Foreword: The Direct Ballot and State Constitutionalism

Harry N. Scheiber
Berkeley Law
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I. INTRODUCTION

When future historians look back on the patterns of change in American politics and law in the late 20th century, I regard it as a certainty that they will regard the impact of plebiscitary democracy in the states—and especially the exercise of the initiative ballot by the state electorate—as one of the most profound forces in shaping the nation’s public life in this period. In this sense, at least, the effects of the direct involvement of the voters in the lawmaking process, both at the level of constitution-writing and revision and in the realm of writing statutory law, have met more than fully the high hopes of those Progressive reformers who, nearly a century ago, foresaw from the initiative and referendum (as from the recall process as well) the generation of a sweeping restoration of popular influence in state politics. There is no gainsaying that this restoration of the public’s direct influence has been, at least on the surface, a dramatic though certainly consistent extension of the long and honored ideological tradition of popular sovereignty in state constitutionalism—that is to say, the tradition that finds in the people themselves the source of legitimacy for both constitutional foundations and the ongoing governance of the state polity. This is a proud lineage, representing a continuous line of political thought and constitutional ideology that runs down from the Founding period to both the claims and activities of reformers from the political left and right alike today, on the

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* Associate Dean and the Stefan Riesenfeld Professor of Law and History, Boalt Hall School of Law, University of California, Berkeley.

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one hand, and, on the other hand, down to recent jurisprudential movements in state and federal law. ¹

As Professor Robert Williams has reminded us, the movement for constitutional reform from the late 1890s through the Progressive period cast in a new context the old (and very radical) idea that each generation should be free to refashion government on its own terms. The concept of a “need for established processes of change in state constitutions” ² was eloquently articulated in the reflections of Thomas Jefferson, who wrote in 1816:

"[L]et us provide in our constitution for its revision at stated periods.... Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness; consequently, to accommodate to the circumstances in which it itself, had received from its predecessors; and it is for the peace and good of mankind, that a solemn opportunity of doing this every nineteen or twenty years, should be provided by the constitution; so that it may be handed on, with periodic repairs, from generation to generation, to the end of time, if anything human can so long endure." ³


³ Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) in THOMAS JEFFERSON, WRITINGS 1395, 1402 (Library of America ed., 1984), quoted in Williams, supra note 2, at 3-4. See Herbert Sloan, "The Earth Belongs in Usufruct to the Living", in JEFFERSONIAN LEGACIES 281 (Peter S. Onuf, ed., 1993) (title phrase in quotation taken from a letter from Thomas Jefferson to James Madison (Sept. 6, 1789)). Sloan argues that other American political leaders had expressed approval of frequent resort to constitutional revision and change, but that Jefferson was in the end willing to "[go] to extremes others might have avoided." Sloan, supra at 295. See also Harry L. Witte, Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania, 3 Widener J. of Pub. L. 383, 398 (stressing that frequent recourse to plebiscites, which has come to characterize state constitutional change, may be seen as "reflect[ing] a greater concern for the liberty of self-governance than for the protection of minorities and individuals from the
However glorious may be its intellectual and political pedigree, the direct ballot does not draw rave reviews on all sides today. Indeed, the record of plebiscitary democracy has evoked from scholarly and lay commentators alike reactions ranging from serious concern to outright disillusionment, and oftentimes sheer despair. There is a singular irony in the content of the recent caveats and complaints: the direct ballot process today is plagued by the very same ills as the problems that inspired the reformers who originally championed direct democracy during the Populist and then the Progressive movements of the turn of the century down to the First World War. The assertions of those reformers that special interests had perverted the legislative process, and that government had been undermined and the will of the people thwarted, are echoed today by the critics of direct democracy. Of course, the direct ballot as an instrument of constitutional amendment and statutory reform is a “neutral” weapon, available to every ideological group and party in state politics, to special interests of virtually every stripe, and to the vast range of causes and movements that term themselves “public interest groups” in today’s politics.

Beyond the conceptual questions that are associated with “neutrality” and the provision of “access” to political and constitutional process, however, excesses of popular rule”). Even Hamilton was prepared to concede that “the right of the people to alter or abolish the established Constitution” must be seen as a “fundamental principle of republican government.” Id., at 408 (quoting THE FEDERALIST, No. 78, at 489, 494 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961)).


5. The constitutional and legal issues associated with “access” are manifest in a significant body of judicial decisions that deal with such matters as proposed limits upon spending in direct ballot campaigns, how ballot issues are presented and explained to the public by state government, requirements for a single subject in each ballot measure, and the like. See Julian N. Eule, Judicial Review of Direct Democracy, 99 YALE L.J. 1503 (1990) (setting forth a wide range of concerns that the author views as warranting more systematic
there are other issues to be confronted in any appraisal of how the direct ballot has in fact affected the constitutional polity in the states and, through the states collectively, affected the national polity—and confronted in any inquiry as to whether the changes that have occurred are, on the whole, for good or for ill. In this lecture, I will revisit this troubled analytical ground to evaluate the recent history and implications of the direct ballot for state constitutionalism and for public life more generally in the United States.

II. PROGRESSIVE HOPES AND THE JEFFERSONIAN HERITAGE

In light of the various types of criticism that have been directed at the popular ballot process in state law, there seems good reason, at the outset, to recall the hopes and predictions of the reformers who originally fashioned for direct ballot measures the key place they enjoy today in the procedures of American democracy. The politicians and elite reformers in the intellectual and business communities, during the height of the movement to introduce the initiative, referendum and recall in the Progressive era, presented their reform enterprise as designed to take back government from the special interests—an effort, as Senator Jonathan Bourne, Jr., of Oregon declared in 1912, “to restore the sovereignty of the people[,] [t]o educate and develop the people[,] [t]o secure legislation for the general welfare[,] [t]o prevent legislation against the general welfare[,] [t]o eliminate the legislative blackmailer[, and] [t]o make our legislative bodies truly representative.” They represented the initiative and referendum as a return to first principles in democratic governance; and champions of direct democracy predicted that there would follow from these reforms, apparently as an inevitable consequence, a return to the “best . . . principles” in the quality of the legislation that government produced.

7. Id. at 16. In phrases reminiscent of a latter-day rhetoric celebrating the ideals of reasoned deliberation, republicanism, and civil virtue, Bourne articulated the notion that the direct ballot would be educative and invigorating for a democratic electorate:

The arguments for vesting initiative powers in the people were taken up also by the Progressive-era advocates of municipal reform, who regarded the direct ballot as an indispensable step for democracy beyond home rule. Thus, the noted urbanist Frederick C. Howe wrote that the two reforms, taken together, were expressions "of the spirit of democracy" in a great movement "for government by public opinion."8

Conservatives responded with an equivalent fervor to what they regarded as the Progressive leaders' hopelessly quixotic faith in direct governance by the people. These opponents of direct democracy unfurled the constitutional banners of "representative government" and "republicanism"; and, like some leading critics of the popular initiative today, they also predicated a formal argument against the direct ballot on the contention that the Federal Constitution's guarantee to the states in Article IV, Section 4, of a "republican form of government" forbade reforms that would undermine the entire structure of the republican system.9 "An ignorant democracy," Elihu Root contended, was not the solution to problems that plagued the existing political order; the sensible alternative was to root out corruption through tough new laws, to be enforced by public officials committed to honest government.10 President William Howard Taft

The [initiative] system encourages every citizen, however humble his position, to study the problems of government, city and state, and to submit whatever solution he may evolve for the consideration and approval of others. The study of the measures and arguments printed in the publicity pamphlet is of immense educational value. The system not only encourages the development of each individual, but tends to elevate the entire electorate to the plane of those who are most advanced. How different from the system so generally in force, which tends to discourage and suppress the individual!


