Direct (Anti-)Democracy

Maxwell L. Stearns*

Abstract

Direct democracy debuted in the United States in the 1890s as a means of checking against apparent state legislative corruption and became less prevalent following the Progressive Era. In recent decades, initiatives and referendums have made striking comeback, so much so that resting intuitions about state lawmaking processes on lessons from high school civics or even separation of powers models from constitutional law is not simply naïve. It is often profoundly mistaken. In approximately half the United States, lawmaking over wide ranging matters of public policy permits the voting public to cut the legislature, the governor, or both entirely out of the process. In recent years, several states have relied upon direct democracy to press change on divisive social and economic issues—including affirmative action, same-sex marriage, and protections against property tax increases or non-public goods takings—in addition to issues related to structural aspects of governance—including state and federal term limits.

Scholars writing from a range of perspectives have expressed strong disagreement as to the wisdom and efficacy of direct democracy. The literature reveals sharp divisions concerning whether initiatives and referendums produce outcomes that are more (or less) democratic, civic minded, efficient, or solicitous of minority concerns than traditional legislation. Scholars have compared direct democracy with representative lawmaking based upon such norms as citizen engagement, deliberation, opportunities to register strength of preference, possibilities of compromise, and even the susceptibility of enacting, or avoiding, outcomes that embed intransitive (or cyclical) voting preferences. One persistent difficulty that has plagued this rich literature has been identifying a common set of normative benchmarks for comparative institutional analysis. Without such benchmarks, arguments about the relative merit of these two lawmaking systems confront problems of selective illustrations, data availability and measurement, and contestable premises.

This Article offers a novel methodological approach that helps to overcome some of these analytical difficulties. Relying upon social choice, the Article identifies a common set of normative benchmarks for engaging in the relevant institutional comparisons. This includes not only direct democracy and representative legislatures, but also appellate judicial tribunals. The analysis demonstrates that in contrast with the social choice profile of a representative legislature, the social choice profile of direct democracy includes critical features that are (rightly) considered anti-democratic in the context of judicial decision making. Both institutions—appellate tribunals and direct democracy—break off discrete legal or policy questions, generally cast them along a single normative dimension, and ensure an outcome that under optimal, or at least preferred, conditions coincides with the preferences the institution’s median member. By contrast, legislatures spread policy making over multiple issue dimensions and allow members and affected constituents not only to register ordinal preferences along discrete policy dimensions, but also to express preference intensities respecting particular issues.

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of interest. In contrast with both direct democracy and appellate judicial tribunals, legislatures have developed in a manner that often avoids collective action on proposals and that permits the institution to thwart the ideal point of the median members along particular policy dimensions.

The analysis highlights an irony related to the infamous footnote 4 in Carolene Products v. United States. In footnote 4, a mainstay of modern equal protection jurisprudence, Justice Stone rested upon intuitions concerning perceived legislative market failures—specifically when laws implicate discrete and insular minorities—that he believed judicial processes could correct. Footnote 4 might hold even greater relevance at least respecting a subset of policies enacted through direct democracy, where discrete and insular minorities are necessarily outnumbered and where the choice mechanism ensures outcomes based on the voters’ ordinal preference rankings, than in representative legislatures, where affected constituents can register cardinal preferences and where the institution retains the power of inertia. The Article holds important implications not only for various scholarly claims about direct democracy, but also for several bodies of constitutional doctrine and, more generally, for democratic theory.
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Introduction

In a standard introductory constitutional law course, it is customary to present federal and state governance structures as essentially parallel. This is not merely a matter of convenience—although to be sure it is pedagogically convenient—but also it is consistent with historical intuition. The framers designed the United States Constitution to embed what they regarded as a core set of republican ideals, and then guaranteed each state a republican form of government. As is true in other areas of constitutional law, it is not surprising that states came to emulate the federal constitutional structure in many significant respects, although subject to inevitable variation. And yet, there are profound limits to the federal-state structural analogy.

Some distinctions, while important, do not fundamentally challenge the claim of structural parallelism. Congress must have a constitutional delegation as a precondition to the exercise of legislative power (a legislative “floor”) and, in addition, is subject to upper limits on its powers taking the form of independent constitutional constraints (a legislative “ceiling”).¹ State legislatures, by contrast, operate on a model of plenary, or presumed, powers, and thus operate without a floor, but like Congress are subject to independent constitutional limits.² State gubernatorial powers also differ from the powers of the President. While the special powers of the President, lacking a state counterpart, are obvious,³ an equally important distinction involves powers that governors hold but the President lacks. State governors have a relatively more direct role in lawmaking. While the President generally confronts a binary choice to take or leave legislation packaged by Congress, most state governors hold item veto power, can enhance or lower budgetary allocations, and in at least one instance, can even alter isolated statutory wording.⁴ Federal and state judiciaries also have different structural features. Perhaps the most

² In fact, in state legislatures, the ceiling is lower because under the Supremacy Clause, treaties and laws in pursuance of the Constitution are also supreme and, in addition, state legislatures are subject to independent state constitutional constraints. See Tom Ginsburg & Eric A. Posner, Subconstitutionalism, 62 STAN. L. REV. 1583, 1604 (noting that some state judiciaries have interpreted state constitutions to provide more protection than the federal Constitution). There are other differences as well. Unlike Congress, many states legislatures are subject to item vetoes, stricter germaneness rules, and balanced budget requirements. See Bruce E. Cain & Roger G. Noll, Malleable Constitutions: Reflections on State Constitutional Reform, 87 TEX. L. REV. 1517, 1520 (2009) (discussing state constitutional innovations in legislating). In addition, whereas Congress is bicameral, Nebraska, which has a unicameral legislature, demonstrates that this is not required. NEB. CONST. art. III, § 1 (“The legislative authority of the state shall be vested in a Legislature consisting of one chamber.”).
³ For example, the President is Commander in Chief of the armed forces and has the authority, subject to Senate ratification, to enter treaties with foreign nations. US CONST. art. II, § 2 (“The President shall be commander in chief of the Army and Navy of the United States . . . [h]e shall have power, by and with the advice and consent of the Senate, to make treaties . . . .”).
⁴ See State v. ex Rel Kleczka v. Conta, 82 Wis. 2d 679, 715, 264 N.W.2d 539, 535 (1978) (upholding gubernatorial “provisos and conditions to an appropriations so long as the net result . . . is a complete, entire, and workable bill which the legislature could have passed in the first instance.”).
notable difference is that while Article III judges are appointed for life during good behavior, many state judges are elected.5

While these differences are important, none marks a fundamental departure from the core set of republican principles. Even the notably enhanced gubernatorial role in state lawmaking does not undermine the essential republican scheme: A representative legislature operates as the primary filter between electoral demands and the enactment of policy; a system of checks and balances allows complementary institutions, like the executive veto or judicial review, to step up when other structural filters prove inadequate; and the least politically accountable branch is in place as a final check to ensure that the more politically accountable branches operate within defined constitutional parameters.6 In its simplest form, generally speaking, within both the federal and state systems, legislatures make law, the executive enforces that law, and the courts interpret the law and occasionally subject the law to the power of judicial review.

And yet, in an important respect, the preceding depiction of the federal-state analogy is not merely naïve. It is profoundly mistaken. Within half the states, the lawmaking process has the potential to cut the legislature, the governor, or both, entirely out of the deal. Initiatives, in which the voters themselves initiate the ballot measure, exclude the legislature and the governor from the process of lawmakers altogether. The initiative process can be used to amend the state constitution or to legislate, but even when used to legislate, the state general assembly often lacks the power to change the resulting policy, a result that requires another plebiscite.7 Referendums,8 in which the general assembly refers the ballot measure to the electorate for an up-or-down vote, bypass the governor, instead empowering the electorate to ratify or reject what is in effect a proposed legislative policy.

Many important Supreme Court cases have grown out of direct democracy within the states. Because the Court has not articulated a different standard of review based upon whether the law in question was enacted through traditional legislation or direct democracy, it might appear that this form of legislating fell within the range of anticipated variation that the Constitution’s framers anticipated. This intuition might be reinforced by the Supreme Court’s repeated insistence that claims arising under the clause guaranteeing each state a republican form of government are nonjusticiable political questions.9

5 Compare e.g., U.S. CONST. art. III, § 1 (“The judges, both of the supreme and the inferior courts, shall hold their offices during good behaviour . . . .”), with OKLA. STAT. ANN. tit. 26, § 11 (West 2010) (governing the election of judicial officers, including justices of the Oklahoma Supreme Court). For a comprehensive discussion of states with elected judiciaries, see generally Stephen Choi et al., Professionals or Politicians: The Uncertain Empirical Case for An Elected Rather Than Appointed Judiciary, 26 J.L. ECON. & ORG. 290 (2010). In addition, while federal courts are most often of general jurisdiction, state judiciaries are often subdivided into specialized courts. See Lawrence Baum, Probing the Effects of Judicial Specialization, 58 DUKE L.J. 1667, 1672–73 (2009) (discussing the differences between federal and state judicial specialization, and noting that “there is a good deal of specialization within state trial courts that statewide organization charts do not disclose”).

6 Even in states with elected judiciaries, various professional rules preclude the sorts of policy disclosures that are commonplace in the political branches. Cf. MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. n.1 (2007) (“Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.”), available at http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

7 See infra note __, and cite therein.


9 Indeed, the Court has specifically applied this doctrine to prevent a claim that the initiative process violates the republican principle. See Pac. States. Tel. & Tel. Co. v. State of Oregon, 223 U.S. 118, 150–51 (1912) (dismissing
The history of direct democracy, however, challenges these intuitions. Some scholars point to the infamous New England Town Meeting, and even the process of constitutional ratification itself, as precursors to, or at least as informing debates on, modern direct democracy among the states. And yet, these examples are of limited value in the context of modern plebiscites. While town meetings are certainly cumbersome, they do not foreclose tradeoffs among multiple policy issues at one time. And claiming support for modern direct democracy in the process of constitutional ratification merely invites problems of infinite regress. In fact, the practice of direct democracy among the states for the resolution of discrete issues of public policy emerged fully a century after the framing period, in the late 1890s, and forty years after the somewhat peculiar, and contested, decision of Luther v. Borden, which is widely credited with (or blamed for) rendering guarantee clause claims nonjusticiable.

The framers did not experience, or anticipate, the processes of initiatives and referendums in the form that is now increasingly commonplace among the states and increasingly important with respect to high profile matters of public policy. Some form of direct democracy is now available in about twenty-four states, although most referendum and initiative activity has centered on California, Oregon, North Dakota, and Colorado. Direct democracy has become increasingly prevalent as applied to salient and divisive legal and political issues.

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challenge to a constitutional amendment adopted initiative process in Oregon based upon “the leading and absolutely controlling case” of Luther v. Borden, 48 U.S. (7 How.) 1 (1849), which it interpreted to render guarantee clause claims nonjusticiable political questions).

10 The constitution was ratified by popularly elected state ratifying conventions rather than by state legislatures. U.S. CONST. art. VII (“The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.”); see also Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat) 304, 324 (1816) (“The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by ‘the people of the United States.’”).

11 See, e.g., Clayton P. Gillette, Is Direct Democracy Anti-Democratic?, 34 WILLAMETTE L. REV. 609, 615-16, 634 (1998). Professor Gillette refutes claims that the framers were unaware of direct democracy based upon New England town meetings and the process of constitutional ratification itself. Id. at 616 (noting for example that Rhode Island employed a state-wide referendum to ratify the Constitution using a process of town meetings). Gillette further responds to arguments against the binary choice nature of plebiscites observing: “[T]he ratification of the Constitution involved submission of the draft to the states on a ‘take it or leave it’ basis. States were not entitled to amend the Constitution, but only to adopt or reject it.” Id. at 634.

12 This is also closely connected with the Godel’s incompleteness theorem. The Constitution had to be somehow ratified before it could take effect, and it is no criticism of the Constitution that the ratification process did not abide the very requirements for lawmaking or constitutional amending that the not-yet-ratified Constitution set up. For general discussions of the relationship between Godel’s theorem and various aspects of legal reasoning, see John Rogers & Robert Molzon, Some Lessons about the Law from Self-Referential Problems in Mathematics, 90 MICH. L. REV. 992 (1992).


14 For an article that challenges this reading of the case, see Robert J. Pushaw, Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis, 80 N.C. L. REV. 1165, 1194 (2002) (contending that the Luther Court did not hold that all claims arising under the Guarantee Clause raised nonjusticiable political questions).


16 As explained below, it is important to distinguish initiatives, which are a subset of referendums in which voters initiate the process of placing a referendum on a ballot, from the referendum process more generally. See Julian N. Eule, Judicial Review of Direct Democracy, 99 YALE L.J. 1503, 1510–12 (1990) (detailing the differences between various forms of direct democracy, and noting that initiatives bypass the legislative and executive branches completely while referendums generally require the legislature to act and the voters to ratify).
In recent years, several states have relied upon various forms of direct democracy to press changes on divisive social and economic issues—including affirmative action, same-sex marriage, and protections against property tax increases or non-public goods takings—and on issues related to structural aspects of governance—including state and federal term limits. Perhaps not surprisingly, therefore, issues taken up by direct democracy have both affected and been shaped by developments in constitutional law. Consider the following: In a referendum that resulted in Nordlinger v. Hahn, California voters sought to protect long-term property owners from the risk of displacement that would otherwise have resulted from current-value tax assessments during a period of dramatic increases in housing prices. In the voter-initiated referendum leading up to Romer v. Evans, Colorado voters categorically excluded sexual preference minorities as such from protection under state and local anti-discrimination statutes. In a referendum that resulted in U.S. Term Limits, Inc. v. Thornton, Arizona voters sought to limit federal congressional terms.

The relationship between constitutional lawmaking and direct democracy has occasionally worked in the other direction as well. Controversial Supreme Court decisions sometimes spur direct democracy. Several states opposed to the controversial Supreme Court decision, Kelo v. City of New London, have passed initiatives or referendums banning state or local takings that transfer property to private economic developers absent a public use. As part of a growing campaign to end racial preferences in state institutions of higher learning, a practice given limited approval in Regents of the University of California v. Bakke, and a stronger—if time limited—endorsement in Grutter v. Bollinger, several states, including California and Michigan, relied upon initiatives to discontinue race-based affirmative action programs.

Scholars writing from a range of perspectives have expressed divergent views on the wisdom and efficacy of these and other illustrations of direct democracy. The literature demonstrates sharp differences on whether initiative and referendum processes tend to produce policy outcomes that are more (or less) democratic, civic minded, efficient, or solicitous of minority concerns. Scholars have directly compared the processes of lawmaking via initiatives and referendums with ordinary legislative lawmaking based upon such norms as citizen engagement, deliberation, ability to register strength of preference, the possibilities of compromise, and even the susceptibility of avoiding or enacting outcomes that embed cycling preferences. One persistent difficulty that has plagued this rich literature has been identifying a common set of normative benchmarks for meaningful institutional comparisons. Without such

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17 [cite].
19 517 U.S. 620 (2003). While the Supreme Court described Amendment 2 as a referendum, the Colorado Supreme Court explained that the proposal was balloted by interested citizens after they obtained the requisite number of signatures. Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993).
22 For a discussion and analysis of the various legislative and popular responses to Kelo, see generally Ilya Somin,
The Limits of Backlash: Assessing the Political Response to Kelo, 93 MINN. L. REV. 2100 (2009).
25 See generally Michael E. Rosman, Challenges to State Anti-Preference Laws and the Role of the Federal Courts, 18 WM. & MARY BILL RTS. J. 709, 709 (2010) (discussing recent “anti-preference” measures passed in a number of states—including referendums in California and Michigan—that were aimed at “prohibit[ing] race-conscious decision-making by the state that might be permitted under federal law, including the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution”).
benchmarks, arguments about the comparative merits of direct democracy or representative legislatures are inevitably limited by problems of selective examples, availability of data and measurement, or contestable analytical premises.

This Article offers a methodology that helps to overcome some of these analytical difficulties. Relying upon social choice, the Article will identify a common set of normative benchmarks for such institutional comparisons and then expand 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 that of a representative legislature, the social choice profile of direct democracy includes critical features that are (rightly) considered anti-democratic in the context of judicial decision making. Both institutions—appellate tribunals and direct democracy—break off discrete legal or policy questions, cast them along a single normative dimension, and ensure an outcome that under ideal, or at least preferred, conditions coincides with the preferences the institution’s median member. By contrast, representative legislative bodies spread policy making over multiple issue dimensions and provide mechanisms that allow participants, 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 significance. In contrast with both direct democracy and appellate judicial tribunals, legislatures have thus developed in a manner that often thwarts the ideal point of the median members on particular policy dimensions.

The analysis highlights an irony related to the infamous footnote 4 in Carolene Products v. United States.26 In footnote 4, a mainstay of modern equal protection jurisprudence, Justice Stone rested upon intuitions concerning perceived legislative market failures—specifically when laws implicate “discrete and insular minorities”—that he believed judicial processes could correct. This Article will demonstrate, however, that footnote 4 might hold even greater relevance at least respecting a subset of policies enacted through direct democracy, where discrete and insular minorities are necessarily outnumbered and where outcomes are a function of ordinal preferences, than in a representative legislatures, where all groups—or their representatives—can register cardinal preferences and where the institution has the power of inertia. The analysis holds important implications not only for several bodies of constitutional doctrine, but also, and more generally, for democratic theory.

This Article proceeds as follows. Part I describes the use of direct democracy and the arguments for and against it presented by scholars. Part II presents 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 validity of the mechanism 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 direct democracy and those that are the product of ordinary legislative processes—in the course of constitutional judicial review. A brief conclusion follows.

I. Direct Democracy in Theory and Practice

In this part, we will begin with a basic model of direct democracy versus legislative decision making. This model will help to frame the arguments of both proponents and opponents

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26 304 U.S. 144, 153 n.4 (1938).
of direct democracy. We will then consider the theoretical and empirical claims on both sides of the direct democracy debate.

A. Basic Principles

Defenders of direct democracy claim that by using initiatives and referendums, voters are able to ameliorate agency slack that otherwise tends to pervade the relationship between legislators and their constituents. The most notable source of agency slack—interest group influence on legislators—is widely known and its mechanisms fairly well understood. Public choice analysis, and more specifically interest group theory, reveals an irony inherent in legislative processes. The very mechanisms designed to protect against majority tyranny by making legislation more difficult to secure also serve as venues for special interest influence.

To ensure that minority constituencies are not plagued by what James Madison and David Hume termed “factions,” the United States Congress, for example, operates with a complex system of “veto gates” or “negative legislative checkpoints.” These impediments to passing proposed bills have the benign consequence of allowing those who anticipate being adversely affected by proposed legislation to exert pressure at often predictable junctures in the political process. These junctures provide a means of influencing—and sometimes thwarting—the substantive policy proposal. Veto gates include, for example, committees and subcommittees, calendaring regimes, the filibuster, conference committees, and failing these, the executive veto. Negotiations at, or in anticipation of, these veto gates provide myriad opportunities for affected interests groups to negotiate the substance of the proposed legislation, or alternatively to insist upon side payments taking the form of unrelated special interest riders.

