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Les promesses et dangers de la démocratie directe : une comparaison historique » Introduction (1)

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Introduction (1)

Les promesses et dangers de la démocratie directe : une comparaison historique » Introduction (1)

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- 1 Debates about the viability of direct democracy are common in both the United States and in Europe. Proponents argue that direct democracy provides citizens with a means of democratic self-defense with which to combat rigid political machines, the corrupting influence of powerful economic players, and the gridlock of non-consensual politics. Detractors argue on the contrary that direct democracy can lead to chaotic policy changes, irresponsible political decisions, and ironically an increased role of moneyed interests in writing ballot measures and influencing votes. These opposing positions create intense and heated discussion not only among alert citizens and other players in the field of politics, but among academics. What exactly do we mean by direct democracy? Does its meaning change according to its context? Can it function to the benefit of ordinary citizens? Or, does rather it prove the adage, “the road to hell is paved with good intentions?” This volume addresses these questions with an examination of direct democracy in the United States, focusing especially on California, and in the European Union, Italy, Switzerland, and France.
- 2 Brought together here are analyses of select American and European systems of direct democracy as presented by American historians and French legal scholars. This diversity reveals in very concrete ways the significant divergences in outlook to be found when crossing cultures, disciplines, and languages. Beyond the use of the French or the American English language and corresponding writing styles, which themselves lead to structural differences in communication, these articles demonstrate cultural nuances inherent in distinctive ways of conceptualizing and structuring argumentation. Surprisingly, differences in academic discipline are perhaps the least profound. The

empirical training of American political historians, grounded as it is in the preeminent weight of jurisprudence in the American system, leads to certain similarities with the approach taken by legal scholars. However, the same consideration for jurisprudence that brings these scholars together in turn creates the widest divergence between the American and European experiences with direct democracy and provides a critical conceptual framework in which to place the experiences of the United States, and in particular of California, that are presented in this volume.

- 3 In the United States, direct democracy does not exist on the federal level, but to varying degrees is part of the electoral process in thirty-eight states and the District of Columbia. In American parlance, direct democracy functions in three ways, sometimes referred to as the “trinity” of California politics: the initiative, the referendum, and the recall. Twenty-four states plus the District of Columbia authorize ballot initiatives that allow citizens to vote on law propositions or constitutional amendments, the texts of which may be written by the state legislatures, or in some states by any group or individual. Other states allow the legislature to vote on texts proposed by citizens. (In California, a further distinction is drawn between initiatives, written and placed on the ballot by the state assembly, and propositions, which citizens generate directly.) The referendum generally allows citizens to vote in answer to a yes/no question, thus accepting or rejecting a particular law or government project. Finally, the recall allows citizens to vote to remove an elected official from office before the end of his or her term. A petition, completed through the collection of citizen signatures, the required number of which varies from state to state, is necessary for various ballot initiatives, referenda, or recall elections to come before voters.
- 4 Direct democracy of different kinds and with clear regional variations also functions at the city and county level throughout the United States, where its use is sometimes greater than at the state level. In California for instance, not only has direct democracy existed at the state level since 1911, but at the county level since 1893, and at the city level beginning in 1898 when the northern California cities of San Francisco and Vallejo were the first in the state to adopt initiative rights.¹
- 5 While the concept of citizens’ initiatives is provided for in the European Union’s Lisbon Treaty (in place since December 1, 2009), because the mechanisms to put it into place are incomplete it does not currently exist except in theoretical form. Nonetheless, six initiatives have already been proposed with the support of over one million citizens in the European Union and are awaiting a structure through which they can be presented to voters (Bertrand).
- 6 Direct democracy does function already in many individual European nations, in a wide variety of forms and to differing degrees. In some nations, such as Italy and Switzerland, the referendum is a regular part of the democratic process. In Italy, the popular referendum was inscribed in the 1947 constitution, but the legal structure required to put referenda into place was only adopted in 1970 (Laffaille). Switzerland is the European nation the most often associated with direct democracy, and since its inclusion in the 1848 constitution, has had a long tradition of citizen proposed initiatives and government proposed referenda, as well as an almost never used recall (Giroux). In contrast, while the French constitution of 1958 recognizes the principle of the referendum, government sponsored referenda are tightly hedged with restrictions and have remained rare. Since 1995, French voters have the right to initiate referenda on the local level, but there is no

existing mechanism by which voters can actually do so, thus the citizen-generated referendum remains more constitutional theory than practice (Dubreuil).

