Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case In Point

Mildred Wigfall Robinson
University of Virginia

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Mildred Wigfall Robinson

Professor Robinson explores the uneasiness present when acts of “direct democracy” through means of voter referenda and ballot initiatives conflict with the ideals of representative government, using fiscal matters, such as the property tax, as an example.

Part I explores the changes that have taken place in the last two decades in voter strategy and in patterns of judicial interpretation, briefly reviewing the history of the property tax focusing on taxpayer reaction to long overdue attempts at administrative reform, and showing how that effort indirectly contributed to the “taxpayer revolt.” It further examines how and why broad-scale attempts to utilize non-tax sources of revenue to maintain services were largely unsuccessful. It also briefly explore the extent to which change tracks voter sentiment. Lastly, it traces the expansion of voter activism to taxes in addition to the property tax, noting the parallel emergence of two additional tactics: the imposition of required supermajority action—either electoral or legislative—to validate any generic tax increase and the enactment of revenue caps.

Part II of the Article highlights initiatives’ patterns of departure from desirable fiscal policy identifying those factors inherent in ballot-box activity that make it difficult, if not impossible, to be attentive to such factors. It shows how legislative activity can accommodate fiscal policy as well as social policy while exercising taxing and spending authority and contrasts the initiative process showing why deliberate attentive response to underlying policy and competing considerations is impossible. It argues that this voter seizure of control significantly forecloses the subsequent possibility of competent long-term legislative financial oversight (i.e., budget-making) in general and then argues that the initiative process impedes the formation and effective interaction of political coalitions on either side of or across the aisle possibly causing disenfranchisement in some cases. Voter control ultimately undermines the efficacy of government in general to everyone’s detriment.

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* Professor of Law, University of Virginia. B.A. 1965, Fisk University; J.D. 1968, Howard University School of Law; LL.M. 1971, Harvard Law School. I express deep appreciation to Taunya Lovell Banks, Charles Daye, Paul Stephan, Barry Sullivan, Samuel Thompson, and Laurens Walker for their many helpful observations and suggestions. I also thank the University of Virginia Law School Foundation for its financial support and our wonderful library staff for their unfailing assistance. Finally my thanks to Craig Weiss and Cordell Faulk for their indispensable research assistance.
Lastly, Part III, explores whether expressions of popular will with regard to fiscal matters can ever be infused into representative government without unduly diluting the former and crippling the latter. Assuming that repeal of the process is politically impossible, Professor Robinson suggests steps that might be taken by the Courts, by legislative bodies, and by the voters themselves to make the initiative process contribute to rather than trump representative government.

Taxes are what we pay for civilized society.

Justice Oliver Wendell Holmes, Jr.¹

Taxation is, in fact, the most difficult function of government and that against which their citizens are most apt to be refractory.

Thomas Jefferson²

Over the last few decades, there has been a sea change in the lawmaking process in this country. By initiative and by referendum,³ American voters in a significant number of states⁴ are participating directly in state and local governments. The increasing use of initiatives to express preferences⁵ is a matter of

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² Yablon, supra note 1, at 236.
³ American voters can participate in the lawmaking process through three avenues: initiative (direct or indirect), referendum (popular or submitted), or recall. Through the direct initiative, citizens may propose either legislative measures or constitutional amendment by submitting a petition bearing the appropriate number of signatures. An indirect initiative is submitted first to a legislative body by the drafting/qualifying group. The proposal will become law if passed by the legislative body; otherwise it is submitted to the voters. A popular referendum occurs when a group petitions to allow the electorate either to ratify or reject a law passed pursuant to the regular legislative process; a submitted referendum is characterized by legislative action to submit a measure to the electorate without the intervention of an interest group. See Elisabeth R. Gerber, The Populist Paradox: Interest Group Influence and The Promise of Direct Legislation 15 (1999). Recall permits voters to petition for the opportunity to remove or discharge an elected official from office. See Thomas E. Cronin, Direct Democracy: The Politics of Initiative, Referendum, and Recall 2 (1989). As such, the recall does not result in lawmaking, per se.
⁴ In twenty-four states plus the District of Columbia, voters may participate directly in lawmaking through either the direct or indirect initiative. Those states have been identified in numerous publications. See, e.g., Sherman J. Clark, Direct Democracy in America, 97 Mich. L. Rev. 1560, 1560 n.1 (1999). A significant number of lesser governmental entities also permit direct participation by voters in lawmaking.
⁵ One commentator has observed:
particular concern for, as Professor Sherman Clark has observed, "[d]irect democracy, where it exists in the United States, always trumps representative democracy [in that] [a]n initiative can over-rule the legislature." Substantively, these issues are increasingly diverse, encompassing constitutional as well as statutory change.

Attention to the tension between direct democracy and a republican form of governance is not new. Rather, it dates from the earliest days of the republic. James Madison thought direct democracy incompatible with republican governance. Madison preferred representative government because it fostered consideration and compromise of competing principles. On the other hand, popular democracy contained no checks against self-interested governance. One writer expressed the tension and explained the choice as follows:

The Federalists rejected pure democracy for indirect democracy, or "republicanism," not only to overcome the problem of geographic scale, but because they feared public acts derived from motives of "interest" or "passion." "Interest," of course, meant self-interest, essentially the pursuit of wealth. Non-economic "passions" might be religious or patriotic, collective emotions of love, fear, or hate.

In the first eighty years of this century there were about 500 separate initiatives placed on state ballots, an average of about 6 a year. Now, following the 1998 elections, there have been 1,916 initiatives considered by the voters in twenty-four states since 1902. . . . In 1996, there were at least 90 citizen initiatives on the ballots of 20 states, and in 1998 there were 64 in 16 states.


6. Clark, supra note 4, at 1569.

7. David Broder notes that, in 1998 the initiative process was the vehicle for passing laws and amending constitutions to "end[] affirmative action, raise[] the minimum wage, ban[] billboards, decriminalize[] a wide range of hard drugs . . . , restrict[] campaign spending and contributions, expand[] casino gambling, ban[] many forms of hunting, prohibit[] some abortions, and allow[] adopted children to obtain the names of their biological parents." DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY 3–4 (2000).

8. In Madison's view, a careful delegation of government to elected representative would best "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." THE FEDERALIST No. 10, at 50 (James Madison) (Charles R. Kessler ed., 1999). In this way, he continues, "it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves . . . ." Id.

toward some group or object—that is to say, communal rather than atomistic.

The Founders ultimately rejected direct democracy on the national level in favor of republicanism. In those states permitting direct citizen participation in governance, the accommodation between direct democracy and republicanism has been uneasy at best. The most recent spate of activity has been a topic of general interest in both the popular press and the academic community. Understanding this phenomenon is of compelling importance, for its long-term effect on representative governance is potentially profound. Nowhere is the current need for critical analysis more compelling than in assessing the cumulative effects of initiatives—both direct and indirect—on the process leading to the formulation and implementation of states' fiscal policy with regard to taxing and spending.


12. See, e.g., Frickey, supra note 11, at 423.


14. See, e.g., CRONIN, supra note 3; GERBER, supra note 3; DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984); DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION (1989); JOSEPH F. ZIMMERMAN, PARTICIPATORY DEMOCRACY (1986); CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES (Shaun Bowler et al. eds., 1998).

15. This view is expressed by numerous writers albeit in varying terms. For example; in Broder's view, "[t]he initiative process . . . threatens to challenge or even subvert the American system of government in the next few decades." BRODER, supra note 7, at 1. To be sure, there are others who laud the initiative as the purest form of democracy. See, e.g., Romer v. Evans, 517 U.S. 620, 647 (1996) (Scalia, J., dissenting) (describing the initiative process that amended the Colorado Constitution as the "most democratic of procedures"); DUBOIS & FEENEY, supra note 13, at 1 (noting that "[m]any see the initiative as the very essence of democracy").

16. James Madison recognized the fundamental importance of issues such as these:

No man is allowed to be a judge in his own case, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? . . . The apportionment of taxes on the
Justice Black, in *James v. Valtierra* explicitly spoke to the modern role of referenda (and, indirectly, initiatives) in addressing fiscal concerns. He characterized the referendum as a sanctioned means for insuring "that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues." 

In light of what has transpired recently, this statement is prescient. After all, this "voter revolution" began its most recent and intensive phase as a tax revolt, directed against the property tax. The 1978 passage of Proposition 13 in California and the passage of Proposition 2½ in Massachusetts shortly thereafter made national headlines. Both generated substantial political fall-out, and Proposition 13 in particular has generated a substantial

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*The Federalist No. 10, supra note 8, at 47–48 (James Madison) (Charles R. Kessler ed., 1999).*


18. *Id.* (emphasis added).

19. See *Broder, supra* note 7, at 6 (noting that the "modern-day romance with the initiative began on June 6, 1978" with the Jarvis-Gann amendment to the California constitution). Howard Jarvis and Paul Gann engineered the campaign that gave birth to Proposition 13. *Id.* Broder goes on to say that "Prop. 13 revived interest in the initiative process." *Id.* at 7.

20. Proposition 13 rolled back and capped property taxes in California at the property's 1975–76 valuation. Increases in assessed value were restricted to two percent per year unless the property was sold, transferred or was the subject of construction. *Cal. Const.* art. XIII A, §§ 1–6. Essentially, California shifted from use of the current fair market value of property to acquisition value of property as the basis for assessment. See Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1293 (1978) (characterizing Proposition 13 as an "acquisition value" system).

21. Massachusetts' Proposition 2½, passed by the voters in 1980, was a statutory measure that rolled back and capped property taxes at 2.5% of the "full and fair cash value" of the affected property's 1979 value. Further, once the 1979 value had been reached, future annual property tax levies in excess of 2.5% of assessed value were barred unless two-thirds of that community voted for a limit override. *Daniel A. Smith, Tax Crusaders and the Politics of Direct Democracy* 86 (1998). Significantly, Barbara Anderson, one of the organizers of the successful effort said that "[w]e couldn't have done it if Proposition 13 hadn't passed in California. . . . Massachusetts is not as adventurous as California. Certainly, the big argument we used was, 'California did it, and they didn't fall into the ocean.'" *Id.* at 85.


23. Cronin observes that "California's Proposition 13 . . . triggered similar tax-slashing measures (both as bills and as direct legislation by the people) in numerous other states . . . ." *Cronin, supra* note 3, at 3 (emphasis added).
amount of scholarship.\textsuperscript{24} Despite the increasing scope and breadth of initiatives generally, tax and financial matters have continued to comprise a significant percentage of the ballot initiatives presented for voter action.\textsuperscript{25}

24. Smith says that over the last 20 years, Proposition 13 has spawned "dozens of articles and numerous books. [It is] probably the most-studied initiative measure in the history of the United States." Smith, supra note 21, at 53.

25. See G. Alan Tarr, Understanding State Constitutions 141 (1998) (noting that "the most heavily amended sections of state constitutions are those whose restrictions are the most severe" and that "[f]rom 1970 to 1993 . . . state provisions dealing with finance and taxation—notorious for their detail and restrictiveness—were the most heavily amended provision in every biennium but one").

The Council of State Governments for the period cited reports these data on an aggregate basis—that is, without specifying direct or indirect origin—and note that the changes described here were all of statewide applicability. While these data do not systematically report on the subject of all initiatives during this period, some observations can be made:

(1) Initiative activity persists and increases over this period.


(3) After a period of relatively increased flexibility in financial matters and with the passage of Proposition 13, constitutional amendment in this area generally again trends toward greater restriction and lessened flexibility. See Council of State Governments, 23 The Book of the States 5 (1980–1981) (noting that, over the 1978–79 biennia, "the most significant and distinctive . . . changes in financial provisions]
A November 5, 1998 Washington Post article reflected the breadth of issues that had been on the ballot that year: allowed Indian casinos to offer slots, lotteries, card games, other gambling (California), legalized slot machines on casinos floating in artificial basins (Missouri), passed plan to provide public money for political campaigns (Massachusetts and Arizona), extended penny-per-$10 sales tax to help build $360 million stadium for Denver Broncos (Denver), approved city expenditure of $275 million on stadium for baseball team (San Diego), rejected allowing candidates for federal office to pledge to work toward scrapping Internal Revenue Service and have pledge noted on ballots (Arizona), raised cigarette tax 50 cents a pack to benefit children and family programs (California), amended constitution so voters must approve increases in most state and local taxes and fees (Montana), defeated limit on state and local government taxes (Nebraska), and defeated ban on future use of property taxes for education (South Dakota). Eight measures passed and only two failed.

Because constitutional amendment is deliberately made a daunting process, voter initiative, that entails state constitutional amendment, is all the more emphatic. The effect of the were proposals to limit taxing and spending by the states and their political subdivisions); see, e.g., id. at 5 (noting that after Proposition 13 was adopted in California, the constitutions of Idaho and Nevada were similarly [indirectly] amended (though a comparable amendment failed in Oregon). Financial retrenchment was accomplished in other states by imposing restrictions on government spending (Hawaii and Tennessee), by classifying property classifications and controlling permissible levels of assessments tax exemptions and by prohibiting unfunded mandates from states to local governments); Council of State Governments, 24 THE BOOK OF THE STATES 125-26 (1982-1983) (recording continued trend in 1980-1981 biennium).

Daniel Smith notes that "tax limitation ballot measures ... achieve a high degree of success." SMITH, supra note 21, at 8. In 1996, voters in California, Florida, Nevada and Oregon passed anti-tax initiatives. That year, anti-tax measures were defeated in only two states, Idaho and Nebraska. Id.


27. The power to amend or change state constitutions has been viewed from the earliest days of the republic as residing solely in the electorate. While the mechanism for change currently varies from state to state, constitutional amendment or revision may be triggered solely by changing public perceptions of what properly makes up the desirable parameters of government. See TARR, supra note 25, at 74–75. A principal function of state constitutions has become the imposition of limits on state government. As such, matters constitutionally enshrined are intended to have permanency—to forestall political change. Id. at 133. As Tarr observes, the corruption and ill-considered nature of 19th century legislation made "the constitutionalization of state politics ... appealing because it offered the hope of circumventing the normal political process and restricting its operation." Id. at 134. As such, a
difference between constitutional amendment and legislative enactment is obvious. Constitutional language protects interests entrenched when the language in question is formulated. Legislative bodies, on the other hand, may respond with much more immediacy to current issues. Once constitutional language is in place, it is not easily undone. Thus, long-term effects of this popular exercise of legislative power are assured.

The issues that are the subject of debate in the financial realm now include all manner of taxes and charges and range across the spectrum of procedural and substantive concerns. Voters are now deciding whether and how to (1) impose or limit existing taxes including sales and income taxes, (2) impose and limit new taxes, and (3) generally exercise the power to tax. Finally, voters are directly deciding through mandated appropriations how to spend.

There is much to suggest that this fundamentally unmonitored ballot box fiscal activity has gone too far. This seizure of control effects ad hoc changes in the use of financial resources and limits with potentially crippling effect the ability of elective bodies to implement a collectively rationalized financial scheme—immediately as well as prospectively. By its very nature, ballot box revenue-collection and budgeting cannot be informed by coherent tax or fiscal policy. Further, the effect of this continued voter attention to financial matters might be characterized as the action of a majority of a numerical minority of voters. The percentage of those eligi-

28. See supra note 20.
29. As Smith notes, citizens "become policy-makers for a day." Smith, supra note 21, at 6 (emphasis added).
30. As has been noted, constitutional language enshrines interests extant when the language is implemented. See supra note 21. Hence, when constitutional language controls, the only direct avenue for implementing change lies through the electorate's ability to change the constitution.
31. See, e.g., Eule, supra note 9, at 1514 (commenting on the numerical minority of regular electoral participants and the lack of voter follow-through on initiatives and referenda).
bile to vote who actually do so is falling. The figures based on official vote counts are lower still. Those data show that, for the overwhelming majority of presidential or congressional election years from 1932 to 1998, less than fifty percent of those of voting age actually cast a ballot. The percentage of those who vote on initiatives is a subset of that group. An initiative's fate may thus be determined by a quite low percentage of eligible voters. Moreover, in a number of recent instances, the initiative has been an outgrowth of the efforts of an economic interest group or even a single individual rather than grassroots activity. Finally, even in states where citizens have no direct ability to participate in lawmaking, the fall-out from direct democracy states has been undeniable: there have been tax cuts in a number of these states. In addition, various publications report continuing interest on a variety of levels in the possibility of importing the initiative process into several of those states.

32. The percentage of registered voters (relative to the voting-age population) has remained fairly stable from 1980 to 1998 across both presidential election years (66.9% in 1980 to 65.9% in 1996) and Congressional election years (64.3% in 1986 to 62.1% in 1998). U.S. Census Bureau, U.S. Dep't of Commerce, Statistical Abstract of the United States 300 tbl.487 (1999) [hereinafter Statistical Abstract]. However, while the percentage of those reporting that they actually voted remained above fifty percent in Presidential election years (59.2% in 1980 to 54.2% in 1996), that percentage was consistently below fifty percent in off-year elections—Congressional election years (46.0% in 1982 to 41.9% in 1998). Id.

33. The percentages range from 49.7% in 1932 (a presidential election year) to an all-time low of 32.9% in 1998 (a congressional election year). Id. at 301 tbl.489.

