

# FEAR OF VOTING: DIFFERENTIAL STANDARDS OF JUDICIAL REVIEW OF DIRECT LEGISLATION

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## I INTRODUCTION

Differential judicial review of direct legislation may occur in two forms. In some cases, the courts might be *more* aggressive in reviewing direct legislation. In other words, they might apply intermediate or strict scrutiny to direct legislation that would elicit only mere rationality review were it adopted by a legislature.<sup>1</sup> Alternatively, they might be *less* aggressive, applying rationality review to direct legislation that would elicit intermediate or strict scrutiny were it adopted by a legislature.<sup>2</sup> These two possibilities demonstrate that proponents of differential judicial review may offer contradictory characterizations of aspects of the direct legislation process, to argue for either more aggressive or less aggressive judicial review of direct legislation.

It seems likely that people tend to favor or oppose arguments supporting differential review depending on the central image they have of direct legislation, combined with their general political leanings.<sup>3</sup> For example, a liberal who thinks of California's Proposition

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1. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1562 (1990) (advocating “abandon[ing] the purpose requirement [in equal protection law] . . . in certain plebiscitary settings”).

2. These explanations use equal protection doctrine, but I use the term *aggressive* to describe the application of whatever standards are used in connection with other clauses as well.

3. It is difficult to read the leading work, Eule, *supra* note 1, without thinking that its author would really like the courts to find unconstitutional many of the items of direct legislation he enumerates even had they been enacted by legislatures. He knows that (unfortunately, in his view) the Supreme Court's doctrine makes that unlikely or impossible, and proposes to catch at least those that are enacted through direct legislation by differential judicial review.

187<sup>4</sup> or Colorado's Amendment 2<sup>5</sup> when she hears the words "direct democracy" is likely to believe that courts should aggressively review direct legislation, while a conservative who thinks of those laws is likely to believe that courts should be deferential. However, a liberal who reflects on state campaign finance initiatives<sup>6</sup> or a populist who considers term limit initiatives, is likely to think that the courts should limit their review of these laws altogether.

Three specific considerations might support differential judicial review of direct legislation.<sup>7</sup>

- *Deliberation.* According to James Madison in the tenth essay of *The Federalist*, legislators "refine and enlarge the public views" held by voters.<sup>8</sup> In particular, debates among representatives promote a better considered position on legislation, leading either to its enactment in an improved form or its defeat. If this is the case, courts should be more aggressive in their review of direct legislation.<sup>9</sup>

4. Directly enacted, Proposition 187 is codified in CAL. EDUC. CODE §§ 48215, 66010.8 (West Supp. 1997); CAL. GOV'T CODE § 53069.65 (West Supp. 1997); CAL. HEALTH & SAFETY CODE § 130 (West Supp. 1997); CAL. PENAL CODE § 113 (West Supp. 1997); CAL. WELF. & INST. CODE § 10001.5 (West Supp. 1997). Proposition 187 restricts the availability of some public resources to those not legally present in the country.

5. COLO. CONST.; see also *Romer v. Evans*, 116 S. Ct. 1620 (1996) (holding unconstitutional directly enacted state constitutional amendment restricting ability of state and local governments to adopt anti-discrimination laws and policies applicable to gays and lesbians).

6. For examples of cases in which courts applied higher standards of review than liberals or populists might find appropriate, see, e.g., *Jones v. Bates*, 127 F.3d 839 (9th Cir. 1997), cert. denied, 118 S. Ct. 329 (1997), rev'd en banc, 131 F.3d 843 (9th Cir. 1997) (overturning term limit ballot initiative); *Shrink Missouri Gov't PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), cert. denied, 116 S. Ct. 2579 (1996) (invalidating campaign finance reform adopted by initiative).

7. In what follows, I do not consider a number of arguments appearing in the literature because I find them largely unpersuasive. Primarily, such arguments do not identify matters on which the processes of direct and representative legislation arguably differ in interesting and significant ways. Examples include the argument that legislators take an oath to uphold the Constitution and native-born citizens do not; that legislatures can engage in fact-finding to illuminate policy issues; that the concept of majority preferences is ill-defined because of the possibility of voting paradoxes; and generalized separation of powers arguments.

8. THE FEDERALIST NO. 10, at 62 (James Madison) (Jacob E. Cooke ed., 1961). At this point in that Paper, Madison is arguing in favor of representative, and against direct, democracy. See *id.*

9. Cf. Eule, *supra* note 1, at 1526 (arguing that representation provides "opportunity . . . for deliberation and debate"); Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 936 (noting that critics of direct legislation argue that "[p]lebiscites take an undifferentiated view of preferences, so individuals may vote their prejudices, free from the constraints of reasoned conversation, and have those biases respected as preferences to be aggregated along with all others"); Robin Charlow, *Judicial Review, Equal Protection and*

• *Log-rolling*. Direct legislation places a single matter before the voters for an up-or-down vote. In contrast, representative bodies deal with a number of matters, and legislators develop trade-offs among them.<sup>10</sup> The implications of log-rolling for judicial review are unclear. Log-rolling, like deliberation, may improve the quality of legislation, in which case courts should be more aggressive in reviewing direct legislation. Alternatively, log-rolling may decrease the quality of legislation by allowing representatives to shift the costs of legislation to under-represented groups. If so, the courts should be less aggressive in reviewing direct legislation.

• *Structural concerns*. Representatives may adopt ill-considered legislation when they are influenced by something other than their constituents' views or their own views of sound public policy. For example, representatives may vote against the adoption of term limits or campaign finance legislation that offers challengers real opportunities to displace incumbents. Courts might be less aggressive in reviewing direct legislation where structural concerns make direct legislation more likely to reflect sound public policy than legislation adopted by representatives.