10. GEORGE MOWRY, THE ERA OF THEODORE ROOSEVELT, 1900-1912, at 42 (1958)
was one of the most prominent critics of the direct ballot, sounding a warning against unrestrained majorities and against the dangers of a new demagoguery. The result, Taft warned, could be the entire subordination of the “higher law” principles that were implicit in a constitutional order and served as a bastion of protection for property rights and other basic rights against the tyranny of transient majorities.11

The alarm was also sounded by the political scientist Woodrow Wilson, then still in academic life and not yet entered into politics. Reflecting upon the reform laws enacted in the states that had adopted the direct ballot, Wilson declared that “where [the initiative] has been employed it has not promised either progress or enlightenment, leading rather to doubtful experiments and to reactionary displays of prejudice than to really useful legislation.”12 By the time he ran for president in 1912, however, Wilson had recanted; to solidify his identity as a progressive and self-proclaimed “insurgent,” he had taken up the cause of the initiative, referendum, and recall while serving as governor of New Jersey.13 Wilson now was ready to

(quotating Elihu Root). See Howe, supra note 8, at 174-75. For Root’s ideas on the proper strategies for reform, see generally richard leopold, elihu root and the conservative tradition (Oscar Handlin ed., 1954). With specific reference to the difficulties of achieving effective regulation of large-scale business interests through state (as opposed to national) legislation, and Root’s arguments for unified codes as the solution, see william graeber, federalism in the progressive era: a structural interpretation of reform, 64 J. Am. Hist. 331, 347-49 (1977).


13. This shift in Wilson’s views was part of the larger agenda of new reform causes that he took up while governor, having opposed them on the whole before seeking that office in New Jersey. One historian, no admirer of Wilson’s style, has written that “[Wilson] believed deeply in any position he took, no matter how recently,” and, by his affirmation of the popular reform program of his day, he positioned himself for the run for the White House. William L. O’Neill, The Progressive Years: America Comes of Age 118 (1975). A more sympathetic view of Wilson’s style is offered by John Wells Davidson, Wilson in the Campaign of 1912, The Philosophy and Policies of Woodrow Wilson 85, 97 (Earl Latham ed., 1958) (commenting upon “[t]he profound elasticity of Wilson’s mind,
praise the initiative as intended: "to restore, not destroy, representative government;" it was, above all, a club that could be held over the heads of machine politicians; "a sobering means of obtaining genuine representative action on the part of legislative bodies." It can be said with certainty that Wilson was not the last politician prominent in American life (and doubtless was not the first, either) who shifted with a powerful tide of a public opinion by thus allying himself, contrary to his earlier proclivities, with the cause of direct democracy.

The movement registered its first success in South Dakota, where in 1898 the electorate approved an amendment, submitted to the voters by the legislature a year earlier, providing for the initiative and referendum. Within a decade’s time Oregon, Utah, Nevada, Montana, Oklahoma, Missouri, and Michigan had adopted variants of the direct ballot amendment process. A turning point in the Progressive campaign came in 1911 in California, when the reformers, well-organized under the vigorous leadership of Hiram Johnson and having gained control of both houses of the state legislature, put before the voters at a special election 23 measures requiring constitutional amendments. All but one of these measures passed in the October election, leading Theodore Roosevelt to exult that California had set in motion “a new era in popular government" and thus had accomplished “the greatest advance ever made by any state for the benefit of its people.” The people, Roosevelt declared in another context, “are entitled to say what their constitution means, for the constitution is theirs, it belongs to them and not to their servants in office—any other theory is incompatible with the foundation principles of our government”; and thus welcomed the new popular checks upon the actions and tenure of judges as well as the initiative and referendum.

exemplified by the way in which the New Freedom [program] grew and took shape during the campaign of 1912 and still later during his first administration”).


17. Theodore Roosevelt, Introduction to WILLIAM L. RANSOM, MAJORITY RULE AND THE JUDICIARY: AN EXAMINATION OF CURRENT PROPOSALS FOR CONSTITUTIONAL CHANGE AFFECTING THE RELATION OF COURTS TO LEGISLATION 3, 6 (1912 ) (the author is indebted to Prof. Lucy Salyer for this reference).
accomplishments may serve as a reminder that, in Roosevelt’s day as in our own, the assessment of direct democracy’s virtues will not likely rest exclusively on abstract notions of political process. The judgment will also depend, ineluctably, on one’s view of the concrete substantive results of the direct ballot—results represented by the merits of the legislation and constitutional innovations that are enacted. Roosevelt was delighted with the substantive policy reforms that were resulting from the new processes of direct democracy; hence, he was happy to align himself with the champions of the direct ballot.

To defenders of the status quo, however, the concrete legislative results of the new processes of direct democracy were very much what they had predicted earlier—especially with regard to how an unrestrained majority might treat the property interests of the railroad companies and other large-scale business firms that had enjoyed a powerful influence in all the branches of government in many states. For the critics as well as for the champions of the new reforms, in other words, expectations were largely realized and their opposed attitudes were simply hardened as they assessed the practical outcomes of decision making in California and the other states where the direct ballot was instituted.

It is worth keeping in mind, however, that the Progressive era’s reformers were not exclusively concerned with reining in the power of the political bosses and machines, nor did their ardor for legislative innovation end with enactment of economic regulatory measures and so-called social

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Roosevelt qualified his otherwise enthusiastic public stand on the initiative and referendum with the caveat that that their use would be salutary “always provided that it be so safeguarded as to prevent its being used either wantonly or in a spirit of levity”; the danger was that “cranks and well-meaning busybodies with fads” might abuse the new instruments of popular power, their mischief made easier to accomplish by virtue of “the extreme laxity with which men are accustomed to sign petitions.” Theodore Roosevelt, Nationalism and Popular Rule, in THE INITIATIVE, REFERENDUM AND RECALL, supra note 7, at 52, 57-58. Roosevelt did not specify what various “safeguards” could be effectively deployed against these dangers, other than to recommend that signatures of a fairly high proportion of the voting population be required before an initiative measure was placed on the ballot. Id. at 58-59. Beyond that, apparently he relied upon the wisdom and good faith of the citizenry themselves.

Compare the more exuberant and unrestrained populistic arguments in favor of the direct ballot being advanced today, sometimes from rather surprising sources, e.g., the recent article Full Democracy: It Means Government by the People, and We Are the People, ECONOMIST, Dec. 21, 1996, at 1-14 (special “Survey” insert).

18. See Mowry, supra note 10, at 82 (“Although the democratization of the election machinery was to some reformers almost an end in itself, most of them considered it simply a means to attain more significant objectives . . . [such as] the better regulation of railroads and the control of . . . trusts.”).
justice legislation. Vitally important as those results of the Progressive movement were, another side of its legacy was the advancement of a very different kind of agenda: enthusiasm for disfranchisement of the African-American citizen in the southern states and for imposing legal disadvantages upon the Asian-American in California and the Far West more generally. Anti-alien land-holding legislation in California, carefully crafted to work against the interests of the Japanese immigrant, and the banishment of African-Americans from the voting booth in the South (with all the dangers, in loss of civil rights more generally, that this purging of the voter lists made possible) were also advanced by Progressive governors and legislatures.\(^\text{19}\) Rooting out corruption, giving the voters a direct voice in lawmaking, and undermining the political machines’ bases of power thus had their less noble side in a racist program—proudly termed “reform” and advocated without embarrassment or recognition of any contradiction or ambiguity in how the term was mobilized—that had both southern and Pacific Coast variants. The political tradition of direct democracy reforms is thus a two-faceted one; and elements of continuity in that tradition’s complexity can be found today, for example, in the popular resort to the initiative process to advance an anti-immigrant platform in California or, in other states, to limit the reach of civil rights measures so as to place specified groups outside the ambit of equal protection.\(^\text{20}\)


\(^\text{20}\). Reference is to California’s Proposition 187 (welfare benefits concerning aliens) (passed Nov. 8, 1994) and to measures such as Colorado’s Amendment 2 (passed Nov. 3, 1992) (later invalidated by the U.S. Supreme Court in Romer v. Evans, 116 S. Ct. 1620 (1996)). Proposition 209 (dismantling affirmative action programs) (passed Nov. 5, 1996), CAL. CONST., art. 1, § 31, has also become a lodestar of conflict, with charges that here too racism played a role.
III. THE CALIFORNIA DIMENSION

Whatever else may have qualified the present writer, in the generous view of the Rutgers Law School, Camden, for the honor of speaking on state constitutional law at this institution whose faculty research and student publications have established it as the leading center in the United States for studies in this area of scholarship, my most evident credential must consist in the fact that I am domiciled in the State of California. For the Golden State is the hottest cauldron of direct democracy and the best exemplar of its travails in America today. And this requires from me at the outset the caveat that, though this lecture will deal with issues pertaining to the general problem of how state constitutionalism fares today in the nation, still a rather obvious emphasis on California developments would be inevitable even if my own research focus happened to fix on the history of other regions, or if my academic base and residency were elsewhere than in Berkeley. This is reflected in the statistics, which reveal an extraordinarily high proportion of popular initiative ballots nationally accounted for by California.\(^1\) The special role of California consists further in the fact that its constitution permits amendment through the direct ballot without involvement in any way by the legislature, i.e., the “pure” citizen-initiated ballot. This one state’s special significance also consists in the innovative character of constitutional and legislative measures advanced there in recent years. Several of the most important movements and specific measures have made their first appearance in national politics on the California ballot and then were widely copied in other states and in a large measure became intertwined with basic changes in national-level party politics and were reflected in shifting voters’ attitudes nationally on key questions in public life.