While veto gates allow those groups most likely affected by the legislation to negotiate changes that reduce the potential impact relative to the original proposal, or even to stop the bill altogether, these mechanisms also provide opportunities for side payments that are not connected to the substance of the bill. Madison envisioned 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 appreciate fully the dark cloud of special interest group (read factional) influence, resulting in what many regard as special interest legislation.

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28 While the following discussion tracks Congressional processes, for purposes of this discussion the differences between federal and state legislative lawmaking are relatively minor.
29 The Federalist No. 10 (James Madison).
32 Id. at 397-98; see also Stearns & Zywicki, supra note 30, at 255–56 (describing various legislative hurdles fixed in the lawmaking process).
33 For an article distinguishing between substantive bargaining, which affects the substance of legislation, and length bargaining, which does not affect the substance, but instead results in dead weight in the form of riders, see Stearns, supra note 34, at 412–22. Scholars have observed that while the President answers to a national constituency, it is mistaken to assume that he is immune from the influence of interest group pressures. See Peter H. Aranson et al., A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 41(1982).
One of the claimed benefits of direct democracy is that it bypasses the potential influence of interest groups on legislators manifested in traditional legislative processes. Direct democracy operates as an escape valve that reduces interest group pressures by either mitigating the stronger form of originally proposed legislation or by imposing unrelated costs in the form of riders. Of course this simple analysis begs important normative questions, including most notably how to assess the proper level of interest group influence,\(^\text{35}\) and how to define general versus special interest legislation.\(^\text{36}\) It also fails to consider how the high costs of balloting through direct democracy invites its own form of special interest influence, which potentially results in placing policy distant from the ideal point of the median electoral voter.\(^\text{37}\)

B. Direct Democracy’s Defenders

Elisabeth Gerber maintains that direct democracy empowers the electorate to force an alignment of public policy over discrete issues with majoritarian electoral preferences. Direct democracy allows voters to “police . . . wayward legislative agents,”\(^\text{38}\) and to blunt special interest group influence, which often distorts legislative outcomes. Gerber claims that through direct democracy, and more specifically through voter initiatives, grassroots organizations have the capacity to work around entrenched political processes in which organized interest groups tend to hold a comparative advantage, and thus a considerable degree of policy influence.\(^\text{39}\)

Gerber maintains that direct democracy accomplishes improved policy alignment, assessed against majority voter preferences, in two complimentary ways. First, assuming that voters are fully, or at least adequately, informed, and thus are not confused about the substance of the initiative or referendum, direct democracy can work directly to effectuate preferred policy outcomes.\(^\text{40}\) If initiative or referendum voters represent a random cross section of registered or eligible voters, the actual outcome will correspond with the ideal point of the electoral median voter along the relevant policy dimension. Second, the mere availability or threat of an initiative or referendum, Gerber claims, exerts pressure on members of the legislature to better align policy outcomes with majoritarian electoral preferences.\(^\text{41}\) Using the ideal point of the median electoral voter as the basis of measurement, the indirect influence of direct democracy promotes improved policy alignment along isolated policy dimensions even when the mechanism is not used.


\(^{37}\) See Thad Kousser & Mathew D. McCubbins, Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy, 78 S. CAL. L. REV. 949, 952–55 (2004–05) (modeling incentives to pursue plebiscites based upon the distance between expected legislative action and the ideal point of the electoral median voter on the relevant policy dimension). For a more detailed discussion of this model, see infra at __.


\(^{39}\) Id. at __.

\(^{40}\) The issue of voter confusion is addressed, infra at __.

\(^{41}\) Elisabeth R. Gerber, Legislative Response to the Threat of Popular Initiatives, 40 AM. J. POL. SCI. 99, 101 (1996); see also Matsusaka, supra note 8, at 185, 192.
This indirect pressure operates both positively—encouraging enactment of preferred policies—and negatively—discouraging enactment of disfavored policies. The combined effect of the direct and indirect pressures of direct democracy is to produce political pressure that tend to inhibit slack between the electorate as principal and members of the state legislature as their agents.

Elizabeth Garrett maintains that the process of disaggregating packaged policies into more discrete choices itself promotes a closer match of policy outcomes with electoral median preferences. This is made most clear when we compare the choice sets for voters under direct democracy versus elections for legislative representatives. Garrett explains that legislative processes invite choices over candidates, who in effect represent a set of packaged issue bundles, or perhaps more accurately, a set of ideal points over each set of issues, perhaps coupled with some set of expectations as to negotiating effectiveness. A consequence of this form of electoral choice is that voters are forced to choose to support or oppose particular candidates based upon whether the combined bundle as a whole is closer to the voter’s ideal point, or more accurately, is closer to the combined set of ideal points over salient issues, even if the candidate’s ideal point for a particular issue or subset of issues in the bundle is quite far from that of the voter. By disaggregating the issue bundle, direct democracy allows voters to register preferences along each given policy dimension unencumbered by the candidate’s—or the political party’s—preferred bundling.

Garrett concludes that this process strengthens the match of policy outcomes to voter preferences. More generally, defenders of direct democracy claim that initiatives and referendums are effective in aligning policy with community values, citing as examples such policy areas as the death penalty, parental consent provisions as a precondition for minors seeking for abortions, laws affecting the provision of access to same-sex marriage, and various demographic groups included or excluded in employment discrimination laws.

John Matsusaka has produced several important empirical studies of direct democracy. His work tends to support the intuition that in those contexts in which there is a likelihood of principal-agent slack, direct democracy generally encourages policy outcomes that are relatively closer to the ideal point of the electoral median voter than does legislative policymaking. Matsusaka has demonstrated similar improved policy alignment along the dimensions of taxation and spending levels respecting various government programs. Direct democracy tends to encourage fee-based over tax-based provision of government largesse. This appears to suggest that direct democracy promotes more cost-effective mechanisms for the provision of government services, at least assuming that ability and willingness to pay correlates to more valuable

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42 This might help explain the disinclination of legislators to take public positions on initiatives. [cite]. Part of the payoff of not resolving issues legislatively might well include not only leaving issues to direct democracy, but also agreeing not to take public stands on those issues.

43 Gerber, supra note 41, at 124.


45 Id. at 5.

46 Id. at __.


48 John G. Matsusaka, For the Many or the Few: The Initiative, Public Policy, and American Democracy (2004); see also Garrett, supra note 44 at 4.

49 Matsusaka, supra note 9, at 195 & n.6.
provision of public goods. Matsusaka has further shown that states with referendums are less
prone to progressive, or redistributive, tax-and-spend policies than states that lack direct
democracy. In addition, overall taxing and spending levels, along with the salary levels for
various executive officials, are generally lower in states that have initiatives than states that do
not.

One interesting illustration of principal-agent slack involves term limits. The Supreme
Court has struck down state laws imposing term limits on congressional delegations. With
respect to state legislatures, where term limits are permitted, states with initiatives are far more
likely to have term limits than those that do not. The data are striking. As Matsusaka observes,
“[Twenty-two] of 24 initiative states adopted term limits for their congressmen or state
legislatures, compared to two of 26 noninitiative states.”

Similar results apply in the context of laws restricting state takings powers. Professor Ilya
Somin has found that following the controversial Supreme Court decision, Kelo v. City of New
London, which rejected a constitutional challenge to a non-public goods taking that effectively
forced the transfer of individually held private property to a large scale developer, those states
with initiative processes were far more likely to enact effective laws that limit future private
development takings than states lacking initiatives. In the latter states, Somin maintains,
responsive legislation tended to be largely symbolic.

In separate but related works, Professors Baker and Clayton Gillette, refute
arguments that representative democracy systematically produces better results, and specifically
results that are more solicitous of minority concerns, than does direct democracy. Professor

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50 Id. at 195.
51 Id. at 195–96. Matsusaka’s results are not limited to the United States. He has shown similar correlations for
example, in Switzerland, where he claims direct democracy has tended to promote results consistent with various
measures of improved a government, for example, based upon the cost effective provision of public goods and
services. See id. at 201 (summarizing studies).
53 Matsusaka, supra note 9, at 195. The same is likely true for federal term limits, but the Supreme Court invalidated
54 Matsusaka, supra note 9, at 195.
56 See Somin, supra note 25, at 2143–48 (discussing popular referendums that limit non-public takings in response
to Kelo).
57 Ilya Somin & Neal Devins, Can We Make the Constitution More Democratic?, 55 DRAKE L. REV. 971, 982 n.50
(2007).
58 See Lynn Baker, Preferences, Priorities, and Plebiscites, 13 J. CONTEMP. LEGAL ISSUES 317 (2004) (Baker,
Direct Democracy [Baker, Preferences]; Lynn Baker, Direct Democracy and Discrimination: A Public Choice
59 Gillette, supra note 11; Clayton P. Gillette, Plebiscites, Participation, and Collective Action in Local Government
60 Baker claims that this result follows from the implications of the Condorcet criterion as applied to legislatures,
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 58, at 726. Gillette claims that
at least with respect to local initiative, the implications of the Tiebout model, or “vote with your feet,” see Charles
M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416 (1956) (demonstrating that under specified
conditions, local governance promotes superior match of taxation and spending policies to constituencies because
individuals can control governance regimes through relocation), provide some degree of functional protection for
minorities inasmuch as they can avoid communities with disadvantageous policies. See Gillette, supra note 11, at
628.
Gillette refutes claims that direct democracy is especially prone to agenda setting by interest groups, and that separating authorship from deliberation necessarily results in inferior draftsmanship as compared with the legislative process, where these authorship and power to negotiate are merged. Baker and Gillette also reject arguments that the nature of the legislative process, including veto gates as venues for negotiating modifications of policy, promotes preferred policy outcomes. While Professor Baker disagrees with Professor Gillette’s claim that benefits of logrolling and legislative compromise are overstated, both conclude that in comparison with direct democracy, legislative processes are not systematically superior in protecting minority concerns. These works suggest that there is no structural reason to discredit the outcomes of direct democracy, at least without similarly calling the quality of legislative outcomes into question.

In fact, however, legislative processes do not invariably ensure that Condorcet outcomes prevail. As explained below, because legislatures provide multiple venues at which interested constituencies and their representatives can express preference intensities, legislatures often thwart potential Condorcet outcomes. And while the Tiebout mechanism in theory might provide minorities with some degree of protection, to the extent that minorities as a group tend to have fewer financial resources, this claimed benefit might be more elusive than it first appears. Moreover, as Gillette concedes, this argument appears in tension with that of Kousser & McCubbins, who maintain that political entrepreneurs will generally seek to pursue initiatives only when there is substantial difference between the issue space separating the electoral median voter and the legislative median voter on the underlying policy question. As the comparative social choice analysis of direct democracy and plebiscites will demonstrate, within legislatures, it is easier to block than to pass, but remains harder for minorities to block.

Finally, some defenders of direct democracy maintain that the dispersion of input giving rise to initiatives or referendums improves the quality of outcomes in a manner that reflects the insights of the Condorcet Jury Theorem or the wisdom of crowds. For a discussion of the Condorcet Jury Theorem and its underlying assumptions, see STEARNS & ZYWICKI, supra note 30, at 430–31; see also JAMES SUROWIECKI, THE WISDOM OF THE CROWDS 10 (2004) (identifying the following as necessary conditions to the wisdom of the crowds: Diversity of opinion, independence, decentralization, and aggregation). On this theory, to the extent that initiatives or referendums resolve issues for
C. Direct Democracy’s Detractors

Critics of direct democracy have questioned each of the preceding arguments in support of direct democracy on various normative and methodological grounds. While generally supportive of direct democracy, Elizabeth Garrett has observed that the claim that direct democracy better aligns policy with median voter preferences only holds if there is sufficient voter turnout to represent a meaningful cross section of the general electorate. Otherwise, direct democracy might offer a skewed vision of median voter preferences. One of the most interesting empirical questions concerning direct democracy is the expected influence of various forms of proposed initiatives on voter turnout and representativeness.

Thad Kousser and Mathew McCubbins have questioned the representativeness of electoral turnouts on plebiscites especially with respect to what they term crypto-initiatives. These initiatives are designed to affect turnout respecting some other balloted matter, for example, candidate election, by motivating a potentially disaffected constituency to turn out to vote even though the prospect of passing the initiative itself is low. Wedge issues, by contrast, have the opposite effect of dividing voters who otherwise are generally aligned, but have a similar effect in distorting electoral turnout, although in perhaps less predictable ways.

Another group of scholars has focused on other systematic biases that are not directly linked to voter turnout. For example, in separate works, Professors Julian Eule and Derrick Bell, have posited that the system of direct democracy operates to the detriment of demographic minorities, including most notably African Americans and the Lesbian, Gay, Bisexual, and Transgender (“LGBT”) community. The intuition here is fairly straightforward: Because minority voters are, almost as a matter of definition, are outnumbered within electorates at the state level, and in most municipalities, 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. The consequence is to force decision making over more ambitious policy proposals than would survive in a legislative setting.

Erwin Chemerinsky has focused specifically on the absence of legislative filters in direct democracy to argue that the practice might run afoul of the constitutional guarantee to every state of a republican form of government. Chemerinsky maintains that historically, the framers did
not anticipate direct democracy, and instead envisioned a regime with filters between voter preferences and enacted legal policies. Specifically, the framers intended a system of government, embodied in the federal Constitution, that balanced concerns for minorities with majority rule. While the particular minority about which the framers were principally concerned were the landed wealthy, Chemerinsky nonetheless maintains that “[they] saw direct democracy as the antithesis of a republican form of government.”

Kousser and McCubbins maintain that political entrepreneurs will only pursue plebiscites when the payoffs are relatively extreme as compared with the expected benefits of legislative action. The authors focus on strategies based upon the expected value of lobbying the legislature, which they equate with the Floor median voter (F) versus the median electoral voter (i) on the issue under review. In their first presentation, depicted in Figure 1, the authors show that if 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. In the second presentation, where F is on the opposite side of SQ as compared with i, political entrepreneurs will have a strong motivation to push for the initiative given because only a plebiscite will move policy in their preferred direction.

The authors note that the incentives of political entrepreneurs are affected by the high cost of balloting initiatives, which involves securing the requisite number of signatures (which varies depending upon the state requirements). Initiative sponsors can be expected to invest the necessary capital only if the process is likely to provide a sufficiently significant policy change in their preferred direction relative to the status quo. To induce this investment, policy must move further from the status quo substantially in the direction of the sponsor’s ideal point relative to F. If F is a reasonable proxy for the expected value of legislative action, the authors conclude, political entrepreneurs are motivated to enact initiatives only when the placement along a single dimensional scale is relatively extreme in comparison with F.

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74 See id. at 295.  
75 See id. at 296 (observing that “[T]he Framers weren’t concerned about racial minorities.”).  
76 See id. at 301.  
77 See Kousser & McCubbins, supra note 37, at 956–57.  
78 The graphics in Figure 1 are taken from Kousser & McCubbins, supra note 37, at 952 & 953.  
79 Id. at 953-54.  
81 Kousser & McCubbins, supra note 37, at 953–54. The sponsor himself or herself will prefer the policy move represented in the initiative, but also will benefit as a political entrepreneur from various secondary effects, including base mobilization at the stage of securing signatures, the publicity attendant the balloting (both pro and con), and the possible success in securing passage. Cf. Daniel A. Smith & Caroline J. Tolbert, The Initiative to Party: Partisanship Ballot Initiatives in California, 7 PARTY POL. 739, 741 (2001) (noting that political party might support an initiative where it will increase base turnout, serve as a wedge issue against an opposing party, or where the substance of the initiative is ideologically compatible with its platform).  
82 As demonstrated infra at __, 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 even further in changing policy relative to the ideal point of the median voter, the median voter might elect to support the initiative if the proposal is closer to the ideal point than either the status quo or the expected value of legislative action.
Kousser and McCubbins pose another theoretical objection to the claim that initiatives track median electoral policy preferences. The authors assert that voter preferences over initiatives can cycle, with the consequence that the outcome of multiple initiatives might sometimes not only miss available Condorcet winners, but also generate Condorcet losers. The authors define this term to mean an option that is regarded as universally inferior to an available alternative. 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, with a combined result—approved projects without adequate funding—that all voters would regard as inferior to either approving and funding the projects, or rejecting and failing to fund the projects, were the combined issues presented at one time.

Other commentators claim that direct democracy risks producing problematic outcomes as a result of voter ignorance and confusion. These claims are difficult to quantify but there is substantial anecdotal evidence. One account offered by the late Professor Julian Eule is interesting and informative. In his landmark article on direct democracy, Eule describes having moved in the 1970s from the East Coast to Los Angeles to join the faculty of the University of California, Los Angeles, School of Law, and being advised by friends and colleagues about how to manage the cultural and financial transition. While he reported taking the “earthquakes, orange-tinted hair, and mortgages resembling the national budget deficit” in stride, he noted an important, but surprising, exception: The enormous mailings that preceded each election cycle, which contained the various initiatives and referendums that would appear on the upcoming ballot. Eule went on to describe 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. He speculated how, if a tenured law professor could not sort this all out, those with less, or no, legal training could manage.

Sherman Clark has also criticized direct democracy, based on the anonymous nature of electoral voting. Clark maintains that direct democracy is problematic because it allows those who affect public policy to do so without publicly disclosing, and thus without being accountable for, their views on particular issues. While there are undoubtedly First Amendment concerns about forced disclosure of information from cast ballots, the Supreme Court has recently resolved by an 8 to 1 vote, a related issue. In Doe v. Reed, the Supreme Court rejected a first
amendment challenge to the request for disclosure of names on a petition for balloting Washington Ballot 71, which was designed to repeal Washington’s “Everything but Marriage” law. While the political outcome was to reject the measure and sustain the law, the case issue was whether the 138,000 signers of the balloting petition had a first amendment right against the disclosure of their identities. The Court rejected that challenge, although some Justices reserved judgment on whether some ballot petitions warranted first amendment protection based upon the sensitivity of the subject matter. The case holding is relatively narrow.

Clark’s broader argument goes to whether there is a First Amendment right to create policy through the initiative process while concealing one’s position. While it seems unlikely that the Court would be willing to force disclosure of positions set out in balloting, or conversely to strike down initiatives and referendums because of the problem of voter anonymity, Clark’s normative claim can be expressed as follows: Unlike legislative processes, in which policy makers are accountable for their votes, initiatives and referendums shield the identity of the policy makers and in doing so, compromise the integrity of the lawmaking process.

II. A Social Choice Analysis of Direct Democracy

The preceding analysis, which reviews some of the more salient arguments in the literature on direct democracy, is sufficient to demonstrate the sharp disagreements concerning the wisdom and efficacy of initiatives and referendums on normative, empirical, and methodological grounds. Despite these disagreements, the scholarship provides the basis for a somewhat coherent sketch of the benefits and burdens of direct democracy, at least when compared with representative democracy. It also suggests that some subject areas might be better or less well suited for resolution through direct democracy.

