

Chicago-Kent Law Review

Volume 67
Issue 3 *University of Virginia Law School of Law*
John M. Olin Foundation: Symposium on Law
and Economics of Local Government

Article 2

October 1991

Direct Democracy and Discrimination: A Public Choice Perspective

Lynn A. Baker

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 Chi.-Kent L. Rev. 707 (1991).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol67/iss3/2>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

DIRECT DEMOCRACY AND DISCRIMINATION: A PUBLIC CHOICE PERSPECTIVE*

LYNN A. BAKER**

INTRODUCTION	708
I. RACIAL MINORITIES AND THE LAWMAKING PROCESS: PASSING VERSUS BLOCKING	712
II. REPRESENTATIVE VERSUS DIRECT DEMOCRACY	715
A. <i>Bicameralism and the Executive Veto</i>	716
B. <i>Logrolling</i>	721
C. <i>Agenda Control</i>	732
D. <i>Open Voting</i>	733
E. <i>Deliberation and Naked Preferences</i>	736
1. A Civic Republican Conception of Deliberation	738
2. "Procedural" Aspects of Deliberation	744
3. Reconciling the Existing Commentary	750
4. The Relationship between Deliberation and Discrimination	751
III. REMEDIES AND THE ROLE OF THE COURTS	752
A. <i>Abolish Plebiscites?</i>	753
B. <i>More Intrusive Judicial Review</i>	755
1. <i>The Effects of Filters</i>	757
2. <i>Intent and Modern Equal Protection Doctrine</i>	759
3. <i>Due Process of Lawmaking</i>	766
C. <i>Improving Plebiscitary Procedures</i>	772
CONCLUSION	775

* This paper was prepared for the John M. Olin Foundation Conference on "The Law and Economics of Local Government" held November 8-9, 1991, at the University of Virginia School of Law.

** Associate Professor, University of Arizona College of Law. B.A., Yale University, 1978; B.A., Oxford University, 1982; J.D., Yale University, 1985.

For their valuable comments on earlier drafts, I would like to thank Kathy Abrams, Julian Eule, Clay Gillette, Robert Glennon, Lani Guinier, Pam Karlan, Mike Klarman, Saul Levmore, Dan Ortiz, Dan Polsby, William Riker, George Rutherglen, Stewart Schwab, Mike Steger, Bill Stuntz, Peter Swire, and Rip Verkerke.

This paper and I also profited from discussions at New York Law School, the University of Arizona College of Law, the University of Illinois College of Law, and the conference held at the University of Virginia School of Law for which the paper was originally prepared.

I am especially grateful for the excellent research assistance of Greg Bowman, Mike Malecek, Jack Ohlweiler, and Mike Steger, all Class of 1993 at the University of Virginia School of Law, and Caryn Gardner, Class of 1993 at the University of Arizona College of Law.

DIRECT DEMOCRACY AND DISCRIMINATION: A PUBLIC CHOICE PERSPECTIVE

INTRODUCTION

The constitutions of approximately half of the states authorize the electorate to initiate and enact legislation without the concurrence or assistance of the state legislature.¹ Although there is substantial variation in the frequency with which the People exercise their direct lawmaking power, every year several important issues are decided by substitutive plebiscite in nearly all of these states.² Moreover, initiative-forced reforms include some of the turning points in American legal history: women's suffrage, the abolition of the poll tax, the establishment of the eight-hour work day, and campaign finance regulations.³

Despite the importance of direct democracy in American lawmaking, legal academics have only recently begun to notice its existence.⁴

1. Citizens may initiate and enact ordinary legislation in 21 states (Alaska, Arizona, Arkansas, California, Colorado, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming). See THE COUNCIL OF STATE GOVERNMENTS, 29 THE BOOK OF THE STATES 330 (1992); THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 51 (1989); DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 38-40 (1984); DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 95-97 (1989); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1587-88 (1990). In these 21 states plus Kentucky, Maryland, and New Mexico, voters can require the legislature to obtain the approval of the electorate before its enactments become law. THE COUNCIL OF STATE GOVERNMENTS, *supra* at 336; CRONIN, *supra*; MAGLEBY, *supra*; Eule, *supra*. Florida, Illinois, and fifteen of the states that allow statutory initiatives also permit citizens to initiate a state constitutional amendment (Arizona, Arkansas, California, Colorado, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota). THE COUNCIL OF STATE GOVERNMENTS, *supra* at 330; CRONIN, *supra*; MAGLEBY, *supra*; Eule, *supra*. (In Illinois, the constitutional amendments may pertain only to the Legislative Article, Eule, *supra*, at 1509 n.22.) The District of Columbia also provides for voter initiatives and popular referenda. D.C. CODE ANN. § 1-281 (1987); CRONIN, *supra*.

2. Five states have each had more than 100 statutory and constitutional initiatives qualify for the ballot since direct democracy has been available in the state: Oregon (227 initiatives proposed in 1902-79); California (160 in 1911-79); North Dakota (141 in 1914-79); Colorado (125 in 1910-79); and Arizona (112 in 1911-79). At the other end of the spectrum, four states that permit initiatives have each had fewer than 10 initiatives qualify for the ballot: Wyoming (0 initiatives proposed in 1968-79); Illinois (2 in 1970-79); Florida (2 in 1968-79); and Utah (8 in 1900-79). MAGLEBY, *supra* note 1, at 71; CRONIN, *supra* note 1, at 51. See also SCHMIDT, *supra* note 1, at 211-15 (initiative and referendum election results for 1987-88), 287-94 (statewide initiatives passed by voters in 1970-86).

The reasons for this variation are not clear. Magleby has suggested that the states qualifying the highest number of measures for the ballot are those with the lowest signature thresholds. MAGLEBY, *supra* note 1, at 42. Other scholars contend that "a state's historical tradition and political culture" may be the critical determinant of the frequency with which direct lawmaking is undertaken. Louis J. Sirico, Jr., *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637, 662 (1980); Eule, *supra* note 1, at 1509 n.22.

3. CRONIN, *supra* note 1, at 50-52, 59, 97-98, 199; Ronald J. Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 NEB. L. REV. 965, 1009-17, 1021-26 (1979).

4. See, e.g., Allen, *supra* note 3; Anthony S. Alperin & Kathline J. King, *Ballot Box Planning*:

Two related questions have quickly occupied center stage. Are plebiscites more likely than representative processes to produce laws that disadvantage racial minorities? And should the courts, which have not historically varied their analyses because of a law's popular origin, begin to employ different standards when reviewing the enactments of plebiscites and legislatures? Thus far, scholars have largely agreed that the

Land Use Planning Through the Initiative Process in California, 21 SW. U. L. REV. 1 (1992); Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Charles L. Black Jr., *National Lawmaking by Initiative? Let's Think Twice*, 8 HUM. RTS. 28 (Fall 1979); Nick Brestoff, Note, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922 (1975); Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347 (1985) (book review); Marc Slonim & James H. Lowe, Comment, *Judicial Review of Laws Enacted by Popular Vote*, 55 WASH. L. REV. 175 (1979) [hereinafter *Judicial Review*]; Kathryn A. Dunwoody, Note, *Arnel Development Co. v. City of Costa Mesa: Rezoning by Initiative and Landowners' Due Process Rights*, 70 CAL. L. REV. 1107 (1982); Eule, *supra* note 1; James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43 (1983); Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733 (1988) [hereinafter *Lousy Lawmaking*]; Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988); James D. Gordon III & David B. Magleby, *Pre-Election, Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298 (1989); Herbert Graham, Note, *The Direct Initiative Process: Have Unconstitutional Methods of Presenting the Issues Prejudiced Its Future?*, 27 UCLA L. REV. 433 (1979); Alexander G. Gray, Jr. & Thomas R. Kiley, *The Initiative and Referendum in Massachusetts*, 26 NEW ENG. L. REV. 27 (1991); Priscilla F. Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URB. L. ANN. 135 (1981); Randall L. Hodgkinson, Comment, *Executive, Legislative, and Judicial Power Over Direct Legislation in Arizona*, 23 ARIZ. ST. L. J. 1111 (1991); Douglas H. Hsiao, Note, *Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic*, 41 DUKE L. J. 1267 (1992); David J. Jordan, Comment, *Constitutional Constraints on Initiative and Referendum*, 32 VAND. L. REV. 1143 (1979); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505 (1982) [hereinafter Lowenstein, *Campaign Spending*]; Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983) [hereinafter Lowenstein, *Single-Subject*]; Daniel Lowenstein & Robert Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 HASTINGS CONST. L.Q. 175 (1989); Randy M. Mastro, Deborah C. Costlow & Heidi P. Sanders, *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It*, 32 FED. COMM. L.J. 315 (1980); Douglas C. Michael, Note, *Judicial Review of Initiative Constitutional Amendments*, 14 U.C. DAVIS L. REV. 461 (1980); Douglas C. Michael, Note, *Preelection Judicial Review: Taking the Initiative in Voter Protection*, 71 CAL. L. REV. 1216 (1983); Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977-78); Elizabeth A. McNellie, Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157 (1989) [hereinafter *Extrinsic Aids*]; Mark A. Nitikman, Note, *Instant Planning—Land Use Regulation by Initiative in California*, 61 S. CAL. L. REV. 497 (1988); Note, *The Referendum as a "Republican Form of Government,"* 24 HARV. L. REV. 141 (1910); Craig N. Oren, Comment, *The Initiative and Referendum's Use in Zoning*, 64 CAL. L. REV. 74 (1976); Lawrence G. Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373 (1978); James J. Seeley, *The Public Referendum and Minority Group Legislation: Postscript to Reitman v. Mulkey*, 55 CORNELL L. REV. 881 (1970); John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377 (1985); Sirico, *supra* note 2; Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127.

answer to both questions is "yes."⁵

In this Article, I argue that the answer to both questions is "no." First, I use public choice theory⁶ to show that a rationally self-interested racial minority's preference between representative and direct lawmaking processes is a difficult empirical question and cannot confidently be resolved on the strength of *a priori* reasoning. My response to the first question, therefore, is best understood as a refutation of confident claims that racial minorities are better served by representative than direct lawmaking processes, than as an argument that direct lawmaking processes are superior to representative ones in this regard.

I then consider commentators' suggestions that plebiscitary legislation should begin to receive "a harder judicial look" under equal protection doctrine than the enactments of representative bodies. I contend that such disparate judicial treatment is neither necessary nor desirable, even if plebiscites *were* empirically found to be systematically less likely than representative bodies to enact legislation that disadvantages racial minorities.

My discussion focuses on substitutive plebiscites, in which the voters completely bypass the legislative and executive branches of government.⁷ This is typically thought to be direct democracy in its purest form. My discussion further centers on racial minorities because the persistence of racial prejudice and of the correlation between race and poverty in our society may make those interest groups unusually vulnerable to majoritarian oppression and unusually incapable of capturing lawmaking processes. It is important to keep in mind, however, that racial minorities are only one type of interest group that is affected by differences in, and the relationship between, the direct and representative lawmaking

5. The only legal scholars even to approximate a dissent on either of these questions have been Allen, *supra* note 3, Briffault, *supra* note 4, and Gillette, *supra* note 4.

6. Whether and how "public choice theory" differs from "positive political theory" is a matter on which there appears to be little consensus. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 6-7 (1991); Daniel A. Farber & Philip Frickley, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457 (1992). I prefer the former term in the present context because it appears to be more frequently used in reference to the theorists (*e.g.*, Buchanan, Tullock, Mueller) on whose work I most heavily rely.

7. Julian Eule has coined highly useful terms to denote the two major types of plebiscites: "substitutive direct democracy" and "complementary direct democracy." Eule, *supra* note 1, at 1510-13.

The enactments of substitutive plebiscites are popularly referred to as "initiatives." Some initiatives, however, are indirect in that they are submitted to the representative legislature before being placed on the ballot. See *id.* at 1510-11.

Popularly referred to as "referenda," complementary plebiscites come in three variants distinguished by who or what prompts the referral to the legislature. *Id.* at 1512-13.

For purposes of this Article, "plebiscite" means only direct initiatives, unless otherwise specified.

processes. As modern equal protection doctrine makes clear, we tolerate majority "oppression" of some interest groups more than others. And we differentially permit interest groups to impose costs on the majority through the passage of rent-seeking legislation.

Part I discusses the important but overlooked reciprocity of effect of any systematic differences in the two types of lawmaking processes. To the extent that a given difference in the two lawmaking processes makes it more difficult for a racial minority to *block disadvantageous* legislation in a plebiscitary than in a representative process, that same difference will make it easier for the minority to *pass advantageous* legislation in a plebiscitary than in a representative process.

Part II examines the major differences in the direct and representative lawmaking processes: (1) state legislatures, but not plebiscites, are nearly always bicameral and their enactments subject to an executive veto; (2) representatives have more opportunities for logrolling than do plebiscite voters; (3) the author of the initiative almost always and almost entirely sets the agenda in a plebiscite, while agenda-setting in a representative body is a much more complicated process; and (4) representatives' votes are public, while plebiscite votes are anonymous. Employing public choice theory, I show that whether these differences result in plebiscites being systematically more likely than representative bodies to enact legislation that disadvantages racial minorities is a much closer theoretical question than previous commentators have thought. Part II concludes by addressing the claims that representative bodies engage in more deliberation than do plebiscites, and that they therefore are systematically less likely than plebiscites to enact legislation that disadvantages racial minorities. I determine that both this premise and conclusion are seriously flawed.

Part III considers what, if anything, should be done if plebiscites *were* empirically found to be systematically more likely than representative bodies to enact legislation that disadvantages racial minorities. I show first that simply abolishing plebiscites is neither politically feasible nor especially desirable. I then take up scholars' suggestions that the courts should engage in more intrusive equal protection review of plebiscitary legislation than of legislatures' enactments.

Close examination reveals these proposals for "a harder judicial look" to be misguided for three reasons. First, there is little evidence that any differences in the two lawmaking processes will make it *more difficult for courts to identify* unconstitutionally discriminatory legislation under existing equal protection standards if it is enacted by a plebiscite

rather than by a representative legislature. Second, these proposals seemingly misunderstand the nature and operation of the intent test in modern equal protection law. Third, implicit in these suggestions is a doctrine of due process of lawmaking, which the Court and most commentators have in other contexts considered to be neither workable nor desirable.

I conclude that those who, despite the analysis in Parts I and II, remain interested in providing racial minorities still greater protection from potentially disadvantageous plebiscitary legislation, might more productively focus their attention on remedying any perceived defects or weaknesses in existing plebiscitary procedures than on altering the standard of judicial review.

I. RACIAL MINORITIES AND THE LAWMAKING PROCESS: PASSING VERSUS BLOCKING

There is a facial attractiveness to the claim that "the more direct democracy becomes, the more threatening it is [to racial minorities]."⁸ By definition, a minority group will not itself have enough plebiscite votes either to pass laws that would advantage it or to stop legislation that would disadvantage it. A minority group may, however, be a sufficiently important sector of a legislator's constituency that her desire for reelection or advancement may induce her to be responsive to the group's interests and concerns.

In recent years, several legal scholars have undertaken detailed theoretical comparisons of the representative and direct lawmaking processes in order to assess more carefully their relative impacts on various interest groups.⁹ Derrick Bell¹⁰ and Julian Eule¹¹ have each contended that, from the perspective of racial minorities, representative democracy has several important advantages over its more direct counterpart.¹²

8. Bell, *supra* note 4, at 1.

9. See, e.g., Allen, *supra* note 4; Bell, *supra* note 4; Eule, *supra* note 1; Gillette, *supra* note 4.

10. Bell, *supra* note 4.

11. Eule, *supra* note 1.

12. Clay Gillette has recently compared the representative and direct lawmaking processes in terms of their relative capacities "to serve public interest." Gillette, *supra* note 4, at 932. He defined "public interest" as "broadly (if vaguely) to comprise behavior that minimizes expropriation (rent-seeking) or maximizes coordination." *Id.* at 933.

Gillette admitted having some difficulty defining "public interest," but believed that his definition "does contain some substantive requirements, primarily by excluding certain conduct or motives." *Id.* at 932. He more broadly defined "public interest" to mean that "individual decisionmakers acting in the public interest would be able to justify their decisions by reference to the resulting increased welfare for society at large." *Id.* Gillette noted, however, that he does "not mean a single conception of the good on which all informed individuals would agree." *Id.*

Gillette undertook "to indicate the existence of incentives in the legislative and plebiscitary

It is uncontroversially true that representative and direct lawmaking processes differ in several important respects.¹³ Contrary to the apparent consensus in the literature, however, these differences do not constitute *a priori* reasons for a racial minority *generally* to prefer representative to direct democracy.

One important concern of a racial minority is blocking the passage of disadvantageous legislation. By “disadvantageous” legislation, I mean legislation of which the rationally self-interested median member of the minority group would not approve, presumably including unconstitutionally discriminatory legislation. Let us assume, *arguendo*, that the differences in the two lawmaking processes cause plebiscites to be systematically more likely than representative bodies to enact legislation that disadvantages a racial minority.¹⁴ That is, let us assume that it is systematically more difficult for a racial minority to block disadvantageous legislation in a plebiscite than in a representative lawmaking process. If correct, this assumption *taken alone* leads to the conclusion that a racial minority is better off with representative than with direct lawmaking.

It is critical to note, however, that blocking disadvantageous legislation is only one goal of any interest group. A racial minority will also be concerned with *passing* legislation that advantages it—that is, with passing legislation of which the rationally self-interested median member of the minority group would approve, including rent-seeking legislation. To the extent that a given difference in the two lawmaking processes makes it *more difficult* for a racial minority to block *disadvantageous* legislation in a plebiscitary than in a representative process, that same difference will make it *easier* for the minority to pass *advantageous* legislation in a plebiscitary than in a representative process.

processes that would tend to favor conduct consistent with public or private interest.” *Id.* at 939. He concluded that “at least in discrete areas with identifiable characteristics, criticisms of plebiscites both understate the capacity of participation and overstate the capacity of legislative processes to serve public interest.” *Id.* at 932.

Although some of Gillette’s many insights will prove useful in the course of this Article, his project is fundamentally distinguishable by his chosen basis for comparing the two lawmaking processes: realization of “the public interest” rather than the likelihood that legislation that disadvantages a racial minority is enacted.

13. State legislatures, but not plebiscites, are nearly always bicameral and their enactments are subject to an executive veto, *see infra* Part II.A.; representatives have more opportunities for logrolling than do plebiscite voters, *see infra* Part II.B.; the agenda-setting process is more complicated in a representative body than in a plebiscite, *see infra* Part II.C.; and representatives’ votes are open, while plebiscite votes are anonymous, *see infra* Part II.D. More controversial is the claim that representative bodies engage in more deliberation than do plebiscites, *see infra* Part II.E.

14. This is the claim of both Derrick Bell, *see supra* note 4, and Julian Eule, *see supra* note 1.

Sometimes, of course, a “racist”¹⁵ *majority* group may exist whose preferences are as intense as those of the racial minority group. In this case, the minority group is unlikely to be able to block disadvantageous legislation *or* to pass advantageous legislation under *either* lawmaking process. If the racists constitute a *minority* group no greater in number than the racial minority group, however, success for either group depends on winning over sufficient numbers of the third, racially indifferent group. In this case, any difficulty that a racial minority encounters when trying to block disadvantageous legislation in a plebiscitary process will be similarly encountered by any *racist* minority that tries to block plebiscitary legislation that advantages a racial minority. Thus, any difference in the two lawmaking processes that makes it more difficult for a racial minority to block disadvantageous legislation in a direct than a representative process will have an equally strong *positive* effect when the racial minority is interested in passing advantageous legislation.

In light of the above analysis, a racial minority is likely *generally* to prefer direct to representative democracy if, *ceteris paribus*,¹⁶ (1) the racial minority will more frequently be seeking to pass advantageous legislation than block disadvantageous legislation in the direct lawmaking process, *and* the ratio of the racial minority’s passing to blocking activity is smaller within the representative than within the direct lawmaking process; or (2) the racial minority will more frequently be seeking to block disadvantageous legislation than pass advantageous legislation in the direct lawmaking process, *and* the ratio of the racial minority’s blocking to passing activity is greater within the representative than within the direct lawmaking process.¹⁷

These comparisons require empirical data that are not currently available and may not be easily gathered. First, there is the task of classifying proposed legislation as “advantageous,” “disadvantageous,” or “neutral” with respect to racial minorities.¹⁸ One can imagine many issues on which reasonable and rationally self-interested members of a racial minority may disagree in their categorizations: bussing, affirmative action, and English-only laws, to name but a few.

15. I use this term simply to denote those who, for whatever reason, oppose legislation that advantages, and/or support legislation that disadvantages, a racial minority. I do not mean to convey any normative judgment about such views or those who hold them.

16. Perhaps the most important thing being held constant here is intensity of preference with regard to blocking or passing any *particular* piece of legislation.

17. Whether the racial minority considers it more important to block disadvantageous legislation or pass advantageous legislation will, of course, depend in part on whether the group perceives the status quo as disadvantageous or advantageous more frequently and on issues of greater import.

18. For my definitions of these terms for purposes of this Article, see text accompanying notes 13-15.

Second, even if this classification problem is adequately resolved, there is the difficulty of measuring and comparing the frequency with which a racial minority seeks to pass advantageous or block disadvantageous legislation in the two processes. In the case of plebiscites, one could simply count the number of advantageous and disadvantageous measures that appear on ballots. But even this measure is not sensitive to earlier but equally important blocking and passing activity that occurs, for example, while the signatures necessary to put a measure on the ballot are gathered (or not). In the case of a representative body, the counting task is made still more difficult by the greater fluidity and complexity of the lawmaking process: Legislation is continuously born, altered, and killed on the floor of each chamber, in committee meetings, and in the proverbial cloakroom. Even if one arrives at a satisfactory measure of blocking and passing activity in the representative body, one must then somehow ensure that the chosen measures of plebiscitary activity are truly comparable.

In sum, whether a rationally self-interested racial minority (or other interest group) ought *in general* to prefer representative to direct lawmaking processes is a difficult empirical question and cannot be resolved on the strength of a priori reasoning. Whether a racial minority is likely to prefer a representative to a direct lawmaking process *in a given instance*, however, will depend on (1) whether the racial minority is attempting to block disadvantageous legislation or pass advantageous legislation, and (2) whether differences in the representative and direct lawmaking processes cause plebiscites to be more (or less) likely than representative bodies to enact legislation that disadvantages (or advantages) the racial minority. The first is an uncomplicated empirical inquiry. The second is the focus of the next Part.

II. REPRESENTATIVE VERSUS DIRECT DEMOCRACY

There are six major, apparent differences in the representative and direct lawmaking processes: bicameralism, the executive veto, logrolling opportunities, agenda control, open voting, and capacity for deliberation. In this Part, I primarily consider the extent to which each of these differences¹⁹ in the two processes will cause plebiscites to be more likely than representative bodies to enact legislation that disadvantages racial minorities.²⁰ I conclude that scholars have greatly overestimated the likely ef-

19. I challenge Bell's and Eule's claims that representative bodies are likely to engage in more deliberation than plebiscites. See *infra* Part II.E. I do not contest the presence or claimed extent of the other apparent differences in the two lawmaking processes.

20. My discussion focuses on the ability of racial minorities to block disadvantageous legisla-

fect of these differences on the ability of a racial minority to block disadvantageous legislation in a representative versus a direct lawmaking process.

A. Bicameralism and the Executive Veto

Perhaps the most obvious differences between plebiscitary and representative lawmaking processes at the state level are the bicameralism of, and the availability of the executive veto in, the latter but not the former.²¹ I begin my analysis of the effects of these two differences begins by employing a stylized approach developed by Buchanan and Tullock, which sets theoretical minimum bounds on the size of groups necessary to block and enact legislation. I later relax these assumptions and conclude that very similar percentages of voters are likely to be necessary in a plebiscite and a representative body both to block legislation that disadvantages a racial minority and to enact legislation that advantages it.

