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Still Keeping The Faith?: Asian Pacific Americans, Ballot Initiatives, and the Lessons of Negotiated Rulemaking

Troy M. Yoshino†

Asian Pacific Americans (APA's) face a number of obstacles to obtaining proportionate electoral power in the United States. The author examines several factors that have contributed to the diminution of the APA political voice including the occupation of a smaller percentage of the political constituency, the absence of a strong national leader, language barriers, and the perpetuation of APA stereotypes. The author argues that the development of the ballot initiative as a significant law-making process has undercut APA political power even more. The author critiques the initiative process as shutting out minority interests while enhancing the discriminatory tendencies of the majority. The author proposes alternative law-making processes that focus on deliberative discussion and voting systems designed to increase minority representation.
Sometimes the most realistic position is an idealistic one.¹

INTRODUCTION

In a 1989 article entitled *Keeping the Faith: Black Voters in the Post-Reagan Era*,² Professor Lani Guinier rhetorically asked how Black voters could be expected to "keep the faith" in light of their significant inability to impact the political process. Guinier notes:

One party has taken blacks for granted; the other, at best, ignored them. Mainstream Democrats do not accept black Democrats, such as Jesse Jackson, as legitimate party spokespersons, and too often only whites are allowed to run for office on the Democratic ticket. On the other hand, Republicans have refused to court the black vote at all. Blacks may vote, but it is the whites who will govern.³

While no one would deny that attempts to silence the political voice of African Americans have been pervasive,⁴ the problem Professor Guinier identified nearly a decade ago with respect to African Americans is worse for today's Asian Pacific Americans (APAs) in a number of ways.⁵ Their electoral woes are due, not only to the subconscious racism, purposeful hatred, institutional discrimination, and invidious stereotypes that African Americans are similarly subjected to, but are also caused by their dramatically smaller political constituency—APAs comprised approximately 2.9% of the total U.S. population in 1990, while African Americans made up 12.1% of the whole.⁶

1. See *Unfinished Business: The Japanese Internment Cases* (Mouchette Films 1984) (quoting Gordon Hirabayashi, the petitioner in *Hirabayashi v. United States*, 320 U.S. 81 (1943)—a case in which the United States Supreme Court upheld a wartime curfew, even though it was disparately applied only to Japanese Americans).


3. Id. at 394 (citations omitted).


5. Cf. Martin Walker, *U.S. Asians Find One Voice*, Guardian (London), Aug. 27, 1997, at 12 (quoting Stewart Kwoh, president of the Asian Pacific American Legal Center, who noted that "Asian Americans are starved for political representation, legitimate influence, and empowerment.... We have long wanted a voice in how public policies are decided. Often, such important issues as immigration, education, and welfare changes are being decided without Asian American participation.").

6. See Bureau of the Census, U.S. Dep't of Commerce, 1990 Census of Population, General Population Characteristics: National (1991). This stark population difference may be slightly offset by the fact that APAs, as a group, tend to vote more often than African Americans. In the 1994 elections, for example, 76% of all APAs registered to vote went to the polls, but only 63% of the registered African American population cast a ballot. See Bill Ong Hing, *Reframing the Immigration Debate—Executive Summary* 9 (1996); cf. Gregory Rodriguez, *Southern California: Asian Americans May Hold Key to Multietnic Politics*, L.A. Times, Oct. 5, 1997, at M1 (noting that, once registered, APAs have the highest electoral participation rate of any group). While APAs have a historically low rate of voter registration, that trend seems to be reversing itself—over 75,000 APAs registered in the months preceding the most recent presidential election. See id.
In fact, APAs may be even more politically disadvantaged than African Americans, who have leaders such as Jesse Jackson who carry their message to the American public. The APA community lacks such a political leader. Some hoped that the election of Gary Locke as the first APA governor within the forty-eight contiguous states marked the emergence of an identifiable leader for the APA community. But while Governor Locke has done an admirable job running the State of Washington, he has been less than a Jesse Jackson-type leader on national issues confronting the APA community like the recent Democratic National Committee (DNC) campaign fundraising scandals. Overall, APA candidates running for public offices across the country say they often have difficulty getting most voters and major political parties to take their candidacies seriously. Many APAs complain that they have no say in setting the country's social or political agenda.

Moreover, unlike most African American voters, many APAs are ignored by both politicians and political parties simply because they are non-English speakers. The 1992 amendments to the Voting Rights Act require language assistance in areas where a single language minority group that is "limited-English proficient" constitutes more than five percent or 10,000 (whichever is lower) of the voting-age citizens in a political subdivision. Because the APA population is generally very small, speaks a variety of languages, and is not very residentially concentrated, many APA communities still have trouble meeting these lowered requirements. APAs who cannot meet these requirements are simply not eligible to receive federally mandated bilingual election materials, and because the "politics of reelection" dictate that candidates put less stock in non-voting opinions, these APAs are left without any effective political voice.

7. See MariaPuente, Asians' "Incredible" Journey in New Phase Election of Governor a Sign of Growing Political Clout, USA TODAY, Nov. 19, 1996, at A1 (quoting Karen Narasaki, head of the National Asian Pacific American Legal Consortium, as noting that "Locke's election is a strong signal that Asian-Americans have arrived politically").
9. See Jay Matthews, San Francisco Campaign May Accent Asian Clout, WASH. POST, June 11, 1991, at A3 (noting that APA candidates have difficulty getting serious political attention); see also SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY 170-73 (1991) (observing that there are few successful APA politicians); Ignatius Ban, Immigrant Rights: A Challenge to Asian Pacific American Political Influence, 5 ASIAN AM. POL. REV. 7, 22 (1995) ("[T]he dearth of Asian Pacific American members of Congress means that there is limited capacity to articulate and implement an Asian Pacific American agenda in Congress.").
10. See Tim W. Ferguson, California Ethnic Politics, Chinese Style, WALL ST. J., May 23, 1991, at A14 (quoting an APA candidate for office as observing that "Blacks and progressive whites set the [Democratic Party's] agenda, and Asians are given short shrift").
There is also some evidence to prove that the plurality voting systems used in federal elections and most American jurisdictions have the ironic effect of creating increasingly disproportionate underrepresentation as the relative size of a minority group decreases. The theory known as "cube law" suggests that if a certain political group receives fifty-five percent of the vote, that group will actually garner approximately sixty-five percent of the seats in any given representative body. The theory has been shown to work in practice: during the 1972 Alabama Democratic presidential preference primary, for example, Governor George Wallace's organization won ninety-one percent of all contested delegate positions with only sixty-eight percent of the votes.

One might interpret the cube law to be good news for the APA community, at least when the Democratic Party is the benefiting organization. Nevertheless, even though the Democratic Party is generally perceived as being friendlier to APA interests, it too has been guilty of pronouncing anti-Asian rhetoric in many instances. Such hate speech, along with insults from other public officials who mimic Asian accents and make generalized and stereotyped comments about APAs or Asian culture, have dampened APA political voices and electoral participation. In a telling example, Representative Thomas J. Manton, the Queens Democratic Party leader, publicly stated that anti-Asian remarks attributed to Democratic New York City Councilwoman Julia Harrison would not hurt her chances for re-election because APAs made up only twelve percent of the registered voters. Manton went on to state that the APA vote could be disregarded because

[i]n a primary, you mainly attract prime voters, which make up 20 to 25 percent of the Democrats in the district... This favors Julia because the voters tend to be middle-aged to older people who are longtime residents. And she is appealing to these voters, rather than the new arrivals, many of whom are Asian.

15. See Joel Kotkin & Bill Bradley, Democrats and Demographics; Asians, Hispanics and Small Business are the Party's Future, WASH. POST, Feb. 26, 1989, at C5 (noting the "increasingly anti-Asian tone of Democratic rhetoric [that was] all too clearly demonstrated in the 'Japan-bashing' and 'Korean-bashing' campaign ads used last year by both Michael Dukakis and Rep. Richard Gephardt (D-Mo.).")
16. Cf. Chandler Davidson, Minority Vote Dilution: An Overview, in Minority Vote Dilution, supra note 14, at 1, 3 (observing that "candidate diminution," a practice in which "candidates representing the interests of a group of voters are prevented or discouraged from running," is a prevalent form of minority disenfranchisement).
19. Id.
This problem has also manifested itself on the national level where the DNC recently began to scapegoat APAs for their party's own acceptance of improper political contributions.\textsuperscript{20} In reviewing their fundraising records, the DNC identified characteristics that disparately focused on APAs (e.g., Asian-sounding names) when deciding if a given contribution required further inquiry.\textsuperscript{21} Controversies questioning the propriety of these political donations came despite the fact that most APA contributions were completely innocent (approximately eighty percent, according to the DNC's own figures),\textsuperscript{22} and that many of the illegal contributions came, not from APAs, but from Asian foreign nationals.\textsuperscript{23} More disturbing, however, is the fact that the DNC's inquiries were not just harassing; they have had real political consequences for the APA community. One reporter surmises that the failed bid of University of California at Berkeley Chancellor Chang-Lin Tien to become President Clinton's Secretary of Energy may be linked to the political fundraising controversies.\textsuperscript{24} Others recognize that the scandal has led to inquiries in Orange County, California, where APAs have had their rights to the franchise questioned simply because of their ethnicity.\textsuperscript{25}

Stereotypes and beliefs concerning APAs have also hurt their interests and their ability to achieve an effective political voice.\textsuperscript{26} Much of the American public perceives the APA community as untouched by racial discrimination—a recent poll of American voters found that most respondents "thought that Asian Americans did not suffer from discrimination" and that they "received too many special advantages."\textsuperscript{27} This misperception makes

\begin{itemize}
  \item \textsuperscript{20} See Phil Tajitsu Nash & Frank Wu, \textit{Asian-Americans Under Glass: Where the Furor over the President's Fundraising Has Gone Awry—and Racist}, NATION, Mar. 31, 1997, at 15; see also K. Connie Kang, \textit{Asian Americans Bristle at Democrats' "Interrogation,"} L.A. TIMES, Feb. 27, 1997, at A1 (quoting John J. Chung, president of the Korean American Bar Association: "These tactics are sending the message: 'If you're an Asian, you have to prove that you are entitled to participate.' This is a barrier erected in front of Asians solely on the basis of their name."); James Sterngold, \textit{For Asian-Americans, Political Power Can Lead to Harsh Scrutiny}, N.Y. TIMES, Nov. 3, 1996, § 1, at 36; Lena H. Sun, \textit{Some Asian Americans Fear Reduced Political Involvement After DNC Flap}, WASH. POST, Nov. 20, 1996, at A6.
  \item \textsuperscript{21} See Nash & Wu, supra note 20, at 15.
  \item \textsuperscript{22} See id.
  \item \textsuperscript{23} See, e.g., Kim Horner, \textit{Few Asians in Local Politics}, DALLAS MORNING NEWS, Mar. 29, 1997, at A1 (explaining that APAs are "leery about entering the political scene" because of claims that China tried to influence American elections via improper donations).
  \item \textsuperscript{24} See Kang, supra note 20, at A1.
  \item \textsuperscript{25} See Nancy Luna, Voter Probe: Needed or Not?, ORANGE COUNTY REG., Mar. 17, 1997, at B1 (quoting attorney Mark Rosen as noting that the voter probe is "designed to discourage people [from voting], particularly people who are new citizens"); Peter M. Warren, \textit{O.C. Registrar Plans to Query Suspected Noncitizen Voters}, L.A. TIMES, Jan. 14, 1998, at A1 (noting that some APAs and other minorities will be asked to provide information—such as naturalization numbers and dates—that other voters are not asked to provide).
  \item \textsuperscript{27} Murray Polner, \textit{Asian Americans Say They Are Treated Like Foreigners}, N.Y. TIMES, Mar. 7, 1993, at B1.
\end{itemize}
it easier for many to view the lack of APA political participation as something that APAs want for themselves. Stereotypes that cast APAs as "model minorities" and "unfair competitors" also serve to rationalize the prevailing treatment of APA social and political interests. Professor Robert Chang notes that "when [APAs] try to make our problems known, our complaints of discrimination or call[s] for remedial action are seen as unwarranted and inappropriate."

It would be bad enough if APAs were merely ignored, but recent history shows that the APA community experiences more than just passive injury because of these stereotypes. Perceptions of APAs as the model minority have led to "negative action" (i.e., caps on the level of APA admissions) at elite universities such as Harvard, Princeton, Brown, and the University of California at Berkeley and incited hate-motivated graffiti on the walls of America's finest institutions of higher education. Professor Ronald Takaki has described graffiti reading "Stop the Yellow Hordes" and "Stop the Chinese before they flunk you out" as a common sight on college campuses. In fact, my own alma mater, Pomona College, experienced a simi-

28. See Deborah Woo, The Gap Between Striving and Achieving: The Case of Asian American Women, in MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN 185–86 (Asian Women United of California ed., 1989) (using academic research to show that Americans see APAs as docile, compliant, and uncomplaining); Kang, supra note 26, at 1931 (1993) (observing that the prevailing stereotypes concerning APAs see them as politically docile, accommodating, and submissive).

29. APAs are stigmatized under the model minority myth as "conscientious and industrious," and coming from cultures where "education, hard work, and thrift" are emphasized. Woo, supra note 28, at 185–86. This myth is perpetuated by unflattering media portrayals of large economic gains accrued by APA-owned small businesses, the increasing presence of APA students at colleges and universities across the country, and high-volume sales of Japanese automobiles. See Neil Gotanda, Asian American Rights and the "Miss Saigon Syndrome," in ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087, 1089 (Hyung-Chan Kim ed., 1992). In spite of the fact that APAs have made some social and economic gains, perceptions of their success are largely overstated and their achievements pale in comparison to Whites from similar (or even lesser) socioeconomic and educational backgrounds. See, e.g., Arthur Brice, Census Report: Asian Americans Earn Less Despite More Education, ATLANTA J. & CONST., Sept. 18, 1992, at C5 (reporting that APAs with a high school education earned an average of $2760 less than comparable Whites, and that APAs with four or more years of college education earned $1660 less than comparable whites). For critical analyses of the model minority myth, refer to UNITED STATES COMMISSION ON CIVIL RIGHTS, SUCCESS OF ASIAN AMERICANS: FACT OR FICTION? 17–18 (1980); Paula C. Johnson, The Social Construction of Identity in Criminal Cases: Cinema Verité and the Pedagogy of Vincent Chin, 1 MICH. J. RACE & L. 347, 389–99 (1996).

30. See Keith Aoki, Foreign-ness and Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes, 4 UCLA ASIAN PAC. AM. L.J. 1 (reporting that this perception stems from perceptions that APAs have superior talent and/or work for subpar wages); Kang, supra note 26, at 1931 ("Workers ... also resent Asian immigrants for supposedly stealing jobs from 'real' Americans or for receiving preferential governmental treatment.").


lar incident where a banner was changed from "Asian American Studies Now!" to read "Asian Americans Die Now!"\(^{34}\)

The failure to distinguish APAs from foreign Asians and the misperceptions that APAs are stealing "American" jobs have also led to political disempowerment and even violent hate crime. Take Proposition 187 as an example; that anti-immigrant initiative was approved by California's electorate largely based on the false assumption that the APA community takes valuable employment opportunities from deserving Whites.\(^{35}\) Even more dramatic and telling are the instances involving the harassment and physical intimidation of Vietnamese fishermen in the Galveston Bay area of the Texas Gulf Coast,\(^{36}\) and the murder of Vincent Chin, a twenty-seven-year-old naturalized Chinese American who was beaten to death by two unemployed Detroit automobile industry employees simply because they thought he was Japanese and therefore, responsible for their unemployment.\(^{37}\)

A number of legal scholars, commentators, and observers have focused their attentions on the inability of the APA community to elect candidates of their choice and the correspondingly detrimental effect that this inability has on APA social and political interests. Although this is an undeniably important problem, the "new" breed of subtle (i.e., non-facial and/or subconscious) racism\(^{38}\) makes another electoral mechanism even more dangerous to APA interests—the ballot initiative.\(^{39}\) It is the problems posed by these types of popularly enacted measures that this Article seeks to resolve.

By observing the historical and current electoral problems of APAs, the first Part of this Article contends that optimists who forecast an immi-

\(^{34}\) See David Arase, Education is Failing Asian Americans, L.A. TIMES, Mar. 16, 1992, at B5.


\(^{38}\) Conversations with Professor John Calmore have helped me to identify and distinguish this type of racism. In his writings, Professor Calmore notes that, "[t]oday's racism is state-of-the-art. 'Its picaresque genius lies in developing so brilliantly... that it [has] disappeared except as it [is] 'imagined' by its subordinated subjects who [continue] to 'suffer' in an unbelievable world—a colorblind word of white innocence." John O. Calmore, Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free," 15 LAW & INEQ. 25, 28 (1997) (quoting John O. Calmore, The Case of the Speluncean Explorers: Contemporary Proceedings, 61 GEO. WASH. L. REV. 1764, 1776 (1993)).

\(^{39}\) Initiatives can generally be defined as policy measures that are placed on the ballot for consideration by the electorate when a specified number of petition signatures are obtained. See Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 134 (1912). For a more complete definition, refer infra to Part II.B. Distinguish referendums—not discussed in this Article—which are legislative measures (i.e., laws previously enacted by local or state legislative bodies) that are referred to the electorate for ratification or disapproval. Id.
nent alleviation to these problems because of increases in APA population and political participation may be overstating their case. Although immigration and enhanced voter education have made APA populations across the nation into a powerful swing vote that cannot be ignored by political candidates any longer, several scholars and politicians have noticed a growing trend in which majority populations are able to disregard the political interests of APAs and other disempowered groups. This is because majority interests have begun to circumvent the representative bodies that have become more responsive to the interests of political minorities. They now enact legislation by themselves through the use of ballot initiatives.

Some argue that these ballot initiatives are more "democratic" because the voters themselves decide issues and are able to oust the special interests that the proponents of ballot initiatives contend have taken over the legislative process. Part II of this Article attempts to demonstrate that the voters who participate in ballot initiative elections are not only more susceptible to flashy advertising and appeal by special interests—they also have discriminatory tendencies that are harmful to the interests of APAs and other politically disadvantaged groups. By comparing ballot initiatives with the American system of government that was originally conceived and constituted, Part II of this Article concludes that such measures contravene the vision of a republican government that the framers of the United States Constitution attempted to establish.

In discussing these concerns about discriminatory tendencies and threats to the structure of representative government, this Article also identifies two general flaws inherent in the initiative process. First, it finds that initiatives are often harmful to minority interests because those interests are shut out of processes in which initiatives are conceptualized and constructed. Second, it observes the subject matter of ballot initiatives involves issues that are too complex to be adequately dealt with by "up or down" voting on one particular proposal.

