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ARIZONA'S EXPERIENCE WITH THE INITIATIVE AND REFERENDUM

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ARIZONA'S constitution was drafted in 1910, preparatory to admission of the territory into the union as a state, in 1912. It was perhaps inevitable, therefore, in that era of advocacy of increased popular control in government, that the initiative, the referendum, the recall, the direct primary, and woman suffrage should have got some attention in Arizona. And there were in territorial Arizona specific local conditions which operated to give these processes strong appeal for alert public welfare-minded persons.

It was generally understood that during the two decades prior to statehood the territorial government was rather effectively controlled by, or in the interest of, railroad and mining corporations. The legislative performance record indicated that these corporate interests had a high batting average in securing enactment of territorial laws and in preventing enactment of labor-sponsored measures and others not desired by mining and railroad management.[1] The historian McClintock records the bold assertion that a veto by the territorial governor could be assured for $2000.[2] Naturally, alert men from the ranks of workers, farmers, and small business were dissatisfied and desirous of breaking this alleged corporation dominance. The then currently-new direct popular control processes seemed to be promising devices for counteracting corporate influence, if they could be adopted in Arizona.

It appears that the initiative and referendum were first brought to public attention in Arizona by an unsuccessful Populist candidate for territorial delegate to Congress in

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1. See V. D. Brannon, *Employers' Liability and Workmen's Compensation in Arizona*, Social Science Bulletin No. 7, University of Arizona, 1934, pp. 11, 12. See also Judson King, "The Arizona Story in a Nutshell," *Equity Series*, Vol. XIV, p. 7, 1912.

2. See J. H. McClintock, *Arizona*, Vol. II, pp. 345, 356, cited by Brannon, *op. cit.*

1894.[3] The platform of the territorial Republican Party in 1898 advocated the principles of the initiative and referendum applicable to measures creating public debt, apparently having in mind particularly the referendum.[4] This declaration did not connote any real Arizona Republican liberalism, however, and in the legislative experiences of the period Republicans generally were reported as voting acceptably to the corporations; such support as labor was able to get came mostly from Democrats.

In the legislative session of 1899, controlled by Democrats, a bill establishing a system of initiative and referendum was passed,[5] but was pocket-vetoed by the Republican territorial governor,[6] and no further legislative consideration was given to the matter till 1909. In that year, a labor-sponsored bill to adopt the initiative and the referendum was able to get through only one house of a heavily Democratic legislature.[7]

In the decade prior to 1910, unionization of workers in Arizona Territory made considerable progress. In the local aspects of the statehood controversy, mine and railroad management were understood to be unenthusiastic about statehood. They felt satisfied with the existing governmental situation, feared higher taxes, and the mines particularly feared what are now called severance taxes. Labor spokesmen favored statehood, hoping to be in a stronger position with a new locally-based state governmental organization.[8]

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3. Mr. W. O. O'Neill, former editor of *Hoof and Horn*, a weekly organ of the Territorial Livestock Association. See *Prescott Weekly Courier*, October 12, 1894. See Charles F. Todd, *The Initiative and Referendum in Arizona*, unpublished thesis in the University of Arizona Library, 1931. This is an excellent study of developments down to 1930.

4. *Arizona Sentinel*, September 24, 1898.

5. *Journals of Twentieth Legislative Assembly of the Territory of Arizona*, pp. 363, 367, 377.

6. Governor N. O. Murphy, reputed to have been very friendly with mines and railroads. Todd, *op. cit.*, p. 9.

7. *Journals of Twenty-fifth Legislative Assembly of the Territory of Arizona*, pp. 247-48; *Arizona Gazette*, March 19, 1909.

8. See Brannon, *op. cit.*, p. 15, and Katheryne Elizabeth Baugh, *Arizona's Struggle for Statehood*, unpublished thesis in the University of Missouri Library, 1934. See also Howard A. Hubbard, "The Arizona Enabling Act and President Taft's Veto," *Pacific Historical Review*, Vol. III, p. 307 (September 1934).

Statehood was also favored by farmers and small business generally.

When Congress finally passed the Arizona Enabling Act in 1910, local labor leaders recognized that the time was ripe for labor, with such other support as might be found, to lay a foundation for a more effective voice in government. As a local union resolution put the matter, "The working class, if it only utilizes it, has the power to make this constitution to its own liking, and if it is properly drafted, our economic struggles of the future will be greatly simplified and our opportunities of bettering our conditions rendered much easier."[9] The common people of Arizona seemed really to *need* the initiative and the referendum forty years ago.

In the struggle to get control of the convention, which was to draft a constitution for the proposed new state, labor and liberal forces teamed up with Democratic Party leaders, the Republicans being alleged to be more friendly to the corporations. In that campaign for the election of delegates, the principal contest was on the issue of whether the proposed constitution should embody the initiative, the referendum, and the recall. Alert labor men wanted particularly to get a plan for direct legislation written into the constitution because of their unhappy legislative experiences in the pre-state era. They had no illusions about being able to control the new state legislature; but, because of their voting strength, they hoped to be able, by the initiative process, to enact laws directly which they would not be able to get by the regular legislative process. They also hoped to be able, by use of the referendum, to prevent enactment of laws which they might not be able to defeat in the legislature.[10] The corporations feared that working people might possibly make good on this threat to use these direct legislative devices, and opposed their adoption with great vigor.

Labor had active support in its fight for direct legislation

9. Resolution passed by Bisbee Miners' Union, calling for a state-wide labor conference to make plans for electing pro-labor delegates to the convention which was to draft a constitution. *Arizona Daily Star*, July 8, 1910.

10. See Tru McGinnis, *The Influence of Organized Labor on the Making of the Arizona Constitution*, unpublished thesis in the University of Arizona Library, 1930.

from two other sources. Advocates of suffrage for women, being unable to get the right to vote by legislative action, threw their support to the effort to get direct legislative processes into the constitution. Similarly, the prohibitionists supported the effort.[11]

Election returns showed that of the 52 convention delegates elected, 41 were Democrats, of whom most were avowedly friendly to labor and committed to adoption of the initiative, referendum, and recall.[12] The convention chose as chairman G. W. P. Hunt, prominent labor man, member of the territorial legislature, and first and long-time governor of the new state. Those committees having charge of matters of particular interest to labor were loaded with men considered friendly to labor and its program.