In theory, slightly more than *one-quarter* of the voters could control a unicameral *representative* legislature: The approval of only a majority of the representatives is required to pass legislation, and each representative in the majority need be elected by only a majority of the voters in her district.²² The addition of a second chamber will likely increase the

tion (rather than their ability to pass advantageous legislation) for two major reasons: (1) the courts have a greater role to play when reviewing legislation that has been enacted versus blocked; and (2) previous scholars have contended that plebiscites are more likely than representative processes to produce laws that disadvantage racial minorities. Because of the reciprocity of effect of any systematic differences in the representative and direct lawmaking processes (*see* Part I *supra*), it does not seem necessary to discuss *both* the legislative blocking and passing ability of racial minorities.

21. Every state except Nebraska has a bicameral legislature. In 1934, Nebraska voters adopted a citizen-initiated constitutional amendment establishing a unicameral legislature. CRONIN, *supra* note 1, at 33. The governor of every state except North Carolina has a veto power over enactments by the legislature, although the scope of this power varies greatly. THE COUNCIL OF STATE GOVERNMENTS, *supra* note 1, at 49-50; MAGLEBY, *supra* note 1, at 47; DANIEL R. MANDELKER, DAWN CLARK NETSCH, PETER W. SALSICH, JR., JUDITH WELCH WAGNER, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM: CASES AND MATERIALS 701-18 (3d ed. 1990) [hereinafter STATE AND LOCAL GOVERNMENT]. No governor has a veto over statutory or constitutional initiatives. MAGLEBY, *supra* note 1, at 47.

At the local level, all representative lawmaking bodies are unicameral and there is no analogue of the gubernatorial veto. CRONIN, *supra* note 1, at 33; STATE AND LOCAL GOVERNMENT, *supra*, at 27-31.

Although plebiscites occur at the local as well as the state level, and a comparison of the two legislative processes at the local level would therefore be useful, I restrict my analysis to the more difficult case in which the alternative to the plebiscite is a representative body with special "filters" (bicameralism and the executive veto) against majority tyranny. To the extent that even these representative bodies are not found to provide racial minorities better protection against disadvantageous legislation than plebiscites, the case will be even stronger with regard to local representative lawmaking bodies.

22. JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 220-22 (1962); Harold H. Bruff, *Legislative For-*

number of voters necessary to pass legislation by a representative body.²³ To the extent that the members of the two chambers are elected from *identical* jurisdictions, the same one-quarter of the voters could, in theory, control a *bicameral* representative legislature. The more diverse the jurisdictions are from which the members of the two chambers are elected, the greater the number of voters that will be necessary to capture both houses of the legislature and, therefore, to pass legislation.²⁴ If each voter gets to elect a representative in *both* chambers, however, and representatives are elected on a geographical basis, no more than 39 percent of the voters could, in theory, be *necessary* to pass legislation, even assuming the most diverse possible jurisdictions.²⁵

Thus, only approximately 39 percent of the voters could, in theory, be *necessary* (in the absence of an executive veto) for a bicameral representative body to pass legislation that disadvantages a racial minority. In contrast, a simple majority of voters is always necessary for a plebiscite to enact legislation. Thus, a greater percentage of voters could, in theory, be necessary for a plebiscite than for a bicameral representative legislature to *pass* legislation that disadvantages a racial minority.

Under similar assumptions, a greater percentage of voters could, in theory, also be required for a plebiscite than for a bicameral representative body to *block* legislation that disadvantages a racial minority. In a

mality, Administrative Rationality, 63 TEX. L. REV. 207, 219 (1984); Saul Levmore, *Bicameralism: When are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145, 151-52 (1992).

23. BUCHANAN & TULLOCK, *supra* note 22, at 233-42; Levmore, *supra* note 22, at 152-53.

24. BUCHANAN & TULLOCK, *supra* note 22, at 236-42; Bruff, *supra* note 22, at 219; Levmore, *supra* note 22, at 152-53. Buchanan and Tullock define "complete diversity" as a situation in which "the members of the constituency of a representative in one house [are] distributed evenly among all of the constituencies for the other house." BUCHANAN & TULLOCK, *supra* note 22, at 237 (italics deleted).

Although bicameralism is today thought to play an important role in reducing the power of factions, it is fascinating that Condorcet, a principal founder of social choice theory, was opposed to it on the ground that it "had no theoretical justification." Iain McLean & Arnold B. Urken, *Did Jefferson or Madison Understand Condorcet's Theory of Social Choice?*, 73 PUB. CHOICE 445, 450 (1992). In his *Lettres d'un bourgeois de New H[e]javen à un citoyen de Virginie, sur l'inutilité de partager le pouvoir législatif en plusieurs corps* (1787), Condorcet argued that "checks on tyrannical legislatures and executives were better achieved by appropriate criteria for the franchise and a suitable voting rule involving qualified majorities." McLean & Urken, *supra*, at 450.

25. Assume that each entity to be represented is divided in half and that one member of Chamber A is elected by each half of the entity. Then assume that representatives to Chamber B are elected from districts whose boundaries are drawn perpendicular (at a 90-degree angle) to the boundaries that determine representation in Chamber A. Under this most diverse possible arrangement of bicameral geographical representation, 26% (51% of the representatives in each chamber, each of whom is elected by 51% of her constituents) of the voters could be necessary for *each* chamber to pass legislation. But approximately 13% of the voters could be geographically situated such that their votes are necessary for passage in *both* houses. Thus approximately 39% of the voters ($2 \times 26\% - 13\%$) could be necessary to secure passage of a law in this most diverse possible bicameral legislature.

See BUCHANAN & TULLOCK, *supra* note 22, at 241-42.

bicameral legislature, a majority of the membership of one house can block proposed legislation. Since each representative in the majority need be elected by only a majority of the voters in her district, approximately 26 percent of the voters could, in theory, block legislation that disadvantages a racial minority in a bicameral representative legislature. In a plebiscite, however, a majority of the voters is always necessary to block legislation.

The executive veto is likely to block enactments by a representative body that would impose external costs on a majority. Although, as we have seen, a coalition of as few as 26 percent of the voters may enact legislation through a bicameral representative body, governors are elected by (and presumed to be responsive to) no less than a simple majority of the voters.²⁶ Thus, the executive veto should impede the passage in a bicameral legislature of only that subset of legislation that disadvantages a racial minority that would otherwise be enacted by a coalition of 26 to 50 percent of the voters.²⁷

If exercised, the gubernatorial veto requires that legislation pass each house by a supermajority, typically two-thirds of the membership.²⁸ Where each citizen gets to vote for a representative in each (rather than only one) chamber of a bicameral legislature, a two-thirds supermajority override requirement could theoretically be met by approximately 45 percent of the voters, assuming the most diverse possible jurisdictions.²⁹ In contrast, a simple majority of voters is always necessary for a plebiscite to enact legislation (recall that no gubernatorial veto of plebiscitary

26. As Saul Levmore has noted, "[o]ne-quarter of the voters may elect one-half of the legislature, but the [executive] must still be responsive to a coalition of one-half." Levmore, *supra* note 22, at 155.

This is particularly true in the case of governors who, unlike U.S. presidents, are elected directly rather than by an electoral college.

27. See *supra* note 22 and accompanying text; Levmore, *supra* note 22, at 155.

28. See THE COUNCIL OF STATE GOVERNMENTS, *supra* note 1, at 172-74.

29. If the two chambers' representatives are elected from identical jurisdictions, only approximately 34% of the voters could in theory be required to achieve the two-thirds supermajority necessary to override a gubernatorial veto. That is, the same 66% of the representatives in each chamber could vote in favor of the measure, and each representative in this supermajority need be elected by only 51% of her constituents ($.66 \times .51 = .337$).

If the two chambers' representatives are elected from the most diverse possible jurisdictions, see *supra* note 25, a total of approximately 67% of the voters will be required to achieve a two-thirds supermajority. Approximately 22% of those voters (44% of the voters in 51% of the jurisdictions), however, will be geographically situated such that their votes are necessary for both chambers. Thus, only approximately 45% of the voters (67% minus 22%) will be necessary to override a gubernatorial veto if the two legislative chambers are elected from the most diverse possible jurisdictions.

Recall that in the absence of a gubernatorial veto, 26% (identical jurisdictions) to 39% (the most diverse possible jurisdictions) of the voters is necessary to pass legislation in a bicameral legislature. See *supra* notes 22-25 and accompanying text.

legislation is available). Thus, even in the case of an executive veto, a greater percentage of voters could, in theory, be required for a plebiscite than for a bicameral representative legislature to *pass* legislation that disadvantages a racial minority.

The exercise of the executive veto also affects the minimum number of voters necessary to block legislation. Under a two-thirds supermajority rule, 34 percent of the representatives in one chamber could, in theory, block a legislative override of an executive veto. Since each representative need be elected by a mere majority of the voters, 17 percent of the voters could, in theory, block legislation in a bicameral legislature once it has been vetoed by the executive.³⁰ In contrast, a majority of the voters is always necessary to block the enactment of plebiscitary legislation. Thus, in the case of an executive veto, a greater percentage of voters could, in theory, be required for a plebiscite than for a bicameral representative legislature to *block* the passage of legislation that disadvantages a racial minority.

Because of the limited circumstances under which an exercise of the executive veto is likely—theoretically when a bicameral legislature has been captured by only 26 to 50 percent of the voters—we would expect most legislation that disadvantages a racial minority to emerge from a bicameral legislature without having to meet a two-thirds supermajority override requirement. But the absence of an executive veto will also mean that the disadvantageous legislation would likely be supported by at least a majority of the voters. Thus, we would expect a majority of the voters to be necessary in either a bicameral legislature or a plebiscite to pass legislation that disadvantages a racial minority. Under these same conditions and assumptions, however, fewer votes could, in theory, be necessary for a bicameral legislature than for a plebiscite to *block* legislation that disadvantages a racial minority. Only 26 percent of the voters could theoretically block legislation in even the most diverse possible bicameral legislature,³¹ while a majority of the voters is always necessary to block plebiscitary legislation.

Thus far, it would seem that a racial minority concerned about blocking disadvantageous legislation is likely to prefer a bicameral legislature to a plebiscite. Although a majority of voters could, in theory, be necessary in *either* process for a racist group to *pass* legislation that disadvantages a racial minority, a far smaller percentage of voters could, in

30. Recall that 26% of the voters could be necessary in the absence of a gubernatorial veto. See *supra* note 22 and accompanying text.

31. See *supra* note 25.

theory, be necessary for a racial minority to *block* disadvantageous legislation in a bicameral legislature (26 percent) than in a plebiscite (51 percent).

Let us now relax some assumptions of Buchanan and Tullock's approach. Most critically, the number of voters *actually* necessary to block legislation in a bicameral legislature may well be closer to 51 percent than to the theoretical 26 percent. The figure of 26 percent assumes that all representatives in the exactly 51 percent who vote against the proposed legislation are (1) elected by exactly 51 percent of voters, and (2) that this group of constituents is identical with the exactly 51 percent of their constituents who believe that the legislation at issue should not be enacted. The figure of 26 percent also assumes that each of the remaining 49 percent of representatives in that chamber (1) is unanimously elected by her constituents, and (2) that those constituents are further unanimous in their agreement that the legislation at issue should be passed.

Each of these foundational assumptions quite obviously represents an extremely unlikely state of affairs.³² We would expect, rather, that *all* representatives are elected by—and will vote on any given issue to reflect the preferences of—some percentage of their constituents *between* 51 and 99. As this more likely state of affairs is approximated, the number of votes necessary to block legislation in a bicameral representative body approaches 51 percent.³³

Relaxing some of Buchanan and Tullock's assumptions in this way leads to the conclusion that very similar percentages of voters are likely to be necessary for a plebiscite and for a representative body to block legislation that disadvantages a racial minority. Thus, contrary to scholars' claims, bicameralism and the possibility of an executive veto should not cause a representative body's enactments to be systematically less likely than those of a plebiscite to disadvantage racial minorities.³⁴ In

32. Even Buchanan and Tullock seem to appreciate this fact. BUCHANAN & TULLOCK, *supra* note 22, at 221.

33. Thus, for example, if *each* of the 51% of representatives in one chamber who vote against the proposed legislation is elected by 70% of the voters, 90% of whom believe that the legislation at issue should not be enacted, the number of voters *actually* necessary to block the legislation in a bicameral legislature increases from 26% ($.51 \times .51 \times 1.00$) to 32% ($.51 \times .70 \times .90$). As each of the first two component percentages increases, and as the third component percentage decreases, the number of voters actually necessary to block legislation in a bicameral legislature approaches 51% ($1.00 \times 1.00 \times .51$).

34. Both Bell and Eule, for example, contend that the bicameralism of legislatures makes representatives less likely than plebiscite voters to enact legislation that disadvantages racial minorities. Bell argues that representatives' "excesses may be curtailed by the checks and balances of the political process," presumably including bicameralism. Bell, *supra* note 4, at 20. Eule claims more spe-

addition, very similar percentages of voters are likely to be necessary for a racial minority to enact rent-seeking or other advantageous legislation through either legislative process. In sum, the bicameralism and the possibility of an executive veto in the representative lawmaking process do not alone provide a priori reasons for a racial minority to prefer representative to direct democracy.

B. Logrolling

The opportunity for logrolling is another apparent difference between representative and plebiscitary lawmaking processes. Logrolling or vote trading means that individuals exchange one *set* of preferences for another.³⁵ In particular, individuals with relatively less intense preferences on one issue provide their votes in exchange for others' votes on a matter of greater personal importance.³⁶ Such trades arguably create value, making all of the voters better off, and none worse off, than before the exchange.³⁷

In order for logrolling to take place, three conditions must be met. First, the same potential traders must be involved in multiple votes (or a single vote on multiple issues). Second, the number of potential traders must be relatively small, so that a given trade is likely to affect the outcome of the pertinent votes. Third, potential traders must be able to monitor and sanction a trading partner's subsequent behavior (or the pertinent votes must simultaneously, as in the case of a single vote on multiple issues).³⁸

It is easy to see that all three conditions are readily met in a representative legislature, and quite difficult to satisfy in a plebiscite. Representatives hold office through a multitude of votes and, therefore, possible trades. The number of representatives in a given legislature is relatively small and constant. And the public nature of representatives'

cifically that bicameralism "imposes something like a supermajority voting rule," thereby forcing majorities to seek broader coalitions. Eule, *supra* note 1, at 1557.

Both Bell and Eule also argue that the possibility of an executive veto makes representatives less likely than plebiscite voters to enact legislation that disadvantages racial minorities. The veto is another one of the "checks and balances of the political process" that Bell implicitly argues may curtail representatives' "excesses," to the advantage of racial minorities. Bell, *supra* note 4, at 20. Eule claims more specifically that the executive veto "not only affords minority groups an additional ear on legislation that affects them, but because legislative override demands supermajority votes, the veto also enhances minority currency." Eule, *supra* note 1, at 1557.

35. Gillette, *supra* note 4, at 967; BUCHANAN & TULLOCK, *supra* note 22, at 122-23.

36. Gillette, *supra* note 4, at 967; BUCHANAN & TULLOCK, *supra* note 22, at 122-23.

37. Gillette, *supra* note 4, at 967; BUCHANAN & TULLOCK, *supra* note 22, at 122-23.

The issue of whether logrolling is a value-creating mechanism is a highly controversial one on which much ink has been spilled. See *infra* note 49.

38. See Gillette, *supra* note 4, at 968.

votes makes both monitoring and retaliation easy and relatively inexpensive. In addition, potential traders can solve the monitoring problem by joining their issues in a single piece of legislation. Plebiscite voters, in contrast, do not often know what initiatives might appear on subsequent ballots, and therefore cannot often make promises about future votes. The relatively large number of plebiscite voters makes it highly unlikely that any two individuals' trade will affect the outcomes of the pertinent votes. And although individuals might agree to exchange votes, the privacy of the voting booth and anonymity of the votes make monitoring, and therefore retaliation, nearly impossible even when the pertinent issues appear on the same ballot. Moreover, "single subject" requirements may prevent potential traders from linking their issues in a single initiative.³⁹

Although it would thus appear that legislatures provide more opportunities for logrolling than do plebiscites, Clayton Gillette has argued that this difference is, at the very least, overstated.⁴⁰ He claims that logrolling "increases value because it gives those with the highest intensity of preference control over an electoral outcome."⁴¹ Because representatives may be accused of shirking if they fail to cast any vote, logrolling simply directs those who must vote in any event to do so "in a socially optimal direction."⁴² Plebiscites, Gillette contends, have "a similarly effective mechanism for reflecting relative intensity of preference."⁴³ One explanation for why large numbers of individuals vote at all, given that the expected personal costs of doing so typically will exceed the expected personal benefits,⁴⁴ is that participating in the election produces its own

39. Several states require that each initiative be limited to a "single subject." See, e.g., ARIZ. CONST. art. IV, pt. 2, § 13; CAL. CONST. art. II, § 8; FLA. CONST. art. XI, § 3; MO. CONST. art. III, § 50; MAGLEBY, *supra* note 1, at 44-45. Although many of these states also subject legislative lawmaking to a single-subject requirement, the courts have not always held the two requirements to embody the same legal standard. See, e.g., *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984); Lowenstein, *Single-Subject*, *supra* note 4, at 936-38, 942-49.

In an important discussion of the purposes underlying the single-subject requirement, Daniel Lowenstein observes that two major ones have been proposed: "limiting the diversity of an initiative [in order] to avoid confusion by simplifying and clarifying the issues, and preventing logrolling that could result in "subverting the will of the majority." Lowenstein, *Single Subject*, *supra* note 4, at 954 (citations omitted; emphasis added).

Whether either of these purposes is well served by the single-subject requirement is a matter on which there is no clear consensus. See, e.g., *id.* at 954-68; A.B.A. SEC. TORTS & INS. PRAC., *The Challenge of Direct Democracy: Report and Recommendations of the Task Force on Initiatives and Referenda 40-47* (Discussion Draft June 1992) [hereinafter *TIPS Task Force Report*].

40. Gillette, *supra* note 4, at 968-69.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 946-47.

benefits for these voters.⁴⁵ Under this "consumption benefits explanation of voting," Gillette claims, "those who have little interest in the outcome will simply not vote at all."⁴⁶ Thus, he concludes that issues put to a plebiscite are unlikely to be decided by those without strong preferences.⁴⁷

Although Gillette's argument provides support for the thesis of this Article, it is important to recognize several problems with his analysis. First, logrolling does not *necessarily* occur in a socially optimal direction, as measured by an increase in aggregate societal welfare. Using the example set out in the following table, it is clear that Representatives A and B can both increase their individual welfare (as measured in utils) by trading votes on Issues 1 and 2.⁴⁸ If both issues pass, Representatives A and B will each realize a net utility of +2, compared to a net utility of -2 for each if no votes are traded and neither issue passes.

TABLE 1

	Rep. A	Rep. B	Rep. C	Agg. util.
Issue 1	+3 utils	-1 utils	-4 utils	-2
Issue 2	-1 utils	+3 utils	-8 utils	-6

If Representatives A and B trade votes to secure the passage of both issues, however, the *aggregate social* utility will be -8 (-2 and -6), compared to an aggregate social utility of +8 (+2 and +6) if neither issue passes. Thus, contrary to Gillette's general claim, rationally self-interested logrolling by Representatives A and B will not necessarily occur "in a socially optimal direction" or therefore increase societal welfare. This is the classic "paradox of logrolling."⁴⁹

45. *Id.* at 951. "Voting, for example, permits the actor to view himself and to be viewed by others as a participant in the political process. It allows one to share in the pleasures of a particular victory or commiserate with others over a defeat." *Id.*

46. *Id.* at 969.

47. *Id.*

48. Neither Representative A nor B should be interested in entering into an agreement with C if: (1) each individual's sincere preferences are known by the others, and (2) C cannot make side payments.

49. See, e.g., DENNIS C. MUELLER, PUBLIC CHOICE 49-58 (1979); ROBERT SUGDEN, THE POLITICAL ECONOMY OF PUBLIC CHOICE: AN INTRODUCTION TO WELFARE ECONOMICS 185 (1981); Peter Bernholz, *Logrolling and the Paradox of Voting: Are They Really Logically Equivalent? A Comment*, 69 AM. POL. SCI. REV. 961 (1975); David H. Koehler, *Vote Trading and the Voting Paradox: A Proof of Logical Equivalence*, 69 AM. POL. SCI. REV. (1975) [hereinafter Koehler, *Vote Trading*]; David H. Koehler, *Vote Trading and the Voting Paradox: Rejoinder*, 69 AM. POL. SCI. REV. 967 (1975) [hereinafter Koehler, *Rejoinder*]; Joe Oppenheimer, *Some Political Implication of "Vote Trading and the Voting Paradox: A Proof of Logical Equivalence."* *A Comment*, 69 AM. POL.

Second, under the consumption benefits explanation of voting, contrary to Gillette's description, individuals may well vote in plebiscites even if they have little interest in the outcome. Indeed, as Gillette himself earlier notes, participation under the consumption benefits explanation "becomes a worthwhile endeavor *wholly apart from any benefits the voter might receive from the particular result* of the political enterprise."⁵⁰ Individuals may vote, for example, simply because they want to view themselves, and have others view them, as "a participant in the political process."⁵¹

Third, issues put to a plebiscite may frequently be decided by those without strong preferences. Issues for plebiscitary decision typically appear on a ballot that includes candidates for elective office.⁵² Thus, a voter may decide to bear the transportation, opportunity, and other costs of entering the booth because she is interested in the outcome of the election for a particular public office.⁵³ Once in the booth, however, the marginal cost to that voter of expressing a preference even on issues about which she cares little is negligible. Thus, contrary to Gillette's claim, individuals *without* strong preferences may well constitute a substantial—even decisive—proportion of the voters on any given plebiscite issue.⁵⁴

SCI. REV. 963 (1975); William H. Riker & Steven J. Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235 (1973); Thomas Schwartz, *Vote Trading and Pareto Efficiency*, 24 PUB. CHOICE 101 (1975).

50. Gillette, *supra* note 4, at 951.

51. *Id.* at 951.

For an interesting exchange on why people vote, compare Michael E. DeBow & Dwight R. Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEX. L. REV. 993, 997-99 (1988) (voting is costless way of expressing individual's ideology), with Daniel A. Farber & Philip P. Frickey, *Integrating Public Choice and Public Law: A Reply to DeBow and Lee*, 66 TEX. L. REV. 1013, 1016-18 (1988) ("ideology, not self-interest, motivates voting") [hereinafter Farber & Frickey, *Reply*]. See also Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 893-94 (1987) [hereinafter Farber & Frickey, *Jurisprudence*]; FARBER & FRICKEY, *supra* note 6, at 24-27, 37 ("People apparently vote because of some view of political obligation: it is part of their conception of themselves as citizens in a democracy.")

52. MAGLEBY, *supra* note 1, at 88-89 ("[s]pecial elections" held solely for initiatives are "rare in the United States but somewhat more common in Europe").

53. Similarly, if more than one plebiscitary issue is to be decided on a given ballot, a voter may decide to bear the costs of entering the booth because she is interested in the outcome of one particular issue. Once in the booth, however, the marginal cost to the voter of expressing a preference on the other issues (about which she may care little) is negligible.

54. The proportion of voters on any given initiative who have strong preferences regarding the outcome is likely to be a function of: (1) the type of election (special or general), and (2) the subject matter of the initiative.

