

# Michigan Law Review

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Volume 108 | Issue 7

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2010

## Voting as Veto

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### Recommended Citation

Michael S. Kang, *Voting as Veto*, 108 MICH. L. REV. 1221 (2010).

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# VOTING AS VETO

Michael S. Kang\*

*This Article introduces an alternate conception of voting as veto—based on “negative preferences” against a voter’s least preferred outcomes—that enriches voting theory and practice otherwise dominated by a conception of voting as a means of expressing a voter’s ideal preferences. Indeed, the familiar binary choices presented in American political elections obscure the pervasiveness of negative preferences, which are descriptively salient in voting under all types of circumstances. Negative preferences have been overlooked, despite their theoretical and practical importance across many domains, leaving important questions unexplored in the literature. The Article develops a normative and positive account of voting as veto that identifies the costs, benefits, and critical tradeoffs in the formal recognition of negative preferences.*

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\* Associate Professor, Emory University School of Law. Thanks for many thoughtful comments from Bobby Ahdieh, Mitch Berman, Bill Buzbee, Oren Bracha, Ed Cheng, Julie Cho, Elizabeth Garrett, Heather Gerken, Lani Guinier, Daryl Levinson, John Matsusaka, Jonathan Nash, Dan Rodriguez, Daria Roithmayr, Bill Rubenstein, Robert Schapiro, Matt Spitzer, Matt Stephenson, and Fred Tung. Many thanks as well for outstanding library support from Amy Flick and excellent research assistance from Brent Bates, Stephanie Grace, Jenny Kwon, Carl Marchioli, Rachel Mondl, and Brian Spielman.

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### INTRODUCTION

The reality television show *American Idol* chooses a winning contestant by measuring what I call the “affirmative preferences” of the show’s audience. *American Idol* gradually winnows down a large field of singers through a weekly process of elimination. After each week’s performances, *American Idol* invites viewers to vote for their favorite singer by recording their top choice through a telephone vote. The votes are “affirmative” in the sense that each voter registers her most preferred choice—the competitor whom the voter most desires to be the ultimate winner. The competitor with the fewest votes during the week is eliminated from the show, and the process iterates in subsequent weeks until only one competitor, the winner, remains.

Affirmative preferences count in *American Idol*—what I call “negative preferences” do not. “Negative preferences,” as I treat them here, reflect the voters’ desires to avoid certain alternatives among a field eligible for selection. Rather than reflecting affirmative preference for a particular alternative, negative preferences represent an opposition against a particular alternative.<sup>1</sup> Because *American Idol* counts only affirmative preferences in the voting process, a contestant’s objective on the show each week is to avoid being the contestant in the multi-competitor field with the fewest affirmative votes.<sup>2</sup> Voters’ negative preferences go unrecognized as a formal matter in the voting process. If *American Idol* were to change its voting process and formally recognize negative preferences, the show would ask

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1. I use the term “preference” to describe the relative attractiveness of different alternatives presented for selection and elimination. Affirmative and negative preferences differ in that affirmative preference describes the superior attractiveness of one’s most-preferred alternative(s) over other alternatives, whereas negative preference describes the inferior attractiveness of one’s least-preferred alternative(s). Although research from psychology suggests that the cognitive and neural processes underlying affirmative and negative preferences may differ in some ways, I am agnostic for purposes of this Article about whether affirmative and negative preferences are fundamentally different in kind from a deeper philosophical or neurological standpoint. My claim is simply that voters’ negative preferences can be salient, can influence voting decisions, and deserve recognition.

2. See Gary W. Cox, *Electoral Equilibrium under Alternative Voting Institutions*, 31 AM. J. POL. SCI. 82, 92 (1987) (noting that under such circumstances, “candidates care only about not placing last in a given voter’s ranking”).

voters to decide which competitor is least deserving of winning the show. The competitor who receives the most votes—that is, the most votes as the worst competitor and least deserving of victory—could be eliminated each week until only one winning competitor survived.

The conceptual distinction between affirmative and negative preferences, as I describe them, tracks a substantive difference in the subjective motivation underlying the voter's decision. For instance, one might vote for a candidate based mainly on a strong affinity for that particular candidate—an affirmative preference for the candidate—or vote for the same candidate based mainly on a strong dislike for the candidate's competition—a negative preference against the opposition.<sup>3</sup> "Affirmative" or "negative" describes the direction of the underlying preference motivating the vote choice. Although subjective motivation may be multifaceted, a voter might have voted for Barack Obama in last year's presidential election mainly because he liked Obama, or alternatively, mainly because he disliked Obama's opponent, John McCain, as well as other minor competitors such as Bob Barr and Ralph Nader.<sup>4</sup>

