Direct (Anti-)Democracy

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Abstract

Legal scholars, economists, and political scientists are divided on whether voter initiatives and legislative referendums tend to produce outcomes that are more (or less) majoritarian, efficient, or solicitous of minority concerns than traditional legislation. Scholars also embrace opposing views on which lawmaking mechanism better promotes citizen engagement, registers preference intensities, encourages compromise, and prevents outcomes masking cycling voter preferences. Despite these disagreements, commentators generally assume that the voting mechanism itself renders plebiscites more democratic than legislative lawmaking. This assumption is mistaken.

Although it might seem unimaginable that a lawmaking process that directly engages voters possesses fundamentally antidemocratic features, this Article defends that very claim. To do so, this Article constructs a set of comparative analytical benchmarks based upon an assessment of the democratic features of representative legislatures and the antidemocratic features of appellate judiciaries, and employs those benchmarks to evaluate direct democracy.

This analysis reveals two critical yet overlooked features of direct democracy: First, direct democracy incorporates many of the theoretical and practical difficulties associated with judicial review. Second, direct democracy risks producing outcomes that embed cycling preferences by eliminating voter choice over the policymaking institution itself and over the range of policy

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matters combined for simultaneous negotiation. The core insight that emerges is not merely that common understandings about direct democracy are misguided; rather, it is that recognizing the antidemocratic features of direct democracy proves essential in determining the sorts of public policy questions that are, or are not, suitable to this form of policymaking.

TABLE OF CONTENTS

INTRODUCTION

Legal scholars, economists, and political scientists have expressed divergent views on the wisdom and efficacy of voter initiatives and legislative referendums. The literature reveals sharp divisions on whether, as compared with traditional legislation, direct democracy better aligns policy with majoritarian preferences, encourages efficient provision of government services, and protects the interests of various demographic minorities.[1] Despite such disagreements, scholars generally assume that direct voter involvement renders plebiscites more democratic than alternative methods of lawmaking. This assumption is mistaken.

Contrary to conventional wisdom, plebiscites are not inherently democratic.[2] If we treat representative legislatures and appellate judicial decisionmaking as endpoints representing more and less democratic forms of policymaking, respectively, direct democracy possesses critical features that more closely resemble the antidemocratic features of judicial decisionmaking than the democratic features of representative governance. At first blush it might seem unimaginable that direct democracy, an institution that facilitates direct voter involvement in creating public policy, possesses fundamentally antidemocratic features. This Article defends that very claim. It further

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1 *See generally infra* Part I (reviewing literature).

2 Throughout this Article, I use the phrase "direct democracy" to describe various forms of plebiscite. The term "plebiscite" refers to the process of having the electorate vote on a substantive matter of policy, as opposed to affecting a public policy by voting for representative legislators who then formulate and enact it. Plebiscite is an umbrella term that primarily embraces two different methods: (1) "voter initiatives," also called simply "initiatives" or "direct initiatives," through which "the proposed statute or constitutional amendment is placed on the ballot automatically once proponents gather the required number of signatures," and (2) "referendums," which "allow[ ] the people to intervene after the legislature has acted on a proposal; in this process, voters are asked to approve or disapprove a law or constitutional amendment that the legislature has already passed." Elizabeth Garrett, *Direct Democracy and Public Choice*, *in* THE RESEARCH HANDBOOK OF PUBLIC LAW AND PUBLIC CHOICE 137, 137 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010). This article will use these terms, and also introduce variations on these methodologies, as is appropriate to the specific form of direct democracy being discussed.

explores the normative implications for several prominent Supreme Court doctrines and questions of public policy.

Scholars have directly compared the processes of lawmaking via initiatives and referendums with legislative lawmaking based upon such norms as promoting citizen engagement, registering strength of preference, promoting deliberation and compromise, and even avoiding outcomes embedding voter preferences that cycle.[3] One persistent difficulty has been identifying common normative benchmarks for meaningful institutional comparisons. Without such benchmarks, comparisons between direct and representative lawmaking are inevitably limited by problems of selective examples, availability of data and measurement, or contestable analytical premises.

This Article helps to overcome several of these analytical difficulties. Relying upon social choice analysis, the Article identifies a common set of normative benchmarks for relevant institutional comparisons. In addition, the Article expands the range of comparisons to include not only direct democracy and representative legislatures, but also appellate judicial tribunals. The analysis demonstrates that in contrast with representative legislatures, direct democracy possesses critical features that are (rightly) considered antidemocratic in the context of judicial decisionmaking. Both institutions—appellate tribunals and direct democracy—break off discrete legal or policy questions, cast them along isolated normative dimensions, and ensure outcomes, that, under ideal or preferred conditions, coincide with the preferences of the institution's median member. By contrast, representative legislatures spread policymaking over multiple issue dimensions and provide mechanisms that allow members and affected constituents not only to register ordinal preferences along discrete policy dimensions, but also to express preference intensities over multiple dimensions respecting matters of particular concern. In contrast with both direct democracy and appellate judicial tribunals, legislatures often thwart the median member's ideal point along isolated policy dimensions.

This analysis reveals two critical yet overlooked features of direct democracy: First, direct democracy incorporates many of the theoretical and practical difficulties associated with judicial review. Second, direct democracy risks producing outcomes that embed cycling preferences by eliminating voter choice over either the controlling institution or the range of policy matters combined for simultaneous

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3 *See infra* Part I (reviewing literature).

decision. The core insight emerging from this analysis is not merely that descriptive claims about plebiscites are often misguided; rather, it is that recognizing the antidemocratic features of direct democracy is essential in determining the sorts of public policy questions that are, or are not, suitable to this form of policymaking.

This Article proceeds as follows. Part I reviews the competing views in the literature on the merits of direct democracy. Part II constructs a social choice framework that allows a three-way institutional comparison of legislatures, appellate courts, and direct democracy as a means of assessing the normative merit of direct democracy. Part III revisits the debates described in Part I based upon the social choice framework of Part II, and offers a normative assessment of how the Supreme Court should consider the process of enacting various forms of state law—those that are the product of various forms of direct democracy and those that are the product of ordinary legislative processes—in the course of constitutional judicial review.

I. Direct Democracy in Theory and Practice

This Part begins with a basic model that frames inquiries about direct democracy, and then considers theoretical, methodological, and empirical arguments for and against direct democracy.

A. Basic Principles

Defenders of direct democracy claim that initiatives and referendums allow voters to ameliorate agency slack that pervades the relationship between legislators and constituents.[4] The most notable source of slack—interest group influence on legislators—is widely known and its mechanisms fairly well understood.[5] Public choice analysis, and more specifically interest group theory, reveals an inher-

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4 *See, e.g.*, Maxwell L. Stearns & Todd J. Zywicki, Public Choice Concepts and Applications in Law 548–49 (2009) (reviewing literature and collecting authorities). The word "slack" refers to the latitude afforded an agent as a result of monitoring costs. Agency slack causes a divergence between the preferences of the principal and the policy outputs of the agent and can arise in various settings, including, for example, between voters and legislators or between legislators and executive officers, administrative agencies, or other officials who are assigned the task of carrying out enacted legal policies. *See, e.g.*, Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 Harv. L. Rev. 617, 619 (2010) (describing slack between voters and policymakers); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93, 110 (2005) (describing slack between legislators and agencies). This Article uses the terms "agency slack," "principal-agent slack," and "legislative-agent slack" as is appropriate to the specific context under review.

5 *See, e.g.*, Stearns & Zywicki, *supra* note 4, at 49–50, 69–72.

ent irony in legislative lawmaking. The very mechanisms designed to protect against majority tyranny by making legislation more difficult to procure serve as venues for special interest influence.[6]

To ensure that minority constituencies are not plagued by what James Madison and David Hume termed "factions,"[7] the United States Congress, for example, operates with a complex system of "veto gates,"[8] or "negative legislative checkpoints."[9] These impediments to passing legislation have the benign consequence of allowing those likely to be uniquely burdened by legislative policy to exert pressure at often predictable junctures in the political process. These junctures provide a means of influencing—and sometimes thwarting—substantive policy proposals. Veto gates include, for example, committees and subcommittees, calendaring regimes, the filibuster, conference committees, and failing these, the executive veto.[10] Although veto gates allow groups potentially affected by legislation to negotiate changes that reduce the potential negative impact of a bill, or even to stop it, these same mechanisms provide opportunities for side payments unrelated to the bill's substance.[11]

Madison proposed a difficult lawmaking process as the silver lining benefiting a minority class comprising the landed wealthy. And yet, some have argued that he failed to fully envision the daunting

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6 The following discussion relies upon congressional lawmaking processes, but for our immediate purposes, the differences between federal and state legislative processes are minor.

7 THE FEDERALIST NO. 10 (James Madison); *see also* Mark G. Spencer, *Hume and Madison on Faction*, 59 WM. & MARY Q. 869, 869–70, 884, 896 (2002) (comparing historical figures' treatment of factions).

8 *See* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter 1994, at 3, 7 (defining "veto gates" as the mechanisms by which legislators determine which branch of the decision tree the legislative process will follow).

9 *See* Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 408 n.137 (1992) (defining "negative legislative checkpoints" as "the various loci at which an individual legislator or a group of legislators representing minority interests can slow down or stop a bill or, alternatively, at which minority interests can focus their lobbying efforts to procure legislative benefits"). Although framed differently, the terms "veto gates" and "negative legislative check points" are virtually synonymous and will be used interchangeably throughout.

10 *Id.* at 397–98; *see also* STEARNS & ZYWICKI, *supra* note 4, at 255–56 (describing various legislative hurdles fixed in the lawmaking process).

11 *See* Stearns, *supra* note 9, at 412–22 (distinguishing "substantive compromise," which affects the substance of legislation, and "length compromise," which results in dead weight in the form of riders). Scholars have observed that although the President answers to a national constituency, he remains subject to interest group pressures. *See* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 41 (1982).

cloud of opportunities for special interest (read factional) influence.[12] One claimed benefit of direct democracy is that it bypasses potential interest group influence on legislators as compared with traditional legislative processes.[13] Direct democracy thus serves as an escape valve that reduces interest group pressures to mitigate bolder legislation or to impose unrelated and costly riders. Of course this analysis begs important normative questions, including how to determine appropriate interest group influence;[14] how to delineate general versus special interest legislation;[15] and how the startup costs of direct democracy themselves invite their own special interest influence, with the effect of encouraging often extreme changes in policy as compared, for example, to the ideal point of median legislators.[16]

B. Direct Democracy's Defenders

Professor Elisabeth Gerber maintains that direct democracy empowers the electorate to improve policy alignment with majoritarian preferences.[17] Through direct democracy, and more specifically through voter initiatives, Gerber claims, grassroots organizations can circumvent entrenched political processes, which tend to afford traditional interest groups a comparative advantage in influencing policy.[18] Gerber explains that, assessed against majority voter preferences, direct democracy improves policy alignment in two complementary ways. First, assuming voters are adequately informed, and thus not

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12 *See generally* Frank Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 17 (1984).

13 *See infra* Part I.B (reviewing literature defending reliance on plebiscites on, among other grounds, minimizing interest group pressures on legislatures).

14 *See generally* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 48–59 (1991).

15 *See* Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403, 408–09 (1988) (distinguishing general and special interest legislation based upon relative cost and benefit functions).

16 *See* Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949, 952–55 (2005) (modeling incentives to pursue plebiscites based upon the distance between expected legislative action and the ideal point of the electoral median voter along relevant policy dimension). For a more detailed discussion of this model, see *infra* notes 59–64 and accompanying text.

17 *See* Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99, 100–01 (1996).

18 *See* ELISABETH R. GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION 10, 72–74 (1999) (explaining that, whereas grassroots organizations tend to use plebiscite processes to influence policy, economic interests tend to use such processes to preserve the status quo).

confused about the substance of initiatives or referendums,[19] direct democracy effectuates preferred policy outcomes.[20] Second, the mere availability or threat of an initiative or referendum indirectly pressures legislatures to better align policy outcomes with median electoral preferences along isolated issue dimensions even when not used.[21]

Operating both positively—encouraging preferred policies—and negatively—discouraging disfavored policies[22]—direct democracy exerts political pressure that tends to inhibit slack between the electorate as the principal, and state legislators as the agents.[23] Scholars maintain that direct democracy has improved policy alignment in states that have it in such areas as the death penalty, parental consent provisions for minors seeking abortions, access to same-sex marriage, and decisions concerning which demographic groups to include within employment discrimination laws.[24]

Professor Elizabeth Garrett maintains that disaggregating packaged policies into discrete choices improves policy alignment with median electoral preferences.[25] Garrett explains that legislative processes force electoral choices over candidates, who represent packaged issue bundles.[26] Each voter supports or opposes a candidate based upon whether the aggregate bundle is closer to the voter's combined package of ideal points for salient issues, even if the candidate's ideal point for a particularly important issue or subset of issues within

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19 Elisabeth R. Gerber & Arthur Lupia, *Campaign Competition and Policy Responsiveness in Direct Legislation Elections*, 17 POL. BEHAV. 287, 288 (1995).

20 Gerber, *supra* note 17, at 100 (explaining that proponents argue that initiatives allow voters to enact preferred policies directly). In general, if initiative or referendum voters represent a random cross section of registered or eligible voters, outcomes will closely correspond with median electoral ideal points along relevant isolated policy dimensions. *See supra* text accompanying notes 19–28.

21 Gerber, *supra* note 17, at 101; *see also* JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY 84, 91 (2004).

22 This might help explain the disinclination of legislators to take public positions on initiatives. *See* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1152 (2003) (noting that "aggressive involvement" in direct democracy by politicians and major political parties is rare). Part of the payoff of not resolving issues legislatively might include not only leaving issues to direct democracy, but also avoiding public stands on those issues.

23 Gerber, *supra* note 17, at 124 (illustrating this phenomenon with parental consent laws).

24 ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 143–48, 195 (2000) (summarizing studies); Timothy Besley & Stephen Coate, *Issue Unbundling via Citizens' Initiatives* 2, 4 (Nat'l Bureau of Econ. Research, Working Paper No. 8036, 2000), *available at* http://www.nber.org/papers/w8036.

25 Garrett, *supra* note 2.

26 Perhaps more accurately, candidates represent a set of ideal points over disparate issues coupled with some set of expectations as to negotiating effectiveness.

the bundle is considerably distant from that of the voter.[27] By disaggregating the issue bundle, direct democracy allows each voter to register preferences along discrete policy dimensions unencumbered by the candidate's—or the political party's—preferred bundling.

Professor John Matsusaka has produced several leading empirical studies of direct democracy. Matsusaka supports the intuition that in those contexts typified by principal-agent slack, direct democracy better aligns policy with the ideal point of the electoral median voter than does legislative policymaking,[28] and shows consistent results respecting taxation and spending levels on various government programs.[29] Direct democracy tends to encourage fee-based over tax-based provision of government largesse.[30] If one assumes that ability and willingness to pay correlate to more highly valued public goods, this might suggest that direct democracy promotes more cost-effective mechanisms for the provision of government services. Matsusaka has further shown that states with referendums are less prone to progressive, or redistributive, tax-and-spend policies than states without direct democracy.[31] In addition, overall taxing and spending levels, and salary levels for executive officials, tend to be lower in initiative than noninitiative states.[32]

One interesting illustration of principal-agent slack involves term limits. The Supreme Court has struck down state laws imposing term limits on congressional delegations.[33] With respect to state legislatures, where term limits are permitted, states with initiatives are far more likely to have term limits than states without initiatives.[34] The data are striking. As Matsusaka observes, "22 of 24 initiative states adopted term limits for their congressmen or state legislatures, compared to two of 26 noninitiative states."[35]

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27 Garrett, *supra* note 2.

28 MATSUSAKA, *supra* note 21, at 86, 130–31; *see also* Garrett, *supra* note 2, at 140.

29 MATSUSAKA, *supra* note 21, at 54–55.

30 John G. Matsusaka, *Direct Democracy Works*, J. ECON. PERSP., Spring 2005, at 185, 195 & n.6.

31 *Id.* at 195.

32 *Id.* at 195–96. Matsusaka has shown similar correlations in Switzerland, where, he claims, direct democracy tends to promote more cost-effective provision of government largesse. *See id.* at 201 (summarizing studies).

33 *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837–38 (1995).

34 Matsusaka, *supra* note 30, at 195. The same is likely true for federal term limits, but the Supreme Court invalidated state-enacted congressional term limits. *Thornton*, 514 U.S. at 837–38.

35 Matsusaka, *supra* note 30, at 195.

Similar results apply in the context of laws restricting takings powers. Professor Ilya Somin has found that, following the Supreme Court's controversial decision in *Kelo v. City of New London*,[36] states with initiative processes were more prone to enact effective laws limiting private development takings than states lacking initiatives,[37] which, Somin maintains, generally enacted symbolic legislation.[38]

In separate but related works, Professors Lynn Baker[39] and Clayton Gillette[40] each refute arguments that, as compared with direct democracy, representative democracy systematically produces higher quality drafting and policies that are more solicitous of minority concerns.[41] Gillette claims that direct democracy is not especially prone to agenda setting by interest groups,[42] and that separating authorship

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36 Kelo v. City of New London, 545 U.S. 469 (2005); *see also supra* note 28 and accompanying text.

37 *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2143–48 (2009) (discussing popular referendums that limited nonpublic takings in response to *Kelo*).

38 Ilya Somin & Neal Devins, *Can We Make the Constitution More Democratic?*, 55 DRAKE L. REV. 971, 982 n.50 (2007).

39 *See* Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 709–10 (1991) [hereinafter Baker, *Direct Democracy*]; Lynn A. Baker, *Preferences, Priorities, and Plebiscites*, 13 J. CONTEMP. LEGAL ISSUES 317, 317–19 (2004).

40 Clayton P. Gillette, *Is Direct Democracy Anti-Democratic?*, 34 WILLAMETTE L. REV. 609, 614 (1998) [hereinafter Gillette, *Anti-Democratic*]; Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 930–31 (1988) [hereinafter Gillette, *Plebiscites*].

41 Baker bases her result on the Condorcet criterion, stating: "A logrolling process . . . will also converge on a Condorcet choice because it is the only outcome that cannot be *blocked* by any coalition of voters." Baker, *Direct Democracy*, *supra* note 39, at 726. Gillette claims that the combination of local initiatives and the power to "vote with your feet," improves policy alignment with constituent preferences. That is because under specified conditions, individuals can exert pressure, for example respecting taxation and spending policies, through threatened or actual relocation. *See* Gillette, *Anti-Democratic*, *supra* note 40, at 628. For the classic presentation of the underlying theory, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419–20 (1956), which demonstrates conditions under which voters can improve policy alignment by relocating from communities with disadvantageous policies and toward those with more favorable policies.

In fact, however, legislative processes do not ensure Condorcet-winning outcomes. Because legislatures provide multiple venues at which interested constituencies and their representatives can register preference intensities, legislatures often thwart potential Condorcet outcomes. *See infra* text accompanying notes 48–64. And while the Tiebout mechanism potentially protects minorities, this benefit is tempered to the extent that minorities have relatively scarce financial resources and thus limited mobility. *See* Tiebout, *supra*, at 421–22. Moreover, as Gillette concedes, this mechanism has diminished force with respect to statewide plebiscites. *See* Gillette, *Anti-Democratic*, *supra* note 40, at 628.