The most notable such measure of recent vintage that proved to be a model for comparable direct-ballot moves in other states was California’s widely known Proposition 13 of 1978. There is no denying that Proposition 13 became the fountainhead of a modern popular “tax revolt” in the states as well as in national politics.\(^2\) Thus, in 1978 alone, as two of the leading commentators have pointed out, Proposition 13 “spawned sixteen taxation


and spending limitations” on the ballots of other states.  

Subsequently, California voters led in using the instruments of direct democracy to make the criminal justice process tougher with respect to both procedure and sanctions. Now, nearly two decades after Proposition 13, the California direct ballot process has resulted in the enactment of two measures that exemplify and symbolize a radical new turn in American law and politics. First, Proposition 187 sought to curtail severely the rights of illegal immigrants with respect to public education, welfare, and services. Second, Proposition 209 required the dismantling of state affirmative action programs. Each of these various initiatives has been endorsed by self-styled conservative forces closely associated with Republican governors. Propositions 187 and 209 have been the special projects of a chief executive, Pete Wilson, who has fashioned his administration around anti-immigrant, anti-welfare, anti-environmental, and anti-affirmative action programs linked with educational reform and recurrent demands upon a legislature controlled, in part, by the Democratic Party to endorse tax-cutting proposals. For the two decades since Proposition 13 was passed, it seems fair to say, the popular initiative, especially the direct initiative (placed on the ballot by popular petition rather than by action of the legislature), has become the most important instrument of policy innovation—and especially of policy reversal and retrenchment—in California’s governance and law. In the end, whatever the fate of the challenges now being pursued against Propositions 187 and 209 in the federal courts, the political battles that surrounded these two measures in California have, on one hand, served as a vivid reflection of trends in national politics and the popular mood; and, on the other, have awakened the hopes of those in other states who wish to see similar reforms through the initiative process affecting their own state laws.

23. Id. at 120. See infra notes 105-108 and accompanying text (regarding Proposition 13 and subsequent California direct ballot measures that have placed strict limits on taxation levels).


27. The campaign manager for Proposition 209, Ward Connerly (who with Pete Wilson’s support, also engineered a reversal of the University of California’s affirmative action policies in the UC Board of Regents) has already announced a national campaign in
For all that may be said of the way in which California’s aggressive politics of direct democracy have influenced the direct ballot revival elsewhere in the country, it is really still a national movement that we must consider. From 1898 to the early 1990s, as David Magleby’s research has shown, some 732 constitutional initiatives were submitted to the voters of seventeen states, and 223 of these initiatives were approved. Both statistical evidence and the record of political conflicts accompanying the presentation of a great number of these measures provide robust evidence of what a previous lecturer in this series, James Henretta, has termed the continuing American tradition of “activist popular sovereignty.”

There have been distinct cycles, however, in the resort by the voters to the direct ballot in state constitutional and legislative reform efforts. During the first great “wave” of reform in the Progressive era, between 1910 and 1919, more than 250 initiatives and referenda were introduced in the states, and some 100 of them were approved by the voters. In subsequent decades, the average number of ballots per state fell markedly, swinging upward again in the post-1960 period, with the single-year ballot figure reaching a 37-year high in 1978 when 350 ballots, including 40 statewide initiatives, were placed before the voters. Looking more closely at the recent data, there is a strongly rising trend in the presentation of state constitutional amending initiatives to the voters as the result of citizen petition: some 21 such amendments were ratified in the 1970s, rising to 33 in the 1980s and 42 in the period from 1991 to 1995. In contrast, from 1968 to 1992, there has

28. Magleby, supra note 21, at 26. Of the total given, 331 of the 732 initiatives were in California and Oregon; 72 of the 223 ballots that passed were in those two states. Id.

29. Henretta, supra note 1, at 826.


31. The basic sources of data on votes taken and typology of initiatives and other direct democracy voting are the analyses by Albert Sturm and Janice May in various annual editions of Book of the States, published by the Council of State Governments. I have relied particularly upon Janice C. May, State Constitutions and Constitutional Revision: 1988-89 and the 1980s, in Book of the States, 1990-91, at 20, 30 (1990), and upon computations from the Sturm and May data in Tarr, Dynamics of State Constitutionalism, supra note 4 (cited by permission of the author).

32. See supra note 31. For comprehensive data on 1904-1975 and 1976-1992, see Lisa Oakley & Thomas H. Neale, Citizen Initiative Proposals Appearing on State Ballots, 1976-
been a steady decline in the number of constitutional amendments approved that were put to the voters by action of the legislatures; by the early 1990s, constitutional ballots that were citizen initiated accounted for fourteen percent of all ballot measures in all the states (though only about a third of the states even permit this procedure). 33

Legal challenges to various aspects of the initiative process, or to specific provisions of ballot measures, have also risen to considerable prominence in the dockets of appellate courts in many states. In one study of state jurisprudence on the direct ballot, it was found that in 11 states embraced in the investigation, 53 appellate decisions were handed down (nearly sixty percent of them from California’s high court) on questions raised by statutory initiatives. 34 Nor were the ballot issues trivial, as is well known; their content included not only taxation and spending policies, but the right of privacy, environmental protection, criminal procedure, the death penalty, reapportionment, property rights and limits on regulatory power, public housing, school desegregation, and, more generally, civil rights, including the principles of anti-discrimination law with respect to the rights of military veterans, the physically handicapped, racial minorities, and homosexuals. 35 And so even by the early 1980s, the direct ballot had become a truly major force in the shaping of basic law and public policy.

By the late 1980s, references in public discourse to the “Ballot Initiative Revolution” were becoming immediately recognizable to any informed observer of American politics. 36 Today, such references to a veritable revolution in legislative and constitutional process are a staple of scholarly analysis as well as popular discussion: “Do-It-Yourself Government” has become the expected mode of innovation and retrenchment. 37 Using the popular ballot for both legislative and constitutional revision in the states is, moreover, a political phenomenon whose progress has coincided roughly in

33. Thomas Gais & Gerald Benjamin, Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform, 68 TEMP. L. REV. 1291, 1299-1300 (1995). The data set in this paragraph does not deal with the separate issue of how state constitutional commissions have obtained a more prominent role in recent years. On this issue see Robert Williams, supra note 2.
35. See infra notes 64-91 (discussing subject matter and results of initiatives).
36. This is the subtitle of the book by DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION (1989).
time with federal aid cutbacks that produced "Fend-for-Yourself Federalism" and attendant fiscal pressures on the states. This process accelerated during the Reagan presidency, 1981-1989, and was impelled by pressures that raised the state taxation issue to new levels of salience in public discourse and served as a wedge for anti-tax reformers. By the late 1990s, the importance of direct-ballot issues in state politics was evidenced by the intensity of debates and the importance of the legal and policy issues being decided by popular vote—and, most interestingly of all, by the manner in which national candidates for office (and not only state-level candidates) were manifestly being forced to take a position on such issues and even place them at the center of their campaigns. The direct ballot had indeed become a truly dominant force in placing both constitutional and legislative questions at the forefront of party and interest-group agendas in many states.

To a degree unknown in the history of constitutional law at the national level, our state constitutional development has come to operate under what one notable critic has termed "a regime of popular supervision." And to a degree seldom matched in past eras of American political history, one may add, this regime of popular democracy in the states has had a powerful, and in some important respects truly formative, impact upon national political debate and legislation. The constitutional dimension is especially significant in the states; by resorting to the direct ballot with such frequency for the purpose of inscribing changes on the tablets of the state constitutions, rather than effecting reforms or retrenchments through the ordinary legislative process, the direct ballot has often been the principal means for inscribing changes into the state constitutions.


