



Nebraska As a Pioneer in the Initiative and Referendum

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NEBRASKA AS A PIONEER IN THE INITIATIVE AND REFERENDUM

BY ADAM C. BRECKENRIDGE

THE practice of referring issues to the voters in American state and local elections has been an accepted device since the trend which began in the latter part of the 19th century. In this development of the instruments of "direct democracy" Nebraska can claim a position of the pioneer. The first state law which authorized the general use of the initiative and referendum in local subdivisions was a Nebraska statute of 1897.

Writing more than forty years ago, William Bennett Munro observed that¹

there has been no more striking phenomenon in the development of American political institutions during the last ten years than the rise to prominence in public discussion, and consequently to recognition upon the statute-book, of those so-termed newer weapons of democracy—the initiative, referendum and recall.

The primary object of the American political adventure conceived more than 175 years ago was to put control over

¹ *The Initiative Referendum and Recall*, (New York, 1912), p. 1.

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the machinery of government into the hands of the people and to provide government guided by public opinion which was democratic in its structure, organization and purpose. In the realm of local government this democracy took such forms as the familiar New England town meeting where the citizens to this day participate even on matters of minor significance. But this system of a more direct democracy did not extend much beyond the New England area². The acceptance of the doctrine of representative government, accompanied by the narrowing of legislative powers, produced a more limited government and tended to produce safeguards against legislative abuses of its authority.³

Direct legislation in American state and local governments has been an established practice almost from the beginning. The early state constitutions and amendments which followed were adopted by popular vote. But this kind of popular participation did not extend very far into the "law-making" process, *i.e.*, statutes or ordinances. It was not until 1898 that South Dakota amended its constitution to permit state use of popularly initiated statutes.⁴

The practice of referring issues to the voters of a local community of specific issues in a narrow range of subject was required frequently before an ordinance could be effective. These took the form of proposed boundary changes, local option on liquor control, debt limits, bond issues, changes in corporate name, and the like. Yet, this was a narrow and restricted use of the referendum and usually it was in the form of the compulsory referendum. There was no plan for the initiation of ordinances directly by the voters, thereby circumventing the local governing body.

The introduction of the initiative and the extension of the general referendum to towns and cities and other local

² Some features are provided in those states having township government. See Lane W. Lancaster, *Government in Rural America* (New York, 1952).

³ Woodrow Wilson, "Hide-and-Seek Politics," *North American Review*, 191 (May, 1910), 585-601.

⁴ *Constitution of South Dakota, Art. III, Sec. 1. Session Laws of South Dakota, 1899, pp. 121, et. seq.*

governmental units, however, had its beginning in Nebraska in 1897. This law was a *general* law and was applicable to all ordinances legislative in nature which were within the powers of any local governmental unit to enact.⁵ It was passed, indeed, in the absence of any specific constitutional authority. The constitutional provision did not come for another fifteen years.⁶

The use of the initiative as a means of permitting any voter to present his desires to the entire voting group and its companion, the initiated referendum, derived impetus not so much from a general popular demand or any conviction that they would supplant the work of a legislature, city council or other local governing body. Rather it was intended that their *availability* and occasional use would impress those in control of the legislative bodies and tend to eradicate or at least limit some of the abuses and some of the popular distrust of the law-making process.⁷ The exposures of innumerable partisan influences upon legislators and councilmen, influences which sought personal gain or privilege, were among the major causes for a search for greater control over representative assemblies, state and local. Chief interest centered also upon control over *commissions* rather than *omissions* by legislative bodies. Thus, the referendum gained ascendancy.

The referendum is a descendant of the most direct kind of democracy, and is a development traceable to the Swiss canton of St. Gallen in 1830. Its introduction was a compromise between those who strove for "pure" democracy at the local level and those who sought only representative government. It provided for a submission to the voters for popular approval any law after passage when a relatively small number of voters demanded it. Such a law could not be made effective upon such demand unless and until approved by popular vote.⁸

⁵ *Laws of Nebraska, 1897, Ch. 32, p. 232.*

⁶ *Constitution of Nebraska, Art. III, Secs. 2 and 3.* (Amendment adopted in 1912 by a vote of 189,200 to 15,315).

⁷ For a general discussion see Ellis Paxson Oberholtzer, *The Referendum in America* (New York, 1912), Ch. IX. Also, Munro, *op. cit.*, Ch. IV.

⁸ John Martin Vincent, *Government in Switzerland* (New York, 1900), p. 84. J. Dubs, *Le Droit Public de la Confederation Suisse*

The movement in America for adoption of these "shot-guns" behind the door, the initiative and referendum, gained supporters during the last quarter of the 19th century. Demands for their adoption were incorporated into political party platforms. In Nebraska they were given support by the Populists and Democrats in their platforms of 1894. Two years later, the state platforms of the Democrat, National, Socialist-Labor, and Prohibition parties advocated enactment of legislation for the initiative and referendum, both state and local in application. The Sound Money Democrats and the Republicans were opposed to their enactment. These parties claimed that it would mean destruction of "the Constitution for the Socialistic experiment of the initiative and referendum."⁹

As a result of these pledges, a bill was introduced in the 1897 session of the legislature by Representative A. E. Sheldon of Dawes County. Apparently it was done at the request of a member of the Douglas County delegation, Representative John O. Yeiser, whose seat was then in contest.¹⁰ This bill was restricted to an extension of the initiative and referendum to local governmental units of the state. Mr. Sheldon wrote some years later that it was "one of the hardest fought battles of the session."¹¹ Not one Republican voted for the bill when it came to third reading and final passage in either the House or Senate.

