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DIRECT DEMOCRACY IN AMERICA

*Sherman J. Clark**

LAWMAKING BY INITIATIVE: ISSUES, OPTIONS, AND COMPARISONS. By *Phillip L. Dubois* and *Floyd Feeney*. New York: Agathon Press. 1998. Pp. xii, 268. \$30.

PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE. By *Peter Schrag*. New York: The New Press. 1998. Pp. 344. \$25.

The phrase "laboratories of democracy," as applied to the states, seems most often to mean something more like "democratic laboratories" — democratic testing grounds for various approaches to social problems. What sort of welfare reform will be most effective? Let Wisconsin try out Plan A, while Michigan experiments with Plan B. What combination of tort liability rules will achieve desired levels of compensation and deterrence? Let the states experiment with strict liability, comparative negligence, or various no-fault schemes. It is also true, however, that the states are literally laboratories of democracy — arenas in which democratic institutions are themselves experimented with and tested. One such experiment, an institution now being tested, is the plebiscite. Since South Dakota adopted the initiative a century ago, American states have been testing the efficacy of direct democracy.¹ Indeed, if the current array of states utilizing the initiative had been designed as an experiment to test that method of governance, one could hardly ask for a better distribution. Approximately one-half do and one-half do not allow for the initiative. Those that do are spread out from Maine to California, albeit with a somewhat greater concentration of initiative states in the West, and include both small and large states. Collectively, the states now have a great deal of experience with lawmaking *sans* legislatures.

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1. In the decade following South Dakota's adoption of the initiative, eight more states followed suit. By the end of the progressive era, nineteen states had adopted the initiative. Currently, twenty-four states plus the District of Columbia provide for lawmaking by initiative. Those states, in the order in which they adopted the initiative, are: South Dakota (1898), Utah (1900), Oregon (1902), Nevada (1904), Montana (1906), Oklahoma (1907), Maine (1908), Michigan (1908), Missouri (1908), Arizona (1910), Colorado (1910), Arkansas (1911), California (1911), Idaho (1912), Ohio (1912), Nebraska (1912), Washington (1912), North Dakota (1914), Massachusetts (1918), Alaska (1959), Florida (1968), Wyoming (1968), Illinois (1970), District of Columbia (1977), and Mississippi (1992). Dubois & Feeney, p. 28 tbl. 1.

Those of us hoping to learn from this experience need several distinct sorts of information. First of all, we need information about the initiative process itself. Who has used it? To what ends? How does it work? What procedural difficulties have arisen? What solutions to those difficulties have been attempted or suggested? Providing this sort of information is the aim of Philip L. Dubois² and Floyd Feeney³ in *Lawmaking by Initiative: Issues, Options and Comparisons*. Dubois and Feeney survey the initiative process and outline the key procedural problems which have arisen in the practice of lawmaking by initiative. While they focus on the experience of California, Dubois and Feeney have collected data regarding direct lawmaking across the country and abroad. They accurately and cogently describe many of the procedural issues generated by the initiative: signature requirements, ballot complexity, voter understanding, campaign finance, and judicial review. Dubois and Feeney's valuable contribution is among the handful of books any student of direct democracy should have on his or her shelf.⁴

Information about the initiative process itself is but one piece of the puzzle. Making sense of the experience of the states requires context. It requires an understanding of the political and social circumstances under which real world initiatives are proposed, debated, and voted upon. Alongside political science, we need political and social history; and that is precisely what Peter Schrag⁵ offers in *Paradise Lost: California's Experience, America's Future*. Schrag's book is not about direct democracy *per se*. It is about California. It is about the political life of the state, and the way in which that life has changed over the past two decades. As Schrag recognizes, however, to write about California politics is to write about the initiative. As a result, Schrag's book is as useful and interesting to students of the initiative generally as it is to those primarily interested in California politics. It puts meat on the bones described by Dubois and Feeney, and fleshes out the "too too sullied" political world in which the process must work.

I suggest, however, that the picture remains incomplete — at least two additional pieces of the puzzle are needed. Not only must we understand how the initiative process works, and not only must

2. President, University of Wyoming.

3. Professor of Law, University of California, Davis.

4. Essential recent book-length treatments of direct democracy include: THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* (1989); DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984); DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* (1989); BETTY H. ZISK, *MONEY, MEDIA, AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS* (1987).

5. Peter Schrag, recently retired, was for nearly two decades the editorial page editor of the *Sacramento Bee*.

we understand the particular political goals of those who make use of the process, but also we should try and think carefully about two closely related aspects of the initiative picture. First, we need an applied theory of direct democracy. I use the term "applied" to emphasize that what is needed is not abstract theorizing but grounded justification. On what understanding of democracy, or of politics generally, is the plebiscite a wise or legitimate way to make political decisions? What does the plebiscite accomplish that representative government does not? What are we hoping to achieve through direct, popular lawmaking? It is neither adequate nor accurate to toss out airy abstractions about "the popular will," or "giving the people a voice in government." What, precisely, is "popular will"? On what basis can one conclude that the plebiscite is a reasonable way to measure it? Why is the initiative a sensible way to hear the voice of the people?

