

DIRECT DEMOCRACY AS CULTURAL DISPUTE RESOLUTION: THE MISSING EGALITARIANISM OF CULTURAL ENTRENCHMENT

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Direct democracy is a form of government in which citizens vote directly for legislation rather than voting for representatives who subsequently formulate the law in a legislative body.¹ Initiatives and referenda are two methods of exercising direct democracy's power. Initiatives, also called propositions, require citizens to obtain a certain number of signatures in support of their legislation, to place the legislation on the ballot. The populace then votes either for or against the legislation.² With a referendum, the populace can toll the enactment of newly passed legislation pending popular vote.³ The initiative often allows for more flexibility than does the referendum system, which can be limited such that tax measures, for example, are exempt.⁴ A third tool of direct democracy, the recall, allows voters to remove elected representatives from office.⁵

Direct democracy is both popular and highly derided. Critics argue that direct democracy leads to a lack of adequate voice for minority constituencies,⁶ has a proclivity for allowing legislators to avoid tackling potentially explosive issues,⁷ and is too demanding of the

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1. Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 13–15 (1997).

2. *E.g.*, CAL. CONST. art. II, § 8.

3. *Rossi v. Brown*, 889 P.2d 557, 562 (Cal. 1995).

4. *See, e.g., id.* (noting that tax measures can be exempt from referenda).

5. Persily, *supra* note 1, at 14.

6. Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733, 747–48 (1998).

7. Mike Feinsilber, *Ballot Issues: Democracy or Cop-out?*, L.A. Times, July 22, 1990, at A14.

voter because information costs are high.⁸ Such criticism is not new. Indeed, James Madison felt that representative democracy was preferable to direct democracy because of the role of deliberation in the representative form.⁹ However, such criticism leaves the population of California, where direct democracy is particularly robust, unfazed. Direct democracy continues as a popular means of legislative action.¹⁰ This note tries to understand direct democracy's popularity in California as a cultural phenomenon that persists despite its inherent problems. Viewing direct democracy as a cultural dispute resolution system provides the foundation for such understanding. Once direct democracy is understood in this way, both the appeal of, and the flaws inherent in, the system become easy to comprehend and articulate. I thus analyze and define direct democracy as a method of conflict resolution in order to criticize direct democracy as a structurally flawed institution.

A dispute resolution system is a mechanism through which a society solves certain conflicts.¹¹ California's proposition system is a mechanism for resolving conflicts, much as a court of law is. The disputes it resolves are both political and legal; a legal question is presented and people vote for or against the proposition based on their political view of it. More importantly, these disputes are also cultural. When voters choose to either support or reject a proposition, they are—whether consciously or not—expressing a cultural preference. A cultural dispute resolution mechanism is then a process through which the tensions inherent in America's cultural values are resolved, even if not always satisfactorily.

American culture has been described through five core values—liberty, egalitarianism, individualism, populism, and laissez-faire.¹² These five values, it has been argued, define who Americans are and help to create a unifying sense of what it is to be an American.¹³ Of course, these values are in tension with one another. Individualism and egalitarianism, for example, do not reside comfortably alongside

8. Fountaine, *supra* note 6, at 753 (arguing, *inter alia*, that direct democracy is too demanding of voters because of costs of information).

9. THE FEDERALIST No. 10 (James Madison).

10. See generally, Harry N. Scheiber, *The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787 (1997) (arguing that plebiscitary democracy was "one of the most profound forces in shaping the nation's public life" in twentieth century).

11. See Oscar G. Chase, *Culture and Disputing*, 7 TUL. J. INT'L & COMP. L. 81 (1999) (discussing forms of dispute resolution in various cultures).

12. SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 19 (1996). See *infra* Part I.A.

13. LIPSET, *supra* note 12, at 19.

one another. This note claims that direct democracy resolves these conflicts inherent in American cultural values at the polls. Culture plays two roles in this analysis: it explains direct democracy's popularity while simultaneously exposing its systemic weaknesses. Through an understanding of direct democracy as a cultural dispute resolution mechanism, the consequences and causes of direct democracy become salient. The power of viewing direct democracy as a cultural dispute resolution mechanism is that it allows for a better understanding of direct democracy's appeal—the appeal of specific propositions and problems that result from direct democracy.

Direct democracy is an outgrowth of American culture, but it also leads to a cultural disenfranchisement of minority views. Direct democracy's social, historical, and cultural roots demonstrate the extent to which it is grounded in American culture. Yet it does not follow from the patent cultural appeal of direct democracy's theoretical underpinnings that the way in which direct democracy functions reflects the whole of American cultural values. In fact, analyzing specific, contemporary initiatives in California exposes the tension between many initiatives and American values. These initiatives pass, however, because of the culturally rooted arguments proponents make; they connect the passage of a particular initiative with well-founded cultural norms such that the particular initiative seems to be an extension of American values.¹⁴ Unfortunately, these initiatives often reflect an overemphasis of certain American values at the expense of others.¹⁵ A majority can then further impose its cultural norms on the whole of society with a claim of legitimacy.

This note consists of three parts. Part I analyzes direct democracy as a cultural dispute resolution mechanism and explains the affirmative cultural appeal of direct democracy as a means through which conflict can be resolved. An analysis of direct democracy's history and its connection to culture and disputing techniques applied in other fields is paramount in this part. Part II attempts to demonstrate the way in which direct democracy functions as a dispute resolution mechanism using two examples of recently passed California initiatives, Proposition 187 and Proposition 13. This part investigates the extent to which direct democracy functions as a cultural tool and explicates how the present initiative system in California is indicative of cultural failure. In Part III, I use the explanatory power of understanding direct democracy as a cultural dispute resolution system to

14. See *infra* Part I.A.

15. See *infra* Part II.

help clarify the political criticisms of California's system. These concluding remarks demonstrate the way in which accepting direct democracy as a cultural dispute resolution system elucidates specific problems with direct democracy as well as possible solutions to those problems.

I.

CALIFORNIA'S DIRECT DEMOCRACY SYSTEM: INTRACULTURAL DISPUTE RESOLUTION IN THE PLEBISCITE-DEMOCRATIC FRAMEWORK

This part explains how culture defines its dispute resolution process through its ontology.¹⁶ Direct democracy, much like institutions of law, is one of California's dispute resolution processes. While I will ultimately argue that culture and disputing interact such that the dispute resolution system of California's direct democracy enables a society to define its cultural values, here I establish only direct democracy as a deeply rooted reflection of culture and describe it as a method of dispute resolution. I will argue that this dispute resolution framework enables direct democracy in California to act as a democratic method of cultural bullying through which a slim majority can impose its cultural preferences on minority groups.¹⁷ A conflict regarding either what a culture deems to be an acceptable tax structure or who belongs in that culture in the first instance can be tested at the ballot box where people express their cultural views. Understanding the way direct democracy functions as a cultural tool necessitates an explanation of direct democracy as an outgrowth of culture, a result of history, and, ultimately, as a dispute resolution system.

Thus, this part has three sections. Section A describes direct democracy's cultural connection to American values through an expla-

16. See Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 278 (2002). In this article Chase describes the interaction between dispute and culture in the more traditional dispute process reflected in our judicial system. I think, however, that his point is relevant to the notion of dispute processes in general being a reflection of metaphysical perceptions.

17. See GEORGE LAKOFF, *MORAL POLITICS: WHAT CONSERVATIVES KNOW THAT LIBERALS DON'T* (1996). Lakoff provides a panoply of metaphorical options through which a society can view itself. The choices an individual—and, by extension, a society or social group—has made often unknowingly reflect how that individual will view fundamental aspects of life. Lakoff uses this metaphorical model to demonstrate how fundamentally our views of ourselves can be altered. He then applies his framework to contemporary political ideology, something that plays a small role in the present discussion. The way one sees the metaphorical family, however, has powerful implications for how one views direct democracy as a whole and specific instantiations of direct democracy.

nation of the relationship between certain values defined as uniquely American (if not Californian) and direct democracy.¹⁸ This connection between culture and direct democracy emphasizes the interaction between that system and American values. Section B glosses the history of direct democracy with a discussion of the political landscape early in the twentieth century. Through the history developed in Section B, Section C will explain both what a dispute resolution mechanism is and the way direct democracy functions as a dispute resolution mechanism. Section C transitions to a more detailed and critical analysis of specific California initiatives passed in the last twenty-five years.

A. “*American Exceptionalism*”: *The Foundation of American Culture*?

My cultural analysis is built on Seymour Martin Lipset’s *American Exceptionalism: A Double-Edged Sword*.¹⁹ Lipset sets forth a set of values that distinguishes America from even its closest western counterparts: “liberty, egalitarianism, individualism, populism, and laissez-faire.”²⁰ Laissez-faire, liberty, and individualism all stimulate the low level of social and economic regulation in the United States.²¹ The Bill of Rights, popular election of judges, and a proclivity for litigation echo a commitment to egalitarianism and populism.²² Lipset’s framework intuits a logical definition of culture in the United States. Lipset’s “creed” helps make “one’s own thoughts the object of one’s own thinking.”²³ The five values that constitute Lipset’s American creed are the shared values of the country. They define who we are as a people, irrespective of an individual’s political proclivities. They will thus be fundamental in creating a connection between direct democracy and American culture.

