THE ORIGINAL INTENT AND CURRENT OPERATION OF DIRECT DEMOCRATIC INSTITUTIONS

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I. INTRODUCTION

It is common these days for analysts to stress the ways that the current operation of direct democratic institutions have departed from the expectations of turn-of-the-twentieth century proponents of these institutions. As is frequently argued, the initiative process was originally intended to permit the popular will to prevail over special interests, but the process is now employed by special interests themselves to secure enactment of their favored policies. There is, to be sure, a sense in which this is an accurate description, especially in light of the costs associated with launching and waging initiative campaigns in the modern era and the advantages possessed by well-financed individuals and groups in the current process. In another sense, however, the recent use of the initiative process is characterized more by a consistency with, rather than a departure from, expectations of the original proponents. For instance, the process continues to be used, as anticipated, to secure passage of legislation blocked by powerful interests, antithetical to legislators’ self-interests, and disfavored by political elites. The principal changes over the last century—and there have been important changes in the specific measures appearing on ballot propositions—are best understood as a product of shifting patterns in the particular issues blocked by dominant groups, legislators, and political elites.

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2 See Broder, supra note 1, at 43–45, 54; Ellis, supra note 1, at 109.

3 But for studies challenging the accuracy of this conclusion, see Elisabeth R. Gerber, The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation 5 (1999); John G. Matsusaka, For the Many or the Few: The Initiative, Public Policy, and American Democracy 2–3 (2004).
My purpose in this brief commentary is to examine the expectations of early proponents of direct democracy by focusing on a representative work, Delos F. Wilcox’s *Government by All the People: The Initiative, the Referendum, and the Recall as Instruments of Democracy*, and to inquire into whether the recent subject matter of the initiative process has fulfilled these original expectations. In focusing on this question, I necessarily leave aside other questions that could fruitfully be posed about direct democratic institutions. One might ask, for instance, whether these institutions have achieved other goals of early proponents, such as promoting citizen participation and knowledge. Conversely, one might inquire into whether these institutions have brought about the harms envisioned by early critics who particularly feared the passage of measures depriving minority groups of fundamental rights. These are worthy questions that have inspired ongoing scholarly analysis. For present purposes though, I focus on the subject matter of the initiative process with the intent of stressing the general continuity over time in the use of these devices, albeit allowing for expected changes due to shifts in the particular issues that have been blocked or disfavored by representative institutions.

II. EXPECTATIONS OF THE ORIGINAL PROONENTS OF DIRECT DEMOCRACY

By the time Delos Wilcox published *Government by All the People* in 1912, state-wide direct democracy had been operating for barely over a decade, with the statutory initiative and referendum first

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4 Delos F. Wilcox, *Government by All the People: The Initiative, the Referendum, and the Recall as Instruments of Democracy* (Da Capo Press 1972) (1912). Wilcox was an especially articulate early proponent. But this analysis could as easily focus on other early advocates, including Benjamin Parke De Witt, *The Progressive Movement: A Non-Partisan, Comprehensive Discussion of Current Tendencies in American Politics* (1915); Frank Parsons, *Direct Legislation OR the Veto Power in the Hands of the People* (1900); several contributors to *The Initiative, Referendum, and Recall* (William Bennett Munro ed., 1912); and W. S. U’Ren, *The Operation of the Initiative and Referendum in Oregon*, 32 Arena 128 (1904).

5 This question has been explored by various scholars, including Daniel A. Smith and Caroline J. Tolbert in their book, *Daniel A. Smith & Caroline J. Tolbert, Educated by Initiative: The Effects of Direct Democracy on Citizens and Political Organizations in the American States* (2004).

adopted in South Dakota in 1898 and the constitutional initiative introduced by Oregon in 1902. Wilcox was therefore in a prime position to express the hopes of early proponents of direct democracy. In fact, he made clear in the preface that he was a strong advocate of these institutions, explicitly disclaiming any pretense of “impartiality” and going on to explain that he “rested [his] argument almost entirely upon a consideration of the failures of our old system of checks and balances and upon the a priori reasons for believing that the new political instruments will be more effective in establishing popular self-government.” He went on to compile a comprehensive list of the expected benefits of these devices—along with detailed responses to critics of these devices. In viewing Wilcox’s book, one can identify three main expectations running throughout the volume.