Voter turnout in special elections (held solely for initiatives) is typically much lower than in general elections. See MAGLEBY, *supra* note 1, at 87-89. Indeed, even when voter "dropoff" in general elections is taken into account, see *id.* at 83-95, voter "turnout" is typically higher for propositions that appear on general, rather than special, election ballots. One might therefore infer that a higher proportion of initiative voters in general elections than in special elections do *not* have a

Finally, to the extent that those with the greatest intensity of preference *may* be able to use logrolling under certain circumstances to control legislative outcomes,⁵⁵ it seems clear that logrolling in a representative body achieves this far better than Gillette's plebiscitary equivalent. Under Gillette's own assumption, those whose interest in the outcome of a given plebiscite is below a certain low point are unlikely to vote.⁵⁶ All those whose interest in the outcome is above that point are likely to vote, but the plebiscite will aggregate their preferences *without regard to their intensity*. Logrolling in the legislature, in contrast, allows many more gradations of intensity of preference to be registered, and therefore provides greater (if still imperfect) assurance that those with the highest aggregate intensity of preference will control the outcome of any given vote.

Given the various difficulties with Gillette's analysis, I cannot agree that "the superiority of legislative compromise" is overstated.⁵⁷ And I remain of the view—unfavorable to the thesis of this Article—that legislatures provide more opportunities for logrolling than do plebiscites.

But what are the implications of the legislature's greater logrolling opportunities for a minority group's ability to block disadvantageous legislation? First, it should be noted that the legislature's greater number of logrolling opportunities will *not necessarily* mean that a racial minority will be better able to block the passage of disadvantageous legislation in a representative body than in a plebiscite. When voters are able to state their "sincere" preferences concerning one issue taken in isolation from another,⁵⁸ Robert Sugden, for example, contends that "log-rolling pro-

strong preference regarding the success of the proposition, and are voting because the cost of doing so is negligible once one is in the booth.

Voter "dropoff" on general election ballots is not typically a function of ballot location (voter "fatigue") in the case of initiatives. *Id.* at 90-95. Rather, "[s]ome voters appear to pick and choose the propositions on which they will vote, with popular initiatives eliciting the largest amount of participation." *Id.* at 90. Thus, for example, in California's 1976 general election, 350,000 more voters marked their ballots for Proposition 13 (the Jarvis-Gann property tax initiative) than for governor, even though Proposition 13 came at the end of the ballot and the governor's race was the first ballot choice. *Id.* at 91-92. In sum, the subject matter of a ballot proposition is a powerful predictor of both voter "turnout" on that proposition and the proportion of voters who have a strong preference regarding the proposition's enactment.

55. The most critical of these circumstances are: (1) the number of issues to be decided and, therefore, the number of votes any one representative has available for trading, and (2) whether side-payments in a currency other than votes are possible and permitted. *See also infra* note 73.

56. Gillette, *supra* note 4, at 968-69. This does not mean, however, that they will not affect the outcome; the *absence* of their vote may well do so.

57. Gillette, *supra* note 4, at 968.

58. SUGDEN, *supra* note 49, at 183. Sugden gives the following example of a voter who is incapable of stating his "sincere" preferences concerning one issue taken in isolation from another:

[T]here are two issues: whether there should be a pub in village A, and whether there should be a pub in village B. . . . [One person] most prefers that neither village has a pub,

vides no defence for minorities against the injustices of the principle of majority rule."⁵⁹ Although Sugden's own analysis does not support so absolute a conclusion,⁶⁰ it is clear that the results of logrolling are not likely to differ from the results of sincere voting under many conditions.⁶¹

If a Condorcet choice exists—that is, if a single alternative defeats all competitors in head-to-head competition even though it is not the first choice of a majority⁶²—it will ultimately be chosen if everyone votes sincerely. A logrolling process, however, will also converge on a Condorcet choice because it is the only outcome that cannot be *blocked* by any coalition of voters.⁶³ Thus, if a Condorcet choice exists, the logrolling pro-

but thinks that it is better to have pubs in both villages than to have a pub in only one. (Perhaps he is particularly concerned about the danger of people driving while drunk; if there must be pubs at all, it is better to locate them so that people do not have to travel far to get to them.) This person's preferences concerning one issue depend on how the other issue is decided. If it is decided that there is to be no pub in village B, then he would prefer there to be no pub in A either. But if it is decided to have a pub in B, then he would prefer there to be a pub in A also. . . . It is of course possible for him to *vote*, that is, to record some ordering of the relevant issue outcomes; but there is no real meaning to the idea of his voting sincerely.

Id.

59. *Id.* at 184.

60. It should be noted that although Sugden's claim is absolute, the reasoning he provides in support leads to a less absolute conclusion. He does not demonstrate that logrolling "provides no defence for minorities against the injustices of the principle of majority rule," *id.*, but rather that logrolling will not always, and perhaps may never, provide such defense for a given minority. Moreover, nothing in Sugden's analysis disproves the intuition that a minority is *more likely* to be able to block disadvantageous legislation in a lawmaking process that provides more rather than fewer (or no) opportunities for logrolling.

61. See, e.g., SUGDEN, *supra* note 49, at 185. On this claim, see also Bernholz, *supra* note 49; Koehler, *Vote Trading*, *supra* note 49; Koehler, *Rejoinder*, *supra* note 49; Oppenheimer, *supra* note 49.

62. In the following example, alternative 1 is the Condorcet winner since both A and B prefer 1 to 3, and both A and C prefer 1 to 2:

A	B	C
1	2	3
2	1	1
3	3	2

The notion of a Condorcet choice derives from MARQUIS DE CONDORCET, *ESSAI SUR L'APPLICATION DE L'ANALYSE À LA PROBABILITÉ DES DÉCISIONS RENDUES À LA PLURALITÉ DES VOIX*. See also MUELLER, *supra* note 49, at 61-64; HANNU NURMI, *COMPARING VOTING SYSTEMS* 66-80 (1987); SUGDEN, *supra* note 49, at 140, 147; Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 989 n.55, 994-96 (1989).

63. SUGDEN, *supra* note 49, at 148. Sugden notes that a Condorcet choice is the only "core solution" to the logrolling game:

An outcome is said to be in the core of a game if it cannot be *blocked* by any coalition of players. Given the assumption that all preferences take the form of strict orderings, a coalition of players blocks one outcome, *x*, if there is some other alternative, *y*, such that (i) every member of the coalition prefers *y* to *x*, and (ii) by the rules of the game, concerted action by the members of the coalition can ensure that *y* is the outcome of the game, irrespective of what non-members do. . . . [A]n alternative, *x*, is in the core of the majority rule game if and only if, for every other feasible alternative, *y*, a majority of voters prefer *x*

cess will converge on the same outcome that would result from sincere voting on the issues.⁶⁴

If a Condorcet choice does not exist, the outcome of sincere voting will be a function of such "procedural" variables as the order in which various alternatives are formally considered.⁶⁵ Similarly, the process of logrolling will not converge at all.⁶⁶ Of course, the process of coalition-forming and bargaining may end if, for example, there is a rule that voting must take place at a given time. But one cannot predict *ex ante* which alternative will then be chosen.⁶⁷ Thus, the outcome of the logrolling process is likely sometimes to be—but is unlikely always to be—the same as the result of sincere voting.⁶⁸

This means that a racial minority will not be able to block the passage of disadvantageous legislation through logrolling if that legislation is a Condorcet choice of a majority (or of a super-majority, in the case of an executive veto) of the legislature. When the proposed legislation is not a Condorcet choice of a majority of the legislature, however, it is difficult to predict the outcome of a logrolling process or of sincere voting. It

to *y*. This of course is Condorcet's criterion. The core of the game is identical with the Condorcet choice.

Id.

64. SUGDEN, *supra* note 49, at 185.

65. This is the "voting paradox," frequently referred to as the Arrow "impossibility theorem," see KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951), although the theoretical significance of the paradox was discussed by Black in the 1940s, see DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958). See also SUGDEN, *supra* note 49, at 140; Levmore, *supra* note 62, at 984-90; Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990) and sources cited therein.

Arrow's theorem applies equally to both direct and representative democracy. Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 89 (1990) [hereinafter Hovenkamp, *Legislation*]. Scholars increasingly agree, however, "that the conditions for Arrow's theorem must be strictly specified, and that the conditions are not necessarily satisfied in actual [democratic decisionmaking] bodies." *Id.* at 90. See also Farber & Frickey, *Jurisprudence*, *supra* note 51, at 901-06 (surveying literature); Pildes & Anderson, *supra* at 2127 (concluding that once the "peculiar conceptions of rationality and of democratic politics" underlying social choice theory are exposed, the theory "pose[s] no significant challenge to the general legitimacy and meaningfulness of democratic decision making"); Herbert Hovenkamp, *Rationality in Law and Economics*, 60 GEO. WASH. L. REV. 293, 296 (1992) (critique of popular argument that "political markets cannot be shown to produce efficient outcomes the way that private economic markets can"); Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 IOWA L. REV. 949 (1990) (arguing that Arrow's condition of Independence of Irrelevant Alternatives generally fails to obtain the legislative process).

Although the literature discussing the applicability of Arrow's theorem to actual democratic decisionmaking processes has focused on representative lawmaking bodies, analogous arguments can be readily made in the context of direct lawmaking processes.

66. SUGDEN, *supra* note 49, at 185.

67. *Id.*

68. "[O]ne cannot rule out the possibility that the chosen outcome [of the logrolling process] will be the same as the one that would have resulted from sincere voting." *Id.*

will, therefore, be difficult to predict whether logrolling will result in a different outcome than sincere voting. Thus, a racial minority is unlikely always to be, but is likely sometimes to be, able to use logrolling successfully to block disadvantageous legislation.⁶⁹ This conclusion is not inconsistent with the intuition that a racial minority is *more likely* to be able to block disadvantageous legislation in a lawmaking process that provides more rather than fewer (or no) opportunities for logrolling.

Three important constraints, however, substantially reduce—even if they do not eliminate—the usefulness of logrolling for improving a racial minority's ability to block disadvantageous legislation. First, logrolling can alter the results of a vote only if the minority feels more intensely about an issue than the majority.⁷⁰ That is, if the majority is equally or more intense in its sincere preference, the majority's preference will prevail no matter what logrolling opportunities are available to the minority.⁷¹ As has already been discussed with regard to Table 1 above, however, even a minority that is more intense in its sincere preference than a majority may not be able to use logrolling to achieve its preferred outcome under some circumstances.⁷² A minority group will be able to use logrolling to achieve a favorable result "only when the intensity of preferences of the minority is *sufficiently greater* than that of the majority to make the minority willing to sacrifice *enough votes* on other issues to detach marginal voters from the majority."⁷³

69. Sugden's explicit conclusion is stronger but, as explained *supra* note 60, unjustifiably so. He concludes that "there is little reason to expect log-rolling to produce results any different from those produced by sincere voting." *Id.*

70. BUCHANAN & TULLOCK, *supra* note 22, at 133.

71. *Id.*

72. See *supra* note 55 and text accompanying notes 48-49.

73. BUCHANAN & TULLOCK, *supra* note 22, at 133 (emphasis added). Compare Table 1 *supra* with the following table:

	Rep. A	Rep. B	Rep. C	Agg. Util.
Issue 1	+3 utils	-1 util	-4 utils	-2 utils
Issue 2	-1 util	+3 utils	-8 utils	-6 utils
Issue 3	+1 util	-2 utils	-3 utils	-4 utils

If Representative C trades Representative A its votes on Issues 1 and 3 in order to keep Representative B from trading its vote on Issue 2 to Representative B (in exchange for the latter's vote on Issue 1), the result will be that Issues 1 and 3 pass, but Issue 2 does not. Representative A will net +3 utils, Representative C will net +1 util, and Representative B will net -6 utils.

If Representative A instead trades its vote on Issue 2 for Representative B's vote on Issue 1 (Representative B will not profit from trading its votes on Issues 1 and 3 for Representative A's vote on Issue 2), Issues 1 and 2 would pass, but Issue 3 would not. Representative A would net +1 util, compared to the +3 utils it nets if it trades instead with Representative C.

Note that the key issue remains the possibility of side payments to balance out the lost utils—that is, even on the conditions set out in Table 1, Representative C achieves a net gain of +1 util if

Second, prejudice can severely (and irrationally) constrain the log-rolling opportunities available to certain interest group representatives within a legislature.⁷⁴ Substantial empirical evidence supports the proposition that “[a] discrete and insular electoral minority often remains an outvoted legislative minority.”⁷⁵ Or, in other words, “prejudice may simply transfer the ‘gerrymandering’ problem from the electorate to the legislature.”⁷⁶ In order for minority group representatives⁷⁷ to form a winning coalition, majority group representatives must enter into cross-racial alliances.⁷⁸ Majority group members are less likely to do so the more they outnumber the minority group, and the more racially charged the atmosphere.⁷⁹ Majority group representatives may also be less likely to join with minority group representatives on issues of particular or

he can make side payments totaling 7 utils to Representatives A and B in some currency other than votes, in order to ensure that Issue 2 does not pass.

74. Many legal scholars have discussed the effect of racial prejudice on the effectiveness of racial minorities in the legislature. No consensus has yet emerged. See, e.g., Kathryn Abrams, “Raising Politics Up”: *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 500-03 (1988); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 732-35 (1985); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1114-28 (1991) [hereinafter Guinier, *Tokenism*]; Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991) [hereinafter Guinier, *Seats*]; Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1868-72, 1880, 1887-88 (1992); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 216-18 (1989); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1523-24, 1530-32 (1988); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 50-55 (1986) [hereinafter Michelman, *Forward*]; Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1367-72 (1987).

Scholars have similarly disputed the issue of whether a racial minority is most effectively represented by a member of the minority group or a sympathetic member of the majority group. See, e.g., ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 7, 21 (1987); Abrams, *supra*; Guinier, *Tokenism, supra*, at 1102-34; Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 420-29 (1989) [hereinafter Guinier, *Faith*]; Issacharoff, *supra*, at 1880; Karlan, *supra*; Schuck, *supra*.

For purposes of the current discussion, I will assume that members of a racial minority are most effectively represented by a member of that minority. By “minority group representatives,” therefore, I mean a member of the racial minority whose constituents are also largely members of that minority.

75. Guinier, *Seats, supra* note 74, at 1416; see also Guinier, *Tokenism, supra* note 74, at 1116-28, and sources cited therein. Lani Guinier has further suggested that “litigation to ensure descriptive representation predictably transfers the problem of disenfranchisement from the electorate to the legislature.” Guinier, *Seats, supra* note 74, at 1416.

76. Guinier, *Tokenism, supra* note 74, at 1126 (footnote omitted). Guinier further notes that a vast array of cases have involved unsuccessful challenges to various types of legislative or deliberative gerrymander “in which minority representatives [are] denied the political clout they would enjoy but for racial prejudice,” often as a result of “majoritarian group voting rules that disproportionately marginalize their status as a permanent, racially homogeneous legislative minority.” Guinier, *Seats, supra* note 74, at 1436.

77. See *supra* note 74 for my definition of “minority group representative.”

78. Guinier, *Tokenism, supra* note 74, at 1123-24.

79. Guinier, *Tokenism, supra* note 74, at 1116, 1123-24, and sources cited therein.

unique concern to the racial minority.⁸⁰ Minority group representatives' frequently resulting status as "an ineffective, 'seen but not heard' minority in the legislature" means that they will often be able to provide only "descriptive" rather than "functional" representation of distinctive minority group interests.⁸¹

Third, even in the absence of any prejudice, minority group representatives within a legislature may find their logrolling opportunities to be severely constrained. Depending on the number and size of competing coalitions, the minority group representatives may actually be *numerically incapable* of affecting the outcome no matter how they vote.⁸² They will therefore lack the bargaining power necessary for successful coalition-building and logrolling. In formal, game-theoretic terms, these minority group representatives will have a Shapley-Shubik index of *zero*.⁸³ None of the competing coalitions will therefore experience any increase in its own Shapley-Shubik index if it joins with the minority group representatives.⁸⁴

Although the above three constraints substantially reduce the likelihood that a minority group will be able to use logrolling successfully to

80. *Id.* at 1123, 1126-27; FRANK R. PARKER, *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965* 135-36 (1990); THERNSTROM, *supra* note 74, at 7.

81. Guinier, *Tokenism*, *supra* note 74, at 1116; Guinier, *Seats*, *supra* note 74, at 1416 & n.4, 1457, 1459-61.

82. *See, e.g.*, MARTIN SHUBIK, *GAME THEORY IN THE SOCIAL SCIENCES: CONCEPTS AND SOLUTIONS* 200-206 (1982).

83. *Id.* The probability model for the Shapley-Shubik index considers all possible orders in which a vote can take place. For any ordering of the players there will be a unique player who is in a position to provide the coalition with just enough strength to win. That player is the pivot for the coalition. If all $n!$ orderings are assumed equiprobable, then the Shapley-Shubik index is a measure of the probability that any player is pivotal.

In the following example, the game has four players (or coalitions)—A, B, C, 1—with votes of 2, 2, 2, and 1, respectively. Four votes are needed to carry a motion. The game is denoted (4: 2, 2, 2, 1), where 4 is the quota and the votes are the weights of the players (size of the coalitions). In each of the 24 (4!) possible orderings of the four players (coalitions), the pivot is underlined.

ABC1	BAC1	BCA1	BC1A
AB1C	BA1C	B1AC	B1CA
A1BC	CAB1	CBA1	CB1A
A1CB	CA1B	C1AB	C1BA
ACB1	1ABC	1CAB	1BCA
AC1B	1ACB	1BAC	1CBA

The Shapley-Shubik indices for A, B, C, and 1 are, respectively, 8/24, 8/24, 8/24, and 0/24. Thus, minority group representatives could constitute 1/7 of the legislative body (that is, have the voting strength of player 1 in the above example), but be numerically incapable of affecting the outcome of any motion no matter how they vote, even if they vote as a block.

I am grateful to Peter Swire for introducing me to the wonders of the Shapley-Shubik index.

84. This can be seen by comparing the results when the game = (4: 2, 2, 2, 1) with the results when the game = (3: 3, 2, 2). In both games, the Shapley-Shubik index for two- and three-person coalitions is 8/24, implying that a two-person coalition does not experience any increase in its Shapley-Shubik index by adding an additional member.

block disadvantageous legislation, they do not reduce that likelihood to zero. Nor do these constraints alter the fact that a representative law-making process is likely to provide more opportunities for logrolling than will a plebiscitary process. A greater number of logrolling opportunities, however, need not result in a lower likelihood that legislation that disadvantages a racial minority is enacted, *ceteris paribus*. Critically, a greater number of logrolling opportunities does not dictate the *direction* in which logs are actually rolled. The greater number of logrolling opportunities is possessed by all interest groups' representatives. And one interest group's preference that a piece of legislation be enacted or blocked can be at least as intense as another group's opposing preference.

American history does not lack for examples either of legislation that disadvantages a racial minority being enacted, or of legislation that advantages a racial minority being blocked, because a racist minority group was able to trade votes and form a coalition with a racially indifferent group.⁸⁵ There are also corollary examples of relatively stable majority racist coalitions, each comprised of two or more potential factions, which are able to hold together only by trading votes on nonracial issues. William Riker, for example, wrote in 1962 that "most Southern politicians" subscribe to the unwritten rule that "no faction may be allowed to be a quasi-permanent loser if there is any likelihood that it will attempt to escape this position by bringing Negroes into the political system."⁸⁶ He adds that this "has in practice meant that no issue may be raised that is so divisive in the white society that two permanent factions may be built around it," and thus explains the absence of dual factionalism "most of the time since the 1890s" in the Democratic party in states without significant Republican minorities.⁸⁷ Riker notes that this un-

85. Most notably, "the post-Reconstruction disenfranchisement of blacks seems to have been motivated largely by the fear that the populist movement would ultimately produce a coalition of blacks and lower-class whites." Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 705 n.100 (1992) (citing V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 8, 541 (1949); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 18, 36-37, 147-48, 203, 221 (1974); STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969*, at 9-10 (1976); HENRY L. MOON, *BALANCE OF POWER: THE NEGRO VOTE* 72-73 (1948)).

Seidman adds that "[t]he pervasive system of segregation together with the elaborate racist ideology supporting it maintained the taboo against interracial political coalitions." Seidman, *supra*, at 706.

It is a difficult empirical question whether racial minorities have been more often helped or hurt throughout American history by the greater opportunities for logrolling in representative bodies.

86. WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* 179 (1962).

87. *Id.* at 178-79. According to Riker's analysis, one would normally expect factions to arise in this context because the "size principle" should lead to a minimization in the size of the winning coalition in the Democratic party within a given state in order to maximize each coalition member's gains from victory. *Id.* at 32-101.

written rule was occasionally evaded and a two-faction system in the game for the control of government created, but only after the "seceding" group identified itself "as the most virulent of Negro-haters," thus providing assurance that "the creation of a two-faction system [would] not, from their side at least, involve the re-entry of Negroes into Southern politics."⁸⁸

C. Agenda Control⁸⁹

An important, if frequently overlooked,⁹⁰ difference between representative and direct lawmaking is the control of the agenda in the two processes. The plebiscitary agenda, William Riker notes, "is set, almost always and almost entirely, by the author of the initiative."⁹¹ In a representative body, in contrast, "the agenda is set by a combination of the legislature's majority party (or a committee of it), back benchers who in one way or another insert themselves in the agenda-setting process, and the pre-existing legislative rules."⁹² As Riker has formally demonstrated, this difference in agenda control results in a greater likelihood that the status quo wins in a representative body than in a plebiscite, *ceteris paribus*.⁹³ Riker concludes from this finding that "minorities have a better chance under a representative system."⁹⁴

I take issue only with Riker's ultimate conclusion. It seems clear that the lawmaking process that is more likely to favor the status quo is not necessarily the one that a racial minority will in general prefer. Sometimes, as in Riker's Figure 3,⁹⁵ the racial minority may prefer the status quo (continued busing) to other alternatives (the elimination of busing, or continued busing but only for a new set of magnet schools). In

88. *Id.* at 179-80.

89. This section did not exist in the Conference draft of this paper, on which the published comments of Professors Eule and Riker were based. In this section, I reply to some issues raised in their published comments, particularly those of Professor Riker. Due to the length of my discussion of these issues, it seemed preferable to take them up in the text of my final version rather than in extensive footnotes.

90. Indeed, I failed to discuss this difference in the Conference draft of this paper. See *supra* note 89. This difference has been similarly overlooked by the other legal scholars who have undertaken a comparative examination of the two lawmaking processes. See Allen, *supra* note 3; Bell, *supra* note 4; Gillette, *supra* note 4. Eule notes only that "limited access to the ballot may provide greater opportunities for agenda manipulation by initiative sponsors, enabling them to achieve equilibria not reflective of majority tastes." Eule, *supra* note 1, at 1521.

91. William H. Riker, *Comment on Baker, "Direct Democracy and Discrimination: A Public Choice Perspective,"* 67 CHI.-KENT L. REV. 791 (1991).

92. *Id.*

93. "[T]he parliamentary procedure [of the representative body] . . . reserves the most advantageous position for the status quo, while the plebiscitary procedure allows the first pressure group to take the opportunity to get a substantial advantage over latecomers and the status quo." *Id.* at 793.

94. *Id.* at 794.

95. *Id.*

these cases, Riker is correct that the racial minority will prefer representative to direct lawmaking. On other occasions, however, the racial minority may like the status quo (continued employment discrimination) much less than the proposed alternatives (the elimination of employment discrimination, or continued employment discrimination but only against short Blacks). In these instances, the racial minority will prefer direct to representative democracy, because of the greater likelihood that the status quo *will not* be the winner under the former lawmaking process.