In spite of these imperfections, however, recent polls indicate that the American public does not want to give up its power to enact legislation via plebiscite. A recent survey of California voters found that almost seventy percent of them were opposed to the idea of allowing legislators to amend initiatives after voters approve them, and that two-thirds of them supported the idea of using plebiscites to enact federal law.40

40. Todd S. Purdum, When Lawmakers Waffle, and Sometimes Before, Voters Turn to the Ballot Measure, N.Y. TIMES, Mar. 31, 1998, at A1. In July 1977, Senators James Abourezk, a Democrat from South Dakota, and Mark Hatfield, a Republican from Oregon, cosponsored a joint resolution proposing a constitutional amendment that would have allowed the use of plebiscites and ballot initiatives to enact federal law. See S.J. Res. 67, 95th Cong. (1977). Although their proposal was obviously not adopted, significant support for such a constitutional amendment is again accruing. See Richard B. Collins & Dale Oesterle, Structuring the Ballot Initiative: Procedures That Do and Don't Work, 66 U. COLO. L. REV. 47, 54 (1995).
Because of this, Part III of this Article searches for an alternative to the current initiative process. It dissects and modifies negotiated rulemaking, a relatively new tool of administrative agencies, and concludes that the lessons of negotiated rulemaking are too important to ignore in designing workable decision-making systems that help to facilitate tough policy choices. Part III therefore analyzes various administrative mechanisms and alternative voting systems to propose a process in which minority interests are guaranteed participation and construct a system in which the electorate is eventually allowed to discuss and choose between a number of alternatives.

I. APAS AND THE LACK OF A POLITICAL VOICE

A. Historical Barriers to the Political Process

Professor Robert Chang has noted that most Americans, including members of the judiciary and various legislators, are largely unaware of formal efforts that have been made to specifically exclude APAs from exercising their right to vote. In a telling example, Harvard Law Professor Archibald Cox, who served as the Solicitor General of the United States from 1961 to 1965, notes that the Voting Rights Act "removed many of the obstacles to voting by blacks and Hispanic citizens," but he fails to mention the barriers to the franchise preventing APAs from achieving their own political voice.

To be fair, there is probably little reason for anyone to be suspicious—after all, the plain language of the Fifteenth and Nineteenth Amendments appears broad enough to preserve the right to vote for both APA men and women. The greatest barriers to the ballot box for the APA community have not been easily identifiable, however. Far from being like the blatant mechanisms of literacy testing and White primary elections employed to disenfranchise African Americans in the South, APAs have been denied the right to vote by the more subtle and simpler inability to obtain United States citizenship. Ever since the first federal naturalization statute excluded Asians from the political process by permitting only "free white persons" to become naturalized, APAs have had problems in securing ef-

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41. See Chang, supra note 12, at 1300 (1993); cf. BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850–1990 (1993) (observing that the immigration laws of the United States have been particularly instrumental in depicting APAs as non-citizens and rationalizing the deprivation of their citizenship rights).


43. See U.S. CONST. amend. XV, § 1 (1870) ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); U.S. CONST. amend. XIX, cl. 1 (1920) ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

44. Naturalization Act of Mar. 26, 1790, ch.3, 1 Stat. 103 (1790), repealed by Act of Jan. 29,
effective representation. Their community has been unable to procure rights and resources because APA interests and opinions have been ignored by the election-minded public officials who remain more accountable and responsive to groups with more political power and capital.45

Early naturalization laws provide several examples of how APA interests have been overlooked. For instance, while federal naturalization statutes and restrictions were amended to allow African Americans to become citizens shortly after the ratification of the Fourteenth Amendment, a proposal to make the naturalization statutes colorblind that was introduced in the same time period by United States Senator Charles Sumner of Massachusetts was defeated 30 to 14.46 Another bill introduced around that time by U.S. Senator Lyman Trumbull of Illinois proposed to specifically allow persons born in China to be naturalized.47 That idea was also soundly trounced by a vote of 31 to 9.48 In fact, on May 6, 1882, the United States Congress actually moved in the opposite direction by approving a law that explicitly denied all Chinese the right to become naturalized citizens: "hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."49

Court decisions have also reaffirmed the fact that Asians could not become citizens of the United States,50 and it was not until the MacCarran-
Walter Act of 1952 was passed that Asian immigrants of all ethnicities could finally be considered for citizenship and its accompanying privileges, including the right to vote.\footnote{51} Thus, although the United States Supreme Court has asserted time and again that the "[Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination,"\footnote{52} government at all levels has been, and continues to be, very successful at denying an effective political voice to the APA community in both "sophisticated" and "simple-minded" ways.\footnote{53} Such methods have led to the odd paradox of APAs finding their political voice to be decreasingly less powerful, even at a time when APA political involvement has surged.\footnote{54}

**B. Current Electoral Difficulties of the APA Population**

California exemplifies the extent of the APA community's political impotence: although it is home to over forty percent of the nation's APA population and APAs now make up approximately ten percent of the state's population, only two APAs ever served in the California Legislature prior to 1996.\footnote{55} In fact, only one, Paul Bannai of Los Angeles, had served in the state assembly prior to 1993.\footnote{56} A similar pattern prevails in local districts and across the nation in general.\footnote{57} In Daly City, California, where APAs (primarily Filipino Americans) comprise over forty-two percent of the population, only one was elected to the local council prior to 1994.\footnote{58}

\footnote{51. Pub. L. No. 82-414, 66 Stat. 163 (1952); see also \textit{Kim}, supra note 49, at 149-50 (analyzing the naturalization provisions of the MacCarran-Walter Act).}

\footnote{52. Lane v. Wilson, 307 U.S. 268, 275 (1939), cited in \textit{City of Mobile v. Bolden}, 446 U.S. 55, 141 (1980) (Brennan, J., dissenting) (arguing for the unconstitutionality of an at-large election system that effectively dilutes the strength of the African American community's vote); \textit{Gomillion v. Lightfoot}, 364 U.S. 339, 342 (1960) (holding unconstitutional a redistricting plan that took a square district and contorted it into a 28-sided figure when that redistricting had the effect of removing almost 99% of all African Americans from the resulting district).}

\footnote{53. \textit{Cf.} Kevin R. Johnson, \textit{Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness}, 73 IND. L.J. 1111 (1998) (demonstrating how the subordination of Asian immigrants and the use of quotas to exclude racialized peoples have evolved into more subtle forms of exclusion with the transformation of racial sensibilities in modern times).}

\footnote{54. See \textit{Kwoh}, supra note 17, at B9; \textit{Hing}, supra note 6, at 9.}

\footnote{55. See \textit{LEAP ASIAN PACIFIC AMERICAN PUBLIC POLICY INSTITUTE & UCLA ASIAN AMERICAN STUDIES CENTER}, \textit{THE STATE OF ASIAN PACIFIC AMERICA: POLICY ISSUES TO THE YEAR 2020—EXECUTIVE SUMMARY} 7 (1993); Stemgold, \textit{ supra} note 20, § 1, at 36.}


\footnote{57. See \textit{Bai}, supra note 56, at 739.}
population, only one APA—a Filipino American selected to serve in 1993—has ever been elected to the city council.\(^5\) Flushing, New York, home to an APA population comprising about twenty-five percent of the whole municipality,\(^6\) has never had an APA representative in the New York City Council.\(^6\) New York City has an APA population of over 400,000, yet it too has never selected an APA to sit on its city council.\(^6\)

The literature focusing on the APA inability to achieve political success is prolific,\(^6\) but few solutions have possessed the political and/or legal feasibility to allow broad-based implementation. The LEAP Asian Pacific American Public Policy Institute, for example, has suggested racial redistricting as a method of enhancing the voice of APA communities.\(^6\) But while vote dilution\(^6\) through apportionment schemes that split APA communities into several voting districts is admittedly a problem,\(^6\) current law prevents APAs from using redistricting along racial lines as a possible solution.

Although Section 2 of the Voting Rights Act prohibits vote dilution where it is preventable,\(^6\) the United States Supreme Court in *Thornburg v. Gingles* explicitly stated that liability under Section 2 is not triggered unless the plaintiff can demonstrate that: (1) the minority group is geographically compact with sufficiently large numbers "to constitute a majority in a single-member district"; (2) there is political cohesion within the group as demonstrated by distinctive interests and bloc voting; and (3) there is suffi-

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64. Federal law defines vote dilution as the submergence of a minority group's voting strength and the denial of an equal opportunity to participate in the political process caused by discriminatory mechanisms or practices. See 42 U.S.C. § 1973(b) (1994).


cient racial bloc voting by the majority that operates "usually to defeat the minority's preferred candidate."67

At the outset, the ability of the APA community to bring a Section 2 claim is limited by the first prong of the Gingles test, which requires geographic concentration. Even though APAs are geographically concentrated in certain states, they are generally not so concentrated at a local level that they can potentially become a majority population in more than a handful of electoral districts. Such a high level of concentration is required because, under the "equipopulation principle" which governs redistricting, all electoral districts must contain approximately the same number of people.68 In fact, federal districts have been held to a near-zero population deviance standard.69 While state districts have been held to a slightly less stringent standard,70 even those equipopulation requirements make it almost impossible to find a centralized population of APAs that is large enough to constitute an electoral district.71 Gregory Rodriguez, a research fellow at the Pepperdine Institute for Public Policy, has observed that "[e]ven the three largest Asian concentrations in Southern California—the southern San Gabriel Valley, central Orange County, and the South Bay—don't tip the ethnic balance of a state Assembly or Senate district ... ."72

Further exacerbating the APA inability to bring a Section 2 vote dilution claim is the fact that APAs are much less likely to vote as a bloc than other minority groups. Although it is difficult to measure the political cohesion of APAs in the absence of a clear "bloc choice" (such as an APA

67. Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986). Angelo Ancheta and Katherine Imahara interpret Gingles as essentially linking liability and remedy by focusing on local geography: Unless a minority population can show that it could form a compact and cohesive majority within a single-member district, the at-large system cannot be the source of vote dilution; if the group can meet the geographic requirements, the remedy is, naturally, the creation of single-member districts, with at least one district containing a majority-minority population. Angelo N. Ancheta & Kathryn K. Imahara, Multi-Ethnic Voting Rights: Redefining Vote Dilution in Communities of Color, 27 U.S.F. L. Rev. 815, 839 (1993). As both this section and Part II.C will prove, however, Gingles does not always provide a possible, or even desirable, solution.


69. See, e.g., Karcher v. Daggett, 462 U.S. 725 (1983) (holding a redistricting plan that contained a 0.6984% deviation between the largest and the smallest jurisdiction unconstitutional where such deviations could not be justified).

70. See, e.g., Mahan v. Howell, 410 U.S. 315 (1973) (noting that state legislative plans with maximum population deviations in the vicinity of 10% are considered presumptively valid; here, a deviation of 16.4% "approach[ed] tolerable limits," but was upheld).

71. Cf. Lily Dizon, Speaking Up for Asian Pacific Communities, L.A. TIMES, Feb. 12, 1996, at B1 (quoting Dan Tsang, a founder of the Alliance for Asian Rights and Responsibilities, as observing: "One percent of this community here, 2% of that community there—we're too small to be effective as individual groups."). Outside of the State of Hawaii, Monterey Park in California is the only city with a majority APA population. Ferguson, supra note 10, at A14; see also John Horton, The Chinese Suburban Immigration and Political Diversity in Monterey Park, California, 23 SOC. JUST. 100–01 (1996) (observing that about 60% of the population in Monterey Park is Asian).

72. See Rodriguez, supra note 6, at M1
a number of scholars have observed that bloc voting is not common in APA communities even when such a choice is available. The "internal diversity—of ethnic origins, generations, social classes, political perspective, and organizational aims—has oftentimes prevented [APAs] from being perceived as a unified actor in articulating their stands on public policy." For example, a recent study involving Chinese Americans in the Los Angeles area shows that approximately 27% of that population identify themselves as "liberal," 33% consider themselves "moderate," 25% say "conservative," and 15% do not identify with any particular political affiliation. Partisanship is simply not as strong among APA voters as it is with other racial and ethnic groups. Overall, national studies show that APA communities are about evenly split between the Democratic and Republican parties; most APAs, however, consider themselves to be independent.

Even on issues where it would make sense to assume that the APA community would be able to present a unified front, APAs show a general lack of cohesiveness. Take the example of affirmative action, where a number of respected APA scholars have given persuasive justifications indicating why their community should support the continuation of affirmative action programs. Theodore Hsien Wang, a staff attorney for the Lawyers' Committee for Civil Rights, observes:

Despite being the best-educated demographic group, Asian Americans have had great difficulty gaining access to managerial positions, public contracts, and other [educational] opportunities. The biases that hurt Asian Americans and other minorities are often difficult to document and challenge under anti-discrimination laws. Consequently, a small but growing number of commentators believe that Asian Americans still need affirmative action to ensure equal access to jobs, education, and contracts.

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73. See Bai, supra note 56, at 758.
74. Nakanishi, supra note 62; see also Bai, supra note 56, at 733 (observing the significant "difficulty of combining Asian Pacific American subgroups into a cohesive 'minority' group because of their diverse nationalities and generations"); Dizon, supra note 71, at B1 (observing that APAs lack the social and political cohesion to make their significant voice (10% of the Orange County population) heard on a number of issues, like immigration, that are important to APA communities).
77. See Sun, supra note 20, at A6.
78. See, e.g., Theodore H. Wang & Frank H. Wu, Beyond the Model Minority Myth: Why Asian Americans Should Support Affirmative Action, in THE AFFIRMATIVE ACTION DEBATE (George Curry ed., 1996); Pat K. Chew, Asian Americans: The "Reticent" Minority and Their Paradoxes, 36 WM. & MARY L. REV. 1 (1994); Mari J. Matsuda, We Will Not Be Used, 1 ASIAN AM. PAC. ISLANDS L.J. 79, 81 (1993) ("We need affirmative action because there are still employers who see an Asian face and see a person unfit for a leadership position. In every field where we have attained a measure of success, we are underrepresented in the real power positions.").
79. Theodore Hsien Wang, Swallowing Bitterness: The Impact of the California Civil Rights Ini-
Despite this strong logical conclusion and the fact that the affirmative action debate often breaks down along racial lines (Latinos and Blacks, for example, heavily favor affirmative action) or political ideologies (conservatives remain largely opposed to affirmative action plans), APA opinions—and therefore voting patterns—on affirmative action have not been easy to predict. Recent surveys find that a majority of the APA community believes that people of color have fewer opportunities to succeed in American society, but they also report that many APAs also believe that "some groups get more than they deserve from affirmative action programs and a quarter [of them] claim to know an individual who got an undeserved position or promotion as a result of an affirmative action program."

The general lack of political cohesion within the APA electorate was evident when Californians went to the polls in November 1996 to cast their vote on Proposition 209, an anti-affirmative action measure. On Election Day, thirty-one percent of the APA vote supported Proposition 209, but fifty-three percent rejected it.

Professors Wendy Tam and Bruce Cain explain this phenomenon by observing that, unlike the voting patterns of most other ethnic groups, APA voting patterns are not highly correlated with socioeconomic status, partisanship, gender, or whether they live in a neighborhood mostly populated by non-Whites. Instead, they say, APAs vote primarily based on their personal experiences. The issue of immigration and the California Proposition 187 vote substantiates this viewpoint. Since APAs are a politically disenfranchised group and most of them either know a number of recent immigrants or are recent immigrants themselves, it makes sense to assume that many of them would be against anti-immigrant measures that cause one's citizenship status to be questioned based on mere appearance. On Election Day 1994, however, the APA community remained extremely polarized—more divided than all of California's other ethnic groups. In fact, nearly half of all APA voters cast their ballots in favor of the initiative, and many APAs expressed the view that opposing Proposition 187

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80. See id. at 18.
81. See id.
83. Id.
84. See id.
85. See id. at 16; see also Walker, supra note 5, at 12 (quoting Professor Don Nakanishi of the Asian American Studies Center at UCLA as observing that "Asians defy political science theory because their education and financial and professional achievements do not get transferred to electoral politics").
86. See Tam & Cain, supra note 82, at 16.
87. See id. at 10.
was simply not an option for their communities because they, their friends, and their families all waited patiently and came to America in a manner that complied with federal immigration laws.

Even assuming that APAs could somehow get past this lack of political cohesion and meet the second prong of the *Gingles* test, however, recent holdings of the United States Supreme Court indicate that the race-based redistricting *Gingles* once allowed is now all but unconstitutional.\(^8\)

Specifically, the Court has noted that "[i]f the State has a 'strong basis in evidence, for concluding that the creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race 'substantially addresses the § 2 violation,' it satisfies strict scrutiny" and is therefore constitutional and permissible.\(^9\) In reality, however, the Court's scrutiny has been "strict in theory, but fatal in fact."\(^9\) That is, the Court has not approved any level of race-conscious redistricting since *Shaw v. Reno* was handed down in 1993.

The Court bases this presumption of unconstitutionality on two separate grounds. First, under a justification that Professors Richard Pildes and Richard Niemi refer to as the "expressive harms" rationale,\(^9\) the Justices of the United States Supreme Court have applied strict scrutiny to all forms of race-based redistricting because they argue that such gerrymandering "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."\(^9\)

Second, the Court rejects race-based districting because of the adverse effect on the American system of representative democracy. Justice O'Connor, speaking for the Court in *Shaw I*, explains that

[[the message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.\(^9\)

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90. *Bush*, 517 U.S. at 976-77 (citations omitted).
93. See *Shaw*, 509 U.S. at 647.
94. See id. at 648; see also Jim Sleeper, *Rigging the Vote by Race*, WALL ST. J., Aug. 4, 1992, at A14 ("[T]here is a profound difference between yesterday's back-room politicking and today's legal mandate to draw racial districts for 'disadvantaged' groups. The new policy shifts the emphasis in politics from mobilizing electorates and building coalitions to dispensing group rights by judicial and administrative fiat.").
Several respected scholars and jurists have attempted to debunk the myth that it is race-conscious districting that promotes these harms. Professor Pam Karlan, for example, has observed that in attempting to prevent certain expressive harms, cases like *Shaw I* actually promote even more invidious ones. Besides denigrating the choices to affiliate along racial lines that are made by African American voters, Karlan says, the expressive harms rationale assumes that being placed in a setting where they do not constitute the dominant group somehow injures Whites. Moreover, Karlan argues that the Court's harm-to-representative-democracy justification is flawed because it spuriously concludes that legislators who are elected out of predominantly African American communities are less fair or responsive than their White counterparts. Despite these efforts and arguments by scholars such as Karlan, *Shaw* and its progeny still prevail as the current law of the land.

According to some political theorists, however, this line of cases is inconsequential to—or perhaps even fortuitous for—the APA community. Because of their lack of a cohesive voting pattern, redistricting APAs into only a few districts could serve only to decrease the number of representatives they elect. Although such a result may be counterintuitive, "concentrating [a] group's members into only those districts in which they predominate can strip the group of its status as a pivotal bloc, able to 'swing' elections in a number of districts to the candidates (sponsored primarily by another, larger group) who offer the most in return." Thus, fighting for widespread race-based redistricting could be especially harmful in the present context, where APAs have been hailed as the swing vote of the 1990s.