40. Fischer, supra note 30 at 44-45.
process, both the virtues and the perils of direct democracy are often manifested in their most extreme and controversial form.\textsuperscript{41}

V. THE FEDERAL DESIGN, DUAL CONSTITUTIONALISM, AND THE SEVERAL FACES OF DIRECT DEMOCRACY

The structural and procedural barriers that work against frequent or ill-considered amendment of the federal constitution is in great contrast to the ease, frequency, and a rather discouragingly casual way in which so many state constitutions have been amended. This striking difference alone justifies the term “dual constitutionalism” in describing the overall system of basic law in our country; but the term also may be used to refer to the fact that the national polity must be described as one that embraces state law and constitutional doctrine—not only national law and doctrine.\textsuperscript{42} Our federal system, as a working machine of governance no less than as a legal and constitutional system, is a mosaic. Regarding each state’s law as a piece in the mosaic, it is evident that each one has its own special configuration of coloration, representing differences of policy, law, and constitutional doctrine. There are palpable differences from one state to another in the laws relating to property, taxation, family relations, abortion and neonatal medicine, crime and criminal sanctions, education, and even such matters as employment law or banking which are heavily interpenetrated with national law. It is not a fixed mosaic, moreover, for every legislative session, every initiative or referendum, and every major doctrinal innovation in the state constitutional courts produces a change in the overall “mix” that gives each

\textsuperscript{41} Although the constitutional initiative has been highly visible and controversial, accounting in a few states for truly crucial turns in law and policy, it still has to be recognized, as Galie and Bopst point out, that up to 1986 only nineteen percent of all amendments proposed in the states and eleven percent of amendments adopted were effected by this means. Galie and Bopst noted that “[b]etween 1986 and 1993 initiatives constituted only 10 percent of all amendments adopted”; with respect to bill of rights alterations, “the initiative has been used sparingly.” Peter J. Galie & Christopher Bopst, Changing State Constitutions: Dual Constitutionalism and the Amending Process, 1 HOFSTRA L. & POL’Y SYMP. 27, 47 (1996).

\textsuperscript{42} The term has been invoked to emphasize that the states, too, have constitutions, and in particular to stress the way in which independent and adequate state grounds may be used as the basis for constitutional decision-making by state courts under their own constitutions. “Dual constitutionalism” is a phrase that was used in a widely cited article by Chief Justice Judith S. Kaye, Dual Constitutionalism in Practice and Principle, 61 ST. JOHN’S L. REV. 399 (1987). For a discussion of this issue with specific reference to amending processes, see Galie & Bopst, supra note 41, at 31.
state its coloration in the larger national picture; the better metaphor may be, then, that of the kaleidoscope. And it has always been so, since the beginning of the Republic; indeed, that the states would have ample room for differences of policy, starting with slavery versus free labor, was essential to the original federal design—the "compound principle" by which a new national system was "engraft[ed]" upon the existing system of states. Notwithstanding the nationalization of rights following the Civil War—and even after the enormous push toward centralization of policy and preemption of state authority in many fields of law and policy that took place in the New Deal era and then accelerated in the 1960s and 1970s—there remains enormous discretionary authority under jurisdiction of the states in that broad range of vitally important areas of law and policy that I have noted above.

In any analysis of American federalism today, regarding it either as an expression of constitutional doctrine or as a working system of governance, it is useful to ask in what relationships the recent history of the direct ballot in the states bears upon the basic values that are typically offered as the rationale for perpetuating our "compound" republican system. For present purposes, I would like to call those values the "arguments for federalism," that is, the arguments that identify important virtues which justify respect for the states as constitutional entities with at least residual elements of sovereignty. Before we move on to a discussion of how the direct ballot has powerfully implicated questions of federalism and its values, each of these arguments needs at least brief comment.

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44. Id. at 88 (quoting James Wilson).
46. The most recent scholarly discussion, and certainly one of the fullest and most insightful in the literature on federalistic values, i.e., on the arguments for federalism, is in DAVID SHAPIRO, FEDERALISM: A DIALOGUE (1995).
A. The Grass-Roots Argument

The arguments for federalism typically honor clusters of values, one canon of which is that maintenance of the states as polities with significant autonomy advances the cause of popular participation in governance. Government is kept close to the people; public opinion at the grass roots can be conveyed more effectively to the state lawmakers and agencies than to the distant national capital. The powers of government are thus going to be exercised in a manner more responsive to the people—much more so than if all power were concentrated at the center—while the people themselves will be better informed on the major issues, closest to their lives at home, that are the concerns of state and local lawmakers.47

B. The Arguments for Diversity and for Experiment

A closely related argument has to do with diversity and experimentation. On the one hand, the nation itself is diverse, encompassing regions and individual states with very different configurations of climate, resources, urbanization levels, economies, ethnicity, religious affiliation, proportion of immigrant residents, and perhaps even dominant social and political attitudes; some scholars go so far (too far, I think) as to claim that significant differences in “political culture” may be identified in regions and even with respect to different states.48 Whether or not one accepts the notion that the idea of basic cultural differences is plausible in this context, clearly there is diversity—authentic diversity—in many dimensions. A federal design accommodates differences, leaving room for individual states to adopt laws and pursue policies that reflect their divergent preferences. Social pluralism, no less than differences in political ideas, is accommodated in the national government’s structure through the system of representation, as Samuel Beer has shown, the residual autonomy and sovereignty of the states persist alongside whatever measure of centralization the people are willing to sanction, politically, in response to specific challenges and needs.49

Of course, from the time that James Madison, in *The Federalist*, No. 10, penned his reflections on the problem of local majorities and the problem of tyranny within the system of diversity, jurists and theorists have struggled repeatedly with the problem of how to contain the dynamic of injustices that can so easily flow from the retention of significant powers of legal coercion in the subnational units. One need look no further than the story of slavery before the Civil War, and then Jim Crow segregation and discrimination in the century that followed, to recognize how deeply this perplexity was embedded in the federal system’s structure. Nonetheless, diversity is generally valued—at least the “right” kinds of diversity, according to one’s lights; and the alternative of what is generally termed scornfully “stifling uniformity,” imposed from above, is viewed at best with suspicion and more typically with an unremitting resentment and will to resist. There is another element, closely related to all this, worth recalling from the wisdom of the Founders. This was the premise that diffusion of power itself, whether in the name of perpetuating diversities or simply or multiplying the loci of power and authority to coerce, is a positive good of incalculable value—a vital defense for the freedom of a democratic people.

Beyond merely accommodating social, political, or cultural diversity, a federal design for governance will also give the subnational units constitutional sanction and practical incentives to be experimental in their policies. This argument for experiment was given perhaps its most famous expressions in a series of opinions by Justices Holmes and Brandeis in the interwar era. Brandeis’s exegesis of the argument for experimentation in *New State Ice Co. v. Liebermann* has become part of the federalistic


50. This is not a view restricted to the political Right. One need only recall the New Left’s suspicion of the national establishment and calls for decentralization of authority (“Power to the People” was the slogan—ironically appropriated later by Richard Nixon). Also consider the fascinating reflections of Professor Charles Black of the Yale Law School faculty, whose credentials as a post-New Deal liberal are surely unquestioned, on the seriousness of a situation in which the federal system “exists only at the sufferance of Congress.” CHARLES L. BLACK, JR., PERSPECTIVES IN CONSTITUTIONAL LAW 30 (1963). See Architecture of Federalism, supra note 45, at 229-31.


52. 285 U.S. 262 (1931).
catechism: “It is one of the happy incidents of the federal system,” he wrote, “that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” A decade earlier Holmes had pointed the way for this kind of argument in commending federalism for allowing states to be “insulated chambers” in which legislative experimentation could be implemented with relatively little danger to other states of the Union or the welfare of the national citizenry generally. As my colleague Robert Post has tellingly argued in a study of Chief Justice William Howard Taft’s views of federalism, the point about experimentation was not lost on conservative constitutionalists. Taft espoused a robust doctrine of property rights protection, to be deployed aggressively by the national judiciary. Taft took this position on a key federalism issue precisely because experimentation in the states could be so dangerous to the stability of rights that he regarded as fundamental to the stability of the social order that was supported by the doctrines of property rights in federal jurisprudence. In any event, the idea of the states as “laboratories” has endured and attracted the attention, approvingly or otherwise, from commentators and political actors on all points in the political spectrum.