34. While there appears to be inconclusive evidence of persistent ballot-falloff across all elections, i.e. lower numbers of voters on ballot issues as compared to those voting for elected officials, in general ballot issue voters are more likely to be higher-income and well-educated. See, e.g., Cronin, supra note 3, at 77–79 (noting that ballot issue voters are less representative of the general voting population).

35. Smith offers as an example the experience of David Biddulph's Tax Cap Committee in Florida. In 1996, roughly seventy-five percent of the financial support for the measure that limited tax on sugar in that state was contributed by the sugar industry. Two companies alone, U.S. Sugar and Flo-Sun Sugar, contributed sixty-two percent of the total raised. Smith, supra note 21, at viii. And the 1998 amendment of the California constitution raising that state's cigarette tax from fifty cents to eighty-seven cents a pack was spearheaded and largely bankrolled by the director Rob Reiner. California Sec'y of State, 1998 General Election: Late Contributions and Early Expenditures, at http://vote98.ss.ca.gov/lcrV98/c/971785.htm (last modified Nov. 13, 1998). More recently, Gov. Paul Cellucci of Massachusetts filed a petition for an initiative to reduce the income tax from 5.95% to 5% after lawmakers had rejected his proposal. Tom Moccia, Governor Begins Effort to Put Income Tax Cut on Ballot, 17 St. Tax Notes 478 (1999).

36. See supra note 16.

37. David D. Schmidt, Citizen Lawmakers 217 app. II (1989) (describing, on a state-by-state basis through 1988, the effort to make an initiative process a part of each listed state's lawmaking authority).
In Part I of this Article, I examine the changes that have taken place in the last two decades in voter strategy and in patterns of judicial interpretation. In Section I, I briefly review the history of the property tax focusing on taxpayer reaction to long overdue attempts at administrative reform. I show how that effort indirectly contributed to the "taxpayer revolt." In Section II, I note the realized effect of the taxpayer revolt on the property tax in particular. I describe the impact of the newly imposed limits on patterns of local governmental expenditure. I examine how and why broad-scale attempts to utilize non-tax sources of revenue to maintain services were largely unsuccessful. I also briefly explore the extent to which change tracks voter sentiment. As a corollary to this discussion, I examine the ongoing struggle to define a "tax," for exactions once easily characterized as levies and charges have come under increasing attack as "taxes" unconstitutionally levied. The discussion in Section III of this part traces the expansion of voter activism to taxes in addition to the property tax. I note the parallel emergence of two additional tactics: the imposition of required super-majority action—either electoral or legislative—to validate any generic tax increase and the enactment of revenue caps. Further, I examine a new phenomenon here: initiatives mandating expenditures.

Part II of the Article highlights initiatives' patterns of departure from desirable fiscal policy identifying those factors inherent in ballot-box activity that make it difficult, if not impossible, to be attentive to such factors. I show how legislative activity can accommodate fiscal policy as well as social policy while exercising taxing and spending authority. Then, I contrast the initiative process showing why deliberate attentive response to underlying policy and competing considerations is impossible. I also argue here that this voter seizure of control significantly forecloses the subsequent possibility of competent long-term legislative financial oversight (i.e. budget-making) in general. Next, I argue that the initiative process impedes the formation and effective interaction of political coalitions on either side of or across the aisle possibly causing disenfranchisement in some cases. I assert that voter control ultimately undermines the efficacy of government in general to everyone's detriment. Finally, I question whether the trend in

More recently, in 1992, Mississippi adopted a statewide initiative, and in 1996, Rhode Island voters approved a non-binding advisory question asking for statewide initiative and popular referendum process that was acted upon by the legislature. Initiative & Referendum Institute, Initiative and Referendum Historical Timeline, at http://www.iandrinstitute.org/factsheets/Timeline.htm (last visited March 9, 2002). In 1999 the Minnesota House of Representatives approved a constitutional amendment that would establish a statewide initiative and popular referendum process. Id.
voting patterns truly supports the claim that initiatives represent "popular will." I conclude by observing that, even in the rare case of majority voter support (majority of those eligible actually voting), the process is fundamentally flawed.

In Part III, I explore whether expressions of popular will with regard to fiscal matters can ever be infused into representative government without unduly diluting the former and crippling the latter. Assuming that repeal of the process is politically impossible, I suggest steps that might be taken by the Courts, by legislative bodies, and by the voters themselves to make the initiative process contribute to rather than trump representative government.

PART I

1. The Property Tax . . . Before the Revolution—The ad valorem or property tax, a levy annually imposed on the value of property, has been the financial mainstay of local government since, roughly, the Great Depression. It has been asserted that "the role of the tax has declined precipitously beginning in the late 1960s and accelerating in the 1970s." This is true, however, only in percentage terms. Though other sources of revenue, primarily state and federal revenue-sharing, gained increasing importance to local government during this period, actual property tax collections increased substantially throughout this period.

By and large, state constitutional and legislative requirements have historically mandated the use of fair market value, an estimated figure administratively determined, as the base for imposing tax liability. This consensus is not coincidental. Though admittedly imprecise, market value has been generally viewed as a rough

38. Note that this has not been the result of any formal allocation of taxing authority. Rather, it results from the preemption of income and sales taxes by the states. During the 1920s, state governments shifted from property taxes to income and sales taxes as sources of revenue, leaving the property tax alone exclusively available to local governments. Quite simply, the ad valorem tax was the only broad-based tax left for use by local governments. Since that period, the property tax has been the major revenue source for local government. See John F. Due & John L. Mikesell, Sales Taxation: State and Local Structure and Administration 1 (2d ed., 1994); Dick Netzer, Economics of the Property Tax 6 (1966).


40. See data infra note 56.

proxy for ability to pay. As such, it is deemed to be an acceptable—and perhaps the best—method of allocating the burden of this tax among affected taxpayers. Distribution of wealth was no less skewed in the 1990s. In fact, in 1998, the top one percent of American households held slightly less than forty percent of national wealth.

Valuation has always been an administrative difficulty in the use of the property tax. This is not to suggest that valuation poses the only concern with the tax. Various accounts report a myriad of concerns about the property tax. Concerns range from those quite fundamental in nature raised by Professor Edwin Seligman in his classic work. Other concerns have focused more narrowly

42. A 1973 article makes this point very nicely:

[T]he property tax is more progressive than the income tax for one simple reason—property is less equally shared in this country than income. . . . Even after acknowledging that there are significantly fewer property taxpayers than those with taxable income, wealth is still more concentrated than income. While a tenth of the adult population receives about 30 per cent of the total income, the top tenth of the property owners hold between 50 and 60 per cent of the real estate.


43. The same article continued:

Even the plight of widows living on fixed incomes and trying to hold on to the family homestead in the face of ever-higher property taxes doesn't undermine this argument. . . . Taxes average about 1 to 1.5 percent of the property's resale value. This means that a home on which taxes are $600 a year could be sold for $40,000 or more. This money, invested at five per cent in a savings account, would produce at least $2,000 in interest per year—or enough money for the widow to move into a $167-a-month apartment without touching her $1,700 yearly income or asking for any help from her children. If the property has value to her heirs, it is likely they would help with the taxes."

Id.

44. See Edward J. Caffery et al., Should We End Life Support for Death Taxes, 88 TAX NOTES 1373, 1374 (2000).

45. Numerous cases and articles address aspects of the difficulties of achieving fair valuation. See, e.g., AARON, supra note 41; Adolph Koeppel, The Illegal Residential Assessment Roll in Nassau County, New York, 5 HOFSTRA PROP. L.J. 139, 155–56 (1992) (suggesting that in order to achieve legality in the assessment of residential property in Nassau County, the cost approach to assessment be eliminated and that all such taxable property be assessed by the use of market value).


47. See EDWIN R. A. SELIGMAN, ESSAYS IN TAXATION 19–32 (1931) ("Few institutions have evoked of late more angry protests and more earnest dissatisfaction than [the general property tax] . . . The defects of the general property tax may be treated under five heads. (1) lack of uniformity, or inequality of assessment. (2) Lack of universality. (3) Incentive to dishonesty. (4) Regressivity and (5) Double taxation.").
on particular aspects of the tax, including, for example, relieving regressivity through targeted tax relief, ending reliance on property tax as a funding source for public education, or narrowing the categories of exempt property. A discussion of these and related concerns is, however, beyond the scope of this Article.

Many, if not most, of the tens of thousands of taxing jurisdictions have at some time and in a pervasive fashion failed to annually redetermine fair market value for taxable property in a timely, ongoing fashion. Instead of full fair market value, only a percentage of that value has been used as the base. This percentage, technically referred to as the assessment ratio, varied unpredictably within taxing units from property to property within the same class of property as well as across classes of property. While remedies for correcting these disparities varied when challenged in court, assessment ratios were often deemed contrary to constitutionally mandated fair market valuations and violative of equal protection guarantees.

Administrative reform efforts during the 1970s largely focused on correcting valuation errors. The only sanctioned departures from reliance on fair market value, thus, were to be those permitted by explicit legislative or constitutional language. The objective was to bring valuations up to fair market value—consistent with statutory requirements—and keep them there by adhering to the required schedule of annual reassessment.

48. Aaron, supra note 41, at 71-79 (discussing circuit breakers).
52. Shannon, supra note 51, at 29.
53. Allegheny Pittsburgh Coal Co. v. County Comm., 488 U.S. 336 (1989), is one of the most recent examples of such a case. In Allegheny Pittsburgh Coal, the Webster County property assessor properly relied on original purchase price to set the initial base for all properties within that taxing jurisdiction. However, the assessor made insufficient further adjustments as the subject property either appreciated or declined in value as market values waxed and waned. The failure to make these adjustments clearly contravened explicitly articulated West Virginia law. Id. at 336-37.
54. The relevant language of the West Virginia constitution required that "property of the kind held by . . . [taxpayers] shall be taxed uniformly according to its estimated market value." Id. at 337. The assessor, a state officer, was statutorily bound to perform this duty.

54. See, e.g., Mason Gaffney, An Agenda for Strengthening the Property Tax, in Property Tax Reform, supra note 51, at 65, 74-79 (discussing the problem of underassessment and need for assessment reform).
During this same period, the demands placed on financial resources available to local government escalated. Property tax collections necessarily increased continuously over an extended period to keep up with this increased expense. Increased tax revenues during this period were attributable, in part, to improved assessment practices. Inevitably, reassessment resulted in some cases in steep and unanticipated increases—attributable to application of a constant rate against an increasing base—in property tax liability, a legally correct but frequently politically unpopular result. Further, increased collections were further fueled in some states, including California, by particularly strong markets that, in turn, caused rapidly increasing property values. Revenue in-

55. Since labor costs are always the biggest budgetary item, examining personnel costs for the last two decades is instructive. The nationwide number of local governmental employees (full-time and part-time for counties, municipalities, school districts, townships and special districts) increased from almost ten million to twelve million between 1980 and 1997. STATISTICAL ABSTRACT, supra note 32, at 338 tbl.534. Payroll costs for the same period went from approximately $10.5 million to $28 million. Id.

56. Revenue contributed by the property tax to local coffers remained fairly stable in percentage terms from 1980 to 1991, moving only from 25.4% to 26.4% of local revenues. TAX FOUND., FACTS AND FIGURES ON GOVERNMENT FINANCE 234 tbl.F12 (1994) [hereinafter FACTS AND FIGURES]. However, to put these percentages in context, in dollars for the same period, total local revenues climbed to $612.2 million from $258.3 million. Id. at 233 tbl.F11. Property tax collections for this period climbed from $65.6 million to $161.8 million. Id.


Recently . . . the clamor for property tax relief and reform has reached such magnitudes that States are taking remedial action. As the governor of Wisconsin recently said:

Today, the State perspective on property tax reform is changing, and changing rapidly. In the spring of 1973, more than 30 governors promised significant property tax relief in their “State of the State” messages; and many coupled this promise with proposals to reform the administration and incidence of the tax itself. The political and practical pressures behind these initiatives are clear: a continuing taxpayer’s revolt, which has focused on the property tax because of its visibility, regressivity and inequitable administration; a series of court decisions which has attacked the constitutionality of existing systems of school finance, based on the property tax; the demand of a growing environmental lobby for an effective State role in local land-use decisions; the unprecedented budgetary surpluses enjoyed by many States this year, as a result of revenue sharing, inflation and an expanding economy.

These factors explain why, after a decade of relative inactivity, many States now are actively working to change their tax systems.

The Advisory Commission’s study provides a description of states’ efforts to reform administration of the property tax during this period.

creases could be easily offset in gross as the tax base increased by adjusting the tax rate or, less expansively, by fine-tuning the tax base in order to target relief. For the most part, however, neither state legislatures nor local governments reduced tax rates during this period. The combination of apparent local government prof- 
ligacy and state legislature inaction did not sit well with taxpayers. Local governments appeared to be overreaching.

State legislative bodies in a number of states attempted to respond to taxpayer complaints about the upward spiral in property tax burden in other ways. One important way of doing so was to classify property, according disparate treatment as deemed appropriate for each class. Homeowners, in particular, were favored targets for relief. Farmers were another favored group; property used for agricultural purposes was assessed in accordance with actual use as opposed to the highest and best use. This was an important concession where agricultural property lay in the path of suburban or urban development because this location could cause assessments to increase beyond the financial capacity of an agricultural enterprise to defray such costs. Any or all of these approaches targeted relief without unnecessarily constraining the revenue system overall.

Steps could also have been taken to control spending. State legislative bodies could have reviewed mandated expenditures reallocating financial responsibility where possible. Options short of gross tax cuts were available, although overall tax rates were, in

59. Id. at 57-58.  
60. See id. at 59 (describing “a general perception of glut in the government sector”). 
61. The Supreme Court has noted that the Equal Protection Clause does not forbid classifications, but requires only that the classification rationally further a legitimate state interest. The governmental authority need only show that the plausible policy reason—the legislative facts—on which the classification was based rationally were considered to be true by the governmental decisionmaker. Allegheny Pittsburgh Coal Co. v. County Comm’n, 488 U.S. 336, 343-45 (1988). 
62. See NETZER ET AL., supra note 39, at 1. By the end of the 1970s, “virtually every state had acted to substantially insulate two important classes of property—farm property and housing occupied by older people—from the full force of the tax.” Id.
63. See AARON, supra note 41, at 71. Steps were taken to provide property relief to homeowners by most states during this period through homestead exemptions, exemptions for senior citizens and “circuit breakers.” Id. at 71. In general, circuit breakers worked by providing a refund to eligible property owners equal to the excess of property tax liability over some fraction of income. Id. at 72-79; see also Henry Aaron, What Do Circuit-Breaker Laws Accomplish?, in PROPERTY TAX REFORM, supra note 51, at 53, 53-64. 
64. See, e.g., AARON, supra note 41, at 85-86; see also John C. Keene, Differential Assessment and the Preservation of Open Space, 14 URB. L. ANN. 11 (1977); Note, Property Taxation of Agricultural and Open Space Land, 8 HARV. J. LEG. 158 (1970). 
65. Mandated (and unfunded) local services can include maintenance of a judicial system, health services, etc.
fact, reduced in many states. Unfortunately, however, in either case, debate addressing fundamental policy objectives rarely occurred.

Government expenditures were also the subject of criticism. In California, for example, there was "widespread public concern" about using revenue derived from the property tax "to pay for extensive programs of public transportation to achieve racial balance in individual schools."67 Further, shifting responsibility for programs federal in origin to state and local governments exacerbated this financial pressure. Financial assistance from state and federal government to local governments declined quite dramatically during this period as the shifts described occurred.68 Local governments were compelled to provide and pay for these programs as they were, frequently, underfunded or unfunded mandates.69 Further, many of these programs were redistributive in nature and hence, political lightning rods.70 Thus, political pressure was an additional element.

66. Steven Hayward, The Tax Revolt Turns 20, POL’Y REV., July-August 1998, at 9 ("Within two years of [the adoption of California’s Proposition 13], 43 states implemented some kind of property-tax limitation or relief, 15 states lowered their income-tax rates, and 10 states indexed their state income taxes for inflation.").

67. Orr, supra note 58, at 58–59 (noting that “the rapid escalation in property taxes was not accompanied by any increase in the quantity or quality of property-related services, and in fact the taxes were seen by some voters as being used for purposes which are socially non-productive or even harmful.”); see also William N. Evans et al., State Education Finance Policy After Court-Mandated Reform: The Legacy of Serrano, 89 NAT’L TAX ASS’N PROC. 366 (1996); William Fischel, Serrano after 25 Years: Are America’s Schools Better and Property Taxes Fairer?, 89 NAT’L TAX ASS’N PROC. 327 (1996); (both suggesting that Serrano v. Priest, 487 P.2d 1241 (Cal. 1971), was the underlying reason for California’s Proposition 13).

68. From 1980 to 1991, transfers from states to local governments ranged from 31.5% to 29.8%. Transfers from the federal government to local governments fell from 8.2% to 3.1%. FACTS AND FIGURES, supra note 56, at 234 tbl.F12.

