Administrative Capacity in Direct Democracy

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The relationship between democracy and regulation is contested. At the federal level, in the absence of a national initiative of referendum process, or democratic control over regulators themselves, we find some democratic accountability in other ways — like the indirect election of the President and the direct election of Congress. Whether these proxies provide sufficient democratic input into the regulatory process is the matter of some debate.

Things look different at the state level. Voters in most states elect some form of economic regulator, and in many states, voters simultaneously enjoy powers of direct democracy. As a result, state-level administrative structures have long been dependent on popular input. For much of the late nineteenth and early twentieth centuries, voters directly elected many regulators. Far-reaching reforms to state governments during the twentieth century reformed the relationship between the electorate and regulation, and voters agreed to an implicit trade: their power to elect regulators for a new power to propose legislation and constitutional amendments of their own. Through these new powers, voters began to play a significant role in shaping administrative structures — they passed judgment on reorganizations of their states'

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executive branches, the creation of new agencies and departments, and the introduction of regulation to new areas of economic activity.

But the role of voters in shaping their states' administrative structures is under attack. Many state legislatures have attempted to impose new restrictions on the initiative and referendum process — which would visit unique harms on voters' powers to create and modify structures. At the same time, the strict application of subject-matter restrictions, like single-subject requirements, by state courts disproportionately targets administrative reforms.

The role of voters in setting structure, rather than directly setting policy, has long been ignored. But this rich history adds a great deal of context to debates over the relationship between democracy and regulation. In this Article, I explore the long history of direct voter involvement in creating regulatory structures, beginning with their ability to pick individual regulators in contested elections, and continuing with their power to initiate statutes and constitutional amendments to restructure the administrative states. I argue that the history of voter involvement in modifying state administrative structures is legally significant. In an era in which state-level policymaking is more important than ever, and in which state administrative and constitutional law are increasingly taken seriously, this history matters. It should inform how state constitutions' initiative and referendum powers should be interpreted, and the context in which statutory restrictions to these powers should be reviewed.

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INTRODUCTION

Voters have little *direct* say over regulation in the United States. True, Congress is elected by the public to pass laws that set the contours of what kind of policies executive agencies can set,[1] and the agencies are presumably held accountable vis-à-vis the public's election of the President.[2] As such, voters can certainly *vote* for presidential or congressional candidates who promise certain types of regulatory policies,[3] or to create or abolish certain regulatory agencies[4] — but these claims to democratic control are derivative at best.

[1] *See, e.g.*, Jennifer L. Mascott, Gundy v. United States*: Reflections on the Court and the State of the Nondelegation Doctrine*, 26 GEO. MASON L. REV. 1, 14 (2018) ("One outworking of these structural safeguards is the elected body of Congress making sure that legislation sets forth principles to guide the discretion of the executive branch as it carries out statutory commands.").

[2] Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 865 (1984) ("While agencies are not directly accountable to the people, the Chief executive is . . . .").

[3] *E.g.*, David Siders, *Democrats Preview Post-Trump Plan: Executive Orders*, POLITICO (May 5, 2019, 6:43 PM EDT), https://www.politico.com/story/2019/05/04/democrats-executive-orders-2020-1301633 [https://perma.cc/S96W-BPGT].

[4] *E.g.*, John Harwood, *"Oops" Moment Takes on a Life of Its Own*, N.Y. TIMES: THE CAUCUS (Nov. 13, 2011, 9:56 PM), https://archive.nytimes.com/thecaucus.blogs.nytimes.com/2011/11/13/oops-moment-takes-on-a-life-of-its-own/ [https://perma.cc/R963-VBP8]

In the absence of direct democratic oversight, citizens who aspire to participate in the regulatory process at the federal level might turn to the notice-and-comment period required in informal rulemaking. But as it currently stands, the opportunity for meaningful public participation in notice and comment is as-yet unrealized.[5]

Perhaps the public disconnect from forming regulatory policy is a virtue — or perhaps it's a vice. But any conclusions about its merits must be cabined to evaluating the development of *federal* regulatory policy.[6] The electorate has historically enjoyed a far greater role in setting *state* regulatory policy, especially with respect to the identity of regulators and the structure of regulatory institutions.

Beginning in the Gilded Age, and continuing through into the early Progressive Era, voters in almost every state enjoyed direct control over a sprawling range of bureaucratic levers through directly elected regulators. On their ballots, voters chose (and almost always in partisan elections) officials to set policy relating to agriculture, food and dairy, insurance, labor, mining, railroad, and water. Over time, this direct influence morphed into *indirect* control. Beginning in the early twentieth century, voters approved constitutional amendments — or new constitutions altogether — that converted many previously elected offices into gubernatorially appointed ones. They similarly elected governors and legislators who pledged to shorten ballots, removing from the electoral process many offices that had niche, specialized

("'It's three agencies of government when I get there that are gone,' Mr. Perry declared. 'Commerce, Education and the, uh, what's the third one there, let's see . . . .'").

[5] *See, e.g.*, David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 231 (noting that the "ostensible virtues of notice-and-comment procedures are today open to serious question"); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 422-28 (2005) (noting the "compromise acceptance" of notice-and-comment rulemaking). *But see generally* Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793 (2021) (discussing the results of a survey conducted for the Administrative Conference of the United States and how rule development can be democratized).

[6] Though as Josh Galperin has pointed out, there is at least one notable exception to this broad reality: the approximately 2,200 elected county committees within the Farm Services Agency in the United States Department of Agriculture. *See generally* Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 GEO. L.J. 1213 (2020) (exploring the dynamics of the elected county committees within the USDA); Joshua Ulan Galperin, *The Death of Administrative Democracy*, 82 U. PITT. L. REV. 1 (2020) (same).

responsibilities. The result was a sharp drop in the number of offices on the ballot at the state and local levels beginning in 1913 and continuing to the present day.

At the crux of this trade may have been an implicit proposition: voters may have been more willing to give up one form of direct control over policymaking in exchange for a combination of direct and indirect controls in other forms. That is, voters might have exchanged their power to directly elect regulators for something theoretically greater — the power to elect powerful, democratically accountable governors *and* the powers of initiative and referendum. With these newfound powers, voters were able to propose state statutes or constitutional amendments — or to overturn legislatively enacted state statutes. As a result, voters passed judgment on the regulatory structures created by state legislatures, and proposed their own, in a sprawling number of areas.

But in recent years, states have increasingly moved to restrict voters' powers. State legislatures have raised the geographic distribution requirements for petition-gathering, imposed new subject-matter restrictions on the content of initiative proposals, and adopted new campaign-finance rules that target direct democracy.[7] Most courts have upheld these restrictions, with some notable exceptions,[8] and have strictly interpreted them to exclude many proposals from the ballot.[9] Accordingly, while voters in *some* states have achieved a wide set of policy goals — including the decriminalization of drugs,[10] raising the minimum wage,[11] expanding Medicaid eligibility,[12] expanding individual

[7] *E.g.*, Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 311-16 (2022) [hereinafter *State Institutions*].

[8] *See* Reclaim Idaho v. Denney, 497 P.3d 160, 191 (Idaho 2021).

[9] *See infra* Part III.

[10] Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 84-90 (2015).

[11] John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV. 1007, 1018-19 (2011) (discussing state efforts to raise the minimum wage as a response to congressional inaction).

[12] Lilliard E. Richardson, Jr., *Medicaid Expansion During the Trump Presidency: The Role of Executive Waivers, State Ballot Measures, and Attorney General Lawsuits in Shaping Intergovernmental Relations*, 49 PUBLIUS 437, 448-52 (2019).

rights,[13] and protecting the environment[14] — voters attempting to do the same in *other* states face obstacles that are prohibitively high.[15]

The application of subject-matter restrictions visits unique and disproportionate harm on voters' power to create or modify regulatory structures. Single-subject requirements prevent voters from proposing any measure that relates to more than one "subject."[16] Such an ambiguous requirement naturally lends itself to a spectrum of interpretations[17] — and administrative proposals are uniquely

[13] While scholars have explored the extent to which state constitutions have widely protected individual rights, see, for example, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 16-21 (2018) (discussing state constitutional development of individual rights) and EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 36-47 (2013) (same), some of the less widespread articulations of individual rights have gotten less attention — like the expansion of rights to bear arms, see, for example, MO. CONST. art. I, § 23 (amended 2014), establishing the right "to keep and bear arms," as well as "ammunition" and "accessories typical to the normal function of such arms"; emerging rights to privacy, see, for example, MO. CONST. art. I, § 15 (amended 2014), expanding the freedom from unreasonable search and seizure to "electronic communications and data" and MICH. CONST. art. I, § 11 (amended 2020) establishing the same, and MONT. CONST. art. II, § 11 (amended 2022) establishing the same; rights relating to agriculture and food, see, for example, ME. CONST. art. I, § 25 (amended 2021), establishing the "natural, inherent and unalienable right to . . . food," and MO. CONST. art. I, § 35 (amended 2014), establishing "the right of farmers and ranchers to engage in farming and ranching practices."

[14] Quinn Yeargain, *Decarbonizing Constitutions*, 41 YALE L. & POL'Y REV. 1, 50-58 (2023) [hereinafter *Decarbonizing Constitutions*].

[15] Seifter, *State Institutions*, *supra* note 7, at 311-16 (describing increased limitations placed on voters' direct democratic powers in states with legislatures hostile to the initiative and referendum).

[16] *See generally* Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35, 36-41 (2002) (discussing the single-subject tests used in several states); Millard H. Ruud, *No Law Shall Embrace More than One Subject*, 42 MINN. L. REV. 389 (1958) (exploring the single-subject rule in the context of state legislation).

[17] *See, e.g.*, Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629, 1650-60 (2019) (evaluating arguments used in defense of single-subject rules); Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 710-11 (2010) (arguing that single-subject tests are necessarily subjective); John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, 9 ELECTION L.J. 399, 400-01 (2010) (same). *See generally* Rachael Downey, Michelle Hargrove & Vanessa Locklin, *A Survey of the Single*

vulnerable to running afoul of it.[18] The administrative state itself does not fit comfortably within one single branch of government,[19] and as such, proposed structural modifications are naturally suspect.[20] Similarly, efforts to comprehensively regulate a field of economic activity — like cannabis production and sales — might technically involve multiple "subjects."[21]

I argue that, given the long history of voter involvement in creating administrative structures, these restrictions should be viewed with suspicion by state courts. To support this argument, I comprehensively survey, for the first time, the depth and scope of voter control over administrative development. I draw on original databases of every state elected office ever created and every state constitutional amendment or statute ever proposed to voters. Using this data, I conducted a survey of elected officials with regulatory responsibilities and looked at several thousand amendments and statutes that altered the structure of regulatory agencies, including the roles of the individual state actors exercising power within them and the rules under which they operate. I examine the scope of robust voter input in the establishment of administrative structures over the last century that had regulatory control over agriculture, alcohol, corporate and financial practices, the environment, gaming, health, insurance, labor, natural resource management, transportation, and even nuclear weapons and energy. This history, I argue, is vital for understanding how restrictions on direct democracy should be interpreted today.

Subject Rule as Applied to Statewide Initiatives, 13 J. CONTEMP. LEGAL ISSUES 579 (2004) (conducting nationwide survey).

[18] *See infra* Part III.

[19] *E.g.*, FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (noting that administrative agencies "have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking"); Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 814 (2000); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 403.

[20] *See infra* Part III.

[21] *See infra* Part III.

In Part I, I focus on the creation of elected institutions and actors empowered to act as economic regulators — and discuss the implicit choice that voters may have made to trade their power to *directly elect regulators* for the power to *shape regulatory structures*. I pick up in Part II by exploring the next part of the story — how voters were able, through statutes and constitutional amendments of their own devise, or through their consideration of statutes and amendments proposed by state legislatures, to set and modify the contours of the regulatory state itself. In this respect, Part II focuses on the agencies and departments, both proposed and created, that engaged as regulators.

Finally, in Part III, I survey the barriers to popular control that have been erected by legislatures. While many other scholars have dutifully catalogued and explored these barriers over the years, my particular interest here is how these barriers are particularly steep and present insurmountable obstacles in the context of proposing new institutional structures. Accordingly, I focus on the development of subject-matter restrictions — not the procedural hurdles. I conclude Part III by exploring how greater voter control over administrative structure could help resolve broader structural issues within state government.

But before proceeding too much further, I want to briefly stop and explain what I mean by "regulation"[22] and "voters" or "electorate." In using the word "regulation," I do not intend to stop at the water's edge of administrative law — or to refer solely and exclusively to the creation and promulgation of formal regulations by administrative entities operating pursuant to some state-level version of an administrative procedure act. Instead, my use of the term "regulation" is meant to capture the creation of state entities that are tasked with governing the conduct of private actors in the economy, as well as their powers to govern the same.[23] "Regulation" is additionally meant to refer to the

[22] *See, e.g.*, Thomas K. McCraw, *Regulation in America: A Review Article*, 49 BUS. HIST. REV. 159, 159 (1975) (noting that "the scope of 'regulation' defies precise definition, since every economic activity is regulated in some degree").

[23] I recognize that any line drawn here carries with it some amount of arbitrariness, but to keep this project manageable, my reference to "economic" regulation, and references to the conduct of private actors in the economy, are meant to exclude the regulation of state benefits from this conversation.

rules — again, not used as a term of art — that prescribe the bounds of how private actors may behave.

"Voters" and "electorate" are also words that will be used consistently throughout this piece. As Glen Staszewski has pointed out, monolithically referring to "voters" in the initiative context "assumes that initiatives appear almost magically on ballots and in statute books as a result of the 'will of the people,'" rather than by the work of special interest groups who do not always represent "the people."[24] My references to "voters" and "the people" in this Article does not assume anything about the practical use of the initiative and referendum process — and instead is done as a matter of simplicity.

Additionally, my references to the democratic process are to the *formal*, Schumpeterian democratic processes, focusing specifically on the process through which the electorate, by voting, determines the allocation of power.[25] There are flaws in using these words in this way. First, up until relatively recently in American history, decisions made by electorates could hardly be considered "democratic" or reflective of the majority will — because the electorates themselves were not representative of the *whole* electorate. Second, a focus on formal democracy obscures the non-electoral ways in which communities seek to ground policymaking in consent of the governed. Both of these critiques are valid and should be considered throughout this piece — and perhaps suggest a greater need to ground administrative construction in *real* democratic support than it has been in the past.

I. THE CREATION OF ELECTED REGULATORS

Early state systems of government were not terribly democratic. In some instances, this meant that democracy didn't work very well — legislatures were malapportioned and gerrymandering distorted

[24] Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 399 (2003).

[25] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269 (3d ed. 1950) ("[T]he democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote.").

representation from the beginning of the Republic.[26] In other instances, this meant that state institutions were not, themselves, democratic — many state governors were not directly elected;[27] there were not, in most states, *any* statewide elected officials whatsoever;[28] and many constitutions were not adopted with popular support.[29]

Within this construct, there was little opportunity for popular input in the construction of economic regulation — and indeed little economic regulation to speak of.[30] But economic and societal changes in the mid-nineteenth century justified a reimagining of state governance. Political power, up to this point concentrated in the landowning elites of society, was increasingly devolved to the people as Jacksonian democracy emerged as the dominant philosophy of the era.[31] Federal and state-level institutions were democratized — and popular control over the levers of government dramatically increased.[32]

In the states, this largely happened through rewritten constitutions. Most early state constitutions were bare-bones documents that created relatively simple forms of government.[33] Very few offices were constitutionally created — and fewer still were created as elected constitutional offices. As a result, state legislatures scaffolded statutes on top of the constitutional text, creating the outline of a recognizable state government. The new constitutions adopted in the 1840s and

[26] *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1775-77 (2022) [hereinafter *Countermajoritarian Legislatures*].

[27] *See, e.g.*, T. Quinn Yeargain, *Democratizing Gubernatorial Selection*, 14 NE. U. L. REV. 1, 9-14 (2022) (detailing history of methods of gubernatorial selection).

[28] *See, e.g.*, T. Quinn Yeargain, *Democratizing Gubernatorial Succession*, 73 RUTGERS U. L. REV. 1145, 1164 (2021) (noting that, in the earliest days of the United States, few states had democratically elected officials other than state legislatures).

[29] *See* Seifter, *Countermajoritarian Legislatures*, *supra* note 26, at 1768-69 (2021). *See generally* Jonathan L. Marshfield, *American Democracy and the State Constitutional Convention*, 92 FORDHAM L. REV. (forthcoming 2024) (manuscript at 24) (describing the adoption of early constitutions).

[30] HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 125 (1991) ("Until the mid-nineteenth century, regulation was the exception rather than the rule.").

[31] Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 872, 880 (2021).

[32] *See id.*

[33] G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 60-62 (1998).

1850s constitutionalized many of these offices — like the secretary of state, auditor, treasurer, attorney general, et cetera.[34]

The growth of statewide elected offices ultimately trickled down to the creation of regulatory offices, too. But many of these offices were created statutorily, not constitutionally.[35] These offices' statutory origins meant that they were easy to create — but also easy to destroy. This flexibility allowed for state governments to be relatively nimble in readjusting their structures to account for new governing realities. And indeed, the economic developments of the eighteenth century quickly justified the need for greater state involvement in the economy. The growth of interstate economic actors like railroads, a series of bank failures, the onset of industrialization, and increased social demands following the end of the Civil War all spoke to the need to modernize, democratize, and operationalize state government.[36]

As a result, the half-century stretching from the 1860s through the 1910s is replete with the creation and destruction (and sometimes resurrection) of elected offices. Some of the first regulators were railroad commissioners, the first of which appeared in the mid-nineteenth century. But the first railroad commissions had little real power.[37] Post-Reconstruction changes to the structure of state government resulted in the creation of a host of elected officials, with responsibilities ranging from supervising state printing to collecting and distributing economic statistics.[38] Many of these new elected officials were responsible for regulating different aspects of the economy. But in the early twentieth century, some reformers — accurately known as Short Ballot advocates — questioned the efficacy of electing so many offices.[39] A concerted effort developed to shorten

[34] *See, e.g.*, Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 63-66 (1982) (discussing changes to the structure of state constitutions through the mid-nineteenth century).

[35] Quinn Yeargain, *Shadow Districts*, 45 CARDOZO L. REV. (forthcoming 2023) (manuscript at 8-9) [hereinafter *Shadow Districts*].

[36] *See* MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 181-88 (1977) [hereinafter AFFAIRS OF STATE].

[37] Yeargain, *Shadow Districts*, *supra* note 35, at 12-13.

[38] *E.g.*, RICHARD S. CHILDS, SHORT-BALLOT PRINCIPLES 110 (1911).

[39] *Id.* ("If by a printer's error one of these little officers should be omitted from the ballot, the voters, if not notified, would vote the ticket and be none the wiser. If the

ballots by transitioning many elected offices with niche responsibilities into gubernatorially appointed offices. Section A details the creation of directly elected economic regulators, beginning with railroad commissions and continuing through the denouement of the Short Ballot Movement.

While not possible to recount the legal histories of *all* such offices, this Part details the creation of elected economic regulators. Here, I explore elected economic regulators with oversight over interstate economic activity, like railroad and insurance commissioners (Section A), agriculture (Section B), natural resources (Section C), and labor (Section D). I conclude in Section E by discussing the emergence of the Short Ballot Movement — and by describing the possible formation of an implicit "bargain" in which voters traded direct electoral power for greater administrative efficiency.

A. Interstate Economic Regulators

Even highly localized economic activities can have broad and far-reaching impacts.[40] But some activities have such an effect naturally and effortlessly. Two such examples are railroads and insurance companies. Though both began as local enterprises, their internal consolidation and expansion resulted in operations with an increasingly interstate flavor. The nature of their businesses was also more public than other companies, which prompted a different form of economic regulation — one rooted in principles of public service and utility. These realities also prompted perpetual questions about which level of government ought to regulate them — the states or the federal government? The answer was different for both industries. States began regulating the railroad and insurance industries in the mid-nineteenth century, creating commissions to oversee both. This state-level activity was followed by the creation of the Interstate Commerce Commission in 1887, which

Democratic nominee for state engineer in New York were by a printer's error slipped into the Republican column, he would be elected with the Republicans, unless the voters could be warned; and there would be a pretty legal tangle to determine whether the multitude who voted a straight ticket were supposed to know what they were doing or not.").

[40] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 124-25 (1942) (holding that an activity "of local character" can "exert[] a substantial economic effect on interstate commerce").

regulated railroads concurrently with the states.[41] But most insurance regulation took place at the state level.[42]

In both cases, many states provided for elected regulators. Railroad commissions were popular state elected offices at the close of the nineteenth century — but pressures from leading Progressive reformers ultimately pushed many states toward an appointment system. On the other hand, a smaller number of states opted for elected insurance commissioners, but those that did mostly kept them.

1. Railroad Commissions

Beginning in the early nineteenth century, railroads began to connect the United States — a slow progress, and one with different regional realities. New England was one of the first regions of the country to have a developed rail system,[43] and as a result, it was also one of the first to experience the need for railroad regulation. Controversy over railroad companies' use of eminent domain power,[44] conflicts between the railroads and the U.S. Postal Service,[45] and a growing perception that influential politicians had been corrupted[46] led to public pressure for state control over railroads. Accordingly, legislatures in New England

[41] States and the federal government had competing interests when regulating railroad companies, as Thomas Cooley noted. Thomas M. Cooley, *State Regulation of Corporate Profits*, 137 N. AM. REV. 205, 215 (1883); *see also* Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1025-26 (1988).

[42] *See generally* Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 664-86 (1999) (discussing reasons for the continued dominance of state-level insurance regulation).

[43] *See generally* MICHAEL J. CONNOLLY, CAPITALISM, POLITICS, AND RAILROADS IN JACKSONIAN NEW ENGLAND 119-23 (2003) (discussing the history and development of railroads in New England).

[44] *Id.* at 26-27.

[45] *Id.* at 27; *see also* VERN K. BAXTER, LABOR AND POLITICS IN THE U.S. POSTAL SERVICE 36-38 (1994) (explaining the extent to which railroad companies overcharged for mail delivery).

[46] CONNOLLY, *supra* note 43, at 27-28.

created the country's first railroad commissions[47] — the first of which, created in New Hampshire in 1844, became the country's first *elected* railroad commission when the legislature converted it from an appointed to elected office in 1851.[48] But these new commissions were largely powerless; they primarily served in advisory and fact-finding capacities and lacked regulatory muscle.[49]

As rail lines were laid across the country in the mid-nineteenth century,[50] a desire for greater constraints on railroad conduct followed soon after. The fervor with which railroads were built led to a glut in the market — which precipitated bankruptcies and railroad closures.[51] These failures were particularly painful for state and municipal governments, which had frequently extended their credit to new railroads, purchased stock in railroad companies, or otherwise invested taxpayer funds in rail construction.[52] Moreover, a swell of populist sentiment — captured in the Grange Movement — voiced the concerns of farmers, who argued that they were being taken advantage of by railroad companies.[53]

As a result of these socioeconomic pressures, the 1870s and 1880s saw a marked increase in the number of railroad commissions at the state level — many of which were elected bodies,[54] and many of which also

[47] FREDERICK C. CLARK, STATE RAILROAD COMMISSIONS, AND HOW THEY MAY BE MADE EFFECTIVE 16-17 (Am. Econ. Ass'n 1891); William S. Ellis, *State Railroad Commissioners*, 41 AM. L. REG. & REV. 632, 633-34 (1893).

[48] Act of June 25, 1851, 1851 Leg., June Sess., ch. 1104, 1851 N.H. Laws 1067.

[49] Clark, *supra* note 47, at 16-17; Ellis, *supra* note 47, at 633-34.

[50] *See, e.g.*, Mark T. Kanazawa & Roger G. Noll, *The Origins of State Railroad Regulation: The Illinois Constitution of 1870*, *in* THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY 13, 13-14 (Claudia Goldin & Gary D. Libecap eds., 1994); David R. Meyer, *Midwestern Industrialization and the American Manufacturing Belt in the Nineteenth Century*, 49 J. ECON. HIST. 921, 926-27 (1989) (noting the growth of railroad lines in the mid-nineteenth century).

[51] KELLER, AFFAIRS OF STATE, *supra* note 36, at 165-68, 184-88, 422-26.

[52] *See id.*

[53] *See, e.g.*, Anne Mayhew, *A Reappraisal of the Causes of Farm Protest in the United States, 1870–1990*, 32 J. ECON. HIST. 464, 465-66 (1972) (critically evaluating farmers' claims about railroad companies' practices).

[54] Act of Mar. 8, 1875, ch. 103, 17th Leg., Reg. Sess., 1875 Minn. Laws 135; Act of Mar. 29, 1875, 28th Gen. Assemb., Reg. Sess., 1875 Mo. Laws 112; CAL. CONST. art. XII, § 22 (1879); Act of Apr. 13, 1881, A.B. 329, ch. 300, 34th Ann. Sess., 1881 Wis. Sess. Laws 389;

had oversight over warehouses and grain elevators.[55] A minority of states, especially those in the South, provided for the election of railroad commissions by district,[56] a previously uncommon method of electing members of a statewide body. Irrespective of their manner of selection, these bodies were more powerful than the commissions created in the 1840s and 1850s — but were still constrained in their ability to meaningfully regulate the railroad industry.[57]

By the early twentieth century, the efficacy of the elected railroad commission was in doubt. Many critics argued that railroad commissions were too friendly toward the industries they were meant to be regulating — and pointed to the election of commission members as providing opportunities for railroad companies to influence the democratic process.[58] Critics also pointed out that the democratic process provided no guarantee that the elected commissioners would have any specialized knowledge — a flaw with real consequences as regulation of railroads and other public utilities became increasingly technical.[59]

Act of Apr. 6, 1888, H.B. 85, ch. 29, 22d Gen. Assemb., Reg. Sess., 1888 Iowa Acts 50; N.D. CONST. art. III, § 82 (1889); Act of 1892, ch. 72, 1892 Leg., Reg. Sess., 1892 Miss. Laws 166; Act of Dec. 19, 1892, Act No. 13, 1892 Gen. Assemb., Reg. Sess., 1892 S.C. Acts 8; Act of Mar. 4, 1893, S.B. 9, ch. 136, 3d Legis. Sess., 1893 S.D. Sess. Laws 226; Act of Apr. 7, 1897, H.B. 242, ch. 10, 50th Gen. Assemb., Reg. Sess., 1897 Tenn. Pub. Acts 113.

[55] *See, e.g.*, Act of Mar. 6, 1899, ch. 39, 31st Leg., Reg. Sess., 1899 Minn. Laws 36; Act of Mar. 29, 1875, 28th Gen. Assemb., Reg. Sess., 1875 Mo. Laws 112; Thomas S. Ulen, *The Regulation of Grain Ware-Housing and Its Economic Effects: The Competitive Position of Chicago in the 1870s and 1880s*, 56 AGRIC. HIST. 194, 194-95, 197-201 (1982).

[56] CAL. CONST. art. XII, § 22 (1879); KY. CONST. of 1891 § 209; LA. CONST. of 1898, art. 289.