First, Wilcox expected that direct democratic institutions would secure passage of measures that were blocked by special interests. As he explained, the initiative would help in “clearing away the artificial obstacles put in the way of legislative progress by the predatory or self-complacent interests that have captured the machinery of representative government.” When it came to identifying the particular interests that then held sway over representative institutions and would be combated by direct democracy, Wilcox focused, unsurprisingly, on “the numerical minority made powerful by the possession or control of wealth,” and he therefore looked forward to passage, with aid of the initiative, of “[s]uch measures as employers’ liability, the regulation of public utilities, conservation of natural resources, taxation of large incomes, the inheritance tax, the land tax, the protection of women and children against exploitation in the fields of industry and the enlargement of the functions of government.” But he was also aware that the initiative would be used to overcome other interests, including, among others, “the liquor interests [that] have almost universally exerted a concentrated and powerful influence over American legislative bodies” in their effort to prevent passage.

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8 U’Ren, supra note 4, at 128.
9 WILCOX, supra note 4, at v.
10 Id. at vii.
11 Id. at 95–96.
12 Id.
13 Id. at 65.
14 Id. at 66.
of prohibitory liquor laws.\textsuperscript{15} A second benefit of the initiative process, Wilcox anticipated, would be facilitating passage of political reforms opposed by legislators who were primarily concerned with protecting their own interests.\textsuperscript{16} As he explained, direct democracy “opens 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{17} He was particularly mindful, in the early twentieth century, of the benefit of taking “direct action to solve the problems of the election law, of nominations for office, of municipal home rule, of party organization, [and] of the qualifications and emoluments of legislators.”\textsuperscript{18} As he noted,

By what right of reason can we expect a partisan legislature to consent to the establishment of a non-partisan legislative ballot? Upon what ground can we ask a municipal council elected by wards to let us vote upon a plan to abolish ward representation and substitute a commission form of government? 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{19} But as Wilcox acknowledged, these were merely a few of the ways in which “[u]nder the Initiative we would be freed from the domination of our own representatives.”\textsuperscript{20}

A third purpose of adopting the initiative and referendum, according to Wilcox, was to permit a hearing and possible passage for proposals that were out of step with the views of political elites, and therefore, not given serious consideration in representative institutions.\textsuperscript{21} Of the existence and consistency of the views of such political elites, Wilcox had no doubt. He took particular note of the \textit{New York Times}, among other news and opinion journals, which he viewed as “pretty well satisfied with the present status of affairs” and thus in favor of “parleying and delay” in the face of innovations.

\begin{itemize}
  \item \textsuperscript{15} \textit{Id.} at 57–58.
  \item \textsuperscript{16} \textit{Id.} at 117–19.
  \item \textsuperscript{17} \textit{Id.} at 117–18.
  \item \textsuperscript{18} \textit{Id.} at 119.
  \item \textsuperscript{19} \textit{Id.} at 118.
  \item \textsuperscript{20} \textit{Id.} at 119.
  \item \textsuperscript{21} \textit{Id.} at 65–66.
\end{itemize}
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and reforms. Nor did Wilcox doubt the susceptibility of elected representatives to the influence of these elites, and thus the likelihood of the stifling of disfavored proposals, even if such proposals might be well-received by the people upon being presented for their consideration. As he noted, “there are fluid in American political society certain thoughts which continually try to crystallize themselves into law and, not succeeding very well under the present legislative system, look with hope to the unfettered rule of the majority promised by the Initiative.” Wilcox pointed to several innovative proposals—“the single-tax program[,] . . . . the ownership and operation of public utilities, . . . . housing reform, industrial education, health protection, and so forth”—that would likely be thrust on the political agenda and receive a fair hearing through direct democratic institutions. But he made clear that the Initiative would have wide-ranging benefits in this regard, in that it generally “gives fluidity to politics, opens the door to the free application of ideas, constantly invites new leadership into the field of government, disarms the reactionary forces in the legislative body.”

