"Two Cheers for Popular Sovereignty and Direct Democracy: Historical Reflections"

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Introduction: Who Could Be Against Involving the People in Government?

The invitation to this symposium is broad: to "All Who Support Involving the People in Government." Whom could this invitation possibly exclude? Alas, the answer is many. I will not indulge in a rant against my own tribe, lawyers, or that rarer subclass of lawyers, those of us who practice our profession within the academy. In their understated way, Ronald Allen and Richard Parker have indicated objections to the elitism that keeps some law professors from really supporting the involvement of the people in law and politics. I agree with that criticism and offer a few examples that illustrate this point. Law journals are full of articles explaining why bench trials are preferable to jury trials in litigation too complex for the ordinary folk to comprehend. Or why judges should have the power to set aside a jury verdict that the judges deem ill-founded in the evidence adduced at the trial. Or the power to stop votes from being counted, so that a curious form of equality might be promoted, if only on an epiphenomenal basis, without any application to any future equal protection claims about voting rights. Or the power to stop legislatures from protecting the life of a newborn child. Or the power to stop a virtually unanimous Congress from surrounding religious liberty with greater protection than the Court deemed necessary. The list is much longer, and – to be fair to law professors – the kinds of articles I mention above are also rebutted in law journals. Nevertheless, I agree with the observation that law professors form a core element of the elite groups that too often regard themselves as better than the people.

Lawyers have no monopoly in mistrust of the people. Many within the new class of managers – of which lawyers form only a small part – maintain the conceit that life and the structures that govern life in community are far too complicated for lesser mortals to be involved in. The very term "layperson" – once a term rich with meaning as a member of the gathered, assembled covenanted people of God, *laos tou theou* – is now fraught with a negative ring, if not laden with contempt. On the lips of the high priests of the managerial class, the term "layperson" connotes someone uninitiated into the sacred mysteries over which the managers claim exclusive power. To sustain the illusion of their control of history, the managers invent ways and means of obfuscating the ordinary with discourse or jargon calculated to keep the people at bay.

This phenomenon has parallels in professional life. For example, to maintain control of the healing arts, some doctors think of lay people – even highly skilled nurses who are often more gifted in bedside manners critical to the healing process – as those who lack medical training. And doctors are not the only professionals who look down their noses at those outside their group. All sorts of trades are now called professions. For example, garbage collectors are sanitary engineers. But this linguistic shift has not

eliminated a corresponding negative attitude toward the "layperson." Thus, skilled plumbers think of non-plumbers as lay folk, or ignorant people. Plumbers probably have greater cause for thinking this way than doctors do about their patients or lawyers about their patients. A lawyer once made a condescending reference to plumbers in the presence of George Meany, a plumber who became the President of the AFL-CIO. Meany replied that the city of New York could get along just swell for a whole week without a single lawyer, but if they tried that with plumbers, they'd have the worst sanitation catastrophe in the history of the world.

The purpose of this symposium and of the larger enterprise of which it is a part is to rekindle a basic trust in democracy as the predicate for engaging the people in the task of lawmaking. It is my pleasant task to offer some historical reflections as a basis for supporting this trust in people, even if I have some doubts about the practical wisdom of moving forward on the assumption that the People may amend the Constitution outside of the process indicated in Article V.

My paper has three parts. First, I offer some historical reflections about where we got the principle of popular sovereignty, and how this doctrine was taken in a radically new direction in the American Revolution. The battle over the inclusion of all members of society within the community designated as "We, The People" has been a very messy business. For that reason I urge two rather than three huzzahs to celebrate the breakthrough of popular sovereignty in this country.

Second, I discuss two distinct but related movements, Populism and Progressivism, that provide a historical precedent for the current task of fostering a greater appreciation for direct democracy through reforms such as the initiative and referendum in state governments. These reforms are directly related to the current task of building support for greater trust in the People, and to the more specific goal of enabling a national initiative.

Third, I offer a few comments on the other papers in this panel, indicating the common ground among all four of us, and ways in which we agree and disagree with one another. And I try to show that contending for various points of view, including our deepest religious commitments, is itself important to the success of this project.

Finally, I conclude with a challenge that all of us taking part in this symposium sustain our interest and enthusiasm in this project long after we go home.

I. A Search for the Roots of Popular Sovereignty

The first question that I address is where we Americans got the idea of sovereignty and what we did with it when we broke away from the Mother Country and "assume[d] among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitled [us]."

Democracy is not a new idea. It has distant roots in the ancient world. However flawed its expression has been in various contexts, democracy is one of those recurrent ideas that bridges the one and the many, that protects the dignity of the human person by ensuring at least that the people will be heard in matters affecting them, or – more extensively – by affording to the People the opportunity to govern themselves. This is not the place to recite the long road from ancient Athens to the sidewalks of New York where the powerful of the world recently gathered for the World Economic Forum and where

demonstrators protested the unrepresentative character of globalization and governance of the world by the new class of capital managers who have effectively rendered the concept of sovereignty obsolete in many important respects.

Before a requiem is sung for this heavyweight idea of sovereignty, it might at least be helpful to get some clarity on what it is not. It seems in keeping with the spirit of this symposium, moreover, to turn to popular culture for a basic lesson on the difference between an earlier European understanding of sovereignty as monarchical rule and the later American understanding of popular sovereignty that underlies the Direct Democracy Act.

I am pleased to report that a text from sixth century England makes all of this crystal clear. It is a fragment of a conversation between King Arthur and two persons who he mistakes as his subjects. They set him straight on the matter.

ARTHUR: Old woman!
DENNIS: Man!
ARTHUR: Man. Sorry. What knight lives in that castle over there?
DENNIS: I'm thirty-seven.
ARTHUR: I-- what?
DENNIS: I'm thirty-seven. I'm not old.
ARTHUR: Well, I can't just call you 'Man'.
DENNIS: Well, you could say 'Dennis'.
ARTHUR: Well, I didn't know you were called 'Dennis'.
DENNIS: Well, you didn't bother to find out, did you?
ARTHUR: I did say 'sorry' about the 'old woman', but from the behind you looked--
DENNIS: What I object to is that you automatically treat me like an inferior!
ARTHUR: Well, I am King!
DENNIS: Oh, King, eh, very nice. And how d'you get that, eh? By exploiting the workers! By 'anging on to outdated imperialist dogma which perpetuates the economic and social differences in our society. If there's ever going to be any progress with the--
WOMAN: Dennis, there's some lovely filth down here. Oh! How d'you do?
ARTHUR: How do you do, good lady? I am Arthur, King of the Britons. Whose castle is that?
WOMAN: King of the who?
ARTHUR: The Britons.
WOMAN: Who are the Britons?
ARTHUR: Well, we all are. We are all Britons, and I am your king.
WOMAN: I didn't know we had a king. I thought we were an autonomous collective.
DENNIS: You're fooling yourself. We're living in a dictatorship: a self-perpetuating autocracy in which the working classes--
WOMAN: Oh, there you go bringing class into it again.
DENNIS: That's what it's all about. If only people would hear of--
ARTHUR: Please! Please, good people. I am in haste. Who lives in that castle?
WOMAN: No one lives there.
ARTHUR: Then who is your lord?
WOMAN: We don't have a lord.
ARTHUR: What?