[57] *See* WILLIAM R. CHILDS, THE TEXAS RAILROAD COMMISSION: UNDERSTANDING REGULATION IN AMERICA TO THE MID-TWENTIETH CENTURY 28-29 (2005); Kanazawa & Noll, *supra* note 50, at 21-22.

[58] *See, e.g.*, Kathryn T. Abbey, *Florida Versus the Principles of Populism: 1896–1911*, 4 J.S. HIST. 462 (1938) (noting that state industry groups attempted to neutralize the nascent Florida Railroad Commission by making it elected instead of appointed).

[59] *See, e.g.*, CAL. SEC'Y OF STATE, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE STATE OF CALIFORNIA, WITH LEGISLATIVE REASONS FOR AND AGAINST THE ADOPTION THEREOF (1911), https://repository.uclawsf.edu/ca_ballot_props/24/ [https://perma.cc/4GUT-P5PK] [hereinafter 1911 CALIFORNIA VOTER PAMPHLET] ("The proposal that the commissioners shall be appointive instead of elective is made entirely in the interest of efficiency. Technical skill is required in an office such as railroad commissioner, and

New York Governor Charles Evan Hughes and Wisconsin Governor Robert La Follette pioneered a different approach: the public utility commission.[60] Under their model, the commission's jurisdiction expanded to include all public utilities, including the burgeoning energy industry, and their regulatory authority grew to include the power to unilaterally set rates.[61] Additionally, they emphasized the need for expert control over the regulatory process — and converted the offices from popularly elected to gubernatorially appointed, with the belief that governors would appoint qualified candidates.[62]

This new approach proved wildly popular — owing in part to the wide respect that Hughes and La Follette had earned as Progressive reformers — and many states copied this approach,[63] with state legislators and governors echoing Hughes's and La Follette's rationales.[64] As a result, the percentage of states with elected railroad or public utility commissions precipitously declined.

2. Insurance Commissioners

Much like railroads, the operation of insurance companies created a unique need for regulation. Early insurance companies were only lightly regulated at the state level in the early and mid-nineteenth century —

experience has shown that the best results in filling such offices have been attained through appointment by the chief executive officer rather than through election by the people at large.").

[60] 1 HENRY C. SPURR, GUIDING PRINCIPLES OF PUBLIC SERVICE REGULATION 13-15 (1924).

[61] *See generally* ALLEN RIPLEY FOOTE, REGULATION OF PUBLIC UTILITIES: A COMPARISON OF THE NEW YORK AND THE WISCONSIN PUBLIC UTILITIES BILLS (1911) (providing a detailed account of the New York and Wisconsin PUCs); George B. Hudnall, *The Public Service Commission Law of Wisconsin*, 4 PROC. AM. POL. SCI. ASS'N 316 (1908) (describing the Wisconsin PUC).

[62] *See* MESSAGE OF GOVERNOR ROBERT LA FOLLETTE TO THE WISCONSIN STATE LEGISLATURE, S. JOURNAL, 47th Leg., Joint Sess. 73-77 (Wis. 1905).

[63] *See, e.g.*, I. Leo Sharfman, *Commission Regulation of Public Utilities: A Survey of Legislation*, 53 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 1-2 (1914) ("The Wisconsin and New York commissions have served, to a large degree, as models for the numerous administrative bodies for the regulation of public utilities that have sprung into being since 1907 . . . .").

[64] *E.g.*, 1911 CALIFORNIA VOTER PAMPHLET, *supra* note 59 ("In the states of New York and Wisconsin, whose commissions are doing the best work in the United States in this line, the commissioners are appointed by the governor.").

and usually only required to comply with public reporting requirements.[65] As a result, insurance companies were free to form compacts with each other, ostensibly as a means of guarding against the deleterious effects of "unbridled competition," and frequently set rates in concert with each other.[66]

Public dissatisfaction with insurance compacts led to a growth in insurance regulation — specifically, bans on compacts and the creation of insurance regulators to oversee licensing and rates.[67] Early insurance regulators were usually preexisting state officials, like the secretary of state, treasurer, or auditor, serving as *ex officio* insurance commissioner, or the creation of a board of insurance commissioners, populated by state officials serving in *ex officio* capacities.[68]

However, this method of administration was abandoned as the demands on the regulators increased, and separate departments and commissioners were created in the late nineteenth and early twentieth centuries.[69] Most states opted for gubernatorially appointed insurance commissioners, but a handful of states chose to designate the office as an elective one.[70]

Eleven states total have provided for elected insurance commissioners — beginning with Wisconsin (1882) and continuing with North Dakota (1889), Delaware (1901), Kansas (1901), Mississippi (1904), Oklahoma (1907), North Carolina (1909), Louisiana (1960), Georgia (1987), and California (1991).[71] Despite the broader trends

[65] JOHN G. DAY, U.S. DEP'T OF TRANSP., ECONOMIC REGULATION OF INSURANCE IN THE UNITED STATES 6-9 (1970); EDWIN WILHITE PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES: A STUDY IN ADMINISTRATIVE LAW AND PRACTICE 525-29 (1927).

[66] DAY, *supra* note 65, at 7-10.

[67] *See* PATTERSON, *supra* note 65, at 529-37.

[68] *Id.* at 529-36.

[69] *Id.* at 536-37.

[70] *Id.* at 34-35.

[71] Act of Apr. 13, 1881, A.B. 329, ch. 300, 34th Ann. Sess., 1881 Wis. Sess. Laws 389 (creating elected Insurance Commissioner); Act of June 30, 1911, S.B. 383, ch. 484, 1911 Leg., Biennial Sess., 1911 Wis. Sess. Laws 579 (abolishing electing office); N.D. CONST. art. III, § 82 (1889) (creating elected Insurance Commissioner); N.D. CONST. art. V, § 12 (amended 1981) (same); DEL. CONST. art. III, § 21 (1897) (same); Act of Jan. 7, 1899, ch. 18, 28th Leg., Spec. Sess., 1898 Kan. Sess. Laws 56 (same); S.B. 24, ch. 59, 1902 Leg., Spec. Sess., 1902 Miss. Laws 62 (same); OKLA. CONST. art. VI, § 23 (1907) (same); Act of Mar. 11, 1907, ch. 868, 1907 Gen. Assemb., Reg. Sess., 1907 N.C. Sess. Laws 1267 (same); S.B.

toward appointment of administrative officers who have primarily technical responsibilities,[72] discussed *infra*,[73] the tendency to elect insurance commissioners actually *increased* in the twentieth century — and only Wisconsin converted its elected insurance commissioner into an appointed one.[74]

B. Agriculture

Beginning in the late 1880s and 1890s, some states — primarily those in the South and Midwest — provided for elected agriculture commissioners. In many cases, this meant converting previously appointed commissioners into elected offices.[75] In others, it meant consolidating existing bureaus and commissions into a single department of agriculture.[76] However, when the commissioner's office was created, there were initially very few responsibilities attached to it, with most commissioners tasked with collecting and distributing agricultural statistics.[77]

Over time, the responsibilities of the office increased — and it became something of a repository of loosely related duties broadly relating to economic regulation. Agriculture commissioners assumed responsibility for regulating agricultural practices; food, drugs, and oil;

429, Act No. 200, 1956 Leg., Reg. Sess., 1956 La. Acts 450 (same); LA. CONST. of 1921, art. V, §§ 1, 18 (amended 1960) (adding office to list of constitutional offices); LA. CONST. art. IV, §§ 1(A), 3(A) (1974) (same); GA. CONST. art. V, § 3, ¶ 1 (1983); CAL. INS. CODE § 12900 (amended 1988).

[72] PATTERSON, *supra* note 65, at 35 ("Election for policy-determining officials, appointment for expert administrators, has become the rallying cry of governmental reorganization. That the insurance commissioner partakes more of the latter than of the former character will become apparent from an examination of his powers and duties.").

[73] *See infra* Part II.A.

[74] *See* Act of June 30, 1911, S.B. 383, ch. 484, 1911 Leg., Biennial Sess., 1911 Wis. Sess. Laws 579. The remaining states still provide for elected insurance commissioners. CAL. INS. CODE § 12900 (amended 1988); DEL. CONST. art. III, § 21; GA. CONST. art. V, § 3, ¶ 1; KAN. STAT. ANN. § 40-106; LA. CONST. art. IV, § 3(A); MISS. CODE ANN. § 83-1-3; N.C. CONST. art. III, § 7(1); N.D. CONST. art. V, § 2; OKLA. CONST. art. VI, § 23(A).

[75] *E.g.*, Act of Feb. 18, 1891, 1891 Gen. Assemb., Reg. Sess., 1890–91 Ala. Laws 1213; Act of Sept. 17, 1889, Act No. 289, 1899 Gen. Assemb., Reg. Sess., 1889 Ga. Laws 63.

[76] *E.g.*, S.F. 594, ch. 46, 40th Gen. Assemb., Reg. Sess., 1923 Iowa Acts 44.

[77] *E.g.*, Act of Mar. 7, 1889, Act No. 30, 27th Gen. Assemb., Reg. Sess., 1889 Ark. Acts 33, 34; Act of Apr. 14, 1906, S.B. 23, ch. 102, 1906 Leg., Spec. Sess., 1906 Miss. Laws 83, 84-85.

and even immigration.[78] In service of all of these duties, they also collected and distributed statistics relating to their states' industries and labor practices — a reflection of the burgeoning movement to ground policymaking in empirics.[79]

Beginning in the late nineteenth century, pressure to regulate the food and drug industries grew. Concerns about contagious diseases spreading among livestock triggered many states to adopt quarantine laws and provisions relating to animal inspection.[80] Though many of these efforts were ineffective, and ultimately resulted in greater federal authority to regulate the industry,[81] the powers persisted and were eventually transferred to agriculture commissioners, who either subsumed or replaced state veterinarians and livestock inspection boards.[82]

Their duties expanded into direct consumer products, too. Much scholarly attention has been focused on the Federal Pure Food and Drug Act, which created the Food and Drug Administration and reflected the beginnings of the modern administrative state[83] — as well as on federal restrictions on oleomargarine, a cheap butter substitute vocally

[78] *E.g.*, Act No. 127, ch. 10149, 1925 Leg., 20th Reg. Sess., 1925 Fla. Laws 302.

[79] *See, e.g.*, STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 177 (1982) (noting that the Progressive Era is "celebrated" as "the period in which business principles and scientific management techniques turned the tide in the battle against profligacy and waste in government").

[80] *See, e.g.*, JOSHUA SPECHT, RED MEAT REPUBLIC: A HOOF-TO-TABLE HISTORY OF HOW BEEF CHANGED AMERICA 147-52 (2019) (discussing the adoption of quarantine laws in Texas).

[81] *See* JIMMY M. SKAGGS, PRIME CUT: LIVESTOCK RAISING AND MEATPACKING IN THE UNITED STATES, 1607–1983, at 80-85 (1986); SPECHT, *supra* note 80, at 145-52.

[82] *E.g.*, Act of Mar. 22, 1910, ch. 60, 1910 Gen. Assemb., Reg. Sess., 1910 Ky. Acts 192 (creating State Live Stock Sanitary Board consisting of members of the State Board of Agriculture, Forestry and Immigration).

[83] *See, e.g.*, Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1365 (2010) (noting that the Interstate Commerce Act of 1887, "the Pendleton Civil Service Act of 1883, the 1890 Sherman Antitrust Act, the 1907 Pure Food and Drug Act, and the 1914 Federal Trade Commission Act," combined, reflected "the gradual construction of a modest national administrative state, and with it a national administrative law").

opposed by the dairy industry.[84] But states across the country adopted Pure Food and Drug Acts[85] and oleomargarine regulations of their own, too[86] — with varying degrees of success.

Two states, Ohio and Oregon, created elected Food and Dairy Commissioners to oversee some aspects of inspection.[87] The direct election of a food commissioner was not a popular approach; instead, most states expanded the duties of their agriculture commissioners to cover the supervision, inspection, and enforcement of their state-level Pure Food and Drug Act.[88] In this capacity, they also oversaw regulation of oleomargarine — which frequently consisted of advertising bans, limitations on its availability in hotels and restaurants, and restrictions on dyes and other artificial colors.[89] Many state departments of agriculture assumed responsibility for inspecting oil — specifically, oils used for "illuminating, heating, cooking or power purposes" — prior to its sale on the market.[90]

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[84] *See, e.g.*, Ruth Dupré, *"If It's Yellow, It Must Be Butter": Margarine Regulation in North America Since 1886*, 59 J. ECON. HIST. 353, 355 (1999) (describing adoption of federal Oleomargine Bill in 1886).

[85] Marc T. Law, *The Origins of State Pure Food Regulation*, 63 J. ECON. HIST. 1103, 1111 (2003) (listing adoption of pure food laws by state); MITCHELL OKUN, FAIR PLAY IN THE MARKETPLACE: THE FIRST BATTLE FOR PURE FOOD AND DRUGS 149-56 (1986) (describing the adoption of early food and drug regulation in Massachusetts and New York).

[86] Dupré, *supra* note 84, at 355 (noting that, "[b]y 1900, 32 states had passed legislation to prohibit the yellow coloring of margarine"); OKUN, *supra* note 85, at 251-78 (describing adoption of margarine regulation in the states).

[87] H.B. 1046, 69th Gen. Assemb., Extra. Sess., 1891 Ohio Laws 496; H.B. 109, 20th Legis. Assemb., Reg. Sess., 1898 Or. Laws 46, 48.

[88] *E.g.*, H.B. 79, Act No. 190, 1909 Gen. Assemb., Spec. Sess., 1909 Ala. Laws 237, 237-38; Act of May 28, 1907, Act No. 431, 36th Gen. Assemb., Reg. Sess., 1907 Ark. Acts 1155, 1156; Act No. 67, ch. 5662, 1907 Leg., 11th Reg. Sess., 1907 Fla. Laws 151, 152; Act of Aug. 21, 1906, Act No. 463, 1906 Gen. Assemb., Reg. Sess., 1906 Ga. Laws 83, 84; Act of Feb. 25, 1907, ch. 368, 1907 Gen. Assemb., Reg. Sess., 1907 N.C. Sess. Laws 548, 549; Act of May 26, 1908, ch. 37, 1st Leg., 1st Sess., 1907–08 Okla. Sess. Laws 403, 403-04; Act of Feb. 21, 1913, Act No. 30, 1913 Gen. Assemb., Reg. Sess., 1913 S.C. Laws 35.

[89] *E.g.*, H.F. 106, ch. 63, 44th Gen. Assemb., Reg. Sess., 1931 Iowa Acts 44, 44-45 (designating the Secretary of Agriculture with the power to "prescribe rules and regulations relative to the handling, keeping, disposal and distribution of oleomargarine" and the affixing of stamps on margarine products).

[90] *E.g.*, Act of June 4, 1919, ch. 7905, 1919 Leg., 17th Reg. Sess., 1919 Fla. Laws 268.

But commissioners of agriculture weren't just commissioners of *agriculture* — their titles were frequently longer than that, like Arkansas's Commissioner of Mines, Manufactures and Agriculture[91] (commonly referred to as the *Agriculture Commissioner* or the *Mines Commissioner*); Mississippi's Commissioner of Agriculture, Statistics and Immigration;[92] or South Carolina's Commissioner of Agriculture, Commerce and Industries.[93] Accordingly, their responsibilities extended beyond *agricultural* matters, and even beyond related matters like food and drug regulation, into immigration and statistics gathering, as their names implied.

Immigration may seem like an unusual item in agriculture commissioners' portfolios. This delegation was most common in southern states — and it was clearly tied to the economic benefits of immigration for local farming enterprises and manufacturing interests.[94] Accordingly, Southern agriculture commissioners were tasked with aggregating and publishing agricultural, mineral, and industrial statistics on their state's economy and natural resources;[95] coordinating with private companies to promote immigration; and in rare cases, even hiring and stationing immigration agents domestically in other states and abroad in major European cities. By the 1910s and 1920s, however, Southern governments' appetite for encouraging immigration had passed. Southern members of Congress supported

[91] Act of Mar. 7, 1889, Act No. 30, 27th Gen. Assemb., Reg. Sess., 1889 Ark. Acts 33.

[92] Act of Apr. 14, 1906, S.B. 23, ch. 102, 1906 Leg., Spec. Sess., 1906 Miss. Laws 83.

[93] Act of Feb. 23, 1912, Act No. 346, 1912 Gen. Assemb., Reg. Sess., 1912 S.C. Laws 618, 618-19.

[94] *See* George E. Pozzetta, *Foreigners in Florida: A Study of Immigration Promotion, 1865–1910*, 53 FLA. HIST. Q. 164, 166-72 (1974) (documenting the efforts by the government of Florida to attract immigrants to the state); E. Russ Williams, Jr., *Louisiana's Public and Private Immigration Endeavors: 1866–1893*, 15 LA. HIST. 153, 154-58 (1974) (documenting the efforts by the government of Louisiana to attract immigrants to the state). For a contemporaneous explanation of the calculations made by Southern states in the early twentieth century, see Walter L. Fleming, *Immigration to the Southern States*, 20 POL. SCI. Q. 276, 278-81 (1905).

[95] *E.g.*, Act of Feb. 17, 1885, Act No. 106, 1885 Gen. Assemb., Reg. Sess., 1884–85 Ala. Laws 168.

harsh immigration restrictions[96] and, at the state level, immigration bureaus were abolished.

Finally, the inclusion of statistical responsibilities within departments of agriculture served to enhance the states' ability to effectively regulate different industries — as well as labor practices more generally. Nationally, labor unions pushed for the creation of the Bureau of Labor Statistics, which they argued would provide policymakers with accurate information on "the condition of our industries, our production, and our consumption" when setting policy in those areas.[97] At the state level, parallel efforts actually resulted in the creation of an elected Commissioner of Labor Statistics in South Dakota[98] and an elected Chief of the Bureau of Statistics in Indiana[99] — but the far more common practice was to create a subdivision within the existing department of agriculture with statistics-gathering responsibilities.

C. Natural Resources

Beginning with the organization of the Northwest Territory in 1787 and continuing with the westward expansion of the United States throughout the nineteenth century, the role of the prototypical state government shifted. Newly admitted states were granted significant

[96] *See* Claudia Goldin, *The Political Economy of Immigration Restriction in the United States, 1890 to 1921*, *in* THE REGULATED ECONOMY, *supra* note 50, at 223, 235-36; MADDALENA MARINARI, UNWANTED: ITALIAN AND JEWISH MOBILIZATION AGAINST RESTRICTIVE IMMIGRATION LAWS, 1882–1965, at 26-27 (2020).

[97] JOSEPH P. GOLDBERG & WILLIAM T. MOYE, U.S. DEP'T OF LAB., THE FIRST HUNDRED YEARS OF THE BUREAU OF LABOR STATISTICS 2-3 (1985).

[98] Act of Mar. 7, 1890, ch. 33, 1st Legis. Sess., 1890 S.D. Sess. Laws 54.

[99] The Indiana General Assembly originally created an appointed Chief of the Bureau of Statistics. Act of Mar. 29, 1879, ch. 91, 51st Gen. Assemb., Spec. Sess., 1879 Ind. Acts 193, 193-94; Act of Mar. 5, 1883, ch. 83, 53d Gen. Assemb., Reg. Sess., 1883 Ind. Acts 1709, 1710. In 1889, however, the Indiana Supreme Court held that, under the 1851 Constitution, "the power to elect State officers whose duties are general, and such as the duties of the chief of the Indiana Bureau of Statistics, remains with the people; . . . and that it is the duty of the Legislature, in creating a State office, to fix the term of the office, and provide for the election of the officer by the people." State *ex rel.* Worrel v. Peelle, 22 N.E. 654, 659 (Ind. 1889). The practical result of the court's decision was that, beginning at the 1890 election, the Chief of the Bureau of Statistics was popularly elected by the voters of the state.

land holdings by Congress — and were tasked with either leasing or selling the lands to fund their education systems.[100] In states with abundant natural resources, the long-term management of these school trust lands became a vital focus of the newly formed state governments.[101] And in states west of the Mississippi River, the limited availability of water resulted in a different system of water rights allocation — again, requiring a concerted effort by state governments to balance competing demands on a limited resource.[102]

In most states, these decisions were made democratically, but with considerably less unity than in other policy arenas. While *some* states experimented with the idea of statewide elected officials overseeing a system of water administration, most didn't, instead opting for local control by elected officials and statewide control by appointed experts. With respect to the allocation of trust lands, most states opted for *some* form of democratic control — either to quickly sell off the lands or to steward the lands for long-term management. In both of these cases, however, the elected officials created to manage these resources were eventually converted into appointed offices and subsumed into their state's administrative processes.

Turning first to water management, only Oregon meaningfully experimented with statewide democratic control. In 1909, the state legislature created an elected State Engineer and divided the state into two water divisions, each of which elected a Superintendent.[103] The Superintendents supervised local watermasters[104] and issued regulations to "secure the equal and fair distribution of water" consistent with established rights.[105] And the Superintendents, together with the State Engineer, formed the Board of Control, which heard

[100] Sally K. Fairfax, Jon A. Souder & Gretta Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENV'T L. 797, 803-06 (1992).

[101] *Id.* at 832-36.

[102] Yeargain, *Decarbonizing Constitutions*, *supra* note 14, at 15-18.

[103] Act of Feb. 24, 1909, ch. 216, 25th Legis. Assemb., Reg. Sess., 1909 Or. Laws 319.

[104] While the definition of "water master" varied some by state, in Oregon, it referred to a state official, one of which was appointed by the State Engineer for each local water district, whose duty was to "divide the water of the natural streams or other sources of supply of his district among the several ditches and reservoirs, taking water therefrom, according to the rights of each." *Id.*

[105] *Id.*

appeals from the Superintendents' decisions and issued general regulations.[106] This arrangement didn't last long. In 1915, the state legislature made the State Engineer appointed,[107] and in 1919, consolidated the two Superintendents into a single one appointed by the Governor.[108]

Only three other states, Kansas, Louisiana, and Nevada, attempted statewide democratic control over setting water policy. In 1859, Louisiana created a Board of Public Works with four members elected from "Internal Improvement, Leveeing, Draining, and Reclaiming Districts."[109] The Board was responsible for "leveeing, draining, and reclaiming swamp land from overflow," responsibilities it inherited from the Board of Swamp Land Commissioners and the State Engineer.[110] The Board was first elected in 1860, but was abolished in 1861 and replaced with a gubernatorially appointed State Engineer.[111] Similar processes played out in Nevada and Kansas. In 1889, Nevada created a State Board of Reclamation Commissioners;[112] in 1913, Kansas converted its existing appointed State Board of Irrigation into a board with both appointed and elected members.[113] Neither system lasted long. Nevada abolished its board in 1891, just months after the commissioners elected in 1890 took office,[114] and Kansas likewise condensed its elected board into a single appointed Commissioner of Irrigation in 1915 shortly after the board was first elected.[115]

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[106] *Id.*

[107] Act of Feb. 24, 1915, ch. 251, 28th Legis. Assemb., Reg. Sess., 1915 Or. Laws 360.

[108] Act of Feb. 24, 1919, ch. 94, 30th Legis. Assemb., Reg. Sess., 1919 Or. Laws 130.

[109] Though the 1852 Constitution obligated the state legislature to create such a board, LA. CONST. of 1852, tit. VI, § 130, 533-34, the legislature did not do so until 1859, Act of Mar. 17, 1859, Act No. 279, 4th Leg., 2d Sess., 1859 La. Acts 229.

[110] Act of Mar. 17, 1859, Act No. 279, 4th Leg., 2d Sess., 1859 La. Acts 229.

[111] Act of Mar. 4, 1861, Act No. 71, 5th Leg., 2d Sess., 1861 La. Acts 52; Act of Mar. 20, 1861, Act No. 261, 5th Leg., 2d Sess., 1861 La. Laws 200.

[112] Act of Mar. 9, 1889, ch. 112, 14th Leg., Reg. Sess., 1889 Nev. Stat. 102.

[113] Act of Mar. 19, 1913, ch. 214, 35th Leg., Reg. Sess., 1913 Kan. Sess. Laws 379.

[114] Act of Mar. 19, 1891, ch. 62, 15th Leg., Reg. Sess., 1891 Nev. Stat. 76.

[115] Act of Mar. 24, 1915, ch. 236, 36th Leg., Reg. Sess., 1915 Kan. Sess. Laws 296; *see Wants to Abolish Several Offices*, PARSONS DAILY SUN, Dec. 17, 1914, at 14, https://www.newspapers.com/image/62308654/ [https://perma.cc/C22N-3893] (detailing

Far more states provided for decentralized popular control over the administration of water policy. Many western states created local elected authorities to govern water policy, who were in turn supervised at the state level by appointed experts.[116] States have also facilitated the creation of local authorities to make it easier for landowners to construct the necessary infrastructure for their own water needs. Beginning with California's Wright Act, passed in 1887, western states have provided property owners with the power to organize and form irrigation districts and drainage districts — among the country's first special districts to be formed.[117]

Management of state lands — including school trust lands, one of the most significant resources administered by state governments — has seen a far more centralized approach than water administration. The most meaningful divide in trust land management is between the states that sold their lands quickly and those that held onto them.[118] In most of the earliest states that received trust lands upon statehood, the land was transferred by Congress directly to the townships, which frequently resulted in fast sales,[119] and the state governments retained only minimal oversight over the selling and leasing of the lands.[120]

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the State Auditor's proposal for the elimination or consolidation of state boards, including the Irrigation Board).

[116] Wells A. Hutchins, *Background and Modern Developments in Water Law in the United States*, 2 NAT. RES. J. 416, 420-21, 427-28 (1962) (discussing the creation of Colorado's administrative system for distribution of water and how it has served as a model for most other western states).

[117] *See* Deborah Moore & Zach Willey, *Water in the American West: Institutional Evolution and Environmental Restoration in the 21st Century*, 62 U. COLO. L. REV. 775, 809-13 (1991); Lenni Beth Benson, Comment, *Desert Survival: The Evolving Western Irrigation District*, 1982 ARIZ. ST. L.J. 377, 384-89.

[118] *See, e.g.*, JON A. SOUDER & SALLY K. FAIRFAX, STATE TRUST LANDS: HISTORY, MANAGEMENT, AND SUSTAINABLE USE 30-31 (1996) (discussing the different approaches taken by states in managing their trust lands); *see also* Sean E. O'Day, Note, *School Trust Lands: The Land Manager's Dilemma Between Educational Funding and Environmental Conservation, a Hobson's Choice?*, 8 N.Y.U. ENV'T L.J. 163, 181-82 (1999) (noting that states initially "wanted to sell the lands," and that "[t]he shift in policy from disposing of school lands by sale to retaining them took place toward the end of the nineteenth century").

[119] SOUDER & FAIRFAX, *supra* note 118, at 29-30.