Second, we ought to check the popular resonance of our applied theory by investigating what might be called the social meaning of direct democracy. What does the initiative process mean to those who advocate its use? Is the public understanding of the plebiscite the same as, or even consistent with, any available theoretical justification? Why do people embrace the initiative as a form of government? It is not enough to respond that people will embrace whatever processes they think will get the results they desire. For some reason, or some combination of reasons, the initiative has been seen by many as more than simply useful. As Dubois and Feeney observe, "many see the initiative as the very essence of democracy" (p. 1). Why so? One can imagine a glib response to my question. The initiative has been accepted as the very essence of democracy, one might respond, because it *is* the very essence of democracy. The likelihood of such a response suggests the importance of the question itself. How and why have we come to see a practice eschewed by our federal Constitution and not permitted by the states for the first century of our nation's history, as the paradigm of democratic government? What does the initiative mean to us?

I. THE INITIATIVE PROCESS

Lawmaking by Initiative grew out of research the authors did for the California Policy Seminar, a joint program of the University of California and the California state government. The book does not contain new empirical research, but rather marshals and organizes the available data in ways designed to allow an overview of the initiative process. In this effort it succeeds. Dubois and Feeney describe the process of initiative lawmaking with admirable breadth. *Lawmaking by Initiative* would be among the first books I would

recommend to a colleague or student interested in, but unfamiliar with, the practice of direct democracy in America. What the authors fail to provide, however, is an adequate conceptual framework in which to evaluate the description they offer.

Lawmaking by Initiative begins with a brief discussion of the history of the plebiscite in America and an even briefer discussion of the theoretical issues surrounding direct democracy generally. These chapters are unsatisfying. For example, Dubois and Feeney gloss over the question of whether direct democracy is or is not compatible with the sort of republican government envisioned by the Founders. They offer little in the way of theoretical grounding and do not outline a view of the goals of government against which to evaluate the information they provide. Indeed, they seem uninterested in what to many might appear the fundamental question: Is the initiative process a sensible or appealing way to go about making laws? In their own words:

This book does not seek to settle the question as to whether the initiative is a wise institution. Rather, it seeks to describe the major issues that have arisen in the use of the initiative and to discuss the policy options available for addressing these problems. By elucidating the problems that have arisen and the possible solutions to these problems, the book seeks both to inform the debate about the wisdom of the initiative and to offer suggestions for improvement to those jurisdictions that choose to use the process. [p. 2]

At one level, this is all well and good, there being nothing wrong with a decision to inform rather than evaluate or theorize. Unfortunately, the information provided is rendered less useful, and the accompanying "suggestions for improvement" less reliable, by the absence of a clearly articulated conception of democratic government. Put simply, it is difficult to describe problems with a process, let alone suggest improvements, without some sense of what the process can or should be trying to accomplish. Imagine an architect attempting to improve a building without thinking carefully about the uses the building is capable of serving or intended to serve.

This lacuna does not undermine the entire book. For example, the introductory chapters are followed by a comparative description of initiative procedures. There, Dubois and Feeney's "just the facts" approach is welcome and appropriate. In Chapter Four, the authors review the various forms of the initiative in use. Chapter Five briefly describes the initiative process in Switzerland and elsewhere. Chapter Six describes the processes employed by the several states in greater detail, addressing, for example, the distinction between state constitutional amendments passed through the initiative and initiative statutes. This information will, for the most part, not be new to students of the plebiscite, but it is well-organized, accurate, and above all, clearly presented. A series of charts outlin-

ing various comparative features provides a nice sense of perspective on the variety, frequency, and nature of initiative lawmaking in the United States (pp. 28-44). These descriptive chapters suffer little, if at all, from the book's lack of a thoroughgoing theoretical grounding.

Beginning with Chapter Seven, the book turns to a discussion of the procedural issues surrounding the initiative. Even there, the absence of an expressly articulated conceptual framework is not a fatal flaw. Some procedural problems can be identified without articulating a vision of what the process is intended to accomplish. To return to the architectural analogy, regardless of the uses to which a building will be put, one can assume that certain basic features — a solid foundation, a sound roof — are desirable. Similarly, in the context of the initiative, it can be safely assumed, that providing voters with accurate information is better than misleading voters and that comprehensible ballots are better than confusing ones. For this reason, Dubois and Feeney's analysis of voter understanding and ballot complexity is straightforward and valuable. The authors describe the problem: voters often do not understand ballot issues or do not understand them as well as might be hoped. In fact, some initiative measures have been so poorly (or deceptively) drafted that substantial percentages of voters later reported having voted contrary to their own preferences (pp. 118-19). Dubois and Feeney review methods explored by various states in their efforts to reduce complexity and better educate voters (pp. 113-80). For example, voter comprehension can be improved by limiting the length and number of initiatives, requiring the subject matter of the initiative to be clearly stated in the title, and requiring the consequences of a "Yes" vote to be clearly stated. Similarly, it may be possible to improve the Voter Information Pamphlets provided to voters.