In general, direct democracy can effectively reduce or inhibit legislative agency slack taking the following forms: fiscal irresponsibility; limits on electoral competition; or cost dispersion through general taxation-based, rather than fee-based, expenditures benefitting narrow constituencies. Direct democracy correlates with more streamlined, and more accountable, government, including limited state legislative terms.

The claimed risks of direct democracy include outcomes that reflect agenda setting and embedded cycles, that are the product of voter misinformation or ballot confusion, and that reflect indifference to the concerns of those who are most adversely affected by the outcome of the referendum or initiative, including most notably demographic minorities. In addition, direct democracy risks distorting electoral turnout affecting other matters, as seen in the study of

91 Id. at 2815.
92 Id. at 2821.
93 See id. at 2822 (Alito, J., concurring) (maintaining that initiative sponsors must be permitted to bring as-applied First Amendment challenges to the disclosures of petition signatures so as not to “chill the willingness of voters to sign a referendum petition”); id. at 2831 & n 5 (Stevens, J., concurring in part and concurring in the judgment) (noting that successful as-applied changes to the public disclosure of ballot petition signers will be infrequent, but that the option must be available in instances where there is a “significant threat of harassment” directed toward petition signers, or for those “rare cases” where disclosure would substantially limit the ability to gather signatures).
94 Clark, supra note 88, at 1346.
95 Matsusaka, for example, notes that in Buchanan and Tullock’s critique of direct democracy as creating excessive decision costs as a means of limiting external costs, the authors neglected to consider the role of direct democracy as an complement to, rather than a substitute for, representative democracy. See John G. Matsusaka, Direct Democracy, in THE ENCYCLOPEDIA OF PUBLIC CHOICE 149-50 (2003).
96 See infra part IV.
crypto-initiatives and wedge initiatives, and more generally risks generating outcomes that, to the extent that electoral voting is not fully representative of eligible voters, might not capture the true electoral median. Finally, direct democracy risks extreme policies when political entrepreneurs strategically locate initiative policies in anticipation of limited electoral opportunities for reconsideration.

Although both supporters of and detractors from direct democracy appreciate the potential for distorting effects resulting from voter misinformation, turnout, and cycling preferences, they disagree as to how often these difficulties affect direct democracy and even on how to test for it. They further disagree, assuming these problems are capable of being resolved, on the normative merit of aligning policy outcomes along discrete issue dimensions with the ideal point of the median electoral voter. In effect, supporters of direct democracy equate sound policy with majority preferences along isolated issue dimensions (assuming that the other difficulties are resolved). Opponents reject this assumption, instead claiming that the filtering processes of representative government improve the quality of legislative outputs relative to direct democracy even when those processes thwart outcomes that would align with majority preferences along isolated policy dimensions. To help assess these competing normative claims, this part develops a social choice model of direct democracy.

The analysis will not suggest either the full adoption or complete elimination of direct democracy. Social choice, first and foremost, reveals the inherent imperfections in all collective decision making institutions. This includes legislatures, appellate judicial tribunals, and direct democracy. The important point, however, is that not all imperfections are the same, and social choice is particularly well suited to identifying and comparing institutional strengths and weaknesses. Social choice provides the basis for 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 democratic processes are good or bad as an a priori matter. Rather, the answer necessarily depends on the specific tasks assigned to the institution under review.

It is also important to remember that in virtually all jurisdictions today that employ some form of direct democracy, the mechanism is used to complement legislative lawmaking rather than to replace it. The analysis therefore cannot compare a regime in which all decisions concerning public policy are made by direct democracy with a regime in which none are. Instead the issue for comparative purposes is whether a mixed regime—one that uses the legislature as the presumptive source of policymaking and that occasionally allows either supplemental policy via voter initiative or a check against legislation in the form of legislative referendums—is better or worse over particular matters than a regime that excludes direct democracy over those matters and that only permits legislative policy making. The answer to this question might not be the same for all policy matters. In a mixed lawmaking regime, the issue is how to best calibrate the division of responsibilities between these lawmaking institutions. As shown below, this analysis requires not merely a comparison between direct democracy and

97 For a discussion on a social choice-related phenomenon called the nirvana fallacy, see generally Harold Demsetz, Information and Efficiency: Another Viewpoint, 12 J.L. & ECON. 1 (1969). See also STEARNS & ZYWICKI, supra note 30, at 112 (noting 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.”).

98 See supra note 95, and cites therein.
legislative decision making, but a three-way comparison that also includes appellate judicial decision making.

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 within the United States, and for that matter, throughout much of the world, is that public policy is enacted by some form of popularly elected legislative body.\(^99\) While there are important differences of course between local, state, and federal legislative bodies, and indeed among various local and state legislatures, as the analysis that follows will demonstrate, there are sufficient similarities to allow for meaningful general comparisons.

The justification for comparing direct democracy to appellate judicial tribunals is less obvious. Even the strongest advocates of a public interest model of adjudication do not claim that absent direct democracy,\(^{100}\) the judiciary should be empowered in the first instance to make public policy.\(^{101}\) This institutional comparison is important, however, for three reasons. First, while courts do not hold legislative primacy, within the United States and many constitutional democracies, they pass judgment on the permissibility, or constitutionality, of positive law, whether enacted through legislative decision making or through direct democracy. Second, because most legal scholars reject the notion of judicial primacy in policy making, it is important to identify those features of judicial decision making processes that seem problematic as the basis for making courts the primary source of public policy making. This is especially important to the extent that appellate judicial decision-making processes bear features that operate in parallel fashion to either direct democracy or legislative decision making. As the social choice analysis will demonstrate, in several critical respects, direct democracy more closely resembles features of appellate judicial decision making than legislative decision making. We will see that this is 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 norms in lawmaking.

An evaluation of the relative institutional competence in transforming preferences into outcomes is ultimately a problem of social choice. Social choice is particularly helpful in undertaking a meaningful comparing institutional analysis because it provides the basis for a

\(^{99}\) See Stearns & Zywicky, supra note 30, at 510 (noting that most political decisions are made by representative democracy). For a public choice analysis of how optimal legislative bodies seek to minimize the sum of “external costs,” or the costs individuals incur as a result of the collective decision of others, and “decision costs,” or those costs associated with participation in the negotiation of the collective decision, see James Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy 64 (1962).

\(^{100}\) For scholars advocating a public interest model of adjudicative processes, see, e.g., Heather Elliott, The Functions of Standing, 61 Stan. L. Rev. 459, 475–77 (2008) (contending that the courts use standing doctrine to channel “generalized grievances” to the political system, and impliedly suggesting that this use of standing relies on an overly narrow understanding of the proper role of the courts); Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance 40 Stan. L. Rev. 1371, 1374 (1988) (arguing that there are “serious negative consequences” for the idea that access to the judicial system should be limited only to private disputes and advocating a public rights model of standing). For an alternative analysis that uses social choice theory to explain standing doctrine, see Maxwell L. Stearns, Standing Back from the Forest: Justiciability and Social Choice, 83 Cal. L. Rev. 1309 (1995) (explaining how private rights model of standing raises costs of litigant path manipulation); Maxwell L. Stearns, Standing and Social Choice: Historical Evidence, 144 U. Pa. L. Rev. 309 (1995) (supporting social choice account with review of historical developments and case law).

\(^{101}\) William N. Eskridge, Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479, 1481 (1987) (developing a model of dynamic statutory interpretation and stating that the author accepts that “the legislature is the primary lawmaking body”).
common set of analytical benchmarks that necessarily apply in some fashion to every collective
decision making body. 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 members
combine their preferences into outputs, things sometimes get complicated in unexpected ways.
For many people “fair” group decision making implies a process in which all votes are equally
weighted and in which outcomes are not distorted through various strategies that manipulate
voting processes. 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 a theoretical and
practical matter, an institutional outcome is almost invariably a function of the decision-making
process that generates it, and therefore that this intuitive sense of fairness that decouples
outcomes from generative processes is elusive. Instead, the manner in which the decision making
rules process group preferences typically affects—or using an economist’s lingo, is endogenous
to—the substantive outputs.

Social choice studies how decision making processes are designed and how they affect
outcomes. The analysis begins with a simple comparison of two groups of three decision
makers, both of which lack a first choice majority candidate over the available options, ABC.
The members rank the options as follows: P1: ABC; P2: BCA [or BAC]; P3: CBA. In this
example, 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 candidate, we might imagine
employing a regime of binary comparisons with the hope that eventually a stable outcome will
emerge. In pairwise comparisons among available options, option B defeats both A and C, with
P1 and P3, preferring B to A, and P1 and P2 prefer B to C. The choice between A and C is
beside the point since B will defeat whichever option prevails. Writing in the 1780s, the
Marquis de Condorcet proposed that absent a first choice majority candidate, that option that
defeats all others in direct comparisons should be selected as best. 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.

The Condorcet criterion is grounded in the majoritarian norm and appeals to intuitions of
fairness in the following sense. Rules that meet the Condorcet criterion ensure that for any binary
comparison, an option that a majority disfavors to an available alternative will not be selected.
Despite this intuitive sense of fairness, rules satisfying the Condorcet criterion suffer two
important defects.

First, while the prior example included a Condorcet-winning option, this is not always the
case. For some non-majority preference combinations, there is no Condorcet winner. Consider
the following slightly altered preferences: P1: ABC, P2: BCA, P3: CAB. Here we have only

102 For general discussions that survey the points described below, see Stearns & Zywicki, supra note 30, at 93–
167, Maxwell L. Stearns, Constitutional Process: A Social Choice Analysis of Supreme Court
Decision Making (paperback ed. 2002).
103 That explains why the same outcome obtains whether P2 rank orders BAC or BCA.
104 See Stearns, supra note 83, at 1253–54 (explaining and illustrating the Condorcet criterion).
altered the second and third ordinally ranked preferences of P3. With these preferences, the same voting regime would reveal that separate majorities prefer A to B (P1 and P3), C to A (P2 and P3), but B to C (P1 and P2). The result is a cycle in which 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. For that reason, in the prior example, where option B is the Condorcet winner, that does not necessarily imply that B should be selected. If, for example, P1 significantly prefers A to B and slightly prefers B to C, while P2 and P3 are essentially indifferent among all three options, but would rank them as indicated if required to do so, then A might be the socially preferred outcome despite the fact that B is a Condorcet winner.

Notice that the defects of the Condorcet criterion are rooted in the majority rule. As previously noted, the Condorcet criterion is grounded in the majoritarian norm, and therefore it is not surprising that 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, nor does the Condorcet criterion. This comparison is important because implicit in many debates over direct democracy is the assumption that majoritarian outcomes, whether reflecting true electoral majorities or implicit majorities (as with Condorcet winners) that represent a median electoral position on a given issue dimension should be presumed normative desirable. As the analysis to follow will demonstrate, outcomes under majoritarianism, like outcomes under other decision making rules, are affected by the strengths and weaknesses of the decision making rule. This implies that the merits of majoritarianism—as applied, for example, to isolated questions of public policy taken up by direct democracy—have to be defended rather than 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. In an important respect, Arrow’s Theorem generalizes what is commonly described as the paradox of voting. The paradox of voting is that even in a group in which each member holds transitive preference orderings, as seen in the first illustration (P1: ABC; P2: BCA; P3: CAB), when the preferences are aggregated through a regime of unlimited binary comparisons, the collective preferences yield a cycle. Arrow generalized this observation by proving that any “solution” to the problem of cycling, meaning any institutional rule that avoids the cycle by imposing a transitive outcome on such preferences, necessarily undermines some other aspect of group decision making that Arrow associated with regime of fair collective decision making.

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:

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105 I have presented these concepts that follow in several prior works. See STEARNS, supra note 102, at 41–94; Maxwell L. Stearns, An Introduction to Social Choice, in ELGAR HANDBOOK IN PUBLIC CHOICE AND PUBLIC LAW (2010); Stearns, supra note 82, at 1247–52.) For a discussion of the relationships between the criteria described in this chapter, based upon William Vickrey’s simplified proof, and the original Arrow’s Theorem criteria, see STEARNS, supra note 102, at 344–45 n.91, 346–47 n.104, 337 n.22, 347–48 n.112.

106 While Arrow’s original presentation was more complex, William Vickrey provided a simplified version of Arrow’s proof that allows for the following, more accessible, presentation. STEARNS, supra note 102, at 81, 344–45 n.91; see also William Vickrey, Utility, Strategy, and Social Decision Rules, 74 Q.J. ECON. 507 (1960), reprinted in WILLIAM VICKREY, PUBLIC ECONOMICS 29 (Richard Arnott et al., eds., 1994).
**Range:** the collective decision making 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:** in choosing between paired alternatives, participants are assumed to decide solely based upon the merits of those options and without regard to how they would rank options that might be introduced later; (3) **Unanimity:** if a change from the status quo to an alternate state will improve the position of at least a single participant without harming anyone else, the decision-making body must so move; and (4) **Nondictatorship:** the group cannot consistently vindicate the preferences of a group member against the contrary will of the group as a whole.

Before taking up a detailed application of Arrow’s conditions, it is worth considering a larger point that involves the relationships among them. Arrow set out to design an institution that would satisfy a combined set of criteria that he posited were basic to both rationality (defined specifically to mean capable of transforming transitive inputs—or member preferences—into transitive outputs, or group orderings) and a group of fairness conditions. Instead, Arrow created an axiomatic proof that demonstrates the impossibility of accomplishing that very task. Arrow demonstrated that any collective decision making body that ensures transitive preference orderings as outputs will necessarily relax at least one of his fairness conditions. Because Arrow’s theorem is axiomatic, a necessary corollary follows: Any institution that satisfies the more basic condition of transforming member preferences into some form of collective outputs necessarily relaxes at least one, and possibly more than one, of the combined criteria of rationality plus the four fairness conditions.

This corollary is essential to the comparative institutional analysis that follows. In effect, by using the combined set of Arrow conditions as a template against which to compare two (or more) collective decision making bodies, we can then identify which Arrovian conditions each institution adheres to or relaxes. We can then use this information to provide a more meaningful comparative assessment of the two institutions against each other. By using Arrow’s Theorem as a common analytical template, we can avoid the otherwise partial or impressionistic assessments that have sometimes characterized comparative analysis of direct democracy with representative democracy.

For virtually every collective decision making body, the analysis will necessarily reveal some important characteristic feature, which we can think of as an Arrovian deficiency and which will vary in important ways across institutions. By way of illustration, while 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,107 the Arrovian analysis provides a basis for going beyond generalizations about these institutions 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 of these different institutional settings as a result of the structural distinctions that the analysis reveals.

One could argue, of course, that there is no obvious reason to assume that each of Arrow’s conditions is essential in any given decision making body and therefore relying on the theorem as a comparative template is misguided. Prominent scholars writing from a range of disciplines have in fact argued against the importance of such conditions as rationality

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107 *See supra* notes 58-65, and accompanying text.
(transitivity), or independence. Resolving these normative debates is not necessary to the analysis that follows. It is sufficient to note that the following analysis is entirely consistent with what we can describe as the underlying meta-level claim in this literature, namely that particular Arrovian conditions might prove inessential to the functioning of some—and maybe even all—institutions. Indeed the analysis is dependent on this very insight.

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 fair to a regime of democratic decision making. While Arrow proved this project impossible, it is important to recognize that Arrow did not set out to identify which of his conditions were more, or less, suitable or important in any given institution. 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 in which it is relaxed even if it is a defining characteristic of another institution, where it is honored. Arrow’s Theorem provides the basis for meaningful comparative institutional analysis by allowing us to identify which criteria are or are not important to any given institution, and thus to unmask important differences in features of institutional design.

B. A Three-Way Comparative Social Choice Analysis

The analysis begins with a comparison of legislatures to appellate courts. After defining which features of collective decision making, based upon the conditions of Arrow’s Theorem, that each institution relaxes, we can then compare these 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 logical endpoints or paradigms that form the basis 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, although the analysis also has implications for the remaining conditions, Unanimity and Nondictatorship. As a general matter, legislatures tend to relax Independence (which in a very approximate sense can be understood to mean principled decision making), while adhering to Range (which in a comparably rough sense means that the institution cannot ensure an outcome when the combined member preferences are intransitive or cycle).

Relaxing Independence is sometimes, but not always, a mechanism through which legislatures achieve Unanimity, meaning mutual beneficial vote trades that leave at least one of the members better off and none of the remaining members worse off. By contrast, appellate courts generally relax Range (thus ensuring outcomes even when judicial preferences over

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110 For a more detailed analysis of an institutional comparison between legislatures and courts, see generally STEARNS, supra note 102.
underlying issues and outcomes are intransitive, or cycle), while adhering to Independence (thus limiting opportunities for various forms of strategic decision making when deciding cases.)

As a general matter judges in appellate judicial tribunals do not engage in a process of vote trading (either within or across cases) as a means of improving the member payoffs. One consequence of this distinction is that judicial decision making tends not to promote mutually beneficial trades that facilitate Unanimity. Neither legislatures nor appellate tribunals technically violate the Nondictatorship criterion, although, as shown below, there are significant power differentials among members that affect the nature of external influence or pressure, the quality of outputs, and the ability of minority interests to protect themselves in the process of group decision making. We will 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

Our analysis begins with the definitions of the two most significant Arrovian conditions for developing these comparative profiles. Independence holds that in choosing between paired alternatives, participants are assumed to decide solely based upon the merits of those options and without regard to how they would rank options that might be introduced later.\(^{111}\) This implies that when choosing among options, AB, the members are expected to be unaffected by the later introduction of C. If the decision is strictly based upon a merits-based comparison, then the later-introduced option is irrelevant as the decision to introduce (or withhold) that option has no bearing on the relative qualities of the two options immediately under review.

One of the main insights of social choice theory is that outcomes are often influenced by the path, or order, of voting. With the following cycling preferences, ABC, BCA, CAB, a regime that permits two binary comparisons can yield any outcome if the first contest eliminates the option capable of defeating a preferred candidate. For example, if the agenda setter wants outcome C, then by creating a voting path A versus B (A wins), then C versus A (C wins), she obtains that result. Assuming a rule prohibiting reconsideration of defeated alternatives, the elimination of B in round 1 prevents the disclosure of a cycle in which BpApCpB.

And yet, this outcome (or any of the remaining outcomes that would follow a different agenda setter’s preferred voting path) is not inevitable in a regime that occasionally (or frequently) condones strategic voting. In this example, if P1, who least prefers C, knows that the agenda setter prefers C and therefore will set about his voting path, then in the first round vote, she might instead vote strategically for B (with the result that B wins), knowing that in the second and final contest, B will also defeat C.

Opportunities for strategic voting are not limited to cycling. Condorcet winners need not be socially optimal outcomes, and strategic voting provides a vehicle for their occasional defeat. Assume the following modified preferences in which B is a Condorcet winner: P1: ABC, P2: BCA, P3: CBA. It is possible that option B nonetheless is an inferior social choice. As previously shown,\(^{112}\) this could occur if only P1 cared deeply about this policy choice and if she significantly preferred A to B (and C), while P2 and P3 were largely indifferent among the choices, but if forced to rank their preferences ordinally, would select those set out above.