The familiar predominance in American elections of binary choices between only two meaningful alternatives obscures what might otherwise be a more intuitive distinction between voting based on affirmative rather than negative preferences.<sup>5</sup> The traditional method of plurality voting in the United States—for instance, the familiar first-past-the-post, winner-take-all format for candidate elections—encourages an effective voter choice between only candidates from the two major parties as a function of Duverger's law.<sup>6</sup> When only two alternatives are offered to voters, it makes

3. See *infra* Section II.A (discussing anticandidate voting).

4. Assume that Voter 1 would assign the following cardinal utility scores to the following candidates.

2004		2008	
John Kerry	0	Barack Obama	10
George Bush	-10	John McCain	0

Voter 1 can be said to vote for John Kerry over George Bush mainly because he has a negative disliking for Bush, who is Voter 1's least-preferred candidate among the four listed above. By contrast, Voter 1 can be said to vote for Barack Obama over John McCain mainly because he has an affirmative liking for Obama, his most-preferred candidate among the four listed above. The difference between the voters is not intensity of preference, but more important for my purposes, what can be understood as the psychological valence of preferences as Voter 1 might see it. Of course, this hypothetical represents only what may be a clear case, designed to illustrate the general principle, while many voters in practice will arrive at decisions that cannot be characterized clearly as dominated by an affirmative or a negative preference.

5. See, e.g., Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917 (1990) (describing how the two-party system simplifies voter choices).

6. See Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 367–71 (applying Duverger's law to the two-party system in the United States). See generally William Riker, *The Two-party System and Duverger's Law: An Essay on the History of Political Science*, 76 AM. POL. SCI. REV. 753 (1982) (explaining the tendency under Duverger's law toward a two-party system with first-past-the-post, winner-take-all elections).

no difference whether voters are asked to formally vote their affirmative or negative preferences, because a vote for the Democrat is effectively a vote against the Republican, and vice versa. The mismatch between negative preferences and traditional voting (which formally recognizes mainly affirmative preferences) can obscure even the most salient cases of negative preferences at work.

Negative preferences are therefore underappreciated but nevertheless practically important across many domains of voting. Indeed, negative preferences regularly motivate all types of voting decisions, and at times represent voters' most meaningful preferences. What is more, a wide array of voting procedures, which this Article briefly surveys, permits the expression of negative preferences to varying degrees, but the literature has not explored this commonality across procedures. As a result, although the notion of negative preferences should be intuitively familiar, there is nonetheless a need in the voting literature for systematic consideration of negative preferences in voting as a potential tool in democratic governance.

One goal of this Article is to give a name to negative preferences and highlight their importance in voting and democratic governance. In the absence of a linguistic label for negative preferences *against* an alternative or outcome, and without a means for exercising those preferences, it is easy to conceptualize preferences as only affirmative preferences *for* something.<sup>7</sup> Academic theory about voting and governance usually regards recognition of affirmative preferences as the operative assumption, because when asked to cast a vote, whether it is voting for the *American Idol* or American president, it is traditionally thought to be a vote in support of one's most preferred alternative or candidate above the other eligible ones.<sup>8</sup> This Article begins the project of sharpening the distinctions between familiar understandings about voting as affirmative choice on one hand, and voting as expression of negative preference as a practical matter on the other hand.

In addition to subverting the traditional conception of voting—from affirmative to negative—I hope to complicate the traditional conception of veto, which is typically exercised as an outright negative trump held by a single actor. The president, for instance, may exercise a unilateral right of veto to override the affirmative choice of the Congress. By contrast, voting based on negative preferences may successfully aggregate the many negative preferences from a multimember electorate to constitute a *collective*

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7. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 269 (1987) (arguing that "as soon as we name, we invariably reify"); DALE SPENDER, MAN MADE LANGUAGE 163 (2d ed. 1985) ("[W]ithout a name it is difficult to accept the existence of an object, an event, a feeling."); Barbara Du Bois, *Passionate scholarship: notes on values, knowing and method in feminist social science in THEORIES OF WOMEN'S STUDIES* 105, 108 (Gloria Bowles & Renate Duelli Klein eds., 1983) ("That which has no name, that for which we have no words or concepts, is rendered mute and invisible . . ."); Frederic G. Cassidy, *A Note of Names and Censors*, 41 NAMES: A JOURNAL OF ONOMASTICS 262, 263 (1993) (arguing that "[n]othing exists concretely in human thought . . . until it exists as a word").