In this paper, I argue that none of the considerations ordinarily invoked to justify differential judicial review of direct legislation adequately supports a judicially administrable doctrine of differential standards of review.<sup>11</sup> My general argument takes the following form:

(1) *Some* direct legislation has defects of deliberation and *some* responds to structural concerns about ordinary legislative processes.<sup>12</sup> Courts ought not ask in each case whether a defect of deliberation, instance of log-rolling, or structural concern is present.<sup>13</sup> If they did, judges could easily disguise their individual evaluations of the merits of the legislation at issue.<sup>14</sup>

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*the Problem with Plebescite*, 79 CORNELL L. REV. 527, 535-36 (describing asserted differences between representative and direct legislative processes with respect to deliberation).

10. See Eule, *supra* note 1, at 1527 ("Isolated decisions . . . create few opportunities for trade-offs and little need for the establishment of continuing relationships," while "[r]epresentative government engenders cooperation because winners and losers return to meet again" on "different issues and shifting alliances.").

11. Little that is said here has not been said before. The classic article is Eule, *supra* note 1, updated and critiqued in Charlow, *supra* note 9.

12. Cf. Gillette, *supra* note 9, at 985 ("[T]here are discrete situations in which plebescites are inappropriate.").

13. *But cf.* Charlow, *supra* note 9, at 592-93 (suggesting that the best form of argument requires "context-specific" and "case-specific" analysis).

14. A judge who disapproves of the substance of the direct legislation will identify a defect of deliberation, invoke a higher standard of review than would be applied to the same law adopted by a legislature, and strike the statute down. A judge who

(2) Standards of review must therefore be geared to general *categories* of direct legislation. However, identification of appropriate categories seems impossible for the following three reasons:

(a) Differential standards of judicial review matter, not in connection with *all* public policies, but in connection only with those that the polity actually pursues through direct or representative legislation. With respect to this subset of public policy, differential standards of judicial review matter only when the laws raise non-trivial, federal constitutional questions.<sup>15</sup> Therefore, the categories we develop must subdivide an already restricted set of public policies.

(b) Any categories that emerge are likely to be ill-defined. This would allow judges to place cases into categories of more or less aggressive review depending on their personal views of which standard is justified.

(c) By their nature, such categories of legislation would be both over- and under-inclusive. Even with well-defined categories, we will always be able to find a case placed in the category of aggressive judicial review where, upon full consideration, only ordinary judicial review was justified. Categorical formalism is justified when it produces better results in the aggregate than does highly specified categorizations or case-by-case review. Nevertheless, it is impossible to gauge whether that defense of categorical formalism is empirically correct.

Part II of this paper will consider the role of differential review. Parts III through V will consider in turn the possible justifications for differential judicial review. I conclude, as noted above, that none of the those arguments is adequate.

## II

### THE ROLE OF DIFFERENTIAL STANDARDS

Differential standards have bite in two situations.<sup>16</sup> Their characteristics are demonstrated most clearly when *exactly the same* legisla-

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approves of the legislation on the merits will identify a structural concern that direct legislation seeks to cure, invoke a lower standard of review, and uphold the statute.

15. See Eule, *supra* note 1, at 1547-48 (stating that argument for differential standards of judicial review “makes sense only when an attack is mounted under a provision of the Federal Constitution”).

16. Differential judicial review almost certainly must rest on *particular* constitutional provisions, which make procedural concerns relevant to some degree. See Eule, *supra* note 1, at 1545 (“[W]hen laws enacted by plebescite are challenged under *other* provisions of the Federal constitution, the republican form clause informs the nature of the judicial role.”); Charlow, *supra* note 9, at 560 (arguing that reasons for differential review “should be based on . . . differences in these law-making processes

tion is upheld or struck down depending only on whether it was adopted by the legislature or by the electorate directly.<sup>17</sup> This is a peculiar result to the extent that the Constitution is a substantive rather than a procedural document.<sup>18</sup> Why should a law's constitutionality turn entirely on whether the *process* by which it was enacted was sufficiently deliberative? For example, a law either is or is not a taking of property without just compensation, but the answer does not depend on *how* the law was adopted.

In the end, the case for adopting differential standards of judicial review rests on proceduralist considerations of constitutional design.<sup>19</sup> These concerns make sense only to the extent that the justification of judicial review rests on proceduralist concerns. The first role of differential standards is to enforce procedural concerns embedded in substantive provisions. Some provisions are concerned to some extent with self-dealing by legislatures. For example, First Amendment doctrine addresses the possibility that incumbents will enact laws that create barriers to their displacement. This might justify less aggressive judicial review of campaign finance laws enacted through the initia-

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that relate to the nature of the particular constitutional provision claimed to be violated"). This seems a better way of phrasing the constitutional point than an alternative also offered by Eule. Eule, *supra* note 1, at 1545 (stating that because "direct democracy is constitutionally suspect, [but] not impermissible . . . , [i]t triggers a harder judicial look"). Strictly speaking, differential judicial review is not an issue if procedural concerns arising out of the difference between direct and representative legislation provide a basis for finding a statute unconstitutional under a particular clause.

17. See Lynn Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHL-KENT L. REV. 707, 765 (1991).

18. Consider, for example, the proposition that a law imposing a 24-hour waiting period before a woman could obtain an abortion is constitutional when enacted by a legislature but is unconstitutional when enacted by direct legislation. I can imagine developing an argument invoking the "deliberation" consideration for that proposition, but it would likely be unresponsive to anything of real constitutional significance.