96. See Karlan, supra note 95, at 293.

97. See id.


101. See, e.g., Tam & Cain, supra note 82, at 2 ("[T]he Asian American group is perhaps currently, the most coveted voting bloc. Unlike other minority groups, their loyalty is not pre-
C. Attempted Solutions—Can Alternative Voting Systems or Swing Votes Guarantee an Effective Political Voice?

Because of problems with solutions like race-based redistricting, several scholars have proposed cumulative voting systems—in which "each voter is given the same number of votes as open seats, and the voter may plump or cumulate her votes to reflect the intensity of her preferences"—as a way to give people of color a political voice. But while cumulative voting systems have been successful in certain instances, there is little reason to believe that success would carry over to most APA populations. In the first place, cumulative voting systems are often difficult to implement because they are harder to understand than traditional voting systems and are more likely to be perceived as undemocratic. More importantly,
as noted earlier, APAs have had trouble demonstrating the type of cohesive political interests that are required to construct even the smaller voting blocs that are needed for success under cumulative voting systems. Finally, the small number of APAs in the American population as a whole makes constructing a workable cumulative voting system difficult—in many jurisdictions, the number of open seats needed to guarantee effective representation of APA interests would be too large to allow an elected body to function efficiently. Because the average APA community constitutes only three percent of the population in any given jurisdiction, a total of 33 seats would need to be available for a politically cohesive APA population to surpass the exclusion threshold in the average community. This figure is especially problematic when one considers that local representative bodies rarely contain more than two dozen members.

Thus, several other alternative voting systems are often considered by scholars when analyzing the electoral problems of APAs and similarly diminutive minority populations. Single transferable voting systems are widely considered to be representative of the broadest range of voting interests, and have been remarkably successful in garnering significant po-

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105. See supra text accompanying notes 73–77.
107. The formula for calculating this exclusion threshold is one divided by one plus the number of seats to be filled. See Still, supra note 14, at 249, 255–58; Lani Guinier, No Two Seats: The Elusive Quest for Political Equality, 77 VA. L. REV. 1413, 1466 (1991) (providing more detailed instructions on the intricacies of how to perform this calculation).
108. See Karlan, supra note 102, at 216.
110. See, e.g., Richard L. Engstrom, The Single Transferable Vote: An Alternative Remedy for Minority Vote Dilution, 27 U.S.F. L. REV. 781, 807 (1993) ("Single transferable voting will not only provide an electorally cohesive minority with opportunities to elect candidates of its choice comparable to [cumulative and limited voting] systems, it will also accommodate electoral competition within the minority."); George H. Hallett, Jr., Proportional Representation with the Single Transferable Vote: A Basic Requirement for Legislative Elections, in CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES 113, 117–24 (Arend Lijphart & Bernard Grofman eds., 1984) [hereinafter CHOOSING AN ELECTORAL SYSTEM] (noting that the single transferable vote is the "one system of election which passes muster, logically and constitutionally," and that the system has achieved political representation for many types of disadvantaged groups); Enid Lakeman, The Case for Proportional Representation, in CHOOSING AN ELECTORAL SYSTEM, supra, at 40, 50–51 (Arend Lijphart & Bernard Grofman eds., 1984) ("If we really want elections to reflect the wishes of the electors, the single transferable vote is by far the most effective means of doing this. ... It gives the voter maximum freedom to express his opinions and assurance that this will affect the election result in the way he wishes."). But see Steven J. Brams & Peter C. Fishburn, Some Logical Defects of the Single Transferable Vote, in CHOOSING AN
itical representation for people of color in places like New York City and Cincinnati. In an election system governed by single transferable voting, voters rank candidates to reflect their relative preferences (i.e., their first choice is ranked "1," their second choice is ranked "2," etc.). The winning candidates are those whose ballot count equals or exceeds a specified number called the "Droop quota." This number is determined by dividing the total votes available by the number of seats available plus one and then adding one to that total. Professor Richard Engstrom gives an example:

if three seats are to be filled, and 1000 votes are cast, the quota is 251 votes \(\left[\frac{1000}{3+1}\right]+1\), or 25%+1, the same percentage (plus 1 vote) as the threshold of exclusion in a three-seat one-vote limited voting election or a three-seat cumulative voting election. As with the threshold of exclusion in these other systems, the quota (when expressed as a percentage) decreases as the number of open seats increases. Ballots are counted by initially allocating a vote to each candidate for every "1" they receive. If no candidate receives the votes necessary to exceed the Droop quota, the candidate in last place is then eliminated and that candidate's votes are redistributed to the candidates who are ranked as second preferences on those ballots. Any candidate who meets or exceeds the quota is deemed elected and his seat within the representative body is secured. Any surplus votes that candidate receives are then redistributed to the candidates marked as second choices on those surplus ballots. This process of transferring votes to remaining candidates (i.e., those who are not eliminated or elected on a previous count) is repeated until a number of candidates equal to the number of seats available have been elected.

Limited voting systems have also been considered. These systems "use multimember districts in which each voter has fewer votes than there are seats to be filled," and have also been successful in securing minority

**ELECTORAL SYSTEM, supra**, at 147, 148-51 (proving, among other things, that the single transferable vote is not monotonic and is vulnerable to the truncation of electoral preferences).

111. See Hallett, supra note 110, at 123.
112. See Stiff, supra note 14, at 258.
113. See Engstrom, supra note 110, at 788-89.
114. See id.
115. Id. at 789.
116. See Hallett, supra note 110, at 118.
117. See id.
118. See id.
119. See id.
120. See id. at 119.
121. Karlan, supra note 102, at 223-24. While the number of votes is always less than the number of available seats, the actual number of votes varies depending on the design of the system. For those desiring a more in-depth discussion of limited voting, I would suggest either Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 163 (1985) or Daniel R. Ortiz, Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 148-50 (1982).
representation under certain conditions. When used effectively, however, both single transferable and limited voting systems have an exclusion threshold exactly equivalent to the one present in cumulative voting systems, and both systems generally accrue the same three drawbacks described previously with respect to cumulative voting. Although there is limited evidence to suggest that voters both understand and prefer single transferable voting as a more democratic alternative to plurality elections, stronger evidence suggests that single transferable voting systems have some larger problems. These include the potential to violate the "reduction principle," which states that elimination of a losing candidate should not affect the identity of winners, and the paradox that sometimes causes a candidate to lose because the candidate garners too many votes as a first preference. Single transferable voting systems therefore may not present realistic alternatives for the average APA community either.

Some forecast that the APA status as an emerging and politically uncommitted swing vote means that the need for these alternative voting systems will soon be alleviated along with the previously discussed political woes of the APA community. In theory, things look good—William Riker notes:

In making calculations about the effect of marginal policy revisions on a prospective reelection, legislators of course know that the bulk of their support in the previous election will be maintained. Hence their chief concern is with a relatively small proportion of votes at the margin. . . . Because of the legislator's concentration on these . . . marginal groups, the content of a substantial amount of legislation is directed at satisfying the interests of minorities of voters who currently stand between the parties. Since most minorities of voters are at one time or another in this marginal position, the interests are well served, probably too well served, in any two-party system. Furthermore, if the members of any group feel poorly served, they have only to become marginal in order to attract attention.

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122. See Karlan, supra note 102, at 227–30 (describing successes in Chilton County, Alabama and Granville County, North Carolina).
123. See id. at 225.
124. See supra text accompanying notes 104–108.
126. See Gideon Doron, Is the Hare Voting System Representative?, 41 J. POL. 918, 920–21 (1979).
128. See supra text accompanying note 100; see also Tam & Cain, supra note 82, at 21 ("Asian American comprise a genuine swing group. They are capable of voting predominantly for either party in a given election and are not bound by strong partisan identifications.").
Some of the relevant statistics also appear favorable: the number of APAs doubled in the 1970s, and then doubled again in 1980s. The 1990 census counted 7.2 million APAs, and estimates show that the number of APAs could reach 12 million in 2000 and almost 20 million by 2020. Moreover, "Asians have the highest naturalization rate of any immigrant group ... and various civic groups are hastening their efforts to register these new citizens as voters." In California, for example, the APA portion of the electorate doubled from an estimated three percent to six percent between 1992 and 1997. Approximately thirty-five percent of the APA voters polled in one survey voted for the first time in 1996. That same poll found that approximately thirty percent of the APA respondents had participated in at least one politically related activity "such as writing a lawmaker or contributing to a political campaign."

Optimistic political observers argue that this demographic explosion and newfound political activism, coupled with the lack of political cohesion discussed earlier, make APAs a group that is highly courted by both political parties. But theory and reality do not mesh comfortably in this case. In spite of their increased political participation and considerably socioeconomic mobility, the political clout of the APA community is greatly diminished by the fact that they are the most geographically dispersed and residentially integrated ethnic group. Moreover, there is also evidence to

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130. Sterngold, supra note 20, §1, at 36.
131. Id.; see also Annie Nakao, Asian Americans Vote Big, S.F. EXAMINER, Dec. 15, 1996, at A1 (quoting Professor Larry Shinagawa, who studies APA voting patterns, as noting that "in 1996 immigrants have finally come to the point where they are participating in large numbers... And it's going to continue.").
132. See Rodriguez, supra note 6, at M1; see also Maia Davis, Many Asians in Quincy Go to Polls for First Time, PATRIOT LEDGER (Quincy, Mass.), Nov. 6, 1996, available in 1996 WL 14130317 ("Since the last presidential election, voter registration among Asians in Quincy has more than doubled to 1519, about 30 percent of those eligible."). But cf. Kimberly W. Moy, Quincy Seeks to Boost Asian-American Voting, PATRIOT LEDGER (Quincy, Mass.), Nov. 3, 1997, at C1 (noting that only a year after the large registration drive, just 14 APAs voted in a September primary).
134. Id.
135. See supra text accompanying notes 74–77.
136. See Dick Kirschten, Trying a Little Tenderness, NAT'L J., Jan. 10, 1998, at 54; Sun, supra note 20, at A6 (quoting Clayton Fong, a former Bush administration official as observing, "[a]s long as people are wooing us—because we're not so firmly in one party or the other—that makes us a force to be reckoned with and gives us a place at the table").
137. See Rodriguez, supra note 6, at M1. Political scientists Wendy Tam and Bruce Cain observe that: Asian Americans are the most residentially dispersed [ethnic group], i.e. the least likely to live in a neighborhood in which their group is a majority (approximately 3% of California's Asian Americans live in such circumstances). Whites, by contrast, are the most concentrated, with 85% of whites living in majority white areas. These numbers contrast with the situation of blacks and Latinos—29% of blacks live in majority black areas and 44% of Latinos live in majority Latino areas. In addition, of the minority groups, Asian Americans are also the most likely to live in majority white tracts—51% of Asian Americans live in these tracts as compared to 31% of blacks and 35% of Latinos. In summary, the Asian American experience is
contradict Riker's theory\(^{138}\) and show that winning candidates rarely pay attention to the minority interests that constituted their swing vote.\(^{139}\) This is because the majority's votes also made a difference—they too were necessary for election\(^{140}\)—and because it is always easier and less risky to stay one's political course and maintain existing votes than it is to try to obtain a new constituency with a different strategy. One telling example shows two Mobile, Alabama city commissioners specifically disavowing the notion that African Americans had been "decisive" in their election, despite the fact that neither could have won their campaigns without the support of the African American constituency.\(^{141}\)

More disturbing though, is the fact that even if the APA community is finally able to capture a swing vote that means something to their elected representatives, that swing vote may not bring them any sort of political empowerment. Recent trends show that ballot initiatives are often used to circumvent representative institutions where people of color have gained substantial influence and/or accomplish the political "dirty work" that a representative legislature could not possibly explain or legitimize.\(^{142}\) The next Part focuses on the invidious uses and effects of these ballot initiatives.

II. THE PROBLEM WITH BALLOT INITIATIVES

A. Discriminatory Tendencies

In normal representative government, overtly racist measures are often filtered out by mechanisms that serve to mediate radical and discriminatory viewpoints—e.g., opportunities for compromise, deliberation, reflection, and exposure to the views and concerns of others.\(^ {143}\) Those who cannot be unusually multi-racial and divided almost evenly between those who live in predominantly white neighborhoods and those who live in more heavily Latino and/or black neighborhoods. Tam & Cahn, \textit{supra} note 82, at 4.

\(^{138}\) See \textit{supra} text accompanying note 129.

\(^{139}\) See Davidson, \textit{supra} note 16, at 10. Professor Davidson also showcases the long chain of questionable assumptions behind the theory that political minorities can be empowered by their pivotal swing vote. \textit{See id.} at 9–10. For example, Davidson observes that minorities can obtain an effective swing vote only if the "winners are aware of the decisive role minority votes played in their victory," but expresses doubt that such knowledge is present in the usual case. \textit{See id.}

\(^{140}\) See \textit{id.}

\(^{141}\) See \textit{id.}


persuaded away from racist feelings still are often persuaded to change their discriminatory votes in the interest of re-election because legislators generally cannot openly attribute their policy positions to racist and/or unconstitutional beliefs and hope to retain their offices in this age of political correctness and racial consciousness.\textsuperscript{144} Note, however, that:

When the legislative process is turned back to the citizenry either to enact laws by initiative or to review existing laws through the referendum, few of the concerns that can transform the "conservative" politician into a "moderate" public official are likely to affect the individual voter's decision. No political factors counsel restraint on racial passions emanating from longheld and little considered beliefs and fears. Far from being the pure path to democracy that Justice Black proclaimed,\textsuperscript{145} direct democracy, carried out in the privacy of the voting booth, has diminished the ability of minority groups to participate in the democratic process. Ironically, because it enables the voters' racial beliefs and fears to be recorded and tabulated in their pure form, the referendum has been a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day.\textsuperscript{146}

Bell's observations are especially troubling when one considers that most modern-day racism is not conscious or overt.\textsuperscript{147} Professor Charles Lawrence offers two explanations for this new breed of discrimination.

\begin{footnotesize}
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\item[\textsuperscript{144}] See Bell, supra note 62, at 13–14; Clayton P. Gillette, Plebiscites, Participation, and Collective Action in Local Government Law, 86 Mich. L. Rev. 930, 944 (1988) ("The requirement of public voting and public explanation restricts the capacity of legislators to vote either their own dark urges or those of their constituents"); see also Donald R. Kinder & Lynn M. Sanders, Divided by Color 268 (1996) (noting that Whites are less likely to express racist sentiments in the presence of minorities).

\item[\textsuperscript{145}] Bell, supra note 62, at 14-15; see also id. at 19 ("Appeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns."); Eule, supra note 143, at 1553 ("While public proclamations of racist attitudes have lost their respectability, prejudice continues to receive an airing in the privacy of the voting booth."); Lawrence G. Sager, Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc., 91 Harv. L. Rev. 1373, 1414–15 (1978) (explaining that plebiscites involve "no individual record or accountability"); Seeley, supra note 143, at 902 (arguing that, while "representatives must take a public position for which they are responsible," an individual plebiscite voter's "decision may never be known," enabling him "easily to discriminate on the basis of race").

\item[\textsuperscript{146}] Refer back to the Introduction for examples of how this "subtle" racism works against APAs. Cf. Kinder & Sanders, supra note 144, at 6–7 ("[W]hite Americans express considerably more enthusiasm for the principle of racial equality than they do for policies that are designed to bring the principle to life.").
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Noting that "our historical experience has made racism an integral part of our culture," but that "our society has more recently embraced an ideal that rejects racism as immoral," Lawrence uses Freudian theory to explain that "[w]hen an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness." He also observes that cognitive psychology substantiates his claims:

[C]ulture . . . transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead they seem a part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings: Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level.

Whatever school of psychological thought one believes in, however, the lesson is clear—initiative elections may often unintentionally tend toward discriminatory results that could be counteracted simply by involving voters in more discussions that engage opposing viewpoints and challenge discriminatory justifications and subconscious beliefs that the electorate may hold.

That change toward more deliberation and discussion is warranted immediately because the discriminatory tendencies of initiatives are now well documented. In recent years, initiatives have been used to mandate special voter approval for the funding of low-income housing, ban school busing used to facilitate racial integration, permit private discrimination in the alienation of real property, declare English the official


149. Lawrence, supra note 148, at 323.

150. Id.

151. Id.; see also Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. Rev. 1359, 1380–82 (using social psychology theory to reach these same conclusions).

152. See James v. Valtierra, 402 U.S. 137, 139 (1971). This requirement was especially invidious because voter approval was not required for the vast majority of other publicly funded projects.


language of certain jurisdictions,155 create electoral redistricting plans that dilute minority voting power,156 bar governments from enacting laws that ban discrimination based on sexual orientation,157 repeal antidiscrimination laws protecting gays and homosexuals,158 impose anti-immigrant regimes,159 and outlaw the use of affirmative action to facilitate equal opportunities for oppressed persons of color.160

Initiatives have even been used in some extreme instances to deny disadvantaged groups access to the political process. For example, although African Americans had never held a seat on Cincinnati's city council prior to 1924, they achieved proportional representation almost immediately after a single transferable voting system was implemented.161 However, due to racial antagonism, Cincinnati abandoned the single transferable vote in favor of another at-large voting system in 1957.162 Because African Americans never achieved proportional representation or an effective political voice under this new system,163 they jumped at the chance to have the single transferable vote reinstated when initiative elections were held in 1988 and 1991.164 But while over three-quarters of all African Americans voted for the reinstatement of a single transferable voting system, they could not overcome a lukewarm response from the larger White population of Cincinnati.165 African American political interests therefore remained grossly underrepresented on the city council.166

156. See Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713 (1964) (refusing to uphold a county-based apportionment system that was approved by referendum because it violated the equipopulation principle of constitutional redistricting).
161. See Engstrom, supra note 110, at 796.
162. See id. at 797.
163. See id.
164. See id. at 800-05.
165. See id. at 801, 804. Initiatives proposing electoral systems that come closer to guaranteeing proportional representation have also been rejected in Seattle, Washington and Eugene, Oregon. See Steven Hill, A Voting Rights Act at War with Itself, 1995 VOTING & DEMOCRACY REPORT available in <http://www.igc.org/environment/georgia.htm>.
166. See Engstrom, supra note 110 at 804-05. In Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982), the United States Supreme Court struck down another initiative barring the access of minorities to the political process. See id. at 470. The initiative at issue in that case prohibited school boards from requiring students to attend schools in districts other than their own. See id. at 462. The
It would be a different story if these laws had been passed after considering the rational objections voiced by APAs and other political minorities. But ballot initiatives are often used to silence those interests and subvert governmental filters that preserve the rights of minorities.\(^{167}\) In fact, they are often effectively used in instances where people of color have made significant advances through the actions of their elected representatives.\(^{168}\) In analyzing Colorado’s Amendment 2, an initiative directed at prohibiting local governments from enacting laws that bar discrimination based on sexual orientation, Professor Pam Karlan supports the claim that the initiative process is often chosen as a way to enact a measure that is clearly grounded in invidious discrimination: "the way the [measure at issue in the initiative] operated was to transfer the power to enact new anti-discrimination measures away from local governments and elected representatives generally and to replace local and republican politics with a regime in which only the Colorado electorate as a whole possessed power to enact such laws."\(^{169}\) Also substantiating this belief are the comments of California Governor Pete Wilson, a staunch proponent of some of the initiatives most harmful to minority interests (e.g., Proposition 209, an anti-affirmative action measure). He has observed that "[a] lot of the things that can't get through the Legislature have no problem winning public approval."\(^{170}\)

Take the example of the English-as-the-official-language movement.\(^{171}\) Since 1981, members of the United States Congress have introduced proposed constitutional amendments and general legislation attempting to validate this movement’s agenda almost every year,\(^{172}\) but these

\(^{167}\) See Elizabeth Garrett, Perspectives on Direct Democracy: Who Directs Direct Democracy?, 4 U. CHI. L. SCH. ROUNDTABLE 17, 19 (1997) (“Minority interests are thought to play a reduced role in direct democracy—so much so that opponents of direct democracy fear that lawmaking by popular vote empowers the majority without sufficiently protecting minorities.”); cf. Karl Manheim, Symposium on the California Initiative Process: Introduction, 31 Loy. L.A. L. Rev. 1161, 1161 (1998) (noting that “racial politics has been a prime target of the initiative,” and that the initiative has highlighted the clash between “minority rights and majority rule”).