- 7 A thumbnail comparison of these three nations would indicate that although Italian voters use referenda regularly, sometimes to make profound alterations to the structure of the political system, increased voter absenteeism since around 2000 has made referenda less likely to pass. The Swiss are asked to vote very regularly (about four times a year), on local, canton-wide, or national referenda with highly varied content, but the complexity of the texts on which to vote on have encouraged increasingly low voter turn-outs. In contrast, the French system emphasizes representative government as the most legitimate vehicle for democracy, leading to high voter participation in elections but little citizen access to decision-making.
- 8 Taken together, the perspectives presented by Christine Bertrand, Franck Laffaille, Denis Giraux, and Charles-André Dubreuil demonstrate an exceedingly cautious, yet somewhat positive view of the potential promise of direct democracy to increase citizen involvement in decision-making and make the electoral process more democratic in Europe. Criticisms are sharpest in the case of Italy, where late twentieth century referenda actually altered the country's political balance of power. The Swiss model is presented as one that functions relatively well, in which citizens rather than pressure groups propose referenda, and in which in case of the passage of texts deemed abusive, the Swiss parliament can propose laws to modify or even counter them.
- 9 Not so in the case of California, where perceived abuses of direct democracy have prompted the Californian historians represented in these pages to cry out in warning of its dangers and risks. In Glen Gendzel's words, direct democracy in California has become a "vivid example of reform gone awry and good intentions leading to catastrophic unintended consequences." Among these consequences, as Robert Cherny points out, are "the ways in which direct democratic procedures have contributed to legislative dysfunction" and "restructured governance" in California, under the "guidance of advocates of small government and the free market." William Issel situates the case of California direct democracy in the larger pattern of U.S. politics, suggesting that at the same time as "increasing numbers of voters have lost faith in government and converted to the religion of the free market in recent years, they have once again demonstrated" ways in which "[c]ultural commitments... have periodically rivaled economic self-interest as motivating forces in American public life." This has encouraged "conservative cultural politics," in which activists have made use of California's direct democracy mechanism to pursue their agendas. These three scholars ground the failure of direct democracy in California in the ravages they deem it has brought to the state's finances, governance, and social cohesion.²
- 10 Delving into the diverse structures, practices, and consequences of direct democracy in California and in the European Union, Italy, Switzerland, and France, this volume presents striking contrasts. This is but to be expected, given the tremendous differences in history, political culture, and economic context in these divergence places located on two continents. Yet, to paraphrase Pierre Nora, the essential task of the intellectual is to demonstrate the complexity of what seems simple and the simplicity of what seems complex. From such diversity in direct democracy a relatively simple distinction between the American and European cases seems to emerge: that of the extent to which the influence of money has intruded into the political process.³ This leads to a consideration of the role of the United States Supreme Court in allowing this to happen through its

interpretation of the U.S. Constitution, in particular its First Amendment, along with the phenomenon of American constitutionalism, that has led to maintained public support for the Constitution-anchored political system, even as it seems to move considerably away from its Early Republic and Jacksonian-era origins.

- 11 One of the most striking differences between U.S. and French elections, for example, concerns the costs of campaigns and the manner in which free speech is understood. In France, campaign advertising is tightly regulated. The only mail voters receive is an official platform statement of each party sent together at a specified time in a single, unmarked brown paper envelope. In contrast to the plethora of political billboards in the United States, in France only official campaign posters, with strict guidelines as to their size and the amount of text and image allowed, are displayed on official bulletin boards near each election site. Although some candidates complain that their voices are not sufficiently heard, in general they have relatively equal access to the media through journalists or official forums, but neither they nor anyone else may purchase advertising time. This does not mean that cases of excessive influence or of political corruption do not exist. However, the absence of campaign advertising means that the economic pressures exerted on the political system do not directly involve voters, but are largely contained in the sometimes covert relationships between powerful individuals or groups and political parties or elected officials. The lack of advertising, along with relatively generous government financing for political campaigns, also translates as a reduced cost of campaigning in France that opens the possibility for small political parties not only to participate in, but occasionally to win elections.
- 12 “Congress shall make no law... abridging the freedom of speech....” In the early twenty-first century, the U.S. Supreme Court has increasingly interpreted this passage in the First Amendment to the U.S. Constitution as protecting campaign contributions as an expression of free speech. This has been particularly the case after Congress passed and President George W. Bush signed into law the 2002 Bipartisan Campaign Reform Act, designed especially to regulate and limit campaign financing and advertising. In a series of decisions culminating in 2010 with *Citizen’s United v. Federal Election Commission*, the Court has dismantled many of the restrictions on political spending in election campaigns, essentially by arguing that the First Amendment protects the rights of corporations, labor unions, or any other American group or individual to participate financially with no limits in election campaigns as a form of free speech. In this way, powerful economic interests participate directly in electoral politics at the national, state, and local level, and in all forms of elections, whether for candidates, initiatives, referenda, or recalls.⁴
- 13 Direct democracy as a political reform dates overwhelmingly to the Progressive era, a period during which many Americans worried about the excessive influence on politics of late nineteenth and early twentieth century businesses, in particular the railroad, banking, and oil industries. Concerned Progressives regularly decried political corruption as a threat to American democracy and called for greater citizen involvement in politics and increased citizen education as to the actual workings of their republic, especially as spelled out in its framework, the U.S. Constitution. In 1924, Solicitor General James M. Beck wrote, “the Constitution is in graver danger than at any other time in the history of America. This is due, not to any conscious hostility to the spirit or letter, but to the indifference and apathy with which the masses regard the increasing assaults upon its basic principles.”⁵