III. CURRENT OPERATION OF DIRECT DEMOCRATIC INSTITUTIONS

When we examine the purposes to which initiatives and referendums are currently put (I will draw on examples from the 2005–2006 election cycle), we find that the general expectations of early direct democracy proponents have in the main been borne out, insofar as measures are routinely proposed in order to overcome special interests, political elites, and legislators’ self-interest. To be sure, the 102 initiatives and referendums proposed in the 2005–2006 election cycle—35 of which were approved—span a wide range of topics and not all of them are encompassed by these analytical categories.

22 Id. at 64.
23 See id. at 67.
24 Id. at 92.
25 Id. at 93.
26 Id. at 110.
27 In 2005, nineteen initiatives and referendums were put on the ballot, and two were approved, compared with eighty-three measures on the ballot and thirty-three approved in 2006. This, and other information in this section on initiatives and referendums from 2005 to 2006, comes from John G. Matsusaka, 2005 Initiatives and Referendums, in THE BOOK OF THE STATES 300–03 (2006); INITIATIVE & REFERENDUM INSTITUTE, BALLOTWATCH 1–9 (2006), http://www.iandrinstitute.org/BW%202006-5%20(Election%20results-update).pdf.
continuity between the founders’ general expectations and the purposes of these propositions, even if the precise ballot measures have changed form in response to changes in the reforms and ideas now blocked in representative institutions.

Thus, Wilcox’s first expected use of direct democratic institutions—the overcoming of special interests—continues to be a prominent purpose of initiatives on the ballot in 2005–2006. In this regard, the main difference between early twentieth-century and early twenty-first century measures is in the particular proposals being blocked in representative institutions and the particular interests that are targeted. Accordingly, whereas corporate interests were blocking labor-supported, employer-liability reforms and maximum-hours restrictions in the Progressive Era that led to initiative proposals in these areas, in recent years, corporate interests are seen as blocking minimum-wage increases. This corporate interest has prompted successful minimum-wage initiatives in Arizona, Colorado, Missouri, Montana, Nevada, and Ohio in 2006. And whereas liquor interests were blocking liquor regulations in the early twentieth century, prompting prohibition initiatives in several states, the current concern is with the lobbying power of tobacco interests. Consequently, tobacco companies were targeted with successful initiatives restricting smoking in various public places in Washington in 2005 and Arizona, Nevada, and Ohio in 2006, as well as initiatives increasing taxes on tobacco products, two of which were successful in 2006 (in Arizona and South Dakota) and two of which were defeated (in California and Missouri).

Various initiatives were also put forth between 2005 and 2006, as in the Progressive Era, for the purpose of securing political reforms that run counter to the interests of legislators and, for that reason, are often blocked in representative institutions. Again, the main difference between the early twentieth century and the early twenty-first century is seen in the particular reforms sought in each period. In the early twentieth century, legislators were often reluctant to allow direct primary elections (because of the risk to their reelection prospects) and to give up free railroad passes (because they enjoyed such perks of the office), leading to initiative

28 Initiative & Referendum Institute, supra note 27, at 3–4, 6–7.
29 See Matsusaka, supra note 27, at 302.
30 Initiative & Referendum Institute, supra note 27, at 3, 6–7.
31 Id. at 3, 8.
32 Id. at 4, 6.
campaigns on these and related subjects. In the early twenty-first century, politicians are no less concerned about threats to their reelection; a major threat at this point in time, though, comes in the form of independent redistricting commissions intended to bring about more competitive elections. Such measures were proposed through the initiative (though ultimately defeated) in California and Ohio in 2005. Nor are early twenty-first-century politicians any less concerned about benefiting from perks of the office and thus opposing efforts to limit these benefits. Leading examples of such efforts in 2006 were successful Colorado and Montana initiatives banning government officials from taking lobbying positions for two years after leaving office and a successful South Dakota initiative preventing state officials from using state-owned airplanes for non-official purposes. Other political reforms of this sort placed on the ballot in 2005 through 2006 include a reduction in legislative session length from four to three months (approved by voters in Alaska in 2006), restoration of legislative term limits (rejected in Oregon in 2006), and a public funding program for state-wide candidate campaigns (rejected in California in 2006).

