THE INITIATIVE AND REFERENDUM
in
THE ROMAN REPUBLIC .

by

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PREFACE .

Mr. Abbott observes that Mark Twain showed a true sense of the incongruous when he placed his Connetticut Yankee in King Arthur's court rather than in the busy marts of Rome. For, while the American of today would miss his morning paper--although indeed, a substitute for this was effected by the posting of bulletins--and while he would have to walk to his office instead of riding in his car, nevertheless he would find the general trend of thought wonderfully modern. And nowhere, perhaps, would this be so true as in the realm of politics. The bribing of the voters, the slandering of the candidates and the post-election alibis of the defeated persons would indeed be reminiscent of democracy in America.

In all the discussion that has been provoked recently concerning the Initiative and Referendum, the practical use of these institutions in the Roman republic has been almost entirely disregarded. The purpose of this thesis is to prove that a scheme strikingly similar to our modern Utopian plan was in use and to trace its development to the end of the republic, and

secondly, to point out the resemblances and the differences between the Roman and modern usages.

For various reasons, Dion's history has been selected as the one on which to base this account. Where his records are meagre or fragmentary, however, recourse has been had freely to other ancient authorities.

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INDEX .

I. THE MODERN INSTITUTIONS 1

II. DURING THE MONARCHY.....21

III. TO THE ELECTION OF THE DECEMVIRI.....26

IV. THE DEVELOPMENT OF THE INITIATIVE.....34

V. THE COMPLETE INITIATIVE.....41

VI. FROM 287 TO THE TIME OF THE GRACCHI.....45

VII. THE PERIOD OF THE GRACCHI.....51

VIII. TO THE END OF THE REPUBLIC.....58

IX. THE ANCIENT AND THE MODERN.....74

THE INITIATIVE AND REFERENDUM
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Based on the Fragments of the First Fifty-One Books of Dion Cassius.

I. THE MODERN INSTITUTIONS.

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Primitive man relied on his individual strength. Alone he struggled against nature, and alone he fought beasts and his fellow-man. When he died, there was none to bury or avenge him.

But, doubtless first on a family basis, he soon began to unite himself with his neighbor in order that he might more ably cope with his obstacles. His sons and his grandsons remained with him, in much the same manner, possibly, as the Roman son remained under the potestas of the father.

When the father was contemplating any serious course of action, he would possibly call his sons and their families together, discuss the matter with them, and ask their advice, which, however, he was not obliged to follow. In this family arrangement--which is exemplified in the conduct of a Roman family--we see the first glimmerings of a referendum.

It is probable, therefore, that the customs

of the primitive family were retained when the union of several families formed tribes, and the union of tribes, nations. The king would call the elders together and ask their advice. After a time, however, this became unsatisfactory, and an attempt was made to ascertain the opinion of all the common people.

The reason for this was based usually on military conditions. The king, however autocratic and despotic he might be, was dependant upon the people to do his fighting. If, therefore, the people disapproved the war, they would either mutiny or fight with such poor spirit that no victories were won. Hence we see that it was highly important that the people should favor the war. From this grew the custom, common to nearly all peoples in the beginnings of their government, of submitting to a meeting of the commons the question of declaration of war. This was the real beginning of the Referendum.[1]

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1. The Comitia Centuriate, organized by Servius about the middle of the sixth century B.C. alone of the Roman bodies had the right of declaring offensive war. In Berne, Swotzerland, after 1513, the government could not contract any alliance without the consent of the people, and after 1531 could not go to war without the consent of the people.

It is obvious that, while the Referendum was a powerful instrument in the hands of the people, yet it was incomplete. The people had no opportunity in the legislation unless the king or sovereign council willed it, and in case of a radical difference between the wishes of the sovereign power and the people, the bill would not be submitted. Charles I of England ruled twelve years without a parliament. The people were powerless because they could not assemble themselves. They had a Referendum, but not the Initiative. We are not surprised to find, therefore, that, having obtained such a power as the Referendum, the people demanded its complement. They wanted the right of submitting bills to themselves; they wanted the right of saying what bills should be referred to them. This power is called the Initiative.

There are several forms of the Initiative and Referendum in vogue today. Of the Referendum, we have two general types, the Optional and the Compulsory Referendum. Under the Optional Referendum, a signed petition is required before a bill is submitted to the people. Under the Compulsory Referendum, all the bills passed by the legislature, with the exception of urgent bills and appropriations, must be submitted to the people. No petition is required. The Compulsory

Referendum is in force in ten and one-half cantons in Switzerland and the Optional in seven and one-half.[1] In United States, the Optional is the more popular form, the Compulsory being used only on constitutional amendments, and on large appropriations which increase the bonded indebtedness beyond a certain amount.

Now the question arises whether or not there is any fundamental difference betwen these two forms. It has been urged that the Compulsory is the true Referendum, while the Optional is only a species of veto[2]. It is a fact that where the Compulsory Referendum is used, we find that the greater effort is made to educate the people on the questions which are submitted. In Zürich, Aargau, Solothurn and Thürgau and Rural-Basle[3], voting is made compulsory by placing a fine of two francs on the non-voters.

Nevertheless, I am inclined to think that the Optional Referendum is as pure a form as the Compulsory Referendum. A right does not have to be exercised to exist. I have the right to examine the books of a certain concern anytime I may wish to do

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1. Referendum in Switzerland; Deploige, 172.

2. Mr. Hilty thinks that there is a constitutional difference betwen these two forms. v. Das Referendum in Schweizerischen Staatsrecht, 411.

3. Deploige, op. cit. 186.

so. That right would be neither lessened or increased if I were compelled to examine them every day. Under the Optional Referendum, the power is always latent, but is only used where there seems to be a real necessity for it. I fail to see any fundamental difference between these two forms. An obvious objection to the Compulsory Referendum may be found in the fact that, in spite of the fines, on all questions that have been submitted in Switzerland, only sixty-one per cent of the electors have voted.[1]

There is also the type of Referendum--such as is used in Michigan--where the legislature may submit a bill if they choose, but where they are not compelled to follow the expressed wish of the people. I am inclined, however, to regard this rather as a primitive form of the Referendum than as a type coordinate with the Optional and Compulsory forms. It is designed as an aid to the legislature in evading an issue, and shifting the burden of decision to the shoulders of the people.

The Referendum today is nowhere entirely untrammeled. While the governor of a state in the

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1. Deploige, op. cit. 212.

United States, for example, is unable to veto a measure approved by the people, yet we find a number of bills exempt from the Referendum. These bills fall into two classes. The first are bills of an urgent nature, whose immediate enactment is deemed necessary to the safety of the state, a sort of senatus consultum ultimum, as it were. In practically all of the states, such bills must be passed by a two-thirds majority of both houses and be signed by the governor.

Under the second class come appropriation bills. In most cases, when the expenditure would increase the outstanding debt to an excessive sum-- in New York to exceed one million dollars-- or where it would levy new taxes or increase the former ones as in Geneva[1], the bills must be submitted; but for the rest, the people have no chance at the appropriations.

I do not believe that the first class of bills can be regarded as in any way opposed to the pure type of Referendum. They are emergency bills, and are therefore exceptions to the general rules which must circumscribe the Referendum. At any

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1. Deploige, op. cit. 172.

rate, if such an emergency bill should prove displeasing to the people, they have only to resort to the Initiative and the bill must be referred at the next election. For such bills are not exempt from the Initiative, and this latter institution is a two-edged sword which may work for the repeal of unsatisfactory laws as well as for the passage of new bills. I do not believe that these exceptions violate either the letter of the spirit of the Referendum.

I believe, however, that the spirit of the Referendum is violated by the exemption of appropriation bills. It might be proper here to state that I am not criticizing the wisdom of such a procedure, or that I am arguing for the unhampered Referendum. In this discussion we are only concerned with sifting the evidence to find what constitutes the real Referendum. If the Referendum means anything, it means that the people are to have the right of voting on every question if they desire. The exemption of any bills is a confession of weakness. While an Initiative petition might be circulated against an item or items in an appropriation bill, yet, in the United States, from six months to two years would elapse before the bill could be

submitted, for in some states the bills must be first discussed by the legislature. An Initiative petition filed against a law does not suspend its operation, so as a result the disagreeable appropriations would be spent before the people could stop them. In other words, the people have no more control over the appropriation bills with the Initiative and Referendum than they do without these institutions. For this reason, I consider that the exemption of appropriation bills violates the spirit of the Referendum, and that the true type of Referendum is found no place on earth save in the six small cantons in Switzerland where the people still meet in Landesgemeiden, and the electors legislate in person. These cantons are so small, and their methods of meeting so primitive that one might with justice disregard them and say that the untrammeled Referendum does not exist.

There are also two forms of Initiative. In one case the people merely draw up a statement of the bill they want and in the second or "Formulated Initiative", the text of the proposed law is submitted. Four Swiss cantons formally recognize this difference.[1] It is urged that, under the former, the actual drafting

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1. Deploige, op.cit. 197.

of the bill is left to the legislature, and, if this body were unfriendly, sections could be inserted which would insure the rejection of the bill, or defeat its usefullness if adopted. This must be granted. But when the people themselves do not draw up the text of the bill, it is usually done by the Secretary of State, and if these inserted sections really violate the spirit of the petition which the people had presented, a writ of mandamus would compel the correct bill to be submitted. In practically all the State constitutions, which contain the Initiative and Referendum amendments, provision is made for the serving of a writ of mandamus against the Secretary of State if he does not submit the bill for which petition has been made; and surely he could not evade this law by submitting a bill which nullifies the spirit of the petition.