69. For example, during the Reagan administration, state and local governments were directed to provide appropriate levels of subsidized Section 8 housing but were provided only part of the necessary financial resources. This program, however, was underfunded. See, e.g., Sheryll D. Cashin, Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities, 99 COLUM. L. REV. 552, 571 (1999) (“Furthermore, Reagan’s block grants to the states were accompanied by a 25% cut in funding, reflecting his admitted intention of using block grants as a first step toward complete elimination of federal participation in many domestic programs.”); see also Harry N. Scheiber, The Direct Ballot and State Constitutionalism, 28 RUTGERS L.J. 787, 799–800 (1997) (“Using the popular ballot for both legislative and constitutional revision in the states is, moreover, a political phenomenon whose progress has coincided roughly in time with federal aid cutbacks that produced ‘Fend-for-Yourself Federalism’ and attendant fiscal pressures on the states.”).

70. U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, 2 SIGNIFICANT FEATURES OF FEDERALISM (1992 ed.), 8 (characterizing federal governmental programs during this era as emphasizing “aid going to individuals” instead of “aid going to places”).
As tax burdens continued to increase, the number of individual taxpayer challenges to assessments rose and public debate increased. Ultimately, taxpayer activism coalesced as a significant political force. Increasing revenue solely through administrative reform and judicial intervention had effectively foreclosed debate that may otherwise have sanctioned spending to achieve fundamental governmental objectives. The subsequent taxpayer outcry—and ultimate ballot box revolt—tilted the debate solely toward relief from increasing assessments with woefully little attention accorded to policy objectives legitimately served through public expenditures.

The California state legislature seemed particularly unable to act effectively. In that state, the combination of increased tax burden, perceived governmental profligacy, and ineffective legislative action proved to be more than adequate provocation for a quite strident wake-up call to elected officials. In June 1978, the electorate implemented through the initiative a shift to “acquisition value,” a temporally-driven standard that replaced fair market value as the base for assessment. Proposition 13 was immediately challenged in the courts. It was adjudged constitutional in the California courts and ultimately, in the United States Supreme Court. Note the effect of the amendment and the decision. In

71. For a description of one example of a reiterative cycle of taxpayer litigation/judicial intervention/legislative reaction during this period, see Hellerstein v. Assessor of Islip, 332 N.E.2d 279 (N.Y. 1975) and the notes following in JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE AND LOCAL TAXATION 103-14 (6th ed. 1997).

72. The apex of this activity was surely the congressional hearings held in 1973 into the property tax. Though there was extensive testimony and debate, Congress ultimately took no action. See Property Tax Relief and Reform Act of 1973: Hearings on S. 1255 Before the Subcomm. on Intergovernmental Relations of the Comm. on Government Operations, 93d Cong. 1 (1973) (statement of Senator Edmund S. Muskie, Chairman, Subcomm. on Intergovernmental Relations) (noting that “[t]he property tax is a burning issue in city halls and in State houses across America. A property tax revolt is indeed brewing at the local level.”).

73. See, e.g., The Year of Proposition 13, WASH. POST, Nov. 6, 1978, at A22; see also Scheiber, supra note 69, at 799-800.

74. See Nordlinger v. Hahn, 505 U.S. 1 (1992). The California legislature enacted several property tax relief measures during this period, including a cap on tax rates in 1972. However, these measures were perceived to be insufficiently responsive. See John C. Throckmorton, Note, What is a Property-Related Fee? An Interpretation of California’s Proposition 218, 48 HASTINGS L.J. 1059, 1060-61 (1997).


76. Id.

77. Nordlinger v. Hahn, 505 U.S. 1. Nordlinger was brought by Petitioner Stephanie Nordlinger, a first-time homeowner, who had bought a house in the Baldwin Hills neighborhood of Los Angeles County for $170,000. The prior owners had purchased the house two years earlier for $121,500. Pursuant to state constitutional requirements, when Ms. Nordlinger purchased the house, the assessment was adjusted in accordance with the
Nordlinger, the constitutional provision directly implicated contravenes generally accepted principles of taxpayer equity by substituting acquisition value for fair market value as a base. The reliance on acquisition value causes allocation of tax burden to be driven by a factor likely to be highly fortuitous—time of property acquisition—rather than current fair market value. As a result, it became impossible for the taxing authority to deliberately treat similarly situated taxpayers in the same manner.

The Supreme Court found that the proposition had an immediate impact at the time of its passage. It, of course, shifted a larger percentage of governmental cost to newer purchasers. In addition, individual taxpayers who were then property owners received fiscal and, possibly, psychological relief. Fiscal relief came in the form of reduced property tax liability. For example, "[a] California homeowner with a $50,000 home enjoyed an immediate reduction of about $750 per year in property taxes." Critical to the Court's view, psychological relief also resulted from the initiative; for pre-1978 taxpayers, what had been a variable expense was transformed into a fixed one, and taxpayers' reliance interests were protected.

most recent purchase price. As a result of that reassessment, the property tax on the house increased from $1246.40 to $1701, a thirty-six percent increase. Ms. Nordlinger then learned that this liability was substantially greater than that of comparable properties. For example, the owner of an identical house, which remained taxable on its 1975 assessment, paid only $358.20 in property tax, a difference of $1,342.80. In effect, Ms. Nordlinger's liability practically equaled that of an owner of beachfront property having a market value in 1988 of $2.1 million but assessed on the basis of a pre-1976 purchase price. Id. at 7.

The California Court of Appeal affirmed the Los Angeles County Superior Court grant of respondents' demurrer to Ms. Nordlinger's suit for a tax refund and a declaration that her tax was unconstitutional. The Court of Appeal noted that Article XIIIA (Proposition 13) had already survived a constitutional challenge. It found that this "acquisition value" system survived equal protection because it (1) prevented property taxes from reflecting unduly inflated and unforeseen current value, and (2) allowed property owners to estimate future liability with substantial certainty. The court distinguished Allegheny Pittsburgh Coal Co. on the basis of West Virginia's constitutional requirement that "property... be taxed at a uniform rate statewide according to its estimated current market value." Id. at 9.

On cert, the Supreme Court felt compelled to "decline petitioner's request to upset the will of the people of California," and affirmed the judgment of the California Court of Appeal. Id. at 18. Thus, acquisition value passed constitutional muster at the highest judicial level.

78. Nordlinger, 505 U.S. at 6. ("Proposition 13 has been labeled by some as a 'welcome stranger' system—the newcomer to an established community is 'welcome' in anticipation that he will contribute a larger percentage of support for local government than his settled neighbor who owns a comparable home.").

79. Id. at 5.

80. See id. at 12. For this reason, the Jarvis/Gann Amendment, as Proposition 13 was styled before its enactment, had a special appeal to those on fixed incomes. The spiraling property tax burden had an especially drastic impact on this group. The prospect of stabilization of this burden removed the specter of loss of home because of inability to pay. This is not to imply that tax relief was the only reason to limit—there were those voters whose dominant interest was in downsizing government. Orr, supra note 58, at 57 ("There is also
Specifically, with property tax costs now stabilized, homeowners no longer lived in dread of relocation financially compelled by uncontrolled property tax expense. Finally, the Court identified possible sociological objectives served by the proposition. Improved "local neighborhood preservation, continuity, and stability" was one such factor.

Unfortunately, in finding Proposition 13 constitutional, the Supreme Court sanctioned a quite undesirable tax policy. The Court noted that post-1978 purchasers also assumed a fixed expense as of their date of purchase. As noted in the opinion, however, this expense would be fixed at levels likely to spiral ever higher for successive groups of purchasers as long as property values continued to appreciate. Post Proposition 13 purchasers were subjected to higher assessment treatment simply because of temporal considerations, not because of any underlying policy related to a deliberate allocation of the tax burden. Thus, the practical effect of the amendment was to shift to post-1978 property-owners any increased governmental costs—hence the "welcome stranger" characterization. That this inevitable outcome was attributed to constitutional as opposed to statutory language made the shift no more defensible as a matter of tax policy. The change to acquisition value as a base created unbreachable insular categories based solely on temporal considerations. Barring a downturn in the market, there was and is simply no way for persons purchasing property subsequent to the passage of Proposition 13 to be assured of a property tax obligation comparable to pre-1978 similarly situated purchasers. And, over time, the differences in amounts actually paid would become exponentially greater irrespective of speculation as to why Thirteen succeeded so overwhelmingly: is it a harbinger of strong public disaffection toward big government and a first step away from continued government growth, or is it simply a peculiar and isolated response to a too-rapid increase in one particular tax?; see also Werner Z. Hirsch, The Post-Proposition 13 Environment in California and Its Consequences for Education, 36 PUB. CHOICE 413, 413 (1981). It is of course, impossible to reliably know voter motivation.

81. Id. at 12.
82. Id. at 5.
83. Id. at 6; see, e.g., Mary LaFrance, Constitutional Implications of Acquisition-Value Real Property Taxation: The Elusive Rational Basis, 817 UTAH L. REV. 817, 817 (1994).
84. See supra note 78; see also Michael Handler, Goodbye to the Welcome Stranger Rule, PROB. & PROP., Sept./Oct. 1990, at 13 (describing assessment practices valuing recently sold properties at current market value while failing to assess other properties at their current value as the "welcome stranger" rule).
subsequent fluctuations in the fair market value of taxed property.  

*Nordlinger* validated a policy deemed rationally related to a permissible state objective but at best only questionably related to inferred objectives and undoubtedly and demonstrably unfair. The unfairness is directly attributable to the arbitrary nature of the classification—time of property acquisition solely unrelated to any consideration of ability to pay. The Court itself characterized Proposition 13 as a possibly "improvident decision[]." It noted, however, that "judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." This despite the fact that, as Justice Blackmun wrote, there appeared little likelihood that this decision would be rectified by "ordinary democratic processes."](86) In fact, from the standpoint of taxpayer equity, Proposition 13 and its affirmation in *Nordlinger* are indefensible. Nevertheless, the Court, using the most permissive standard of review, found Proposition 13 constitutional. The Court approved Proposition 13 notwithstanding its undeniable insularity and its corrosive effect on taxpayer equity, local fiscal integrity, and democratic spirit in the state.  

The financial windfall enjoyed by pre-1978 property owners might be deemed somewhat more palatable to post-1978 property owners if it ultimately proved to be transient—that is, if advantaged taxpayers, at some point, accounted for this benefit. Theoretically, this accounting could occur upon the sale of the property. Conventional wisdom has listed property tax costs among the factors that influence property price and that, as such, are

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85. In *Nordlinger*, Petitioner asserted that, over the first 10 years in her home, her total property taxes would approach $19,000. Comparatively, a neighbor purchasing a comparable home in 1975 would pay just $4100. 505 U.S. at 7.  
86. *Id.* at 10.  
87. *Id.* at 17.  
88. *Id.* at 17–18.  
89. *Id.* at 18. (noting that "California's grand experiment appears to vest benefits in a broad, powerful, and entrenched segment of society, and, as the Court of Appeal surmised, ordinary democratic processes may be unlikely to prompt its reconsideration or repeal." ) (emphasis added).  
90. This, of course, assumes that a sale takes place. If there is no such sale, under provisions of Proposition 13 not germane to the case, (1) property owners over the age of fifty-five who sell and relocate can take their assessment base with them if that figure is less than the acquisition value of the replacement residence and (2) successors in interest who take gratuitously use the transferor's assessment base as a means of determining property tax liability. Cal. Const. art. XIIIA, § 2. Thus, if either provision applied, there would be neither a taxable event compelling the realization (and recognition) of gain nor a reassessment for property tax purposes. Finally, it is not clear that a taxable exchange (reciprocal transfer of properties) would trigger reassessment.
The Property Tax as a Case in Point

If this capitalization in fact occurs, the anticipated higher property tax burden would depress market value. California property purchasers would certainly be aware of the pending reassessment with its attendant increase in property tax burden and could be expected to react strategically by seeking the lowest purchase price possible. As such, the seller would be penalized to the extent that Proposition 13 depresses fair market value. At least one commentator has noted the difficulties of putting this hypothesis to the test. She observes that, in the aggregate, the artificial constraints on the California market may undermine this possibility. This constraint, she asserts, results from prospective sellers’ disincentive to sell in light of the higher costs of replacement properties. As such, the diminished number of properties available for purchase would likely sustain or even boost the market overall. Thus, sellers motivated to sell would likely suffer no economic disadvantage because of the post-sale reassessment.

Alternatively, even if capitalization depresses market price, the seller will have already realized a very tangible, quantifiable benefit from ownership in the form of property tax burden avoided. Without the proposition, the property tax burden for pre-1978 property owners would have been higher than was in fact the

91. See LaFrance, supra note 83, at 862-63; see also Aaron, supra note 41, at 58. Aaron makes the following statement in writing of the effect of disparate assessment ratios: "Variations in property tax rates within jurisdictions likewise may be capitalized into property values, most likely when they are expected to persist. If such capitalization has been crystallized in a market sale, the present owner, in reality, will not benefit from a below-average rate or suffer from an excessive rate." Id. It then follows that an expected increase where assessments have been stable could depress market values.

92. It is important to note that even if such an accounting were to take place, while the property would be reassessed for future tax assessment purposes, the locality will not benefit from any tax on the gain. Instead, the state directly benefits. Gains from transactions in property are taxable for income tax—not property tax—purposes and income taxes are almost exclusively preempted by the state. Increased income tax collections may accrue in part to the benefit of localities as a result of the largesse of the state but there is obviously no guarantee that this revenue-sharing will, in fact, take place. Revenue-sharing is very much a state legislative prerogative. Further, any incidental transactional costs (transfer taxes, for example) are earmarked for particular purposes and will not become a part of the general coffers. Finally, while a reassessment of the underlying property incident to the sale will result in increased collections for the locality, increased collections are prospective only and will not permit the locality to recoup any part of what would have been collected had acquisition value not controlled assessment base. The same cycle repeats during the purchaser’s term of ownership.

93. See LaFrance, supra note 83, at 862.
94. Id. at 863-64.
95. Id. at 864.
96. Id.
But post-1978, the locality's revenue needs have not disappeared; they have simply been shifted to more recent purchasers. To the extent that earlier purchasers experience a reduction in property tax burden or are protected from a higher levy, income that would have been used to defray that liability becomes available for some other use. It then follows that pre-1978 property owners are not penalized by lower selling prices when the property is sold even if the sales price realized is less than the asking price. In effect, property value has been enjoyed throughout the years of ownership—and without any tax accounting whatsoever. As a matter of tax and social policy, Proposition 13 remains problematic.

Notwithstanding Proposition 13's overly generous tax relief and undesirable social and civil impact, other states shortly followed in providing tax relief. Proposition 13 set off a chain reaction. This reaction occurred in both initiative and non-initiative states as citizen groups sought comparable relief and risk-averse legislators rushed to provide it. Thus, change sometimes resulted from initiative and sometimes through legislative intervention. That pattern persists to the present. As will be shown, the difference is significant.

97. See supra note 85 for an example of the temporal effect of Proposition 13.

98. This will likely result even if there have been initial reductions in governmental costs, as spending increases either to maintain the status quo for a larger group of consumers or to provide restored or even additional services in response to demand.

99. The theory under which one might argue for imputed income on these facts is a variation on income attribution attendant to discharge of a taxpayer's obligation by a third party. See, e.g., Old Colony Trust Co. v. Comm'r, 279 U.S. 716 (1929) (holding that federal income taxes paid by the employer on the employee's million dollar salary represented income to the employee within the meaning of the Internal Revenue Code). In this context, attribution would likely require three additional steps: (1) determining fair market value of the affected property; (2) determining the property tax liability flowing from that value; and (3) treating the amount above actual liability as income. Enforcement of such a change would, for the first time, force taxpayers to account for unrealized appreciation in property value for income tax purposes. At a minimum, even if such a result were possible within the law as presently interpreted, the shift would pose a daunting administrative challenge. More practically, the shift is highly unlikely on either the state or federal levels. State voters will certainly not eagerly embrace this liability for state income tax purposes and it is unlikely that the federal income tax code would be amended (or interpreted) to reach a problem peculiar to a relatively small subset of states.

One faculty colleague observed that the concept of a reverse mortgage is a useful analogy here. Instead of increasing equity through payment on a mortgage obligation, a property owner is gradually withdrawing equity to the extent that acquisition value protects from increased tax liability that would otherwise flow from a higher assessment base.

100. See Hayward, supra note 66.

2. The Property Tax And Other Taxes . . . After the Revolution—Proposition 13's passage ignited a conflagration. Even as the post-Proposition 13 events described above were unfolding, the anti-property tax sentiment that had smoldered and occasionally flared during the early 1970s burst forth in earnest. In the November 1978 election, sixteen states had tax and spending limits (characterized in one article as "sons of Proposition 13") on their respective ballots. Citizen initiatives were successful in several states. In numerous other states, legislative bodies moved to implement changes intended to further lessen the burden of the tax generally even as administrative and judicial reform continued. Reform activity was thus overtaken by frenetic legislative activity (encompassing here both direct initiative and
tinues, states may well be forced for the first time in over a decade to undertake spending cuts or tax increases. Id. at 7.

102. A contemporaneous article in Business Week predicted that "the issues originally raised in California . . . [would] reverberate in all of the nation's state legislatures, and quite possibly in Congress as well, during their next sessions." The Economic Fallout From Proposition 13, Bus. Wk., Nov. 13, 1978, at 101. An editorial in The Washington Post identified the taxpayers' revenge as a single large and unifying theme to the midterm election campaigns being waged for Congress and state and local offices all over the country. The Year of Proposition 13, WASH. POST, Nov. 6, 1978, at A22. While characterizing as "good news" the fact that politicians felt compelled as a result of Proposition 13 to take seriously legitimate public grievance with arrogant, overblown and blowsy government, the editorial also blasted Proposition 13's limits on taxing as mindless and as self-indulgent as the practices which the taxpayers were objecting to in the first place. Id. The editorial went on to lament the blown opportunity to have that long awaited (and still awaited) debate on how to reassess the programs and redirect the energy and money that went into the legislative outpouring of the Great Society years and their Republican aftermath. Id.


