

# 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 3

October 1991

## Representative Government: The People's Choice

Julian N. Eule

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



Part of the [Law Commons](#)

---

### Recommended Citation

Julian N. Eule, *Representative Government: The People's Choice*, 67 Chi.-Kent L. Rev. 777 (1991).  
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol67/iss3/3>

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](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

## REPRESENTATIVE GOVERNMENT: THE PEOPLE'S CHOICE

JULIAN N. EULE\*

Derrick Bell has encountered racism first-hand. I have lived in California for the past seven years. Perhaps these experiences go a long way to explain why the two of us see the world so differently than does Lynn Baker.<sup>1</sup> Whatever the experiential and psychological causes, it is apparent that we share little common ground with her evaluation of the risks posed to racial and other unpopular minorities by direct democracy.

Professor Baker's assessment is formed around four independent conclusions. First, she contends that plebiscite voters are no less deliberative, informed, civic-minded and responsive to minority interests than is the ordinary legislator.<sup>2</sup> Second, while acknowledging structural differences in the two processes, Professor Baker asserts that the checks and balances imposed on legislative power provide no greater assurance against tyranny of the majority than does the unfiltered aggregation of the plebiscite.<sup>3</sup> Third, even conceding a greater hazard of majority oppression through plebiscite, she nonetheless believes that standard judicial review can adequately protect the rights of racial and other unpopular minorities without resort to a "harder look" or intensified scrutiny.<sup>4</sup> Finally, Professor Baker calculates that the danger that minorities will be inadequately protected by a "business as usual" judicial evaluation of voter plebiscites is less ominous than the possibility that courts may edge down the slippery slope of examining the process—in addition to the product—of all lawmaking.<sup>5</sup>

I disagree with each of these four appraisals and will address them in reverse order. This reordering starkly illustrates how Professor Baker

\* Professor of Law, University of California, Los Angeles. An earlier version of these remarks was delivered at the John M. Olin Conference on "Law and Economics of Local Government," held at the University of Virginia School of Law on November 8-9, 1991. If the written version is better than the oral one, it is largely because of the helpful comments of my colleagues Evan Caminker, Ken Karst, Gary Schwartz, John Setear and Jon Varat.

1. Compare Derrick Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978) and Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990) with Lynn Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991).

2. Baker, *supra* note 1, at 736-52. I confess to reversing the order of Professor Baker's first two arguments.

3. *Id.* at 715-36.

4. *Id.* at 757-66.

5. *Id.* at 766-72.

and I arrive at such divergent conclusions. We begin from a different starting line. At the core of my disagreement with Professor Baker's carefully considered treatment of direct democracy is the inclusion in my calculus of a factor she disregards—the United States Constitution and *its* assumptions about which form of decision-making (direct or representative) best protects unpopular minorities from majority neglect or subordination. Professor Baker invokes an impressive body of public choice literature in an attempt to demonstrate that the deliberative nature of legislatures is romanticized and that the structural checks against “unjust majorities”<sup>6</sup> have marginal impact. When combined with her faith in the willingness of plebiscite voters to respect and take account of minority interests, this literature prompts her to perceive the constitutional filtering of majority preferences both as unnecessary and ineffectual. The constitutional preferences can therefore be ignored. Faster than you can say Patrick Henry, the “republic” is converted into a “democracy,” and those who express concern over what popular masses will do to unpopular minorities are said to evince an “unjustified and dangerous elitism.”<sup>7</sup>

Caring about the Constitution's language or its structural preferences is admittedly “uncool.” Clever semanticists can make any word look indeterminate. Political economists undermine the Framers' underlying assumptions and historians question their motivations. Time, social change, and technological advances render portions of the document quaint, antiquated, or—worse yet—impediments to continued progress. Yet, in defining the judiciary's appropriate role when reviewing the validity of plebiscitary measures,<sup>8</sup> it seems important to me not to forget that it is *our* Constitution we are expounding.<sup>9</sup> It helps, of course, to believe the Framers got it right.

## I. PROTECTING PROCESS

Professor Baker's objective is profoundly enigmatic. In the concluding pages of her paper she labels the enterprise of reviewing the processes by which laws are promulgated as unworkable and undesirable. She questions whether courts can “coherently specify the legislative process

6. See James Madison, *Majority Governments*, in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 412 (M. Meyers ed., 1981) (unmailed letter of James Madison) (Those who framed and ratified the Constitution believed that by separating and dividing governmental power “unjust majorities would be formed with still more difficulty.”).