But if such a bill is passed and adopted by people, have they not the right to petition immediately for the repeal of the disagreeable sections?

Again, I would call attention to the fact that even under the "Formulated Initiative", the will of the people is often defeated. For, if our legislators, trained in law though they are--or should be--can scarcely draw up a bill which will be useful and

at the same time constitutional, how could we expect the untutored mind of the private citizen to escape this Scylla and Charybdis? The popular Initiative has been used but seldom in either Switzerland[1] or the United States, so it is impossible to do much except to theorize on this point. I fail to distinguish, however, any fundamental differences between the "Formulated" and what might be called the "Practical" Initiative; and I must certainly confess a preference for the latter on account of its simplicity.

The Initiative is unlimited in its scope, and the only requisite for its use is the signatures of a small percentage of the electors to the petition. This percentage is usually higher than that required for the Referendum, and also a larger number is required to initiate a constitutional amendment than to initiate a statue law. In the states, the most popular figures are five per cent. for the Referendum and eight per cent for the Initiative. Also it is usually stipulated that at least two-fifths of the counties be representated by the signers.

As long as these requirements are reasonable, they may be regarded merely as formal safeguards, and in no wise as hampering the Initiative. When, however,

the requirements are somewhat exorbitant as, for example, in Wyoming where twenty-five per cent of the voters are required to sign a petition for both the Initiative and Referendum, it seems probably that a serious handicap is placed on these institutions. In general, however, I think that we may safely say that the pure Initiative is found in many of the states and in Switzerland. Let us now trace the historical development of these institutions.

"During the Middle Ages the ancient assemblies died out and the right of making laws passed either to the sovereign or to a body of magnates and representatives surrounding the sovereign, such as the English parliament, the older scheme surviving only in such primitive communities as some of the Swiss cantons".[1] From the thirteenth century, the people in a number of these cantons had been accustomed to legislate for themselves, and to vote their own taxes. These meetings were called the Landesgemeide, and are still in vogue in the cantons of Uri, Schwyz, Unterwallen[2], Appenzell, Zug and Glacus. These Landesgemeide probably present the truest picture of democracy in

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1. American Commenwealth, Bryce, ii, 446.

2. These are the three cantons where the scene of Wilhelm Tell is laid, and are proverbial for their democracy.

history. Every free male of proper age---at one time as low as fourteen, but now twenty---is entitled to initiate legislation, take part in the discussion and vote. The people elect their own chairman. The meetings were held originally on Sunday, and the custom of holding the elections on Sunday has survived from this to the present day.

The next appearance in modern Europe of the Referendum was in "the provision of the French Constitution passed by the National Convention in 1793 which directs that any law proposed by the legislative body shall be published and sent to all the communes of the Republic, whose primary assemblies shall be convoked to vote upon it, in case objections have been raised by one-tenth of these primary assemblies in a majority of the departments"[1]. France, however, has made no further use of the Referendum from that day to this.

Soon the cantons in Switzerland began to adopt the Referendum until it was in force, in some form or other, in every canton except Fribourg, which does not use it yet. At last, after being in use in the cantons for one hundred and fifty years, the Referendum was finally adopted in the Federal Consti-

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1. Bryce, ibid.

tution of Switzerland, May 29, 1874. Section 89 of that document reads: "Federal laws shall be submitted for acceptance or rejection by the people if the demand is made by 30,000 voters or by eight cantons. The same principle applies to Federal resolutions which have a general application and which are not of urgent nature".

The Initiative has a much more recent origin. We find no trace of it in early European history. In 1831 Felix Diog de Rapperwyl tried unsuccessfully to persuade the canton of St. Gall to adopt it[1]. "The canton of Vaud about this time adopted the institution which had hitherto been unknown outside the little cantons with the Landesgemeiden. According to the constitution of 1845, if 8,000 citizens demanded a popular vote on any question whatever, whether it were the making of a new law or the repeal of one already in existence, the legislative assembly was obliged to comply with this demand. This was the popular Initiative, unlimited in its scope".[2] This institution spread to the other cantons, was adopted in Aargau in 1852[3], and was also incoperated in the

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1. Deploige, op.cit. 190
2. Deploige, op.cit. 76-7.
3. Deploige, op.cit. 81.

Federal Constitution of May, 1874. It requires a petition signed by 50,000 voters, or from eight cantons to demand a submission.

It is not strange that such a democratic principle should have influenced the constitution of the United States. Rousseau's Social Contract had already been translated into English and was doubtless familiar to the writers of the constitution.

The Referendum in the United States has, however, developed independent of France or Switzerland. During the Revolutionary period, two states, Massachusetts and New Hampshire alone referred their completed constitutions to a popular vote.[1] The constitutions of Maryland, Virginia and Pennsylvania embodied the declaration that the people had a right to alter or abolish their constitutions in case they ceased to be satisfactory, but they were not submitted to a popular vote.[2]

Beginning with New Hampshire in 1792, however, it became the custom for the states to submit their constitutions to the people, which custom has prevailed ever since. "Barring the Secession and reconstruction periods in the South, there seems to have been, since Florida pursued the course in 1839,

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1 & 2. Referendum, Initiative and Recall in America, Oberholtzer, p. 106-7.

no instance of a constitution being put into effect without a popular vote in any American state until Mississippi adopted this policy in 1890, being followed in a few years by South Carolina, Deleware, Kentucky (with respect to certain amendments and details) and Louisiana".[1] Inasmuch as these exceptions were owing entirely to the large negro vote prevailing in these sections, we see that the adoption of a constitution for a state, under normal conditions, always involves the Referendum.

With the decay of the powers of the state legislatures, the personnel of these bodies began to decline. In place of regarding the Referendum as an attack on their rights and privileges and struggling against it as such, they began to welcome it and to seek in it relief from the more embarrassing problems. It is not surprising, therefore, that they soon began to submit other questions to the people. It was often an easy way out of a difficult situation.

The constitutions of many states provided for a compulsory referendum of certain matters; in New York, for example, any expenditure which would increase the public debt to more than a million dollars---except in cases of invasion, etc., ---must be

submitted to a vote of the people; in Washington, a two-thirds vote is required to change the location of the capitol; this is, however, in the nature of a constitutional amendment.

Having come thus far, it is not strange that the Swiss Referendum should be enacted by the states. In 1898 South Dakota took the lead by amending her constitution to read: "The legislative power of the state shall be vested in a legislature which shall consist of a senate and house of representatives, the people expressly reserve to themselves the right to propose measures, which measures the legislature shall enact and submit to a vote of the electors of the state;" and again "to require that any laws which the legislature may have enacted shall be submitted to a vote of the people before going into effect, except such laws as may be necessary for the immediate preservation of the public peace", etc., etc.[1]

Here we have both the Initiative and Referendum. Five per cent of the voters may initiate a law and require its submission to the people, and a like number may require the submission of a law already passed by the legislature. As mentioned above, the

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1. Constitution of South Dakota, 1889, Art. iii, Sec.1.

governor has no power to veto a bill passed by Referendum.

The legislative power is vested in the people by four methods: "The first is the enactment or amendment by them of the constitution".[1] This is a great deal like the Swiss Referendum, because the provision is first passed by the legislature and then submitted to the people.

The second method is when the legislature has "not given its decision on the proposal; but the popular vote at the polls takes place in obedience to a direction in that behalf contained in the constitution. This is not, strictly a Referendum, but a case of legislation by the people alone, as if the voters of the state were all gathered in one assembly".[2] This indeed takes us back to the picture of Rousseau: --among whom a company of peasants sitting under the shade of an oak, conduct the affairs of a nation with a degree of wisdom and equity that do honor to human nature."[3]

The third method is the true Swiss Referendum, that is, the submission of laws already passed by the legislature; and the fourth is the Swiss Initiative,

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1. Bryce, op.cit. p.470
2. Bryce, op.cit. p.472.
3. Rousseau; Social Contract, p 288.

i.e., the "power for a certain number of voters to propose either ordinary laws or amendments"[1] to the state constitution. It is not practical perhaps at this point to discuss in detail the laws of the different states which have the Initiative and Referendum. It is enough to state that over a third of the states have some form of these laws, each state differing as to details, but conforming to one or more of the four principles laid down above. The percentage of signers required varies from five per cent each in South Dakota to twenty-five per cent each in Wyoming. In some states, notably Oklahoma and Oregon, elaborate provisions are made for distributing pamphlets, and arguments for and against a proposed bill. In these states, the printer prints the arguments at cost, and the state circulates them at its own expense. In practically all the states, some provision is made for advertising proposed bills.

We have seen the momentary flash of the Referendum in France, and have traced the fuller development in Switzerland and the United States. From the negative point of view, the people who have the Compulsory Referendum do not need the Initiative. If

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1. Bryce, op.cit. p. 472.

the legislature passes a law which they do not like, they can easily defeat it. If the legislature passed a prohibitory law, for example, and the people were opposed to it, they could easily render it void by compelling a referendum. But, if the people wanted prohibition and the legislature refused to pass it for them, what recourse would they have? It is obvious that, under the Referendum alone, the people possess only a part of the legislative power of government.