In the convention, opponents of direct legislation continued to fight, seeking to set the required numbers of signatures to petitions high enough, they said, to discourage too frequent use; so high, charged labor delegates, as to render impractical the operation of its processes. As finally adopted, signatures required for use of the state-wide initiative were set at 10 per cent for statutory measures and 15 per cent for constitutional amendments. For the referendum, the requirement is 5 per cent. These fixed percentages are of the total vote cast for all candidates for governor in the last preceding general election.[13] Any legislative enactments carrying an emergency clause, and passed by a two-thirds vote of all members of both houses, are exempt

11. Todd, *op. cit.*, pp. 17, 18. These elements appear also to have worked together to put over direct legislation plans elsewhere in that period. For example, see N. D. Houghton, "The Initiative and Referendum in Missouri," *Missouri Historical Review*, Vol. XIX, pp. 268-300 (January 1925).

12. One of the most prominent of the Democrats, Mr. E. E. Ellinwood, was an attorney for one of the copper companies and was considered to be openly a spokesman for that point of view.

13. Art. IV, Part 1, and Art. XXI. All petitions for state use must be filed with the Secretary of State. Initiative petitions must be filed at least four months prior to the election at which the measures are to be submitted to popular vote. Referendum petitions must be filed within ninety days after the close of the legislative session at which the measures are enacted, during which period operation of all enactments to which the referendum is applicable, is automatically suspended. For local city, town, and county purposes, signature requirements are 15 per cent for the initiative and 10 per cent for the referendum.

from operation of the referendum.[14] In actual practice, essentially every law enacted by the Arizona legislature carries an emergency clause, if its sponsors can muster the necessary votes, by deliberate design, to avoid any possibility of its being subjected to the referendum process.

Measures initiated or referred by petition to a vote of the people are submitted at regular general elections only.[15] The Secretary of State is required by law to prepare and make available to the voters for their information on such measures a *Publicity Pamphlet* containing their full texts, titles, and forms in which they are to appear on the ballot, and carrying also such limited-length arguments for and against any measures as sponsors or opponents may care to submit and pay for.[16] In order to become effective, any measure submitted to popular vote must receive an affirmative majority of all votes cast upon it.[17]

Simple tabulation reveals that, in the forty-year period from 1912 to 1952, a total of 133 measures[18] were submitted to the people of Arizona by these processes:

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14. Measures necessary "to preserve the public peace, health, or safety, or to provide appropriations for the support and maintenance of the Departments of State and of State Institutions" may be declared "emergency measures" by the legislature.

15. The legislature may, at its own discretion, refer any enactment to a popular vote, making its adoption contingent upon popular approval, and must so refer all legislative proposals of constitutional amendments. The former may be referred at general elections only, but the latter may be referred at either general, primary, or special elections, as designated by the legislature. For decisions holding invalid referendum measures approved at special elections, see *Estes v. State*, 48 Ariz. 21; 58 Pac. 2d 753 (1936); *Hudson v. Cummard*, 44 Ariz. 7; 33 Pac. 2d 591 (1934); *Tucson Manor, Inc. v. Federal National Mortgage Assn.*, 73 Ariz. 387; 241 Pac. 2d 1126 (1952).

16. 60-107, Ch. 60, Art 1, *Arizona Code Annotated*, 1939.

17. All statutory enactments by the legislature are subject to the governor's veto at time of enactment. In order to override a veto of an act carrying an emergency clause, and passed by a two-thirds vote of both houses, the legislature must repass it by a three-fourths vote in both houses. These majorities are of members, not merely of those present.

18. In addition, the legislature submitted 48 proposals to amend the constitution, making a grand total of 181 measures upon which the people of Arizona were called upon to vote in 22 elections over a period of 40 years. (At a special election, held in conjunction with the primary election in 1950, only legislative proposals of constitutional amendments were submitted.) Of the 48 *legislative* proposals for amending the constitution, 21 were adopted and 27 were disapproved. Out of a grand total of 181 propositions of all kinds submitted to the voters in that 40 year period, 73 were approved and 108 were rejected.

38 *initiated* proposals to *amend* the Constitution

13 adopted
25 lost

58 *initiated statutory* measures

18 adopted
40 lost

26 measures by *referendum petition*

14 approved
12 rejected

11 measures *referred* by *legislature*

7 approved
4 rejected

Professorial search for startling or even significant "trends" in these over-all statistical data may be disappointing. As might have been expected, the proverbial "new broom" was used rather freely in its early years. In the first four consecutive elections, 15 *constitutional amendments* were proposed by *initiative* petitions; that was approximately one-third of all such proposals for the forty year period, which saw 24 such elections. In the first five consecutive elections, 24 *statutory* measures were proposed by *initiative* petition, that being approximately 40 per cent of all that type of proposals for the forty year period. Those same first five consecutive elections saw the *referendum* by petition applied to 15 legislative enactments; that was about 55 per cent of all use of this device for the forty year period. The first half of this period saw all the devices of direct legislation used 81 times, while the second twenty year period saw them used only 52 times, the referendum being applied only 11 times, as compared with 26 applications of it in the previous twenty year period.

All this is not meant to imply, however, that these devices are dying for lack of use or popular interest, as may be seen

TABULATION SHOWING NUMBERS OF ALL KINDS OF MEASURES SUBMITTED TO ARIZONA VOTERS FROM 1912 TO 1952, INCLUSIVE

Year	By the Initiative		Referendum		Amendments Proposed by the Legislature
	Amendments	Statutes	By Petition	By Legislature	
1912	1	0	8	0	4
1914	5	10	4	0	0
1916	5	5	0	0	2
1918	4	3	2	1	0
1920	0	6	1	1	2
1922	2	1	0	1	8
1924	1	3	1	0	1
1925	0	0	0	0	1
1926	1	2	1	1	0
1927	0	0	0	0	2
1928	1	3	4	1	1
1930	2	0	0	0	4
1932	5	3	1	0	0
1933	0	0	2	0	6
1934	0	2	0	0	0
1936	0	0	0	1	0
1938	2	1	0	0	0
1940	4	3	1	0	2
1942	0	1	0	0	0
1944	1	0	0	1	0
1946	1	1	0	0	4
1948	0	4	1	0	3
1950	3	9	0	0	7
1952	0	1	0	4	1
Totals	38	58	26	11	48

from simple graphical representation. In fact, in only one previous year had more petitioned measures been on the Arizona ballot than in 1950;[19] and recent years have shown

19. In 1914, there were 19 propositions on the ballot by petition. In 1950, the corresponding number was 12; but there were also referred to the people in 1950 by the legislature seven additional proposals to amend the state constitution.

a sustained high voting performance on these propositions, both numerically and proportionally.

