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Popular Legislation in California: 1936-1946

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THE initiative and referendum in California can now claim to be long established institutions. They became part of the constitution of California by the amendment of 1911.

Article IV, section 1, originally ran:

"The legislative power of this state shall be vested in a senate and assembly, which shall be designated 'The Legislature of the State of California'."

To which the amendment added,

"... but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the legislature."

The introduction of this system of popular legislation into California was part of the program of the Progressive movement, then captained by Hiram Johnson. The older among us remember the bitterness of the attack made against it and the prophecies of disaster that accompanied it.¹ It was chiefly attacked as a violation of the "republican form of government" guaranteed by the United States Constitution.² And even after the decision of *Pacific States Telephone and Telegraph Co. v. Oregon*³ the fantastic doctrine that "republican"

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¹ See the elaborate note in Treadwell's edition of the Constitution of the State of California (1931) p. 286, containing, among other things, Mr. Louis Bartlett's brief on the subject prepared for the Commonwealth Club of California. Cf. Note (1910) 24 HARV. L. REV. 141.

² Art. IV, § 4.

³ (1912) 223 U. S. 118.

excludes "democratic", a doctrine which manages at the same time to contradict history, etymology and common sense,⁴ is still demumified from time to time and seriously presented to Americans.⁵

In an earlier article⁶ I analyzed the results of popular legislation, especially in the elections of the years 1932, 1934, 1936, 1938. I propose here to supplement that study with the following four elections,⁷ those of 1940, 1942, 1944, and 1946. I shall, however, precede the tabulation of these years by the statement of the votes in 1936 and 1938 for purposes of a comparison between the results of 1940-1946 and those in what may be called the high tide of the New Deal movement, *i.e.*, 1936-1938.

Since one of the chief objections to the use of popular forms of legislation has been that the great mass of the public will show but little interest in the matter as compared with their interest in candidates, I have added the total vote in each case.

The method of voting in California requires two separate ballot-sheets to be handed to voters. One contains the candidates for state and local offices. The other contains the measures submitted. It is to be noted that no distinction is made between initiative measures and referendums. Nor is any distinction made between constitutional amendments and amendments to statutes.⁸ They are numbered consecutively without being grouped in the four possible divisions, *i.e.*, (a) constitutional amendments by initiative petition; (b) constitu-

⁴ The decision in state courts had been against the constitutionality of a referendum. *Cf. People v. Barnett* (1931) 344 Ill. 62, 176 N.E. 108, 76 A.L.R. 1044. This case, however, did not base its decision on the Federal Constitution. The dissenting opinion of Justice Holmes in *In re Municipal Suffrage to Women* (1894) 160 Mass. 586, 595, 36 N.E. 488, 492, says of an old Delaware case [*Rice v. Foster* (1847) 4 Del. 479]: "The contrary view seems to me an echo of Hobbes' theory that the surrender of sovereignty by the people was final. I notice that the case from which most of the reasoning . . . has been taken by later decisions states that theory in language which almost is borrowed from the Leviathan." Professor Louis Jaffe, to whom I owe this reference, adds: "It is not the pretended logic of republican institutions which explains these decisions but, on the contrary, an enormous distrust of them and the premises on which they are based." *Law Making by Private Groups* (1937) 51 HARV. L. REV. 200, 222.

⁵ The protest against poll-tax and against election by the modern type of rotten borough prevailing in some states has been met with the protest that the United States is a "republic", not a "democracy". As an example of the standard discussion of the subject as late as 1932 see Munro, *Initiative and Referendum* (1932) 8 ENCYC. SOC. SCIENCES 50.

⁶ *Popular Legislation in California* (1939) 23 MINN. L. REV. 559.

⁷ Elections are held biennially in California. In 1939 a special election on a revised form of old age pension was held, at which other measures were also presented. See text *infra*.

⁸ *Cf. Note* (1925) 13 CALIF. L. REV. 151.

tional amendments referred by the legislature; (c) statutes presented by initiative; (d) enactments of the legislature referred to the people. They are called indiscriminately "propositions" and are adopted or rejected by simple plurality vote.

It must not be supposed that the public renders snap-judgment on these issues. The elections are preceded by a vigorous public discussion which goes a considerable distance toward the community's roots, and if the proposal deals with a controversial issue the roots are clearly reached, as will be evident from the number of votes cast.

A "controversial" issue may be defined as not so much a project which has been much discussed or on which, to quote Sir Roger de Coverly, there is much to be said on both sides, but rather as one which has generated a considerable deal of heat in the discussion. In most instances it is either the affirmative or the negative—rarely both—which is supported with the kind of intensity which we associate with the word "controversy", but intensity on either side suffices to bring the matter to the active attention of the public.

Something of a pattern of public discussion has been created within the last fifteen years. When all the proposals have been filed, their titles and subject matter are announced in the press, or can be obtained by interested parties from the Secretary of State. This takes place several months before the election. If the matter is a "controversial" one—if we bear in mind what "controversial" means—the attack on it in the press and in poster advertisements begins almost at once. For most proposals discussion is not likely to begin until a month or so before election.

Besides the newspapers, the chief organs of discussion are the "forums" which are held for that very purpose in organizations of many types. Forums are often under the sponsorship of the Extension Division of the University of California, or of other colleges and schools. They are by no means confined to large cities. Rural districts in California often maintain a "consolidated" high school, and in many of these schools forums are conducted in which proponents and opponents of particular measures are heard and submit themselves to questions. Many of the churches, chiefly in the cities, maintain similar forums. Further there are a number of clubs and federations, like the League of Women Voters, in which discussions often in the form of debates are briskly carried on. To these must be added similar discussions in labor unions.