DENNIS: I told you. We're an anarcho-syndicalist commune. We take it in turns to act as a sort of executive officer for the week,...
ARTHUR: Yes.
DENNIS: .but all the decisions of that officer have to be ratified at a special bi-weekly meeting...
ARTHUR: Yes, I see.
DENNIS: ..by a simple majority in the case of purely internal affairs,...
ARTHUR: Be quiet!
DENNIS: ...but by a two-thirds majority in the case of more major--
ARTHUR: Be quiet! I order you to be quiet!
WOMAN: Order, eh? Who does he think he is? Heh.
ARTHUR: I am your king!
WOMAN: Well, I didn't vote for you.
ARTHUR: You don't vote for kings.
WOMAN: Well, how did you become King, then?
ARTHUR: The Lady of the Lake,... [angels sing] ...her arm clad in the purest shimmering samite, held aloft Excalibur from the bosom of the water signifying by Divine Providence that I, Arthur, was to carry Excalibur. [singing stops] That is why I am your king!
DENNIS: Listen. Strange women lying in ponds distributing swords is no basis for a system of government. Supreme executive power derives from a mandate from the masses, not from some farcical aquatic ceremony.
ARTHUR: Be quiet!
DENNIS: Well, but you can't expect to wield supreme executive power just 'cause some watery tart threw a sword at you!
ARTHUR: Shut up!
DENNIS: I mean, if I went 'round saying I was an emperor just because some moistened bint had lobbed a scimitar at me, they'd put me away!
ARTHUR: Shut up, will you? Shut up!
DENNIS: Ah, now we see the violence inherent in the system.
ARTHUR: Shut up!
DENNIS: Oh! Come and see the violence inherent in the system! Help! Help! I'm being repressed!
ARTHUR: Bloody peasant!
DENNIS: Oh, what a give-away. Did you hear that? Did you hear that, eh? That's what I'm on about. Did you see him repressing me? You saw it, didn't you?
Source: *Monty Python and the Holy Grail* (London: Mandarin Paperbacks, 1993), cited at http://bau2.uibk.ac.at/sg/python/Scripts/HolyGrail/grail-03.html

King Arthur isn't supposed to know the name or even the gender of the person he addresses. He is too absorbed in power relationships for a meaningful exchange with a peasant, especially one who turns out to be familiar with Senator Gravel's plan to involve the People more directly in governing themselves. If Monty Python doesn't help you understand the difference between monarchical pretensions and popular sovereignty, I suspect that you have signed up for the wrong symposium.

The idea of sovereignty emerged within seventeenth-century European political thought about monarchy. As Judith Shklar writes, "the word sovereignty has scarcely any meaning at all apart from absolute monarchy." Or, as Garry Wills describes the thought

of leading seventeenth-century thinkers, "Bodin and Althusius, Hobbes and Locke, each in his own way, argues that the people are a body crying for a head." That head was the monarch. Others might be called to court to talk [parler] things over in council [parlement], but the liege lord, the sovereign, was the only one ultimately in charge of things.

Political theory was actually a lot more complicated than that because of the separate jurisdiction of the church. Long after the famous murder of Thomas Becket in Canterbury cathedral, the people flocked in pilgrimage to his tomb, not to that of his royal murderer, Henry II. The distinction between church and state became more complicated in the Reformation period when "the church" no longer meant the same community. And political theory had to be rethought with the appearance of the followers of Menno Simons, or Mennonites, who refused to baptize infants and thus created a group of people who were members of the state without yet being members of the church; and who refused to engage in violence, and thus created a group of persons who were members of the church but unwilling to obey the command of the monarch.

The idea of sovereignty was familiar to the American colonists. That is why they framed several humble petitions to the Crown in the decade between the Stamp Act Congress in 1765 and the First Continental Congress in 1775. Monarchical sovereignty being what it is, these petitions went unopened and therefore unanswered. In 1776 the Americans decided not only that they were better able to secure their traditional English liberties by governing themselves, but decided to do so by repudiating monarchy as a form of government and by setting up a republic of free and independent states. At this critical turning point, the idea of sovereignty was not discarded, but transformed. Jefferson located sovereignty within the people. The central text is at the beginning of the Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Jefferson continued to think powerfully about the role of the People in the governance of the republic. For example, when Jefferson received a copy of the Constitution of 1787 in Paris, he wrote to his friend, Col. William Humphries, urging strong opposition to the Constitution in the Virginia ratifying convention because the new Constitution did not protect "the right to trial by the People themselves, that is by jury." In the same year he wrote to James Madison: "The people...are the only sure reliance for the preservation of our liberty." And in 1816 he wrote to John Taylor: "The mass of the citizens is the safest depository of their own rights." And in 1819 he wrote to his old friend and one-time adversary John Adams: "No government can continue good, but under the control of the people."

Other founders also addressed the idea of popular sovereignty. For example, Benjamin Franklin wrote: "In free governments the rulers are the servants and the people

their superiors and sovereigns." But the leading light on this theme was another delegate from Philadelphia, James Wilson. Professor Allen is curiously dismissive of Professor Amar's reliance upon Wilson. Allen writes: "a quotation from a person 200 years ago invoking God and natural law will strike many disinterested observers as grasping at straws in a plainly ad hoc effort to dispose of difficulties." On the contrary, Amar turned to exactly the right source in the founding period. Wilson had an even subtler grasp of the idea of sovereignty than Jefferson. Judith Shklar describes Jean Jacques Rousseau as the Continental thinker who truly "turned sovereignty on its head." The people on the bottom became the leaders on the top. As Garry Wills notes in his important article, "James Wilson's New Meaning for Sovereignty," moreover, "Rousseau's principal innovation was not in making the people sovereign but in saying that they must *always* remain the *only* and active sovereign…. Most of what we call government was for Rousseau only the executive (*Social Contract*, 3.1, 3.11), with the legislative power being retained in the body of citizens, who meet in almost continual legislative assembly." Wills notes that Wilson's "favorite doctrine" in his *Law Lectures* at the University of Pennsylvania was that of an "inalienable popular sovereignty that is expressed through the general will." And he shows that Wilson's intimate familiarity with Rousseau led him to emphasize that "the citizen never ceases to be sovereign," a doctrine that demands "a high and continuing degree of citizen participation in the government." Wills concludes: "Wilson, unlike Madison, thought the intermediation of representatives was a regrettable (but necessary) departure from the ideal of direct democracy. But Wilson calls voting for representatives an act of original – originating – sovereignty, constitutive each time of the legitimacy of the government – something that Rousseau also said when he admitted that Englishmen exercised their original sovereignty when voting for representatives (3.14)." In short, James Wilson is precisely the founding father whose thinking we need to know better if we are to ground the effort to expand direct democracy in the doctrine of popular sovereignty. He writes: "Permit me to mention one great principle, the vital principle I may well call it, which diffuses animation and vigor thru all the others. The principle I mean is this, that the supreme or sovereign power resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering or amending this constitution, at whatever time and in whatever manner they shall deem it expedient."