7. Baker, *supra* note 1, at 776.

8. This is, after all, the question I proposed to answer in the Yale Law Journal article which Professor Baker critiques in her paper. See Eule, *supra* note 1, at 1504-08.

9. Cf. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (In assessing language outlining scope of congressional power “we must never forget that it is *a constitution* we are expounding.”).

that is constitutionally required"<sup>10</sup> and opines that, even if questions of proof and standards could be overcome, the benefits that would flow from such a judicial role are minimal at best and counterproductive at worst.<sup>11</sup> Fair criticism—and one that process-oriented scholars are accustomed to hearing.<sup>12</sup> Our differences might serve as an interesting focus for debate. What is puzzling, however, is why these concluding pages do not render her preceding pages a pointless exercise. If one resists the notion that the process of lawmaking is as proper a subject of judicial inquiry as the substance of what the lawmaker produces, it matters not a whit whether the plebiscite is or is not more threatening to the interests of racial and other unpopular minorities. There is no need to run the race. If I have posed a question that courts ought not to be asking—and are incapable of answering in any event—comparative assessments of direct and representative lawmaking are largely beside the point.

One might, of course, feel prompted to engage in comparisons of two alternative lawmaking processes, notwithstanding one's own belief that the answers provided were irrelevant, if one felt the judiciary had already gone astray and needed redirection. But Professor Baker believes that "neither the Court nor the vast bulk of academic commentators" has proved receptive to the possibility of scrutinizing the process of lawmaking.<sup>13</sup> Alternatively, Baker's academic excursion might be understood as an examination of the merits of plebiscites without regard to the judicial role in reviewing them. Indeed, in her introduction she separates the two questions.<sup>14</sup> Yet, this is not how she chooses to characterize her central inquiry.<sup>15</sup> The result is not just overkill but a curious discontinu-

10. Baker, *supra* note 1, at 770.

11. *Id.* at 770-72.

12. See generally *Symposium on Democracy and Distrust: Ten Years Later*, 77 VA. L. REV. 631-879 (1991).

13. Baker, *supra* note 1, at 766. See also *id.* at 776 (Court has never varied analysis because of law's popular origins.).

14. The first question she poses is whether plebiscites are "more likely than representative processes to produce laws that disadvantage racial minorities." The second asks whether courts should vary their scrutiny because of a law's popular origins. Baker, however, identifies the two inquiries as related. *Id.* at 709. The relationship is not inevitable. Of course, if one believes a sensitivity to process is an appropriate judicial role, the second question depends heavily upon the answer to the first. But, if you believe, as Professor Baker does, that it is unwise and impossible for courts to monitor the process of the lawmaking, the answer to the second inquiry is "No," regardless of how one resolves the first question.

15. *Id.* at 710 ("In this Article, I . . . consider commentators' suggestions that plebiscitary legislation begin to receive 'a harder judicial look'. . . than the enactments of representative bodies."). At several brief points in the article Baker does address the merits of the plebiscite independent of the relevance of that inquiry to the question of judicial review. First, she raises, and rejects, the desirability of abolishing plebiscites. See *id.* at 753-55. I concur. See Eule, *supra* note 1, at 1558, 1559-60, 1559 n.252. Second, she concludes her article with the intriguing acknowledgment that

ity. She expends more than fifty pages taking issue with Derrick Bell's and my assessment that minorities are at greater risk in the plebiscitary process and then concludes by arguing that the whole comparative enterprise lacks criteria and means of measurement.<sup>16</sup> Furthermore, even were comparative assessments possible, Baker suggests that it would be a mistake for courts to pay attention to which process most endangers the rights of unpopular minorities. Are law professors who address such matters similarly acting beyond their capacities? Are they exhibiting interest in questions whose answers don't matter? I believe that Professor Baker's assessment of whether minorities fare differently in the legislature and at the polls makes a valuable contribution to a debate of critical importance. Does she?

## II. DEFERENCE AND DISTRUST

Professor Baker rejects my suggestion that the absence of adequate checks against majority oppression in the substitutive plebiscite warrants a "harder" judicial look. As noted above, her underlying belief that courts should pay no attention to process defects<sup>17</sup> makes her rejection inevitable. But what allows her to remain so sanguine in the face of the possibility that racial and other unpopular minorities may be systematically disadvantaged by unfiltered lawmaking<sup>18</sup> is her sense that courts have demonstrated the capacity to identify unconstitutional discrimination in ballot measures without the need for a boost in the level of scrutiny.<sup>19</sup> It is interesting to note the primary case that Professor Baker relies upon to make her point: *Washington v. Seattle School District No. 1*.<sup>20</sup> Trying to understand equal protection jurisprudence by reading the *Seattle* decision, however, is like attempting to learn about professional basketball by watching the Harlem Globetrotters. In neither instance do

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." Baker, *supra* note 1, at 775 n.297. However, no hints are offered for her normative preference for representative over plebiscitary decisionmaking.