Whether or not the processes of direct legislation may be said to have been "successful" in Arizona depends partly upon definition, partly upon the extent to which groups who have made use of the devices have been able to attain their objectives, and partly upon the subjective attitudes of interested persons at particular times. The initiative was designed as a *positive* device for the *enactment* of law. The referendum by petition was designed as a *negative* device, frankly for the *prevention* of lawmaking. Groups which have made use of the *initiative* in Arizona have *secured enactment* of their measures in approximately one-third of their attempts; while groups which have resorted to *referendum* by petition in efforts to defeat the enactment of statutes have managed to *defeat* 46 per cent of the measures attacked. Measured by achievements through regular legislative processes, these results may seem impressive, particularly when it is realized that presumably these groups have been unable to secure (or defeat) the enactment of *any* of these laws in the legislature. In fact, the apparent "successes" of these devices seem largely to account for a recurrent spotty demand for their abandonment or drastic restriction. On the other hand, expensive unsuccessful efforts to gain their objectives by these devices have naturally been disappointing to some groups on occasion.

Voters' responses to the challenges presented by these legislative measures on the ballot may be shown by a simple chart, statistically speaking. But any such presentation must necessarily be highly superficial. Any inclination to draw significant conclusions from them would probably be unwarranted. The number of petitioned measures appearing on the ballot has ranged from one to nineteen,[20] per election. The proportion of voters voting at the elections,

20. The official election returns on all measures from 1912 to 1948 may be found in two compilations made by the Arizona Secretary of State in 1930 and 1949. Yearly records are available at the same office.

who have voted on the measures, has ranged from 28 per cent in 1936 to 83.2 per cent in 1946.[21]

Brief special mention should be made of the experience record of the three readily identifiable groups who joined in sponsoring the fight for adoption of the initiative and referendum in Arizona in the 1910-1912 era, labor, suffragists, and prohibitionists. All three groups met immediate successes with these new devices in the early years of their operation. Woman suffrage was adopted by the initiative process at the new state's very first election in 1912. A prohibition amendment was adopted by the initiative in 1914, and strengthened by another in 1916; but they were both repealed by initiative in 1932.

The first experience organized labor had with the actual operation of direct legislation in Arizona found labor on the defensive side of the referendum. Labor came out of its active participation in the framing of the constitution with new vigor, prestige, confidence, and accepted leadership. In 1912, at the peak of its new and brief position of power and assertiveness, labor was able to secure passage by the legislature of a series of laws, in the face of traditional opposition from mining and railroad sources. Seven of these laws were held up by referendum petitions. Labor managed to get them all approved by the voters, but it got an early demonstration of the fact that wealthy elements, with ample means to pay the costs, could use the new devices at least as advantageously as labor.

In 1914, six initiated measures, sponsored or supported by the Arizona Federation of Labor, were adopted at the

21. Stated percentages are composite averages for all measures on the ballot at each election:

1912—81.5	1928—47.3	1942—52
1914—68.7	1930—53.3	1944—72.3
1916—66.6	1932—73.4	1946—83.2
1918—53.6	1933—(Special Election)	1948—71
1920—58.7	1934—48.6	1950—80
1922—58.1	*1936—28	1952—67.4
1924—67.4	1938—54	
1926—62.4	1940—65.1	

* In 1936, only one measure was on the ballot.

polls, though by very narrow margins in some cases. Retrospectively, it can be seen that the going was getting harder for labor. And in 1916, not only did it fail to secure adoption of the two measures which it sponsored by the initiative,[22] but it also had to fight desperately to defeat two amendments, initiated with alleged corporation support, and apparently designed virtually to emasculate both the newly-won workmen's compensation system[23] and the direct legislation system itself.[24] That ended labor's honeymoon with direct legislative processes in Arizona. Only rarely thereafter has labor resorted to them by deliberate design.

On two later occasions, in 1918 and in 1932, labor had to defend its workmen's compensation system against determined attempts to weaken it at the polls. In 1946, in the wake of postwar reaction, an anti-union, so-called "Right to Work" Amendment was adopted, in spite of labor's best efforts to prevent it. In 1948 labor was also unable to defeat an initiated statutory measure effectuating this amendment. In 1950, all six measures initiated with labor backing were defeated.[25] And in 1952, labor was unable to prevent the overwhelming adoption by the initiative process of a so-called "Fair Labor Practices Act," prohibiting "secondary

22. One was an amendment designed to establish a unicameral legislature. See N. D. Houghton, "Arizona's Adventure with Unicameralism—an Anti-Climax," 11 *University of Kansas City Law Review* 38 (December, 1940).

23. See Brannon, *op. cit.*, pp. 47-48.

24. Opponents of direct legislation were able to get legislative submission to the voters in 1916 of a proposed amendment to the constitution providing that, in order to become effective, initiated or referred measures must receive an affirmative vote equal to "a majority of the total vote of the electors *voting at said election*," as distinguished from the existing requirement of merely a majority of the votes cast *on the particular measures*. *Publicity Pamphlet*, 1916, pp. 3-4. That would have made the initiative process virtually unworkable. Only five initiated measures out of 31 which have been adopted, have ever received a majority of all votes cast at the elections at which they have been approved, not one since 1916, when a prohibition amendment was so adopted.

On the other hand, adoption in 1916 of the requirement of a majority of all votes cast at an election could well have meant that no referendum measure would ever have been saved from defeat. No referred measure has ever received a majority of all votes cast at the election since 1912, when 3 measures were so approved.

This proposal was defeated by the very narrow margin of 18,961 to 18,356.

25. Two merit system laws, two measures extending and liberalizing the state's unemployment compensation plan, one liberalizing old age assistance, and one liberalizing workmen's compensation as to occupational diseases.

boycotts," restricting picketing, and authorizing injunctions for enforcement.[26]

It has been widely asserted that the potency of corporate and conservative influences in Arizona's public affairs has remained very well intact. The terms "special interests," "big interests," and "large taxpayers," have been used there to include mining, railroad, banking, utility, and sometimes large cattle and ranching interests, and it has been commonly said that perhaps they have never been more effectively integrated. Generally understood to operate in close harmony with the leadership in what has been known as the "majority" bloc in the legislature, and with the so-called Arizona Tax Research Association, this somewhat varying alignment of interests has allegedly been able to exert a powerful influence upon Arizona's traditional governmental processes for many years.[27] Reputedly, it has also managed, on occasion, to operate by means of, even in defiance of, those special people's devices, the initiative and the referendum.