42 *See* Gillette, *Anti-Democratic*, *supra* note 40, at 624 ("My claim . . . is not that interest groups will avoid initiatives. . . . Rather, my more modest claim is that there is little reason to believe that the initiative is *more* susceptible to interest groups than is the legislature.").

from negotiating power does not produce inferior draftsmanship relative to legislatures, which merge these functions.[43] Baker and Gillette reject arguments that legislative veto gates, which serve as venues for negotiating policy modifications, improve policy outcomes.[44] Although Baker disagrees with Gillette's claim that the benefits of logrolling and legislative compromise are overstated,[45] both agree that legislative processes are not systematically better at protecting minority concerns than direct democracy.[46] Both maintain that there is no structural reason to discredit direct democracy without also questioning the quality of legislative outcomes.[47]

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43 *See id.* at 631–35. Gillette advanced the more "extreme claim, that deliberation is overvalued," based upon historical examples of separating functions of drafting and debate and the intuition that when these processes are separate, compromise is often reflected in the proposal prior to formal submission. *See id.* This argument appears in tension with that of Professors Kousser and McCubbins, who maintain that political entrepreneurs pursue initiatives only when the expected value is high, as reflected in the policy distance between the electoral median voter and the legislative median voter on the underlying policy question. *See* Kousser & McCubbins, *supra* note 16, at 953–54.

44 For example, Professor Baker states:

> 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.

Baker, *Direct Democracy*, *supra* note 39, at 711; *see also* Gillette, *Anti-Democratic*, *supra* note 40, at 628 (supporting Baker's conclusion that "a rational, self-interested minority would not necessarily favor representative over direct democracy"). The claimed symmetry, however, appears overstated. Within legislatures, it is generally easier for minorities to block than pass, whereas within plebiscites, it is easier for majorities to pass, yet more difficult for minorities to block. *See infra* text accompanying note 54.

45 *See* Baker, *Direct Democracy*, *supra* note 39, at 725 (conceding that "legislatures provide more opportunities for logrolling than do plebiscites"); Gillette, *Anti-Democratic*, *supra* note 40, at 623 (stating that "opportunities for logrolling likely are greater with representatives than with the voters").

46 *See* Gillette, *Plebiscites*, *supra* note 40, at 968–69 (observing that voter turnout to a limited extent reflects intensities of preference).

47 *See* Baker, *Direct Democracy*, *supra* note 39, at 757; Gillette, *Plebiscites*, *supra* note 40, at 978. Finally, some defenders of direct democracy maintain that dispersed voter inputs improve initiative or referendum quality of outcomes consistent with the Condorcet Jury Theorem ("CJT") or the wisdom of crowds. *See, e.g.*, DENNIS C. MUELLER, PUBLIC CHOICE III 129 (2003) (illustrating CJT with a hypothetical national referendum on drug legalization). For a discussion of the CJT and its underlying assumptions, see STEARNS & ZYWICKI, *supra* note 4, at 430–31, and JAMES SUROWIECKI, THE WISDOM OF CROWDS 10 (2004), which identify the following as necessary conditions for the wisdom of the crowds: diversity of opinion, independence, decentralization, and aggregation. To the extent that initiatives or referendums resolve issues for which a broad pool of separately generated inputs improves the accuracy of outcomes, direct democracy might strengthen the quality of inputs relative to ordinary legislative processes (unless individual legislators receive adequate separate constituent inputs). Even so, questions of public policy rarely admit of a right or wrong answer as required for the CJT to apply.

C. Direct Democracy's Detractors

Critics of direct democracy question each of the preceding arguments on normative or methodological grounds. While also offering arguments in support of direct democracy,[48] Garrett acknowledges that direct democracy only better aligns policy with median voter preferences assuming sufficient voter turnout to represent a meaningful cross section of the general electorate.[49] Otherwise, direct democracy risks a skewed depiction of median voter preferences.[50]

Among the most interesting empirical questions concerning direct democracy is the expected influence of various forms of initiatives on the level and representativeness of voter turnout. Professors Thad Kousser and Mathew McCubbins explain that what they term crypto-initiatives distort turnout representativeness.[51] These initiatives are designed to affect turnout respecting some other balloted matter—for example, candidate election—by motivating potentially disaffected constituencies to vote even though few expect the initiative to pass.[52] Conversely, wedge issues divide otherwise generally aligned voters, with a similar but less predictable distorting effect on turnout.[53]

Another group of scholars posit systematic biases not directly linked to voter turnout. In separate works, the late Professors Julian Eule and Derrick Bell posit that direct democracy operates to the detriment of demographic minorities, including most notably, African Americans and the Lesbian, Gay, Bisexual, and Transgender ("LGBT") community.[54] The intuition is fairly straightforward: because minority voters are, almost by definition, outnumbered within state and municipal electorates, the risk of adverse outcomes pervades initiative and referendum processes. These authors claim that direct democracy is inherently problematic for minority interests because unlike legislatures, which have mechanisms that facilitate compromise, direct democracy presents the electorate with a binary choice. Direct democracy forces decisionmaking on more ambitious policy proposals than those that would survive in a legislative setting.

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48 *See generally* Garrett, *supra* note 2.

49 *See id.* at 140.

50 *See id.* at 141.

51 *See* Kousser & McCubbins, *supra* note 16, at 975.

52 *See id.* at 974.

53 *See id.* at 976–77.

54 Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1552–53 (1990).

Dean Erwin Chemerinsky focuses specifically on the absence of legislative filters to argue that direct democracy might run afoul of the constitutional guarantee to every state of a republican form of government.[55] Chemerinsky maintains that, historically, the Framers did not anticipate direct democracy, and instead insisted upon filters between voter preferences and enacted legal policies. Specifically, the Framers intended a system of government, embodied in the U.S. Constitution, that balanced concern for minorities with majority rule.[56] Although the particular minority about which the Framers were principally concerned was the landed wealthy,[57] Chemerinsky nonetheless maintains that "[they] saw direct democracy as the antithesis of a republican form of government."[58]

Most notably for the social choice analysis that follows, Kousser and McCubbins maintain that political entrepreneurs will generally pursue plebiscites with relatively extreme payoffs as compared with expected legislative action.[59] The authors compare strategies tracking the expected value of the median legislator, equal to the floor median voter (*F*), versus the median electoral voter (*i*), on the issue under review. As the authors show in the first graphic—reproduced in Figure 1 below[60]—where *F* is relatively closer than *i* to the status quo (*SQ*), but moves policy in the preferred direction, political entrepreneurs will assess whether to pursue lobbying or an initiative depending on the distance between *F* and *i*.[61] In the second graphic—also reproduced in Figure 1—where *F* is on the opposite side of *SQ* as compared with *i*, the authors posit that political entrepreneurs will have a stronger motivation to push an initiative because expected legislative action would move policy opposite their preferred direction.

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55 Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 301–03.

56 *See id.* at 295.

57 *See id.* at 296 (observing that "the Framers weren't concerned about racial minorities").

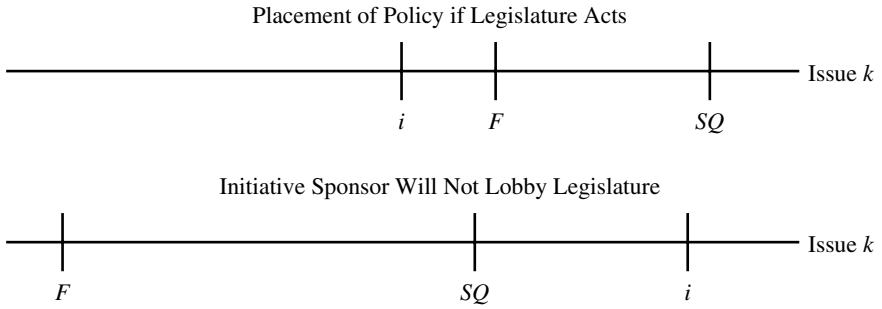
58 *See id.* at 301.

59 *See* Kousser & McCubbins, *supra* note 16, at 956–57.

60 The graphics in Figure 1 are taken from Kousser & McCubbins, *supra* note 16, at 952–53 fig.2.

61 *Id.* at 953–54.

Figure 1. Issue Placement and Relationship to Legislative or Plebiscite Process



The authors note that given the high startup costs of balloting initiatives, which include securing the requisite number of signatures according to varying state law requirements,[62] initiative sponsors will invest the necessary capital only if doing so is likely to produce a significant and favorable policy change from the status quo.[63] Kousser and McCubbins conclude that political entrepreneurs will be motivated to seek initiatives only when the value of doing so, represented by the difference between *F* and *i*, is relatively extreme.[64]

Kousser and McCubbins pose another theoretical objection to claims that initiatives track median electoral policy preferences. The authors assert that voter preferences over initiatives can cycle, with the result that multiple initiative outcomes not only miss available Condorcet winners,[65] but also generate Condorcet losers, meaning an

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62 *See* NAT'L CONFERENCE OF STATE LEGISLATURES, SIGNATURE REQUIREMENTS FOR INITIATIVE PROPOSALS: 2010 ELECTIONS (2010), *available at* http://www.ncsl.org/documents/legismgt/elect/2010_Sig_Reqs.pdf (detailing, state-by-state, the signature requirements for ballot initiatives).

63 Kousser & McCubbins, *supra* note 16, at 953–54. The bill sponsor will receive secondary benefits including base mobilization at the stage of securing signatures and publicity attendant the balloting (both pro and con), in addition to possible success in securing passage. *Cf.* Daniel A. Smith & Caroline J. Tolbert, *The Initiative to Party: Partisanship and Ballot Initiatives in California*, 7 PARTY POL. 739, 741 (2001) (noting that a political party might support initiatives that will increase base turnout and that will serve as a wedge issue against an opposing party, provided the substance is ideologically compatible with the party platform).

64 *See infra* text accompanying notes 73–76. As this Article demonstrates, extending the logic of this model, it is possible that when voters anticipate limited proposals on the subject matter under review, and when the initiative goes further in changing policy relative to the median voter's ideal point, the median voter might support the initiative if it is closer to his or her ideal point than either the status quo or the expected value of legislative action.

65 Condorcet winners are options that, absent a first-choice majority candidate, defeat all others in binary comparisons. *See* Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1253 (1994).

option universally regarded as inferior to an available alternative.[66] This result might obtain, for example, if the process allows the voters to sequentially approve spending projects in periods one and two and then to retrench on the necessary funding to support those projects in period three. The combined result—approved projects without adequate funding—is one that all voters would consider inferior to either (1) approving and funding, or (2) rejecting and failing to fund, were the issues taken up simultaneously.[67]

Other commentators claim that direct democracy risks problematic outcomes reflecting voter ignorance or confusion.[68] Such claims are difficult to quantify, but there is some anecdotal evidence.[69] In his landmark article on direct democracy, Eule describes moving in the 1970s from the East Coast to Los Angeles to join the faculty of the UCLA School of Law, and receiving advice from friends and colleagues about managing the cultural and financial transition.[70] Although he reported taking the "earthquakes, orange-tinted hair, and mortgages resembling the national budget deficit" in stride, he noted a surprising exception: the enormous mailings before each election cycle, which contained the various initiatives and referendums that would appear on the upcoming ballot.[71] Eule described wading through the morass of the competing Propositions 100, 101, 103 and 104, each dealing with insurance reform, and his sincere, but ultimately failed, attempt to make sense of it.[72] He questioned how, if a

66 Kousser & McCubbins, *supra* note 16, at 964. For an argument that, even if they do not reflect cycling, the outcomes of initiatives are problematic because they reflect the will of a "random majority," see Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 702 & n.67 (2010), which posits that seemingly cyclical popular democratic outcomes might reflect changing voter preferences over time.

67 For a more detailed discussion and analysis, see *infra* notes 227–31 and accompanying text.

68 *See, e.g.*, Chemerinsky, *supra* note 55, at 297–99 (arguing that, because initiatives are frequently poorly drafted and initiative campaigns are often deceptive, voters often decide on measures they do not fully understand); Eule, *supra* note 54, at 1508–09 (describing personal confusion and frustration with California initiative campaigns).

69 For an account claiming that voters rely on third-party endorsements as proxies, see Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 69–72 (1994). At a minimum, voter reliance on endorsements to support or oppose plebiscites, as opposed to independent assessments, undermines CJT-based justifications for direct democracy. *See generally* sources cited *supra* note 47 (explaining CJT-based justifications for direct democracy).

70 *See* Eule, *supra* note 54, at 1508.

71 *Id.* at 1508–09.

72 *See id.* at 1569 ("If among the nine million voters there were some who purported to understand the pros and cons of the various measures, I was not one of them.").

tenured law professor could not sort this all out, those with less legal training could manage.[73]

II. A Social Choice Analysis of Direct Democracy

The preceding literature review demonstrates sharp disagreements concerning the wisdom and efficacy of direct democracy on normative, empirical, and methodological grounds. And yet, these scholarly works provide the beginnings of a somewhat coherent sketch of the benefits and burdens of direct democracy, at least as compared with representative democracy. The scholarship suggests that not all subject areas are equally well suited to resolution through direct democracy.[74]

In general, direct democracy potentially reduces or inhibits slack between legislators and constituents taking the following forms: fiscal irresponsibility, limits on electoral competition, or cost dispersion through general taxation-based—rather than fee-based—funding.[75] Direct democracy correlates with streamlined and more accountable government, including limited state legislative terms.[76]

Conversely, direct democracy risks producing outcomes that reflect agenda setting and embedded cycles,[77] outcomes that are the product of voter misinformation or ballot confusion,[78] and outcomes that reflect indifference to the concerns of those most adversely affected by particular plebiscites, including, most notably, demographic minorities.[79] In addition, direct democracy risks distorting electoral turnout affecting other matters through such devices as crypto-initiatives and wedge initiatives.[80] More generally, when voting is not meaningfully representative, direct democracy risks producing outcomes that might not reflect median electoral preferences.[81] Finally, direct democracy risks generating extreme policies when political entrepreneurs strategically locate initiative policies anticipating limited opportunities for electoral reconsideration.[82]

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73 *See id.* at 1509.

74 *See infra* Part III.

75 *See* John G. Matsusaka, *Direct Democracy*, *in* 2 The Encyclopedia of Public Choice 149, 149–52 (Charles K. Rowley & Friedrick Schneider eds., 2004).

76 *See id.*

77 Kousser & McCubbins, *supra* note 16, at 966–67.

78 *See* Eule, *supra* note 54, at 1508.

79 *See* Bell, *supra* note 54, at 1; Eule, *supra* note 54, at 1551–52.

80 *See* Kousser & McCubbins, *supra* note 16, at 974–75.

81 *See* Garrett, *supra* note 2.

82 *See* Kousser & McCubbins, *supra* note 16, at 956–57.

Although direct democracy's supporters and detractors appreciate the potential for distorting effects resulting from voter misinformation, differential turnout, and cycling preferences, they disagree as to how often these difficulties arise and even on how to test for it.[83] Holding these problems aside, supporters and detractors also disagree on the normative merit of aligning policy with the ideal point of the median electoral voter along discrete issue dimensions. Supporters claim that satisfying majority preferences along isolated issue dimensions improves public policy.[84] Opponents rejoin that the filtering processes of representative government improve legislative outputs even when legislation fails to vindicate majoritarian preferences registered along isolated policy dimensions.[85] The social choice analysis developed below helps to assess these competing claims.

The following analysis endorses neither broad adoption nor elimination of direct democracy. Social choice, first and foremost, reveals inherent imperfections in all collective decisionmaking institutions. This includes legislatures, appellate judicial tribunals, and direct democracy. But not all imperfections are the same, and social choice is particularly well suited to identifying and comparing relative institutional strengths and weaknesses.[86] Social choice analysis provides a common set of analytical benchmarks against which all institutions can be compared, and against which all institutions will necessarily come up short in some respect. Given the inevitable differences across institutions, we cannot answer whether legislatures, courts, or direct democracy are good or bad as an a priori matter. The answer will depend on the specific tasks assigned to each institution.

Remember also that virtually all jurisdictions with direct democracy use it to complement, not to replace, legislative lawmaking.[87] The critical comparison is not between a regime in which *all* public policy decisions are made by direct democracy and a regime in which *none* are. Instead the issue is whether a mixed regime—one that uses the

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83 *See supra* Part I.

84 *See* Gerber, *supra* note 17, at 100.

85 *See* Chemerinsky, *supra* note 55, at 296; Eule, *supra* note 54, at 1556–57.

86 For a discussion framed in terms of the nirvana fallacy, see generally STEARNS & ZYWICKI, *supra* note 4, at 112, which notes that "[s]cholars commit the nirvana fallacy when they identify a defect in a given institution and then, based upon the perceived defect, propose fixing the problem by shifting decisional responsibility somewhere else." *See also* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969).

87 Matsusaka, for example, notes that while Buchanan and Tullock claim that direct democracy creates high decision costs as a means of limiting external costs, the authors only consider direct democracy as displacing representative democracy. *See* Matsusaka, *supra* note 75, at 149–50; *see also* STEARNS & ZYWICKI, *supra* note 4, at 548.

legislature as the presumptive source of policymaking and that occasionally allows either substitute policymaking via voter initiative or that allows a check against legislation in the form of legislative referendums—is better or worse *over particular matters* than a regime that only permits legislative policymaking.[88] The answer to this question need not be the same for all policy matters.[89] As shown below, determining how best to calibrate policymaking between these institutions requires a three-way comparison that also includes appellate judicial decisionmaking.

The justification for comparing direct democracy to representative legislatures is obvious. Absent direct democracy, the presumptive, or default, position at both the state and local levels is that public policy is enacted by some form of popularly elected legislative body.[90] Although there are important differences between local, state, and federal legislative bodies, and indeed among various local and state legislatures, there are nonetheless sufficient similarities to allow for meaningful general comparisons.

The justification for comparing direct democracy to appellate judicial tribunals is less obvious. Even strong advocates of a public interest model of adjudication do not generally claim that, absent direct democracy, the judiciary should be empowered in the first instance to make public policy.[91] This institutional comparison remains important, however, for two reasons. First, although courts do not hold legislative primacy within the United States and many other constitutional democracies, they pass judgment on the permissibility, or constitutionality, of positive law, whether enacted via legislation or plebiscite. Second, because most legal scholars reject judicial primacy in policymaking,[92] it is important to identify those features of judicial decisionmaking processes that appear problematic in assigning the judiciary primary policymaking responsibility. This is especially important to the extent that appellate judicial decisionmaking processes bear features that operate in parallel fashion to either direct democracy or legislative decisionmaking. The social choice analysis demonstrates that in several critical respects, direct democracy more closely resembles appellate judicial decisionmaking than legislative decision-

88 *See* Matsusaka, *supra* note 75, at 150.

89 *Id.*

90 *Id.* at 149.

91 *See, e.g.*, William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1481 (1987) (reconciling dynamic statutory interpretation with the claim that "the legislature is the primary lawmaking body").

92 *See id.* (noting that the legislature is the primary lawmaking body).

making. This proves both a strength and weakness of direct democracy. The three-way institutional comparison provides the basis for closer consideration of the capacity of direct democracy to further, or undermine, important democratic lawmaking norms.[93]

Evaluating relative institutional competence in transforming preferences into outcomes is ultimately a problem of social choice. To see why, we need to turn to first principles.