Finally, the initiative process was used on numerous occasions in 2005–2006 to fulfill the original expectations that the process would permit a hearing for measures out of step with the views of political elites, as typified by leading newspapers such as the New York Times or the dominant media outlets in state capitols. Here, though, it is important to take account of a significant evolution over the last century in the views of political elites, and therefore, in the types of measures disfavored by these elites but often successful in the initiative process. In the early twentieth century, the single-tax program and government ownership of public utilities were the types of measures that Progressive reformers placed on the ballot so as to make an end run around conservative political elites. By the early twenty-first century, however, the initiative process has come

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34 See Matsusaka, supra note 27, at 302.
35 Id.
36 Initiative & Referendum Institute, supra note 27, at 4, 6.
37 Id. at 8.
38 Id. at 3.
39 Id. at 7.
40 Id. at 4.
41 Wilcox, supra note 4, at 93; Persily, supra note 33, at 33.
to serve as a vehicle for advancing a different and more varied set of disfavored proposals. In many cases, it is conservatives who now view the initiative process as a way of advancing measures disfavored by political elites, as demonstrated most clearly in 2006 by passage of an affirmative-action ban in Michigan.\textsuperscript{42} Conservatives have also enjoyed success in recent decades in adopting tax-and-expenditure limitation initiatives, and similar measures were placed on the ballot in 2006 in Maine, Nebraska, and Oregon, although each of these was defeated.\textsuperscript{43} Each of these measures has enjoyed success almost exclusively through the initiative process; in other instances, conservatives have pushed proposals in both the legislative and initiative processes, and though they have enjoyed some success in legislatures, they have relied on the initiative when legislatures in certain states were unwilling to act. Examples from 2006 include banning same-sex marriage, which was achieved without resort to direct democracy in many states but accomplished through the initiative process in Colorado\textsuperscript{44} (though defeated in Arizona)\textsuperscript{45} and limiting use of the eminent domain power for private purposes, which was approved through initiatives in Arizona, Nevada, North Dakota, and Oregon\textsuperscript{46} (though more expansive initiatives were defeated in California and Idaho).\textsuperscript{47} In still other instances, libertarians are the ones using the initiative process to advance proposals that otherwise would not receive serious consideration.\textsuperscript{48} This is typified by drug legalization advocates, who have recently enjoyed much success in passing medical marijuana initiatives, but who, in 2006, saw a medical marijuana initiative defeated in South Dakota\textsuperscript{49} and marijuana legalization initiatives rejected in Colorado and Nevada.\textsuperscript{50} In each of these respects, then, the initiative process continues to serve its original purpose of gaining a public hearing for disfavored innovations, even if conservative and libertarian ideas are now often benefiting from such a hearing.

\textsuperscript{42} See Initiative & Referendum Institute, supra note 27, at 5.
\textsuperscript{43} See id. at 5–7.
\textsuperscript{44} Id. at 4.
\textsuperscript{45} Id. at 3.
\textsuperscript{46} Id. at 3, 6–7.
\textsuperscript{47} Id. at 4–5.
\textsuperscript{48} See Mr. Weld, Libertarian: A Candidate for Governor Looks Beyond Differences in Ideology and Takes a Minor Party’s Line on the Ballot, Times Union, May 2, 2006, at A10 (stating that the Libertarian Party “supports the legalization of marijuana”).
\textsuperscript{49} Initiative & Referendum Institute, supra note 27, at 8.
\textsuperscript{50} Id. at 4, 6.
IV. CONCLUSION

Direct democratic institutions have several implications for scholars of state constitutional law, insofar as the constitutional initiative is used to add or revise state constitutional clauses and occasionally for the purpose of overturning state court rulings and insofar as the statutory initiative is used to adopt legislation that is often the subject of state constitutional challenge. Although a good deal of recent academic commentary has focused on ways that the initiative process departs from original expectations, I have sought to call attention to the significant degree of continuity, albeit with expected changes over time, in the purposes for which the process is used. Admittedly, early proponents of direct democracy had a specific set of issues in mind that they hoped would be addressed through these devices, but as we begin a second century of operation of these institutions, the original proponents would hardly be surprised by their continued use in securing passage of measures blocked by powerful interests, legislators’ self-interest, and political elites, but favored by popular majorities.