The Initiative therefore is the instrument for forcing the legislature either to pass a law, or to submit it to the vote of the people. In some cases, the Initiative partly supersedes the Referendum, because the legislature will pass a popular bill, and submission to the people will be unnecessary. This, however, is exceptional.

By the power of the Initiative, the electors may propose a new law, or demand the repeal of a law in existence. By the Optional Referendum, they only have the right of demanding the submission to the people of some law shich the legislature has passed. Again, legislation via the Initiative may be made at any time; legislation via the Referendum must be made within a certain time fixed by law, usually in

the United States, ninety days after the legislature adjourns. The Referendum only destroys, it does not create.

It will be seen, therefore, that the Initiative but completes the Referendum. It places in the hands of certain percentages of the voters, varying with different subjects and in different localities, the power which under the Referendum alone belongs to the legislature, that is, of submitting the law to the people.

Thus it is evident that the Initiative and Referendum must go hand in hand. The Referendum alone is incomplete because it affects only the bills that the legislature has passed; but when it is coupled with the Initiative, the circuit is completed; together they form a most powerful instrument which theoretically places the ultimate legislative authority on all important matters in the hands of the people, leaving the legislature to perform the routine work.

THE INITIATIVE AND REFERENDUM IN ROME.

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II. DURING THE MONARCHY (753-509 B.C.)

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Strictly speaking, there were no such institutions as the Initiative and Referendum during the monarchy. It is true that at times the people, aroused by some unusually despotic act of their rulers, rose up and violently demanded --and obtained-- certain rights, such as, for example, a relief from debt. But even when the people obtained the passage or rejection of laws by such methods, the act itself was in no wise an act under the Initiative or Referendum. These institutions are constitutional and legal in their nature.

For example, let us say that the people of Kansas want a bill passed rendering judges subject to recall. A riotous mob is formed, the people swarm into Topeka and demand the law, which the frightened legislature hurriedly passes. This is not the use of the Initiative on the part of the people. It is rather, a contract between two opposing factions,

of which the people form one part and the legislature the other. Laws passed under the Initiative and Referendum would not be each time a compromise between two or more parties. These institutions represent a legal power of legislation held by the people. However, we can readily see how the legislature, in order to prevent a reoccurrence of the scene, would thereafter arrange for a peaceable meeting in which the people might express their opinion on doubtful questions. This would represent the granting to the people of some sort of an Initiative and Referendum.

This is what happened in Rome. During the period of the monarchy, the people held no recognized share in the legislation; but occasionally, goaded to desperation, they rose and upset all precedents. These various risings of the people are interesting to us, therefore, in so far as they point to a power latent in the people, and an occasional recognition of this power by their rulers.

The first recorded instance in Dion Cassius of the interference on the part of the people with the established institutions is about B.C. 672. In the war between the Romans and the Albans, following the death of Numa, Horatius, a Roman, distinguished

himself. "But because he futhermore killed his sister when she lamented on seeing Horatius carrying the spoils of her cousins, he was tried for murder."[1] The next line reads: "However, he appealed to the people, and was acquitted."It is evident that an assembly of the people was called for the purpose of arbitration.

Thus we may probably conclude, I think, that Horatius was adjudged guilty by the legal procedure of that day, but an assembly of the people was called -- how or by whom, we are not informed-- which decided in his favor, and he was acquitted. This is, in truth, a vague, crude recognition of the right of Referendum along judicial lines.

There is, however, another explanation of this incident. Livy, whom Dion Cassius followed, may have confused this story with the right of appeal, which was not granted until 509 B.C. It is, of course, often difficult to tell to what extent our authorities may be relied upon.

In Rome, the development of the Initiative

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1. Zonaras, 7,6. The Greek words φρόνου ἐκρίθη are probably not adequately translated by the phrase "tried for murder." Κρίνω in the passive carries the idea of condemnation. The passage probably means "He was tried and found guilty of murder".

and Referendum was first along the line of judicial decisions and prosecutions, and later along legislative lines. In the modern world, this process has been reversed. For a long time we have known the Initiative and Referendum as pertaining to legislative matters, but it is only recently that the questions of "Recall of Judges" and the "Submission of Judicial Decisions" has been agitated. So far as I know, an Initiative in Judicial matters has not yet been proposed.

Servius Tullius (B.C. 578) seems to have derived his power and authority almost entirely from the people. The fact is mentioned that the people offered no objection to his siezing the royal power, and soon afterward he proceeded "to pay court to the people believing that he could secure control of the multitude more easily than of the patricians."[1] When the senate brought the charge against him that he had no authority to rule as king, "he gathered the people together and by the use of alluring statements, he so disposed them toward himself that they at once voted the kingdom to him outright."[1] Tullius probably went further in the matter of recognizing the author-

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1. Zonaras, 7,9.

ity of the people than any of the other kings, in fact he referred the question of whether or not he should be king to the people. This might be called a sort of Referendum.

There is little of importance in the reign of the last king, Tarquinus Superbus (B.C. 534-509). We are told that he wanted to abolish the senate, "but he was afraid that the multitude ..... in their capacity as citizens might revolt by reason of vexation at the change in government, he refrained from this openly."[1] His reign was so unbearable that the people "made a compact not to receive Tarquin again",[2] and he was driven from his throne.

While during the monarchy the power of the people as shown by the Initiative and Referendum was demonstrated, the right of the people to use these weapons was not recognized. A very suggestive incident is the Horation episode. While the accounts are meagre, yet there seems to have been a certain semblance of legality about his acquittal; and there are no evidences of violence or force. I think we may conclude, however, that only the barest beginnings of the Initiative and Referendum are visible to the time of the founding of the republic.

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1. Dio,II
2. Zonaras, 7, 11.

DURING THE REPUBLIC (B.C. 509-44)

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III. FROM THE FOUNDING OF THE REPUBLIC TO THE EJECTION OF THE DECEMVIRI (449 B. C.).

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The period from the founding of the republic to the expulsion of the decemviri is the story of the beginning of the struggles between the plebeians and the patricians. Every constitutional change is a result of a compromise between these opposing factions.

Unfortunately, Dion Cassius' account of this period is fragmentary. For the proper understanding of subsequent events, it will be necessary at some points to supply a brief sketch of the historical situation from other sources.

At the time of the institution of the republic, the burdens of the common people were undoubtedly lightened. The port-dues and taxes were lessened. In 509 B.C. the Valerian law was passed

which compelled the consul to permit the appeal of a person condemned to capital or corporal punishment-- except by due process of martial law-- and also of any individual whose fine exceeded two sheep or thirty oxen. It will not be our purpose to notice further the development of the Judicial Referendum. It is enough to say that from this time on, the principle was recognized in Roman common law.

The condition of the common people, which had been at the first materially bettered by the change in the form of government, soon began to grow worse. Rome was always at war; hence during the six summer months, the plebeians were away from home. During the winter, agriculture was impossible, and the common people fell into the hands of the lenders. Then military service the ensuing summer kept them from either paying past debts or saving for the coming winter; and laws permitting imprisonment for debt rendered their situation intolerable. So it was not long until the people were again clamoring for relief.

It is not surprising, therefore, to find that the people sought to better their condition by refusing to fight unless relief were granted. The patricians tried various pretexts; first they offered to cancel the debts, but after the war was finished,

they refused to do this; next the praetors declared a cancellation of debts which the senate afterward refused to approve. This crisis came in 494.

At the conclusion of a successful war against the Sabines, Volsci and Aequi[1], Valerus Maximus besought the senate to cancel the debts, as had formerly been promised to the soldiers. But the senate refused to do this. The enraged soldiers, therefore, withdrew to a neighboring mount and began devastating the country.

The constitutional result of the compromise which reunited the warring factions was the tribune of the plebs. These officials, two in number at first, were entrusted with the duty of protecting the citizens. There were elected by the assemblies of the common people, and were always plebeians. Their person was sacrosanct.[2]

The tribunes never became magistrates in the technical sense of the term. At first their powers were limited. They could intervene in the behalf of any citizen and render him exempt from any law or punishment. They did not render the law void except in the case of the individual in whose behalf they had intervened. It is easy to see how this perogative which was at first individual in its application, soon

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1. Zonaras 7,14. 2. Zonaras 7, 15.

became general. If a tribune were opposed to a law, he could announce that he would protect any citizen from punishment in case he violated its provisions. This probably accounts for the fact that the tribune soon obtained the privilege of sitting in the senate, the right to summon this body, and to veto what bills he disliked.

These tribunes of the plebs, who were soon increased to ten in number, represent that part of the Roman system of government which may be compared to the modern Referendum. Any one of them had the right to veto a senatus consultum, i.e., a bill passed by the senate. Since the tribunes were elected by the people each year, it is inconceivable that any considerable number of the people would be opposed to a senatus consultum without securing its rejection by a tribune.

In fact, it was not a very difficult feat to secure the rejection of a bill. Any one of the ten tribunes could do this, and it must have been an easy matter for a small but active minority to secure the rejection of a bill. In other words, it might very easily happen that a bill which was favored

by the majority of the people was vetoed because an energetic minority were opposed to it.[1] This is an illustration showing how, by giving too much power to the people, the Romans actually took some away. This is not a vital difference between the modern and ancient Referendum. It was merely a curious feature of the Roman system that they used a tribune where we use a petition.