\(^{168}\) See, e.g., Mulkey v. Reitman, 413 P.2d 825, 829 (Cal. 1936) (concluding that a California ballot initiative was approved “with the clear intent to overturn [three recent] state laws that bore [unfavorably] on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right”), aff’d, 387 U.S. 369 (1967).

\(^{169}\) Karlan, supra note 142, at 296 (citing Romer v. Evans, 517 U.S. 620, 631 (1996)).

\(^{170}\) See Purdum, supra note 40, at A1 (quoting Governor Wilson).


\(^{172}\) See Tena Jamison Lee, How Can There Be Free Speech if It’s Only in English, 24 Hum. Rts. Q. 10, 17 (1997). One of the first versions of the English Language Amendment was introduced in 1981 by U.S. Senator S.I. Hayakawa, the first person of Asian ancestry to be elected to the U.S. Senate
proposals have rarely received any serious consideration. Roger Rice, Co-Executive Director of Multi-Cultural Education Training and Advocacy, explains that this is because the movement is "all part of a backlash against immigration." Others agree that it is really just an illegitimate, unconstitutional, and "veiled expression of racism and xenophobia."

In response to this legislative impotence, powerful supporters of the movement to make English the official language have taken their case to the polling booth. Already, states like Colorado, California, and Arizona have passed broad-sweeping initiatives that declare English as the official language of their states. Arizona's initiative, for example, provides in relevant part that:

English shall be the official language of Arizona and all of its political subdivisions, that the Article is applicable to all branches of government and to all government officials and employees during the performance of government business, that the state and its political subdivisions shall take all reasonable steps to preserve, protect and enhance the role of English as the state's official language, that the state and its political subdivisions, with some limited exceptions, shall act only in English, and that private citizens shall have standing to bring suit to enforce this Article.

from any of the 48 contiguous states. See S.J. Res. 167, 98th Cong. (1981); see also CHAN, supra note 9, at 173 (reporting that Senator Hayakawa was a Republican from California).


See Lee, supra note 172, at 11 (quoting Roger Rice). Rice goes on to admit that there are a few people who support officializing English for legitimate reasons ("if people want to get ahead, they should speak English"), but he feels that this viewpoint is misguided because most immigrants actually do want to learn English. See id. at 17. Rice and his peers simply feel that immigrants shouldn't be forced into learning the language. See id.

See Laura A. Cordero, Constitutional Limitations on Official English Declarations, 20 NEW MEX. L.J. 17, 18 (1990). The act of attempting to eliminate foreign languages in response to racism and xenophobia is not a new phenomenon. In the 1920s, for example, states like Nebraska were spurred by anti-German sentiments and other World War I propaganda to enact a statute that prohibited teaching in any language other than English. See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923) (using substantive due process to declare the prohibition invalid; noting that the statute improperly infringed upon the liberty of school administrators and parents to make their own educational decisions).

To say that proponents of officializing English have been totally ineffective would be untrue. To date, 22 states have passed varying form of legislation making English their official language. See Valente, supra note 171, at 210. Noteworthy, however, is the fact that less than one-quarter of these states had passed such laws before strong anti-immigrant sentiments were aroused by California's Proposition 187 in 1994. See id. at 210 n.28 (listing the legislative measures officializing English in various states).

See COLO. CONST. art. II, § 30a.


See ARIZ. CONST. art. XXVIII, §1.

Alaska, a state in which native tongues had begun to reemerge in the public and political discourse, became the most recent state to nominate English as its official language on Election Day in 1998. See Kim Murphy, Decision '98: The Final Count, L.A. TIMES, Nov. 5, 1998, at S1.

Yniguez v. Mofford, 730 F. Supp. 309, 310 (D. Ariz. 1990) (holding this provision unconstitutional when it was applied to stop a state-employed insurance claims manager from speaking Spanish with Spanish-speaking clients who asked for assistance in asserting medical malpractice claims against
California's Proposition 187 provides another example of an initiative contrived to approve a proposal that could not be enacted through the legislature because of its discriminatory undertones. Although the initiative was officially directed at preventing "illegal aliens in the United States from receiving benefits or public services in the State of California," many felt that it was really motivated by invidious prejudices—both subconscious and purposeful—against persons of color. One editorial observed that "Prop. 187 will lead to discrimination against Asian Pacific Americans and other groups who look or sound foreign."

Proponents of Proposition 187 did much to validate this belief with their conscious words and actions. Many of the Proposition's supporters who observed an anti-187 rally where foreign flags were displayed, speeches in foreign languages were given, and huge crowds of people of color gathered together, indicated that they felt like "American values [were] being overrun by an uncontrolled influx of Third World citizens." They characterized the march as an "outrageous display of Mexican nationalism that bolsters the case for reducing immigration"—Alan Nelson, a co-author of Proposition 187, noted, "Any time they're flying Mexican flags, it helps us."

Recent experiences with initiatives that propose the repeal of anti-discrimination laws geared to protect gays and lesbians also show how otherwise irrelevant, impermissible, and unconstitutional actions motivate the
electorate to vote certain ways. In the words of Oregon Supreme Court Justice Hans Linde, Oregon's version of the anti-gay ballot measure impermissibly "invited Oregon's citizens to choose sides between the righteous and the sinners [and] between the homosexual minority and the heterosexual majority" by directing government to set a "standard for Oregon's youth that recognizes homosexuality...as abnormal, wrong, unnatural, and perverse." Justice Linde's position decrying the use of ballot initiatives to legislate morality was so powerful that it garnered the support of the strongly anti-gay Catholic church. The Oregon Catholic Conference of Bishops noted that the ballot initiative process "does not provide an appropriate forum to discuss in a reasonable and civil manner the important social issues involved."

Maine voters recently encountered a similar measure and a similar campaign strategy espousing hatred. Karen Geraghty, campaign manager for the anti-initiative group Maine Won't Discriminate summarizes the campaign strategy of those interested in repealing the anti-discrimination law: "[the opposition used fear as its message...fear was a bigger motivator [than fairness]." Political economist John Buell recognized that the economic insecurities of Maine's rural citizens also played a large role in securing their support for the initiative. Much of the Maine electorate voted for the anti-gay initiative based on an unfounded misperception promoted by flashy advertising that caused them to believe that protections for homosexuals were actually special preferences that threatened their own jobs.

Left alone, the problems posed by ballot initiatives only promise to get worse because the number of ballot initiatives is skyrocketing in many states across the nation. In the area of affirmative action alone, Hous-

190. See id. at 37 (citing Oregon Catholic Conference, Statement on Ballot Measure 9 (Sept. 29, 1992)).
191. Id.
192. Id.
193. Steven G. Vegh, Maine's Gay-Rights Advocates Debate What Went Wrong: More Education About the Importance of an Anti-Discrimination Law Is Needed, Supporters Say, PORTLAND PRESS HERALD, Feb. 14, 1998, at A1; see also Shea, supra note 158, at B16 (citing political scientist and sociologist Alan Wolfe as noting that the results of the Maine initiative confirm the conclusions of his recent two and one-half year study—Americans are tolerant of many things, but not of homosexuality).
195. See id.
196. See Daniel M. Warner, Direct Democracy: The Right of the People to Make Fools of Themselves; the Use and Abuse of Initiative and Referendum, A Local Government Perspective, 19 SEATTLE U. L. REV. 47, 48–49 (1995) ("Today, direct legislation is increasingly popular—and increasingly destructive... ."); Peter Schrag, California, Here We Come, ATLANTIC MONTHLY, Mar. 1998, at 20 ("In November of 1996 voters in twenty-three states were polled on a total of ninety initiatives, the most in eighty years (a decade ago there were forty-one... ").
have already held elections with a ballot initiative proposing a ban on affirmative action. Compounding the significance of this problem for the small APA population is the fact that initiatives are really "at-large elections" that lead to the dilution of what little voting strength they now possess.202

But to characterize every initiative as intentionally running over all minority interests would be unfair.203 The recent Native Hawaiian Sovereignty Plebiscite held during the summer of 1996204 demonstrates that initiatives can actually help minorities if designed in certain ways.205 Because

196. See Clarence Page, A Timely Message from Houston on Affirmative Action, CHI. TRIB., Nov. 9, 1997, at C23 (observing that Houston's voters rejected the anti-affirmative action measure).


200. See supra note 196, at C23.

201. See id.

202. See Bell, supra note 62, at 25. At-large elections tend to dilute minority voting strength because they destroy whatever geographical compactness (and resulting political voice) a minority population might have by making the minority population vote with all residents of a given at-large district. See Whitecomb v. Chavis, 403 U.S. 124 (1971). One empirical study found that cities with at-large districts were approximately half as likely as cities with single member districts to have an African American on their city council. See Richard A. Walawender, Note, At-Large Elections and Vote Dilution: An Empirical Study, 19 U. MICH. J.L. REFORM 1221, 1233 (1986); see also Chandler Davidson & David Korbel, At-Large Elections and Minority Group Representation: A Reexamination of Historical and Contemporary Evidence, in MINORITY VOTE DILUTION, 65, 71–74 (Chandler Davidson ed., 1984) (surveying a number of contemporary empirical studies on the effects of at-large districting on minority voting strength and discovering that most studies find evidence of dilution).

203. It might also be unfair not to observe that some of these initiatives, while approved by the electoral public, have been found to be unconstitutional. See, e.g., Romer v. Evans, 517 U.S. 620, 625–26 (1996) (finding a measure effectively barring political participation by homosexuals to be unconstitutional); Hunter v. Erickson, 393 U.S. 385, 390–93 (1969) (striking down an Akron, Ohio law that required approval of any fair housing legislation by a majority of the electorate); cf. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property... and other fundamental rights may not be submitted to vote; they depend on the outcome of no election."); Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 736 (1964) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."). More often, however, initiatives are upheld or are never challenged in court. See Jane S. Schacter, The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy, 105 YALE L.J. 107, 109 (1995).

It goes without saying that some initiatives have also provided great benefit to the general public by protecting them from the excesses of government. California's Political Reform Act of 1974, which regulates campaign finance practices and candidates' conflicts of interest, is the result of such an initiative. See CAL. GOV'T CODE §§ 81000–81016 (West 1997). So are the Washington laws on open meeting, lobbying, and campaign practices. See Hugh A. Bone & Robert C. Benedict, Perspectives of Direct Legislation: Washington State's Experience 1914–1974, 28 W. POL. Q. 330, 332–35 (1975).


205. Initiatives similar to the one in Hawaii that have concerned the issue of sovereignty and involved largely empathetic populations have also occurred in Puerto Rico and Quebec. For more information regarding these initiatives and their contexts, consult Edward T. Canuel, Nationalism, Self-Determination, and Nationalist Movements: Exploring the Palestinian and Quebec Drives for Independence, 20 B.C. INT'L & COMP. L. REV. 85 (1997). See generally Ediberto Roman, Empire Forgotten: The United States's Colonization of Puerto Rico, 42 VILL. L. REV. 1119 (1997).
the Native Hawaiian constituency is small\textsuperscript{206} and disproportionately under-represented in the Hawaii State Legislature,\textsuperscript{207} it has had a difficult time achieving the forms of remuneration that it wants from the United States to compensate for the wrongful annexation of Hawaii in 1893.\textsuperscript{208} In order to ameliorate this problem, the State of Hawaii decided to hold a plebiscite asking if the "Hawaiian people [should] elect delegates to propose a Native Hawaiian government" \textsuperscript{209} and limited participation in that plebiscite to Hawaiians who were over the age of eighteen.\textsuperscript{210} In doing so, the State of Hawaii ensured the success of the measure at issue\textsuperscript{211} and ensured that the Native Hawaiians would be able to carry on their movement toward self-governance.

Nevertheless, it is important to note that the current ballot initiative system was able to help Native Hawaiians only by silencing the political voice of others. Such a system is probably unconstitutional because it systematically excludes a group from the normal workings of the political process,\textsuperscript{212} but as the next subsection notes—constitutional or not—the current ballot initiative system is inherently and fatally flawed because it contradicts our original conceptions of how American government is supposed to operate.

B. The "Un-American" and Deceptive Nature of Ballot Initiatives

Originally introduced into American politics around the turn of the century as a means of conveying political power from political elites and wealthy members of society to the public at large,\textsuperscript{213} ballot initiatives "permit citizens to set the political agenda by placing statutes and constitutional

\begin{itemize}
\item \textsuperscript{206} Depending on whose definition of "Hawaiian" is used, Native Hawaiians make up somewhere between 12% and 20% of the state's 1.1 million residents. See Mindy Pennybacker, Should the Aloha State Say Goodbye? Natives Wonder, NATION, Aug. 12, 1996, at 21.
\item \textsuperscript{208} For more on this wrongful annexation and the Native Hawaiian fight for redress and/or sovereignty, see generally Native Hawaiian Study Commission, Report on the Culture, Needs and Concerns of Native Hawaiians (1983); Michael Dougherty, To Steal A Kingdom (1992); Haunani-Kay Trask, From a Native Daughter: Colonialism and Sovereignty in Hawaii (1993).
\item \textsuperscript{210} See id.
\item \textsuperscript{211} The measure prevailed by a margin of 73% to 27%. See Carey Goldberg, Native Hawaiian Vote Favors Sovereignty, N.Y. Times, Sept. 14, 1996, at A1.
\item \textsuperscript{212} See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980). In another of my articles, I argue that the way the Native Hawaiian Sovereignty Plebiscite was designed may have actually helped Native Hawaiians in an unconstitutional fashion because it disregarded the "one person, one vote" rule governing voting systems. See Yoshino, supra note 207. Thus, although the design of the Native Hawaiian Sovereignty Plebiscite did help to recognize the interests of a politically disadvantaged group, I argue that the system proposed in Part III of this Article provides a better solution that is also more clearly within the bounds of the United States Constitution.
\end{itemize}
amendments on the ballot, and by vetoing actions taken by legislative bodies at the state and local levels if they can gather the threshold amount of valid petition signatures. Proponents of the initiative structure frequently argue that the ballot initiative system represents American democracy at its best because the voters are making policy choices for themselves and because winner-take-all majority rule prevails without the compromises of legislative logrolling and backscratching to hinder true preferences. These arguments are attractive because of the increasingly popular belief that the people should be able to oust "special, minority, and corrupt" influences and replace the structure of a government run "by the few" with a structure in which a group of citizens sets the agenda and then the electorate as a whole decides what approach to take.

The problem with these arguments, however, is that majoritarianism is not the central premise on which our government is based—and for good reason. Although the framers of the United States Constitution meant for American government to derive its legitimacy from the will of the people, they were especially wary of majority rule and thought that majority factions presented a clear danger of oppression:

Protection . . . against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them . . . how to make the fitting adjustment between indi-

215. See id.
216. See Romer v. Evans, 517 U.S. 620, 647 (1996) (Scalia, J., dissenting) (describing a referendum as the "most democratic of procedures").
217. See City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 672 (1976) (relying on the fiction that the referendum process is the exercise of a nondelegated legislative power that gains legitimacy merely because it is exercised directly by the people); Magleby, supra note 214, at 15.
218. See GUINIER, supra note 62, at 2; see also Bell, supra note 62, at 2 (acknowledging that criticizing direct democracy "appears reactionary, if not un-American").
219. MAGLEBY, supra note 143, at 45.
220. See THE FEDERALIST No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961) ("When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.").

Modern political scientists continue to believe that there are undeniable concentrations of power and inequalities among various groups that need to be recognized and accounted for before the political process can work correctly. See generally, THEODORE LOWI, THE POLITICS OF DISORDER (1971).
individual independence and social control—a subject on which nearly every-thing remains to be done. \(^{221}\) The framers felt that "a society under the forms of which the stronger faction can readily unite and oppose the weaker" was no better than anarchy, \(^{222}\) and therefore designed the Constitution to produce good government in the form of "refined, or filtered majoritarianism." \(^{223}\) The raw majoritarianism of the electorate was to be tempered by the structure of republican government, a bicameral legislature, and a Constitution that was difficult to amend. \(^{224}\) Government was not meant to be a "winner-take-all" system that "pursued the interests of a privileged few or even of only those groups that could work themselves into some majority coalition." \(^{225}\) Instead, it was to be a system where elected representatives governed in the interest of all people. \(^{226}\)

Thus, as noted earlier, the framers devised a scheme of representative government containing a number of protections against tyranny by the majority. \(^{227}\) Ballot initiatives circumvent these safeguards in myriad of ways \(^{228}\) where the U.S. Constitution prescribes a complicated and rigorous process of legislation, amendment, or deliberation, initiatives pass the responsibility of acting to an electorate that is more willing and able to ignore constitutional protections. \(^{229}\) Peter Schrag summarizes:

The larger danger, of course, is precisely the nondeliberative quality of the California-style initiative . . . . Nothing is built into the process—no meaningful hearings, no formal debates, no need for bicameral concurrence, no conference committees, no professional staff, no informed voice, no executive veto—to present the downside, to outline the broader implications, to ask the cost, to speak for minorities, to engineer compro-

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\(^{222}\) The Federalist No. 51, at 352 (James Madison) (Jacob E. Cooke ed., 1982); see id. at 351 ("It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part.").

\(^{223}\) Ely, supra note 143, at 1532; see Cass R. Sunstein, The Partial Constitution 21–22 (1993) (noting that the American system of representative government was designed "to promote deliberation and to limit the risk that public officials would be mouthpieces for [their] constituent interests"); see also Priscilla F. Gunn, Initiatives and Referendums: Direct Democracy and Minority Interests, 22 Urb. L. Ann. 135, 141 (1981) ([D]irect democracy eliminates the procedural safeguards which protect minority rights in representative government."); cf. John B. Anderson & Nancy C. Ciampa, Ballot Initiatives: Recommendations for Change, Fla. B.J., Apr. 1997, at 71 (observing that ballot initiatives are beginning to distort the primary purposes of the Florida Constitution: to limit the powers of the legislature; and to define and allocate government functions among the various branches").

