DENVER — Few elected officials would ever dare say, at least within earshot of a microphone, that voters making public policy decisions through ballot-box referendums are less capable or wise than legislators deliberating under a capitol dome.

But now a federal lawsuit challenging Colorado’s 20-year-old taxpayer-controlled state budgeting process, known by its acronym, Tabor, is speaking truth to power, plaintiffs say, and challenging the assumption that voters always know best.

“For a long time people have been tweaking Tabor around the edges and avoiding a direct assault,” said Michael F. Feeley, an attorney who is representing the group of 33 plaintiffs — mostly current and former state legislators, local county and municipal officials and educators. “But now there’s political will, political courage and enough legal firepower to say, ‘enough’s enough — we’ve got to fix this.’ ”

On the surface, the suit seems technical, arguing that Colorado’s Taxpayer Bill of Rights, generally considered the tightest cap on spending and taxation in the nation, blocks the ability and jurisdiction of the state Legislature to properly do its job.

The deeper intellectual wellspring, though, harks back to the definitions of what a representative democracy is supposed to be, as articulated by the nation’s founding framers, especially James Madison, the fourth president. In the Federalist Papers, a series of essays written in part by Madison in support of the Constitution, he pushed strongly for a barrier between the passions of the popular will and sober governance of the nation through a legislative branch. The lawsuit, filed last year, will have its first major hearing in federal District Court in Denver on Feb. 15.

“A legislature unable to raise and appropriate funds cannot meet its primary constitutional obligations,” the Colorado lawsuit reads. “Since the passage of Tabor in 1992, the State of Colorado has experienced a slow, inexorable slide into fiscal dysfunction.”

Some historians and legal scholars said the suit tilts at windmills, pushing an argument — the constitutional defense of representative government — that federal courts have rarely recognized and that broad segments of society, in the age of Twitter, WikiLeaks and disdain for Congress, do not see as worth breaking a sweat to defend.

“When you start arguing against these initiatives and referendum, you’re actually on strong historical grounds with the founding fathers,” said Kevin M. Wagner, an assistant professor of political science at Florida Atlantic University in Boca Raton.
But we are not in raw frontier America anymore, Professor Wagner said, and the literate, educated and plugged-in electorate of today fully expects to make its voice heard.

“There’s no evidence that we’re going to go back,” Professor Wagner said. “Participation in the system and ability to do so has increased and will continue to increase.”

The roots of direct democracy run especially deep across the states of the American West, where revulsion in the late 1800s over legislatures that were bought and sold by big-money mine owners, timber barons and ranchers led to the first initiative laws. Of 2,363 state ballot initiatives since then, according to the National Conference of State Legislatures, only two — Oregon and California — have had more than Colorado, and those three states account more than 38 percent of the national total.

Attorneys for the State of Colorado, in asking a judge to throw the suit out, said the sweeping arguments in favor of the legislative branch’s role in society are too grand and too small at the same time.

“Their arguments ultimately would require the Court to hold unconstitutional all forms of direct citizen lawmaking,” the state’s reply said. “Whether representative and direct democracy are actually incompatible, as plaintiffs argue, or whether they are simply two complementary ways of carrying out a republican government, as the American experience shows, is an interesting subject for philosophic and academic debate.”

The United States Supreme Court has thrown out, at least twice, ballot-approved amendments like Tabor to Colorado’s Constitution that the high court said were in violation of the U.S. Constitution, in 1964 and 1996.

But legislative prerogative for its own sake, under what is called the “guarantee clause” in Article IV of the United States Constitution — that states are guaranteed “a republican form of government” — has been harder to defend partly because interpretations of that phrase differed even during the early years of the republic and were never really settled in the centuries since.

Getting a federal judge or appeals panel to accept the argument at the heart of the anti-Tabor suit also means overcoming a Supreme Court precedent going all the way back to the 1840s, Luther v. Borden, in which the high court held that questions about the guarantee clause are the province of politics, not law.

One professor of constitutional law, Wilson R. Huhn at the University of Akron School of Law in Ohio, said that recent scholarly research supported the Madisonian notion that direct democracy could sometimes crush the interests of a minority in society — in votes, for example, to ban same-sex marriage.

But as a legal matter, Professor Huhn and several other prominent legal scholars said, the precedent of Luther stood like an implacable guard at the courthouse door.
“If you want an opinion from me, they don’t stand a chance,” Professor Huhn said, referring to the anti-Tabor legal team.

Plaintiffs and their lawyers concede that they have an uphill fight. But they say that Colorado’s journey with Tabor is special, and different from any other legal case or state. The law restricts spending and requires a popular vote on tax increases, which the plaintiffs say has led to a system of end-runs and shell games to keep government operations going.

“The structure of Colorado’s government has been changed in a fundamental way,” said David E. Skaggs, a lawyer for the legal team, which is working pro bono on the case. “We really have facts that are distinguishable from any prior cases.”

Other states where ballot propositions have shaped the nature of government, notably California, are wrestling with the consequences of direct democracy, too. There, the Legislature complained for years — becoming a national symbol of government dysfunction along the way — about being hamstrung by a ballot proposition from the 1930s that required a super-majority of two-thirds to pass a state budget.

Finally, in 2010, lawmakers in Sacramento overcame the supermajority rule. The result, last year, was the first budget passed on time in years, by a simple majority. How did the change in rules come about? Through a ballot initiative.