Other procedural issues, however, are more difficult to evaluate without some sense of the ends the process is meant to serve. Consider, for example, the method through which initiatives are qualified. Advocates of a measure are required to collect a certain number of signatures during a specified period of time prior to the election. The number of signatures required is generally calculated as a percentage — ranging from five to ten percent — of votes cast in the most recent gubernatorial election (p. 33). California, for example, allows supporters of an initiative 150 days to gather signatures totaling 5 percent of the votes cast in the last gubernatorial election, a percentage which currently translates to something in the neighborhood of 700,000 signatures (p. 97). This qualification process has become highly professionalized, with paid signature gatherers employed to supplement or replace volunteers. Dubois and Feeney report anecdotal evidence that the process emphasizes the efficient collection of signatures rather than the dissemination

of information or the gauging of public opinion. The upshot is that "paid circulators are able to qualify a measure even if no one cares strongly about it" (p. 99). Even volunteer signature gatherers are discouraged from any actual attempts at public education. According to one widely quoted campaign manual:

Volunteers should not converse at length with signers or attempt to answer lengthy questions. While such a conversation is in progress, a hundred people may walk by unsolicited. The goal of the table operation is to get petition signatures, not educate voters. All efforts to educate voters will be futile if the initiative does not qualify for the ballot.⁶

Research suggests that "only a fraction of the citizens who sign petitions attempt to read or understand what they are signing" (p. 96). As a result, "[i]t is highly doubtful," Dubois and Feeney conclude, "that the signature qualification process has ever reflected careful voter deliberation" (p. 96).

Dubois and Feeney accurately identify one obvious problem with this state of affairs — the lack of necessary correspondence between petition signatures and public support. The authors assume that

it is desirable, as a matter of state policy, to have an initiative qualification process that is more reflective of the degree of popular support for a proposal (or voters' willingness to submit the issue for a public vote) than it is the ability of supporters to circulate their proposal. [p. 100]

On this basis, they outline and evaluate a range of potential reforms to the initiative qualification process, all designed to increase the extent to which signatures on petitions reflect public support. The authors conclude that "if the signature solicitation process is to become meaningful as a barometer of the breadth and depth of public concern, ways must be found to separate the solicitation of signatures from the collection or acquisition of signatures" (p. 106). For example:

Solicitors could be limited to discussing ballot measures with prospective signers and to distributing the official ballot title and summary along with appropriate campaign literature urging voters to support placing the matter on the ballot. Petitions for signatures could then be made available for voters to sign in a number of prominent public locations, such as state and local government offices, public libraries, and fire stations. [p. 107]

Dubois and Feeney's suggestion may or may not offer a method of improving the signature-based qualification process, depending on what counts as improvement. Severing the solicitation of support from the gathering of signatures would in all likelihood reduce the number of signatures obtained through pressure, but it might

6. P. 95 (quoting SCHMIDT, *supra* note 4, at 199).

also reduce the number of "legitimate" signatures that advocates are able to obtain. Before one can decide whether the authors' prescription would make the process more effective, one needs to decide what the process ought to affect.

Dubois and Feeney are ambiguous on this point. They assume that the process ought to reflect "the degree of popular support for a proposal (*or* voters' willingness to submit the issue for a public vote)" (p. 100; emphasis added). But of course these are two different things entirely. Do we want to measure popular support for a particular issue? If so, we might want to ensure that as many signatures as possible represent informed decisions on the merits. Or do we want to measure popular willingness to put the issue to a vote? In that case, voters may well be able to decide with little or no information about the proposal itself. One can imagine, for example, a citizen reasoning as follows: "I don't know what I think about this issue yet, but I do think that in general people ought to be given the chance to vote on issues of this sort." Elsewhere, the authors argue that:

The goal of reform should be to ensure that voters are sufficiently informed about the contents of initiative petitions so that their signatures, considered in the aggregate, represent a critical minimum number of individuals who are sufficiently dissatisfied with the substance of existing policy (or the absence of policy) that they want the matter brought before their fellow citizens for discussion and disposition by majority vote. [pp. 99-100]

This represents yet another potential criterion. Perhaps signature-based qualification requirements ought to measure popular dissatisfaction with current legislative policy. If so, why the emphasis on voters being "sufficiently informed about the content of initiative petitions" themselves?

What sorts of issues ought to get on the ballot? Those with a high likelihood of success? Those touching on issues as to which popular dissatisfaction is high? Or might there be substantive criteria? Are certain kinds of issues better suited to plebiscitary law-making than others? These questions cannot be answered without some understanding of what the initiative process as a whole is designed to accomplish.