Crucially, Lipset conceives of these core American values as existing in constant tension. For example, the egalitarian desire to provide equality of opportunity clashes with the freedom of individualism and laissez-faire.²⁴ The fact that core societal values cohabitate with

18. See LIPSET, *supra* note 12.

19. *Id.* While one commentator has noted that American exceptionalism is not a new idea for Lipset, his 1996 book represents the first time he tried to describe conclusively the American “creed.” See Sidney Verba, *American Exceptionalism: A Double-Edged Sword*, 91 AM. POL. SCI. REV. 192, 192 (1997) (book review).

20. LIPSET, *supra* note 12.

21. Chase, *supra* note 16, at 281.

22. *Id.* at 282–83.

23. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 237 (2000). The term the authors give to this self-reflection is “metacognition.” *Id.*

24. See LIPSET, *supra* note 12, at 113–14 (discussing how these values balance differently in black and white America).

such invariable internal inconsistency strengthens Lipset's contention that these values are distinctly American. The United States is a physically large country composed of disparate ethnic, racial, and social groups.²⁵ The country's borders expanded for 125 years after the birth of the country,²⁶ and distinct immigrant groups bringing their own cultural perspective entered—and enter still—the United States. A unifying tension exists within the American creed that allows the large, varied system to thrive. The tension within Lipset's creed represents the tension of who Americans are as a people.

Examining a uniquely American institution elucidates the way in which Lipset's values exist in a state of tension within American culture. Judicial review—the mechanism through which even an appointed judge can overturn a piece of legislation²⁷—is simultaneously anti-populist, pro-egalitarian, and pro-individualistic. The system is anti-populist because the judge subordinates the manifest will of the people to a principle of the Constitution. Tension thus exists between judicial review and part of Lipset's core American value system. In fact, Jeremy Waldron feels that the entire process is beyond the scope of appropriate American constitutionalism.²⁸ Judicial review is pro-egalitarian, however, because the court can protect the rights of a minority against the will of the majority. Moreover, the rights of the individual are likewise protected against a potential danger the majority poses to that individual. The American creed is a battle between different values, each vying with one another for a place in American institutions.

Direct democracy uses the popular election to resolve similar contradictions of American exceptionalism; the disputes at issue in many initiatives reflect conflicts between the five values of Lipset's American creed.²⁹ Such an application of Lipset's values to an area of dispute resolution is not novel. Oscar Chase connects the American creed to values within our system of law, establishing the culturally

25. See, e.g., Mark Bixler, *As U.S. Diversity Increases, South Gaining More Hispanics*, ATLANTA J.-CONST., Mar. 8, 2000, at A3 (marveling at transition of country from biracial conception to "one sprinkled with people of more various racial and ethnic backgrounds").

26. See FREDERICK JACKSON TURNER, *THE SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY* (Harold P. Simonson ed., 1963) (envisioning culmination of voyage west to Pacific at end of nineteenth century as completion of positive American values, conception termed "Turner Thesis").

27. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *Marbury* establishes the ability of the U.S. Supreme Court to review acts of Congress even though the Constitution does not explicitly grant such judicial power.

28. JEREMY WALDRON, *LAW AND DISAGREEMENT*, 15–17 (1999).

29. See, e.g., LIPSET, *supra* note 12, at 19.

dependent nature of law as a dispute resolution system and the culturally dependent nature of dispute resolution systems in general.³⁰ For his definition of culture, Chase relies on Clifford Geertz's notion of culture as an order-keeping mechanism through which meaning develops.³¹ According to Chase, the civil jury system demonstrates the manifestation of the five cultural values in law.³² The jury additionally demonstrates the way in which borrowed institutions from an immigrant group become rooted in, and reflective of, core American values. The civil jury survives in the United States despite its virtual elimination in England, its country of origin.³³ Chase associates America's strong civil jury system with Lipset's underlying cultural values. The jury, Chase says, is "quintessentially an egalitarian, populist, anti-statist institution."³⁴ Similarly, Lipset's view of American culture equally well grounds direct democracy as a stalwartly American institution. Direct democracy is fundamentally individualist, populist, and anti-statist. Chase's project is to investigate the connection between culture and the civil jury as a dispute resolution mechanism. My project is to connect culture with direct democracy as a dispute resolution mechanism.

United States Supreme Court Justice Stephen Breyer indirectly helps connect direct democracy with American culture when he discusses the importance of participatory liberty.³⁵ Justice Breyer believes that a view of liberty as a participatory process, while rooted in ancient views of the subject, warrants more attention in contemporary America.³⁶ In making his claim, Breyer contrasts liberty bound in government participation with a modern conception of liberty as an individual independence from governmental restraint. At times in the Supreme Court's history, it has emphasized one category of liberty over the other, with the present Court maintaining an emphasis on the modern conception.³⁷ Both notions of liberty are critical to democratic

30. Chase, *supra* note 16, at 277–78.

31. Chase, *supra* note 11, at 83–84.

32. Chase, *supra* note 16, at 289.

33. Chase, *supra* note 16, at 288–89. The criminal jury is still prominent in most English-speaking countries. *Id.* at 288.

34. *Id.* at 289.

35. Justice Stephen Breyer, Address at New York University James Madison Lecture (Oct. 22, 2001), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_10-22-01.html (on file with the *New York University Journal of Legislation and Public Policy*).

36. *Id.*

37. *Id.* (“[W]hen judges interpret the constitution, they should place greater emphasis upon the ‘ancient liberty,’ i.e., the people’s right to ‘an active and constant participation in collective power.’”).

survival, and Breyer endorses the position that both conceptions of liberty are important. He believes that the Supreme Court of which he is a part could reemphasize the older variation as an aid to resolving several contemporary issues.³⁸

The emphasis Breyer places on participation implies a connection between direct democracy and American culture. While Breyer does not refer to direct democracy, the notion that the participant should play a greater role when analyzing liberty takes from American culture the importance of individual participation in shaping political life. Direct democracy is quintessential participation—the populace both votes and writes legislation. California’s initiative system is populist, egalitarian, laissez-faire, and individualistic. The populace directly impacts the legislative framework of the state. Each person’s voice is equalized; hierarchy of voting worth has no place in direct democracy. Initiatives place the direct will of the people over the representative will of their elected body such that the marketplace of ideas manifests itself in a laissez-faire manner. Each individual has an opportunity for expressing herself in the political process; each person feels a part of the process as a person. This is not to say that direct democracy works well within the democratic framework. Its appeal, though, is rooted in the same cultural values as judicial review, the civil jury, and Breyer’s concept of legal thought.

B. A Brief History of Direct Democracy in the American West

Direct democracy’s history explains why the institution flourishes in the American West. The politically diverse Progressive movement of the early twentieth century, which included two presidents of different parties as well as governors with distinct political affiliations, engendered direct democracy in the West.³⁹ The Progressive movement “had as their common denominator the delegation of political decisions to the ordinary voter.”⁴⁰ Direct democracy was emblematic of this goal. The movement wanted to restore both economic individualism and political democracy, which it thought corporate greed had helped to destroy.⁴¹ As newer territories became states, the Progressive movement’s call for a stronger connection between the

38. *Id.* Breyer then analyzed five areas in which the ancient conception of liberty would be of help to the Supreme Court. Rather than attempting to eradicate a dependence on the more modern conception of liberty, Breyer feels that a better balance can be struck between the two categories of liberty. *Id.*

39. Persily, *supra* note 1, at 25–26. The presidents, of course, are Theodore Roosevelt, a Republican, and Woodrow Wilson, a Democrat.

40. *Id.* at 13.

41. *Id.* at 18.

electorate and legislation resonated with the West as a method through which governmental ideals promised in the Constitution could become reality.

Direct democracy emerged in the United States early in the twentieth century, taking its strongest hold in western states such as Oregon, Colorado, and California.⁴² The more radical faction of the Progressive movement believed the then-neoteric notion that direct democracy symbolized another step toward a government of, by, and for, the people.⁴³ Western states had a larger contingent of this more radical wing of the Progressive movement than did the eastern ones, with movements such as the "Direct Legislation League" strongly advocating for what would become California's direct democracy system.⁴⁴ Nathaniel Persily describes the inevitability of direct democracy's rise in the West:

At the turn of the century, Western legislatures, like those in the East, confronted new issues and new interest groups spawned by industrialization and internal migration. The pressures for social reform came from all walks of life—prohibitionists, feminists, socialists, unionists, and farmers' organizations, to name just a few. As a front for the ruling plutocracy, the legislature and party system, displaying its characteristic complacency, eventually could not withstand the onslaught of the new groups which rapidly diversified the political economy of the era.⁴⁵

Direct democracy was seen as a way of practically enfranchising those whom the contemporary legislative scheme abandoned.

The rise of direct democracy in the western part of the United States implicates a particular cultural view of legislation. Direct democracy clashes with Madison's conception of American federalism,⁴⁶ yet Progressive supporters of the system rooted its appeal in New England town meetings.⁴⁷ A tension thus resulted regarding direct democracy's cultural acceptability; proponents of direct democracy could be construed as "backwards looking" rather than truly progressive in the sense that they wanted a return to local, individual control uncomplicated either by political parties or corporations.⁴⁸ Op-

42. *Id.* at 20–21.

43. See Lloyd Sponholtz, *The Initiative and Referendum: Direct Democracy in Perspective 1898–1920*, 14 AM. STUD. 43, 46 (1973).

44. Persily, *supra* note 1, at 27.

45. *Id.* at 29.

46. *Id.* at 13.

47. *Id.* at 18.