19. Commentators agree that the only relevant general constitutional text is the Guarantee Clause, U.S. CONST., art. IV, § 4. There appear to be two possibilities. First, states with direct legislation subject to non-differential judicial review have a republican form of government, but they would have an even more republican form if their direct legislation were subject to differential judicial review. I find this position nearly unintelligible as a matter of constitutional law. Alternatively, states with direct legislation and non-differential judicial review do *not* have a republican form of government; consequently, differential judicial review is constitutionally required. I doubt that the standards for determining whether a government is republican are violated by such statutes, and the commentators do not appear to contend that they are. It is peculiar that, if this alternative position is correct, the courts could enforce the Guarantee Clause in this manner by exercising differential judicial review, despite broad statements in the case law that Guarantee Clause cases present nonjusticiable political questions. See Eule, *supra* note 1, at 1542 n.165 (compiling relevant cases).

tive process. Similarly, some substantive constitutional provisions are concerned with the appropriation of unpopular people's assets. For example, some aspects of the Takings Clause and Contracts Clause address the possibility that majorities will target unpopular people as sources for redistribution of wealth. Because legislative deliberation might refine and enlarge the public's views, this might be a consideration in favor of more aggressive judicial review of directly adopted regulatory provisions.

On the other hand, no constitutional provision lacks some purely substantive content. The First Amendment speaks to autonomy as well as legislative self-dealing; the Takings Clause invokes transcendent principles of fairness associated with individual effort and enterprise, even as it expresses concern over the popular appropriation of the fruits of another's labor. The inevitable presence of substantive concerns makes it particularly difficult to defend differential judicial review based solely on procedural considerations.

Differential standards of review perform a second role: channeling policy-making into a procedurally preferred forum.<sup>20</sup> In this role, the underlying intuition is not that the same law is permissible or impermissible depending on how it is enacted, but rather that we can use judicial review to channel policy-making into direct or representative legislation when we think that the preferred forum is likely to produce different and better policy because of its procedural characteristics. However, none of the considerations invoked to support differential judicial review is strong enough to allow us to transform this intuition into a judicially administrable constitutional doctrine.<sup>21</sup>

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20. The case for differential review may ultimately rest on the view that laws enacted through one procedure would not in fact have been enacted if they had to go through the alternative procedure. In other words, deliberative legislatures would modify or defeat laws enacted through direct legislation, and the voters would not directly enact laws adopted by legislatures. In its strongest form the case is straightforwardly libertarian: it is better to have no law at all than one enacted through a flawed procedure.

21. As a policy matter, restructuring the process of direct legislation in some ways might be preferable. But the case for differential judicial review is largely unconnected to the case for such reforms, unless differential judicial review somehow forces restructuring. For example, Richard Pildes suggests that courts should be more aggressive in reviewing direct legislation for vagueness than they are in reviewing representative legislation. On the merits of that argument, I note only that Professor Pildes may have identified a characteristic of *constitutional amendments* rather than a characteristic of direct legislation (except insofar as constitutional amendments can be adopted only by direct processes except in Rhode Island). Other reform suggestions, such as the idea of automatically terminating—"sunsetting"—such legislation, do not appear to identify problems distinctively characteristic of direct legislation. Richard Pildes, Remarks at Symposium, *The Legitimacy of Direct Democracy: Ballot Initia-*

### III DELIBERATION AS A BASIS FOR DIFFERENTIAL JUDICIAL REVIEW

As commentators have noted, the underlying question about differential standards for judicial review is comparative:<sup>22</sup> is direct legislation adopted through a process that differs materially from the process that results in statutes enacted by legislatures?<sup>23</sup> More specifically, is the legislative process necessarily more deliberative than the process of direct legislation?

The answer is almost certainly “No.”<sup>24</sup> One can, of course, readily compile anecdotes demonstrating distortions in campaigns for direct legislation.<sup>25</sup> But for each such anecdote there is another showing how representative bodies adopt important legislation with deliberation of no better quality.<sup>26</sup>

Perhaps more important, the comparative question needs to be formulated precisely: given a particular policy proposal, such as tort reform, campaign finance legislation, or immigration policy, is the quality of deliberation likely to differ when that proposal is considered by a legislature or by the people directly? Lawrence Sager implicitly praises the legislative process for its deliberative characteristics in his criticism of direct legislation: “there is no genuine debate or discus-

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*tives and the Law* (Nov. 22, 1996) (transcript on file with *Annual Survey of American Law*).

22. See, e.g., Gillette, *supra* note 9, at 938 (“[C]laims about plebiscites are comparative.”); Eule, *supra* note 1, at 1549 (“[M]y venture is a comparative one . . .”).

23. For completeness, I note the possibility that direct democracy might be *more* deliberative than representative democracy. This may be true, for example, in what Bruce Ackerman calls constitutional moments. See generally BRUCE A. ACKERMAN, *WE THE PEOPLE* (1991). Professor Ackerman himself does not make this claim, for two reasons. First, he confines himself to the national political process, which does not provide for direct legislation. Second, he is concerned primarily with the interaction between the people and political elites, particularly representatives. Even commentators skeptical about claims that direct legislation is *less* deliberative seem satisfied with establishing that legislatures are no more deliberative than the public. See generally Charlow, *supra* note 9.

24. See Richard Briffault, *Distrust of Democracy*, 63 *TEX. L. REV.* 1347, 1362-63 (1985) (book review) (describing defects in deliberation in legislatures); Gillette, *supra* note 9, at 985-86 (arguing that defects in direct legislation at local level arise because decisions are made locally, not because they are made in direct legislation); Eule, *supra* note 1, at 1549-50 (cataloguing defects in legislative process).