\(^{224}\) See The Federalist Nos. 10, 51 (James Madison).

\(^{225}\) Ely, supra note 212, at 79.

\(^{226}\) See id.

\(^{227}\) See supra notes 143–144 and accompanying text; The Federalist No. 51 (James Madison) (Jacob E. Cooke ed., 1982) (delineating the variety of methods that the Constitution uses to protect minority interests from the potentially destructive will of majority coalitions).

\(^{228}\) See supra note 146 and accompanying text.

\(^{229}\) Cf. Linde, supra note 189, at 37 (observing that the deliberative processes mandated by the U.S. Constitution provide "the only guarantee safeguarding minorities against unmediated swings of majority passions").
mises, to urge caution, to invoke the lessons of the past, or, once an initiative is approved by the voters, to repair its flaws except by yet another ballot measure (unless the text of the initiative itself provides for legislative amendment).230

One major problem stems from the fact that the electorate is extraordinarily fickle. Voting trends show that plebiscite results may have more to do with general moods than substantive politics.231 Moreover, even when an effort to consider substantive issues is made, studies show that the electorate is far more susceptible to slick advertisements and emotional appeals than legislators and legislative processes are because voters "too quickly form preferences, fail adequately to consider the interests of others, and are overly susceptible to contagious passions and the deceit of eloquent and ambitious leaders."232 Several studies indicate that voter behavior at the polls is heavily influenced by media campaigns. The positions of the electorate on initiatives have been found to reflect superficial and fleeting opinions that have been largely formulated by television, newspaper, and radio advertising rather than deeply deliberated choices.233 One empirical


231. Recent commentary in the Wall Street Journal about the 1998 elections exemplifies this problem:

Exit polls suggested that voters generally felt good about the economy and the future, which probably boosted support for local initiatives. "If you're mad at everyone, you'll say 'no' to that and 'don't ask me about this,'" says Democratic pollster Peter Hart. "If you're a little more upbeat, you look at the opportunities. . . ."

"We tend to be more generous about what we want government to do when we think we're doing pretty well," says Karlyn Bowman, a resident fellow in public opinion at the American Enterprise Institute in Washington. By contrast, Mr. Hart notes, fewer initiatives and referendums passed in 1994, when the mood was more "downbeat and negative."


232. Eule, supra note 143, at 1526–27; see also Felsenthal & Perine, supra note 231, at B1 (analyzing the 1998 ballot initiative election and noting that "voters didn't necessarily give a lot of thought to some issues"). But cf. H. Richardson, What Makes You Think We Read the Bills? 37–38 (1978) ("Legislators consistently vote on legislation without understanding what is in it, especially when the final vote is taken. Every legislator has his own system for judging how he will vote, but reading the bill usually isn't part of the procedure, and listening to debate on the bill's merits certainly isn't either.")

233. See Bell, supra note 62, at 18–21; Magleby, supra note 214, at 39; Randy M. Mastro et al., Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It, 32 FED. COMM. L.J. 315, 320 (1980); see also Spokane Arcades, Inc. v. Ray, 449 F. Supp. 1145 (E.D. Wash. 1978) (chronicling the tumultuous, media-oriented campaign that led to the passage of an unconstitutional anti-pornography law by initiative in the state of Washington); Gotanda, supra note 160, at 1137, 1145–49 (noting that the California Civil Rights Initiative (CCRI) debated in the media is dramatically different from the CCRI presented on the ballot).

The fact that voters are heavily influenced by flashy advertising might, at first glance, be taken as good news for the APA community; all they have to do to secure their interests is spend enough money. Besides often being economically infeasible, recent experience shows that minority populations are not able to "buy" votes as easily as others are. See, e.g., Gay-Rights Veto Foes Outspend Referendum Win-
study of California initiatives found that big budgets are extraordinarily successful at defeating ballot measures: from 1954 to 1982, only one initiative was able to pass when a heavily funded campaign was waged against it. This problem is exacerbated by the fact that there are no limitations on contribution amounts for ballot initiatives, and is even more troubling when one considers that (1) the results of these studies apply to both well-publicized measures as well as relatively obscure ones, (2) initiative partisans are now spending record amounts of money in attempting to influence voters, and (3) courts often ignore media and advertising sources when discerning the popular intent behind a given initiative.

Also contributing to the unrepresentative and un-American nature of the ballot initiative process is the fact that initiative elections generally do not measure the intensity of public interest as easily as the legislative process—a proposal that is extremely harmful to minority interests, but only moderately beneficial to non-minority interests may be adopted.


Richard Briffault justifies the distinction between candidate elections and ballot initiatives by noting that in initiative elections "candidates and party labels are absent from the ballot, replaced by proposed statutes and constitutional amendments. This eliminates potential corruption of officeholders as a justification for imposing limitations on campaign finance activities. At the same time, it increases the value of information contained in campaign communications for voters." Richard Briffault, Ballot Propositions and Campaign Finance Reform, 1996 ANN. SURV. AM. L. 413, 421.

236. See MAGLEY, supra note 143, at 133. Many voters report that they receive information about ballot initiatives from only electronic media sources. See id. at 134.

237. See Havemann, supra note 160, at B12 (noting that over $200 million was spent in campaigning for ballot propositions in 20 states); Howe, supra note 234, at A19 ("Twelve ballot measures in California's 1998 election drew a record $189 million in contributions ... The total far outstripped the $153 million spent by President Clinton, Bob Dole and Ross Perot in their election battle two years ago.").

238. See Schacter, supra note 203, at 111.

239. See Bell, supra note 62, at 25. In reality, the situation may not even be that good. Derrick
because a small but passionate group is much more likely to be able to make a persuasive case (both in terms of substance and politics) to one elected representative than to an entire electorate. Moreover, some initiatives do not measure the intensity or level of permissible or relevant interests at all. Although many people blamed the problems of illegal immigration on lax enforcement of federal immigration laws, those same people often voted for Proposition 187 (an initiative that did nothing about federal immigration law enforcement) without examining its merits and disadvantages simply because they wanted to "send a message that even the White House [would] understand." In fact, political commentator George Will lauded Proposition 187 because of its unconstitutionality. Will urged passage of the measure because he thought that Proposition 187 would "force the Supreme Court to reconsider" a case in which the Court prohibited public school districts from denying undocumented immigrant children the right to a public education.

Studies demonstrate that only the most educated and economically privileged people tend to vote on plebiscite measures and that people of

Bell notes:

Racism is not simply a disease that afflicts some whites and leaves the rest untouched. It is a pervasive influence, though it manifests itself most virulently among those lower-class whites who have been and remain convinced that their own insecure social status may best be protected by opposing equal rights for blacks. This view is contagious and perhaps incurable. It results in white support for policies limiting the rights of blacks even while simultaneously, if more subtly, those policies also limit opportunities for less advantaged whites. Id. at 10; see also KINDER & SANDERS, supra note 144, at 268 (observing that "racially resentful whites are much more likely to consider themselves and their families threatened by racial policies at work and school than are whites who express sympathetic views toward blacks—even though we can find no evidence that they are in fact more threatened").

240. Harold Ezell, Enough Is More Than Enough, L.A. TIMES, Oct. 23, 1994, at M5; see also Brad Hayward, Foes Sharpen Strategies on Immigration Measure, SACRAMENTO BEE, Sept. 4, 1994, at A1 (noting that some proponents of Proposition 187 thought of the measure as an occasion for the electorate to "send a visceral 'we're fed up' message to the [federal] government about the need to tighten both the border and the public's spending on undocumented immigrants").


242. Id.


244. See Eugene C. Lee, The American Experience, 1778–1978, in THE REFERENDUM DEVICE 46, 55 (Austin Ranney ed., 1981) ("Among those who vote, those from upper socioeconomic categories are disproportionately represented among those who decide referendums. More specifically, education has a strong impact on the likelihood of voting on propositions."); MAGLEBY, supra note 143, at 137 (observing that 44% of those with advanced degrees gleaned information from an election handbook describing particular ballot initiatives, but that only 7% with less than an eighth-grade education did so); Collins & Oesterle, supra note 40, at 58.

Many voters cast votes for candidates, but do not vote on propositions that appear on the same ballot. See MAGLEBY, supra note 143, at 83–95 (reporting that up to 25% of the voters that come to the polls do not vote on ballot initiatives); cf. Steven A. Capps, Ballot Initiatives Get Mixed Reviews in Poll, SACRAMENTO BEE, Nov. 3, 1997, at A4 (reporting that a survey of California voters found that only about half of all voters vote on every initiative that appears on their ballots). This low overall participation rate makes initiative elections extremely susceptible to capture by special interests. Cf. Jim Bodor, Direct Democracy Has Its Downside, TELEGRAM & GAZETTE (Worcester, Mass.), Feb. 18, 1998, at B1 (giving examples of how public apathy has led to control of the local government by a few
color as a whole tend to vote on initiative measures less often. This indicates that politically disadvantaged groups are not really gaining any of the supposed benefits of the initiative legislation process. In the case of the Cincinnati initiative proposing a switch to a single transferable voting system, for example, approximately 22.2% of the African Americans signing in to vote did not cast a ballot with respect to the issue of the voting system (compared to only 10.9% of the Whites signing in to vote).

This problem of nonparticipation is especially acute in the case of APAs, where language barriers often prevent voters from fully comprehending exactly what they are choosing (or not choosing) to support. Even though the Voting Rights Act mandates language assistance for some APAs, such assistance is often of little use in dealing with legalistic ballot initiatives because translations can often only approximate meanings of specific and complex legal provisions. Moreover, there is some evidence that initiatives are becoming longer and more complex. In California, for example, during the 1988 and 1990 elections, thirteen initiatives that exceeded 5000 words (about twenty double-spaced, typewritten pages) and one that numbered 15,663 words (about sixty-two pages) were placed on the ballot.

In a study applying three different readability tests to a number of initiatives, Professor David Magleby has found that comprehending most ballot measures in California and Oregon requires an eighteenth grade reading level. Ballot descriptions in Massachusetts and Rhode Island were slightly easier, requiring the voter to possess only a fifteenth

large corporations).
grade reading ability. In either case, however, where ballot initiatives are so difficult that only about one-fifth of the general population of the four states could read and understand the ballot questions, it easy to recognize how the vast number of APAs who learn English as a second language are practically unable to effectively participate in initiative elections.

The problems of voter misunderstanding are further exacerbated by the fact that summaries or arguments concerning initiatives are sometimes designed to mislead voters about the potential consequences of their vote. Take the example of Arizona's Proposition 200, an initiative measure proposing to regulate the taking of wildlife on public lands. Although the official legislative analysis specifically stated that the restrictions imposed by the initiative "should not prohibit . . . regulated hunting or fishing with guns or other 'implements in hand,'" opponents of Proposition 200 launched an intensive media campaign asserting that the measure would ban all fishing and hunting on public lands. This misinformation led to the overwhelming defeat of the measure by a margin encompassing almost one-fourth of the electorate. A hidden consequence of California's Proposition 209 provides a more dramatic example. Although supporters of that initiative believed they were voting against affirmative action preferences on the basis of race and gender in employment and education, many were unaware that Proposition 209 implicitly lowers the

253. See id.
254. See id.
257. Id. (quoting ARIZONA SECRETARY OF STATE, ARIZONA PUBLICITY PAMPHLET: GENERAL ELECTION 85 (Nov. 3, 1992)).
259. See id. (citing Proposition Results, ARIZ. REPUBLIC, Nov. 5, 1992, at A5). Misinformation starts far before the election ever takes place. In discussing the signature-gathering process that is a necessary prerequisite to get an initiative on the ballot, Richard Briffault notes:

[the techniques these solicitors use at shopping centers and street corners are more those of the pitchman than the civic educator. The solicitor summarizes the initiative in the briefest and most appealing way possible. Voters are urged to "lower taxes" or "stop corrupt practices" by signing the petition. Under tight time constraints to gather the required signatures, the solicitors have no interest in debating the merits of the measure with citizens or even in enabling potential signers to read and consider the petition carefully. . . . One solicitor apparently obtained great results by asking people to sign because it was his birthday. Others employ less innocent methods, such as "dodger cards," which cover up the text of a measure so that voters cannot see undesirable or confusing provisions, or outright forgery of signatures of voter names drawn from the telephone book.

standard that the state is held to in discriminating against someone on the basis of their gender.\textsuperscript{260} Instead of showing a compelling reason for the discrimination, the state now need only prove that it acted reasonably.\textsuperscript{261}

Another problem caused by initiatives stems from the fact that the political agenda these measures dictate is not set by the public as a whole—or even a significant part of the electorate for that matter. Rather, control of the agenda lies with a small group of elite individuals who possess the financial resources that are sufficient to employ the signature-gathering and legislation-drafting agencies necessary to actually put a measure on the ballot.\textsuperscript{262} The costs of putting an initiative on the ballot are prohibitive for all but the most well-organized groups. In Florida, for example, the cost of gathering the required signatures (equivalent to eight percent of the Florida electorate in the most recent presidential election) is steep—it was already over $1 million in 1990.\textsuperscript{263}

Despite these indications of the non-representative nature of the initiative process, some scholars remain skeptical of the actual extent of the problem. In a review of Professor David Magleby's book, \textit{Direct Legislation: Voting on Ballot Propositions in the United States}, Richard Briffault attacks Magleby for overstating the inability of the initiative process to protect the interests of politically disadvantaged groups.\textsuperscript{264} Briffault states that Magleby misidentifies the issue and that his real focus should have been on "whether the initiative is more likely than the legislature to be a source of measures that discriminate against minorities or infringe upon the rights of the politically powerless."\textsuperscript{265}

While there may be merit in Briffaut's findings that state legislatures are more than capable of discrimination,\textsuperscript{266} such findings are irrelevant to

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\begin{enumerate}
\item \textsuperscript{261} Compare Sailer Inn, Inc. v. Kirby, 95 Cal. Rptr. 329, 339 (1971) (observing that, prior to Proposition 209, the state needed to demonstrate a compelling reason for discriminating on the basis of gender) with Erwin Chemerinsky & Laurie Levenson, \textit{Sex Discrimination Made Legal}, L.A. TIMES, Jan. 10, 1996, at B9 (noting that Proposition 209 lowers the standard of review to a reasonableness inquiry).
\item \textsuperscript{262} See Wallace v. Zinman, 200 Cal. 585, 588 (1927) ("It is common knowledge that an initiative measure is originated by some organization or small group of people . . . ."); Magleby, supra note 214, at 35–36; \textit{see also} Briffault, supra note 259, at 1352 ("[I]f a test for the popular sovereignty of initiatives and referendums is equal access in placing an issue on the ballot, the initiative and referendum fail."); \textit{Initiatives: Use and Abuse}, L.A. TIMES, Apr. 19, 1998, at M4 ("It still may be possible for a true grass-roots movement to rise up and right wrongs through the ballot box. But the common use of the initiative in California today is for well-heeled special interests to write their own wishes into state law of the Constitution.").
\item \textsuperscript{263} See Anderson & Ciampa, supra note 223, at 72.
\item \textsuperscript{264} See Briffault, supra note 259, at 1363–66.
\item \textsuperscript{265} Id. at 1364.
\item \textsuperscript{266} See id. ("Racial discrimination was largely a product of state legislative action, not initiative votes. Nor are the great advances of minorities in recent decades attributable to state legislative action . . . . The legislatures resisted and delayed and became more responsive only under extraordinary political and legal pressures.").
\end{enumerate}
the issue at hand. Discrimination resulting from initiatives is invidious enough to warrant both concern and action, regardless of whether legislatures discriminate more or less than the general public. Briffault prefers the initiative option because legislators may sometimes deliberate less than the general public. However the problem with Briffault's argument is that it fails to consider choices outside of the existing binary paradigm. If neither legislatures nor initiatives are very deliberative or attuned to the interests of the politically disadvantaged, the solution should be to create a different process that is more conducive to deliberation and less facilitating of discrimination. Arguing about whether the legislature or the initiative structure is less discriminatory is a wholly fruitless debate.

Because ballot measures are so far out of line with our original conceptions of democracy, they have led some scholars to claim that they violate the United States Constitution's guarantee of a "Republican Form of Government." Although the Supreme Court has never gone so far as to hold all initiatives unconstitutional, we should think about whether there are more "American" and less discriminatory ways to restructure the ballot initiative system because constitutional framers like James Madison expressed concerns about governance by raw majoritarianism and because the ballot initiative process leaves disadvantaged groups without a method

267. See id. at 1362–63.
268. See infra Part III for suggestions on how this can be achieved.
269. The Guarantee Clause of the Constitution states that "[t]he United States shall guarantee to every state in this Union a Republican Form of Government." U.S. CONST. art. IV, cl. 4. Although the Guarantee Clause does not explicitly require any specific form of state government, scholars like Professors Eule and Seeley argue that it does require state governments to mirror the federal government's accountability to the majority with corresponding filters to protect electoral minorities. See Eule, supra note 143, at 1539–41; Seeley, supra note 143, at 909.
270. The closest that the Court has come to the disapproval of initiatives is to recognize that plebiscites are not immune from constitutional safeguards or entitled to any special deference. See, e.g., Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981) ("It is irrelevant that the voters rather than a legislative body enacted [this law] because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."). More often, however, the Supreme Court has moved in the opposite direction. See, e.g., James v. Valtierra, 402 U.S. 137, 141 (1971) ("Provisions for referendums demonstrate devotion to democracy."). Other courts have followed this lead. See, e.g., Southern Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291, 294 (9th Cir. 1970) (praising the referendum as a useful tool that allows voters to exercise their traditional rights to legislate directly); McKee v. City of Louisville, 616 P.2d 969, 972 (Colo. 1980) ("[T]he power of initiative is a fundamental right at the very core of our republican form of government.").
271. See supra note 220 and accompanying text. Had Madison and his peers decided that a plebiscitary democracy was the best system, they would have had a number of models to follow since "[c]itizens were permitted to propose and decide legislation directly in Greek city-states of the fifth century [and] in Swiss cantons of the Middle Ages." Magleby, supra note 214, at 19; see also HARLAN HAHN & SHELDON KAMIEIECKI, REFERENDUM VOTING: SOCIAL STATUS AND POLICY PREFERENCES 8 (1987) (describing the use of direct democratic processes in ancient Roman plebiscites); DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 3–4 (1989) (observing that certain tools of direct democracy were used in some American colonial governments). Indeed, Aristotle himself defined democracy as a "rule by the multitude." ARISTOTLE, THE POLITICS 89 (Stephen Everson trans., Cambridge Univ. Press 1988).
to influence the political process. The next part of this Article examines that issue.