One of the difficulties with the Democracy Foundation project is that the masses may lack accurate information that is vital to the assessment of public policy. The objection is a familiar one in legal circles, where contempt for the People has all but extinguished the civil jury in complex matters. One reply to the objection is that the government disseminates so much irrelevant information that it renders it difficult to focus on the things that matter. For example, parents all over America had to talk to little children about sex and cigars not because of the misconduct of President Clinton, but because of the decision of Speaker Gingrich to upload every scrap of evidence against the President gathered by Judge Starr and his team. As the polls surrounding the ensuing impeachment inquiry demonstrate, however, the People are capable of sorting out the good, the bad, and the ugly, even when an enormous volume of information gets disseminated with the speed of light.

A major predicate for the effort of Democracy Foundation is that information technology now makes it more feasible for the People to reclaim a more direct share of the governance of the nation. I guess we all have to be grateful to Al Gore for inventing

the Internet. But I am not so sure that there is a technological fix to the problem of anti-intellectualism in American politics, thoughtfully addressed by Richard Hofstadter. To raise this issue is not to seek a return to literacy tests or to succumb to the disdain of intellectual elites for the common man (and woman) that Professor Parker rightly rejects. But it would be helpful if we had another look at Rousseau, who linked the right of the franchise to the duty of studying about public affairs. It would also be well to pay attention to James Wilson, who wrote in his Lectures: "The publick duties and the public rights of every citizen of the United Sates loudly demand from him [and, we would now add, her] all the time that he [and she] can prudently spare, and all the means which he [and she] can prudently employ, in order to learn that part which is incumbent on him [and her] to act." Being intelligent about anything, including politics, is at the core of what Bernard Lonergan describes as self-transcendence, a point to which I return below.

The founders, most notably James Wilson, drew a critical distinction between virtual representation (of the colonists by the Crown in Parliament) and actual participation (of the free and independent states by the elected representatives of the People). As Allen notes in his paper, American Indians, African slaves, and women were excluded from the understanding of those comprehended within the term "We, the people," at the dawn of the republic. For that very reason, I argue that two rather than three huzzahs are in order to celebrate the breakthrough of popular sovereignty in this country. The battle over the inclusion of members of these persons within the American people in a full, rich, thick sense has been a very messy business. I explore these points in the second section of my paper.

Parker correctly notes that the subsequent development of popular sovereignty may not fairly be depicted as a "comforting story of progress" in which "more and more Americans have been embraced into the People – which, in turn, has regularly exercised its sovereign prerogative in a most benignant, high–toned, high–quality fashion marked by `thoughtful discussion,' `good deliberation.'" And I accept Parker's deft description of popular sovereignty as "a practice, nothing more or less than the incremental practice of democratic politics, an historical process, contingent and context–bound, a possibility, perhaps a tendency, but one that is never fully defined, never authoritatively established, never finally realized in law – a living practice whose meaning and destiny is always up to the political will, energy and acuity, the strength and the luck, of the living."

II. A Search for Moments of Increased Fervor for Direct Democracy

A fuller account of the messy history of direct democracy would surely include the role of the common man in Jacksonian democracy. Think of the wild celebration on the day of Old Hickory's first inauguration. Real people from the wild west of Kentucky and Tennessee putting their muddy boots on damask chairs. So much boisterous drinking going on that, to preserve the furniture in his new home, the President ordered the kegs removed to the south lawn, which immediately emptied the White House. But the contraints of space and time require me to focus on two movements in the late nineteenth and early twentieth centuries that gave rise to a set of reforms of state polity that provide an interesting precedent for the reforms that the National Initative for Democracy (NI4D) seeks to achieve. Neither movement was inevitable. Neither achieved all that can or

should be done. But it is a marvel that these movements arose when they did, and a greater marvel that they had a significant degree of success.

The marvel of these movements is that they arose in a context when many forces in our society were conspiring to render impossible the claim that the People should be directly involved in government. I refer to the background of contempt for African-Americans, women, American Indians, and the working poor that prevailed in the legal and economic culture in the decades immediately preceding Populism and Progressivism. To appreciate the nadir of this contempt for the People can actually inspire us to engage in mighty efforts to reinvigorate democratic participation in our day even when we might think the forces opposing democracy are formidable. The counter-populist tendencies of our era seem small when compared to the overt assault on the People that was endemic in the late nineteenth century.

The postbellum period was not a golden age in American history. In Mark Twain's famous phrase, it was, rather, a gilded one. It was a time for vast territorial expansion, but not one of expanding inclusion of groups contemplated as real actors within the constitution-making community known as "We, the People."

First, the Gilded Age was not a nice time for African-Americans. Just beneath the superficial glitter of the age was a malignant spirit that struck at the heart of the Second American Revolution embodied in the Civil War Amendments. The infamous Compromise of 1877 purported to resolve a dispute about how to count election returns from Florida and South Carolina. Voting on straight party lines, eight members of a specially designed fifteen member Election Commission (nowhere mentioned in the text of the Constitution) sustained the claim of the Republicans that the Democrats had cheated in these States by intimidating newly emancipated slaves from voting in a federal election. At one level – the matter of racial discrimination ignored in the replay of this story a little over a year ago – one might say, "So far, so good."

It was the rest of the compromise that reeked at the time and that dashed the hope for equality for decades, until the People reclaimed that dream in the 1950s and 1960s. Having secured the White House for the Republican Governor of Ohio, Rutherford B. Hayes, the Commission effectively gave the statehouses and the state legislatures in the Old South to the Democrats by arranging a commitment to call off Reconstruction, or federal enforcement of the civil rights laws that prior Congresses had enacted to enforce the provisions of the Civil War amendments. Five Justices had served on the erzatz Election Commission in 1877. The Court soon fell into line with the Zeitgeist, adding the judicial stamp of approval to the arrangements by construing the federal power securing civil rights to reach only official action, not acts by private parties. Discrimination in public accommodations in major northern cities – Boston, New York, Philadelphia, Chicago, and San Francisco – was deemed beyond the reach of the federal government.

The Democrats of the old Confederacy knew how to read this precedent as a license to create a whole system of enforced segregation. Jim Crow laws were advanced in this country before the Afrikaners had invented the term "apartheid." The effect of these laws was to nullify the action of the People in ratifying a major shift in thinking about who was to be included within the meaning of the term "People," and to nullify the power shift reflected in giving to Congress the power to enforce these provisions with legislation that the People's representatives deemed "necessary and proper" to enforce these amendments.

Second, the Gilded Age was one of continuing oppression of women. To grasp the full force of the term "continuing," I will roll the clock back to the 1830s, when the feminists of the day were also ardent abolitionists because they could see the evil of treating anyone, whether an African slave or a free woman, as "chattels personal." All-male legislatures continued to enact laws regulating women's lives in a host of ways and to tax them without representation.