25. See, e.g., Eule, *supra* note 1, at 1517-18.

26. The legislative history of the Prison Litigation Reform Act is a current example. See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Anti-Terrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 *DUKE L.J.* (forthcoming 1997). Charlow, *supra* note 9, at 626, points out the availability of anecdotal evidence pointing in every direction.

sion, no individual record or accountability, no occasion for individual commitment to a consistent or fair course of conduct.”<sup>27</sup> Following Derrick Bell, Julian Eule argues, “Our worst tendencies toward prejudice . . . are chastened in legislative debate.”<sup>28</sup> Unconscious racism is constrained “[w]hen minorities are part of the legislative ‘we’.”<sup>29</sup>

It is unlikely that the implicit contrast is accurate across all issues—and particularly with respect to the subset of public policy issues that both become the subject of direct legislation and raise non-trivial federal constitutional questions.<sup>30</sup> There is a structural reason to think that the quality of deliberation would not differ in a way likely to affect the quality of the ensuing legislation, whether direct or representative. Assume that direct legislation campaigns are characterized by simplification and distortion,<sup>31</sup> and that those direct legislation campaigns that raise substantial federal constitutional questions are likely to involve issues about which voters are, or can be made to be, especially concerned. However, legislators must ultimately answer to their constituents. The simplifications and distortions associated with the direct legislation campaigns will surely be deployed in legislative election and re-election campaigns. Anticipating this, a legislator would be unwilling to take a fully deliberated position on the matter.<sup>32</sup>

This argument shows why an obvious fall-back is unavailable. One might concede that there are no differences in the *overall* quality of deliberation, but contend that there are discrete subcategories of issues in which legislative deliberation is better than the deliberation that occurs in direct legislation. Representatives’ incentives are such

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27. Lawrence Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1414-15 (1978). See also Eule, *supra* note 1, at 1520-21 (arguing that deliberation affects the outcome of legislative debate, in contrast to the “rigidity of plebescites”).

28. Eule, *supra* note 1, at 1555.

29. *Id.*

30. For a catalogue of methods by which voters can engage in deliberation, see Baker, *supra* note 17, at 749. See also Gillette, *supra* note 9, at 957-58 (describing aspects of direct legislation process that are “equivalent” to aspects of legislative process in inducing deliberation).

31. I am agnostic on whether this assumption is accurate.

32. See Baker, *supra* note 17, at 741, 742-43 (describing representatives’ reelection incentives). Cf. Gillette, *supra* note 9, at 942 (“[I]f self-interested voters are not to be trusted to select legislation . . . , it is unclear why their judgment is more commendable in the selection of representatives.”). Even if voters are *generally* unaware of the positions their legislators take, a claim that some scholarship disputes, the same forces that organize initiative campaigns can—and in my view are likely to—organize voter education campaigns in representative elections to inform constituents of their representatives’ actions.



that one cannot anticipate relevant differences in deliberation with respect to matters likely to trigger distorted direct legislation.<sup>33</sup>

The strategy of identifying categories of cases where differential deliberation is likely to occur is unpromising for an additional reason. As I have suggested, the power to identify such categories may provide judges with the power to choose the level of review that will produce the outcomes they already favor regarding the laws in question. A judge who favors gay rights, for example, may say that gay rights initiatives, or initiatives affecting the interests of minorities against which the public might be prejudiced, are particularly prone to the failures of deliberation, and more prone to such failures than the legislative process in dealing with identical policies. Saying so, however, does not make it so, and it is doubtful that in the end the case for differential deliberation could be made out as to any significant subcategory.

Perhaps, however, my focus has been misplaced. Perhaps courts should be concerned with deliberation *as such*, and not with the effects of deliberation on the quality of the ensuing legislation. Such a theory suggests that the Constitution, in this dimension at least, is about education, and deliberation is desirable because it contributes to that public goal. Assume that the campaign for the adoption of Colorado's Amendment 2 was characterized by simplification and distortion.<sup>34</sup> I have argued that legislators' incentives will lead them to adopt the same provision out of fear of a re-election campaign characterized by similar simplifications and distortions.<sup>35</sup> The argument for deliberation as such is that legislators can take more time to develop more complex and less distorted arguments for the legislative equivalent of Amendment 2. In the end the public will have both the

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33. Daniel Lowenstein pointed out to me that the legislative process can be structured to insulate representatives from constituent pressures. A controversial position can be embedded in a complex statute that constituents favor overall, and the legislator can respond to challenges to her controversial position by pointing to the statute as a whole and claiming that legislative procedures gave her no choice but to vote for the controversial provision as well. It is not clear that this is a good defense of *deliberation* in the legislature.

34. Direct legislation campaigns are, of course, a form of public education. Eugene Volokh pointed out to me that the simplifications and distortions in such campaigns may nonetheless have a net positive effect on public education because they create a focus on a particular issue in a way that candidate elections do not. In addition, the visibility of direct legislation campaigns may produce more high-quality discussion in newspapers than the lower visibility legislative process, resulting in greater "quality adjusted" public education despite the simplifications and distortions.

35. See *supra*, text accompanying notes 31-32.

Amendment, which it wants, and a better appreciation of the values at stake, which it might not get through the process of direct legislation.

This is an argument for differential review of direct legislation adopted through campaigns of distortion and simplification. As I have noted, however, a doctrine allowing judges to invoke differential review retrospectively, by assessing the quality of the direct legislation campaign, is almost certainly unadministrable without serious implications for the idea of government by law. So, once again, we need criteria that would allow courts to identify categories in which campaigns of distortion and simplification are particularly likely. Furthermore, these would have to be categories in which substantive concerns would not outweigh the interest in deliberation as such. I confess that every such category I have seen, or have been able to think of, fails to satisfy this second test.