A. An Introduction to Social Choice

The problem of social choice begins with the simple observation that when individuals combine preferences to generate outputs, things sometimes get unexpectedly complicated.[94] For many people, "fair" group decisionmaking implies a process in which all votes are given equal weight and in which outcomes are not distorted through various manipulative strategies.[95] In effect, a fair process is one in which the outcome—reflecting the majority preferences of group members—is independent of the process itself in the sense that some other reasonable or fair process would generate the same, or a substantially similar, outcome. One of the major contributions of social choice, however, is demonstrating that as both a theoretical and practical matter, an institutional outcome is almost invariably a function of the decisionmaking process that generates it.[96] Therefore, this intuitive sense of fairness, one that decouples outcomes from generative processes, is elusive. Instead, the manner in which the decisionmaking rules process group preferences typically affects—or using an economist's lingo, is endogenous to—substantive outputs.

Social choice studies how the structure of decisionmaking processes affects outcomes.[97] Consider two groups of three deci-

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93 Although this analysis has valence for various formal theories of democracy, including deliberative democracy, pluralism, and republicanism, developing a formal democratic theory is beyond the scope of this Article. For an informative introduction to the general literature on theories of democracy, see FRANK CUNNINGHAM, THEORIES OF DEMOCRACY: A CRITICAL INTRODUCTION (2002). The theory of "direct (anti-)democracy" advanced in this Article fits comfortably with many, and perhaps most, extant theories of democracy, including deliberative, pluralist, and most obviously social choice accounts. One theory that potentially might not fit comfortably with this view is republicanism, at least to the extent that republican theory anticipates carving out discrete issues for majoritarian resolution, with limited opportunities for adversely affected minorities to express intensity of interest or to negotiate reciprocal gains in an overall policy package.

94 *See* STEARNS & ZYWICKI, *supra* note 4, at 93.

95 *See id.* at 94–95 (discussing the impact of voting method on ultimate result and the impact of intensity of preference in influencing outcomes).

96 *See id.* at 93–94.

97 For a more thorough presentation of the social choice principles that are briefly ex-

sionmakers, both of which lack a first-choice majority candidate over available options, *A*, *B*, and *C*. The group members rank the options as follows: P_1: *ABC*; P_2: *BCA* (or *BAC*); P_3: *CBA*. Even though there is no first-choice majority candidate, it is possible to generate an outcome that honors each member's preferences and that aligns with common intuitions concerning majority rule. Because there is no first-choice majority winner, the members might consider a series of binary comparisons—that is, successive votes between two of the three options—in the hope of discovering a stable outcome. In this regime, option *B* defeats both *A* and *C*, with P_2 and P_3 preferring *B* to *A*, and P_1 and P_2 preferring *B* to *C*. The choice between *A* and *C* is irrelevant; *B* defeats each alternative.[98] In 1785, the Marquis de Condorcet proposed that absent a first-choice majority candidate, the option that defeats all others in direct comparisons should prevail.[99] This option is now known as a Condorcet winner, and rules that ensure that available Condorcet winners prevail are said to satisfy the Condorcet criterion.[100]

The Condorcet criterion appeals to fairness intuitions because when it is satisfied no outcome will emerge that a majority disfavors relative to an available alternative. Despite this, rules satisfying the Condorcet criterion suffer two important defects. First, although the prior example included a Condorcet-winning option, this does not hold for all nonmajority preference combinations. Consider an alternative set of preferences: P_1: *ABC*, P_2: *BCA*, P_3: *CAB*, where only the second and third ordinally ranked preferences of P_3 are changed. This time, the same voting protocol reveals separate majorities favoring *A* to *B* (P_1 and P_3 prevailing) and *C* to *A* (P_2 and P_3 prevailing), but also *B* to *C* (P_1 and P_2 prevailing). The result is a cycle subject to the designation: *ApBpCpA*, where *p* means preferred to by simple majority vote. Second, the Condorcet criterion only accounts for ordinally ranked preferences. It does not account for the intensity with which individuals hold those preferences. In the first example, although option *B* is the Condorcet winner, other considerations might render

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plored in the following paragraph, see *id.* at 93–107. *See also* MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 41–52 (2000) (containing a slightly more technical discussion of the same topic).

98 This explains why the same outcome obtains whether P_2 ranks the options *BCA* or *BAC*.

99 *See* Stearns, *supra* note 65, at 1221, 1252–54 (explaining and illustrating the Condorcet criterion).

100 *See id.* at 1252–53, 1255; *see also* STEARNS & ZYWICKI, *supra* note 4, at 103, 129–31 (discussing the evolution of rule systems to make Condorcet winners more likely).

that outcome problematic. If, for example, P_1 significantly prefers A to B and slightly prefers B to C, whereas P_2 and P_3 do not much care about this issue but would rank the options as indicated if asked, then A might be socially preferred to B even though B is a Condorcet winner.

The Condorcet criterion is grounded in the majoritarian norm, and, not surprisingly, it shares the defects of majoritarianism. Just as there is not always a majority candidate, so too there is not always a Condorcet winner. And just as majority rule does not consider strength of preference, the Condorcet criterion does not either. This comparison is important because implicit in many arguments for direct democracy is the assumption that majoritarian outcomes are normatively preferred, whether they reflect first-choice electoral majorities or implicit majorities (meaning Condorcet winners) that represent a median electoral position on a given issue dimension. And yet, the normative merit of majoritarian outcomes, like outcomes under alternative decisionmaking rules, are affected by the strengths and weaknesses of the rule itself. The merits of majoritarianism as applied to isolated questions of public policy taken up by direct democracy must therefore be defended, not merely assumed.

The problem of cycling preferences lies at the root of what might well be the most important modern insight of social choice, namely Arrow's impossibility theorem, or simply Arrow's theorem.[101] In an important respect, Arrow's theorem generalizes what is commonly described as the paradox of voting.[102] The paradox holds that even when individuals hold transitive preference orderings, under some circumstances, for example the second illustration above (P_1: ABC; P_2: BCA; P_3: CAB), aggregating the preferences through a regime of unlimited binary comparisons yields a cycle ($ApBpCpA$). Professor Kenneth Arrow's generalization proves that any "solution" to cycling, meaning any institutional rule that ensures a transitive outcome when process-

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101 For a general discussion of the concepts that follow, see STEARNS, *supra* note 97, at 41–94; Maxwell L. Stearns, *An Introduction to Social Choice*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 88, 88 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010); Stearns, *supra* note 65, at 1247–52. For a discussion of the relationships between the criteria described in the text following Professor William Vickrey's simplified proof and Arrow's articulated criteria, see STEARNS, *supra* note 97, at 327 n.22, 334–35, 336 n.104, 337 n.112. *See also* William Vickrey, *Utility, Strategy, and Social Decision Rules*, 74 Q.J. ECON. 507, 507–35 (1960).

102 *See* WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 116 (1982) (claiming Arrow's theorem "generaliz[es] the paradox of voting").

ing such preferences, necessarily undermines a feature of institutional design associated with fair collective decisionmaking.

Arrow's theorem proves that no institution can ensure the ability to transform member preferences into a rational, or transitive group ordering (meaning *A* preferred to *B* preferred to *C* implies *A* preferred to *C*), while also satisfying the following four fairness conditions[103]: (1) *Range*: the collective decisionmaking rule must select its outcome in a manner that is consistent with the members' selection from among all conceivable ordinal rankings over three available alternatives; (2) *Independence of Irrelevant Alternatives*: participants must choose between paired alternatives based solely upon the merits and without regard to how they would rank later-introduced options; (3) *Unanimity*: the institution must implement changes from the status quo to an alternate state that will improve the position of at least a single participant without harming anyone else (the Pareto criterion); and (4) *Nondictatorship*: the group cannot consistently vindicate the preferences of one member against the contrary will of the group as a whole.

Before parsing Arrow's conditions, it is worth considering their broader relationship. Arrow set out to design an institution that would satisfy a set of criteria that he regarded as essential to rationality (meaning capable of transforming transitive member preferences into transitive group orderings) and fairness (meaning founded in democratic norms).[104] Instead, Arrow proved axiomatically the impossibility of that very task.[105] Arrow demonstrated that any collective decisionmaking body that ensures transitive group orderings will necessarily relax at least one fairness condition.[106] Because Arrow's theorem is axiomatic, it implies the following corollary: any institution that satisfies the most basic condition of transforming member preferences into some form of collective output necessarily relaxes at least one, and possibly more than one, of the combined criteria of rationality plus the four fairness conditions.[107]

This corollary is essential to the comparative institutional analysis that follows. By treating Arrow's combined conditions as a template against which to compare two (or more) collective decisionmaking

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103 *See* sources cited *supra* note 101.

104 *See* Stearns, *supra* note 101, at 92.

105 *See id.*

106 *See* STEARNS, *supra* note 97, at 81; Stearns, *supra* note 101, at 117–18; Stearns, *supra* note 65, at 1252.

107 *See* STEARNS, *supra* note 97, at 83; Stearns, *supra* note 101, at 118.

bodies, we can discern which Arrovian condition(s) each institution adheres to or relaxes. For virtually every collective decisionmaking body, the analysis will necessarily reveal some important characteristic feature, or Arrovian deficiency, and this will vary in important ways across institutions. By way of illustration, whereas some commentators maintain that direct democracy and representative democracy are both subject to interest group influence, defects in draftsmanship, and outcomes that operate to the detriment of minorities,[108] social choice analysis provides a basis for going beyond such generalizations by identifying the differing mechanisms of interest group influence, how the quality of draftsmanship might vary, and how minorities are likely to fare in each institutional setting given the structural differences.

One might argue that there is no obvious reason to assume that each of Arrow's conditions is essential in any given decisionmaking body and that reliance on the theorem as a comparative template is therefore misguided. Prominent scholars writing from a range of disciplines have argued against the importance of such conditions as rationality (transitivity),[109] or Independence.[110] Resolving these normative debates is not necessary to the analysis that follows. The following analysis is not merely consistent with, but is dependent on, what we can describe as the overriding metalevel claim in this literature, namely that particular Arrovian conditions might prove inessential to the functioning of some—and maybe even all—institutions.

To see why, remember Arrow's project. Arrow sought to develop a single institution capable of transforming individually transitive preference orderings into rational outputs for the institution as a whole while also satisfying conditions he deemed essential to democratic decisionmaking.[111] Although Arrow proved that project impossible, it is important to recognize that Arrow did not set out to identify which of his specified conditions were more, or less, important in any given institution.[112] Because any functioning institution necessarily relaxes at least one Arrovian condition, it is inevitable that any given condition might prove inessential to the functioning of the institution

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108 *See supra* Part I.B and accompanying notes.

109 *See* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2147–58, 2192 (1990) (impugning collective rationality or transitivity).

110 *See* RIKER, *supra* note 102, at 129–30 (challenging Arrovian Independence); *see also* DONALD G. SAARI, DISPOSING DICTATORS, DEMYSTIFYING VOTING PARADOXES: SOCIAL CHOICE ANALYSIS 45 (2008) (positing that Independence vitiates individual transitivity).

111 *See* Pildes & Anderson, *supra* note 109, at 2131–36.

112 *See id.*

in which it is relaxed.[113] This holds *even if* honoring the same condition is a defining characteristic of another institution. Arrow's theorem provides the basis for meaningful institutional comparisons based upon identified criteria that are, or are not, important to each institution. This method unmasks each institution's comparative social choice profile, meaning its dominant features of institutional design.

B. A Three-Way Comparative Social Choice Analysis

The analysis begins with a comparison of appellate courts to legislatures. After defining which features of collective decisionmaking, based upon the conditions of Arrow's theorem, each institution relaxes, we can then compare the social choice profiles of these two institutions to that of direct democracy. Beginning with legislatures and courts, rather than with direct democracy, allows us to set up the analytical endpoints or paradigms for the eventual three-way institutional comparison.

1. A Comparative Analysis of Legislatures and Appellate Courts

The critical difference between appellate courts and legislatures from a social choice perspective involves two fairness criteria, Independence and Range,[114] although the analysis also has implications for the remaining conditions, Unanimity and Nondictatorship. As a general matter, legislatures relax Independence (which approximates principled decisionmaking), while adhering to Range (which approximates permitting indecision, or inertia, when group preferences cycle).[115]

Relaxing Independence is sometimes, but not always, the means through which legislatures achieve Unanimity, meaning mutually beneficial vote trades that leave at least one member better off without harming other members.[116] By contrast, appellate courts generally relax Range (thus ensuring outcomes even when judicial preferences over underlying issues and outcomes are intransitive, or cycle), while adhering to Independence (thus limiting opportunities for various forms of strategic decisionmaking when deciding cases).[117]

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113 *See id.*

114 Stearns, *supra* note 65, at 1247.

115 *Id.*

116 *Id.*

117 *Id.*

Generally speaking, appellate judges do not trade votes, either within or across cases, to improve member payoffs.[118] This implies that judicial decisionmaking tends not to promote mutually beneficial trades that facilitate Unanimity. Neither legislatures nor appellate tribunals violate Nondictatorship despite substantial power differentials among members that affect the quality of outputs and the ability of minority interests to protect themselves in group decisionmaking. We now unpack this summary to offer a more detailed social choice profile of legislatures and appellate courts.

a. The Social Choice Profile of Legislatures: Relaxing Independence, Adhering to Range

We begin with the two most significant Arrovian conditions for comparing legislatures and appellate courts. Independence holds that in choosing between paired alternatives, participants must decide solely based upon the merits and without regard to how they would rank options that might be introduced later.[119] This implies that the choice between options *A* and *B* must not be affected by the possible later introduction of *C*. If the decision between *A* and *B* is strictly merits-based, the later decision to introduce or withhold *C* has no bearing.

A central insight of social choice is that outcomes are often dependent on the path, or order, of voting. With the following cycling preferences, *ABC*, *BCA*, *CAB*, a regime permitting two binary comparisons can yield any outcome if the first contest eliminates the option capable of defeating a preferred candidate.[120] For example, if the agenda setter wants to achieve outcome *C*, then by pitting *A* versus *B* initially, with the result that *A* wins, *C* will prevail over *A* in the next round. Assuming a rule prohibiting reconsideration of defeated alternatives,[121] the elimination of *B* in round one prevents the formal discovery of a cycle in which *BpApCpB*. And yet, strategic voting can avoid this outcome or any other that might follow a specified voting

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118 *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 303–04 (1994) (describing Justice Powell's rejection of Justice Brennan's overture to accommodate different views on de facto/de jure distinction and busing in effort to garner majority support in Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973), as "characteristic" of Powell's disinterest in "making deals"); Anthony D'Amato, *Judicial Legislation*, 1 CARDOZO L. REV. 63, 65 (1979) ("[A] judge who traded votes with his brethren from one case to another would properly be subject to censure."). Other Justices have sometimes more willingly accommodated other jurists to garner majority support within specific cases. For a general discussion, see *infra* note 172 and accompanying text.

119 *See* STEARNS, *supra* note 97, at 88–92.

120 *See id.* at 121–22.

121 *See id.* at 70.

path. If P_1, who least prefers C, anticipates the preceding agenda favoring C, then she might strategically vote for B in the first round knowing that after B defeats A, B will then defeat the remaining option, C.

Opportunities for strategic voting are not limited to cycling. Condorcet winners are not always socially optimal, and strategic voting sometimes allows their defeat. Assume the following modified preferences: P_1: ABC; P_2: BCA; P_3: CBA. As previously shown,[122] although B is a Condorcet winner, B might nonetheless be an inferior social choice if strength of preference is considered. Assuming that P_3 cares more deeply than the others about this issue, then if B versus A is presented first, P_3 might vote for A, knowing that with B defeated, C would prevail over A in the next round.

A defining feature of legislative decisionmaking is that strategic voting and vote trading—relaxing Arrow's Independence criterion—defend against agenda setting and occasionally thwart Condorcet winners.[123] Within legislative markets, member effectiveness often depends on careful attention to agendas and voting strategies, with members sometimes voting strategically and avoiding outcomes that would follow from strict merits-based comparisons. Legislative veto gates, or negative legislative checkpoints,[124] provide focal points at which those concerned about the direction of the proposed bill can exert pressure to change language or adverse voting paths, or vote strategically to otherwise thwart a disadvantageous result. These junctures make it easier to block than to pass legislation because success at every focal point is required for passage whereas failing at only one is sufficient for defeat.[125] For this reason, effective threats to derail a planned voting path—for example, through strategic voting—are potentially effective in avoiding adverse outcomes and in securing reciprocal commitments, thus allowing members to register cardinal, or weighted, preferences.

Logrolling also allows members to transform ordinal into weighted preferences. Through logrolling, members agree to support each other's preferred legislation to improve mutual prospects for pas-

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122 *See supra* text accompanying notes 94–100.

123 For a contrary position, see Baker, *Direct Democracy*, *supra* note 39, at 726–27 (arguing that legislative processes favor Condorcet winners).

124 *See supra* notes 8–9.

125 This asymmetry implies that interest groups, including demographic minorities, can more easily block than pass within legislatures. *But see* Baker, *Direct Democracy*, *supra* note 39, at 711, 726 (arguing that symmetry exists in blocking and passing legislation within both direct democracy and legislation).

sage when, separately considered, each member would oppose the other's preferred bill and support only his or her own. Numerical minorities supporting separate bills, or items within bills, who feel intensely about passage can, through mutual exchange, form successful majorities over larger legislative packages. Logrolling often produces special interest items, or riders, that would fail to garner majority support on their own.

Vote trading facilitates legislative Unanimity. As in private markets, Arrow assumed that when individuals engage in mutual exchange, at least one member benefits and the other is not harmed.[126] Otherwise they would not have bothered. Resolving scholarly debates over whether logrolling is welfare enhancing is unimportant for our purposes.[127] The issue here is not whether legislative logrolling improves welfare for *society*; it is instead whether logrolling improves the welfare of *legislators*. Of course, legislators would not roll logs if they did not anticipate a benefit from doing so. Within legislatures, relaxing Independence thus promotes Unanimity.

The other defining legislative characteristic involves Range. Range requires that the collective decisionmaking rule select its outcome in a manner that is consistent with the members' selection from among all conceivable ordinal rankings over three available alternatives.[128] This somewhat complex framing becomes more intuitive when we divide Range into its constituent parts. First, each member must be permitted to select from among all conceivable rank orderings over three available alternatives. Second, the processing rule must honor—meaning it must operate consistently with—those rankings when producing a group outcome. Now consider the difficulty that these two requirements pose.

Assume the following preferences, which yield B as a Condorcet winner: P_1: ABC; P_2: BCA; P_3: CBA. In this case each member has issued ordinal rankings over three options, ABC. A decision rule that ensures an outcome consistent with all possible ordinal rankings will satisfy Condorcet's rule, thus ensuring that an available Condorcet

126 STEARNS, *supra* note 97, at 49.

127 *Compare* JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 145 (1962) (arguing that legislative bargaining can be mutually beneficial), *and* Gordon Tullock, *Why So Much Stability?*, 37 PUB. CHOICE 189, 190 (1981) (positing that vote trading can eliminate legislative cycling), *with* William H. Riker & Steven J. Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235, 1236 (1973) (arguing that, although vote trading improves the position of the trader, it often generates significant costs for nontraders). *See also* STEARNS & ZYWICKI, *supra* note 4, at 26–28 (detailing the pros and cons of legislative logrolling).