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\(^{111}\) See Stearns, supra note 102, at 88-92.

\(^{112}\) See supra at __.
One of the defining features of legislative decision making is that the process of strategic voting and vote trading—in Arrovian terms the relaxation of Independence of Irrelevant Alternatives—facilitates outcomes that respond to agenda setting and that sometimes thwart the Condorcet criterion. A striking feature of legislative markets is that effectiveness of members often turns on the ability to consider and evaluate voting strategies, and not to limit consideration to the immediate merits-based comparisons. Within legislatures, there are many institutional venues at which to engage in strategic, or insincere, voting behaviors. Common mechanisms include calendaring rules, committee structures, conference committees, and filibusters. In each instance (or at each juncture), the legislature establishes a “veto gate” or “negative legislative checkpoint,” meaning a focal point within the legislative process at which those concerned about the direction of the proposed bill can exert the requisite pressure to change an expected adverse voting path or vote strategically to thwart the result of the expected voting path. Veto gates make it easier to block than to pass legislation because a bill must withstand every veto gate to survive, but need only fail at a single veto gate to be defeated. Effective threats to derail a planned voting path, for example through strategic voting, are often highly effective in avoiding adverse outcomes and in securing reciprocal commitments that have the effect of cardinalizing member preferences.

Logrolling is another important mechanism that has the effect of allowing members to transform votes into weighted preferences rather than expressions of ordinal preferences. Through logrolling, members agree to support each others’ preferred legislation to improve mutual prospects for passage when each member would otherwise oppose the other member’s bill and only support his or her own. In this manner, bills supported by numerical minorities who feel intensely about passage can engage in mutual exchanges that generate majority support when those bills are included in a larger package of overall proposed legislation. Logrolling, not surprisingly, is often the mechanism through which special interest items, or riders, pass through legislative bodies since it is rarely the case that such items would garner majority support on their own.

Vote trading helps to facilitate legislative adherence to 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. Otherwise they would not have bothered with the exchange. While the welfare enhancing aspects of logrolling are debated,113 resolving this debate is unimportant for our purposes. For our immediate purposes, the issue is not whether legislation that is the product of logrolls benefits society; rather, it is whether it benefits the legislators. Of course, legislators would not engage in logrolls if they did not anticipate a benefit from doing so, and thus within the limited context of the legislature itself, by relaxing Independence, legislatures promote Unanimity.

The other defining characteristic of legislative decision making involves Range. Range requires that the collective decision making 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.114 While this requirement appears complex, it becomes intuitive when we

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113 Compare also Buchanan & Tullock, supra note 99, at 145 (arguing that bargains among voters can be mutually beneficial), and Gordon Tullock, Why So Much Stability?, 37 PUB. CHOICE 189, 190 (1981) (suggesting that vote trading can eliminate cycling in legislative decision making), 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 does improve the position of the trader, it also generates costs, often significant, for non-traders); see also Stearns & Zywicki, supra note 30, at 26–28 (detailing the pros and cons of legislative logrolling).
114 Stearns, supra note 102, at 47.
divide it into its two constituent parts and then illustrate with now familiar examples. Each member must be permitted to select an ordinal ranking from among all conceivable rank orderings over three available alternatives. In addition, the processing rule must honor those rankings—meaning that the outcome operates consistently with those rankings—when producing a group outcome. Now consider the difficulty that these two requirements pose for the two prior examples.

First assume the following preferences, which yield B as a Condorcet winner: P1: ABC; P2: BCA; P3: 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 the rule set out by Condorcet. It will ensure that if a Condorcet winner is available, that option 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. 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, leaving the final binary choice between A and C irrelevant; whichever option prevails will lose to B in a direct contest.

Now consider the example in which preferences cycle: P1: ABC; P2: BCA; P3: CAB. Once again, the members have selected their preferred ordinal rankings over options ABC, but this time applying decision rule that ensures consistency with each member’s ordinal ranking produces a cycle such that ApBpCpA. In this case, there is no stable outcome consistent with each member’s preferences, and thus there is no outcome that satisfies the range requirement. When the members hold ordinally ranked preferences that cycle in a regime of unlimited binary comparisons, a rule that adheres to range will fail to issue an output because any proposed output will violate the ordinal rankings of at least one member as compared with an available alternative.

We can formalize this intuition to show that for options ABC, there are six possible ordinal rankings. This can be expressed mathematically as three factorial (3x2x1) meaning that for the first option, there are three choices, for the second there are two, and there is no choice for the third. We can more bluntly list the six possible ordinal rankings as follows: ABC, ACB, BAC, BCA, CAB, CBA. For members selecting among those six combined sets of ordinal rankings, we can also identify two sets of combinations that produce a cycle. One is the forward cycle that we have already seen: ABC, BCA, CAB. There is also a reverse cycle: CBA, BAC, ACB.

Because a rule that complies with range must therefore permit the same number of binary choices as options, the rule risks inaction in the event that members’ combined sets of ordinal rankings cycle (ABC, BCA, CAB or ACB, CBA, BAC). In fact, the legislature has the wherewithal to recognize this 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 one of these non-majority options. This result requires some explanation given that various scholars have identified mechanisms within Congress that formally limit consideration of all available alternatives, thus promoting the possibility of agenda setting.

Social choice theorists, including William Riker, Steven Brams, Kenneth Shepsle, Barry Weingast, and McNollgast, have identified features of rules within the United States Congress

115 See id.
that have the effect of raising the cost of discovering cyclical preferences and thus of inducing equilibrium outcomes even when preferences cycle. Riker focused on formal decision rules limiting the number of permissible amendments relative to potentially available options, and Shepsle and Weingast focus on other structural features, including committee structures, calendaring rules, and the like, that have a similar set of effects. Rules that formally limit the number of permissible iterations relative to options have the capacity to induce stable outcomes, but those outcomes will depend on the agenda. The preceding argument, however, suggests that legislatures have the wherewithal to identify cycles and the power to avoid action when confronted with them. While legislative rules that limit the disclosure of information regarding cycles to promote stable outputs seem to be in tension with the claim that legislators can avoid action when confronted with cycling preferences, the two claims can be reconciled. That is because disclosures of preference need not occur through formal voting processes.

While the various veto gates, formal rules limiting amendments, and other structure-induced equilibrating rules prevent the formal disclosure of binary comparisons relative to outcomes, this is only the first step in the analysis. Behind these formal rules are the often more important norms that permit informal disclosures. These disclosures are then used to inform choices and strategies at the various veto gates. Because Independence is relaxed, legislators have an incentive to discern preferences, through formal and informal means, especially in high stakes matters. Members do not necessarily vote sincerely with their ordinal rankings, and instead they often vote strategically to avoid results they consider undesirable. In this respect, Range and Independence are flipsides of a coin. By learning informally what member preferences are—based either on disclosed ordinal rankings or on expressions of cardinal values—members can determine whether it is worth their while to prevent adverse voting paths by voting strategically rather than sincerely. The result is to potentially thwart path dependent outcomes that are the product of structure-induced equilibrating rules based upon informally acquired information when that information demonstrates either that underlying preferences cycle, or that the weights of preferences counsel against being led down the agenda setter’s intended voting path. Thus, the same process can be used to avoid outcomes that although nominally Condorcet winners, appear undesirable when the intense preferences of a minority are taken into consideration.

While differing legislative bodies have widely divergent features, they also share important common characteristics. Whether a legislature is unicameral or bicameral, chooses the head of state or is elected independently, or has members selected through districted elections

116 Riker & Brams, supra note 111, at 354 (providing illustration).
117 Kenneth A. Shepsle & Barry R. Weingast, Structure-Induced Equilibrium and Legislative Choice, 37 PUB. CHOICE 503, 514 (1981). The Shepsle and Weingast analysis was a response 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 generate cycles when they do not. In that sense, the structure induced equilibrium analysis is a more general result.
118 Riker and Brams, for example, have observed that at various times, the Congress limited formal amendments relative to potential options, thus limiting the requisite number of binary comparisons to disclose a cycle. Riker & Brams, supra note 116, at 354. Shepsle and Weingast have identified numerous mechanisms that forge what they term “structure induced equilibria” with the effect of precluding cycles. Shepsle & Weingast, supra note 117, at 504. And McNollgast’s veto gate theory is quite similar, focusing on the numerous potential stumbling blocks that can bar legislation, but also that can raise the cost of disclosing the potential range of legislator preferences. McNollgast, supra note 30, at 7.
119 Cf. Baker, Direct Democracy, supra note 60, at __ (positing that Condorcet winners necessarily dominate legislative processes).
or parliamentary lists, virtually all legislatures include features that include committee structures, calendaring rules, priority rankings, and other orders of proceeding. They also have some degree of involvement by the head of state in the formation of policy, either through a formal presidential or gubernatorial veto process, or as the first among equals in the role of Prime Minister. Each also has some vehicle for judicial checks on legislative outputs, either through a specialized constitutional court, or a system like that in the United States in which virtually every court can exercise such power, subject of course to appellate processes. Each of these mechanisms, and many informal ones, allow members to identify sensitive points in the legislative process at which there is a possibility of codifying an outcome that risks 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) to either force inaction, encourage alternative (and preferred) voting paths, or to exercise appropriate threats to negotiate substantive change in the bill itself.

In effect, the overall picture that emerges is that 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 its members determine in matters with sufficiently high stakes that there is insufficient support for changing the status quo. 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 because legislative rules are generally known in advance, 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

Contrast the preceding picture with the social choice profile of appellate courts. The critical difference between and legislative and judicial decision making involves the power of legislatures, unlike judicial tribunals, to remain inert when confronted with a properly presented proposal to change the status quo and when there is inadequate consensus to justify collective action. While this is a permissible basis for legislative inaction—through any of the previously discussed mechanisms, legislatures can let bills die—the absence of doctrinal consensus is not a basis for failing to issue a judgment in a case. This basic distinction translates into an opposite social choice profile of judicial decision making, as compared with legislative decision making, based, once again, on the critical criteria of Range and Independence.

We can express this intuition at two levels, the individual case and groups of cases decided over time. To keep the analysis simple, we will use simplified illustrations drawn from actual Supreme Court decisions. The micro-analysis, explaining how individual cases are decided, can be generalized to almost any multimember appellate panel; the macro-analysis, explaining how groups of cases are decided over time, can be generalized to explain appellate decision making in nearly any common law judicial system.120

120 With some modifications, this analysis can also be extended to civilian systems once we recognize that the influence of persuasive opinions previously announced operates much like 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
i. Individual Case Decision Making

In the recent Supreme Court decision, *McDonald v. City of Chicago*, the Supreme Court decided whether to extend its 2008 decision, *District of Columbia v. Heller*, holding that the Second Amendment protects an individual right to bear arms as applied to the District of Columbia, to the City of Chicago. The plaintiff, McDonald, presented two arguments to strike down a Chicago ordinance preventing him from owning a handgun in the city. He argued that under the Fourteenth Amendment Due Process clause, the Second Amendment was a fundamental right that was incorporated, and thus applied to state and local governments. Alternatively, he argued that despite 150-plus years of contrary precedent, under the Fourteenth Amendment Privileges or Immunities clause, the Second Amendment right was covered and applied to states and localities. To rule for McDonald, any individual jurist would have had to determine that the claimed right was covered under either the due process or privileges or immunities clauses. The Court ruled for McDonald, however, based upon a combined set of opinions in which separate majorities rejected each of the arguments on which McDonald needed to succeed as a logical matter to win. Analyzing this recent case demonstrates that in contrast with legislatures, which have the ability to remain inert when confronted with preferences that cycle, Supreme Court decisionmaking rules, along with those of nearly all appellate tribunals, compel outcomes even when member preferences risk embedded cycles.

The *McDonald* Court issued five opinions, but for our purposes we need focus on the three principle 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. He further determined that whatever the merits of the Privileges or Immunities argument, the century and a half of precedent rendering that clause all but a dead letter did not invite reconsideration on the facts of *McDonald*. Justice Thomas, writing a partial concurrence and a partial concurrence in the judgment, rejected the Due Process argument, maintaining that the clause had wrongly been extended by the Court from its more limited meaning, involving process, not substantive rights. He then explained that *The Slaughterhouse Cases*, which had effectively gutted the Privileges or Immunities Clause, was wrongly decided and that the clause protected a number of rights that today would be described as fundamental using a due process analysis. Thomas then concluded that the Second Amendment is included under the Privileges or Immunities clause. Writing 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.

While no individual jurist would reject both the due process and privileges or immunities arguments yet rule for McDonald, that is precisely what the Court as a whole accomplished. The Court did so by applying the nearly universal appellate court decision rule of outcome voting.

*Common Law Nation, 66 LA. L. REV. 775, 787–88 (2005) (discussing the use and value of precedent in civil law systems, using Louisiana as a teaching example).*

121 130 S.Ct. 3020 (2010).
123 *McDonald*, 130 S.Ct. at 3030–31, 3050 (Alito, for a plurality).
124 83 U.S. 36 (1873).
125 *McDonald*, 130 S.Ct. at 3083 & n.19 (Thomas, J., concurring in part and concurring in the judgment).
126 Id. at 3120 (Breyer, J., dissenting).
This rule requires the members of the Supreme Court (which not coincidentally has an odd number of jurists) to each cast a binary vote—Affirm or Reverse—and then determine the basis upon which to justify the vote, either by writing an opinion or by joining a colleague’s opinion.\textsuperscript{127} The outcome voting rule effectively limits the number of binary comparisons relative to options, with the consequence, as seen in \textit{McDonald}, of ensuring an outcome even though with plausible assumptions, it is possible to demonstrate that the member preferences embed a cycle. The following table illustrates the case:

<table>
<thead>
<tr>
<th>Accept P or I Argument</th>
<th>Reject DP Argument</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accept P or I Argument</td>
<td>(A) Alito (plus 3)</td>
</tr>
<tr>
<td>Reject P or I argument</td>
<td>(B) Breyer (plus 3)</td>
</tr>
</tbody>
</table>

\textit{Table 1: McDonald v. City of Chicago}

The embedded cycle in this case, and in similar cases, can be expressed in various ways.\textsuperscript{128} For our purposes, a single presentation is sufficient since other methods produce the same essential result.\textsuperscript{129} Rather than treating each issue as presenting a binary option, we will take the combined set of issue resolutions represented within each opinion, grouped here as ABC, as a separate package that the justices ordinarily rank. The question is how the justices joining each camp would elect to rank order the remaining options after they realize that there is no first-choice majority option.

The analysis reveals two critical features—multidimensionality and asymmetry—that combine to explain the \textit{McDonald} anomaly. Asymmetry means that two camps reach opposite resolutions on each underlying issue, yet accomplish a common outcome.\textsuperscript{130} This set of conditions makes it possible to generate reasonable assumptions from which to infer a cycle. The Alito camp (A) is forced to select as a second choice either an opinion that reaches an opposite holding on each of the two underlying issues—Due Process and Privileges or Immunities—but gets to the same judgment of reversing the lower federal court, thus also granting McDonald relief (position (C)), or instead to select an opinion that resolves one of the two issues in the same manner—rejecting the Privileges or Immunities analysis—but that reaches an opposite holding on the due process issue and an opposite judgment (position (B)). Justice Thomas (C) must select as a second choice between an opposite rationale on both issues (applying due process but rejecting privileges or immunities) leading to the same judgment (position (A)), or a

\textsuperscript{127} For an analysis of why introducing the third option to remand does not exacerbate the cycling problem described in the text, see \textit{Stearns, supra} note 102, at 153-54 (explaining norm among Justices to defer to remand position as needed to achieve a judgment in three-judgment cases in which no single judgment commands majority support as an initial matter); see also Maxwell L. Stearns, \textit{Should Justices Ever Switch Votes?: Miller v. Albright in Social Choice Perspective}, 7 SUP. CT. ECON. REV. 87, 110 & n.76 (detailing cases in which Justices preferring a more extreme but unsuccessful outcome switch their votes to support a remand and thus produce a majority outcome).

\textsuperscript{128} See \textit{Stearns & Zywicky, supra} note 30, at 438-42 (using \textit{Kassel v. Consolidated Freightways} to illustrate an instance of an embedded cycle in a Supreme Court decision); David S. Cohen, \textit{The Precedent-Based Voting Paradox}, 90 B.U. L. REV. 183, 206–11 (2010) (using \textit{Hein v. Freedom from Religion Foundation, Inc.} to illustrate the “precedent-based voting paradox,” which can arise where a court appears to be faced with only one issue).

\textsuperscript{129} See generally \textit{Stearns & Zywicky, supra} note 27, at 438–47 (presenting multiple ways of illustrating judicial cycling phenomenon).

\textsuperscript{130} Conversely symmetry arises in cases in which those camps reaching opposite outcomes on the dispositive issues also reach opposite judgments. When this occurs, the conditions meet the requirements of the narrowest grounds rule. For an analysis, see Stearns, \textit{supra} note 115, at 144 n.37 (using \textit{Board of Regents of the Univ. of Cal. v. Bakke} as an example of symmetry in adjudication).
common rationale on the Due Process issue, but an opposite rationale and judgment on privileges or immunities (position (C)). As a matter of pure intuition, there is no way to know \textit{a priori} how the members of camps (A) or (C) would select among these options in generating their ordinal rankings. The information provided in the published opinions does not answer the question, and it is possible, and even plausible, to set out reasonable assumptions capable of generating either a forward or reverse cycle. These cycles take the following forms: Alito: ABC; Breyer: BCA; Thomas: CAB or Alito ACB; Breyer: BAC; Thomas: CBA. The assumptions needed to posit these ordinal rankings are contestable, but this does not undermine the claim that the case has the characteristic features from which it is reasonable to infer a cycle. After all, the two combined sets of cycling preferences include opposite assumptions about the ordinal rankings for each camp.

The implications for appellate judicial decision making are important. Recall that when the legislature discovers, through whatever means, that its member preferences cycle, it is not obligated to act. Instead, it can remain inert, thus defaulting to the status quo. Outcome voting is an example of a rule that demonstrates that appellate courts are different. When the members of an appellate tribunal who are called upon to resolve properly docketed case discover conditions that give rise to a cycle, they nonetheless employ decision rules that resolve the case, even if in doing so they forge doctrine that has the potential to defy majority preferences of its own members. This is precisely what occurred on each issue dimension in \textit{McDonald}. Outcome voting accomplishes this result by limiting the number of formal votes relative to options. In effect, the rule forces a binary choice to affirm or reverse even if a combined set of binary choices over each dispositive issue and judgment potentially generate a cycle.

ii. Stare Decisis: The Single Dimensional Case

We now consider the institutional mechanism of stare decisis as applied in two contexts, first with respect to a single dimensional case, and next in a pair of cases that present an embedded cycle. The Supreme Court applies a presumptive rule of stare decisis in which the members inquire whether a previously resolved case controls the case immediately under review. Stare decisis shares a common characteristic with outcome voting. By limiting the inquiry in a later case to whether an earlier case controls, the Court is once again limiting the number of binary comparisons relative to options. The regime does so by presumptively disallowing an independent inquiry into how the later 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—the stare decisis regime ensures a combined set of outcomes whether or not the preferences in the two cases mask a cycle. Depending on preference configurations, this can either result in the selection of a Condorcet winner, or it can affect dimensionality in a manner that yields a cycle.