53. Id. at 311 (Brandeis, J., dissenting).
55. Post, supra note 11, at 54-60, 66-69. Nonetheless, Taft was in a more general sense similar to other centrists and conservatives of his day in his suspicion of excessive concentration of power at the center. Needless to add, his respect for doctrines of states’ rights was ample enough with respect to the states’ authority in the ordering of race relations. See GEORGE E. MOWRY, THEODORE ROOSEVELT AND THE PROGRESSIVE MOVEMENT (2d ed. 1960) (discussing Taft).
In my own view, Taft in his day, and to no less a degree many of the neo-conservative jurists and theorists of our own time, failed to understand the actual historic tradition of American property law and constitutionalism—a tradition that included an ample measure of respect for “public rights” exercised through the police power and eminent domain powers, public trust, and taxation. See generally Harry N. Scheiber, Economic Liberty and the Constitution, in ESSAYS IN THE HISTORY OF LIBERTY 75 (1988); Harry N. Scheiber, Public Rights and the Rule of Law in American Legal History, 72 CAL. L. REV. 217 (1984).
C. The Argument for Governmental Competence and Efficiency

The quality of governmental performance is the focus of the last cluster of values that I propose to discuss, in this brief survey of the main arguments for federalism. In their essays in *The Federalist*, Madison and Hamilton proceeded from the premise that enumeration of powers would assure strong residual authority to the states. Madison was more agreeable to referring to that authority as an attribute of sovereignty than was Hamilton, who took a more pragmatic—and also grudging—approach to the matter, but both argued the point that the nation's governance overall would be strengthened by this division of authority. Logic as well as the practical politics of the day warranted decentralized power, for there were many things, important in the day-to-day lives of the people, that the states were best suited to govern. Thus, even if the states were abolished, as Madison asserted, "the general government would be compelled by the principle of self-preservation, to reinstate them in their proper jurisdiction." The durability and salience of this view is illustrated dramatically by the recurrent efforts in the last forty years to "sort out" those functions of government which can best be performed at the national level, distinguishing in the process those which are best left to state and local government. The conviction that this can be done and that it will advance the cause of governmental competence and efficiency has been a major theme of reform efforts in "redesigning the architecture" (or at least tinkering with the architecture) from the Advisory Commission on Intergovernmental Relations Report in the Eisenhower Administration down through Revenue Sharing, from President Reagan's notorious proposal for a comprehensive "swap" of program responsibilities as between the states and the national government to the very recent congressional and presidential


initiatives (much influenced by intervention of the Governors Conference),
and finally culminating in the radical changes in national welfare programs
enacted in 1996. The quest has always been a prominent feature of our
politics and will no doubt always continue, despite the realist criticism that
“distinctions between ‘national’ and ‘local’ are entirely subjective, as are
similar distinctions between ‘common’ and ‘particular,’ ‘important’ and
‘unimportant,’” so that the process of sorting out in the end is simply a
matter of elaborate political “horse-trading.” Even if this criticism were to
be accepted wholesale, and the idea that neither doctrine nor the objective
nature of varying governmental functions is really controlling in decisions to
allocate power between the nation and the states, the core idea remains:
things will work more efficiently when there is some measure of
decentralization and the national government is not burdened with the
complete load (or “overload,” to use a term often invoked to describe the
reality of federal responsibilities since the 1960s) of policy responsibilities.
Insofar as inefficiency may result from a federal division of powers—and
undoubtedly elements of redundancy, overlap, and fragmentation do
produce certain palpable inefficiencies—they are taken as the price of
diffusing power, a trade-off as it were, in the name of affording protection to
liberty.

D. The Several Faces of the Direct Ballot

In appraising the impact of the direct ballot on state constitutional
processes in recent years, and especially the ways in which this history
relates to our nation’s federal design and the arguments for federalism, it
must be recognized at the outset that ballot measures have been of several
types that can be distinguished despite obvious areas of overlap. Changes in
governing principles and in policy instituted by measures of the types I shall

60. For analysis of successive “sorting out” efforts since World War II, see Scheiber,
Architecture and Federalism, supra note 45, at 265-96. See generally William Anderson,
The Nation and the States, Rivals or Partners? (1955) (providing a comprehensive
overview and analysis of federalism issues as they were perceived in the 1950s, when
Anderson, a political scientist, was serving on the Commission on Intergovernmental
Relations, appointed by President Eisenhower to deal with “sorting out” policies).

61. Thomas J. Anton, American Federalism and Public Policy: How the System

62. Id. at 13 (quoting Rufus Davis).

63. See Shapiro, supra note 46. See also David B. Walker, The Rebirth of
Federalism: Slouching Toward Washington 129, 150 (1995) (examining the “overloaded
federalism” of the governmental system in the 1970s).
mention below have had often-profound effects on the overall direction of constitutional and legal change in the United States. 64

1. Structural Amendments

One type of change, in a rough classification of such measures and the objectives they have been designed to advance, may be termed structural. In this category are included such amendments as those adopted in California and other states that have established term limits, i.e., amendments that address the basic organization and system of governance rather than going to the substance of particular questions of policy or basic individual rights. 65 Institutional organization was a prime target for constitutional reformers in the states long before the twentieth-century initiative came into play. This prior history is illustrated by the extensive changes introduced through the amendment process (by conventions, commissions, popular referenda or amendments submitted to voters by the legislatures) on such institutional questions as creation of executive departments for more efficient administration of the laws, compensation of public officers, organization of trial and appellate courts, and the like. 66

2. Redistributive and Procedural Amendments

Partially overlapping with this first category are the amendments that address the nature and distribution of governmental powers and the specification of procedures. Included in this second classification are the procedures for obtaining amendments; obviously, the introduction of the initiative and other direct ballot measures was itself a landmark change in this category. Among the basic issues that run through the entire history of constitutional change since the nation’s founding are the following: specifying the powers of the executive, and the powers and procedures of the legislature and of administrative agencies; laying out the jurisdiction and procedures of the judiciary; defining the terms of municipal governance; and, establishing the procedures for elections and the formulae for


65. Bruce E. Cain et al., Constitutional Change: Is It Too Easy to Amend Our State Constitution?, in CONSTITUTIONAL REFORM IN CALIFORNIA 265, 277 (Bruce E. Cain and Roger G. Noll eds., 1995).

66. See generally Sturm, supra note 64.
representation. Among the most important recent amendment campaigns in this category have been California’s Proposition 13 and its counterparts elsewhere—the measures that in various ways have restricted significantly both the taxation power and the spending power. In the case of California in particular, the limits on taxation and spending have been linked to the institution of procedural changes requiring supermajorities (either of the voters or of the legislature) to override or to reverse the new limits. This ingenious procedural twist has had an extraordinary impact upon the way in which the state government in California operates—a major topic which we shall discuss more at length later in this lecture. In the prior history of state governance, probably only the nineteenth century amendments that established limits on state deficits or borrowing and the later introduction of the state income tax have produced results anything like the equivalent, in terms of their effects upon the scope and efficacy of state-level governance.

3. Substantive Amendments

Clearly distinguished from the foregoing categories have been amendments that have as their objective institution of substantive policy reform. A classification by subject matter of successful constitutional reforms, provided by Bruce Cain and collaborating authors, provides us with dramatic evidence of the range and variety of such amendments. Studying the amendments to all fifty state constitutions effective as of 1995, they identified: 154 concerning education; 151 dealing with energy, public utilities, water, and highways; 79 regarding sports industries and gambling; 36 involving labor issues; 63 with veterans; 53 affecting forests and fishing; 19 concerning militia; and, 116 involving what they term “moral issues.” By far the largest category of amendments was that bearing on taxation, for which 686 were identified, representing more than thirteen percent of all amendments studied.