128 STEARNS, *supra* note 97, at 45, 49.

winner will be selected. Each rule satisfying Condorcet's condition shares the essential feature of permitting at least the same number of binary comparisons as options.[129] With three options, the decision-making body requires a minimum of three binary comparisons (*A* versus *B*, *B* versus *C*, and *C* versus *A*) to determine whether the selected outcome is a Condorcet winner or is instead the arbitrary product of a voting path. In this example, *B*, the Condorcet winner, defeats *A* and *C* in direct comparisons, rendering a final binary choice between *A* and *C* irrelevant because *B* will defeat whichever option prevails.

Now consider preferences that cycle: P_1: *ABC*; P_2 *BCA*; P_3: *CAB*. Once again, the members have selected their preferred ordinal rankings over options *ABC*, but this time applying a decision rule that ensures consistency with each member's ordinal ranking produces a cycle such that *ApBpCpA*. No outcome honors each member's selected rankings and therefore to ensure an outcome, the decision rule must relax Range. When the members hold ordinally ranked preferences that cycle, a rule adhering to Range will not ensure an outcome because any proposed outcome will violate the ordinal rankings of some majority as compared with an available alternative.

We can formalize this intuition as follows: For options ABC, there are six possible ordinal rankings. This can be expressed mathematically as three factorial (3 *x* 2 *x* 1), meaning that, for the first option, there are three choices, for the second there are two, and there is no choice for the third. The possible rankings are: *ABC*, *ACB*, *BAC*, *BCA*, *CAB*, *CBA*. When the members select among those six sets of rankings, two packaged combinations produce a forward cycle—*ABC*, *BCA*, *CAB*—and a reverse cycle—*CBA*, *BAC*, *ACB*—respectively.

Because Range-complying rules permit the same number of binary choices as options, such rules risk inaction in the event that members' combined sets of ordinal rankings cycle (*ABC*, *BCA*, *CAB or CBA*, *BAC*, *ACB*). The legislature has the wherewithal to recognize a cycle (or less formally to recognize the absence of majority support for proposed action on *A*, *B*, or *C*), and thus to decline to act on pairwise votes that might inevitably lead to selecting a nonmajority option. Because scholars have identified institutional mechanisms within Congress that limit consideration of all available alternatives, this result requires some explanation.

Social choice theorists, including William Riker, Steven Brams, Kenneth Shepsle, and Barry Weingast, have identified features of

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129 *See id.* at 47.

rules within the United States Congress that raise the cost of discovering cyclical preferences and that induce equilibrium outcomes even when preferences cycle. Riker and Brams focus on formal decision rules that limit permissible amendments relative to available options.[130] Shepsle and Weingast consider features, including committee structures, calendaring rules, and the like, that have a similar effects.[131] Rules that limit permissible iterations relative to available options promote stable outcomes, but those outcomes will depend on the agenda.[132] The preceding analysis, however, suggests that legislatures have the wherewithal to identify cycles and the power to remain inert when they arise. Although legislative practices that raise the cost of disclosing cycling preferences appear in tension with the claim that legislators can avoid acting on cycling preferences, the two claims can be reconciled. That is because disclosures of preference need not occur through formal voting processes.

Although veto gates, rules limiting amendments, and other structure-induced equilibrating rules formally limit disclosure of all binary comparisons over alternatives, behind these formal rules are the often more important norms that permit informal disclosures, thus informing choices and strategies at the various veto gates. Legislators have an incentive to discern preferences, through formal and informal means, especially in high-stakes matters. By discovering member preferences informally—based either on disclosed ordinal rankings or on expressions of cardinal values—members determine whether it is worth their while to prevent adverse voting paths by voting strategically rather than sincerely. For this reason, Range and Independence are flipsides of a coin. Members will seek to thwart path-dependent outcomes that are the product of structure-induced equilibrating rules based upon information that demonstrates either that underlying preferences cycle, or that weighted preferences counsel against being led down the agenda setter's intended voting path. The same processes

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130 Riker & Brams, *supra* note 127, at 354–56 (providing illustration).

131 Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 514 (1981). Shepsle and Weingast responded to Gordon Tullock's claim that vote trading avoids cycling. *Id.* at 504. Tullock's result obtains when legislators have different intensities of preference, but logrolling can yield cycles when they do not.

132 Riker and Brams have observed that Congress sometimes restricts formal amendments relative to potential options, thus limiting the requisite number of binary comparisons to disclose a cycle. Riker & Brams, *supra* note 127, at 354. Shepsle and Weingast have identified mechanisms that forge "structure induced equilibria" with the effect of precluding cycles. Shepsle & Weingast, *supra* note 131, at 504.

sometimes avoid nominal Condorcet winners that thwart intensely opposing minority interests.

Virtually all state legislative processes include committee structures, calendaring rules, and formal orders of proceeding. They also have some degree of involvement by the governor in the formation of policy. Each also includes a role for judicial checks on legislative outputs. These formal and informal mechanisms combine to allow legislators to identify sensitive points in the legislative process at which there is a possibility of codifying outcomes that risk undermining collective welfare, whether assessed based upon ordinal rankings or intensities of preference. This information allows members at these critical junctures (veto gates or negative legislative checkpoints) either to force inaction, encourage alternative (and preferred) voting paths, or to exercise appropriate threats to negotiate substantive change in the bill itself.

The emerging picture is of a rough-and-tumble quasi market where votes take the place of money and where effective legislators bargain in a manner that allows them to express cardinal preferences (thus relaxing Independence) over matters of particular concern to themselves and their constituents. This includes the power to avoid having the legislature as a whole act on options (thus adhering to Range) when members determine in matters with sufficiently high stakes that there is insufficient support for enacting legislative change. Some play this game better than others, of course, and there is no denying that formal legislative rules affect substantive outcomes. That, after all, is among the most basic insights of social choice. But legislative rules are generally known in advance, and it is not surprising that those who play the game well have a deep appreciation for how to work these rules to their advantage.

b. The Social Choice Profile of Courts: Relaxing Range, Adhering to Independence

In contrast with legislatures, within appellate courts in a properly docketed case, the absence of consensus—based either on cycling or preference intensities—is not a basis for declining collective action, taking the form of a judgment. This basic distinction translates into an opposite social choice profile of judicial decisionmaking, as compared with legislative decisionmaking, based, once again, on the critical criteria of Range and Independence.

This intuition is evident at two levels, within an individual case and over sequential cases. To ease exposition, this Article illustrates

with actual Supreme Court decisions. The microanalysis, explaining how individual cases are decided, can be generalized to almost any multimember appellate panel; the macroanalysis, explaining how groups of cases are decided over time, can be generalized to other common law judicial systems.[133]

i. Individual Case Decisionmaking

In *McDonald v. City of Chicago*,[134] the Supreme Court extended its 2008 decision, *District of Columbia v. Heller*[135]—holding that the Second Amendment protects an individual right to bear arms as applied to the federally controlled District of Columbia—to the City of Chicago. The plaintiff, McDonald, presented two arguments supporting his challenge to Chicago's handgun ban. First, he argued that the Fourteenth Amendment's Due Process Clause incorporated the Second Amendment as a fundamental right, thus applying it to state and local governments.[136] Second, he argued that despite 150-plus years of precedent nullifying the Clause, the Second Amendment was a Fourteenth Amendment privilege or immunity.[137] To rule for McDonald, an individual jurist would have had to find in his favor on at least one of these two theories. The Court ruled for McDonald, however, based upon combined opinions in which separate majorities rejected each of those theories. This case, and others like it,[138] demonstrates that Supreme Court rules—as well as the rules of other appellate tribunals—ensure outcomes in properly docketed cases even when member preferences embed cycles.

The *McDonald* Court issued five opinions, but for our purposes, we need only focus on the three principal opinions. Justice Alito, writing in part for a majority and in part for a plurality of four, determined that the Second Amendment was a fundamental right that applied to the states via the Due Process Clause.[139] He further determined that the facts did not justify revisiting longstanding prece-

133 The analysis can also be extended to civil law systems to the extent that the influence of persuasive opinions operates similarly to stare decisis. *See, e.g.*, Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 787–88 (2005) (analyzing functional precedent in civil law systems).

134 McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010).

135 District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

136 *See McDonald*, 130 S. Ct. at 3028.

137 *See id.*

138 *See* STEARNS, *supra* note 97, at 99–117 (collecting cases).

139 *McDonald*, 130 S. Ct. at 3030–31, 3050 (Alito, J., plurality opinion).

dent effectively nullifying the Privileges or Immunities Clause.[140] Justice Thomas, writing a partial concurrence and a partial concurrence in the judgment, rejected relief based upon due process, which he claimed had wrongfully become unmoored from its original process-based meaning to protect substantive rights.[141] Revisiting the *Slaughter-House Cases*,[142] which he determined mistakenly gutted the Privileges or Immunities Clause, Justice Thomas concluded that the Second Amendment was a covered privilege or immunity.[143] In dissent, Justice Breyer, joined by three other Justices, rejected both the due process argument on the ground that the right to bear arms is not fundamental, and the Privileges or Immunities Clause argument based upon, among other considerations, longstanding precedent.[144]

Although no individual jurist would reject both the due process and privileges or immunities arguments while ruling for McDonald, the Court as a whole did just that. Applying the universal outcome-voting rule, which requires the Justices to cast a binary vote—affirm or reverse—and then to write or join opinions setting out a rationale,[145] the Court generated a judgment despite the voting anomaly.[146] The outcome-voting rule effectively forces members of an odd-numbered tribunal to make a binary choice, thus ensuring an outcome, as in *McDonald*, without regard to preference configurations.

Table 1. Supreme Court Voting Lineup in *McDonald v. City of Chicago*

	Accept Due Process Argument	**Reject Due Process Argument**
Accept Privileges or Immunities Argument	N/A	Thomas
Reject Privileges or Immunities Argument	Alito (plus 3)	Breyer (plus 3)

140 *See id.* at 3030–31.

141 *See id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

142 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

143 *McDonald*, 130 S. Ct. at 3077, 3084.

144 *Id.* at 3120, 3123 (Breyer, J., dissenting).

145 Maxwell L. Stearns, *Should Justices Ever Switch Votes?* Miller v. Albright *in Social Change Perspective*, 7 SUP. CT. ECON. REV. 87, 125 (1999).

146 For an analysis of why introducing the third "remand" option does not exacerbate the cycling problem described in the text, see Stearns, *supra* note 145, at 110 & n.76, which collects cases illustrating the norm of acquiescence to moderate position to secure judgment.

The embedded cycle in *McDonald* can be expressed in various ways.[147] Rather than treating each issue as a separate binary option, Table 1 treats each opinion as comprising packaged issue resolutions that, because none has majority support, each group of Justices implicitly seeks to rank ordinally.

The analysis reveals two critical features—multidimensionality and asymmetry—that combine to explain the *McDonald* anomaly. In addition to the two-issue dimensions, Table 1 reveals the following asymmetry: Two camps, Alito (*A*) and Thomas (*C*), resolve each dispositive issue in opposite fashion yet reach the same judgment.[148] On these conditions, reasonable assumptions allow us to infer a cycle. The Alito camp must rank second either Thomas's opinion, which reaches an opposite holding on each of the two underlying issues—due process and privileges or immunities—while reaching the same judgment of ruling for McDonald, or Breyer's opinion (*B*), which resolves one of the two issues as Alito prefers—rejecting the privileges or immunities analysis—while reaching an opposite holding on due process along with an opposite judgment. Justice Thomas must rank second either Justice Alito's opinion, which reaches opposite holdings on both controlling issues but reaches the same judgment, or Justice Breyer's opinion, which resolves one of the two issues as Thomas prefers—rejecting the due process analysis—while reaching an opposite holding in privileges or immunities along with an opposite judgment. Purely as a matter of intuition there is no way to know a priori how the members of camps *A* or *C* would construct these ordinal rankings, thus explaining why the rankings are necessarily implicit. The published opinions do not provide this information, and plausible assumptions can generate either a forward or reverse cycle.[149] Although the assumptions needed to generate each cycle are contestable, the case possesses the characteristic features from which it is reasonable to infer a cycle. After all, the resulting forward and reverse cycles

147 *See* STEARNS & ZYWICKI, *supra* note 4, at 436–47 (offering alternative presentations of judicial cycling); David S. Cohen, *The Precedent-Based Voting Paradox*, 90 B.U. L. REV. 183, 206–11 (2010) (illustrating paradox with Hein v. Freedom from Religion Found., Inc., 551 U.S. 587 (2007)); David S. Cohen, *The Paradox of* McDonald v. City of Chicago, 79 GEO. WASH. L. REV. ARGUENDO 823 (2011), http://groups.law.gwu.edu/LR/ArticlePDF/79-Arguendo-Cohen.pdf (extending analysis of precedent-based voting paradox to *McDonald*).

148 When preferences are symmetrical, camps resolving dispositive issues in opposite fashion also reach opposite judgments, thus flattening dimensionality. *See* Stearns, *supra* note 145, at 117–21 (illustrating this principle with Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).

149 These cycles take the following forms: Justice Alito: *ABC*; Justice Breyer: *BCA*; Justice Thomas: *CAB or* Justice Alito: *ACB*; Justice Breyer: *BAC*; Justice Thomas: *CBA*.

(*ApBpCpA* or *CpBpApC*, respectively) derive from each possible ranking for each individual camp.

The implications for appellate judicial decisionmaking are important. Recall that legislatures need not act when members discover cycling preferences through whatever means. Instead, legislatures can remain inert, defaulting to the status quo. By contrast, when appellate judges are called upon to resolve properly docketed cases, they employ decision rules that produce a judgment whether or not preferences cycle.[150] This holds even though the case might forge doctrine along a particular issue dimension that thwarts the preferences of the deciding jurists. Outcome voting accomplishes this by restricting Range—forcing a binary outcome choice—even when majority issue resolutions, considered separately, reveal a cycle.

ii. Stare Decisis: The Single-Dimensional Case

In a stare decisis regime, cycling can arise across separate majority opinions. We first evaluate stare decisis in a single-dimensional case and then in a pair of cases that combine to reveal an embedded cycle. Under the presumptive stare decisis regime, Supreme Court Justices inquire whether a previously resolved case—the precedent—governs the case under review. Stare decisis shares a common characteristic with outcome voting. By inquiring whether an earlier case controls, the Court limits binary comparisons relative to options. The regime presumptively disallows an independent inquiry into how the present case would be resolved absent the precedent. With two votes over three potential issues—(1) how to resolve case *A*, and (2) whether case *A* controls case *B*, but not (3) how to resolve case *B* absent controlling case *A*—the stare decisis regime stabilizes doctrine. Depending on the underlying preference configurations, this regime can either generate a Condorcet winner, or it can limit dimensionality (by disallowing an independent assessment of the second case absent the precedent) so as to mask a cycle.

The combined outcome-voting and stare decisis regime further encourages Justices to vote consistently with their sincere views on issues within cases and on the precedential relationship between cases. This analysis is not contingent upon the normative merit of any particular jurisprudential views; rather the more limited claim is that Jus-

150 For an analysis reconciling this general observation about appellate judicial practice with the Supreme Court's power of docket control, see STEARNS, *supra* note 97, at 194–97, which explains the twin roles of certiorari and standing in limiting doctrinal path manipulation and which relates the analysis to the judicial obligation to resolve properly docketed cases.

tices are rarely motivated to depart from their own sincerely held views, however derived.

To illustrate, consider *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[151] Although the Supreme Court once again fractured, this time its combined opinions included a Condorcet winner. The Court issued the following opinions: (1) a plurality decision by Justices O'Connor, Kennedy, and Souter;[152] (2) a partial dissent and partial concurrence in the judgment by Chief Justice Rehnquist, joined by Justices Scalia, White and Thomas;[153] and (3) alternative partial dissents and partial concurrences in the judgment by Justices Blackmun[154] and Stevens.[155] To simplify, we can treat the plurality coalition as moderate, the first partial-concurrence and partial-dissent coalition as conservative, and the second such coalition as liberal.

Casey addresses whether Pennsylvania's abortion restrictions violated the fundamental right to abort announced in the landmark 1973 decision, *Roe v. Wade*.[156] The moderates divided that question as follows: (1) should *Roe v. Wade* be overturned, and (2) if not, does *Roe* prohibit some or all of the Pennsylvania abortion restrictions?[157] The moderates ruled that *Roe*'s "basic holding" should be maintained.[158] They proceeded to revise two aspects of *Roe.* First, they downgraded abortion from a "fundamental" right to a liberty interest.[159] Second, they relaxed the trimester framework to elevate the state's claimed interest in the potential life represented by the fetus.[160] Applying this new framework, the plurality sustained all provisions of the statute—including a controversial parental notification provision—except for the spousal notification provision.[161] The conservatives would instead have overturned *Roe* and upheld all of the Pennsylvania abortion restrictions.[162] The liberals would have retained *Roe* entirely and would

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151 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

152 *Id.* at 843–911 (plurality opinion).

153 *Id.* at 944–79 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

154 *Id.* at 922–43 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

155 *Id.* at 911–22 (Stevens, J., concurring in part and dissenting in part).

156 *Id.* at 844 (plurality opinion); Roe v. Wade, 410 U.S. 113 (1973).

157 *Casey*, 505 U.S. at 845–46, 879 (plurality opinion).

158 *Id.* at 845–46.

159 *Id.* at 846–53; *Roe*, 410 U.S. at 152, 155.

160 *Casey*, 505 U.S. at 872–73.

161 *Id.* at 901.

162 *Id.* at 944 (Rehnquist, J., concurring in the judgment in part and dissenting in part).

have struck down all provisions except for the nonrestrictive medical emergency exemption.[163]

Table 2. *Planned Parenthood v. Casey* in a Single Dimension

Conservative Camp	Moderate Camp	Liberal Camp
Rehnquist, Scalia, White, Thomas	O'Connor, Kennedy, Souter	Stevens, Blackmun
Overturn *Roe*; sustain all provisions	Revise but retain *Roe*; sustain all but spousal notification	Retain all of *Roe*; strike all but medical exception
Narrow Right to Abort←——————→Broad Right to Abort		

Although *Casey* presented two separate issues,[164] the opinions nonetheless line up along a single normative dimension based upon the strength or weakness of the claimed abortion right. Most fractured-panel opinions can be meaningfully cast along a single normative dimension, making *Casey* the norm, and *McDonald* the exception.[165] To identify the controlling opinion in such cases, the Supreme Court applies the narrowest grounds doctrine.[166] This rule effectively ensures that if the various opinions in a fractured case include a Condorcet winner, that opinion will express the Court's holding.[167] The rule states that absent a majority opinion, the opinion consistent with the outcome that resolves the case on the narrowest grounds controls.[168] This means that if the case sustains a statute against a constitutional challenge, the opinion reaching that judgment that would sustain the fewest statutes controls; conversely, if the case strikes a statute down on constitutional grounds, the opinion reaching that judgment that would strike down the fewest statutes controls.[169] As applied to *Casey*, for the judgment sustaining all provisions other

163 *See id.* at 914, 917–18, 922 (Stevens, J., concurring in part and dissenting in part); *id.* at 930, 934 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

164 *See id.* at 844–46 (plurality opinion).

165 *See* STEARNS, *supra* note 97, at 124–33 (illustrating and applying narrowest grounds rule).

166 *See* Marks v. United States, 430 U.S. 188, 193 (1977) (specifying narrowest grounds rule).

167 *See* STEARNS, *supra* note 97, at 133 (noting that the doctrine "restores the Court's rationality by singling out as the holding that opinion which is a Condorcet winner").