One important consequence of outcome voting in the individual case and stare decisis over sequential cases is that the rules tend to encourage justices to vote consistently with their sincere views on the governing case issues and on the relationships between and among cases. This is not to suggest that the views themselves are necessarily normatively defensible; rather it is to suggest that justices rarely have an incentive to vote other than consistently with their views whatever normative framework they use to derive those views. This is most easily illustrated with another case that offers a helpful contrast with \textit{McDonald}. In \textit{Planned Parenthood of
Southeastern Pennsylvania v. Casey, the Supreme Court also produced a badly fractured set of opinions, but this time produced a combined set of opinions that included a Condorcet winner.

The opinions included a plurality decision by three justices, O'Connor, Kennedy, and Souter; a partial dissent and partial concurrence in the judgment, by Justices Rehnquist, Scalia, White and Thomas; and an alternative partial dissent and partial concurrence in the judgment by Justices Blackmun and Stevens. To simplify the presentation without changing the analysis, we can treat the plurality coalition as moderate, the first partial concurrence and partial dissent coalition as conservative, and the second partial concurrence coalition as liberal.

The issue in Casey was whether Pennsylvania’s somewhat complex abortion scheme violated the fundamental right to abort announced in the landmark 1973 decision, Roe v. Wade. The moderates divided the question into two issues: (1) should Roe v. Wade be overturned, and (2) if not, does Roe prohibit some or all of the Pennsylvania abortion restrictions. The moderates ruled that what they defined as the “basic holding” of Roe should be maintained. The jointly authored plurality opinion revised two critical aspects of that holding. First it revised the characterization of abortion from a “fundamental” right to a protected liberty interest. Second, it revised the trimester framework as a means of elevating the state’s claimed interest in the potential life represented by the fetus. This allowed the plurality to sustain all provisions of the statute, including a controversial parental notification provision, with the sole exception of a spousal notification provision.

The conservatives would instead have held that Roe should be overturned, and would have upheld all of the Pennsylvania abortion restrictions, including the spousal notification provision. The liberals would have maintained Roe in its original form and would have struck down all provisions except for the one provision that allowed an exception from the other abortion restrictions in the event of a medical emergency.

The Casey opinions can be lined up along a single normative spectrum based upon the strength or weakness of the claimed abortion right.

<table>
<thead>
<tr>
<th>Rehnquist, Scalia, White, Thomas</th>
<th>O’Connor, Kennedy, Souter</th>
<th>Stevens, Blackmun</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overtur Roe; sustain all provisions</td>
<td>Revise but retain Roe; sustain all but spousal notification</td>
<td>Retain all of Roe; strike all but medical exception</td>
</tr>
<tr>
<td>Narrow Right to Abort</td>
<td></td>
<td>Broad Right to Abort</td>
</tr>
</tbody>
</table>

Figure 2: Planned Parenthood v. Casey in a Single Dimension

The Casey decision is in some respects typical of the dynamics of Supreme Court decision making in the absence of a majority decision. Most often, when the Court fractures and thus fails to issue a majority opinion, the opinions can be meaningfully cast along a single normative dimension. To identify the controlling opinion in this situation, the Supreme Court has issued a decision-making rule, referred to as the narrowest grounds doctrine. This rule has the effect of ensuring that if among the various opinions there is a Condorcet winner, that opinion

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133 Planned Parenthood, 505 U.S. at 901.
134 Id. at 2855 (Rehnquist, J., concurring in judgment in part and dissenting in part).
135 Id. at 2845–46 (concurring in part, concurring in judgment, and dissenting in part).
136 See Marks v. United States, 430 U.S. 188, 193 (1977) (articulating narrowest grounds rule and applying rule to strike down obscenity conviction).
will express the Court’s holding. The rule states that absent a majority opinion, the opinion consistent with the outcome that resolves the case on the narrowest grounds controls. This means that if the case sustains a statute against a constitutional challenge, the opinion reaching that result that would sustain the fewest such statutes is controlling, and conversely, if the case strikes a statute down on constitutional grounds, the opinion reaching that result that would strike down the fewest statutes is controlling.\(^{137}\) As illustrated by \textit{Casey}, this implies that for the holding sustaining all provisions other than the requirement of spousal notification, thus making the conservative and moderate positions eligible, the moderate position is narrower because it would retain \textit{Roe}, albeit in modified form, and thus sustain fewer abortion laws than would the conservatives. For the part of the opinion striking the spousal notification provision, the eligible opinions are those of the moderates and liberals, with the moderates again expressing the holding on narrower grounds. Whereas the liberals would retain \textit{Roe} in its entirety, thus striking a broader set of laws (including for example all of the challenged ones other than the medical emergency exemption), the moderates revised \textit{Roe} formulation results in striking fewer restrictive abortion provisions.

One important implication of this analysis is that as a general matter, the jurists are not motivated to engage in strategic voting behavior. As illustrated in \textit{Casey}, the moderates achieve the result of expressing the holding in a manner consistent with their apparent ideal point without engaging in strategic voting behavior. Under the combined outcome voting and narrowest grounds rules, the moderates understand that those who want to take a more conservative view or more liberal view of abortion rights in \textit{Casey} have no incentive other than to express their views sincerely; otherwise they would affect the voting line-up in a manner that favors the other side. Given these incentives, and subject to an exception that does not alter this analysis, the moderates also have an incentive to sincerely express their position, one that allows a revised \textit{Roe} formulation and a partial victory to each side.

Because the narrowest grounds rule effectively graphs the Condorcet criterion onto single dimensional Supreme Court cases, the more extreme jurists gain little by voting other than sincerely for their preferred position in each case. This is not to suggest, however, that there is no room for strategy in Supreme Court decision making, or appellate judicial decision making more generally. There is an important circumstance in which a kind of strategic voting behavior sometimes occurs in an effort to secure majority precedential status, and thus to avoid the fractured panel result. Because the Supreme Court gives precedential status to majority opinions, and thus because only a majority opinion can overturn a prior majority opinion, there are examples in which a Justice taking a more extreme view in a case will moderate his views to elevate what otherwise would be a narrowest grounds opinion to majority status.\(^{138}\) Notice however that when this occurs, the bargaining arises along a single issue dimension with the effect of moderating the holding from a more extreme form.\(^{139}\)

\(^{137}\) For a more detailed explanation and analysis, see Maxwell L. Stearns, \textit{The Case for Including} Marks v. United States in the Canon of Constitutional Law, 17 CONST. COMM. 321 (2000).

\(^{138}\) For an analysis explaining such a voting strategy by Justice Scalia in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), see Stearns, \textit{supra} note 137, at 333–35. The critical difference is that the justices do not vote against their preferred normative view to secure a favorable resolution of another issue within a case or to secure a different outcome in another case. For a more detailed discussion, see STEARNS, \textit{supra} note 102, at 444–46.

\(^{139}\) In \textit{Adarand}, the effect was for Scalia to nominally embrace a holding that maintained that “strict in theory is not fatal in fact” in the context of race-based preferences, even though his ideal point expressed the position that strict was and should be fatal. One other narrow exception that does not affect the analysis set out in this discussion involves switching positions to provide the appearance of majority support when there is an embedded cycle. For a
As a general proposition, this analysis demonstrates that within cases, members of the Supreme Court, and by extension of other appellate tribunals operating in a common law system, adhere to the Arrovian Independence criterion. The Supreme Court’s combined decision making rules motivate jurists to retain their preferred positions in almost all cases. One additional feature that promotes adherence to Independence in an appellate judicial setting is the publication of written opinions.\textsuperscript{140} While justices will occasionally prefer to depart from prior rulings, including prior opinions that they joined, doing so is not costless. The fact of publication invites criticism by other jurists, academic commentators, and the media.\textsuperscript{141} One consequence is that justices generally prefer to devise clever distinctions rather than to expressly depart from prior rulings that they joined, at least without a justification, for example, a contrary and controlling majority or narrowest ground opinion.

\begin{itemize}
  \item iii. Deciding Multiple Cases: Stare Decisis and Judicial Path Dependence\textsuperscript{142}
\end{itemize}

The preceding analysis becomes more complicated when we consider the dynamics of cases over time that occasionally give rise to embedded cycles. Even in cases in which the Court issues majority decisions, there are circumstances in which the Court’s members manifest intransitive preferences over larger groups of cases. To illustrate, consider the following two actual cases that the Court decided on the same day in 1982, \textit{Washington v. Seattle School District No. 1},\textsuperscript{143} and \textit{Crawford v. Board of Education}.\textsuperscript{144} These cases have implications not only for developing the social choice profile of the Supreme Court voting protocols, but also for how the Court treats issues that arise through direct democracy.\textsuperscript{145} Both cases involved the question whether a state that was not previously subject to de jure segregation, but which had taken affirmative steps to integrate its public schools, could be prevented by a state constitutional amendment—one referred by the state legislature, the other taken up by a statewide voter initiative—from taking further integrative steps beyond that which is constitutionally required without running afoul of the requirements of equal protection set out in the Fourteenth Amendment or, in the case of Washington State, that plus the parallel state equal protection requirement.

discussion of this analysis in the contest of the infamous decision of Bush v. Gore, 531 U.S. 1038 (2000), see Michael Abramowicz & Maxwell L. Stearns, \textit{Beyond Counting Votes: The Political Economy of Bush v. Gore}, 54 \textit{VAND. L. REV.} 1849 (2001) (explaining that the conservative camp, which preferred to ground the ruling in Article II, might have joined what would otherwise have been the moderates’ non-majority equal protection analysis to create the appearance of majority support for a single rationale in a case in which the Supreme Court effectively foreclosed further political processes from ultimately choosing the President).

\textsuperscript{140} In recent decades, this practice has been substantially relaxed in the United States Circuit Courts of Appeals, with the result that judges express their views in a subset of actual resolved cases. Commentators have observed that this has the effect of limiting the flow of meaningful information about doctrinal development and of the views of particular jurists. See William Reynolds & William Richman, \textit{An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform}, 48 U. Chi. L. Rev. 573 (1981); William Richman & William Reynolds, \textit{Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition}, 81 \textit{CORNELL L. REV.} 273 (1996).

\textsuperscript{141} For a discussion, see Stearns, supra note 83, at 1259 n.153 (explaining how the publication of judicial opinions, in contrast with legislative votes for which published explanations are not provided, promotes differential voting behavior across these two institutions).

\textsuperscript{142} Portions of the discussion that follows are adapted from \textit{STEARNS & ZYWICKI, supra} note 27, at 458–64.

\textsuperscript{143} 458 U.S. 457 (1982).

\textsuperscript{144} 458 U.S. 527 (1982).

\textsuperscript{145} \textit{See infra} part IV (applying social choice analyses to \textit{Crawford} and \textit{Seattle}).
In *Crawford*, California had passed a state constitutional amendment, following a referendum process that began in the state general assembly, that prevented state courts from ordering integrative busing unless the court first determined that a federal court would find that the order was necessary to remedy a violation of the Fourteenth Amendment Equal Protection Clause.\footnote{Seattle Sch. Dist., 458 U.S. at 462, 464.} Writing for a majority of six, Justice Powell sustained the amendment against a federal equal protection challenge. Justice Brennan wrote a concurrence for two, and Justice Marshall dissented alone. In *Seattle*, 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.\footnote{Crawford, 458 U.S. 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.} Writing for a majority of five, Justice Blackmun struck down this referendum. Justice Powell wrote a dissent for four. The following table helps to explain the voting line up in the two cases: \footnote{See STEARNS & ZYWICKI, supra note 27, at 461.}

| Table 2. Supreme Court Voting Line-up  
<table>
<thead>
<tr>
<th>in <em>Seattle</em> and <em>Crawford</em></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Seattle</strong></td>
</tr>
</tbody>
</table>
| Majority | Blackmun  
Marshall*  
Brennan  
White  
Stevens | Powell*  
Burger*  
Rehnquist*  
O'Connor* |
| **Crawford** | **Concurrence** | **Dissent** |
| Majority | Powell*  
Burger*  
Rehnquist*  
O'Connor*  
Stevens  
White | Brennan  
Blackmun | Marshall* |

In Table 2, 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* dissent, and Justice Marshall, who joined the majority in *Seattle*, and who alone dissented in *Crawford*. In his dissenting opinion in *Crawford*, Marshall maintained that although the Court had decided *Crawford* and *Seattle* in opposite fashion, the two cases were constitutionally indistinguishable.\footnote{Crawford, 458 U.S. at 547–48 (Marshall, J., dissenting).} In his dissenting opinion in *Seattle*, Justice Powell rejected each argument offered to distinguish the two cases.\footnote{Seattle Sch. Dist., 458 U.S. at 490 n.3 (Powell, J., dissenting).} As a matter of substantive equal protection law, one can certainly debate whether the two cases are indistinguishable, but for our immediate
purposes, resolving this debate is unnecessary. Whatever the merits of arguments drawn to distinguish the cases, a majority of the Court—Powell, Burger, Rehnquist, O’Connor, and Marshall—wrote or joined opinions that concluded that the two cases should be decided in the same manner. And yet, the Court as a whole, in two separate majority opinions issued on the same day, resolved them in opposite fashion.

These cases demonstrate that it is possible for two separate majority decisions to embed a cycle within a stare decisis regime. To appreciate this point, 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 initiative based upon equal protection. And a third majority seeks to resolve these cases in a consistent fashion such that either both are upheld or both are struck down. Obviously it is not possible to simultaneously satisfy all three majorities.

Now imagine that the two cases were issued sequentially, 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 the actual Crawford and Seattle cases, then the order in which the cases were presented for decision would, in theory, control the outcomes in both cases. If Crawford arose first, the Court would have sustained the challenged law. If Seattle came up one year later, the five Justices with asterisks next to their names would not have asked how to resolve the case as a matter of first impression, but rather, they would have asked whether Crawford controlled Seattle. If we assume that the Justices resolved this sincerely (according to the expressed views in the actual cases and thus consistently with the Independence criterion), they would answer yes, and based upon stare decisis, would sustain the Seattle initiative, with the result that both laws are sustained. Conversely, if Seattle was decided first, a majority would have voted to strike down the challenged initiative. One year later when Crawford is presented, the same five Justices would ask if Seattle governs Crawford, and applying the same logic, would vote to strike the Crawford amendment as well, with the result that both laws are struck down. The actual cases were presented at the same time, such that neither case was a controlling precedent in the other. As a result, the Crawford amendment was sustained and the Seattle initiative was struck down, thus thwarting the crossover majority of Justices who determined that the cases should have been decided in like manner.

These cases help to show how stare decisis, here used to mean the Court’s presumptive deference to its own prior decisions, further operates as a Range restriction in appellate judicial decision making. As we have already seen, social choice demonstrates the need for the same number of binary comparisons as options as a means of assessing the social significance of institutional outcomes. Consistent with range, this voting requirement allows participants to determine if the proposed outcome is a Condorcet winner or is instead the arbitrary product of a voting path. The prior discussion explained that within legislatures, for example, it is commonplace to limit the number of votes relative to options through any number of formal rules. This can include, for example, a limit on amendments, or a prohibition on reconsideration of defeated alternatives. If there are more options than permitted amendments, or if defeated

151 In the next part, we will consider an important argument designed to explain the differing outcomes not based upon a merits-based distinction respecting the underlying legal policies, but rather based upon the different forms of direct democracy through which the two laws were enacted. See Eule, supra note 16, at 1566–67.

152 For a discussion of other forms of stare decisis, see STEARNS & ZYWICKI, supra note 27, at 423–29.

153 William H. Riker, The Paradox of Voting and Congressional Rules for Voting on Amendments, 52 AM. POL. SCI. REV. 349 (1958) (discussing Congressional rule limiting votes relative to options); see also STEARNS & ZYWICKI, supra note 27, at 144.
options cannot be resurrected and pitted against the option poised to be chosen, it is not possible to know whether the outcome is a Condorcet winner or the product of a voting path. The common practice of preventing reconsideration of defeated alternatives thus ensures an outcome, but does so at the cost of uncertainty as to that outcome’s social significance. Within legislatures, however, informal mechanisms allow members to work around such formal restrictions, at least when stakes are sufficiently high, thus facilitating results that adhere to Range.\(^\text{154}\) Within the framework of social choice, stare decisis operates as a time-honored cycle-breaking rule that ensures an outcome by preventing an option defeated in a prior round from being later pitted against the eventual outcome.

Once again, consider *Crawford* and *Seattle*. These two cases presented three binary choices: (1) uphold or strike the California amendment (*Crawford*); (2) uphold or strike the Washington referendum (*Seattle*); and (3) decide the cases consistently or inconsistently (stare decisis). Stare decisis effectively takes one of the options off the table, namely the choice to decide the second case—the one subject to prior precedent—on its independent merits without regard to the obligation of precedent. It is for that reason that stare decisis has the potential to ground the substantive case outcomes in the order in which the cases are presented and decided. *Crawford* followed by *Seattle* produces opposite holdings in both cases as compared with *Seattle* followed by *Crawford*.\(^\text{155}\)

To be clear, I am not suggesting that the ordering of presentations would necessarily have produced the results predicted above. It is possible that some or all of the Justices who initially presented the cases as indistinguishable when stare decisis was not in play would have devised a distinction if called upon apply stare decisis. Notice, however, that if they did so, the effect would have been to embed some set of distinctions—and possibly problematic ones—in the resulting doctrine.\(^\text{156}\) As previously noted, the prior opinions that the Justices wrote or joined would have raised the cost of departing from the earlier expression of legal principle.\(^\text{157}\) The argument is not that the Justices never depart from sincere positions. Rather it is that the institutional mechanisms under which they operate have the effect of raising the cost of doing so, thus promoting adherence to Independence, and of ensuring outcomes regardless of preference structures, thus relaxing Range. This is opposite the social choice profile of the legislature.

It is for this very reason, in fact, that commentators generally regard the judiciary as a non- or anti-democratic institution. Courts, unlike legislatures, are generally required to act, and knowing this, litigants often seek opportunities to use courts to force resolutions on policy issues that legislatures are unwilling to act on as a result of the power of legislatures to remain inert. Sometimes the judicial range restriction produces compelling results. The reluctance of state legislatures in the South, and of Congress, to embrace needed reforms during the period of racially segregated schools motivated the NAACP to pursue a strategy of favorable case orderings in the judiciary that targeted important changes in Supreme Court doctrine.\(^\text{158}\) The campaign to end state sanctioned practices imposing restrictions on women based upon archaic and overbroad assumptions about sex roles followed a similar course of favorable case

\(^{154}\) As previously explained, as an alternative, through the commodification of votes, legislators will sometimes enact results that would support minorities of voters when preferences are viewed in strictly ordinal terms. See *supra* at __ (explaining mechanism through which legislators commodify preferences).