67. For an illustration of the richness of the antebellum history on this score, see, e.g., Fletcher M. Green, Constitutional Development in the South Atlantic States, 1776-1860: A Study in the Evolution of Democracy (1930).
68. See infra notes 107-08 and accompanying text.
69. Cain et al., supra note 65, at 285-86.
70. Id.
71. Id. It is important to note that categorization of a few specific measures can sometimes be somewhat misleading. One example offered by Cain and his fellow authors is that of California’s Proposition 99, which mandated new taxes but earmarked the revenues specifically for public programs of tobacco-related education and for medical treatment and research. Id. at 287. Thus, the public health and taxation aspects of Proposition 99 make it
The numbers do not, of course, always tell the full story; relative importance of the issues addressed is another matter. Thus there are only some 15 to 20 amendments on environmental issues, and yet it is well known that in many instances such amendments have produced some of the most profound changes in the scope and substance of constitutional law in the last two decades. The great majority of such policy reform-oriented amendments provide the target for the familiar (and well-justified) lament of critics that the direct ballot has trivialized the constitutional amendment process. The eminent legal historian Lawrence Friedman has written

[policy reform-oriented amendments constitute] a vast, miscellaneous storehouse of... [what] we might call super-legislation. These provisions do not have a constitutional flavor at all; they are no different in quality or type from ordinary laws; and yet, for some political reason, they have been upgraded from the statute books to constitutional status.  

Such amendments contribute to a confusion of the distinction between “fundamental and statutory law.” Hence, the constitutions of many states have now come to represent little more than what has long been recognized as “a kind of statutory law altered by a somewhat more difficult procedure than that used in the case of ordinary statutes.” A view commonly voiced in political circles has it that the constitutions, in such instances, become equally apposite to place it in either of these two categories.

72. As computed in id. at 285. See infra note 73 (regarding Barton Thompson’s contribution on this point).


74. Lawrence Friedman, State Constitutions in Historical Perspective, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 36 (1988).

75. JAMES DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS FROM 1776 TO THE END OF THE YEAR 1914, at 120 (1915).

76. Id. This complaint was echoed by Roger B. Traynor, later the great chief justice of the Supreme Court of California, in Traynor’s 1927 doctoral dissertation. See Roger B. Traynor, Amending the Constitution (1927) (unpublished Ph.D. thesis, University of California, (Berkeley)). (“[i]f the constitution is to remain a constitution in the true sense there must be a distinction between ordinary legislation and the broad underlying proposition of fundamental law”), quoted in Note, California’s Constitutional Amendomania, 1 STAN. L. REV. 279, 281 n.16 (1949). See also Gardner, infra note 93.
little more in fact than temporary working drafts. The exalted, idealized view of constitutions as expressing enduring principles that represent widely held values becomes victim to this trivialization of both the law and legal process.

4. Fundamental Rights Amendments

What, for shorthand purposes, may be termed "fundamental rights amendments"—provisions that are concerned with statement or restatement of the basic constitutional rights and privileges of the citizenry—are another variant of substantive change achieved by state constitutional processes. Among the most significant of such initiatives have been those advancing equal protection concerns, especially provisions against discrimination on grounds of race, gender, or physical disability. Explicit assertion of the right of privacy has been another important development in state constitutional revision. Especially controversial in recent days, however, have been the amendment efforts in the following four areas of law that bear on the civil liberties of individuals: (1) the successful campaign for Proposition 209 in California regarding affirmative action programs;\(^77\) (2) measures regarding gay and lesbian rights, most notably the Colorado amendment struck down by the Supreme Court in the Romer decision;\(^78\) (3) proposed amendments either asserting or denying women's rights to abortion, and others proposing the rules with respect to voluntary termination of life;\(^79\) and, (4) a wave of

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amendments in various states significantly reducing the procedural rights of criminal defendants and introducing "victims' rights" provisions into the justice codes.\(^8\) One of the great ironies of the rollback by direct ballot initiatives in the search and seizure limitations, the rights of persons detained or arrested by law enforcement, and criminal rights during the trial and appellate processes, is that the electorates in several states have achieved these rollbacks by overturning decisions of their state supreme courts that had earlier been regarded as glowing evidence of the vitality of state constitutionalism and diversity under federalism.\(^9\)

Evident from the foregoing, when the voters have amended state constitutions with respect to fundamental rights, the changes have not always gone in the same direction: some amendments have been rights-enhancing while others have been rights-reducing.\(^2\) Janice May's research on constitutional amendments in the period of 1986-1990 provides evidence that the direct initiative process was especially important—by comparison with alternative processes, including referenda on proposals put to the voters by the legislatures, or by conventions or commissions—as the source of rights-reducing measures.\(^3\) It is worth noting further, on this point, that a trend in one particular state toward adoption of rights-reducing measures in

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80. In California, moreover, the direct ballot was successfully resorted to by advocates of the death penalty who overturned the state supreme court's rulings on this key question in criminal law and jurisprudence. See generally McCoy, supra note 24, at 128-47.


82. Janice C. May, The Constitutional Initiative: A Threat to Rights?, in HUMAN RIGHTS IN THE STATES (Stanley H. Friedelbaum ed., 1988), cited with approval in Galie & Bopst, supra note 41, at 47-48. Again, there is the problem of normative perspective in identifying specific measures in one or the other of these two categories. For proponents of prohibition against abortion, to cite an obvious example, the change in law that they seek is a protection or enlargement of the constitutional right to life of the unborn—a rights-enhancing measure in that sense; for their opponents, who instead favor freedom of the mother to choose with respect to terminating a pregnancy, any constitutional abridgment of that freedom of choice is a "rights-reducing" measure. See generally KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984); KRISTIN LUKER, CHANCES: ABORTION AND THE DECISION NOT TO CONTRACEPT (1973); LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990).

83. May, supra note 82, at 48-49.
the bill-of-rights category does not necessarily mean that all constitutional initiatives that prove attractive to voters in that state will be either "liberal" or "conservative," or either "pro-governmental" or "anti-governmental," in other areas of fundamental law. Thus while California voters were overruling their own state supreme court's school desegregation decisions, insofar as they went beyond federal requirements, the voters were also constitutionalizing the death penalty and reducing the rights of those caught in the toils of the criminal justice process. The California voters were instituting victims' rights measures—and, of course, were also establishing the national model for drastic tax-cutting and leading in term limits with Proposition 13. Statutory direct ballot measures in California were also used to enact some of the nation's most stringent ambient pollution and coastal management regulations. This same California electorate had led the nation in making the right to privacy explicit in the state constitution, but it had also sought to curb the legislature's power to enact open housing legislation. At a later time, the California electorate defeated a heavily financed move by the tobacco industry to preempt local option in smoking control and subjected the auto insurance industry to a highly restrictive set of regulations.

VI. THE IMPLICATIONS FOR FEDERALISM AND DEMOCRATIC VALUES

Thus we find in the record of plebiscites in state constitutionalism some elements that lend it great complexity: the variety of categories of amendments that have been accomplished through the initiative process, the great range of subject matter, and the very mixed pattern of voter preference that is often manifested (sometimes with perplexingly mixed signals as to ideological orientation). Taking this complexity into account, what can be

84. The ballot result was upheld by the United States Supreme Court in Crawford v. Board of Education, 458 U.S. 527 (1982).
85. See generally Latzer, supra note 81, McCoy; supra note 24 (California's criminal law and death penalty measures).
86. CAL. CONST. art. XIII A.
88. CAL. CONST. art. I, § 1.
89. See Seely, supra note 77.
90. Proposition 188 (defeated Nov. 1994).
91. Proposition 103 (passed Nov. 8, 1988) (codified as CAL. INS. CODE, § 1861.01).
said about the relationship of plebiscitary democracy in the states and the values that have traditionally been advocated as "arguments for federalism"?

A. Participation

With respect, first, to the "grass-roots values" that are intended to be advanced by a federal design for national government, it is self-evident that the goal of encouraging participatory democracy has been served. The people are aroused to action by calls for single-issue, up-or-down voting on measures that profoundly affect the terms of their relationships within the community itself and between the citizens and their government. An argument can be made that, at least at the theoretical level, the direct ballot more than any other institution of governance permits the electorate to express the kind of consensus on basic values that properly ought to be embodied in a constitution.\textsuperscript{92} If a state constitution, at its best, is supposed to be expressive of such values—if it is to embody the political culture of the state's electorate in the way it addresses fundamental law and the ethos of its collective authors, the citizenry\textsuperscript{93}—what better way to assure accurate reflection of such basic mores than direct ballots? At least with respect to theoretical possibilities, then, the objective of encouraging participation by the citizenry in the process of establishing the basic framework and powers of government, and defining the structure of rights and obligations that are left to the discretion of the states within terms of the national Constitution, is well served by the plebiscitary process.

In the face of criticisms against such a benign view, defenders of the direct ballot have responded that there is no persuasive evidence that the processes of direct democracy are any more seriously flawed than those of representative governance.\textsuperscript{94} The real question, I submit, obviously is not

\textsuperscript{92} See generally Carol Pateman, Participation and Democratic Theory (1970) (offering a broad theoretical perspective).