168 *See id.*

169 For a more detailed explanation and analysis, see Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321 (2000).

than spousal notification, the conservative and moderate positions are eligible. The moderate position is narrower, and thus controlling, because it would retain *Roe*, albeit in modified form. The moderate position would therefore sustain fewer abortion laws than would the conservative position.[170] For the part of the opinion striking down the spousal notification provision, the moderates and liberals are eligible. The moderates again control because, whereas the liberals would retain *Roe* in its entirety, thus striking down a broader set of laws (including all the restrictive provisions of the challenged Pennsylvania statute), the moderates' revised *Roe* formulation instead struck down only the spousal notification provision.[171]

This analysis reveals why, in general, jurists are not motivated to depart from sincerely held views. As *Casey* illustrates, all three camps encourage doctrine closer to their ideal points by voting sincerely, not strategically. The moderates forge preferred doctrine by expressing views consistent with their ideal point, and were the liberal and conservative camps to vote other than sincerely, they would move doctrine in the opposite ideological direction.

This is not to suggest that there is no room for strategy in Supreme Court decisionmaking or in appellate judicial decisionmaking more generally. There is an important, albeit limited, opportunity for strategic voting affecting the ability to give an opinion precedential status. Because only a majority opinion can overturn a prior Supreme Court case, in rare instances, a Justice embracing a more extreme ideal point will moderate his or her view to elevate a potential narrowest grounds opinion to majority status.[172] The limited strategy involves moving toward a more moderate position along a single-dimensional scale.

The analysis demonstrates why, in general, appellate jurists adhere to Arrovian Independence and thus vote sincerely. The publication of written opinions reinforces this incentive.[173] Prior publication

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170 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992) (plurality opinion).

171 *See id.* at 900.

172 For an illustration, see Stearns, *supra* note 169, at 333–35, which explains Justice Scalia's voting strategy in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). *See also* Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 VAND. L. REV. 1849, 1903, 1920 (2001) (explaining the conservative camp's decision in Bush v. Gore, 531 U.S. 98 (2000), to join the per curiam's equal protection analysis based on the perceived need to provide appearance of a united front in a historic case controlling the 2000 presidential election).

173 Recent decades have witnessed a notable decline in published opinions in the federal appellate courts. *See* William Richman & William Reynolds, *Elitism, Expediency, and the New*

raises the cost of departing from previously expressed views by inviting criticism by other jurists, academic commentators, and the media.[174] One consequence is that Justices generally prefer to devise distinctions—often clever ones—rather than to expressly depart from prior opinions that they joined, at least without a justification (for example, a contrary controlling opinion).

iii. Deciding Multiple Cases: Stare Decisis and Judicial Path Dependence[175]

Although the *Casey* opinions fell along a single dimension, stare decisis sometimes expands dimensionality with the consequence of masking a cycle over separate majority opinions. To illustrate, consider the following two cases decided on the same day, *Crawford v. Board of Education*,[176] and *Washington v. Seattle School District No. 1*.[177] These cases are important not only in illustrating the Range-restricting role of Supreme Court voting protocols, but also for their independent implications for judicial treatment of direct democracy.[178] Both cases involve whether a state that never mandated segregation by law could be prevented from taking affirmative steps to integrate public schools.[179]

In *Crawford*, California had passed a state constitutional amendment following a referendum process that began in the state general assembly.[180] The referendum prevented state courts from ordering integrative busing unless they first determined that a federal court would conclude it was necessary to remedy a Fourteenth Amendment equal protection violation.[181] Writing for a majority of six, Justice Powell sustained the amendment against a federal equal protection

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Certiorari: Requiem for the Learned Hand Tradition, 81 CORNELL L. REV. 273, 281–86 (1996) (criticizing development as limiting flow of information concerning doctrinal development and jurisprudential views).

174 For a discussion of how the publication of judicial opinions, in contrast with the opposite norm for legislative votes, promotes differential voting behavior across these two institutions, see Stearns, *supra* note 65, at 1259 n.153.

175 For adapted portions of the following discussion, see STEARNS & ZYWICKI, *supra* note 4, at 458–64.

176 Crawford v. Bd. of Educ., 458 U.S. 527 (1982).

177 Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).

178 *See infra* Part III (applying social choice analysis to *Crawford* and *Seattle*).

179 *See Crawford*, 458 U.S. at 530–33; *Seattle Sch. Dist.*, 458 U.S. at 457–58.

180 *See Crawford*, 458 U.S. at 531–32.

181 *Id.* at 529. The referendum responded to a decision of the California Supreme Court that interpreted the state constitution to allow reasonable steps to abate de facto segregation. *Id.* at 530–32

challenge.[182] Justice Blackmun wrote a concurrence for two,[183] and Justice Marshall dissented alone.[184] In *Seattle School District*, the State of Washington passed a statewide voter initiative that prevented local school boards from ordering integrative busing unless necessary to avoid a violation of either the state or federal equal protection requirements.[185] Writing for a majority of five, Justice Blackmun struck down this referendum.[186] Justice Powell wrote a dissent for four.[187] Table 3 helps to explain the voting lineup in the two cases.[188]

Table 3. Supreme Court Voting Lineup in *Seattle School District* and *Crawford*

Majority	Concurrence	Dissent
Seattle School District		
Blackmun Marshall* Brennan White Stevens	N/A	Powell* Burger* Rehnquist* O'Connor*
Crawford		
Powell* Burger* Rehnquist* O'Connor* Stevens White	Brennan Blackmun	Marshall*

In Table 3, the asterisks appear next to the names of five Justices—Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor—who joined the majority opinion in *Crawford* and the *Seattle School District* dissent, and Justice Marshall, who joined the majority in *Seattle School District*, and dissented alone in *Crawford*. In his *Crawford* dissent, Marshall maintained that, although the Court resolved *Crawford* and *Seattle School District* in opposite fashion, the cases were constitutionally indistinguishable.[189] In his *Seattle School District* dissent, Justice Powell rejected each argument offered to dis-

182 *Id.* at. 545.
183 *Id.* at 545–47 (Blackmun, J., concurring).
184 *Id.* at 547–63 (Marshall, J., dissenting)
185 *Seattle Sch. Dist.*, 458 U.S. at 462–63.
186 *Id.* at 458, 487.
187 *Id.* at 488–501 (Powell, J., dissenting).
188 *See* STEARNS & ZYWICKI, *supra* note 4, at 461.
189 *Crawford*, 458 U.S. at 547–48 (Marshall, J., dissenting).

tinguish the two cases.[190] For our immediate purposes, resolving whether the cases are distinguishable is unnecessary.[191] Holding the merits aside, a majority of five—Powell, Burger, Rehnquist, O'Connor, and Marshall—wrote or joined opinions claiming that the two cases should be resolved in the same manner. And yet, separate majorities resolved the two cases in opposite fashion on the same day.

These cases demonstrate that in a regime of stare decisis, two separate majority decisions can embed a cycle. Consider the three separate and overlapping majorities. One majority seeks to sustain the *Crawford* amendment against the equal protection challenge. A second majority seeks to strike down the *Seattle School District* initiative based upon equal protection. And a third majority seeks to resolve these cases consistently such that both cases are either upheld or struck down. Obviously, it is not possible to satisfy all three majorities.

The Range-restricting quality of stare decisis emerges when we imagine how these outcomes might have changed had the two cases been issued one year apart, rather than on the same day. If we assume that the Justices vote consistently with their preferences as expressed in the opinions that they drafted or joined in *Crawford* and *Seattle School District*, thus adhering to Independence, then the order in which the cases were presented for decision would potentially control both case outcomes. After *Crawford* initially sustained the challenged law, the five Justices in *Seattle School District* with asterisks next to their names would not ask how to resolve that later case as a matter of first impression, but rather, would ask whether *Crawford* controls *Seattle School District.* If the Justices voted sincerely, they would answer yes, thus also sustaining the *Seattle School District* initiative. Conversely, after *Seattle School District* initially struck down the challenged initiative, the same five Justices would later ask if *Seattle School District* governs *Crawford*. Voting sincerely, this majority would also vote to strike down the *Crawford* amendment. The actual cases were presented at the same time, such that neither case controlled the other as precedent. As a result, the *Crawford* amendment was sustained and the *Seattle School District* initiative was struck down, thus thwarting the majority favoring consistency.

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190 *Seattle Sch. Dist.*, 458 U.S. at 490 & n.3 (Powell, J., dissenting).

191 For a discussion distinguishing the outcomes based upon the different forms of direct democracy through which the two laws were enacted, see *infra* Part III.A.

Like outcome voting, stare decisis—meaning presumptive deference to the Court's prior decisions[192]—operates as a Range restriction. Recall that social choice reveals the need for the same number of binary comparisons as options to determine the social significance of institutional outcomes.[193] With more options than permitted amendments, or with a bar to reviving defeated alternatives to pit them against later victors, it is not possible to discern the outcome's social significance, meaning whether or not it is a Condorcet winner or the arbitrary product of a voting path. As we have seen, whereas legislative rules often limit votes relative to options, informal rules open Range within legislatures,[194] thus allowing disclosure of cycles, or intense minority opposition, especially in high-stakes matters.[195] Within the framework of social choice, stare decisis operates as a time-honored cycle-breaking rule that ensures outcomes by preventing an option defeated in a prior round from being later pitted against the eventual winner. That is why *Crawford* followed by *Seattle School District* potentially produces opposite holdings in both cases as compared with *Seattle School District* followed by *Crawford.*[196]

Of course, the differing order of presentation might not have produced these results. Some or all of the Justices who viewed the cases as indistinguishable when stare decisis was not in play might have devised a clever distinction to avoid the obligation of stare decisis in the second case. In doing so, however, these Justices would necessarily embed a new set of distinctions—quite possibly problematic ones—in developing doctrine.[197] Recall that published opinions that the Justices wrote or joined raise the cost of departing from the earlier expression of legal principle.[198] The argument is not that Justices never depart from sincere positions. Rather it is that the cost of doing so promotes adherence to Independence. In addition, outcome voting and stare decisis break potential voting cycles, thereby ensuring out-

192 For a discussion of external benefits and policy justifications for stare decisis, see STEARNS & ZYWICKI, *supra* note 4, at 423–29.

193 *See supra* note 129 and accompanying text.

194 *See* William H. Riker, *The Paradox of Voting and Congressional Rules for Voting on Amendments*, 52 AM. POL. SCI. REV. 349 (1958) (discussing the congressional rule limiting votes relative to options); *see also* STEARNS & ZYWICKI, *supra* note 4, at 144.

195 *See supra* notes 130–32 and accompanying text (discussing how formal and informal legislative processes disclose relevant information).

196 For a discussion of the relationship between path dependence and standing doctrine, see STEARNS, *supra* note 97, at 170–97.

197 For a general discussion, see STEARNS & ZYWICKI, *supra* note 4, at 462–63.

198 *Id.* at 463.

comes and relaxing Range. This is opposite the social choice profile of the legislature.[199]

The preceding analysis helps to explain why the judiciary is widely viewed as a nondemocratic institution.[200] Courts, unlike legislatures, are generally obligated to act, and knowing this, litigants often seek opportunities to force courts to resolve policy issues that legislatures are unwilling to act on given their power to remain inert.[201] Nothing in this analysis undermines the merits of constitutional judicial review. The judicial Range restriction described above has oftentimes produced compelling results. The reluctance of state legislatures in the South, and of Congress, to embrace needed reforms during the period of racially segregated schools, for example, motivated the NAACP to pursue a strategy of favorable case orderings targeting important changes in Supreme Court doctrine.[202] The campaign to end state-sanctioned practices restricting women based upon archaic and overbroad suppositions concerning sex roles followed a similar course.[203] In each instance, it was the judicial inability to avoid action, and the assumption that the judiciary, and eventually the Supreme Court, would resolve the cases that produced cries of unfair removal of issues from the longer, and more tedious, road of democratic resolution by those opposing the resulting doctrinal changes.[204]

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199 *See supra* Part II.B.1.a.

200 During his confirmation hearing for Chief Justice, then–Circuit Court Judge John G. Roberts made a consistent observation:

> As [Chief Justice John] Marshall explained, we have to decide a case. If the argument is that it's inconsistent with the Constitution, we have to decide that. Therefore, we have that authority, and I believe that's consistent with the intent of the Framers.
>
> But it does mean . . . that judges should be very careful to make sure they've got a real case or controversy before them, because that is the sole basis for the legitimacy of them acting in the manner they do in a democratic republic. They're not accountable to the people.

Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be the Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 342 (2005) (statement of J. Roberts).

201 *See* STEARNS, *supra* note 97, at 197–98.

202 For a detailed discussion and analysis, see STEARNS, *supra* note 97, at 187–89.

203 In fact, the judicially created, sex-based equal protection doctrine is ironically credited with defeating the Equal Rights Amendment. *See generally* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

204 *See, e.g.*, Lino A. Graglia, *Constitutional Law: A Ruse for Government by an Intellectual Elite*, 14 GA. ST. U. L. REV. 767, 776–77 (1998) (decrying the Supreme Court's "judicial activism" and successful efforts of organizations like the ACLU to achieve policy change via the courts that they could not accomplish in legislatures).

This remains the cry when more current contentious issues are presented for judicial resolution. The label "antidemocratic" has been applied in the contexts of abortion, same-sex marriage, and a variety of other fundamental rights claims that have moved from hot political issues to vehicles for doctrinal reform.[205] In each instance, the distinguishing characteristics of legislatures—adherence to Range and relaxed Independence—and of courts—relaxed Range and adherence to Independence[206]—motivated praise or scorn depending on the side of the underlying substantive issue on which the commentator stands.[207]

Direct democracy, as shown below, bears features that more closely resemble judicial review than legislative decisionmaking. But unlike judicial review, which relies upon a higher external source of constitutional authority to limit legislative powers, direct democracy limits such powers based strictly on raw electoral preferences registered ordinally along isolated policy dimensions merely because the plebiscite question has been put to the voters.

2. *The Social Choice Profile of Direct Democracy: Legislatures or Appellate Courts?*

Properly balloted initiatives and referendums ensure outcomes without regard to the preference profile of voters. Regardless of the nature of electoral preferences, once balloted, a plebiscite will produce a collective resolution. The regime places a binary choice—pass or reject the proposal—before a large number of voters, subject to a default rule of inaction in the event of a tie.[208] With large numbers, ties are sufficiently improbable that a collective outcome is virtually guaranteed. The electoral binary choice is structurally parallel to the binary choice—affirm or reverse—presented to an appellate court. In both instances, whether the participants' preferences are neatly al-

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205 *See, e.g.*, J. Harvie Wilkerson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (arguing that both *Heller* and *Roe* suffer from "transfer of power to judges from the political branches of government—and thus, ultimately, from the people themselves").

206 *See* Maxwell L. Stearns, *supra* note 101, at 124–25. This account is causal, not merely correlative. Institutions lacking these characteristics would be competed away in favor of those possessing them. *See* STEARNS, *supra* note 97, at 68–69 (describing evolutionary social choice analysis of legislatures and appellate courts).

207 This is not to suggest that all commentators arguing for or against judicial intervention are doing so based upon which strategy is more effective, as opposed to based upon a principled understanding of the proper legislative and judicial roles in a scheme of separation of powers.

208 *See, e.g.*, CAL. CONST. art. 2, § 10(a) ("An initiative statute or referendum approved by a majority of the votes thereon takes effect the day after the election . . . .").

igned, yielding a Condorcet winning outcome, or prone to a cycle, thus risking an outcome that thwarts majority preferences on some dimension, the binary outcome choice—pass or reject the plebiscite, or affirm or reverse the lower court judgment—forces collective institutional action.[209]

Direct democracy further resembles appellate court decisionmaking in its tendency toward median outcomes. Generally speaking, when there is a median voter position on the issue put to a plebiscite, the outcome will reflect that position.[210] Although some qualification is required, this is almost true as a matter of definition. When preferences align along a single-dimensional spectrum, the median voter result necessarily obtains, at least assuming fair electoral representation and no voter confusion, or alternatively, that any nonparticipation or confusion is sufficiently evenly dispersed as to avoid systemic distortion.[211]

Like appellate courts, direct democracy generally honors Arrovian Independence, or sincere voting, respecting the binary choice to pass or oppose a plebiscite. In a large-number electoral setting, strategic voting is very nearly impossible to accomplish. Even if agreements to swap votes—"I'll vote for your proposed plan to approve private religious school tax vouchers if you vote for my proposed plan to increase public school funding"—are not legally prohibited,[212] such strategies are beset by problems of high information and enforcement costs.

Like judicial decisionmaking, direct democracy relaxes Range—there will be an outcome without regard to preference structures—and adheres to Independence—there is little opportunity for strategic voting behavior. Plebiscite voters generally gain little or nothing by voting other than consistently with sincere policy preferences. This follows from the median voter theorem[213]: along a single-dimensional scale, constituents occupying more extreme positions to the right or

209 *See* Stearns, *supra* note 65, at 1260–62.

210 *See* STEARNS & ZYWICKI, *supra* note 4, at 96–97 (explaining outcome of median voter position).

211 *See* STEARNS & ZYWICKI, *supra* note 4, at 100 (explaining that voters may continue supporting candidates in their ideological direction even when these candidates converge on the median position).

212 Thus, although the California Electoral Code prohibits monetary and nonmonetary consideration for votes, *see* CAL. ELEC. CODE § 18522 (West 2010), the United States Court of Appeals for the Ninth Circuit, in *Porter v. Bowen*, 518 F.3d 1181 (9th Cir. 2008), rejected the application of section 18522 to prohibit vote trading absent additional consideration. *See id.* at 1182, 1185–86.

213 *See* STEARNS & ZYWICKI, *supra* note 4, at 96–101 (describing theorem).

left of the median voter will prefer options closer to (but on their side of) the ideal point of the median voter to options on the opposite side of the median voter. Although voters might be disappointed that presented options are moderated relative to their ideal points, voting insincerely moves policy away from, rather than toward, a voter's ideal point.[214] The median voter theorem predicts that, in a single stage election, rational candidates tend to move toward the median voter.[215] Similarly, plebiscite voting would also appear to push policy in the direction of the median voter in an effort to appeal to more voters. Despite this intuition, plebiscites might sometimes thwart median voter preferences.

Consider two voter-preference configurations, those in which preferences are nicely aligned, yielding a Condorcet winner, and those in which they are not, yielding a cycle. Such cycles can arise in two situations. In the first, cycling affects sequential plebiscites. As demonstrated below, these situations are likely to produce path-dependent but stable outcomes. In the second, cycling lurks in the background of isolated initiatives. The latter cycles are a consequence of restricting voter Range by disallowing separate consideration along the dimension of choosing to resolve the underlying issue today or to leave it instead with legislative process (or more bluntly, to say "not now"). By removing the inertial option, these "plebiscycles" pose a serious challenge to the descriptive claim of plebiscites as democratic.

a. The Single-Dimensional Case

Assuming no voter confusion, a regime that aligns policy with voter preferences registered along a specified issue dimension appears to be a sound approach in resolving discrete policy questions. Under these conditions, if the purpose of placing a given proposal in the form of a plebiscite is to discern majoritarian electoral preferences, then assuming representative turnout and no systemic confusion, direct democracy will tend to move policy from the status quo toward the ideal point of electoral median. Other mechanisms (like polling) can also identify median voter preferences, but polling results are often contestable and polling lacks the institutional legitimacy to force policy change.