\(^{155}\) For a discussion of the relationship between path dependence and the standing doctrine, see *Stearns,* *supra* note 102, at 170-97 (2002).

\(^{156}\) For a detailed discussion and analysis, see *Stearns,* *supra* note 102, at 187-89.
orderings. In each instance, it was precisely the inability of the Court to avoid action, and the assumption that the Court would resolve the cases based upon a set of articulable principles rather than strategy, that produced cries of the unfair removal of these issues from the longer and more difficult road of democratic resolution among those who opposed the resulting doctrinal changes.

This is also the cry when more current contentious issues are presented for judicial resolution. The label “anti-democratic” 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 case vehicles for doctrinal reform. In each instance, the distinguishing characteristics of legislatures—adherence to range, relaxed independence—and courts—relaxed range, adherence to independence—motivated praise or scorn depending, at least in part, on the side of the issue on which the commentator stands.

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

Now that we have seen the profiles of the two most significant lawmaking bodies against which to compare direct democracy, we are ready to develop a profile of direct democracy itself. The analysis shows that in its most important features, the social choice profile of direct democracy is far closer to that of appellate judicial, than legislative, decision making. This observation has significant normative implications across a number of issues, some of which have found their way into constitutional doctrine.

i. Constructing the Direct Democracy Profile

Initiative and referendum processes invariably ensure outcomes without regard to the preference profile of the voters. Whether or not the voters hold a majority or Condorcet winning preference for resolving the issue presented on the ballot, once the proposal is balloted, the electorate will reach 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 (statistically rare) event of a tie. With large numbers, a tie is sufficiently improbable that for all practical purposes a collective outcome of balloted plebiscites is guaranteed. The binary choice put to a large number electorate is structurally parallel to the binary—affirm or reverse—choice put to members of an appellate court. In both instances, whether the participants’ preferences are neatly aligned, thus conducive to a Condorcet winning outcome, or prone to a cycle, with the risk that the outcome will thwart majority preferences over some issue dimension,

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159 In fact, the judicially created sex based equal protection doctrine is sometimes ironically credited with contributing to the defeat of 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 CAL. L. REV. 1323 (2006).

160 See, e.g., J. Harvie Wilkerson III, Of Guns, Abortions, and the Unraveling Rule of Law, 95 V.A. L. REV. 253, 254 (2009) (comparing Heller v. District of Columbia to Roe v. Wade, and arguing that both decisions suffer from the same shortcomings, including a “transfer of power to judges from the political branches of government—and thus, ultimately from the people themselves”).

161 This is not to suggest, of course, 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.

162 See, e.g., CAL. CONST. art 2, § 10(a) (“An initiative or referendum approved by a majority of the votes thereon takes effect the day after the election . . . .”)
the binary outcome choice—pass or reject the plebiscite or affirm or reverse the lower court judgment—forces collective institutional action.

The social choice profile of direct democracy further resembles that of appellate courts in revealing a tendency toward outcomes favoring the median voter. As a general matter, when there is a median voter position on the issue put to an initiative or referendum, the outcome will reflect that median position. Although this requires some explanation and is subject to some qualifications, this is almost true as a matter of definition. When preferences are aligned along a single dimensional spectrum, this median voter result necessarily holds if we set aside the problem of voter confusion and assume fair representation in voting, or if we assume that voter confusion or nonparticipation is approximately evenly spread across the electorate to avoid any systematic distortion effects. On these assumptions, the majority that passes or defeats the ballot measure will necessarily include the median electoral voter.\textsuperscript{163}

Like appellate courts, direct democracy generally honors Arrovian Independence, or sincere voting respecting the binary choice to pass or oppose the plebiscite. This follows from the nature of large number electoral voting. In a large election, strategic voting is very nearly impossible to accomplish. If voters agree to swap votes—I’ll vote for your proposed plan to approve private religious school tax vouchers if you vote for my proposed ban to increase public school funding—such agreements would be legally unenforceable.\textsuperscript{164} In addition, such strategies are beset by problems of high information and enforcement costs.

The net effect is that like judicial decision making, direct democracy is characterized by relaxed Range—there will be an outcome without regard to preference structures—and adherence to Independence—over large numbers, there is little opportunity for strategic behavior. Plebiscite voters gain little or nothing by voting other than sincerely for their preferred policy position. This follows from the median voter theorem.\textsuperscript{165} Along a single dimensional scale, constituents who occupy more extreme positions to the right or left of the median voter will nonetheless 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. While the voter might be disappointed with the options presented, voting contrary to one’s sincere preferences over the binary choice will tend to move policy farther from the voter’s ideal point on the issue under consideration.\textsuperscript{166}

Based on this dynamic, the median voter theorem predicts that that in a single stage election, rational candidates tend to move toward the median voter. By similar reasoning, plebiscite voting would appear to also push policy in the direction of the median voter in an effort to appeal to more voters. Despite this, there are good reasons to suspect that plebiscites sometimes thwart median preferences.

To fully develop this argument, and to see the conditions under which plebiscites might thwart median voter preferences, we now must develop two voter preference configurations, those in which preferences are nicely aligned, thus yielding a Condorcet winner, and those in

\textsuperscript{163} For a discussion of dimensionality and cycling in plebiscites, which I term plebiscycles, see infra at __.

\textsuperscript{164} See, e.g., CAL. ELEC. CODE § 18521(a) (West 2010) (“A person shall not directly or through any other person receive, agree, or contract for, before, during or after an election, any money, gift, loan, or other valuable consideration, office, place, or employment for himself or any other person because he or any other person . . . [v]oted, agreed to vote, refrained from voting, or agreed to refrain from voting for any particular person or measure.”). In Porter v. Bowen, 518 F.3d 1181, 1185–86 (9th Cir. 2008), the Ninth Circuit interpreted § 18521(a) to prohibit the swapping of votes between voters for particular candidates.

\textsuperscript{165} For an introduction to the median voter theorem, see STEARNS & ZYWICKI, supra note 27, at 96–101.

\textsuperscript{166} In this discussion, the voter’s ideal point corresponds to her first choice policy position along a single dimensional ideological spectrum. See id. at 96 (defining ideal point).
which they are not, thus yielding a cycle. The cycles can arise in two situations. The first involves cycling over proposed plebiscite policies introduced in sequential periods. As demonstrated below, these situations are likely to produce path dependent, but stable outcomes. The second involves problem of cycling that threatens to lurk in a larger number of initiatives. These cycles are embedded in outcomes as a consequence of failing to allow voters to consider the independent question at the time of each initiative whether they would prefer resolution of policy question raised through the plebiscite or legislative process. This form of cycling, which we term “plebsycles” poses more normative concerns for plebiscite outcomes, at least as applied to certain subject areas. After discussing the single dimensional case, we consider these two forms of cycles.

ii. The Single Dimensional Case

Assuming no voter confusion, a regime that aligns policy with the preferences of the median electoral voter on a specified issue dimension appears to be a perfectly sensible way to resolve the underlying policy question. Assume, for example, the question posed to voters involves the amount of money to spend on a public works project, and there are a variety of proposals, one of which has been balloted, and others of which might be balloted in the future. Direct democracy might prove a useful mechanism for discerning which of the options along a single dimensional scale has majority approval. If the policy options can be meaningfully cast along a single dimensional scale, and if the purpose of placing the measure in the form of a plebiscite is to discern voters’ majoritarian preferences, then assuming no confusion, direct democracy facilitates this result. 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 associated with a balloted plebiscite.

When the relevant alternatives are actually aligned along a single dimensional scale, plebiscites will tend to move policy in the direction of a Condorcet winner even if the plebiscites themselves appear to involve more extreme policy shifts. To see why, consider the following hypothetical.167

Assume a single dimensional scale along which the voters are evenly dispersed. 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 would pass as a majority will prefer the policy change, with the effect of moving policy closer to the median voter’s ideal point. This outcome is chosen even though it is not at position five. More notably, the same result obtains if the starting point and the initiative are on opposite sides of the median voter’s ideal point. Assume that the starting position is at position one and the initiative is once again at seven. Compared with the prior policy, the initiative places policy closer to the median voter’s ideal point and thus a majority of voters will prefer the initiative to the status quo.

167 Figure 3 is adapted from Stearns, supra note 27, at 97 Figure 3:1.
If the resulting initiative policy is more extreme than the preferred position of the median voter (as seen for example by comparing positions five and seven),\footnote{This extends the prediction of the Kousser and McCubbins model, see Kousser and McCubbins, supra note 37, at 980–81, by demonstrating that political entrepreneurs might sometimes be motivated to place plebiscites at more extreme positions on the relevant issue dimension than the ideal point of the median voter on the assumption that the median voter will assess the policy choice relative to other choices that are more distant from his or her ideal point and with the expectation that the options on the policy question will be limited in the future. See supra note __.} no rule precludes a further initiative along the same dimension that moves closer to the ideal point of the median voter in a later round.\footnote{If the plebiscite enacts a policy, in some states, the state legislature cannot overturn it through ordinary legislation, but a later plebiscite can change policy relative to an earlier plebiscite. See Matsusaka, supra note 8, 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 emend them as ordinary statutes.”).} The system might produce stronger policy moves than is ideal when measured against a median preference benchmark,\footnote{As compared, for example, with an immediate policy move to position five.} but in this example, nothing prevents reconsideration through another plebiscite in an effort to move policy closer to the median position along the single-dimensional scale.\footnote{As explained below, this might be a fair reading of the Oregon and Massachusetts case illustrations described by Kousser and McCubbins. See infra notes 180-185, and accompanying text.}

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,\footnote{See supra note 25 (discussing Michigan and California race-based preference initiatives).} or same sex marriage restrictions for gay and lesbian voters,\footnote{[cite various initiatives on SSM]} it is possible that when intensity of preferences is accounted for, the preferred outcome would differ from that obtained under the blunt choice mechanism of direct democracy. While the plebiscite is likely to capture the preferences of the median voter, and thus satisfy the Condorcet criterion when such an option is available, this criterion fails to account for intensities of voter interest.\footnote{See supra at __ (discussing features of Condorcet criterion).}

One of the defining characteristics of legislative decision making is a series of decision junctures—veto gates or negative legislative checkpoints—at which participants and their affected constituencies can register not merely ordinal preferences but preference intensities. The process of registering preference intensities often involves making decisions based upon reciprocal commitments on other, sometimes unrelated, bills. As a result, preference intensities along a single dimension can have effects on outcomes along separate issue dimensions within a legislative setting. Because virtually every regime that uses some form of direct democracy uses it to supplement legislative lawmaking rather than to replace it,\footnote{See supra note 95, and cite therein.} this insight has implications for direct democracy as well.

Assume, for example, that a legislature is considering restricting or ending affirmative action in higher education within three years. It is possible that those most opposed to this policy will negotiate concessions by agreeing to support a variety of other measures that they would otherwise be inclined to oppose. This might include, for example, funding schemes benefiting schools located in high value property areas, or issues entirely unrelated to education. Assume
that in exchange for those concessions, the affirmative action proposal is dropped. In the next election cycle, however, a proposed initiative seeking to ban affirmative action is balloted, and consistent with majority electoral preferences, the measure passes. 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. But notice that the problem is not merely because of the possibility that some voters who oppose the measure feel more intensely about their views that those who support it. It is also because those who made concessions in the legislature to avoid a similar legislative result have now had their reciprocal gains—the payoffs for supporting measures that they otherwise would have opposed—taken from them through the initiative process. In effect, the initiative process has prevented reciprocal commitments made in the legislature, where Independence is relaxed, from being honored in the direct democracy process, where Independence is adhered to.

This analysis is a similar argument to concerns raised when legislative victories in one period are undermined in a later period through constitutional litigation. Any payoffs associated with having the measure passed in its final form have been 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 policy dimensions. The very same argument applies to the process of initiatives. As explained below, the implications might differ in an important respect legislative referendums, but not for automatic recall referendums.177

iii. Dimensionality Over Sequential Plebiscites

The prior example is not intended to suggest that all issues for which multiple proposals involve a common unit of measurement, for example, dates, dollar amounts, or acreage, the options actually do rest on a single normative dimension. It is possible that despite the common measurement scale, some participants least prefer 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 would be nothing irrational about one member or constituency taking the view: “Do it right or not at all.” The expenditure allocation on which the options appear to rest fails to account for those participants who view the policy question as implicating an alternative dimension based upon the quality of the overall product or the opportunity cost of the resource allocation. When these two dimensions are both accounted for, it becomes possible to see the underpinnings of a cycling despite the initial—and misleading—presentation along the single normative dimension of expenditures.179

Kousser and McCubbins maintain not only that democracy can theoretically generate cycling results, but also that through what they term “sequential elimination agendas,” the

176 This is not to suggest that constitutional judicial review is not often justified. Rather, it is to suggest that even when justified, it is not costless.
177 See infra at __.
178 For a general discussion of the relationship between dimensionality and cycling, see STEARNS & ZYWICKI, supra note 27, at 131-32.
179 For an analysis demonstrating that the single dimension with multi-peaked preferences can be expressed as two dimensions over which each member’s preferences are single peaked, see STEARNS, supra note 27, at 73-75 (providing illustrations).
process can produce Condorcet losers. The authors define this term to mean an outcome that is universally regarded as inferior to another available choice. Consider the following table,\footnote{This table is taken from Kousser and McCubbins, supra note 36, at 964.} which the authors use to depict a game in which three voters, 1, 2, and 3, rank three possible policy options, ABC, and the status quo, Q.

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<tr>
<td>First</td>
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<tr>
<td>Second</td>
<td>C</td>
<td>Q</td>
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<tr>
<td>Third</td>
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<td>C</td>
<td>Q</td>
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<tr>
<td>Fourth</td>
<td>A</td>
<td>B</td>
<td>C</td>
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Table 3: Kousser & McCubbins Illustration of Cycling in Initiatives

The authors explain:

The game proceeds as follows. First, there is a vote between policy A and the status quo, Q. Next the new status quo (either A or Q) is pitted against B. Then the new SQ (either A, B, or Q) goes against C. If this voting game were to be actually played out the winner is C, despite the fact that Q is unanimously preferred to C. (thus C is Pareto inferior to Q). The movement to C is clearly non-welfare enhancing as no possible majority would choose C over Q, and no one would have wanted to end up with C, having started with Q.\footnote{See id. at 964 (italics in original, bolding added).}

While the text has not been modified, for ease of exposition, the actual winners in each round are presented in bold typeface. The cycle arises as follows: A defeats Q, B defeats A, and C defeats B. And yet, completing the cycle, Q unanimously defeat C, so C\textsubscript{p}B\textsubscript{p}A\textsubscript{p}Q\textsubscript{p}C. The result of this hypothetical “sequential elimination agenda,” namely C, is not merely arbitrary; it is Pareto inferior given that Q is unanimously preferred to C.

The authors provide two accounts from Oregon and Massachusetts that are designed to illustrate sequential elimination agendas and the possibility of 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 spending may be mutually inconsistent.

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.
The above anecdotes suggest that the theoretical problems of sequential elimination agendas have an empirical basis in the initiative process.\textsuperscript{182}

While it is possible that these examples illustrate a cycle, this result is not inevitable. Instead, these examples might illustrate a change in voter preferences, and thus moves back and forth, along a single dimensional issue continuum over time.\textsuperscript{183} In Oregon, in periods one and two, the voters elect to approve measures that reduce specific taxes and school revenues respectively. Then in period three, they pass another initiative that imposes a sufficiency standard for schools, thus requiring a higher level of taxation and a higher allocation of educational resources. In the Massachusetts, in period one, the voters restrict radioactive waste disposal, and in period two they decline to ban the electric power plants that generate the waste in need of storage.

In both accounts, the voters have confronted sequential choices that can be cast along a single dimensional scale—restrictive to generous 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 median voter’s ideal point (and along with it the ideal points of other voters) respecting the tradeoffs involved. One indication that this might not reflect a cycle is that a single individual could rationally make the aggregate set of choices sequentially without violating the premise of individual rationality. By way of analogy, if asked today (period 1) whether to buy a particular good (say a nice automobile), a person might choose to do so, but if asked a year later whether it is worth continuing to allocate the resources (car payments, maintenance costs, gas) to sustain the purchase (period 2) the same person might say “no.” In the later period, with the benefit of more information about how much the car is worth to her and the true opportunity cost that the purchase reflects, she might decline to support the acquisition. While buyer’s regret is unfortunate, and also costly, it is a fairly common experience. In an extreme case, the buyer might even sell the car in an effort to cut her losses. Buyer’s regret does not reflect a cycle. Rather, it reflects a change of mind based upon newly acquired information. And just as individuals can change their minds, so too can groups.

Under some circumstances, however, sequential initiatives can embed cycles over more than a single substantive policy dimension. When this occurs, however, the outcome is likely to be coherent, but path dependent, especially when the outcome of the first plebiscite commits the voters to a policy that effectively limits the range of choices for a critical group of marginal voters in a later round. Assume, for example, that an initial plebiscite seeking to authorize slot machines at race tracks is approved. After the resources are committed to this development and the state has also made funding commitments contingent on the success of the slots, a second plebiscite seeks to authorize changes in zoning laws to allow secondary businesses, for example restaurants and retail outlets, without which the voters are then led to believe, the slots will fail. It is possible that some voters who initially would have opposed allowing the change in residential zoning, the second initiative, would nonetheless vote to support it once they realize the consequences of the first initiative, and this might be true regardless of how they voted on that measure. If there are enough such voters to tip the outcome, then the second initiative will pass. And yet, combined policies, casinos and business zoning near residential communities, is opposite what would have resulted had the choices been reversed. If the first plebiscite had

\textsuperscript{182} Kousser & McCubbins, supra note 37, at 965-66.

\textsuperscript{183} For a consistent result, see Cooter & Gilbert, supra note 84.
instead asked whether to ban the approval of business zoning near residential communities (as the anticipated price of a later referendum on approving slots), the same group of marginal voters, along with those opposing the slots, would have voted no. In this example, without approval of the zoning change, some who might initially have approved slots might oppose it if led to believe in the second round that without the zoning approval, the slots will not succeed. In this case, the same voters, with the plebiscites in reverse produce opposite outcomes, no change in zoning and no slots.

In this example, the outcomes are path dependent (or using the Kousser and McCubbins terminology, the product of a sequential elimination agenda). The order of voting controls the outcome of choices along both policy dimensions in the same manner as the hypothetical in which Crawford and Seattle were presented sequentially rather than in a single period. The bonding effect of the first plebiscite—committing to the casino or committing to ban business expansion—affects the way a controlling minority of voters resolves the second initiative. Notice, however, that when this occurs, the result is potentially a coherent—but opposite—policy depending on the order of votes.