By using the initiative process, the public employees of Arizona secured adoption of a state retirement system for

26. *Publicity Pamphlet*, 1952, pp. 24-26.

27. Speaking on personal privilege in a move to get his remarks recorded in the *Journal of the Senate*, near the end of the first regular session of the 21st Legislature, on March 26, 1953, Senator James Smith, the unsuccessful "minority" candidate for President of the Senate, was quoted as saying in part that in the course of the session, "I have been a member of the Independent and Minority group and have had very little to do with any major legislation which has passed this body—a thing for which I am proud! I am also proud of my colleagues in this Independent group who have had the courage to stand up on their hind legs and fight a system that has so completely throttled . . . the body politic of this state that fair and equitable legislation has become a lost art. . . .

"The governor could have had anything he wanted in legislation from this Senate, so long as it did not cost the big interests of this state additional taxes. . . .

"Mr. President, . . . I am only attacking a system . . . a system that is bigger than men, distorts legislatures, influences governors, and stymies equality in legislation. It has no God except the almighty dollar, and all legislation is based on how many dollars it will save the system.

"This system . . . is a lobby of big interests. It operates to the disadvantage of 95 per cent of the citizens of this state.

"Fine men are elected to both branches of this legislature, but before they can have even the slightest consideration in getting a bill out of the packed committees, they must align themselves with the powers in control of that system. . . ." Text published in the *Arizona Statesman*, April 2, 1953. See also *Arizona Republic*, March 28, 1953, p. 8.

public employees, a relatively excellent plan, in 1948.[28] The law was approved by a decisive vote of 86,989 to 38,111. Yet the "majority" leadership in the state legislature persistently throughout three regular sessions and one competent special session refused to permit voting of appropriations to effectuate the plan. This refusal was in disregard of the law's provision purportedly requiring the legislature to appropriate funds to operate the system, and in the face of the fact that, by terms of the law, compulsory deductions from state employees' earnings had started building a retirement fund on July 1, 1949. This legislative defiance of a people's enactment seems to have been a new development in the country's experience with direct legislation. That and its consequent developments seem, therefore, to call for careful analysis in the interest of realistic understanding.[28a]

Finally, in 1952, the "majority" in the legislature passed a measure repealing the Public Employees Retirement Act of 1948 and referring it to a vote of the people at the general election in November 1952. Then followed an observably unequal campaign contest, conducted simultaneously with the presidential and general state campaigns. It fell to the state's eloquent and very popular Republican governor,[29] campaigning for election to a second term, to play a leading part in the appeal to the voters to repeal their own previous enactment, in a Republican landslide election.[30] The public employees had almost no funds to use in making out a case in favor of retention of the Retirement Act, as contrasted

28. Sections 12-801 to 12-823, *Arizona Code Annotated,* 1939. Cum. Supp.

28a. In the course of this long and unsuccessful struggle by the public employees to get the Retirement Act of 1948 activated, they finally resorted to an effort to use the initiative process in 1952 (1) to levy a severance tax on ores and minerals in order to provide funds to operate the system, and (2) to appropriate money to pay the costs of getting the plan into operation. One of the two costly suits which enjoined the Secretary of State from putting these measures on the ballot was brought in the *names* of the Speaker of the House and the President of the Senate. *Mattice and Langham v. Bolin,* Case No. 73, 296, Maricopa County Superior Court, September 19, 1952.

29. The third Republican governor since statehood in a traditionally Democratic state. See N. D. Houghton, "The 1950 Elections in Arizona," *Western Political Quarterly,* Vol. IV, p. 91 (March 1951).

30. See Paul Kelso, "The 1952 Elections in Arizona," *Western Political Quarterly,* Vol. VI, p. 100 (March 1953).

with what appeared to be ample expenditures on behalf of the repeal effort.[31] The result was repeal by a vote of 128,094 to 48,409—and a vivid illustration of the fact that the "popular will," as recorded by use of one of these people's devices, may be successfully defied by a sufficiently determined and powerful opposition, even with engineered approval of the "popular will."[32]

In the years following the adoption of the Arizona Constitution there came, in the natural course of events, legislative enactments to effectuate the provisions for direct legislation[33] and judicial interpretation of them.[34] The bulk of these statutory enactments and court decisions, though important, do not imperatively call for attention here; but one recent decision of the Arizona Supreme Court has so vitally affected the operation of the initiative and referendum in the state as to make mandatory some analysis of the situation. It involves a series of developments with respect

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31. The files of the newspapers of the state will reveal part of the contrast, although comparable radio evidence is not so readily re-examined, having largely vanished with the sounds of the voices.

32. In the campaign, pledges were given that popular repeal of the unactivated Retirement Act would be followed by action of the state: (1) to bring Arizona's public employees under federal old age and survivors insurance coverage, and (2) to provide an "adequate supplementary retirement plan." Pursuant to this assurance, the necessary steps were taken to effectuate (1), and in 1953 the legislature passed a law in the direction of (2). Spokesmen for the public employees were disappointed with the law, however, considering it defective in several important respects, and particularly inadequate in its almost complete failure to make provision for the "prior service" component so essential to launching a plan for adequate retirement compensation.

33. Most of the effectuating legislation was enacted in 1912. See *Arizona Session Laws*, 1912, Chapters 70 and 71. Current citations are 60-101 to 60-115, Ch. 60, Art. I, *Arizona Code Annotated*, 1939. See also *Arizona Session Laws*, 1953, Chapters 57 and 82.