[120] *See, e.g.*, ALA. CONST. of 1819, art. VII, § 1 (granting the state legislature the duty to "take measures to preserve, from unnecessary waste or damage, such lands as are or

That minimal oversight was sometimes democratized, however — most states created land offices, and the office was sometimes headed by an elected commissioner or register of lands. Arkansas, Florida, Iowa, Kentucky, Louisiana, Maryland, Michigan, Mississippi, and Missouri all had statewide elected offices of this flavor.[121] In many cases, these officials had one job, and a ministerial one at that: keeping track of land sales.[122]

Western states, meanwhile, largely maintained direct control of their trust lands. Most states opted to create a land commission populated by state elected officials serving in *ex officio* roles. But in Nebraska, New Mexico, South Dakota, Texas, and Washington, the state constitutions placed management in the hands of a single elected land commissioner.[123] Regardless of the chosen method, in the course of managing state lands, these commissioners — or the commissions on which they served — would draft rules relating to the assessment, lease, and sale of the lands.[124] They also oversaw the granting of leases and

hereafter may be granted by the United States for the use of schools within each township in this State, and apply the funds, which may be raised from such lands, in strict conformity to the object of such grant").

[121] Act of Mar. 8, 1875, 20th Gen. Assemb., Reg. Sess., 1874–75 Ark. Acts 264; Act No. 28, ch. 236, 1848 Gen. Assemb., 4th Sess., 1848 Fla. Laws 41; Act of Jan. 25, 1855, ch. 153, 5th Gen. Assemb., Reg. Sess., 1854 Iowa Acts 222; KY. CONST. of 1850, art. III, § 24; S.B. 20, Act No. 193, 1904 Gen. Assemb., Reg. Sess., 1904 La. Acts 427; MD. CONST. of 1851, art. VII, § 6; MICH. CONST. of 1850, art. VIII, § 1; MICH. CONST. of 1908, art. VI, § 1; Act of 1892, ch. 78, 1892 Leg., Reg. Sess., 1892 Miss. Laws 279; MO. CONST. of 1820, art. VIII, § 9 (amended 1851); MO. CONST. of 1865, art. XIII, § 9.

[122] *E.g.*, Act of Jan. 25, 1855, ch. 153, 5th Gen. Assemb., Reg. Sess., 1854 Iowa Acts 222 (requiring the Register of the State Land Office to "preserv[e] a proper record of all lands belonging to the State, and of their final disposition, and of transacting business in relation thereto . . . .").

[123] NEB. CONST. art. V, § 1 (1875); NEB. CONST. art. IV, § 1 (1920); N.M. CONST. art. V, § 1 (1911); S.D. CONST. art. IV, § 12 (1889); TEX. CONST. art. IV, § 1 (1876); WASH. CONST. art. III, §§ 1, 3 (1889). Outside of these states, states with elected surveyors general sometimes tasked *them* with managing state lands. *See, e.g.*, Act of Apr. 2, 1867, ch. 5, 3d Leg., Spec. Sess., 1867 Nev. Stat. 165 ("[A] State Land Office is hereby created, of which the State Surveyor General shall be *ex officio* Register.").

[124] *E.g.*, H.B. 224, ch. 89, 5th Leg., Reg. Sess., 1897 Wash. Sess. Laws 229 (granting the Board of State Land Commissioners, on which the elected Commissioner of Public Lands served, with the power to adopt rules and regulations); H.R. 9, ch. 7, 36th Leg., Extra. Sess., 1918 Neb. Laws 43 (granting the Board of Educational Lands and Funds, on

contracts to extract timber and mineral resources and the direct sale of those resources. In the states that maintained their land offices into the twentieth century, the commissioners or registers were usually vested with these responsibilities, too.[125]

Land commissioners didn't have *total* discretion in setting rules for land management, though. With respect to school trust lands in particular, state governments acquired ownership of those lands through admission or statehood acts approved by Congress — which specified the purpose of those lands, *e.g.*, for education, in a manner that sometimes created a legal trust.[126] The imposition of that trust carries with it a legal obligation to maintain the body of the trust (the land and the income from it) for the purpose of the trust (namely, for support of schools).[127] Many state constitutions added additional rules on top of that basic obligation, limiting the amount of land that can be sold in a certain period of time, requiring certain interest rates for installment purchases, limiting the purposes for which lands can be sold or leased, and explicitly reserving to the state certain mineral rights on sold lands.[128]

Today, elected land commissioners remain in New Mexico, South Dakota, Texas, and Washington. In 1936, Nebraskans ratified a constitutional amendment abolishing their elected Commissioner of Public Lands and Buildings.[129] In states that previously had elected registers, however, as the list of unsold lands dried up — especially in states east of the Mississippi River — the logic for the office's existence was undermined. As a result, registers were abolished in the late

which the elected Commissioner of Public Lands and Buildings served, with the power to adopt rules and regulations).

[125] States with elected surveyors general sometimes tasked *those* officers with managing state lands.

[126] SOUDER & FAIRFAX, *supra* note 118, at 27-33.

[127] *Id.* at 33-36.

[128] *E.g.*, IDAHO CONST. art. IX, § 8 (1889) (setting minimum price for land sales, limiting size of individual land sales, and establishing annual limits on aggregate sales); S.D. CONST. art. VIII, §§ 4-5 (1889) (same).

[129] H.R. 404, ch. 188, 50th Leg., Reg. Sess., 1935 Neb. Laws 694 (amending NEB. CONST. art. IV, § 1 (amended 1936)).

nineteenth century in Florida, Iowa, Kentucky, Maryland, and Missouri, and by the late twentieth century in every state but Arkansas.[130]

D. Labor

The movement to improve working conditions was a major priority of Progressive reformers, but institutional forces stymied many of their early efforts. State legislatures, whom Progressives alleged were unduly influenced by corporate interests, blocked major labor reforms.[131] Those reforms that were able to get through state legislatures were repeatedly struck down by state courts.[132] And when institutions were created to supervise different areas of industry, there was no guarantee that a gubernatorially appointed regulator could be trusted to be independent.

Accordingly, many Progressives turned to the electoral process to try to achieve effective oversight over labor practices.[133] In the late 1890s and early 1900s, eight states created two new classes of elected positions — labor commissioners and mine inspectors — with the ability to wield significant regulatory power. Labor commissioners were created in

[130] Act No. 15, ch. 1727, 1869 Leg., Extra. Sess., 1869 Fla. Laws 48; Act of Mar. 30, 1880, S.F. 222, ch. 206, 18th Gen. Assemb., Reg. Sess., 1880 Iowa Acts 204; Act of Mar. 11, 1898, ch. 11, 1898 Gen. Assemb., Reg. Sess., 1898 Ky. Acts 41; S.B. No. 488, Act No. 326, 1976 Leg., Reg. Sess., 1976 La. Acts 892; MD. CONST. of 1867, art. VII, § 4; Act of May 8, 1913, Act No. 270, 1913 Leg., Reg. Sess., 1913 Mich. Pub. Acts 524; Act of Mar. 31, 1978, S.B. 2470, ch. 458, 1978 Leg., Reg. Sess., 1978 Miss. Laws 769; Act of Feb. 25, 1891, 36th Gen. Assemb., Reg. Sess., 1891 Mo. Laws 181. *But see* ARK. CONST. art. VI, § 1.

[131] John Dinan, *Framing a "People's Government": State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933, 958-59 (1999) [hereinafter *Framing a "People's Government"*].

[132] *See, e.g.*, John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 989-98 (2007) (cataloging the frequency with which state courts struck down early regulations) [hereinafter *Court-Constraining Amendments*].

[133] *E.g.*, DANNY M. ADKISON & LISA MCNAIR PALMER, THE OKLAHOMA STATE CONSTITUTION 17-18 (2011); ALAN DERICKSON, WORKERS' HEALTH, WORKERS' DEMOCRACY: THE WESTERN MINERS' STRUGGLE, 1891–1925, at 169-70 (1988); DANNEY GOBLE, PROGRESSIVE OKLAHOMA: THE MAKING OF A NEW KIND OF STATE 218 (1980); Robert Henry, *Deliberations About Democracy: Revolutions, Republicanism, and Reform*, 34 WILLAMETTE L. REV. 533, 558 (1998).

Georgia, North Carolina, North Dakota, Oklahoma, and Oregon, and mine inspectors in Arizona, Idaho, Nevada, and Oklahoma.[134]

The mine inspectors were responsible — unsurprisingly, and as their name implies — for inspecting mines. The enabling statutes for elected mine inspectors were quite similar to each other. All of them mandated inspection of *all mines* in the state at least once a year and allowed the inspector to gain access to mines for inspection at all times. All of them also obligated the inspector to investigate all allegations in any complaint filed with their office or in the event of a workplace death or serious injury — and further allowed the inspector to mandate that corrective action be taken in the event of a violation, with a possible referral to a prosecutor for failure to comply.

One of the most important elements of having a separate mine inspector, from the perspective of the miners, anyway, was a requirement that the inspectors be "practical miners."[135] Though a requirement like this would be difficult to enforce against a prospective candidate, its impact was still acutely felt. Take, for example, Oklahoma — the only state to ever provide for the statewide election of an *assistant* officer. Under its 1908 law, three mining districts were created, each with an assistant mining inspector who, though elected statewide, was required to be from the district to which they were elected.[136]

The requirement that the assistant mine inspector have "eight years actual experience as a practical miner"[137] proved inapposite in Delaware

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[134] ARIZ. CONST. art. XIX (1910) (creating the Mine Inspector); Act of Aug. 21, 1911, Act No. 298, 1911 Gen. Assemb., Reg. Sess., 1911 Ga. Laws 133 (creating the Commissioner of Labor and Commerce); Act of Mar. 11, 1895, H.B. 66, 3d Leg., Reg. Sess., 1895 Idaho Sess. Laws 160 (creating the Mine Inspector); Act of Mar. 24, 1909, ch. 176, 24th Leg., Reg. Sess., 1909 Nev. Stat. 218 (creating the Inspector of Mines); Act of Mar. 3, 1899, ch. 373, 1899 Gen. Assemb., Reg. Sess., 1899 N.C. Sess. Laws 519 (creating the Commissioner of Labor and Printing); N.D. CONST. art. III, § 82 (1889) (creating the Commissioner of Agriculture and Labor); N.D. CONST. art. III, § 82 (amended 1960) (creating a separate Department of Labor); OKLA. CONST. art. VI, § 1 (1907) (creating the Commissioner of Labor and the Chief Mine Inspector); Act of Apr. 6, 1908, ch. 54, 1st Leg., 1st Sess., 1907–08 Okla. Sess. Laws 527 (creating three Assistant Mine Inspectors); Act of Feb. 24, 1903, H.B. 14, 22d Legis. Assemb., Reg. Sess., 1903 Or. Laws 205 (creating the Commissioner of the Bureau of Labor Statistics).

[135] DERICKSON, *supra* note 133, at 170.

[136] Act of Apr. 6, 1908, ch. 54, 1st Leg., 1st Sess., 1907–08 Okla. Sess. Laws 527.

[137] *Id.*

and Ottawa Counties in the far northeastern part of the state. There, the most abundant natural resources were lead and zinc — not coal, as was the case in the rest of the state. As construed, the "practical mining" requirement placed lead and zinc miners under the supervision of those with experience in *coal* mining, "men who have had absolutely no knowledge or experience in lead and zinc mining."[138] Accordingly, the Oklahoma legislature created a *fourth* mining district, consisting just of Delaware and Ottawa Counties, and required that the assistant mining inspector in that district "have eight (8) years' actual experience as a practical lead and zinc miner" in Oklahoma, Kansas, or Missouri.[139]

The labor commissioners possessed similar duties — but without respect to any particular industry, and with less regulatory muscle than the mine inspectors. Many labor commissioners operated a free employment bureau within their offices, which maintained a roster of people in the state actively looking for work and which regulated the conduct of private employment agencies.[140] Most possessed specific authority to enforce minimum wage and working condition requirements — especially with respect to female and minor employees.[141]

Here, there was more variation than among the mine inspectors. Georgia's Commissioner of Labor and Commerce had the power to investigate the causes of strikes and lockouts; North Carolina's Commissioner of Labor and Printing housed a Bureau of Labor for the Deaf; Oklahoma's Commissioner of Labor oversaw a State Factory Inspector; and Oregon's Commissioner of Labor had the power to enforce its investigatory queries with subpoenas and compulsion of testimony.[142]

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[138] *County Is in New Inspection Zone*, MIAMI NEWS-RECORD, Mar. 27, 1927, at 5.

[139] Act of Apr. 4, 1927, ch. 86, 11th Leg., Reg. Sess., 1927 Okla. Sess. Laws 130.

[140] *E.g.*, Act of Aug. 20, 1917, Act No. 209, 1917 Gen. Assemb., Reg. Sess., 1917 Ga. Laws 88; Act of Mar. 5, 1921, ch. 131, 1921 Gen. Assemb., Reg. Sess., 1921 N.C. Sess. Laws 388; S.B. 81a, ch. 53, 1st Leg., 1st Sess., 1907–08 Okla. Sess. Laws 499.

[141] *E.g.*, Act of Aug. 21, 1911, Act No. 298, 1911 Gen. Assemb., Reg. Sess., 1911 Ga. Laws 133; Act of Mar. 5, 1921, ch. 131, 1921 Gen. Assemb., Reg. Sess., 1921 N.C. Sess. Laws 388; S.B. 11, ch. 39, 2d Leg., 1st Sess., 1909 Okla. Sess. Laws 629.

[142] Act of Aug. 21, 1911, Act No. 298, 1911 Gen. Assemb., Reg. Sess., 1911 Ga. Laws 133; Act of Mar. 2, 1923, ch. 122, 1923 Gen. Assemb., Reg. Sess., 1923 N.C. Sess. Laws 300; S.B.

Though most labor commissioners have remained separately elected offices — and occasionally prominent ones at that[143] — most mine inspectors have faded out of existence. Only Arizona still elects its mine inspector, pitting elderly, cowboy-looking men against each other in electoral contests,[144] and eliciting calls to abolish the office.[145]

E. A Short Ballot Bargain?

The sheer number of elected officials was not seen as an advantage by many reformers. Beginning in the early 1900s, the Short Ballot movement began organizing for a reduction in the number of elected offices. Richard S. Childs, the leader of the movement, argued that the popular conception of how elections worked — *e.g.*, that voters went to the polls aware of which candidate "best represents their individual desires" and that "every elected officer shall thus find favor with the people" — was far removed from the actual experience of democracy.[146]

81a, ch. 53, 1st Leg., 1st Sess., 1907–08 Okla. Sess. Laws 499; H.B. 14, 22d Legis. Assemb., Reg. Sess., 1903 Or. Laws 205.

[143] *See, e.g.*, Jacob Smith, *Cherie Berry Put Her Picture in Every North Carolina Elevator. Here's How That Affected Her Reelection.*, WASH. POST (Apr. 14, 2016, 2:00 PM EDT), https://www.washingtonpost.com/news/monkey-cage/wp/2016/04/14/cherie-berry-put-her-picture-in-every-north-carolina-elevator-heres-how-that-affected-her-reelection/ [https://perma.cc/DZP8-KZ4J] (noting North Carolina Labor Commissioner Cherie Berry's notoriety and high name recognition from her picture appearing in elevator inspection certificates); Gary D. Robertson, *Cherie Berry, the "Elevator Lady," Won't Seek Reelection*, AP NEWS (Apr. 2, 2019, 5:59 PM PDT), https://apnews.com/article/4308e84d94184359aedebca0d8b26ca3 [https://perma.cc/U8NS-SE84] (same).

[144] Alison Steinbach, *Arizona Mine Inspector Candidates Vie for One-of-a-Kind Elected Position*, ARIZ. CENT. (July 17, 2018, 7:32 AM MST), https://www.azcentral.com/story/news/politics/elections/2018/07/16/arizona-elections-joe-hart-bill-pierce-ballot-mine-inspector/757002002/ [https://perma.cc/WV4R-XJDB] (noting that the candidates in the 2018 election, incumbent Joe Hart and Democratic challenger Bill Pierce "both sport grey hair and aged but strong-looking physiques, a testament perhaps to their years in mining").

[145] *E.g.*, Richard Ducote, *Race for Mine Inspector Open for First Time in 18 Years*, ARIZ. DAILY STAR (Aug. 18, 2006), https://tucson.com/news/local/govt-and-politics/elections/race-for-state-mine-inspector-open-for-first-time-in-18-years/article_f430a4a8-8949-5951-ab13-08e5758c64ef.html [https://perma.cc/83VN-ST7F] (noting that "[p]roposals are floated to eliminate the elected position of state mine inspector about every four years").

[146] CHILDS, *supra* note 38, at 14-15.

The problem was not with democracy in the abstract, but with *which* offices were elected. Too many elected officials had "purely ministerial" duties "prescribed by statutes" and involved no meaningful "question[s] of policy."[147] As a result, most voters were unfamiliar with the offices and candidates that appeared on their ballots: "Ask Mr. Average Citizen as he emerges from the polling booth whom he voted for for state treasurer and he will not have the slightest idea. He voted for the Republican, whoever that was."[148]

Accordingly, the Short Ballot movement argued for a massive reduction in the number of elected officials — and the number of elections. Childs's view was that democracy had three "limitations": (1) that "[e]ach elective office must be visible";[149] (2) that the districts used to elect offices must be manageable;[150] and (3) "the government must be strong and unhampered."[151] The basic principles of the movement — if not Childs's exact views — became popular in many Progressive circles. Woodrow Wilson and Teddy Roosevelt both were supporters of the movement,[152] and many governors around the country urged a reduction in the number of state elected offices.[153]

At the same time, direct democratic reformers were pushing for the adoption of voter powers to propose state constitutional amendments and statutes ("the initiative") and to propose the repeal of legislatively enacted statutes ("the referendum"). This advocacy conflicted somewhat with the original principles of the Short Ballot movement, at

[147] Charles A. Beard, *The Ballot's Burden*, 24 POL. SCI. Q. 589, 602 (1909).

[148] Richard S. Childs, *The Short Ballot Movement and Simplified Politics*, 64 ANNALS AM. ACAD. POL. & SOC. SCI. 168, 168 (1916); *see also* CHILDS, *supra* note 38, at 24-25 ("When the ballot is long, *i.e.*, when there are many offices to be filled simultaneously by popular vote, the people . . . will not scrutinize every name, but will give their attention to a few conspicuous ones and vote for the others blindly.").

[149] CHILDS, *supra* note 38, at 50.

[150] *Id.* at 56.

[151] *Id.* at 127.

[152] *See* THEODORE ROOSEVELT, AMERICAN IDEALS, AND OTHER ESSAYS, SOCIAL AND POLITICAL 127 (New York, G.P Putnam's Sons 1897).

[153] *E.g.*, DAVID R. BERMAN, GOVERNORS AND THE PROGRESSIVE MOVEMENT 28-29, 69, 103, 206, 261 (2019) (detailing Progressive governors' support of the Short Ballot Movement); Edward R. Lewis, *The Short Ballot — Governor's Messages*, 11 AM. POL. SCI. REV. 322, 322-24 (1917) (surveying governors' short-ballot recommendations in their messages to state legislatures).

least as Childs articulated it — under Childs's view, elections should have consequences, and to "diminish [legislators'] importance by providing other ways of law-making, such as the initiative and referendum, is to divert what little light now shines upon them . . . ."[154] But many Progressive reformers endorsed both sets of reforms anyway. And these reforms were largely embraced by voters, too. In most elections in which voters were presented with constitutional amendments granting them the powers of initiative and referendum, they ratified the amendments.

The tension that existed between short ballot and direct democracy advocates wasn't just over direct democracy; it was over the respective powers of different branches of government. Classic short ballot advocates favored powerful legislatures and governors,[155] but those supporting direct democracy were generally skeptical of legislatures — instead favoring more powerful governors.[156] The adoption of both sets of reforms had the practical effect of strengthening governors (who had the power to appoint the previously elected officials) and weakening legislatures (who lost some of their legislative power).

Despite the apparent tension between these two separate ideas, however, voters largely ended up embracing both of them. Constitutional amendments that proposed to create initiative and referendum processes generally passed,[157] as did amendments that

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[154] CHILDS, *supra* note 38, at 104.

[155] *See id.* at 49-50 ("Democracy requires that the power shall not pass out of sight of the people, but shall remain entirely within their vision, in the hands of visible officers. . . . Concentrated *visible* power is controllable and not dangerous.").

[156] STEVEN L. PIOTT, GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA 2 (2003) (noting that reformers supported direct democracy to allow voters "to bypass unresponsive or irresponsible political bodies"); TARR, *supra* note 33, at 151 (noting that Progressive reformers "favored a strong executive in whom political authority and responsibility could be concentrated"); *see also* Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1371 (1985) (reviewing DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984)) (noting that the Progressives "envisioned" that "the initiative [would] serve[] as a remedy for legislative failure" by "cabin[ing] the legislature's discretion and ensur[ing] that certain proposals not ordinarily high on the legislative agenda [would be] given consideration").

[157] *See* DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 7-14 (1989) (describing the adoption of the initiative and referendum generally in the late

abolished individual offices or new constitutions that consolidated executive branches.[158] Additionally, voters supported candidates for office who ran on adopting the "short ballot" — and eliminated a host of offices that were created by statute.[159] It's possible, therefore, that voters saw a connection between these two ideas. By giving up their powers to elect state officials — especially administrators — and claiming legislative powers, voters essentially traded control over *who* the regulators were for *how* the regulators were selected and *what* they did. In the century that followed, voters routinely exercised this power, as the next Part shows.

nineteenth and early twentieth centuries). *See generally* PIOTT, *supra* note 156 (describing the adoption of the initiative and referendum state by state).

[158] *E.g.*, CAL. CONST. art. VI, § 21 (amended 1911) (abolishing elected Supreme Court Clerk); CAL. CONST. art. XII, § 22 (amended 1911) (abolishing elected Railroad Commission); N.Y. CONST. art. V, §§ 1-11 (amended 1925) (abolishing elected Secretary of State, Treasurer, and State Engineer and Surveyor); OHIO CONST. art. VI, § 4 (1912) (abolishing elected Commissioner of Common Schools). In some states, voters also rejected amendments during this time that would have created new offices. For example, Colorado voted down an initiated amendment that would have created an elected state printer, Oregon voters repeatedly rejected amendments that would have created an elected lieutenant governor, and Tennessee voters failed to ratify amendments that would have created an elected Secretary of State, Treasurer(s), and a Comptroller of the Treasury. *E.g.*, Act of Jan. 9, 1911, S.J.R. 4, 26th Legis. Assemb., Reg. Sess., 1911 Or. Laws 516 (proposing the creation of an elected Lieutenant Governor); Act of Jan. 5, 1903, H.B. 223, ch. 532, 53d Gen. Assemb., Reg. Sess., 1903 Tenn. Pub. Acts 1410 (proposing the statewide election of the Secretary of State, Treasurer(s), and Comptroller of the Treasury); *Amendment 1*, GRAND JUNCTION DAILY SENTINEL, Oct. 6, 1924, at 5, https://www.newspapers.com/image/535898824/ [https://perma.cc/97VM-WV3T] (elected Colorado State Printer). However, much of the success of the Short Ballot Movement was slower — and took place as the twentieth century progressed. Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1553-54, 1556 (2019) [hereinafter *Understanding State Agency Independence*]; BERMAN, *supra* note 153, at 261-62.

[159] *E.g.*, Yeargain, *Shadow Districts*, *supra* note 35, at 9-10 (describing abolition of statutorily created elected railroad commissions).

II. VOTERS AS ARCHITECTS OF REGULATORY INSTITUTIONS

The fractured state of administration in the early twentieth century — too many elected officials and too many overlapping institutions[160] — resulted in consolidation and reconstruction. Beginning in the 1910s, state policymakers began pushing to consolidate and reorganize existing institutions, urged on by countless studies into the inefficiencies of state government.[161] One of the primary objectives of reformers during this time was taking existing boards, bureaus, and commissions — which, in some cases, numbered over one hundred — and sorting them into a smaller number of executive departments.

States used different mechanisms to achieve the shared goal of more efficient and streamlined administration. Some states — notably, New York — set out to constitutionalize the exact departments that would exist following this reorganization.[162] Other states — Massachusetts being the first among them — instead opted to put a cap on the number of departments without naming all of them, allowing for future policymaking needs to be integrated into the consolidated and reorganized system without requiring a constitutional amendment.[163]

The changes to state executive branches that were initiated in the 1910s continued through the remainder of the century. Through the adoption of new constitutions altogether, the ratification of individual constitutional amendments, and the passage of statutory reorganization schemes, by the mid-to-late twentieth century, state executive branches, including administrative agencies, were largely centralized around the governor — and the number of statewide elected officers had decreased dramatically.[164] After this point, state constitutional change slowed, and despite some piecemeal tinkering, the new executive

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[160] Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 557-59 (2001); Seifter, *Understanding State Agency Independence*, *supra* note 158, at 1551-60.

[161] Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 496-99 (2017) [hereinafter *Gubernatorial Administration*]; *see also, e.g.*, Gerald Benjamin & Zachary Keck, *Executive Orders and Gubernatorial Authority to Reorganize State Government*, 74 ALB. L. REV. 1613, 1616–18 (2011) (discussing history of executive reorganization in New York).

[162] N.Y. CONST. art. V, § 2 (amended 1925).

[163] MASS. CONST. art. LXVI (amended 1919).

[164] Seifter, *Gubernatorial Administration, supra* note 161, at 496-99.

branches have since remained largely intact. As such, given their monumental effect on the composition of state government, these changes have received significant attention in state constitutional literature.

But how did states get there? As administrative consolidation was occurring in the 1920s and 1930s, many scholars contemporaneously discussed legislative acts that consolidated agencies and departments — or spoke vaguely and with a passive voice about the changes that state governments were undergoing.[165] Even more recently, scholars have noted the role played by constitutional amendments in bringing about administrative consolidation in state government and in broadening the scope of state regulatory power — but don't go much further.[166]

As a result, the specific role that voters played in shaping and structuring state administrative institutions has largely gone unmentioned. Even discussions specifically about the initiative and referendum focus exclusively on the *policies* that voters enacted with their newfound power — and make no mention of how voters used their powers to weigh in on legislatures' proposed structures and to propose alternatives of their own.

Here, in Part II, I explore voters' underappreciated role in building out state administration. I explain how voters provided input in shaping the structure and powers of subject-specific regulatory institutions —

[165] *See generally* A.E. BUCK, THE REORGANIZATION OF STATE GOVERNMENTS IN THE UNITED STATES (1938) (summarizing state reorganization efforts nationwide); A.E. Buck, *Recent Steps Toward Administrative Consolidation in State Governments*, 14 NAT'L MUN. REV. 672 (1925) (outlining reorganization efforts in Indiana, Minnesota, Missouri, Nevada, South Dakota, Texas, and Wyoming); William H. Edwards, *A Factual Summary of State Administrative Reorganization*, 19 SW. SOC. SCI. Q. 53 (1938) (summarizing reorganization efforts); Charles S. Hyneman, *Administrative Reorganization: An Adventure into Science and Theology*, 1 J. POL. 62 (1939) (summarizing and critiquing scholarly narratives about reorganization); J. Mark Jacobson, *Evaluating State Administrative Structure — The Fallacy of the Statistical Approach*, 22 AM. POL. SCI. REV. 928 (1928) (noting idiosyncrasies of each state's reorganization effort); Harvey Walker, *Theory and Practice in State Administrative Organization*, 19 NAT'L MUN. REV. 249 (1930) (summarizing administrative reorganization efforts and making recommendations).