Again, in modern times, a petition for a Referendum must be made within a certain specified time after the adjournment of the legislature. But in Rome, the tribune, under the pretext of protecting the people, might render void a law which had been in force for years. Thus it is evident, from the two reasons just given, that the Roman Referendum was in some respects more powerful than the modern institution.

This principle of Referendum became firmly fixed in the minds of the Romans. When, under the first decemvirate, the laws were drawn up, they were voluntarily submitted to the people, and upon receiving their approval, were inscribed on ten stones.[2] It

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1. If a minority could veto a bill, let us not condemn the Romans too hastily for that. As mentioned above (v.p.5) only 61 % of the electors in Switzerland have voted on the average bill, and therefore 31 % of them could reject a bill in Switzerland.
2. Zonaras,7,18.

must be remembered that, during the period of the decemvirate, all the regular offices, including the tribunate, were abolished; so, unless the decemvirs had chosen to give them the privilege, the people would have had no chance to express themselves upon the laws. Also, all the members of the first decemvirate were patricians. This bit of legislation differs from the Referendum as representated by the veto of the tribunes in that the people themselves, and not the tribunes as their representatives, voted on the proposition. The submission of the laws by the Decemviri finds an exact parallel in the submission of state constitutions in the United States.

The tribune had two fundamental privileges; his body was sacrosanct and the person who disreguarded this could be put to death without a trial, and he could punish any magistrate who persisted in opposing him. But some times the acts of the magistrate might have been committed away from Rome, or some time previous to the time when he was accused. In such cases, the tribune did not take it upon himself to convict the magistrates, but brought the matter before the concilium plebis. Soon the custom grew up of trying all kinds of criminal cases before the concilium plebis,

which custom was continued until the establishment of the quaestiones perpetuae.

It is easy to see how the right of the Initiative developed at the same time. When the tribune had called the people together to conduct his criminal prosecutions, there was nothing to prevent him from discussing other matters, and ascertaining the sense of the people in regard to certain legislation. These plebis scita were at first merely resolutions such as any mass meeting might make. The people, however, immediately asserted that these resolutions had a binding force on the entire community, a principle which was afterward recognized by the entire state and then the plebiscita were on a par with the senatus consulta.

Zonaras tell us[2] that in 449 B.C. the people voted a triumph to the consuls Valerius and Horatius, and a festival of two days, although the patricians and senators had previously signified their displeasure and refused to enact these laws. We are not told where this legislation, so manifestly initiatory in its character was passed, but in all probability the bills authorizing the festival and the triumph were

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1. Zonaras 7, 19.

proposed by the tribune and passed by an assembly of the people.

Thus by the time of the ejection of the decemvirate in 449 B.C., we have a recognized Referendum and the beginnings of the Initiative. Instead of a certain percentage of the people signing a petition as is the custom today, they must obtain the ear of one of the ten tribunes. The people, through the person of the tribune who attended the meetings of the senate and could either veto or allow a bill to be enacted, held the Referendum; and the patrician and senatorial parties had nothing to say during this process, whereas in the case of the Referendum today, a legislator has the same voting privileges as the private citizen. That is to say, in Rome the two classes were regarded as separated and opposed, while today there are everywhere regarded as one.

IV. FROM 449 B.C. TO THE LEX PUBLILIA (339 B.C.)

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THE DEVELOPMENT OF THE INITIATIVE.

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It is obvious that the next developments would logically be in the Initiative. The Referendum was now established and recognized.

The Initiative, in its inception, was merely a legalizing of force. In 494 B.C. (v.p. 28) when the people were dissatisfied, they mutinied and withdrew to a neighboring mount until certain laws relating to the cancellation of their debts were passed. This act was approximately initiatory in its results, though of course the manner by which it was secured was unconstitutional and illegal. The people themselves, so far as we know, neither suggested or passed on the law, still the mutiny which they began was the direct cause of the concessions; hence the laws, though originated in and passed by the senate, may be regarded as crudely initiatory. Or, looking at them from another angle,

the acceptance of them on the part of the people might be regarded as a Referendum; for had they been unsatisfactory, surely the mutiny would not have ended; and by going back the people virtually passed on and approved the laws.

Again in 449 (v.p. 32) the people voted a triumph to the consuls and a festival of two days, though the senate strongly opposed these measures. Dio does not state whether this act of the people was considered legal, or whether they expressed their wish and the senate was cowed into passive submission. Probably the latter was the case. As we shall later see, it was not until 287 that the full and untrammeled Initiative was given to the people. If this precedent had been regarded as legal, it is not probably that the laws of 339 and 287 would have been necessary.

It is a regrettable fact that, in the fragments of Dion Cassius that are now extant, record of but few of the constitutional changes of this period have been preserved for us. The reason for this is, I think, a very human one. The ancients were very modern in that they preferred to read stirring tales of military achievements to treatments of dry constitutional questions. As a result, practically all of

the legends and tales of battles seem to have been preserved, and the parts lost were doubtless the parts describing constitutional changes. So, if for the next few periods, we are compelled to cite other authorities, let us not censure Dion, but regret that the Greeks and Romans were, after all, so modern in their tastes.

The Valerian-Horatian laws, passed in 449, were the fulfillment of the promises made by the patricians. One of them placed the tribunate on a firmer basis. But by far the most important bit of legislation, as far as we are concerned, was an enactment bearing on the validity of the plebiscita. Livy says on this point (III.55,3) quod tributim plebes iussissit populum teneret.

The most important aspect of the laws of 449 was that it gave to the tribune a positive character which he had not possessed up to this time. He now had the right of initiating legislation. He could veto any act which the senate passed, and he could also compel the senate to act on any bill which he had the people pass, though the senate, if it chose, might reject it.

But this plan was unsatisfactory both to the plebeians and the patricians. The indignation of

the plebeians when the senate refused to confirm some measure that they had passed, must have been much greater than it would have been if the people had not been privileged to demand concessions so formally. So the people, finding that their Initiative failed to secure results once more resorted to force. Zonaras tells us[1] that in 342 the people became insubordinate, and received the benefit of certain new laws.

This arrangement was also unsatisfactory to the patricians. Upon almost any pretense the plebeians could start an agitation in their concilium, and if the patricians refused to sanction their action with an auctoritas patrum, they, the plebeians, had only to wait until the first public crisis arose and they could "wring from the patricians" what concessions they wished. To put a stop to this, therefore, the Lex Publilia was passed in 339, which provided that the approval of the senate must be given before the bill was passed by the people.

If the statement of Livy quoted above, "quod tributim plebs jussissit populum teneret were literally true, it would imply that the people had the complete Initiative after 449 B.C. In which case, what was the necessity of the Lex Publilia in 339, whose third clause

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1. Zonaras, 7, 25.

according to Livy enacted ut plebiscita omnes Quirites tenerent? or for the Lex Hortensia in 287 which, according to the elder Pliny, provided ut plebiscita universum populum tenerent?" Obviously, taken by themselves, these laws are duplicates.

It is not probable that it would have taken three enactments and a period of one hundred and sixty-two years to establish the same principle. We should be inclined to believe rather that the details of the laws have been lost, and that these details representated the checks and the handicaps which were thrown about the people. It is now generally agreed by authorities that, according to the legislation of 449, the plebiscita must receive the sanction of the senate before they became binding. The auctoritas patrum had to follow the actions of both the concilium plebis and the comitia centuriata. This order, as we shall presently see, was reversed by the legislation of 339.

At any rate, this is the distinction which the authorities make between the Valerian-Horatian laws and the Lex Publilia. The first gave the people the right of initiating legislation, but left the right of referendum on plebiscita with the senate.

When we remember that the Senate also held the right of initiating laws which the tribune, the re-

presentative of the people, could veto, we see that the forces were balanced, each one holding equal powers of initiation and also the right to reject the laws of the other. The Lex Publilia practically took away from the senate the right to veto the plebiscita.

This law, passed in 339, stipulated that the plebiscita must receive preliminary approval in the senate. Now, at first glance, this seems a curb on the powers of the people. But practically, it was not, for the securing of the auctoritas patrum degenerated into a mere formality which was entirely dispensed with by the Lex Hortensia in 287. From that time on the plebiscita were supreme and no power could annul them save a later plebiscitum.

Roman constitutional history is the story of the struggles between two peoples. At the beginning of the republic, the contest was between the patrician or senatorial class and the plebeians. Later, however, a rich plebeian class arose, which was called the nobilitas. Provision was made for the admission of this class into the senate, and the only distinction between such senators and the original patrician senators was that the latter retained the auctoritas patrum, that is, the right to pass on certain bills. As previously

mentioned, this auctoritas patrum came after the action of the assemblies until the Lex Publilia; after this law, it was given previous to the action of the people, and degenerated into a mere formality. As we shall later see, it was always necessary for the comitiae tributa, curitia and centurita, but in the case of the concilium plebis, this restriction was removed in 287 by the Lex Hortensia.

V. FROM 339 B.C. TO THE LEX HORTENSIA (287 B.C.)

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THE COMPLETE INITIATIVE.

