades.

The reasons for such a widespread failure of legislatures to live up to state constitutional redistricting requirements are not difficult to find. In almost any reapportionment a number of legislators would be personally affected through the abolition or consolidation of districts. A legislator naturally finds the status quo under which he was elected to be satisfactory and usually dreads the prospect of a new and unknown constituency. Also, many refuse to move because their particular party would lose strength. In almost all cases a dominant consideration has been the increasing disparities in rural and urban popular strength, with legislators from smaller communities showing a hostility to growing cities. Finally, interest groups benefiting from the status quo have fought reapportionment.\footnote{113}

With the advent of the initiative and referendum, the people obtained a new tool for securing an equitable apportionment, one that permitted them to bypass the legislature as well as the cumbersome and unpredictable process of calling a constitutional convention.\footnote{114}

The initiative could be used to simply redraw district lines. Although a number of states across the country used the initiative for this purpose, none of the states in this sample used the initiative in this way. In 1930 and 1932, Michigan voters had an opportunity to do so, as did Oregon voters in 1950, but each of these proposals was rejected.\footnote{115}
Some states also used the initiative to set up alternative mechanisms for redrawing district lines. The usual strategy was to construct a reapportionment procedure that either bypassed the legislature altogether or provided a backup plan in case the legislature failed to act promptly. Thus in 1952, after the Oregon Legislative Assembly had failed to reapportion for some five decades, Oregon voters turned to the initiative, in what Gordon Baker referred to as “a fruitful case study of how effective this direct democratic device can be in circumventing legislative inaction on a fundamental problem of free government.” In particular, the citizens established a formula for measuring the equity of future apportionments, directed the secretary of state to use this formula to draw the district lines in the event the legislature failed to do so, and gave the state supreme court original jurisdiction to review any contested apportionment plans. Ironically, Clay Myers, who as a student at the University of Oregon had been one of the chief advocates for this amendment, had the opportunity in 1966 as the Oregon secretary of state to comply with the amendment by redrawing the state district boundaries after the legislature failed to do so. Citizens in other states took to the polls to vote on similar schemes for bypassing legislatures. In 1952 Michigan voters approved an amendment that mandated decennial apportionment, required that boundary lines be drawn on an equitable basis, and directed the board of state canvassers to assume responsibility in the event the legislature failed to take prompt action.

The use of the initiative to remedy malapportionment became so prevalent that this figured prominently in the landmark 1962 U.S. Supreme Court case *Baker v. Carr*. The Court determined that this particular case, which concerned the failure of the Tennessee General Assembly to reapportion for some six decades, was justiciable only after noting that Tennessee lacked an initiative procedure, and therefore the voters lacked any effective recourse. Justice William Brennan noted in his majority opinion that the Tennessee General Assembly was unlikely to “submit reapportionment proposals either to the people or to a Constitutional Convention,” and that “[t]here is no provision for popular initiative in Tennessee.” Likewise, Justice Tom Clark argued in his concurring opinion that he “would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no ‘practical opportunities for exerting their political weight at the polls’ to correct the existing ‘invidious discrimination.’ Tennessee has no initiative and referendum.”

Several commissions on governmental organization also took note of the value of the initiative for reapportionment purposes. The Connecticut Commission on State Government Organization reported in 1950: “To ask the General Assembly to reconsider its own basis of apportionment is to ask a man to judge his own case. He can scarcely rise above his own interest if he does, and he cannot escape the charge of bias however he decides.” As a result, the commission recommended that states adopt “an additional method of constitutional change,
by initiative petition and popular referendum." Likewise, when the National Municipal League proposed its Model State Constitution in 1961, it also recommended that states adopt the initiative, on the ground that "[s]ome way should be provided by which the people may directly effect constitutional change without depending on existing governmental institutions."124

THE RIGHT TO ECONOMIC AND SOCIAL SECURITY

In addition to securing an assortment of new political rights, populist reformers sought to recognize a variety of economic and social rights. The view took hold that women, children, and laborers in dangerous industries had a right to reasonable working hours. In addition, all workers had a right to safe working conditions. Senior citizens, disabled individuals, and mothers with dependent children were also entitled to be protected from economic insecurity. Finally, as the century progressed, the view took hold in some states that individuals had a right to work without having to join a union. The majority of these rights were recognized through legislation, but when legislatures failed to act promptly or were incapacitated by the disproportionate influence of interest groups, the people turned to the initiative to secure their rights.