34. Leading cases: *Allen v. State*, 14 Ariz. 458; 130 Pac. 1114 (1913); *Bullard v. Osborn*, 16 Ariz. 247; 143 Pac. 117 (1914); *Clements v. Hall*, 23 Ariz. 2; 201 Pac. 87 (1921); *Willard v. Hubbs*, 30 Ariz. 417; 428 Pac. 32 (1926); *McBride v. Kirby*, 32 Ariz. 515; 260 Pac. 435 (1927); *State v. Pelosi*, 68 Ariz. 51; 199 Pac. 2d. 765 (1948); *Ward v. Industrial Commission*, 70 Ariz. 271; 219 Pac. 2d 765 (1950); *Warner v. White*, 39 Ariz. 203; 4 Pac. 2d 1000 (1931); *Kirby v. Griffin*, 48 Ariz. 434; 62 Pac. 2d 1131 (1936); *Whitman v. Moore*, 59 Ariz. 211; 125 Pac. 2d 445 (1942); *Arizona v. Superior Court*, 60 Ariz. 69; 131 Pac. 2d 983 (1942); *Hernandez v. Frohmiller*, 68 Ariz. 242; 204 Pac. 2d 854 (1949); *Dennis v. Jordon*, 71 Ariz. 430; 229 Pac. 2d 692 (1951); *Eide v. Frohmiller*, 70 Ariz. 128; 216 Pac. 2d 726 (1950); *Adams v. Bolin*, 74 Ariz. 269; 247 Pac. 2d 617 (1952); *Estes v. State*, 48 Ariz. 21; 58 Pac. 2d 753 (1936); *Tucson Manor, Inc. v. Federal National Mortgage Assn.*, 73 Ariz. 387; 241 Pac. 2d 1126 (1952).

to whether and under what conditions measures once adopted by the voters shall be subject to subsequent alteration or repeal by the legislature.

Examination of the provisions for direct legislation in the various states having those devices discloses some variety of policy in this regard. In some states, measures adopted by direct legislative processes are entirely immune from any subsequent legislative disturbance.[35] In other states, such enactments are immune from legislative repeal or amendment for some specified period of time—two years in Washington. It is the peculiar wording of the Arizona Constitution which has permitted recent confusion there.

It has also been common practice to exempt measures adopted by vote of the people from veto by the governor, in terms making the exemption applicable to "measures referred to the people" or to "initiative or referendum measures." And again, it is the peculiar wording of the Arizona Constitution which has led to confusion there.

Let it be recalled at this point that the outstanding issue in the election of delegates to the Arizona Constitutional Convention in 1910 and also in the deliberations of the convention was on the initiative, referendum, and recall. Research on the work of the convention does not reveal whether the confusing provision, to which reference has been made immediately above, was simply inadvertently so worded, or whether possibly it could have been done by deliberate design of opponents of the whole idea of direct legislation. Records show that the Oregon provision for direct legislation was the major pattern by which the Arizona Convention was guided; yet for some reason the wording in this unfortunate instance did not follow the comparable Oregon provision.

The Arizona Constitution provides that

> any measure or amendment to the constitution proposed under the Initiative, and any measure to which the Referendum is applied, shall be referred to the qualified electors, and shall

35. See, for example, the Constitution of California, Art. IV, sec. 1.

> *become law* when approved by a *majority of the votes cast thereon*. . . .[36]

Then, as originally adopted, the Constitution provided that

> The veto power of the Governor shall not extend to Initiative or Referendum measures approved by a *majority of the qualified electors*.[37]

Thus, as originally adopted, the legislature was left entirely free to repeal or amend statutory measures approved by a vote of the people and, although there is indication that the convention originally deliberately refrained from denying this power to the legislature, search fails to reveal any convention awareness or intent that measures approved at the polls by a "majority of the votes cast thereon," as provided by paragraph 5, were in any way distinguishable from measures approved by a "majority of the qualified electors," as the wording was put in paragraph 6. The *original intent* appears simply to have been: (1) that measures should become effective when approved by a *majority of the votes cast thereon,* and; (2) that *all* measures so approved should be exempt from *executive veto,* but subject to legislative repeal or alteration.

Then, for reasons shortly to be stated, the enthusiastic proponents of direct legislation sponsored and secured adoption in 1914 of an amendment to paragraph 6 designed to immunize all measures adopted by these devices from subsequent legislative repeal or alteration. Thereafter, paragraph 6 read:

> The veto power of the Governor, *or the power of the legislature to repeal or amend,*[38] shall not extend to initiative or referendum measures approved by a majority vote of the qualified electors.

There is an obvious discrepancy between the *wording* of paragraph 5, a "majority of the votes cast thereon," and

36. Art. IV, Part I, sec. 1, paragraph 5. Italics supplied.
37. Art. IV, Part I, sec. 1, paragraph 6. Italics supplied.
38. Italics supplied to show the words added by the 1914 amendment.

paragraph 6, a "majority of the qualified electors," which was pointed out by the first comprehensive study made of the initiative and referendum in Arizona, back in 1931.[39] Again, however, careful search fails to reveal any evidence prior to 1952, that there ever was any official or legal assertion or assumption of doubt that the two were *intended* to *mean* precisely the same thing, namely, *approved by the voters.* But in the spring of 1952, alert and ingenious counsel, working not only to prevent legislative effectuation of the Public Employees Retirement Act of 1948, but also to nullify that law, argued effectively before the State Supreme Court that the two expressions should be interpreted *absolutely literally.* The result was that the court, by a division of 4 to 1, held that a "majority of the qualified electors" means a majority of all *registered voters* of the state; and the effect was to make all statutory measures approved by a "majority of the votes cast thereon" subject to subsequent alteration or repeal by the legislature,[40] *unless* approved by a "majority vote of the qualified electors (registered voters)" of the state.[41]

The potential significance of this decision becomes apparent in light of the fact that no single measure has ever been approved by a majority of the *registered voters* of the state; and there appears to be no real prospect that any measure ever will receive that number of votes, so as to be immune from legislative repeal. The significance is equally impressive, on the one hand with ardent proponents of direct legislation, as devices for getting results by popular action, in spite of the legislature, and on the other hand, with those who feel more comfortable with a restoration of essentially

39. See Todd, *op. cit.*, p. 37. In this study, made in 1931, long after paragraph 6 had been amended to bar also legislative alteration or repeal of such measures, Mr. Todd pointed out that "under a strict construction of this phrase, the governor, apparently, could veto, or the legislature could act upon a measure approved by a majority of those voting upon that particular question, should that number be less than a majority of the 'qualified electors.' Although it is not established that this loophole was deliberately placed in the Constitution, and no court construction has been made thereupon, the situation seems to leave a possibility of the above-mentioned action on the part of the governor or the legislature."