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The period extending from 339 to 287 seems to have been chiefly a history of the wars with the Samnites. The internal disruptions of the Romans were often adjusted because of external dangers.

Dion writes that "The Romans voted to wage implacible war upon them",[1] and Zonaras that in 292 B.C. "the Romans .... had not chosen consuls on grounds of excellence".[2] In both of these references the comitia centuriata is meant. For this body alone had the right to declare offensive war, and they alone elected consuls. The tribunes of the plebs could not preside over the comitia centuriata, and therefore in these two cases, had no part in the legislation.

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1. Dion, VIII
2. Zonaras, 8,1.

In 320 the consuls Postumius and Calvinus met with a severe defeat by the Samnites and were compelled to sign a rather ignominius truce. The question arose as to whether or not this truce should be ratified. The consuls explained that they had signed the articles under compulsion, and advised that the people reject them. Speaking of Postumius, Zonaras says: "So he came forward and said that their acts should not be ratified by the senate and by the people ....."[1]

I cite this merely because it illustrates the fact that the people --in this case represented in the comitia centuriata--had from earliest times the right to declare war and the right to make treaties and conclude peace. While in this assembly the people never obtained the power that they did in the concilium plebis, yet in early times it was a very important legislative body.

I wish now to lay before you two fragments which seem to be Dion's and Zonaras' account of the Lex Hortensia in 287. This is the law which, as we noted above, gave the full and complete Initiative to

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[1] Zonaras 7, 26.

the Romans by making the plebiscita binding upon the whole people.

"After this, when some of the tribunes moved an annulment of debts, the people, since this was not granted by the lenders as well, began a sedition; and this was not quieted until foes came against the city."[1]

"When the tribunes moved an annulment of debts, the law prohibiting imprisonment for debt was often proposed without avail, since the lenders were desirous of recovering everything, and the tribunes offered the rich the choice of either puting this law to the vote and recovering their principal only or ----(hiatus in mss.)---receiving --(h. in mss.)---in three annual payments."------- "Finally the people would not make peace even when the nobles were willing to concede much more than had been originally hoped for ..... and consequently they would minimize the concessions made them from time to time feeling that these had been won by force; and they strove for more using as as stepping stone thereto the fact that they had already obtained something."[2]

These statements are plain and call for little explanation. I would emphasize these facts.

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1. Zonaras 8, 2.
2. Dion, VIII, 37:2.

(1) The poorer people and the tribunes wanted some legislation which the richer people, the lenders, successfully prevented them from obtaining legally. It is obvious, therefore, that the people did not have the complete Initiative at this time, or they could have obtained relief. (2) The people resorted to force, the nature of which we are not told, and obtained not only the concessions they sought along the line of debtor laws, but also many other privileges. Among these we know, from other sources, was the Lex Hortensia, a law which made the plebiscita binding upon all the people, and which made the auctoritas patrum unnecessary for acts of the concilium plebis.

With the close of this period, we have at last the complete Initiative and Referendum. These institutions represent the culmination of the struggle between the plebeians and the patricians which began with the founding of the republic. We must not, however, regard this as a triumph of democracy over the aristocracy. It merely means the triumph over the old patrician element in the senate; as a matter of fact the nobilitas and the patricians usually managed to control the tribunes. The people did indeed legislate, but, up to the time of the Gracchi, few laws were passed by the people to which the senate was opposed.

VI. FROM 287 TO THE TIME OF THE GRACCHI (133 B.C.)

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The period from 287 to 133 B.C. was a very crucial one for Rome. Perhaps the greatest struggles in which that warring nation ever engaged are included within these years. In 287 Rome was but the rising power of Italy; by 133 she had blotted out Carthage, conquered Spain, dominated Greece and the kingdom of Philipp and Alexander; she was the great world power.

The extraordinary struggles without compelled order within the state. Dissentions between the plebeians and the nobilitas seem to have been fewer than in the periods preceeding. As a result, while we may presume that the Initiative and Referendum --particularly the former-- were frequently used, yet, inasmuch as the plebeians and the nobilitas were for the most part harmonious, we do not have the record of many

instances of the use of these forms of legislation.

We find mention in one place that the "Romans the next year refrained officially from naval warfare."[1] The word which is translated 'officially' is δημοσία which is derived from the noun δῆμος meaning the people, or the populace; and is the word which Zonaras uses most frequently in speaking of the plebeians. This implies that the action was taken by the people in some sort of comitia meeting, doubtless in the comitia centuriata if it were the action of the comitia.

But a little later on we have a decisive example. In 223 B.C. the consuls Flaminius and Furius were waging war. A number of portents frightened the people and they sent a letter to the consuls recalling them. But the consuls did not open the letter until a battle had been fought and won. Even then, upon the urging of Flaminius, they delayed for some time. "At length the leaders returned home and were charged by the senate with disobedience ..... But the populace in its zeal for Flaminius, opposed the senate, and voted them a triumph. After celebrating this, the consuls laid down their office."[2]

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1. Zonaras, 8, 16.
2. Zonaras, 8,20.

This is a clear example of the Initiative.

We find that, after the little trouble with Rufus, when Fabius accepted entire control in 217 B.C., the "people gave their sanction".[1] In this case the senate probably submitted a resolution which the people approved, or else the people of their own accord voted encouragement to Fabius.

The next example is unusual in that it is a clear Initiative, with also a touch of the Referendum, and especially so because it is cited by both Dion and Zonaras. In 201 B.C. the Carthaginians sent an embassy to Rome to sue for peace. Let the authorities tell the story. "But the senate did not receive the embassy readily; indeed the members disputed for a long time being disagreed among themselves. The popular assembly, however, unanimously voted for peace and accepted terms."[2] And Dion, after speaking of the attitude of the consul, who thought that Carthage ought to be destroyed, says "In the popular assembly, however .... all unanimously voted for peace."[3]

Now, as we stated above, the comitia cen-

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1. Zonaras, 8, 26.
2. Zonaras, 9, 14.
3. Dion xvii,

turiata alone had the right to declare war, enter into treaties and conclude peace. Therefore, this action should have been taken by the comitia centuriata. If it were passed by the concilium plebis, it was, strictly speaking, illegal; though as it was evidently a very popular measure, it is easily possible that the senate would be afraid to stand on its rights in the face of the plebeian opposition. In either case, it was an expression of a desire of the people which was opposed to the wish of the senate.

This completes Dion's list of the uses of the Initiative and Referendum during this period. There is one more reference which might be of interest, however, so I shall cite it here. In Book XXVI Dion describes the arrogance of Claudius, who though he had done nothing to deserve a triumph, yet resolved "not to say a word in either the senate or the assembly about the triumph; but acting as if it belonged to him in any case, even if no one should vote to that effect, he asked for the necessary funds."[1] This is interesting in that it clearly implies that Claudius recognized the legislative power of the popular assembly as equal to that of the senate, at least in so far

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1. Dion xxvi.

as it concerned triumphs. A clearer implication of the Initiative at this time perhaps could not be found.

VII. THE PERIOD OF THE GRACCHI (133 B.C.-121 B.C.)

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One of the most important and most interesting periods in Roman history is that which embraces the work of the Gracchi. Unfortunately here again we find that but a few fragments of Dion's work have been preserved to us. This period is too vital to our subject to be ommitted, therefore it was necessary that some other source be used. Very good accounts may be found in Theodore Mommsens's "History of Rome" and --a much briefer one-- in Frank Frost Abbott's "Roman Political Institutions."

The people never fully realized the strength of the mighty sword which they possessed until the two Gracchi called it into action. These two brothers opened the gates and released the flood which later led to the overthrow of the republic. All of their laws were plebiscita, and their power was based on their popularity with the people. They first pampered

and flattered the city mob, and, by their treatment, increased it. It was this restless, idle crowd of dependents that sapped the virility of the republic and made it plastic in the hands of Sulla, Pompey, Caesar and Octavius. The only reason that the founding of the empire was delayed for fifty years was because Sulla lacked the inclination and Pompey decision.

Tiberius Gracchus, a young man of noble family, became tribune of the plebs in 133 B.C. The condition of the "third estate " was at that time most wretched. Two causes contributed to this; first the immense slave population, and secondly, the concentration of the farming land in the hands of the wealthy burgesses and senators. Land which was conquered in war was styled public land and was supposed to be rented by the state. But during the last two hundred years the great families had been picking it up, piece by piece, using it, and paying no rent for it, and finally claiming it and willing it to their children. The laws restricting this practice and restoring the land to the state had hitherto proved futile.

Tiberius Gracchus perceiving, as did every

thoughtful Roman of that day, the frightful political, "military, economic and moral decay of the burgesses", proposed an agrarian law which was, in many respects, but a reenactment of the Licino-Sextian law of 367. Briefly, it provided, under certain restrictions, for the resumption on the part of the state of these public lands which were occupied and held by their possessors without remuneration. This land was to be broken up into small lots of 30 jugera, which were to be distributed to the burgesses. Such land could pass from father to son, but could not be sold. A committee overseeing the resumption and distribution of these lands was also provided for.