[166] *E.g.*, JON C. TEAFORD, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT 70-76 (2002); Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS 11, 14, 22 (1982); Seifter, *Gubernatorial Administration*, *supra* note 161, at 496-99; Sturm, *supra* note 34, at 68-71; TARR, *supra* note 33, at 144-57.

including those with regulatory authority over agriculture, corporate and financial practices, the environment, labor, health, motor vehicles, and public utilities[167] — with the role of voters in overseeing institutional construction in each of these areas discussed in a separate section.

A. Food and Agriculture

In the early 1900s, pure food and drug acts were adopted at the state level, and as discussed in Part I.B, many states tasked elected agriculture commissioners to enforce them.[168] By the time that the initiative and referendum power was adopted in the 1910s and 1920s, food and drug acts were prolific — and were complemented nationally with the Food and Drug Act, which created the Food and Drug Administration. To encourage nationwide consistency in regulatory practices, the Office of State Cooperation was created in the FDA in 1913,[169] and in the 1920s and 1930s, the Association of Food and Drug Officials — a private association consisting of state regulatory officials[170] — drafted a model Uniform Food and Drug Law and began lobbying for its passage.[171]

While voters generally played little role in drafting the first food and drug regulations, they played some role in modifying their scope. In 1916, for example, Clarence E. Harmon, the Nebraska State Food, Drug,

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[167] There are some other categories I have chosen to omit: restrictions on substances like alcohol and activities like horse racing, gambling, and athletic competitions. While "regulation" is admittedly a broad category, alcohol, racing, gambling, and athletic regulation sit uncomfortably in a conversation about economic regulation. These regulations, after all, originally sought to *prohibit* the regulated activities altogether in a manner that effectively converted any institution with such regulatory authority into an entity with law enforcement powers more akin to the police.

[168] *See supra* Part I.B.

[169] James C. Pearson, *Uniform State Food Laws*, 14 FOOD, DRUG, COSM. L.J. 183, 185 (1959).

[170] *See AFDO History and Video*, ASS'N FOOD & DRUG OFFS., https://www.afdo.org/history/ (last visited Aug. 16, 2023) [https://perma.cc/R73N-LPNG].

[171] *Developments in the Law: The Federal Food, Drug, and Cosmetic Act*, 67 HARV. L. REV. 632, 636-37 (1954); William F. Reindollar, *The Association of Food and Drug Officials*, 6 FOOD, DRUG, COSM. L.J. 52, 57-58 (1951); Patricia J. Zettler, *Pharmaceutical Federalism*, 92 IND. L.J. 845, 860-61 (2017) (describing widespread adoption of the Uniform State Food, Drug, and Cosmetic Act in the late twentieth century).

and Oil Commissioner, initiated a constitutional amendment that would have taken his office "out of politics," by placing the Commissioner into the state civil service and instituting a six-year term.[172] The amendment narrowly failed, its prospects likely diminished by Harman's self-serving motivations.[173]

Similarly, in 1921, Arthur Hyde, the Republican Governor of Missouri, proposed a reorganization of the executive branch[174] through a series of "cabinet measures," including a reshuffle of food and drug regulation in particular.[175] He proposed the creation of a Department of Agriculture, which consolidated a host of agricultural agencies, boards, commissioners, and departments into a single unit.[176] Hyde also proposed the creation of a Supervisor of Public Welfare, who would inherit the duties of the Food and Drug Commissioner, the State Inspector of Oils, the State Beverage Inspector, and the Inspector of

[172] *Food Commissioner Defends Amendment: Mr. Harman Tells of Benefits Which Will Come if Civil Service Rules*, HOLDREGE PROGRESS, Sept. 14, 1916, at 1, https://www.newspapers.com/newspage/702904091/ [https://perma.cc/5EXN-48YB]. For the text of the amendment, see NEB. CONST. art. V, § 19b (proposed 1916), *reprinted in Sample Ballot*, FALLS CITY J., Nov. 3, 1916, at 4, https://www.newspapers.com/image/689743015/ [https://perma.cc/6Y8X-3D5N].

[173] *See, e.g.*, *Mr. Harman as an Intimator*, BLOOMINGTON ADVOC., July 14, 1916, at 4 ("If it is adopted . . . Governor Morehead will be at liberty to appoint Mr. Harman for a period of six years."); *Pollytricks*, NEB. ST. J., Oct. 7, 1916, at 6 ("[Harman] has laid before the voters at the coming election, using the force of his office to secure the necessary petitions, a constitutional amendment intended to perpetuate him in office and make his department independent of legislative control.").

[174] *Inaugural Address of Arthur M. Hyde: Governor of Missouri*, *in* 1 APPENDIX TO THE HOUSE AND SENATE JOURNALS, 51ST GEN. ASSEMB. 2, 3-7 (1921) (arguing that "a large number" of departments "can be eliminated through co-ordination and efficiency methods").

[175] *End to Missouri Session*, WKLY. KAN. CITY STAR, Mar. 23, 1921, at 4, https://www.newspapers.com/image/654561032 [https://perma.cc/8MXL-SFZR] ("Both houses passed the agricultural bill, one of Governor Hyde's 'cabinet' measures, creating a state department of agriculture to be placed under the head of a commissioner of agriculture."); *Hyde Predicts Saving of $603,000 on Two Consolidation Bills*, ST. LOUIS DAILY GLOBE-DEMOCRAT, Mar. 5, 1921, at 10, https://www.newspapers.com/image/572240255 [https://perma.cc/WWW7-95KT].

[176] Act of Mar. 24, 1921, Comm. Sub. for H.B. 462 & 609, 51st Gen. Assemb., Reg. Sess., 1921 Mo. Laws 125.

Hotels.[177] Shortly after the bills passed, state Democratic leaders organized petition-gathering efforts to put many of the proposed consolidations on the ballot in 1922.[178] At the election, voters rejected the proposed changes — and elected Democrats to a majority in the State Senate to boot.[179] Many of the rejected changes were quietly enacted in the next decade with little controversy — and no referenda.[180]

But the scope of food and agricultural regulation didn't stop at what was covered by pure food and drug acts. In the decades before federal food inspection statutes preempted state laws,[181] AFDO and state policymakers pushed for more aggressive meat inspection and dairy regulation.[182] Voter input in meat regulators and inspectors was relatively minimal. In 1926, Arizona voters rejected a referred statute that modified the duties of the Live Stock Sanitary Board with respect to meat inspections,[183] and in 1936, North Dakota voters similarly

[177] Act of Mar. 24, 1921, H.B. 718, 51st Gen. Assemb., Reg. Sess., 1921 Mo. Laws 589 (creating Supervisor of Public Welfare, abolishing Food and Drug Commissioner); Act of Mar. 24, 1921, H.B. 719, 51st Gen. Assemb., Reg. Sess., 1921 Mo. Laws 405 (abolishing Inspector of Hotels); Act of Mar. 24, 1921, H.B. 720, 51st Gen. Assemb., Reg. Sess., 1921 Mo. Laws 406 (abolishing State Beverage Inspector); Act of Mar. 24, 1921, H.B. 721, 51st Gen. Assemb., Reg. Sess., 1921 Mo. Laws 406 (abolishing State Inspector of Oils).

[178] *See Democrats to Decide About Referendum*, COLUM. EVENING MISSOURIAN, May 6, 1921, at 1; *Statement of Democratic State Committee in Regard to Proposed Referendum on Measures Passed by Republican Legislature*, HOUS. HERALD, May 5, 1921, at 2.

[179] *Republicans Lost Foothold in State*, MARYVILLE TRIB., Nov. 9, 1922, at 1.

[180] *E.g.*, Act of Mar. 22, 1923, S.B. 116, 52d Gen. Assemb., Reg. Sess., 1923 Mo. Laws 227 (transferring duties of Inspector of Hotels to Food and Drug Commissioner); Act of Mar. 22, 1923, S.B. 117, 52d Gen. Assemb., Reg. Sess., 1923 Mo. Laws 228 (transferring duties of State Beverage Inspector to Food and Drug Commissioner); Act of Apr. 21, 1933, S.B. 16, 57th Gen. Assemb., Reg. Sess., 1933 Mo. Laws 255 (transferring duties of Food and Drug Commissioner to Commissioner of Health); Act of May 8, 1933, S.B. 42, 57th Gen. Assemb., Reg. Sess., 1933 Mo. Laws 166 (creating State Department of Agriculture).

[181] *See* Charles P. Mitchell, *State Regulation and Federal Preemption of Food Labeling*, 45 FOOD, DRUG, COSM. L.J. 123, 129-32 (1990) (discussing preemptive effects of the Federal Meat Inspection Act, the Egg Products Inspection Act, and the Poultry Products Inspection Act); *see also* Norman E. Kirschbaum, *Role of State Government in the Regulation of Food and Drugs*, 38 FOOD, DRUG, COSM. L.J. 199, 200 (1983) (discussing the status of contemporary state-level food and agricultural standards).

[182] *E.g.*, Reindollar, *supra* note 171, at 55-57.

[183] *See* JAMES H. KERBY, ARIZ. SEC'Y OF STATE, STATE OF ARIZONA INITIATIVE AND REFERENDUM PUBLICITY PAMPHLET 1926, at 5-21 (1926).

rejected expanding the power of the state's Railroad Commission to include livestock.[184] More recently, however, in 2009, Ohio voters amended their constitution to establish a Livestock Care Standards Board.[185]

With respect to dairy regulation, however, voters had much more input. Much has been written about the onslaught of federal and state laws that sought to regulate oleomargarine out of existence,[186] but few of these laws altered the scope of any regulatory institutions. The practice of regulating *actual* dairy, however, did. In the 1930s, a price collapse in the milk industry led many states to adopt milk control laws that created boards to set price floors for milk.[187] While the construction of milk control boards differed by state, many established marketing districts within the state and set prices for milk sold from producers to dealers.[188]

The constitutionality of these laws notwithstanding,[189] milk control boards have been on the ballot — and voters have proposed their own forms of dairy regulation. As milk control acts were first adopted in the 1930s and 1940s, some of them were quickly challenged on the ballot, with voters in Oregon voting on repeal of milk control acts, and thus abolition of the milk control boards, in 1940, 1952, and 1954,[190] and

[184] Act of Mar. 11, 1935, ch. 3, 24th Leg. Assemb., Reg. Sess., 1935 N.D. Laws 5; *North Dakota to Remain Dry Oasis: All Other Referred, Initiated Acts Are Defeated by Substantial Margins*, BISMARCK TRIB., June 27, 1936, at 1.

[185] Amended Substitute S.J.R. 6, 128th Gen. Assemb., Reg. Sess., 2009–10 Ohio Laws 1.

[186] *See supra* notes 83–89 and accompanying text.

[187] *E.g.*, Julius Cohen, *Milk Regulation: A Problem in Economics, Legislation, and Administration*, 40 W. VA. L.Q. 247, 247-49 (1934); Frank E. Coho, *Milk Price Control — A Developing Field of Administrative Law*, 45 DICK. L. REV. 254, 255-58 (1941); Bruce D. Varner, Note, *Price Regulation: Authority to Fix Different Minimums for Milk Distributors and Retailers*, 12 HASTINGS L.J. 316, 316-17 (1961).

[188] *See, e.g.*, ERIC M. ERBA & ANDREW M. NOVAKOVIC, CORNELL PROGRAM ON DAIRY MKTS. & POL'Y, THE EVOLUTION OF MILK PRICING AND GOVERNMENT INTERVENTION IN DAIRY MARKETS 8-9 (1995), https://dairymarkets.org/pubPod/pubs/EB9505.pdf [https://perma.cc/4SRW-W6WA] (describing adoption of state-level regulation over milk marketing).

[189] For a description of litigation involving the constitutionality of milk control laws, see Mathilde Cohen, *Of Milk and the Constitution*, 40 HARV. J.L. & GENDER 115, 125-49 (2017).

[190] EARL SNELL, OR. SEC'Y OF STATE, OFFICIAL VOTERS' PAMPHLET FOR THE REGULAR GENERAL ELECTION 58-62 (1940) (outlining initiative statute to repeal milk control act);

Michigan voters doing so in 1942.[191] The first two efforts in Oregon failed, but the third succeeded, as did the repeal effort in Michigan. Voters in Washington likewise repealed the state's milk marketing law, which would have created a marketing board.[192] By the 1980s, following a longer trend toward deregulation of the agricultural industry,[193] a number of states moved to deregulate their milk industries.[194] And voters in two of the states that maintained regulation of retail milk prices, Maine and Montana,[195] rejected voter-initiated efforts to abolish milk controls and regulatory institutions.[196]

B. Corporate and Financial Activity

Corporate formation is one of the few areas with a long history of both state government regulation *and* some modicum of voter involvement — even before direct democratic reforms came into effect. Prior to the adoption of general incorporation statutes, early state legislatures had near-total autonomy over corporate formation.[197] And beginning in the mid-nineteenth century, many state constitutions were amended to include regulations regarding corporate practices — including

EARL T. NEWBRY, OR. SEC'Y OF STATE, OFFICIAL VOTERS' PAMPHLET FOR THE REGULAR GENERAL ELECTION 72-76 (1952) (same); EARL T. NEWBRY, OR. SEC'Y OF STATE, OFFICIAL VOTERS' PAMPHLET FOR THE REGULAR GENERAL ELECTION 26-28 (1954) (same).

[191] HERMAN H. DIGNAN, MICH. SEC'Y OF STATE, MICHIGAN OFFICIAL DIRECTORY AND LEGISLATIVE MANUAL 309 (1943–44); *see also* Patterson-Acker Milk Marketing Act, Act No. 369, 1941 Leg., Reg. Sess., 1941 Mich. Pub. Acts 696.

[192] *See* Washington State Milk Marketing Act, ch. 298, 37th Leg., Reg. Sess., 1961 Wash. Sess. Laws 2400; *see also* VICTOR A. MEYERS, WASH. SEC'Y OF STATE, VOTERS PAMPHLET 8-9 (1962) (outlining the arguments for and against the measure).

[193] ERBA & NOVAKOVIC, *supra* note 188, at 11 ("The theme of the early 1970s was to get government out of agriculture . . . ."); Richard F. Fallert, *Milk Pricing — Past, Present, the 1980's*, 64 J. DAIRY SCI. 1105, 1111-12 (1981).

[194] Ronald N. Johnson, *Retail Price Controls in the Dairy Industry: A Political Coalition Argument*, 28 J.L. & ECON. 55, 74 (1985).

[195] *See id.*

[196] *See* JIM WALTERMIRE, MONT. SEC'Y OF STATE, 1984 VOTER INFORMATION PAMPHLET 8-9, 13 (1984) [hereinafter 1984 MONTANA VOTER PAMPHLET] (outlining text and arguments for and against Initiative 96); JIM WALTERMIRE, MONT. SEC'Y OF STATE, 1986 VOTER INFORMATION PAMPHLET 12-13, 20-23 (1986) (same with respect to Initiative 104).

[197] Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 93-94, 97-104 (1999).

shareholder liability and voting procedures. One of the more interesting provisions that existed in a handful of state constitutions ostensibly required voter approval for the adoption of a banking act, as well as any statutory amendments to the act.[198] However, in almost all states, these provisions were narrowly construed by state supreme courts to only apply to banking laws that granted corporations "banking powers" — namely, the authority to issue bank notes as currency.[199]

Other than those minimal regulations, state governments largely did not regulate corporate or financial practices until the early twentieth century. At that point, the perception of fraudulent corporate practices, coupled with the Progressive movement's general support for regulation of the private sector, states began adopting some of the first corporate and financial regulations.[200] Blue-sky laws, for example, were adopted beginning in 1911, and required securities brokers to register with the state.[201]

In some western states, voters played a role in the adoption of these early regulations, and the creation of institutions to enforce them. Voters in Oregon drafted their own version of a blue-sky law, which created a corporation department,[202] but it narrowly failed in 1912. A

[198] ILL. CONST. of 1848, art. X, § 5; ILL. CONST. of 1870, art. XI, § 5; IOWA CONST. art. VIII, § 5; KAN. CONST. art. XIII, § 8 (1859); MICH. CONST. of 1850 art. XV, § 2; MO. CONST. of 1875 art. XII, § 26; OHIO CONST. of 1851, art. XIII, § 7; WIS. CONST. art. XI, § 5 (1848).

[199] People *ex rel.* Badger v. Loewenthal, 93 Ill. 191, 197 (1879); Allen v. Clayton, 18 N.W. 663, 667 (Iowa 1884); Pape v. Capitol Bank of Topeka, 20 Kan. 440, 442-44 (1878); Bissell v. Heath, 98 Mich. 472, 478 (1894); State v. Reid, 125 Mo. 43, 50 (1894); Dearborn v. Nw. Sav. Bank, 42 Ohio St. 617, 624 (1885). *But see* State *ex rel.* Reedsburg Bank v. Hastings, 12 Wis. 47, 50, 52 (1860) (holding that the vote requirement applied to all banks, not just those authorized to print bank notes).

[200] MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900–1933, at 205-07 (1990) [hereinafter REGULATING A NEW ECONOMY]; Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 350-51 (1991); Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & ECON. 229, 230-33 (2003) (concluding that "the decision to adopt a blue-sky law was most heavily influenced by the strength of broad-based coalitions associated with the progressive movement").

[201] Conrad G. Goodkind, *Blue Sky Law: Is There Merit in the Merit Requirements?*, 1976 WIS. L. REV. 79, 83-87; Macey & Miller, *supra* note 200, at 348-49, 356; Mark A. Sargent, *A Future for Blue Sky Law*, 62 U. CIN. L. REV. 471, 501 (1993).

[202] BEN W. OLCOTT, OR. SEC'Y OF STATE, A PAMPHLET CONTAINING A COPY OF ALL MEASURES "REFERRED TO THE PEOPLE BY THE LEGISLATIVE ASSEMBLY," "REFERENDUM

similar vote-backed effort to merge the corporation and insurance departments failed in 1914.[203] In California, the legislature's blue-sky law was referred to the ballot in 1914; separately, a group of voters proposed a weaker competing measure that would have provided state regulators with fewer powers.[204]

The concerns about the integrity of the financial system weren't restricted to securities, though. Related concerns about the banking system, heightened after the Panic of 1907, triggered legislation at the state level meant to guarantee deposits made in state-chartered banks.[205] This legislation frequently created new regulatory authorities in the process. In 1915, the Governor of South Dakota put before the legislature bills to guarantee deposits, creating state depository and banking boards to oversee the guarantee provisions and the resolution of failed bank assets.[206] Both were referred to the 1916 ballot, where they were narrowly defeated.

ORDERED BY PETITION OF THE PEOPLE," AND "PROPOSED BY INITIATIVE PETITION" 128-40 (1912) [hereinafter 1912 OREGON VOTER PAMPHLET].

[203] BEN W. OLCOTT, OR. SEC'Y OF STATE, PROPOSED CONSTITUTIONAL AMENDMENTS AND MEASURES WITH ARGUMENTS RESPECTING THE SAME TO BE SUBMITTED TO THE ELECTORS OF THE STATE OF OREGON AT THE GENERAL ELECTION 65-66 (1914) [hereinafter 1914 OREGON VOTER PAMPHLET].

[204] *See* CAL. SEC'Y OF STATE, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME TO BE SUBMITTED TO THE ELECTORS OF THE STATE OF CALIFORNIA AT THE GENERAL ELECTION ON NOVEMBER 3, 1914, at 38-41 (1914) [hereinafter 1914 CALIFORNIA VOTER PAMPHLET] (referred blue-sky law); *id.* at 78-82 (Competing Investment Companies Act). The initiated measure was widely understood to be a competing measure. *See id.* at 81-82 ("The authors of the initiative act . . . apparently desired to draw the teeth of the referendum act and to substitute in its place another so harmless as to be of no real protection, effect or benefit to the investing public."); *Voters Approve Blue Sky Act Referred to Them: Attempt to Block Supervision of Securities Is Defeated*, FRESNO MORNING REPUBLICAN, Nov. 11, 1914, at 1, https://www.newspapers.com/image/607249201/ [https://perma.cc/XT7T-2W6W].

[205] EUGENE NELSON WHITE, THE REGULATION AND REFORM OF THE AMERICAN BANKING SYSTEM, 1900–1929, at 33 (1983).

[206] Act of Mar. 13, 1915, ch. 103, 14th Legis. Sess., 1915 S.D. Sess. Laws 163; Act of Mar. 13, 1915, ch. 104, 14th Legis. Sess., 1915 S.D. Sess. Laws 211; MESSAGE OF GOVERNOR FRANK M. BYRNE TO THE FOURTEENTH LEGISLATIVE SESSION OF THE STATE OF SOUTH DAKOTA, 14th Legis. Sess., at 38-39 (1915).

And while federal law at the beginning of the twentieth century generally prohibited branch banking,[207] the passage of the McFadden Act in 1927 allowed national banks to establish branch locations if it was permitted under state law.[208] Toward the mid- and late-twentieth century, states began allowing banks to operate branches.[209] Voters in Missouri (1958) and Colorado (1980) proposed statutes that would have legalized branch banking in both states, providing the state Commissioner of Finance and the state Banking Board, respectively, with the authority to approve any proposed branch[210] — but the electorate overwhelmingly rejected both proposals.

C. Environmental Protection

Many institutions that set environmental policy were incorporated into state constitutions — especially in western states, and specifically with regard to public land and water management — in the late nineteenth century,[211] as explored in Part I.C.[212] With their initiative and referendum powers, as well as through their required approval of any legislatively initiated constitutional amendments, voters in some states tinkered with the approaches taken by their constitutions through the twentieth century.

In the context of water and state land, for example, the institutions that regulated them, as well as the rules under which the institutional actors operated, underwent significant change during this period of time. Though few states provided for democratic *state* management of water resources, most of them allowed for the creation of special

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[207] PETER S. ROSE, BANKING ACROSS STATE LINES: PUBLIC AND PRIVATE CONSEQUENCES 25-27 (1997); Daniel C. Giedeman, *Branch Banking Restrictions and Finance Constraints in Early-Twentieth-Century America*, 65 J. ECON. HIST. 129, 130-34 (2005).

[208] Philip Hablutzel, *State Regulation of Branch Banking*, 16 DUQ. L. REV. 679, 681-82 (1977); ROSE, *supra* note 207, at 28-31.

[209] ROSE, *supra* note 207, at 35-40.

[210] LEGIS. COUNCIL OF THE COLO. GEN. ASSEMB., RSCH. PUBL'N NO. 248, AN ANALYSIS OF 1980 BALLOT PROPOSALS 20-24 (1980); *Arguments for and Against Branch Banking*, KAN. CITY STAR, Oct. 16, 1958, at 1A, 4A, https://www.newspapers.com/image/658718260/ [https://perma.cc/724A-RNBH].

[211] Yeargain, *Decarbonizing Constitutions*, *supra* note 14, at 51-52.

[212] *See supra* Part I.C.

districts — like irrigation, drainage, and water-power districts — that provided for democratic *local* control.[213] With respect to management of state lands, voters in several states ditched democratically elected land commissioners or registers, instead subsuming land management into the growing administrative state. In a handful of western states, the original imperative to manage state lands to maximize profit was either abolished or significantly weakened in the late twentieth century to instead favor environmentally sustainable management.

Most of these institutions were not designed to regulate the *environment* as much as they were the relationship that competing economic actors had with a limited resource. The first institutions that emerged with a decidedly environmental*ist* bent were fish and game commissions. Some of the first environmental regulations — fish and game laws — were adopted in the late nineteenth century to regulate hunting and fishing practices in light of declining wildlife populations.[214] However, the widespread non-enforcement of these laws by the existing game commissions[215] led to calls to radically restructure fish and game regulations and to place them under the oversight of an independent commission.[216]

The development of many of these proposals led to a back-and-forth dialogue between lawmakers and voters. Voters initiated their own fair

[213] To a point, anyway. Many states required property ownership as a prerequisite for voting to organize these kinds of special districts and to manage their affairs once organized, which the Supreme Court has largely upheld as constitutional.

[214] JAMES A. TOBER, WHO OWNS THE WILDLIFE? THE POLITICAL ECONOMY OF CONSERVATION IN NINETEENTH-CENTURY AMERICA 81-102 (1981) (describing losses in wildlife); *id.* at 191-225 (describing adoption of hunting and fishing regulations).

[215] *See Merrie Melodies: Rebel Rabbit* (Warner Bros. television broadcast Apr. 9, 1949) (Game Commissioner: "I'm game! Count me in"; Bugs Bunny: "Ah, that must be the Game Commissioner!").

[216] *E.g.*, Eric Biber & Josh Eagle, *When Does Legal Flexibility Work in Environmental Law?*, 42 ECOLOGY L.Q. 787, 817-21 (2015); Clay Henderson, *The Greening of Florida's Constitution*, 49 STETSON L. REV. 575, 603-12 (2020) (detailing the creation of this commission, including its evolution over time, in Florida); Jason Scott Johnston, *The Tragedy of Centralization: The Political Economics of American Natural Resource Federalism*, 74 U. COLO. L. REV. 487, 551-57 (2003); Thomas Lund, *Nineteenth Century Wildlife Law: A Case Study of Elite Influence*, 33 ARIZ. ST. L.J. 935, 980-81 (2001); Martin Nie, Christopher Barns, Jonathan Haber, Julie Joly, Kenneth Pitt & Sandra Zellmer, *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 ENV'T L. 797, 808-10 (2017).

share of statutes and constitutional provisions relating to hunting, fishing, and environmental preservation — in Oregon, for example, voters initiated and then adopted two measures in 1908 that (perhaps unintentionally) effectively banned all fishing in the Columbia River.[217]

But the greatest influence of the electorate was felt in the establishment (and positioning) of state institutions. Responding to perceptions that fish and game commissions were too vulnerable to political pressures,[218] many voters bypassed legislatures altogether by proposing politically independent regulatory commissions. In some cases, this meant voters acting themselves when the legislature declined to,[219] and they set out to create commissions that were either written into the constitution (and thus insulated from constant reshuffling) or achieved independence through fixed terms for commissioners and confirmation by the state legislature.[220] In the 1930s and 1940s, voters

[217] Paula Abrams, *The Majority Will: A Case Study of Misinformation, Manipulation, and the Oregon Initiative Process*, 87 OR. L. REV. 1025, 1028 (2008); Dinan, *Framing a "People's Government*," *supra* note 131, at 971.

[218] *E.g.*, *24,000 Sign for Game Law Vote*, TWIN FALLS NEWS (Twin Falls, Idaho), July 7, 1938, at 9, https://www.newspapers.com/image/566299296/ [https://perma.cc/7NYJ-3S6U] (noting that sponsors of Idaho's initiated statute "claim the law would take the administration of the fish and game department 'out of politics'"); *State Voters Face Intricate Ballot Tuesday*, BALT. EVENING SUN, Nov. 1, 1940, at 50, https://www.newspapers.com/image/369708454 [https://perma.cc/DP55-QBLF].