As previously noted, one of the characteristic features of cycling preferences is the requirement of multiple issue dimensions. This is what is at play in Table 3, where the three players assess the policy choices over ABC and Q along more than a single dimension, thus generating the cycle. In the account of the Oregon and Massachusetts plebiscites offered by Kousser and McCubbins, however, this does not appear to have occurred. Instead, the voters produced contradictory results—or shifts back and forth—along a single dimensional scale. The final plebiscite in each sequence was not resolved in a manner that was contingent on the resolution of the first, but rather moved policy back from a position that might have been pushed too far in the opposite direction. If so, this further supports the preceding analysis suggesting that when policy options align along a single dimensional scale, the plebiscite process tends toward the median, or Condorcet, outcome.

iv. Plebiscycles: Cycling Over Policy and the Choice of Collective Decision-Making Rule

Even if the Oregon and Massachusetts plebiscites do not illustrate a cycle, plebiscite cycles are possible when the underlying issues introduce an added issue dimension. A potentially significant source of dimensionality that could affect a broad range of plebiscites involves combining the underlying question of public policy with a question on the choice mechanism itself. We now consider the potential for, and significance of, “plebiscycles,” meaning cycles that combine questions of policy with questions of institutional choice. To illustrate the potential for

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184 See supra notes 145-152, and accompanying text.
185 See supra at __. An alternative way to express this insight is that along a single dimensional scale, preferences are multi-peaked. This means that at least one participant prefers the opposite extremes to the middle position. In fact, single peaked preferences over two dimensions and multi-peaked preferences over a single dimension express the same insight in different graphical form. The reason is intuitive. When one member holds multi-peaked preferences over options cast along a single issue dimension, this necessarily implies that for this person, the selected normative scale does not capture the critical dimension along which he or she is making the ordinal ranking assessment. If it did capture the relevant normative dimension, then the person would rank his or her preferences with a single peak. For a more detailed discussion and analysis, see Stearns, supra note 102, at 71-77 (explaining relationship between dimensionality and single and multi-peakedness, and providing illustrations).
186 See supra at __.
a cycle over the choice mechanism, we must first present three options along a single dimensional spectrum and then consider how an added dimension of institutional choice mechanism affects the ordinal rankings over options.

Assume three voters or blocs of voters hold three sets of positions regarding a proposed initiative. The initiative can involve a broad range of subjects. Among the possibilities are whether to prevent sexual minority status from forming the basis for inclusion in nondiscrimination statutes, whether to ban busing for purposes of integrating public schools, or whether to prohibit non-public goods takings. Assume that the relevant policy change that the plebiscite would produce is one that conservatives favor and that liberals oppose. The voters divide into three groups based upon the following ideal points of the respective members: (1) those who favor the originally proposed initiative (the Conservative position); (2) those who oppose the initiative altogether and want no action (the Liberal position); and (3) those who want action but would prefer an initiative that takes a more moderate approach (the Moderate position). For now, assume that the voter preferences neatly align on the following single dimensional issue spectrum.

<table>
<thead>
<tr>
<th>Liberal</th>
<th>Moderate</th>
<th>Conservative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preserve status quo</td>
<td>Enact intermediate policy</td>
<td>Enact initiative</td>
</tr>
<tr>
<td>Strong opposition to policy</td>
<td></td>
<td>Strong support of policy</td>
</tr>
</tbody>
</table>

Table 4: Hypothetical Initiative With Single-Dimensional Preferences

Assume no voter confusion and full voter participation or the more relaxed condition of roughly balanced (and thus non-distorting) voter confusion or non-participation. If we further assume that any two of the three groups has the requisite number of votes to command a majority, faced with this binary choice, the moderate voters will control the outcome. If the moderates ultimately vote to pass the initiative, then through revealed preferences we can infer that this is a Condorcet-winning position; conversely if the moderates oppose the initiative, then applying the same logic, that is the Condorcet-winning position. This result obtains even though each camp held a different first choice as its ideal point.

Now consider an alternative version of the initiative process that demonstrates how reliance on a range-restricted regime might, in fact, thwart majority preferences. In this regime, the range of choices is expanded to include an option that the voters do not separately consider in the actual process of direct democracy. In addition to selecting whether to enact or oppose a change on the legal status quo on the subject of the proposed initiative policy, voters are also allowed to decide whether the issue is one that should be resolved through direct democracy or instead through the ordinary legislative process. A decision to resolve the issue through direct democracy is equal to a decision to isolate this policy question from broader consideration within a legislature and to present a proposal on the issue to the electorate in the form of a binary

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190 An ideal point is the optimal policy location for the members who comprise the group. See Stearns & Zywicki, supra note 27, at 96-98.
191 Of course it is possible to generalize this to a larger number of discrete positions along the same single dimensional scale.
choice. A decision to leave the issue with the legislature is instead a decision to allow members of the legislature to negotiate over this issue along with other issues. 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 two presentations that follow include two of the four 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 policy change in the underlying issue in more moderate form. The presentations include as option (C) either of the following combinations: first, isolate the policy for consideration through the initiative process, but oppose the initiative; and, second, conjoin the issue with others in the legislative process, but with the hope that legislative policymaking will entirely defeat proposed policy change on this issue.

To demonstrate how the expansion of issue space invites the possibility that the eventual outcomes mask a cycle, imagine once again that the three camps are required to rank order their preferences over the remaining options. We begin with the version in which option (C) prefers to follow the initiative process on the policy question, but to oppose the initiative. While this position might appear counterintuitive, it is not. These voters might assume that since they oppose any action on the underlying policy, the prospect of defeat is greater if the issue is sent to the voters in more extreme form, and if the legislature construes the failure of the initiative to pass as a signal not to avoid acting on the issue in the future. This group opposes conjoining the issue in the legislature because while they are incurring the risk that the initiative might pass, they fear that the likelihood of moderate legislative action is greater without the initiative vote than with the initiative vote.

<table>
<thead>
<tr>
<th></th>
<th>Favors Policy Change</th>
<th>Opposes Policy Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Isolate policy (use plebiscite)</td>
<td>(A) Pass initiative in proposed form.</td>
<td>(C) Reject initiative, thus preserving status quo.</td>
</tr>
<tr>
<td>Conjoin policy (use legislature)</td>
<td>(B) Enact moderated version of proposed initiative or combine with other issues.</td>
<td></td>
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</tbody>
</table>

Table 5: Initiative Over Two Dimensions (Version One)

The initiative process imposes a non-Condorcet rule that resolves the issue along the horizontal axes. To see how this risks producing an outcome that embeds a cycle, consider the potential ordinal rankings of each camp over the remaining options. There are two possible cycles, based upon reverse assumptions for each camp. We begin with a forward cycle. Assume that the camp that most prefers isolating and passing the original initiative would prefer a moderate policy enacted by the legislature to no change in policy, with the resulting preferences ABC. Assume that the camp that most prefers a moderate policy enacted by the legislature would ultimately prefer no policy change to the extreme change in 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, rather than to have a moderate policy enacted by the legislature, with the resulting preferences CAB. While this ranking is admittedly counterintuitive, imagine that this group believes that enacting the extreme policy will create a significant campaign issue, whereas a more moderated policy will remain entrenched without garnering substantial opposition. Alternatively imagine that this group remains optimistic about
defeating initiatives more generally even if they have to pay the price of an occasional success that they strongly oppose. In this case, the combined preferences ABC, BCA, CAB generates the cycle ApBpCpA.

Now consider the reverse cycle. Assume that the members of camp (A) who prefer to isolate the policy and for the initiative to pass prefer as a second choice to isolate the policy for the initiative process even if the initiative fails rather than to cede the issue for legislative consideration. While the policy proposal will have failed, the issue will continue to play to the political base and thus allow 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 it to fail would prefer a moderate policy enacted by the legislature to having the initiative actually pass in strong form. The resulting ranking is CBA. Finally, assume that those who prefer a moderate policy enacted through the legislature would prefer a more extreme policy to pass over no policy change. The resulting ranking is BAC. These combined preferences present a reverse cycle, with ACB, CBA, BAC, with the result that CpBpApC.

<table>
<thead>
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<tbody>
<tr>
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<td></td>
</tr>
<tr>
<td>Conjoin policy (use legislature)</td>
<td>(B) Enact moderated version of proposed initiative or combine with other issues.</td>
<td>(C) Supports legislative consideration with the hope of no policy change.</td>
</tr>
</tbody>
</table>

Table 6: Initiative Over Two Dimensions (Version Two)

In an alternative version, camp (C) supports legislative consideration, but hopes that the underlying policy change ultimately fails in that forum. Once again, consider the second and third ordinal rankings of each camp, first with a forward cycle, and then with a reverse cycle. Assume that camp (A) prefers a moderate policy over no policy, with resulting preferences ABC. Assume that camp (B) prefers no policy to the extreme initiative policy, with the resulting preferences BCA. Assume that camp (C) which opposes action on this policy would prefer to have the extreme initiative policy enacted rather than the moderate legislative policy, with the resulting preferences CAB. While this appears counterintuitive, imagine that because this group prefers legislative consideration, the members believe that the more extreme policy will provide the basis for a more effective campaign issue and will rally the base more than moderate legislative action.192 The combined preferences, ABC, BCA, CAB, generate the forward cycle ApBpCpA.

Now consider the reverse cycle. Assume that camp (A) would prefer to have the policy defeated in the legislature rather to have a moderate policy pass. This would provide the basis for rallying base political support and a greater likelihood of enacting a stronger future policy through an initiative than if a moderate legislative proposal is enacted on the subject. The resulting preferences as ACB. Assume that camp (B) would prefer the stronger initiative policy to no action, with resulting preferences BAC. Finally assume that Camp (C) would prefer a moderate policy to the more extreme policy in the proposed initiative with resulting preferences BAC. The combined preferences, ACB, BAC, CBA, generates the cycle ApCpBpA.

192 While it is possible that as a result of the initiative, the policy can only be changed with another initiative, this camp might regard the prospect of a wedge issue or a crypto-initiative on this policy more attractive than an entrenched, but moderate, policy that provides no such political benefit. For a discussion of wedge and crypto-initiatives, see Kousser and McCubbins, supra note 37, at 969-74.
In each of the four sets of preferences that generate a cycle (two forward, two reverse), the assumptions needed to generate the combined ordinal rankings are based upon contestable premises. Specifically, each of the four examples includes one set of seemingly counterintuitive assumptions. This is generally the case with constructed cycles, and it is important to emphasize that this does not undermine the analysis. Notice that for each first choice position, we have posited a cycle based upon either of the two available ordinal rankings over the remaining options. It is certainly possible that in the first illustration, where position (C) favors isolating the issue for the initiative process but opposes the initiative, to generate preferences in which camps (A) and (C) each select moderate legislative action (B) as their second choice. It is also possible that in the second version in which camp (C) prefers to conjoin but oppose legislative policy change that once again, 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 the dimensionality and thus have moderate legislative action emerge a Condorcet winner. While this is certainly plausible, it implies that there is invariably a normative justification grounded in social choice for preferring legislative action in moderate form to the alternative of allowing the initiative process to risk action in more extreme form. And yet, electoral majorities do enact strong form initiatives, meaning initiatives that set policy at a point that the legislature would not along the relevant normative issue spectrum. This suggests there are frustrated majorities when issues are combined as part of a larger legislative process.

Moderate legislative outcomes are often viewed as insufficient measures among those who want more pronounced policy change. It is also important to recognize that the line constructed in Table 6 between moderate legislative action and legislative inaction is a fine one. Depending on how moderated the response turns out to be, many voters might view it as equivalent to inaction. In short, among major segments of the electorate it is not surprising that seeming middle positions prove more a source of frustration than of settling compromise.193

From a social choice perspective, what causes the cycle in each case is the combination of by multidimensionality and asymmetry.194 In the first hypothetical depicted at Table 5, camps (B) and (C) both oppose the proposed initiative, but accomplish this outcome with opposite resolutions along the two relevant issue dimensions. Camp (B) prefers to isolate the policy and oppose any change, while camp (C) prefers to conjoin the issue and enact change, albeit in moderate form. And yet, despite opposite resolutions along these two policy dimensions, these two camps reach the same result of opposing the initiative. As with outcome voting and stare decisis in a judicial context, the binary vote to pass or oppose an initiative is a range-restricted rule. The electoral voters do not, in fact, consider the combined binary choices over all options.

193 For an analogous exchange on the role of constitutional compromise on whether Roe should be treated as a binding precedent that resolved whether the Constitution protects a right to abortion, compare Casey, 505 U.S. 833, __ (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 __ (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.").

194 See supra at __.
As a result, the plebiscite outcome cannot resolve whether the final vote on the initiative, whatever it might be, has thwarted the preferences of a majority who would have preferred to kick the entire question, along with many others, to the legislature to resolve in the complex, and messy, course of legislative bargaining.

As public choice theorists have demonstrated, it is difficult to demonstrate the existence of embedded cycles as an empirical matter. But that is not because all decisions rest neatly along isolated policy dimensions and conduce to Condorcet winning outcomes. Rather it is because, as social choice demonstrates, outcomes are invariably a reflection of, or in the economists’ lingo, endogenous to, the rules under 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. Conversely, when the legislature fails to act on an issue, or acts in a manner widely deemed inadequate, it is clear that there is often a sense that some majority, one that combines those strongly favoring a policy change and those who remain anxious about even the prospects of moderated legislative action, who would prefer to cut the legislature out of the deal. But it cannot be the case that both legislative processes and direct democracy routinely produce outcomes satisfying the Condorcet criterion. The very existence of these competing venues for policy change in the states that have direct democracy proves otherwise.

Legislative decision making is inordinately messy. It is a cliché to quote Churchill for the proposition that “democracy is the worst form of Government except all those other forms that have been tried.” 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 that are now commonplace among the states. The same is true of republicanism as Madison defined the term. Whether we define the United States lawmaking system as democratic or as republican, it is certainly clear that the legislative branch is the most democratic of the branches created in the Constitution and that the judiciary is the least. Part of this is owing to the manner of selection, and the lack of direct accountability. But another, and equally important part, is the process through which the institutional decisions are made. The judiciary is antidemocratic in large part because its decision rules force (generally) 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 affected by it, do not believe that the time is right for the question to be asked and answered. The parties, in a proper case or controversy, can force the question to an answer.

A fundamental part of democratic decision making is not only the power to resolve policy issues, but also the power to decide the timing of resolving policy issues. Another aspect of

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196 RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS (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.”), available at http://bartelby.org/73/417.html.

197 See Stearns, supra note 102, at 198-204 (distinguishing judicial and legislative decisionmaking based in part on the relatively greater power of the latter, as compared with the former, to control timing of decisions).
democratic decision making is the power to decide that relevant choice mechanisms include weighting of preferences, not merely expressing preferences ordinally. These critical features, the power to control timing and the ability to register preference intensities, which characterize democratic decision making, are absent in appellate courts. They are also absent in the regime of direct democracy. This does not mean that direct democracy should play no role in policy setting. 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.

The empirical work on the outputs of initiatives and referendums suggests that in general, those polled on the overall usage of direct democracy, favor it. These data are important because they support the intuition that in many areas of policy making, direct democracy has broad support. This is not surprising. If asked whether it is appropriate for the electorate to play a larger role in policy setting, it would perhaps be more surprising if the answer were no. While minorities are part of the group seeking greater policy control, many policies that affect demographic minorities do not survive legislative decision making processes. 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 push advocates of stronger policy reform toward direct democracy.

III. The Policy Implications of Direct (Anti-)Democracy

Now that we have defined the social choice profile of direct democracy, the normative question is what the implications are for allocating policymaking between the two complementary institutions, legislatures and direct democracy. In this part, we briefly consider four sets of normative implications of the preceding social choice analysis. First, we compare 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. Second, we consider the implications of debates among the justices concerning whether there are 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, along with Hunter v. Erickson, and Evans v. Romer. Third, we consider the implications of plebiscites for the Court’s evolving standards of constitutional judicial review in equal protection cases, especially the animus cases. Finally, we revisit the anomaly that opened our analysis. While Carolene Products footnote 4 rests upon intuitions about legislative market failure, the underlying intuitions might have more profound implications for direct democracy. We conclude with some general observations about the complementarity of these two forms of policy making and the implications for the allocation of decision making responsibility on particular questions of public policy.

198 [find polling data]
199 See Matsusaka, supra note 8, 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.”)
200 393 U.S. 385 (1969). See Matsusaka, supra note 8, 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.”)
A. Initiatives versus Referendums: *Crawford* and *Seattle* revisited

Recall that in *Washington v. Seattle School Dist. No. 1*, a Washington initiative banned school boards from using integrative busing unless the board determined that busing was necessary to redress a violation of state or federal constitutional requirements of equal protection requirements. In *Crawford v. Board of Educ. of City of Los Angeles*, a California referendum banned state courts from ordering busing to integrate public schools unless the court determined that busing was needed to redress an identified federal equal protection violation. The Washington initiative contained the more liberal policy in that it allowed busing to redress not only a federal, but also a state, equal protection violation. Despite this, the Supreme Court, which issued two opinions on the same day, sustained the California Amendment, but struck down the Washington Initiative. As previously shown, the cases are anomalous in that an overlapping majority would have preferred to treat the cases as constitutionally indistinguishable. Justice Powell, joined by three other justices, concluded that both laws should be sustained and rejected each substantive arguments presented to distinguish the two state laws. Justice Marshall, by contrast, writing only for himself, expressly stated that the two laws were indistinguishable and concluded that both should be struck down.

Julian Eule offered an important early insight grounded in the features of direct democracy that might help to reconcile the results. The Supreme Court has expressly rejected arguments for treating state laws enacted through direct democracy differently from other laws enacted through the legislative process. In *Pacific States Telephone and Telegraph Co. v. Oregon*, the Supreme Court rejected a constitutional challenge to a tax enacted through the initiative process, claiming that the nonjusticiability of such questions going to government structure were effectively governed by the doctrine established in *Luther v. Borden*. And yet, Eule observed, it is notable that the Court sustained the state law enacted through a legislatively initiated referendum, but struck down the law enacted through a voter referendum.

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204 See supra at 33, Table 2.
205 In *Pacific States Telephone and Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), the Supreme Court rejected a constitutional challenge to a tax enacted through the initiative process, claiming that the nonjusticiability of such questions going to government structure were effectively governed by the doctrine established in *Luther v. Borden*. 48 U.S. 1 (1849). Eule describes an interesting related exchange during the later oral argument in *Reitman v. Mulkey*, 387 U.S. 360 (1967) between then-solicitor general, Thurgood Marshall, and Justice Hugo Black. Eule explains:

By an overwhelming majority, California voters had adopted an initiative measure amending the state constitution to repeal existing open housing laws and forbid the enactment of new ones. During oral argument, Marshall stressed that this authorization of racial discrimination in the private housing market had been the result of voters bypassing the representative process. "Wouldn't you have exactly the same argument," he was asked, if the provision challenged "had been enacted by the California legislature?" "It's the same argument," Marshall replied, "I just have more force with this." "No," interjected Justice Black, "it seems to me you have less. Because here, it's moving in the direction of letting the people of the States … establish their policy, which is as near to a democracy as you can get."