Shortly before the election and as a rule after lengthy examina-

tion by committees, the Commonwealth Club in San Francisco and the Town Hall in Los Angeles ballot on the proposals. The voters, to be sure, are rarely more than one-third of the members, if so many. The balloting, however, is a fair sample of the sentiment of both clubs. Both profess complete impartiality but it will doubtless be admitted that the great majority of the members in both cases are decidedly conservative.

The newspapers in nearly all the larger cities prominently announce their recommendations on all the measures proposed. How far these recommendations are attended to is problematical. It is a matter that deserves a special study as part of an examination of newspaper influence.

But besides all these sources of information on "controversial" issues, or indeed on any issue in which an organized group takes a special interest, the voters are likely to receive in the mail letters and "material" proving or disproving the need of the legislation proposed. Often, during the war years, the flood of this mail has been such as to arouse legitimate wonder whether the paper shortage was as serious a matter as it was declared to be.

And finally, some two weeks before the election, the County Clerk sends to each voter a sample ballot which contains not only the title of the proposition with a brief summary and the full text as well, but also arguments pro and con submitted by the supporters and the opponents of the bill. The signatures often indicate just what persons or "interests" are furthering or opposing the proposed changes. This fact often is given significance by the voters.

It may be said, therefore, that popular legislation in California has not only a history, but has traditions. And if it is objected that the time involved—less than a generation—is too little for the establishment of traditions, we may say that the accelerated tempo of American life is equal to producing traditions in an even shorter time. At all events, this institution in California is no longer in the experimental stage.

In the year 1936, twenty-three propositions were presented.⁹ It was a year of great political excitement, when President Roosevelt was at the height of his popularity and when he received the highest popu-

⁹ The Secretary of State publishes each year a report of the total vote cast for all candidates voted for at every election, primary or final. A complete file of these publications is available in the library of the Bureau of Public Administration of the University of California, from which the following tables are derived.

lar vote ever given a candidate, fully three-fifths of the total cast. In California, he received 1,766,836 against 836,431 cast for Landon. The total vote cast for all presidential candidates was 2,712,342 out of a total registration of 3,253,821. No other state-wide candidates were elected that year. The total vote cast for members of congress in 1936 was 2,258,419.

The vote on the propositions was as follows:

PASSED			
	For	Against	Total Vote
15. Relief to assessment districts; enables legislature to provide refunding, etc.	857,818	764,615	1,622,433
17. Computing taxes on unsecured property.....	967,896	605,791	1,573,687
21. Establishing women's prison	879,010	871,557	1,750,567
24. Regulating procedure for city and county charters	834,864	751,314	1,586,178
DEFEATED			
2. Repealing income tax	737,629	1,193,225	1,930,854
3. Creating Alcoholic Beverage Commission.....	748,486	1,432,559	2,181,045
4. Authorizing tideland oil drilling from uplands.....	971,569	1,081,346	2,052,915
5. Los Angeles County Exposition bonds.....	645,279	1,013,332	1,658,611
6. Authorizing Pacific Exposition	670,587	911,223	1,581,810
7. Regulating county and municipal civil service, exempting some offices	670,407	1,174,612	1,845,019
8. Permitting constitutional provision for registration to be amended by legislature.....	471,478	1,193,690	1,665,168
9. Providing local option	719,185	1,474,571	2,193,756
10. Motor fuel taxes and license fees.....	829,440	1,061,114	1,890,554
11. Providing for teachers' tenure.....	438,490	1,259,603	1,698,093
12. Establishing Court of Criminal Appeals.....	278,498	1,378,765	1,657,263
13. Eminent domain for state expositions and fairs.....	322,526	1,282,644	1,605,170
14. Allowing consolidated city and county government for small counties	793,050	887,235	1,680,285
16. Authorizing water districts to hold stock of water companies	706,307	883,339	1,589,646
18. Excise tax on oleomargarine	400,367	1,513,924	1,914,291
19. Extending authority for legislative printing.....	709,095	836,882	1,545,977
20. Authorizing publicly-owned museums or art galleries for all cities and counties	705,417	917,941	1,623,358
22. Chain-store tax	1,067,443	1,369,778	2,437,221
23. Changing name of Railroad Commission to Public Service Commission; eliminating fixed terms of service	306,831	1,331,767	1,638,598

No proposition of that year involved any fundamental issue. Of the four passed, three passed by small majorities and all of them were adopted by a total vote less than the average vote cast for all propositions.

A few had elicited a considerable popular interest. They were No. 4, permitting lateral drilling for oil in tide-lands; and No. 22, the chain-store tax. In both there had been vigorous campaigns. Both were defeated by relatively small majorities in a large total vote.

No. 4 was defeated by less than 110,000 in a total vote of over two millions, and No. 22 by 300,000 in a total vote of over 2,400,000. Of the other propositions for which large votes (over 1,900,000) were cast, *i.e.*, 2, 3, 9, 18, public discussion before the election was certainly not active. In no instance had the major parties taken any stand on any of the propositions.