40. And also subject to veto by the governor.

41. *Adams v. Bolin*, 74 Ariz. 269; 247 Pac. 2d 617 (1952).

the old territorial situation, in which groups able to control the legislature need have perhaps not too much fear of effective popular defiance of their will.

We have had occasion earlier to refer to the fact that at the first session of the Arizona legislature after statehood, organized labor was able to secure enactment by the legislature of a number of laws, in spite of the traditional opposition of railroad and mining interests. The opposition immediately had recourse to the referendum in an unsuccessful effort to nullify several of these enactments. In the course of the campaign, however, and in the next session of the legislature there was some apparently serious threat that the legislature might undertake to repeal some of these laws.[42]

This early experience led to the proposal in 1914 of the constitutional amendment by the initiative process, sponsored by the Arizona Federation of Labor, *designed* to prevent the legislature from altering or repealing *any* measure once *adopted by popular vote.* The form of the proposal was to add a minimum of essential words to paragraph 6, so as to bar *both* veto by the governor and alteration by the legislature of all "initiative or referendum measures *approved by a majority vote of the qualified electors.*"[43] Thus, due to an economy in the use of words, not commonly attributed to lawyers in the popular mind, the framers of this amendment allowed the language to stand so as to invite argument for literal interpretation of it by some attorney of a later generation, who 'vas not there, Charlie,' when the general understanding of intent and purpose originated among lawyers of the state contemporary to the wording of the language.

As an indication of the *intent* and *purpose* of the *sponsors* of the 1914 amendment, their argument published in the *Publicity Pamphlet* of 1914 declared:

42. Particularly, a law fixing maximum railroad passenger rates and another requiring private employers to pay workers twice a month. See *Publicity Pamphlet,* 1914, pp. 41-42.

43. *Publicity Pamphlet,* 1914, pp. 39-42.

> We wish to impress upon the voters of the State the importance of the amendment to the State Constitution whereby the Legislature will not be allowed to repeal or amend *any* initiative or referendum measure *passed by the people.*[44]

As an indication that the active *opponents* of the 1914 amendment also understood its intent and purpose precisely as its sponsors did, their opposing argument published in the *Publicity Pamphlet* stated specifically that:

> The Constitution already prohibits the governor from vetoing *any* law *adopted by the people,* so the amendment merely pertains to [alterations or repeal of such measures by] the legislature.[45]

The main argument of the opposition was simply that the amendment should be defeated because the legislature ought to have power to "correct mistakes" in popularly enacted laws; and they certainly accepted the sponsors' interpretation that, if adopted, this amendment would effectively deprive the legislature of its power to alter or repeal *any* law "passed by the people."[46] As previously stated, the amendment was adopted; and, so far as can be ascertained, no judge, legislator, governor, or attorney ever questioned the accepted proposition that its intended effect had been accomplished, until the summer of 1952.[47]

In explanation of the wording of the 1914 amendment, a prominent member of the Convention of 1910, continuous and forceful advocate of direct legislation, and one of the state's most highly respected attorneys, states that:

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44. Statement signed by Bert Davis, President of the Arizona Federation of Labor. Italics supplied.

45. Italics supplied.

46. *Publicity Pamphlet,* 1914, pp. 41, 42.

47. The most serious previous frontal attack made upon the workability of the initiative and referendum had come in 1916, immediately following the amendment of 1914, while the original sponsors and opponents of direct legislation were still rather clearly and identifiably squared off against each other. Since the 1914 amendment was universally accepted as having removed laws enacted by popular vote from subsequent legislative alteration or repeal, those elements in the state who were unhappy about the situation were able to secure legislative proposal of an amendment to the constitution designed to make it decidedly *more difficult* to *enact* measures by popular vote. See footnote 24.

> The form of the [original] paragraph was left, as is the usual practice in preparing legal amendments, to follow the original form except as to the addition of such words as might be necessary to effect the desired purpose, and the only change desired in this instance was to supplement the denial of power to the Governor to veto with the denial of the power to the legislature to repeal or amend an initiative or referendum measure approved by the people. It did not occur to the proposers of the amendment in 1914, as in thirty-six years following, it did not occur to any Governor, any legislator, or any citizen, that the form of the paragraph limited its effectiveness to measures approved by a majority of all eligible voters, whether voting or not.

This appears to be a fair statement of the matter. In fact, the Arizona Supreme Court in several cases, over the period from 1926 to 1950, took occasion to affirm the general understanding that, after 1914, *all* measures adopted by popular vote were immune from subsequent repeal or alteration by the legislature.

In 1926, the court said that, "no measure approved by a referendum could be repealed or amended by the legislature."[48]

In 1927, the court declared that, "paragraph (6) expressly deprives the legislature of the right to enact measures affecting . . . initiated or referred measures approved by the voters."[49]

In 1942, the court had occasion to say that, "there is one difference between an initiated and legislative law. While a legislative act may be repealed by a subsequent legislature, an initiated measure, *once adopted,* can only be repealed in the same manner in which it was adopted."[50]

In 1948, the court, referring to certain sections of the statutes, said they, "were enacted by the Legislature and referred to and approved by the people, and having been approved by the people, the Legislature is without power to repeal or amend these measures."[51]

48. *Willard v. Hubbs,* 30 Ariz. 417; 248 Pac. 32 (1926).
49. *McBride v. Kerby,* 32 Ariz. 515; 260 Pac. 435 (1927).
50. *Arizona v. Superior Court,* 60 Ariz. 69; 131 Pac. 2d 983 (1942).
51. *State v. Pelosi,* 68 Ariz. 51; 199 Pac. 2d 125 (1948).

And as late as 1950 the court recognized the "constitutional immunity [of initiative and referendum measures] from amendment by the Legislature."[52]

When the legislative majority in 1952, refusing again to effectuate the Public Employees Retirement Act of 1948, passed a bill purporting to repeal that law, but referring it to a vote of the people, the public employees with support from Mr. William R. Mathews, Editor and Publisher of the *Arizona Daily Star*, sought an injunction to prevent the Secretary of State from putting the measure on the ballot on the ground that "the Legislature was without power to refer the measure" to a vote of the people.[53] The Superior Court having refused to grant the injunction, the case was appealed to the State Supreme Court, which not only affirmed the propriety of the Legislature's action to refer the law to the people for a "second look," as it was semiofficially designated,[54] but it also held that the Legislature has power to *amend* or *repeal*, on its *own authority*, any statutory measure which has been enacted by the people *unless* it has been approved by a "majority vote of the qualified [registered] electors" of the state.[55]

To counsel's reliance upon the apparently universal official and legal acceptance of the proposition that the *intent* and *purpose* of the amendment of 1914 had been to place all measures adopted by vote of the people beyond the power of the legislature to repeal or amend, buttressed as it had been by repeated acceptance of it by the State Supreme Court, the Court in 1952 simply replied: (1) that "where

52. *Ward v. Industrial Commission*, 70 Ariz. 271; 219 Pac. 2d 765 (1950).