16. See, e.g., Baker, *supra* note 1, at 769 (pointing out lack of agreement with regard to what constitutes "good process"); *id.* at 770 (pointing out elusiveness of measuring "appropriate deliberation").

17. *Id.*

18. Although Professor Baker denies in an earlier portion of her article that minorities are significantly disadvantaged by the absence of filters, see *id.* at 715-16, she assumes for purposes of attacking the need for shifting levels of judicial scrutiny that Derrick Bell and I are correct in concluding that representative legislatures "provide racial minorities better protection against disadvantageous legislation than substitutive plebiscites." *Id.* at 757.

19. *Id.*

20. 458 U.S. 457 (1982).

those on the court seem to care much about observing the rules of the game.

The majority in *Seattle* invalidates Washington's anti-busing initiative using a strict scrutiny standard of review. Yet, it does so despite the fact that the initiative is racially neutral on its face<sup>21</sup> and the evidence of impermissible motivation falls considerably short of the Court's ordinary requirements.<sup>22</sup> Scholars have speculated at some length on the factors that prompted the Court to depart from its ordinary game plan in *Seattle*. My own contribution to this debate was to suggest that the Court may have been justifiably suspicious of the process by which the anti-busing edict was enacted.<sup>23</sup> Thus, *Seattle* evinces much the sort of "harder look" that I urge is appropriate in reviewing substitutive plebiscites.<sup>24</sup> Undoubtedly, Professor Baker would not subscribe to my theory as to *why* the *Seattle* majority was willing to ease the route to strict scrutiny, for she fails to acknowledge that anything extraordinary is occurring.<sup>25</sup> But her analysis of that case is twice flawed. It overlooks that *Seattle* is a departure from the usual equal protection review; and it uses the Court's invalidation of Washington's anti-busing plebiscite as the central piece of evidence that a "harder look" is unnecessary to ferret out racial discrimination in voter plebiscites.<sup>26</sup> Thus, she concludes, the nor-

21. *Id.* at 471 (describing the initiative as "facially neutral"). As I have noted elsewhere, Justice Blackmun's majority opinion later retreats somewhat from this characterization, see *Eule, supra* note 1, at 1564 n.276, and the dissent properly takes him to task for it. *Id.* at 1564 n.278.

22. *Eule, supra* note 1, at 1565 n.279. Indeed, Justice Blackmun's finding of impermissible purpose, see 458 U.S. at 471, was so subtle that the dissent appears to have missed it. See 458 U.S. at 491 n.5 (Powell, J., dissenting) (District court's alternative holding that initiative was motivated by discriminatory intent is not "relied upon by the Court today.").

23. *Eule, supra* note 1, at 1564-65.

24. And, in *Crawford v. Board of Education*, 458 U.S. 527 (1982), where the plebiscite complemented a legislative decision rather than substituted for it, the "harder look" was absent and compliance with the ordinary rules of the game led the Court to uphold the challenged referendum under a rational basis standard. See *Eule, supra* note 1, at 1566-67.

I do not mean to suggest that *Seattle*'s departure from "ordinary" equal protection review was wholly without precedent. But *Hunter v. Erickson*, 393 U.S. 385 (1969), relied upon by the *Seattle* majority, is similarly aberrational. *Hunter* itself can be explained in one of two ways. One might point out that, because it predated the adoption of a requirement that impermissible motivation be demonstrated before a law without a facial classification based on race is subjected to strict scrutiny, see *Washington v. Davis*, 426 U.S. 229 (1976), it is antiquated precedent. *Seattle* certainly does not treat it so. Or one might conclude that *Hunter* like *Seattle* is an exception from the general rule announced in *Washington v. Davis*. See Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 150. If one takes the latter position, as I do, then one must struggle with the question of what triggers this exception. And, for me, it is not merely coincidental that *Hunter*, like *Seattle*, involved a constitutional challenge to a substitutive plebiscite.