Marcus Octavius, a colleague of Gracchus, who probably really doubted the efficacy of the measure, vetoed the proposition. Gracchus, after trying other expedients, brought his measure to vote a second time. Again it was vetoed. Gracchus, in anger, turned to the people and asked if a tribune, who acted against the people, had not forfeited his right to represent them? The assembly answered in the affirmative, and, at the bidding of Gracchus, Marcus Octavius was removed from the tribune's bench. The agrarian law was then passed and the first committee

for distribution appointed. The Referendum was used in recalling Octavius and next in passing the bill.

Such was the legislation of Tiberius Gracchus. In the attempt to regain his office for another year, he fell, slain before the statues of the seven kings at the temple of Fidelity. His measures, though bitterly opposed by the oligarchy, were nevertheless carried out. The people finally set a limit to the reform by passing a bill which exempted the Latin allies from the jurisdiction of the committee and remitted the decision "respecting what were dominal and what private possessions to the consuls, to whom where no special laws enacted otherwise, it constitutionally belonged." This act was also obviously Initiative in its character.

Ten years later Gaius Gracchus took up the reform where his brother had left off. He was elected to the tribunship in 123 B.C. His first step was to secure the passage of a bill which enabled the tribunes to be at liberty to stand for reëlection for the year following the one in which they had held that office. With this law as a basis, he proceeded to other reforms. The next law was one which introduced the distribution of grain in the capital. "Gracchus

enacted that every burgess who should personally present himself in the capital should thenceforth be allowed a definite quantity of grain monthly", amounting to one and one-quarter bushels at about half the regular price. Gracchus' motive in this was that he might always have a multitude in the city on whom he could rely.

In order to keep secure their majority in the comitiae, the order of voting in the comitia centuriata was changed. Instead of allowing the five property classes to vote one after another, they were in the future to vote in an order of succession determined by lot. Tiberius' agrarian law was reënacted, though it was still in force--save that the jurisdiction over the Latins had been taken away, as mentioned above. However, little or no distribution was effected, as practically all the land which Tiberius had originally intended to allot, had been distributed.

Gaius next launched out on another line. This was the sending of colonists. Not only were places in Italy provided --especially at Capua and Tarentum-- but colonists were also sent to Carthage, and thus the principle of transmarine colonization was established.

Gracchus passed a law that no burgess should be enlisted until he was sixteen years old. This law was in force before, but was probably frequently violated. He restricted the number of campaigns requisite for full exemption from military duty, and enacted that the state should furnish gratuitously the soldier's clothing.

Gracchus probably was the author of a law which granted the right of appeal to burgesses even in the camp (Gracchus de provacatione). Cognisance of such capital crimes as poisoning and murder was, however, withdrawn from the burgesses and entrusted to permanent judicial commissions.

Gaius enlarged the gulf between the knights and the aristocrats by enactments favoring the former. It is probably that the privileges of wearing the gold ring and of occupying separate and better places at the burgess festivals were conferred by Gaius Gracchus. Futhermore, he "burdened the provinces, which had hitherto been almost free from taxation", with extensive taxes, and provided that they be exposed to auction for the province as a whole and in Rome. Thus he opened "a gold mine for the mercantile class". Next he took away from the senators

the privilege of serving on the juries and conferred this on the equestrian order.

Having thus two parties, the common people and the knights, to back him, Gracchus proceeded to the overthrow of the senate. He first enacted that the senate should assign the respective sphere of duties to the consuls before the ones concerned were elected. This took away a great deal of the senate's influence over these magistrates. He prohibited the appointment by the senate of extraordinary commissions of high treason. Such a commission had sat at his brother's death. Publius Popillius, an obnoxious aristocrat was exiled, though this measure was carried by a majority of only one vote in the comitia tributa.

All the Sempronian laws illustrate the use to which the Initiative was put and the extraordinary extent to which it was carried. Democracy was at its height during this period, and from this time on, a gradual decay may be detected.

VIII. FROM THE TIME OF THE GRACCHI TO THE END OF THE REPUBLIC (29 B.C.)

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We shall now pass over quite a period. The accounts of the legislation of Sulla are too confused to attempt to disentangle them here, and furthermore, practically all of his laws were soon repealed.

In 69 B.C., Lucullus was engaged in the war in Asia. While he was a great general, yet Lucullus lacked the qualities of diplomacy and tact; consequently not only did his soldiers become insubordinate, but also the people at Rome were dissatisfied. He did not follow up Tigranes, and "because of this, he was charged by the citizens as well as others, with refusing to end the war-------. Therefore they, at this time restored the province of Asia to the praetors and later, when he was believed to have acted in the same way again, they sent to him the consuls of the year to relieve him."[1] Again Dio says that the

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1. Dio xxxvi.

populace, although earlier it "had sent the proper officials to establish a government over the conquered territory, regarding the war as at an end from the letters which Lucullus had sent them ----,"etc.[2] I think that these two statements show that the first mentioned was a plebiscitum. In a line or two above the people are especially mentioned as being dissatisfied.

Two years later, the Gabinian law, which granted to Pompey command of the grain supply, and of the war against the pirates, was up for discussion. This was a plebiscitum[1], but was afterward ratified, though reluctantly, by the senate, which also proceeded to pass additional measures.[3] Just why the senate ratified these measures, I am unable to state. Certainly they did not need their ratification to make them legally binding. It is probable--unless our authority has erred-- that the senate, finding itself overpowered, deemed it better to acquiesce than by opposing to admit its defeat.

An interesting, though somewhat vague state-

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1. Dio xxxvi, 30 ff.
2. Dio xxxvi 43.
3. Xiphilionus xxxvi, 37.

ment occurs in Dio xxxvi, 39. Cornelius, a tribune, having quarreled with the senate, proposed in a popular assembly a number of laws curtailing the powers of the senators; among others was one which prohibited senators from usurping "the people's right of decision in any matter". Dio adds "this, indeed, had been the law from very early times, but it was not being observed in practice." This seems to indicate that while the Referendum had been a recognized right of the Romans for many generations, it had, for some such reason as the untrustworthiness of the tribunes, fallen into disuse. This time the assembly was dismissed in an uproar, but shortly afterward, he added a provision "that the senate should invariably pass the preliminary decree and that it should be necessary for this decree to be ratified by the people."[1] This same tribune[2] also secured the passage of a law which compelled praetors to announce at the beginning of their term of office the principles of law according to which they intended to try cases; this law further provided that the praetors were to follow these principles absolutely.

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1. Dio xxxvi, 39.
2. Dio, xxxvi, 40.

In this same year, Roscius introduced a law which sharply marked off the seats of the knights in the theatres from other locations.[1] This was presumably a plebiscitum, first, because of its nature, for the knights and senators were always opposing factions, and secondly because it is mentioned in the same line with the law introduced by Gaius Manilius, which I shall now describe.

Gaius Manilius, a tribune, introduced a law which permitted freedmen to vote with those who had freed them. By suborning a portion of the people, he passed this on the very last day of the year, toward evening. The senate, learing of this, on the following day rejected his law.

Manlius was terribly frightened because the plebs were so angry with him. So, early in 66, in order to win the friendship of Pompey, he had passed by the populace the Manilian law, which gave Pompey command of the war against Tigranes.[2] The senate itself was opposed to this measure, because it removed from office Marcius and Acilius, who had been appointed to establish a government over this territory by the same fickle populace, a short time before.

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1. Dio xxxvi, 42.

2. Dio xxxvi 43.

It is evident that the power of the people was increasing again. The important laws of this period were passed by them and the senate was becoming subservient to them as later it became subservient to the generals. The leaders of the time recognized the drift of affairs. "Caesar, not only courted the good-will of the multitude, observing how much stronger they were than the senate, but also at the same time paved the way for a similar vote ---i.e. the Manilian law--- to be passed some day in his own interest."[1]

In 66 B.C., the senate became angry at Publius Paetius and Cornelius Sulla because these latter, having been convicted of bribery, had plotted to kill their accusers. "A decree (would have been) passed against them, had not one of the tribunes opposed it."[2] Now the question arises, is this a use of the Referendum by the tribune as a representative of the people? In other words, is this a case of the use of the Referendum?

In the original conception, the tribune was regarded solely as the instrument of the people. When a number of the people were opposed to some measure under consideration by the senate, the tribune

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1. Dion xxxvi, 43.
2. Dion, xxxvi, 44.

representing these people, vetoed the bill; this was in effect, the Referendum with the tribune acting for the people. When the people obtained the full Initiative in 287 B.C., however, the tribunship itself should have been abolished, or at least the tribune should have had power only to assemble the people and put questions to them to vote upon, for it is evident that the former arrangement was superfluous. This was not done; and the tribunes themselves often became corrupt and were in no sense representatives of the people.

Therefore, if the tribune as the instrument of the people vetoed a measure because he thought a substantial number were opposed to the bill, his act constitutes a Referendum; but if, on the other hand, his motives were separate from a consideration of the people, then of course, it has no connection with the Referendum, any more than the bribes accepted by a mayor would be called acts of the people. It should be noted that the official represents the great difference between the ancient Roman and the modern Initiative and Referendum. We use a petition; they, in lieu of this, substituted a number of men, directly responsible to the people, whose business it was to

check up to the people, or else veto themselves, all doubtful measures.