In 1938, twenty-five propositions were submitted. This was the year of a gubernatorial election in which Mr. Culbert Olson was elected governor, an election which gave California its first Democratic governor in fifty years. The total vote cast for governor was 2,695,904, out of a registration of 3,611,416. The vote on the propositions was as follows:

PASSED

	For	Against	Total Vote
3. Motor vehicle taxation and revenue.....	1,505,043	766,063	2,271,106
5. Fishing control	1,309,007	795,023	2,104,030
6. Taxation of insurance companies.....	1,424,076	609,135	2,033,211
7. Relief administration	1,166,589	834,332	2,000,921
12. San Francisco Bay Exposition.....	1,067,573	943,533	2,011,106
14. Removal of judges upon conviction of crime.....	1,782,350	346,701	2,129,051
17. Increasing time on initiative petitions.....	985,255	832,359	1,817,614

DEFEATED

1. Anti-picketing and anti-strike measure.....	1,067,229	1,476,379	2,543,608
2. Regulation of pounds	721,126	1,581,258	2,302,384
4. Highway and Traffic Safety Commission.....	904,491	1,358,351	2,262,842
8. Apportionment of funds to political subdivisions.....	479,500	1,395,523	1,875,023
9. Veterans tax exemption	839,379	1,288,517	2,127,896
10. Oil leases on state-owned tidelands at Huntington Beach	491,973	1,666,251	2,158,224
11. State and county boards of equalization.....	540,578	1,371,153	1,911,731
13. Revenue bond act of 1937.....	516,591	1,465,841	1,982,432
15. Judicial Council	806,742	972,526	1,779,268
16. Retirement of judges	822,982	1,105,183	1,928,165
18. State money	826,901	998,421	1,825,322
19. Lending or gift of public money.....	405,552	1,493,574	1,899,126
20. Taxation	372,386	1,836,585	2,208,971
21. Church, orphanage, and college tax exemptions.....	760,482	1,323,176	2,083,658
22. City charters	702,387	1,086,405	1,788,792
23. Legislative help	451,880	1,378,262	1,830,142
24. Leasing state-owned tidelands for oil drilling.....	309,795	1,744,801	2,054,596
25. Old age pension involving issuance of warrants every Thursday ("Ham and Eggs")	1,143,670	1,398,999	2,542,669

It will be seen that for fifteen of the twenty-five propositions more than two million votes were cast, which includes six of the seven measures adopted. In the case of the two measures which were most hotly debated, Nos. 1 and 25, the total vote was over two and a half million which was very near the total vote for governor.

These two measures, the anti-picketing and the "Ham and Eggs"

pension law, were the subjects of vigorous and well-organized campaigns. In the case of No. 1, the labor bill, the proponents of the measure were far more vigorous than the opponents and had much greater newspaper and organizational support. In the case of the pension bill even more passion was displayed by its supporters. An army of pension enthusiasts in public and private meetings—all well-attended—backed by an extensive use of the radio, urged the passing of the bill.

Both measures were defeated, the anti-picketing bill by more than 400,000 votes, the pension bill by the much smaller margin of 250,000.

The only other measure which aroused any large public interest was a new attempt to secure oil leases from state-owned tide lands. This measure was defeated by nearly four to one in a vote of over two million.

In 1939, a special election was ordered by Governor Olson because of the huge number of signatures, more than a million, to a new petition for old age pensions. This proposal, while slightly different from the "Ham and Eggs" proposal defeated in the general election of 1938, contained a provision for weekly "warrants" and further added one for a gross income tax. One other proposition was added by initiative petition and two almost identical propositions were referred to the voters by the legislature. Both referendums were passed.

	For	Against	Total Vote
3. Regulating pawnbrokers I	1,853,663	753,480	2,607,143
4. Regulating pawnbrokers II	1,850,811	732,873	2,583,684

The two initiatives were defeated.

	For	Against	Total Vote
1. Old age pensions, with warrants and gross income tax	993,204	1,933,557	2,926,761
2. Regulating chiropractors	801,173	1,894,764	2,695,937

The pension bill, accordingly, did not receive as many votes as there were signatures to the petition which placed it on the ballot. The vote was nearly two to one against it in a total vote of more than 2,900,000, although in the previous year it had failed of passage by a relatively narrow margin. What is particularly noteworthy is that the other measures which, so far as public discussion went, seemed to be of only mild interest were similarly defeated or passed by a two to one vote in a large total.

The next general election was in 1940 which was a presidential campaign, conducted with even more warmth than the campaign of

1936. Mr. Roosevelt was once again elected but with a considerable diminution of plurality. It had been 930,000 over Mr. Landon in 1936. It was only 526,000 over Mr. Willkie in 1940 in a much larger total.