25. Baker, *supra* note 1, at 757, 759.

26. Furthermore, she cites *Seattle* as proof that Professor Bell and I incorrectly identify the presence or absence of a "bigoted decision-maker" as "central . . . under modern equal protection doctrine." *Id.* at 759. We are not alone. See Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 149 (1991) (Rehnquist Court requirement of "discriminatory motive based on belief that discriminatory

mal standard works just fine and nothing more is called for.

On one level, of course, Professor Baker is correct. The Court in *Seattle* seemed to have “little difficulty” finding proof of impermissible intent.<sup>27</sup> From this she draws the conclusion that no easier route to demonstrating impermissible motivation is required in the case of plebiscitary enactments. As I have already noted, her argument ignores the reason Justice Blackmun had such an easy time of it in *Seattle*: he didn’t play by the rules. But, more fundamentally, Professor Baker misconstrues what prompts my call for a “harder look” at substitutive plebiscites. I do not doubt that judges are as capable as any one else of perceiving the racist underpinnings of facially neutral legislation. Judges can see the world realistically when they wish. The problem is that usually they tolerate masquerades.<sup>28</sup> The issue, therefore, is not the difficulty of identifying impermissible racial motivations but how thick will be the rose-colored glasses through which courts view legislation.

Professor Baker urges that there is no reason for courts to change lenses dependent on the lawmaker. Indeed, she invokes the specter of laws that would otherwise “be unconstitutional if enacted by a plebiscite, but permissible if enacted by a representative body.”<sup>29</sup> I do not deny this consequence of my proposal. It is intended.

Judicial review of legislation is a sensitive endeavor. It is only tenuously tied to constitutional text. It involves one branch of government’s voiding the action of another. And, it is performed—at least on the federal level—by nonelected and largely unaccountable actors. All this induces courts to be circumspect in their use of the power and to begin each instance in which they are called upon to invoke it with a deferential presumption of constitutionality.

The weight of the presumption, however, is not a constant. While this variability is generally recognized and applauded, the fundamental debate among judges and scholars concerns which factors appropriately undermine the starting presumption. For most, the presumption lightens and the deference fades when certain textually explicit or fundamental rights are infringed by the challenged legislation.<sup>30</sup> Almost as wide-

laws are passed, by and large, by bigots”). Once again, relying on *Seattle* to illustrate the Court’s general approach to the equal protection clause is treacherous business.

27. Baker, *supra* note 1, at 759-61.

28. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (winner-take-all system of electing City Commission of Mobile not established or maintained for purpose of racial discrimination); *City of Memphis v. Greene*, 451 U.S. 100 (1981) (Memphis decision to close road frequently used by blacks which passed through affluent white neighborhood not racially motivated).

29. Baker, *supra* note 1, at 765.

30. See, e.g., *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (“There may be

spread is the acknowledgment that the presumption may vary depending on the nature of the group that is singled out to bear the law's burden.<sup>31</sup> In both these settings the willingness to tolerate greater judicial oversight is prompted by an increase in the distrust of the decisionmakers: certain rights are not safely entrusted to majoritarian rule, and the singling out of unpopular groups for differential treatment is an appropriate cause for suspicion.<sup>32</sup>

It seems entirely logical for me that levels of deference and distrust should be influenced by the nature of the lawmaker, just as it is influenced by the nature of the right implicated and by the nature of the group that is targeted. I do not intend here to reiterate my argument for this "contextualizing" of judicial review. The thesis is set forth in the *Yale Law Journal* article with which Professor Baker takes issue in her principal paper.<sup>33</sup> It is worth noting, however, that the Supreme Court subsequently has embraced the notion of contextualized judicial review in a different but surprisingly analogous setting.

In *Metro Broadcasting v. Federal Communications Commission*,<sup>34</sup> the Court applied a lower level of scrutiny to an affirmative action plan ratified by Congress than it had applied the previous Term to a set-aside plan adopted by the Richmond City Council. Invoking earlier language by Justice Scalia, Justice Brennan noted that "as a matter of 'social reality and governmental theory,' " the Federal Government is unlikely to be captured by political factions and "used as an instrument of discrimination."<sup>35</sup> Smaller political units like states and municipalities, because they pose heightened danger of oppression, warrant more intensive judicial review.<sup>36</sup> The Court thus acknowledges that deference and distrust are in inverse correlation. As a matter of "social reality and governmental theory," the case for differential treatment of legislative enactment and substitutive plebiscite stands on an even firmer foundation.

narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution.").

31. *Id.* (Statutes directed at particular religious, national or racial minorities "may be a special condition, which tends seriously to curtail the operations of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

32. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

33. See Eule, *supra* note 1, at 1533-39.

34. 110 S. Ct. 2997 (1990).