It might appear that the theoretical basis for the initiative is self-evident. Indeed, one reading of Dubois and Feeney would be that they do not eschew theory, but rather assume it — they assume that the theoretical pedigree of the initiative is so clear as to require neither explanation nor defense. For example, the authors observe that the initiative was supported during the Progressive Era by "reformers who were searching for ways to make the political system more responsive to the popular will" (p. 10) and was "designed to increase the power of the electorate" (p. 3). They further note that

the initiative is "widely regarded as a useful method for expressing the popular will" (p. 3). Perhaps the theory behind direct democracy is nothing more complicated than populism. The populist might put it this way: We believe in popular sovereignty. That means that we, the people, are the source of political power. We can and do delegate to our representatives the authority to make many day-to-day political decisions, but we remain in charge. Direct democracy is simply a way in which we are able to make some decisions ourselves. Call this the basic populist defense of the plebiscite.

This understanding, or something like it, seems to have informed the decisionmaking of the Supreme Court in its most well-known direct democracy case, *City of Eastlake v. Forest City Enterprises*.⁷ There, the Court, in an opinion by Chief Justice Burger, upheld the constitutionality of a City Charter provision, enacted by popular vote, which required that any land use changes passed by the City Council be approved by referendum. The provision had been challenged as a standardless delegation in violation of the Due Process Clause. The Court, however, held that:

A referendum cannot . . . be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. . . . In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.⁸

The plebiscite, by going directly to the source of political power, is, on this reading, the process *least* in need of guiding standards or legitimating justification. According to the Court, direct democracy is a straightforward way to "give citizens a voice on questions of public policy."⁹

Despite its pedigree, this basic populist justification is neither sufficient nor satisfactory. It is insufficient because it begs the question of which issues should be decided directly. Presumably, not even the staunchest supporters of the initiative would be willing to forego entirely the benefits of representation. Dubois and Feeney list, as the first of several guiding principles: "The concept that laws should normally be developed through the legislative process and that the initiative is a device to be used primarily when the legislative process is blocked" (p. 223). It is far from clear, however, what one ought to understand by the term "blocked." Does this mean "procedurally precluded from considering an issue," as in the case of an entrenched state constitutional provision? Dubois and

7. 426 U.S. 668 (1976).

8. 426 U.S. at 672 (citations omitted).

9. 426 U.S. at 673 (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971)).

Feeney do not recommend limiting the initiative to situations in which the legislature appears literally unable to consider an issue. At the other extreme, "blocked" in this context could mean simply "unwilling to give the people what they want." If that is the meaning of blocked, however, it provides literally no guidelines for limiting the appropriate scope of initiative lawmaking.

If, as seems likely, Dubois and Feeney mean to suggest that direct lawmaking is appropriate on some occasions but not others — that some but not all issues ought to be submitted to a popular vote — they need to provide some criteria. In a brief discussion of "Subject Matter Restrictions," the authors offer a clue as to what sort of criteria they might endorse. They note that many states limit the extent to which budget matters can be decided by initiative. "Because the appropriations process necessarily involves comparisons among programs, it also seems unwise and ultimately unworkable to allow a great proportion of a state's resources to be appropriated through the initiative process" (p. 83). This suggests a criterion that might be called severability. The initiative should be used for issues that can be distinguished conceptually from others, such that the decision on those issues will have limited impact on other matters. This understanding would fit well with Dubois and Feeney's emphasis on the single-issue requirement and with their willingness to disparage logrolling (pp. 126-29).

But how does a severability criterion fit with the authors' assertion that initiatives should be used primarily when the legislature is "blocked"? More to the point, fiscal issues are hardly the only example of issues requiring comparisons. One's opinion on any issue is likely to be influenced by one's expectations and understandings of numerous other points. At bottom, the concerns apparently underlying a severability criterion reflect just one manifestation of a long-recognized difficulty with direct democracy — complex, real-world problems are difficult to articulate in the form of the yes/no dichotomies required by the plebiscite. If one were to limit the initiative to those issues which truly stand alone in the minds of voters, one might well end up with an empty set. It would, however, be unfair of me to criticize the severability criterion after having myself foisted it on Dubois and Feeney. Perhaps they would not embrace that basis for identifying the proper role of the initiative. Perhaps they would instead articulate an account of what it means for a legislature to be blocked, so as to render direct lawmaking appropriate. Perhaps they would offer some other criteria entirely. My point here is that they have not done so in this book.