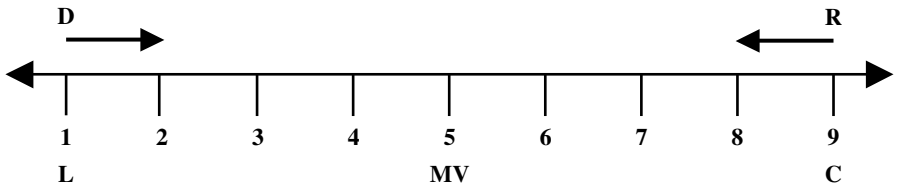
When relevant alternatives align along a single-dimensional scale, plebiscites tend to move policy in the direction of a Condorcet winner

214 As used here, a voter's ideal point corresponds to her first-choice policy position along a single-dimensional ideological spectrum. *See id.* at 96 (defining ideal point).

215 *See id.*

even if the plebiscites themselves invite extreme policy shifts. To illustrate, consider the following hypothetical.[216]

Figure 2. Policy Location in a Single-Dimensional–Issue Spectrum



L	=	Liberal
C	=	Conservative
MV	=	Median Voter
D	=	Liberal (Democratic) Candidate
R	=	Conservative (Republican) Candidate

Assume a single-dimensional ideological spectrum with evenly dispersed voters. The potential policy positions are marked at increments one through nine, with the median voter's ideal point at five. If a plebiscite operates against a background rule at policy-position nine and offers voters the chance to move policy to seven, the initiative will pass as a majority prefers the policy change, which moves in the direction of, but not quite to, the median voter's ideal point. Notably, the same result obtains if the starting point and the initiative are on opposite sides of the median voter's ideal point. If, for example, the status quo is position one and the initiative is position seven, the initiative, once again, is likely to pass as it moves policy closer to the median voter's ideal point.

In both examples, although the initiative policy is more extreme than the median voter's ideal point (compare positions seven and five),[217] nothing precludes a later plebiscite from moving closer to five.[218] The sequence might produce strong policy moves (or broad swings) as compared with the median-voter benchmark, but this alone

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216 Figure 3 is adapted from STEARNS & ZYWICKI, *supra* note 4, at 97 fig.3:1.

217 This extension of Kousser & McCubbins, *supra* note 16, at 980–81, demonstrates that political entrepreneurs might sometimes place plebiscites at relatively extreme positions assuming that the median voter will not only assess the relevant policy distance to his or her ideal point, but also the probability that the policy question will be revisited.

218 In some states, legislatures cannot overturn plebiscites through ordinary legislation, instead requiring a later plebiscite. *See* Matsusaka, *supra* note 30, at 187 ("Once approved, laws enacted by direct democracy may be easy or difficult to amend: at one extreme, California initiatives can only be amended by another initiative, while other states allow the legislature to amend them as ordinary statutes.").

does not foreclose future moves toward the median along the single-dimensional scale.[219]

Even when an issue can be cast along a single-dimensional scale, however, there is a risk that direct democracy might not produce socially optimal outcomes. This takes us back to the difference between the application of Independence in a judicial and legislative setting. For ballot measures that risk a disproportionate effect on an identifiable class of voters, for example affirmative action for African American voters,[220] or same-sex marriage restrictions for gay and lesbian voters,[221] when intensity of preferences is accounted for, the preferred outcome might differ from that obtained through direct democracy's blunt choice mechanism. Even if the plebiscite captures median electoral preferences, thus satisfying the Condorcet criterion, that criterion does not account for intensities of voter preference.[222]

A defining characteristic of legislative decisionmaking is a series of decision junctures—veto gates or negative legislative checkpoints—at which participants and affected constituencies can register not merely ordinal preferences but also preference intensities. The process of registering preference intensities often involves vote trading—meaning, basing reciprocal commitments on other, sometimes unrelated, bills. Within legislatures, registering preference intensities on one issue dimension can affect outcomes along separate issue dimensions. Because direct democracy supplements, rather than replaces, legislative lawmaking,[223] this insight carries normative implications for direct democracy.

Assume, for example, that a legislature is considering restricting or ending affirmative action in higher education within three years. Imagine that those most opposed to the proposal negotiate having the proposal dropped by agreeing to support separate measures that they would otherwise be inclined to oppose. This might include, for exam-

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219 This might explain the Oregon and Massachusetts case illustrations described by Kousser and McCubbins. *See infra* text accompanying notes 229–31.

220 *See* Michael E. Rosman, *Challenges to State Anti-Preference Laws and the Role of Federal Courts*, 18 WM. & MARY BILL RTS. J. 709, 709 (2010) (discussing recent "anti-preference" referendums in states including California and Michigan aimed at ending race-conscience admissions to institutions of higher learning); *see also* Grutter v. Bollinger, 539 U.S. 306 (2003) (sustaining the University of Michigan School of Law's affirmative action program against an equal protection challenge).

221 *See* Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL'Y 385, 393 n.70 (2010) (collecting bans on same-sex marriage enacted via initiative).

222 *See supra* note 99 and accompanying text (discussing features of Condorcet criterion).

223 *See supra* note 87 and accompanying text.

ple, funding schemes benefiting schools located in high-value property areas, or issues entirely unrelated to education. In the next election cycle, however, a proposed initiative seeking to ban affirmative action is approved consistently with majority electoral preferences. When the issue is viewed strictly along a single-dimensional scale, the outcome honors the Condorcet criterion. This does not, of course, mean that the policy is optimal. And the problem is not merely due to the possibility that opponents might hold stronger views than the majority. It is also that the opponents, through their representatives, made concessions in the legislature respecting other issues in an effort to avoid a similar legislative result, only to then have their reciprocal gains—declining to end affirmative action—taken away through the initiative process. In effect, the initiative process has prevented reciprocal commitments made in the legislature, where Independence is relaxed but Range is adhered to, from being honored in the direct democracy process, where Independence is adhered to but Range is relaxed. Moreover, even unsuccessful plebiscites force affected interest groups to defend prior legislative successes, often taking the form of legislative inaction on bills affecting them, in successive election cycles.[224]

This analysis raises analogous concerns to when legislative victories in one period are undermined in a subsequent period of constitutional litigation. Any payoffs associated with having the measure passed in its final form are undermined when the judiciary, which has to resolve the case, strikes down the law. This is one argument in favor of judicial restraint: restraint facilitates a more robust set of exchanges in the legislative market, thus allowing participants not only to register preferences ordinally, but also to commodify preferences and to secure the benefits of reciprocal payoffs often embedded along different legislative policy dimensions.[225] The same argument generally applies to plebiscites.[226]

b. Dimensionality over Sequential Plebiscites

The prior discussion is not intended to suggest that all issues for which multiple proposals can be assessed using a common unit of

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224 For an analogous dynamic involving legislative rent extraction, see FRED MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 55–66, 74–78 (1997), which demonstrates that the mere threat of regulation can coerce rents.

225 This is not to suggest that constitutional judicial review is unjustified; rather, it is to suggest that even when judicial review is justified, it is not costless.

226 *See infra* text accompanying notes 277–82 (distinguishing special case of automatic referendums).

measurement—for example, dates, dollar amounts, or acreage—necessarily rest on a single normative dimension.[227] Despite a common scale, some participants might least favor the middle position. For budgetary allocations for a public works project, for example, in which there are three proposals, with high, medium, or low expenditure levels, there is nothing irrational in the position: "Do it right or not at all." The expenditure dimension on which the options appear to rest fails to account for participants who view the policy question as implicating an alternative dimension based upon such considerations as overall quality or opportunity cost. When both dimensions are accounted for, the underpinnings of a cycle emerge despite the initial—and misleading—depiction along a single-dimensional scale.[228]

Kousser and McCubbins maintain that direct democracy not only threatens cycles, but also that, through "sequential elimination agendas," the process risks Condorcet losers, defined as outcomes universally regarded as inferior to an available alternative. Consider Table 4,[229] depicting a game in which three voters, P_1, P_2, and P_3, rank policy options, A, B, C, and the status quo, Q.

Table 4. Kousser and McCubbins's Illustration of Cycling in Initiatives

P_1's Preferences	P_2's Preferences	P_3's Preferences
Q	*A*	*B*
C	*Q*	*A*
B	*C*	*Q*
A	*B*	*C*

Kousser and McCubbins explain that if the participants vote sincerely in this game, A defeats Q, B defeats A, and C defeats B, and yet, completing the cycle, Q unanimously defeats C, so that $CpBpApQpC$. Assuming Q defeats C in the initial round and that defeated outcomes cannot be reconsidered, the result of this "sequen-

227 *See* STEARNS & ZYWICKI, *supra* note 4, at 131–33 (discussing dimensionality and cycling).

228 For illustrations and analysis demonstrating that a single dimension with multipeaked preferences can be expressed as two dimensions over which each member's preferences are single peaked, see STEARNS, *supra* note 97, at 71–77. When one member holds multipeaked preferences over options cast along a single issue dimension, this implies that, for this person, the chosen normative scale does not capture the relevant stakes. If it did, that person would rank his or her preferences with a single peak. *See id.*; *see also* SAARI, *supra* note 110, at 13–15 (ascribing cycling to "curse of dimensionality").

229 Table 4 is taken from Kousser & McCubbins, *supra* note 16, at 964.

tial elimination agenda," namely *C* as the selected outcome, is not merely arbitrary; it is Pareto inferior because no one prefers *C* to *Q*.[230]

The authors provide two historical accounts, from Oregon and Massachusetts, that they claim illustrate sequential elimination agendas and thus initiative outcomes that cycle:

> In 1990, the citizens of Oregon passed an initiative that sought to reduce property taxes, and then, in 1996, they passed another measure that limited the revenue available for schools and other services that had been funded by property taxes. Just four years later in 2000, citizens passed an initiative that established a "sufficiency standard" for funding based on the Oregon Quality Education Model that required a significant increase in state spending on education. It is easy to see that following multiple ballot measures to reduce taxes with one that instructs the legislature to increase education spending may be mutually inconsistent.
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> Similar contradictory initiatives occurred in Massachusetts. For example, in 1982, citizens voted to restrict radioactive waste disposal, but then in 1988, they failed to ban the electric power plants that produced such nuclear waste. Needless to say, citizens in these two time periods passed measures that were largely at odds with each other—with the 1988 result perpetuating the problem that the 1982 initiative sought to solve.
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> The above anecdotes suggest that the theoretical problems of sequential elimination agendas have an empirical basis in the initiative process.[231]

And yet, these examples might illustrate a change in voter preferences, which move back and forth along a single-dimensional issue continuum over time rather than a cycle.[232] In Oregon, in periods one and two, the voters elected to approve measures that reduced specific taxes and school revenues, respectively. In period three, they passed another initiative that imposed a sufficiency standard that required a higher level of taxation and educational expenditures. In Massachusetts, in period one, the voters restricted radioactive waste disposal, and in period two they declined to ban the electric power plants that generated waste in need of storage.

In both accounts, the voters confronted sequential choices that can be cast along a single-dimensional scale—restrictive-to-generous

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230 *Id.*

231 *Id.* at 965–66 (footnotes omitted).

232 For a consistent result, see Cooter & Gilbert, *supra* note 66, at 702 n.67.

tax-based allocations for improved quality of education in Oregon and restrictive-to-permissive provision of radioactive waste storage facilities in Massachusetts—and have taken positions over time that reflect a change in the location of the median voter's ideal point respecting the tradeoffs involved. One indication that this might not reflect a cycle is that a single individual could rationally embrace such sequential choices. If asked today (period one) whether to buy a particular good (say a nice automobile), I might do so, but if asked a year later to continue allocating my scarce financial resources (car payments, maintenance costs, and gas) to sustain the purchase (period two), I might decline. The later decision reveals the benefit of more information about how much the car is worth to me and the true opportunity cost of the allocated resources. Although buyer's regret is unfortunate, and costly, it is not uncommon. In an extreme case, such a buyer might sell the car to cut the losses. Buyer's regret does not reflect a cycle. Rather, it reflects a change of mind based upon newly acquired information. Just as individuals can change their minds, so too can enough group members to reverse a prior collective outcome.

Under some circumstances, however, sequential initiatives can embed cycles over more than a single policy dimension. When this occurs, contrary to the Oregon and Massachusetts illustrations, the outcome is likely to be coherent but path dependent. This is most likely when the first plebiscite, much like precedent in a judicial setting, effectively restricts Range for a critical subset of voters in a later plebiscite. Although a rejected plebiscite does not legally foreclose reconsideration in the same manner as, for example, a rejected constitutional challenge relied upon as precedent in a later case, in at least some circumstances even rejected plebiscites can induce path dependence.

Assume an initially approved plebiscite authorizing slot machines at a race track. After the state has made funding commitments contingent on the success of the slots, a second plebiscite seeks to authorize zoning changes allowing secondary businesses, for example restaurants and retail outlets, without which, the voters are then led to believe, the slots will ultimately fail. Some voters who initially opposed both the slots initiative and the residential zoning change, might support the latter initiative once they realize that otherwise the state will renege on established slot-based funding commitments. If there are enough such voters to tip the outcome, then the second initiative will also pass. And yet, the combined policies, casinos and business zoning near residential communities, is opposite what would have re-

sulted had the choices been reversed. If the first plebiscite had instead asked whether to permit business zoning near the residential community (as the anticipated price of a later referendum to approve slots), the same group of marginal voters, along with those opposing the slots no matter what, would vote no. With the zoning plebiscite defeated, some who might have initially supported slots might then vote against them, realizing that absent the zoning approval, the slots are destined to fail. As in the judicial hypothetical based on *Crawford* and *Seattle School District*,[233] for sequential plebiscites, the ordering affects both outcomes. Notice, however, that changing the order produces opposite, yet coherent, policy and that this follows whether the initial result is to approve or reject the plebiscite.

As previously noted, a characteristic feature of cycling preferences is multiple-issue dimensions.[234] This is what is at play in Table 4, where the three players assess the policy choices over *ABC* and *Q* along more than a single dimension, thus generating the cycle.[235] In the account of the Oregon and Massachusetts plebiscites offered by Kousser and McCubbins, however, it appears as likely that the voters produced results that shifted back and forth along a single-dimensional scale.[236] The final plebiscite in each sequence was not resolved in a manner contingent upon the resolution of an earlier plebiscite, but rather pulled policy back from a position that a critical group of voters later concluded had been pushed too far. Once again, when policy options align along a single-dimensional scale, the plebiscite process tends toward the median, or Condorcet, outcome, but not necessarily in a single round.

c. Plebiscycles: Cycling over Policy and the Choice of Collective Decisionmaking Rule

"Plebiscycles" arise within single plebiscites that restrict Range along a given policy dimension. This might apply broadly to plebiscites if we consider combining the underlying policy question with a separate question concerning institutional choice. To illustrate, we must first present three options along a single-dimensional spectrum and then consider how the added dimension affects ordinal rankings.

Assume that three voters or blocs of voters hold three sets of positions regarding a proposed initiative. The initiative can involve a

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233 *See supra* Part II.B.1.b.iii.

234 *See supra* notes 227–28 and accompanying text.

235 *See supra* Table 4.

236 *See* Kousser & McCubbins, *supra* note 16, at 965–66.

broad range of subjects, for example, whether to prevent sexual minority status from forming the basis for inclusion in nondiscrimination statutes,[237] whether to ban busing for purposes of integrating public schools,[238] or whether to prohibit nonpublic goods takings.[239] Assume that, in general, the plebiscite is one that conservatives favor and liberals oppose. The voters divide into three groups based upon the following ideal points of the respective members[240]: (1) those favoring the original initiative (the Conservative position); (2) those opposing the initiative and who want no action on the subject (the Liberal position); and (3) those who want action but in more moderate form (the Moderate position).[241] For now, assume that the voter preferences neatly align on the following single-dimensional issue spectrum.

Table 5. Hypothetical Initiative with Single-Dimensional Preferences

Liberal Position	**Moderate Position**	**Conservative Position**
Preserve status quo	Enact intermediate policy	Enact initiative
Strong opposition to policy←——————→Strong support of policy		

Assume no voter confusion and full voter participation or the more relaxed condition of nonsystemic distortion. If we assume that any two of the three groups has the requisite number of votes to command a majority, then faced with this binary choice, the moderate voters will control the outcome. Through revealed preferences we can infer that whatever the outcome, it is the Condorcet winner.

Now consider an alternative regime that exposes how the plebiscite process risks limiting Range and thus thwarting majority preferences. In this regime, the range of choices is expanded to include an option that the voters do not separately consider in direct democracy. In addition to selecting whether to pass or defeat the initiative, voters decide whether to resolve the plebiscite question through direct democracy or instead to leave the issue to the legislative process. A decision to resolve the issue through direct democracy translates into a

237 *E.g.*, Romer v. Evans, 517 U.S. 620, 624 (1996).

238 *E.g.*, Crawford v. Bd. of Educ., 458 U.S. 527, 532–37 (1982); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 461–62 (1982).

239 *E.g.*, Kelo v. City of New London, 545 U.S. 469, 472 (2005). For a general discussion of the post-*Kelo* initiatives, see Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183, 244–50 (2007).

240 *See supra* note 214 (defining ideal point along a single-dimensional scale).

241 Of course, it is possible to generalize this to a larger number of discrete positions along the same single-dimensional scale.

decision to isolate this policy question from broader legislative consideration and to present the electorate a binary policy choice that will ensure an outcome. A decision to leave the issue with the legislature entails promoting legislative deliberation over this and any number of other issues, with possible results including inaction or compromise. The combination of the two dimensions—whether to undertake a policy change and whether to isolate the issue from legislative consideration as part of a broader set of legislative proposals—results in four possible packaged combinations from which to choose.

Each of the following two presentations includes two of the possible four packaged combinations: (*A*) isolate the policy and enact the proposed initiative in original form, and (*B*) conjoin the policy through the legislative process with other issues and enact a more moderate policy change. The presentations differ in the framing of option *C*. By combining the two alternative versions of option *C* with options *A* and *B*, the analysis provides two different sets of combined options. Although both versions hope for the initiative's defeat, and for inaction more generally on the underlying issue, the first assumes this result is more likely via initiative, whereas the second assumes it more likely in the legislature.

Imagine once again that the three camps are required to rank their preferences over the remaining options. In the first example, option *C* isolates the policy for the initiative process hoping for its defeat. Although this might appear counterintuitive, assume that these voters do not wish to risk legislative compromise, and that they believe that the prospect of defeat is greater when the issue is presented to voters in extreme form, thus warning legislators to avoid this issue.[242] Conversely, these voters fear that moderate legislative action is more likely to pass and endure absent the initiative defeat.

Table 6. Initiative over Two Dimensions (Version One)

	Favors Policy Change	**Opposes Policy Change**
Isolate Policy (use plebiscite)	(*A*) Pass initiative in proposed form	(*C*) Reject initiative, thus preserving status quo
Conjoin Policy (use legislature)	(*B*) Enact moderated version of proposed initiative or combine with other issues	N/A

242 Indeed, this further provides yet another restricting consequence of a defeated initiative, albeit not technically a range restriction because it arises in a separate institution. *See supra* text accompanying notes 210–22 (demonstrating that passing or defeating plebiscites can induce path dependence across plebiscites).