\textsuperscript{94} The existence of vagaries and a lack of standards that may prevail in the legislative process, immune from effective challenge in constitutional litigation, is acknowledged even by Justice Linde, one of the most ardent and eloquent critics of the direct ballot as it is now exercised under prevailing constitutional rules. Linde writes that a bill in the legislature "may be enacted by members whose minds are wholly closed to reasoned argument" and its purposes need not even be explained, let alone rationally defended. Hans. A. Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 226 (1976).
whether the plebiscitary style is participatory, for of course by definition it is; but rather, the question is whether it is truly democratic, in the sense that the actual process comes at least reasonably close to the ideal of participatory democracy. That ideal calls for more than merely the availability of voting opportunities on direct ballot issues: it also has to do with the realities of access to the process, the realities of participation levels, the accuracy and fullness with which information about the options is disseminated to the public, and the degree to which judicial standards of review assure that there is honest conformity to the specific terms—the rules of the game—that the constitutions set down for the process. Can there be any doubt that on many counts the process is faulted, in some instances shockingly so? The indictment, a litany of weaknesses and distortions that must be of great concern with respect to democratic aspirations for our governance system at large, and not only with respect to the direct ballot, is well known to students of state constitutionalism.95 One subject of intense criticism is the way in which an "initiative industry" has grown up, with well-paid professional consultants engineering and overseeing petition signature campaigns; it is difficult, under terms of most state constitutions, and especially so in the most highly populated states, to meet the signature standards, and in this—as in all aspects of the initiative process—money has come to count a great deal, and is often manifestly controlling. The quaint picture of the petition gatherer standing on a corner of Main Street approaching fellow citizens has become virtually obsolete; instead, the portrait of the petitioning process is one that features computerized mailings, targeted voter lists, and often media advertising at an intensive (and highly expensive) level, especially on television.

A second, closely related, concern is the degree to which this process of media presentation of initiative issues, carrying into the voting campaign itself, serves to inform voters or instead create an artfully contrived atmosphere of emotionalism and alarm, distortion of facts, and a general atmosphere of opinion manipulation—the same ills as beset the electoral process, only with the difference that a single-issue focus accommodates an

95. For references to the voluminous literature on the workings of the direct ballot and its shortcomings (and virtues), and fuller discussion of the arguments pro and con recapitulated in the following brief segment of this lecture, see THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (1989); MAGLEBY, supra note 4; REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY, supra note 5, passim; Eule, supra note 5; Cynthia L. Fountaine, Note, Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative, 61 S. CAL. L. REV. 733 (1988); SCHMIDT, supra note 36.
all-or-nothing approach undiluted by concern to achieve pluralistic interest group coalition-building (with the moderating influence that such concern can foster). Groups without heavy funding have an uphill battle in getting their arguments to the voters at all. The voter pamphlets and official state publications that present the pro and con arguments on initiatives are addressed often far above the reading level of a large segment of the eligible voting population; and with respect to voting participation itself, the timing of direct ballots—whether, for example, linked with controversial primaries that will draw heavy votes from a party’s membership whose views on a particular initiative-ballot measure can be predicted—also affects (or distorts, as may be argued) the votes. Equally notorious are the techniques, now highly developed, for confusing the electorate or frustrating probable intentions of the voters through the misleading titles used for ballot measures, the often-impenetrable language of the amendments or legislation up for a vote, and the tactic of placing opposed or complementary measures on the ballot bearing on the identical subject matter.

In sum, if fear of majority tyranny has been a recurrent theme in criticism of the direct ballot since its introduction in our country a century ago, we have equal reason to beware of the tyranny that can issue from skillful manipulation of ballot voting by well-focused and well-financed minorities who manage to capture the necessary majority of actual voters on specific ballot measures.

All this does not present an encouraging picture, even to those, I would think, who are on the whole pleased with the recent trends of substantive outcomes in the record of amendment through initiative. The difficulties in squaring modern plebiscitary constitutional process with the democratic ideal calls to mind the warning that James Madison voiced in The Federalist No. 49 amidst the campaign for a republican constitution in 1787-88, when he wrote that “a constitutional road to the decision of the people” must be kept open, since in the last analysis it was the people on which a republic’s legitimacy rested. But constitutional plebiscites should be set in motion only on “certain great and ordinary occasions,” he declared, for the “danger
of disturbing the public tranquility by interesting too strongly the public passions, is a ... serious objection against a frequent reference of constitutional questions, to the decision of the whole society." 

Echoing Madison's generalized suspicion of the wisdom of plebiscites, modern critics also draw upon his and other Framers' republican (as opposed to purely democratic) political and legal philosophy to find in the Guarantee Clause of the Federal Constitution specific grounds for searching judicial review of initiative and referendum results. This is a position most closely associated with Justice Linde and Professor Derek Bell, but one whose merit has been endorsed, albeit circumspectly, by at least one respected judicial source. That the popular ballot today "poses more danger to social progress than the problems of governmental unresponsiveness it was intended to cure" is a conclusion that this group of critics finds all the more compelling because notoriously the poor and the minorities who are the targets of many rights-reducing measures have disproportionately small turnouts at elections. If critics are correct, as seems indisputable, in asserting, that "[a]ppeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns," these results merely compound the offensiveness to the democratic ideal that is associated with the flaws of process that the enshrining of participation, without reference to results, has already manifested.

99. Id.


101. Bell, supra note 100, at 17-18. Whatever its merits with respect to the direct ballot's potential for expressing prejudice and doing social harm, Professor Bell's analysis proved far off the mark insofar as he contended that, by contrast with issues such as race or sexual conduct, when initiatives deal with "taxation problems and matters of governmental structure ... [they] typically evoke little voter response." Id. at 18. Ironically, in 1978, the same year as his article appeared, California's Proposition 13 inaugurated the modern popular tax revolt.

102. Id. at 19.
B. Diversity and Experimentation

The mosaic, as I have described it, that comprises the “map” of the states, as to the variety and shifting coloration of law and policy, has been rendered vastly more complex—but also more volatile and unstable—by the impact of constitutional initiatives in the working system. The states as “insulated chambers” for experimentation, for good or for ill, continue to function as before; however, only now, with the proliferation of constitutional amendments through initiative, the dimensions of change are often achieved through constitutional, and not merely statutory, innovation. This much is self-evident and requires no elaboration here.

I do, however, want to point out an important paradox in the recent pattern of innovation. This has to do with the way in which designers of certain initiatives, at least in California, have craftily taken advantage of the direct ballot’s legal possibilities so as to fix what amounts to virtually once-and-for-all change of the law. They have done so in California by writing into initiatives—measures that need only a simple majority of those voting in the election to become part of the constitution—a provision that requires a super-majority of two-thirds for purposes of its reversal or even substantial revision. The most notorious example of this maneuver is in the case of Proposition 13, the tax limitation initiative. From this approach entrenching the super-majority requirement comes a new set of difficulties in undertaking to effect new experiments, or to undo the experiments in place—a result that produces a contradiction and a paradox with respect to the ideal of fostering diversity of policy according to local preferences. At the very least, it goes violently against the grain with respect to fairness in popular decision-making as well. States other than California have been more discerning in creating procedural requirements that avoid such manifest distortions of democratic process, e.g., requiring super-majorities for the initial approval of amendments, making certain fundamental Bill of Rights or Declaration of Rights provisions out of bounds for amendment, or requiring a role for the legislature before an amendment becomes effective.


C. Competence and Efficiency of Governance

The values of efficiency and competence have not been well-served by the recent uses of the initiative, since in fact many of the new measures are designed specifically to divest the institutions and processes of ordinary governance of resources, flexibility, and authority. Thus, these initiatives have set in motion a vicious cycle by which term limits, measures requiring reductions in legislative staffing levels, and tax limitation amendments have reduced government’s ability to deal effectively with many of the leading policy questions that concern the electorate (including crime levels, quality of public education, deterioration of physical infrastructure, and the like). The rising criticism of failure to deal effectively with such problems leads to further disillusionment with government and sets the political ground for still further attacks on taxation and the regular institutions of governance.  