48. *Id.*

Its general theme was the effort to restore a type of economic individualism and political democracy that was widely believed to have existed

ponents of the system, however, viewed it as contradictory to the original vision of American governance. Persily argues that the virgin territories of the West were ripe for assimilating a positive view of direct democracy into the newly created states because they were unfettered by the state constitutional history of either the South or the Northeast.⁴⁹ Consistent with this idea, western states were founded on public referenda,⁵⁰ thus making direct democracy a more acceptable practice.

To Persily, there was a strong connection between direct democracy and the Progressive movement.⁵¹ Patrick L. Baude thinks this causal link may be overstated.⁵² For Baude, direct democracy connects to fundamental notions of American democracy. Baude believes that connecting direct democracy too closely with the Progressive movement allows for the constitutional undervaluing of direct democracy.⁵³ By re-categorizing the West as a place rather than a process of growing civilization, Baude established it as a multi-ethnic, multi-linguistic “meeting ground.”⁵⁴ With this framework in place, Baude argues that direct democracy is a reflection of deep-seated American values:

Rather than democracy in the sense of rude manners by angry populists, [direct democracy mechanisms] represent democracy in the sense of genuine efforts to understand what legitimacy might mean in the first European and non-European pluralist societies to write constitutions as part of the American federal system.⁵⁵

By connecting the concepts underlying the Constitution and direct democracy, Baude helps elucidate the link between American culture and direct democracy.

earlier in America and to have been destroyed by the great corporation and the corrupt party machine; and with that restoration to bring back a kind of morality and civic purity that was also believed to have been lost.

Id. (quoting RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 5–6 (1955)).

49. *Id.* at 18 (establishing timing for admission into union as key factor in development of direct democracy in West).

50. *Id.* at 19.

51. See generally Persily, *supra* note 1 (examining relationship between Progressive movement and direct democracy).

52. Patrick L. Baude, *A Comment on the Evolution of Direct Democracy in Western State Constitutions*, 28 N.M. L. REV. 343, 345 (1998) (“As the Populist movement was closely linked with the agricultural economic interests of the west, and as the referendum and initiative arose there as well, and in the same decade, it has seemed plausible to link these events as cause and effect.”).

53. *Id.* at 343.

54. *Id.* at 347–48.

55. *Id.* at 348.

This connection between culture and direct democracy can be expanded to explain California's affinity for the system, particularly in light of Persily's historical analysis. California's political climate was particularly conducive to direct democracy even when compared with other western states. Constitutions from other states greatly influenced the original California Constitution of 1849, which lasted thirty years and included the still-existing state bill of rights.⁵⁶ Nevertheless, this constitution predated direct democracy in the state by sixty-two years. California's unique history as a former Spanish and Mexican state created both an unusual demographic situation and set of issues for the crafters of that constitution. New Anglo immigrants who came to California in search of gold wanted to replace the Spanish and Mexican systems intended to govern geographically isolated states.⁵⁷ Little deference was given to native Californians.⁵⁸ Even when it was just a territory, eastern political factions shaped California's political landscape. The tension between native Californians and new residents in search of one form of gold or another still remains in California.⁵⁹ This tension, woven into the fabric of the state's contentious history, made the state ripe for direct democracy. Railroad barons and the Knights of the Royal Arch, a brewers and distillers organization, controlled the state legislature early in the twentieth century, the same era in which Progressives tried to complete the democratic ideal of a self-governing populace.⁶⁰

Culturally speaking, a conflict developed within Lipset's American creed between the laissez-faire notions the barons and Knights represented, and the egalitarian, individualistic notion that people rather than interest groups controlled California's political destiny. The Progressive movement's appeal to the egalitarian, individualistic democratic self was perfectly timed in California. Californians resolved this tension found within the American creed in favor of egalitarianism and individualism when they initiated direct democracy in 1911.⁶¹ The origins of California's direct democracy were the mani-

56. Myra K. Saunders, *California Legal History: The California Constitution of 1849*, 90 LAW LIBR. J. 447, 447 (1998).

57. *Id.* at 448.

58. *Id.* at 450.

59. See, e.g., Jonathan Schwartz, Note, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, 71 S. CAL. L. REV. 183, 183-84 (1997) (discussing unintended political consequences of Proposition 13, including imbalance in property tax requirements between long-time residents and those just moving to state).

60. Persily, *supra* note 1, at 13, 30.

61. L. Tobe Liebert, *Researching California Ballot Measures*, 90 LAW LIBR. J. 27, 28 (1998).

festation of a cultural dispute. Direct democracy grew out of a fundamental dispute over the nature of democracy in America, and California in particular. What it means to be a democracy and how people perceive their access to power reflects a need to express individualism within an egalitarian framework. Even at its inception, California's direct democracy was a cultural dispute resolution mechanism.

Dispute resolution mechanisms reflect, and result from, a culture's values. For example, the "hard-bitten, skeptical empiricism in America" coincides with a court's dependence on first-hand accounts of witnesses.⁶² The link between California's culture and its direct democracy system maintains similar connections. The state has always been multicultural, multilingual, and—most importantly—a symbol of the culmination of the American dream. California "[is] just like the rest of the country, only more so."⁶³ Whether it was people seeking gold in the nineteenth century or dot-com success in the 1990s, California provided the cultural framework of dream realization. Californians believe they exert cultural influence over the rest of America.⁶⁴ While California often ploughs the field of legal reform believing other states will follow,⁶⁵ the reform is typically seen as a realization of something profoundly American.⁶⁶ It makes sense, then, that the state's populace so readily accepts a form of democracy that is more democratic than representative democracy. The Progressive view of direct democracy as a realization of greater democratic ideals resonates well with a population that considers itself on the cutting edge of all things modern and American. California is thus ideally suited to a cultural inquiry into direct democracy. It is at once a microcosm of American cultural values and at the forefront of the direct democracy movement. No state better demonstrates the connection

62. AMSTERDAM & BRUNER, *supra* note 23, at 227.

63. Bill Keller, *In a State of Denial*, N.Y. TIMES, Nov. 17, 2001, at A23 (crediting Wallace Stegner with famous banality).

64. See, e.g., Sophia Harang, *The Cinema of Angels*, DAILY TROJAN, Feb. 1, 2000, at 7, available at 2000 WL 7272539 (implying that California's domination over film industry allows it to import cultural perspectives); Connie Koenenn, *Design: Reflecting and Shaping Our American Culture*, L.A. TIMES, Mar. 2, 2000, at E1 (reviewing art show in New York and stating that California influence is strong); *Saba and FAST COMPANY Present Forum on Learning and Culture in the New Economy*, BUS. WIRE, Apr. 25, 2000, available at 2000 WL BWIRE 7272539 (describing forum in which connection between then-new economy and California culture is probed).

65. See, e.g., *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975) (redefining tort standard for contributory negligence such that it does not bar plaintiff's claim).

66. *Id.* The holding reflects individualistic and egalitarian concerns for fairness.

between direct democracy and culture or the way in which direct democracy functions as a dispute resolution mechanism.

*C. Direct Democracy Unfolding as a Dispute
Resolution Mechanism*

Useful for further analysis of the way in which direct democracy functions as a dispute resolution mechanism is an explication of disputing and dispute resolution mechanisms in general. It is necessary to demonstrate the way in which a group—used here as a proxy for “culture”—has disputes and establishes mechanisms to resolve those disputes internally. In *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, William Felstiner, Richard Abel, and Austin Sarat describe a structural system through which they analyze disputing.⁶⁷ As they detail the emergence and transformation of disputes, the authors focus on disputing apart from the formal processes established for disputing, such as the law. The reification of disputing through court documents and analogous concrete evidence diverts attention from a more accurate description of instances of dispute as social constructs.⁶⁸ While *Naming, Blaming, Claiming* ultimately argues that, contrary to rhetoric and widely held perception, too little litigation exists in the United States, the article more importantly establishes a framework through which the disputes can be understood.⁶⁹ Hence, *Naming, Blaming, Claiming* provides the explanatory structure for a culturally grounded description of California’s proposition system.

In a later article describing the cultural analysis of disputing, Sarat explains the three phases of disputing:

The first stage, defining a particular experience as injurious, we called naming. The next step in the life cycle of a dispute “is the transformation of a perceived injurious experience into a grievance. This occurs when a person attributes an injury to the fault of another individual or social entity.” This stage we called blaming. The third step occurs “when someone with a grievance voices it to

67. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW AND SOC’Y REV. 631 (1980).

68. *Id.* at 631.

69. *Id.* at 632. Indeed, the authors feel that their framework establishes mechanisms through which they can analyze any dispute. The application of that framework to litigation excess or lack thereof represents one such analysis. An explication of Proposition 187 grounded in the same structure will shed light on direct democracy as a cultural dispute resolution mechanism in much the same way the authors of *Naming, Blaming, Claiming* generate an original view of litigation as disputation in society.

the person or entity believed to be responsible and asks for some remedy.” This final stage is called claiming.⁷⁰

The first stage—naming—involves bringing an unperceived injury to the attention of the injured party. The unperceived injury then manifests itself as a perceived injury to the injured. Once the injured recognizes the injury, attention turns to who is at fault. Only after establishing both that there is an injury and that a particular person bears responsibility for that injury does the injured seek out resolution.⁷¹

A role exists for a third party to act as an instigator in the naming stage. For example, a person suffering from asbestosis may not realize why he is sick until he reads about a similar case in the newspaper or a lawyer informs him of the possibility of action. Sarat focuses on the lawyer as instigator in his later article.⁷² Conflating naming and blaming, a lawyer provides a target for blame while simultaneously naming the injury. Without the lawyer, no dispute exists. It is not that no dispute should exist, but rather that no dispute did exist prior to third party interference. Such involvement can be negative or positive. Asbestosis sufferers, to the extent that they were tortiously injured, should be able to blame and ultimately claim against the tortfeasor.⁷³ However, a lawyer rabble-rousing for clients may raise the specter of legal self-interest and trigger suspicion of the dispute’s very existence.⁷⁴ There are many complications with determining which unperceived injuries become beneficially perceived.