In 65 B.C. a plebiscitum introduced by Gaius Papius was enacted which banished the resident aliens in Rome, except inhabitants of what is now Italy.[1]

In the consulship of Cicero (63 B.C.) a plebiscitum referred the election of the priests back again to the people, of which privilege Sulla had formerly deprived them. This motion was made by Labienus and supported by Caesar.[2] At this time too, a triumph was voted to Pompey. This was one of the most magnificent ever shown in Rome up to that time. The law granting the triumph was a plebiscitum and secured through Caesar's influence.[3]

In the next year--62 B.C. -- Cato and Quintus Minucius, the tribunes, vetoed the proposition, brought forward by Nepos, also a tribune, that Pompey should be summoned from Asia with his army. Nepos was influenced by the fact that Pompey favored the multitude, and hence he upheld Pompey.[4]

In 60 B.C., a law was passed abolishing taxes.

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1. Dio xxxvii, 10.
2. Dio xxxvii, 37.
3. Dio xxxvii, 43.
4. Dio xxxvii, 51.

Of this Dio says "since the taxes were very oppressive to the city and the rest of Italy, the law that abolished them was acceptable to all. The senators, however, were angry at the praetor who proposed it--Metellus Nepos--- and wished to erase his name from the law, entering another one instead."[1] Now if the senators were angry at the praetor because he proposed this bill, this was evidently passed in the comitia tributa. If they merely happened to be angry at Metellus for some other reason, this may easily have been a senatus consultum, i.e. a law passed by the senate.

Reference was made above to the fact that Caesar held the miltitude in high esteem and regarded them as the more powerful. We are not surprised to learn, therefore, that in his consulship (59 B.C.), "he communicated nothing further to the senate during his term of office, but brought directly before the people whatever he desired"[2] after a rather disagreeable experience with Cato in the senate. Among his acts we have mentioned that "he first ratified all the acts of Pompey, meeting with no opposition either from Lucullus or any one else, and later he put through

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1. Dio xxxvii,51.

2. Dio xxxviii, 4.

many other measures without exciting resistance."[1] A little later,[6] Dio mentions the fact that others also proposed whatever "he---Caesar--- wished, and had it passed, not only by the populace, but by the senate itself." Thus it was that the multitude "granted him the government of Illyricum and Cisalpine Gaul with three legions for five years, while the senate entrusted him in addition with Transalpine Gaul and another legion."

Among other laws which Caesar had passed by the multitude was one distributing public land in Campania to Pompey's soldiers.[2] Bibulus, Caesar's colleague in the consulship, was opposed to the law and attempted, with the aid of three tribunes, to prevent its passage.[3] In a rather violent and somewhat illegal meeting, the law was passed.[4]

Clodius, when tribune of the plebs in 58 B.C., introduced a rather important bill. There was a peculiar custom connected with divination in the case of public assemblies. In the case of other meetings, if an adverse portent was seen, the meeting of course adjourned, but in the case of the

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1. xxxviii, 7;5.
6. xxxviii, 8;4.
2. xxxviii,1;4.
3. xxxviii,4;3: 6;1.
4. xxxviii,6;3-4.

popular assembly, one had only to announce his intention of taking an observation to prevent their voting. It can be seen from this how easily the people could be prevented from exercising their rights. Clodius, outwitting Cicero, had this law and some others as well passed[1], and then turned to attack the orator himself. The decree exiling Cicero was also passed by the people.[2]

In 57, Pompey proposed a vote for the recall of Cicero; but Clodius, knowing that the same fickle multitude was now on the side of Cicero, took a number of his brother's gladiators, and broke up the meeting in confusion.[3] Later "the senate decreed, on motion of Spinther, that Cicero should be restored, and the populace, on motion of both consuls, passed the measure."[4]

In 55, after considerable opposition, the people passed a law extending Caesar's command in Gaul. Dio says in xxxix:33-4 and also in xliv:43;2, that the command was extended for three years, but Suetonius, Plutarch and Appian say five years, which

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1. xxxviii; 13-14.
2. xxxviii; 14:6; xxxviii;17
3. xxxix; 7:2.
4. xxxix, 8:2.

latter is the generally accepted date. Not only was this law passed, but a meeting, intimidated by a considerable bodyguard, passed additional measures relating to Caesar.[1] It is worthy of comment that the multitude was always Caesar's friend.

An intimation of a plebiscite forbidding the restoration of Ptolemy to his kingdom is given in Dio xxxix, 65:4; --"This he"--Gabinius--"did--" i.e. went into Egypt at the request of Ptolemy--- "although the people and the Sibyl had declared that the man should not be restored." We read a little further[2] that the people were very angry at Gabienus for his disregard of their wishes, and only the consuls, Pompey and Crassus, prevented his condemnation. "When, however, they had laid down their office---once more many opinions were expressed and the majority proved to be against Gabinius------. They"-(the people?)-" decided, therefore, that the verses of the Sibyl should be read, in spite of Pompey's opposition."[3] Further Dio tells us[4] that Gabinius was convicted and exiled, though Cicero plead for him, and received the name of "turn-coat"

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1. xxxix, 36;2.
2. xxxix, 59;2.
3. xxxix, 60.
4. xxxix, 63.

because of this act. All these laws were presumably plebiscita.

When he was in Spain in 49 B.C., Caesar granted citizianship "to all the people of Gades, in which the people of Rome later confirmed them."[1] Here, unless Dio has written carelessly, is evidence of a plebiscite granting citizianship to the people of Gades.

The people, who had always befriended Caesar, were the ones to elect him dictator. Marcus Aemilius Lepidus, the man who afterward became a member of the triumvirate, was praetor in 49, and "took council with the people to elect Caesar dictator, and immediately moved his nomination, contrary to ancestral custom."[2]

After the battle of Pharsalus, the people of Rome stumbled over each other in their haste to grant favors to Caesar. Dio does not give the full list of the honors voted for fear, as he confesses, "that I might become wearisome, were I to enumerate them all" But among these he does mention are that "they granted him (Caesar) permission to do as he

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1. xli,24.

2. xli,36.

pleased to those who had favored Pompey's cause,..... that he might seem to be acting with some show of legal authority. They appointed him lord of wars and peace, using the confederates of Africa as a pretext, in regard to all mankind. ... He received the privilege of being consul for five consecutive years and of being chosen dictator not for six months but for an entire year, and could assume the tribunician authority for life. ... All the elections except those of the people were put in his hands. ... The citizens themselves ... voted that Caesar might give them (governships in subject territory) to the praetors without the casting of lots."[1]

In 48 B.C., the Romans assigned a triumph for him--Caesar--"to hold, as if he had been victor."[2] This was a plebiscitum, if we are to believe the words of Antony, who says in that famous funeral oration, addressing the people, "this is the reason that you voted him at once the office of consul."[3] The consulship referred to was given in 46 B.C. "Caesar was at that time serving as dictator, and some time later, near the close of the war, he was appointed consul

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1. xlii; 20.
2. xlii; 20.
3. xliv; 42.

when Lepidus, who was master of the horse, convoked the people for this purpose."[1] Later in the same oration, Antony says "you did not dispute at all about titles, but applied them all to him as being still less than his merits."[2]

We have now passed the time when the Initiative and Referendum were common. True, they were still used, but rather seldom. The rulers found it easier to obtain what they wished from the senate than from the people; hence the legislation was enacted nominally by the former. I say nominally because in reality the emperor was absolute. It is a curious fact to note that in the last days of these institutions, as in their beginning, the people sometimes obtained by violence what they could not legally enact; thus does the development in the Initiative and Referendum form a circle, so to speak.

In 41 B.C., Fulvia, the wife of Antony and the mother-in-law of Caesar "herself managed affairs so that neither the senate nor the people dared transact any business contrary to her pleasure."[3]

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1. xlviii, 33.
2. xliv, 48.
3. xlviii,4.

Lucius, who, with her permission, obtained a triumph boasted that whereas Marius had received a crown almost from nobody, he had obtained many, "and particularly from the people, tribe by tribe." This seems to show that the people still enacted some legislation. Caesar and Antony did not wish to make peace with Sextus Pompey in 40 B.C., but "because the wrath of the populace was aroused to the highest pitch and it was feared that they would commit some violence, the two rulers were forced unwillingly to make propositions of peace to Sextus."[1]

Dio tells us that in the next year---39 B.C. -- when Marcus and Gaius Labinius held the consulship, the acts of the triumvirate from the time they had formed a close combination received ratification at the hands of the senate."[2] Here it is significant that the people as a legislative body are ignorned.

However, we are told (36 B.C.) that "the people of the capital unanimously bestowed laudatories upon him"---Octavius---"and images, the right to front seats and an arch surrounded by a trophy" as well as other privileges.[3]

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1. xlviii, 32.
2. xlviii,34.
3. xlix, 15.

Just as one of the first privileges of the people was the right to declare war, so this was one of the last to disappear, and is in fact the last recorded instance in Dio of the use of the Initiative and Referendum. In 32 B.C., the people voted for a war against Cleopatra, thus virtually beginning the last struggle between Octavius and Antony which ended the next year with the battle of Actium.

"The Roman people had been robbed of democracy but had not become definitely a monarchy." Thus Dio opens his fiftieth book. This, in fact, was the case much earlier. The republic was overthrown in 49, although the empire was not established until twenty years later. This fact must be borne in mind; the legislation that was passed by the people between the years 49 B.C. and 29 B.C. was not voluntary and untrammeled, but was of a nature conciliatory to the general in power at that moment.