Seventeen propositions were submitted, and the vote was as follows:

PASSED			
	For	Against	Total Vote
1. Releasing obligations, etc., taken as security for state aid to aged persons.....	1,508,547	922,109	2,430,656
2. Releasing obligations, etc., taken as security for state aid to aged persons.....	1,519,963	853,243	2,373,206
3. Authorizing institutions for felons	994,101	991,722	1,985,823
4. Making returns for election of governor and lieutenant-governor	1,198,015	673,794	1,871,809
8. Creating Fish and Game Commission.....	1,287,473	735,589	2,023,062
10. Providing for public improvement.....	1,138,237	680,353	1,818,590
11. Permitting state to own shares in mutual water companies	1,151,911	810,549	1,962,460
12. Allowing interim powers to legislative committees....	929,527	855,845	1,785,372
DEFEATED			
5. Daylight saving	785,634	1,834,564	2,620,198
6. Superior court review of acts of administrative officers	907,761	921,832	1,829,593
7. Increasing number and power of district courts of appeal	723,330	1,082,647	1,805,977
9. Creating tax-exemption for vessels	530,673	1,480,475	2,011,148
13. Authorizing sale or lease of state park lands containing oil	315,408	1,776,128	2,091,536
14. Apportionment of certain moneys to political subdivisions	759,683	1,110,087	1,869,770
15. Authorizing transfer of funds by city treasurer.....	709,385	1,153,446	1,862,831
16. Annual budget for legislature and governor.....	556,469	1,268,684	1,825,153
17. Authorizing of insurance for personal liability of public officers	807,199	1,138,039	1,945,238

Of the seventeen propositions submitted to the people in this year, eight were adopted. It is difficult to find in any one of the eight anything that could be designated as a matter of popular interest. Indeed, one, No. 12, which gave interim power to legislative committees, was—so far as there was opposition of any kind—vigorously attacked by liberal and progressive spokesmen. It nonetheless passed although by the scant majority of 73,000 votes in a total vote which was substantially below the average for that year.

The authorization for prisons was passed by an even smaller majority, (2379 in a somewhat larger total). But all the other measures passed with substantial majorities, although none had the benefit of any real campaign.

Similarly, only one of the measures rejected had received much public discussion. This was No. 5, the daylight saving plan, which was defeated by two and a half to one. No. 6, which was much agitated by lawyers and administrators, was defeated by 14,000 votes in a total of over 1,800,000. All the others were defeated by large pluralities despite the fact that they would normally seem unlikely to arouse popular support or opposition.

Perhaps exception should be made for Nos. 9 and 13. No. 9 was a tax exemption measure, a type which is generally unpopular. The majority against it was 950,000. No. 13 involved oil in public lands. That is nearly always enough to elicit an emphatic "No". In this case the majority against it was 1,460,000. In both instances the total vote was over 2,000,000.

In 1942, the country was at war. Mr. Warren, a Republican, was elected governor. The total vote cast was 2,264,288 which was only 59.26 per cent of the registration and was more than 400,000 votes less than the total vote cast four years earlier for governor. Eighteen propositions were submitted of which seven were adopted.

The vote was as follows:

PASSED

	For	Against	Total Vote
1. "Hot Cargo" prohibited during war.....	1,124,624	909,061	2,033,685
7. Regulating taxation of insurance companies.....	987,687	449,094	1,436,781
8. Restricting use of fish and game funds to fish and game purposes	1,100,033	398,944	1,498,977
11. Regulating wrestling and boxing matches.....	1,022,107	429,205	1,451,312
12. Schools districts of 5th and 6th class may acquire stock in water companies	789,385	609,226	1,398,611
17. State treasurer trustee of certain state moneys.....	897,132	426,872	1,324,004
18. Changing personnel of Reapportionment Commission	859,783	421,919	1,281,702

DEFEATED

2. Annual legislative sessions and budgets.....	623,316	840,494	1,463,810
3. Establishing a basic science requirement for medical, dental, osteopathic or chiropractic schools.....	584,324	1,132,957	1,717,281
4. Repealing income tax	763,700	907,311	1,671,011
5. Compensation of legislators increased to \$200 a month	531,931	961,023	1,492,954
6. Board of Forestry established.....	714,527	736,977	1,451,504
9. Compensation of specified state officers may be changed during term of office.....	647,721	756,810	1,404,531
10. Reorganization of building and loan associations....	378,805	1,015,128	1,393,933
13. Reorganization of Board of Equalization.....	617,990	758,388	1,376,378
14. Changing interest on loans and judgments.....	511,810	851,076	1,362,886
15. Regulating appeal procedure	284,009	999,255	1,283,264
16. Judicial review of administrative decisions (Laisne case). ¹⁰	323,558	1,103,717	1,427,275

¹⁰ Laisne v. Cal. St. Bd. of Optometry (1942) 19 Cal. (2d) 831, 123 P. (2d) 457.

The most "controversial" was the "Hot Cargo" bill already passed by the legislature and referred to the people. It was expressly made a war measure and limited to the duration of the war. Both sides conducted an active campaign. It was the only measure in which more than 2,000,000 votes were cast and it was passed by a majority of 215,563.

The most notable thing about all the other measures, both those that passed and those that failed, was the small number of votes cast. Only two received more than 1,500,000, Nos. 3 and 4. Both were defeated, No. 3 by over 500,000, and No. 4 by 140,000. In both cases more popular spokesmen opposed than supported the measures.

In all other cases, the total vote was small. The smallest vote (1,281,702) was for No. 18 which passed by two to one. Very close to it was the No. 15 (1,283,264) which failed by nearly four to one. Both votes were less than half the total vote for governor and both were on matters of administrative or legal procedure in which a decided preference one way or another on the part of the people would normally not have been expected.

The year 1944 was once more a presidential year. The total vote for president was 3,566,734 which included absentee and federal war ballots. Roosevelt received 1,988,564 as against 1,512,965 for Dewey, smaller than his majority had been over Willkie. Only twelve propositions were presented, of which eight were adopted and four rejected. "This was the first time that more than half of the propositions were successful.