Dubois and Feeney's vagueness over the proper role of direct democracy is perhaps indicative of a familiar tendency on the part of students of direct democracy. There seems to be some sense that

we can avoid comparing or adjudicating between direct and representative lawmaking because the two can coexist. Direct democracy, it is said, is not intended to replace representation, but merely to supplement it.¹⁰ At one level, this is true. In terms of numbers of issues decided, the initiative may be understood as a mere supplement. That is not the key question, however. The heart of the matter is not frequency but authority, and the question confronting people deciding what sort of political processes to employ is this: What process has the last word? Direct democracy, where it exists in the United States, always trumps representative democracy. An initiative can overrule the legislature. The initiative does not supplement representation, it sits above representation, wielding, in the words of the Court "a veto power, over enactments of representative bodies."¹¹

That this hierarchy (initiative over representation) goes unchallenged, indeed unremarked upon, is evidence of the force and pervasiveness of the basic populist defense of direct democracy described above. If the people are in charge, and if initiatives measure the will of the people, then *of course* initiative outcomes should trump. Not only does the basic populist defense appear incapable of providing limits upon the role of the initiative, it seems as well to deny the existence of such limits. If one desires, as do Dubois and Feeney, to somehow limit the role of the initiative, one needs to qualify (or provide an alternative to) the facile assertion that the initiative captures the voice of the people.

Fortunately, the basic populist defense of direct democracy is not only insufficient but also unsatisfactory. First of all, plebiscites suffer from a range of practical difficulties, many of which are documented by Dubois and Feeney. Given realities such as confusing and poorly drafted ballot issues, uninformed voters, limited and uneven voter turnout, and the pervasive influence of money, it is fair to ask whether initiatives ever identify the preferences of an informed and considerate majority. While recognizing many of the problems with direct democracy as practiced, Dubois and Feeney fail to acknowledge that a sufficiently egregious set of practical failings can undermine an otherwise appealing theoretical foundation.¹²

10. See Richard Briffault, *Distrust of Democracy*, 63 TEXAS L. REV. 1347, 1350 (1985) (book review) ("Indeed, to proceed by contrasting direct and representative democracy may miss the point. We do not have to choose between the initiative and the legislature: in twenty-three states we have both. In these states the legislature and the initiative not only coexist but interact in a system of lawmaking.").

11. 426 U.S. at 673.

12. I do not mean to suggest that representative government is free from similar difficulties — agency costs, if you will. Rather, my point is that the practical problems attached to the plebiscite make it impossible to conclude, a priori, that "direct" democracy is more responsive to the electorate. Indeed, we will be unable to decide which method is more re-

More fundamentally, it is not at all clear that the plebiscite would be capable of meeting the goal so frequently attributed to it — that of hearing the voice of the people — even if all of the practical problems were resolved. For example, as I have argued elsewhere, even a perfectly conducted plebiscite would disregard the intensity of preferences and thereby submerge interissue priorities.¹³ On this understanding, the “preference of the majority” and “the voice of the people” are two different things entirely, with the latter including information about the relative importance of issues. Single-issue majority votes may tell us what the most people want, but they cannot tell us what the people want most.

It may well be possible to answer this and other objections by outlining a role for the initiative in the resolution of issues as to which inter-issue priorities are less important. My concern with Dubois and Feeney’s book is not that it fails to come to terms with my or any other particular theoretical objection to direct democracy. Rather, the difficulty is that the authors fail to offer any grounding of their own — other than to note in passing that initiatives are “widely regarded as a useful method for expressing the popular will” (p. 3). This will not do. While I would and indeed do recommend Dubois and Feeney’s *Lawmaking by Initiative* for its valuable and well-presented information about the initiative in America, I would recommend as well that the authors’ recommendations for improvement be taken with a grain of salt. Each of the recommendations seems perfectly sensible, but I hesitate to take directions from someone who has not paused to ask me where I want to go.

II. THE POLITICAL CONTEXT OF INITIATIVE LAWMAKING

Peter Schrag ran the editorial page of the *Sacramento Bee* for two decades, and is as well-placed an observer of California politics as one could desire. In *Paradise Lost*, he describes what he has observed. Schrag lets us know what he sees, and he also lets us know where he stands. He believes that California politics is a lesser thing than it was decades ago in the heyday of Governor Pat Brown, and that the initiative is part of the problem. Nostalgic for the era of big, ambitious government, Schrag sees the initiative as the tool and emblem of a pinched and small minded anti-communitarian social and political ethic. While it is possible to dispute Schrag’s characterization of California politics and easy to question his allegiance to tax and spend governance, it is impossible to doubt

sponsive until we decide to what we want to respond — that is, until we fill in the underlying theoretical gap I have attempted to identify.

13. See Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998).

the value of Schrag's book to those interested in understanding the role played by the initiative in the state which has used it the most.