The initiative process is a Range-restricted (non-Condorcet) rule that forces resolution along only the horizontal axis. To see how this risks either of two embedded cycles, consider the potential ordinal rankings of each camp over the remaining options. We begin with a forward cycle. Assume that the camp that most prefers isolating and passing the original initiative would prefer a moderate policy change enacted by the legislature to no policy change, with the resulting preferences *ABC*. Assume that the camp that most prefers a moderate policy change enacted by the legislature would ultimately prefer no policy change to the original initiative, with the resulting preferences *BCA*. Finally, assume that those who prefer to isolate the policy in the hopes of its defeat would prefer the initiative to pass over a moderate legislative policy change, with the resulting preferences *CAB*. Although this too appears counterintuitive, remember that for group *C* either alternative choice involves enacting a disfavored policy. Assume that this group believes that enacting the more extreme adverse policy will at a minimum create a significant campaign issue, whereas the more moderate policy will not garner substantial opposition and therefore will remain entrenched. In this case, the combined preferences *ABC*, *BCA*, *CAB* generate the cycle *ApBpCpA*.

Now consider the reverse cycle. Assume that the members of camp *A* who most prefer to isolate and pass the initiative rank second isolating the initiative even if it fails rather than ceding the issue to the legislature. At a minimum, this will allow the sponsors to continue courting their base for future political entrepreneurial activities. The resulting ranking is *ACB*. Assume that the members of camp *C* who most prefer to isolate the issue hoping for its defeat rank second moderate legislative action to avoid the risk of enacting a disfavored policy. The resulting ranking is *CBA*. Finally, assume that those who most prefer a moderate legislative policy rank second the initiative over no policy change. The resulting ranking is *BAC*. These combined preferences *ACB*, *CBA*, *BAC*, generate the reverse cycle *CpBpApC*.

Table 7. Initiative over Two Dimensions (Version Two)

	Favors Policy Change	**Opposes Policy Change**
Isolate Policy (use plebiscite)	(*A*) Pass initiative in proposed form	N/A
Conjoin Policy (use legislature)	(*B*) Enact moderated version of proposed initiative or combine with other issues	(*C*) Support legislative consideration with the hope of no policy change

In this alternative version, camp *C* prefers ceding the substantive policy to the legislature hoping for its defeat, rather than risking that the initiative, which it opposes, passes. Once again, it is possible to construct assumptions across the two dimensions that generate either a forward cycle, *ABC*, *BCA*, *CAB*, or a reverse cycle, *ACB*, *BAC*, *CBA*. In each of the preceding cycle-generating combinations (two forward, two reverse), the assumptions needed to generate the ordinal rankings are contestable. Specifically, each illustration includes one set of seemingly counterintuitive assumptions.[243] Although this is often true of constructed cycles, it does not undermine the analysis. Each cycling combination rests on either of the two possible orderings over remaining options for each camp. It is certainly possible, for example, in the first illustration, where position *C* favors isolating the issue for the initiative process but opposes the initiative, to construct alternative preferences in which camps *A* and *C* each select moderate legislative action (*B*) as their second choice. Similarly, it is possible in the second variation, where camp *C* prefers to conjoin but oppose legislative policy change, that camps *A* and *C* prefer moderate legislative action as a second choice.

To the extent that this is true, however, it has important, and potentially problematic, implications. The result in each instance would be to flatten dimensionality such that moderate legislative action emerges a Condorcet winner. Although this is certainly plausible, it implies that there is invariably a normative justification grounded in social choice for preferring moderate legislative action to the alternative of using the initiative process to promote (or risk) action in more extreme form. And yet, electoral majorities do enact initiatives that set policy at a more extreme point than the legislature would along the relevant normative issue spectrum. This suggests there are potential frustrated majorities when issues are combined as part of a larger legislative process.

Moderate legislative outcomes are often viewed as insufficient half measures among those hungering for stronger policy change. Notice also that the line constructed in Table 7 between moderate legislative action and legislative inaction is a fine one. Depending on how moderate the enacted policy, many voters might view the result as

243 In the first version, the counterintuitive ranking is *CAB*, where camp *C* believes that the more extreme policy will provide the basis for a more effective campaign issue that will rally the base than would opposing a more moderate legislative policy, and in the second, the counterintuitive ranking is *ACB*, where camp *A* prefers legislative defeat to rally its base rather than to risk an entrenched moderate legislative policy.

equivalent to inaction. Among major segments of the electorate, it is not surprising that seeming middle positions prove more a source of frustration than of settling compromise.[244]

As with outcome voting and stare decisis in a judicial context, the binary choice to pass or oppose an initiative results from a Range-restricted rule. Electoral voters do not consider the combined binary choices over all options. As a result, the plebiscite outcome, whatever it is, risks thwarting majority preferences for kicking the policy question, along with others, to the legislature to resolve in the complex and messy course of legislative bargaining.

As public choice theorists have observed, it is difficult to demonstrate cycles empirically.[245] But that is not because all decisions rest neatly along isolated policy dimensions, thus yielding Condorcet winners. Rather it is because outcomes invariably reflect, or in the economists' lingo, are endogenous to, the rules through which they are chosen. And yet, there are hints. We know that most initiatives present issues in a more extreme form than that which a legislature would likely adopt. Political entrepreneurs are rarely motivated to replicate what a legislature would enact were it to act on the issue.[246] Conversely, when the legislature fails to act on an issue, or acts in a manner widely deemed inadequate, there is often a sense that some thwarted majority, one that combines those strongly favoring a policy change and those who remain anxious about even the prospects of moderate legislative action, would prefer to cut the legislature out of the deal or to send it a strong signal to avoid future action. It cannot be the case that both legislative processes and direct democracy routinely produce outcomes satisfying the Condorcet criterion. The very

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244 For an analogous exchange on the role of constitutional compromise in the sensitive area of abortion, compare *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 866–67 (1992) (plurality opinion) ("Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* . . . , its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."), with *id.* at 995 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The Court's description of the place of *Roe* in the social history of the United States is unrecognizable. Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve.").

245 *See, e.g.*, Shepsle & Weingast, *supra* note 131 (attributing absence of verifiable cycling to cost-raising institutional mechanisms in Congress); Tullock, *supra* note 127, at 189 (attributing absence of verifiable legislative cycling to logrolling).

246 *See* Kousser & McCubbins, *supra* note 16, at 953–54.

existence of these competing venues for policy change in the states that have direct democracy proves otherwise.

Legislative decisionmaking is inordinately messy. It is a cliché to quote Winston Churchill for the proposition that "democracy is the worst form of Government except all those other forms that have been tried."[247] But it would also be ironic in an Article using social choice to analyze direct democracy to ignore his central insight. The democracy Churchill had in mind bore no resemblance to the process of initiatives and referendums now commonplace among the states. The same is true of republicanism as Madison understood the term. Within virtually all normative democratic theories,[248] the legislative branch is regarded as the most democratic and the judiciary is considered to be the least.[249] Part of this, undoubtedly, is owing to the manner of selection and the lack of direct electoral accountability. But as this Article shows, another equally important part involves the process through which the institutional decisions are made. These two aspects of institutions are not disconnected; instead, they are inextricably linked. The judiciary is antidemocratic in large part because its decision rules generally force binary choices over decisions to affirm or reverse, with the significant possibility that in resolving the case, law will be made. This process will occur even if those called upon to make the decision, or those most affected by it, do not believe that the time is right for the question to be asked and answered with the result of establishing precedent. The manner of judicial selection merely reinforces the choice of a decision rule obligating the courts to decide.

By contrast, democratic lawmaking includes not only the power to resolve policy issues, but also the power to control the timing of decision.[250] Democratic policymaking institutions also have the power to weigh preference intensities rather than to register preferences strictly ordinally. Once again, the method of choosing legislators reinforces the decisionmaking rule by encouraging inertia, and thus pro-

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247 RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 83 (Suzy Platt ed., 1989) ("Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.").

248 *See supra* note 93.

249 In this respect, the republican tradition is particularly distrustful of judicial legitimacy in lawmaking. *See* Robert Justin Lipkin, *We Are All Judicial Activists Now*, 77 U. CIN. L. REV. 181, 183 (2008) (noting that rule by "elite, unelected, and unaccountable judges . . . is antithetical to republican democracy").

250 *See* STEARNS, *supra* note 97, at 198–204 (distinguishing judicial and legislative decisionmaking based on power to control timing of decisions).

moting legitimacy of outcomes, when there is not sufficient justification for policy change. Appellate courts lack these features; so too does direct democracy. This does not mean that direct democracy should play no role in policymaking. But it does mean that it is important to consider the antidemocratic features of direct democracy rather than assuming that the mere fact of electoral voting renders the process democratic.

Empirical surveys suggest broad general support for direct democracy.[251] Moreover, although the polling data is dated, one study shows that racial minorities favor direct democracy by a wide margin.[252] These data are important because they support the intuition that, in many areas of policymaking, direct democracy is widely accepted. This is not surprising. If asked whether it is appropriate for the electorate to play a larger role in policymaking, it would perhaps be surprising if the answer were no. Although minorities are part of the group seeking greater policy control, many proposed policies affecting demographic minorities do not survive legislative decisionmaking processes.[253] Over a broad range of issues, certainly not limited to those of minority concern, it is the very fact that legislatures fail to act, or act in middling ways, that pushes advocates toward direct democracy.[254]

III. THE POLICY IMPLICATIONS OF DIRECT (ANTI-)DEMOCRACY

We now turn to the implications for allocating policymaking between the two complementary institutions: legislatures and direct democracy. This Part briefly considers four sets of normative implications of the preceding social choice analysis. First, it compares the presumptive validity of voter initiatives versus referendums, especially in areas that implicate traditional equal protection concerns. This analysis returns us to the analysis of *Crawford* and *Seattle School District.* Second, it considers the implications of judicial debates con-

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251 *See*, *e.g.*, Shaun Bowler, Todd Donovan & Jeffrey Karp, Popular Attitudes Towards Direct Democracy 23 (Aug. 2003) (unpublished paper prepared for American Political Science Association Meeting), *available at* http://faculty.wwu.edu/donovat/bdkapsa03.pdf (citing studies finding broad popular support across four countries for direct democracy, and sixty-seven percent support in California and eighty percent support in Washington State).

252 *See* Matsusaka, *supra* note 30, at 201 (observing that "racial minorities overwhelmingly support the initiative process—57 percent to 9 percent for blacks and 73 percent to 3 percent for Latinos in a 1997 poll").

253 *See*, *e.g.*, *id.*

254 *See* Bowler, Donovan, & Karp, *supra* note 251, at 8 (describing hypotheses advanced by Professors Russell Dalton and Ronald Inglehart claiming that dissatisfaction with the functioning of representative democracy helps stimulate support for direct democracy as an alternative).

cerning possible constitutional limits on raising the level of decision-making for policies that affect particular minority groups. This discussion also has implications for *Crawford* and *Seattle School District*, along with *Hunter v. Erickson*[255] and *Romer v. Evans*.[256] Third, this Part considers the implications of direct democracy in the context of the Court's animus-based equal protection cases, including *Romer*, *United States Department of Agriculture v. Moreno*,[257] and *City of Cleburne v. Cleburne Living Center, Inc*.[258] Finally, it considers the famous footnote four from *United States v. Carolene Products Co.*,[259] and its underlying intuitions about legislative market failure as compared with this Article's observations about direct democracy. This Part concludes with some general observations about optimizing the complementarity of these two lawmaking institutions.

A. Initiatives Versus Referendums: Crawford *and* Seattle School District *Revisited*

Recall that in *Washington v. Seattle School District No. 1*, a Washington initiative banned school boards from using integrative busing absent a determination that busing was necessary to redress state or federal equal protection violations.[260] In *Crawford v. Board of Education*, a California referendum banned state courts from ordering integrative busing unless they determined that busing was necessary to redress an identified federal equal protection violation.[261] The Washington initiative contained the more liberal policy by allowing busing to redress not only federal, but also state, equal protection violations.[262] Despite this, and notwithstanding a crossover majority of Justices who favored like treatment of both cases,[263] two simultaneous majorities sustained the California amendment[264] but struck down the Washington initiative.[265]

Professor Eule offered an important early insight that might help to reconcile the results.[266] The Supreme Court has expressly rejected

255 Hunter v. Erickson, 393 U.S. 385 (1969).
256 Romer v. Evans, 517 U.S. 620 (1996).
257 U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).
258 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).
259 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
260 Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 462–63 (1982).
261 Crawford v. Bd. of Educ., 458 U.S. 527, 532 (1982).
262 *Seattle Sch. Dist.*, 458 U.S. at 463.
263 *See supra* Table 3.
264 *Crawford*, 458 U.S. at 545.
265 *Seattle Sch. Dist.*, 458 U.S. at 470.
266 Eule, *supra* note 54, at 1566–67.

arguments for treating state laws enacted through direct democracy differently from laws enacted through the legislative process.[267] And yet, Eule observed, it is notable that the Court sustained the state law enacted through a legislative referendum, but struck down the law enacted through a voter initiative.[268]

Despite the Court's rejection of the initiative process as a ground upon which to strike down a challenged state law,[269] Eule's observation carries important implications that are consistent with the preceding analysis. Although minorities can seek to protect themselves by blocking or modifying proposed legislation concerning them, they also can protect their interests in other ways, thus leveraging blocking or modifying powers to other ends.[270] If a policy enacted by a state legislature appears adverse to minority interests, it is certainly possible—although difficult if not impossible to verify empirically—that minority-negotiated benefits appear elsewhere in the overall complex package of legislation.[271] The payoffs for supporting a bill limiting busing to integrate public schools, for example, need not manifest themselves in moderated substantive policy (e.g., extending the phase-out period), although it certainly could. It could also manifest itself in some other seemingly unrelated bill or set of bills that bear no surface connection to the substance of school integration. For example, as the price for continuing busing, minority constituencies might support programs helping other communities for which they bear part of the general cost.

The argument is parallel to claims of unforeseen ripple effects following regulatory interferences in private markets. One need not demonstrate this at the level of specific forgone transactions. Just as price theoretical models generally explain that regulatory interventions affect the manner in which markets clear by disallowing, or by raising the cost of, certain private transactions,[272] so too judicial decisions *and plebiscites* affect the manner in which legislative quasi markets clear by disallowing, or raising the cost of, certain legislative

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267 *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 143–44, 151 (1912) (relying on Luther v. Borden, 48 U.S. 1 (1849), to conclude that constitutional challenge to law enacted through the initiative process presented a nonjusticiable political question).

268 *See* Eule, *supra* note 54, at 1566 ("In marked contrast to Initiative 350, Proposition 1 was a complementary plebiscite. . . . Admittedly, none of this is explicit in the two opinions.").

269 *Pac. States Tel. & Tel. Co.*, 223 U.S. at 151.

270 *See* Eule, *supra* note 54, at 1557.

271 *Id.* at 1556.

272 For a general introduction to price theory, see STEARNS & ZYWICKI, *supra* note 4, at 29–41.

exchanges. Even if there is no constitutional basis for striking down laws that emerge from direct democracy generally, there might be a normative basis for applying different presumptions to plebiscites that carry a different risk of affecting minorities in an adverse manner, including, most notably, initiatives, on the one hand, and referendums, on the other.

Striking down a law on constitutional grounds is costly to democratic processes. Of course the costs are frequently justified by the benefits of protecting individuals and groups who are treated adversely based upon illicit criteria, for example, race, sex, or sexual orientation,[273] or protecting individuals based upon rights embedded in, or inferred from, the Constitution. A cost of striking down legislation on constitutional grounds is that it undermines confidence among legislators, voters, and affected groups that the outcomes of future legislative negotiations, respecting substance or unrelated matters, will be preserved in the courts. While rejecting an initiative might not always have the same consequence—although it can have path-inducing or rent-extracting effects[274]—sustaining an initiative potentially holds the same consequence as constitutional judicial review, namely undoing implicit agreements that form part of a broad and more complex legislative bargain.

Legislative referendums, however, pose fewer risks. Even if the referendum is one that identifiable minority interests oppose, the referendum itself follows the series of negotiated legislative processes. Before the bill becomes law, the legislature refers the matter to the electorate for an up-or-down vote. This cuts the governor out of the deal, substituting a majority of the electorate in his or her place, and there might be reason to assume that governors are systemically more sympathetic to minority concerns than large electoral constituencies. In fact, the executive veto has been shown to protect interest groups against having legislatures renege on prior legislative payoffs.[275] To the extent that demographic minorities benefit from this gubernatorial repeal-checking function, replacing a gubernatorial veto with an elec-

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273 This is not to suggest that the normative concerns for these three categories are the same. For a discussion of race-based equal protection jurisprudence, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 690–751 (3d ed. 2006); for a discussion of gender-based classification, see CHEMERINSKY, *supra*, at 752–66; for a discussion of sexual orientation classification, see CHEMERINSKY, *supra*, at 812–13.

274 *See supra* note 224 and accompanying text.

275 *See* W. Mark Crain & Robert D. Tollison, *The Executive Branch in the Interest-Group Theory of Government*, 8 J. LEGAL STUD. 555, 557–58, 561–66 (1979) (providing interest group account of executive veto with supporting data).

toral veto in the form of a referendum might be a cause for concern. Despite this, the relatively large number of veto gates in the legislature, as compared with plebiscites, provides such groups substantially greater protection in the context of referendums, which eliminate only the veto, than of initiatives, which eliminate all veto gates.

This Article does not suggest that the *Seattle School District* and *Crawford* majorities envisioned this sort of analysis but kept it to themselves. In addition, none of this undermines the cycling anomaly across these cases. So long as a majority of the deciding Justices regarded the cases as indistinguishable, the opposite results in the two cases underscore the voting anomaly.[276] Rather, along with Eule, this Article suggests that despite doctrinal assertions to the contrary, the Justices might have general intuitions about the value of legislative versus other forms of decisionmaking that affect their presumptions concerning particular plebiscites enacted with or without a legislative imprimatur.

B. Level Shifting in a Multilevel Democracy

In his controversial *Romer v. Evans* dissent, Justice Scalia took Justice Kennedy to task for applying rational basis scrutiny to Colorado Amendment 2, which banned sexual orientation as a protected category in Colorado state or municipal antidiscrimination laws, while nonetheless striking the law down.[277] Although Justice Scalia's discussion of whether minority sexual orientation provides the basis for suspect classification status is certainly more attention-getting, embedded within Scalia's analysis are important assertions concerning the role of decisionmaking processes themselves as a potential rational justification in support of a law. Scalia maintained that if the relevant test is rational basis, it is not irrational for a majority of Colorado voters to remove policymaking from the municipal to the state level in an area in which, Scalia claimed, a majority of Colorado voters had determined that policymaking had been driven by disproportionate influence of advocates for the LGBT community.[278]

Because Scalia's analysis is important, it is quoted at length:

> The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have re-

276 *See supra* text accompanying notes 176–99 (describing voting anomaly in *Seattle School District* and *Crawford*).

277 Romer v. Evans, 517 U.S. 620, 636, 639–40 (1996) (Scalia, J., dissenting).

278 *Id.* at 636, 640–41, 645–47.

