Direct Democracy and the Courts

Who should have the last word on fundamental policy issues? This book analyzes the rise of two contenders – the people, through direct democracy, and the courts. Introduced in the United States during the Progressive Era and now available in nearly half the states, direct democracy has surged in recent decades. Through an outpouring of ballot measures, voters have slashed taxes, mandated government spending, imposed term limits on elected officials, enacted campaign finance reform, barred affirmative action, banned same-sex marriage, and adopted many other controversial laws. In several states, citizens now bypass legislatures to make the most important policy decisions. However, the “people’s rule” is not absolute. This book demonstrates that courts have used an expanding power of judicial review to invalidate citizen-enacted laws at remarkably high rates. The resulting conflict between the people and the courts threatens to produce a popular backlash against judges and raises profound questions about the proper scope of popular sovereignty and judicial power in a constitutional system.

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As a native of California, I grew up in a state where citizens expect, as a birthright, to vote directly on questions of public policy. Multitudes in my state (and in several other states that have adopted the initiative process), regularly exercise this power. Sometimes dutifully, other times enthusiastically, we cast votes for or against citizen-initiated laws. Having participated in this process, I easily understand the appeal of a system that allows citizens to weigh the pros and cons of a policy proposal and vote “yes” or “no.”

I never considered the potential disadvantages of direct democracy until the late 1980s, when I worked for a year as a legislative assistant in the California state senate. As part of my orientation, I met with several legislative leaders. One of them said, “The initiative process has become more powerful than the legislature in this state. A big part of what we do here is clean up after ballot initiatives. You begin to feel like the guy who follows the parade and sweeps up after the elephants!”

That provocative remark made a lasting impression. It caused me to think more seriously about the quality of laws enacted through the initiative process, the institutional conflict between direct democracy and representative government, and the place of direct democracy in a constitutional system.

Several years later, as I began a graduate program at the University of California at Berkeley, my interest turned to the conflict between the initiative process and the courts. At the time, many controversial California initiatives (addressing affirmative action, term limits, campaign finance reform, open primaries, immigrant social services, bilingual education, tribal gaming, and criminal punishment, among other issues) were tied up in litigation. I found it striking that judges had somehow assumed a central role in the California initiative process. I wanted to learn how and why that had happened and to see whether other states had similar experiences.

Eventually, my attempts to answer those questions produced a dissertation, several articles, and this book. During the time I worked on the project, new controversies emerged, including the fight between popular majorities and
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courts over same-sex marriage. These developments confirmed the theoretical and practical importance of this conflict and renewed my hope that the book will help readers understand its dynamics.

Many people generously contributed to the book. At U.C. Berkeley, Bruce Cain, Sandy Muir, and Bob Kagan were outstanding mentors. They helped me develop a theoretical framework for analyzing the conflict between direct democracy and judicial review and an empirical approach that combined my interests in history and law. As I learned more about the initiative process, I drew on the work of many fine scholars who are listed in the notes and references. At various times, I also received specific help and encouragement from Richard Ellis, Hans Linde, Dan Lowenstein, Shaun Bowler, Dane Waters, Gerald Uelmen, Dan Smith, Liz Gerber, Thad Kousser, Todd Donovan, John Dinan, and Peter Schrag.

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