[219] *E.g.*, CAL. SEC'Y OF STATE, PROPOSED AMENDMENTS TO CONSTITUTION AND PROPOSED LAWS TO BE SUBMITTED TO THE ELECTORS OF THE STATE OF CALIFORNIA AT THE GENERAL ELECTION TO BE HELD TUESDAY, NOVEMBER 4, 1930, at 16 (1930) [hereinafter 1930 CALIFORNIA VOTER PAMPHLET] ("The conservation program introduced by the Fish and Game Commission and conservationists at the last session of the Legislature to restore our fish and game, was defeated by lobbyists representing selfish interests.").

[220] CAL. CONST. art. IV, § 25 ½ (proposed 1930), *in* 1930 CALIFORNIA VOTER PAMPHLET, *supra* note 219, at 16-17 (creating a gubernatorially appointed Fish and Game Commission with five members appointed to six-year terms and removable only for cause); MO. CONST. of 1875, art. XIV, § 16 (amended 1936) (creating a gubernatorially appointed Conservation Commission with four members appointed to six-year terms and required partisan balance); Idaho State Fish and Game Commission Act, 25th Leg., Reg. Sess., 1939 Idaho Sess. Laws 1 (creating gubernatorially appointed Fish and Game Commission with five members appointed to six-year terms and removable only for cause); COLO. CONST. art. XXI (proposed 1940), *in No. 3: An Act to Amend the State Constitution by Adding Thereto a New Article Concerning the Game, Fish and Wild Life of the State*, CRAIG EMPIRE-COURIER (Craig, Colo.), Oct. 2, 1940, at 8 (creating a gubernatorially appointed Fish and Game Commission with six members appointed to six-year terms,

in California, Colorado, Idaho, Missouri, Nevada, and Washington all proposed fish and game commissions of their own designs.[221] Voters similarly passed judgment on the regulatory institutions created by state legislatures. Voters in Maryland, North Dakota, and Washington referred legislative acts to the ballot that reorganized fish and game commissions,[222] and in many other states, voters were presented with constitutional amendments proposed by state legislatures that added these commissions as a constitutional institution.[223]

In enacting these institutions, voters frequently raised and confronted fundamental questions about the organization of state administrative entities. Commissions insulated from *politics*, opponents of reorganization argued, were also insulated from *voters* — and they characterized the creation of "independent" commissions as placing a "dictatorship" in charge of managing wildlife. On the other hand, proponents of reorganization emphasized the value of taking fish and game regulation "out of politics," which they argued would improve the quality and efficacy of the policies adopted. The latter position was advanced by the International Association of Game, Fish and Conservation Commissioners, which at its 1934 meeting endorsed a model administrative setup drafted by a committee shepherded by

removable only for cause, and required partisan balance); NEV. SEC'Y OF STATE, PROPOSITIONS TO BE VOTED UPON IN STATE OF NEVADA AT GENERAL ELECTION, NOVEMBER 3, 1942, at 5-28 (1942) (creating gubernatorially appointed Fish and Game Commission with five members appointed to five-year terms, removable only for cause, and required balance).

[221] *See supra* note 220 and accompanying text.

[222] Act of Mar. 7, 1929, ch. 130, 21st Leg. Assemb., Reg. Sess., 1929 N.D. Laws 155 (consolidating multimember Game and Fish Commission into a single gubernatorially appointed Game and Fish Commissioner); Act of May 3, 1939, H.B. 480, ch. 353, 1939 Gen. Assemb., Reg. Sess., 1939 Md. Laws 766 (creating separate Fisheries Commission to manage wildlife in the Chesapeake Bay region); Act of Mar. 14, 1945, S.B. 57, ch. 37, 29th Leg., Reg. Sess., 1945 Wash. Sess. Laws 153 (consolidating multimember Game Commission into single gubernatorially appointed Game Commissioner).

[223] *E.g.*, Assemb. Const. Amend. No. 45, ch. 61, 53d Leg., Reg. Sess., 1939 Cal. Stat. 3196; Act of May 5, 1941, Comm. Sub. For S.J.R. 28, 1941 Leg., 28th Reg. Sess., 1941 Fla. Laws 2812; Act of Mar. 5, 1943, Act No. 31, 1943 Gen. Assemb., Reg. Sess., 1943 Ga. Laws 28; S.B. 91, Act No. 328, 1944 Leg., Reg. Sess., 1944 La. Acts 1008; S.J.R. 22, 25th Leg., Reg. Sess., 1955 Okla. Sess. Laws 567.

former U.S. Senator Harry B. Hawes.[224] In the end, the electorate largely agreed with this move, generally approving the creation of politically independent commissions with broad regulatory power.

D. Labor

At the beginning of the twentieth century, many labor leaders — Samuel Gompers of the American Federation of Labor chief among them — frequently advocated for the initiative and referendum as democratic reforms.[225] Their advocacy of direct democracy made sense given the reluctance of many state legislatures to adopt labor policies favored by Progressives[226] and the frequency with which state supreme courts struck down legislatively passed statutes.[227]

Accordingly, after the adoption of initiative and referendum procedures, labor-affiliated groups used their powers of direct democracy to bypass reluctant legislatures by enacting their own policies — and to sideline hostile courts by adopting these policies through constitutional amendments. At the time, the labor movement's top priorities included protections from dangerous or unsanitary workplace conditions, and the adoption of workers' compensation or industrial accident systems.[228]

As the pressure to adopt these schemes grew, the need for centralized administration was obvious. States began creating labor departments in the late nineteenth century, and the increased regulatory demands soon justified their widespread adoption.[229] Voters generally did not have the

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[224] Harry B. Hawes, *A Model State Game and Fish Law Setup*, *in* INTERNATIONAL ASSOCIATION OF GAME, FISH AND CONSERVATION COMMISSIONERS: TWENTY-EIGHTH CONVENTION 86, 89-96 (1934) (on file with author).

[225] THOMAS GOEBEL, A GOVERNMENT BY THE PEOPLE: DIRECT DEMOCRACY IN AMERICA, 1890–1940, at 31-33 (2002); JULIE GREENE, PURE AND SIMPLE POLITICS: THE AMERICAN FEDERATION OF LABOR AND POLITICAL ACTIVISM, 1881–1917, at 132 (1998).

[226] *See* Dinan, *Framing a "People's Government*," *supra* note 131, at 958-59.

[227] Dinan, *Court-Constraining Amendments*, *supra* note 132, at 989-96.

[228] MELVYN DUBOFSKY & JOSEPH A. MCCARTIN, *The Labor Question in the Progressive Era*, *in* LABOR IN AMERICA: A History ch. 11 (9th ed. 2017).

[229] Bernard L. Shientag, *The Department of Labor and the State*, 28 AM. LAB. LEGIS. REV. 87, 88-89 (1938) (discussing adoption of state labor departments); Estelle M. Stewart, *The Expanding Activities of State Labor Departments*, 45 MONTHLY LAB. REV. 529, 529-37 (1937).

opportunity to play a significant role in the creation of labor departments, but during the spate of referred laws in Missouri in 1921,[230] the statutory creation of a State Department of Labor was referred to the ballot in 1922. The bill, as drafted by the state legislature, consolidated several different boards, bureaus, and commissions relating to labor and working conditions into a single department.[231] Just as voters rejected the other consolidation efforts, they rejected the creation of the State Department of Labor, too,[232] but it was created without controversy just a few years later.[233]

Voters were much more directly involved with narrower questions of how different labor policies would be administered and overseen. Though the creation of state civil service systems was not a direct focus of the labor movement, reformers and patronage critics successfully pushed for the creation of civil service commissions[234] — both via initiated statutes and constitutional amendments.[235]

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[230] *See supra* notes 174–180 and accompanying text.

[231] Act of Mar. 25, 1921, H.B. 648, 51st Gen. Assemb., Reg. Sess., 1921 Mo. Laws 417 (consolidating the Bureau of Labor Statistics, Board of Mediation and Arbitration, State Industrial Inspector, State Board of Boiler Rules, State Bureau of Mines, State Board of Coal Mining, Commission for the Blind, and Negro State Industrial Commission in the Department of Labor).

[232] *See supra* notes 174–180 and accompanying text.

[233] Act of Apr. 8, 1927, S.B. 149, 54th Gen. Assemb., Reg. Sess., 1927 Mo. Laws 292 (creating Department of Labor and Industrial Inspection).

[234] SHELTON STROMQUIST, REINVENTING "THE PEOPLE": THE PROGRESSIVE MOVEMENT, THE CLASS PROBLEM, AND THE ORIGINS OF MODERN LIBERALISM 67-68 (2006) (noting that support for civil service reform primarily came from democratic reformers); Anirudh V.S. Ruhil & Pedro J. Camões, *What Lies Beneath: The Political Roots of State Merit Systems*, 13 J. PUB. ADMIN. RSCH. & THEORY 27, 30-32 (2003).

[235] *See e.g.*, *Proposed Amendment to the Constitution of the State of Colorado, Initiated by Petition Under the Initiative and Referendum*, ASPEN DEMOCRAT-TIMES (Aspen, Colo.), Oct. 31, 1916, at 1 (proposing creation of Civil Service Commission); Act of Nov. 5, 1918, ch. 102, 22d Gen. Assemb., Reg. Sess., 1919 Colo. Sess. Laws 341 (creating Civil Service Commission); JAMES D. GRONNA, N.D. SEC'Y OF STATE, NORTH DAKOTA PUBLICITY PAMPHLET: MEASURES TO BE SUBMITTED TO THE ELECTORS AT THE GENERAL ELECTION, NOVEMBER 8TH, 1938, at 15-28 (1938); *Proposal Would Establish Dictatorship over Personnel*, LANSING ST. J., Nov. 1, 1940, at 1, 10, https://www.newspapers.com/image/204033486/ [https://perma.cc/SRA5-KG56] (creating Civil Service Commission); CURTIS M. WILLIAMS, ARIZ. SEC'Y OF STATE, STATE OF ARIZONA INITIATIVE AND REFERENDUM PUBLICITY PAMPHLET 1948, at 15-18 (1948) (creation of Civil Service Board); *see also* S.J. Res. 642,

More central to the labor movement's goals, however, was the creation of regulatory institutions designed to protect workers in the private sector. Workers' compensation schemes — or, alternatively, industrial accident schemes — were first created in the United States in the early twentieth century.[236] But many of these first systems lacked clear methods of administration and were executed poorly by the judicial system.[237]

Accordingly, coalitions of voters, along with state legislators, began proposing more detailed workers' compensation systems that were accompanied by clearer systems of administration.[238] Some of the early constitutional amendments were responsive to adverse state court rulings, which held that legislatures didn't have the power to enact workers' compensation schemes — so the amendments were designed to reverse those decisions and give legislatures the power to create a system of workers' compensation of its own design.[239]

But voters set out to propose their own policies, procedures, and administration for workers' compensation schemes. The structure of the institutions that voters set out to create were quite similar — most were gubernatorially appointed commissions of four members serving staggered terms and with some requirement of partisan balance.[240]

1955 Leg., 35th Reg. Sess., 1955 Fla. Laws 1216 (allowing legislature to create civil serviced boards).

[236] *See, e.g.*, John Fabian Witt, Note, *The Transformation of Work and the Law of Workplace Accidents, 1842–1910*, 107 YALE L.J. 1467, 1499-1501 (1998).

[237] Edward Berkowitz & Monroe Berkowitz, *The Survival of Workers' Compensation*, 58 SOC. SERV. REV. 259, 263 (1984).

[238] *See id.*; *see also* Arthur Larson, *Nature and Origins of Workmen's Compensation*, 37 CORNELL L. REV. 206, 231-33 (1952) (describing development of commissions).

[239] S. Const. Amend. No. 32, ch. 66, 39th Sess., Reg. Sess., 1911 Cal. Stat. 2179 ("The legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration, or by an industrial accident board, by the courts, or by either any or all of these agencies . . . ."); NEB. CONST. art. XV, § 9 (amended 1920); OHIO CONST. art. II, § 35 (amended 1912); H.J.R. 1, 5th Leg., Reg. Sess., 1915 Okla. Sess. Laws 587; *see also* S. Const. Amend. No. 30, ch. 60, 1917 Cal. Stat. 1953 (adding additional requirements to authorized workers' compensation scheme); OHIO CONST. art. II, § 35 (amended 1923) (same).

[240] *E.g.*, BEN W. OLCOTT, OR. SEC'Y OF STATE, MEASURES WITH ARGUMENTS RESPECTING THE SAME TO BE SUBMITTED TO THE ELECTORS OF THE STATE OF OREGON AT THE SPECIAL ELECTION ON TUESDAY, NOVEMBER 4, 1913, at 17-31 (1913); MONT. SEC'Y OF STATE, INITIATIVE

Voters also responded to legislative enactments, either by referring the laws to the ballot[241] or by supplementing the powers of legislatively created bodies.[242]

However, little attention was focused on the *structure* of the institutions created in workers' compensation schemes. Indeed, to this end, voters explicitly copied administrative structures that were proposed or enacted in other states.[243] Much more attention was focused on the details of the policies themselves — especially whether the proposed scheme was mandatory.[244]

MEASURE NO. 7: RELATING TO COMPENSATION OF WORKMEN INJURED IN EXTRA-HAZARDOUS INDUSTRIES 1-32 (1914); SIDNEY P. OSBORN, ARIZ. SEC'Y OF STATE, INITIATIVE AND REFERENDUM PUBLICITY PAMPHLET, STATE OF ARIZONA, 1918, at 2-37 (1918) [hereinafter 1918 ARIZONA VOTER PAMPHLET]; *Proposition No. 6: An Act Providing a System for Compensation for Workmen Injured in Industrial Accidents*, SPRINGFIELD NEWS-LEADER, Oct. 29, 1924, at 7-8, https://www.newspapers.com/image/40271847/ [https://perma.cc/5EB6-ZTKK].

[241] *E.g.*, Act of Apr. 28, 1919, Comm. Sub. For S.B. 389, 50th Gen. Assemb., Reg. Sess., 1919 Mo. Laws 456; Act of Mar. 28, 1921, H.B. 73, 51st Gen. Assemb., Reg. Sess., 1921 Mo. Laws 425.

[242] I.M. HOWELL, WASH. SEC'Y OF STATE, A PAMPHLET CONTAINING A COPY OF ALL MEASURES "PROPOSED BY INITIATIVE PETITION," "PROPOSED TO THE PEOPLE BY THE LEGISLATURE," AND "AMENDMENT TO THE CONSTITUTION PROPOSED BY THE LEGISLATURE" 30-33 (1914) [1914 WASHINGTON VOTER PAMPHLET] (increasing duties of existing Industrial Insurance Department to supervise employee-funded provision of first aid medical care); SAM A. KOZER, OR. SEC'Y OF STATE, PROPOSED CONSTITUTIONAL AMENDMENTS AND MEASURES (WITH ARGUMENTS) TO BE SUBMITTED TO THE VOTERS OF OREGON AT THE GENERAL ELECTION, TUESDAY, NOVEMBER 4, 1924, at 21-22 (1924) [hereinafter 1924 OREGON VOTER PAMPHLET] (implementing compulsory workers' compensation scheme and requiring that any legislative modification to the workers' compensation law be submitted to voters).

[243] *E.g.*, SIDNEY P. OSBORN, ARIZ. SEC'Y OF STATE, INITIATIVE AND REFERENDUM PUBLICITY PAMPHLET, STATE OF ARIZONA, 1918, at 62 (1916) (noting that the proposed amendment is "in every essential the same as the Compensation Law now in effect in the State of Montana").

[244] *E.g.*, 1918 ARIZONA VOTER PAMPHLET, *supra* note 240, at 36-37 (statement of a representative of the American Federation of Labor, in opposition to the amendment) ("The proposed law will abrogate the present workmen's compensation law and employer's liability law, and will set up in their place a shrewdly worked profiteering and efficiency destroying provisions born and bred in the minds of certain unscrupulous Bisbee politicians and copperbundists."); 1924 OREGON VOTER PAMPHLET, *supra* note 242, at 24-25 (statement of representative of the Oregon Industrial Accident Committee, in opposition to the amendment) (arguing that the execution of the proposed amendment

E. Medicine

Some of the earliest medical regulations were professional licensing requirements, which were first adopted beginning in the late nineteenth century — primarily as an anti-competitive measure backed by established professionals.[245] States passed the first modern licensing and practice regulations beginning in the nineteenth century,[246] but these regulations were quite minimal. Many licensing statutes "specified no particular method of practice for certification" and defined the practice of medicine in such a narrow manner that many professionals who were *functionally* medical practitioners were excluded from the statutes altogether.[247] This "jungle of state statutes" proved dissatisfying and led to a push for unification.[248]

The adoption of new licensing requirements served another purpose — the sidelining of alternative practices like chiropractic medicine, osteopathy, homeopathy, naturopathy, and Christian Science.[249] Practitioners in these groups sought to establish their own licensing procedures. Osteopaths saw the greatest success. Aided by the American Osteopathic Association, which drafted model state laws that adopted osteopath licensing procedures,[250] they frequently succeeded in creating either alternative licensing boards for themselves or securing representation on hybrid boards.[251] Chiropractors were successful in establishing licensing procedures for their members, but not always successful in creating "autonomous chiropractic licensing board[s]" with no outside medical professionals sitting on them.[252]

"tramples upon every principle of individual liberty, and overrides every legal safeguard which experience has shown to be necessary for the protection of personal rights").

[245] KELLER, AFFAIRS OF STATE, *supra* note 36, at 411-12.

[246] DAVID A. JOHNSON & HUMAYUN J. CHAUDHRY, MEDICAL LICENSING AND DISCIPLINE IN AMERICA: A HISTORY OF THE FEDERATION OF STATE MEDICAL BOARDS 22-26 (2012).

[247] KELLER, REGULATING A NEW ECONOMY, *supra* note 200, at 91-92.

[248] JAMES G. BURROW, ORGANIZED MEDICINE IN THE PROGRESSIVE ERA: THE MOVE TOWARD MONOPOLY 32-33 (1977).

[249] *Id.* at 53-56.

[250] Norman Gevitz, *Osteopathic Medicine: From Deviance to Difference*, *in* OTHER HEALERS: UNORTHODOX MEDICINE IN AMERICA 124, 132-33 (Norman Gevitz ed., 1988).

[251] BURROW, *supra* note 248, at 60-61.

[252] J. STUART MOORE, CHIROPRACTIC IN AMERICA: THE HISTORY OF A MEDICAL ALTERNATIVE 89-91 (1993).

Many states opted for "compromise" legislation for all aspiring medical practitioners. Beginning in the early 1900s, and continuing through the mid-century, at the urging of the traditional medical community, states established "basic science" requirements. These requirements mandated all those seeking a medical license to pass a test that covered what were considered to be "basic sciences" — like anatomy, chemistry, physiology, toxicology, et cetera, though the specific subjects were set by each state.[253] A 1937 report by the Kansas Legislative Council to the State House Public Health Committee observed that the goal of "basic sciences" laws was, in light of the growth of "a myriad of healing professions," some of which were "fraudulent 'quackery,'" to "guarantee that the practitioner was schooled in the fundamental and basic sciences of healing, irrespective of the 'art' he practiced."[254] Many aspiring osteopaths, chiropractors, and homeopaths had a difficult time passing these examinations, creating the impression — likely accurate — that they were designed to set alternative-medicine practitioners up for failure.[255]

As these regulations were put in place, chiropractors, osteopaths, and naturopaths frequently formed associations in states with permissive initiative and referendum laws to advocate for their preferred licensing regimes. Though they occasionally referred licensing laws passed by state legislatures to the ballot,[256] their more common tactic was to propose their own licensing procedures.

Beginning in 1914 in California, chiropractors' associations proposed the creation of state boards of chiropractic examiners. But these efforts failed in California (1914 and 1920), Colorado (1920), Arizona (1932),

[253] BURROW, *supra* note 248, at 61-62; MOORE, *supra* note 252, at 91-92; Walter I. Wardwell, *Chiropractors: Evolution to Acceptance*, *in* OTHER HEALERS, *supra* note 250, at 157, 165-66.

[254] RSCH. DEP'T, KAN. LEGIS. COUNCIL, PUBL'N NO. 58, THE BASIC SCIENCES: THEIR RELATIONSHIP TO THE CONTROL AND REGULATION OF THE HEALING ARTS 4 (1937).

[255] Gevitz, *supra* note 250, at 141-42 (noting poor passage of osteopaths); MOORE, *supra* note 252, at 91 (noting poor passage of chiropractors); Wardwell, *supra* note 253, at 166 (noting poor passage of chiropractors).

[256] *See, e.g.*, Act of Apr. 12, 1915, ch. 148, 20th Gen. Assemb., Reg. Sess., 1915 Colo. Sess. Laws 415 (creating a State Board of Medical Examiners); Act of Mar. 27, 1917, ch. 164, 6th Leg., Reg. Sess., 1917 Okla. Sess. Laws 264-65 (requiring all doctors to be subjected to examinations by the State Board of Medical Examiners).

Massachusetts (1932), and Washington (1954).[257] Osteopaths and naturopaths saw similar levels of defeat, with their proposed measures losing in Oregon (1924), Arizona (1934), California (1934), and Montana (1944).[258] Chiropractors and osteopaths succeeded, however, in passing initiated statutes in California in 1922, creating state boards of examiners for both disciplines — and they used the initiative process to further tweak the boards' composition and powers in the decades that followed.

In response to this failure, some practitioners of alternative medicine tried a different tactic — constitutional amendments that proposed the creation of broad individual rights to healthcare and medical professionals' rights to practice medicine.[259] While these rights sounded

[257] 1914 CALIFORNIA VOTER PAMPHLET, *supra* note 204, at 97-101 (Measure 46); CAL. SEC'Y OF STATE, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME TO BE SUBMITTED TO THE ELECTORS OF THE STATE OF CALIFORNIA AT THE GENERAL ELECTION ON TUESDAY, NOVEMBER 2, 1920, at 15-22 (1920) (Measure 5); *Question 2: Proposed Law of the State of Colorado, Initiated by Petition under the Initiative and Referendum*, ORDWAY NEW ERA, Oct. 1, 1920, at 6; SCOTT WHITE, ARIZ. SEC'Y OF STATE, STATE OF ARIZONA INITIATIVE AND REFERENDUM PUBLICITY PAMPHLET 1932, at 71-79 (1932) (Nos. 304 and 305) [hereinafter 1932 ARIZONA VOTER PAMPHLET]; *Oppose Practice of Chiropractic: Dr. Carpenter Voices Medical Men's Objections*, NORTH ADAMS EVENING TRANSCRIPT (North Adams, Mass.), Oct. 25, 1932, at 3, https://www.newspapers.com/image/545300568 [https://perma.cc/T665-ZKLC] (Question 1); EARL COE, WASH. SEC'Y OF STATE, OFFICIAL VOTER'S PAMPHLET CONTAINING FULL TEXT OF ALL STATE MEASURES TO BE VOTED UPON AT THE STATE GENERAL ELECTION NOV. 2, 1954, at 5-12 (1954) (Initiative 188).

[258] 1924 OREGON VOTER PAMPHLET, *supra* note 242, at 15-20 (Nos. 308 and 309); JAMES H. KERBY, ARIZ. SEC'Y OF STATE, STATE OF ARIZONA INITIATIVE AND REFERENDUM PUBLICITY PAMPHLET 1934, at 18-29 (1934) (Nos. 302 and 303); CAL. SEC'Y OF STATE, PROPOSED AMENDMENTS TO CONSTITUTION, PROPOSITIONS AND PROPOSED LAWS TO BE SUBMITTED TO THE ELECTORS OF THE STATE OF CALIFORNIA AT THE GENERAL ELECTION TO BE HELD TUESDAY, NOVEMBER 6, 1934 pt. 1 at 24-25, pt. 2 at 32-40 (1934) (Measure 17); *Three Special Ballots for General Election November 7 Hold Interest*, MISSOULIAN, Oct. 31, 1944, at 8, https://www.newspapers.com/image/349313680 [https://perma.cc/T9NB-86GR].

[259] ARIZ. CONST. art. II, § 35 (proposed 1928) ("No law shall be enacted in this State respecting the establishment of any method of healing, or prohibiting the free exercise of the right of any person to choose any method of healing, or that will compel any healer to be examined by a board of examiners which is not entirely composed of members of his or her school of healing."); OR. CONST. § 6 (proposed 1934) ("Every person shall have the right to choose a particular Oregon-licensed physician or physician and surgeon . . . irrespective of the school of practice to which such physician or physician and surgeon may belong, to treat his or her infirmity, ailment or malady . . . provided further, that

innocuous,[260] the proponents of these amendments acknowledged that these amendments would have served to impliedly validate self-regulatory licensing regimes, ending the states' power to meaningfully regulate any of the affected professions.[261] This tactical switch was consistent with much of the messaging that these practitioners' associations used in their campaigns. When describing their proposed measures, the associations relied heavily on themes of "freedom" and "liberty" — like the "freedom" of each person to visit a doctor of their

every person . . . shall have the right to select the mode of treatment and practitioner or his or her choice."); *id.* § 3 ("Each and every examination in connection with the *right to secure a license or certificate to practice medicine, surgery, osteopathy, chiropractic, or naturopathy*, hereby is brought under the exclusive jurisdiction and supervision of the respective boards of examiners of each art or profession . . . ." (emphasis added)); COLO. CONST. § 1 (proposed 1938) ("No person shall be denied the exclusive right to choose his own State licensed system of healing and doctor for State required examinations . . . ."); *id.* § 2 ("No profession recognized by the State shall be denied the exclusive right to examine, license and regulate the practice of its own members through its own legally constituted board or authority.").

[260] JAMES H. KERBY, ARIZ. SEC'Y OF STATE, STATE OF ARIZONA INITIATIVE AND REFERENDUM PUBLICITY PAMPHLET 1928, at 7-8 (1928) [hereinafter 1928 ARIZONA VOTER PAMPHLET] (statement of A.C. Carlson, President of the Arizona State Medical Association, in opposition to the amendment) ("This measure is worded and designed to appeal to the layman who is overly jealous of his personal liberty and rights."); P.J. STADELMAN, OR. SEC'Y OF STATE, OFFICIAL VOTERS' PAMPHLET FOR THE REGULAR GENERAL ELECTION, NOVEMBER 6, 1934, at 20-22 (1934) [hereinafter 1934 OREGON VOTER PAMPHLET] (statement of Francis B. Jacobberger, President of the Oregon State Federation of Professional Societies, in opposition to the amendment) (noting that the sponsors allege "[t]hat the amendment gives to all a constitutional guarantee of the doctor of their choice" but "[a]ll persons always have had and now have the right to engage the services of any licensed doctor of any school or system of healing").