(Geneva, 1878), pp. 212-220. Joh. Adolph Herzog, *Das Referendum in der Schweiz* (Berlin, 1885). William E. Rappard, *La Constitution Federale de la Suisse* (Neuchatel, 1948), pp. 435, 436. Virtually all the Swiss cantons have since adopted the initiative and referendum. For an earlier American appraisal, see A. Lawrence Lowell, "The Referendum in Switzerland and America," *Atlantic Monthly*, April, 1894, pp. 517-526.

⁹ *Nebraska Party Platforms, 1858-1940* (University of Nebraska, Lincoln, Department of Political Science, 1940), pp. 193-219. According to Addison E. Sheldon, in his *Nebraska, The Land and the People* (Chicago, 1931), Vol. I, p. 767, the Populists, Democrats, and Silver Republicans met at the same time, the same place, and used conference committees to recommend the division of the state ticket. They became known as the "three ring political circus."

¹⁰ Introduced January 13, 1897, House Roll 68, *House Journal*, 1897, p. 188. A detailed account of the appeal to the Populist and Democrat members of the House can be found in the *Nebraska State Journal*, March 7, 1897, p. 2, and March 9, p. 2.

¹¹ Addison E. Sheldon and William E. Hannan, *Nebraska Municipalities* (Nebraska Legislative Reference Bureau, Bulletin No. 5, Lincoln, 1914), p. 9.

During the debate on the measure, Mr. Yeiser reviewed the development of these twin devices for general use based upon the Swiss experience, not only for local governmental units, the cantons, but also for federal legislation. He considered that these two schemes had made Switzerland a well-governed democratic country, and that their use made government there more responsive to public sentiment and rather promptly so.

Opponents of the initiative and referendum measure, mainly Republicans, claimed that the Swiss experience did not show conclusively that these direct methods were successful nor did they measure up to the claims stated. Representative E. J. Burkett of Lancaster County, for example, argued that only a minority of the voters ever participated in the various referenda and thereby produced government by minorities.¹² He reviewed the development of government in America, by contrast, especially in cities. He observed that in these governments there were two sorts of laws. The first were those which pertained to the basic and fundamental law, those which contained the principles for government: constitutions and charters. They required the approval of the voters. But the other sort were the rules and regulations which stemmed from the basic law, the statutes and ordinances. These latter were the province of the representatives of the people. Furthermore, he related, the practice of requesting approval from the voters on many specific questions had long been an established practice. Here, he insisted, was evidence of democratic government, adequate for protection against the claimed abuses of representative government.¹³ Furthermore, it was improper to compare the Swiss experience with the type or structure of American government since the Swiss did not have the system of checks and balances on the several branches of government, did not provide for the executive

¹² Simon Deploige, *Le Referendum en Suisse*, trans. by C. P. Trevelyan (London, 1898), pp. 207-210. During the period 1874-1898 no federal law had been accepted by a majority of *all* the electors, although majorities of those voting had been frequent.

¹³ Opinions were reported to have been based upon observations by "Bryer's [sic] American Commonwealth." See James Bryce, *The American Commonwealth* (New York, 1905), Ch. 39. See also, *Nebraska State Democrat*, March 13, 1897, p. 3.

veto, and it was questionable whether the judiciary was independent.¹⁴

Others who were reported as speaking against the bill in the House objected because of the added costs of special elections. Representative J. M. Snyder of Sherman County thought that no barrier of consequence, since, he said, "the abuses of city rule under the government of city councils" were many and that it was time they were done away with.¹⁵

Representative Charles Wooster of Merrick County opposed the measure because he said there was no popular demand for it. "If you ask the majority of farmers what the initiative and referendum is, they will reply, 'what the devil is that'."¹⁶ He also thought that there was enough work for the legislature to do without passing experimental measures.

But despite these objections, the bill passed by the sizeable majority of 60 to 26. The Republicans were unanimous in their opposition. There was little debate in the Senate which approved it 18 to 7, and was similarly opposed.¹⁷

Just before the final vote in the House, on a motion to indefinitely postpone, the *House Journal* records explanations of two votes about to be cast: Representative E. M. Pollard of Cass County said, "I believe that the history of the world has demonstrated beyond any question of doubt that the republican form of government is the best known to the civilized world. I believe that Nebraska can ill afford to take a step backward at this time, therefore, I vote yes." Representative Wilson Winslow of Gosper County said in support of the bill but in opposition to the motion to kill that, "I believe the history of the world demands this measure, and the republican form of government in Nebraska is a fake. I vote no."¹⁸

The initiative and referendum law of 1897 is substantially the law of 1953. It provides for proposing ordinances

¹⁴ See Dubs, *op. cit.*, pp. 120-125, 133-136; also, Vincent, *op. cit.*, p. 187.