The vote was as follows:

PASSED			
	For	Against	Total Vote
1. Veterans Bond Act	2,385,571	333,892	2,719,463
2. Veterans exemption from taxation.....	2,244,775	557,949	2,802,724
3. Authorizing legislature to fix compensation of constitutional officers	1,285,238	1,163,543	2,448,781
4. Exemption of religious, charitable and hospital institutions	1,532,141	1,277,160	2,809,301
5. Reinstatement of public officers after military service	2,230,692	372,722	2,603,414
7. Allowing expenses of legislators	1,285,929	1,081,759	2,367,688
9. Funds for elementary schools.....	1,753,818	996,808	2,750,626
10. Permitting increase of compensation of officials during term	1,250,876	1,156,956	2,407,832
DEFEATED			
6. Annual session of legislature	935,763	1,408,066	2,343,829
8. Validating tax deeds	745,771	1,539,318	2,285,089
11. Retirement payments; gross income tax.....	1,017,924	2,089,102	3,107,026
12. Anti-closed shop	1,304,418	1,893,589	3,198,007

The vote in all cases was large, in two cases over 3,000,000. The extraordinary vote was due to elements that were sure to interest the public. No. 11 was a revival of the pension proposal. It was, however, a much less objectionable measure than the two "Ham and Eggs" bills of 1938 and 1939. It wholly eliminated the "warrants" which were both economically impracticable and almost surely unconstitutional. But it undertook to finance the great increase in the pension burden proposed by means of a gross income tax, an obviously regressive and unsound method of taxation.

No. 11 was defeated by over a million votes, better than two to one in a total of over 3,000,000.

No. 12 was directed against the closed shop. It carried the title "Right to Work" but was taken by labor unions of both federations as an undisguised attack on them. The support of the amendment was chiefly undertaken by the Merchants and Manufacturers' Association of Los Angeles, which has a long record of consistent anti-union agitation. The opposition was sponsored by the State Federation of Labor, a branch of the American Federation. Citizens' committees against the bill were formed in many cities and held meetings opposing it. The campaign for and against was conducted in the usual fashion, by radio, by forums, by mailing literature and by seeking the support of various types of organizations.

It will be remembered that in 1938, when the federal government was successfully urging labor legislation and when a Democratic governor with an unbroken pro-labor record was elected, an anti-labor proposition, the famous No. 1, was defeated by 400,000 votes in a total of over 2,500,000. The anti-labor forces got forty-two per cent of the vote. In 1942, when public feeling against wartime strikes had roused a strong feeling of opposition to labor, the outlawing of "Hot Cargo" strikes for the duration of the war had passed by a narrow majority, fifty-two per cent out of a vote of 2,000,000.

This latest attempt in 1944, while the war was still going on and when the anti-labor feeling was still being persistently whipped up by reason of the continuance of strikes, the measure was lost by nearly 600,000 votes out of a total of nearly 3,200,000. The anti-labor percentage was 40.8 per cent, less than the vote in favor of No. 1, four years earlier.

The eight acts passed contained a number of measures which ordinarily are rejected. Nos. 2 and 4 were exemption statutes which are usually unpopular. But No. 2 was an exemption statute for veterans

which was passed by four to one in a large vote. The war was still going on. The exemption in No. 4 for religious and charitable institutions was also passed but by a little over 250,000 which in view of the rather generous temper of the electorate was fairly close.

All the measures for veterans were passed by large majorities in large total votes, No. 1 (Veterans Bond Act) by seven to one, and No. 5, reinstatement of veterans in public office, by the same vote. Funds for public schools (No. 9) were equally voted by the large majority of 800,000. But Nos. 3, 7 and 10 which seemed to be in the interests of the legislature or of public officers were passed by small pluralities: No. 3, by 121,000; No. 7, by 200,000; No. 10, by about 94,000. And No. 6, which provided for annual sessions of the legislature, was defeated by 470,000.

The other bill defeated, No. 8, for validating tax-deeds, fell foul of a popular suspicion that some kind of a job was being planned. The proposal was defeated by nearly 800,000 votes.

The year 1946 was the year in which the Republicans for the first time since 1928 got control of both Houses of Congress. Governor Warren, a Republican, received both nominations and was of course elected as well as all other Republican candidates for state offices. The total vote for governor was 2,759,641, which however was 500,000 more than the total vote in 1942 when there was a contest, and very near the vote for governor in 1938, when Olson was elected.

Seventeen propositions were submitted of which twelve were adopted and five rejected, once more giving the successful ones a majority.

PASSED

	For	Against	Total Vote
1. Veterans Bond Act	1,818,323	467,364	2,285,687
3. Minimum salary for teachers (\$2400)	1,772,370	610,967	2,383,337
4. Business loans for veterans	1,168,764	1,125,123	2,293,887
6. Annual sessions of legislature	1,312,683	682,108	1,994,791
7. County boards of education	1,468,519	600,848	2,069,367
8. County superintendent of schools.....	1,262,961	803,363	2,066,324
9. Creating deputy and subordinate superintendents of education	1,003,451	998,375	2,001,826
10. Authorizing legislature to fix governor's salary, not less than \$10,000	1,284,505	836,698	2,121,203
12. Permitting legislature to amend initiative laws subject to popular ratification	1,090,989	827,439	1,918,428
14. Succession to governor if lieut.-governor is incapacitated	1,629,030	384,813	2,013,843
16. Repealing educational poll tax	1,465,655	599,561	2,065,216
17. Changing name of Railroad Commission to Public Utilities Commission; appointments subject to senate approval	1,158,967	783,031	1,941,998