Such laws had been exposed at Seneca Falls as an assault on the first principle announced in the Declaration of Independence, which Elizabeth Cady Stanton rewrote in a critical detail:

> We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed. Whenever any form of government becomes destructive of these ends, it is the right of those who suffer from it to refuse allegiance to it, and to insist upon the institution of a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

The Declaration of Independence is the best example in our history of a petition for redress of grievance. Jefferson included in this classic text specific reasons why it was necessary to alter the form of government from an unresponsive monarchy to a participatory republic. The Declaration of Sentiments of 1848 is the second best example of a petition for redress of grievance. Consciously imitating Jefferson, Stanton and her colleagues offered a series of specific grievances committed against women by unrepresentative legislatures.

The attempt to provide legitimacy to the rules and taxes enacted by all-male legislatures was "virtual representation." The chief problem with the fiction that men were really representing the needs of all persons, male and female, is that virtual representation was precisely the theory invoked by King George as he declined even to open the humble petitions forwarded to Westminster by the colonists after the Stamp Act Crisis. Against the notion that the royal sovereign acting in Parliament had the welfare of the colonists close to his regal, nay imperial, heart, the Americans emphatically repudiated virtual representation with the claim that government derives just power from the consent of the governed. The Baptist preacher Isaac Backus had in mind real, not virtual representation of beliefs, when he wrote in the 1770s that taxation of Baptists to support the Congregational establishment of New England was "a tyrannical abuse of power." Thomas Paine surely meant real, not virtual representation when he wrote in his famous pamphlet *Common Sense* in January of 1776: "Taxation without representation is tyranny." The nineteenth century feminists made all the right moves rhetorically by claiming for themselves this tradition about taxation and representation. But men long accustomed to ignoring women did so both in 1848 and at the critical moment when the Civil War Amendments were being drafted. Women were given the franchise in Wyoming and in three surrounding states in the Rockies. But the promise of inclusion of women within the community described as "We, the People" was postponed at a national level until 1920, when the People ratified the 19th Amendment. That is nearly a century

and a half of waiting for justice. And during this long period, it must be recalled, women in this country suffered terrible abuses that enjoyed the full force of the law.

Third, the Gilded Age was the time during which Sullivan's essay on Texan annexation came to have a transcontinental extension. "Manifest destiny" now referred not to the right of Texans to throw the Mexicans out, but to the duty of the white man – disclosed in racist biological claims of the time to be the pinnacle, the acme of evolutionary development – to remove the American Indians from the lands they had inhabited for millennia before the European discovery of this continent. The answer to the question "How Was the West Won?" is not a pretty one. Indians had never been deemed part of the polity implied in the term "We, the People." But now matters took a decisive turn for the worse from the perspective of the natives.

I have never spelled America with a K, and I loathe the facile overuse of the term "Fascist" to refer to nearly any policy with which one disagrees. I do so because a part of me wishes to acknowledge a sense in which the Shoah was unique, and because a deeper part of me resonates to Richard Parker's call to a patriotism that celebrates the real greatness of our country. But it is precisely my involvement in Holocaust and Genocide Studies that has led me to reassess the Gilded Age in terms of the genocide committed against the American Natives. As Americans reached out for more Lebensraum, their leaders decided that the time had come not for negotiation with the Indians, but for the final solution to the Indian problem. Just as Jews do not ask the so-called Jewish question, so also American Indians did not ask themselves whether they should be allowed to exist or to continue to use the land and share it with their neighbors. That sort of question was put by our government, and the official answer to the question – eliminate the Indians – enjoyed wide popular support among the white males who deemed themselves to be the sole real persons included within the community described as "We, the People." As the Nazi genocide was justified by phony scientific claims about racial superiority, the American one was replete with similar racial theories lifted straight out of the reigning scientist of the day, Charles Darwin. Both the Nazi bureaucrats and the Bureau of Indian Affairs in the U.S. Department of Interior masked intentional mass murder in politer terms like "resettlement" and "reservation." Raul Hilberg unmasked these euphemisms in the title of his masterful history, *The Destruction of the European Jews*. Lucy Davidowitz did so in her volume, *The War Against the Jews*. So too has the historian Wade Churchill helped us to count up the number of wars waged against the Indians in the last half of the nineteenth century by the dozens, and to reckon the mass destruction of a people and their culture as an atrocity.

Fourth, the Gilded Age was a time of increased wealth, but that wealth was concentrated in the hands of a few at the top: the Ascots, the Carnegies, the Harrimans, the Rockefellers, the Vanderbilts, and those who could afford a cottage at Newport, Rhode Island. With the concentration of economic wealth came concentration of political power, with concomitant negative effects for the working poor.

Self-interest was defined classically. Adam Smith's *Wealth of Nations* was published in the year of our revolution, and its zero-sum approach to competitive rivalry went virtually unchallenged in the field of economics until John Nash's equilibrium theory, published in 1950 in the Proceedings of the National Academy of Sciences. I say "virtually" unchallenged, because it would be a mistake to treat Nash as though he were the first to discover the value of striving not only for oneself, but also for the sake of the

good of the community. Nash was brilliant, but – perhaps without knowing it – he was standing on the shoulders of lots of little people who were not geniuses at Princeton, but who did know how to think and act collectively. I refer to the rank and file in labor unions who organized and demanded the right to bargain collectively with employers over the terms and conditions of employment. When asked "What do workers want?," Samuel Gompers famously responded "More." (Perhaps that single word is also the best answer to Freud's famous question, "What Do Women Want?") The "more" for which the AFL and the nineteenth-century feminists strove was economic improvement, but much more besides: full participation in the structures of governing and determining these economic outcomes, full inclusion within the community of those known as "We, the People."

At most turns in the road, economic privilege was validated and sustained in the nineteenth century not by the People acting directly on such matters, but by the government. More particularly, the Supreme Court wrote the Social Darwinism of the day into the constitution that the People had ordained and established in order to secure justice. In the critical year of 1895, for example, the Court held that a cartel that almost totally monopolized the sale of sugar did not fall within the meaning of a trust or monopoly in the Sherman Antitrust Act. It justified this odd result on the view that Congress has power to regulate commerce, but that manufacturing is not the same thing as "commerce." Within weeks, the Court ruled that Eugene Debs's labor union was engaged in illegal restraint of trade when it went out on strike against the Pullman Company. And the Court nullified a modest federal income tax (at a rate of 1% of income). One of the banks attacking the legislation argued that the tax was "the first onslaught of socialism." Without using that precise term, the court adopted the grand theory of laissez-faire capitalism and grafted it into the constitution, making efforts of the People's representatives to regulate railroads and other corporations increasingly difficult.

This was the historical context within which the Populists and Progressives strove to involve the People more directly in the political life of the several States. Before turning to these two movements, I should indicate that my principal reason for discussing some of the history relating to exclusion of whole groups of persons from the People – African Americans, women, Indians, and the working poor – is so that we will not lose heart in our times or cop out on the task before us just because engaging the People may be a hard thing to do. It was just as hard, if not harder, for the Populists and the Progressives to attempt what they did in their times.