35. *Id.* at 3009 (citing Justice Scalia's concurring opinion in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 522 (1989)).

36. *Id.*



### III. AS A MATTER OF GOVERNMENTAL THEORY. . .

When Justice Scalia invokes governmental theory for the view that small political units need closer monitoring than large ones, he does not rely on theories espoused by law professors, political economists or public choice scholars. The theorist he quotes is James Madison.<sup>37</sup> The choice is a fitting one. If the Court's role is to be defined by governmental theory it is appropriate that the theory embraced be the one embodied in the document which creates and legitimates the judiciary's exercise of power in the first place.

Just as Madison saw a stronger federal government as one solution to the threat of factions, he regarded representation and divided power as essential structural guards against majority oppression.<sup>38</sup> Of course, it is not necessary to conjure up dead Framers in order to find a governmental theory to inform our understanding of the judicial role. In this case, the Founders embodied their preferences in the constitutional text. For the federal government, the mechanics of representation and checks and balances are set forth with some detail. Although the specifics of the structure of state government are largely undefined, Article IV's "guarantee" of a "Republican Form of Government" provides convincing evidence of the constitutional preference for a representative over a direct form of lawmaking.<sup>39</sup>

Our Constitution assumes that deliberation, informed decisionmaking, and separated and divided government *do* make a difference in protecting minorities from the tyranny of the majority. Furthermore, its structural components are formed around a belief that representative government can better accommodate the lofty goals of consensus building and effectuation of the public good—a concept that embraces sensitivity to minority interests as well as majority preferences—than the popular masses. Professor Baker disputes the validity of these beliefs. But she is mistaken when she identifies Derrick Bell and me as their source.<sup>40</sup> When she challenges the soundness of the assumptions she must do battle with the Constitution, not merely with two misguided law

37. 488 U.S. at 523.

38. See Eule, *supra* note 1, at 1526-28.

39. *Id.* at 1539-42. It is not, of course, my contention that the Republican Form Clause prohibits states from supplementing their legislative system with the opportunity for ancillary voter initiatives, *id.* at 1544, but merely that this clause properly informs the judicial role when courts review plebiscites challenged as violating the justiciable provisions of the Constitution. *Id.* at 1545.

40. See, e.g., Baker, *supra* note 1, at 750 & n.151 ("It therefore seems important to understand how legal scholars [citing to Derrick Bell and Julian Eule] have arrived at the . . . judgment that representative legislatures have a greater capacity for, and are more likely actually to engage in deliberation than plebiscites."). Indeed, her citation to "Eule[s]" contention that popular masses too quickly form preferences, fail adequately to consider the interests of others, and are overly sus-

professors. It is a far more formidable foe.<sup>41</sup>

#### IV. AS A MATTER OF SOCIAL REALITY. . .

Okay, so representative government is considerably less virtuous than the Framers hoped. Informed deliberation is too often a stranger to the legislative halls. Legislators are motivated by the desire to save their seats (in both senses of the word) at least as often as they are moved by a desire to further the "public good." Baker appears to have me there.<sup>42</sup> But, for three reasons, this unfortunate reality does no damage to the preferred position of representative government.

[1] *Compared to What?* If Professor Baker has properly identified my portrait of legislative decisionmaking as somewhat idealized, she has replicated my romanticism by measuring her coldly realistic substitute vision against a sentimental image of the plebiscite. Professor Baker offers us a snapshot of informed voters<sup>43</sup> debating ballot measures at town halls and grocery check-out lines<sup>44</sup> without the slightest hint of racism, sexism or homophobia. It is a picture that I don't recognize. Perhaps I have been hardened by my own exposure to direct democracy but I can't help but believe that the California experience<sup>45</sup> demands that we wake

ceptible to contagious passions, *id.* at 750, is in truth merely my paraphrasing of a letter by James Madison. See Eule, *supra* note 1, at 1526-27 & n.96.

41. Thus, the charge that distrust of popular masses is "dangerous elitism," Baker, *supra* note 1, at 776, must be leveled against the Constitution. I do not dispute the elitist origins of our framing document. The minorities that the Framers feared for, after all, were creditors and property owners. See Eule, *supra* note 1, at 1523. But the way to liberate ourselves from those aristocratic beginnings is by redefining the nature of the threatened minorities, not by ignoring the document's apprehension about unchecked majority rule.