Simon Roberts subscribes to a view of disputing as a positive and reinforcing aspect of a culture.⁷⁵ Disputes are a result of the way in which a society is organized. For Roberts, a dispute over who should

70. Austin Sarat, *Exploring the Hidden Domains of Civil Justice: “Naming, Blaming, and Claiming” in Popular Culture*, 50 DEPAUL L. REV. 425, 426–27 (2000). Interestingly, this article doubts the conclusion of Felstiner et al., *supra* note 67, at 632, that too little litigation persists in the United States. Simply because a different conclusion is reached here, though, does not diminish the usefulness of the disputing structure established in the initial article.

71. Felstiner et al., *supra* note 67, at 635.

72. Sarat, *supra* note 70, at 426.

73. See, e.g., *Miller v. Armstrong World Indus., Inc.*, 949 F.2d 1088 (10th Cir. 1991) (offering further discussion of harmful effects of asbestos exposure); *Larson v. Johns-Manville Sales Corp.*, 140 Mich. App. 254 (1985) (noting relationship between asbestos exposure and decedents’ health); William B. Johnson, Annotation, *Products Liability: Inhalation of Asbestos*, 39 A.L.R. 4th 399 (1985) (discussing asbestosis and products liability).

74. See Sarat, *supra* note 70, at 445–48.

75. SIMON ROBERTS, *ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY* 46 (1979) (“Thus the shared beliefs which supply the unifying strands in . . . a society at the same time constitute an inevitable source of quarrels.”).

lead a small tribal community is an inevitable dispute over the way in which that society chooses a leader.⁷⁶ This maps easily onto the cultural grid of the ballot box: a presidential election can be seen as a dispute over who will be president, while the voting process serves as our cultural dispute resolution mechanism. This is a dispute in more than a metaphorical sense. A presidential election is not *similar to* a dispute; it *is* a dispute.

Disputes bifurcate into conflicts between groups and conflicts within groups.⁷⁷ Roberts deconstructs this distinction, describing the process through which intra-societal disputes devolve into inter-societal disputes via faction creation.⁷⁸ That is, intra-group disputes fracture into different disputing groups as people choose sides along lines created within the culture. In a tribal society, for example, a fight between two members of different families in the same village is intra-group only until the two families form factions.⁷⁹ This is so with a presidential election in the United States. An intra-group dispute exists concerning who the next president will be. That dispute, however, is intra-group only as viewed from outside of the group, outside of the United States. Viewed from the point of view of a potential voter—who is part of the adjudication of the dispute’s resolution—there appears to be very little intra-group disputing. For this voter, Democrats, Republicans, and often third party candidates vie for a favorable decision. The dispute, from this internal point of view, is between several groups.

Also of importance for a dispute resolution system is the concept of the ritual. Ritual in this context means “a formal, socially standardized, and repetitive action wrapped in a web of symbolism that serves to channel emotion, define experience, and guide understanding.”⁸⁰ The ritual gives a dispute resolution system cultural legitimacy. The ritual surrounding legal institutions empowers them to deprive people of money, property, and liberty. Men and women clad in black call to order their courtrooms with arcane language and ardent formalism, thus deflecting blame for the outcome away from the decision-maker and onto the process. “The whole process reaffirms both the actual power of the deciders and the presumed social and moral efficacy and

76. *Id.* at 47.

77. *Id.* at 49.

78. *Id.*

79. *Id.*

80. Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 *YALE J.L. & HUMAN.* 1, 5 n.15 (1999) (citing DAVID I. KERTZER, *RITUAL, POLITICS AND POWER* 8 (1988)).

correctness of the norms and values referred to.”⁸¹ Voting rituals similarly engender the outcome’s authenticity. The presidential election example clarifies the concept. The ritual of casting one’s vote in a little booth creates legitimacy for the winner. A failure in that ritual system leads to a cultural clash.⁸² Questions of legitimacy for the new president become patent, but those feelings can be mollified.⁸³ The real problems are not for the particular president chosen in the disputed election, but in society’s belief that the election process is flawed. Democrats were unhappy in 1988, when George H.W. Bush defeated Michael Dukakis, but they did not feel cheated, as many did with the 2000 election. The ritual process was exposed in 2000 when the ritual of voting was not completed in its usual manner. It was no longer the process that was responsible for the outcome. The unfamiliar ritual of court involvement forced people to question the end result.

Direct democracy, just like a presidential election, methodologically resolves intra-group disputes through ritual. The fact that it can also be viewed as inter-group once factions form does not hinder the inquiry into direct democracy as a dispute resolution mechanism. This ability to shift points of view in describing a conflict is crucial when looking at specific initiatives. It is easy to see the “sides” of a dispute in a civil or criminal trial; courts and the law are easily seen as dispute resolution mechanisms for a dispute between litigants. It is more difficult to see how a dispute develops with direct democracy. The understanding that disputes can be within a group, and that whether or not something is within or between groups largely depends on point-of-view, illustrates that disputes need not be rigidly categorized. A faction who wants a certain tax code passed⁸⁴ or a particular amendment made to that state’s constitution disputes in a very real sense with the part of the society who thinks the particular tax code or amendment imprudent. This ultimately requires the development of distinct, opposing groups within the culture.

Complicating the view of direct democracy as a dispute resolution system, the factions each compose part of the adjudicators of the

81. Sally Falk Moore, *Selection for Failure in a Small Social Field: Ritual Concord and Fraternal Strife among the Chagga, Kilimanjaro, 1968–1969*, in *SYMBOL AND POLITICS OF COMMUNAL IDEOLOGY* 110, 115 (Sally Falk Moore et al. eds., 1975).

82. SAMUEL ISSACHAROFF ET AL., *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* 42 (2001) (focusing on surprise legal scholars expressed in wake of Supreme Court granting certiorari in case that would decide presidential election of 2000).

83. *Id.* at 95–106 (excerpting views of various legal scholars on 2000 presidential election, none of which focuses on actual outcome as being particularly problematic).

84. See Schwartz, *supra* note 59, at 184–85, 189.

dispute. Disputing literature refers to this as dyadic disputing,⁸⁵ in contrast to triadic disputing in which a third party acts as the arbiter in the dispute.⁸⁶ Dueling is the classic dyadic dispute example, while a civil trial presents a classic triadic dispute because the judge rather than the disputants determines the outcome.⁸⁷ Direct democracy features a dyadic dispute resolution mechanism in an intra-group framework. The presence of millions of often non-communicating actors with thousands of justifications for any given dispute resolution complicates this dyadic framework. Disputes settled using direct democracy are dyadic, however, in the very real sense that there can ultimately only be two sides—proponent and opponent.

The gloss of the Progressive movement and its influence in the West help establish the way in which direct democracy functions as a dispute resolution mechanism. Initiative systems give people direct access to voice their complaints.⁸⁸ The direct democracy movement ebbed through most of the twentieth century, however, only regaining its momentum in the late 1970s.⁸⁹ The rest of this note focuses on how this dispute resolution mechanism functions as a reflection of contemporary culture in the late twentieth century and early twenty-first century.

Direct democracy lends itself to such cultural dispute resolution in California. The entire direct democracy system rode a wave of cultural dissatisfaction toward implementation in the early twentieth century. The cultural dispute over how one values democracy resolved itself with the installation of a dispute resolution mechanism. Direct democracy has always been a tool of cultural value determination. The desire to create a democracy more democratic than representative

85. See, e.g., Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 STETSON L. REV. 611, 640 (2002) (defining concept of dyadic situation).

86. See, e.g., Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1250 (1998) (discussing implications of triadic dispute settlement).

87. The judge in the trial system is often seen as the third party to the triadic dispute mechanisms of western societies. Chase compares the role of the judge with that of an Azande prince who sits in judgment of disputes. His purpose in making this comparison is to demonstrate a link between dispute resolution systems and the culture in which they grow. See Chase, *supra* note 11, at 89.

88. See Charles Price, *Two Views of the Initiative*, 20 CAL. J. 467 (1989) (reviewing THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM AND RECALL* (1989) and DAVID D. SCHMIDT, *CITIZEN LAWMAKERS—THE BALLOT INITIATIVE REVOLUTION* (1989)).

89. *Id.* (explaining that many political scientists viewed referenda system as political relic of Progressive movement in middle of twentieth century).

democracy stemmed from a cultural connection with Lipset's creed.⁹⁰ The resolved dispute concerned the view of democracy as an institution. The revitalization of California's initiative system reflects an intra-group set of cultural disputes. Californians struggle at the ballot box over who has access to power and who best has the right of self-determination. Just as people turned to direct democracy in the early twentieth century because of cultural dissatisfaction, so too have California voters been attempting to assert their cultural dissatisfaction through direct democracy since the end of the twentieth and beginning of the twenty-first century.

II.