The first movement – the Populists – erupted suddenly onto the stage of politics in 1889 as a grassroots movement. That phrase gets overused a lot these days. Back in 1889 it described the rural matrix of the Populists. Angered by the unresponsiveness of the Republicans and the Democrats to the issues of farmers, they formed a third national political party. One of their leaders in Kansas, Mary Lease, said that farmers should raise more hell and less corn. They did both. The hell-raising took the forms of accusations of corruption of democracy leveled against businessmen who – the Populists thought – had little concern for the average American "except as raw material served up for the twin gods of production and profit." The rhetoric was intense, calling on the People to rise up, seize the reins of government, and tame the power of the wealthy and privileged.

In 1892 the Populist Party platform endorsed labor unions and urged an end to court injunctions against unions; it decried long work hours and supported an eight-hour workday. The platform confronted concentration of economic power as follows: “The fruits of the toil of millions are boldly stolen to build up the fortunes for a few, unprecedented in the history of mankind.” The Populists also called for a secret ballot; women's suffrage; direct election of U.S. Senators and the President and Vice President; and initiative and recall to make the political system more responsive to the people.

Before fading from the scene in 1896, the Populists bequeathed to American politics several ideas that seem relevant to this symposium: (1) mainstream parties ignore the People at their peril; (2) the will of the People is supreme; (3) corporate involvement in politics tends to corruption of politics by making the People’s representatives unresponsive to the People, and (4) efforts to involve the People directly in the governance of the society are desirable.

The Progressives began as a loose association of political reformers who thought that rigorous empirical investigation could identify and eliminate the causes of poverty and social injustice. The leading light was President Theodore Roosevelt, who spoke approvingly of the major reforms embraced by the movement: “I believe in the Initiative and Referendum, which should be used not to destroy representative government, but to correct it whenever it becomes misrepresentative.” When Roosevelt lost the presidential nomination of the Republican Party in 1912, the Progressive Party nominated Roosevelt to run as a third-party candidate. TR may have felt “as fit as a bull moose” in that campaign, but the People chose neither him nor President Taft, but elected the president of Princeton University, Woodrow Wilson. Professor Parker is silent on whether this Wilson (no relation to James Wilson) was one of those elitist intellectuals he disparages. The Progressives faded quickly, but like the Populists, they contributed to the culture of increased democratic participation of the People in government on the local and state level.

These two movements changed American politics in significant ways. Against seemingly insuperable obstacles, they had a degree of success in introducing several reforms at the level of state government, most notably the initiative and the referendum. Table 1 traces the historical developments relating to these reforms.

These reforms provide a close antecedent to the major revision of the federal constitution that the Direct Democracy Amendment seeks to achieve. Part of the work of this symposium should be to assess the overall net value of the initiative and referendum at the state level, and to draw comparisons appropriate for a national initiative.

The first task is to undertake an accurate account of what has happened in the states that have the initiative. Professor Allen rightly attacks “amateurish standard journalistic and political theorist’s treatment of ballot propositions focused inappropriately on idiosyncratic propositions that were not placed in historical context.” By the same token, Allen is equally right in insisting that an accurate assessment of the value of these reforms “requires careful and meticulous study.” This is precisely the sort of work that Dane Waters of the Initiative and Referendum Institute has done in a comprehensive way Professor Allen does not cite that work, but does hold up the work of two scholars, Elisabeth Gerber and John G. Matsusaka, for special commendation. He refers favorably to Gerber’s 1999 volume, *The Populist Paradox*, which he describes as grounding the conclusion that “the simplistic fear that ballot propositions can be bought

and paid for by the rich is ill founded." Another work by Gerber and several other colleagues, *Stealing the Initiative*, studies eleven recent California initiatives and referendums on issues as wide ranging as a special tax on tobacco that requires smokers to pay for anti-smoking ads, transportation, legislative spending provision, term limits, open primaries, and bilingual education. Gerber and her colleagues set out in this book to discover what actually happens to initiatives that win on Election Day and withstand judicial review.

Allen cites a 1995 article by Matsusaka comparing the fiscal effects of initiatives. Matsusaka concludes that while "demographic factors are by far the most important determinants of fiscal behavior, availability of the initiative does matter as well. After one controls for income, population density, metropolitan population, population growth, mineral production, ideology of U.S. senators, and federal aid, initiative states have lower combined state and local direct general expenditure, spend more locally and less at the state level, and rely less on taxes and more on charges to generate revenue than pure representative states."

Another panelist at this symposium, Caroline J. Tolbert, is one of the foremost scholars who has engaged in precisely the sort of rigorous empirical analysis that Allen calls for. She can speak more authoritatively to these matters than I can. So I simply cite her work in the bibliography attached to this paper, and I call your attention to Table 2, in which Professor Tolbert lists initiative States in the rank order of the frequency with which an initiative has appeared on the ballot since adoption of this way of making law. On balance, the effects of initiatives and referendum in the States that have incorporated these reforms into their constitutions have been positive. This conclusion is bound to help sustain the energy needed to undertake the larger task of revitalizing popular participation in our republic through a national initiative in which We, the People, are invited to take seriously our roles as lawgivers.

When we have a reliable account of the experience at the state level with initiative and referendum, we can turn to the question of the likely meaning of this experience for the success or failure of the national initiative proposed by the Democracy Amendment.

III. On Trusting and Distrusting the People without Being a Doppelganger

Professor Parker is right on the money when he contrasts "the empowerment of a tiny, unrepresentative elite: judges and their academic doppelgangers" with entering into "the messiness – the ordinary politics – of engagement in the real–world enterprise of popular sovereignty." I don't want to be an academic doppelganger – a word that would have driven Spiro Agnew to the dictionary. Yet I will confess to a degree of discomfort with the idea that "ordinary politics" is a sufficient correlative for popular sovereignty. And I want to join in Parker's call for a renewed sense of patriotism, yet find myself able to offer only two cheers. My sense of history is that the People are as capable of getting things very badly wrong as the government is. To adopt a gambling metaphor, I want to bet that the deep trust in democracy that infuses the work of Democracy Foundation is a solid one. But another part of me wants to hedge my bet, reserving some means of checking the authority of the People to destroy the very things that make me proud to be an American.

Parker offers a tantalizing example that merits further exploration. He refers in passing to the use of the flag as a symbol of national unity. I can, of course, grasp the point made by Justice Frankfurter in the first flag salute case when he cited an earlier decision to the effect that "... the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense.... it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression." But Frankfurter was excessive when he wrote: "National unity is the basis of national security."

I think, for example, that United States Senators who disagree about war and peace have a duty to debate those matters openly and publicly without being accused of disloyalty or undermining our national security. More particularly, I think of our host at this symposium, Senator Mike Gravel, reading into the record of a Senate committee the text of the Pentagon Papers. At the very moment when the Executive Branch was seeking to enjoin the publication of these documents, Gravel was discharging his sense of duty that the facts of the Vietnam War be available to the People for our public debate. What Senator Gravel did was highly unpopular even to colleagues on the same side of the aisle, but he was right then, and I would like to thank him now for doing that and for many other selfless acts of courage in his distinguished career as a servant of the People.