III. THE LESSONS OF NEGOTIATED RULEMAKING—DESIGNING A BETTER BALLOT INITIATIVE SYSTEM

A. The Negotiated Rulemaking Approach

In many ways, "negotiated rulemaking" is a glorified name for the simple negotiation processes with which everyone is familiar.\(^\text{272}\) Introduced at the federal level in the early 1980s,\(^\text{273}\) negotiated rulemaking is designed to deal with many of the problems apparent in the administrative rulemaking process—\(^\text{274}\) for example, adversarialism and positional bargaining, the withholding or mischaracterization of information, and the emotional or irrational attacking of opposing viewpoints and their legitimacy.\(^\text{275}\) In short, the negotiated rulemaking process is directed at achieving improved administrative regulations through the facilitation of cooperation and deliberative discourse between government agencies, the regulated community, and public interest groups.\(^\text{276}\)

In their famous administrative law casebook, U.S. Supreme Court Justice Stephen Breyer and Professor Richard Stewart describe the negotiated rulemaking process in just two sentences: "The agency selects a facilitator to convene meetings of interested parties. They will meet with staff to propose rules, to discuss their own proposals, and to try to come up with a final, agreed-upon rule, including the rule's specific language."\(^\text{277}\) To the former sentence of this description, I would simply add that interested parties not initially invited to participate may petition the agency for representation or membership in the negotiating group.\(^\text{278}\) Upon receiving such a petition, the agency and the mediator leading the negotiated rulemaking then determine: "(1) whether the petitioner will be affected sub-

\(\text{272. For a good primer on negotiation techniques, see generally ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991).} \)
\(\text{273. See DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 1 (1995).} \)
\(\text{274. Not coincidentally, these problems are also often readily apparent in ballot initiative campaigns.} \)
\(\text{275. See, e.g., Intent to Form an Advisory Committee to Negotiate Proposed Farmworker Protection Standards for Agricultural Pesticides, 50 Fed. Reg. 38,030 (1985) (discussing the use of negotiated rulemaking to resolve these types of problems).} \)
\(\text{276. See PRITZKER & DALTON, supra note 273, at 1.} \)
\(\text{278. See Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305 (1985).} \)
Still Keeping the Faith?

stastically by the rule; (2) if so, whether it is represented by a current member of the negotiating group; and (3) whether, in any event, the petitioner should participate, or whether interests can be consolidated in a way that provides adequate representation.279

Negotiation training and orientation sessions are often held before the negotiated rulemaking process actually begins.280 These sessions usually consist of several hours of lectures on negotiation techniques, practice exercises, and demonstrations,281 and are constructed to offset the potentially wide disparity in negotiation experience among the participants.282 The sessions are also valuable because they offer a neutral and informal setting that encourages participants to build constructive relationships.283 EPA officials, for example, claim that these training and orientation sessions greatly contribute to the success of the actual negotiated rulemaking.284

There are six general selection criteria that a policy issue must fulfill before it is eligible to undergo the negotiated rulemaking process: (1) There must be a need for a rule or policy;285 (2) interested parties must be limited and identifiable;286 (3) there must be a high likelihood of convening a committee with balanced representation whose members are willing to negotiate in good faith;287 (4) there must be a high likelihood of finishing the

280. See Pritzker & Dalton, supra note 273, at 193; see also 1 C.F.R. § 305 (1985) (Recommendation 85-4).
281. See Pritzker & Dalton, supra note 273, at 194-95.
283. See id.
284. See id.
285. See Negotiated Rulemaking Act of 1990, 5 U.S.C. § 563(a)(1) (1994). Connected to this requirement is the need for diverse issues and a range of possible outcomes so that the negotiating parties might have room to compromise. See Susskind & McMahon, supra note 282, at 139-40. This necessity is rarely an obstacle, however—objects of potential regulation almost always raise multiple issues. See Philip J. Harter, Negotiated Regulations: A Cure for the Malaise, 71 GEO. L.J. 1, 50 (1982) (observing that most policy problems raise the following subissues: the extent of the problem, the stringency of the response, the manner of compliance, the components of the regulation, and the date of implementation).
286. See 5 U.S.C. § 563(a)(2). This requirement is not as stringent as it might seem at first glance—successful negotiating groups have exceeded 25 participants. See Owen Olpin et al., Applying Alternative Dispute Resolution to Rulemaking, 1 ADMIN. L.J. 575, 577 (1987); Susskind & McMahon, supra note 282, at 156.
287. See 5 U.S.C. § 563(a)(3). Balanced power among the participants is necessary to avoid domination of the proceedings by any individual party. See Pritzker & Dalton, supra note 273, at 39; Harter, supra note 285, at 46; see also supra notes 355-383 and accompanying text (discussing problems and solutions to disparities caused by gender, culture, and race). This requirement also means that each participant must have a desire to use the process. See 5 U.S.C. § 563(a)(3)(B); Henry J. Perritt, Jr., Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States, 74 GEO. L.J. 1625, 1636-37 (1986). Finally, each participant must be required to promise not to pressure other parties into compromising their fundamental values. See Colloquium, The Fifth Annual Robert C. Byrd Conference on the Administrative Process, 10 ADMIN L.J. AM. U. 23, 59 (1994); Harter, supra note 285, at 49; Susskind & McMahon, supra note 282, at 139.
proceedings in a timely manner;\(^{288}\) (5) the administrative agency must be willing to participate in the negotiated rulemaking;\(^{289}\) and (6) the administrative agency must commit to using the negotiated recommendation as the basis for its proposed rule.\(^{290}\)

This short summary and description, alone, should make it obvious that many of the policy issues referred to the electorate via ballot initiatives would be ripe for consideration under a deliberative process like negotiated rulemaking. Such a framework is ideal because it allows participants in the negotiation to discover and address each other's concerns directly,\(^{291}\) and the dialogue that results from this process provides participants with an opportunity to evaluate opposing arguments and data thoroughly.\(^{292}\) Most importantly, bargaining, negotiation, and deliberative discussions also facilitate the airing of different approaches and perspectives that help all involved parties to generate creative solutions to difficult problems.\(^{293}\)

But it should also be obvious that not all of the structures of negotiated rulemaking are conducive to considering the types of issues that are placed on the ballot during the initiative process. For example, long-time observers of the negotiated rulemaking process indicate that issues involving fundamental values, like euthanasia, may not be amenable to the process because such core personal beliefs are usually not negotiable or easily compromised.\(^{294}\) Yet issues revolving around fundamental values are precisely the types of measures often tested in ballot initiatives.\(^{295}\) The modifications necessary to adapt negotiated rulemaking to the ballot initiative process are the subject of this Article's next subsection.
B. Discussions, Negotiations, and Borda Counts—Keys to a Successful Initiative

1. Requirements for a Workable System

Professor Donald Saari has noted that "[t]he ultimate goal [of designing a democratic decision-making procedure] is to choose a procedure that always honors the beliefs of the voters." By this yardstick, the current ballot initiative procedure is a miserable failure. Take the issue at hand in California's Proposition 209 for example; there, the primary provision banning affirmative action simply mandated that

[i]the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

Legal scholars and practitioners were decidedly confused by exactly what this provision meant. Theodore Hsien Wang, a staff attorney for the Lawyers' Committee on Civil Rights, observed that there were three possible interpretations of Proposition 209: (1) "codification," where the initiative would be "interpreted simply as a codification of existing federal constitutional protections against race and gender discrimination," (2) "complete elimination," where Proposition 209 would be understood to prohibit "any state action that provides benefits or advantages based on race or gender—even if these traits are not considered in the actual decision to select a person for a job, contract, or educational opportunity;" or (3) "partial elimination," where the initiative would be viewed as "prohibiting only state action that provides a distinct advantage to minorities and women in a narrowly defined selection process." This myriad of possible interpretations allowed Professor Eugene Volokh, a supporter of Proposition 209, to assert that the initiative would not touch "outreach and other nonpreferential forms of affirmative action," but led Professor Neil Gotanda, an opponent, to believe that "[a]n outreach program that spends money to recruit students from a particular racial or ethnic community, or an apprenticeship program that prepares citizens of a particular community

296. DONALD SAARI, GEOMETRY OF VOTING 9 (1994).
297. CAL. CONST. art I, § 31(a).
299. Id. at 477–80.
300. Id. at 480–83.
for entry into the job market, both clearly fall within the plain language of the prohibitions" of Proposition 209. 302

Whether or not such outreach and apprenticeship programs are covered makes a large difference to most Americans. A recent study of public opinions reported that when affirmative action policies were phrased to embrace opportunity-enhancing approaches like outreach, job training and/or education programs, the policies garnered wide support. 303 When such policies were framed to insinuate a mandate of equal outcomes by explicit preferences, however, broad-based opposition resulted. 304 Given that "affirmative action" could really mean either of these things—or anything in between—how do most individuals know that they correctly voted their opinions when it came to Proposition 209? 305 And when the public itself lacks the knowledge to know what they intended in voting, how is a court charged with the task of interpreting the mandate of an initiative supposed to do so? 306

The most important lesson of this Proposition 209 case study, however, is the recognition that issues like affirmative action are too complex to be adequately dealt with by "up or down" voting on one particular proposal. Limiting voters to a choice between hard quotas or nothing at all is an unfair and unwise method of deciding the course of affirmative action

303. See Jack Citrin, Affirmative Action in the People's Court, PUB. INTEREST, Jan. 1, 1996, at 39-40. Citrin defines this type of affirmative action as "soft" and notes that it "refers to a conscious, though largely voluntary, effort to improve opportunities for women, blacks, and other minorities." Id. at 40 n.1. He also states that "soft" affirmative action "accepts the use of racial, gender, or ethnic considerations as 'tie-breakers' among qualified candidates with roughly similar test scores in circumstances where historical discrimination has caused dramatic imbalances across groups." Id.
304. See id. at 40. "Hard" affirmative action might include quotas, but it is always a policy involving resource redistribution. Id. at 40 n.1. "Its goal is a different, and purportedly fairer, distribution of jobs, admissions to universities, government contracts, or radio and television licenses among the races than would be realized otherwise." Id.
305. This observation is especially poignant in the case of Proposition 209 where the ballot pamphlet conveying the official interpretation of the State of California actually reproduced the substantive disagreement between Professors Volokh and Gotanda. See Coalition for Economic Equality v. Wilson, 122 F.3d 692, 696-97 (9th Cir.) (quoting from the California Ballot Pamphlet provisions discussing Proposition 209), cert. denied, 522 U.S. 963 (1997).

It is even more troubling to realize that the same interpretive problems were recently reproduced on Election Day in 1998 when Initiative 200, a measure substantially similar to California's Proposition 209, was passed by the voters of Washington State (58%--42%). See William Booth, The Ballot Battle: Initiatives Bypass Traditional Lawmaking, WASH. POST, Nov. 5, 1998, at A33.

306. See Schacter, supra note 203, at 111 (surveying 53 cases involving the interpretation of ballot initiatives to conclude that courts are not very good at interpreting the intent of electorates). While Professor Schacter admits that courts are often not all that good at discerning the intent of legislative bodies either, she notes that the problem of misinterpretation is exacerbated in the initiative context because of (1) the massive size of the electorate; (2) the absence of legislative hearings, committee reports, floor debates, or other recorded legislative history; (3) the inability of citizens to deliberate about, or amend, proposed ballot initiatives; and (4) the electorate's lack of knowledge concerning the law, legal terminology, and legislative context. Id. at 110.
policies for the State of California. Besides the various options that Citrin suggests, affirmative action could use certain minimum diversity requirements with respect to beneficiaries without capping the representation of any specified group or involve the reevaluation of college admissions policies with an eye toward eliminating their discriminatory aspects. Affirmative action could also be based on socioeconomic class rather than race or ethnicity, on U.S. military conceptions of what affirmative action should be, on any number of other possible options, or on any combination of permissible alternatives.

The example of Proposition 209 demonstrates that there are three substantive "wishes" for the structure of any ballot initiative procedure: (1) making the substance of what the initiative will and will not accomplish absolutely clear to voters; (2) creating a record that will allow judges to interpret initiatives consistent with the intent of the electorate; and (3) promoting the ability of voters to consider a variety of options to attack social problems. Additional research demonstrates that workable decision-making systems should also ensure:

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307. A number of political scholars and columnists have made the same point in various ways. For example, Clarence Page of the Chicago Tribune has observed that:

Sweeping ballot measures take a hatchet, instead of a scalpel, to affirmative action, throwing out all government efforts targeted to help women and minorities, whether they have popular support or not. The best way to thwart such heavy-handed measures is . . . to take the initiative and to "mend it, don't end it," as President Clinton said. Otherwise, if we don't act to mend it responsibly, someone else will end it immediately. Page, supra note 196, at C23 (emphasis added).

308. See supra notes 303–304 and accompanying text.

309. This alternative is proposed by many groups within the APA community and is discussed in detail by Frank H. Wu, Neither Black nor White: Asian Americans and Affirmative Action, 15 B.C. THIRD WORLD L.J. 225 (1995). In a note that uncovered the use of informal racial quotas to limit the admission of APA students at a number of prestigious Ivy League colleges, Grace Tsuang discusses alternatives to capping that could also represent alternatives to Proposition 209. See Tsuang, supra note 32, at 676–78.

310. See, e.g., Lani Guinier, An Equal Chance, N.Y. TIMES, Apr. 23, 1998, at A21 (discussing Texas's 10% plan, a program that eliminates the use of SAT scores in college admissions for Texas residents in the top 10% of their high school classes and automatically admits those students to the state's two most selective public universities).

311. See Richard Kahlenberg, Class, Not Race: An Affirmative Action That Works, NEW REPUBLIC, Apr. 3, 1995, at 21 (providing a detailed proposal of how this idea would work). Whether affirmative action based on one's level of economic disadvantage is actually a good idea form the basis for an entirely different article. For the present, it is enough to note that many scholars believe that affirmative action based on race cannot be replaced—it is absolutely necessary because race colors social perceptions as nothing else in America does. See, e.g., KINDER & SANDERS, supra note 144 (using empirical surveys to demonstrate that Blacks and Whites have inherently different social and political viewpoints); Pamela S. Karlan, Our Separatism? Voting Rights As an American Nationalities Policy, 1995 U. CHI. LEGAL F. 83, 92–94 (arguing that Blacks have a distinct political viewpoint).

312. See Fredrick F.Y. Pang, Marching Towards the Dream, 6 ASIAN AM. POL. REV. 25 (1996) (discussing the relatively successful programs of affirmative action used by the United States military).

313. A number of scholars have already made attempts to modify the ballot initiative system so that it provides better protection for the interests of politically disadvantaged groups. Professor Julian Eule, for example, would deny presumptive validity to all initiatives. See Eule, supra note 143, at 1545. Former Oregon Supreme Court Justice Hans Linde has suggested that initiatives should be declared
1. Proportionality between representation and group strength.
2. Generality of operation in a variety of sociopolitical conditions.
   The plan should not be so specific that it can only operate successfully in very limited situations. This condition also allows for temporal changes in the relative size or voting patterns of voting groups.
3. Resistance to gerrymandering or other manipulation.
4. Minimization of "wasted" votes. Wasted votes occur in two situations: when votes are cast for losing candidates; or when a group casts more votes than necessary for a winner to the detriment of another candidate supported by the same voting group.\(^{314}\)

But there are also a number of procedural "wishes" that need to be incorporated into an ideal initiative structure. The most important of these is guaranteeing access to the political process for all viewpoints.\(^{315}\) This is necessary, at least in part, to ensure a perception of fairness—another critical procedural requisite. There is an expectation that decision-making will only be done through the exercise of "reasoned elaboration,"\(^{316}\) whereby a consistent procedure allowing for the consideration of relevant factors will be used, and a connection between an analysis of those factors and the resulting policy that will eventually be produced.\(^{317}\) Moreover, workable de-

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\(^{314}\) See Still, supra note 14, at 252–53.

\(^{315}\) See Ely, supra note 212, at 77 (1980) (noting that courts should be most concerned with whether "the opportunity to participate either in the political process by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been duly constricted"); Lewis F. Powell, Jr., Carolene Products Revisited, 82 COLUM. L. REV. 1087, 1088–89 (1982) (averring that one of the Supreme Court's primary responsibilities is to "ensure that all groups can equally engage in the political process").


\(^{317}\) See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) (reversing an administrative agency's decision where the agency failed to justify its choice or consider all reasonable alternatives in making its decision); SEC v. Chenery Corp., 318 U.S. 80 (1943) (rejecting an agency decision that had no rational basis in the law or in the agency's expertise); United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240 (2d Cir. 1977) (chastising an administrative agency for concealing the basis of its decisions and failing to address the relevant concerns of involved parties).
cision-making procedures should be informed,\textsuperscript{318} deliberative,\textsuperscript{319} and efficient.\textsuperscript{320} The next subsection attempts to design a system that incorporates all of these wishes into its structure.

2. The Proposed System

\textit{a. Step One—Petitioning for Entry into the Process}

The first step toward enacting legislation by initiative would still be to collect the legally required number of petition signatures—for example, 58,242 signatures would still be required to "get the ball rolling" in Colorado.\textsuperscript{321} This initial barrier is required to limit the number of initiatives (or, more to the point, the amount of knowledge required to cast informed votes) and ensure that only politically salient and important issues are brought to the table. But this signature requirement also presents a problem for small and/or politically disenfranchised populations who want to see their issues confronted within the confines of the political process. Because of this, the proposed system modifies the substance of what a signature "endorses." Rather than having to find signatures of persons who want to abolish affirmative action or eliminate social services provided to illegal immigrants, campaigns to obtain signatures could now focus on both sides of the line and gather signatures from all who would agree that government should do \textit{something} about existing social problems—whether it be to implement, terminate, contract, or expand programs that are designed to deal with those issues.

Broadening political issues to include more than just APA interests has already been a successful strategy for some APA groups. In San Francisco, for example, two former housewives named Julie Lee and Rose Tsai, who really cared only about reconstructing the section of the city's Central Freeway that serviced Chinatown,\textsuperscript{322} recognized that other, more politically powerful neighborhoods within the city were also serviced by sections of the freeway.\textsuperscript{323} They therefore sparked a coalition called the San Francisco

\textsuperscript{318} By "informed" I mean to require that all relevant information be obtained before a decision is made. \textit{See} HART \& SACKS, supra note 316, at 695.

\textsuperscript{319} This requirement mandates that a full exchange of views and arguments among competing interests take place. \textit{See id.}

\textsuperscript{320} Efficiency requires the process to be completed in the time available. \textit{See id.} Note, however, that "the needs of efficiency may interfere with the ideals of information and deliberation." \textit{See id.}

\textsuperscript{321} \textit{See} COLO. CONSTR. art V, § 1. Richard Briffault reports:

Qualification requires that the proponents of an initiative obtain signatures on petitions of a certain number of voters, usually equal to a percentage of the votes cast in the preceding general or gubernatorial election. Signature requirements range from a low in North Dakota of 2\% of the voting-age population to a high in Wyoming of 15\% of the preceding gubernatorial vote. The median requirement nationwide is 8\% of the vote in the last gubernatorial election. Briffault, supra note 259, at 1350–51 (footnote omitted).