- 14 In 2010, U.S. Supreme Court Justice Stephen Breyer echoed this concern: “education, including the transmission of civic values from one generation to the next, must play the major role in maintaining public confidence in the Court’s decisions...” However, “the Court too must help maintain public acceptance of its own legitimacy. It can do this best by helping ensure that the Constitution remains ‘workable’ in a broad sense of that term. Specifically, it can and should interpret the Constitution in a way that works for the people of America today.”⁶ Breyer thus moves beyond the Progressive era expectation that through civic education and by participating in direct democracy an educated citizenry could defend democratic principles. He calls as well for the Supreme Court to play its role in maintaining the distinctive American tradition of constitutionalism, defined by historian Michael Kammen as embodying “a set of values, a range of options, and a means of resolving conflicts within a framework of consensus. It has supplied stability and continuity to a degree the framers [of the U.S. Constitution] could barely have imagined” and “has been remarkably successful in safeguarding the Constitution itself,” buffering it from “our most erratic impulses.”⁷
- 15 Direct democracy in the United States is embedded in a workable constitutional heritage and a tradition of constitutionalism, and its principles can only be realized if both of these are safeguarded by a non-politicized judiciary. The decisions made by the Supreme Court in recent years have led to an increase in the influence of financing on campaigns and the abuse of the democratic process by powerful players. They have also raised charges that the court has become overly partisan in carrying out its mission of judicial review, thus weakening the constitutionalism that is the bedrock of all American politics and government, including direct democracy.⁸ In the following pages, the merits and dangers of direct democracy measures are examined, debated, applauded, and denounced, revealing the many facets of this controversial approach to political governance.

NOTES

1. For a recent discussion of American direct democracy, see for example Donna Kesselman, “Direct Democracy on Election Day: Ballot Measures as Measures of American Democracy,” *Transatlantica : revue d’études américaines/American Studies Journal*, 1/2011, accessed April 2012 at <http://transatlantica.revues.org/5279>; Initiative and Referendum Institute at the University of Southern California, accessed August 2012 at <http://www.iandrinstute.org>.
2. Most California historians would agree that there is urgent need to reform direct democracy in California to reduce its abuse by powerful interests, but not all agree that it is beyond redemption. See for example, Marie Bolton and Nancy C. Unger, “The Case for Cautious Optimism: California Environmental Propositions in the Late Twentieth Century,” *La Californie:Périphérie ou laboratoire?*, Annick Foucrier and Antoine Coppolani, eds. (Paris: L’Harmattan, 2004), 81-102.
3. See Denis Giroux below: « Alors qu’aux États-Unis, l’argent est aussi roi lors des référendums, que les millions de dollars privés sont jetés dans ces campagnes sans pour autant garantir la

victoire au plus dépensier, cette problématique est méconnue de ce côté de l'Atlantique au grand étonnement des intellectuels américains qui y voient le talon d'Achille de leur démocratie. »

4. The highly controversial *Citizen's United* decision is the subject of ongoing debate and interpretation.

5. James M. Beck, *The Constitution of the United States: Yesterday, Today—and Tomorrow* (NY, 1924) quoted in Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (NY: Knopf, 1986), 4.

6. Stephen Breyer, *America's Supreme Court: Making Democracy Work* (NY: Oxford UP, 2010), 73.

7. Kammen, 399.

8. The 2000 decision *Bush v. Gore* also contributed to a growing public mistrust of the court's nonpartisanship.

ABSTRACTS

Delving into the diverse structures, practices, and consequences of direct democracy in the United States and California and in the European Union, Italy, Switzerland, and France, this volume presents striking contrasts. French legal scholars demonstrate an exceedingly cautious, yet somewhat positive view of the potential promise of direct democracy to increase citizen involvement in decision-making in Europe, while Californian historians cry out in warning of its dangers and negative consequences. Central to the distinctions drawn between American and European systems of direct democracy is the extent to which the influence of money has intruded into the political process, as well as in the United States, the role of the U.S. Supreme Court, and the phenomenon of American constitutionalism.

Cherchant à analyser en profondeur les différentes structures, pratiques et conséquences de la démocratie directe aux États-Unis et plus particulièrement en Californie ainsi que dans l'Union Européenne, en Italie, en Suisse et en France, ce numéro de *Siècles* donne à voir des contrastes frappants. Si les juristes français font preuve d'une lecture très prudente – mais toutefois quelque peu positive – quant à la promesse potentielle que contient la démocratie directe pour permettre l'augmentation de la participation des citoyens dans le processus décisionnel en Europe, à l'opposé, les historiens californiens se répandent en avertissements contre ses dangers et conséquences négatives. Deux éléments permettent d'éclairer les distinctions tracées entre les systèmes américain et européen de démocratie directe : d'une part, le degré d'influence de l'argent dans le processus politique et, d'autre part, aux États-Unis, le rôle de la Cour Suprême des États-Unis et le phénomène du constitutionnalisme américain.

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