It was imperative for the nation to bind together closely after the shocking atrocity of September 11. The flag helped serve that purpose. But there came a point when we were so awash in a sea of flags that we xx were in danger of succumbing to a patriotism that is a mile wide and an inch deep. Being connected to other Americans does not mean that we can avoid hard questions or the deep disagreements that will surely follow if we take such questions with the seriousness they deserve. Is the Fourth Amendment right of the People to be secure in our persons, homes, papers, and effects to be waived because we find ourselves in a time of national crisis? If so, will we not be handing the terrorists a victory they do not deserve? Will we be betray the heritage that goes back to James Otis's protested against the British use of writs of assistance in 1760, a moment witnessed by young John Adams, who later wrote if it: "Then and there the revolution was born." Should the captives at Guantánamo be accorded the protection of the Geneva Conventions? If not, can we expect our own armed forces caught in a situation like the one represented in the film "Black Hawk Down" to be treated as POWs? And will the current position of the Executive Branch on this matter send to military dictators throughout the world the message that they may hold their prisoners without any of the restraints of international law? Who is to decide this question, the executive or – as the Geneva Convention suggests – an independent judiciary? Are we really at war, and if so, against whom? Again, who has the power to declare the answer to questions like these, the People's representatives in Congress or the President in a State of the Union address?

It is all well and good for the OMB to deliver the latest budget submission to Congress literally wrapped in a flag. But the red, white, and blue wrapper does not guarantee that Congress will agree with the contents inside the patriotic cover. The enactment of a budget will require months of careful study, critical reflection, and vigorous debate. If the House moves swiftly to approve this bill in a great rush, that will be a great pity, for it was to this body that the framers entrusted the task of deliberation about spending the People's money. And it was to this body that Alexander Hamilton

was pointing when he uttered the phrase that Parker used to entitle his Seegers lectures at Valparaiso University, "Here the People rule."

Another issue relating to the Spending Power is the congressional appropriation of $20 billion last fall to assist the airline corporations that were – like many other businesses – profoundly affected by the events of September 11. Corporate welfare for airline companies, even one represented by the wife of the Senate Majority Leader, served a legitimate public purpose in the extraordinary times when confidence in airport security and airplane safety plummeted drastically. But more carefully tailored legislation might have required the airlines receiving the federal aid to take steps to help the interests of the workers in the airlines and in the plane manufacturing business, who were being laid off by the thousands. Instead, one airline used its share of the dole to purchase planes made in France, not in Seattle. And these jets were not the Airbus subsidized by Euro-nations; they were small-sized luxury jets designed to take corporate executives wherever they want while the rest of us have to put up with the drastic reduction of service, long lines for security checks, and confiscation of our finger-nail clippers. It is not unpatriotic to question policies like these, which should not escape scrutiny by the invocation of the two words, "national security." Not even the atrocities committed on September 11 are a good excuse for citizens to roll over and play dead during a national crisis. On the contrary, now above all is the time for the People to take seriously our roles as thoughtful citizens.

To return to the flag, shortly after September 11, I used George M. Cohan's song about the "Grand Old Flag" to teach my law students about immigrant Jews in the teeming tenements of Hells's Kitchen in New York. A week later I made a similar point when we sang "God Bless America," another patriotic song by another Jew, Irving Berlin. And I told them about the two flag salute cases. In the first case, *Gobitis*, the Court ruled 8-1 in 1940 that a state could punish a young Jehovah's Witness for refusing to stand to recite the pledge of allegiance in public school. Three years later, on identical facts , the Court reversed *Gobitis*, releasing its opinion in *Barnette* on Flag Day, June 14, 1943. The Court was fully aware of the intense devotion to the flag that accompanied the spirit of a nation mobilized for a global conflict. Indeed, it was precisely this feverish pitch that led some justices to worry about everyone thinking alike in the manner of the enormous crowds at Nuremberg gathered to worship the Führer and to extend their right arm and chant "Sieg Hiel!" The justices were also aware of the atrocities perpetrated against the Witnesses in the few short years since its decision in 1940. In *Render unto Caesar: The Flag-Salute Controversy* (1962), David R. Manwaring describes several incidents of mob violence in Texas against the Witnesses, attacks on Witnesses in Maine, including beatings and the burning of the Kingdom Hall in Kennebunk; forced drinking of castor oil in West Virginia; tarring and feathering in Wyoming; castration in Nebraska, shooting in Arkansas; and mob attacks in Illinois, Indiana, Maryland, Mississippi, and Oregon.

This brings me to the question whether the People should retain a right to amend the Constitution in a manner beyond the process identified in Article V. I wouldn't describe Yale in the way that Professors Allen does, or Professors Amar and Ackerman in the way that Professor Parker does. But like Allen and Parker, I find Professor Amar's argument from first principles both intriguing and one that is highly unlikely to command much popular support. I do not say that it defies a volume of logic for Amar to maintain

that Article V does not contain the exclusive means of amending the Constitution. The more telling objection is that his idea cannot be found on a page of history in all the years between the ratification conventions in 1788 and the present moment. It is difficult enough that we lack any historical experience of what it would be like to amend the Constitution by majority vote. It is asking too much that we launch this experiment by a process that will seem to many to defy their reading of Article V, even if the text does not contain the words, "This shall be the exclusive methods for amending the Constitution."

In addition, there are some aspects of our life together – not many, but some – that I don't think should be put to a popular vote. Justice Jackson made this point when he wrote in the second flag salute case: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." On the facts of that case, the American sense of plural voices in religious matters means that We, the People, must have deep respect for those who cannot salute the flag because they do not confuse their ultimate loyalty or obedience with idolatrous worship of the nation state.

And this point brings me to my final observation about the connection between the first principle (popular sovereignty) and our first freedom (religious liberty). Perhaps I misread Professors Allen and Parker, but it seems to me that both of them betray in passing a nervousness about religion in American public life. In the context of Allen's dismissal of James Wilson's views about being "under God" – a phrase as ancient as Bracton's "sub Deo et lege" – Allen also expresses "doubt that Philadelphia II [Democracy Foundation] will want to enter into debate that relies on properly interpreting God's will in order to justify its political agenda." Two quick replies to this view. First, an empirical observation. Has Allen turned into one of those intellectual elites whom he worries about? Surely an eminent empirical scholar like Allen knows of the vast literature on the sociology of religion in this country that describes the continuous stream of contending views about religion on political matters in this country. I can foresee no good reason why religion should be divorced from politics on a matter of such great importance to the People. On all accounts I have ever read, an overwhelming percent of the American People remain incorrigibly religious, defined in a wide variety of ways.