There is, finally, a broader issue. To put it as a provocation, what's so great about deliberation? Or at least, what's so great about deliberation that it should be allowed to displace decisions made directly by the people?<sup>36</sup> When contrasted with backroom dealing, *deliberation* is an open process in which participants invoke public reasons. But direct legislation displays that modest form of deliberation.<sup>37</sup> One might claim that the word "deliberation" connotes a certain ponderousness of thought and analytic detachment from the rough-and-tumble of daily life; it stands against the "sudden breeze[s] of passion," the "transient impulse[s] which the people may receive from the arts of men[,] who flatter their prejudices to betray their interests."<sup>38</sup> If deliberation has this detached quality, its transcending merits are far from clear. A person who deliberates in this way may overlook important information not readily reducible to the forms of reasoned argument, or may undervalue policy-relevant concerns that appear unreasonable or "emotional."<sup>39</sup>

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36. Elitists believe that representatives are better at deliberating than the people, but this position, whether accurate or not, does not explain why deliberation is valuable.

37. Akhil Amar praises two kinds of deliberation. The modest form seems characteristic of direct legislation. The more extensive form seems to suffer from problems described in the next paragraphs. See Akhil Reed Amar, Remarks at the *Annual Survey of American Law Symposium, The Legitimacy of Direct Democracy: Ballot Initiatives and the Law* (Nov. 22, 1996) (transcript on file with *Annual Survey of American Law*).

38. THE FEDERALIST No. 71, at 482 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961).

39. For a discussion of why policy-makers can properly take popular views into account even when they differ from expert views, see Richard Pildes & Cass Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 68-90 (1995).

In addition, deliberation of this sort is differentially distributed in society. Roughly speaking, those with *other* sorts of social power have greater ability to engage in such deliberation. Policies designed to encourage deliberation of this sort simultaneously reinforce hierarchies of power that direct legislation is partly designed to overcome. In this view, the argument for more aggressive judicial review of direct legislation is an indirect attack on direct legislation itself.

#### IV LOG-ROLLING AS A BASIS FOR DIFFERENTIAL JUDICIAL REVIEW

Direct legislation offers voters a simple choice: for or against a particular proposal. Representative legislation appears to provide opportunities for more complex choices.<sup>40</sup> Legislators can “log-roll,” assembling packages of proposals. A legislator who cares about proposal A and is moderately opposed to proposal B might join with another legislator with the reverse preferences in a coalition to vote for both A and B. Each gets the policy she cares about at the cost of putting up with a policy she only mildly opposes. Both participants benefit on balance.<sup>41</sup>

Whether log-rolling is socially beneficial is controversial. Society arguably benefits whenever deals are made that the parties favor. But log-rolling may have costs the parties do not take into account.<sup>42</sup> Log-rolling is condemned by those who see the legislative process as a forum for rent-seeking by organized interest groups, who may be able to strike deals that extract wealth from unorganized consumers.<sup>43</sup> On this view, direct legislation is desirable precisely because it reduces the opportunities for log-rolling. Arguably, courts should then be less aggressive in reviewing direct legislation.

On the other hand, direct legislation may not reduce the opportunity for log-rolling. Considered in purely formal terms, direct legisla-

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40. See Gillette, *supra* note 9, at 939 (“[V]oters will be faced with a binary choice. . . . Unlike legislators, they have no opportunity to effect bargains or compromises that might moderate a proposition’s language or impact, or make it more palatable.”); Eule, *supra* note 1, at 1556 (“[Y]ou can’t dicker with an electorate for support now in exchange for your support on something else later.”).

41. Working the argument with more precise numbers would be unnecessarily complex. The conclusion that log-rolling can benefit all participants still follows. For a more formal statement, see Baker, *supra* note 17, at 721-32.

42. See Baker, *supra* note 17, at 723 (explaining why “logrolling does not necessarily occur in a socially optimal direction”).

43. See generally Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 35-43 (1991).

tion simply shifts the time at which log-rolling occurs. Parties make their deals in formulating proposals to go on the ballot rather than in assembling a package of bills. As Clayton Gillette observes, “If the measure is to attain sufficient support, it may have to take a form more moderate than the one favored by its most zealous advocates.”<sup>44</sup>

State constitutions and courts have attempted to constrain log-rolling at both levels, through single-issue requirements. Scholars in the field seem to agree: such requirements are largely ineffective with respect to bills,<sup>45</sup> and may be no more effective with respect to direct legislation.<sup>46</sup> These controls work at the purely formal level, defining what can appear on the ballot.<sup>47</sup>

There is another reason why log-rolling in direct legislation may be less effective than log-rolling in legislatures. Consider a log-rolling deal made in a state with an effective single-issue requirement. The parties cannot put together a package that contains both proposal A and proposal B. Legislators have to vote on A, and then on B. This gives the party who mildly opposes B a chance to renege. But legislators have to deal with each other repeatedly. The party who reneges will find it more difficult to make deals in the future.<sup>48</sup> In contrast, direct legislation may involve parties who will not likely deal with each other again. They may agree to coordinate their campaigns, but one may renege—or may exert less effort than the other thinks appropriate.<sup>49</sup>

44. Gillette, *supra* note 9, at 970.

45. See generally Millard Ruud, *No Law Shall Embrace More than One Subject*, 42 MINN. L. REV. 389 (1958). Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 944 n.27 (1983), asserts, “[A]lthough single-subject rules applicable to legislatures are widespread, they have been applied nonrestrictively, and statutes have been struck down only rarely for violating such rules.”

46. See generally Lowenstein, *supra* note 45.

47. Such controls cannot constrain informal political arrangements, whereby the parties agree to coordinate their ballot campaigns. However, cross-proposition coordination seems unlikely. Those interested in coordinating campaigns seem more likely to combine their proposals into a single proposition and take their chances with the weak single-subject rule.