[261] 1928 ARIZONA VOTER PAMPHLET, *supra* note 260, at 5-6 ("The third clause prevents any person or persons from compelling any healer to be examined by any board of examiners which is not composed entirely of members of his school of healing."); 1934 OREGON VOTER PAMPHLET, *supra* note 260, at 19 (The amendment "retires the basic science board and places the duty of examining in these sciences upon the regular examining boards").

choice.[262] These amendments all failed.[263] Basic science laws remained in effect, but over time, practitioners of alternative medicines were ultimately able to persuade state legislatures to establish licensing boards specific to their practices.[264]

Similar efforts took place with respect to the practice of dentistry in some states. Early dental licensing boards in California and Oregon were seen by some aspiring dentists as anti-competitive, and the examinations as onerous.[265] Accordingly, groups of discontent dentists proposed initiated statutes in the 1910s and 1920s that either eliminated

[262] *E.g.*, 1914 CALIFORNIA VOTER PAMPHLET, *supra* note 204, at 97-101 ("The real object of this proposed act is to secure freedom."); 1932 ARIZONA VOTER PAMPHLET, *supra* note 257, at 71-79 ("[Y]ou would lose your freedom of choice."). *But see* JAMES H. KERBY, ARIZ. SEC'Y OF STATE, STATE OF ARIZONA INITIATIVE AND REFERENDUM PUBLICITY PAMPHLET 1933, at 53-61 (1933) ("[N]o charlatan should be permitted to escape reasonable examination concerning his qualifications by the specious claim of 'freedom of choice' in healing methods.").

[263] Similar claims of "freedom" — specifically, the freedom to *not* purchase health insurance — still pop up in more recently proposed state constitutional amendments. But these amendments, in contrast to the amendments proposed in the 1930s, have largely passed. ALA. CONST. art. I, § 36.04(a) (amended 2012) ("In order to preserve the freedom of all residents of Alabama to provide for their own health care, a law or rule shall not compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system."); ARIZ. CONST. art. XXVII, § 2(A)(1) (amended 2010) ("A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system."); OHIO CONST. art. I, § 21(A) (amended 2011) ("No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system.").

[264] *E.g.*, Gevitz, *supra* note 250, at 143-56; Martin Kaufman, *Homeopathy in America: The Rise and Fall and Persistence of a Medical Heresy*, *in* OTHER HEALERS, *supra* note 250, at 99, 122-23; Wardwell, *supra* note 253, at 178-82.

[265] 1914 OREGON VOTER PAMPHLET, *supra* note 203, at 67-69; CAL. SEC'Y OF STATE, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME TO BE SUBMITTED TO THE ELECTORS OF THE STATE OF CALIFORNIA AT THE GENERAL ELECTION ON TUESDAY, NOVEMBER 5, 1918, at 51-54 (1918) [hereinafter 1918 CALIFORNIA VOTER PAMPHLET].

the existing boards of dentistry[266] or exempted out-of-state dentists licensed in their home states from in-state licensing requirements.[267]

Later, toward the end of the twentieth century, the regulation of how dentures are installed attracted a similar back-and-forth between voters and legislatures. Up to this point, dentures could only be fitted and installed by licensed dentists[268] — one of many medical services or procedures that can only be provided by specialized medical professionals.[269] Accordingly, in Idaho, Montana, Oregon, and Washington, denturists proposed statutes that created denturitry licensing boards and allowed them to install dentures.[270]

F. Motor Vehicles

State departments of motor vehicles have a discrete task, but a significant reach. Overseeing the registration of motor vehicles, including registration payments, taxes, and ongoing compliance like emissions testing, and licensing all state drivers is just a fraction of what

[266] 1914 OREGON VOTER PAMPHLET, *supra* note 203, at 67-69.

[267] 1918 CALIFORNIA VOTER PAMPHLET, *supra* note 265, at 51-54; *An Act to Amend Sections 4571 and 4574, Compiled Laws of Colorado of 1921, Relating to the Practice of Dentistry*, CRAIG COURIER, Oct. 6, 1926, at 2.

[268] MICHAEL GREER & ANN MAYO PECK, KY. LEGIS. RSCH. COMM'N, RSCH. REPORT NO. 292, A STUDY OF DENTURITRY 9-15 (2000) [hereinafter KENTUCKY DENTURITRY STUDY] (describing development of denturitry regulation).

[269] *See* Mary Anne Bobinski, *Law and Power in Health Care: Challenges to Physician Control*, 67 BUFF. L. REV. 595, 633-34 (2019) (discussing powers of non-doctors to provide medical services generally); Christopher Ogolla, *Litigating Hypocrisy: Turf Wars Between Health Care Professionals Regarding Diagnosis, Evaluation, and Treatment*, 50 U. TOL. L. REV. 67, 81-83 (2018) (discussing state-level litigation regarding which professionals can provide care).

[270] NORMA PAULUS, OR. SEC'Y OF STATE, VOTERS' PAMPHLET: STATE OF OREGON, GENERAL ELECTION, NOVEMBER 7, 1978, at 29-36 (1978) (creating Advisory Council on Denture Technology within State Health Division); Initiative Authorizing the Practice of Denturitry and Establishing Licensing Board, 47th Leg., 1st Reg. Sess., 1983 Idaho Sess. Laws 762 (creating State Board of Denturitry); Act of Apr. 11, 1983, ch. 194, 47th Leg., 1st Reg. Sess., 1983 Idaho Sess. Laws 527 (codifying and modifying initiated statute); 1984 MONTANA VOTER PAMPHLET, *supra* note 196, at 10-11, 13-16 (creating Board of Denturitry); RALPH MUNRO, WASH. SEC'Y OF STATE, WASHINGTON STATE VOTERS PAMPHLET: STATE GENERAL ELECTION, NOVEMBER 8, 1994, at 6-7 (1994) (creating State Board of Dental Technology); *see also* KENTUCKY DENTURITRY STUDY, *supra* note 268, at 9-10 (discussing adoption of denturitry laws generally).

state governments do in total — but these responsibilities easily have some of the most tangible stakes for the public. Most state residents have reason to interact with DMVs,[271] making them one of the administrative agencies with which members of the public interact the most. It makes sense, then, that DMVs' public-facing role has led policymakers to link them with other policy priorities — like encouraging voter registration[272] and organ donation.[273]

Getting to this point was not inevitable, though. At the beginning of the twentieth century, as cars were just starting to become affordable for a large swath of the population, motor-vehicle regulation was deeply

[271] *See* FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., OUR NATION'S HIGHWAYS 25 (2011), https://www.fhwa.dot.gov/policyinformation/pubs/hf/pl11028/onh2011.pdf [https://perma.cc/ZV6P-39TD] (noting that in 2009, "87 percent of the driving-age population (age 16 and older) ha[d] a license"); *see also* James H. Pricer & Nicholas E. Wyckoff, *Practices and Procedures of the Department of Motor Vehicles*, 14 HASTINGS L.J. 355, 355 (1963) ("Among regulatory and control agencies of the state government of California, the Department of Motor Vehicles touches the lives, property, and prevailing customs of more of the populace than any other through the modern family's interest in motor vehicle ownership and operation."). Indeed, Americans may underestimate the frequency with which DMV experiences are universal. A 2022 YouGov poll showed that respondents estimated that 68% of American adults had a driver's license (when the actual percentage was 83%) and only 66% owned a car (when the actual percentage was 88%). Taylor Orth, *From Millionaires to Muslims, Small Subgroups of the Population Seem Much Larger to Many Americans*, YOUGOV (Mar. 15, 2022), https://today.yougov.com/politics/articles/41556-americans-misestimate-small-subgroups-population [https://perma.cc/8ZF2-B7V7].

[272] Michael D. Martinez & David Hill, *Did Motor Voter Work?*, 27 AM. POL. Q. 296, 297 (1999) ("If new residents, young people, and the poor could be reached at the time that they were applying for, or renewing, a driver's license or public assistance benefits, the disenfranchisement of those populations might be partially overcome and turnouts might continue to climb."); Staci L. Rhine, *Registration Reform and Turnout Change in the American States*, 23 AM. POL. Q. 409, 421 (1995) (noting that motor-voter registration can help increase voter registration of "hard-to-reach citizens"); Joshua S. Sellers & Justin Weinstein-Tull, *Constructing the Right to Vote*, 96 N.Y.U. L. REV. 1127, 1144-46 (2021) (describing the arguments made in support of the National Voter Registration Act's provision requiring motor-voter registration).

[273] Reid Kress Weisbord, *Anatomical Intent*, 124 YALE L.J.F. 117, 121 (2014) ("In most states, the current system of gratuitous organ donation designates the department of motor vehicles (DMV) as the primary point of contact for organ donor registration."); Hayley Cotter, Note, *Increasing Consent for Organ Donation: Mandated Choice, Individual Autonomy, and Informed Consent*, 21 HEALTH MATRIX 599, 613 (2011) (noting that the "current opt-in system of organ donation operates" through state departments of motor vehicles).

decentralized. Localities adopted their own regulatory requirements for vehicles, which frequently served as discriminatory taxes on non-resident drivers.[274] Beginning with New York in 1901, states began to standardize registration and licensing requirements, folding up the patchwork quilt of local laws.[275]

From here, state governments' role in regulating private ownership of automobiles morphed. As registration laws came into effect, most states taxed vehicles as personal property[276] — which could prove expensive or prohibitive for a prospective car buyer. If legislatures wanted to change this reality, they would be constrained from doing so. State constitutions generally imposed strict uniformity requirements on state legislatures that prevented them from, among other things, exempting automobiles from assessment as taxable personal property.[277] So legislators in some states proposed constitutional amendments that added an exception to the uniformity requirement that allowed states to impose a registration fee on automobiles in lieu of a property tax.[278] Voters approved most of these amendments.

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[274] *E.g.*, JAMES J. FINK, AMERICA ADOPTS THE AUTOMOBILE, 1895–1910, at 171-73 (1970) (noting the "complex and abusive municipal system of motor vehicle laws"); *see also Automobile Owners Registering*, N.Y. DAILY TRIB., Sept. 4, 1901, at 5, https://chroniclingamerica.loc.gov/lccn/sn83030214/1901-09-04/ed-1/seq-5/ [https://perma.cc/Q9AW-QM6K] ("One of the objects of the [motor vehicle registration] law was to put a stop to the harassing of the owners of automobiles with local regulations.").

[275] FINK, *supra* note 274, at 166-69.

[276] James W. Martin, *Report of the Committee of the National Tax Association on Taxation of Motor Vehicle Transportation*, 23 PROCS. OF THE ANN. CONF. ON TAX'N 134, 138-39 (1930).

[277] *See* David A. Myers, *Open Space Taxation and State Constitutions*, 33 VAND. L. REV. 837, 844 (1980) ("This attitude [of uniformity in taxation] poses a difficult problem for state legislatures, because they must develop an effective and equitable property taxation system without differentiating between classes of property. To be sure, this safeguard inhibits preferential treatment of certain groups of taxpayers. But it also precludes legislation of a special character designed to promote the general good.").

[278] *E.g.*, H.J. & Con. Res. 14, 51st Gen. Assemb., Reg. Sess., 1921 Mo. Laws 699; S.J. Res. 7, 25th Gen. Assemb., Reg. Sess., 1925 Colo. Sess. Laws 559; S.C. Res. 4, ch. 4, 42d Leg., Spec. Sess., 1928 Kan. Sess. Laws 3; S. Const. Amend. No. 18, ch. 47, 48th Leg., Reg. Sess., 1929 Cal. Stat. 2223; H.J. Res. 753, 1929 Leg., 22d Reg. Sess., 1929 Fla. Laws 786; H.C. Res. 10, ch. 212, 56th Leg., Reg. Sess., 1955 Kan. Sess. Laws 431; H.C. Res. 10, ch. 438, 1956 Leg., Reg. Sess., 1956 Miss. Laws 715. *But see* S.F. 352, ch. 418, 47th Leg., Reg. Sess., 1931 Minn. Laws 613 ("The legislature is hereby authorized to provide, by law, for the taxation of

The creation of a separate process for collecting revenue from car ownership necessitated an administrative structure to oversee the process. Many state constitutional amendments providing state governments with the power to impose vehicle registration fees were accompanied by statutory enactments creating departments of motor vehicles, or at the least, motor vehicle officers within the offices of secretaries of state.[279] In many states, these statutory schemes — the creation of the department itself, the power of state officials to collect registration fees, et cetera — were challenged by voters.[280] And some of these statutes were defeated in referendum elections,[281] partly out of fear that removing automobiles from tax rolls would reduce the state's overall revenue (and result in higher property taxes for those who didn't own cars) or could constitute double taxation.[282]

motor vehicles, using the public streets and highways of this state, *on a more onerous basis than other personal property* . . . ." (emphasis added)).

[279] *E.g.*, Act of July 30, 1921, H.B. 80, 51st Gen. Assemb., 1st Extra. Sess., 1921 Mo. Laws 76 (creating Commissioner of Motor Vehicles following proposed constitutional amendment); Act of Apr. 9, 1927, ch. 136, 26th Sess., Reg. Sess., 1927 Colo. Sess. Laws 518 (creating motor vehicle supervisor to oversee vehicle registration following passage of 1926 amendment); Act of May 26, 1927, ch. 11901, 1927 Leg., 21st Reg. Sess., 1927 Fla. Laws 421 (creating Motor Vehicle Commissioner, followed two years later by constitutional amendment).

[280] *E.g.*, 1928 ARIZONA VOTER PAMPHLET, *supra* note 260, at 32-37 (referendum on legislation placing the Motor Vehicle Department in the Highway Department); Act of Mar. 6, 1929, ch. 246, 21st Leg., Reg. Sess., 1929 S.D. Sess. Laws 286 (implementing registry tax on motor vehicles and tasking Secretary of State with handling administration); *see also* Act of Apr. 16, 1947, ch. 563, 1947 Gen. Assemb., Reg. Sess., 1947 Md. Laws 1401 (altering term of Commissioner of Motor Vehicles); C.R., 182d Leg. Sess., 1959 N.Y. Laws app. 2259 (adding Department of Motor Vehicles to list of state executive departments).

[281] *E.g.*, *Republicans Elect Most of County Ticket*, EAGLE VALLEY ENTER. (Eagle, Colo.), Nov. 5, 1926, at 1; *The Legislature's Big Job*, ARGUS-LEADER, Nov. 8, 1930, at 6, https://www.newspapers.com/newspage/229688089/ [https://perma.cc/B74U-M79P].

[282] *E.g.*, *The Highway Measures*, EAGLE VALLEY ENTER., Oct. 29, 1926, at 4 ("It simply means this — that if this measure carries the property owner and taxpayer who does not own a car will have to pay, indirectly, for the building of road for the man with a car."); *The Automobile Registry Tax*, Editorial, ARGUS-LEADER, Nov. 3, 1930, at 6, https://www.newspapers.com/newspage/229685158/ [https://perma.cc/E28J-W4D5] ("Again permit us to point out that the 3 per cent automobile registry tax law contains no provision whereby a taxpayer can deduct the amount he pays upon the purchase of an automobile from his regular property taxes.").

Separately, states began to enforce their regulation of drivers' conduct on the road. In the early 1900s, speed and safety limits were routinely disregarded, and governments frequently lacked the ability to enforce them.[283] As states began to build out highway systems in the 1910s and 1920s, financed primarily through gasoline taxes and motor vehicle registration fees,[284] the need for policing the conduct on these new highways grew.[285] To both finance new highway construction and to provide for law enforcement resources on these highways, many states created highway commissions.

State legislatures were the usual proponents of creating highway commissions, passing statutes and proposing state constitutional amendments that created them. These constitutional amendments gave highway commissions sprawling powers of enforcement, and frequently extended the preemptory power to state legislatures to place local highways under the authority of the commissions.[286] Voters also used

[283] FINK, *supra* note 274, at 179-95 (discussing imposition of speed limits, lack of enforcement by local authorities, and development of private enforcement mechanisms).

[284] MARK. H. ROSE & RAYMOND A. MOHL, INTERSTATE: HIGHWAY POLITICS AND POLICY SINCE 1939, at 4-9 (3d ed. 2012) (discussing development of state trunk highway systems).

[285] *See, e.g.*, H. KENNETH BECHTEL, STATE POLICE IN THE UNITED STATES: A SOCIO-HISTORICAL ANALYSIS 40-43 (1995) ("Owing to the growing presence of the automobile, a number of states began to develop enforcement agencies designed to deal with traffic problems."); David N. Falcone, *The Missouri State Highway Patrol as a Representative Model*, 24 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 585, 592 (2001) (discussing formation of Missouri State Highway Patrol as caused by "the inability of decentralized policing institutions to deal effectively" with enforcing traffic laws and "the mobility of rural criminals resulting from the new system of hard-surfaced roads"); Fabrice Hamelin & Vincent Spenlehauer, *Road Policing as a State Tool: Learning from a Socio-Historical Analysis of the California Highway Patrol*, 16 POLICING & SOC'Y 261, 263 (2006) (noting that the formation of the California Highway Patrol "paralleled the expansion of road traffic and its resultant dangers" and was created "to deal with the emergence of specific safety and crime problems linked to the expansion of road traffic").

[286] Act of Apr. 23, 1897, H.F. 918, ch. 333, 30th Leg., Reg. Sess., 1897 Minn. Laws 600; Act of Feb. 28, 1922, H.C. Res. 12, ch. 158-A, 1922 Leg., Reg. Sess., 1922 Miss. Laws 145; Roads & Highways Comm. Sub. For H.J. Res. 2, 19th Leg., Reg. Sess., 1949 N.M. Laws 507; OKLA. SEC'Y OF STATE, STATE QUESTION NO. 325 (1950) (proposing amendment to OKLA. CONST. art. XVI, § 1-A); OKLA. SEC'Y OF STATE, STATE QUESTION NO. 396 (1960) (proposing amendment to OKLA. CONST. art. XVI, § 1).

their new initiative and referendum powers to either propose their own highway commissions[287] or to pass judgment on the legislature's statutory enactment.[288]

G. Public Utilities and Energy Generation

By the beginning of the twentieth century, the idea of the elected railroad commission was in decline. Inspired by the models of the new public utility commissions created in New York and Wisconsin,[289] many states shifted to a gubernatorially appointed public utilities commission ("PUC") with oversight over the burgeoning private electricity-generation sector — as well as, in many states, water distribution, telephone companies, and transportation companies that operated as common carriers.[290] Over the course of the twentieth century, PUCs established themselves as significant forces in setting energy policy,

[287] 1912 OREGON VOTER PAMPHLET, *supra* note 202, at 91-101 (outlining initiated statutes proposing (1) construction of permanent roads and (2) the creation of a State Highway Department headed by a State Highway Engineer); *Proposed Law of the State of Colorado, Initiated by Petition Under the Initiative and Referendum*, ALAMOSA COURIER, Oct. 12, 1912, at 13-14 [hereinafter *1912 Colorado Ballot Measures*] (proposing creation of a State Highway Commission); JAMES H. KERBY, ARIZ. SEC'Y OF STATE, STATE OF ARIZONA, INITIATIVE AND REFERENDUM PUBLICITY PAMPHLET 1924, at 11-12 (1924) (outlining initiated constitutional amendment proposing creation of State Highway Commission); CAL. SEC'Y OF STATE, PROPOSED AMENDMENTS TO THE CONSTITUTION, PROPOSITIONS AND PROPOSED LAWS TO BE SUBMITTED TO THE ELECTORS OF THE STATE OF CALIFORNIA AT THE GENERAL ELECTION TO BE HELD TUESDAY, NOVEMBER 8, 1938, at 10-11 (1938) (outlining initiated constitutional amendment proposing creation of Highway and Traffic Safety Commission).

[288] Act of Apr. 9, 1921, ch. 213, 80th Leg., Reg. Sess., 1921 Me. Laws 269 (creating State Highway Commission); *see also* Act of Apr. 9, 1921, ch. 211, 80th Leg., Reg. Sess., 1921 Me. Laws 234 (laying out duties and powers of State Highway Commission).

[289] *See supra* notes 60–62 and accompanying text.

[290] *See, e.g.*, Brian Balogh, *Introduction: Direct Democracy*, *in* A LEGACY OF INNOVATION: GOVERNORS AND PUBLIC POLICY 1, 3-4 (Ethan G. Sribnick ed., 2008) (noting the expansion of PUC jurisdiction in the early twentieth century); Richard S. Markovits, *"Public Utility" Regulation: Some Economic and Moral Analyses*, 35 YALE J. ON REGUL. 875, 878-80 (2018) (discussing the broad approach taken to defining a "public utility"); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1634-40 (2018) (same).

though the rise of "energy federalism" has challenged traditional notions of dual sovereignty over energy regulation.[291]

But the national landscape for public utility regulation has been far from uniform, even today. Though voters had little say at the *beginning* of the twentieth century about how railroad commissions or PUCs should be selected and structured — few railroad commissions were, and are, established in constitutions[292] — as the century developed, they had a much greater say about their composition and powers.

The constitutions adopted in the early twentieth century in Arizona (1910), New Mexico (1911), and Oklahoma (1907), for example, all created statewide elected corporation commissions with regulatory power over public utilities,[293] in large part because of the influence of the Progressive and labor movements.[294] And in other states, voters either pushed for their own conceptions of public utility commissions[295]

[291] *See, e.g.*, Daniel A. Lyons, *Protecting States in the New World of Energy Federalism*, 67 EMORY L.J. 921, 954-56 (2018) (identifying the challenges to energy federalism in light of recent U.S. Supreme Court jurisprudence); Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 433-61 (2016) (same); *see also* William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1071-88 (discussing the role of federalism in setting climate policy).

[292] One of the notable exceptions here is California, which in 1902 amended its constitution to create an elected Railroad Commission, Act of Mar. 16, 1901, Assemb. Const. Amend. No. 28, ch. 44, 34th Leg., Reg. Sess., 1901 Cal. Stat. 962, and in 1911 amended its constitution to convert it to a gubernatorially appointed commission, Act of Mar. 24, 1911, Assemb. Const. Amend. No. 6, ch. 53, 39th Leg., Reg. Sess., 1911 Cal. Stat. 2048.

[293] ARIZ. CONST. art. XV (1910) (creating the Corporation Commission); N.M. CONST. art. XI (1911) (creating the Corporation Commission); OKLA. CONST. art. IX, §§ 15-35 (1907) (creating the Corporation Commission).

[294] *E.g.*, JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION 19-20 (2d ed. 2013); Michael K. Avery & Ronald M. Peters, Jr., *Oklahoma's Statutory Constitution*, 13 OKLA. POL. 47, 49 (2004).

[295] 1914 WASHINGTON VOTER PAMPHLET, *supra* note 242, at 19-22 (transferring to the Public Service Commission power to regulate corporations); *Question 2: Constitutional Amendment: Public Utilities Commission*, GRAND JUNCTION DAILY SENTINEL, Oct. 28, 1922, at 11 [hereinafter 1922 COLORADO PUC AMENDMENT] (COLO. CONST. §§ 1-5, (proposed 1922)) (creating Public Utilities Commission); *Amendments on Ballot Are of Importance*, STEAMBOAT PILOT, Oct. 6, 1926, at 1 (COLO. CONST. §§ 1-5 (proposed 1926)) (adding Public Utilities Commission to constitution).

or pushed back on systems developed by their state legislatures.[296] In one notable example, two separate groups gathered signatures to propose public utility regulatory authorities in Colorado — a coalition of unions, including the Denver Trades and Labor Assembly and the Colorado State Federation of Labor, proposed a lengthy initiated statute that created a Public Service Commission,[297] while the Colorado Direct Legislation League proposed a constitutional amendment that created a Public Utility Court.[298] Both groups competed against each other,[299] and both efforts failed.

In making those decisions, voters also confronted questions about the proper regulatory scope of a public utility commission. Many PUCs were not "created" so much as they were repurposed from other existing authorities.[300] Accordingly, as this authority was being concentrated, voters drew boundaries on *how much* it would be concentrated. While most PUCs won the power to ban mergers or consolidations of public utility corporations, voters were more skeptical when the question was put to them.[301] They were similarly reluctant to extend PUCs' authority

[296] Act of Feb. 24, 1911, S.B. 73, ch. 279, 26th Legis. Assemb., Reg. Sess., 1911 Or. Laws 483 (giving Railroad Commission the power to supervise every public service corporation and utility); Act of Mar. 27, 1913, ch. 129, 76th Leg., Reg. Sess., 1913 Me. Laws 133 (creating Public Utility Commission); Act of Mar. 19, 1915, ch. 178, 14th Leg., Reg. Sess., 1915 Wash. Sess. Laws 603 (placing gas, water, light, power, and street railway systems under regulatory power of Public Service Commission).

[297] *Organized Labor Urges Public Service Bill*, FORT COLLINS MORNING EXPRESS, Oct. 10, 1912, at 4, https://www.newspapers.com/image/588212394 [https://perma.cc/EJ56-CJJV]; *1912 Colorado Ballot Measures*, *supra* note 287, at 9-11.

[298] *1912 Colorado Ballot Measures*, *supra* note 287, at 12 (COLO. CONST. art. VI, § 31 (proposed 1912)); *The Amendments*, MONTROSE ENTER., Oct. 14, 1912, at 2.

[299] WESTERN FED'N OF MINERS, OFFICIAL PROCEEDINGS OF THE TWENTIETH ANNUAL CONVENTION 186-87 (1912).

[300] *E.g.*, Act of Feb. 24, 1911, S.B. 73, ch. 279, 26th Legis. Assemb., Reg. Sess., 1911 Or. Laws 483; Act of Mar. 28, 1911, S. Const. Amend. No. 47, ch. 60, 39th Leg., Reg. Sess., 1911 Cal. Stat. 2164; Act of Mar. 19, 1915, ch. 178, 14th Leg., Reg. Sess., 1915 Wash. Sess. Laws 603.

[301] S.J. Res. 3, 4th Leg., Reg. Sess., 1913 Okla. Sess. Laws 269; Act to Amend Section 201 of the Constitution of the Commonwealth of Kentucky, ch. 125, 1916 Gen. Assemb., Reg. Sess., 1916 Ky. Acts 716; NEB. CONST. CONVENTION, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE STATE OF NEBRASKA AS ADOPTED BY THE CONSTITUTIONAL CONVENTION 1919–20, at 34 (1920). *But see* Act of Apr. 12, 1913, ch. 127, 19th Gen. Assemb.,

over *municipal* utilities[302] — and, indeed, in some cases, the state supreme court made clear that voters could not grant PUCs any such authority without another constitutional amendment.[303]

Given the broader trend toward creating unelected commissions, it is unsurprising that many of these preferences percolated down to ballot measures. In the mid-twentieth century, state legislatures continued pushing to propose reconstructions of PUCs — including the consolidation of different regulatory authorities with similar tasks into a single commission,[304] the conversion of elected commissions from statewide to district-level elections,[305] and a transition from elected,

Reg. Sess., 1913 Colo. Sess. Laws 464; S.J. Res. 15, ch. 173, 14th Leg., Reg. Sess., 1933 Okla. Sess. Laws 391.

[302] CAL. SEC'Y OF STATE, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME TO BE SUBMITTED TO THE ELECTORS OF THE STATE OF CALIFORNIA AT THE GENERAL ELECTION ON TUESDAY, NOVEMBER 7, 1922, at 76-77 (1922) (CAL. CONST. art. XII, § 23b (proposed 1922)); 1922 COLORADO PUC AMENDMENT, *supra* note 295, at 11; *Question 7: An Act to Provide an Amendment to the State Constitution Creating a Public Utilities Commission with Exclusive Power and Jurisdiction to Regulate All Public Utilities Within This State Except Those Municipally Owned and Except Irrigation Systems Whose Chief Business Is Furnishing Water for Irrigation*, CRAIG COURIER, Oct. 4, 1926, at 2.