In sum, the difference in agenda control in the two lawmaking processes will, under Riker's analysis, result in legislation that disadvantages a racial minority *and* legislation that advantages it *both* being less likely to be enacted through representative than direct democracy, *ceteris paribus*. A racial minority thus has an a priori reason to be relatively more optimistic that disadvantageous legislation will be blocked in a representative body, but relatively more optimistic that advantageous legislation will be enacted in a plebiscite. Which lawmaking process the racial minority ought *in general* to prefer, however, will depend on (1) its assessment of the status quo (does it largely advantage or disadvantage the minority?); (2) whether its preference that disadvantageous legislation be defeated is, at the median, more intense than its preference that advantageous legislation be enacted; and (3) whether advantageous or disadvantageous legislation is more often proposed.

D. Open Voting

The representative and plebiscitary lawmaking processes are further distinguishable by the open voting of decisionmakers in the former and anonymous voting in the latter. The intuition of most commentators has been that a racial minority should clearly prefer the open voting of the representative legislature to the anonymous voting of the plebiscite, *ceteris paribus*. Politicians, it is asserted, "are in the spotlight and do not wish publicly to advocate racism."⁹⁶ In addition, "[w]hen minorities are part of the legislative 'we,' subordination of the 'other' becomes both

96. Bell, *supra* note 4, at 13-14. Bell argues that the anonymity of the direct democracy vote, contrasted with the openness of the representative vote, makes the former a more effective facilitator of bias, discrimination, and prejudice. *Id.* at 13-15. He claims that "few of the concerns that can transform the 'conservative' politician into a 'moderate' public official are likely to affect the individual [plebiscite] voter's decision." *Id.* at 14. He adds that "[n]o political factors counsel restraint on racial passions emanating from longheld and little considered beliefs and fears." *Id.*

Bell cites as an interesting historical example the Oregon territory's 1857 referendum to exclude all free blacks.

Despite its very small black population, residents of the territory had discussed barring blacks for several years, but neither the legislature nor constitutional conventions would approve such a measure because each political party feared that another would be able to

more visible and less comfortable."⁹⁷ Close examination reveals the issue to be much more complicated and any conclusion less clear, however.

It is a commonplace of modern American politics that pre-election and exit polls systematically overstate the proportion of the vote that the black candidate in a racially mixed race will actually receive.⁹⁸ A popular and plausible interpretation of this persistent finding is that (typically white) individuals are more willing to vote against the black candidate than to admit publicly that they will or did; that is, individuals are more often willing to *be* "racists" than to risk being *perceived* as such.⁹⁹

One must be careful, however, when extrapolating from these findings to the present context. To the extent these data suggest that *plebiscites* would yield different results if the voting were open rather than

exploit the issue. When the proposal was finally submitted to a popular vote, however, it received more support than an accompanying antislavery proposition.

Id. at 16-17 (footnotes omitted).

It is important to note, however,—and Bell does—that several state legislatures had also enacted "similar provisions" as a result of "strong pressure from their constituencies." *Id.* at 17 n.65. 97. Eule, *supra* note 1, at 1555.

98. See, e.g., Robert Staples, *Tom Bradley's Defeat: The Impact of Racial Symbols on Political Campaigns*, 13 THE BLACK SCHOLAR 37, 43 (Fall 1982) (pre-election pollsters "figured in a 4-5 percent racial bias factor" in their Bradley-Deukmejian predictions); Dan Balz, *Vote Counting Methods, Race Factor in Polls Leave Plenty of Room for Error; Some Blame Voters for Off-the-Mark Projections*, WASH. POST, Nov. 9, 1989, at A37 (Wilder and Dinkins elections "highlighted the complexities of conducting polls pitting a black candidate against a white candidate"); Les Payne, *The Lies White Voters Tell to Pollsters*, NEWSDAY, Nov. 12, 1989, at 11 ("[w]henver polls show a black candidate ahead of a big-city white opponent, one has to shave 10 points from the leader's margin to get the accurate tally.").

99. What surprises about the polls is not that some white respondents lied, before and after, about their having voted for a black candidate, but that anyone would expect otherwise. The pattern holds in racial polling in other areas. As segregated housing, for instance, became less acceptable in principle, pollsters have recorded Americans' attitudes as becoming more tolerant of black neighbors.

However, there has not been a corresponding decrease in segregated housing, in fact. Blacks today encounter perhaps as much racism in house-hunting as they did in the days when pollsters registered less racial tolerance among white respondents. As with the political polling . . . , some people prefer to give the socially acceptable answer so long as it is not binding.

Payne, *supra* note 98, at 11.

Lying by white respondents is not the only plausible explanation for the inaccuracy of pre-election and exit polls in contests between a black and a white candidate. An unusually high number of those who favor the white candidate may refuse to participate in the survey or may claim to be undecided. See Staples, *supra* note 98, at 44; Balz, *supra* note 98, at A37; see also Larry Tye, *In South, Ballot Box Inequality Lingers On*, BOSTON GLOBE, July 23, 1990, at 1 ("Polls by The Atlantic Constitution found that a third of whites would be reluctant to vote for a black. Other surveys suggest the number is even higher, but whites are reluctant to acknowledge their racism in interviews.").

The race of the interviewer may further skew the results if white voters are unusually reluctant to tell a black interviewer that they do not support the black candidate. See Balz, *supra* note 98, at A37. Finally, the inaccuracy of pre-election (but not exit) polls may be explained by changes in the race, with the white candidate in fact picking up support after the final pre-election polls have been conducted. See *id.*

It is, of course, the case that a vote in favor of the white candidate running against a black is not necessarily a "racist" vote.

anonymous, the difference in outcomes is likely to be greatest when the proposed legislation explicitly and unambiguously discriminates against a racial minority in its intent and effect. One is more likely to be perceived as "racist" if one supports (and is therefore more likely to be deterred by open voting from supporting) legislation that is obviously and intentionally intended to disadvantage a racial minority, than if one votes in favor of legislation that is ambiguous in both its effect and intent. The courts, however, should have little difficulty finding such obviously and intentionally disadvantaging legislation unconstitutional. Legislation about whose purpose and effects reasonable people disagree is more likely to be sustained by the courts, and open voting is less likely to deter support of such legislation.

Moreover, the present issue is not whether plebiscites with open voting would yield different results than plebiscites with anonymous voting, but whether anonymous-voting plebiscites are systematically more likely than open-voting *representative bodies* to enact legislation that disadvantages racial minorities. Two issues merit discussion. First, a personally nonracist representative has incentives *to support* legislation that disadvantages a racial minority that she would not have if her vote were anonymous—incentives that the nonracist anonymous plebiscite voter does not have. Most obviously, to the extent that a *nonracist* representative seeks reelection and has a majority of constituents who support proposed legislation that disadvantages a racial minority (or who simply prefer a racist representative), the personally nonracist representative has an incentive to support the disadvantageous legislation that he would not have if his vote were anonymous. The anonymous plebiscite voter never has such an incentive.

On the other hand, to the extent that a personally *racist* representative seeks reelection and has a majority of constituents who *oppose* proposed legislation that disadvantages a racial minority (or who simply prefer a *nonracist* representative), the racist representative has an incentive to *oppose* the disadvantageous legislation that he would not have if his vote were anonymous. Again, the anonymous plebiscite voter never has such an incentive. Which of these two states of affairs more often occurs, however, is difficult to assess.

Second, the median voter may be more willing to vote (anonymously) for representatives who openly support legislation that disadvantages a racial minority, than she would be to vote anonymously for the same legislation in a plebiscite. The voter may simply be less comfortable enacting discriminatory legislation directly than indirectly. In addition, the voter will likely be able to justify (to herself and others) her

choice of a "racist" representative on the basis of his many policies and actions on non-racial issues;¹⁰⁰ explaining her plebiscite vote in non-racial terms is likely to be more difficult.

Finally, to the extent that open voting deters representatives from supporting legislation that disadvantages a racial minority, it is most likely to do so in the case of legislation that is explicitly and unambiguously discriminatory in its intent and effect. And, as has already been noted, the courts should have little difficulty finding such legislation unconstitutional. More problematic is legislation about whose purpose and effects reasonable people disagree. Although open voting may also deter representatives from supporting legislation of this latter sort, it seems at least as likely that open voting will instead cause representatives to engage in sophisticated subterfuge, obfuscation, and rationalization when drafting such legislation and crafting its official history.¹⁰¹ (Indeed, the seeming ambiguity of such legislation may itself be the product of crafty obfuscation.) Unlike the typical plebiscite voter, representatives are, after all, lawmaking experts.¹⁰²

E. Deliberation and Naked Preferences

Finally, several commentators have contended that representative legislatures are likely to engage in more deliberation than plebiscites on

100. For example, supporters of former Klan grand wizard, David Duke, in the 1991 Louisiana gubernatorial election gave a wide range of non-racial reasons for their decision: a dislike of his opponent, Peter Applebome, *On Eve of Louisiana Vote, Nothing Is Certain*, N.Y. TIMES, Nov. 15, 1991, at A1 [hereinafter Applebome, *On Eve*]; "just want[ing] a change," Applebome, *On Eve, supra*, at A1; Peter Applebome, *Louisiana Politics Dances to Music of Rage*, N.Y. TIMES, Nov. 16, 1991, at 1 [hereinafter Applebome, *Louisiana*]; the economy, Applebome, *Louisiana, supra*, at 1; Peter Applebome, *Duke May Seem to Be Wallace of '91, But Both Times and the Risks Differ*, N.Y. TIMES, Nov. 25, 1991, at A14 [hereinafter Applebome, *Duke*]; the environment, Applebome, *Louisiana, supra*, at 1; taxes, Applebome, *On Eve, supra*, at A1; Anthony Lewis, *Abroad at Home: "America Be on Guard"*, N.Y. TIMES, Nov. 18, 1991, at A15; William Schneider, *Riding the Anti-Establishment Wave*, 16 NAT'L J. 2894 (Nov. 23 1991); welfare, Lewis, *supra*, at A15; Applebome, *Duke, supra*, at A14; Schneider, *supra*, at 2894; big government, *id.*; to send an anti-establishment message, *id.*; to "shake things up," *id.*; crime, Applebome, *Duke, supra*, at A14.

Not surprisingly, only 12 percent of Duke voters told exit pollsters that his views on racial matters decided their vote. Schneider, *supra*, at 2894. Indeed, "[m]ore than 80 percent of Duke's supporters said they thought he had changed his views on race since the days when he was a leader of the Ku Klux Klan." *Id.*

101. It is important to note that state enactments, unlike federal ones, often have no or little published legislative history. Harry Willmer Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737, 738 (1940); Note, *Nonlegislative Intent as an Aide to Statutory Interpretation*, 49 COLUM. L. REV. 676, 677 (1949); McNellie, Note, *Extrinsic Aids, supra* note 4, at 164.

102. For an interesting analysis of the various incentives affecting the degree of subterfuge legislators employ in drafting bills, see Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986). See also *infra* note 121.

any given issue.¹⁰³ As a result, they argue, legislation enacted by a representative body is less likely to violate minority rights and more likely to realize “the common good” than is legislation enacted through direct democracy.¹⁰⁴ Close examination of this premise and conclusion, however, finds both to be seriously flawed.

In this section, I first use a conception of deliberation popular among civic republican theorists to compare representative bodies and plebiscites. I find that one *cannot* conclude *a priori* that the decisions of individual representatives will more often than those of plebiscite voters (1) be motivated by a concern with “the public good,” or (2) be explicitly justified by appeals to the public good. Nor can one conclude *a priori* that the decisions of legislatures will more often than those of plebiscites reflect consensus-building through conversation rather than the mere aggregation of bargained-over preferences.

103. Derrick Bell, for example, charges that the ordinary voter is likely to be less well informed, less responsible, and more emotional, than the typical representative. He notes that “intense interest” in direct democracy is generated “when the issues are seemingly clear-cut and often emotional matters such as liquor, gun control, pollution, pornography, or race.” Bell, *supra* note 4, at 18. He adds that “[t]he emotionally charged atmosphere often surrounding referenda and initiatives can easily reduce the care with which the voters consider the matters submitted to them.” *Id.* “Appeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns.” *Id.* at 19.

Although Bell concedes that “politicians, too, may offer quick cure-alls to gain electoral support and may spend millions on election campaigns that are as likely to obfuscate as to elucidate the issues,” he asserts that “[o]nce in office, they may become well-informed, responsible representatives.” *Id.* at 19-20. Bell adds that “at the least, [representatives’] excesses may be curtailed by the checks and balances of the political process.” *Id.* at 20.

Julian Eule also contends that representatives are more likely than plebiscite voters to engage in deliberation. He argues that “[p]opular masses too quickly form preferences, fail adequately to consider the interests of others, and are overly susceptible to contagious passions and the deceit of eloquent and ambitious leaders.” Eule, *supra* note 1, at 1526-27. Worse, the substitutive plebiscite “has little *capacity* for deliberation,” *id.* at 1555 (emphasis added), according to Eule. “Public debate is infrequent. Exposure to minority perspectives occurs accidentally if at all. . . . Any efforts at self-education are thwarted by manipulative campaigns designed to oversimplify the issues and appeal to the electorate’s worst instincts.” *Id.* at 1555-56.

Eule portrays lawmaking by representatives, in contrast, as a “deliberative process [which] offers time for reflection, exposure to competing needs, and occasions for transforming preferences.” *Id.* at 1527. According to Eule, “[o]ur worst tendencies toward prejudice . . . are chastened in legislative debate.” *Id.* at 1555. “Knowledge and exposure are effective weapons against prejudice. Debate and deliberation inevitably lead to better informed judgment.” *Id.* Through legislative hearings and the testimony of various interest groups, the legislator’s exposure to competing ideas and perspectives is enlarged, which “induces greater sensitivity and checks partiality.” *Id.*

Eule concedes that “[n]o one would be so naive as to deny that [the] deliberative ideal [of the legislature] breaks down with disturbing frequency,” and that “the legislature often has trouble hearing voices from the margin.” *Id.* at 1550. He observes, however, that “the process anticipates its own frailties by subdividing lawmaking authority.” *Id.* at 1551.

See also, e.g., Black, *supra* note 4, at 30-31, 49; Fountaine, Note, *Lousy Lawmaking, supra* note 4, at 743-46; Sager, *supra* note 4, at 1403, 1412, 1414-15.

104. See, e.g., Bell, *supra* note 4; Black, *supra* note 4, at 30-31, 49; Eule, *supra* note 1; Fountaine, Note, *Lousy Lawmaking, supra* note 4, at 745; Sager, *supra* note 4, at 1412, 1414-15.

I then compare representative bodies and plebiscites along several other dimensions of deliberation that are not explicitly embodied in the civic republican conception. I find that one *cannot* conclude *a priori* that representatives are systematically more likely than plebiscite voters to: (1) be well-informed about legislation on which they vote, (2) more thoughtfully and rationally consider the issues on which they vote, (3) discuss an issue with fellow decisionmakers prior to voting, or (4) revise one's preferences in light of discussion or new information.

I conclude this section by explaining how previous commentators arrived at their contrary judgment that representative legislatures have a greater capacity for, and are more likely actually to engage in, deliberation than plebiscites. I show that greater deliberation, in any case, would not systematically result in a legislature's enactments being less likely than those of a plebiscite to disadvantage a racial minority.

1. A Civic Republican Conception of Deliberation

Are representative legislatures systematically likely to engage in more deliberation than plebiscites on any given issue? Any answer to this question must begin by specifying what is meant by "deliberation." Unfortunately, the commentators who have discussed this issue typically have not explicitly defined the term.¹⁰⁵ Let us first, then, consider a conception of deliberation popular among republican theorists. Three aspects of this conception merit particular consideration: that decisions be *motivated by a concern with* "the public good;" that they be *explicitly justified by* appeals to "the public good;" and that the goal of deliberation be agreement among the decisionmakers.

The requirement that decisions be *motivated by* a concern with "the public good" is consistent with the civic republican view that deliberation "embodies substantive limitations":¹⁰⁶ "[I]n their capacity as political actors, citizens and representatives are not supposed to ask only what is in their private interest, but also what will best serve the community in general—understood as a response to the best general theory of social welfare."¹⁰⁷ Unfortunately, civic republicanism does not specify how a political actor is to determine what "the public good" is.¹⁰⁸ Indeed, it is

105. See, e.g., Bell, *supra* note 4, at 18-20; Black, *supra* note 4, at 30-31, 49; Eule, *supra* note 1, at 1526-27, 1550-51, 1555-56; Fountaine, Note, *Lousy Lawmaking*, *supra* note 4, at 743-46; Sager, *supra* note 4 at 1412, 1414-15.

106. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1550 (1988).

107. *Id.* (footnote omitted).

108. See, e.g., Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591, 1599-1601 (1988); Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1670 (1988); Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673, 1676-77 & n.16 (1988);

not clear that any coherent content can be given the notion.¹⁰⁹ Nor is it therefore obvious how one is to determine whether representatives and plebiscite voters differ systematically in their ability or willingness to be motivated by "civic virtue" in their decisionmaking.

Despite this difficulty, Clayton Gillette has recently suggested that plebiscite voters may be more likely than representatives to be motivated in their decisionmaking by concern for "the public good."¹¹⁰ It is axiomatic that the expected personal costs of voting are likely to exceed the expected personal benefits for most individuals.¹¹¹ Gillette contends that the fact that a substantial number of citizens nonetheless vote in plebiscites might be explained by these citizens' "preferences for activities that foster deliberative or other forms of *checks on self-interest*."¹¹² He reasons that if the otherwise irrational act of voting "is explained by a sense of duty, obligation, or beneficence towards others, deliberativeness appears to be an integral part of the voting process":¹¹³ "It would be anomalous for a potential voter to proclaim that he had an obligation to vote, but no similar obligation to consider how to vote."¹¹⁴ The result, according to Gillette, is that those who vote in plebiscites may also be those more likely to deliberate before doing so.¹¹⁵ And, the reasons voters enter the booth may well affect the policies for which they ultimately vote.¹¹⁶

H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1710-11 (1988); Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1713 (1988).

109. Much of the difficulty is captured in the debate over whether there exists a unitary "public good." See, e.g., Sunstein, *supra* note 106, at 1540, and sources cited *id.* at n.2; Abrams, *supra* note 108, at 1599-1604; Richard A. Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 YALE L.J. 1633, 1640 (1988); Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1698; Sullivan, *supra* note 108, at 1713.

Farber and Frickey contend, however, that

A legislative decision has a good claim to represent the public interest when individual preferences on particular issues themselves generally fall into coherent ideological patterns; when decisions are made using techniques that embody society's understandings about relevance; when norms of fair division are respected; and when the end result is preferred by a majority to the status quo.

FARBER & FRICKEY, *supra* note 6, at 59 (citation omitted).

See also Hovenkamp, *Legislation*, *supra* note 65 (analyzing various mechanism for identifying "social well-being").

110. Gillette, *supra* note 4, at 946-60.

111. See, e.g., ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 260-74 (1957); Gillette, *supra* note 4, at 946-47, 950, and sources cited therein.

112. Gillette, *supra* note 4, at 947 (emphasis added); see generally *id.* at 946-60.

113. *Id.* at 957.

114. *Id.*

115. *Id.* Gillette further contends that to the extent that "consumption benefits" explain voting, those benefits "presumably correlate to effort expended." *Id.* Thus, the likelihood of receiving additional consumption benefits may cause the individual voter to engage in more pre-vote deliberation of various sorts. *Id.* at 957-58.

116. *Id.* at 954. Gillette argues, "the motivations that lure voters to the voting booth simultane-

There are several problems with Gillette's analysis. First, the sense of duty or obligation that he (rightly, I believe) contends explains the willingness of some voters to engage in the otherwise irrational act of voting is not obviously other-regarding, nor is the act of voting therefore obviously an act of "beneficence toward others." Rather, the obligation to vote may be felt as an obligation formally to voice one's opinion or as a duty simply to participate in the democratic system.

Second, the felt "obligation to consider how to vote," which Gillette (rightly, I believe) claims is likely to attend a felt obligation to vote, does not obviously require that the voter consider what "the public good" requires. It simply requires that the voter consider *something* in deciding how to vote.

In sum, Gillette makes a plausible case that a felt duty to vote explains the willingness of some individuals to engage in the otherwise irrational act of voting, and that those who feel a duty to vote are likely also to feel an obligation to consider how to vote. One cannot conclude, however, that plebiscite voters are therefore more likely than representatives to be motivated in their decisionmaking by a concern for "the public good."

Nonetheless, there is little reason to think that representatives are systematically more likely than plebiscite voters to be guided by "the public good" in their decisionmaking. First, an interest in being re-elected competes favorably with consumption benefits as the explanation for representatives' voting behavior.¹¹⁷ A representative who fails to

ously and systematically induce *other-regarding behavior*." *Id.* (emphasis added). Gillette acknowledges that "there is a darker side to the consumption benefits explanation of voting": "If self-interest motivates the selection of benefits for consumption, it may be that those who have the narrowest self-interest at heart, who are at the fringe, or whose 'dark urges' are most fanatic are the persons for whom voting is the currency of choice." *Id.* at 958-59.

117. It is an axiom of political science and theory that legislators' primary, but not sole, concern is winning reelection. *See, e.g.*, R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 5 (1990); RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* 1 (1973); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION*, 5-7, 13-17, 37, 46-49 (1974); FRANK E. SMITH, *CONGRESSMAN FROM MISSISSIPPI* 127 (1964) ("All members of Congress have a primary interest in getting re-elected. Some members have no other interest."); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislators*, 74 VA. L. REV. 373, 396 (1988) (legislator is "a placeholder opportunistically building up an ad hoc majority for the next election"); Mark Tushnet, *Principles, Politics, and Constitutional Law*, 88 MICH. L. REV. 49, 51-53 (1988). Under this view, legislators may pursue other goals, including enacting their own visions of good public policy or achieving influence within the legislature, if reelection is not at risk. *See, e.g.*, ARNOLD, *supra*, at 5; FENNO, *supra*, at 1.

Recently, however, a lively debate has grown up around the extent to which legislators enact their own ideological preferences rather than those of interest groups or their constituents. *See, e.g.*, FARBER & FRICKEY, *supra* note 6, at 27 (economic theory of agency suggests that "legislators will sometimes 'shirk,' acting in accord with their own preferences, rather than those of voters or interest groups"); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 143-50 (1989) (criticizing Farber and Frickey's analysis); William R.

vote, even on issues about which she cares little and on which she is highly unlikely to deliberate, faces charges of absenteeism and shirking that may reduce her chances for reelection.¹¹⁸ Thus, there is little reason to believe that the representatives who vote on a given issue are also those representatives more likely to consider “the public good” in their decisionmaking.

There is another pertinent difference between the incentives of representatives and plebiscite voters. A representative is less likely to be reelected if the median voter in her constituency believes that she voted “the wrong way” on an important issue. Thus, to the extent that “the public good” (defined somehow) dictates a result different from that preferred by the median voter in her constituency, a representative has an incentive to ignore “the public good”—an incentive that a plebiscite voter does not have. On the other hand, to the extent that “the public good” dictates the same result that is preferred by the median voter in her constituency, a representative has an incentive that the plebiscite voter never does to be guided by “the public good” in her lawmaking. Which of these two scenarios more often occurs is difficult to assess and, of course, depends on how “the public good” is defined.