> course to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle . . . . And it seems to me most unlikely that any multilevel democracy can function under such a principle. For *whenever* a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (*i.e.*, by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. To take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen. Once such a law is passed, the group composed of such relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection, which is why the Court's theory is unheard of.
>
> The Court might reply that the example I have given is *not* a denial of equal protection only because the same "rational basis" (avoidance of corruption) which renders constitutional the *substantive discrimination* against relatives (*i.e.*, the fact that they alone cannot obtain city contracts) also automatically suffices to sustain what might be called the *electoral-procedural discrimination* against them (*i.e.*, the fact that they must go to the state level to get this changed). This is of course a perfectly reasonable response, and would explain why "electoral-procedural discrimination" has not hitherto been heard of: A law that is valid in its substance is automatically valid in its level of enactment. But the Court cannot afford to make this argument, for as I shall discuss next, there is no doubt of a rational basis for the substance of the prohibition at issue here. The Court's entire novel theory rests upon the proposition that there is something *special*—something that cannot be justified by normal "rational basis" analysis—in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level. That proposition finds no support in law or logic.[279]

Other Justices have advanced similar arguments in the past. Consider the following excerpt from Justice Powell's dissenting opinion in *Seattle School District*:

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279 *Id.* at 639–40.

> Under today's decision, this heretofore undoubted supreme authority of a State's electorate is to be curtailed whenever a school board—or indeed any other state board or local instrumentality—adopts a race-specific program that arguably benefits racial minorities. Once such a program is adopted, *only* the local or subordinate entity that approved it will have authority to change it. The Court offers no authority or relevant explanation for this extraordinary subordination of the ultimate sovereign power of a State to act with respect to racial matters by subordinate bodies. It is a strange notion—alien to our system—that local governmental bodies can forever pre-empt the ability of a State—the sovereign power—to address a matter of compelling concern to the State. The Constitution of the United States does not require such a bizarre result.[280]

Finally, in an earlier related case, *Hunter v. Erickson*, Justice White expressed a contrary view in striking down an "automatic referendum" demanding separate ratification by a majority of city voters as a precondition to passing a municipal housing antidiscrimination law.[281] White explained:

> Only laws to end housing discrimination based on "race, color, religion, national origin or ancestry" must run § 137's gantlet. It is true that the section draws no distinctions among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end. But § 137 nevertheless disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor. The automatic referendum system does not reach housing discrimination on sexual or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes.
>
> Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a ref-

280 Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 494–95 (1982) (Powell, J., dissenting).

281 Hunter v. Erickson, 393 U.S. 385, 390–91 (1969).

> erendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot, § 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others.[282]

These opinions raise the question whether level shifting via plebiscite, and more specifically via initiative or automatic referendum, justifies a closer look at the law challenged on independent grounds when the underlying claim arises separately from the nonjusticiable Guarantee Clause. For present purposes, hold aside Justice Scalia's contentious claim respecting alleged disproportionate lobbying influence by the LGBT community over inclusion in state and local antidiscrimination laws.[283] Whether or not Justice Scalia is correct that any argument for a closer judicial look following a ratcheting up of the required level of lawmaking for future policy changes is unheard of in a multilevel democracy, the interesting question is whether there is a sound normative basis for advocating a closer look based on this structural shift on the *Romer* facts. If the issue is simply about level shifting, it would be difficult to refute the claim advanced by Justice Scalia, as well as Justice Powell in *Seattle School District*, that in such cases, lower levels of governance could exert a counterintuitive policy lock-in effect. By contrast, in *Hunter*, Justice White focuses solely on the groups affected by the automatic referendum, without considering the potential lock-in effect.

At first blush, Justice Scalia's argument that lower levels of government cannot be permitted to lock in policy against change by higher levels of government appears unassailable. Providing higher status to policies enacted at higher levels is, after all, an integral feature of a multitiered lawmaking system. Federal statutes are subject to constitutional judicial review and thus are subject to the Constitution as higher law. The same logic should apply within states. Local laws are inferior to state law, and state law is inferior to state constitutional law, all of which is subordinate to federal law. Justice White's argument appears to merge two questions: Is there a substantive rule against level shifting? And is there a prohibition against treating beneficiaries of housing discrimination laws—racial minorities primarily among them—differently? The latter claim is entirely consistent with

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282 *Id.* (citation omitted).

283 *See*, *e.g.*, Clifford J. Rossky, *Hard-Fought Gay Rights Victories Do Not Prove Group's 'Political Power*,' L.A. DAILY J., Sept. 26, 2007, at 6 (offering contrary assessment of relative lobbying power of LGBT community).

principles of equal protection, but the former one is swept through the equal protection gate without parsing it as an independent claim.

And yet, if Justice White has merged two claims in *Hunter*, so too has Justice Scalia in *Romer*. The issue is not merely whether level shifting is permissible. Of course it is. Rather, the question is whether level shifting that targets demographic minorities in a manner that effectively precludes their meaningful participation in democratic processes and that threatens (and might actually accomplish) diminishing gains secured through that process provides the basis for closer scrutiny of the underlying claim. Notice the nature of the laws that the Court has struck down: an automatic referendum that allows a majority of the electorate to undo the gains minorities have secured through the city council, in *Hunter*,[284] and an initiative prohibiting inclusion of protected minorities in antidiscrimination laws without an opportunity to signal through the state-level veto gates the intensity with which the LGBT community embraces its view of the relevant policy question, in *Romer*.[285]

This analysis might help to resolve the apparent tension between *Crawford* and *Seattle School District*. A legislative referendum comes about only after the legislative process—veto gates and all—is complete. The process cuts the governor out of the deal, instead conferring alternative veto power upon the electorate. This is notable inasmuch as the gubernatorial veto might preserve prior legislative payoffs to affected groups,[286] might prove the last venue for registering intensities of preference, and might facilitate tradeoffs among disparate constituencies. Legislative referendums lack some of these features, but they do not prevent legislators from negotiating across bills and from thereby accounting for intensities of preference at multiple veto gates.

This analysis, and the *Crawford* result, appear in tension with *Hunter*, but notice that in *Hunter*, every municipal ordinance targeting fair housing was subject to the automatic referendum procedure prior to taking effect.[287] This was not an isolated law sent to the voters for ratification or defeat, but rather a prospective rule governing all laws in a broad category.[288] As a result, those most affected by the law could not ensure that their seemingly successful bargains over munici-

284 *See Hunter*, 393 U.S. at 386.

285 *See* Romer v. Evans, 517 U.S. 620, 623–24 (1996).

286 *See supra* note 275.

287 *Hunter*, 393 U.S. at 387.

288 *See id.*

pal legislative policy would ever be paid off since a majority of the electorate could always undo the deal.

C. Rational in Theory, but Fatal in Fact: The Animus Cases[289]

The preceding analysis also provides the basis for insights into the Supreme Court's animus cases, including *Romer v. Evans*, which rested on the analysis developed in *City of Cleburne v. Cleburne Living Center, Inc.* and *United States Department of Agriculture v. Moreno*. *Cleburne* involved a denial of a special use permit to construct a home for mentally retarded adults,[290] and *Moreno* involved a denial of food stamps to households with unrelated individuals as applied to, among others, the mother of a hearing impaired girl who could not afford to live near a special school and thus moved in with another woman on public assistance.[291]

Neither of these earlier cases involved direct democracy. In each case, despite applying deferential rational basis review, the Court struck down the challenged law on the ground that it evinced a "bare . . . desire to harm a politically unpopular group,"[292] thereby rendering rational basis review fatal. Although each case is analytically problematic, the doctrinal maneuvers are not difficult to understand. In each case, there is a rational justification independent of illicit animus, and under traditional rational basis scrutiny, one rational justification is sufficient. In *Moreno*, despite the compelling circumstances affecting the particular claimant and the fact that the statutory scheme contains independent welfare fraud provisions,[293] it is not irrational to include supplemental provisions that prohibit benefits to households with unrelated individuals, which are more likely than households with connected families to include members for purposes of receiving welfare benefits.[294] In *Cleburne*, although unpleasant, it is not irrational that homeowners would be concerned that a home for mentally retarded adults might reduce property values. Poli-

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289 *Cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment))).

290 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435 (1985).

291 U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 532 (1973).

292 *Cleburne*, 473 U.S. at 447 (quoting *Moreno*, 413 U.S. at 534).

293 *Moreno*, 413 U.S. at 536 ("[I]t is important to note that the Food Stamp Act itself contains provisions, wholly independent of § 3(e), aimed specifically at the problems of fraud and of the voluntarily poor.").

294 *Id.* at 546 (Rehnquist, J., dissenting) ("This unit provides a guarantee which is not provided by households containing unrelated individuals that the household exists for some purpose other than to collect federal food stamps.").

cies that preserve property values are hardly irrational. Of course, similar arguments were rightly rejected as a justification for race- and religious-based restrictive covenants in place throughout much of United States history.[295] The analytical difficulty in *Cleburne* is that, unlike in these contexts, the Court was not willing to classify mentally retarded adults as a suspect or quasi-suspect class.[296] In both *Cleburne* and *Moreno*, the Court ignored or rejected seemingly rational justifications, instead homing in on a single illicit rationale, and then concluded that this rationale alone renders the challenged law illicit. That, of course, is not standard rational basis review.

Despite this, the justification for the doctrinal maneuver is easily explained. In many contexts, there are good reasons to distinguish mentally retarded adults from the general population: for example, prohibitions on driving and exemptions from particular obligations on contract.[297] Declaring mentally retarded adults suspect, or even quasi-suspect, would call into question the presumptive validity of benign laws distinguishing this group from adults more generally. Similarly in *Moreno*, declaring recipients of welfare benefits suspect or quasi-suspect would undermine a host of laws that impose reasonable conditions on the receipt of benefits. And yet, the Court sought to end a regime that had the effect of imposing unfair conditions on a group of obviously worthy recipients.

In effect, the Court read out a legitimate rationale for each law to produce a desired result without having to incur the cost of elevated scrutiny for the affected class. These cases demonstrate the Court's willingness to employ a doctrinal sleight of hand to fit cases within the illicit animus category to avoid the administrative consequences associated with more candid elevated scrutiny. By excluding other rational justifications to then posit that the actual rationale is illicit, for cases in the animus category, rational in theory becomes "fatal in fact."[298]

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295 *See Cleburne*, 473 U.S. at 440. For the classic judicial treatment, see *Shelley v. Kraemer*, 334 U.S. 1, 13–18 (1948), which bootstrapped judicial enforcement of a racially restrictive covenant to avoid the state action barrier that would otherwise have permitted a private agreement to limit property transfers based on race. One decade earlier, the Supreme Court had already signaled that state laws distinguishing on the basis of race might be subject to closer scrutiny. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

296 *Cleburne*, 473 U.S. at 442. For a discussion of *Carolene Products*, see *infra* Part III.D.

297 *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring).

298 For a similar maneuver by Justice Brennan, converting rational basis to the equivalent of per se invalidity in the context of the dormant Commerce Clause doctrine, see *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 680–82 (1981) (Brennan, J., concurring in the judgment). For a more detailed analysis, see Stearns, *supra* note 65, at 1256–57.

Cleburne and *Moreno* took on added significance when the Court extended its animus analysis to *Romer v. Evans.* The prior analysis, however, suggests that the animus rationale might have stronger footing in the context of targeted initiatives. Although Colorado Initiative 2 displaced both state and local enactments, the failure of the state legislature to enact policy on this issue might once more suggest successful state lobbying by the LGBT community, or more generally, a policy decision to leave this to local decisionmaking. That is the very policy choice, Justice Scalia argued, that Colorado voters rallied against.[299]

As previously discussed, raising the level of decisionmaking in a multilevel democracy is fair game.[300] The problem in *Romer*, however, is that the initiative process subjected this minority community to raw majoritarian preferences respecting the underlying policy—inclusion in various antidiscrimination laws—and also the policy choice respecting the level of decisionmaking itself. Despite the test's literal wording, the animus rationale need not entail hatred toward a politically unpopular group. It might be sufficient that the process disallows a group to claim the benefit of prior legislative successes (leaving this to local rulemaking) or to express intensities of preference through a legislative process prior to sending the question to the electorate for an up-or-down vote. If the Colorado General Assembly had first vetted the proposal past its veto gates, after which the resulting proposal was pitched to the voters as a substitute veto, the illicit animus argument would be more difficult to make. Instead, the initiative process forced a decision on an issue for which a broad constituency of voters might have been largely indifferent.

D. Carolene Products *Footnote Four Revisited*

By modern lights, *United States v. Carolene Products Co.* serves fairly bland fare. The Supreme Court rejected a due process challenge to a federal statute banning filled milk.[301] The law rested on the expressed desire to protect families, and especially children, from an adulterated product substituting butterfat with vegetable oil.[302] Public choice scholars who have scoured the record have exposed the cost of

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299 Romer v. Evans, 517 U.S. 620, 646–47 (1996) (Scalia, J., dissenting).

300 *See supra* Part III.B.

301 United States v. Carolene Prods. Co., 304 U.S. 144, 151, 154 (1938).

302 *See* Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397, 400–20 (detailing the history of *Carolene Products* and the Filled Milk Act of 1923, 21 U.S.C. §§ 61–63 (2006)).

this regulatory regime, and the sour motivations of the supportive fresh milk industry.[303] As Professor Geoffrey Miller has shown, filled milk was a valuable technological innovation benefiting poor rural families lacking electricity and thus refrigeration.[304] Filled milk, a canned product with a long shelf life, provided children with a dairy substitute between fresh milk deliveries, which were only good until the ice block melted.[305]

Although *Carolene Products* signaled the end of close scrutiny for economic regulation following the *Lochner v. New York*[306] era, it is, of course, better known for its famous footnote four.[307] There, Justice Stone posited that closer judicial scrutiny than rational basis might be warranted in cases involving protections set out in the Constitution and also affecting "discrete and insular minorities."[308] Stone's intuition rests on what modern scholars would call political market failure. When minorities are outnumbered in the legislative process, they often fare poorly. One need go no further than Jim Crow to see the point.

Nothing in this Article belies the claim that when political markets fail, they often harm demographic minorities. But not all political institutions manifest failure in the same way. One irony of this Article's analysis is that, to the extent political market failure follows the law of larger numbers (relative to the minority class that is), then short of judicial review, legislatures are likely better equipped to protect minority concerns. That is because legislatures offer multiple veto gates at which to register intense opposition. Of course legislatures often produce bad results, but as between legislatures and direct democracy, and especially initiatives, there is good reason to suspect that the latter is relatively less solicitous of concerns affecting discrete and insular minorities. The Court has formally rejected the process of lawmaking as the basis of presuming against constitutionality.[309] This is undoubtedly bound up in the Court's longstanding treatment of Guarantee Clause claims as nonjusticiable.[310] Although Justice Brennan

303 *See id.* at 423 (describing the role of milk industry in passing law).

304 *See id.* at 400.

305 *See id.*

306 Lochner v. New York, 198 U.S. 45 (1905).

307 *See* Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1087 & n.4 (1982) (describing *Carolene Products* footnote four as "the most celebrated footnote in constitutional law").

308 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

309 *See supra* note 267.

310 *See* Baker v. Carr, 369 U.S. 186, 218 (1962); Luther v. Borden, 48 U.S. 1, 42 (1849).

cleverly maneuvered an independent equal protection claim from a violation of equally weighted voting,[311] formally raising the stakes for laws enacted through direct democracy would require revisiting over a century and a half of settled doctrine.

As the preceding analysis shows, however, the Court has sent signals in such cases as *Hunter*, *Seattle School District*, and *Romer*. These cases demonstrate that sometimes, when the results seem particularly problematic, the Court is willing to consider process, and in particular, the antidemocratic aspects of direct democracy, including voter initiatives and automatic referendums, as a factor in decisionmaking.

E. What Direct Democracy Does Well

Within states that use it, direct democracy is a complement to, not a substitute for, legislative lawmaking. The normative question is when this complementarity functions well. In the context of groups fitting the criteria of "discrete and insular minorities"—whether or not formally categorized as such—there is reason for concern about direct democracy, especially in the form of citizen initiatives and automatic referendums. But other policy questions—those that go to budgetary allocations; structural aspects of government (term limits, tenure of judges, and the like), when expressed neutrally; and issues of taxation—might be well suited to plebiscites.[312] The plebiscite process is not the only, or necessarily the preferred, method of resolving such policy issues, but it is a reasonable one when preferences align along isolated policy dimensions and when the question is the level at which to set policy. Having the electorate decide along such policy spectra potentially improves political satisfaction. When targeting legislative reform, plebiscites carry the added benefit of reducing agency slack. One need not be a public choice theorist, or a cynic, to recognize that legislators might not be the best decisionmakers respecting policies that directly affect them.

Direct democracy in the form of legislative referendums is also a potentially meritorious way for legislators to validate policies that rest on inevitable judgment calls concerning which it is difficult to precisely gauge electoral preferences. Although polling provides valuable information, polls are not universally trustworthy and lack

311 *Baker*, 369 U.S. at 237.

312 *See* Richard L. Hasen, *Comments on Baker, Clark, and Direct Democracy*, 13 J. CONTEMP. LEGAL ISSUES 563 (2004) (defending plebiscites where helpful in avoiding legislative agency costs).

institutional legitimacy. The timing of referendums, because they are tied to fixed election dates, is also harder to manipulate.

Although the empirical data on direct democracy suggests popular support, at least in those states that have it, many scholars have identified a range of concerns about the quality of laws enacted, the placement of policy along relevant issue spectra, and outcomes that fail to account for the particular interests of racial and other minorities.[313] Several of the conclusions in this Article have been expressed elsewhere in the literature. The benefit of the social choice analysis is providing a common analytical framework for evaluating competing claims respecting direct democracy.

Conclusion

Perhaps the most important contribution of social choice is demonstrating that outcomes do not exist independently of the processes that generate them. This insight forces consideration not only of the merits of outcomes, but also of the legitimacy of the process. Both the process and legitimacy of legislating are affected by the substantive scope of legislative lawmaking power and by the risk that external institutions will not honor those deals its members have made.

The history of judicial review has long been concerned with the institution's costs to democratic processes. Plebiscites resemble judicial review in that they have the potential to undo implicit or explicit legislative bargains. But there is an important difference. Judicial decisions are grounded in legal principles and are generally backed up with written opinions, especially when striking down legislation. Plebiscite voters need not offer any justifications, written or otherwise.

In some respects, the arguments in this Article might be captioned "Direct (Anti-)Republicanism." After all, the Framers never anticipated direct democracy in its present form. They anticipated, and indeed insisted upon, legislative filters, at least at the federal level. But that is the point. Because outcomes are never entirely independent of the processes that generate them, democracy is not self-defining. The meaning of democracy turns on our acceptance of legitimating decisional rules that transform our preferences into public policy. The question of how we set up the rules is as, if not more, important than the answers to any specific policy questions our democratic system is called upon to provide. When Churchill lamented democratic processes, except in comparison to other systems, he was

313 *See supra* Part I.

not chiding town meetings. He understood that legislative decisionmaking, and sloppy legislative decisionmaking at that, *is* democratic decisionmaking, or at the very least is democratic decisionmaking in its most practical form. Madison understood that too. This system is legitimated by the complex filters that we as a society have chosen to impose in transforming constituent inputs into policy outputs and by that most important legislative power: the power not to act.

The claim of this Article is not that direct democracy is good or bad. Rather, the claim is that it is antidemocratic in an important sense. Plebiscites are antidemocratic when compared with the features of democratic decisionmaking that characterize legislatures, on the one hand, and the antidemocratic features of appellate courts, on the other. Recognizing these important characteristics of a pervasive institution will not end past debates on the wisdom of direct democracy. At a minimum, however, it might help to frame future ones.