CULTURAL CONFIRMATION: AN EXPLANATION IN TWO PROPOSITIONS

California's Proposition 187⁹¹ and Proposition 13⁹² demonstrate the way in which direct democracy functions as a cultural dispute resolution mechanism. Proposition 187, passed in the 1994 November election, was designed to restrict the rights of undocumented aliens in California.⁹³ Proposition 13, passed in June of 1978, reorganized the property tax system in California, starting a direct democracy revitalization in the process.⁹⁴ While both of these propositions generated intense political debate, I analyze the cultural implications, justifications, and perceptions surrounding each proposition. Hence, the focus remains on cultural values with the political components that make either proposition attractive or unattractive serving limited evidentiary purposes. The examination in Part II takes the same form as that of Part I: inquiries of political science and history explicate the cultural framework within which the political process functions.

90. See LIPSET, *supra* note 12.

91. Cal. Prop. 187 (1994), available at <http://homes.uchastings.edu/cgi-bin/starfinder/14686/calprop.txt> [hereinafter Cal. Prop. 187] (on file with the *New York University Journal of Legislation and Public Policy*).

92. Cal. Prop. 13 (1978), available at <http://homes.uchastings.edu/cgi-bin/starfinder/14686/calprop.txt> [hereinafter Cal. Prop. 13] (on file with the *New York University Journal of Legislation and Public Policy*).

93. Cal. Prop. 187, *supra* note 91; John SW Park, Note, *Race Discourse and Proposition 187*, 2 MICH. J. RACE & L. 175, 175 (1996). The Proposition's controversial measures denied education and all-but-emergency medical care to the estimated 1.6 million undocumented immigrants in California. Furthermore, Proposition 187 made healthcare and social service agencies responsible for reporting possible non-citizens to California's Attorney General and the Immigration and Naturalization Service (INS). Park, *supra*.

94. Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1049–50 (2001).

Some recent propositions have been nothing but cultural. Proposition 22,⁹⁵ a 2000 initiative intended to ban homosexual marriage,⁹⁶ is one such nakedly cultural initiative. Proposition 22 is very short, reading “[o]nly marriage between a man and a woman is valid or recognized in California”⁹⁷ The fact that heterosexual marriage already legally defined the institution in California⁹⁸ buttresses the claim that the Proposition was a struggle over cultural rather than political aims. Voting for 22 changed no legislation, whether heterosexual, homosexual, or bisexual, Proposition 22 neither added to nor subtracted from an individual’s ability to get married or to have that marriage recognized in California. Stripping away the cultural aspect of Proposition 22 leaves you with nothing. The Proposition is starkly more cultural than either Proposition 187 or Proposition 13. The cultural dispute so thoroughly dominates Proposition 22 that it fails to demonstrate the cultural conflict inherent in direct democracy.

This is why I turn to Propositions 187 and 13. Neither initiative is purely cultural. That is, a legitimate legal and political dispute underscores each initiative. My claim is not that some initiatives are cultural; Proposition 22 would perfectly illustrate such an argument. My claim is rather that direct democracy necessarily functions as a means of resolving cultural conflict. In order to understand how a voting mechanism resolves cultural conflict, the precise nature of the dispute for each initiative must be described. This basic step in dispute resolution—determining what people are disagreeing about—is multifaceted. In one sense, the dispute is over the political issue at hand. Often, proponents and opponents of the proposition maintain competing notions regarding what political dispute the legislation is designed to solve. With Proposition 187, for example, proponents viewed the debate as one of resources.⁹⁹ Opponents, conversely, saw the debate as one over civil rights.¹⁰⁰ The two sides characterize the dispute so differently that it is difficult to determine which dispute Proposition 187 tried to resolve through direct democracy. The dispute was neither solely about the rights of undocumented aliens nor

95. Cal. Prop. 22 (2000), available at <http://homes.uchastings.edu/cgi-bin/starfinder/14707/calprop.txt> [hereinafter Cal. Prop. 22] (on file with the *New York University Journal of Legislation and Public Policy*).

96. Jenifer Warren, *Proposition 22: Gays Differ Sharply Over Their Next Steps*, L.A. TIMES, Mar. 9, 2000, at A3.

97. Cal. Prop. 22, *supra* note 95.

98. *Id.*

99. See Park, *supra* note 93, at 176–77.

100. *Id.* Park believes that this focus on civil rights too closely connected those rights with citizenship, thus dooming the argument. *Id.*

about pure economic impact of those aliens on California. Instead, the debate surrounding Proposition 187 was over cultural values.

I begin with Proposition 187 because the cultural analysis is more readily apparent. A proposition dealing with immigrant rights appears to be more cultural than does a tax-reform measure. Through Proposition 187, I will develop the way in which both the framework of the dispute and the basic concepts of American culture function in direct democracy. After the cultural analysis of Proposition 187, a similar cultural analysis of Proposition 13 will be easier to understand and digest. Proposition 13 was the harbinger of California's modern initiative movement. Through it, California voters realized the power they could wield by using propositions to address quickly concerns the legislature did not. Understanding the cultural implications of Proposition 13 as a dispute resolution mechanism will demonstrate the power of cultural analysis. First, though, I turn to Proposition 187 for a description of direct democracy as a cultural dispute resolution mechanism.

A. *The Save Whose State? Initiative: A Cultural Anti-Immigrant Proclamation*

Proposition 187's drafters labeled it the "Save Our State" initiative.¹⁰¹ Although most of the Proposition was never implemented because of judicial intervention,¹⁰² fifty-nine percent of voters helped proponents of the Proposition prevail.¹⁰³ Citizens concerned about "overcrowding, unemployment, scarcity of state resources, and fears of cultural fragmentation" supported 187.¹⁰⁴ Proposition 187 is lengthy and provides a plethora of remedies for those concerns. Section 7 detailed precisely how undocumented immigrants should be excluded from elementary and secondary education.¹⁰⁵ Teachers and school administrators would have been responsible for ensuring the

101. Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 653 (1995).

102. See *League of United Latin Am. Citizens v. Wilson*, 997 F.Supp. 1244 (C.D. Cal., 1997); See also Benjamin Guiliani, *Mean-Spirited Laws with Racial Overtones Have No Place in America*, PORTLAND PRESS HERALD, Nov. 25, 1999, at A21 (referring to Proposition 187's legal history and Gov. Gray Davis's refusal to defend measure in court as effectively ensuring that Proposition would not be implemented).

103. Jeffrey R. Margolis, Comment, *Closing the Doors to the Land of Opportunity: The Constitutional Controversy Surrounding Proposition 187*, 26 U. MIAMI INTER-AM. L. REV. 363, 368 (1995).

104. *Id.* at 366-67.

105. Proposition 187, *supra* note 93, at § 7. This section was to be added as § 48215 to the California Education Code.

validity of the immigration status not only of their student body, but also of the parents of their student body.¹⁰⁶ Sections 5 and 6 detailed precisely how undocumented immigrants were to be excluded from social services and public health care, respectively. While constitutional issues abound with the methodology of immigrant exclusion,¹⁰⁷ the Proposition was crafted to achieve its aim—denying access to illegal immigrants and their children to publicly funded institutions.

The political fight that engulfed Proposition 187 enveloped familiar ground. Proponents of the measure thought they were fighting the evils of an almost literal alien invasion that could destroy the economy,¹⁰⁸ while opponents perceived that denying these benefits threatened the economic and physical well-being of all people in California.¹⁰⁹ Recognizable conservative arguments were made on behalf of 187. Pete Wilson, the Republican governor, sought reelection in 1994, and he used illegal immigration as the founding issue of his campaign.¹¹⁰ The Republican dislike of welfare and other social programs led to support for a Proposition designed to curtail those very programs. Some leading conservatives, however, felt that the Proposition denied important conservative values such as hard work and perseverance.¹¹¹ Illegal immigration also created a cheap labor pool available in the state.¹¹² The left's position was familiar as well: "Opponents, particularly ethnic activist and immigrant rights groups, [thought] that the initiative was nativist, racist, and motivated by antipathy toward undocumented Mexicans and, more generally, Mexican-Americans."¹¹³

Californian and national newspapers reflected the vibrant debate over Proposition 187. The Sunday prior to the election, the *Los Ange-*

106. *Id.*

107. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States . . ."). In other words, every person born in the United States is a citizen of the country, irrespective of the nationality of his or her parents. Proposition 187's focus on parental status then seems questionable.

108. Johnson, *supra* note 101, at 653. The author points out that any practical appeal to the cost of illegal immigration as a justification for this exclusion contradicts the fact that passing the Proposition threatened fifteen billion dollars in federal funding. *Id.*

109. Park, *supra* note 93, at 198.

110. Johnson, *supra* note 101, at 633.

111. See Park, *supra* note 93, at 197. William Bennett and Jack Kemp, two influential Republicans, viewed 187 as shortsighted at the very least. Latino voters who felt targeted by the Proposition represented a largely untapped potential for Republican votes. *Id.*

112. *Id.* at 196. "Undocumented aliens . . . picked fruit and vegetables so well that even Governor Pete Wilson himself once thought them an indispensable asset." *Id.*

113. Johnson, *supra* note 101, at 633.

les Times ran an exposé describing different views of the Proposition.¹¹⁴ Supporters cited fairness and the fact that “they” do not “deserve” to have tax dollars spent on “them.”¹¹⁵ Opponents focused on the negative economic impact the initiative would have due to a loss of federal funding and on the morally bankrupt underpinnings of the bill.¹¹⁶ George F. Will wrote several syndicated columns supporting 187 as a reclaiming of states’ rights and a repudiation of activist courts.¹¹⁷ Thus, the political dispute took shape. On one side were those who believed in states’ rights and what non-citizens deserved while on the other were those who saw racism and scapegoating. In a clearly political sense, states-rightists and anti-immigrationists won the dispute because the Proposition was approved so resoundingly.¹¹⁸ Proposition 187’s passage had two major political implications. First, other states began to contemplate similar anti-immigration legislation.¹¹⁹ Second, the Republican party’s lack of political clout with the Latino community in California ensured a different Republican strategy with respect to that community for the foreseeable future.¹²⁰

The political positions and consequences that resulted from the Proposition 187 debate help demonstrate the way in which direct democracy functions as a system with which Californians can attempt to resolve disputes over cultural values. The political structure fits snugly with established cultural and sociological understandings of law as a dispute resolution mechanism. The dispute surrounding Proposition

114. *Voices: Prop. 187: A Chorus of Views*, L.A. TIMES, Nov. 6, 1994, (Sunday Home Edition), at 22.