48. Cf. Gillette, *supra* note 9, at 968 (describing monitoring and retaliation in legislatures in connection with log-rolling); Baker, *supra* note 17, at 721 (identifying three conditions for effective log-rolling: “the same potential traders must be involved in multiple votes . . . [.] the number of potential traders must be relatively small . . . [.] and] potential traders must be able to monitor and sanction a trading partner’s subsequent behavior”).

49. Note that compliance with a sequential log-rolling deal is easily monitored in the legislature, where the measure is simply whether the party votes for proposal B. Effort is harder to measure.

Perhaps these arguments might be enough to justify less aggressive judicial review of direct legislation.<sup>50</sup> Note, however, that the argument works only if agreements to coordinate ballot campaigns are hard to enforce. As ballot campaigning becomes more professionalized, parties to log-rolling deals may come to resemble legislators who deal with each other repeatedly, thereby reducing the difference between direct and representative legislation.

Finally, the log-rolling dilemma is associated with structural concerns, when the discussion turns to whether the legislative process or the process of direct legislation is more likely to be subject to “special interest” domination.

## V

### STRUCTURAL CONCERNS AS A BASIS FOR DIFFERENTIAL JUDICIAL REVIEW

Structural considerations initially appear to be the most promising candidates justifying differential judicial review. The point about structural considerations is this: proponents of direct legislation assert that legislators’ incentives make it unlikely that they will adopt appropriate legislation themselves.<sup>51</sup> Incumbents will not enact term-limit laws, and whatever campaign finance laws they adopt will subtly, or not so subtly, disfavor challengers. In these circumstances direct legislation should be fostered. Courts can contribute to this by adopting less aggressive standards of review of direct legislation enacted in the face of structural obstacles to appropriate representative legislation.<sup>52</sup>

To justify differential judicial review, structural problems associated with representative legislation—the possibility of capture by organized groups, the vulnerability of legislatures to particularly intense

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50. Daniel Lowenstein insists that the possibility of coordination in direct legislation campaigns is a fantasy. In addition, he points to evidence suggesting that ballot proposition campaigns are not as effective as proponents and opponents alike seem to think. *See generally* DANIEL LOWENSTEIN, *ELECTION LAW: CASES AND MATERIALS*, ch. 12 (1995).

51. The most general form of this argument is that representatives are more (or less) easily captured by special interest groups. Direct legislation would then be more (or less) likely to enact appropriate public policy. Commentators seem to agree that there are few overall differences in the susceptibility of the two processes to special interest capture. *See, e.g.*, Gillette, *supra* note 9, at 974-75, 978-82.

52. *Cf.* Briffault, *supra* note 24, at 1368 (“[G]overnment structures and regulation of the political process, taxation, and spending” are “areas in which institutional pressures cause representatives to stray from the interests of popular majorities.”); Eule, *supra* note 1, at 1559-60 (exempting direct legislation from more aggressive judicial review when “the electorate acts to improve the processes of legislative representation”).

minorities, and the like—must differ from the structural problems associated with direct legislation. The problems do not appear to be dramatically different overall: both representative and direct legislation are hard to enact, and though narrow interest groups may find it a bit easier to defeat ballot propositions, it is doubtful the differences are large enough to support a judicial doctrine. Nor does it seem possible to develop criteria by which courts could reliably identify categories of situations in which differential structural problems occur.

One preliminary objection to relying on structural concerns to support differential judicial review generalizes the following observation about campaign finance legislation: legislatures do not fail to adopt campaign finance legislation. Instead, they adopt incumbent-favoring campaign finance legislation. To simplify, courts believe that such laws implicate two independent First Amendment concerns: an interest in preserving voter autonomy (“money is speech”) and an interest in avoiding self-dealing or entrenchment. Both concerns are implicated when the courts review a campaign finance law adopted by a legislature. Only the first is implicated when they review one enacted directly. Suppose that the courts use a strict scrutiny standard to assess legislatively adopted campaign finance laws and rationality review for direct legislation on the subject. Superficially, it appears the courts are exercising less aggressive judicial review when dealing with direct legislation. In fact, however, they are not. One consideration has simply dropped out of the equation: the courts do not take self-dealing into account when reviewing direct legislation because self-dealing is simply irrelevant. But it is irrelevant for reasons arising from the First Amendment itself.<sup>53</sup>

The argument can be generalized: some constitutional provisions make self-dealing relevant and others do not; differential judicial review is not justified by structural concerns when a constitutional provision that makes self-dealing irrelevant is implicated; and, when a constitutional provision makes self-dealing relevant, courts are not exercising truly *differential* judicial review if they approach direct and representative legislation differently.

What exactly *is* a structural concern? It is helpful to distinguish between *direct* and *indirect* self-entrenchment as structural concerns. In both categories legislators act to enhance the prospect of re-election. *Direct* self-entrenchment occurs when they enact laws that, by

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53. To put it schematically, the First Amendment means that self-dealing problems plus autonomy concerns lead to strict scrutiny, and the First Amendment means that autonomy concerns standing alone lead to rationality review.

their terms, make it difficult to displace them.<sup>54</sup> The core example here is term limits: the advantages of incumbency coupled with the absence of term limits entrenches incumbents directly. *Indirect* self-entrenchment occurs when legislators enact laws whose practical effect is to make it difficult to displace them. We must further divide this category into two parts. First, sometimes legislators enhance their prospect of re-election by enacting laws bearing on the electoral process, and bias those laws in their favor. Here the core example is campaign finance law.<sup>55</sup> Second, sometimes legislators enhance their prospect of re-election by enacting laws that they calculate the voters favor. Everything else in the law falls into this category.