Second, a normative judgment about the social value of religion in our republic. The historical experience (which should not be confused with three-part or eleven-part tests designed by the Supreme Court on this matter) of religious freedom in this country (disempowerment of the government in deciding religious matters, so as to empower the People to enjoy what James Madison called in this very place in 1776 the "full and free exercise of religion") is central to the political and civil liberties that enable popular sovereignty to thrive. On the occasion of the bicentennial of the call of Virginia for a Bill of Rights in the United States Constitution, several leaders from all walks of life came to this place to sign the Williamsburg Charter, a document celebrating religious freedom in America. This Charter states: "Religious liberty finally depends on neither the favors of the state and its officials nor the vagaries of tyrants or majorities. Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and free as it is respectful of this right, especially

toward the beliefs of its smallest minorities and least popular communities. The right to freedom of conscience is premised not upon science, nor upon social utility, nor upon pride of species. Rather, it is premised upon the inviolable dignity of the human person. It is the foundation of, and is integrally related to, all other rights and freedoms secured by the Constitution. This basic civil liberty is clearly acknowledged in the Declaration of Independence and is ineradicable from the long tradition of rights and liberties from which the Revolution sprang."

Professor Parker writes that "argument from external, transcendent authority is inherently in tension with a claim for popular sovereignty." Well, yes. But who said that transcendental authority is "external" to human history? And on what basis must all reference to transcendental authority be deemed as "inherently in tension with a claim for popular sovereignty"? Parker has raised important questions that call for much more dialogue, indeed for another three-day symposium which he might arrange at his campus some day. Until that day three brief points may suffice.

First, I do not believe in a philosophy that identifies the real with something extrinsic to the human, or something that is "out there." I believe in a method of self-transcendence that is predicated upon four recurring imperatives that Bernard Lonergan succinctly expressed as follows. Be attentive to data; get the facts. Be intelligent in grasping the meaning of things. Be reflective in moving past guesswork to forming accurate judgments. And be authentic, true not only to one's self, but also to the duty of care for others.

Second, as Richard John Neuhaus has written, " [A] religious evacuation of the public square cannot be sustained, either in concept or in practice. When religion in any traditional or recognizable form is excluded from the public square, it does not mean that the public square is in fact naked. This is the other side of the `naked public square' metaphor When recognizable religion is excluded, the vacuum will be filed by *ersatz* religion, by religion bootlegged into public space under other names. Again, to paraphrase Spinoza: transcendence abhors a vacuum. The reason why the naked public square cannot, in fact, remain naked is in the very nature of the law and laws. If law and laws are not seen to be coherently related to basic presuppositions about right and wrong, good and evil, they will be condemned as illegitimate."

Third, I do not believe in a God who is "up there." I do believe in a God who is within and yet beyond me, and who beckons me forward in a journey of companionship with my fellow humans. I am a Christian informed by my community that "The joys and hopes, the griefs and anxieties of the people of this age, especially those who are poor or who are in any way afflicted, these too are the joys and hopes, the griefs and anxieties of the followers of Christ." (Vatican II, *The Church Today*, ¶ 1) My friend, Doug Sturm, has described this sort of covenantal living as follows: "Life is a constant give and take. We receive and we give. How we receive and how we give make all the difference in the world. Some ways of receiving and giving enhance life. Other ways of receiving and giving degrade, delimit, and destroy. That is the narrative of human life. That is the narrative of a covenantal way of looking at and living in the world. If in our receiving and in our giving we are constituted by the qualities of liberation, faithfulness, justice, and peace, then life is enhanced. If, on the contrary, in our receiving and in our giving we are constituted by the qualities of oppression, disloyalty, injustice and alienation, the result is destructiveness and degradation of life." I count myself a pilgrim moving in this

direction, open to surprises, above all to the possibility that the source of all life is also my guide and goal. Understood in this sense, being a layperson – a member of the People of God – is not a negative thing caught up in patriarchy or other archies. It is a very positive good that enables me to connect the first principle of popular sovereignty as a political concept with the content of the religion I am free to exercise by virtue of the first of our civil liberties.

Conclusion: The Road Ahead

This is how our ancestors at Philadelphia I concluded the Declaration of Independence: "And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor." We may not be prepared to go quite this far in support of one another in our current endeavor. But it would be a great pity if all that this symposium generated was another set of papers.

The task before us is immense. Stimulating greater awareness of the value of direct democracy will not be easy in a population where there are so many distractions from republican virtue and so many excuses for avoiding civic commitment. But support for the general proposition that the People ought to be engaged in the government we created and legitimated is something that can unite all of us here. I hope we each find ways of making that support known to one another and to our fellow citizens in a host of ways in the time leading up to Philadelphia II.

Table 1: Initiative and Referendum Historical Timeline

1775	**In his proposed 1775 Virginia state constitution, Thomas Jefferson includes a requirement that the constitution must be approved by the voters in a statewide referendum before it can take effect. Unfortunately, because he was hundred of miles from Virginia at the time attending the Continental Congress, delegates to the Virginia Convention did not receive the proposal until after the convention was already over.**
1776	**Georgia delegates gather in Savannah to draft their state's constitution. The constitution includes a provision that would allow amendments whenever a majority of voters in each county signed petitions calling for a convention, but the provision is never invoked.**
1778	**Massachusetts becomes the first state to hold a statewide legislative referendum to adopt its constitution. The voters reject it by a five-to-one margin, forcing the legislature to rewrite its proposal.**
1792	**New Hampshire becomes the second state to hold a statewide legislative referendum to adopt its constitution.**
1830	**Voters in Virginia demand the power to veto amendments to their state constitution and are given it.**
1834	**Alabama, Connecticut, Georgia, Maine, Mississippi, New York, North Carolina, and Rhode Island adopt provisions preventing their state constitutions from being amended without the approval of the voters.**
1848	**The 1848 Swiss Constitution includes provisions for initiative and popular referendum.**
1857	**Congress requires that voters must approve all state constitutions proposed after 1857.**
1885	**Father Robert Haire, a priest and labor activist from Aberdeen, South Dakota, and Benjamin Urner, a newspaper publisher from New Jersey become the first Americans to propose giving the people statewide initiative and popular referendum power.**
1897	**Nebraska becomes the first state to allow its cities to use initiative and popular referendum.**
1897	**South Dakota becomes the first state to adopt statewide initiative and popular referendum.**
1900	**Utah becomes the second state to adopt statewide initiative and popular referendum.**
1901	**The Illinois legislature creates a statewide nonbinding advisory initiative process.**
1902	**Oregon becomes the third state to adopt statewide initiative and popular referendum. In Illinois, using a statewide nonbinding advisory initiative process, citizens place an advisory question on the ballot asking whether or not Illinois should adopt a real initiative and referendum process – voters say yes, but the legislature ignores them.**
1904	**Oregon is the first state to place a statewide initiative on the ballot. In Missouri, voters defeat a measure that would have established statewide initiative and popular referendum.**
1905	**Nevada adopts statewide popular referendum only.**
1906	**Montana adopts statewide initiative and popular referendum. Delaware voters approve an advisory referendum put on the ballot by the state legislature, asking whether they want the initiative process -- but the legislature ignores the mandate.**
1907	**Oklahoma becomes the first state to provide for statewide initiative and popular referendum in its original constitution.**
1908	**Michigan and Maine adopt statewide initiative and popular referendum. Unfortunately, Michigan's initiative procedures are so difficult that, under them, citizens are unable to place a single initiative on the ballot. Missouri adopts statewide initiative and popular referendum.**
1910	**Arkansas and Colorado adopt statewide initiative and popular referendum. Kentucky adopts statewide popular referendum. Illinois voters again approve a citizen-initiated nonbinding advisory question in support of statewide initiative and popular referendum – and the legislature again ignores them.**
1911	**Arizona and California adopt statewide initiative and popular referendum. New Mexico adopts only statewide popular referendum.**
1912	**Idaho, Nebraska, Ohio and Washington adopt statewide initiative and popular referendum. Nevada adopts a statewide initiative process, complementing its statewide popular referendum process adopted in 1905. A majority of Wyoming voters voting on a constitutional amendment**