42. In fact, however, I rely far less on a republican depiction of the legislature, see Eule, *supra* note 1, at 1549-51, than Baker suggests. See Baker, *supra* note 1, at 751 (Bell and Eule consistently employ interest group or pluralist model of lawmaking by ordinary citizens, but republican or public-interest model of lawmaking by legislatures.). Indeed, it is the very frailty of the deliberative model that prompted the Framers to institute a system of checks and balances. Eule, *supra* note 1, at 1527-28. Because of this safety net, the legislative process affords minorities a role they lack in the substitutive plebiscite, even if the legislature is more pluralist than deliberative. *Id.* at 1555-58.

43. See Baker, *supra* note 1, at 745-48 (voters likely to be as informed as legislators about issues on which they vote).

44. *Id.* at 748-50 (voters have as much opportunity and incentive as legislators to engage in thoughtful and rational consideration of the issues to be voted upon and there is little reason to expect differences in the actual amount of time spent on such discussions by the two groups).

45. Certainly we must be wary of generalizing the California experience, even if we embrace the adage that California is where the future happens first. No other state uses the voter plebiscite to anywhere near the extent that California does. But that is just the point. We aren't going to discover much about substitutive plebiscites from the twenty-nine states that don't permit them. See Eule, *supra* note 1, at 1509 n.22 & App. A (listing 21 states which permit citizens to initiate and enact ordinary legislation). Nor will a study of a state such as Wyoming—where sixteen years went by without a single initiative qualifying for the ballot—see *id.* at 1509 n.22—prove terribly instructive. Most of this nation's adventure with plebiscites—at the statewide level at least—has been concentrated in half a dozen states. If we are going to learn from laboratories we might as well turn to those that are doing experiments.

up and breathe the fumes. Even the skewed portion of the electorate that bothers to vote on plebiscitary issues—a sample that is disproportionately wealthy and educated<sup>46</sup>—is ordinarily unable to sort out the issues they are permitted to decide.<sup>47</sup> And then there is the matter of voter manipulation. While special interests spend large sums of money trying to pressure legislatures into giving them their due—and more—the money that is channeled into the plebiscitary process appears designed more to obfuscate than to persuade.<sup>48</sup> Informed electorate? Not if one looks to me as your average voter.

Of course I am not saying that the capacity, motivation and opportunities to engage in rational discourse are entirely lacking in the voting public. When the California electorate was asked to choose among five complex and conflicting automobile insurance measures,<sup>49</sup> the UCLA law faculty called upon a series of speakers to elucidate the issues we were being asked to decide. I am not certain that I walked away understanding the differences among the various measures but at least I learned the views of my colleague Gary Schwartz—and he seemed to grasp the distinctions. Admittedly, this may be similar to what goes on at the legislative level where many representatives rely on the wisdom and good sense of a respected colleague. But this represented the plebiscitary process at its best, and I doubt that the discourse on the Von's check-out line was of as high a quality—or that it even took place.<sup>50</sup>

At the same time that Professor Baker's portrait of the plebiscite exaggerates the extent of voter information and rational discourse, it omits the shadow of bigotry. It is instructive that her opening paragraph depicts the role of the initiative in woman's suffrage, the abolition of the poll tax and campaign finance regulation.<sup>51</sup> She could just as well have noted the substantial part it played in "restricted" housing, "English-only" legislation and discrimination against the gay community.<sup>52</sup> In a nation where more than half of the white citizens of Louisiana cast their votes for a former Grand Wizard of the Ku Klux Klan with Nazi credentials to match, any examination of the dangers of plebiscites must take notice of the hostility toward "outsiders" which often motivates popular

46. Eule, *supra* note 1, at 1514-15.

47. *Id.* at 1516-17.

48. *Id.* at 1517-18.

49. *Id.* at 1569-70.

50. Unless, of course, my colleague Schwartz shops at Von's.

51. Baker, *supra* note 1, at 708.

52. See Eule, *supra* note 1, at 1551, 1565 n.282.

action.<sup>53</sup> James Madison's fear that popular masses will fail adequately to consider the interests of others and be overly susceptible to contagious passions and the deceit of eloquent and ambitious leaders<sup>54</sup> has not lost its force with time.