[303] The Arizona Constitution, for example, designates "[a]ll corporations *other than municipal*" providing certain services as "public service corporations." ARIZ. CONST. art. XV, § 2 (emphasis added). In *Menderson v. City of Phoenix*, 76 P.2d 321 (Ariz. 1938), the Arizona Supreme Court held that "the Constitution not only does not expressly authorize the Corporation Commission to regulate municipal corporations which are operating public utilities, but that it, by necessary implication, forbids such regulation." *Id.* at 322. In this respect, "no plainer language could have been used." *Id.* For further discussion of this section, see LESHY, *supra* note 294, at 357-60.

[304] Act of Mar. 4, 1933, ch. 166, 23d Legis. Sess., 1933 S.D. Sess. Laws 178 (converting elected, three-member Railroad Commission into single gubernatorially appointed Utility Commissioner); S. Pub. & Mil. Affs. Comm. Substitute for S.J. Res. 2, 22d Leg., Reg. Sess., 1955 N.M. Laws 867 (merging Public Service Commission and Corporation Commission into a single commission, with legislature deciding how members are selected); *see also* Initiated Bill 1, Legis. Doc. 522, 110th Leg., 1st Reg. Sess. (Me. 1981) (voter-initiated statute proposing the merger of the unelected Public Utilities Commission and Office of Energy Resources into an elected three-member Maine Energy Commission).

[305] Act of Mar. 24, 1961, ch. 251, 72d Leg., Reg. Sess., 1961 Neb. Laws 739 (providing for the election of Railway Commission members by district).

multimember PUCs into gubernatorially appointed commissioners.[306] Voters gave a mixed response to these proposals — at least at the beginning. But by the late twentieth and early twenty-first centuries, the electorate was more amenable to structural changes in public utility regulation.[307]

Beginning in the 1970s, several states voted on proposals to create offices of consumer advocates, which would be tasked with representing consumers' interests in PUC hearings. These questions of public representation and opportunities for consumer advocacy before PUCs were nestled within a larger debate taking place at the time about regulatory agencies' accountability to the public.[308] Many commentators at the time noted that, while PUCs *ostensibly* served the public interest,[309] their patterns of decision-making frequently demonstrated an inability to do so.[310] And existing opportunities for public

[306] Act of Mar. 4, 1933, ch. 166, 23d Leg., Reg. Sess., 1933 S.D. Sess. Laws 178 (converting elected, three-member Railroad Commission into single gubernatorially appointed Utility Commissioner); S.J. Res. 7, 25th Leg., Reg. Sess., 1961 N.M. Laws 852 (providing for gubernatorially appointed commission); S. Con. Res. 8, 28th Leg., 2d Reg. Sess., 1968 Ariz. Sess. Laws 829 (same); H.C. Res. 2003, 36th Leg., 2d Reg. Sess., 1984 Ariz. Laws 1666; H.R. Con. Res. 2003, 26th Leg., 2d Reg. Sess., 1984 Ariz. Sess. Laws 1666 (same).

[307] H.R.J. Res. 16, 42d Leg., 2d Reg. Sess., 1996 N.M. Laws 1080; S.B. 70, ch. 399, 2000 Gen. Assemb., Reg. Sess, 2000 Ky. Acts 1232; S.J. Res. 1 & 4, 54th Leg., 1st Reg. Sess., 2019 N.M. Laws 4017; *see also* S.B. 1927, ch. 305, 99th Gen. Assemb., 1st Reg. Sess., 1995 Tenn. Pub. Acts 450 (statutory abolition of Tennessee Public Service Commission).

[308] *E.g.*, Bernard R. Adams, *State Administrative Procedure: The Role of Intervention and Discovery in Adjudicatory Hearings*, 74 NW. U. L. REV. 854, 864-72 (1980); Gregory L. Ogden, *Analysis of Three Current Trends in Administrative Law: Reducing Administrative Delay, Expanding Public Participation, and Increasing Agency Accountability*, 7 PEPP. L. REV. 553, 559-67 (1980) (discussing trend in administrative law in "expanding public access to, and citizen participation in, administrative agency proceedings").

[309] John N. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U. L. REV. 65, 83-98 (1985) (discussing the U.S. Supreme Court's jurisprudence on utility rate regulation, which, since the 1930s and 1940s, required a balance between "the investor and consumer interests" (quoting Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944))); Patricia Gabel, Gerald N. Swartz & Rhonda D. Zeitlin, *Utility Rates, Consumers, and the New York State Public Service Commission*, 39 ALB. L. REV. 707, 710 (1975) (noting the original mandate of regulatory agencies as "to attack specific monopoly-oriented problems").

[310] *See* Robert B. Leflar & Martin H. Rogol, *Consumer Participation in the Regulation of Public Utilities: A Model Act*, 13 HARV. J. ON LEGIS. 235, 239-44 (1976).

participation — whether through municipal representation of their citizens' interests, affected parties hiring attorneys, or even through the PUC's counsel — proved inadequate.[311] Simultaneously, the inflationary pressures of the 1970s and the high energy prices for most of the decade further motivated policymakers to pursue opportunities for representation of the public.[312]

Accordingly, many state-level advocates and policymakers began pushing for the creation of special consumer advocates. Voters in a handful of states proposed the creation of some sort of consumer advocacy organizations in the 1970s and 1980s — a new executive department in Colorado (1976), consumers' utility organizations in Missouri (1982), a consumer advocate in the state attorney general's office in Nevada (1982), a residential consumer advocacy group in Ohio (1976), and an elected citizens' utility board in Oregon (1984). These efforts all failed (though a competing statute proposed by the Nevada General Assembly won in 1982). These proposals were generally more successful when done legislatively, given the hostility of public utilities to voter-initiated statutes or constitutional amendments creating consumer counsels.[313] Even after the creation of consumer advocates in

[311] *See, e.g.*, William M. Barvick, *Public Advocacy Before the Missouri Public Service Commission*, 46 UMKC L. REV. 181, 182-88 (1977) (noting difficulties in advocating for the public before the Missouri Public Service Commission); Gabel et al., *supra* note 309, at 715-17 (noting difficulties in advocating for consumers before the New York Public Service Commission, and comparing consumer advocacy opportunities in other states); Paul Kens, *Public Futility — The Status of Consumers in Light of the Public Utility Regulatory Act,* 28 BAYLOR L. REV. 953, 954-58 (1976) (noting limited opportunities for citizens to participate in Texas Public Utility Commission proceedings); *see also* Deborah Teeters Henthorn, Note, *Consumer Law: Consumer Representation at PURPA Hearings*, 20 GONZ. L. REV. 567, 581-84 (1984) (discussing appointment of special assistant attorneys general to represent consumers at the Washington Utilities and Transportation Commission).

[312] Leflar & Rogol, *supra* note 310, at 237-38; Elin Swanson Katz & Tim Schneider, *The Increasingly Complex Role of the Utility Consumer Advocate*, 41 ENERGY L.J. 1, 6-7 (2020); *see also Who We Are*, NAT'L ASS'N OF STATE UTIL. CONSUMER ADVOCS., https://www.nasuca.org/about-us/ (last visited Aug. 17, 2023) [https://perma.cc/7HWP-TMAE] (noting that the first utility consumer advocates were created in the 1970s "after natural gas and electric prices were driven up by the energy crises" in the 1970s).

[313] *See, e.g.*, Richard L. Goodman, *The Role of Consumer Advocacy Before the Public Utilities Commission of Ohio*, 8 CAP. U. L. REV. 213, 218-21 (1978) (discussing the creation of Ohio's Office of Consumer Counsel, including the defeat in 1976 of a voter-initiated amendment creating "a decentralized, public advocate" after the state's public utilities

most states,[314] however, the barriers to consumer access in public utility regulation remain quite high.[315]

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The depth and scope of voter involvement in creating and shaping regulatory institutions is easy to miss in most discussions of how electorates have used their direct democratic power — primarily because most surveys documenting the subject matter of initiative and referendum measures focus on *policy*, even when the policy in question creates a new institution or modifies an existing one.

The value of this addition to the literature on direct democracy is more than just a collection of interesting facts about legal history — it can, and should, affect how we view the exercise of direct democratic powers and how we understand the construction of state administrative agencies today. In particular, the popular responses via referendum to state agency reorganization help temper some of the partisan concerns about constant agency reorganization,[316] and perhaps even suggest a way in which voters could enhance agency independence.[317]

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defeated the measure by "outspen[ding] the consumer groups by a margin of eighty to one").

[314] Shelley Welton & Joel Eisen, *Clean Energy Justice: Charting an Emerging Agenda*, 43 HARV. ENV'T L. REV. 307, 349-50 (2019); *see also* William T. Gormley, Jr., *Statewide Remedies for Public Underrepresentation in Regulatory Proceedings*, 41 PUB. ADMIN. REV. 454, 456-60 (1981) (surveying different approaches for consumer representation).

[315] *See, e.g.*, Katz & Schneider, *supra* note 312, at 9-12 (discussing relationship between powers of consumer advocates and outcomes); Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 581, 594 (2018) ("[T]he United States has a byzantine bureaucratic structure for governing electric energy. It involves federal, regional, state, and local oversight of for-profit, not-for-profit, and cooperatively owned ventures that manage the production, generation, transmission, transportation, and distribution of electricity. Such dense, bureaucratic layering does not lend itself easily to democratic interventions."); Darryl G. Stein, Note, *Perilous Proxies: Issues of Scale for Consumer Representation in Agency Proceedings*, 67 N.Y.U. ANN. SURV. AM. L. 513, 565-76 (2012) (surveying success of state public utility consumer advocates).

[316] *See, e.g.*, Seifter, *Understanding State Agency Independence*, *supra* note 158, at 1588-90 (noting that "legislative revisions of agency independence sometimes seem like raw partisanship, or actions intended to benefit the party itself rather than any public majority").

[317] *See generally id.* at 1590 ("If the rules of independence are murky, ever-changing, and different for each agency, and if those factors occur in a legal community where

Of course, the choices made by voters nearly — if not more than — a century ago do not stamp them with any sort of imprimatur of democratic legitimacy *today*. But the initial choices made in constructing an institution necessarily affect the power it has — and the role it plays in future policymaking.[318] And even if an institution doesn't survive in the exact form in which it was originally created, the choices made by its founders are still highly relevant. State government institutions are routinely shuffled around, and new agencies are frequently created out of old ones, so having the agency already in existence has the potential to make administrative reorganization more efficient and less cumbersome than starting from scratch.[319]

III. CONSTRAINTS ON INITIATIVES AND THE EFFECT ON INSTITUTIONAL CONSTRUCTION

Voters' exercise of their direct democratic powers has not gone unchallenged by state governments. From the very beginning, legislatures, courts, and governors have worked to undermine voters' powers of initiative and referendum. After initiative amendments were adopted, some legislatures dragged their feet on passing enabling acts so that the powers could actually be utilized[320] — and have since layered on more obstacles to putting a measure on the ballot.

Courts, too, have limited voter power by requiring legislative action to operationalize the initiative and referendum power — and then by

independence is not a salient topic, then state agency independence will be harder to forge and sustain, even where state governments intend to do just that.").

[318] *See generally* Arthur L. Stinchcombe, *Social Structure and Organizations*, *in* HANDBOOK OF ORGANIZATIONS 142, 169 (James G. March ed., 1965) (noting that "traditionalizing forces, the vesting of interests, and the working out of ideologies may tend to preserve the structure" of organizations in the years after their original founding).

[319] *See, e.g.*, Sharon B. Jacobs, *Agency Genesis and the Energy Transition*, 121 COLUM. L. REV. 835, 861-80 (2021) (describing "agency genesis," the creation and reorganization of institutions, in state government).

[320] *See, e.g.*, SCHMIDT, *supra* note 157, at 232 (noting that the Idaho Legislature did not pass an enabling statute for the initiative provision in its constitution for twenty years); *id.* at 270 (noting that the Utah Legislature's enabling statute "effectively prohibited Initiative sponsors from circulating petitions," precluding any initiative from making the ballot until 1960).

striking down voter-initiated statutes and amendments for technical noncompliance and for violating subject-matter restrictions. And governors have increasingly used the powers of their offices to not comply with successful voter initiatives and to then challenge their validity in court. The initiative process has even been used to undermine itself; time and again, voters have approved amendments limiting their own power by limiting the subjects on which they can legislate and raising the thresholds for placing initiatives on the ballot and approving them.

Many of these limitations have been adopted — or deployed effectively — only recently. Legislatures, for example, have responded to the passage of measures they disfavored by attempting to *further* raise the standards to place a proposal on the ballot.[321] And state supreme courts have invalidated measures that proposed expanding Medicaid under the Affordable Care Act,[322] legalizing medical (or recreational) cannabis,[323] adopting non-partisan redistricting commissions,[324] implementing alternative electoral systems,[325] expanding the rights of

[321] Seifter, *State Institutions*, *supra* note 7, at 311-16.

[322] Mayor Butler v. Watson (*In re* Initiative Measure No. 65), 338 So. 3d 599, 615-16 (Miss. 2021).

[323] *In re* Advisory Op. to the Att'y Gen. (Regulate Marijuana in a Manner Similar to Alcohol), 320 So. 3d 657, 668 (Fla. 2021) (discussing inaccurate ballot summary); *In re* Advisory Op. to the Att'y Gen. (Adult Use of Marijuana), 315 So. 3d 1176, 1180-81 (Fla. 2021) (same); State *ex rel.* Wagner v. Evnen, 948 N.W.2d 244, 260-61 (Neb. 2020) (invalidating constitutional amendment because it encompassed more than one subject); Thom v. Barnett, 967 N.W.2d 261, 282-83 (S.D. 2021) (same).

[324] *In re* Advisory Op. to the Att'y Gen. (Indep. Nonpartisan Comm'n), 926 So. 2d 1218, 1225-29 (Fla. 2006); Hooker v. Ill. State Bd. of Elections, 63 N.E.3d 824, 838-39 (Ill. 2016).

[325] Miller v. Thurston, 605 S.W.3d 255, 259-61 (Ark. 2020); Haugen v. Jaeger, 948 N.W.2d 1, 3-4 (N.D. 2020).

victims of crime,[326] and expanding environmental protections[327] — sometimes even after measures had already been approved. In Mississippi's case, the state supreme court went even further, striking down the initiative process altogether.[328]

But other limitations have been in effect for much longer. In many states, single-subject limitations on constitutional amendments or statutes have been part and parcel of direct democracy from the very beginning. So, too, have substantive limitations on the referendum power that prohibit citizens from referring statutes with emergency clauses or that relate to government appropriations.

Regardless of their timing, however, these limitations affect the kinds of measures that can be presented to voters. And while subject-matter limitations facially affect *all* measures, they visit unique difficulties on voter efforts to create or restructure regulatory institutions. Some limitations, by their own text, explicitly sideline these proposals; others have been interpreted by state supreme courts to similar effect.

In this Part, I survey some of the subject-matter restrictions that affect the electorate's power of initiative and referendum specifically in the context of institutional construction. In Section A, I identify several different subject-matter restrictions and how courts have interpreted

[326] *See generally, e.g.*, Westerfield v. Ward, 599 S.W.3d 738, 752 (Ky. 2019) (striking down Marsy's Law Amendment for failure to submit the full text of the amendment to voters as required by the Kentucky Constitution); Mont. Ass'n of Cntys. v. State, 404 P.3d 733, 747-48 (Mont. 2017) (striking down Marsy's Law Amendment as violating the separate-vote requirement of the Montana Constitution); Armatta v. Kitzhaber, 959 P.2d 49, 50-51 (Or. 1998) (striking down Measure 40 ("a 'crime victims' rights' initiative") as violating the separate-vote requirement of the Oregon Constitution); League of Women Voters v. DeGraffenreid, 265 A.3d 207, 241-42 (Pa. 2021) (striking down Victim's Rights Amendment as violating the separate-vote requirement of the Pennsylvania Constitution).

[327] *See generally*, *e.g.*, Kemper v. Hamilton, 172 P.3d 871, 875-76 (Colo. 2007) (striking from the ballot constitutional amendment from the ballot on the grounds that it violated the single-subject requirement of the Colorado Constitution); *In re* Advisory Op. to the Att'y Gen. (Save Our Everglades), 636 So. 2d 1336, 1341-42 (Fla. 1994) (striking from the ballot constitutional amendment from the ballot on the grounds that it violated the single-subject requirement of the Florida Constitution).

[328] *In re Initiative Measure No. 65*, 338 So.3d at 616. This is actually the *second time* that the Mississippi Supreme Court has struck down the power of voters to propose constitutional amendments. *See generally* Power v. Robertson, 93 So. 769 (Miss. 1922) (declaring the initiative and referendum amendment invalid).

them. Then, in Section B, I explain how these restrictions are uniquely harmful in the context of voter-initiated proposals to reform the structure of state regulation. Finally, in Section C, I outline the proper role of direct democracy in institutional construction.

A. Subject-Matter Constraints on Initiatives

1. Single-Subject Limitations

The most common subject-matter limitation on voter-initiated constitutional amendments is the "single-subject" rule — which, as the name implies, restricts constitutional amendments to "one subject."[329] This rule is derived from a similar requirement limiting state legislatures to only passing laws that embrace "one subject."[330] In extending to voters the power to initiate constitutional amendments and statutes, most states imposed the single-subject requirement on voter-initiated measures, even while sometimes excluding legislatively proposed constitutional amendments from the requirement.[331]

In requiring that an amendment or statute not encompass more than one subject, courts frequently give weight to the intent behind the rule — avoiding the packaging of unpopular ideas into a single palatable proposal ("logrolling") and not latching an unpopular idea onto a popular one ("riding"). Accordingly, courts frequently ask whether voters would have wanted to vote on the packaged items separately[332] and whether the proposals in the measure are closely related.[333]

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[329] ARIZ. CONST. art. XXI, § 1; CAL. CONST. art. II, § 8(d); COLO. CONST. art. V, § 1(5.5); FLA. CONST. art. XI, § 3; MO. CONST. art. III, § 50; MONT. CONST. art. XIV, § 11; NEB. CONST. art. III, § 2; OKLA. CONST. art. XXIV, § 1; OR. CONST. art. IV, § 1(2)(d); S.D. CONST. art. XXIII, § 1; NEV. REV. STAT. § 295.009; OHIO REV. CODE § 3519.01(A).

[330] *See generally* Ruud, *supra* note 16, at 389-90 (exploring the single-subject rule in the context of state legislation).

[331] *See, e.g.*, Lowenstein, *supra* note 16, at 37-41 (noting that in several states, the single-subject rule does not apply to legislatively initiated constitutional amendments).

[332] *E.g.*, Thom v. Barnett, 967 N.W.2d 261, 273-76 (S.D. 2021).

[333] Manduley v. Superior Ct., 41 P.3d 3, 37 (Cal. 2002) (Moreno, J., concurring) ("[A]lmost any two legislative measures may be considered part of the same subject if that subject is defined with sufficient abstraction."); Or. Educ. Ass'n v. Phillips, 727 P.2d 602, 612 (Or. 1986) (Linde, J., concurring) ("The Linnean system of classifying plants and animals offers a familiar illustration. A measure to control the anopheles mosquito

Some courts are skeptical of measures that propose *too many* changes to different sections or articles of the state constitution.[334] Others, like the Florida Supreme Court, employ a "functional as opposed to a locational" test — also described as "a logical and natural oneness of purpose" test[335] — in which the relevant question is whether "a proposed amendment changes more than one government function . . . ."[336]

That the single-subject requirement would yield different results across different states is unsurprising. A purposivist application of the test, relying on the avoidance of logrolling and riding, will necessarily lead to different results — and the rule also serves as a useful subterfuge for "judges to smuggle their personal views into court."[337]

2. Limitations on Voters' Legislative Powers

The limitations on voters' *legislative powers* — that is, what kind of statutes they can propose themselves or refer to the ballot — are far more diverse and have been discussed in the scholarship with substantially less frequency. It is helpful to understand that, by granting voters the powers of initiative and referendum, states *literally* granted voters "legislative power" generally equivalent to that of the state

deals with a particular genus. Try to control gypsy moths as well as mosquitos, and your 'subject' skips past families and orders to the class of insects. Add rattlesnakes and ragwort, and the measure simply vaults past the separate plant and animal kingdoms to the 'subject' of controlling 'dangerous organisms,' or perhaps 'pests.' Measures to preserve 'endangered species,' 'the environment,' or 'public health,' or to prevent 'pollution' are similar examples.").

334 *E.g.*, Mont. Ass'n of Cntys. v. State, 404 P.3d 733, 747-48 (Mont. 2017); State v. Rogers, 288 P.3d 544, 547-48 (Or. 2012) ("First, if a measure proposes to add new matter to the constitution, the measure proposes at least one constitutional change. Second, if a measure has the effect of modifying an existing constitutional provision, it proposes at least one additional change to the constitution, whether that effect is express or implicit.").

335 Fine v. Firestone, 448 So. 2d 984, 990 (Fla. 1984); *cf.* Matsusaka & Hasen, *supra* note 17, at 403 (referring to the "oneness of purpose" test as "zen-like").

336 Evans v. Firestone, 457 So. 2d 1351, 1354 (Fla. 1984).

337 Cooter & Gilbert, *supra* note 17, at 690.

legislature itself.[338] And given that state constitutions have historically included a list of subjects on which legislatures are forbidden to legislate,[339] it makes sense to extend those limitations onto voters, too.

Beginning first with initiatives, many states — irrespective of whether they apply the single-subject rule to *constitutional amendments* — apply the single-subject rule to initiated statutes,[340] while other states explicitly *exclude* initiated statutes from an otherwise-applicable single-subject limitation.[341] Several states restrict voter-initiated statutes from making (or repealing) appropriations,[342] creating courts (or defining their jurisdiction),[343] or passing local laws.[344] The requirement in Arizona that any initiated measure dedicating funds must also identify a source of revenue applies to initiated statutes as well, and is also a requirement for initiated statutes in Nevada and Utah.[345]

Weightier restrictions exist to limit which legislatively passed laws voters can refer to the ballot and repeal. Most states with referendum

[338] *See, e.g.*, Reclaim Idaho v. Denney, 497 P.3d 160, 193 (Idaho 2021) (noting that initiated legislation is "on an equal footing" with legislatively drafted statutes because the power is "derived from the same source").

[339] Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 725-32 (2012). *See generally* Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271 (2004) (describing the operation of special laws prior to the state constitutional prohibitions).

[340] CAL. CONST. art. II, § 8(d); COLO. CONST. art. V, § 1(5.5); MO. CONST. art. III, § 50; NEB. CONST. art. III, § 2; OR. CONST. art. IV, § 1(2)(d); WYO. CONST. art. III, § 24; IDAHO CODE § 34-1801A; NEV. REV. STAT. § 295.009; OHIO REV. CODE § 3519.01(A); S.D. CODIFIED LAWS § 2-1-11.1; UTAH CODE ANN. §§ 20A-7-202(5), (6).

[341] Ariz. Chamber of Com. & Indus. v. Kiley, 399 P.3d 80, 88 (Ariz. 2017) ("This Court has long recognized that the Single Subject Rule applies only to acts by the legislature; it does not apply to initiatives."); *In re* Initiative Petition No. 259, 316 P.2d 139, 145 (Okla. 1957) (holding that the single-subject requirement "is not required of initiated measures").

[342] ALASKA CONST. art. XI, § 7; MASS. CONST. amend. art. XLVIII, § 2; MO. CONST. art. III, § 51; MONT. CONST. art. III, § 4(1); NEV. CONST. art. XIX, § 6; WYO. CONST. art. III, § 52(g); D.C. CODE § 1-204.101.

[343] ALASKA CONST. art. XI, § 7; MASS. CONST. amend. art. XLVIII, § 2; WYO. CONST. art. III, § 52(g).

[344] ALASKA CONST. art. XI, § 7; MONT. CONST. art. III, § 4(1); WYO. CONST. art. III, § 52(g).

[345] ARIZ. CONST. art. IX, § 23(A); NEV. CONST. art. XIX, § 6; UTAH CODE § 20A-7-202(2)(e)(ii).

powers include blanket prohibitions on referring "laws necessary for the immediate preservation of the public peace, health, or safety"[346] — which is usually meant to refer to emergency clauses. Most states also exclude all laws making appropriations or dedicating revenue from being referred.[347] Laws providing appropriations specifically for the support of institutions are also frequently protected from being referred,[348] but states differ as to whether this prohibition applies to *all* institutions or only institutions in existence at the time the law was passed.[349]

3. Appropriations-Based Limitations

While appropriations-based limits on direct democracy have largely existed in the *statutory* context, they have historically been rarer in the constitutional context. One of the earliest examples of such a limitation is in Florida, where in 1996, a voter-initiated amendment imposed a requirement that, to ratify a constitutional amendment that imposes any "new State tax or fee," a two-thirds supermajority of the electorate must vote to do so.[350] While Florida's restriction stood alone for many years, state legislatures have recently moved to import many of these restrictions into the constitutional amendment context, too. Arizona,

[346] ALASKA CONST. art. XI, § 7; ARIZ. CONST. art. IV, pt. 1, § 1(3); CAL. CONST. art. II, § 9(a); COLO. CONST. art. V, § 1(3); ME. CONST. art. IV, pt. 3, §§ 16-17; MO. CONST. art. III, § 52(a); N.M. CONST. art. IV, § 1; OHIO CONST. art. II, § 1d; OKLA. CONST. art. V, § 2; OR. CONST. art. IV, § 1 (amended 1902); S.D. CONST. art. III, § 1; WYO. CONST. art. III, § 52(g); D.C. CODE § 1-204.101(b).

[347] ALASKA CONST. art. XI, § 7; CAL. CONST. art. II, § 9(a); MD. CONST. art. XVI, § 2; MASS. CONST. amend. art. XLVIII, pt. 2, § 2; MO. CONST. art. III, § 52(a); MONT. CONST. art. III, § 5; NEB. CONST. art. III, § 3; N.M. CONST. art. IV, § 1; OHIO CONST. art. II, § 1d; WYO. CONST. art. III, § 52(g); D.C. CODE § 1-204.101(b).

[348] ARIZ. CONST. art. IV, pt. 1, § 1(3); COLO. CONST. art. V, § 1(3); MD. CONST. art. XVI, § 2; MICH. CONST. art. II, § 9; MO. CONST. art. III, § 52(a); NEB. CONST. art. III, § 3; N.M. CONST. art. IV, § 1; OHIO CONST. art. II, § 1d; S.D. CONST. art. III, § 1.

[349] NEB. CONST. art. III, § 3; (excluding "appropriations for . . . a state institution *existing at the time of the passage of such act*." (emphasis added)); OHIO CONST. art. II, § 1d (excluding "appropriations for the *current expenses of the state government and state institutions*" (emphasis added)); S.D. CONST. art. III, § 1 (excluding laws for the "support of the state government *and its existing institutions*" (emphasis added)).