	DEFEATED	For	Against	Total Vote
2. Permitting greyhound racing		570,688	1,907,826	2,478,514
5. Creating a Court of Tax Appeals.....		586,412	1,458,568	2,044,980
11. Fair Employment Practice Act.....		675,697	1,682,646	2,358,343
13. Regulating the allocation of school funds.....		832,886	1,280,667	2,113,553
15. Validating legislative amendments to Alien Land Law		797,067	1,143,780	1,940,847

Again as in 1944 the participation of the people was high. In three cases, Nos. 3, 4 and 11, the vote was between eighty-five and eighty-eight per cent of the total vote for governor. The most decisive approval was given to No. 1, loans for veterans, four to one; No. 3, minimum salary for teachers, two and a half to one; the bill for the succession to the governorship, five to one; the repeal of the educational poll-tax, nearly three to one. In the same way, greyhound racing was rejected by three and a half to one and the Fair Employment Practice bill by two and a half to one.

The campaign against the last bill was conducted largely by persons who saw in it signs of "subversive" influence, although an almost identical bill was successfully sponsored by Governor Dewey in New York and had been drawn up by Senator Ives, who is not normally regarded as subversive. It is not likely that the blatant posters which raised this literally "red" herring had much influence on the result, which must be ascribed quite simply to the still unextirpated traces of race prejudice in the voters. A bill of this sort, although sponsored by Governor Warren, did not succeed even in being reported out of committee by the legislature.

While the people rejected this bill, a rejection in which active race prejudice certainly played a part, No. 15 which was almost openly anti-Japanese was defeated by some 300,000 majority in a total vote less than the average for that year, about seventy-five per cent of the total vote cast for governor.

One of the striking facts in the election was the passing of the bill for annual sessions of the legislature by better than two to one. This bill had been defeated in 1942 by 217,000 and in 1944 by 470,000. Another change of mind is registered in No. 10. In 1942 an attempt to authorize an increase in salary of public officials was rejected. Such a general authorization was passed in 1944 and in the last election, in 1946, it was specifically voted to authorize the legislature to fix the governor's salary at not less than \$10,000.¹¹

¹¹ \$10,000 was the governor's salary, which was less than that of several other state officials—notably the attorney general. Senate Bill 746 passed the state legislature and was signed on May 12, 1947 by Lieut.-Governor Knight, raising the salary of the governor to \$25,000.

In these six elections, out of 116, forty-eight measures received total votes of over 2,000,000, two received totals of over 3,000,000. For these measures the total was about seventy-five or eighty per cent of the vote for governor or president. In no case did the vote fall below fifty per cent and the average was well over sixty per cent.

Nor can we see any predilection in favor of measures that can be called popular. Of the 116 measures voted on in these ten years, the great majority, whether of those passed or rejected, were "technical" matters, questions of regulation of administrative agencies or procedures, or authorizing such regulation. To determine just what can be called technical and what is a matter of general interest is not easy, but a rough estimate would be to say that eighty-three were such "technical" matters and that thirty-seven of these were passed and forty-six rejected. In no case, with the possible exception of that dealing with court review of administrative decisions (1942, No. 16) does the result of the popular determination seem open to serious objection.

In the thirty-three cases in which popular feeling was evident, eleven were passed and twenty-two rejected. Among these there were at least twelve cases out of the thirty-three in which what was commonly believed to be the popular view was not shown by the result of the vote.

Accordingly we may make the following general observations. The participation in direct legislation in California since 1935 is very high.¹² There is no uniform trend in favor of measures that are assumed to be popular.¹³ Besides those noted above, bills seriously reducing popular elections of judges and increasing the power of judges at the expense of a jury were passed in 1934. Pension measures have been three times defeated since 1938, in spite of almost fanatic efforts on their behalf. Pro-labor bills have been sometimes defeated and sometimes passed.

¹² In a special election held on Aug. 13, 1935, three constitutional amendments were submitted to the voters. The vote was as follows:

	For	Against	Total Vote
1. Legalizing State Building Bond Act of 1935	211,683	241,414	453,097
2. Authorizing state's borrowing in anticipation of revenues	154,225	291,780	446,005
3. Authorizing contracts with Rector Dam Authority	191,623	256,449	448,072

The small vote is noteworthy compared to the large votes of all subsequent elections.

¹³ These measures were the following: 1936, No. 11; 1938, No. 25; 1939, No. 1; 1940, No. 12; 1944, Nos. 7, 10, 11 and 12; 1946, Nos. 6, 11, 12 and 15.

It may be interesting to compare the results in the elections with "conservative" sentiment as illustrated in the Commonwealth Club, which has been previously referred to. In all the years here analyzed, the propositions were debated in committee and in full session of the Club and were voted on by ballot. I shall not give the vote—always a small minority of the total membership—but merely the agreement or disagreement with the popular result.

1936	
Agreement	Disagreement
16	5

The Club made no recommendation on local option which was decisively defeated by the voters.

1938	
Agreement	Disagreement
20	4

The Club made no recommendation on tideland drilling which was defeated by five and a half to one. Of the two "controversial" measures, the Club agreed with the popular vote on the "Ham and Eggs" bill and disagreed on the anti-strike bill.