The Right to Reasonable Work Hours

Of all the rights to which workers were entitled, the one that was established the earliest and with the least resistance was the right to limited work hours. According to Theda Skocpol: "The typical pattern was for subnational labor bodies to campaign first for legal hours limits for children, women, and particular male occupations, following up victories in these areas with campaigns for general eight-hour statutes."125 Thus children's hours were first limited by a law enacted by the Massachusetts General Court in 1842,126 and by the start of the twentieth century, there was a near consensus among the states in favor of child-labor laws.127 Limiting women's hours was the next reform goal. The Massachusetts General Court enacted the first such law in 1874, and most other states again followed suit.128 Reformers sought, finally, to limit the hours of all workers in particular industries such as railroads, mines, and public works.129

The representative process was generally effective in securing these rights, but when legislatures proved unresponsive the people turned to the initiative. Thus in 1912 Oregon voters proposed and enacted an eight-hour-day law for public workers, and Colorado voters approved a pair of initiatives that mandated eight-hour days for women and for miners.130 Then, in 1914, the American Federation of Labor branches in Oregon, California, and Washington proposed universal eight-hour-day initiative measures. In the end, these propositions were defeated soundly, but interestingly enough, not necessarily on account of opposition from
business groups. Following a 1913 AFL West Coast convention at which labor leaders were seemingly united in their support for these initiatives, it soon became apparent that national union leaders were ambivalent toward, if not opposed to, these measures. Between the 1913 convention and the 1914 vote, “AFL President Gompers spoke out against general eight-hour laws, infuriating unionists in California, Oregon, and Washington, who had to watch business interests put quotes from Gompers on billboards and on pamphlets distributed during successful efforts to defeat eight-hour laws by popular referenda in those states.”131 As a result, state union leaders had to remain content with their limited gains achieved through prior initiatives. With the exception of a forty-eight-hour-workweek that was secured through the initiative in Maine in 1923, all future maximum-hours laws were pursued and obtained through the legislative process.

The Right to Safe Working Conditions

The right to safe working conditions was the next to be secured, and it was established in two stages. The first step was to repeal the common-law rules that absolved employers of virtually all liability for work accidents. According to these rules, the employer was held blameless if the worker knew about and therefore could be said to have assumed the risk involved in the job (the assumption-of-risk doctrine), if the worker himself contributed in any way to the accident (the rule of contributory negligence), or if a fellow worker’s negligence contributed to the accident (the fellow-servant rule).132 The second step toward securing this right was to establish workmen’s compensation bureaus that provided compensation to disabled employees.133

For the most part, these changes were implemented through statutes that were enacted in the first two decades of the twentieth century.134 The relatively smooth passage of these reforms was due, in part, to the fact that “workmen’s compensation, in contrast to other forms of social security, represented a redefinition or expansion of certain limited rights the worker already had.”135 In addition, these reforms attracted the rare support of both labor and business groups.136

At times, however, railroads and other interest groups wielded such inordinate influence on the legislative process that they succeeded in blocking reform of workmen’s compensation laws. In these cases, the initiative and referendum proved helpful. Thus in its 1901 session, the Oregon Legislative Assembly defeated a bill that would have abolished the fellow-servant rule for railroad workers, but in 1903, in the first session after the adoption of the referendum, the law passed easily.138 Several years later, when the 1909 session of the Oregon Legislative Assembly refused to enact a more comprehensive workmen’s compensation plan, the issue was placed on the ballot through the initiative process,139 and in 1910 Oregon voters enacted workplace safety rules and abolished the contributory-negligence and fellow-servant rules.140 When these gains
came under attack in the next assembly session, the threat of a referendum was instrumental in preventing their repeal.\textsuperscript{141}

The Right to Financial Subsistence

Throughout the first several decades of the twentieth century, labor leaders and progressive reformers pressed for broad-based European-style social insurance plans that would guarantee workers and their families a reasonable wage and pension. What the states eventually enacted, however, was a number of specific pension plans that targeted the disabled, mothers of dependent children, widows, and the elderly. The most successful campaigns, as well as those in which the initiative played the most prominent role, concerned mothers’ and old-age pensions.

Although support for mothers’ pensions did not take hold until as late as 1909, after President Theodore Roosevelt’s Conference on the Care of Dependent Children,\textsuperscript{142} it spread like “wildfire,” and by 1915, mothers’ pension laws had been enacted in twenty-three states.\textsuperscript{143} In some state legislatures, however, opposition from business and philanthropic groups was so strong that mothers’ pension supporters resorted to the initiative.\textsuperscript{144} Thus in 1912 Colorado voters enacted a comprehensive reform of the state’s dependent children act, complete with a mothers’ pension plan,\textsuperscript{145} and in 1914 Arizona voters approved an initiative measure that provided for mothers’—as well as old-age—pensions.\textsuperscript{146}

Proposals to secure the right to an old-age pension generally endured a significantly longer gestation period and engendered even stronger opposition. Old-age pension proposals were introduced into state legislatures as early as 1903,\textsuperscript{147} but by 1920, Arizona remained the only state to have actually enacted such a proposal, which was accomplished through the 1914 initiative.\textsuperscript{148} Supporters of old-age pensions enjoyed somewhat more success through state legislatures over the next decade and a half, during which time they secured the enactment of pension plans in half of the states,\textsuperscript{149} but in the late 1930s they began to press their case through the initiative procedure.

Although voters in several states had voted on old-age pension initiatives prior to this period,\textsuperscript{150} the primary impetus came from Dr. Francis Townsend, who proposed to stimulate the economy by giving a $200-per-month pension to all Americans over age sixty on the condition that they spend it immediately.\textsuperscript{151} In part because it was significantly more expensive and more economically suspect than the standard pension proposals, Townsend’s plan was ill received by Congress and by most state legislatures. Then, in 1938, he began to consider the possibility that his plan could be enacted through the initiative. “The ‘initiative’ enabled the pressure group to appeal directly to the electorate for a vote on the Townsend Plan and thus to circumvent both the state legislature and the political parties. In addition, the pension advocates discovered common ground upon which to cooperate with other interest groups.”\textsuperscript{152} In particular, the initiative permitted old-age pension supporters to make common cause with labor unions and
to overcome the strong opposition of “business and conservative groups, who, ironically, were joined by the Communist press.”