53. *Adams v. Bolin*, 74 Ariz. 269; 247 Pac. 2d 617 (1952).

54. On three previous occasions the legislature had referred to the voters measures to repeal the same identical law (a game control law) which had originally been enacted by the initiative process in 1916. The people rejected the repeal in 1921 (See *Arizona Session Laws*, 1923, p. 444) and again in 1926 (See *Arizona Session Laws*, 1925, Chap. 6). On the third try, the people approved the repeal in 1928 (See Chap. 3, Acts of the Special Session of the Eighth Legislature, *Session Laws*, 1928). It appears, however, that the courts had had no previous occasion to adjudicate the propriety of this legislative action, but the experience seems to show that the legislature had never considered that it had power to repeal outright any measure previously enacted or approved by the people by a "majority of the votes cast thereon."

55. *Willard v. Hubbs*, 30 Ariz. 417; 248 Pac. 32 (1926).

there is involved no ambiguity or absurdity, a statutory or constitutional provision requires no interpretation"; (2) that in no previous case had the meaning of the pertinent language of the Arizona Constitution ever been questioned by litigants; (3) that in one of the cases cited it had not been necessary for the court to make the statement recognizing immunity of all popularly enacted laws from legislative power to repeal; and (4) that in any event all such previous holdings of the court were now specifically *overruled,* in so far as they may have applied to measures approved by less than a "majority vote of the qualified (registered) electors" of the state.[56]

Said the Court:

> None of these [previous] cases presented the direct question as to whether there is a *vital distinction* between an initiated or referred measure enacted or approved by a *majority of the qualified* (registered) *electors* and measures enacted or approved merely by a *majority of the votes cast thereon.*[57] The instant case for the first time asserts that there is such distinction and makes an issue of it.

The Court readily saw the distinction, and being unimpressed by a showing of original and long accepted understanding that the two expressions were *identical* in *intent* and *purpose,* the Court, admitting that "we are on our own in attempting to construe the words 'approved by a majority vote of the qualified electors,' " for lack of any reference to any case in which the expression had ever been judicially construed, nevertheless reached the

> conclusion that the words mean simply what they say. . . . To enforce it according to its terms [said the opinion], will mean that only those initiated and referred measures which receive the majority vote of the qualified [registered] electors will be immune from legislative amendment or repeal.

Counsel for plaintiffs argued vainly, but apparently unanswerably, that the court was being asked to adopt an interpretation which would be both administratively and ju-

56. *Adams v. Bolin,* 74 Ariz. 269; 247 Pac. 2d 617 (1952).
57. Italics supplied.

dicially *unworkable.* They pointed out that, as a matter of practical application, it is simply not administratively feasible to know or to determine for any election how many "qualified electors" there are in the state. *Registration,* which the court accepted and designated as the test for voter qualification, is as a matter of fact not an adequate test. Even, assuming the legality of registration, as of the date of enrollment for each registered voter, registration lists become notoriously and progressively inaccurate, due to deaths, and removals from precincts and counties, and even from the state. A sizeable proportion of registered persons are, therefore, not "qualified electors," and the only way really to know how many "qualified electors" there are in the state at any given election time would be actually to check every registration, in order to verify its validity, a process which is simply not practicable. If any case should ever develop inviting or calling for court determination of whether any measure has been adopted by a "majority of the qualified electors," only a litigant with ample funds to pay for the very expensive checking services could possibly offer the courts even allegedly accurate data on which a sound decision might be based; and only a group with equally ample funds could offer any effective rebuttal.

The majority opinion is one which perhaps many lawyers might call "well reasoned," or what perhaps Professor Rodell of Yale Law School might call "well rationalized."[58] It purports to put the court in a position of really having no choice but to rule as it did. In fact, if one may take a bit of liberty with a bit of Hamlet, it may appear to some that the judge who wrote the opinion in *Adams v. Bolin,* "doth protest too much," with approval of three of his brethren, to the moralistic effect that the state's legislative future must necessarily be in safer hands because of this decision.

Saith the Court:

> We are of the opinion that to permit the legislature to make needed amendments to ill-considered initiated laws or referred measures that, through the passage of time, have become obso-

58. Fred Rodell, *Woe Unto You, Lawyers,* Ch. 8, esp. p. 193.

> lete, will be a step forward and relieve the people of shackling legislation.

Continuing, the opinion stated that measures enacted by popular vote

> do not have the advantage of open debate and analysis, and oftentimes incorporate provisions that are out of harmony with and contradict the general scheme of legislation.

Aside from the fact that no examples were cited of such "oftentimes"-enacted poorly conceived laws by popular vote in the state, the court seemed to overlook the fact that all measures referred by referendum petition will have had all the alleged "advantage of open debate and analysis" when enacted by the legislature.

As further indication that some of the judges may possibly have had their own individual intolerances for the processes of direct legislation, on principle,[59] the opinion referred to the fact that some Arizona laws approved by popular vote in the early years of statehood, when the population was far less than in the 1950's, had received relatively small numbers of votes.

> In order, [said the court] to propose [by the initiative] an amendment or repeal of an initiated or referred law at the present time [prior to *Adams v. Bolin*], for the most part, requires one and one-half times as many signatures as the measure received when it was enacted or approved, a most

59. One of the judges who concurred in *Adams v. Bolin* had taken occasion frankly to express his lack of confidence in the initiative process in a recent previous case, in which he dissented. Said he: "I recognize that the Constitution reserves to the people of the state the right to initiate and pass legislation . . . and it may be that, upon the ground of public policy, it is entitled to be shielded by the same protective armor of legal presumptions that surround an act of the legislature. Public policy, however, is the only theory in my opinion upon which such presumption could possibly rest. I say this for the reason that it is common knowledge that voters, for the most part, have no knowledge whatever of the contents of initiative measures, therefore the language used therein cannot be said to express their legislative intent. Under such circumstances it is very doubtful in my mind if public policy should be allowed to prevail in establishing a legislative intent in initiative measures when the facts all contradict that presumption." *Dennis v. Jordon*, 71 Ariz. 430; 229 Pac. 2d 692, 707 (1951) in which the Court, 4 to 1, upheld the constitutionality of the Public Employees Retirement Act of 1948 against a battery of attacks.