1940	
Agreement	Disagreement
10	7

It is worth noting that in one instance of disagreement, No. 12, which gave interim powers to legislative committees, the Club was on what would ordinarily be the popular side, but the people were not.

1942	
Agreement	Disagreement
11	6

The Club made no recommendation on No. 11 dealing with boxing and wrestling. On the one "controversial" measure, the "Hot Cargo" bill, the Club agreed with the popular vote in forbidding this type of strike for the duration.

1944	
Agreement	Disagreement
9	3

The most striking disagreement was that on No. 4, for tax exemption of charitable organizations which the Club rejected by a better than three to one vote and which passed by a narrow popular margin.

1946	
Agreement	Disagreement
11	5

On annual sessions of the legislature (No. 6) the two Club committees were equally divided in their combined vote.

The Town Hall of Los Angeles similarly votes on proposed measures. The composition of this organization is much like that of the Commonwealth Club of San Francisco. Only the last three reports of the Town Hall's action are available to me but they have a value as samples.

1942

Agreement
10

Disagreement
8

On the income tax the Town Hall was almost equally divided.

1944

Agreement
10

Disagreement
2

The vote was almost identical with that of the Commonwealth Club. Both clubs voted against increased funds for elementary schools (No. 9), and for the anti-closed shop measure (No. 12), of which the former passed and the latter failed with the people.

1946

Agreement
11

Disagreement
6

Both clubs rejected the Fair Employment Practice Act and greyhound racing by decided majorities, and both disagreed with the people on public school support (minimum of \$2400 for teachers) No. 3, and even more decidedly on loans to veterans, No. 4. No. 3 was passed by a large majority in the election. No. 4 barely got through.

The alternative to legislation by popular vote is the present practice of legislation by a representative legislature. The century-old controversy about the functions of representatives cannot be examined here. We may merely say briefly the two views that are usually opposed to each other are, first, the view that representatives are elected officials and not delegates or mouthpieces of the people, who must use their own judgment or discretion and are not bound by the expression of the opinions of their constituents even when it is unmistakable. The other view makes "representatives" what the word seems to mean, *i.e.*, the means of declaring a popular determination that cannot be made clear in any other way.

Of a representative legislature, it may be said that considered as a body of officials, there are too many of them; and considered as a

mouthpiece of the public will, it as often thwarts that will as fulfills it. Very few legislatures are in fact "representative". Tricks of apportionment give some residents—usually in the rural areas—far greater voting strength than their numbers justify. And despite the legend to the contrary, there is no evidence that these legislators are superior in wisdom or character to the others.

But the most serious defect of a legislature is its susceptibility to pressures that have become in so many instances a crying scandal.¹⁴ The growth of organized lobbies has created what is often correctly called a "third house", which has far more power over our destinies than the formally responsible legislature. Licensing and registration of lobbyists have scarcely mitigated the evils they create. The requirement of an accounting is, to be sure, a more effective method of control.¹⁵ But a still better and even more effective method would be to shift more and more legislative activity to the legislative body which, as this record indicates, has shown itself both effective and competent and which, whatever other defects it may have, cannot be manipulated by lobbies.

¹⁴ The problem of lobbying in our legislatures has been much studied and whatever can be said for it has been sifted and examined a dozen times. See (1938) 195 ANNALS p. 1 *et seq.*; Logan, *Lobbying* (1929) 144 ANNALS (Supp.) 1. For a full bibliographical report on this subject see LASSWELL, PROPAGANDA AND PROMOTIONAL ACTIVITIES (1935). So far as Congress is concerned see HERRING, GROUP REPRESENTATION BEFORE CONGRESS (1929); MILLER, LOBBYING IN CONGRESS (1932); Skelton, *The Lobby System at Washington* (March 1929) 4 SOCIAL SCIENCE p. 1 *et seq.*; HEARINGS BEFORE COMMITTEE ON JUDICIARY, SENATE, ON S. RES. 20, 71st Cong. 2d Sess. (1930). For the states generally see BEEK, *THE CALIFORNIA LEGISLATURE* (1942); YOUNG, *THE LEGISLATURE IN CALIFORNIA* (1943); Zeller, *Pressure Groups* (1938) 11 STATE GOVERNMENT 144. The most depressing picture is that of the *Legislative Investigative Report* submitted by Philbrick to the Grand Jury of Sacramento County, California, Dec. 28, 1938. It was never printed, but is available in a "processed" form in a number of repositories, among them the library of the Bureau of Public Administration of the University of California. Cf. *Samish v. Sup. Court* (1938) 28 Cal. App. (2d) 685, 83 P. (2d) 305.

¹⁵ Lobbying is made a special Title (Title III, §§ 302-311) of the Legislative Reorganization Act of 1946. 60 STAT. (1946) 839, 2 U. S. C. A. §§ 261-270. Section 308a [60 STAT. (1946) 841, 2 U. S. C. A. § 267] provides for registration and goes on to say:

"Each such person so registering shall, between the first and tenth day of each calendar quarter, so long as his activity continues, file with the Clerk and Secretary a detailed report under oath of all money received and expended by him during the preceding calendar quarter in carrying on his work; to whom paid; for what purposes; and the names of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editorials; and the proposed legislation he is employed to support or oppose."

If this is enforced, it will be an undoubtedly effective way of checking some of the worst abuses of lobbying, provided that the "detailed report" is accessible to the public. What the result will be depends on just this matter of enforcement.