A second and related aspect of civic republican conceptions of deliberation is the requirement that political actors *explicitly* “justify their choices by appealing to a broader public good.”¹¹⁹ Some commentators suggest that “[t]he requirement of appeal to public-regarding reasons may make it more likely that public-regarding legislation [—defined somehow—] will actually be enacted.”¹²⁰ Representatives may in fact *be better able* than plebiscite voters to provide “public-regarding” justifications (defined somehow) for their legislative choices. The fact that a representative has waged a successful election campaign implies a relatively

Dougan & Michael C. Munger, *The Rationality of Ideology*, 32 J.L. & ECON. 119 (1989); Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 J.L. & ECON. 103 (1990) [hereinafter Kalt & Zupan, *Slack*]; Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984); James B. Kau & Paul H. Rubin, *Self-Interest, Ideology, and Logrolling in Congressional Voting*, 22 J.L. & ECON. 365 (1979). See also sources cited in Kalt & Zupan, *Slack*, *supra*, at 103 n.1.

Farber and Frickey have made a persuasive case that “the best picture of the political process . . . is a mixed model in which constituent interest, special interest groups, and ideology all help determine legislative conduct.” FARBER & FRICKEY, *supra* note 6, at 33.

118. See Gillette, *supra* note 4, at 968; ARNOLD, *supra* note 117, at 62-63 (“challengers love to use below-average voting [participation] scores as evidence that incumbents are not diligently doing their jobs”).

119. Sunstein, *supra* note 106, at 1544 (emphasis added).

120. *Id.* at 1545, and sources cited *id.* at n.21. Sunstein acknowledges that it would “be a mistake to exaggerate the extent of this effect. Self-interested motivations may merely be concealed; the requirement of deliberation can be an invitation to hypocrisy and deceit.” *Id.* at 1545 n.21.

good ability to talk in terms of the public good—or at least an ability to tell voters what they want to hear. In addition, the median representative is likely to have greater lawmaking expertise and experience than the median plebiscite voter. Plebiscitary measures are often drafted by professionals, however, whose lawmaking expertise and experience compete favorably with those of the median representative.¹²¹

Representatives and plebiscite voters may also differ systematically in their *willingness* to provide public-regarding justifications for their legislative choices, but the direction of that difference is unclear. Certainly the two groups have different incentives to give or withhold such justifications. A citizen's employer is unlikely ever to ask her to justify her vote in a given plebiscite, much less fire her solely because of the reason she gives.¹²² A representative, however, may well not be reelected if a majority of her constituents do not like her justification for her (easily monitored) vote on a particular issue.¹²³ Thus, a representative inter-

121. Many initiatives are drafted by special campaign consultants "whose business is to draft a proposition with maximum chances of electoral success." MAGLEBY, *supra* note 1, at 60-61. In addition, many initiatives are drawn from pending or recently defeated legislative bills. *Id.*

At present, six states formally offer drafting assistance to initiative proposers. In Colorado, Idaho, Montana, and Washington state, all proposed initiatives are automatically referred to a legislative drafting office that makes non-binding suggestions and recommendations. See COLO. CONST. art. V, § 1; COLO. REV. STAT. § 1-40-101 (West 1989 & Supp. 1992); IDAHO CODE § 34-1809 (Supp. 1990); MONT. CODE ANN. § 13-27-202 (1991); WASH. REV. CODE ANN. § 29.79.010 (Supp. 1992).

In the District of Columbia, the Board of Elections and Ethics is directed by statute to conform all proposed ballot measures to the legislative drafting format of acts of the Council of the District of Columbia, and "may consult experts in the field of legislative drafting" to do so. D.C. CODE ANN. § 1-1320(c)(3) (1992).

California offers non-binding drafting assistance only when requested by 25 or more electors or when there is a reasonable probability that the measure will ultimately be submitted to the voters. CAL. GOV'T CODE § 10243 (West 1992).

Empirical studies "consistently have concluded that the work-product of the initiative process overall is at least the equal of, and often superior to, that of the legislative process. There is no evidence from any extensive study that legislation enacted by initiative is, as a whole, . . . more 'poorly drafted' . . . than the work product of the legislative branch." Allen, *supra* note 3, at 1010-11 (footnote omitted).

122. Certainly the secrecy of plebiscite ballots makes employer monitoring of employees' actual votes difficult. This is, of course, a separate point from the fact that jobs are sometimes eliminated by plebiscites as, for example, with budgetary ballot measures.

123. In recent years, abortion has been the issue most likely to have this potency. For example, the pro-choice stance of Virginia's Governor Wilder, New Jersey's Governor Florio, and New York City's Mayor Dinkins were thought to have played a major role in their respective victories at the polls. See, e.g., *Abortion, the Voters and the Court*, N.Y. TIMES, Nov. 13, 1989, at A20; Rochelle Sharpe, *Abortion Politics at Work*, GANNETT NEWS SERVICE, Nov. 3, 1989, available in LEXIS, Nexis Library, Wires File. Abortion was also a central issue in recent primaries and elections for various public offices in California, Idaho, Iowa, Massachusetts, and Minnesota. See, e.g., Sharpe, *supra*; *Campaign Watch: Abortion Distortion*, L.A. TIMES, June 10, 1990, at M6; Mark Starr, *Playing Single-Issue Politics*, NEWSWEEK, Aug. 14, 1989, at 22; Dan Balz, *Abortion Issue Slows Iowa Democratic Frontrunner; Miller Laments NARAL "Hit-List" Politics as Gubernatorial Primary Lead Slips After Attacks*, WASH. POST, May 10, 1990, at A20; Dan Balz, *Idaho Republicans Feeling Fallout from Battle over Abortion*, WASH. POST, May 4, 1990, at A4; Barry M. Horstman, *Bentley Tries to*

ested in reelection is likely to provide a "public-regarding" explanation for her vote only if she believes that a substantial portion of her constituents want to hear such a justification. Whether constituents want to hear "public-regarding" justifications for representatives' votes more often than other types of reasons (or no reason at all) is difficult to assess.¹²⁴

A third aspect of civic republican conceptions of deliberation is the goal that all the political participants reach agreement.¹²⁵ That is, the core of the political process is understood to be consensus-building through conversation, rather than the mere bargaining over and aggregating of preferences.¹²⁶ On their face, however, the procedural rules of both legislatures and plebiscites typically provide political actors incentives to secure the agreement of only a simple majority of fellow deci-

Refocus Campaign against Killea, L.A. TIMES, Nov. 30, 1989, at B1; Gerald Kopplin, *High Iron Range Voter Turnout Could Help Perpich*, UPI, Sept. 11, 1990, available in LEXIS, Nexis Library, Wires File.

Other single-issue issues through the years have included slavery, the coinage of gold and silver money, the federal role in the construction of roads, the death penalty, state income taxes, and the ERA. See, e.g., Arnold Sawislak, *Washington Window Marching Forward into the Past*, UPI, Nov. 20, 1989, available in LEXIS, Nexis Library, Wires File; John Holusha, *Tax Increase Has 2 in Michigan Fighting for Seats*, N.Y. TIMES, Nov. 20, 1983, pt. 1, at 33; Mark Shields, *Loyal—and Losing—to ERA*, WASH. POST, July 17, 1981, at A23.

In addition, although "[t]he recall process was originally designed to get rid of officials for gross malfeasance or corruption in office," single-issue political groups have increasingly used the process to advance their agendas. See, e.g., Joanne M. Haas, *Democrat: Recall Organizers Should Pay for Election*, UPI, March 9, 1990, available in LEXIS, Nexis Library, Wires File (quoting Rep. David Travis, D-Madison).

That the realm of single-issue issues knows no bounds is apparent from the following:

At a time when single-issue politics has made lawmakers leery of sensitive issues, Mississippi legislators find themselves staring down the barrel of perhaps the most explosive issue of them all.

It's not abortion. It's not taxes. It's deer dogs.

The question of how to regulate hunters who use dogs to flush deer out of the woods is laced with issues of class, gun ownership and private-property rights. It pits Faulkner's Snopeses against his Compsons and Mississippi's rural heritage against its creeping urbanization. It's got Bambi, money, violence, and this year even death.

"This is the most complex thing, politically and socially, you can imagine," said John E. Stack of Meridian, president of the Mississippi Property Rights Association, which wants more regulation of hunting deer with dogs. "It's the one issue no one wants to touch. I asked one legislator, 'What's your least favorite topic, abortion or deer dogs?' He said, 'I believe it's deer dogs.'"

Peter Applebome, *Mississippi Journal; Hunting Is the Issue Surpassing All Others*, N.Y. TIMES, Feb. 21, 1990, at A14.

It is important to note, however, that in the case of such controversial issues it is not clear that any justification could be given that would appease voters who dislike the candidate's expressed preference on the issue.

124. One could easily imagine constituents preferring that a representative provide the following "self-interested" justification for her vote: "I voted for/against the proposed legislation because I knew [from polls/talking with constituents] that a vast majority of my constituents wanted me to vote that way. My job is to represent my constituents' preferences, not my own." Indeed, representatives might find this a particularly safe justification to give for their votes on unusually controversial issues.

125. Sunstein, *supra* note 106, at 1554.

126. *Id.* at 1554-55.

sionmakers, and few, if any incentives to seek greater agreement or unanimity. In practice, proponents of legislation before both plebiscites and representative bodies will likely strive to secure a supermajority of votes, largely because of the uncertainty under which pre-vote lobbying takes place: the outcome of the final vote cannot be known in advance.¹²⁷ Rules concerning filibusters and amendments provide additional incentives for proponents of legislation in representative bodies to minimize the size of the opposing coalition.¹²⁸ Analogously, proponents of plebiscitary legislation will try to provide a threat of victory sufficiently credible to encourage potential opponents to conserve their resources rather than pursue a seemingly lost cause.

The conversational component of this aspect of deliberation may be better met by plebiscites than legislatures. For proponents of plebiscitary measures, logrolling and other forms of bargaining are usually not possible, and persuasion on the merits is therefore the only available route to (super)majority agreement.¹²⁹ Representatives concerned with reelection, in contrast, are more likely to "sell" their votes to one another for something that their constituents will prefer than they are to "give away" their votes because they have been persuaded on the merits. In sum, both the legislature and the plebiscite provide decisionmakers incentives to secure the agreement of a supermajority of their fellows. There is reason to believe, however, that the plebiscitary (super)majority is more likely than the legislative (super)majority to be achieved through persuasion on the merits rather than through logrolling or other forms of bargaining.

In sum, one cannot conclude *a priori* that legislative enactments are systematically more likely than plebiscitary enactments to be the product of deliberation as conceived by civic republican theorists.

2. "Procedural" Aspects of Deliberation

There are four other, more "procedural" aspects of deliberation that

127. All else equal, [legislative] leaders prefer large coalitions because they provide the best insurance for the future. Each proposal must survive a long series of majoritarian tests—in committees, subcommittees, in House and Senate, and in authorization, appropriations, and budget bills. Large majorities help to insure that a bill clears these hurdles with ease. ARNOLD, *supra* note 117, at 117-18. See also, R. DOUGLAS ARNOLD, CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE 43-44, 52 (1979); MAYHEW, *supra* note 117, at 111-15 (contrary to Riker's theory, actual distribution of votes in both federal and state legislatures is "bimodal, with a mode in the marginal range (50-59.9 percent) and a mode in the unanimity or near-unanimity range (90-100 percent)"); RIKER, *supra* note 86.

128. See ARNOLD, *supra* note 117, at 117-118; MAYHEW, *supra* note 117, at 119-21.

129. See *supra* Part II.B. To be sure, these attempts at persuasion may sometimes be no more "substantive" than a soundbite.

are not embodied in the civic republican conception¹³⁰ with its “substantive limitations.”¹³¹ First, deliberation requires that one be well-informed about proposed legislation. This includes being knowledgeable about competing—and minority—ideas, needs, and perspectives. Second, it requires that this information be thoughtfully and rationally considered rather than reacted to emotionally. Thoughtful and rational consideration will typically be more time consuming than purely emotional reaction. Third, deliberation requires that one be able to discuss and exchange views on proposed legislation with other decisionmakers, if one chooses. Fourth, deliberation requires openmindedness. One’s preferences must be revisable in light of discussion, debate, and new information.

An examination of each of the above four aspects shows the question of whether representative legislatures are likely to engage in more deliberation than plebiscites to be a much harder one than previous commentators have suggested. First, it is not at all clear that representatives are systematically more likely than plebiscite voters to be well-informed about legislation on which they vote. To be sure, the median state legislator may be better educated than the median plebiscite voter.¹³² In addition, lawmaking is something that plebiscite voters engage in only occasionally,¹³³ but is a paid and staff-assisted (if frequently part-time) *job* for state representatives.¹³⁴ As representatives fulfill the basic requirements of their jobs, such as attending hearings and meeting with

130. See, e.g., Bell, *supra* note 4, at 18-20; Eule, *supra* note 1, at 1526-27, 1550-51, 1555-56.

Julian Eule’s conception of deliberation also seems to embody a particular substantive result: “Public debate among those of equal status and eloquence thus ultimately leads to realization of the common good.” *Id.* at 1527. He is careful to distinguish this from a “utopian account” of deliberation according to which “legislators listen to one another because they are virtuous and because they share a common goal of discovering the public good.” *Id.* Eule adds that it is “no small part of the Federalists’ genius that their design achieves many of its aims even when the actors fail to play their roles as hoped.” *Id.*

131. Sunstein, *supra* note 106, at 1550.

132. The median educational level of members of the U.S. Senate in 1991 was a law degree (19 years of formal education completed). See THE ALMANAC OF AMERICAN POLITICS 1992 (1991). Even assuming that state legislators are less well educated than their federal counterparts (no official statistics appear to have been published), their median number of years of formal education completed is still likely to be higher than that for the general population (12.7 years); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1991, at 138 (111th ed. 1991) [hereinafter 1991 STATISTICAL ABSTRACT]. And even though the median plebiscite voter is likely to be better educated than the median American of voting age, see MAGLEBY, *supra* note 1, at 80-81, one would still expect the median state legislator to have completed relatively more years of formal education. See CRONIN, *supra* note 1, at 198.

133. See *supra* note 2.

134. At present, 41 legislatures meet annually. Six meet biennially in odd years (Arkansas, Montana, Nevada, North Dakota, Oregon, and Texas), while the Kentucky legislature meets in even years. The legislatures of Minnesota, North Carolina, Tennessee, and Vermont are supposed to meet in odd years, but usually split their working days between odd and even years. The California

lobbyists and constituents, they necessarily acquire information about proposed legislation. Moreover, this same information may frequently be useful as representatives later consider other legislation, thereby minimizing the amount of education necessary for them to be well-informed on each new piece of legislation. Finally, a representative's interest in being reelected provides an incentive to *appear* well-informed about pending legislation when speaking to constituent groups and the media, which may frequently result in a representative *actually being* well-informed.

On the other hand, representatives are regularly confronted with decisions on many more issues than are plebiscite voters, vastly reducing the time and energy that representatives and their staffs can devote to gathering and processing information on any one issue.¹³⁵ In addition, pending and prospective legislation are not the sole (or even primary) concern of representatives or their staff.¹³⁶ Legislation is undoubtedly a *significant* concern of representatives since frequently failing to vote at all ("absenteeism" and "shirking") or voting "the wrong way" on important issues can severely and adversely affect one's chances of reelection. But a representative will frequently be able to maximize her chances of reelection simply by voting "the party line" or by voting according to her own previous record on similar issues and, therefore, without becoming well-informed about the actual piece of legislation at issue. Indeed, a representative's interest in being reelected may cause her to channel more resources toward learning the preference of the median voter in her constituency with regard to any given piece of legislation than toward

legislature meets from the first Monday in January of each odd-numbered year until November 30 of the next even-numbered year. THE COUNCIL OF STATE GOVERNMENTS, *supra* note 1, at 137-40.

The lengths of legislative sessions also vary greatly, ranging from 30 working days in Alabama to 120 working days in Minnesota and five and one-half months in Delaware and Missouri. Fourteen states have no limits on the length of legislative sessions. *Id.*

As of February 1992, yearly salaries for state legislators range from \$100 in New Hampshire, \$4,267 (odd years) in South Dakota, and \$7,125 in Maine, to \$47,000 in Pennsylvania, \$52,500 in California, and \$57,500 in New York. Travel allowances and other benefits, including retirement benefits, vary greatly among the states. *Id.* at 151-65.

Budgets for staff, clerical assistance, and office expenses vary greatly among the states. *Id.* at 153-56.

135. In the 1991 regular session, the number of bills introduced in state legislatures ranged from less than 700 in Alaska, Colorado, Delaware, Idaho, South Dakota, Utah, and Wyoming, to 15,506 in New York. *Id.* at 183-85. Compare these statistics for state legislatures to the statistics for plebiscitary ballot measures *supra* note 2.

136. The classic account of how legislators' desire for reelection affects the activities in which they engage is MAYHEW, *supra* note 117, at 49-77 (legislators find it "electorally useful" to engage in three types of behavior: advertising, credit-claiming, and constituent casework).

See also *supra* note 117; BRUCE CAIN, JOHN FERREJOHN & MORRIS FIORINA, THE PERSONAL VOTE (1987); JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS (1973).

learning about the legislation itself.¹³⁷ Moreover, the threat of being branded a "shirker" may induce representatives to vote even on legislation in which they (and their constituents) have little interest and about which they are therefore relatively uninformed.¹³⁸ Plebiscite voters have no comparable incentive to vote on legislation about which they know or care little.¹³⁹

One might expect *any* interest group concerned to enact a particular law to attempt first to do so through the legislature, *ceteris paribus*. Collective action theory (and common sense) suggest that an interest group can less efficiently and successfully lobby the voting population at large than a discrete and insular segment of the population (representatives) with a unified interest in obtaining a benefit that an interest group has to offer (reelection).¹⁴⁰ Thus, one might expect a standing interest group to attempt to enact legislation through a plebiscite only (1) when the legislature has refused to act (or to act favorably) on the matter, (2) when the interest group's goal is the repeal of legislation recently enacted by the legislature, or (3) when the interest group seeks to constrain the power of the legislature.¹⁴¹ In addition, some ad hoc interest groups with particularly controversial or urgent concerns may decide that they are more likely to achieve success through a plebiscite than through the legislature, and may therefore take the matter to the People first.¹⁴²

Once legislation is actually pending in the legislature or has been placed on a plebiscite ballot, however, a concerned interest group should be equally likely to provide voters and representatives their views on, and pertinent information concerning, that legislation. Assuming that each interest group's goal is to affect the outcome of the legislative process, its incentives to persuade plebiscite voters and representatives should at this point be the same. Although lobbying efforts may well take systematically different forms in the case of representatives (personal visits, campaign contributions, honoraria) and plebiscite voters (direct mailings, telephoning, flyers, posters, mass media advertising), the latter group is

137. See *supra* note 117.

138. See *supra* note 118.

139. See *supra* note 54.

140. RUSSELL HARDIN, COLLECTIVE ACTION 38-49 (1982); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 53-65 (1965); Ackerman, *supra* note 74, at 724-26; Gillette, *supra* note 4, at 981.

141. See, e.g., MAGLEBY, *supra* note 1, at 60; Briffault, *supra* note 4, at 1371; Gillette, *supra* note 4, at 982; Lowenstein, *Campaign Spending*, *supra* note 4, at 567-68.

142. This "safety valve" function of the plebiscitary lawmaking option may operate in tandem with that served by federalism under Jonathan Macey's account. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990).

not obviously more expensive for interest groups to lobby and educate.¹⁴³ Indeed, large differentials in lobbying costs for the two groups are most likely to arise when successful lobbying of representatives also requires successful lobbying of the voters who elect the representatives.¹⁴⁴ There is, in short, little reason to expect that an interest group will find it more costly—or will, therefore, be less likely—to provide its views on, and pertinent information concerning, pending legislation to plebiscite voters than to representatives. And, to summarize, wide variation both among representatives and among plebiscite voters seems more likely than systematic differences between the two groups in the extent of their information about legislation.

Second, it is not at all clear that the median plebiscite voter is systematically inferior to the median representative in the extent to which she engages in thoughtful and rational consideration of the issues on which she votes. The median state legislator may be more intelligent and better educated than the average plebiscite voter, and those traits may correlate positively with a *capacity* for thoughtful and rational consideration of legislation. A representative's interest in being reelected, however, provides no particular incentive actually to engage in thoughtful and rational consideration of an issue before she votes. Rather, as has already been noted, she will frequently be able to maximize her chances of reelection by voting according to the preference of the median voter in her constituency, by voting "the party line," or by voting according to her own previous record on similar issues. In addition, as discussed above, the threat of being branded a "shirker" at reelection time may induce representatives to vote even on legislation that they have not thoughtfully and rationally considered. Plebiscite voters have no comparable external incentives to vote on matters in which they have little interest.

A third "procedural" aspect of deliberation is that decisionmakers discuss and exchange views on proposed legislation with other decisionmakers. Although there are obvious systematic differences between

143. For discussions of the relationship between campaign spending and the success of ballot propositions, see, e.g., TIPS Task Force Report, *supra* note 39; CRONIN, *supra* note 1, at 99-124; PHILIP L. DUBOIS & FLOYD F. FEENEY, IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE 143-59 (1992) (publication of the California Policy Seminar, "a joint program of the University of California and state government"); MAGLEBY, *supra* note 1, 145-65; SCHMIDT, *supra* note 1, at 35; Allen, *supra* note 3, at 1028-38; Lowenstein, *Campaign Spending*, *supra* note 4; Mastro et al., *supra* note 4.

144. This is most likely to occur when an issue is controversial and likely to attract "single issue voters," and a representative, therefore, needs special reassurance that her vote on the issue will not ultimately cost her her seat. The abortion issue may be the best current example. See *supra* note 123.

representatives and plebiscite voters regarding the *forums* in which such discussion and debate occur, there is little evidence of systematic differences in the extent of the two groups' *opportunities*. At nearly any hour of the day or night, both representatives and plebiscite voters are able to discuss proposed legislation with their fellow decisionmakers. For both groups, the opportunities for discussion and debate are both formal and informal. Representatives hold committee hearings and participate in floor debates; similarly, plebiscite voters can attend hearings held by local government agencies and participate in various forms of "town meetings." Less formally, representatives talk in the proverbial "cloakroom" and lobby each other over lunch and on the golf course. Plebiscite voters, analogously, can discuss proposed legislation in their workplaces and schools, on radio talk shows and in the local press, at social and recreational clubs, with their friends and neighbors, and at meetings of civic and voluntary organizations.¹⁴⁵

There is equally little reason to expect systematic differences between representatives and plebiscite voters in the *actual* amount of discussion of proposed legislation in which the two groups engage. To be sure, such discussion is part of a representative's paid job, but that does not necessarily mean that she will be systematically more likely than the ordinary voter to exchange views with fellow decisionmakers on a given issue. As has already been noted, proposed legislation is not the sole (or even primary) concern of representatives.¹⁴⁶ In addition, representatives are regularly confronted with decisions on many more issues than are plebiscite voters, vastly reducing the time and energy that representatives can devote to discussing any one issue with their legislative colleagues.¹⁴⁷ Moreover, the committee system of most legislatures means that an exchange of views on any given issue is likely to be concentrated in the small subset of representatives on the pertinent committee.¹⁴⁸ To the extent other representatives support the committee's recommendation, their votes may often represent a proxy given to the committee rather than any independent discussion of the matter with fellow decisionmakers. Thus, wide variation among both representatives and plebi-

145. This comports with the "historically American" and "non-state centered notion of republican citizenship" recently discussed by a variety of legal scholars. See, e.g., Michelman, *Law's Republic*, *supra* note 74, at 1531; Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 *YALE L.J.* 1860, 1861-62 (1987); Sunstein, *supra* note 106, at 1572-73.