Accordingly, in 1938, Oregon voters approved an initiative that endorsed the Townsend movement, and between 1944 and 1950, Townsend clubs initiated constitutional amendments in a number of states across the country. Although the Townsend Plan itself met with little success, the initiative campaign was instrumental in securing the passage of a number of more modest old-age pension plans. In 1946 Massachusetts voters approved the creation of the Old Age Pension Commission, which provided a minimum payment of $48 per month. Another successful initiative in Massachusetts in 1950 increased the pension to $75 per month, and $85 for blind seniors. Oregon voters, after rejecting several extravagant pension initiatives in 1944 and 1946, enacted a proposition in 1948 that paid $50 per month.

The Right to Work

The positions of the supporters and critics were reversed in the case of right-to-work proposals. Whereas these other economic rights were generally supported by unions and opposed by businesses, the right to work was supported by business interests and bitterly opposed by labor groups.

Of the states in our sample, Virginia is the only one that actually secured the right, and it did so through a legislative referendum approved by the voters in 1947. Massachusetts was the only state in the sample that featured an initiative campaign to establish the right, and the voters defeated the measure by a resounding margin. This is one area, however, where it is particularly instructive to look beyond our primary data set, because right-to-work initiatives generated significant activity in a number of states around the country. In fact, between 1944 and 1964, a total of eleven states debated the right to work in at least one initiative campaign, and four of these states voted on the issue in multiple elections.

In the belief that labor unions had been the beneficiary of particularly favorable legislation on the national level in the late 1930s, right-to-work supporters tried to persuade a number of state legislatures to enact right-to-work laws. They generally failed in their initial efforts, but because they attributed these defeats to the disproportionate influence of labor unions on the legislative process, they turned to the initiative. For a time, this strategy proved to be quite effective. Of the first five states to enact right-to-work laws, three did so through the initiative: Arkansas in 1944, Nebraska in 1946, and Arizona in 1946. In addition, Nevada voters approved a right-to-work initiative in 1952 and upheld the right by rejecting counterinitiatives in 1954 and 1956. Not all right-to-work initiative campaigns were successful, though, and in fact propositions were defeated on eight occasions. But every state that secured the right did so through a popular vote of some kind, through an initiative, a legislative referendum, or a constitutional amendment.
CONCLUSION

Admittedly, this survey falls short of being comprehensive in several respects. A complete evaluation would examine a greater number of states and would go even further in identifying the indirect effects of populist institutions. Even so, the existing data are sufficiently rich to advance several conclusions about the capacity of populist institutions to secure rights.

In the first place, populist institutions provided a superior level of protection for the right to vote and the right of the electorate to control governing institutions. The pull of self-interest was simply too strong in a number of cases to permit legislators to deliberate reasonably about these matters, and the initiative provided an effective way to secure these rights independently of the legislature. Thus the initiative was the vehicle for securing an equal apportionment, abolishing the poll tax, banning the free rail pass, regulating campaigns and elections, removing legislative control over constitutional conventions, and reducing the size, frequency, and duration of legislative sessions.

In another set of cases, popular institutions secured rights more quickly than or in a slightly different manner from legislatures, but they did not provide a markedly better level of protection. Thus the initiative secured women's suffrage when it was blocked by the liquor interests, it secured the right to workmen's compensation when it was stymied by the railroad interests, and it secured the right to an old-age pension over the opposition of a diverse coalition of groups. It is not clear, however, that one can draw any general conclusions from these particular cases. To be sure, these rights were secured in a more timely fashion through the initiative than through the legislature, but legislatures across the country generally secured them in a suitable manner. In another group of cases, concerning movie censorship and the grand jury, the initiative and referendum protected rights in a slightly different manner from the legislature, but again, these cases do not necessarily indicate any general superiority on the part of populist institutions.

In one final group of cases, concerning liberties in crisis times, populist institutions provided decidedly less protection than legislatures. To be sure, there were only a limited number of cases when the initiative process served as the vehicle for violating individual rights. Nonetheless, there were several periods when popular majorities were gripped by a momentary ill humor and the initiative process failed to provide the type of deliberation that ordinarily characterized legislative assemblies. In particular, the initiative provided inferior protection for the rights of Catholic schoolchildren in Oregon in the 1920s at the height of the Americanization movement, for alien landholders in several western states in the 1910s, and for African Americans in several periods.

In the majority of cases, therefore, there was only a marginal difference between the capacity of republican and populist institutions to secure rights. In
several cases, however, certain differences emerge. With respect to the right to vote and the right of the electorate to exercise control over governing institutions, the initiative provided a higher level of protection than the legislature. With respect to the rights of individuals during periods of political or social ferment, the initiative provided inferior protection.