115. *Id.* A Japanese-American clergyman, for example, stated:

I’m really sold on this bill. We have three major problems in California. One is education. Another is safety issues [sic] and another is business revitalization. I believe California collects enough taxes, but billions are funneled away to pay for illegal immigrants. This proposition will improve our education system, and I also believe this will bring more jobs to our state.

Id. Notice the focus of the comment: the problems are largely economic, yet the writer determines that it is illegal immigration that must be fixed as a proxy for fixing other problems. The speaker reflects the rhetoric of the initiative supporters.

116. *Id.* A Southern Christian Leadership Conference member claimed that the loss of federal money and the disallowance of the immunization and participation in education of immigrant children warranted a “strong stand” against 187. *Id.*

117. *E.g.*, George F. Will, *Reclaiming the Right of Self-Determination*, WASH. POST, Oct. 30, 1994, at C7.

118. *See* Cal. Prop. 187, *supra* note 91.

119. Jay Hamburg, *Florida’s Growing Concern: Some Immigrants Fear State May Follow California’s Lead*, ORLANDO SENTINEL, Dec. 4, 1994, at A1.

120. In fact, a follow-up proposition designed to withstand judicial scrutiny could not gain enough Republican signatures to be placed on the ballot in 2000. Jennifer Mena, *Successor Plan to Prop. 187 Won’t Be on Ballot*, L.A. TIMES, Apr. 22, 2000, (Orange County Edition), at B3.

187 can be analyzed in Felstiner, Abel, and Sarat's disputing construction of naming, blaming, and claiming.¹²¹ In order to name the dispute, Californians had to become aware of an injury. They then had to find fault with another for that injury in the blaming stage. Only after both the injury had been recognized and the cause of that injury identified could Californians demand a remedy from those inflicting the harm in the claiming stage.

With direct democracy, the initial unperceived injury that becomes manifest is often illusive until a third party—in the guise of television commercials¹²² rather than legal representation—establishes both whom to blame and for what. Such was the case with Proposition 187. The official California voting pamphlet in 1994 stated, “[i]t has been estimated that ILLEGAL ALIENS are costing taxpayers in excess of 5 billion dollars a year.”¹²³ The pamphlet *blamed* illegal aliens while simultaneously *naming* the harm for which they were being blamed—the loss of a huge amount of state revenue. Consistent with the cultural diagram, naming and blaming are conflated. The next section of the proponent's statement further followed the cultural structure. “While our own citizens and legal residents go wanting, those who choose to enter our country ILLEGALLY get royal treatment at the expense of the California taxpayer [sic]. IT IS TIME THIS STOPS!”¹²⁴ Voters were *claiming* the dispute; they were confronting those who were causing the harm and requesting a remedy. The remedy asked for was that those being blamed not participate in education or receive healthcare benefits. The unperceived injury inflicted on the state in the form of illegal immigration became manifest through Proposition 187, which enabled the blaming and claiming stages to follow. California's initiative process provided the mechanism through which these three stages evolved.

The unperceived injury Proposition 187 brought to the attention of Californians was not fully articulated in the campaign literature. The problems facing Californians were largely economic. At anything more than a superficial level, the Proposition was bad for the econ-

121. See *supra* Part I.C.

122. See generally Becky Kruse, Comment, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 CAL. L. REV. 129 (2001) (suggesting remedy to problem of deceptive advertising often used during direct democracy contests).

123. STATE OF CAL., CAL. BALLOT PAMPHLET: GEN. ELECTION NOVEMBER 8, 1994 54 (1994).

124. *Id.*

omy.¹²⁵ The appeal of the initiative, however, resided in its cultural appeal to certain core American values. Opponents' contentions that the initiative was simply racist, while a compelling and accurate description of 187 and some of its supporters,¹²⁶ cannot account for the passage of the Proposition given the hostility our legal culture shows toward outward racism.¹²⁷ Furthermore, the stereotype of illegal immigrants using taxpayer resources acted as more than just a proxy for racial hostility. This is not to say that racist assumptions and feelings do not impose upon the acceptance of those stereotypes and subsequent support for the initiative. Rather, something more profoundly rooted in cultural norms—norms that are ostensibly hostile to racism—must have appealed to proponents of the initiative. In fact, many proponents rejected the notion that 187 was racist.¹²⁸

Culturally rooted notions enabled Californians to accept the questionable unperceived injury illegal immigration imposed upon them. A dubious name was named. Proposition 187 focused on the damage illegal immigration was doing to California and its economy. This led to the misplacement of blame. Illegal immigrants were at fault for the damage they caused. An incoherent claim then logically followed: all illegal immigrants and their children should be denied school, health-care, and welfare. Voters, however, accepted this imaginary un-

125. Kevin C. Wilson, Recent Development, *And Stay Out! The Dangers of Using Anti-Immigrant Sentiment as a Basis for Social Policy: America Should Take Heed of Disturbing Lessons from Great Britain's Past*, 24 GA. J. INT'L & COMP. L. 567 (1995).

[U]ndocumented immigrants improve the economy by taking the lowest quality jobs and providing cheap labor for big business. By working long hours for little pay, undocumented immigrants help to keep inflation rates low. Most immigrants do not come to the United States to receive welfare benefits; most come to work and provide a better quality of life for their families. Also, there is overwhelming evidence that undocumented immigrants pay more in taxes than they receive in public benefits.

Id. at 578.

126. *Id.* at 583. "Some of the primary backers for Proposition 187 lend credence to the idea that its motivation is racist. Don Rodgers, a white supremacist in the Christian Identity movement, donated \$20,000 to the S.O.S. initiative. Bette Hammond, an S.O.S. organizer, drove through Latino neighborhoods complaining of the (imagined) 'stench of urine' and hypothesized that the immigrants must defecate in bushes. S.O.S. also garnered support from the Federation for American Immigration Reform (FAIR), which receives money from the Pioneer Fund, a right wing philanthropy group that sponsors studies on race and I.Q." *Id.*

127. Johnson, *supra* note 101, at 634. "One of the most vociferous, and serious, contentions made by Proposition 187 opponents in the heated campaign was that, at bottom, it is racist. This often is a damning claim in our legal culture." *Id.*

128. See Park, *supra* note 93, at 178 (citing support for Proposition 187 in minority communities).

perceived injury; understanding Proposition 187 as a cultural dispute helps explain why.

Proponents and opponents of Proposition 187 entrenched its appeal or lack thereof in California's cultural value system. Both sides appealed to elements of Lipset's American creed¹²⁹ to support their positions. California's existence as a multi-cultural society from its inception as a territory has accompanied a racist history.¹³⁰ The early 1990s, in the words of Wayne Cornelius, were ripe for "another . . . nativist spasm."¹³¹ The Proposition provided a platform through which a cultural dispute over illegal immigration could be resolved. This history of racial tension is an outgrowth of American and Californian culture. Proposition 187 represented one example of this cultural connection; it was both entrenched in Lipset's creed and demonstrative of the conflicts inherent in that creed. Proposition 187 was anti-statist in the sense that it was anti-federal. The federal government failed to provide adequate protection from immigration, so people must use direct democracy as a means of fashioning a remedy. The initiative had populist appeal. Similar to many anti-tax movements, proponents claimed that people—by which they meant citizens—deserved to get from the state government what they gave. Citizens pay taxes, so the argument goes, and they should not have to support those who have no right to be in the state. Those who opposed the Proposition found their opposition equally well founded in American cultural norms. Opponents of 187 stressed individualism and egalitarianism. By creating an "us" and a "them," 187 focused on the group more than the individual. The us-them dichotomy also shifted the dispute from intra to inter-group. Most importantly for opponents, the Proposition demonstrated a profound lack of egalitarianism exemplified in equality of political and civil position.

Proposition 187 represented a culturally-rooted dispute resolved through the direct democracy system. The dyadic nature of direct democracy as dispute resolution meant that the Proposition functioned as a dispute resolution mechanism of the citizenry even though that citizenry established the dispute in the first instance when they garnered enough signatures and placed the initiative on the ballot. Proposition 187 was a cultural initiative wrapped inside a political scheme. The

129. See *supra* Part 1.A.

130. See Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 2–3 (1995) (describing nativism and discrimination in California).

131. *Id.* at 3 (quoting WAYNE A. CORNELIUS, AMERICA IN THE ERA OF LIMITS: NATIVIST REACTION TO THE "NEW" IMMIGRATION 5–6 (Ctr. for U.S.-Mex. Studies, Working Paper No. 3, 1982)).

arguments surrounding the initiative concentrated on cultural debates over the meaning of citizenship, government, and direct democracy. Supporters of 187 grounded their position such that the initiative appeared to be an outgrowth of what America should be. The anti-statist, populist positions made Proposition 187 appear less cruel than its naked facts would suggest. Proponents in the debate labeled the other side as un-American.¹³² That they viewed Proposition opponents in this light reflects a struggle over the meaning of American and Californian culture. An interaction between politics and culture influences this perception; the political uses the cultural to achieve its end, i.e., the passage of the Proposition. Supporters of 187 provided a solution to the problems people found in the economy through the creation of an unperceived injury made tangible in the form of a supposed immigrant invasion. Direct democracy provided the format for resolving the dispute between those who wanted to blame illegal immigrants and those who did not. It also allowed the authors of the initiative to name and blame as they wished; direct democracy allows writers to shape the cultural debate in the first instance.