It would be awkward to assert that courts should differentially review direct and representative legislation falling into this last subcategory of indirect self-entrenchment. Legislators who enact such laws are doing what voters want them to do. The representative and direct processes of legislation do not have systematically different characteristics with respect to this sort of ordinary legislation. Sometimes interest groups will find it easier to lobby legislators; sometimes the very same interest groups will find it easier to appeal directly to the voters. It might be pointless for voters to use direct legislation to enact such laws, but the laws do not appear to raise questions as to which *differential* judicial review is more reasonable. Richard Briffault writes, "The initiative process may be dominated by the rich and the well-organized but it is not their exclusive preserve, and it is far from clear . . . that the ballot is less accessible to citizens out of the usual channels of power than is the legislature."<sup>56</sup> Exactly the same can be said about the legislative process: "The problems of wealth and organizational limits on access are common to both direct and representative government."<sup>57</sup>

The problem with indirect self-entrenchment through laws bearing on the electoral process is more serious. The first step is to specify precisely what the problem is. Voters prefer a set of policies at time A when they elect their representatives. Responsive to voters, the representatives enact those policies. Voter preferences then change and representatives want to repeal some of the laws enacted in the first round and address a new set of issues. But some of the laws enacted

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54. It also occurs when they preserve a status quo with the same effect, as in refusing to enact term limits.

55. Another example, on a lower level, is the congressional franking privilege.

56. Briffault, *supra* note 24, at 1358.

57. *Id.* at 1362. See also *id.* at 1361 ("Private wealth and special interests dominate the financing of candidate elections as well as initiative petition drives and ballot proposition campaigns.").

at time A obstruct voters' ability to get their current preferences enacted.

This obstruction can occur with respect to laws bearing on elections and to substantive laws. Suppose that in 1990 the legislature adopted a campaign finance law that was fully responsive to what the voters then wanted. But by 1996, voters are disillusioned with the law and want it changed. The campaign finance law, however, entrenches incumbents, and they will not change the law. Alternatively, suppose the 1990 voters wanted a program of environmental protection and elected legislators who provided it. By 1996 the voters prefer a different environmental program. Again, however, they are unable to displace the existing legislators because of the campaign finance law.

Suppose, finally, that voters use direct legislation to address *either* the campaign finance issue *or* the environmental issue. The structural argument for differential judicial review is that courts should defer to the electorate more readily than they would to laws enacted by the legislature on the same subject because the direct legislation reflects voter preferences better than the representative legislation does.<sup>58</sup> We should try to channel policy-making into direct legislation when indirect self-entrenchment is a problem.

Perhaps the argument for differential judicial review works with respect to direct self-entrenching laws. That category seems quite small, however. Indirect self-entrenchment may be a real problem with respect to some matters, but devising a judicial doctrine triggering differential judicial review can in some cases be quite difficult. This is the case when structural defects trigger differential review of laws that do not themselves bear on structure, as in the example of laws affecting the environment mentioned earlier.

The basic difficulty arises because identifying indirect self-entrenchment is necessarily controversial. Nearly every law that arguably entrenches legislators indirectly is supported by reasonable policy arguments as well. Furthermore, from the other side, we can construct reasonable arguments showing that nearly every law results from some sort of indirect self-entrenchment. Taken together, these points mean that judges who want to uphold direct legislation will characterize it as a reasonable response to indirect self-entrenchment; those who want to invalidate direct legislation they dislike will be able to

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58. Note again that this is not precisely *differential* judicial review, because it does not recommend less aggressive judicial review of *exactly the same* law when enacted directly. Note as well that the argument is for greater deference, not for automatic validation. So, for example, First Amendment autonomy concerns might still lead a court to invalidate campaign finance legislation adopted directly.



say that the standards for reviewing it should be at least as stringent as those for reviewing representative legislation. The reason for this is that there are no structural impediments to representative legislation of the same sort.<sup>59</sup>

The most promising arguments for differential structural concerns are “footnote four” related.<sup>60</sup> Some groups have systematic and unfair advantages in legislatures, so we should try to channel policy-making on issues those groups favor into direct legislation.<sup>61</sup> Other groups have systematic and unfair advantages in direct legislation, so we should try to channel policy-making on *their* issues into the legislature.

Justice Scalia’s dissent in *Romer v. Evans*<sup>62</sup> relies on one part of this argument.<sup>63</sup> He asserted that Colorado’s voters, taken in the aggregate, would have difficulty expressing their preference for a law in which gays and lesbians were not protected from discrimination “because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and of course care about homosexual-rights issues much more ardently than the public at large.”<sup>64</sup> As a result, “they possess political power much greater than their numbers, both locally and statewide.”<sup>65</sup> Amendment 2 “sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolv-

59. Consider Gillette’s formulation that “courts could exclude ballot propositions likely to evoke response only from a group with particularly intense sentiments on one side of the issue. . . .” Gillette, *supra* note 9, at 982. Gillette states this in connection with exclusion of propositions from the ballot, but it is plainly adaptable to the present setting as a criterion triggering more aggressive judicial review. *See id.*

60. “Footnote four” refers to *United States v. Carolene Products, Co.*, 304 U.S. 144, 153 n.4 (1938) in which the Court suggested “[t]here is a narrower scope for operation of the presumption of constitutionality where legislation appears on its face to be within a specific prohibition of the Constitution. . . .”

61. *See, e.g.*, Eule, *supra* note 1, at 1553-58 (describing relative advantages of “footnote four” minorities in the legislative process).

62. 116 S. Ct. 1620 (1996).