[350] FLA. CONST. art. XI, § 7.

for example, requires that if an initiated measure proposes a specific expenditure, it must identify a new source of revenue.[351]

In 2022, the Arizona and South Dakota legislatures proposed higher approval thresholds for certain kinds of measures — while South Dakotans rejected the proposal, Arizonans ratified it. The failed proposal in South Dakota would have required sixty percent of voters to approve a measure that spent more than $10 million over five years, a measure that was rushed onto the June primary ballot in an effort to preempt a voter-initiated constitutional amendment to expand Medicaid that was on the ballot in November.[352] In Arizona, voters ratified an amendment that requires sixty percent approval for any ballot measures that "approve a tax."[353]

4. Some Implied Limitations

Beyond the explicit limitations imposed by constitutions or statutes, there are some implied limitations on the electorate's power to amend their state constitution. The most common such limitation concerns the distinction between an *amendment* and a *revision*. Some courts have reasoned that some proposed amendments are *revisions* and not *amendments* because they alter so much of the document's text as to create a new constitution altogether.[354] This limitation is not necessarily unique to voter-initiated constitutional changes; many courts have applied it to legislatively initiated changes, too.[355] However, the sum

[351] ARIZ. CONST. art. IX, § 23(A).

[352] Quinn Yeargain, *"A Systematic Assault": GOP Rushes to Change Election Rules to Block Medicaid in South Dakota*, BOLTS (May 30, 2022), https://boltsmag.org/amendment-c-south-dakota-medicaid/ [https://perma.cc/R5T6-GYSZ].

[353] ARIZ. CONST. art. IV, § 1(5) (amended 2022).

[354] *E.g.*, McFadden v. Jordan, 196 P.2d 787, 788-89 (Cal. 1948); Holmes v. Appling, 392 P.2d 636, 638-39 (Or. 1964); Adams v. Gunter, 238 So. 2d 824, 830-31 (Fla. 1970); Citizens Protecting Mich.'s Const. v. Sec'y of State, 761 N.W.2d 210, 229 (Mich. Ct. App. 2008), *aff'd without opinion*, 755 N.W.2d 157 (Mich. 2008).

[355] *See, e.g.*, Livermore v. Waite, 36 P. 424, 426 (Cal. 1894) (striking down legislatively initiated amendment that proposed changing the state capitol from Sacramento to San Jose on the grounds that it was an inappropriate amendment to the California Constitution); Rivera-Cruz v. Gray, 104 So. 2d 501, 504-05 (Fla. 1958) (striking down legislatively initiated amendment consisting of 14 separate joint resolutions that proposed 14 separate amendments to the state constitution); Graham v. Jones, 3 So. 2d

total of voters' power to revise the constitution (which is tempered by single-subject limitations in most states[356]) is dwarfed by legislative power to revise the constitution (which is not always tempered by such limitations, and sometimes extends to actually proposing new constitutions).

Moreover, the line between *amendment* and *revision* is necessarily fuzzy. It may well be that a two-thousand-plus word amendment to the constitution that "regulate[s] pensions, gambling, taxes, oleomargarine, the healing arts, civic centers, the legislature, hunting and fishing, surface mining, printing, and amendments to the constitution" constitutes such an invasive set of changes, small though they may be, that the practical effect is a revision — as the California Supreme Court held in *McFadden v. Jordan*.[357] Similarly, a proposal for a unicameral legislature may "radically change the whole pattern of government in this state and tear apart the whole fabric of the Constitution" such that it is properly classified as a *revision* — as the Florida Supreme Court held in *Adams v. Gunter*.[358]

Of course, single-subject limitations necessarily come into play in defining the proper scope of an "amendment." But both *McFadden* and *Adams* were decided *before* California and Florida imposed single-subject limitations,[359] belying the role that the single-subject rule may have played in how they were decided.

761, 784 (La. 1941) (striking down legislatively initiated amendment that reorganized executive branch on the grounds that it constituted separate amendments); *see also* William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMPAR. L. 485, 501 (2006). *But see* Opinion of the Justices, 264 A.2d 342, 347 (Del. 1970).

[356] *See supra* Part III.A.1.

[357] Cody Hoesly, Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 CALIF. L. REV. 1191, 1219 (2005) (citing *McFadden*, 196 P.2d 787).

[358] *Adams*, 238 So. 2d at 830-31.

[359] *Compare McFadden*, 196 P.2d at 788-89 (decided in August 1948), *with* CAL. CONST. art. IV, § 1c (amended 1948) ("Every constitution amendment or statute proposed by the initiated shall relate to but one subject."); *and compare Adams*, 238 So. 2d at 830-31 (decided in 1970), *with* FLA. CONST. art. XI, § 3 (amended 1972) ("The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment . . . shall embrace but one subject and matter directly connected therewith.").

B. Effects of Restriction on Institutional Construction

The role that subject-matter limitations have played in clipping voters' powers to create and restructure regulatory institutions has largely remained hidden and undiscussed in state constitutional literature. To be fair, there are plenty of general restrictions that apply with equal force to *all* initiated measures — the increasingly demanding geographic-distribution requirements for petition signatures, for example. But subject-matter restrictions particularly constrain voter power in the institutional context.

As outlined above, most states restrict voter power to *initiate* statutes that propose appropriations and to *refer* statutes that have already made appropriations (including to institutions). The logic for this is obvious: avoiding the "financial embarrassment" that state governments might experience if their appropriations bills were routinely held up by voters, which courts acknowledged a risk of in some of the first cases involving challenged exercises of the referendum.[360] In this respect, it makes sense to limit voters' power to suspend appropriations for institutions.

The effect of these limitations on voter power to reject the state legislature's proposed creation of an institution, however, extends far beyond mere "financial embarrassment." If an institution is created (or its duties expanded) *and* funded in the same statute, the existence of an appropriation has been held in many states to exclude the statute from being referred to the ballot[361] — even when done manipulatively, as has

[360] *E.g.*, Detroit Auto. Club v. Deland, 203 N.W. 529, 530 (Mich. 1925); Winebrenner v. Salmon, 142 A. 723 (Md. 1928); *see also* Barbara F. Grossman, *The Initiative and Referendum Process: The Michigan Experience*, 28 WAYNE L. REV. 77, 96-97 (1981); Lisa T. Hauser, *The Powers of Initiative and Referendum: Keeping the Arizona Constitution's Promise of Direct Democracy*, 44 ARIZ. ST. L.J. 567, 585 (2012); Scott L. Kafker & David A. Russcol, *The Eye of a Constitutional Storm: Pre-Election Review by the State Judiciary of Initiative Amendments to State Constitutions*, 2012 MICH. ST. L. REV. 1279, 1310-12 (discussing the role of initiatives in creating a "fiscal straightjacket" in California).

[361] *E.g.*, *Detroit Auto. Club*, 203 N.W. at 530; State *ex rel.* Janes v. Brown, 148 N.E. 95, 97-99 (Ohio 1925); *see also* ALASKA LEGIS. COUNCIL, MINUTES OF THE DAILY PROCEEDINGS OF THE ALASKA CONSTITUTIONAL CONVENTION 941 (1965) (remarks of Delegate Taylor) ("The universities, school systems, orphan homes, penitentiaries, those are all exempt because those are functions of the government that have to be carried on, so they don't get, you might say, some chance of trying to nullify those institutions by cutting off appropriations for them . . . ."); Jeffrey T. Even, *Direct Democracy in Washington: A*

happened for decades in Michigan.[362] Some state supreme courts have taken a different tact (at least initially),[363] but the longer-term trend has been toward excluding these acts from a referendum.[364]

The force of these holdings rests on the expansive meaning given to "institution." Many courts have read "institution" with extraordinary breadth. The Supreme Court of Washington, for example, held that "[a] public institution is any organized activity created or established by law or . . . authority," including "all branches and departments created by law and exercising any activity or function defined by the Legislature."[365] Armed with that definition, state supreme courts set the tone for their next century of jurisprudence by declaring in some of their earliest cases

Discourse on the Peoples' Powers of Initiative and Referendum, 32 GONZ. L. REV. 247, 287 (1996).

[362] *See* SUSAN P. FINO, THE MICHIGAN STATE CONSTITUTION 69 (2011) ("To avoid the possibility of a referendum, the legislature creates a tax, places its proceeds in a special fund, and immediately appropriates the tax to a 'state institution.'"); Grossman, *supra* note 360, at 96-97; Kathleen Garbacz, Note, *Michigan Republicans' Tactics to Evade Democracy Using Referendum Proof Laws and Other Means*, 16 J.L. SOC'Y 197, 199-216 (2014).

[363] *E.g.*, Bartling v. Wait, 148 N.W. 507, 509 (Neb. 1914) ("[T]he word 'expenses' . . . must be construed to mean the ordinary running expenses of the state government and existing state institutions . . . ."); *Winebrenner*, 142 A. at 725 ("Certainly an act would not be within this exception merely because it carried an appropriation to an agency of the government, if it *created* an entirely new function not theretofore recognized as coming within the sphere of governmental activity."); State *ex rel.* Wegner v. Pyle, 226 N.W. 280, 284 (S.D. 1929); Warner v. White, 4 P.2d 1000, 1004 (Ariz. 1931) ("[T]he people could not be deprived of their right to approve or reject a law creating a department of the state government and prescribing its functions merely because it provides in addition the funds for the purpose of carrying out its terms in case it should finally come into being."); Dorsey v. Petrott, 13 A.2d 630, 640 (Md. 1940) ("[A]n act of the General Assembly which relates primarily and specifically to a subject matter of general legislation cannot be converted into an appropriation bill merely because there may be an incidental provision for an appropriation of public funds.").

[364] *E.g.*, Garvey v. Trew, 170 P.2d 845, 847 (Ariz. 1946); *see also* LESHY, *supra* note 294, at 125-26 (noting that the Arizona Supreme Court's holding in *Garvey*, while leaving "*Warner*'s narrow holding intact," functionally reversed its holding and "held that nonemergency measures for the support of principal departments of state government are not subject to the referendum process").

[365] State *ex rel.* Blakeslee v. Clausen, 148 P. 28, 32-33 (Wash. 1915).

on referenda that *highways* are "institutions" — and thus, appropriations for them excluded from the referendum.[366]

What explains this general deference to legislative determinations? Perhaps affecting the decisions here is a related exclusion — acts with emergency clauses from the referendum.[367] Though these are *usually* separate exclusions, many states have intertwined them, which could perhaps explain the caselaw bleeding over.

Many courts take a deliberately broad view of what constitutes an "emergency," and many apply a blanket presumption of validity to any legislative determination in that respect.[368] The original distinction in the state-level caselaw was the approach taken by the Oregon Supreme Court in *Kadderly v. Portland*, which held that courts could not evaluate the legislature's determination of an emergency,[369] and the Washington Supreme Court in *State* ex rel. *Brislawn v. Meath*, which held that, to avoid the exception from swallowing the rule, courts could look behind the declaration.[370] Over time, however, the *Kadderly* approach has won out, even in Washington.[371]

While initiated constitutional amendments involve few of the budgetary limitations that initiated *statutes* do,[372] single-subject limitations can affect voters' powers to create or restructure administrative agencies. Single-subject rules — regardless of whether they're violated when an amendment affects multiple *provisions* in a constitution or the *functions* of multiple branches[373] — are implicitly predicated on separated powers within a tripartite system of

[366] *Id.* at 33 ("Upon any theory, a public highway is a public institution."); *Detroit Auto. Club*, 203 N.W. at 530.

[367] *See supra* note 346 and accompanying text.

[368] Chip Lowe, *Public Safety Legislation and the Referendum Power: A Reexamination*, 37 HASTINGS L.J. 591, 613-20 (1986).

[369] Kadderly v. City of Portland, 74 P. 710, 712-14 (Or. 1901).

[370] State *ex rel.* Brislawn v. Meath, 147 P. 11, 16-17 (Wash. 1915).

[371] ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION 65 (2013); Bryan L. Page, *State of Emergency: Washington's Use of Emergency Clauses and the People's Right to Referendum*, 44 GONZ. L. REV. 219, 222-23 (2008); Eva Sharf, Comment, *Rethinking Emergency Legislation in Washington State*, 94 WASH. L. REV. 1477, 1480 (2019).

[372] *But see* ARIZ. CONST. art. IX, § 23(A).

[373] *Compare, e.g.*, State v. Rogers, 288 P.3d 544, 547-48 (Or. 2012), *with* Fine v. Firestone, 448 So. 2d 984, 990 (Fla. 1984).

government. From a separation of powers standpoint, the *locational versus functional* distinction is without a difference. In virtually every state, the three branches of government are located in different articles of the state constitution[374] — so a proposed amendment affecting the functions of different branches has an identical effect as an amendment affecting different constitutional provisions.

In the context of creating an administrative agency, this reality creates some unavoidable tension. Agencies straddle the line of executive, legislative, and judicial, which has led some scholars and even some judges to opine that they constitute a "fourth branch" of government.[375] Because of their unusual positioning within systems of separated powers, and because of their hallowed constitutional status in some states, public utilities commissions have also been referred to as the "fourth branch" of government in some states.[376] Of course, this rhetoric is *constitutionally* meaningless; courts pay it no real attention and insist upon a fantasy of separated powers that doesn't match reality.[377]

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[374] G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 333 (2003).

[375] *E.g.*, FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (noting that administrative agencies "have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking"); Freeman, *supra* note 19, at 814; Shapiro & Levy, *supra* note 19, at 403.

[376] *E.g.*, Ralph T. Catterall, *The State Corporation Commission of Virginia*, 48 VA. L. REV. 139, 141 (1962) ("The Constitution of Virginia expressly makes the [Corporation Commission] a fourth branch ('department') of the state government."); David V. Seyer, *Public Utilities: The Black Fox Nuclear Project Cancellation Dilemma: Of Judicial Review and Reform of Oklahoma's Administrative Process*, 36 OKLA. L. REV. 190, 226 (1983) ("The extent of the Commission's unfettered discretion has led one legal scholar to inquire cogently whether the Corporation Commission is 'the fourth branch of government.'"); Deborah Scott Engelby, Comment, *The Corporation Commission: Preserving Its Independence*, 20 ARIZ. ST. L.J. 241, 245-46 (1988) ("[T]he [Arizona Corporation] Commission falls outside the three traditional branches of government and has been referred to as the fourth branch of government.").

[377] *E.g.*, Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n, 496 P.3d 421, 425 (Ariz. 2021) ("This expansive view of the Commission's power has led some to erroneously characterize it as a fourth branch of government. To the contrary, our Constitution is clear that we have only three branches of government: legislative, executive, and judicial.").

But it's easy enough to see how this tension causes some problems in the single-subject context. If the creation of a new administrative agency is proposed that — like most other agencies — straddled the line among executive, legislative, and judicial, exercising aggregate powers that pulled from each branch, one could easily imagine it running afoul of a single-subject rule in a stricter state. The Florida Supreme Court has specifically cautioned that voters cannot "create a new [administrative] entity where none exists" without "substantially alter[ing] . . . the functions of multiple branches of government" and thereby violating the state constitution's single-subject requirement.[378] In a series of cases from the 1990s, it contrasted a voter-initiated proposal to create a *new* administrative agency with a proposal to *modify* an existing one. The former ran afoul of the single-subject requirement; the latter didn't.[379]

While single-subject requirements are likelier to come up in the context of voter-initiated amendments, in some states, they apply with the same force to legislative proposals. In Louisiana, a reform-minded governor proposed "to reorganize the executive branch to improve its efficiency" in 1940, which, because the state constitution included so many offices, required a sprawling constitutional amendment.[380] The Louisiana Supreme Court ultimately struck down the amendment on the grounds that it constituted "more than one amendment" under the state constitution, and therefore needed to be submitted in separate proposals.[381] Under the court's view, the "proposal embraces an executive cabinet, military affairs, conservation, public works, public safety, public welfare, public service, public education, highways, health, banking, labor, agriculture, occupational standards, state lands, state

[378] Advisory Op. to the Att'y Gen. (Fish & Wildlife Conservation Comm'n), 705 So. 2d 1351, 1354-55 (Fla. 1998).

[379] *Compare In re* Advisory Op. to the Att'y Gen. (Save Our Everglades), 636 So. 2d 1336, 1340-41 (Fla. 1994), *with Fish & Wildlife Conservation Comm'n*, 705 So. 2d at 1354-55.

[380] DUANE LOCKARD, THE POLITICS OF STATE AND LOCAL GOVERNMENT 86-87 (2d ed. 1969).

[381] Graham v. Jones, 3 So. 2d 761, 774-75 (La. 1941) (quoting LA. CONST. of 1921, art. XXI, § 1).

records, financing, accounting, taxation, state institutions, and other subjects."[382]

Likewise, the single-subject rule affects the ability of voters to adopt a structure that comprehensively regulates a particular area of the economy. In 2020, for example, voters in Nebraska and South Dakota proposed constitutional amendments that would have legalized cannabis. Both proposals did more than just legalize cannabis; Nebraska's also provided a level of protection for medical users,[383] and South Dakota's proposed new regulations for hemp.[384] From the initiative supporters' perspective, these policies were included to avoid enforcement problems and to ensure that the proposal they submitted was a comprehensive set of regulations.[385] In both cases, however, the state supreme courts struck down the proposals for single-subject violations.[386]

C. Protecting a Role for Voters in Administrative Construction

Since the adoption of limited direct democracy in the United States, judges, scholars, and policymakers have debated its proper role in state government. The relationship between the state legislature and the initiative process has consistently resulted in court battles over the last century — beginning with whether constitutional amendments creating an initiative and referendum process were self-executing,[387] and continuing today with whether the restrictions that legislatures have layered onto the process are constitutional.[388]

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[382] *Id.* at 778.

[383] State *ex rel.* Wagner v. Evnen, 948 N.W.2d 244, 260-61 (Neb. 2020).

[384] Thom v. Barnett, 967 N.W.2d 261, 264 (S.D. 2021).

[385] *Id.* at 288 (Myren, J., concurring in part and dissenting in part); *see also Wagner*, 948 N.W.2d at 262 (Papik, J., dissenting) ("A right of individuals to use cannabis for medicinal purposes is meaningful only if individuals can access cannabis. Some means of access is naturally and necessarily related to use. The [Nebraska Medical Cannabis Constitutional Amendment] proposes to provide that access through both allowing individuals to grow their own cannabis and allowing production and sale by third parties.").

[386] *Wagner*, 948 N.W.2d at 259; *Thom*, 967 N.W.2d. at 279-80.

[387] *E.g.*, State *ex rel.* Linde v. Hall, 159 N.W. 281, 282 (N.D. 1916).

[388] Seifter, *State Institutions*, *supra* note 7, at 311-16.

Courts have not played a totally passive role in this process. Their strict interpretations of the subject-matter restrictions in state constitutions have resulted in a material restriction on what voters can propose. And their treatment of voters' *constitutional powers* of initiative and referendum as something that legislatures can regulate into obsolescence is inconsistent with their treatment of government actors' constitutional powers.

Some courts have been willing to carefully review their states' experiences with direct democracy in evaluating the scope of voters' powers.[389] But missing from state-court jurisprudence generally is an appreciation for the role that voters have played historically in shaping their polities — and how much of modern state administration can be traced back to voter input or feedback.

Accordingly, the final contribution of this Article is to suggest that courts take this context into account. Where legislatures have added statutory restrictions onto the initiative process, courts should view them with skepticism. And when deciding how to interpret and apply a state constitutional restriction on direct democracy, courts should recognize the practical effects of different outcomes on what kinds of measures voters can propose. Or at the very least, courts should be honest about what their decisions mean.

Recent litigation before the Utah Supreme Court illustrates what this approach might look like in practice. In 2018, Utah voters approved an initiated statute that created an independent redistricting commission to redraw the state's congressional and state legislative districts.[390] But in 2020, the legislature repealed the statute[391] and, after the 2020 Census, drew a gerrymandered congressional map that split deep-blue Salt Lake City among four dark-red congressional districts.[392] In response, the League of Women Voters ("LWV") filed suit, arguing that

[389] *E.g.*, Reclaim Idaho v. Denney, 497 P.3d 160, 191 (Idaho 2021).

[390] UTAH CODE ANN. §§ 20A-19-201 to -301 (repealed 2020).

[391] S.B. 200, ch. 288, 63d Leg., 2d Gen. Sess., 2020 Utah Laws 2018.

[392] Katie McKellar, *Utah Gov. Spencer Cox Signs Off on Controversial Congressional Map That "Cracks" Salt Lake County*, DESERET NEWS (Nov. 12, 2021, 4:07 PM PDT), https://www.deseret.com/utah/2021/11/12/22778945/utah-governor-signs-legislature-controversial-congressional-map-cracks-salt-lake-city-gerrymander [https://perma.cc/C5G7-DW79].

partisan gerrymandering is unlawful under the Utah Constitution — and, apropos of this Article, that the state legislature unconstitutionally repealed the voters-initiated statute.[393]

While the LWV raises several different reasons that the state legislature's repeal of the redistricting commission is unconstitutional,[394] one specific argument is worth discussing. The LWV argues that Article I, Section 2, of the Utah Constitution, which grants to the people "the right to alter or reform their government as the public welfare may require,"[395] was violated. Because the redistricting commission statute was an initiative to "reform the structure of the redistricting system," the legislature's repeal of the statute unconstitutionally interfered with voters' power to reform their government.[396] At oral argument, the Utah Supreme Court honed in on this argument,[397] and ultimately requested supplemental briefing on the matter.[398]

Though many state constitutions contain similar "alter or reform" clauses,[399] little force has been given to them by courts or scholars.[400]

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[393] Michael Wines, *Utah G.O.P.'s Map Carved up Salt Lake Democrats. Is It a Legal Matter?*, N.Y. TIMES (July 11, 2023), https://www.nytimes.com/2023/07/11/us/redistricting-map-utah-salt-lake-city.html [https://perma.cc/XMB3-DA5T].

[394] The LWV's first argument is that the legislature has no "authority to negate a citizen initiative." Opening Brief of League of Women Voters of Utah, Mormon Women for Ethical Government, Stephanie Condie, Malcolm Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, and Jack Markman at 28-40, League of Women Voters v. Utah State Legislature, No. 20220991-SC (Utah 2023), https://redistricting.lls.edu/wp-content/uploads/UT-law-20230331-ps-brief.pdf [https://perma.cc/97QP-CTFC] [hereinafter LWV Brief].

[395] UTAH CONST. art. I, § 2.

[396] LWV Brief, *supra* note 394, at 13, 40-50.

[397] Oral Argument at 2:14:28–:23:00, League of Women Voters v. Utah State Legislature, No. 20220991-SC (Utah July 11, 2023), https://www.youtube.com/watch?v=NKjXEu4t38s [https://perma.cc/T6SX-9WVX].

[398] Ben Winslow, *Utah Supreme Court Signals It Is Grappling with a Big Issue in Redistricting Case*, FOX13 NEWS (July 14, 2023, 4:58 PM), https://www.fox13now.com/news/local-news/utah-supreme-court-signals-it-is-grappling-with-a-big-issue-in-redistricting-case [https://perma.cc/Y9H9-QD2N].

[399] Christian G. Fritz, *Foreword: Out from Under the Shadow of the Federal Constitution: An Overlooked American Constitutionalism*, 41 RUTGERS L.J. 851, 871 n.58 (2010).

[400] Christian G. Fritz, *Recovering the Lost Worlds of America's Written Constitutions*, 68 ALB. L. REV. 261, 276-82 (2005).

Most of the courts that have heard arguments regarding the power of alter-or-reform clauses have concluded that they confer little actual power on "the people."[401] But the specific argument raised by the LWV is interesting because it suggests a way to read the "power" of the people to propose initiated statutes in tandem with the thematically related power to alter or reform their government.[402] And while the LWV lawsuit was brought in the context of a legislature's decision to *repeal* an initiated statute, the idea advanced in the case should extend to how courts ought to review restrictions on the initiative process.

CONCLUSION

Living in American society today, we all use government services that voters — *sometime* in the last century — helped to shape.[403] Beginning with the elected economic regulators in the late nineteenth and early twentieth centuries and continuing through to the electorate's use of the initiative and referendum, voters have long helped answer questions about the structure of state administrative law. But the form of the answer has shifted — in most cases, voters have traded their power to *elect regulators* for a new power to *set policy*. Following the decline of elected offices in the early twentieth century and the introduction of direct democratic powers in the same timeframe, the electorate has seized its power to step into the shoes of legislators again and again.

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[401] *E.g.*, English v. Commonwealth, 845 A.2d 999, 1002-03 (Pa. Commw. Ct. 2004) (rejecting argument that Article I, Section 2, of the Pennsylvania Constitution confers an inherent power to initiate legislation).

[402] Anthony Johnstone, *The Separation of the Legislative Powers in the Initiative Process*, 101 NEB. L. REV. 125, 129-31 (2022); *cf.* Robert F. Williams, *Enhanced Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WIS. L. REV. 1001 (exploring how other rights in state constitutions, like protections of equal protection, have been read in tandem with the right to education).

[403] This is *roughly* the same rhetoric that Elizabeth Warren and others have used to argue for progressive taxation when she noted, "You built a factory out there? Good for you . . . . But I want to be clear: You moved your goods to market on the roads the rest of us paid for . . . ." Lucy Madison, *Elizabeth Warren: "There Is Nobody in This Country Who Got Rich on His Own,"* CBS NEWS (Sept. 22, 2011, 9:55 AM), https://www.cbsnews.com/news/elizabeth-warren-there-is-nobody-in-this-country-who-got-rich-on-his-own/ [https://perma.cc/VE43-5USU].

While legal, political, and historical scholarship is not left wanting for critiques of *how* voters have used this power, many of the criticisms have been overblown — at least in the context of institutional construction. It's true that voters have, at various times, embraced strict fiscal constraints in some states — most notably, California and Colorado — that have created "straightjackets" for policymakers.[404] But no similar chaos has shown itself in the structural context. Voters have embraced administrative restructuring proposed by state governments, tapped the brakes on more revolutionary ideas, and used their powers of direct democracy to tweak state systems of administration.

But despite the voluminous literature dissecting direct democracy, these changes have been largely ignored; scholars have instead focused on the adoption (and rejection) of policies by the electorate. Accordingly, in my effort to investigate the feedback loop in institutional construction between policymakers and the electorate, I conducted a survey of several thousand statutes and constitutional amendments presented to voters in the last century. This survey produced a treasure trove of qualitative and quantitative data, with contributions to studies of state constitutional law, both state and federal administrative law, and legal history. I showed that voters created structures to regulate agriculture, finance, the environment, labor, the medical profession, motor vehicle ownership, and energy, and I explored how the back-and-forth between voters and legislators on structural questions shaped much of modern state administration.

The result, however, is not just a descriptive statement of what *was* — it is also an aspirational statement of what could be. The electorate's long-established role in passing judgment on proposed regulatory reconstructions has continued relevance today. Courts interpreting legislative enactments in the direct-democracy context, or considering the proper way to interpret state constitutional text, should take this history into account.

[404] *E.g.*, Kafker & Russcol, *supra* note 360, at 1310-12.