Voting ritual provides the framework through which direct democracy functions as a dispute resolution mechanism. The importance of ritual to a dispute resolution system, and the ability to understand disputes as simultaneously inter- and intra-group, further help explain why Proposition 187 passed. Ritual is fundamental to a dispute resolution mechanism because it creates legitimacy and structure.¹³³ The ritual of voting offers protection from personal responsibility for the consequences of how one votes. A person who votes to deny benefits to undocumented immigrants does not have to look the immigrant in the eyes and take away her benefits. It is instead done through a highly regarded process. I am not arguing that voting ritual is negative. Rather, in the context of direct democracy, it provides protection from blame for the consequences of the vote. Such protection is not *a priori* bad. Ritual provides necessary protection from societal guilt for difficult decision. The ability to vote on a position lends that position credibility. With Proposition 187, however, the ability to see immigrants as outside of the group—that is, to see the initiative as an inter-group dispute—combines with voting ritual to

132. Johnson, *supra* note 101, at 654–55. (“Besides suggesting that Proposition 187 opponents were ‘anti-American,’ Prince [one of the writers of 187] linked ‘illegal aliens’ with criminals: ‘[t]he . . . mindset on the part of illegal aliens, is to commit crimes. The first law they break is to be here illegally. The attitude from then on is, I don’t have to obey your laws.’”) (first alteration added, second alteration in original).

133. *See supra* Part I.C.

make the Proposition more palatable. A fact about dispute resolution systems, that a dispute can be seen as either between a group or between groups, shapes the way the cultural dispute is governed. Because proponents of Proposition 187 viewed immigrants as an outside group, the argument over 187 was not seen as defining the cultural values of the group. Instead, it was seen as protecting the group from an “other.” The very ritual of direct democracy shields voters from seeing the cultural nature of the dispute resolution mechanism.

Resolution in this context does not imply that the correct solution was reached. Quite the opposite seems true with Proposition 187—a mean-spirited initiative with little constitutional logic passed. Kevin Johnson suggests that 187 represented the way in which direct democracy puts discrete minorities at risk.¹³⁴ While Johnson refers to the lack of political clout afforded minorities within the initiative process and subsequent legal battles over those initiatives,¹³⁵ his view has immense cultural implications. Rather than merely representing a lack of ability to have their voice heard because of direct democracy’s political process, minorities were actually defined out of California culture with Proposition 187. The way in which the American creed is reflected in Proposition 187 demands a reemphasis on those values less prized by the initiative’s proponents. Specifically, egalitarianism’s place in California’s cultural discussion must play a prominent role in the critique of 187 as an avenue through which one can understand the cultural flaw in the initiative. Proponents of 187 were able to appeal to an anti-statist individualism, but opponents who appealed to its lack of egalitarianism could not gain an equal voice. No feature of the voting mechanism allows opponents to match the ability of initiative authors to name and lay blame for an unperceived injury.

B. The “First” Proposition: Property Tax, Culture, and Disputing

Proposition 13, which became Article XIII of the California Constitution, drastically cut property taxes and required voter approval for future tax increases.¹³⁶ The measure consisted of four principle sections.¹³⁷ The core of Proposition 13 set the maximum property tax rate at one percent and limited increases in property tax assessment to two

134. Johnson, *supra* note 101, at 634.

135. *Id.*

136. Cal. Prop. 13, *supra* note 92.

137. *Id.*; see also Article XIII.A of the California Constitution reads in part: Section 1. (a) The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the district within the counties.

percent per year “after rolling them back to March 1975 levels.”¹³⁸ The Proposition passed with a two-to-one majority in the June 1978 election, with record voter turnout demonstrating the popularity of the initiative.¹³⁹ The passage of Proposition 13 immediately slashed the average Californian’s property tax fifty-seven percent.¹⁴⁰ Even then-Governor Edmund Brown, who had campaigned against Proposition 13, felt that the voice of the people was loud enough to declare, “There will be no new state taxes and we must put a lid on government spending.”¹⁴¹

Proposition 13 led to the revitalization of direct democracy. Initiative lawmaking sharply increased in California,¹⁴² leading to the later use of direct democracy to pass propositions such as 187 and 22. By September of 1978, only three months after Proposition 13 passed, several major initiatives were ready for the November ballot.¹⁴³ Supporters of one initiative, an anti-homosexuality proposition targeted at gay teachers, wanted to follow Proposition 13’s lead and become a

(b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on (1) any indebtedness approved by the voters prior to July 1, 1978

Section 2. (a) The full cash value means the county assessor’s valuation of real property as shown on the 1975–76 tax bill under “full cash value” or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975–76 full cash value may be reassessed to reflect that valuation.

(b) The full cash value base may reflect from year to year the inflationary rate not to exceed two percent for any given year or reduction as shown in the consumer price index or comparable data for the area under taxing jurisdiction

Section 3. From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

Section 4. Cities, counties, and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

138. Cal. Prop. 13, *supra* note 92.

139. Sara Fitzgerald, *Californians Approve Proposition 13*, 10 NAT’L J. 935 (1978).

140. *Id.*

141. *Id.*

142. Miller, *supra* note 94, at 1049–50.

143. Lou Cannon, *Poll Shows Californians Support Controversial Initiatives*, WASH. POST, Sept. 20, 1978, at A2.

model for similar initiatives across the country.¹⁴⁴ Proposition 13's passage also triggered an immediate direct democracy frenzy, as Americans across the country followed California's lead. Nevada and Idaho passed similar tax initiatives within months of 13's triumph.¹⁴⁵ Arizona, Hawaii, South Dakota, and Texas were among myriad other states to approve tax-relief measures in 1978.¹⁴⁶

There were many political reasons for the Proposition's popularity. A Roper Center Survey of Proposition 13 supporters found five basic reasons people supported Proposition 13. People felt the Proposition was a rebuke to the wasteful spending of government, that property taxes were higher than they needed to be, that this would prohibit the government from spending money on projects of which the respondent largely disapproved, that politicians were in need of a hubris check, and that the financial strain of property taxes was just too great.¹⁴⁷ Only fifteen percent of the respondents cited the last reason—actual financial strain—as the reason for their support for Proposition 13.¹⁴⁸ California voters went to the polls in 1978 to try and make a statement about political power. In a return to the initial appeal of the proposition system from earlier in the twentieth century, voters saw direct democracy as a way of finding a voice in a political machine of which they did not feel a part.

Howard Jarvis, the co-author of Proposition 13, saw the Proposition's passage as a rebuke to public officials with lavish jobs.¹⁴⁹ The "Yes-on-13" voting ballot declared: "More than 15 percent of all government spending is wasted! Wasted on huge pensions for politicians which sometimes approach \$80,000 per year! Wasted on limousines for elected officials or taxpayer paid junkets. Now we have the opportunity to trade waste for property tax relief!"¹⁵⁰ The appeal of saving money was secondary in the literature to preventing the perceived excess of government officials and bureaucrats. The initiative, along with the direct democracy renaissance it triggered, emblemized a growing distrust of representative government. Because Proposition 13 was a constitutional amendment, it could not be altered by legisla-

144. *Id.*

145. *Tax-Limiting Referenda*, 38 FACTS ON FILE Y.B. 1978 847 (1979).

146. *Id.*

147. Poll, Roper Center for Public Opinion Research, University of Connecticut (1978), available at <http://www.ropercenter.uconn.edu/ipoll.html> (last visited March 9, 2003) [hereinafter Roper Poll] (on file with *New York University Journal of Legislation and Public Policy*).

148. *Id.*

149. Fitzgerald, *supra* note 138, at 935.

150. Miller, *supra* note 94, at 1049.

tive decree.¹⁵¹ The anti-representative voice Californians intentionally and knowingly expressed in 1978 would be heard.¹⁵²

The Proposition 13 conflict can also be analyzed in the naming, blaming, and claiming disputing structure.¹⁵³ The unperceived injury that Jarvis brought to the attention of the California voter was the wasteful government spending of taxpayer money. The term “unperceived” indicates that people first became aware of the injury *qua* injury. People became aware of the fact that they had been harmed, not of the fact that they were averse to taxes. Crucially, proponents of Proposition 13 named the dispute in a particular way. Rather than arguing that excessive property taxes were draining voters’ resources, Proposition 13 took aim at public-sector waste. The unperceived injury was not high taxes; it was a lack of government restraint. California’s initiative system once again permitted proponents of an initiative to define the debate. Once this unperceived injury had been named, the blaming stage became academic—the government was to blame. This followed from the way the naming stage was established. Once government waste was the problem, it seemed natural to attribute fault to the government. The only stage of the dispute remaining was then the claiming stage. Proposition 13 allowed citizens to confront the squander that they now perceived as an injury. The initiative system gave people the mechanism with which to claim their remedy. By approving Proposition 13, perceived government waste could be reigned-in.