104. These states included Arkansas (repeal the three percent sales tax on food and prescription drugs); Michigan (initiatives to cut or limit property taxes); Illinois (measure advisory to legislature to place a ceiling on property taxes); Massachusetts (local option to employ different rates for taxing residential and commercial property); Idaho (statutory initiative to limit property taxes to one percent of current market value); Nevada (rollback valuation to 1975 level and limit taxes to one percent of market value); Oregon (initiative to limit property taxes to 1.5% of value or adopt legislature-passed more limited relief); Alabama (proposal to limit the increase on property taxes to twenty percent); North Dakota (cut state income taxes for individuals and raise them for corporations); Texas (increase homestead exemptions, targeted tax relief to the elderly and tie to state spending increases to economic relief); Arizona (a constitutional amendment to limit state spending to seven percent of total personal income); Colorado, Hawaii (amendments to peg spending growth to state's economic growth, to limit state bonded indebtedness and to provide tax refunds if surplus exceeded a specified ceiling); South Carolina (creation of a rainy day fund equal to five percent of the general fund budget); Nebraska (ceiling on spending by local government and school systems); and South Dakota (a measure to require a two-thirds legislative vote to raise sales tax or real property tax rates).

105. See supra note 25.

106. See supra text accompanying notes 58–63.
legislation). All too often, legislative change took the form of undesirably expansive relief, primarily by reducing permissible tax rates or by imposing base limitations.\textsuperscript{107} Thus, even as improved administration of the property tax gradually brought the tax into alignment with applicable provisions of state constitutions and statutory language (and coincidentally with generally accepted tax policy norms), the pace of changes that undermined those norms accelerated. Local governments were hard-pressed financially\textsuperscript{108} and politically\textsuperscript{109} by the newly imposed limitations. This was the case regardless of whether those entities attempted to expand services, maintain the status quo or—as was true in a number of jurisdictions—limit or eliminate services.\textsuperscript{110}

In California, where this reconstruction was most dramatically evidenced, Proposition 13's short-term impact was initially softened on the local level by drawing down local reserves that had accumulated as a result of increased collections (a fact that likely contributed significantly to voter outrage).\textsuperscript{111} These reserves, however, were rapidly depleted and could not be replenished. At that point, the state itself provided financial assistance.\textsuperscript{112} The state surplus was estimated to be five to seven billion dollars.\textsuperscript{113} This surplus was attributed to "the effects of inflation on personal incomes and the sharply progressive structure of the California state income tax."\textsuperscript{114} This assistance ended when the state experienced increasing financial difficulties. The continuing financial pressure on the taxing districts\textsuperscript{115} could not be alleviated (let alone rectified) either by the legislature or by local taxing districts through further

\begin{itemize}
\item \textsuperscript{107} See Hayward, \textit{supra} note 66.
\item \textsuperscript{108} See infra text accompanying notes 116–22.
\item \textsuperscript{109} The respective state legislative bodies control the taxing process for all units of government—state and local.
\item \textsuperscript{110} See Hirsch, \textit{supra} note 80, at 421–22 (noting that the secondary effects of Proposition 13 will include deferred public infrastructure repair and maintenance, declining school budgets, labor force shrinkage and retarded economic growth).
\item \textsuperscript{111} The surplus on the city and county level was estimated to be as much as $3 billion. \textit{See} The Economic Fallout From Proposition 13, \textit{supra} note 102, at 104.
\item \textsuperscript{112} See Gene Swimmer, \textit{The Impact of Proposition 13 on Public Employee Relations: The Case of Los Angeles}, 1 J. Collective Negotiations Pub. Sector 13 (1982) (noting that the immediate impact of Proposition 13 on public sector employer-employee relations will be cushioned for a one to two year period by the state budget surplus but will likely be felt after the surplus is exhausted).
\item \textsuperscript{113} See McBee, \textit{supra} note 103, at A4.
\item \textsuperscript{114} See Orr, \textit{supra} note 58, at 59.
\item \textsuperscript{115} Taxpayers may have revolted against the property tax but they simultaneously continued to demand government services. \textit{See} Terri A. Sexton et al., \textit{Proposition 13: Unintended Effects and Feasible Reforms}, 52 Nat'l Tax J. 99, 100–06 (1999) (noting that "[i]n [passing Proposition 13, voters] did not expect reductions in government services, but believed that government could provide the same level of services with less money. Just before the election, 38 percent of the electorate believed that state and local governments could absorb a 40 percent cut in tax revenue without cutting services." \textit{Id.} at 100).
\end{itemize}
by the legislature or by local taxing districts through further manipulation of the property tax.\textsuperscript{116} The impact and extent of the newly enacted constraints were manifested both directly, as local governments made spending cuts, and indirectly, as property tax limitation impeded collections by special taxing districts and borrowing for public projects.\textsuperscript{117}

Coincidentally, limitations may have heightened the regressivity of the property tax in its remaining form\textsuperscript{118} and caused increased local fiscal dependence on a variety of even more regressive user fees and charges.\textsuperscript{119} Relief from limitations like Proposition 13, for example, proved most meaningful for taxpayers who move infrequently or not at all\textsuperscript{120} and would provide no protection from increased user fees and charges. National data for this period generally show a corresponding and steady increase in collections from "other sources"—a category aggregating various user fees and charges.\textsuperscript{121} User fees or charges,\textsuperscript{122} and special assessments\textsuperscript{123} have turned out to be an increasingly important source of local government revenue.

\begin{itemize}
  \item \textsuperscript{116} Indeed, it may well have been illegal to do so. Proposition 13 allowed no changes in the state taxing scheme unless such changes were approved by two-thirds of each of the two houses of the legislature. That section bars the imposition of new \textit{ad valorem} taxes on real property. Cal. Const. art. XIII A, § 1.
  \item \textsuperscript{117} See, e.g., Arnold P. Schuster & Philip R. Recht, \textit{Tax Allocation Bonds in California After Proposition 13}, 14 Pac. L.J. 159 (1983) (noting that Proposition 13 impeded the use of tax increment financing to fund community development projects by limiting the property tax rate to one percent of fair market value and by limiting the allowable annual assessment increase to two percent of the increase of fair market value).
  \item \textsuperscript{118} See Richard A. Musgrave & Peggy B. Musgrave, \textit{Public Finance in Theory and Practice} 268 (3d ed. 1980) (explaining that property tax distribution is "mildly regressive," assuming that the homeowners tax is allocated according to ownership, renters tax according to rental payments, and businesses property tax is allocated half to consumption and half to capital income). When the property tax is seen as a tax on housing, its regressivity is more pronounced. \textit{Id.} at 485–86.
  \item \textsuperscript{119} In the fiscal year 1980, local governments had total revenues from all sources of approximately \$258.3 billion. Of this, roughly \$65.6 billion (25.4\%) came from property taxes, \$43.6 billion (16.9\%) was collected from charges and miscellaneous fees and \$81.3 billion (31.5\%) from their respective states. Facts and Figures, \textit{supra} note 56, at 233 tbl.F11.
  \item By 1996, total revenues for all states from all sources had risen to approximately \$803.7 billion. Of this amount, \$199.5 billion (24.8\%) came from property taxes, \$168.1 billion (21\%) came from current charges and miscellaneous fees, and \$243.6 billion (30\%) was provided by the respective states. Statistical Abstract, \textit{supra} note 92 at 330 tbl.524.
  \item \textsuperscript{120} See Sexton et al., \textit{supra} note 115, at 105–06 (noting that "[c]ompared to an \textit{ad valorem} system, the winners [in an acquisition value system] will be those with the lowest turnover rates and the losers will be those with the highest turnover rates.").
  \item \textsuperscript{121} See data, \textit{supra} note 119.
  \item \textsuperscript{122} A user fee or charge is imposed in order to defray the cost of a particular government service. See, e.g., Bloom v. City of Fort Collins, 784 P.2d 304 (Colo. 1989). In order to be valid as a fee, it must be reasonably related to the overall cost of the service. Fees that exceed the cost of services rendered will be characterized as taxes. \textit{Id.}
  \item \textsuperscript{123} A special assessment or benefit assessment is a charge levied against real property for a local public improvement of direct benefit to that property. The amount levied must
are generally fixed without concern for ability to pay. Rather, the revenue objective is to defray all costs of providing the underlying service. In the face of political pressure brought by those threatened by proposed cuts in spending\textsuperscript{124} as well as those who viewed efforts to maintain or expand services as contrary to the spirit of the newly-imposed limitations and to offset inevitable budgetary shortfalls, public administrators sought when possible to charge for services as they were provided.

California did not escape this trend. Property tax collections in fact dropped precipitously after Proposition 13's passage.\textsuperscript{125} These amounts, however, were offset by steep increases in collections from fees, user charges, and special assessments.\textsuperscript{126} Thus, on a

directly relate to the extent of benefit to the property. \textit{See} Heavens v. King County Rural Library Dist., 404 P.2d 453 (1965). The requirement of direct benefit distinguishes this assessment from the general \textit{ad valorem} or property tax.

124. As expenditure shifts evolved, there was much interest group lobbying for and against various proposals. Such groups were likely, ironically, to include some who supported the proposition anticipating that reduced revenues would mean only greater efficiency in management and not elimination of services. This is a fair inference given the high margin of support of Proposition XIII's passage. Inevitably, there would be overlap between those supporting the proposition's passage and those subsequently objecting to changes in patterns of expenditure when a favored public good was threatened.

125. \textit{See} Allen D. Manvel, \textit{Tracing Proposition 13 Effects}, 28 Tax Notes 1540, 1540 (1981) ("In fiscal 1980, property tax collections in California amounted to about $6.5 billion. Two years earlier, the total was over $11 billion. . . . These figures reflect the impact of Proposition 13 which was adopted in June 1978"). Throckmorton notes that "[b]etween 1977 and 1986, the percentage distribution of revenue attributable to property taxes declined by 38.2\% for California cities and 28.1\% for California counties." Throckmorton, \textit{supra} note 74, at 1063. In response to decreased property tax collections, "local governments shifted their revenue sources" generating increases of 62.4\% from "other taxes" for California cities and 36.2\% from fees. \textit{Id}.

126. \textit{See} Lloyd J. Mercer & W. Douglas Morgan, \textit{California City and County User Charges: A Post Proposition 13 Assessment}, 7 Urb. L. & Pol'y 187 (1985). Data analyzed by these two writers show early on a relatively small but measurable increase in the percentage of total revenue from user charges at both the city and county level. They note that additional increases may be fueled by the introduction of new user charges as well as increases in existing charges. They opine, however, that the apparent increases may be attributable more to efficiency improvement (pricing refinements) than actual revenue augmentation, a result that should be applauded by those wishing for greater governmental efficiency. \textit{Id}. at 204; \textit{see also} Julie K. Koyama, \textit{Financing Local Government in the Post-Proposition 13 Era: The Use and Effectiveness of Nontaxing Revenue Sources}, 22 Pac. L.J. 1333 (1991). Koyama notes that "California courts have tempered the effect of the taxing restrictions of Proposition 13 by allowing local governments to develop nontaxing sources of revenue." \textit{Id}. at 1369. These sources include special benefit assessments and governmental regulatory and service fees. \textit{Id}.

Sexton et al. underscore the magnitude of the shift. In the last two decades, the most commonly raised fees and new levies were "new development fees, real estate transfer fees, business license fees, utility user fees, sewer charges, and park and recreation fees." Sexton et al., \textit{supra} note 115, at 107. For all California cities, revenue percentages from current service charges increased from twenty-five percent in 1977-78 to forty-one percent in 1995-96. \textit{Id}. Among non-enterprise special districts (e.g., parks, libraries, police and fire protection districts), the percentage of revenue from fees increased from seven percent in
broader level, property tax limitation relief could be and was undermined by increased service driven collections. In short, relief could be illusory.

As it turned out, these attempts to broaden the base for collections to maintain or restore prior levels of service proved counterproductive with a restive electorate that expected the continuance of their preferred services but considered non-tax levies evidence of government bad faith.

1977–78 to forty-six percent in 1995–96. Id. City revenues from property-transfer fees more than tripled, from $40.7 million in 1977–8 to $168.4 million in 1995–6. Id.

They continue:

Another financing technique that has been greatly expanded since Proposition 13 is the establishment of special assessment districts. Special assessments are charges imposed on property to pay for a public improvement of direct benefit to that property, e.g., flood control, drainage, and street lighting . . . Special assessment fees collected from property owners increased more than fivefold between 1983 and 1995, from $64.4 to $401.4 million.

Id. at 108.

127. This individual voter reaction is neither surprising nor contradictory. As noted, taxpayers did not expect reduced revenue to actually have a negative impact on services generally and, in any case, not on their preferred services. See Susan A. MacManus, Taxing and Spending Politics: A Generational Perspective, 57 J. OF POL. 607, 629 (1995) (examining the taxing and spending preferences of different age groups, using data from public opinion surveys, and finding that generational preferences are explained by an individual’s stage in the life cycle). Moreover, support of Proposition 13 cannot be read as agreement to cuts of preferred services. As Professor Clark has convincingly argued, an initiative’s weakness lies in its inability to register a voter’s priorities. Sherman J. Clark, Commentaries: A Populist Critique of Direct Democracy, 112 HARV. L. REV. 434, 449–50 (1998) (noting that an initiative is not “a world of isolated issues and yes or no preferences,” and it does not provide what is needed—“a method of allowing people to tell us, given that they will not get everything they want, which outcomes they want most.”). In short, populist democracy in this case could not, with the necessary precision, communicate what voters really wanted.


Proposition 13 has exacerbated organizational inabilities to carry out service functions . . . .

. . .

. . . [causing] public confidence [to] decline even further since the initiative was approved by California voters . . . . The consequence of such perceptions are further limitations on government spending and taxing . . . as well as worsening levels of discontent and confusion within public agencies . . . .
Perhaps unavoidably, this increased reliance on such charges resulted in litigation during this period over whether and how to set fees and charges. Tax activists sought to challenge the prior jurisprudential practice of subjecting special assessments, fees and charges to a standard that differed from that deemed applicable to a traditional “tax” with mixed results.\textsuperscript{129} Finally, they returned to the ballot box and passed several propositions intended to limit reliance on fees and charges as well as general taxes.\textsuperscript{130}

Thus, a number of additional undesirable consequences could flow from imposing limitations on the general tax with subsequent increased reliance on nontax levies. First, the general tax limitations could exacerbate the tendency towards regressivity that exists in state and local taxes in general even if increased efficiencies could be achieved. A rate rollback, for example, imposes relatively higher effective costs on less affluent taxpayers when the tax administratively utilizes disparate assessment ratios instead of fair market value as the base for assessment. And as has been noted, mobile taxpayers will gain no benefit in an acquisition value system. Second, use of user fees and charges, and special assessments for public services and goods even though regressive in effect appears efficient in that costs are borne by actual users.\textsuperscript{131} To the extent, however, that such goods are necessities,\textsuperscript{132} the absence of concern for and attention to ability to pay ushers increased regressivity into the overall system. Third, especially if successful, the combination of limited property tax collections and shifts to user fees and charges could ultimately lead to increased disparities in the availability of public goods. The revenue collected pursuant to the imposition of a special levy of whatever description would of

\textsuperscript{129} See Throckmorton, supra note 74, at 1068–76.

\textsuperscript{130} See id. at 1077–78.

\textsuperscript{131} See County of Fresno v. Malmstrom, 156 Cal. Rptr. 777, 782 (Cal. Ct. App. 1979). Benefit assessments are not treated as taxes because they are seen as the payment of a property owner for benefit rather than as a revenue raising matter. Although usually used to finance public improvements, benefit assessments can be employed to pay for an ongoing service such as road maintenance. See, e.g., City Council of San Jose v. Smith, 194 Cal. Rptr. 110 (Cal. Ct. App. 1983).

\textsuperscript{132} One writer surmises that against the backdrop of “basic principles of economics and property law, in addition to \ldots anecdotal evidence” taxpayers are less likely to exercise control over spending in ways likely to improve the general welfare. Stacy Simon, Comment, A Vote of No Confidence: Proposition 218, Local Government, and Quality of Life in California, 25 Ecology L.Q. 519, 521 (1998).
necessary be dedicated to a predetermined use. Thus, the "public good" of necessity would be available only to those who paid the levy. If there were no means of imposing a levy, interested consumers otherwise denied the service from a public provider could band together and form a fiscal community akin to homeowner associations in order to avail themselves of the service. The obvious outcome would leave those least able to pay without the affected public good. Finally, reliance on the "non-tax" revenue source could be limited or eliminated thus further circumscribing financial options available to localities.

Thus, the bar was raised. What started as an effort to cabin the property tax grew to encompass fees and charges and, as will be discussed in the next section, spilled over to include general taxes. As a result, this movement has had and continues to have an ever more profound impact at the local level and, increasingly, at the state level as various taxes, fees and charges are affected.