> *expensive* and *laborious* undertaking; *so much so*, in fact, *that many of them die a-borning.*[60]

Then, putting a sort of cap sheaf upon this moral line of justification for its presumably judicially unavoidable ruling, the opinion went on to say that,

> To give the legislature the outright power to amend or repeal, both subject to the referendum, can only result in good; not 'good' that we, as members of the court view it, but the opportunity for 'good' as envisioned and authorized by the Constitution. And if the people think that any legislative repeal or amendment of initiated law is not desirable, five per centum of the qualified electors can force a referendum against it and the people will *again* have an opportunity to express their opinion thereon.

The court may have spoken more truly than it realized when it referred to the "expensive and laborious undertaking" involved in making use of the processes of direct lawmaking. In fact, that use is *so* "laborious and expensive" as to make it impractical for the same group of the common "people" to utilize them over and over, in order to accomplish and maintain results, as against allegedly entrenched power in the legislature, and in the face of demonstrated financial disadvantage of "the people" in the conduct of popular campaigns. Experience in this respect particularly has shown that the sponsors of direct legislation forty years ago had some reason to seek to put popularly enacted measures beyond the power of the legislature freely to annul them.

It is submitted here that the matter ought not to be allowed to rest as it was left by *Adams v. Bolin.* It should be possible to work out a proper repair job by way of a constitutional amendment. There has always been recognized merit in the proposition that it is unwise, on principle, to give ordinary statutory law a status of constitutional law, whether by writing it into a constitution or by placing popularly enacted measures beyond all reach of necessary legislative alteration. Yet legislative alteration of such measures

60. Italics supplied.

should not be so easy as to invite legislative sabotage of hard-won ("laborious and expensive") popularly-approved reforms. There may be no way to give effective voice in state policymaking to minority groups with modest financial assets comparable to the influence of other closely integrated minority groups. But in a democracy the underlying assumption is that an effort must be made to do just that.

It is suggested, substantially in accord with a proposal introduced in the first regular session of the 21st legislature in 1953,[61] that the Arizona Constitution might well be amended so as to permit legislative alteration of popularly enacted statutory measures under presumably adequate restrictions. Perhaps all such enactments could well be given a trial run of some minimum period of say six years, during which they would be completely immune from all legislative action directed toward their repeal or alteration. Then, after expiration of this period, they might with some reason become subject to legislative alteration by a vote of two-thirds or three-fourths of the members of each house,[62] subject, however, to use of the referendum; and in the event of popular rejection of such legislative alteration, then it might seem reasonable to make the measure immune from further legislative molestation for an extended period of years.

At the regular session in 1953, immediately following the long controversy about the activation of the Public Employees Retirement Act of 1948 and *Adams v. Bolin*, the legislature passed an act, "introduced by the Committee on Suffrage and Elections," purporting to revamp the law prescribing the operating details for direct legislation. In an introductory section entitled "Declaration of purpose," it is set forth in part that

> In recent years small pressure groups, taking advantage of the substantial increase in the size of the electorate and the

61. House Concurrent Resolution, No. 4.

62. There is already some basis in the Constitution for suggesting either of these extraordinary majority votes. Legislative enactments may be made immune from the referendum by a two-thirds vote of the elected members of both houses. And such "emergency" measures, if vetoed by the governor, may be passed over the veto only by a vote of three-fourths of the members of each house. Art. IV, Part I, par. 3.

> resultant great numbers of uninformed signers of initiative and referendum petitions, have attempted, through fraudulent and corrupt practices in connection with the circulation of petitions, to appropriate this fundamental right of the people to their own selfish purposes. These abuses have tended to bring the initiative and referendum processes into disrepute. It is the sense of this legislature that in order to prevent the recurrence of such abuses . . . legislation should be enacted further implementing the provisions of the constitution governing the exercise of this right.

Careful examination of the new law fails to reveal anything which would appear to offer any additional safeguard against alleged "fraudulent and corrupt practices" or "abuses," though perhaps it may make the process of securing valid signatures somewhat *more difficult.* The *new and really significant feature* introduced here is a provision for a system by which well-financed groups, opposed to submission of any particular measures to a vote of the people, may undertake to induce wholesale *withdrawals* of signatures within 60 days, after petitions have been filed.

This plan provides for withdrawals by means of individual affidavits to be executed by signers of previously filed petitions. The process, being necessarily expensive and inconvenient, could hardly conceivably be used, *spontaneously* and individually, by any appreciable number of persons. But, under the pressure of an organized, publicized, and possibly prepaid *movement,* enough withdrawals may very well be *induced* either (1) to invalidate the petitions or (2) to provide a basis for expensive litigation in court. In any event, only well financed interests could either (1) *utilize* the device effectively to prevent submission of measures whose submission they oppose, or (2) *survive* its use against measures which they may wish to sponsor.[63]

63. *Arizona Session Laws,* 1953, Chapter 82 (House Bill No. 167). In the interest of realistic evaluation and clarity of understanding, it should be made clear that this legislative allegation of "fraudulent and corrupt practices" and "abuses" in the circulation of direct legislation petitions appears to be a misleading one. That is not to say that in the course of forty years there have never been any irregularities or improprieties in these processes; but any implication that they have been more prevalent in this field than in other aspects of the state's political and governmental processes seems unwarranted.

It appears that irreconcilable opponents of the processes of direct legislation in the state may not be satisfied even with the new situation which permits the legislature to alter or repeal measures so enacted.[64] There are persistent reports that it is proposed again to sponsor an amendment to the constitution providing that measures of direct legislation shall become effective only if approved by a *majority of the voters voting at the election* at which they are submitted. That could make it virtually impossible ever to secure the enactment of any such measure.[65]

64. Unsuccessful efforts were made at the regular session of the legislature in 1953 to get consideration of a proposal to bar legislative alteration or repeal of popularly enacted measures. House Concurrent Resolution, Nos. 3 and 5.

65. See footnote 24 for a similar effort in 1916.