In the Introduction to *Paradise Lost*, Schrag cogently and accurately summarizes the five sections of his book:

- A section briefly describing California's heyday of post-World War II optimism, itself probably founded on excessive expectations, that peaked in the era of Pat Brown — roughly 1958-66 — and an examination of the demographic, economic, and political stresses that so quickly began to undermine it.
- A snapshot of California today, focusing on the state's Mississippified public services and infrastructure and the fundamentally changed government structure and social relations that California's tax revolt and its political progeny have produced.
- A section on the causes of the radical tax revolt that's associated with Proposition 13, and its consequences in California's ability to manage its affairs. Although 13 has become its enduring symbol, the attempt to mandate fiscal policies has run through scores of other ballot measures, some of them (in reaction to the tax limits) mandating certain kinds of spending, most further restricting either revenues or spending.
- An elaboration of the history, dynamics, and broader implications of California's orgy of plebiscites, as well as a discussion of the major measures of the past two decades, and their consequences both in substantive policy and in the increasingly constrained exercise of policy choices imposed on representative government in California.
- A brief coda examining the possibilities for a new political integration and a revitalized social ethic in California, describing the contrary forces pushing even further toward a market-based governmental ethic, and appraising the national implications and the stakes that ride on the outcome of the conflict between them. [pp. 19-20]

As Schrag sees it, California once represented everything good and hopeful about American political life. During the postwar years, the state poured millions into ambitious infrastructure programs including, among other things, a highway system once the envy of the nation. The public education system was unparalleled and actually aimed for the now hardly imaginable goal of free college education for all who could benefit from it. To this end, a total of nine new state colleges were opened between 1957 and 1966 (p. 36). Government was big, energetic, and above all, confident. The state government displayed, as Schrag puts it, "a cheerful willingness to raise taxes" (p. 35). Schrag quotes Governor Pat Brown's response to an assistant who, in 1960, questioned the availability of funds for the ambitious, multi-billion dollar California Water Project given the rising expenses attached to public education. Brown was undaunted: "We'll find enough money to do both. We'll build the water project and we'll build new universities and new state colleges and new community colleges and elementary

schools, too. We've got plenty of money and we have to do it" (p. 35). As Schrag notes, this "was something that no California governor — and probably no other American governor — would ever say again in the same way" (p. 35).

Things have changed. For example, California has opened no new branches of the state university system in the last two decades. The state has, however, opened twenty new prisons. California's public schools, once among the nation's best, now rank near the bottom. The state's once gleaming freeway system is crumbling — functional, but hardly the model it once was. Schrag attributes these changes — this fall from grace — to a narrow and selfish, market-based, political and social ethic. Schrag sees a state whose more prosperous residents have come to view taxes as an unwarranted, external imposition rather than a legitimate, shared community obligation. The device which in Schrag's view has both encouraged and facilitated the growth of this anticomunitarian ethic is the initiative, the very paradigm of which is Proposition 13.

By the mid-1970s in California, inflation and economic growth, combined with political measures designed to control development, were driving property values sky high. While this growth represented a boon for those who sold their homes, it meant just one thing for millions of Californians with no plans to move — higher property taxes. Between 1975 and 1978, assessed values for owner occupied homes more than doubled, and the share of the total property tax burden borne by the owners of single family homes increased from thirty-two to forty-two percent (p. 139). The prevailing attitude among California homeowners was anything but "cheerful willingness." Conditions were ripe for revolt — a revolt which took the form of Proposition 13, a property tax limitation initiative created by long-time political gadfly Howard Jarvis and conservative activist Paul Gann. As Schrag accurately describes it, Proposition 13 was designed to capture the interest, attention, and votes of those who feared being taxed out of house and home:

[Proposition 13] would be a simple scheme that any voter could understand: Property values would be rolled back to their 1975 levels and could be raised by no more than 2 percent a year for inflation until the property was sold and transferred, at which point it could be reassessed at the purchase price. The tax rate would be limited to 1 percent on the value of each parcel, with the legislature determining how that 1 percent would be apportioned among the various local agencies that had previously set their own tax rates. The only exception to that 1 percent would be for the cost of amortizing whatever local bonds were still outstanding. But henceforth, local agencies, in-

cluding schools, would effectively be prohibited from issuing any new bonds.¹⁴

With a remarkable sixty-nine percent of voters turning out, Proposition 13, the Jarvis-Gann Initiative, won in a landslide, receiving nearly two-thirds of the votes cast.

It is certainly possible to take issue with the substance of Proposition 13, and Schrag does allow himself a few shots. For example, as predicted from the outset by opponents of the measure, the overwhelming beneficiaries have been corporate, rather than residential, landowners. More generally, of course, one can ask whether the particular balance struck by Jarvis-Gann is ideal or desirable. But Schrag's point is a larger one. The passage of Proposition 13 signaled not merely a dramatic shift in policy, but a fundamental shift in the very form and method of government as well. In the past two decades, increasing numbers of key political issues have been decided by initiative rather than by the legislature. Schrag outlines this transformation in a section of his book appropriately headed "March of the Plebiscites." He describes in detail what he calls the "modern plebiscitary cycle," a "spiral of public alienation and disengagement, of constitutional reform, gridlock, unintended consequences, further alienation, and more reform" (p. 188).

As Schrag sees it, the difficulty with initiative lawmaking is not only that the wrong decisions are made, but also that decision-making is itself distorted. On one hand, the move to initiative lawmaking is generally understood as taking power from politicians and putting it into the hands of the people.¹⁵ Whatever one thinks about this characterization, initiative lawmaking certainly does one other thing. The plebiscite moves decisionmaking away from an arena in which a range of issues are considered in connection with each other over a period of time, to an arena in which issues are addressed in isolation, one at a time. It is this narrowing of focus, this blinkered vision and concomitant piecemeal decisionmaking, that is to Schrag, at least, as salient as the purported popular nature of the initiative.