3. Other Taxes, New Procedural Requirements—As noted above, the property tax has not been the sole focus of voter activism. Sales and income taxes have also drawn fire. A favored tool has become the imposition of a requirement for general electoral ratification of any tax increases or a requirement for a legislative supermajority if changes are to be made in the revenue-generating system. Adoption of this tactic continues. For example, as reported in Amalgamated Transit Union Local 587 v. Washington, in that state's 1999 general election, the voters approved Initiative 695 that required voter approval for all tax and fee increases. The Washington Supreme Court struck the initiative down in October

133. See supra notes 122 and 123 for the definitions of user fees and charges and special assessments.

134. See, e.g., Uriel Reichman, Residential Private Governments: An Introductory Survey, 43 U. CHI. L. REV. 253, 254-55 (1976) (describing homeowners' associations as "Residential Private Government[s]"). "Comprehensive services like those usually supplied by municipalities may be furnished by the private organization: parks, recreational, and cultural facilities may be provided along with the more traditional services such as street maintenance, snow removal, and garbage collection." Id. at 255; see also Robert C. Ellickson, Cities and Homeowners Associations, 130 U. PA. L. REV. 1519, 1524 (1982) (noting that "[i]n the case of a homeowners association, ex ante redistributive policies are unlikely to succeed.").

135. See generally Simon, supra note 132 (assuming the public good is not being provided because of voter concern for free-riders). There is a difference between those who could pay but opt out and those who are entirely financially unable to bear the cost of private arrangements.

136. See Max Minzner, Entrenching Interests: State Supermajority Requirements to Raise Taxes, 14 AKRON TAX J. 43, 55-58 (1999). Minzner lists the sixteen states where a super-majority requirement has been enacted. With two exceptions (Arkansas in 1939 and Mississippi in 1892), these are all post-1978 enactments pursuant to initiative. Id.

137. 11 P.3d 762 (Wash. 2000).
2000 because it addressed two topics: elimination of the motor vehicle excise tax and the requirement described above.\textsuperscript{138}

This shift to required voter approval or legislative supermajority imposes a check that can be exercised by a proactive electorate majority uninformed of potential consequences (not necessarily the case if the public is reacting to a legislative proposal)\textsuperscript{139} or by a recalcitrant legislative minority choosing to adhere to the status quo.\textsuperscript{140} As noted, the framers rejected both general and specific supermajority requirements at the national level.\textsuperscript{141} Tax supermajority requirements both limit the size of government by limiting revenue and entrench existing political interests.\textsuperscript{142} Other political and fiscal effects of such limitations are considered further below.

Another popular tactic has become to constitutionally limit state and local revenue growth to the rate of either inflation, population growth, or both.\textsuperscript{143} Revenue caps differ from supermajority requirements in that they limit the size of government but do not entrench existing interests.\textsuperscript{144}

Moreover, the vote is now being used proactively as well as reactively. The electorate is deciding when and how to extend the state's taxing power. Current examples, from California, include

\begin{itemize}
  \item It has been said that \ldots in particular cases, if not in all, more than a majority of a quorum [ought to have been required] for a decision. That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or in particular emergencies to extort unreasonable indulgences.
\end{itemize}

\begin{footnotes}
\item[138.] Id.
\item[139.] See Eule, supra note 9, at 1525 ("[M]ost of the ways the Constitution devises to filter majority preferences are absent from direct democracy.").
\item[140.] Minzer cites to a passage in the Federalist Papers that eloquently captures the profound difficulties with supermajority requirements:
\item[141.] Id. at 48.
\item[142.] Id. at 49.
\item[143.] For example, the Colorado constitution limits increases in tax revenues to the rate of inflation and population growth. Id. at 56. Any excess collections must be returned to taxpayers. Id. Nine states—California, Colorado, Florida, Hawaii, Louisiana, Massachusetts, Michigan, Missouri, and Washington—have adopted revenue caps. Id. at 76 n.124.
\item[144.] Id. at 76.
\end{footnotes}
the imposition of an additional cigarette tax\textsuperscript{145} and the approval of Native American ability to provide gaming opportunities.\textsuperscript{146}

Finally, possibly in relation to frustrations arising when the flow or quality of public goods is adversely affected by imposing limits, the electorate has begun to vent that frustration by mandating spending.\textsuperscript{147} Voters are currently seeking both to contain costs and to allocate resources—sometimes in the same election.\textsuperscript{148} These are

\textsuperscript{145} See State Ballot Initiatives, Wash. Post, Nov. 5, 1998, at A46. This initiative raised the cigarette tax from $.50 to $.87 cents a pack to benefit children and family programs.

\textsuperscript{146} Id. This initiative allowed Indian casinos to offer slots, lotteries, card games, and other gambling. I include this initiative here because, in many states, gambling proceeds constitute an increasingly important source of revenue. From 1980 to 1998, total proceeds from lottery sales increased from $2.4 million to $35.6 million. A significant portion of the states’ share went to education. See Statistical Abstract, supra note 32, at 333 tbl.529.

\textsuperscript{147} See generally Schrag, supra note 13 (describing the repeating cycles of retrenchment and reaction by California voters); see, e.g., Kenneth J. Cooper, Ballot Initiatives Turning to Schools, Wash. Post, Aug. 28, 2000, at A8 (reporting that the following education issues were to come before voters: (1) to authorize private school vouchers of at least $4,000 per student (California); (2) to annually dedicate a third of a percentage point of federal taxable income to school finance and to require the state to increase K-12 funding by at least one percent more than inflation rate every year for a decade (Colorado); (3) to guarantee state’s per pupil expenditures remain at current level, about $6,600 (among other issues) (Michigan); (4) to require legislature to provide sufficient funding to meet its quality education goals or explain why funds unavailable (Oregon); (5) to allocate surplus state lottery revenue to reduce class sizes and construct schools (Washington)); see also Voters Speak: Spend on Schools, Wall St. J., Jan. 4, 2001, at A1 (describing Colorado voters’ approval in the last election of the proposal to increases K-12 funding).

\textsuperscript{148} For example, in the November 1998 elections, the California ballot included (among others) the two following propositions:

\textbf{(1) Proposition 7—California Air Quality Improvement Act.} California Sec’y of State, 1998 California General Election Voter Information Guide/Ballot Pamphlet, at http://vote98.ss.ca.gov/VoterGuide/Propositions/7text.htm (last visited May 8, 2002). Legislative analysts estimated an annual net state revenue loss due to the new tax credits to be, on average, tens of millions to one hundred million dollars between 1999 and 2010. California Sec’y of State, 1998 California General Election Voter Information Guide/Ballot Pamphlet, at http://vote98.ss.ca.gov/VoterGuide/Propositions/7analysis.htm (last visited May 8, 2002). Because a tax credit reduces what would otherwise be tax liability, the credit is the equivalent of a tax reduction. The proposition included no mechanism to offset the revenue loss.

\textbf{(2) Proposition 8 - Permanent Class Size Reduction and Educational Opportunities Act of 1998.} California Sec’y of State, 1998 California General Election Voter Information Guide/Ballot Pamphlet, at http://vote98.ss.ca.gov/VoterGuide/Propositions/8text.htm (last visited May 8, 2002). Legislative analysts estimated that, if passed, the proposition would cost the state $60 million in new state programs; potential costs to local school districts could reach into the tens of millions though actual costs could be considerably less. California Sec’y of State, 1998 California General Election Voter Information Guide/Ballot Pamphlet, at http://vote98.ss.ca.gov/VoterGuide/Propositions/
not, however, flip sides of the same coin; there is no deliberate attempt to balance revenues and expenditures.\textsuperscript{149} On the national level, under the deficit reduction process that started in 1990 and remains in place, the annual revenue effect of changes to the Internal Revenue Code must be considered.\textsuperscript{150} As such, for every revenue-reducing amendment whether offered on the floor or in Committee, there must be proposed changes in the Code increasing revenue by a like amount. This is not, however, to suggest that this balancing can easily or precisely be achieved.\textsuperscript{151} The latter point is a consideration of compelling importance at this level since state constitutions almost universally require balanced budgets on both the state and local level.\textsuperscript{152} Nor is there a mechanism for redressing post-election imbalances. The combination of constitutionally imposed taxing limitations and spending directives inevitably hamstrings legislative ability to develop and oversee state fiscal policy in any systematic way.

\section*{PART II}

In introducing this Article, I wrote that the Federalists rejected pure democracy "because they feared public acts derived from motives of '[self] interest' or 'passion.'"\textsuperscript{153} The series of initiatives that I have described are not universally subject to this criticism. Rather, a number of these initiatives are at least arguably independently defensible. Examples of such initiatives arguably include

\begin{quote}
\begin{footnotesize}
\item[8] analysis.htm (last visited May 8, 2002). This proposition was allocative in effect. There was no provision for offsetting revenue.
\item[149] \textit{But see} \textit{ARiz. Rev. Stat.} § 19-123(A.6) (2001) (requiring the Joint Legislative Budget Committee Staff to prepare fiscal impact estimates for ballot initiative measures).
\begin{quote}
[S]ince 1986, virtually all significant tax legislation has been a revenue-raising part of 'Omnibus Budget Reconciliation Act' legislation with the principal mission of deficit containment. ... The budgetary rules of the 1990 and 1993 Acts [as well as subsequent budget reconciliation acts] demanded that any revenue reducing measures be paid for either through offsetting revenue increases or spending reductions . . . .
\end{quote}
\item[151] \textit{Id.} at 611-12.
\item[152] \textit{To put it charitably, Professor Graetz is not optimistic about the prospects for success of this Congressional effort.} \textit{Id.} at 678.
\item[153] \textit{See Robert F. Williams, State Constitutional Law} 984 (3d ed. 1999) (noting that "[m]ost state constitutions contain the requirement of a 'balanced budget' under which planned spending may not exceed anticipated revenues.").
\item[158] \textit{See Linde, supra note 10, at 166; see also supra text accompanying note 9.}
\end{footnotesize}
\end{quote}
forcing smokers to subsidize anti-smoking efforts and mandated increased spending for public education. Initiatives such as these appear reasonably related to an identifiable and permissible public objective and would likely meet the most permissive standard of constitutional review if challenged. In fact, many if not most initiatives escape litigation altogether.

However, whether challenged or not, these initiatives, taken together, impose substantial constraints on the ability to consider and accommodate competing principles in the fiscal lawmaking process. Fiscal policy is not implemented anew with each new enactment. Rather, legislative fiscal policy-making and oversight is an iterative process with, ideally, each new amendment or enactment placed in an integrated mosaic. It is a combination of painting with broad strokes and fine-tuning. Initiatives, on the other hand, are always necessarily narrowly cast (though possibly with broad and unanticipated ramifications); they are constitutionally limited to a single subject. The cumulative effect of what may otherwise be reasonable individual initiative enactments can not be considered and fine-tuned either easily or reliably. Indeed, because of this characteristic, initiatives present deceptively simple solutions for quite complex problems. This apparently straightforward approach is also deceptive in another sense. As noted earlier, Professor Clark has argued that an initiative is by its very nature incapable of communicating voter

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154. See supra text accompanying note 145.
155. See supra text accompanying note 146.
156. See Jane S. Schacter, The Pursuit of 'Popular Intent': Interpretive Dilemmas in Direct Democracy, 105 YALE L.J. 107, 109 (1995) (nothing that "[the] gap in the literature [regarding the statutory meaning of direct legislation] is . . . lamentable . . . because many popular ballot measures are found to be constitutional or are never challenged as unconstitutional").
157. See Dubois & Feeney, supra note 13, at 81-85; see also Clark, supra note 127, at 468-73 (arguing that the way voters vote on initiatives does not effectively communicate voter priorities because initiatives are limited to single issues).
158. Schacter, in exploring limitations on popular foresight, makes the following point: One can see the case for expecting legislative drafters to be aware of such things as related and prior law, judicial interpretations of similar language, and relevant interpretive canons that reviewing courts may apply. Whether all legislators do, in fact, have this knowledge may be another matter, but given the staff, legislative analyses, and other resources available to professional lawmakers, it is reasonable enough to expect them to know something about the 'legal landscape' into which a new law will fit. Because this is not the case with ordinary voters, many of the legal consequences of new initiative laws are systematically unforeseeable to citizen-legislators.

Schacter, supra note 156, at 127-28; see also Clark, supra note 127, at 471.
preferences with reliable precision. For this reason, even if constitutional, initiatives can do as much violence cumulatively to republicanism as those initiatives individually found to be animated by "religious or patriotic, collective emotions of love, fear, or hate toward some group or object." A brief comparison of republican and direct lawmaking underscores this point.

1. Contrasting the Legislative Process with Enactment Through the Citizen Initiative—Taxpayers' actual liability is the outcome of two separate legislative processes: the lawmaking process that implements and oversees the revenue-generating mechanism—the statute itself, and the budget/appropriation process that makes allocation decisions based upon the generation of predicted revenue. Ideally, tax policy is (at least initially) attentive to equity, simplicity, and neutrality in the tax statutory scheme.

159. See generally Clark, supra note 127.
160. Linde, supra 10, at 166.
161. Consistent with constitutional mandate and on both the state and local levels, these must be balanced budgets.
162. "The qualities desirable, economically speaking, in a system of taxation, have been embodied by Adam Smith in four maxims or principles, which, having been generally concurred in by subsequent writers, may be said to have become classical." John Stuart Mill, Principles of Political Economy 537-38 (New York, D. Appleton & Co. 1884).

Adam Smith's four maxims are:

1. The subjects of every state ought to contribute to the support of the government, as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. . . . In the observation or neglect of this maxim consists, what is called the equality or inequality of taxation. . . .

2. The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person. Where it is otherwise, every person subject to the tax is put more or less in the power of the tax-gatherer, who can either aggravate the tax upon any obnoxious contributor, or extort by the terror of such aggravation, some present or perquisite to himself. The uncertainty of taxation encourages the insolence and favours the corruption of an order of men who are naturally unpopular, even where they are neither insolent nor corrupt. The certainty of what each individual ought to pay is, in taxation, a matter of so great importance, that a very considerable degree of inequality, it appears, I believe, from the experience of all nations, is not near so great an evil, as a very small degree of uncertainty.

3. Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it. A tax upon the rent of land or of houses, payable at the same term at which such rents are usually paid, is levied at a time when it is more likely to be convenient for the contributor to pay; or, when he is most likely to have wherewithal to pay. Taxes upon such consumable goods as are articles of luxury, are all finally paid by the consumer, and generally in a man-
sity, the legislative goal must be to generate adequate revenue while affording those who bear the cost of governance appropriate treatment. In fulfilling this responsibility, a legislative body may enact a constitutionally sound system that considers neither property characteristics nor ability to pay in its design. On the other hand a state may, pursuant to policy embraced within its taxing system, anticipate and provide for deviations of whatever kind that effectively reallocate tax burdens. In either case, judicial "rational basis" review does not require either that the objective be explicitly stated or directly served by the strategy employed. It is enough that the strategy, i.e., relief to those on fixed incomes, for...

4. Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible, over and above what it brings into the public treasury... in the four following ways. First, the levying of it may require a great number of officers, whose salaries may eat up the greater part of the produce of the tax, and whose perquisites may impose another additional tax upon the people. Secondly, it may obstruct the industry of the people, and discourage them from applying to certain branches of business which might give maintenance and employment to great multitudes... Thirdly, by the forfeitures and other penalties which those unfortunate individuals incur who attempt unsuccessfully to evade the tax, it may frequently ruin them, and thereby put an end to the benefit which the community might have received from the employment of their capitals. An injudicious tax offers a great temptation to smuggling... Fourthly, by subjecting the people to the frequent visits and the odious examination of the tax-gatherers, it may expose them to much unnecessary trouble, vexation, and oppression.


163. Commissioner of Internal Revenue Margaret Richardson said in a speech to Columbia Law students on October 16, 1996: "Ultimately, I suspect, the real issue that concerns taxpayers [is] whether they feel they can afford what they are being asked to pay and whether they feel they are getting good value for the taxes they do pay—two issues that do not lend themselves to easy analysis." [1996] 213 Daily Tax Rep. (BNA) I-1 (alteration in original).

164. This is the West Virginia model at issue in Allegheny Pittsburgh Coal, and sound tax policy underlay the state constitutional language and legislative enactments in that case. If executed as enacted, all taxpayers would have had the same base for tax and, in that sense, would be treated alike.

165. For example, a legislative body clearly has the constitutional authority to utilize classifications in order to factor in ability to pay.

166. The Court, in Nordlinger v. Hahn, 505 U.S. 1, 15 (1992), observed that the "Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." The Court then noted that a legitimate state purpose may be ascertained even when the legislative or administrative history is silent. Id.
example, be related to the approach adopted—reduced liability for all property owners whose total income is less than $20,000 for the year in question. The reliability of and judicial respect for the underlying legislative judgment is derived from the process and the opportunity afforded for broad-based deliberative participation and possible compromise leading to the formal expression of collective judgment.

Moreover, in today's political arena, the reality is that elected officials are not the only participants in the republican lawmaking process. Where the positive law framework creating the tax structure is legislative in origin, legislators, taxpayers, representatives of the state executive branch (experts from the Department of Revenue, for example), other government officials and lobbyists are all likely to have had a hand in developing the framework of state positive law by testifying at hearings and assisting with drafting during the committee process. The process itself would likely be characterized by hearings open to the public and receptive to public input. Further insights may have been gleaned from legislators sitting as members of specialized legislative committees charged with matters of financial oversight. Particularly in light of the technical nature of these concerns, the committees in turn may well have been assisted by staff having expertise in financial matters. Informal exchanges will also be a part of the process. As such, the legislative setting would have provided ample opportunity to consider various perspectives and possible approaches—viewpoints that are inevitably contradictory. In winning passage of the proposed legislation, coalitions could form necessitating further compromise and concession and, importantly, the kind of deliberation critical to effective overall governance.