206 223 U.S. 118 (1912).
207 See Eule, *supra* note 16, at 1566 (noting that “In marked contrast to Initiative 350, Proposition 1 was a complementary plebiscite,” and adding that “none of this is explicit in the two opinions.”).
Despite the Court’s rejection of the initiative process as a ground upon which to strike down a challenged state law, Eule’s observation carries an important insight that is consistent with the preceding social choice analysis. While it is certainly true that minorities can seek to protect themselves by blocking or modifying the substance of proposed legislation that concerns them, it is also true that they can protect their interests in other ways, thus leveraging blocking or modifying powers to other ends. If the policy enacted by a state legislature appears adverse to minority interests, it is certainly possible—although difficult if not impossible to prove empirically—that the minority-negotiated benefits appear elsewhere in the overall complex package of legislation. The payoffs for supporting a bill limiting busing to integrate public schools, for example, need not manifest themselves in the form of a moderated substantive policy, for example extending the phase-out period, although certainly it could. It can 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 concede to supporting programs that help other communities but for which they bear part of the general cost.

These sorts of exchanges may be impossible to verify empirically. And yet, the argument is similar to claims that regulatory interferences in private markets have unforeseen rippling effects. One need not prove this at the level of the specific foregone transactions to appreciate that just as price theoretical models generally demonstrate that regulatory interventions affect the manner in which markets clear by disallowing or raising the cost for certain exchanges, so too judicial decisions and plebiscites affect the manner in which legislative quasi-markets clear by disallowing or raising the cost for certain exchanges. This analysis supports the intuition that even if there is not a basis for striking down laws generally because they are the product of direct democracy, there might be a sound normative basis for applying different presumptions about plebiscites that risk affecting minorities in an adverse manner taking the form of initiatives on the one hand and referendums on the other.

Striking down a law on constitutional grounds is extremely 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 preference, or protecting individuals based upon protected rights embedded, or inferred from, the Constitution. A cost of striking legislation on constitutional grounds is that it undermines confidence among legislators that future negotiations, either over substance or over unrelated matters, will be honored when it gets to the courts. By contrast, striking down an initiative does not have the same consequence. In fact, and perhaps ironically, sustaining an initiative might

208 Pacific States Telephone and Telegraph Co., 223 U.S. 118.
209 This is not to suggest that the normative concerns for these three categories are the same. The Supreme Court, for example, has sustained some sex-based distinctions against equal protection challenges that would not survive in the context of race, see, e.g., Rotsker v. Goldberg, 453 U.S. 57 (1981) (rejecting equal protection challenge to men-only military registration law). In addition, the Court has only recently closed the door on some sex-based distinctions that were long ago rejected in the context of race. Compare United States v. Virginia, 518 U.S. 515 (1996) (invalidating limitation of Virginia Military Institute to men when Virginia Women’s Institute for Leadership program was deemed inferior in both tangible programming and intangible reputational quality) with Sweatt v. Painter, 339 U.S. 629 (1950) (sustaining equal protection challenge to race-based exclusion from the University of Texas Law School where law school offered in state for African Americans was inferior in both tangible programming and in intangible reputational quality). The Court’s treatment of equal protection claims based upon sexual preference is presently in flux, as the following discussion demonstrates. See infra at __.
have the very same adverse consequence of undoing some implicit agreement settled as part of a broader and more complex legislative bargain.

Striking down a referendum, however, poses few such risks. Even if the referendum is one that minority interests vehemently oppose, the referendum itself follows the series of negotiating processes within the legislature. 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. And yet, most of the veto gates available in the ordinary legislative process remain open to those affected by referendums, with the sole exception of the gubernatorial veto.

To be clear, I do not suggest that the majorities in Seattle and Crawford envisioned this analysis and kept it to themselves. In addition, it is important to observe that none of this undermines the cycling analysis of the two cases. So long as a majority of the Justices regarded the cases as indistinguishable, the opposite results in the two cases underscore the voting anomaly.210 Rather, along with Eule, I am suggesting that despite doctrinal assertions to the contrary, it is quite likely that the Justices have general intuitions about the value of legislative decision making versus other forms of decision making and that these intuitions might well affect their presumptions about particular laws.

B. Level Shifting in a Multi-Level Democracy

In a particularly strongly worded dissent in Evans v. Romer,211 Justice Scalia took Justice Kennedy to task for applying rational basis scrutiny to Colorado Amendment 2, which banned sexual orientation from qualifying as the basis for discrimination in state or municipal antidiscrimination laws within Colorado, while nonetheless striking the law down. While Salia’s discussion of whether or not minority sexual preference provides the basis for suspect classification status is more attention-getting, embedded within Scalia’s analysis are important assertions concerning the role of decision making processes themselves as forming a 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 a policy decision that up until the time of the initiative had been made at the municipal levels in a manner that a majority of Colorado voters, Scalia claimed, concluded was the product of disproportionate influence by advocates for the LGBT community.

Because Scalia’s analysis is important, it is quoted in full:

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 recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. 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)

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210 See supra at __ (describing voting anomaly in Seattle and Crawford).
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.212

Other Justices have advanced similar arguments in the past. In Seattle, Justice Powell made the following related argument in dissent:

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 preempt 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.213

Finally, in the earlier case, Hunter v. Erickson,214 Justice White expressed a contrary view in striking down an “automatic referendum” law that demanded separate ratification by a majority of city voters as a precondition to passing a municipal housing antidiscrimination law. 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

212 Romer, 517 U.S. at __ (Scalia, J., dissenting).
213 Seattle, 548 U.S. at __ (Powell, J., dissenting).
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 referendum might be bothersome but no more than that. Like the law requiring specification of candidates’ race on the ballot, Anderson v. Martin, 375 U.S. 399 (1964), 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.215

The question that these competing views raise is whether the level shifting via plebiscite, and more specifically via initiative or recall referendum, creates the basis for a closer look at the law challenged on independent grounds when the underlying claim involves something separate from the guarantee clause, which the Court has long held non-justiciable. For purposes of reviewing Scalia’s analysis, we can set aside his controversial claim about the relatively greater influence of the gay and lesbian community on lobbying at the state and local level for laws, including antidiscrimination laws, that favorably affect them.216 Whether or not Scalia is correct that the claim for a closer look when the level of governance is ratcheted up is unheard of in a multilevel democracy, the more interesting question is whether there is a sound normative basis for giving this structural shift a closer look. Scalia’s argument is important because if we assume that the issue truly is about nothing more than level shifting, it would seem hard to refute the claim that lower levels of governance could then have a counter intuitive policy lock-in effect. This is the concern that Justice Powell raised in the quoted passage from Crawford. Justice White’s contrary intuition in Hunter focuses solely on the groups of interest affected by the automatic referendum, rather than the potential lock-in effect of his announced rule.

At first blush, Scalia’s argument that lower levels of government cannot be permitted to have a policy lock-in that precludes change at higher levels appears unassailable. This, after all, is the point of levels of governance in a multi-tiered constitutional system. Federal statutes are subject to constitutional judicial review, meaning that they are subject to the higher law of the Constitution. 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 principles of equal protection, but the former one is swept through the equal protection gate without parsing the independent claim.

I would suggest that a better way to view this, however, is to appreciate that if White has merged two claims in Hunter, Scalia has also merged two claims in Evans. The issue is not

215 Hunter, 393 U.S. at __.
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 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, 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 LBGT community embraces its view of the importance of this policy question, in Evans.

The contrary result accomplished in Crawford, and the seeming contradiction of that case with Seattle, might seem less problematic in light of this analysis. A legislative referendum comes into effect only after the legislative process—veto gates and all—is complete. The process does cut the Governor out of the deal, but in effect it confers an alternative veto power upon the electorate. This is a notable difference because in some respect, the gubernatorial veto might prove the last venue for registering intensities of preference and for facilitating tradeoffs among disparate constituencies. The referendum as a veto substitute lacks this feature, but it does not generally undermine the ability of legislators to negotiate across bills in a manner that facilitates overall registration of preference intensities.

This analysis, along with the Crawford result, might appear at odds with Hunter because there the regime forced a referendum on every municipal discriminatory housing ordinance prior to the law taking effect. The difference, however, is that this is not an example of a single enacted law that is sent to the voters for ratification or defeat. It is a prospective rule governing all laws in a broad category. As a result, those most affected by the law could not ensure that their seemingly successful bargains over municipal legislative policy would receive a payoff since a majority of the electorate could always undo the deal.

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

The preceding analysis also provides the basis for insights into the Supreme Court’s animus analysis as applied most notably in Evans v. Romer, which rested on the analysis developed in United States Dept. of Agriculture v. Moreno, and City of Cleburne v. Cleburne Living Center. Cleburne involved a denial of a special use permit to construct a facility for mentally retarded adults, and Moreno involved a denial of food stamps to households with unrelated individuals as applied to, among others, the mother of a deaf girl who could not afford to live near a special school and thus moved in with another woman on public assistance.

Neither of these latter cases involved direct democracy. In each case, the Court determined that while the relevant standard was the generally deferential rational basis test, the targets of the law evinced an “illicit animus against a politically unpopular group,” thus rendering the analysis fatal. The analyses in these cases are each problematic in their own right, but the underlying doctrinal maneuver in each case is nonetheless easy to understand. In each

\[\text{Cf. Adarand v. Pena, 515 U.S. 200, __ (1995) ("Finally, we wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’")}\]

\[\text{413 U.S. 528 (1973).}\]

\[\text{473 U.S. 432 (1985).}\]

\[\text{[Moreno and Cleburne cites].}\]
case, there is a rational justification independent of illicit animus, and under traditional rational basis scrutiny, one rational justification would be enough. In *Moreno*, despite the compelling circumstances affecting the particular claimant, and despite the fact that the statutory scheme contains independent prohibitions against welfare fraud,\\(^{221}\) barring benefits to households with unrelated individuals supplements the welfare fraud provisions by reducing a category of households that are more likely than households with connected families to reside together for purposes of receiving welfare benefits.\\(^{222}\) In *Cleburne*, it is unpleasant, but certainly not irrational, to imagine homeowners expressing their concern that a home for mentally retarded adults might reduce property values. And of course policies that preserve property values are hardly irrational.\\(^{223}\) The Court in both cases ignores or rejects these rational justifications as a means of homing in on a single illicit rationale, and then claiming that rationale renders the law illicit.

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

In effect, the Court read out a legitimate rationale for each law in an effort to produce a desired result without having to incur the cost of elevating scrutiny for the relevant class of individuals. These somewhat peculiar cases demonstrate that the Court is willing to use a sort of doctrinal sleight of hand to force cases into an illicit animus category to avoid the larger administrative difficulties that would otherwise plague its equal protection analysis if it, more candidly, elevated scrutiny. In short, if it can exclude other arguments to then posit that the actual rationale is an illicit animus against a politically unpopular group, rational in theory becomes “fatal in fact.”\\(^{224}\)

*Cleburne* and *Moreno* were curious doctrinal anomalies, but took on added significance when the Court applied the animus rationale in the context of *Evans v. Romer.*\\(^{225}\) The prior analysis, however, suggests that the animus rationale might have stronger footing in the context of targeted initiatives. While Colorado Initiative 2 displaced local, rather than state, laws, the

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\(^{221}\) *Moreno*, 413 U.S. at __ ("It 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").

\(^{222}\) *Moreno*, 413 U.S. at __ (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.").

\(^{223}\) Similar arguments were rightly rejected as a justification for race- and religious-based restrictive covenants in place throughout much of United States history. For the classic judicial treatment, see Shelley v. Kraemer, 334 U.S. 1 (1948) (bootsraping judicial enforcement of racially restrictive covenant to avoid state action barrier that would otherwise have permitted private agreement to limit property transfers based on race). With respect to state laws, as opposed to private agreements, that distinguish on the basis of race, the Supreme Court had signaled one decade earlier that a higher level of scrutiny was appropriate, see, e.g., United States v. Carolene Prods., 301 U.S. 144 (1938). The analytical difficulty in *Cleburne* is that the Court was not willing to classify mentally retarded adults as a suspect or quasi-suspect class. For a discussion of Carolene Prods., see infra at __.

\(^{224}\) See supra note 217, and cite therein.

\(^{225}\) 517 U.S. 620.
failure of the state legislature to enact policy on this issue might once more suggest successful exertion by the LGBT community, or more generally, a decision to leave this to local government. As previously discussed, raising the level of decision making in a multilevel democracy is fair game. The problem in Evans, however, is that the initiative process subjected the LGBT community to raw majoritarian preferences. Despite the Court’s literal wording, the animus rational need not necessarily entail hatred toward a politically unpopular group. It might be sufficient that the process disallows a group to claim the benefit of prior successes in the legislature (leaving this to local rulemaking) or to express intensities of preference through a legislative process, at the very least prior to sending the final question to the voters for an up or down vote. If the legislative process vetted the law past the various Colorado General Assembly veto gates, and then the product of that process, whatever it might have been, was pitched to the voters, the end result would have been harder to ground in the illicit animus rationale. The problem, however, is that the initiative process forces an outcome, and one that might well appeal to a broad constituency of voters who are largely indifferent to the effects of the legal policy on a distinctly targeted minority.

D. Carolene Products Footnote Four Revisited

By modern lights, United States v. Carolene Products, serves fairly uninteresting fare. The Supreme Court rejected a due process challenge to a federal statute banning filled milk. The law rested on the desire to protect families, and especially young children, from an adulterated product that substituted butterfat with vegetable oil. Public choice scholars who have traced the record have convincingly exposed the cost of this regulatory regime, and the less attractive motivation of protecting the interests of the fresh milk industry. As Geoffrey Miller has shown, filled milk was a valuable technological innovation benefiting poor and rural families who lacked electricity and thus refrigeration. Filled milk, a canned product with a long shelf life, allowed such families—and their children—access to a dairy product during the periods between fresh milk deliveries, which were only good until the ice block melted.

While Carolene Products signals the end of close scrutiny for economic regulation following the Lochner era, it is, of course, far more well known today for the famous footnote four. There, Justice Stone articulated a theory 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.” Stone’s intuition ultimately rests on what scholars today would identify as political market failure. When minorities are outnumbered in a legislative process, they often fare quite poorly. One need go no further than the tragic history of Jim Crow to see the point.

Nothing in this Article’s analysis belies the claim that there is political market failure and that this failure is often most acutely felt by demographic minorities. But not all political institutions manifest failure in the same way. One irony of this Article’s analysis is that if political market failure respecting minorities arises from the law of larger numbers (relative to

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226 304 U.S. 144 (1938).
228 See id. at 423 (describing role of milk industry in passing law).
229 See id. at 400.
230 [Find one or two articles making this point.]
the minority class that is), then short of judicial review, legislatures are relatively better equipped to protect minority concerns. That is because legislatures have multiple venues, or veto gates, at which minorities can register intensities of preference. Of course bad legislative policies might still result, but as between legislatures and direct democracy, and especially initiatives, there is good reason to suspect that the latter is relatively less solicitous of the concerns of discrete and insular minorities. The Court has formally rejected the process of lawmaking as the basis of presuming against constitutionality. This is undoubtedly bound up in the Court’s longstanding treatment of guarantee clause claims as nonjusticiable.232 While Justice Brennan cleverly maneuvered an independent equal protection claim from a violation of equally weighted voting,233 formally raising the stakes for laws created through direct democracy would require revisiting over a century and a half of settled doctrine.

As the preceding analysis has shown, however, the Court has sent important signals in such cases as *Hunter*, *Seattle*, 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, especially initiatives and recall referendums, as a factor in decision making.

E. What Direct Democracy Does Well

Within those 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 that generally fit the criteria of “discrete and insular minorities”—whether or not the Court has formally categorized them as such—there is reason to have concern about direct democracy, especially when it takes the form of citizen initiatives and recall referendums. But other policy questions, those that go to budgetary allocations; structural aspect of government (term limits, tenure of judges, and the like), when expressed in neutral terms; and issues of taxation might be potentially well suited to plebiscites. This is certainly not the only, or even the necessarily preferred, method of resolving policy choices, but it is a reasonable one especially for issues that naturally are aligned along a single dimensional spectrum and for which the question is the level at which to set policy. Having the electorate set policy along these spectrums has the potential to improve political satisfaction with outcomes. When used to target legislative reform, plebiscites carry the added benefit of reducing agency slack thus restoring the charge of the principal. Legislators might not be the best decision makers respecting policies that affect them directly. There seems nothing inherently wrong with voters using direct democracy to rein in their agents.

Direct democracy in the form of legislatively referred referendums is also a potentially meritorious way for legislators to validate policies that rest on inevitable judgment calls about which it is difficult to intuit majority electoral preferences. While polling is a valid source of such information, polls are not universally trustworthy, and certainly lack the legitimacy of law. One additional benefit of referendums is that the timing is harder to manipulate. Elections tend to be fixed well ahead of time and the dates are widely known.

While 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 the issue spectrum, and outcomes that fail to account for

the particular interests of racial and other minorities. Several of the conclusions in this article have been expressed elsewhere in the literature. The benefit of the social choice analysis is providing a framework for linking these competing claims based upon a common analytical foundation.

IV. Conclusion

Perhaps the most important contribution of social choice is in explaining that outcomes do not exist independently of the processes that generate them. This is important because it forces consideration not only of the merits of outcomes, but also of the legitimacy of the process. The process of legislating is profoundly affected by the scope of legislative power over a broad range of issues, and by the risk that external institutions will not honor the resulting deals that are made.

The history of judicial review has long been concerned about the costs of judicial decision making on democratic processes. Plebiscites are like judicial review in the sense that they have the potential to undo implicit or explicit legislative bargains. But there is an important difference. Judicial decisions are generally grounded in legal principals and need to be justified with written opinions, especially when striking down a legislatively enacted law. Plebiscite voters need not offer any rationales, and until recently, even those who were responsible for balloting initiatives were entitled to full anonymity.

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. In fact, that is the point. Because outcomes can never be fully 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 certainly as, if not more, important than the answers to the specific policy questions democratic forms of governance are called upon to provide. When Churchill lamented democratic processes, except in comparison to all other systems, he was not chiding town meetings. He understood that legislative decision making, and sloppy legislative decision making at that, is democratic decision making, or at the very least is the most practical form of democratic decision making. Madison understood that too. This form of democratic decision making is largely legitimated by the complex set of filters that we as a society have chosen to value in transforming constituent inputs into policy outputs.

The claim of this Article is not that direct democracy is good or bad. Rather, the claim is that it is anti-democratic in an important sense. Plebiscites are anti-democratic when compared with the features of democratic decision making that characterize legislatures, on the one hand, and the anti-democratic 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.

234 See supra notes __-__, and accompanying text.
Figure 1: Issue Placement and Relationship to Legislative or Plebiscite Process
Key:  
L = Liberal  
C = Conservative  
MV = Median Voter  
D = Liberal (Democratic) Candidate  
R = Conservative (Republican) Candidate

Figure 3:1