63. Justice Scalia used the argument based on differential power in the legislature to support a *substantive* conclusion about the permissibility of Amendment 2, not to suggest that decisions like that embodied in Amendment 2 *ought* to be made by direct legislation. *See id.* at 1360-61 (Scalia, J., dissenting). For another example using part of the argument, see Charlow, *supra* note 9, at 612 (arguing that those who acquired real property in California after enactment of that state’s assessment-limiting Proposition 13 were disadvantaged by direct legislation process). Charlow’s example, however, may only identify disadvantages faced by later arrivals, whether they are adversely affected by representative or direct legislation.

64. *Romer*, 116 S. Ct. at 1634 (Scalia J., dissenting).

65. *Id.*

ing the controversy at the statewide level, and (2) making the election a single-issue contest for both sides.”<sup>66</sup>

In the terms I have been using, Justice Scalia believed that gays and lesbians had disproportionate political power in the Colorado legislature because of their distribution. This factor, combined with the intensity of their interest in gay rights issues, made it difficult for Colorado voters in the aggregate to obtain legislation they desired from the legislature.<sup>67</sup>

Advocates of *more* aggressive judicial review deploy structural arguments as well. The most prominent arguments suggest that “footnote four” minorities, while at some disadvantage in legislatures, are even more disadvantaged in the direct legislation process.<sup>68</sup> Face-to-face interactions in the legislature may temper legislators’ willingness to respond to the pressures they feel from their constituents. “Footnote four” minorities may live in conditions of residential segregation that produce representatives who are re-elected more consistently than representatives from majority districts, thereby giving “footnote four” minorities the added power in legislatures that comes from seniority and experience.<sup>69</sup> These representatives will be able to block laws that the constituents of their colleagues want enacted.<sup>70</sup>

These advantages disappear in the direct legislation process. Accordingly, proponents of differential judicial review argue that courts should be more willing to overturn direct legislation adversely affect-

66. *Id.*

67. One can of course quarrel with Justice Scalia’s description, and particularly with his questionable assertion that intense concern leads to *disproportionate* political power. Intensity matters in reasonable theories of democracy, so that the political power of gays and lesbians, while perhaps disproportionate to their numbers, need not be disproportionate to anything with which democracy ought to be concerned.

68. Eule, *supra* note 1, at 1557, identifies three “features of the legislative structure [that] magnify the minority voice”: the committee system, political parties, bicameralism, and the executive veto. Although these features may “magnify” the voices of *political* minorities, it is unclear to me why they would systematically magnify the voices of *racial* or other “footnote four” minorities. These features may make it difficult to get legislation enacted, but it is unclear why preserving the status quo is advantageous to “footnote four” minorities.

69. This occurs even with term limits.

70. See Charlow, *supra* note 9, at 545-46 (describing the view that the legislative process “ameliorates unfamiliarity with ‘outsiders,’ and . . . may even reduce partiality by increasing sensitivity to and understanding of others” through committee hearings and the “very presence” of minorities “in the legislative hall”); see also *id.* at 547 (describing means by which minorities in legislatures may “attain disproportionate influence”).

ing “footnote four” minorities than representative legislation which affects them.<sup>71</sup>

We should note one real peculiarity about this argument. Under existing law, laws that use racial classifications receive intense judicial scrutiny, while laws that do not, but otherwise adversely affect racial minorities, receive less intense review. Combine this fact with the view of the legislature offered by proponents of differential judicial review, and the picture is quite odd.<sup>72</sup> Racial minorities do not have enough power in legislatures to block enactment of laws expressly disadvantaging them, and therefore courts should intensely scrutinize such laws. However, it would seem, racial minorities do have enough power in the legislature to block the legislative adoption of laws with a disproportionate racial impact, and therefore (apparently) courts should intensely scrutinize direct legislation with such effects. This does not seem an accurate description of political reality.

The general point is one I have made throughout: reasonable structural arguments can be deployed to show that “footnote four” minorities *and* their opponents suffer systematic disadvantages in both the representative and the direct legislation processes. As a general matter, it is hard to see how such arguments could thereby support differential judicial review.<sup>73</sup> But, of course, people deploy these structural arguments selectively. That is precisely the problem: the general availability of structural arguments means that they will be adopted when they produce results that seem congenial and rejected when they do not.

## VI CONCLUSION

The case for differential judicial review ultimately rests on a fear of voting. The people, alas, are not as good as they ought to be.

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71. Eule, *supra* note 1, at 1558-59, suggests that his approach would add “a new paragraph for the *Carolene Products* footnote,” but his criteria for invoking the harder judicial look are closely tied to the concerns identified in the second paragraph of the footnote.

72. I am concerned here only with the connection between current disparate impact doctrine and the argument for differential judicial review, and not with whether current doctrine is justified. Eule and others who agree with his position may believe that the Court’s current doctrine regarding disparate impact is mistaken. An indirect challenge to that doctrine, via a defense of differential judicial review of direct legislation, seems an odd way to revise the doctrine. Additionally, under a revised doctrine, it is not clear that the argument for differential review would be forceful.

73. *Cf.* Baker, *supra* note 17, at 720 (“[V]ery similar percentages of voters are likely to be necessary for a plebiscite and for a representative body to block legislation that disadvantages a racial minority.”).

Bertolt Brecht, writing after the Communist government of East Germany suppressed a workers' revolt in 1953, noted that the government had distributed leaflets saying that "the people had forfeited the confidence of the government."<sup>74</sup> Brecht asked, "Would it not then be simpler, if the government dissolved the people and elected another?"<sup>75</sup> Arguments for differential judicial review of direct legislation have something of the quality Brecht so effectively skewered.

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74. Bertolt Brecht, *The Solution*, quoted in Timothy G. Ash, *East Germany: The Solution*, N.Y. REV. BOOKS, Apr. 26, 1989, at 14.

75. *Id.*