167. It is true that this is a system that is administered on the local level and that the revenues generated are to be expended at that level. However, the legislative role is key since the states retain control over the format and content of the system.


When I say the legislature is deliberative, what I mean is that most issues get airings. Not necessarily an airing on the floor of the Senate or the House, Oxford-style debate. The airing is an airing on the run, in the interstices of the process, in the elevators and in the hallways as legislators chat with one another or lobbyists chat with legislators. By the time an issue has either been buried or made its way through the process, there's been a lot of deliberation, and views have changed, and people do influence each other . . . . [L]egislatures do a lot better at deliberation than most of us do in our families or in our workplace.
Given the differing perspectives and objectives of the varied participants, the final product will be, with some frequency, the result of extensive consultation and compromise and could well incorporate hard-won concessions.

Likewise, the budget and appropriation processes will be influenced by considerations that range from allocations driven by mandate or the need to provide "hard services" to those that are unquestionably redistributive in nature. It, too, is likely to be the outcome of extensive and wide-ranging discussion and participation by legislators as well as many of those affected by the decisions made including interest groups. The final product is likely to have undergone considerable negotiation and change prior to enactment in its conclusive form.

The opportunities for this broad-ranging participation constitute both the great strength and the great weakness of republican governance. Individual legislators are critical to the success of the process, but individuals may be corrupt or inept. There is no guarantee that a variety of voices will be either heard or heeded. Opportunity for participation unquestionably creates the risk of capture of the process either by internal coalitions described or external interest groups. Any and all of these possibilities exist.

The legislative process itself, however, holds participants accountable. In the legislative arena, all steps in financial oversight are increasingly in public view; broad citizen oversight is increasingly the norm. And legislators responsible for passage of the

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169. Cass Sunstein recognizes the role that interest groups play in modern regulation. He sees this activity as falling along a continuum ranging from "cases in which interest-group pressures are largely determinative and statutory enactments can be regarded as 'deals' among contending interests" to "cases where legislators engage in deliberation in which interest-group pressures, conventionally defined, play little or no role." Sunstein, supra note 11, at 48. He assesses this activity against the backdrop of Madisonian republicanism concluding that while contrary to Madisonian ideals it is quite likely impossible to eliminate and must be accommodated in a constitutional fashion. Id. But see Elizabeth Garrett, Who Directs Direct Democracy?, 4 U. CHI. L. SCH. ROUNDTABLE 17, 18 (1997) (arguing that ballot initiatives are also susceptible to interest group activity). Daniel Smith makes much the same point. SMITH, supra note 21, at 16, 47-51 (using analyses of the "tax revolts" in California, Massachusetts and Colorado to support his characterization of tax limitation citizen initiatives as "carefully orchestrated faux populist moments.").

170. Again, James Madison wrote:

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. . . .

The inference to which we are brought is that the causes of faction cannot be removed and that relief is only to be sought in the means of controlling its effects.
legislation (as well as those who may have been opposed) will be held accountable in the court of public opinion for decisions made or not made, possibly leading to the ultimate sanction—failure to win reelection. In short, public oversight and accountability is likely with representative government.

In contrast, enactment through direct initiative does not and structurally cannot follow the pattern described above. With a citizen initiative, once the language has been formulated by initiative proponents, the lines of debate are set. The language cannot be subsequently modified to accommodate emerging legitimate concerns. It is intentionally inflexible. The initiative may in fact compromise accepted tax policy as Proposition 13 did by creating unbreachable temporal taxpayer classifications without regard to equity or to underlying policy. While there may be extensive publicity and broad dissemination of explanatory materials after the initiative is drafted, no deliberative process in the republican sense can occur. Before the vote on the initiative, there is no opportunity to collaboratively address broader questions of policy—here, the desirability of creating unbreachable temporal taxpayer classifications—in the attempt to frame an appropriate response to the range of very legitimate concerns raised, such as those by taxpayers on fixed incomes facing the burden of rapidly escalating assessments.

171. Sunstein notes several theories that attempt to explain legislative decisionmaking. One theory predicates legislative behavior to a considerable extent on a single-minded determination to be re-elected. Another identifies three primary considerations, one of which is obtaining reelection (the other two are achieving influence within the legislature and promoting public policy). Finally, he notes that in the economic literature, legislative behavior is attributed to constituent pressures. Sunstein, supra note 11, at 48. Importantly, in this context, all theories accord weight to the effect of accountability when standing for reelection. See also Raymond E. Wolfinger & Fred I. Greenstein, The Repeal of Fair Housing in California: An Analysis of Referendum Voting, 62 AM. POL. SCI. REV. 753 (1968) (noting that legislators take into account intensity of demand as well as numerical support because they want to know the political import of disappointing one side or the other).

172. Note the other side of this: that the inflexibility is intended to provide constraints that will (1) insure that the process of amendment does not run wild (single subject) and (2) help voters understand the initiative.

173. Legislative history, by establishing the link between positive law and underlying purpose, can be a useful way of identifying the state interest. However, there is no "legislative history" as the term is commonly employed available in the initiative context. The initiative is not a true "legislative product."

Similarly, where spending is mandated by initiative, opportunities for debate and compromise after the initiative is drafted are foreclosed. A successful initiative compels non-participatory allocative decisions. Nor is there any reliable opportunity to deliberately consider the effects of tax reductions or spending mandates in the larger fiscal picture. Fine-tuning is impossible. The initiative process may also conflate the quite separate lawmaking and allocative legislative functions. This is illustrated well by California’s Proposition 10, the initiative that raised California’s cigarette tax by fifty cents per pack. That initiative both imposed a new (additional) tax and earmarked the revenues realized for early childhood development and smoking prevention programs. Passage of an initiative is simply not the equivalent of a legislative outcome. In the final analysis, in a world where an optimum outcome cannot be guaranteed, the legislative process is clearly the preferable model for decision making.

2. Impact on Meaningful Ongoing Legislative Financial Oversight: Fine-tuning Appropriations—Ignoring for a moment the violence done to generally accepted tenets of tax policy, this taxpayer activism, or capture, if you will, violates traditional public finance doctrine. Capture has an obvious effect: it carves out and earmarks portions of general funds or particular sources dedicating the funds to a particular use. The practice thus hamstrings the general ability to make contextual decisions and allocations. In short, anticipatory allocations thwart flexibility. For this reason, the practice is generally criticized.

This is not to say that legislative bodies have not engaged in earmarking. In fact, every state earmarks to some extent and a few states earmark more than fifty percent of tax revenues. As recently as 1995, the latest date of availability for composite data, on average states earmarked twenty-five percent of tax revenues.

Legislative history can be particularly helpful in a court’s attempt to resolve any of the myriad of policy and technical issues that are inevitably encountered in tax matters. In dealing with federal taxation matters, for example, courts have relied heavily on committee reports prepared by technicians on the staff of the Joint Committee on Taxation. These reports discuss the impetus for the legislation, language used and anticipated impact.

174. See supra note 35.
175. Id.
177. Id.
178. Id. at 3.
179. Id.
Importantly, taxes earmarked tend to be specific excise taxes rather than general taxes. A number of state court rulings support this position as a matter of state constitutional law.

Again, inflexibility is the intent and effect of some citizen enactments and is entirely consistent with the underlying concern that may have motivated taxpayer activity in the first place: the conviction that the legislature was not acting in the public's interest. Further, the data show that California had been quite moderate in its use of earmarking; the 1995 data reveal that as of 1993 only nineteen percent of that state's tax revenues were earmarked. The effect of citizen earmarking, however, may be especially pernicious in the California context, for earmarking must be considered against the backdrop of significantly increased reliance on user fees and charges. As discussed, this reliance alone exacerbates the existing trend towards regressivity. Overall, from a policy perspective, earmarking combined with user fees and charges will quite likely reallocate tax burdens in a particularly indefensible manner.

Moreover, even if a given limitation or change appears reasonable in a given moment in time, public needs and perceptions change—sometimes even within one election cycle. Concerns that were earlier deemed pressing now pale into comparative insignificance, only to be replaced by some new, possibly contradictory concern, which may equally plausibly present a contrary or competing financial demand. The ability to mount an appropriate response through the republican process to the new concern may

180. Id. at 6-8. With exceptions noted by Pérez and Snell, legislative bodies generally refrain from earmarking general purpose taxes for a dedicated objective for an indefinite period. This is, of course, in marked contrast to the treatment accorded a special charge or fee. This is in marked contrast to the treatment accorded to a special charge or fee; these are generally dedicated to defraying the costs of the service provided. See discussion supra notes 121-23.

181. A variant on earmarking excise taxes exists where the increment to general revenues from the property tax resulting from specific projects is earmarked to service public borrowing incident to costs of infrastructure improvement. A number of courts have upheld this tactic. See, e.g., Tax Increment Fin. Comm'n v. Dunn Constr. Co., 781 S.W.2d 70 (Mo. 1989) (rejecting several arguments against the constitutionality of this arrangement). See generally Jonathan M. Davidson, Tax Increment Financing as a Tool for Community Development, 56 U. DETROIT J. URB. L. 405 (1979) (describing use of tax increment financing as a legal and economic strategy for redevelopment). But see Muskogee Urban Renewal Auth. v. Excise Bd., No. 74,424, 1993 Okla. LEXIS 102 (Okla. June 15, 1993) (held unconstitutional).

182. See SCHRAG, supra note 13, at 144.

183. PÉREZ & SNELL, supra note 176, at 22 tbl.1.

184. See discussion supra notes 121-23.

185. Id.

186. Arguably, this is precisely what has happened as cuts in property tax support are now seen to compromise the quality of public education. Id.; see also supra note 147.
well be compromised or even foreclosed by constitutionally based financial limitations. And this inflexibility is obviously impervious to legislative dominant party or political philosophy change—change that would, in a less constrained system, carry with it an opportunity to make corresponding philosophically consistent financial adjustments. Nothing will be gained on these facts by throwing the rascals out.

In fact, recent opinion polls suggest that there has been a gradual shift in voters' attitudes toward government over the last two decades. Responses suggest that voters are moving from skepticism and cynicism to cautious investment of trust. Unfortunately, the constraints earlier imposed on the exercise of fiscal discretion preclude a republican reaction to the shift. Perhaps this reality explains the recent initiative trends from mandated tax cuts to mandated spending. Peter Schrag, in examining the effect of these mandates, concludes that the perceived quality of public services remains less than what it had been prior to the revolution principally because of the inability to consider the changes in light of the total fiscal picture. Continuing voter dissatisfaction, even in light of the shift to spending mandates instead of or in addition to tax cuts, eloquently illustrates the difficulty with attempting to conduct ongoing governance through citizen ballots. Ultimately, the financial inflexibility introduced through an intentionally cumbersome process may inure to the benefit of very few and then for only what may be a quite small window in time.

3. Impact on Political Coalition-Building—There is yet another dimension to this popular seizure of lawmaking control. Modern legislative political life features increasing participation by groups

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187. Frickey comments on how initiatives constitute a double-edged sword for political parties:

This synthesis of initiative campaigns, candidate campaigns, and our two-party system creates an unfortunate dilemma for candidates and political parties: they have incentives to use direct democracy as a primary driver of their own electoral politics, but the effect is an undercutting of their institutional power as politicians. Ironically, these candidates are using the initiative to get themselves elected to posts that the initiative is rendering increasingly irrelevant and powerless.

Frickey, supra note 11, at 435.


189. See Schrag, supra note 13, at 20–22, 166; see also text accompanying note 127.
that constitute a numerical minority in the population at large. 190 The lack of majority status in the population at large may be overcome in the legislative arena by forming political coalitions with other elected officials on matters of mutual concern—by engaging in "log-rolling."191 The political arena itself imposes checks on overly aggressive individual or coalition behavior; the process of bargaining for support is one that promotes compromise and exiles those who fail to keep their word. Further, this is a public stage; the lawmaking process is ever more open to public view.192 In short, bad actors can be identified. Finally, in addition to litigation as a means of testing validity of legislative products of whatever description, there remains the ultimate external sanction—failure to win reelection. Insofar as voter oversight is concerned, coalitions can be held immediately accountable in the legislative arena; coalitions cannot be held accountable when changes are put in place pursuant to voter initiative.

The initiative process carries significant negative implications for legislatively-based political coalitions. The reciprocal ability to educate, cultivate, persuade, and compromise is the heart of political give-and-take and, ultimately, inclusive governance. Coalitions that can exist only in the legislative environment are likely to find participation in governance constrained and perhaps neutralized by actions motivated by unknowable considerations of a minority of legislators and/or voters at large. Seizure through popular control is thus particularly troubling for groups not otherwise having any realistic prospect of meaningful political influence outside of the legislative arena. The opportunity to function effectively in the legislative environment has an equalizing

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190. Between 1970 and 1996, the number of black elected officials in the United States Congress and in state legislatures increased from 179 to 617. See Statistical Abstract, supra note 32, at 298 tbl.483. Between 1985 and 1994, the number of Hispanic public officials who were either state executives or legislators increased from 129 to 199. Id. at 298 tbl.484. And while women are not a numerical minority of the population, in 1998 there were 1617 women holding seats in state legislatures. Id. at 297 tbl.482. We cannot know from these numbers the extent to which women who are members of minority groups are double-counted and there is no data reporting numbers of gay and lesbian office-holders. Similarly, there is no aggregate data reporting on the relative wealth held by elected officials. Even within these constraints, however, legislative bodies are clearly more diverse along racial and gender lines than ever.

191. See Clark, supra note 127, at 456–63. One context in which this coalition activity is likely to be both critical and appropriate revolves around funding of public education. See Mildred Wigfall Robinson, Financing Adequate Education Opportunity, 14 J.L. & Pol. 483 (1998).

192. See infra note 235 and accompanying text.
effect. Limiting or eliminating opportunities for affected groups to attempt meaningful participation in the political arena may be tantamount to disenfranchisement.

4. Expression of the 'Popular Will'? And Do Numbers Really Matter?—The initiative process has repeatedly been characterized as "the people’s voice." An initial question is "whose voice?" Are the initiatives that wind up on the ballot truly the product of spontaneous citizen action? Several recent studies suggest that initiatives are just as likely to be the result of interest group activity in this setting as in the legislative forum. Schacter notes that the involvement of "sophisticated and specialized" participants makes the initiative process "more susceptible to strategic behavior of the kind that is quite typical in the legislative domain." Indeed, in a number of recent instances, initiatives have been the outgrowth of a government official's frustration over roadblocks encountered in a futile attempt to enact legislation addressing some favored issue.

Before a proposed initiative can be placed on the ballot in most states, popular support must be shown through satisfaction of some petition requirement. Assuming that an initiative does indeed, have a grass-roots—i.e., non-interest group—origin, meeting this requirement could be taken as credible evidence of popular substantive support. And in earlier decades, when citizen-organizers largely performed the task of canvassing for signatures, the theory of debate was certainly defensible. These citizen-organizers, however, have been largely replaced by professional signature-collectors for whom a profit motive is significant, if not paramount. A substantive exchange is not the collector's objective. The expense of professional collectors in addition to campaign expenses generally has dramatically increased the cost of lawmaking by initiative perhaps reducing to mere rhetoric the

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193. See Clark, supra note 127, at 463 ("[L]ogrolling cannot give any individual more than an equal and limited share of political power. All it does is what it should do: it allows individuals to decide how to allocate that power.").
195. See, e.g., Garrett, supra note 169, at 18.
196. Schacter, supra note 156, at 129.
197. See, e.g., 20 The Book of the States (1974–1975), supra note 25 (describing then Governor Ronald Reagan’s support of an early, unsuccessful attempt to impose restrictions on perceived governmental financial excesses in California).
199. Id. at 20.
200. Id.
assurance of control through citizen action.\textsuperscript{201} The cost of the process and the foreclosure effect of that geometrically increasing expense make this a prohibitively expensive undertaking increasingly inaccessible to the grass-roots populace who gave birth to the concept.\textsuperscript{202}

Is this "citizen legislators" activity ultimately typified by voter participation as broad-based as this characterization suggests? Recent data suggest that there may be little long-term fall-off in lawmaking through voter initiative as compared to direct voting for elected officials.\textsuperscript{203} Studies have shown, however, that in a given election, those voting on initiatives tend to be a subset of all voters and represent the "elite" of those voting; voter participation at this level seems significantly influenced by the level of education attained.\textsuperscript{204} And even here the process of educating the "law-makers" is flawed. There must, indeed, be information widely dispersed that explains the amendment's objective and effect in sufficient detail.\textsuperscript{205} But the quantity of information provided can be overwhelming both technically and by sheer volume.\textsuperscript{206} Further, information made available by advocates will be partisan in nature and will lack the short-hand identifiers that come, for example, through party sponsorship.\textsuperscript{207} There will be no opportunity to compromise in order to accommodate legitimately competing viewpoints. Thus, if the purpose of such information and analysis is, as it should be, to educate and effectuate the formulation of a solution informed by coherent policy, its objective is not being ac-

\textsuperscript{201} In the affirmative action context, where initiatives have also been used, Lydia Chavez notes that "[w]ith the best of intentions—to give ordinary citizens the ability to change laws—the initiative process instead permits wealthy special interest groups to bypass the deliberative process and change laws in their narrow interest." \textit{Lydia Chavez, The Color Bind: California's Battle to End Affirmative Action} 243 (1988).