The most obvious way in which the tunnel vision promoted by single-issue initiatives manifests itself is through poor or short-sighted decisionmaking. Sounding a theme which he has emphasized elsewhere,¹⁶ Schrag describes the way in which California has painted itself into a series of corners from which any movement at all, let alone effective governance, is virtually impossible. One mea-

14. P. 140. The limitation on new bonds was subsequently amended, in 1986, to allow for school districts to issue construction bonds if approved by two-thirds of the electorate.

15. As I have suggested, this characterization appears unwarranted. See *supra* note 12 and accompanying text.

16. See Peter Schrag, *California, Here We Come*, ATL. MONTHLY, Mar. 1998, at 20; Peter Schrag, *California's Elected Anarchy*, HARPER'S, Nov. 1994, at 50.

sure limits taxation and thus caps revenue, while another mandates expenditures. Absent legislative accountability, responsibility is divided between (or lost among) a dizzying array of state and local agencies. Schrag describes the situation nicely:

Paradoxically, the further the initiative process goes, the more difficult and problematic effective citizenship becomes. California has not just seen a sharp decline in the quality of public services — education, public parks, highways, water projects — that were once regarded as models for the nation. It has also seen the evolution of an increasingly unmanageable and incomprehensible structure of state and local government that exacerbates the same public disaffection and alienation that have brought it on, thus creating a vicious cycle of reform and frustration.

Each measure, because it further reduces governmental discretion, and because it moves control further from the public — from local to state government, from the legislature to the constitution, from simple majorities to supermajorities — makes it even harder to write budgets, respond to changing needs, and set reasonable priorities. And since many of those measures have irrationally — though sometimes necessarily — divided authority between state and local governments and among scores of different agencies, the opportunity for buck passing is nearly unlimited. To cite the most glaring example, because Proposition 13 specifically (and ironically) transferred a great deal of effective spending authority from local governments to the state, the state legislature, itself increasingly constrained by constitutional limits and mandates, allocates funds for local schools. But local school boards have, at least in theory, and, again, within the constraints of their own limits, the authority for spending it.

Thus, when funds run low or programs have to be cut, it is nearly impossible to determine whether accountability rests with the state's elected politicians for not providing enough or with the local board for spending it wastefully. Something similar is true for county governments. And since spending is so hopelessly tangled in formulas that have been written into the constitution — directly by measures like Proposition 98, which established mandatory minimum state funding requirements for the schools; indirectly by a three-strikes initiative that threatens to devour a large part of the state's discretionary funds in escalating prison costs — the system often runs largely on autopilot, beyond the control of any elected official. The whole fiscal system, in the view of Elizabeth Hill, California's nonpartisan Legislative Analyst, has become "dysfunctional." It "does not work together to achieve the public's goals." [pp. 11-12]

Schrag details many of the negative, if generally unintended, consequences of this situation, including the effect upon governmental decisionmaking generally. State and local policymakers, hedged about by limitations and mandates, make decisions based not on the long-term best interest of constituents, but based rather on the arbitrary but inescapable exigencies of the near-gridlock im-

posed by piecemeal, initiative governance. As an excellent example, Schrag describes the way in which local governments, barred by Proposition 13 from making reasoned property taxation decisions, pursue sales tax revenues above all else, seeming to eschew long-term light industrial or high tech development which might bring high paying jobs (pp. 178-80).

It should come as no surprise that blunderbuss fiscal measures have unintended consequences, or that measures passed without a careful consideration of the big picture fail to form a coherent financial policy. Initiative decisionmaking, however, not only disfavors careful and deliberate policymaking, it also severely inhibits, if not precludes, big-picture thinking. Initiatives, by their nature, force voters to confront one issue at a time. On one day the voters are asked whether they want lower taxes. On the next day they are asked if they want funding for schools. On yet another day the question is whether repeat felons should stay in jail. At no time are voters, or their representatives, given an opportunity to evaluate the relative importance, costs, and benefits of the particular measures in a world of limited resources and interconnected political realities.

Schrag makes a persuasive argument that the initiative is not conducive to wise decisionmaking, but he also suggests a subtle and potentially more troubling point. The plebiscite may bring out not only the fool in each of us, but the knave as well. Direct democracy is often lauded on communitarian grounds as a method of recalling people to their status and duty as citizens. It seems, however, that forcing voters to focus on issues one-at-a-time, and in isolation, leads to decisionmaking which is not only short-sighted but selfish, or worse.