IX. THE ANCIENT AND THE MODERN.

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Since we have traced the development of these two democratic institutions from the time of the monarchy to the end of the republic in 29 B.C., we shall now sum up the differences between the Roman scheme and the modern conception of the Initiative and Referendum. For the most part these differences have been pointed out as they came up, and our purpose here is merely to collect and restate them.

There were three kinds of legislation in Rome, senatus consulta, leges and plebiscita. There were four legislative bodies, the senate, the comitia centuriata and the comitia tributa, and the concilium plebis. In the early history of the republic, the

comitia curiata was also of importance, but this assembly declined and for our purposes, may be disregarded.

The senate was the official representative organ of the patricians and of the nobilitas. At the close of the republic, only ex-magistrates were eligible to it and, since the majority of these were of the aristocracy, that faction controlled this body. The senate passed the senatus consulta. These never held the same power as the leges or the plebiscita, nor could a senatus consultum repeal either of the latter. However, they could interpret and explain provisions of the leges and the plebiscita. The people had nothing to say about such laws and of all the Roman legislation, they are the farthest removed from the Initiative and Referendum. The tribune, however, had the right to veto any bill before the senate, in which case the bill was called an auctoritas senatus if passed, but it had no force.

The leges were passed by the comitia centuriata and the comitia tributa. The comitia centuriata was originally a military organization composed of the representatives of the plebeians and the equites. Its fundamental functions, which it retained to the

last, were the power to declare war, negotiate treaties and conclude peace. Inasmuch as the richer of the plebeians and of the knights later became a part of the nobilitas, and united with the aristocracy, this latter class almost controlled this assembly. However, it was primarily democratic, and the laws which it passed have been listed under acts of the Initiative and Referendum. It could be presided over by any magistrate.

Leges were also passed by the comitia tributa. Ancient writers themselves confused the comitia tributa and the concilium plebis, and it is impossible to know all the differences between them. However it seems certain that the comitia tributa was an organization composed of representatives of both the plebeian and patrician classes. For this reason its acts might also be called acts involving the use of the Initiative or Referendum. It was not of much prominence.

The most important of all the assemblies from our viewpoint was the concilium plebis. This body was composed entirely of plebeians, and over it a plebeian official, either a tribune or an aedile always presided. We have noted how, previous to 339 its acts had to receive the approval of the senate

after they were enacted to render them valid; and how this approval was given before they were passed until the time of the Hortensian law in 287; and how from that time on, they were binding on all of the people without any action of the senate being necessary. The plebiscita are the great examples of the use of the Initiative and Referendum in the Roman state.

An unusual phase of Roman legislation was the manner by which a part of the people could bind the rest. The senate, as representative of the aristocracy, could enact laws which were valid throughout the state. The plebeians, in the concilium plebis, could pass measures to which the aristocracy must yield. Perhaps the one place where both factions could get together to act on a proposition was in the comitia tributa, and this assembly, as noted above, seems to have been of no great importance.

In the earlier part of this thesis we classified the modern kinds of Referendum as Optional and Compulsory. Following the same classification, we find that the Roman plan was not generally Compulsory. The declaration of war and the conclusion of peace must come before the people, just as bond issues and a few other matters in United States must be submitted at a popular election. For the rest, it

all depended upon the moral suasion which could be brought to bear upon the tribune. The senate always had more or less control over these officials, and it was the exception rather than the rule that the will of the senate was disregarded by a plebiscitum. When an unusually powerful tribune, such as the Gracchi, for instance, arose, then the power of the people was exercised to its full, and the senate struggled against it in vain; but for the rest, the senate quietly held control.

We classified forms of the Initiative into Practical and Formulative. As all Roman laws were passed first and drawn up afterwards, their Initiative would resemble the Practical form.

There are two fundamental differences between the Roman scheme and the modern forms of the Initiative and Referendum. The first of these lies in the different conception of the body politic. The modern state is regarded as a unit. It legislates as one body. The poor man votes as often as the rich citizen, and the wealthy man has every right possessed by his plebeian neighbor. There is no official recognition of the two classes--the wealthy or aristocratic class and the poor or plebeian citizen. The one has no rights which the other does

not share.

Rome was governed by an oligarchy, and from the earliest time there were two factions in the state. When the patrician or, as it was later, the class of the nobility, became too tyrannical, the plebeians rose up against them and demanded their rights. The members of the oligarchy had many peculiar privileges, and it was very natural that the plebeians should demand rights of which the patricians had no part. Such a privilege was the Initiative and Referendum.

In United States we have but one legislative body. True, the Initiative and Referendum amendments to the state constitutions usually provide that "all legislative power ... shall be vested in the legislature and the people of the state," or words to that effect. But the idea is that the people are the ultimate legislators, while the senators and representatives are merely acting for them. In other words, legislatures are not per se authoritative, but they hold their authority on the principle that they are representatives of the people, with whom the ultimate power lies. In other words, we recognize in fact but one legislative body.

In Rome the case was different. The

patricians -- or, as it was later, the nobilitas -- were one body, separate and distinct; the plebeians were a second body. In the union of these two factions a plan something like that used by the Romans becomes logical. Each body, as a partner in the concern, had the right to act of its own accord, and to initiate legislation without consulting the other; and each faction had the right to act as a check on the other.

Again the Romans, having a duo-legislative system based, so to speak, on a partnership between two parties, permitted one faction to blockade the work of the other. The tribune could veto the senatus consulta. The senate for a while held the privilege of nullifying the actions of the people, but they later lost this right when the power of the people increased. This system seems almost absurd if the Romans are regarded as one united body, but, as suggested above, it would be the logical compromise between two factions.

In United States we do not recognize a veto over the will of the people as expressed by the Initiative and Referendum. The governor may veto acts of

the legislature, but that is merely a case of one servant of the people acting as a check upon another. Neither the governor nor the legislature can veto an act passed under the Initiative or Referendum, for that is the expressed will of the people, and they are sovereign.

When we say, therefore, that the people of Rome used the Initiative and Referendum, we mean that this was a separate and distinct power held by the common people. The oligarchy was represented by the senate which enacted laws and, to a certain degree, acted as a check upon the people. Each body acted independently of the other.

The people passed their bills in the comitia centuriata, the comitia tributa and the concilium plebis. The functions of these bodies have been explained above, as has also the control which the aristocracy exercised over each of them.

The second great distinction between the modern and the Roman institutions is the use made of the tribune of the plebs. In using the Initiative and Referendum, there must be some way to get an issue before the people. This mechanical part has been accomplished in three ways. In the Landesgemeiden of Switzerland, any member of the body is

privileged to speak and to make motions. This is the simplest and easiest way to get a proposition before the people. In United States, where the area of the locality prohibits the assembling in one body and the following of such a system, we endeavor to accomplish the same thing by petition. Rome was too large for the first method---though the citizens possessed the right of speaking in the assemblies, sometimes before the magistrates[1] --- and the second was unknown. So the problem was solved by the tribune of the plebs.

This office had two incumbents at first, though later the number was increased to ten. The tribune was elected annually by the plebeian organization, and directly responsible to them. We have shown previously how his power to protect each citizen led , finally to the right to veto a bill. Later he acquired the power of introducing legislation in the concilium plebis, which, if passed, was binding on the state. If there had been but one tribune and he had always vetoed the bills which the people disliked and submitted to them whatever they wished, this system would have been well-nigh perfect.

But there were a number of tribunes, each

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1. Dio, xxxix; 35.

possessing equal powers. This was wise in a measure because it insured that any legislation desired by a substantial number of citizens would be acted upon. Out of the ten tribunes, there was surely at least one who would lend a ready ear to their desires.

The great difficulty arose from the fact that one tribune could veto the acts of another, or rather, he could prevent a vote from being taken. The most notable case is that of Marcus Octavius who interposed his veto on the agrarian law of Tiberius Gracchus. Tiberius recalled him, and after that date the power of one tribune to veto the acts of another, while still exercised, was jeopardized.

The tribunes often lost sight of the fact that they acted solely as representatives of the people. Marcus Octavius know that he was acting against the will of the majority of his constituency, but probably honestly doubted the wisdom of the measure, and so courageously vetoed it. Many times the tribunes were actuated by meaner motives, and, disregarding the people entirely, vetoed the measure because of personal reasons.

The second weakness lay in the corruptibility of the tribunes. Often these officials were

frankly open to bribes. At such a time the powers of the people became mere names, and the Initiative and Referendum were dead letters until some wave of reform set them on their feet again.

Such are the weaknesses of the tribunician system. But shall we condemn it too hastily? Men in Oregon testify that they sign petitions without reading them, while in Switzerland cases are known where signatures have been obtained by paying a small sum to each signer. The Romans are not the only people who have experienced difficulty with the practical use of the Initiative and Referendum.

Such then are the two points of difference between the Roman and the modern institutions; the one, resulting from the dual conception of the state, was the plan which deprived the aristocracy of a participation in the workings of the Initiative and the Referendum, while the second was the use of a tribune in place of the petition. But in the main, these distinctions are small. The great fundamental principle on which these institutions are based, is, briefly, legislation by the people independent of their rulers. Rome recognized and

used this principle about fifteen hundred years before it was resurrected again in Switzerland.

Finis.