\textsuperscript{323} \textit{See} Samson Wong, \textit{Political Potstickers: Tale of Two Freeways}, ASIANWEEK, Apr. 10, 1997,
Neighbors Association and started a campaign that eventually resulted in a
ballot initiative proposing to allow the transit authority to restore the dam-
aged freeway.324 Despite opposition by virtually every other politically sa-
lient interest in San Francisco,325 the measure achieved a "stunning victory" during the city's November 1997 elections.326

b. Step Two—Selecting a Diverse Group of Participants

But, of course, the story of successful APA political groups like the
San Francisco Neighbors Association is still rare327—and virtually unheard of in towns and cities with smaller APA populations than San Francisco.328 Therefore, to obtain the perspective of the APA community and other po-
litically disenfranchised groups, the second phase of the proposed system selects a diverse advisory committee in the mold of the groups convened during negotiated rulemaking.329 General access would be provided to any individuals or organizations that could collect a minimal number of signa-
tures. That number should be designed to limit the interests at the table to those with proven constituencies, but should not be so high as to eliminate the possibility for any small and/or politically disenfranchised interests to participate. In a state the size of Colorado, for example, a fair number might require something on order of 2000 signatures. Whatever the num-
ber, however, the right to petition for membership on the advisory com-
mittee should be maintained to the extent that it is available within the ne-
gotiated rulemaking process.330 Petitions for membership and all other procedural disputes and questions would be reviewed by the agency now in charge of running elections in the jurisdiction. Such petitions, disputes, and questions should be adjudged with an eye toward ensuring that a di-

324. See Wong, supra note 322, at A19.
325. William Wong notes that the San Francisco Neighbors Association is
not beholden to the dominant Burton/Brown Democratic machine. They are not allied with
San Francisco's tiny Republican Party. They are generally in opposition to white liberals, en-
vironmentalists and some gay and lesbian political powers. They are not linked directly with
traditional Chinese Americans and Asian American political groups, which are splintered.
See id.
326. See Paul Van Slambrourck, Asian Americans Forge Political Role Despite Bitter "Donorgate"
1.
327. Of some comfort is the fact that the San Francisco Neighborhood Association has been continually
active and periodically successful in protecting APA interests. See, e.g., id. at 1 (reporting that the Association
continues to grow and raised a record amount of money at a fundraising dinner that drew a number of political,
business, and philanthropic leaders); Wong, supra note 322, at A19 (noting that the Association has also been
active in campaigns to lift ceilings on the numbers of Chinese American students that can attend San Fran-
cisco's elite Lowell High School, support the continued sale of live animals at Chinatown markets, and combat
hate graffiti aimed at APAs).
328. The APA community constitutes approximately one-third of San Francisco's population. See
Wong, supra note 322, at A19. APAs "have increased their share of The City's registered voters in
three years from 13 percent to 18 percent." Id.
329. See supra notes 277–284 and accompanying text.
330. See supra notes 278–279 and accompanying text.
verse cross-section of interests are represented in the third phase of this process.  

There are those who conclude that diversity is sometimes problematic because a broad range of interests makes it harder for decision-making bodies to achieve consensus.  This, in turn, makes it harder for that body to take quick action and govern effectively or expeditiously.  In spite of these drawbacks, however, diversity is important—and even constitutionally necessary—for several reasons.

First, if the advisory committee is too homogenous, the entire process exposes itself to a challenge like that in Terry v. Adams.  In that case, the United States Supreme Court found that the White primary elections held by the Jaybird Party of Texas violated the Fifteenth Amendment right of African Americans to vote despite the fact that a formal right to vote in the general election existed for the Black community.  The system could not be upheld as constitutional because it denied African Americans the right to participate in "an integral part, indeed the only effective part, of the elective process . . . ."

Second, even if the failure to achieve diversity does not rise to the level of a constitutional violation, a lack of diversity can be fatal to the committee's practical functioning. The way parties are selected for participation in a community conflict resolution meeting can itself lead to conflict, both within and without the bounds of the negotiation.  Studies have shown, for example, that politically disadvantaged groups are less likely to participate in and be satisfied with any given decision-making procedure unless they feel that they have had a say in the outcome of the process.

331. To the extent that the agency responsible for ballot initiatives is different from the agency that runs the elections for any given jurisdiction, I would maintain adjudicative power in the election agency. This is because such agencies already have experience and/or procedures in resolving the situations that might arise. Offices concerned with initiatives, on the other hand, are less involved with resolving disputes and more often involved with validating signature petitions and drafting legislative analyses for ballot initiatives.


333. See id.; see also WILL MCWHITNEY, PATHS OF CHANGE: STRATEGIC CHOICES FOR ORGANIZATIONS AND SOCIETY (1992) (explaining that diversity causes conflicts because of the differing perceptions that are inherent in any diverse group).


335. See id. at 469.

336. Id.

337. See Lawrence Susskind & Connie Ozawa, Mediated Negotiation in the Public Sector: Mediator Accountability and the Public Interest Problem, 27 AM. BEHAV. SCIENTIST 274 (1983).

338. Cf. Delgado et al., supra note 151, at 1402 (observing that people of color do not fully participate in alternative dispute resolution process unless "they believe that what they do and say will make a difference, that the [decision-making] structure will respond, and the outcome is predictable and related to effort and merit").
c. Step Three—Initiative Design by Negotiated Rulemaking

Of course, diversity can generate great creativity if managed productively.\(^3\) Because negotiated rulemaking can be successful at accommodating diverse interests,\(^3\) this Article employs the structure of that mechanism with several modifications and caveats. As in negotiated rulemaking, the involved parties would bring a myriad of proposals to the bargaining table. This range of proposals can be illustrated by considering the problem of illegal immigration that was at issue in California Proposition 187. Besides the elimination of social benefits and comprehensive reporting schemes suggested by the Proposition itself, parties at the negotiating table might attempt to eliminate the illegal immigrant reporting schemes that are most harmful to APA interests.\(^3\) Other approaches that the parties might take would be to design a system that maintains the pre-Proposition 187 status quo, attempt to trade federal monies for increased border patrol services from the INS, request payments from the federal government to compensate for the lax enforcement of U.S. borders,\(^3\) decide to lobby for a change in immigration laws that would reflect a consensual idea of citizenship,\(^3\) argue for a removal of American borders based on a transnational migration theory,\(^3\) or proceed under any number of other alternatives and/or combinations.

In addition to lessening the impact of consciously racist and xenophobic ideas on the illegal immigration debate,\(^3\) the discussion facilitated by a negotiated rulemaking session would do much to clear up the types of fact, interest, and value conflicts portrayed (and ineffectively countered) in the media during the Proposition 187 campaigns.\(^3\) Proponents of the measure voiced concerns that undocumented immigrants were unduly draining Cali-

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340. See supra Part III.A.

341. The largest self-interested concern of the APA community with respect to Proposition 187 was that they would be subjected to greater suspicion and discrimination because of their foreign appearances and/or foreign accents. See Thomas D. Elias, Prop. 187’s Ugly Impact, S.F. EXAMINER, Dec. 11, 1994, at C4.


343. See Peter H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985). This theory holds that the consent of the federal government is a necessary requirement for citizenship and therefore concludes that children of undocumented immigrants born in the United States could not be citizens. But see Lee, supra note 44, at 102 (dismissing this theory as ill-conceived).

344. See Lee, supra note 44, at 104 (arguing that "nation-state bound citizenship is no longer meaningful in the context of globalization").

345. See supra notes 144–151 and accompanying text for a discussion of how public deliberation hinders the effectiveness of overt discrimination.

346. See MacNaughton, supra note 339, at 751–53 (explaining and defining these three types of conflicts).
For the most part, this phase of the process will maintain the free flow of negotiated rulemaking and give both the mediator and the participants the opportunity to construct whatever customized ground rules that they feel are necessary to generate a high level of productivity. Unlike negotiated rulemaking, however, participants in this phase of the process would not be forced to reach consensus on any one proposal. This is largely a

347. See Illegal Immigrants, ECONOMIST, Sept. 3, 1994, at 35 (reporting that Governor Wilson estimated the net cost of illegal immigration to be $2.3 billion); Julie Marquis, Wilson Blames Ills on Illegal Immigrants, L.A. TIMES, Oct. 17, 1994, at B1 (noting Governor Wilson's suggestion that much of this cost could be recouped if illegal immigration were eliminated).


349. See Secretary of State, California Ballot Pamphlet 53, 92 (1994) (noting that Proposition 187 may actually cost California up to $15 billion in federal education, health, and social services funds because it violates federal privacy and eligibility laws); Marc Sandalow & Louis Freedberg, Panetta Warns State of Prop. 187 "Chaos," S.F. CHRON., Oct. 27, 1994, at A2 (relaying a veiled threat from President Clinton's then-Chief of Staff, Leon Panetta, which noted that the unconstitutionality of Proposition 187 could mean that the State of California would lose federal funding for its schools and hospitals).


351. While this discussion may seem slanted toward the anti-187 Interests, its slant does not result from political bias. My discussion merely reflects the recognition of the more "silenced" viewpoints in the Proposition 187 debate. For example, I could point to the fact that proponents of the measure have a strong argument in their observation that illegal immigrants may be deserving of less protection because they are in violation of federal law, but that point was made—and obviously heard—during the campaigns on Proposition 187. See, e.g., Marquis, supra note 347, at B1 (quoting a speech by Governor Wilson making this observation); A Panoply of Emotions over Proposition 187, S.D. UNION-TRIB., Oct. 22, 1994, §1, at 7 (quoting one voter as noting that "[w]e really need Proposition 187 to stop the flaunting of our laws").

352. Mediators and participants who feel as though they may need help in designing these rules could refer to MICHAEL DOYLE & DAVID STRAUSS, HOW TO MAKE MEETINGS WORK (1976) or STEVEN SAINT & JAMES R. LAWSON, RULES FOR REACHING CONSENSUS: A MODERN APPROACH TO DECISION MAKING (1994).
practical constraint induced by the scarcity of time and other available resources, but it also constitutes a recognition of the fact that negotiated rulemaking has not worked well with issues that involve fundamental values because almost all individuals feel that those types of values cannot be compromised.\textsuperscript{353} Instead, participants will be asked to pare down their proposals into no more than seven specifically worded ballot proposals for their fellow citizens to consider.\textsuperscript{354}

Also unlike some negotiated rulemaking sessions (but like all good ones) there will be the inclusion of an explicit requirement for mediators in these sessions to pay close attention to cultural, racial, and gender differences that create biases, disparities, and tendencies toward unfavorable or unconstitutional results. There is a significant body of research indicating that all three characteristics shape the way in which we negotiate with one another. In fact, a significant number of scholars, a high percentage of which write from the critical race theory school of thought, feel that politically disenfranchised minorities are significantly disadvantaged by informal settings like those surrounding alternative dispute resolution and negotiation.\textsuperscript{355} For example, in a detailed study of negotiation practices conducted by using testing scripts and a rigorous battery of analytical social science tools, Professor Ian Ayres concluded that white males received significantly better prices than either African Americans or women when making retail automobile purchases.\textsuperscript{356} Specifically, Ayres found that white women had to pay forty percent higher markups than white men; black men had to pay more than twice the markup, and black women had

\textsuperscript{353} See supra note 294 and accompanying text.

\textsuperscript{354} Admittedly, seven is a wholly arbitrary number, but the intent behind the imposition of some numerical limitation is by no means random. At some point, voters suffer information overload and may be unable to cull proposals that they like from a ballot full of complex alternatives. See \textit{Cronin, supra} note 214, at 74–75; Magleby, \textit{supra} note 214, at 31–34. While even seven options may seem like a high number, informational problems at this level will probably be no more severe than whatever problems that arise from inundating California voters with a multitude of complex initiatives and a think booklet explaining them. Cf. Purdam, \textit{supra} note 40, at A1 (noting that California voters may face up to 15 initiatives during their 1998 elections).


Professor Richard Delgado has even gone so far as to suggest that people of color should generally refrain from participating in informal negotiations. See Delgado et al., \textit{supra} note 151, at 1359. He notes that formality is a better bet when politically disadvantaged groups confront those with more power. See \textit{id}. I am uncertain whether the process this Article suggests contains enough formality to allay Professor Delgado's fears. Compared to the choice between informal alternative dispute resolution and formal adjudication that Delgado specifically addresses in his article, however, the proposed process here changes the status quo to increase the level of formality. The process also takes a situation where people of color have virtually no history of effective participation and transforms it into a situation where effective participation is at least a possibility. That comparative advantage should allay most any fear or doubt.

to pay more than three times the markup of white male testers. . . . The study [also] reveals that testers of different race and gender are subjected to several forms of nonprice discrimination. . . . [T]esters were systematically steered to salespeople of their own race and gender (who then gave them worse deals) and were asked different questions and told about different qualities of the car. 357

Cultural biases and practices also dramatically affect the structure and outcome of negotiations. Attention to these effects is especially important to APAs, most of whom are either immigrants who are not familiar with American cultural practices or persons who grew up under a unique mixture of Asian and American cultural influences. 358 A recent issue of the Australian Financial Review illustrates the dramatic effect of culture on negotiations by telling a story of how an American technology firm lost out on a contract when one of its people broke a Chinese cultural rule by starting to eat before the host. 359 "The Chinese decided to award the tender to a French firm, which had inferior technology, but showed that it could more astutely manage cultural differences. 'The Chinese said they felt more 'comfortable' with the French.' 360

Moreover, cultural differences, like racial disparities, 361 can often be subtle and unnoticeable to all but the most attentive eye—such is the case with the traditional Japanese practices of sending an older male to attend important negotiations or remaining silent during bargaining discussions. 362 Although age and silence are virtuous qualities in Japan, these characteristics can create subtle disadvantages in the United States where age is often mistaken for feebleness and silence is often taken as either reticence or disapproval. 363

Although this Article is not meant as a manual on how to mediate a negotiated rulemaking session and does not intend to construct a full dis-

357. Id. at 819.
358. Asian American literature is replete with examples describing the problems that both of these circumstances create for APAs. See, e.g., Growing Up Asian American (Maria Hong ed., 1993); Gish Jen, Typical American (1992); Milton Murayama, All I Asking for Is My Body (1988); John Okada, No-No Boy (1976); Amy Tan, The Joy Luck Club (1989).
360. Id. (quoting Ruth Stanat, an advisor on cross-cultural negotiation techniques); see also Von J. Christiansen, Ritual and Resolution: The Role of Reconciliation in the Mediation Process, DISP. RESOL. J., Fall 1997, at 66 (describing negotiation processes in a rural and traditional Chinese Village and discussing lessons for negotiators from other cultures).
361. See Delgado, supra note 151, at 1375–85.
362. Cf. Anne Macquin & Dominique Rouzies, Selling Across the Culture Gap, FIN. TIMES, Mar. 13, 1998, § 1, at 10 (describing Japanese silence as a tactic to encourage negotiating adversaries to disclose more information: "If you are embarrassed by silence during the negotiation process you may feel compelled to oblige, often offering too much.").
363. For a good discussion of how groups often acquire these cultural characteristics, refer to Michael Harris & Peter B. Smith, Cross-Cultural Social and Organizational Psychology, 47 ANN. REV. PSYCHOL. 205 (1996).
discussion of strategies and solutions to problems raised by gender, cultural, or racial biases inherent in the dynamics of informal discussions and negotiations, it would be dishonest not to flag some of the issues that are likely to arise in circumstances using negotiated rulemaking.

Distinguishing between cultural and racial disparities is often difficult. In fact, distinguishing between the two becomes nearly impossible at some level. This is often the case with groups of APAs that have been in the United States for longer periods of time. Third-generation Japanese Americans, for example, appear more acculturated to American society but their race plays a large role in shaping who they are, how they negotiate, and how they perceive the world. To help distinguish cultural and racial influences in cases where it is possible, however, Professor Richard Lempert tells a story of the problems experienced by Samoans living in Hawaiian housing projects. Although the social science data indicated that Samoans may have been treated unfairly because of their race, Lempert noticed that their disparate treatment really resulted from cultural misunderstandings. That is, the board adjudicating claims concerning late rent payments to the housing project was found to be more sympathetic to excuses that involved things like a stolen wallet, but less likely to sympathize with explanations involving the need to send money to help pay for weddings or deaths within one's family. This hurt the Samoans because they were far more likely to explain their delinquent rent payments with the latter, less sympathetic justification. That rationalization is much more persuasive in the eyes of Samoans because their culture places family above all else.

In spite of the difficulty involved in distinguishing between cultural and racial effects, making the distinction is often imperative because the strategies for rectifying the disparities caused by each type of influence

364. Cf. Keith Aoki, Critical Legal Studies, Asian Americans in U.S. Law & Culture, Nell Gotanda, and Me, 4 ASIAN L.J. 19 (1997) (describing how the author did not "feel" different than other Americans, but was often treated as such). The same observations made throughout this section can, of course, be made with respect to interactions between gender and race or gender and culture. My point, however, is not to analyze (or even really discuss) these complex relationships—it is to demonstrate the extent of their complexities. I therefore trust that the examples I provide to illustrate the interactions between race and culture will be sufficient to make my point, and do not include gender-specific examples in most of my discussions.


366. See id. at 118-21 (citing data demonstrating disparate treatment of Samoans housing claims and separate data indicating that negative stereotypes concerning Samoans prevail among the residents of Hawaii).

367. See id. at 121-26.

368. See id. at 121-22.

369. Id. at 121.

370. See id.

371. See id. at 122.
vary significantly. The conventional wisdom on mediating cultural disputes places an emphasis on recognizing the other's values. Mediators dealing with racial disparities, on the other hand, should place emphasis on creating an environment that (1) supports equal status between majority and minority groups; (2) promises to be rewarding, rather than threatening or antagonistic; and (3) is intimate, rather than casual or impersonal.

The pre-existing relationships between involved groups and individuals also play an important role in negotiated rulemaking-type situations because such informal bargaining systems often have difficulty eliminating prejudices, especially where persons of lower social, economic, or educational status confront persons or institutions with greater power and higher status. Professor Richard Delgado observes:

In such situations, the party of high status is more likely than in other situations to attempt to call up prejudiced responses at the same time the individual of low status is less likely to press his or her claim energetically. The dangers increase when the mediator or other third party is a member of the superior group or class.

In adjudicating race-related disputes, the Justice Department uses a concept that it refers to as "Two Tap Roots and a Triggering Incident" to remind itself of the context in which it is operating. The first Tap Root reminds Justice Department officials that "subordinate groups see society as inherently racist," while the second recognizes that politically disenfranchised groups often see "society's public and private organizations [as] operat[ing] to keep [them] out of positions and circumstances where they could begin to have control over their own lives." The triggering incident varies from circumstance to circumstance but can be generally defined as the climatic event that has brought the negotiating parties to the bargaining table.

Connected to this consideration of context should be an accounting of

372. Conflating culture and race may also lead to the perpetuation of harmful and simplistic stereotypes. See Lawrence B. Nadler et al., Culture and the Management of Conflict Situations, in COMMUNICATION, CULTURE, AND ORGANIZATIONAL PROCESSES 1 (William B. Gudykunst et al. eds., 1985). In cases where race and culture are indistinguishable, such as the one involving third-generation Japanese Americans, the best strategy may be to attempt to determine which characteristic predominates at each phase of the negotiation.