Recently, Governor Pete Wilson of California proposed sweeping changes in welfare policy that would dramatically slash welfare payments, especially to indigents moving into the state. In what the *New York Times* labeled "a wise political move on Mr. Wilson's part," the Governor has chosen to "[c]ircumvent[] the Legislature" and go the route of ballot initiative.<sup>55</sup> Because the measure involves "sensitive issues of race and class," the legislature would be wary of entering the fray. The public, on the other hand, is burdened by California's financial emergency and despondent over the declining quality of life in the state. Economic crisis breeds "scapegoats."<sup>56</sup> The Governor understands why the ballot measure offers greater chances of success for his proposal. The citizens of California know why he has chosen this route. So does the *New York Times*. The shadow missing from Professor Baker's portrait casts a distinctive pall over this plebiscite.

[2] *The Joy of Impasse*. Voters are not the only public actors capable of bigotry. Legislators can be bigots too. It makes sense, of course. Voters elect them. David Duke was a bigoted legislator.<sup>57</sup> If he had captured another 10% of the vote he would have been a bigoted Governor. My claim therefore is not—and cannot be—that legislators are inherently more fair-minded than the people who vote for them at the ballot box.<sup>58</sup> The difference is that the structure of representative government limits the damage a bigoted legislator or governor can do to minorities.<sup>59</sup>

53. The fact that David Duke *lost* the 1991 election is of small comfort. Absent a nationwide campaign against him and a massive registration drive, things may have turned out differently.

54. Eule, *supra* note 1, 1526-27 & n.96.

55. Jane Gross, *California Proposes Ballot Cutting Aid to the Poor*, N.Y. TIMES, Dec. 11, 1991, at A25.

56. See generally T. Edsall & M. Edsall, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1991). Assembly Speaker Willie Brown has condemned the Governor's plan, noting that the problems of California "go beyond the cost of welfare families" and that "finding a scapegoat" was easier than "finding a solution." Gross, *supra* note 55.

57. Archbishop Desmond Tutu recently called him a "media star giving expression to the latent but hidden racism of many." "[R]acism," he warned, "has come out of the closet and people are beginning to not be afraid of declaring blatantly racist views and getting away with it." *Racist Views Gaining Respect in West's Society, Tutu Says*, WASH. TIMES, Dec. 16, 1992, at A2. See also Andrew Rosenthal, *Bush Signals He's Prepared For Tough Campaign in '92*, N.Y. TIMES, Jan. 3, 1992, at A8, col. 1 (President calls Duke a racist and a bigot).

58. Although there is evidence that at least some of the Framers harbored such a belief, the hope that representative government would attract the "purest and noblest characters," see Eule, *supra* note 1, at 1526 n.94, is surely among the most dashed of their aspirations.

59. As Jon Varat has recently noted, constitutionalism "rejects the romantic notion of utopian societies consisting of altruistic individuals. It does not assume cooperation for the good of the

When public action takes the low road in a plebiscite, only the courts remain to safeguard the interests of unpopular groups. When prejudices at the ballot box lead to the selections of biased lawmakers, minorities retain a variety of mechanisms to neutralize them. Even if the legislature is no more informed, deliberative, or fair-minded than the plebiscite, the legislative process affords minority groups greater checking power.

Professor Baker argues that in reality these blocking mechanisms—which she admits are present in the representative but not the plebiscitary process—don't work to the benefit of minority groups. Bicameralism, executive vetoes, and logrolling are examined and each is found less effective than I suggest. It is possible to take issue with her thesis in a number of different ways. To begin with she examines the structural differences seriatim. Yet all operate contemporaneously. Thus even if one accepts her contention that individually each of the structural checks offers only marginal benefits to minority group blocking efforts,<sup>60</sup> as a package they afford diverse means to curb the efforts of a "simple" majority. Second, her list of blocking mechanisms is incomplete. Most critically, she trivializes the impact of the committee system and overlooks the role of political parties. Both features—missing from the plebiscitary process—significantly amplify the minority voice.<sup>61</sup> Third, her conclusion that minorities are not necessarily aided by bicameralism, executive vetoes, and logrolling is informed by what she calls the "reciprocity of effect." By this she means that each apparent advantage of the representative lawmaking process when a racial minority is attempting to "*block disadvantageous* legislation" becomes an equally potent disadvantage when the racial minority is attempting to "*pass advantageous* legislation."<sup>62</sup> I do not disagree. The question, however, is which matters more. The two events do not occur in equal numbers. That, after all, is what it means to be a minority. Your veto is thus more valuable than your affirmative vote. The Framers understood this. It is the premise behind the negative biases they built into the Constitution.<sup>63</sup> The first

people, but creates a structure that forces cooperation, dialogue and compromise." Jon Varat, *Reflections on the Establishment of Constitutional Government in Eastern Europe*, 9 CONST. COMMENT 171, 174 (1992).