In my previous article on this topic I asked whether some practical or theoretical publicist somewhere would have the hardihood to suggest that we might abolish the legislature altogether. I had not at that time noted the article by Judge John D. Shafer of Pittsburgh, Pennsylvania. In his article, *A Teutonic Institution Revived*,¹⁶ after discussing the fact that representative government was based on the impossibility of assembling large groups of citizens in one place, he says:

"Until the invention of the railroad, the telegraph and the newspaper, and what is more, the bringing of them into universal use, there was no substitute for the voice of the leader in the council uttered in the hearing of all. . . . The people are now in fact at all times assembled and ready and able on any reasonable notice to say whether they agree to any proposed action or not, and that so we should apply the maxim *cessante ratione, cessat et ipsa lex*. As the reason for what is called representative government has ceased, let it, too, cease, or at least, let it take a subordinate place where it may still be useful. Let the people resume the privilege of determining directly and in their own persons what they will do or have done, as their ancestors did long ago. The referendum is therefore not a transitory invention of doctrinaires, but a practical, long tried institution, about to be brought back to us on the tide of time. The direct government of the people by themselves made impracticable by circumstances has now by change of circumstances become practicable once more."

Judge Shafer should not have confined his historical basis to the practice of ancient Teutonic tribes where, except for approving of tribal chieftains and decisions on war and peace, it was little developed. The peoples from whom our civilization is derived, the Greeks and Romans, began with a system of popular legislation and never ceased to regard it as the only really proper source of law. The Institutes, written by the authority of an absolute, semi-divine monarch for subjects who had no rights against him, declare: *Lex est quod populus Romanus . . . constituebat*.¹⁷ Everything else is formally admitted to be at best quasi-law. And the Institutes give the famous rationalization which has served publicists ever since as the sufficient reason for representative government: *cum auctus est populus Romanus in eum modum, ut difficile sit in unum eum convocari legis sancienda causa*.¹⁸

¹⁶ (1913) 22 YALE L. J. 398, 406.

¹⁷ INSTITUTES OF JUSTINIAN I. 2.4. pr.

¹⁸ *Ibid.* at I. 2.5. pr.

If the real reason for representative government were this rationalization, Judge Shafer's argument for abolishing it would be unanswerable. The reason for the rule has gone. Political scientists, sometimes aided by experience, have, however, evolved other reasons which cannot be summarily brushed aside. Nor did Judge Shafer ask for more than a qualified rearrangement of the legislative functions.¹⁹

But if it turns out that the evils of lobbying under modern conditions are almost ineradicable, the question might arise whether the legislature as it is now organized might not be assigned a more limited sphere of legislative activity than it has, one that will give the kind of pressure that is now palpably being put upon it a limited sphere of operation. Bills involving important policies, like those of housing, public health, highways, natural resources, could be made to require automatic references to the people. In emergency matters, a special election as in 1939 can be held without any reason to doubt that the people will go to the polls in sufficient numbers, or to assume that their vote will be reckless or unconsidered.

A concrete suggestion may help to indicate how legislative activity may be divided. The constitution at present permits the legislature to refer bills it has passed to the people for approval. The governor is in our system part of the legislative machinery, since his veto gives him a vote equal to one-sixth of the vote in each house. Suppose we had a provision which permitted the governor when he disapproves of a measure or is in doubt about it to refer it to the people. This would not mean that all vetoed measures would automatically be so referred, but would merely permit such reference. Or else, it might be provided that any bill which has been rejected in either house by a less than two to one vote might, if the governor approves, be similarly referred.²⁰

¹⁹ Lest it be supposed that Judge Shafer, who died in 1926, was a desperate radical, it may be well to point out that he was Dean of the Pittsburgh Law School, Vice-President of the Carnegie Institute, a Republican and a Presbyterian.

²⁰ The justification for this suggestion lies in the following facts. An act passed by the legislature by a bare majority will not become law if it is vetoed by the governor, unless an additional sixth of the legislature votes with the majority to override his veto. This is equivalent to giving the governor a voice in legislation equivalent to one-sixth of the votes in each house.

If, therefore, a bill before the legislature has been passed by more than one-third, we may say that this one-third added to what may be called the "vote" of the governor constitutes a majority. There would be a good reason not to allow this as a majority for passing a bill. There seems no very good reason why this may not be a good majority for referring it to the people.

In such a situation, two such controversial measures as the public health bill of 1943 and the highway bill of the present legislative session could be taken before those who should have the final determination and who could not be swayed by the lobbies whose influence governor after governor has so sharply attacked.

The inferences which I felt justified in making in the former article²¹ seem amply confirmed by the four elections that have taken place since. Direct legislation can deal with complete competence—at any rate with a competence equal to that of representative legislatures—with the technical and routine problems which need legislative intervention. So far as large problems of public welfare are concerned, it is markedly more likely to reach a fair and socially valuable result.

One thing is clear. The vote of the people is eminently sane. The danger apprehended that quack-nostrums in public policy can be forced on the voters by demagogues is demonstrably nonexistent. The representative legislature is much more susceptible to such influences.

The evils of democracy that enemies of our system inveigh against are really abuses of the representative system. These abuses can doubtless be cured without destroying the theory of representation. Some of them, however, can clearly be cured by more democracy. Popular legislation as practised in California since the great days of Hiram Johnson is a demonstration of that fact.

²¹ *Supra* note 6.