to adopt statewide initiative and popular referendum approve the amendment; but Wyoming's constitution requires that all amendments also receive a majority vote of all voters voting in the election, regardless of whether or not they vote on the actual amendment itself – so the measure fails. A majority of Mississippi voters voting on a constitutional amendment to adopt statewide initiative and popular referendum also approve the amendment; but, like Wyoming, a constitutional requirement that all amendments also receive a majority vote of all voters voting in the election, defeats the measure.

1913 **Michigan initiative and popular referendum supporters lobby the legislature to pass amendments simplifying its statewide initiative and popular referendum process, a process so difficult that it is unusable. The legislature passes the amendments and voters approve them.**

1914 **Mississippi and North Dakota adopt statewide initiative and popular referendum. Wisconsin and Texas voters defeat measures creating a statewide initiative and popular referendum process. A majority of Minnesota voters voting on a constitutional amendment to adopt statewide initiative and popular referendum approve the amendment; but Minnesota's constitution requires that all amendments also receive a majority vote of all voters voting in the election, regardless of whether or not they vote on the actual amendment itself – so the measure fails.**

1915 **Maryland adopts popular referendum.**

1916 **A majority of Minnesota voters voting on a constitutional amendment to adopt statewide initiative and popular referendum again approve the amendment; but the Minnesota constitution's requirement that all amendments also receive a majority vote of all voters voting in the election, regardless of whether or not they vote on the actual amendment itself – again dooms the measure.**

1918 **Massachusetts adopts statewide initiative and popular referendum. North Dakotans vote and approve a more lenient initiative process. The amendment passed by the North Dakota legislature and adopted by the voters in 1914 had such strict procedures that no initiatives qualified for the ballot in the following election, so initiative proponents put an initiative on the 1918 ballot to ease the procedures.**

1922 **Mississippi Supreme Court overturns Mississippi's initiative and popular referendum process.**

1956 **Alaska adopts statewide initiative and popular referendum as part of its new constitution.**

1968 **Wyoming adopts statewide initiative and popular referendum.**

1970 **Illinois adopts a very limited initiative process.**

1972 **Florida adopts statewide initiative.**

1977 ***Hardie v. Eu* is decided by the California Supreme Court which finds unconstitutional the Political Reform Act's cap on expenditures for qualifying ballot measures since it violates the First Amendment of the U.S. Constitution. The District of Columbia adopts initiative and popular referendum. The U.S. Supreme Court rules in *First National Bank of Boston v. Bellotti* that state laws prohibiting or limiting corporate contributions or spending in initiative campaigns violates the First and Fourteenth Amendment.**

1980 **For the third time, a majority of Minnesota voters voting on a constitutional amendment to adopt statewide initiative and popular referendum approve the measure; but for the third time the Minnesota constitution's requirement that all amendments also receive a majority vote of all voters voting in the election, regardless of whether or not they vote on the actual amendment itself dooms the measure. The U.S. Supreme Court rules in *Pruneyard Shopping Center v. Robins* that state constitutional provisions that permit political activity at a privately-owned shopping center does not violate federal constitutional private property rights of owner.**

1981 **The U.S. Supreme Court rules in *Citizens Against Rent Control v. Berkeley* that a California city's ordinance to impose a limit on contributions to committees formed to support or oppose ballot measures violates the First Amendment.**

1986 **Rhode Island voters defeat a measure establishing statewide initiative and popular referendum.**

1988 **The U.S. Supreme Court rules in *Meyer v. Grant* that states cannot prohibit paid signature**

gathering, saying that initiative petitions are protected political speech.

1992 **Mississippi adopts statewide initiative for the second time.**

1996 **Rhode Island voters approve a nonbinding advisory question put on the ballot by the legislature asking if they would like to have a statewide initiative and popular referendum process – but the legislature ignores them.**

1998 **The Initiative & Referendum Institute is formed to study and defend the I&R process on the 100 year anniversary of the adoption of statewide initiative and popular referendum process in America.**

1999 **The Minnesota House of Representatives approves a constitutional amendment that would establish a statewide initiative and popular referendum process; the Senate will vote on the amendment in 2000. The U.S. Supreme Court declares in *Buckley v. American Constitutional Law Foundation* that, among other things, states can not require that petition circulators be registered voters.**

Source: Initiative and Referendum Institute, http://www.iandrinstitute.org/factsheets/Timeline.htm

Table 2: Historical Use of Direct Democracy

States Ranked by Number of Initiatives on the Ballot since Adoption

State	Year Initiative Adopted	Initiatives on Ballot	Avg Initiatives per Year
Oregon	1902	274	3.01
California	1911	232	2.83
North Dakota	1914	160	2.03
Colorado	1910	150	1.81
Arizona	1910	133	1.60
Washington**	1912	91	1.12
Arkansas	1909	80	.95
Oklahoma	1907	79	.92
Missouri	1906	60	.69
Ohio	1912	58	.72
Montana	1904	56	.63
Michigan	1908	54	.64
South Dakota	1898	42	.44
Massachusetts	1918	41	.55
Nebraska	1912	35	.43
Nevada	1904	27	.30
Maine**	1908	27	.32
Alaska**	1959	22	.65
Idaho**	1912	17	.21
Utah**	1900	16	.17
Florida*	1972	12	.48
Illinois*	1970	4	.17
Wyoming**	1968	3	.12
Mississippi*	1992	0	0

*Applies only to constitutional amendments **Applies only to statutes

Source: Caroline J. Tolbert, "Changing Rules for State Legislatures: Direct Democracy and Governance Policies," in Bowler, Donovan and Tolbert eds., *Citizens as Legislators: Direct Democracy in the United States* (Ohio State University Press, 1998).

Source: of raw data, Tommy Neal, "The Voter Initiative," National Conference of State Legislatures, October 1993, vol. 1, no 38.

Note: The standardized number of initiatives on the ballot per year was calculated by dividing the total number of initiatives by the number of years the state has had the process. With regular elections every two years this number can be multiplied by two for the average number of initiatives appearing on the ballot per election cycle. Eight states were coded high use of the initiative (above .9 initiatives per year), nine state were coded moderate (.43 [mean] to .90 per year) and six states were coded low (below .43 initiatives per year).

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