374. See Delgado et al., supra note 151, at 1386.

375. See id. at 1402.

376. Id. at 1402-03; cf. Savage, supra note 373, at 287-91 (suggesting that one solution for avoiding stereotypes and the appearance of prejudice and impropriety is the use of diverse mediation teams).


378. Id.

379. Id.

380. See id. at 153-54.
cultural sensitivities—e.g., filial piety in the case of APAs—or stereotypes—e.g., the model minority myth and the myths of submissiveness that often come into play when APAs are at the bargaining table. Taking account of the context in which cultural biases and differences occur means paying particular attention to individual tendencies regarding time orientation, aversion to uncertainty, willingness to accept levels of inequality, masculine or feminine tendencies, individual or collective tendencies, and whether the individual comes from a culture that is adopting or adapting.

Basic ground rules about speaking one at a time, not interrupting each other, and treating one another with respect will be absolute necessities in dealing with the contentious issues that will enter this process. Professor Ann MacNaughton notes: "If parties have agreed at the outset of a process to treat one another with respect, ground rules can be an important touchstone for restoring civil relations among parties when emotions (predictably) heat up." More specific instructions for dealing with race, culture, and gender are impossible—and probably a bad idea. The reason is that any broadly applied techniques quickly degenerate into stereotypes (often derogatory ones in the case of disadvantaged groups like APAs) that can cost the mediator credibility and fatally doom the entire process by bringing discrimination back into the discussion.

d. Step Four—Presenting the Proposed Initiatives to the Public

In the final phase of the proposed initiative process, the proposals for action that result from the negotiated rulemaking sessions will be submitted to the general electorate during a plebiscite that employs a modified Borda count voting procedure to choose the ultimate course of action. Under a normal Borda system, a voter ranks all alternatives listed on a ballot and the voter's top choice is given a number of points equal to the total number of available alternatives. The voter's second choice receives one less point, the third choice is assigned one less point than that, and so on, until the last ranked alternative is assigned a value of a single point. In the end, all voter preferences are tallied and the option accruing the largest number of points wins. The modified system would have each voter take

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381. See Gunning, supra note 355, 76-77 (discussing the various cultural dynamics that needed to be considered in dealing with a dispute between a Korean American fast food stand owner and an African American car repair shop owner).

382. See Macquin & Rouzies, supra note 362, at 10; see also Savage, supra note 373, at 286-88 (displaying a much more comprehensive list of cultural facets that could impact the way a negotiation proceeds).

383. MacNaughton, supra note 339, at 760.


385. See Benoit & Komhauser, supra note 384, at 1522 n.44; Freed et al., supra note 384, at 552.

386. See Benoit & Komhauser, supra note 384, at 1522 n.44; Freed et al., supra note 384, at 552.
the list of the seven (or possibly fewer) alternatives prepared by the advisory committee and rank only his or her top three choices in order of preference. This alteration to the normal procedure is necessary largely because of informational problems that arise when too many possibilities are available.387 It is, however, a proven system that is used in determining the winner of many awards. For example, Major League Baseball, for example, uses the modified Borda count to determine its Rookie of the Year—because there are simply too many rookies out there, voters are asked to rank the three most deserving.388 The San Francisco Board of Examiners also considered a similar alternative voting system recently.389

The complexities of this system may seem unnecessary at best and problematic at worst. But there are several good reasons for using a Borda count election system, especially because the procedure governing the outcome of a vote often affects its outcome.390 The normal American plurality/winner-take-all system is harmful to minority voting interests391 and to democracy in general; dumping winner-take-all methods has been shown to reduce voter apathy, extremism, and misjudgments.392 Plurality systems are also extraordinarily prone to resulting in outcomes that contradict voter preferences. Studies find that in plurality elections, where the number choices rises above two, the chances that the most popular option will not prevail increases greatly.393 In his book, Geometry of Voting, Professor Donald Saari works to design a decision-making procedure that minimizes this phenomenon, which he refers to as a "paradox." These paradoxes

387. Cf. Randy Harvey, The Inside Track: Blame the Polling System for Theater of the Absurd, L.A. TIMES, Jan. 5, 1998, at C2 (observing that football coaches, who are asked to consider all NCAA Division I-A football schools in ranking their top 25 teams, often foist the duty onto their aides because they lack the knowledge (or the wherewithal to gather that knowledge) in order to make their own decisions).


391. See Lani Guinier, Lift Every Voice 256 (1998) (observing that although the plurality election system "might have satisfied the needs of a homogeneous (white, male, property-owning) electorate over two hundred years ago, ... [it is] ill-suited to the multiracial and polyethnic society of today because... [it is] unable to fill the need for diverse debate and broad representation"); Still, supra note 14 (noting that alternative voting systems do better at protecting the interests of politically disenfranchised groups); cf. Saari, supra note 296, at 13 ("[T]he commonly used plurality vote turns out to be one of the worse methods that could ever be adopted.").


occur in situations where multiple options are available to voters either because similar options tend to split support between themselves or because people are unlikely to waste their vote on an unrealistic (but actual) preference when they have only one chance at affecting the outcome of an election. "One example," Saari says, "is the 1970 New York senatorial election which conservative Buckley won even though over 60% of the voters would have preferred one of the two liberal candidates." Such paradoxes should be avoided at all costs because they "can lead to unpopular and unintended changes in policy, differences in the allocation of resources, and even [changes in] the direction of a society."

Putting aside the other drawbacks of limited and cumulative voting systems for the moment, these previously mentioned options still do not fit nicely into the proposed system because only one choice can prevail here. Unlike elections involving multimember boards where a voter may prefer to influence the election of several candidates, the only logical strategy in an election with only one winner is to cast all votes for the alternative that is preferred the most. The process of single transferable voting is similarly hindered—votes never transfer from winners to losers because there is only one winner. The practical result of such a system is the same as it is under the Borda count voting system because the option with the highest average preference rank is inevitably selected under both regimes.

Approval voting schemes are sometimes used in situations where electorates must choose a number of different policy options. Approval voting allows members of the electorate to cast a vote for any and every alternative that they consider to be acceptable, and implements the option that is "approved" by the largest number of voters. This system has the desirable advantages of (1) giving voters the total freedom to express all of their true preferences—i.e., vote for all the acceptable alternatives without...
fear of wasting a vote on a sure loser—and (2) ensuring that the option with the greatest overall support prevails. The Borda count is comparatively advantageous to this system as well. It not only ensures that the option with the greatest support prevails, but also tracks the electorate's intensity of preference with respect to each option.

To be sure, the Borda count voting system is not perfect. Unlike cumulative and limited voting systems, it (at least in one sense) favors members of the electorate who can rank at least three preferences. This is because "their list will amount to a greater number of [total] points and thus have a more significant impact on the outcome." One possible solution to this problem would be to pass a "full slate" law in conjunction with the implementation of this proposal. Such laws invalidate "ballots on which the voter has not marked all the choices to which he or she is entitled." Professor Chandler Davidson indicates that "full slate" statutes are a bad idea, however, because the failure to rank all alternatives may not have such an unfavorable result after all. Politically disenfranchised groups have learned to use this tactic to engage in "single-shot" voting, a practice where "the group decides . . . to vote only for one or a few preferred candidates, and to withhold its remaining votes." Davidson explains that "[t]his procedure has the effect of a weighted vote system, for it deprives other candidates of votes relative to the group's preferred candidate." The Borda count system is not difficult to understand; it is at least easy enough for the average sports fan to comprehend. But it may have problems being seen as democratic or fair because (1) it is less likely to result in the implementation of majority preferences than the current winner-take-all election system, and (2) is relatively easy to manipulate in situations where an electorate is voting cohesively.

I am skeptical of those who claim that the first problem is anything more than a misperception or an argument that masks other irrational beliefs. American democracy does not promise majority rule, and the American public seems understanding of the principle, at least in certain circumstances—although Bill Clinton did not receive majority support in his first presidential bid, he remained hugely popular well into his second

404. See id.
405. Freed et al., supra note 384, at 522.
407. Id.
408. Id.
409. See supra note 388 and accompanying text.
410. See supra notes 220-226 and accompanying text; see also RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977) (noting that minority interests should have "equal concern and respect in the design and administration of the political institutions that govern them").
411. See SAARI, supra note 296, at 10-11. In her newest book, Lani Guinier observes that "over 76 percent of eligible voters did not support President Clinton's reelection" either. See GUINIER, supra note 391, at 253. Although Professor Guinier qualifies this figure by noting that it includes both people who did not vote for him or cast a ballot at all, See id., her observation still makes a strong statement
term and possessed a level of public support that allowed him to govern more effectively than many of his presidential predecessors who were elected by a majority of the voting population.412

The second problem, however, is more pressing, and is reflected in the recent national collegiate football championship debate over polling results. At the end of the 1997–98 season, only two teams, the Nebraska Cornhuskers and the Michigan Wolverines, stood undefeated.413 Although one of the two teams was ranked first on all 132 ballots across both polls taken and Michigan was the overwhelming winner in one of the polls (the "AP Poll"),414 the Wolverines were narrowly defeated in the other poll (the "ESPN/USA Today Poll") amidst allegations that at least one voter had cast his ballot dishonestly.415 Nebraska's four point margin of victory in the ESPN/USA Today poll meant that either two coaches ranked Michigan third or one coach ranked the Wolverines fourth.416

Whether those coaches actually voted dishonestly or really felt that Michigan was only the third or fourth best team in the nation, this example demonstrates that voters who purposefully downrank certain popular choices can contribute to their eventual defeat and thwart the true preferences of the electorate. This Article has few answers to that problem—Kenneth Arrow's "impossibility" theorem hypothesizes that no democratic voting system can be completely fair,417 and the preceding discussion only serves to substantiate that theory. But the Borda count is the best possible tool for allowing an electorate to choose one policy option from a list of multiple alternatives because "it is the unique method to minimize the number and kinds of paradoxes, to minimize the likelihood of a paradox, to minimize the likelihood that a small group can successfully manipulate the outcome [of the election, and] to minimize the possibility of voters' errors adversely changing the [result of the vote]."418

CONCLUSION

I have few illusions about the political feasibility of this proposed system. Although it is not incredibly difficult to understand, it is much more complex than the existing method of legislation by initiative and winner-take-all voting. The United States Supreme Court has also been ex-

413. See Split Poll, supra note 388.
414. Michigan won the AP college football poll, easily outdistancing Nebraska by a margin of 33 votes, 51 1/2 to 18 1/2. See id.
415. See Harvey, supra note 387, at C2.
416. See Joe Pellock, Few Ready to Accept Split NCAA National Football Title, USA TODAY, Jan. 5, 1998, at 12A.
418. SAARI, supra note 296, at 14.
tremendously unsympathetic to claims of political disenfranchisement made by individuals who support losing candidates or propositions.\footnote{419} Federal courts approach proposals suggesting the use of alternative voting systems that tend toward increasing minority representation with similar hostility.\footnote{420} Russell Hayman explains this contempt by summarizing the prevailing judicial logic:

Any [proposal] to improve minority representation, however, would also be discriminatory. Cumulative or proportional voting systems, for example, can improve the ability of minorities to elect representatives. Where these schemes replace majority win systems, it is unlikely that the majority will elect as many representatives as it could under the prior electoral system. This loss in ability to elect representatives is sufficient to support a prima facie violation of equal protection.\footnote{421}

Even if this proposed system is adopted, however, it does not guarantee that APA interests will always be vindicated in initiative voting. Such a result would be unconstitutional (not to mention undesirable) because it would mean that interests conflicting with those of the APA community could never prevail.\footnote{422} Rather, the purpose of this proposed system is to rectify a situation that has seen the APA community go without the ability to have any significant or lasting impact on the American political process—a situation that has persisted in spite of the Supreme Court's promise that "the power to influence the political process is not limited to winning elections."\footnote{423}

The APA community is a politically disenfranchised group that is victimized by a wide variety of stereotypes which lead to misperceptions about them, their culture, and their social and political interests. Because ballot initiatives provide fewer chances for voters to engage in rational

\footnote{419} In \textit{Whitcomb v. Chavis}, 403 U.S. 124 (1971), for example, the Court noted:

Arguably the losing candidates' supporters are without representation . . . ; arguably they have been denied equal protection of the laws since they have no legislative voice of their own . . . . But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called "safe districts" where the same party wins year after year.

\textit{Id.} at 153.

\footnote{420} See, e.g., \textit{McGhee v. Granville County}, 860 F.2d 110 (4th Cir. 1988) (reversing a decision of the lower court that required the implementation of a limited voting system). \textit{But see} \textit{Dillard v. Chilton County Bd. of Educ.}, 699 F. Supp. 870 (M.D. Ala. 1988) (approving the use of limited and cumulative voting systems to remedy past discrimination against African Americans).

\footnote{421} Russell Hayman, Note, \textit{Affirmative Action and Electoral Reform}, 90 \textit{Yale L.J.} 1811, 1823 (1981) (footnotes omitted). Courts have used this line of reasoning in a number of cases where African Americans have been effectively denied their right to the franchise or have been subjected to schemes that dilute their votes. See, e.g., \textit{Gomillion v. Lightfoot}, 364 U.S. 339 (1960); \textit{Kirksey v. Board of Supervisors}, 554 F.2d 139 (5th Cir.) (en banc), \textit{cert. denied}, 434 U.S. 968 (1977).

\footnote{422} \textit{Cf supra} notes 334–336 and accompanying text (discussing \textit{Terry v. Adams}, 345 U.S. 461 (1953), and the constitutional requirement that all citizens be allowed to influence the political process).

\footnote{423} \textit{Davis v. Bandemer}, 478 U.S. 109, 132 (1986); \textit{cf.} \textit{Thornburg v. Gingles}, 478 U.S. 30, 84-94 (1986) (O'Connor, J., concurring) (noting that although the Constitution does not guarantee that political minorities will prevail in political contests, it does grant them equal access to the political process in a way that allows those minorities an equal \textit{opportunity} to prevail in such contests).
policy discussions and more opportunities for voters to be influenced by negative and/or misleading sound bites, they allow legislation to be enacted on the basis of uninformed and—sometimes—unconstitutional beliefs. Instead of democracy, we are left with a raw majoritarian system that Thomas Jefferson equated with anarchy; instead of control, we are subjected to the whims of the majority; and instead of a political process exemplified by reasoned elaboration, we are left with ad hoc decision-making.

Recognizing these things, this Article puts forth a modest proposal that attempts to learn from the experiences of the negotiated rulemaking process and reintroduce honest and thoughtful discussion into the ballot initiative process. It suggests a deliberative system that accounts for the viewpoints of political minorities in formulating policy options and proposes a voting procedure that it believes will help politically disadvantaged groups to best exercise their voting strength in a manner that is proportional to their population within the electorate.

I am cognizant of the fact that my proposal is far from flawless, however. Beyond (or perhaps behind) its unlikely implementation are suggestions that curtailments on the popular control of the legislative initiative are horribly unpopular,424 and that this proposal is too resource-intensive—both in terms of time and money—for government, much less politically disadvantaged and economically disempowered groups to use effectively.425 The true extent of these perceived problems is unknown, for there is also evidence indicating that there is a solid base of political support for negotiated rulemaking,426 that negotiated rulemaking can be used to deal with both controversial issues and the problems of politically

424. See Capps, supra note 244, at A4 (reporting that 70% of the respondents to a recent poll of California voters said that they opposed the idea of allowing the state legislature to amend initiatives after they are approved by voters and that 52% of those surveyed expressed their opposition to a system that allowed the legislature to pre-approve initiatives before they went on the ballot).

It was this stark opposition to amendment after approval of the initiative that partially pushed me away from the idea of a slightly different system that allowed voters to suggest only general courses of political action (e.g., curtailing affirmative action or ameliorating the problems of illegal immigration) and then used the negotiated rulemaking framework to allow the design of specific methods of implementation by participating interests.

425. See Cary Coglianese, Assessing Consensus: The Promise and Performance of Negotiated Rulemaking, 46 DUKE L.J. 1255 (1997) (providing a comprehensive study and empirical evidence on the deficiencies of negotiated rulemaking). On the other hand, the resource-intensive nature of this process could be exactly the type of impetus to change that is necessary to protect the interests of the APA community and other disadvantaged groups.

426. After a five-year trial period, the Negotiated Rulemaking Act was permanently reauthorized by Congress in 1996. See Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11(a), 110 Stat. 3870, 3873 (1996). Its use has also been encouraged and mandated through specific directives from the White House. See Exec. Order No. 12,866, 3 C.F.R. 638, 642-43 (1994), reprinted in 5 U.S.C. § 601 (1994); Memorandum from William J. Clinton to the Heads of All Executive Departments and Administrative Agencies 3 (Mar. 4, 1995) (on file with author) (directing agencies to promote the use of negotiated rulemaking to show "the regulated community that we want to work together on even the most difficult subjects"). Although the popularity of negotiated rulemaking among elected officials may do little to ameliorate public concerns about regulation of the ballot initiative pro-
disadvantaged groups,\textsuperscript{427} and that the negotiated rulemaking process is not as resource-intensive as other decision-making systems that provide for a similar level of deliberative discussion.\textsuperscript{428}

These problems run deeper than I have discussed in this Article, and are probably even larger than I perceive. I therefore leave the majority of problems concerning scarcity to the economists and policy analysts and let the politicians and spin doctors tangle with negative misperceptions about my proposal. I do so not to be callous about the practical constraints of the real world, but to heed the advice of Professors Charles Lawrence and Mari Matsuda. They observe that the price of democracy, deliberation, and education cannot be too high to pay because the costs of living in a society without those elements would be unbearable.\textsuperscript{429}

I readily admit that at least one criticism of the system is right on point, however. The changes in political procedures suggested here may help an emerging and cohesive political community to get on its feet, but these changes do little to ensure long term political, social, or economic success. The true and lasting empowerment that the APA community needs to obtain in order to achieve equality cannot come by simply finding a seat at the negotiating table or securing the ability to make helpful suggestions that solve policy problems. That type of empowerment can only come through participation in democracy—through voting, education, and activism. It can only come by "keeping the faith."


\textsuperscript{428} Although negotiated rulemaking cannot compare favorably to the speed, ease, and frugality of legislating by initiatives, because I argue that the legislative process needs more than is provided by the current ballot initiative system, I provide evidence to show that negotiated rulemaking may present a viable option that is less resource-intensive than alternatives providing for similar types of deliberative discussion. See OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW: IMPROVING REGULATORY SYSTEMS 32 n.6 (1993) (reporting that EPA negotiated rulemakings take less time than other types of rulemakings and have resulted in cost savings through a decline in the rate of legal challenges); Conference, Harvard Electricity Policy Group: Regulatory Decisionmaking Reform, 8 ADMIN. L.J. AM. U. 789, 874 (1995) (quoting Professor Michael Asimow as observing that "negotiated rulemaking is an exceptionally promising technique to speed up the rulemaking process and achieve consensus"); Harter, supra note 285, at 30 (noting that negotiated rulemaking "can reduce the time and cost of developing regulations").