This political dispute surrounding property taxes thinly masked a cultural debate over the meaning of government. Lipset’s American creed was on full display in the debate over Proposition 13. Just as with Proposition 187 twenty-five years later, proponents of Proposition 13 appealed to its cultural aspects rather than economic consequences. At its core, Proposition 13 was billed as a populist initiative. More than half of its proponents based their support on disapproval of government excess and inefficiency.¹⁵⁴ Voters were having their voices heard over the normal political machinery of representative democracy. Proposition 13 also represented a *laissez-faire*, anti-statist attitude embodied in the notion of individuality. The injury that Proposition 13 resolved at the polls was cultural. This was a tax revolt,

151. *Id.* at 1046–47.

152. There were several court challenges to Proposition 13, the most important of which is *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281 (Cal. 1978). The court upheld Proposition 13 because it was an amendment to the California Constitution rather than a more radical revision.

153. *See supra* Part I.C.

154. Roper Poll, *supra* note 147.

meant to reduce government coffers and reassert the financial control of the individual.

Proposition 13, however, was not the embodiment of all five values that constitute Lipset's creed. The initiative lacked a sense of egalitarianism that is so fundamental to American culture. Absent from the initiative was any sense of equality of opportunity or greater duty to humanity. The economic reality of Proposition 13 was that it favored property owners over non-property owners and previous property owners over new property owners.¹⁵⁵ Moreover, Proposition 13's passage decimated California's ability to finance education. As one observer noted, "Throughout the 1980s, California was last or near last in the country in terms of the percent of personal income spent on public education."¹⁵⁶ Since the passage of Proposition 13 in 1978, California's per pupil spending has steadily decreased.¹⁵⁷ Test scores in the state are now more fractured along economic lines,¹⁵⁸ despite a California Supreme Court mandate to equalize education spending.¹⁵⁹ All of this can be attributed to the lack of available funds after Proposition 13's passage.¹⁶⁰

We can thus see the tension between egalitarianism and populism in Proposition 13. And herein resides the cultural conflict inherent in California's direct democracy system. The injury Proposition 13 named, along with the placement of the blame and the method of claim, led to an ostensibly lucid resolution of the dispute. Californians wanted to send a message to their government. The initiative system gave them the tools to do just that. This partially explains the popularity of the initiative post-Proposition 13. Voters became aware of their ability to use direct democracy as a dispute resolution mechanism. There is a very real sense, however, in which the resolution rings hollow. Egalitarianism was once again missing from this Proposition. The cultural nature of the Proposition 13 debate allowed proponents to avoid any discussion of the economic consequences that followed the 1978 vote. Passage of Proposition 13 made it difficult for the state to fund education and further increased the cost of entry into the homeowner's market. These very consequences created a separation be-

155. See Richard B. Collins, *How Democratic are Initiatives?* 72 U. COLO. L. REV. 983, 993-94 (2001) (discussing democratic implications of initiative voting).

156. William A. Fischel, *How Serrano Caused Proposition 13*, 12 J.L. & POL. 607, 613 (1996).

157. *Id.* at 614.

158. *Id.*

159. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

160. See Miller, *supra* note 94, at 1049-50.

tween classes that runs counter to the egalitarian thread of Lipset's creed.

III.

CONCLUSION: MINORITY DISENFRANCHISEMENT THROUGH ÜBER-DEMOCRACY

Understanding direct democracy as a cultural dispute resolution system helps explain why initiatives such as Proposition 187 and Proposition 13 appear on the ballot and subsequently pass. The rhetoric supporting these initiatives appeals to fundamental cultural values of the relevant majority. Academics, however, remain overwhelmingly critical of direct democracy because of its political impact. A typical analysis, for example, claims that direct democracy "does not give minority groups with limited resources a sufficient opportunity to effectively communicate their position to the general public."¹⁶¹ According to this view, minorities lack an opportunity to shape and define culture through direct democracy because they lack political clout. Even before the onslaught of initiatives in the 1990s, critics thought direct democracy was being abused.¹⁶² The inquiry into Proposition 187 implicitly supports this view because the initiative demonstrates that a traditional majority can impose its cultural will on a minority using the tools of direct democracy. Proposition 13 is indicative of a related problem with California's direct democracy, the ability of cultural appeal to cloud consequences that result from the passage of an initiative.

The proposition system in California—which ostensibly gives greater democratic power to the people through direct voting—is a forum for cultural protectionism through which a majority enshrines its cultural value system in law. The resolution of the cultural dispute presented in both initiatives represents an actual majority representation of cultural will. Denying benefits to illegal aliens and slashing property taxes for existing owners are both consistent with American culture. Yet simply because each initiative resolves a cultural dispute using direct democracy does not mean that the resolution is socially beneficial or indicative of the morally correct outcome. A murder case in which an innocent man is convicted represents the resolution of a dispute even though the dispute was wrongly resolved. Both Proposition 187 and Proposition 13 are equally indicative of cultural entrenchment and a democratic cultural conclusion. Those hostile to

161. Fountaine, *supra* note 6, at 748.

162. *See, e.g.*, Price, *supra* note 88, at 467 (noting abuse of direct ballot systems).

illegal immigration and public funding of certain institutions can implement a cultural hostility toward both using direct democracy. Those who want to make it difficult for first-time home owners and for those who move from another state into California can engrain this culturally grounded antagonism in the fabric of California's legal structure. This critical analysis points to the more fundamental flaw in California's direct democracy system. A majority—no matter how small—can always impose its cultural will on the minority. If, for example, forty-nine percent of California voters support the right of gay people to marry, fifty-one percent can use the initiative system as a cultural tool to make that option unavailable. Hence, to the extent that direct democracy allows for a cultural dispute resolution, necessary empowerment inheres in a majority to impose its cultural will on a minority. In a state as culturally, ethnically, and racially diverse as California,¹⁶³ a segment of the population will always be culturally abandoned through the resolution of these cultural disputes. The claim that direct democracy enables a cultural dispute resolution then does not involve a claim supporting the efficacy or propriety of that solution.

Criticism of direct democracy, however, leaves only one practical alternative—desertion of the system entirely. Yet abandoning a popular system¹⁶⁴ so rooted in a culture as is California's direct democracy expresses a democratically untenable position. Even those who think of direct democracy as an inherently flawed institution of democracy cannot summarily dismiss its popularity without engaging in a basic paternalism. Even those who are mandated to reform California's initiative system are caught between popular support for the system and flaws inherent therein. The California Assembly Speaker's Commission on the Initiative Process, a group in charge of reforming California's direct democracy system, is split over whether they should try to reduce or increase the number of propositions appearing on the ballot every year.¹⁶⁵ Not surprisingly, agency officials and legislators want to restrict the practice while "initiative entrepreneurs" want to see it expanded.¹⁶⁶

Analyzing direct democracy as a cultural dispute resolution system gives the proper framework upon which any reform of the initia-

163. Seema Nayyar, *The Future Is Now*, Am. Demographics, Apr. 2001, at 6 (describing California as first state with "Minority Majority").

164. Ed Salzman, *Seeking Villains in a Sacramento Swamp*, L.A. TIMES, Jan. 21, 1990, at M3.

165. Miller, *supra* note 94, at 1037.

166. *Id.*

tive system should be built. This note has demonstrated the impact of Lipset's creed on direct democracy while also suggesting that the way these inherently conflicted values resolve themselves in that system is flawed because of the strength of the status quo. A system designed to regulate initiatives must reflect Lipset's American creed or risk an unfriendly reception. Individuals must maintain their voice in the system such that a marketplace of ideas still thrives. California's present system has built in protections for individualism and laissez-faire. Individuals can define a dispute as they so choose. Government interference is restricted. Proponents of both Proposition 187 and Proposition 13 made use of this individuality and laissez-faire not only to have their voices heard, but also to define the debate surrounding each proposition.

The ability of a cultural majority to entrench its cultural position stems from the cooptation of certain American values in defense of its position. Proposition 187's anti-statist federalism made the initiative more appealing as a natural progression of American jurisprudence while Proposition 13's appeal to populism supported the appearance of it as an outgrowth of American culture. Egalitarianism, however, must also be preserved. And this is what the present system fails to do. No mechanism exists within the initiative system to protect this element of the American creed. A fundamental restructuring of priorities must occur such that egalitarianism plays a more prominent role in direct democracy. Finding a method through which each initiative's abandonment of the fundamental notion of a casteless society can be exposed not only lessens the appeal of each initiative, it also exposes an inherent flaw in the structure of direct democracy. A restructuring in the methodology of defining a dispute must be made. Justice Breyer makes a similar request for restructuring of viewpoint in his appeal for the United States Supreme Court to reemphasize a participatory rights conception of liberty rather than merely looking at liberty as a negative right to be free from governmental interference.

Just as Justice Breyer justifies a reprioritization of competing conceptions of liberty through contemporary examples, a cultural critique of Propositions 187 and 13 illustrates the way in which a different understanding of cultural norms establishes the framework for a more successful form of direct democracy. The very project of cultural definition is incompatible with an egalitarian, liberty-based notion of cultural values. Madison foreshadowed this fundamental conflict in *The Federalist No. 10* when he expressed his concern over the formation of a majority faction imposing its will on the minor-

ity.¹⁶⁷ American society views itself as classless. Egalitarianism in the American cultural tradition makes equality of opportunity a paramount concern of American culture and law.¹⁶⁸ It was this very egalitarianism that first motivated the Progressive movement's interest in direct democracy. California's current use of direct democracy misunderstands and undervalues the egalitarianism that is so much a part of the rest of America's democracy.

167. THE FEDERALIST No. 10 (James Madison).

168. LIPSET, *supra* note 12.