146. See *supra* note 136.

147. See *supra* note 135.

148. See ARNOLD, *supra* note 117, at 85-87; FENNO, *supra* note 117; KINGDON, *supra* note 136, at 69-104.

For a listing of the standing committees of the state legislatures during the 1991 regular session, see THE COUNCIL OF STATE GOVERNMENTS, *supra* note 1, at 191-92.

scite voters—and across issues—seems more likely than systematic differences between the two groups in the extent to which individuals discuss a given issue with fellow decisionmakers prior to voting.

Finally, wide variation among both representatives and plebiscite voters in the degree of openmindedness and of the revisability of preferences also seems more likely than systematic differences between the two groups. If one considers openmindedness to be an intellectual trait that is positively correlated with intelligence and years of formal education, one would expect the median representative to exhibit more of it than the median plebiscite voter.¹⁴⁹ In addition, a substantial proportion of individuals who bother to vote in a plebiscite at all may do so because they have unusually passionate, and therefore unrevisable, opinions on an issue.¹⁵⁰ The revisability of representatives' preferences, however, may be equally severely constrained by concern with reelection and therefore with the preferences of one's constituents, the position taken on the matter by one's political party, or one's own previous voting record and ideology.

3. Reconciling the Existing Commentary

The above analysis leads to the conclusion that plebiscites are not *a priori* inferior to legislatures in either their capacity for, or their actual willingness and ability to engage in, deliberation under any of several different conceptions. It therefore seems important to understand how legal scholars have arrived at the contrary judgment that representative legislatures have a greater capacity for, and are more likely actually to engage in, deliberation than plebiscites.¹⁵¹ Implicit (sometimes explicit) in such analyses is the critical assumption that representatives are largely concerned with effecting "the public good," while plebiscite voters are guided solely by self interest. Thus, Derrick Bell, for example, portrays the plebiscite voter as driven by emotion, prejudice, and solipsistically personal preferences, while representatives are "responsible" (presumably to some notion of "the public good") and well-informed.¹⁵² Similarly, Julian Eule contends that "[p]opular masses too quickly form preferences, fail adequately to consider the interests of others, and are overly susceptible to contagious passions . . ."¹⁵³ Representatives, in contrast, are engaged in a "deliberative process [which] offers time for

149. See *supra* note 132.

150. See *supra* note 54.

151. See, e.g., Bell, *supra* note 4, at 18-20; Eule, *supra* note 1, at 1526-27, 1550-51, 1555-56.

152. Bell, *supra* note 4, at 18-20.

153. Eule, *supra* note 1, at 1526-27.

reflection [—presumably on “the public good”—], exposure to competing needs, and occasions for transforming preferences.”¹⁵⁴

In brief, both Bell and Eule consistently employ an interest group or pluralist model of lawmaking by ordinary citizens, but a republican or public-interest model of lawmaking by legislatures.¹⁵⁵ In Eule’s words, “naked preferences emerge from a plebiscite,”¹⁵⁶ while the products of representative legislatures “represent far more than a simple aggregation of majority will.”¹⁵⁷ By consistently using different models to describe the two legislative processes—models that differ precisely along the dimension of “deliberation”—Bell and Eule predetermine the outcome of their comparative analyses of legislatures’ and plebiscites’ capacities for, and actual engagement in, deliberation.

4. The Relationship between Deliberation and Discrimination

Taken as a whole, the above analysis suggests that one cannot conclude *a priori* that representatives are systematically likely to engage in more deliberation (of any sort) than plebiscite voters. Assuming *arguendo*, however, that scholar’s claims to the contrary are correct, would the legislature’s greater amount of deliberation mean that its enactments will be systematically less likely than those of plebiscites to disadvantage racial minorities? There seems little reason to think so. Four of the seven aspects of deliberation discussed above can as readily result in a vote in favor of, as a vote against, legislation that disadvantages a racial minority. That lawmakers are (1) well informed, (2) openminded, and (3) willing and able to discuss proposed legislation with other decisionmakers (4) in order to build a consensus, imposes no *substantive* constraint on the outcome of the legislative process.

Each of the remaining three aspects of deliberation discussed above, however, embodies something closer to a substantive constraint on the outcomes of the lawmaking process. Indeed, both Derrick Bell and Julian Eule imply that certain outcomes are less likely when lawmakers (1) engage in thoughtful, rational, and unemotional consideration of issues,

154. *Id.* at 1527.

155. For detailed descriptions of these two models of lawmaking, see, e.g., FARBER & FRICKEY, *supra* note 6, at 13-14, 44-45; Michelman, *supra* note 74; Sunstein, *supra* note 106; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

Farber and Frickey have recently argued that “[d]espite the apparent conflict between these two forms of political theory, . . . there is a deeper connection between them. Properly understood, public choice theory can support the republican vision of deliberative democracy.” FARBER & FRICKEY, *supra* note 6, at 8.

156. Eule, *supra* note 1, at 1551.

157. *Id.* at 1532.

(2) are guided in their decisionmaking by concern for "the public good," and/or (3) explicitly justify their decisions by appeals to "the public good."¹⁵⁸ And scholars of both "civic republicanism" and "social choice" such as Cass Sunstein,¹⁵⁹ Frank Michelman,¹⁶⁰ and Robert Goodin¹⁶¹ have *explicitly* claimed that these (and other) aspects of deliberation are likely to reduce the incidence of "discriminatory" legislation—legislation that one "cannot believe that a rational member of th[e] disadvantaged class could ever approve of . . ."¹⁶²

As has already been noted, however, the notion of "the public good" is neither obvious nor uncontroversial in its content.¹⁶³ Indeed much (all?) legislation is controversial precisely because both its passage and its defeat are perceived to impose costs on one group and benefits on another. "Rationality" and concern for "the public good" will, of course, preclude legislation that disadvantages a racial minority if these terms are specifically defined to do so.¹⁶⁴ But to thus define the two terms is to beg the very question of whether there is an inverse correlation between a legislature's capacity for deliberation and the likelihood that its enactments disadvantage racial minorities.

III. REMEDIES AND THE ROLE OF THE COURTS

Parts I and II have argued that a rationally self-interested racial minority's preference between representative and direct democracy is a

158. See Bell, *supra* note 4, generally, but especially at 18-20; Eule, *supra* note 1, generally, but especially at 1526-27, 1550-51, 1555-56.

159. Sunstein, *supra* note 106, at 1543 n.14, 1547-58. Cass Sunstein's belief in the "public interested" powers of deliberation is further evidenced by the school of statutory interpretation that he helped found, which has as its normative goal the encouraging of deliberation—and the preventing of "naked redistributions"—by legislative bodies. See, e.g., Sunstein, *supra* note 106; Sunstein, *supra* note 155; Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

160. See, e.g., Michelman, *Law's Republic*, *supra* note 74, at 1504 (applauding the sensitivity of republicanism to "the dependence of good politics on social and economic conditions capable of sustaining 'an informed and active citizenry that would not permit its government either to exploit or dominate one part of society or to become its instrument'"); Michelman, *Foreword*, *supra* note 74, at 33 ("themes of dialogue" in republicanism "emphasize openness to 'otherness'").

161. Robert E. Goodin, *Laundering Preferences*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 75, 86-91 (Jon Elster & Aanund Hylland eds., 1986).

162. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 455 (1985) (Stevens, J., concurring), *quoted in* Sunstein, *supra* note 106, at 1569 n.170. See also *supra* text accompanying notes 13-14.

163. See *supra* notes 108-09 and accompanying text.

164. It is, of course, the case that in America in the 1990s, there is a popular consensus that "the public good" precludes *unconstitutional discrimination* against racial minorities. The question at issue, however, is the harder one of whether certain types of legislation that *disadvantage* racial minorities are, or should be found to be, unconstitutionally discriminatory. It seems fair to say that on issues such as bussing, affirmative action, and "English only" laws, to take just a few examples, there is no clear popular consensus as to what "the public good" dictates.

difficult empirical question and cannot confidently be resolved on the strength of *a priori* reasoning. If one nonetheless believes that representative lawmaking processes systematically provide racial minorities better protection against disadvantageous legislation than do plebiscites, however, the question remains as to what, if anything, should be done. In this Part, I show first that simply abolishing plebiscites is neither politically feasible nor especially desirable. I then take up scholars' suggestions that the courts subject plebiscitary legislation to a "harder judicial look" under equal protection doctrine than the enactments of representative bodies. Close examination reveals such disparate judicial treatment to be neither necessary nor desirable. I conclude that those interested in providing racial minorities greater protection from potentially disadvantageous plebiscitary legislation might more productively focus their attention on remedying any perceived defects in existing plebiscitary procedures.

A. *Abolish Plebiscites?*

If one believes, contrary to the analysis in Part II above, that representative bodies are systematically less likely than plebiscites to enact legislation that disadvantages racial minorities, one obvious solution would be for states and localities to abolish substitutive plebiscites. This option is not likely to be politically feasible, however.¹⁶⁵ Nor, as even many critics of plebiscites concede,¹⁶⁶ would it be clearly desirable. The substitutive plebiscite has uncontroversial benefits that may well exceed the costs of the allegedly inferior protection it provides racial minorities against disadvantageous legislation.

First, the substitutive plebiscite increases the breadth of participation in the drafting and enacting of legislation. Many successful initiatives have been the product of "forces outside the power elite who are not usually successful at the ordinary politics of working the lobbies of the

165. Recent polls conducted in various states reveal that plebiscites are enormously popular in states that have them, and are much desired in states that do not. CRONIN, *supra* note 1, at 203 n.10. It is further interesting that during the past 20 years, 12 states that do not currently provide for plebiscites considered direct democracy devices at constitutional conventions or in legislative debates and hearings. In no state, has the abolition of plebiscites been equally seriously considered. *Id.* at 51 (table 3.1).

166. Bell, for example, states that "[b]lack and other minorities neither seek nor need *absolute* protection against the dangers they face from direct democracy." Bell, *supra* note 4, at 22. Rather, both the problem and its solution lie in the courts. *Id.* at 22-28. Eule observes approvingly that the electorate sometimes "acts to improve the processes of legislative representation," Eule, *supra* note 1, at 1559, and that "[p]lebiscites serve as an escape valve for the frustrations of day-to-day encounters with faceless, unresponsive, and oppressive bureaucracies." *Id.* at 1585.

State House."¹⁶⁷ The initiative process is also sometimes used by state legislators or governors unable to achieve their legislative goals through the representative legislature.¹⁶⁸ Without the alternative lawmaking channel of the plebiscite, a substantial portion of these issues might never have received serious consideration.¹⁶⁹

The substitutive plebiscite also casts a shadow over representatives' agendas and deliberations, making them more responsive to popular concerns and desires.¹⁷⁰ Many more initiatives fail than succeed,¹⁷¹ but even unsuccessful measures can have important effects. They can cause the representative legislature to consider issues that would not normally be high on its agenda, while simultaneously providing those lawmaking "experts" a grace period in which to act before the "amateurs" generate enough grassroots support to pass their own version of the measure.¹⁷²

A third important function of the substitutive plebiscite is the "safety valve" it provides for particularly volatile issues that state legislators, concerned with reelection, might not want to handle.¹⁷³ It is noteworthy that many landmark reforms that were highly controversial at the time of enactment began as initiatives in various states: women's suf-

167. Briffault, *supra* note 4, at 1357-58; CRONIN, *supra* note 1, at 224-25.

168. These elected representatives may resort to direct democracy because they are consistently in the minority in the legislature, or because of legislative gridlock. CRONIN, *supra* note 1, at 202-03, 211; Michael deCourcy Hinds, *Frustrated Governors Bypass Legislators With Voter Initiatives*, N.Y. TIMES, Oct. 16, 1992, at A10 ("If we continue to have gridlocked governments, then not only will we see more initiatives by politicians but we'll also see more states adopt the initiative process.")

169. Briffault, *supra* note 4, at 1357, 1370-72.

170. *Id.* at 1372.

171. Only "35 to 40 percent of the more than 1,500 citizen-initiated ballot measures considered since 1904 have won voter approval." CRONIN, *supra* note 1, at 197. See also Lowenstein, *Campaign Spending*, *supra* note 4, at 548; MAGLEBY, *supra* note 1, at 167; Allen, *supra* note 3, at 1036 ("Close to two-thirds of the statewide measures that have appeared on the ballot have lost, a figure that has remained remarkably stable over time."); SCHMIDT, *supra* note 1, at 211-15.

The explanation most often given for the low initiative passage rate is that voters have a "predisposition" to vote "no" on initiatives. MAGLEBY, *supra* note 1, at 167; Allen, *supra* note 3, at 1016-17, 1036 ("usually the voter seems, quite sensibly, to resolve any doubts he has on a particular measure against it"); Briffault, *supra* note 4, at 1356-57, 1359, 1366. Indeed, "[o]n issues other than those on which voters have standing opinions, there is a predictable movement from general support for the proposition in the early campaign to its rejection as the campaign proceeds." MAGLEBY, *supra* note 1, at 167-68; Lowenstein, *Campaign Spending*, *supra* note 4, at 549; Allen, *supra* note 3, at 1037.

Lowenstein, however, contends that the low initiative passage rate "does not necessarily . . . reflect any voter predisposition to vote 'no' on initiatives . . ." Rather, "voters may simply consider each proposition on the merits, without significant predisposition one way or the other." Indeed, Lowenstein argues that if voters had a strong predisposition to vote "no," we would expect to see "initial low levels of support, which would increase during the campaign as information and arguments sufficed for some voters to overcome the predisposition to vote 'no.'" Lowenstein, *Campaign Spending*, *supra* note 4, at 548-49.

172. Allen, *supra* note 3, at 1036-38; Briffault, *supra* note 4, at 1372.

173. CRONIN, *supra* note 1, at 11, 199, 205, 229; Briffault, *supra* note 4, at 1371. Cf. Macey, *supra* note 142.

frage, the abolition of poll taxes, prohibition and antiprohibition measures, the eight-hour work day, campaign finance regulations, and establishment of the nation's first presidential primary system, to name but a few.¹⁷⁴

Finally, substitutive plebiscites provide citizens the important consumption good of direct political participation.¹⁷⁵ In addition, there is evidence that opportunities for this form of participation result in an overall decrease in voter apathy and ignorance and, therefore, an increase in the overall level of "civic virtue."¹⁷⁶

B. *More Intrusive Judicial Review*

Several scholars have proposed a less drastic remedy for the inferior protection against disadvantageous legislation which they contend plebiscites provide racial minorities: more intrusive judicial review of the enactments of substitutive plebiscites than of representative bodies.¹⁷⁷ Derrick Bell, for example, argues that popular sovereignty processes present a threat to minority rights "largely because the Supreme Court, for the most part, refuses to alter or strike down laws which, although neutral in form, function to promote racial discrimination."¹⁷⁸ He takes particular issue with the intent or purpose test of modern equal protection doctrine: "Unfortunately, the racial motivations and discriminatory impact of many modern referenda and initiatives cannot . . . be attacked directly because the measures are couched in racially neutral terms and may be viewed as serving some legitimate, nonracial public purpose."¹⁷⁹ Bell suggests that "as a first step," the courts might give heightened scrutiny¹⁸⁰ to ballot legislation in which the majority attempts to "take away something the minority obtained through the representative system."¹⁸¹

Julian Eule similarly contends that "[i]n its substitutive form, direct democracy bypasses internal safeguards designed to filter out or negate factionalism, prejudice, tyranny, and self-interest."¹⁸² By way of a rem-

174. CRONIN, *supra* note 1, at 50-52, 59, 97-98, 199; Allen, *supra* note 3, at 1021-26.

175. See, e.g., HANNAH ARENDT, ON REVOLUTION 115 (1963); Gillette, *supra* note 4, at 951, 957-58; Sunstein, *supra* note 155, at 36; Michelman, *Forward, supra* note 74, at 22; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 548 (1986).

176. See, e.g., Gillette, *supra* note 4, at 951; CRONIN, *supra* note 1, at 11.

177. See, e.g., Bell, *supra* note 4; *Judicial Review, supra* note 4; Eule, *supra* note 1; Gunn, *supra* note 4.

178. Bell, *supra* note 4, at 23.

179. *Id.* at 24. Unfortunately, Bell never explains why the same complaint could not be levied against the enactments of representative legislatures.

180. Bell's actual phrase is "[c]ourt scrutiny," *id.* at 26, but he seems to mean "heightened scrutiny." See *id.* at 23-24.

181. *Id.*

182. Eule, *supra* note 1, at 1549.

edy, he suggests that courts should "take a harder look when constitutional challenges are mounted against laws enacted by substitutive plebiscite."¹⁸³ Eule describes several ways this harder judicial look might be achieved in the context of equal protection claims. First, we could "abandon the purpose requirement altogether in certain plebiscitary settings,"¹⁸⁴ in effect employing a "disparate impact" test for unconstitutional discrimination.¹⁸⁵ This suggested change in standard is partly driven by proof concerns: "The search for a bigoted decision-maker seems particularly elusive in the context of substitutive plebiscites," since voting is private and the lower federal courts have barred inquiry into the motivations of individual voters.¹⁸⁶ Eule also notes that in the equal protection context this harder judicial look might be achieved by courts "be[ing] more imaginative about the sources [they] canvass—for example, ballot pamphlets, exit polls, campaign advertising"—for proof of discriminatory motivation.¹⁸⁷

From these discussions one might expect the United States Reports to be littered with instances in which the Court has upheld arguably racially discriminatory legislation enacted by plebiscites. In fact, the Court has heard only four cases in which plebiscitary legislation was challenged as racially discriminatory in violation of the Fourteenth Amendment.¹⁸⁸ Applying the same equal protection standards that it applies to the enactments of representative bodies, the Court found that three of the four plebiscitary enactments violated the Equal Protection Clause.¹⁸⁹ Of the

183. *Id.* at 1558. Eule argues that "[t]he judiciary must compensate for these process defects. It must serve as the first line of defense for minority interests; a back-up role is no longer adequate. The absence of structural safeguards demands that the judge take a harder look." *Id.* at 1549. The only exception is where "the electorate acts to improve the processes of legislative representation" because "[t]hese measures install new filters rather than seeking to bypass the existing ones." *Id.* at 1559-60. As examples, Eule cites measures to enforce ethics in government, to regulate lobbyists, or to reform campaign finance practices, all of which he asserts "pose no distinctive threat of majoritarian tyranny." *Id.*

184. *Id.* at 1562.

185. *Id.* at 1561-62. See also Gunn, *supra* note 4, at 158-59.

186. Eule, *supra* note 1 at 1561. See Kirksey v. City of Jackson, 663 F.2d 659, 662 (5th Cir. 1981) (First Amendment "assures every citizen the right to 'cast his vote for whatever reason he pleases'"); Arthur v. City of Toledo, 782 F.2d 565, 573 (6th Cir. 1986) ("a court cannot ask voters how they voted or why they voted that way"); Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291, 295 (9th Cir. 1970) (inquiry into voters' motives "would entail an intolerable invasion of the privacy that must protect an exercise of the franchise"). See also Sager, *supra* note 4, at 1421 ("Th[e] solicitude for the sanctity of individual choice in the electoral context logically extends to legislative plebiscites.").

187. Eule, *supra* note 1 at 1562. See also Bell, *supra* note 4, at 24 n.91.

188. Crawford v. Board of Educ., 458 U.S. 527 (1982); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967). It should be noted that these are the only such cases in which the Court *explicitly notes* the popular origin of the challenged state statute or constitutional provision.

189. *Seattle Sch. Dist.*, 458 U.S. 457; *Hunter*, 393 U.S. 385; *Reitman*, 387 U.S. 369.

two such cases that the Court has heard under “modern” equal protection law, it upheld the challenged legislation in one and invalidated it in the other.¹⁹⁰

In the remainder of this Part, I will argue that even if previous scholars are correct and representative legislatures do systematically provide racial minorities better protection against disadvantageous legislation than do substitutive plebiscites, it is neither necessary nor desirable that the courts respond to equal protection challenges by more intrusively reviewing the enactments of substitutive plebiscites. First, there is little evidence that any differences in the two lawmaking processes will make it more difficult for courts to identify unconstitutionally discriminatory legislation under existing equal protection standards if it is enacted by a plebiscite rather than by a representative legislature. Second, these proposals for a harder judicial look seemingly misunderstand the nature and operation of the intent test in modern equal protection law. Third, implicit in these proposals is a doctrine of due process of lawmaking, which the Court and most commentators have in other contexts considered to be neither workable nor desirable.

1. The Effects of Filters

Assuming *arguendo* that the presence of various filters does enable representative bodies to provide racial minorities better protection against disadvantageous legislation than substitutive plebiscites, it is important to understand the effect of this difference. Both Bell and Eule seem to contend that the courts will therefore find it more difficult to *identify* unconstitutionally discriminatory legislation under existing equal protection standards if it is enacted by a plebiscite rather than by a representative legislature.¹⁹¹ In fact, the *only* logical result of the “better protection” allegedly provided minorities by the various filters embodied in the representative lawmaking process is a *lower likelihood* that unconstitutionally discriminatory legislation—as measured by a constant standard—emerges from a legislature than from a plebiscite.

190. Compare *Crawford*, 458 U.S. 527 (plebiscitary enactment sustained), with *Seattle School District*, 458 U.S. 457 (plebiscitary enactment found unconstitutional).

191. Bell contends, for example, that “the racial motivations and discriminatory impact of many modern referenda and initiatives cannot . . . be attacked directly because the measures are couched in racially neutral terms and may be viewed as serving some legitimate, nonracial public purpose.” Bell, *supra* note 4, at 24. Unfortunately, Bell never explains why the same criticism cannot be levied against the enactments of representative legislatures.

Eule similarly focuses on the intent requirement of modern equal protection doctrine, arguing that “[t]he search for a bigoted decision-maker seems particularly elusive in the context of substitutive plebiscites.” Eule, *supra* note 1, at 1561.

This finding would not lead to the conclusion that the courts should subject plebiscitary legislation to a harder judicial look than enactments by representative bodies. We would simply expect the courts—employing a constant standard of unconstitutionality—to hear a higher proportion of *successful* equal protection claims concerning the enactments of plebiscites than of representatives, *ceteris paribus*.¹⁹²

Oddly, neither Bell nor Eule even mentions this implication of their claims. Rather, both seem concerned that the courts will find it *more difficult to identify* unconstitutionally discriminatory legislation if it is enacted by a plebiscite rather than by a legislature.¹⁹³ It is not clear, however, that this is likely to be the case. First, there is no reason to expect the drafters of initiatives to be either better at couching discriminatory legislation in racially neutral terms, or more likely to engage in this form of subterfuge, than representatives. Indeed, the greater law-making expertise of representatives, as well as their unique interest in being reelected, might lead one to be more suspicious of the true motives underlying their enactments.¹⁹⁴

Second, although the difficulties in determining the motivation of a group of decisionmakers are well known,¹⁹⁵ they do not obviously dimin-

192. Alas, *ceterae sunt raro pares*, and no good empirical evidence on this point exists or is likely to be generated. Cf. Gillette, *supra* note 4, at 938-39.

193. See *supra* notes 179, 186-87 and accompanying text.

194. See *supra* notes 102, 117, 121 and accompanying text.

195. In *The Forum of Principle*, Ronald Dworkin described the following as "common ground between the rival schools on constitutional intention":

It is often problematical what a particular congressman or delegate to a constitutional convention intended in voting for a particular constitutional provision, especially one of the vaguer provisions, like the equal protection or due process clause. Indeed, a particular delegate might have had no intention at all on a certain issue, or his intention might have been indeterminate. The difficulties obviously increase when we try to identify the intention of Congress or a constitutional convention as a whole, because that is a matter of combining individual intentions into some overall group intention. Even when each congressman or delegate has a determinate and ascertainable intention, the intention of the group might still be indeterminate, because there may not be enough delegates holding any particular intention to make it the intention of the institution as a whole.

Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 476 (1981).

Dworkin's own view is that "there is no such thing as the intention of the Framers waiting to be discovered, even in principle. There is only some such thing waiting to be invented." *Id.* at 477.

See also, e.g., *Symposium: Law and Literature*, 60 TEX. L. REV. 373 (1982).

Public choice theorists describe the problem of "legislative intent" in different terms:

Because legislatures comprise many members, they do not have "intents" or "designs," hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes. It is not only impossible to reason from one statute to another but also impossible to reason from one or more sections of a statute to a problem not resolved.

This follows from the discoveries of public choice theory. Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice. Every system of voting has flaws. The one used by legislatures is particularly dependent on the order in which decisions are made The existence of agenda control makes it impossible for a court—

ish when the decisionmakers are representatives rather than plebiscite voters. To be sure, the courts neither know, nor can inquire into, the often complex motivations of each plebiscite voter.¹⁹⁶ But they also cannot know the true stimulus for each representative's vote.¹⁹⁷

Third, representative bodies do not obviously generate a more extensive "record" on each piece of legislation than do plebiscites. Unlike Congress, state representative bodies produce scant record of the "history" of their enactments.¹⁹⁸ Nonetheless, state legislatures are more likely than plebiscites *sometimes* to have official reports of committees and hearings available for judicial scrutiny. This difference is most important, however, if such reports are *necessary* for a court to determine that a challenged piece of legislation is the product of discriminatory intent. And as Part III.B.2 explains, the Court has had little difficulty finding other evidence of discriminatory intent persuasive. Moreover, as the evidence of discriminatory intent cited in judicial decisions make clear, there are many respects in which the legislative history of plebiscitary enactments is both more extensive and more public than that of legislative enactments.¹⁹⁹

Finally, both Bell and Eule appear to consider proof of "a bigoted decision-maker" to be the central barrier to judicial findings of unconstitutionally discriminatory legislation under modern equal protection doctrine.²⁰⁰ As the next Part discusses, however, the Court's stumbling block has typically lain elsewhere.

2. Intent and Modern Equal Protection Doctrine

To the extent that evidence of "a bigoted decision-maker" is central to finding legislation unconstitutionally discriminatory under modern equal protection law, the courts have had little difficulty obtaining such proof in the case of plebiscitary enactments. In *Seattle School District No. 1 v. Washington*, for example, several Washington school districts

even one that knows each legislator's complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact.

Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983). See also, e.g., WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 167 (1982); Richard Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 195-96 (1986-87); Mashaw, *supra* note 117, at 126-27; FARBER & FRICKEY, *supra* note 6, at 40-42.

196. See *supra* note 186.

197. Even the representative herself may not always know why she is voting a particular way. See, e.g., Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 529, 536-540 (1982).

198. See *supra* note 101.

199. See *infra* Part III.B.2.

200. Bell, *supra* note 4, at 23-24; Eule, *supra* note 1, at 1561.

challenged the constitutionality of a state-wide initiative that effectively repealed the school districts' voluntarily instituted plans to achieve racial balance in their schools.²⁰¹ In assessing the constitutionality of the initiative under the Equal Protection Clause of the Fourteenth Amendment, the district court acknowledged that "the secret ballot raises an impenetrable barrier" to any attempt to determine "the subjective intent of the voters."²⁰² The court went on to note that this "does not, however, relieve this court of the burden of determining whether there was in fact [a racially discriminatory] intent or purpose behind the adoption of Initiative 350. One must simply look elsewhere than within the minds of the voters."²⁰³

The district court in *Seattle School District* then examined Initiative 350 in light of the five factors that the Supreme Court used to determine racially discriminatory intent in both *Village of Arlington Heights v. Metropolitan Housing Development Corp.*²⁰⁴ and *Personnel Administrator of Massachusetts v. Feeney*.²⁰⁵ Concerning "the impact of the action," the court found that "there is a disproportionate impact upon the education of minority children when their schools are racially imbalanced" and that the voters "were well aware that the passage of Initiative 350 . . . could only result in racially-imbalanced schools in [the affected] districts and a disproportionate impact upon minority students."²⁰⁶

When considering "the historical background of the decision," the court observed that "[t]he very words of the initiative reveal the intent to frustrate the [racial balancing] plan of the Seattle School Board."²⁰⁷ The court further found that "[i]f implemented, the initiative will achieve that purpose."²⁰⁸ It concluded that "[o]ne must assume therefore that the voters, in adopting the initiative, intended to accomplish the very purpose for which the initiative was designed and intended therefore the disproportionate racial impact which its implementation will have."²⁰⁹

With regard to the "sequence of events leading up to the adoption of the initiative," the court noted "a whole series of lawsuits and a recall election, the objective of which was to prevent the racial balancing of

201. 473 F. Supp. 996 (W.D. Wash. 1979), *aff'd in part, rev'd in part*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982).

202. 473 F. Supp. at 1014.

203. *Id.*

204. 429 U.S. 252 (1977).

205. 442 U.S. 256 (1979).

206. 473 F. Supp. at 1015.

207. *Id.*

208. *Id.*

209. *Id.*

Seattle schools.”²¹⁰ The court also determined that “the adoption of the plan of racial balancing by the Seattle School Board was the event which gave rise to the thought of a statewide initiative as a means of thwarting that decision.”²¹¹

Finally, the court found two “procedural and substantive departures from the norm” to be critical.²¹² First, “an administrative decision of a subordinate local unit of government, the Seattle School Board, was overridden in a statewide initiative by voters, a great number of whom were entirely unaffected by that plan.”²¹³ Second, the initiative restricted the traditional autonomy of local school boards with regard to the assignment of students.²¹⁴

These factual findings led the district court to conclude that “a racially discriminatory intent or purpose was at least one motivating factor in the adoption of the initiative,” in violation of the Fourteenth Amendment.²¹⁵ The U.S. Supreme Court later relied approvingly on the district court’s factual record and use of the *Arlington Heights* factors in similarly concluding that the initiative at issue violated the Equal Protection Clause.²¹⁶

Successful searches for “a bigoted decision-maker” were clearly necessary for both the district court and the Supreme Court in *Seattle School District* to find the initiative at issue unconstitutional. But it is the courts’ *prior* inquiry—determining *the particular group affected* by the challenged legislation—that is typically the barrier to finding plebiscitary enactments invalid under the Equal Protection Clause.²¹⁷

Prior to examining the evidence of racially discriminatory intent, the district court and the Supreme Court in *Seattle School District* each found that the challenged initiative “create[d] an impermissible *racial classification*” insofar as it “forb[ade] mandatory student assignments for racial reasons while permitting such assignments for purposes unrelated to race.”²¹⁸ Both courts went on to hold (1) that “[n]o compelling state

210. *Id.* at 1015-16.

211. *Id.* at 1016.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *See Seattle Sch. Dist.*, 458 U.S. at 465 n.9, 470-84.

217. *See, e.g., Daniel R. Ortiz, The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1117 (1989). Bell acknowledges this: “Blacks and other minorities will encounter substantial difficulty when they challenge a referendum on race discrimination grounds because . . . they must show ‘that a law seemingly neutral on its face is in fact aimed at a racial minority.’” Bell, *supra* note 4, at 24.

218. 473 F. Supp. at 1011 (emphasis added); *see* 458 U.S. at 470, 474, 485.

interest justify[d] that racial classification," and (2) that "[a] racially discriminatory intent or purpose was one of the factors which motivated the adoption of the initiative."²¹⁹

Compare the decisions in *Seattle School District* to the opinion of the Supreme Court in *Crawford v. Board of Education*.²²⁰ *Crawford* involved a Fourteenth Amendment equal protection challenge to a voter-ratified amendment to the California Constitution (Proposition I) which "provides that state courts shall not order mandatory pupil assignment or transportation unless a federal court would [be permitted under federal decisional law to] do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment" to the Federal Constitution.²²¹ The *Crawford* Court sustained the challenged plebiscitary enactment.²²² In contrast to its holding in *Seattle School District*, the Court in *Crawford* found that "Proposition I *does not embody a racial classification*."²²³ It noted that Proposition I "neither says nor implies that persons are to be treated differently on account of their race. It simply forbids state courts to order pupil school assignment or transportation in the absence of a Fourteenth Amendment violation."²²⁴ The Court added that "if Proposition I employed a racial classification it would be unconstitutional unless necessary to further a compelling state interest."²²⁵ The *Crawford* Court's finding that the challenged enactment did not classify on the basis of race was dispositive;²²⁶ the presence or absence of a bigoted decision-maker was irrelevant.²²⁷

Since the mid-1960s, the Court has been clear that race and a few other classifications would be accorded strict scrutiny, while others were to receive reduced scrutiny.²²⁸ By the early 1970s, it was so well estab-

219. 473 F. Supp. at 1011; see 458 U.S. at 471-72, 485 n.28.

220. 458 U.S. 527 (1982). Scholars and judges have made many creative attempts to reconcile *Crawford* and *Seattle*. See, e.g., Eule, *supra* note 1, at 1562-67 and sources cited *id.* at 1566 n.284.

221. 458 U.S. at 529.

222. *Id.* at 545.

223. *Id.* at 537 (emphasis added).

224. *Id.*

225. *Id.* at 536.

226. *Id.* at 536-39.

227. As something of an afterthought at the end of its opinion, the Court did note that the plebiscitary enactment had neither a "racially disproportionate effect" nor a "discriminatory purpose." *Id.* at 544-45.

228. Strict scrutiny requires that the governmental action bear a necessary relationship to a compelling state interest. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

Rational basis scrutiny, in contrast, requires only that a governmental action bear a rational relationship to a legitimate state interest. See, e.g., *Kadrmas v. Dickinson Pub. Schools*, 486 U.S. 450, 457-58 (1988); *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

And intermediate scrutiny, which the Court introduced in the mid-1970s for sex and legitimacy classifications, requires that a governmental action bear a substantial relationship to an important

lished that the level of scrutiny to be applied also dictated the result in equal protection cases that Gerald Gunther could describe strict scrutiny as “‘strict’ in theory and fatal in fact,” and rational basis scrutiny as “minimal . . . in theory and virtually none in fact.”²²⁹ Over the years, the Court has been equally clear about the level of scrutiny that laws affecting different groups should receive.²³⁰ Thus, the only remaining—and therefore the critical—issue in equal protection inquiries has been identifying the particular group affected by the challenged legislation.²³¹

The target of discrimination is sometimes apparent from the face of a law, as the history of school segregation laws, interracial cohabitation prohibitions, and antimiscegenation statutes makes clear.²³² Since the later 1960s, however, laws that discriminate by proxy have largely superseded laws that discriminate against a racial minority on their face.²³³ In theory, the Court could employ a straightforward “disparate impact” test in these cases. Taken alone, however, this measure of discrimination is overinclusive. Because of the strong correlation in our society between race and other traits such as educational level and wealth,²³⁴ discrimination on the basis of these other traits could always be construed—and therefore prohibited—as discrimination on the basis of race. The intent test enables the Court to distinguish proxies for impermissible classifications from unavoidable (and benign) cohort classifications.²³⁵

governmental interest. *See, e.g.,* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 & n.9 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976); Clark v. Jeter, 486 U.S. 456, 461, 1914 (1988); Mills v. Habluetzel, 456 U.S. 91, 99 (1982).

229. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

230. *See, e.g.,* Ortiz, *supra* note 217, at 1117.

231. *Id.*

232. *See, e.g.,* the laws struck down in *Brown v. Board of Education*, 347 U.S. 483 (1954); in *Loving v. Virginia*, 388 U.S. 1 (1967); and in *McLaughlin v. Florida*, 379 U.S. 184 (1964).

233. *See, e.g.,* Ortiz, *supra* note 217, at 1117-18.

234. As of 1989, the most recent year for which official statistics are available, white households in the U.S. had a median income of \$28,781, compared to a median income of \$16,407 for black households. 1991 STATISTICAL ABSTRACT, *supra* note 132, at 451. Even more striking is the racial disparity in household net worth as of 1988, the most recent year for which official statistics are available: a median of \$43,279 for whites and \$4,169 for blacks. *Id.* at 469.

As of 1989, the most recent year for which official statistics are available, the median black 25 years old and over had completed 12.4 years of school compared to 12.7 years for the median white. *Id.* at 138. This statistic embodies the fact that 21.8% of whites, but only 11.8% of blacks, had completed 4 years or more of college. *Id.*

235. Ortiz, *supra* note 217, at 1118. Ortiz also contends that the intent requirement can be seen “as a response to the rigidification of the suspect classification and tiers of scrutiny stages of equal protection.” *Id.* at 1117.

Theodore Eisenberg and Sheri Lynn Johnson present an important empirical study of “how the intent standard actually operates” in racial discrimination cases. Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1151 (1991). They concluded that,

[t]he expert judgment that plaintiffs would have a low success rate in intent cases is not

Notwithstanding its name, however, the "intent" test of modern equal protection doctrine frequently has little to do with individual motivation. In areas such as housing and employment in which the intent test has required plaintiffs to show that race was "a *motivating factor*" in the enactment of the allegedly discriminatory legislation, the Court has been satisfied if a showing of disparate impact is supplemented by a variety of other *objective* factors.²³⁶ The Court has suggested that government officials might be called to testify at trial about their *actual motives* only in a few extraordinary cases, and as something of a last resort.²³⁷

In many other areas, the intent test has not required plaintiffs to make *any* showing of discriminatory motivation, although it has required something more than evidence of disparate impact.²³⁸ In jury selection cases involving both panel selection and venire constitution, the Court has required that proof of adverse impact be supplemented merely by a showing that the juror "selection procedure . . . is susceptible of abuse or is not racially neutral."²³⁹ In voting cases, the intent doctrine bears even less relationship to motivation. In this area, the Court has required only a showing of disparate impact plus a showing that the pertinent jurisdiction has previously engaged in other types of objectively verifiable racial discrimination.²⁴⁰

verifiable by observing all published opinions. Intent claimants' success rate is not markedly different from that of other civil rights claimants. The more striking finding is the low volume of intent litigation. The Supreme Court's standard takes its toll not through an unusually high loss rate for those plaintiffs reaching trial or appeal, but by deterring victims from even filing claims.

Id. at 1153.

236. These factors include the specific series of events leading up to the challenged action, the general historical background of the decision, the legislative and administrative history of the action, and departures from the normal procedural sequence and usual substantive policies followed by the government decisionmaker. *See, e.g.,* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-68 (1977); Washington v. Davis, 426 U.S. 229, 241-48 (1976); Personnel Administrator v. Feeney, 442 U.S. 256, 274-80 (1979). *See also* Ortiz, *supra* note 217, at 1110-16, 1134-36.

237. *See Arlington Heights*, 429 U.S. at 268 & n.18 ("judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore 'usually to be avoided'").

238. *See Ortiz, supra* note 217, at 1119-36; Eisenberg & Johnson, *supra* note 235, at 1158.

239. *See, e.g.,* Castaneda v. Partida, 430 U.S. 482, 494 (1977); Batson v. Kentucky, 476 U.S. 79, 96 (1986).

240. The Court in *Rogers v. Lodge*, 458 U.S. 613 (1982), for example, found discriminatory intent substantiated by an aggregate of 14 factors having at best an indirect bearing on motivation. 458 U.S. at 623-27.

Dan Ortiz contends that the result of these different burdens of proof in different substantive contexts is that equal protection doctrine makes judicial review of legislative decisionmaking undemanding in realms (such as housing and employment) in which traditional liberalism relegates decisionmaking to markets. In areas (such as voting, jury selection, and sometimes education) in which traditional liberalism insists on a nonmarket allocation of goods, however, the same doctrine makes judicial intervention much more likely. Ortiz, *supra* note 217, at 1107, 1134-42.

In sum, the fact that a plaintiff (or a court) neither knows, nor can inquire into, the often complex motivations of each plebiscite voter should not pose an additional or unique barrier to a successful claim under existing equal protection doctrine. The court's determination of the particular group affected by the challenged law is often dispositive. Even when a search for "a bigoted decision-maker" is necessary, however, the courts have had little difficulty obtaining the requisite proof without the voters testifying about their actual motives.

The above description of modern equal protection doctrine also highlights the undesirability and unworkability of scholars' recommendations that the courts abandon the intent requirement in equal protection cases involving plebiscitary legislation.²⁴¹ Were the Court to employ a straightforward "adverse impact" test in such cases, a wide range of currently constitutional enactments would be unconstitutional if enacted by a plebiscite, but permissible if enacted by a representative body. For example, an initiative (but not a legislative enactment) requiring the local police department to base its hiring decisions on an aptitude test developed by the Civil Service Commission would now be unconstitutional if more blacks than whites failed the exam.²⁴² This would be the result even if the Court found the test to be "reasonably and directly related to the requirements of the police recruit training program."²⁴³ Similarly, an initiative (but not a legislative enactment) requiring the state to give an employment preference to veterans would be unconstitutional, no matter what its justification, if fewer blacks than whites met this criterion.²⁴⁴ And an initiative (but not a legislative enactment) prohibiting the rezoning from single-family to multi-family of a 15-acre parcel in the middle of 80 acres of single-family homes, as requested by a low-income housing development corporation, would now be unconstitutional if the failure to rezone would (as is likely) bear more heavily on racial minorities.²⁴⁵ In brief, any plebiscitary legislation that adversely affected racial minorities would be unconstitutional under these proposals (1) no matter what the affected "good," and (2) no matter what race-neutral justification would or could be offered on behalf of the legislation.

A slightly different proposal with the same aim would be for the Court to employ a sliding-scale intent requirement that made bad motive

241. See, e.g., Bell, *supra* note 4, at 23-24; Eule, *supra* note 1, at 1561-62; Gunn, *supra* note 4, at 154-59.

242. Cf. *Washington v. Davis*, 426 U.S. 229 (1976).

243. Cf. *Davis v. Washington*, 348 F. Supp. 15, 17 (D.D.C. 1972) (citation omitted).

244. Cf. *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

245. Cf. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

somewhat easier to prove for plebiscitary enactments than for identical legislation by a representative body. As the discussion of *Seattle* above makes clear, however, the Court has not historically had any difficulty establishing improper motive in cases involving plebiscitary legislation that it determines classifies on the basis of race.²⁴⁶ Rather, the difficulty lies with the Court's determination of the particular group affected by the challenged legislation.²⁴⁷

As an alternative, therefore, one might propose a sliding-scale for levels of scrutiny such that legislation that currently receives rational basis scrutiny would receive heightened scrutiny if enacted by a plebiscite.²⁴⁸ Similarly, plebiscitary enactments that currently receive strict scrutiny would receive "super-strict" scrutiny. The difficulty with this alternative, however, is that all legislation, no matter what the classification at issue, would receive heightened scrutiny. And, as was discussed above, the level of scrutiny to be applied has long dictated the result in equal protection cases, with heightened scrutiny typically being "fatal in fact."²⁴⁹ The result, therefore, is that the courts would invalidate any and all plebiscitary enactments challenged under the Equal Protection Clause.

3. Due Process of Lawmaking

One final aspect of proposals for a harder judicial look at plebiscitary legislation merits discussion. By arguing that the courts should treat the legislative products of plebiscites and representative bodies differently because of differences in the two *lawmaking processes*, these proposals would start the Court down the slippery slope toward a doctrine of due process of lawmaking. The Court, however, has almost always declined to invalidate statutes and constitutional amendments where a denial of due process of lawmaking is alleged. Indeed, neither the Court nor the vast bulk of academic commentators has considered due process of lawmaking to be either a workable or desirable doctrine.

246. See *supra* text accompanying notes 201-216.

247. See *supra* note 217 and accompanying text.

248. Eule, for example, suggests that the courts replace rationality review with heightened ends-means review when a law is the product of a substitutive plebiscite. Eule, *supra* note 1, at 1568. He argues that the traditional deferential approach is premised on the fact that legislatures conduct hearings and are, in general, more competent factfinders than the courts. Eule notes, in contrast, "[t]he absence of structured factfinding in the substitutive plebiscite and the dangers of classification inherent in a process of naked aggregation . . ." *Id.* Heightened scrutiny of plebiscitary lawmaking would nonetheless be unnecessary, he contends, when "the burden of plebiscitary action falls on political actors able to defend their interests in the popular arena . . ." *Id.* at 1573. Here Eule has the vast bulk of economic regulation in mind. *Id.*

249. See *supra* note 229.

In many nations, the courts are empowered to review the lawmaking process but not the substance of laws that have been legitimately enacted.²⁵⁰ In the United States, however, the courts largely believe themselves to hold the reverse powers of review. The Court has heard challenges to many aspects of the process through which particular statutes were enacted, but has scarcely ever found the alleged lack of legislative due process to invalidate the law.²⁵¹ Even when its rhetoric suggests that it considers some aspect of the *making* of a law illegitimate, the

250. See, e.g., MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 99 n.8 (1971); Gottfried Dietze, *Judicial Review in Europe*, 55 MICH. L. REV. 539, 541 (1957).

251. The classic discussions of due process of lawmaking are Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); and Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975). An important recent contribution is FARBER & FRICKEY, *supra* note 6, at 118-31. See also sources cited *id.* at 118 n.4, 119 n.6.

Daniel Farber and Philip Frickey suggest that there are three, non-mutually exclusive models of due process of lawmaking: structural, procedural, and deliberative. *Id.* at 118-31. Under the structural model, the court "attempt[s] to protect against governmental abuses, not by substantive judicial review, but by improving the structure of decisionmaking." *Id.* at 121. The most notable example of a decision comporting with the structural model is *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). See also cases discussed in FARBER & FRICKEY, *supra* note 6, at 121-22.

Under the deliberative model, the court "require[s] not only compliance with formal legislative rules, but also evidence that the legislature actually acted with sufficient deliberation." *Id.* at 122. Farber and Frickey posit *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), as an exemplar of this model. FARBER & FRICKEY, *supra* note 6, at 122.

Under the procedural model of due process of lawmaking, "courts would merely require legislatures to follow their own rules." *Id.* at 125. The most notable such case is *Powell v. McCormack*, 395 U.S. 486 (1969). See also cases cited in FARBER & FRICKEY, *supra* note 6, at 125-27; Linde, *supra*, at 226.

The Court has only rarely employed the structural model of due process of lawmaking to invalidate regulations or statutes, and this model is much more controversial than the procedural model among the justices as well as among commentators. See FARBER & FRICKEY, *supra* note 6, at 119-23 ("The [] limits [of structural review], let alone [its] ultimate judicial acceptance, [is] highly unclear."); Mark V. Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809, 823 (1983) ("The difficulty is that no one has yet specified when structural review is appropriate.").

Although the deliberative model of due process of lawmaking has sometimes been suggested by various justices, see FARBER & FRICKEY, *supra* note 6, at 122 n.31, this model has "the weakest support in American law," *id.* at 129, and has scarcely ever been invoked to *invalidate* an enactment. Even commentators relatively favorably disposed toward the structural model have expressed "somewhat greater doubts about the utility of the model of legislative deliberation," *id.* at 124.

The Court has occasionally been willing to employ the procedural model of due process of lawmaking to invalidate legislative actions, see *id.* at 125-27, and some commentators consider these cases relatively unproblematic, see, e.g., *id.* at 127 ("uniform enforcement of procedural rules will tend to produce better results on the average"). The Court has held that legislatures must follow some form of rational fact-finding in the rare cases in which legislatures adjudicate individual rights, as in contempt and impeachment cases, and probably when expelling a member. See, e.g., *Groppi v. Leslie*, 404 U.S. 496 (1972); *Powell v. McCormack*, 395 U.S. 486 (1969); *Unites States v. Brewster*, 408 U.S. 501, 518-20 (1972). See also Linde, *supra*, at 226.