\textsuperscript{202} Garrett in 1995 estimated the initial costs of qualifying a California initiative to approach $1 million. \textit{Id.} at 21. This amount is likely to exceed the financial reach of most grassroots interest groups.

\textsuperscript{203} \textit{See Dubois & Feeney, supra note 13, at 147 n.98} The most recent study appears to be a Swiss study showing that citizen understanding drops as ballot measures become more complex and that voter participation declines with increased complexity.

\textsuperscript{204} \textit{Id.}

\textsuperscript{205} \textit{See generally id.} at 164–80 (explaining that quality of voter participation improves when, among other factors, voters have multiple sources of information).

\textsuperscript{206} \textit{Id.} at 230.

\textsuperscript{207} \textit{See generally Daniel H. Lowenstein, Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment,} 29 UCLA L. Rev. 505 (1982) (detailing the success of one-sided spending in elections); Schacter, \textit{supra} note 156, at 130–38 (discussing the effect of the media on voters).
The Property Tax as a Case in Point

complished. Finally, the ballot language itself may prove difficult to understand.\textsuperscript{208}

Because these enactments are insular events, no institutional memory exists. The enacting body cannot learn from prior experience. If a change spawns subsequent litigation, there is no reliable debate upon which to draw, no legislative history identifying dominant preferences, and no coalition that can meaningfully be held accountable if the anticipated outcome proves unattainable.\textsuperscript{209} Further, there is no reliable incentive to reform coalitions to try to do it better the next time. Thus, the body politic may gain little in what should be its continuing quest to evolve a truly representative government. Possible disparate impact is also a concern; implementation of these instruments may have a disparate and undesirable ethnic impact.\textsuperscript{210}

Popular governance, however, is ultimately fundamentally objectionable whether disparate impact is the effective outcome or not. Even in the unlikely case that an initiative enjoys support from a majority of those eligible to vote in a given election, the process remains fundamentally flawed for all of the reasons discussed above. Without ultimate financial control in a republican setting and the responsibility for accountability that should go with it, a republican form of governance cannot be maintained.

\textsuperscript{208} Schacter notes that researchers “[studying] ballot questions [have] concluded that ballot language typically requires a reading comprehension level that far exceeds that held by the vast majority of a state’s population.” Schacter, \textit{supra} note 156, at 139–40. David Magleby’s study of ballot language for the years 1970–1979 in California, Massachusetts, Oregon, and Rhode Island found that voters in those states needed to read at the 16th to 18th grade level in order to understand that ballot language. Less than twenty percent of voting adults could be expected to have attained that level of education. \textit{David B. Magleby, Direct Legislation: Voting on Ballot Propositions in the United States} 118–19 (1984), \textit{cited in} Schacter, \textit{supra} note 156, at 140.

\textsuperscript{209} For example, much of the background information cited by the Supreme Court in \textit{Nordlinger v. Hahn}, 505 U.S. 1 (1992), was drawn from the Report of the Senate Commission on Property Tax and Equity and Revenue to the California State Senate. Schacter argues that “direct democracy tests the limits of judicial willingness to deploy intentionalist methodology.” Schacter, \textit{supra} note 156, at 110. She notes that, while courts view their task as locating “popular intent,” a number of factors may cause this search to be even more problematic than the traditional search for legislative intent. These factors include “the mass size of the electorate; the absence of legislative hearings, committee reports, or other recorded legislative history; and the inability of citizen lawmakers to deliberate about, or to amend, proposed ballot measures.” \textit{Id.} In the absence of legislative materials, courts turn to statutory text, language in related statutes and ballot pamphlets or voter guides. \textit{Id.} at 111. Schacter also notes that “the notion that voters had any intent at all on the interpretive question facing the court—individually or collectively—is often untenable.” \textit{Id.} at 126. This observation will be generally true across initiatives.

\textsuperscript{210} See generally Derrick A. Bell, Jr., \textit{The Referendum: Democracy’s Barrier to Racial Equality}, 54 \textit{Wash. L. Rev.} 1 (1978) (arguing that referenda pose special threats to minority populations).
5. "Taxpayers' Revolution" Impact on Non-initiative States—"Tax cut fever" struck in most of the states, though the effect of the cuts were blunted somewhat by virtue of a robust economy. Revenues increased from property as well as income and sales taxes even as tax cuts were implemented. However, if the economy proves once again to be cyclical as now seems to be occurring, some drop in revenues is to be expected. When that occurs, those states best positioned to cope with the challenge of diminished resources will be states in which tax cuts have not been matched by constitutionally enshrined constraints on fiscal decision-making. Legislators should have latitude in fiscal management free of unduly disabling constraints.

There is a clear lesson for non-initiative states: a system of uninformed direct action and copy-cat tax-cutting is one that serves no one well. Lawmakers in non-initiative states must appreciate the importance of latitude. Lawmakers should capture some reliable sense of what issues really matter and to whom. They should certainly remain attuned to public opinion and should, where possible and as appropriate, factor those views into the decisions being made. But they must remain ever aware of their larger responsibility in doing so. In the final analysis, balance must be maintained in a way that permits or encourages deliberative, not reactive, lawmaking. The power to tax as well as to make allocative decisions should be exercised with the greatest care by persons fully aware of the crucial nature of their responsibility as public stewards. Public patterns of expenditure reflect our view of society as a body politic. I cannot overstate the importance of broad-

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211. See, e.g., William Claiborne, From Surpluses to Spending Cuts: States' Poorer Revenue Outlook, Higher Medicaid Costs May Force Belt-Tightening, WASH. POST, Mar. 11, 2001, at A5 (reporting that many states are facing revenue shortfalls for the first time in more than a decade).


213. For example, in Virginia, the former governor, James S. Gilmore III, successfully ran for office in 1997 principally on a promise to repeal the personal property tax on automobiles if elected. A strong state economy enabled the legislature to begin a phase-out of that tax, a process that is now approximately forty-eight percent complete. However, a currently cooling state economy has imperiled continuation of the phase-out. Importantly, in 1998 when the phase-out began, the legislature specified the economic conditions that would have to be met to keep the repeal process going. If the economy failed to perform in accordance with projected expectations, the phase-out would be slowed or halted. R. H. Melton, Economy Imperils Repeal of Car Tax: Gilmore Forced to Review Numbers as Revenues Slow, WASH. POST, Nov. 26, 2000, at C1.


215. See Clark, supra note 127, at 478. ("[Representation] is superior [to direct initiatives] because it includes information about citizen priorities and because it permits citizens to express their opinions as well as their interests.").
based, deliberate participation with ultimate indirect voter oversight in fulfilling this responsibility. With so much at stake, financial decisions demand the most inclusive and accommodating deliberative process possible.\textsuperscript{216}

In the final analysis, the formulation of fiscal policy is unlikely ever to be a responsibility objectively discharged in the privacy of the voting booth against a broad view of state policy by a majority of voting taxpayers. After all, in the words of Judge Learned Hand, "taxes are enforced exactions, not voluntary contributions."\textsuperscript{217} And this holds true irrespective of whether the liability results from popular or representative action. On the allocative side, consumers want ultimately to have public spending respond to their particular needs and interests.\textsuperscript{218} In light of this, an impartial observer can never know with any degree of certainty where individual preference ends and group preference begins. And even if that point could be identified, there may be no ultimate redress. After all, it is quite impossible where legislation is enacted through initiative to "throw the rascals out."\textsuperscript{219} Frickey's invocation of the timeless quote from \textit{Pogo} is very apt: "We have met the enemy, and he is us."\textsuperscript{220}

\begin{itemize}
\item[216.]
\textit{See} Frickey, \textit{supra} note 12, at 444 (citations omitted):

Fair processes of law require two things. First, they must embody processes that, as much as possible, objectively develop the relevant facts and legal standards so that people are not deprived of important rights or interests based on erroneous assumptions. This is the so-called utilitarian aspect of due process. Second, they require something more, sometimes called the dignitary interest in due process, the "promotion of participation and dialogue by affected individuals in the decisionmaking process." These twin interests preserve both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

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\item[218.]
\textit{See supra} text accompanying note 124.

\item[219.]
In writing about the impact of recent initiatives on affirmative action, Jodi Miller makes the following generally applicable comment:

\begin{quote}
\textit{[N]o one is accountable for all of the possible ramifications of the laws thus created. The campaigns are run by private citizens who make promises which they cannot keep because they do not have any authority to enforce laws. They can not be removed from office and they have no fear of any upcoming reelection campaign, both of which would temper the behavior of an elected official.}
\end{quote}


\item[220.]
\textit{See} Frickey, \textit{supra} note 11, at 447.
PART III

Overall, the potential for bad policy outcomes seems to far outweigh the opposite potential when financial control is popularly exercised. This is true whether this conclusion is based upon the undesirable impact of a single controversial enactment, such as Proposition 13, or on the cumulative effect of a number of successive benign enactments. Comparisons with taxing schemes in non-initiative states suggest that the populist result is quite at odds with results that would have been reached through the legislative process. Furthermore, the relief anticipated by virtue of departure from accepted schemes is hardly guaranteed and may rend the fabric of governance besides. Fine-tuning substitute schemes are also likely to prove difficult when citizens act as legislators. Thus, and ironically, instead of increased fairness and optimism about the capacity to govern fairly, public cynicism regarding the initiative process grows. And that result is doubly tragic, for no alternative remains. Legislative bodies have been hindered from acting while the citizens acting directly have been unable to act effectively. The only option is to somehow constrain the ability to directly act.

As a preliminary matter, as desirable as simply surrendering the power to legislate in this way may be, that concession is highly

221. Again, California and its constitutionally mandated Proposition 13 stands in stark contrast to the vast majority of American states in its use of acquisition value as the tax base. The latter group continues to use fair market value as the basis for assessment for property tax purposes. See Property Tax Overview, St. Tax Guide (CCH) ¶ 20-000, at 5013 (Jan. 1997) (noting that California’s use of acquisition value pursuant to Proposition 13 is the exception to this general practice).

222. See, e.g., Michael D. Rawlins, Note, Taxation, Equal Protection, and Inquiry into the Purpose of a Law: Nordlinger v. Hahn and Allegheny Pittsburgh Coal Co. v. County Commissioner, 1993 BYU L. REV. 1001 (1993). The author suggests that the arguably contradictory outcomes in the two cases can be explained as follows: “Counsel for Webster County would have been better off letting the Court search for that ‘plausible purpose’ [by stretching its judicial imagination] rather than articulating a goal that the assessor’s actions could not possibly accomplish.” Id. at 1014. Further, “the law maker should also query whether the court will summarize concoct a purpose as the Supreme Court did with Proposition 13.” Id. at 1016 (emphasis added). And finally:

[T]he Nordlinger court claimed to have found the precise purpose of Proposition 13 where no single purpose existed. In actuality, the Court had a cornucopia of plausible purposes from which it could, and did, select—some happened to match the consequences of the initiative. The result was traditional deferential rational basis scrutiny. After Nordlinger, counsel for the government would be wise to avoid alleging that an actual, primary purposes exists; the Court may be more likely to exercise judicial imagination and find a legitimate purpose effected by the scheme.

Id. at 1017–18 (emphasis added).
unlikely. Repeal would be, at a minimum, politically unpopular. Perhaps for this reason, few commentators have advocated the complete elimination of initiatives. Practically, initiatives properly structured could serve as an important safety valve and could be a very useful conduit for public opinion. It would be more efficacious to attempt to structure an accommodation between direct democracy and republicanism such that, in the financial area at least, legislative outcomes would not be summarily trumped by direct democracy.

1. The Role of the Courts—State courts have historically dealt primarily with the validity of citizen initiatives through a variety of preliminary procedural issues eschewing substantive issues. These issues have included such matters as verifying the integrity of the petition process by reviewing the role of persons collecting signatures, validating signature collected (both as to number and credibility), and determining that the “single-subject” limitation has been met. Assuming that the initiative passes judicial muster, practical, initiatives properly structured could serve as an important safety valve and could be a very useful conduit for public opinion. It would be more efficacious to attempt to structure an accommodation between direct democracy and republicanism such that, in the financial area at least, legislative outcomes would not be summarily trumped by direct democracy.

223. See Frickey, supra note 11, at 446 ("[T]he abolition of direct democracy . . . is politically infeasible."); see, e.g., High Court Strikes From Ballot Proposal To Require Voter Approval of New Taxes, [1997] 96 Daily Tax Rep. (BNA), at H-3. In reacting to the news that the Florida Supreme Court had killed a ballot question that would have placed on the 1998 general-election ballot a proposed constitutional amendment to require voter approval of any new state or local taxes, David Biddulph, chairman of the Tax Cap Committee, expressed outrage at the court's action saying that the decision amounted to denying citizens their constitutional right to change government and stymied the will of the more than 930,000 persons who signed petitions to place the proposal on the ballot. Id.

224. For example, in spite of his expressed grave misgivings, Bell stopped short of calling for a ban or referenda and initiatives. (Blacks and other minorities neither seek nor need absolute protection against the dangers they face from direct democracy. There will therefore be no call here for a ban on referenda and initiatives.) Bell, supra note 210, at 22. Note that there exists a group of scholars who argue that initiatives are inherently unconstitutional. See, e.g., Hans A. Linde, When Initiative Lawmaking is Not “Republican Government”: The Campaign Against Homosexuality, 72 OR. L. REV. 19 (1993); Catherine A. Rogers & David L. Faigman, “And To The Republic For Which It Stands”: Guaranteeing a Republican Form of Government, 23 HASTINGS CONST. L.Q. 1057 (1996).


226. See Frickey, supra note 11, at 446 (arguing that direct democracy should be difficult to use, should be targeted at obvious legislative malfeasance or nonfeasance, and should not displace the legislative function). Clark suggests several situations that may be particularly well-suited to direct democracy. These are (1) where agency costs of representation may be especially high; (2) where measurement of priorities is inessential; and (3) where receiving direct input is considered more important than measuring priorities—though a case could be made for the need to assess. Clark, supra note 127, at 471–72.

227. See DUBOSE & FEENEY, supra note 13. For a very recent example of judicial response to a violation of the “single-subject” limitation, see Taxpayer Protection Alliance v. Arizonans Against Unfair Tax Schemes, 16 P.3d 207 (Ariz. 2001). At trial, Proposition 107 which would have repealed the state’s income tax was removed from the November general election ballot. The initiative was found to have log-rolled, impermissibly combining several
however, none of these issues reach fundamental concerns such as the efficacy of the effort to educate voters, capping out-of-control expenses, and illuminating and eliminating undesirable proposals. The very troubling absence of a meaningful deliberative enactment process suggests that state or federal courts or both undertake a more aggressive substantive examination either by employing a heightened standard of review of such products or by redefining "rational basis" review in the context of citizen initiatives.\textsuperscript{228}

A heightened standard of review has considerable appeal. It preserves the mechanism but subjects it to more rigorous judicial review. A number of commentators have argued for a more aggressive judicial evaluation.\textsuperscript{229} However, by no means is there unanimity on this point. A substantial number of commentators have concluded that a more nuanced examination is either inappropriate, unwarranted, or both.\textsuperscript{230}

In any event, I have reservations about the efficacy of a more aggressive judicial review. Courts are simply not structured to discharge what is, in the final analysis, a legislative function. While a court will certainly have a greater appreciation of where an enactment fits into the legal landscape than will an ordinary voter, the necessary fact-finding, the weighing and balancing of interests, the determination unrelated issues into a single ballot measure. The Arizona Supreme Court subsequently affirmed the trial court's ruling. \textit{Id.} See also Kurrus v. Priest, 29 S.W.3d 669 (Ark. 2000), where that court concluded not only that the ballot title of proposed Amendment 4 (a proposed amendment to abolish state and local sales and use taxes on used goods, prohibit the increase of taxes without voter approval at a general election, provide for a three-year statute of limitations on actions to recover taxes by the taxing authority or by an aggrieved taxpayer) was insufficient and misleading, but also surprisingly (because rarely done) made the substantive determination that the proposal would violate the federal and state constitutions by impairing the obligation of contracts.

\textsuperscript{228} For example, notwithstanding the clear financial disadvantage temporally, undeniable, and irrevocably imposed upon post-1978 property purchasers, the absence of any reasoned tax policy underlying Proposition 13, that enactment was not examined in any meaningful way by the majority of the \textit{Nordlinger} Court. The highly permissive standard of review flowing from doctrinal constitutional rational basis analysis employed in \textit{Nordlinger} perpetuated a policy deemed rationally related to a permissible state objective, but in fact, demonstrably unfair. \textit{See Nordlinger v. Hahn}, 505 U.S. 1 (1992).