60. Professor Baker does seem to concede some enhancement of minority blocking power. See Baker, *supra* note 1, at 725, 727-28, 730 (minority group's logrolling opportunities to block disadvantageous legislation more likely to arise in legislature than in plebiscite).

61. See Eule, *supra* note 1, at 1557. See also Jonathan R. Macey, *The Role of the Democratic and Republican Parties as Organizers of Shadow Interest Groups*, 89 MICH. L. REV. 1 (1990) (presence of two-party system promotes ability of certain factions to make themselves heard in the political process).

62. Baker, *supra* note 1, at 711; see also *id.* at 712-15.

63. The initiative was designed precisely to circumvent these biases. See Eule, *supra* note 1, at 1558.

rule is, Do no harm.

[3] *Back to Protecting Process.* Legislatures fall considerably short of the Framers' deliberative aspiration. Professor Baker is on the mark here. The filters of representation and divided power often fail to work as intended. Our response to such breakdown, however, should be a call for judicial vigil, not a sigh of resignation.<sup>64</sup> In the most recent Foreword to the *Harvard Law Review*, Dean Guido Calabresi has carefully and compellingly outlined the framework for such a judicial role.<sup>65</sup> I applaud and embrace his proposal. In view of Professor Baker's perception that efforts to promote due process of lawmaking are neither workable nor desirable, she is unlikely to be persuaded of the merits of such an approach. Instead she highlights legislative inadequacies in order to alert us that an intensified review of plebiscites will set the courts on a slippery slope.<sup>66</sup> Process defects are all around us, she seems to be warning. If we start to pay attention to those in the plebiscite, we risk being dragged into addressing those in the legislature. Baker thus urges that, 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 satisfy itself that greater attention to process defects—especially at the legislative level—will not be the next step.<sup>67</sup> We are back at our initial disagreement: the virtues of process review. Professor Baker's slippery slope is my garden path.

Even so, I do not endorse the same intensified review for legislation that I propose for plebiscites. Legislative efforts deserve special attention when there is evidence that the system has broken down.<sup>68</sup> The burden of demonstrating such a systemic failure properly rests with those challenging the legislation. In the absence of such a showing, we invoke the heavy presumption of constitutionality that properly constrains a nonelected judiciary. Plebiscites are different. The defects are intrinsic.<sup>69</sup>

64. For a sigh accompanied by an explanation, see *United States R.R. Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980) (if constitutionality of legislative action depended on legislators' awareness of what they had done, few laws would survive).

65. See Calabresi, *supra* note 26, especially the discussion of Type III judicial review at 103-08.

66. Baker, *supra* note 1, at 766.

67. *Id.* at 771-72.

68. For various attempts to articulate those instances, see *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938); ELY, *supra* note 32; Calabresi, *supra* note 26.

69. See Eule, *supra* note 1, at 1550-51. Even so, I do not argue either that the plebiscite is unconstitutional, *id.* at 1544, or that it serves no useful function. *Id.* at 1559-60 & n.252. Indeed, precisely because the plebiscite allows bypass of structural obstacles that enhance minority clout, it permits the citizenry to break the legislative stranglehold of powerful special interest groups thwarting popular reform. *Id.* at 1558. But this circumvention is a double edged sword. If we are willing to indiscriminately lower barriers designed to temper majority will, we must compensate with a

## CONCLUSION

Perhaps we are approaching the day when we will conclude that representative government has failed us altogether. We already seem to have lost a great deal of faith in our representatives.<sup>70</sup> The move toward term limits, however, suggests that we do not view the two matters as identical. Efforts to amend the Constitution to permit national initiatives have not succeeded.<sup>71</sup> Nor have the last twenty years produced a single addition to the roll of states permitting substitutive plebiscites.<sup>72</sup> The American public may not be wildly enthusiastic about the Framers' preference, but they seem unwilling to abandon it just yet. For the present, representative government remains the constitutional norm. Departures deserve to be viewed with suspicion.

greater judicial vigilance on behalf of the unpopular racial and political minorities that will be placed at risk.

70. As a result of the Savings and Loan scandal, the Clarence Thomas hearings and media accounts of check-bouncing privileges, the members of Congress seem to enjoy the public trust on a par with those who sell used cars.

71. Public opinion polls, however, suggest considerable support for such an amendment. See Eule, *supra* note 1, at 1507 n.16.

72. See THOMAS E. CRONIN, *DIRECT DEMOCRACY* 51 (Table 3.1) (1989).