In addition, in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), the Court arguably employed the procedural model in finding the legislative veto unconstitutional. Although Farber and Frickey make an interesting and thoughtful case that "the legislative veto ran afoul of *all* the components of due process of lawmaking," FARBER & FRICKEY, *supra* note 6, at 129 (emphasis added), they note both that the "Court did not rely on lack of legislative deliberation," *id.*

Court only rarely invalidates the law on that ground.²⁵²

When proposed in the state legislature, a bill is not required to state a purpose or to recite the "findings" on which it is based.²⁵³ It may be enacted by legislators who have never read it or whose minds are wholly closed to reasoned argument.²⁵⁴ Not even the *opportunity* for debate and discussion need precede enactment; the New York Legislature once passed 508 bills in three days.²⁵⁵ More than one commentator has concluded that "[p]rocedures like these are indefensible when one takes seriously the notion that due process commands a legislature first to agree on a purpose and then to assess the efficacy of the proposed means to accomplish it."²⁵⁶

Why, then, has the Court historically declined to ensure that legislation is the product of due process? Scholars have often attributed the Court's reluctance to respect between coordinate branches or to problems of proof,²⁵⁷ although as Justice (then Professor) Hans Linde has noted, "[n]either problem keeps courts from insisting on such adherence [to lawful procedures] by executive officers"²⁵⁸

at 130, and that the "effect of the ruling was to require the observance of appropriate legislative procedures," *id.* at 131.

Most *state* courts (and commentators thereon) have found it improper to question legislative adherence to lawful procedures, although "[j]udicial views on allowing a law to be attacked for faulty enactment differ from state to state and with the nature of the asserted fault" Linde, *supra*, at 242. See also Linde, *supra*, at 242-43 for additional source citations.

252. The most prominent exceptions are cases in which the Court employs the procedural model of due process of lawmaking, see *supra* note 251, and cases in which "the Court's rhetoric suggests a rejection of interest-group politics as a legitimate basis for legislation." Sunstein, *supra* note 155, at 53. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); and *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973).

253. See, e.g., Linde, *supra* note 251, at 226.

254. See, e.g., SENATOR H.L. "BILL" RICHARDSON, WHAT MAKES YOU THINK WE READ THE BILLS 36-46 (1978):

Every legislator has his own system for judging how he will vote, but reading the bill usually isn't part of the procedure, and listening to debate on the bill's merits certainly isn't either

I hope you will have noticed that I haven't mentioned logic and reason as factors in how legislators vote. In the many years I have served in the state legislature, no one has ever approached me and stated, "Bill, your premises are inaccurate"

255. Briffault, *supra* note 4, at 1362; RICHARDSON, *supra* note 254, at 41 (California Senate voted on 25 bills at one time "late in the session, when things were all jammed up."). See also *supra* note 135.

256. See, e.g., Linde, *supra* note 251, at 226-27; Sunstein, *supra* note 155, at 53-54. Cf. Tushnet, *supra* note 251, at 826.

257. See, e.g., Linde, *supra* note 251, at 243, and sources cited therein at note 117; FARBER & FRICKEY, *supra* note 6, at 125.

258. Linde, *supra* note 251, at 243.

Justice Linde suggests two alternative explanations for the Court's resistance to legislative due process: First, "the due process clauses do not command compliance with legitimate procedure in the abstract; they state that no person shall be deprived of life, liberty, or property without such compliance." *Id.* at 244-45. Linde terms this "the practical reason to withhold judicial review." *Id.* at 245. He notes that "to deny an injured party relief from an improperly made law means either

More recently, Cass Sunstein has concluded that the Court's unwillingness to supervise the functioning of the legislative process reflects its "skepticism toward the view that the Constitution forbids legislation that is based on the power of self-interested private groups."²⁵⁹ He argues that the common law equal protection and due process demands that legislation be "rational" might "be understood precisely as a requirement that regulatory measures be something other than a response to political pressure."²⁶⁰ He adds that "[i]n no modern case has the Court recognized the legitimacy of pluralist compromise as the exclusive basis for legislation."²⁶¹ Sunstein acknowledges, however, that this seeming evidence of the existence of a doctrine of due process of lawmaking is undercut by the fact that "[t]he Court is willing to hypothesize legitimate ends [in order to sustain legislation] even in cases in which it is highly unlikely that those ends in fact account for [the] legislation"²⁶²

The primary reason for the Court's longstanding unwillingness to ensure that legislation is the product of due process may be more straightforward, however. A doctrine of due process of lawmaking would require the Court to specify what legislative process is in fact due, a task that it may be neither able nor willing to carry out.²⁶³ At the very least, the Court would need to specify the legislative behaviors that due process would require or prohibit. Making these choices would ultimately force the Court to adopt a particular conception of good government—pluralistic, republican, or something else. None of these determinations is likely to be easily made or uncontroversial.

Specifying appropriate lawmaking behavior may, in addition, embody seemingly intractable problems of proof.²⁶⁴ The Court may, for

that courts will tolerate violations of due process of law, or else that *every breach of the prescribed process does not fall short of due process in the constitutional sense.*" *Id.* at 245 (emphasis added).

Second, Linde contends that "[t]o judge legislation as a process, not as a product, . . . requires [courts] to deny validity to some excellent enactments while sustaining deplorable ones that have been faultlessly made." *Id.* at 254. While obviously true if taken alone, this second, alternative explanation has force only if the Court were *completely to substitute* judicial review of the lawmaking process for judicial review of the legislative product. This is neither the present, nor a probable, state of affairs.

259. Sunstein, *supra* note 155, at 66.

260. *Id.* at 49.

261. *Id.* at 50.

262. *Id.* at 53.

263. Historically, the Court has been willing to specify the legislative process that is due only in the rare cases in which the legislature adjudicates individual rights. See *supra* note 251.

264. One response to Linde's observation that such problems of proof do not deter courts from insisting that executive officers adhere to lawful procedures, Linde, *supra* note 251, at 243, is that these problems of proof may in fact be greater in the case of legislative process than administrative or adversarial process because of greater disagreement in the case of the former regarding both the definition and evidence of "good process."

example, decide that legislative due process requires that legislators deliberate before voting, or prohibits legislators from responding mechanically to interest group pressures. But what will count as evidence of appropriate deliberation (or its absence)? What behaviors will signify that a representative's vote is the prohibited product of interest group pressures rather than the permitted result of her independent judgment that the proposed legislation promotes "the public good"?

Even if the Court could coherently specify the legislative process that is constitutionally required and could further overcome any problems of proof, the question of desirability remains. Do we really want the courts directly and explicitly to monitor the lawmaking process? There is reason to think not. First, judicial review of the lawmaking process will not substitute for judicial review of the legislative product. If we will always want the courts also to engage in substantive review of legislation, it is not clear that any significant benefit will accrue from supplemental judicial review of the lawmaking process.²⁶⁵ If scholars are interested in having the courts review the lawmaking process in order indirectly to add teeth to currently weak doctrines of substantive review of the legislative product, they should simply encourage the courts and/or Congress directly and explicitly to strengthen those substantive doctrines.

Second, to the extent that interest in due process of lawmaking reflects a more general substantive concern that legislative products be "public-regarding,"²⁶⁶ this concern may be optimally met by *not* having a doctrine of due process of lawmaking. Rent-seeking by interest groups cannot be eliminated without cost, and we should be willing to expend resources to control the behavior of our representatives "only up to the point at which the marginal costs of such expenditures equals the marginal benefit in terms of reduced rent-seeking."²⁶⁷

It is possible that the existing regime provides optimal deterrence of rent-seeking by interest groups. First, the Constitution currently contains many mechanisms that hinder the passage of special interest legisla-

265. Supplemental judicial review of the lawmaking process seems likely to have an effect only if a *substantively permissible* law is enacted through procedures that are found to have been unlawful. In this case, an enactment that would have been sustained but for judicial review of the lawmaking process will be held to be invalid. In the vast majority of cases, however, one would expect a substantively permissible law to have little difficulty subsequently being reenacted through proper legislative processes. "Enacting" the same law twice will, of course, be more costly than enacting it once, and the additional cost(s) may sometimes deter the sponsor(s) of the proposed legislation from seeking (re)enactment.

266. See, e.g., Macey, *supra* note 102, at 226.

267. *Id.* at 245-46.

tion.²⁶⁸ Indeed, more than one scholar has concluded that “the idea that the Constitution was designed to impede interest groups from obtaining economic advantage through political means is ‘the most promising candidate for a unitary theory of the Constitution.’”²⁶⁹ Second, although the Constitution is rarely used to invalidate statutes (especially economic ones),²⁷⁰ Jonathan Macey has shown that the judiciary, “*inevitably . . .* encourages passage of public-regarding legislation and impedes passage of interest group bargains” when it employs “traditional method[s] of statutory interpretation.”²⁷¹ Third, since the federal courts depend on Congress for their jurisdictional authority and, in some cases, very existence, “it is simply unrealistic to think that Congress would permit the courts systematically to eradicate the rents it receives from interest groups.”²⁷² Thus, Congress may not be willing to tolerate any more judicially imposed impediments to the passage of interest group bargains than currently exist.

Finally, Einer Elhauge has shown that recent proposals to have the courts more intrusively review legislation that is the product of “disproportionate interest group influence” are incoherent for at least two reasons. First, “we cannot hope to identify improper interest group influence by the political methods those groups use,” since “there is nothing distinctive” about those methods.²⁷³ Second, “even an ideally conscientious and knowledgeable judge will be unable to separate judicial findings about whether interest group influence is excessive from normative conclusions about how much influence that interest group should have.”²⁷⁴ And there is no uncontroversial basis for setting these decisive baselines.²⁷⁵ Elhauge concludes that “in making the threshold finding that supposedly narrows their normative discretion, judges will be making precisely the sort of normative judgment that the proposals seek to limit to a subset of cases. The result is no different than if the judge applied that normative standard to all cases.”²⁷⁶

In sum, before the Court accepts scholars’ proposals that it treat the legislative products of plebiscites and representative bodies differently because of differences in the two lawmaking processes, it should need to be

268. *Id.* at 242-43, 247-50.

269. *See, e.g., id.* at 249 (quoting with approval Sunstein, *supra* note 159, at 1732).

270. *See, e.g., Macey, supra* note 102, at 224.

271. *Id.* at 226-27; *see also id.* at 238-41, 250-52, 254-55, 257-61, 263-67.

272. *Id.* at 242.

273. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 49 (1991).

274. *Id.* at 60.

275. *Id.* at 49-50.

276. *Id.* at 60.

persuaded either (1) that a coherent doctrine of due process of lawmaking is both possible and desirable, or (2) that disparate treatment of the products of different legislative processes does not mandate a larger doctrine of due process of lawmaking. Neither case has yet been made.

C. *Improving Plebiscitary Procedures*²⁷⁷

Those who, despite the analysis in Parts I and II above, remain interested in providing racial minorities greater protection from potentially disadvantageous plebiscitary legislation might most productively focus their attention on directly remedying any perceived defects or weaknesses in existing plebiscitary procedures.²⁷⁸

The ability of any minority group to *block* potentially disadvantageous plebiscitary legislation might be directly enhanced in a variety of ways. For example, the number of signatures necessary to place a proposition on the ballot could be increased²⁷⁹ or a geographical distribution requirement imposed.²⁸⁰ A supermajority of votes could be required to

277. This section did not exist in the Conference draft of this paper, on which the published comments of Professors Eule and Riker were based.

This section (and I) profited from my service as an independent commentator on the *TIPS* Task Force Report, *supra* note 39, at the ABA Annual Meeting, August 1992, in San Francisco.

278. Indeed, even those persuaded that a rationally self-interested racial minority's preference between representative and direct lawmaking processes is a difficult empirical question and cannot confidently be resolved on the strength of *a priori* reasoning, may still be interested in improving various aspects of existing plebiscitary procedures.

For examples of recent, general proposals to improve direct democracy, see DUBOIS & FEENEY, *supra* note 143; *TIPS* Task Force Report, *supra* note 39.

279. All states that permit initiatives require a certain number of signatures to qualify a measure for the ballot, but the number of signatures required varies widely among jurisdictions. Compare, e.g., MASS. CONST. amend. art. LXXXI, § 2 (3% of votes cast in preceding gubernatorial election), with NEV. CONST. art. XIX, § 2 (10% of votes cast in preceding general election).

The signature requirement can pose a real—not just formal—barrier to ballot entry. For example, between 1914 and 1989 in the state of Washington, 551 initiatives were filed with the state prior to the commencement of the signature collection process, but only 85 (15%) were ultimately certified as containing enough signatures to warrant placement on the ballot. *TIPS* Task Force Report, *supra* note 39, at 22. In addition, a regression analysis of plebiscitary measures qualifying for the ballot between 1950 and 1980 revealed a strong statistically significant relationship between a state's signature threshold levels and the number of measures qualifying for the ballot. MAGLEBY, *supra* note 1, at 41-44. This relationship was found to be stronger for initiatives than for referenda. *Id.* at 42.

Although the *TIPS* Task Force concluded that "there is no optimal percentage of signers that will ensure appropriate use of the plebiscite," it acknowledged that "the signature requirement could affect the costs of the plebiscitary process significantly, and that higher requirements could help to limit plebiscites to situations of legislative failure." *TIPS* Task Force Report, *supra* note 39, at 22-23.

280. At present, several states require that the signatures necessary to qualify a proposition for the ballot be collected from a cross section of the state. See, e.g., MO. CONST. art. III, § 50 (signatures required from 8% of the voters in each of two-thirds of the state's congressional districts); MONT. CONST. art. III, § 4(2) (signatures required from 5% of the qualified electors in each of at least one-third of the legislative representative districts); NEB. CONST. art III, § 2 (signatures required from 5% of the electors of each of two-fifths of the counties of the state); MASS. CONST.

enact initiatives.²⁸¹ The governor could have the power to veto plebiscitary enactments,²⁸² and the state legislature could have the power to amend or repeal them.²⁸³ It is important to remember, however, that any change in the plebiscitary process that makes it easier for a minority group to block potentially disadvantageous legislation will simultaneously make it more difficult for the minority group to pass potentially advantageous legislation.²⁸⁴

Those concerned to increase the likelihood and quality of plebiscitary deliberation also have a wealth of options. States could send pamphlets to all registered voters 30 days prior to each election, which set forth: (1) the ballot title of the proposition, (2) a clear, readable summary statement of the proposal, (3) an explanation of the effect of the proposal and of an affirmative and a negative vote, and (4) advocacy statements by

amend. art. 48, gen. prov., pt. 2 (no more than one quarter of the required signatures may be of registered voters in the same county).

Geographical distribution requirements are typically thought to help ensure both that issues of purely local concern are not subsidized by the state and that various localities do not impose a disproportionate burden on another locality. See, e.g., TIPS Task Force Report, *supra* note 39, at 23-24. In addition, however, the requirement also makes signature collection more expensive and difficult, "especially if it imposes an obligation to collect signatures in rural areas where relatively few signatures can be obtained per work-hour invested in the collection process." *Id.* at 24.

281. Denmark, Scotland, and Wales all have *de facto* supermajority requirements in the guise of "qualified majority requirements whereby 30-67 percent of the electorate (all eligible voters) must vote affirmatively for a measure to pass." MAGLEBY, *supra* note 1, at 89.

Some American states and localities already require more than a simple majority of affirmative votes to approve referenda on issues such as bonded indebtedness and incorporation, respectively. *Id.* at 47. The U.S. Supreme Court has held that supermajority requirements are not inherently unconstitutional. *Gordon v. Lance*, 403 U.S. 1 (1971); *Mihaly v. Westbrook*, 403 U.S. 915 (1971).

Lani Guinier has recently proposed supermajoritarian decision-making rules and weighted voting *within representative bodies* "to give minority groups an effective veto, thus forcing the majority to bargain with them and include them in any 'winning' coalition." Guinier, *Seats*, *supra* note 74, at 1503.

282. At present, no governor has a veto power over statutory or constitutional initiatives. See *supra* note 21. "In most states, successful initiatives are automatically implemented within ninety days of the election" unless a legal challenge is pending. MAGLEBY, *supra* note 1, at 47.

283. In approximately half of the states that currently permit statutory initiatives, the legislature's ability to amend them is restricted. *Id.* at 47. Frequently, any legislative amendment (including repeal) of a statutory initiative must be submitted to a popular vote. *Id.*; see also, e.g., ARIZ. CONST. art. IV, pt. 1, § 1(6); NEB. CONST. art. III, § 4. In other states, the legislature can amend or repeal a statutory initiative, but only by a two-thirds vote of all members, see, e.g., ARK. CONST. amend. 7, or only three years after the initiative's effective date, see, e.g., NEV. CONST. art. XIX, § 2(3).

Noting that "the risk that the legislature will spitefully overturn a popularly elected measure is effectively countered by a desire for political self-preservation," the TIPS Task Force recommends that statutory initiatives be treated the same as legislative enactments *two* years, after their effective date, but that amendments or repeal by a *supermajority* of the legislature should be permitted prior to that. TIPS Task Force Report, *supra* note 39, at 55-56.

284. See *supra* Part I.

proponents and opponents of the proposition.²⁸⁵ Prior to each plebiscite, the state could also hold public debates or hearings involving both proponents and opponents of each ballot proposition.²⁸⁶ In addition, voter understanding of plebiscitary proposals might be improved by: requiring that the title and text of each ballot proposition be reviewed by an appropriate state official for misleading or confusing language,²⁸⁷ by limiting each ballot proposition to a single subject,²⁸⁸ by limiting the number of propositions on the ballot in any given election,²⁸⁹ and by requiring disclosure of a proposition's sponsor(s).²⁹⁰

Finally, those concerned that well-funded organizations may find it easier to "buy" plebiscitary than legislative enactments that disadvantage racial minorities could pursue campaign finance and disclosure laws that are at least as stringent as those for candidate elections.²⁹¹ (This concern might also be assuaged by recent empirical findings that: (1) campaign spending was the decisive factor in only 12 percent of all state-level initiative campaigns during 1976-1984,²⁹² and (2) heavy expenditures have been successful in persuading people to vote *against* an initiative, but

285. For a good overview of current state practices, see TIPS Task Force Report, *supra* note 39, at 27-37.

Although anecdotal evidence suggests that voter pamphlets may be seldom read and quickly discarded, *see, e.g.*, Eule, *supra* note 1, at 1508-09, surveys in several states indicate that "where voter pamphlets are available, voters claim to read some or all of them and consider them a valuable resource in helping them decide how they will vote." CRONIN, *supra* note 1, at 81.

The TIPS Task Force concluded that the level of use "could profitably be increased by making pamphlets more readable," and that "the state has an obligation, as a matter of principle, to place relevant information concerning ballot propositions before the voters." TIPS Task Force Report, *supra*, note 39, at 30.

286. At present, only a few states hold hearings or debates on ballot propositions. California law provides for, but does not mandate, such hearings. *See* TIPS Task Force Report, *supra* note 39, at 38. In Colorado, initiatives proposed to amend the constitution, are submitted to the legislative research and drafting offices of the general assembly, which subsequently report their comments at a meeting open to the public. COLO. CONST. art. V, § 1, cl. 5. A bill was introduced into the Nebraska legislature in 1991 that would require the sponsor of record of an initiative to hold at least one public hearing in each congressional district in the state between the 15th and 60th day prior to the general election. Neb. bill 585, Legislature of Nebraska, 92nd Legislature, 2nd Session (1991).

287. At present, initiative petitions can be circulated only after a state official approves their language, although the identity of the official and the stringency of the review differ among the states. TIPS Task Force Report, *supra* note 39, at 11-19.

288. *See supra* note 39. No state currently appears to have a limit on the number of propositions that may appear on a given ballot, and the TIPS Task Force found the issue "insufficiently problematic to raise the difficult questions that any limiting legislation would entail." *Id.* at 47-48.

289. *Id.*

290. For a good overview and normative analysis of current state practices, *see id.* at 62-65.

291. The TIPS Task Force notes that some of the justifications for campaign contribution restrictions may apply with less force in the plebiscitary setting where "the outcome of the election is to enact a new law, not to place any person in a position to reward contributors." *Id.* at 59. For a good overview and normative analysis of the widely varying current state practices, *see id.* at 56-65.

292. SCHMIDT, *supra* note 1, at 35-37.

have had a negligible effect on obtaining affirmative votes.²⁹³)

CONCLUSION

There are obvious and important differences between the representative and plebiscitary lawmaking processes. Even if these differences *did* cause plebiscites to be systematically more likely than representative bodies to enact legislation that disadvantages racial minorities, that finding should not mandate either the abolition of plebiscites or any alteration in standards of judicial review under the Fourteenth Amendment. I have demonstrated, however, that a rationally self-interested racial minority's preference between representative and direct lawmaking processes is a difficult empirical question and cannot confidently be resolved on the strength of *a priori* reasoning.

That the question turns out to be hard should not surprise. Rather, it is precisely what we should expect given that approximately half the states have provided for some form of plebiscitary lawmaking while a nearly equal number of states has not.²⁹⁴ As Saul Levmore has argued in a wide range of other contexts, "variety among legal systems often arises in rules that either (a) do not much matter or (b) raise issues about which reasonable people (even in the same culture) could disagree."²⁹⁵ Both possibilities are borne out in the present context.

As the analysis in Part II shows, even those interest groups most likely to fear majority oppression cannot conclude *a priori* that a representative lawmaking process is preferable to a plebiscitary one *with regard to any given piece of legislation*.²⁹⁶ In this respect, the lawmaking

293. *Id.*; Lowenstein, *Campaign Spending supra* note 4, at 511.

As Farber and Frickey note, summarizing the empirical findings of Schlozman and Tierney, the influence of an interest group on Congress is similarly "likely to be strongest when the group is attempting to block rather than obtain legislation." FARBER & FRICKEY, *supra* note 6, at 19 (discussing KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986)).

294. *See supra* note 1.

295. Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43, 44 (1987); *see also*, Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235 (1986); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986).

296. It is important to note that I am not claiming normative indifference, from the perspective of general social welfare, between representative and plebiscitary lawmaking processes as to the "default" legislative process. There are obvious and good reasons—*having nothing to do with the likelihood that legislation that disadvantages racial minorities is enacted*—to prefer that representatives make the vast bulk of our laws. Many of those same reasons may help to explain why we have plebiscites at the state and local, but not the national, level.

In addition, as is discussed *supra* at text accompanying notes 140-41, individual interest groups have several reasons to channel their lobbying efforts toward representative lawmakers over the long run.

options that a state provides should not much matter. Whether a state or municipality is *generally* better off with or without plebiscitary supplements to its representative lawmaking processes, however, is a different question that raises issues about which reasonable people could—and do—disagree.

All the same, we should beware the possibility that legal scholars' nearly unanimous distrust of direct democracy—and faith in the courts' ability to remedy any deficiencies—evinces an unjustified and dangerous elitism. If the ordinary citizen cannot be trusted to make the laws by which she will be governed, why should she be given the responsibility of electing the representatives who will make those laws? Indeed, why should we leave the important task of lawmaking to representatives elected by the masses when an appointed bevy of Platonic Guardians is available to do the job?

Ironically, the Supreme Court has never shared these scholars' views of either the Court or the People: The Court has never varied its analysis because of a law's popular origin. Rather, consistent with the analysis presented in this Article, the Court has long subscribed to Justice Black's view that constitutional provisions for direct democracy "demonstrate devotion to democracy, not to bias, discrimination, or prejudice."²⁹⁷

297. *James v. Valtierra*, 402 U.S. 137, 141 (1971).