¹⁵ *Nebraska State Journal*, March 7, 1897, p. 2.

¹⁶ *Ibid.*

¹⁷ *Nebraska House Journal*, 1897, p. 750. The bill passed March 15, 1897.

¹⁸ *Ibid.*, p. 680.

—the initiative—“for the government of any city, or other municipal subdivision” whenever fifteen percent of the voters request it. To avoid unnecessary elections, no popular vote is held if the city council or governing body adopts the proposed measure and enacts it as an ordinance. If adopted, but with amendments, however, the original and the amended version must both appear together on a ballot at the next regular election or at a special election if twenty percent of the voters request it. A majority vote on the question is required for approval.

The companion, and older method of direct legislation, the referendum, may be invoked against any ordinance passed by the governing body within thirty days after passage, unless it is declared by the governing body by unanimous vote to be one “relating to the immediate preservation of public peace or health or items of appropriation of money for current expenses of the several departments of such city, which do not exceed the corresponding departments of the preceding year. . . .” In these cases the referendum cannot apply. The percentages on referendum petitions are the same as for the initiative.

Although this statute was not mandatory upon any local subdivision of the state and required approval of the voters before it would become effective, it was the first successful attempt to provide the initiative and referendum for general use in cities in the United States. Cities in Nebraska were thus free to use it or not as they saw fit.

It should be recalled in this connection, that cities owe their origin to, and derive their powers wholly from the state, and generally this means the legislature. As Judge Dillon put it more than three quarters of a century ago, the legislature “breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control.”¹⁰

¹⁰ *City of Clinton v. Cedar Rapids and Missouri Railroad Co.* 24 Iowa 455 (1868). At one time the Supreme Court of Nebraska gave support to a doctrine of an inherent right of local self-government. In *State v. Moores*, 5 Nebraska 480 (1898), the Court said that “the denial to the people of the right to govern themselves is undemocratic.” It affirmed that the right of local self-government in towns and cities was not surrendered upon the adoption of the Constitution, but “is still vested in the people of the respective muni-

Thus, although legally inferior to the state, cities of Nebraska, and other local subdivisions, were given some recognition of local self-government and self-determination.

The initiative and referendum are available also under the optional forms of city government in Nebraska, the commission and council-manager plans, although there are some modifications if compared with the 1897 law. Those cities which have adopted either of these two plans of government accept the initiative and referendum concurrent with the change in governmental organization.²⁰ Finally, of course, cities having or adopting home rule charters may obtain it from the constitutional authority.²¹

It is unfortunate that no cities adopted this privilege immediately, for it would have given Nebraska firm ground for being first in use as well as availability. On this point, one critic of the Nebraska permissive feature wrote that²²

The legislature of Nebraska desiring to introduce the Swiss systems of the initiative and referendum into cities and other local districts of the State did not, however, have the full courage of its convictions. It only passed the law contingent upon its later submission to and approval by the people in the various local communities.

The first cities in the state to adopt the initiative and referendum law were Omaha and Lincoln, ten years after it was made available to them. No data are readily available on the total number of cities and other local subdivisions of the state which have adopted it in the period since that time.²³ The eleven commission and council-manager

cipalities." But this view did not prevail. Indeed, only three years later, in *Redell v. Moores*, 63 Nebraska 219 (1901), the Court in effect reversed itself, and concluded that "what petitioners really claim is local independence, rather than local self-government."

²⁰ *Revised Statutes, Nebraska*, 19-638 to 19-644; 19-427 to 19-431, (1943).

²¹ *Constitution of Nebraska*, Art. XI. *R. S. Nebraska*, 1943, 19-501 to 19-503.

²² Oberholtzer, *op. cit.*, p. 306. It was reported that Mr. Sheldon, the introducer of the initiative and referendum measure, was willing that the law should not become operative except by a vote of the people. Apparently, the opposition to the automatic use of the plan was such that he moved to so amend the bill. See *The Evening Post*, Lincoln, March 6, 1897, p. 1.

²³ The Supreme Court of Nebraska upheld the law in *Enos v. Hanff*, 98 Neb. 245 (1915).

cities may be included in such a list even though under slightly modified provisions.

These twin instruments of democracy are intended to be used as protective weapons against any abuses of representative government, legislative in nature, and may be regarded as complementary to it. They have not been used extensively, either. The representative system rests upon the principle of the delegation of power from the sovereign people, but it is difficult to conceive that any organ of human government, however constituted, if left to its own devices, can escape the tendency to abuse that authority which has been granted to it. Perhaps the initiative and referendum should be considered, therefore, as methods of guaranteeing, in part, that governments will be not only representative and responsive to the public will, but responsible as well.