\textsuperscript{229} \textit{See}, e.g., Bell, \textit{supra} note 210, at 23. ("The courts should at least recognize that the initiative and referendum may operate as a nonracial facade covering distinctly discriminatory measures... The evidence, both historical and contemporary, justifies a heightened scrutiny of ballot legislation similar to that recognized as appropriate when the normal legislative process carries potential harm to the rights of minority individuals."); \textit{see also} Eule, \textit{supra} note 9, at 1558; Mihui Pak, \textit{The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives}, 32 COLUM. J.L. & SOC. PROBS. 237, 239 (1999) ("[R]eviewing courts should... use strict scrutiny as the standard of review.").

of appropriate trade-offs are beyond a court's competence. A court will encounter significant difficulty in procedurally assessing a constitutional initiative in accordance with standards used for legislative products. And it will likely stray beyond permissible judicial boundaries in attempting to do so. As I have argued, the legislator should understand or may be presumed to understand where a particular enactment fits in the overall fiscal picture. A judge cannot be expected to have this breadth of oversight. Thus, a substantive examination places a court in a "lose-lose" posture.

In the final analysis, a court faces the same short-sighted binary choice presented by an imprecise instrument as the electorate—"yea" or "nay." It cannot modify or amend an initiative in any way. If an initiative is approved because it is procedurally legitimately enacted, a crude product (comparatively speaking) remains in place. In the words of Judge Linde, "invalidation of some initiatives on substantive grounds says nothing about legitimate enactment of laws that can survive judicial review of their substance."231 There is no way to reach judicially what may be obviously desirable accommodations designed to accomplish permissible policy objectives.

On the other hand, invalidating an initiative leaves the initial problem or concern unaddressed and disregards the electoral will, possibly heightening voter frustration. This outcome bars implementation of undesirable tax or fiscal policy. But it could lead to dire personal consequences for members of state, as well as federal, courts.232

A further impediment exists at the federal level. Federal courts are statutorily barred from interfering in states' tax law making unless no adequate remedy for the wrong complained of exists under state law.233 This has proven to be a formidable hurdle even where, arguably, violations have seemed clear. And insofar as recasting "rational basis" is concerned, the courts show no signs at this point of requiring explicitly articulated policy when assessing initiatives.

231. Linde, supra note 10, at 168.
233. See The Tax Injunction Act, 28 U.S.C. § 1341 (1994). The Tax Injunction Act provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Id. The Supreme Court has held that the Act prohibits declaratory as well as injunctive relief. See, e.g., California v. Grace Brethren Church, 457 U.S. 393, 411 (1982).
For all of these reasons courts seem to be the institution least able to effect the desired accommodation. Ultimately, judicial proceedings even in their present ineffectual form, are prone to generate voter hostility. And state court judges in particular are likely to be politically constrained because of the limited term of their appointments. They must either stand for election or for reappointment. Some judges have paid the ultimate price for judicial adoption of unpopular views: failure to win reelection.\(^{234}\)

2. Legislative Opportunity—This does not mean, however, that no options exist. In the present context, there may be limited opportunity for legislative action. At least three sets of options exist. First, state legislators could seek to increase the quantity and quality of pre-election publicly available information premised on the general public “right to know” by bringing more sunshine to bear on the initiative process.\(^{235}\) These enactments would parallel those adopted for representative government—enactments that have arguably improved the quality of representative governance. Second, legislation intended to make the process more accessible might be enacted. Third, post-election data might be made available.

Pre-election disclosure requirements might include the following. The process used to satisfy the signature requirement could be disclosed. Such information would identify the gatherers, whether they were paid and, if so, by whom, the basis of such payment, and total amount paid.\(^{236}\) Principal proponents (and opponents) could be identified along with relevant financial data.

Measures intended to better substantively inform the public may also be enacted. Synopsized information relating to an initiative’s objective could be required.\(^{237}\) The absolute number of initiatives in

\(^{234}\) See Gibeaut, supra note 232.

\(^{235}\) Perhaps Louis Brandeis said it best: “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY, AND HOW THE BANKERS USE IT 62 (1967).

\(^{236}\) Note, however, the Supreme Court’s rejection of spending regulations. See First Nat’l Bank of Boston v. Belloti, 435 U.S. 765 (1978); see also DUBOIS & FEENEY, supra note 13, at 216–19; Elizabeth Garrett, Money, Agenda Setting, and Direct Democracy, 77 Tex. L. Rev. 1845, 1873–76 (noting that suggestions made to cabin the advantage that otherwise accrues because of the ability to use paid signature-gatherers range from an outright ban on their use to a requirement that those using paid gatherers be required to exceed the minimum number of signatures otherwise required).

\(^{237}\) Dubois and Feeney question the effectiveness of financial disclosure requirements since “sponsorship information is rarely disseminated as widely as the political advertising to which it relates” and “voters do not focus on statewide initiative campaigns until the last few weeks of an election.” DUBOIS & FEENEY, supra note 13, at 217. Professor Garrett further observes that public financing of initiatives remains an option. Garrett, supra note 236, at 1876–79.

\(^{238}\) DUBOIS & FEENEY, supra note 13, at 113–18. This extends to both print and non-print media. Id. at 165–82.
any election could be limited and a process for resolving an otherwise ambiguous outcome where more than one initiative addressing the same issues appears on the ballot could be crafted. Analysis of the impact of a given initiative (fiscal or otherwise) could also be required. A useful addition here could include information disclosing whether there have been prior comparable initiatives and the outcome of those votes.

It could also be useful to require post-election disclosure of initiative electoral experience—for example, number of votes cast both absolutely and as a percentage of all voting (widely publicized) and an analysis of voting patterns. That data would provide additional insight into whether the effort was in fact populist as received. The true nature and effect of the effort would thus be further illuminated.

None of these suggestions, however, redresses the substantive problems identified with the initiative process. It would remain difficult if not impossible to consider and accommodate competing principles in the fiscal lawmaking process. Neither limiting the absolute number of initiatives nor instituting a "winner-take-all" process for resolving the problem of conflicting resolutions as Professors Dubois and Feeney suggest resolves this problem. The contextual conflicts described earlier are not "same-subject" conflicts, but rather conflicts that may exist as the electorate votes, in the same election and pursuant to different propositions, to both mandate spending and constrain tax collections. The ability to harmonize the appropriations process with policy objectives would continue to be constrained. Political participation by numerical minorities would still be problematic. Finally, the fundamental nature of the direct initiative would remain unchanged; it would continue to trump inconsistent legislative products.

3. Constitutional Amendment—Direct constitutional change that fundamentally limits the initiative process disposes of the difficulties described once and for all. State constitutions can be amended to limit the exercise of fiscal power by voters (assuming that complete elimination of citizen initiative is either impossible or politically undesirable). Since most if not all state constitutions permit

239. Id. at 153–58.
240. Id. at 158–63.
241. Id. at 118–20.
242. I recognize that persuasion can forestall constitutional change. Voters in several states have recently declined to seize fiscal control. See Tax Report, WALL ST. J., July 14, 1999, at A1 (reporting that Iowa voters narrowly rejected two proposed state constitutional amendments). However, for each state that has, another has not.
legislative bodies to move to amend constitutional language, the appropriate body could suggest such change. A number of options seem plausible. For example, a properly drafted constitutional amendment could eliminate public power to affect fiscal matters through changes in the constitution. Several states now have such language in their constitutions.\footnote{243} Alternatively, the power with regard to fiscal matters could be limited to referenda\footnote{244} or passage of legislative products only. Using the referendum or moratorium as a model, the electorate's role could be made purely reactive to legislative products. These conduits of voter opinion are equally definitive but much less disruptive to the process. Any and all allow voter input into the legislative process while simultaneously affording the affected legislative body an opportunity for reflection and deliberate legislative reaction. Another possibility is to require a supermajority of all those voting for enactment of public instruments (but simple majority for legislative action).\footnote{246} Further, Professor Clark has suggested that the process itself might be modified in order to make it more sensitive to voter priorities. This might be done by using cumulative plebiscitary voting or multi-issue ballots offering a choice from quite different possibilities.\footnote{247} Finally, sunset provisions could be made a part of such enactments.

Finally, if the power remains uncurbed in any of the ways suggested, it may be tempered by changing its immediate effect. Briefly, instead of treating such enactments as self-executing, they could be recharacterized pursuant to appropriate constitutional amendatory language as instructions to the appropriate legislative body—

\footnote{243} The Alaska constitution, for example, bans the use of initiatives to make appropriations. ALASKA CONST. art. XI, § 7.

\footnote{244} That is: through the use of the indirect initiatives akin to those historically used for the validation of general obligation bonds.

\footnote{245} Eule, supra note 9, at 1574–75 (finding such participation fundamentally different from unfiltered products).

\footnote{246} In the same vein, Frickey notes several suggestions for restructuring the direct initiative: (1) to limit the state constitutional amendment process to matters of governmental structure, organization, and powers, and to the basic rights of persons against their government; (2) to require initial referral of constitutional amendments first to the legislature for consideration with approval predicated on meeting a voter supermajority requirement of sixty percent; or (3) that constitutional amendments be referred to the legislature with no ballot-box budgeting. Frickey, supra note 11, at 446.

\footnote{247} See Clark, supra note 127, at 471.

\footnote{248} The best and most recent example of the use of sunsetting provisions, albeit on the federal level, is drawn from the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified in scattered sections of 26 U.S.C.). That act makes changes in the federal tax code, the vast majority of which will disappear for tax years beginning after December 31, 2001 if Congress does not take additional action during the interim period.
possibly with a delayed fuse. If the legislative body failed to take appropriate action within some reasonable period (perhaps over the course of one legislative session), the enactment would take effect. Under this approach, the legislative body would have the necessary latitude to structure the "directive" (for want of a better term) in a manner more complementary to the overall scheme of governance thus hopefully achieving a smoother integration of electorate wishes into the overall structure. In this way, the will of the electorate could be accommodated in a less disruptive fashion.

Changes of this kind would preserve direct democracy essentially in its present form but within more manageable limits. It could result in more credible reliance by courts on rational basis review because the enactment will have been considered in a traditional legislative context. The judicial branch would thus be more legitimately able to do what it is constituted to do: assess and interpret the law with the assurance that a deliberative process has, in fact, taken place. In this framework, rational basis as a standard for review is at least understandable if not always well-received. That is to say, the decision rendered may not be the outcome preferred by a particular party, but the considerations supporting the outcome are less likely to have been speculative. Further, such change would enable the legislative process to screen out more egregious "personal noise,"

249. Garrett suggests public hearings and legislative action and deliberation prior to the popular election. She also suggests financial disclosure rules in order to highlight any interest group activity. Garrett, supra note 169, at 27.

250. Linde, supra note 10, at 170.

251. Sunstein summarizes the interaction of the federal judiciary and administrative agencies as an attempt to diminish the authority of powerful private groups over the regulatory process by ensuring that regulatory decisions are reached through a process of deliberation about statutorily relevant factors. These requirements, he says, "amount to an effort to promote the Madisonian conception of politics and representation without according special protection to private property or private ordering." Sunstein, supra note 11, at 85. He continues:

[T]he special role for courts might be justified on the ground that judicial insulation provides an opportunity for critical scrutiny of citizen preferences—in Madison's terms, refinement and enlargement of the public view—rather than their mechanical implementation. In this respect, a relatively active judicial role is designed to fulfill the purposes of the original constitutional scheme, which attempted to insulate national representatives in order to facilitate the performance of their deliberative tasks.

Id. at 86. This objective is no less compelling on the state level in the context of citizen initiatives.

252. See criticisms supra note 222.

253. As noted in the beginning of this Article, the Federalists feared public acts derived from motives of interest or passion: economic self-interest or collective emotions whether religious or patriotic of love, fear, or hate toward some group or object. Linde, supra note
respond to legitimate public concerns, and permit consideration (and where possible accommodation) of those concerns in the process. Legislators would have a powerful incentive to consider possible responses to the voter preferences in a fashion defined by the requirements imposed by their oath of office. The process of enactment and the results of this consultative undertaking are public, and the electorate can hold the legislative body accountable for whatever action it ultimately deems appropriate. Thus both flexibility and accountability are assured. An electorate that cared enough to send a message through the ballot would certainly be interested in the legislative response and constitutional considerations would necessarily form the context for the framing of that response. All of these concerns are of heightened importance where a carefully nuanced approach to legislation is dictated. That area of concern certainly includes fiscal matters.

The lawmaking process should be open and accessible, rational and deliberate, and policy concerns should be articulated and, wherever possible and appropriate, accommodated. No one can convincingly argue that the amending process that makes an initiative a part of the governing entity’s law is deliberate in this sense. Unless the legislative arena is the cauldron from which such enactments emerge, the range of considerations that should properly be publicly raised and responsibly debated can never affect the final product.

The point here is not so much that reducing the tax burden is inevitably unwise or that disparate tax burdens should be always viewed as inherently unfair. Rather, this discussion relates to the process for making taxing and allocative decisions. Unfairness may be legislatively deemed a secondary concern, and is certainly an issue of less than constitutional import. After all, there is no constitutional requirement that law be fair in order to be rational. When fiscal policy is at issue, however, every effort should be made to accommodate what may be disparate interests within a framework encouraging more, not less, deliberation. Revenue systems and budgetary allocations of necessity ultimately rely upon a perception of rationality for long-term acceptance. Otherwise, their survival becomes imperiled, for citizen confidence in the competency of government is adversely affected—especially where there are, as here, clear winners and losers.

10, at 166–69. While the possibility of such animus can never be eliminated, the effect is far more likely diminished in a republican setting. Id. at 169–72.

254. McGowan v. Maryland, 366 U.S. 420, 425–26 (1961) (noting that, as a general rule, “legislators are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.”).
CONCLUSION

If it were possible to eliminate the property tax then the problems discussed here would disappear to that extent. The property tax, however, of necessity remains well entrenched. The economic press of recent events suggests that the tax has heightened, not lessened, importance. The central role of the legislature in grappling with the state and local fiscal situation cannot be ignored. State constitutions place limits on the tax base, the tax rate, and local budget management generally. A realistic assessment of the effect of such limitations leads inexorably to the conclusion that the legislature should properly be accorded maximum latitude for responding to governmental economic burdens. This proposal maintains that legislative role even as it responsibly accommodates democratic input.

The property tax is a very important part of the system of governmental finance. It is, however, only a part of a system, which is, increasingly, an interdependent one. A better-administered tax will likely improve local finance but is by no means a panacea. Meaningful reform, if it is be successful over the long term, must take that into account and must be reflective of informed collective judgment embracing financial considerations generally. Reform should not result from the action of a rump coalition acting pursuant to a myriad of concealed considerations. Even if voter initiatives are structurally perfect, time is needed to debate, reflect, and adjust for important policy reasons as well as to adjust to the mandate for change.

The most unfortunate aspect of the popular seizure of fiscal control, thus, is its effect on the larger debate that should be taking place. The present debate, cast in terms of mechanics and immediate tax burden, would much more usefully focus on an examination of the larger question: what is organized government prepared to pay for and on what level? This is a complex question involving several subparts. These sub-issues include the following: (1) What tax and how is it to work? (2) To what use should proceeds be put? And for what length of time? (3) How does the nature of the tax affect allocation decision-making and where should final authority to decide reside? This is an analysis that has never taken place in a coherent, direct fashion. The dimensions of the debate have been changed by rampant constitutional amendment that

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255. See data supra note 51.
hobble the ability to ultimately make reasoned decisions and all too often drive the debate in non-initiative as well as initiative states.\footnote{See generally, Paul E. Peterson, The Price of Federalism, (1995). Sexton et al. also speak to this:}

The continuing downward shift of the financial burden has made necessary a close, increasingly painful, contentious examination of state and local fiscal policy. Driven by the changes now well underway, the system is becoming one that cannot be made to respond to these characteristics in light of capture by a numerical minority unmotivated to participate in a republican system of governance. It is also becoming a part of the problem—a system that is ever more regressive and exacerbates the entrenched and exponentially exploding differences in wealth in this country.\footnote{See Edward J. Caffery et al., supra note 44, at 1374:}

It is unacceptable for either organized bodies of governance or rump voter majorities to seize control of fiscal machinery recklessly abdicating responsibility for funding government—inappropriately compromising equity in taxpayer treatment, and reallocating public revenues in the absence of a meaningful debate. The imbalances certain to emanate from this appropriation of power and abdication of republican governance pose a major threat to the political consensus on which both local and state governments necessarily rests. How we as a nation tax ourselves and spend common resources says a very great deal about our self-view of what a civilized society means. We ignore this brooding fiscal crisis at our own peril.

Our final recommendation is for a fresh look at the fiscal relationship between the state and local governments. The current system of intergovernmental grants and mandates is a convoluted mix of short-term quick fixes. The only apparent policy rationale for the current system is that each rule appeared to be expedient at the time it was implemented. Over time, the layering of these rules has generated a system that cannot be understood, much less defended on policy grounds. The state should develop a new system of intergovernmental grants and mandates, one that recognizes the current budgetary and judicial realities and is true to the principles of fiscal federalism.

Sexton et al., supra note 115, at 110.

The share of [Adjusted Gross Income] reported by persons having more than $200,000 of AGI, making up 1.6 percent of the people filing returns, increased from 14.5 percent in 1993 to 21.6 percent in 1998. Those with 1998 AGI exceeding $1 million saw their share of AGI almost double from 4.9 percent of the total on 1993 returns to 9.3 percent on 1998 returns.

In these same seven years, . . . wealth has become more tightly concentrated. A little less than 40 percent of it is now held by the top 1 percent of households.