Without making crass or oversimplified accusations, Schrag builds a persuasive case that older, well-to-do, predominantly white voters have become increasingly hesitant to fund programs they see as benefiting primarily younger residents (those with school-age children), minorities, or immigrants. Schrag correctly sees this hesitance as not a new phenomenon, but one which was evident as early as 1978, when Howard Jarvis "was writing articles complaining about aliens 'who just come over here to get on the taxpayers' gravy train.'"¹⁷ Schrag does not blame the initiative for selfishness. In his view, the initiative has been an outlet for, rather than a source of, the narrow, anti-communitarian ethic he laments. But it hardly seems a stretch to suggest that issue-by-issue initiative decisionmaking might be less conducive to communitarian generosity than other forms of governance. When political issues are couched not

17. P. 139 n.17 (citing *Illegal Aliens Take Free Ride on Gravy Train*, SACRAMENTO BEE, Sept. 17, 1978, at F5).

in the form of "What should we do?" (as is at least possible in the legislature), but rather in the form of "What do you want?" (as is the unavoidable tenor of the ballot issue), an increased level of self-centered decisionmaking appears likely if not inevitable.

Paradise Lost contains even less theory than does Dubois and Feeney's *Lawmaking by Initiative*. Unlike Dubois and Feeney's work, however, Schrag's book does not suffer by the omission. Schrag does not purport to be analyzing direct democracy. Nor does he purport to offer suggestions for improving the process. Indeed, it might be fair to say that *Paradise Lost* is not about direct democracy at all, although that might be an exaggeration, given that the book is well-researched and does contain a fair amount of information about the evolution and use of the initiative in California. My point is that the book is useful, even invaluable, to students of the plebiscite not for what it says about the initiative, but for its description of the political world in which certain well-known initiatives were enacted. Accordingly, one does not expect *Paradise Lost* to offer a theory of the plebiscite, and one is neither disappointed nor misled by the absence of any such theory.

This is not to say, however, that Schrag's analysis is completely satisfying. Although it would be unfair to expect him to provide the applied theory found wanting in Dubois and Feeney, it would not be at all unreasonable to ask Schrag to help fill an analogous gap in our understanding of the plebiscite. Schrag is admirably, perhaps even uniquely placed to describe and evaluate the public equivalent of applied theory — social meaning. *Paradise Lost* is less useful than it might be because he does not strive to understand or communicate to the reader any sense of what the processes of direct democracy mean to those who make use of them.

It is easy to miss an important distinction here. Schrag does an excellent job explaining what the *issues* mean to the parties involved. He is an astute and careful student of human motivations. Not only does Schrag give us a good sense of what moved the key political players in the drama he describes, but he also provides valuable insight into the ways in which the current political environment in California — meaning, in this context, the motivations and understandings of the voters — is intimately interconnected with the changing demographics of the state. Schrag understands that political issues have meanings and that those meanings can matter as much as the concrete, material costs and benefits of this program or that. What Schrag fails to recognize, or at least fails to discuss, is the possibility that political processes may have meanings as well.

One might be tempted to ask whether political processes mean anything at all. Do people really care about which political processes are employed, apart, that is, from the strategic question

of which process is likely to effect a particular, desired result? Historically, the answer seems to be a resounding yes. Wars are fought over forms of governance. People care not only about what the rules are, but also about how they are made, and those who would debate the propriety of lawmaking by initiative need to figure out what that process means to those who support and utilize it. I have argued elsewhere that jurists, journalists, politicians, and academics tend to argue as though "more direct" meant "more democratic."¹⁸ On one potential understanding, therefore, direct democracy stands to representative democracy as the authentic to the second best. On this reading, the plebiscite is "us" while the legislature is "them." If this understanding — an understanding I have attempted to challenge — is, as seems likely, shared by the people at large, criticisms of direct democratic outcomes will face an uphill battle. If the process is in fact sanctified in this manner, pragmatic critiques are likely to be perceived as elitist — academics and journalists trying to tell the people that they don't know what's good for them.

It will be argued that popular understanding of the initiative is more complicated than this. I agree. What the people think about direct democracy — what the process means — is not something one could hope to capture in any simplistic formulation. No doubt the "more direct equals more democratic" equation is part of the social meaning of the initiative, but only a part. Journalists like Schrag would appear to be, along with social scientists, the best source of information regarding public understandings of direct democracy. Given that Schrag has so cogently captured the public debate surrounding so many of the particular issues California voters have decided, one wishes he had also fleshed out the public meaning of the processes through which those issues have been confronted. What do Californians, and others, understand themselves to be doing when they decide an issue by initiative?

III. CONCLUSION

The two questions left unanswered by the books reviewed here — the questions of applied theory and social meaning — are closely related: What do we understand ourselves to be accomplishing, or trying to accomplish, through the initiative? Until we come to terms with this question, it will be difficult for us to learn from our collective experience with the plebiscite. Dubois and Feeney describe the process. Schrag puts the process in context. We know where we have been, and that is useful, but it will be hard for us to decide which road to take from here unless and until we devote some thought to where we are trying to go.

18. See Clark, *supra* note 13, at 434-36.