California is an especially egregious (and cautionary) example. For the full fruits of Proposition 13 and the other constraining amendments that followed it, undermining the fiscal basis for effective public programs in many vital areas, were not seen for more than a decade after the direct ballot votes took place. This was so because from 1978 (the year Proposition 13 passed) until the mid-1990s, the legislature still enjoyed sufficient revenues to bail-out local governments crippled by the property tax cuts, and thus help to support health, educational, and other local services. By the mid 1990’s, however, as additional limitations took effect as the result of measures capping state level taxes and expenditures, the legislature could no longer sustain the annual bail-outs. There was an ineluctable trend toward a reduced level of discretionary expenditures—largely because a mandated percentage of the state budget was required for grades K-12 and community college educational budgets, as the result of a popular ballot, but also because Three Strikes legislation and the drastic rise in prison population that occurred as the result of direct ballots on the criminal justice and sentencing rules, with a concomitant rise in the prison budget.

In the public mind, it is a difficult thing to connect votes that took place in 1978 or 1980 with drastic cutbacks in public services that make for lurid newspaper

105. Thus one commentator has written that in California the tax limits and propositions constraining legislative effectiveness have resulted in “state government with almost no flexibility, few resources, and little chance to earn voter trust.” Matthew D. McCubbins, Putting the State Back into State Government: The Constitution and the Budget, in CONSTITUTIONAL REFORM IN CALIFORNIA, supra note 65, at 353.
106. SEARS & CITRIN, supra note 103, at 196-97.
headlines fifteen years later. And there is, I think, a distinct "disconnect" effect in all this: the voters seem to regard a building crisis in public services as evidence of inherent governmental incompetence or the result of corruption; their disillusionment provides a rich seed ground for politicians living on anti-taxation rhetoric and platforms; and the specter of losing their legislative seats, let alone the menace of still further punishment of government through new anti-tax and similar initiatives, has a chilling effect on the political leaders who might otherwise be standing firm in support of new measures that might run against the anti-governmental mood. In the face of national support for serious reduction in welfare programs, and facing the need to implement the cutbacks at the state level and to survive the political storms generated by the recent California direct ballots on immigrants (Proposition 187) and on affirmative action (Proposition 109), the atmosphere is anything but auspicious for deliberative politics in Sacramento.108

Even a dedicated enemy of big government and of social programs would have to concede, I believe, that cutbacks and parsimony are not the same as efficiency, and that the results of the direct ballot as "law in action" are no more elevating with respect to efficacy of governance than they are with respect to reasoned deliberation in politics. If the more drastic negative effects of the plebiscitary style in my own state are at all indicative of how things may go nationally, in a period of shifting and often highly volatile political moods, there is good reason for skepticism that democratic ideals are truly advanced by the direct ballot as it is working now. To cite only one hypothetical, let me suggest a scenario for the long-term future of Proposition 13. In what I would term a blatant contradiction of equal protection norms, in contrast to the U.S. Supreme Court’s view, Proposition 13 established a two-tier taxation system for real property in the state. All commercial and residential owners were grandfathered in at a fixed rate based on a rollback of assessments to much earlier levels, generally conceded to be half or one-third of market value in many commercial and residential districts. Constitutional challenges to the new system failed both in the state’s high court and, years later, in an appeal to the United States Supreme Court.109 In the U.S. Supreme Court, Justice Blackmun wrote for the majority that the new system was manifestly unjust, as all purchasers of


property after 1978 paid on the basis of real market value (price of purchase) rather than the artificially reduced basis that pre-1979 taxpaying businesses and homeowners enjoyed. Yet, the Court upheld the two-tier system both on the grounds that judicial review of reasonableness of state tax systems goes forth on the basis of low scrutiny, and on the grounds (never argued for by counsel) that the California initiative tended to preserve the value of stable neighborhoods.¹¹⁰

We now visit our scenario. Eventually half or more of the residential property owners in California will be post-1978 purchasers.¹¹¹ Presuming that renters will not be persuaded to throw their weight on the side of the advantaged pre-1979 owners, it is then possible that the necessary two-thirds of new property owners—who, because of leverage effects, are by now paying three to four (or more) times the taxes on identical properties as are the advantaged owners—will mobilize to place a new measure on the ballot, say Proposition 113. This new proposition will turn the tables, requiring that when properties are held at the old (advantaged) tax levels for more than twenty years, an “equalization tax” of, say, fifty percent on the old annual tax will apply each year to those properties. All commercial properties advantaged by Proposition 13 will pay both an equalization tax—say, at a relatively low ten percent level in order to head off protestations that the “business climate” is being destroyed, and a special levy of five percent in addition on the value of any property transferred in the future. The measure will also include, of course, a one-time tax relief reduction as partial compensation for having carried an unfairly high share of public expenses since 1978. Presumably the reduction can be scaled to be proportional to the number of years since purchase that the property owner has carried the higher rate. Taking a clue from Jarvis and Gann and their design of Proposition 13, the “carrot” for these latter taxpayers, the disadvantaged who now form a majority, will need to be large and immediate. This tactic will virtually assure passage of the measure. So, just as Proposition 13 offered an instant and then continuing boon to the older group, now Proposition 113 will impose a special money penalty upon those who have been partial free riders for a quarter century. Hence, the new majority will vote itself a big tax break, at least to the extent of putting all taxpayers once again on the same basis.

¹¹⁰ Nordlinger, 505 U.S. at 5.

¹¹¹ In referring to “half or more,” I leave out the commercial and industrial properties that benefit from Proposition 13 because counting their “owners” is a more difficult matter.
This scenario has the terrible odor of "naked preferences" and majority tyranny which on that ground, would probably be denounced in the political hustings as the worst kind of irresponsible populism (just as Jarvis and Gann were denounced). For that matter, this scheme might run into trouble with property-minded judges who might not be so ready as Justice Blackmun and his colleagues in the majority to be deferential to a direct ballot majority's voice. The prospect of the hypothetical Proposition 113 crashing on the shoals of judicial review is not diminished by the fact that it is a plebiscitary majority that speaks, demanding special deference by the court. Consider, in that regard, the *Nollan* case (the California direct ballot measure which established the California Coastal Commission was to be given no special deference) where the Court's majority overturned one of the commission's decisions to sustain the private rights of a coastal property owner against a regulation not deemed to have a clear "nexus" with the purpose to be served.\(^{112}\)

**VII. CONCLUSION**

Whatever the degree of probability that the new majority in California will somehow reverse course in taxation, whether on this line or some other, the scenario serves to remind us of the dangers that inhere in the arbitrariness with which a volatile electorate can act in several of the central realms of public life and personal liberties. The principles of review that ought to prevail in the judicial review of direct ballot measures is a vitally important question, certainly relevant to the present discussion but beyond its scope in this context. Ample literature on the subject of the judiciary and the direct ballot has suggested various approaches that might serve to check some of the more obvious excesses of plebiscitary constitutionalism.\(^{113}\) However promising some of these proposals for standards of review may be, however, I think that the more urgently needed course is for procedural reform in the states, so that the direct ballot may be "tamed" and constrained, as it were, first, by a more rational approach to the super-majority requirement problem; and then, by a classification process that will impose higher procedural standards for measures that propose to reduce the


It may not be too much to hope for, either, that some way will be found to keep matters of ordinary statutory legislation out of the state constitutions to a greater degree than is now the case. One hopes that by whatever means used to achieve consensus, we can find ways to adjust the state constitutional process so that the direct ballot will in fact, not only in theory, both sustain and nurture competence in government and also demonstrate (as Justice Black once averred) "devotion to democracy, not to bias, discrimination, or prejudice."  

114. A suggestive, if politically problematic, approach to the problem of sorting out was advanced in a much-cited student piece years ago: Note, California's Constitutional Amendomania, supra note 76. See Rachel A. Van Cleave, A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California, 21 HASTINGS CONST. L.Q. 95, 137-42 (1993). A powerful critique of various current proposals for the role of the judiciary in reviewing results of plebiscites is provided in Charlow, supra note 113.

Eugene C. Lee, for more than a quarter century a distinguished leading commentator on the initiative process, returns to the subject in a newly published work and concludes forcefully that, in California, "direct democracy" is no longer democratic" and that basic reforms are vitally needed in the plebiscitary process. Eugene C. Lee, The Initiative Boom: An Excess of Democracy, in Governing California: Politics, Government, and Public Policy in the Golden State 133, 131 (Gerald C. Lubenow and Bruce E. Cain, eds., 1997).