8. See, e.g., Ronald Rogowski, *Representation in Political Theory and in Law*, 91 ETHICS 395, 399 (1981) (concluding that "if representation is perfect . . . the representative person or institution reflects in every instance the members' ideal preferences").

veto, exercised by the voting body, rather than the more familiar unilateral veto held by an individual executive. Reconceptualizing voting as veto therefore flips both voting and veto on their heads. It simultaneously upsets familiar conceptions of collective voting, from affirmative to negative, and of the veto, from the individual to the collective, to yield a new framework of “voting as veto”—the recognition of negative preferences in voting to pare away disfavored alternatives in the process of determining collective choice.

This Article builds a positive and normative account for voting as veto and the formal recognition of negative preferences in voting. Different voting structures formally recognize negative preferences in voting to varying degrees and thus provide more or less opportunity for the effectuation of negative preferences in collective decision making. Looking across a variety of different voting procedures, this Article identifies commonality in how they effectuate negative preferences and sees them not as troubling divergences from majority rule based on affirmative preferences, but instead as connecting with a different orientation about what types of preferences count in democratic practices. Even when satisfaction of negative preferences does not align with usual sensibilities about voting, a focus on negative preferences may offer a fuller understanding of voters’ subjective motivations in voting and enable one to better understand the preferences that motivate voters within a specific context.

However, this Article does not claim that negative preferences are always more important, more salient, or more common than affirmative preferences. Nor does it claim that negative preferences always, or even in most cases, deserve priority over affirmative preferences. Greater recognition of negative preferences would certainly bring its own costs, which can be considerable and prohibitive. Even when voters’ primary preferences are negative, recognition of such preferences could alter voting discourse, encourage conflict, and retard change in problematic ways. What is more, the choice to recognize negative preferences in greater or lesser measure implicates certain value judgments, such as the value of centrism and social agreement, that cannot be predetermined across the wide variety of voting contexts discussed in this Article. As such, this Article simply seeks to identify the important considerations in determining whether greater recognition of negative preferences would be useful in a given voting context, what information is needed in making that determination, and which way particular considerations cut in the analysis. This Article attempts to identify the necessary tradeoffs and assesses the normative case for voting based on negative preferences contingent upon given value judgments. More descriptively, this Article thus may provide analytic tools to identify why voting based on negative preferences is deployed where it is, and not deployed where it is not, and helps explain why it is not more common.

A clearer conception of voting as veto offers a new lens for seeing familiar problems. I offer examples from three different contexts for voting: the voir dire process for jury selection, racially polarized voting for political office, and direct democracy. I argue that negative preferences offer a new

lens for viewing familiar practices and debates in each context. For *voir dire*, negative preferences help explain why the process might be structured as negative selection and suggest what benefits a process of negative selection offers. For racially polarized voting, negative preferences clarify the dynamics of racial polarization and help challenge the conventional understanding of why cumulative voting advantages the voting interests of the racial minority. For direct democracy, negative preferences provide an alternate normative perspective on the debate about how well direct democracy fulfills voters' wishes. In each context, expanding the usual conception of voter preferences to include explicitly negative preferences adds nuance to existing scholarly understandings.

A couple caveats are in order. First, this Article is not focused primarily on the relative strengths of different voting procedures. Within political science and other fields, empirical and formal scholarship already provide descriptive accounts of different types of voting structures. Although the Article draws from this research, it is only partially, and not principally, about different types of voting systems and how they operate. This Article is not focused on how well executive vetoes, supermajority requirements, or other voting institutions compare against one another, but instead explores the potential usefulness of effectuating negative preferences across these different types of institutions. Absent a clear conception of negative preferences as a focus, the existing literature on voting and different types of voting structures has not studied the commonality across different voting structures in terms of how well they recognize negative preferences. Nor has this existing literature sought to identify the overarching tradeoffs that accompany greater recognition of negative preferences beyond a specific institutional context. This Article begins to fill these gaps with the project of developing a positive and normative account about the value of recognizing negative preferences across voting procedures.

Second, this Article explores the role of negative preferences only in the context of voting. The notion of negative preferences may be similarly useful and intuitive outside the study of voting, but that is beyond the scope of this Article.<sup>9</sup> As a practical matter, it is common for people to have strong negative preferences that might need expression, through law or otherwise, across multiple domains. Even in a field where legal instruments usually specify affirmative preferences with precision, it may be useful to effectuate what can be an entirely oppositional negative preference.<sup>10</sup> This Article begins by considering the nature of underlying preferences held by voters and

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9. In this Article, however, "voting" refers to a great variety of mechanisms for determining collective choice among two or more decision makers. This definition includes certain examples, such as *voir dire* (discussed in Section III.A.), that are not usually considered voting in the colloquial sense.

10. Negative preferences help explain the "negative will" from the law of trusts and estates through which a decedent may specify nothing other than the exclusion of a particular person from intestate distribution. See UNIF. PROBATE CODE § 2-302(b)(1) (amended 2006) (codifying the "negative will," under which a decedent can expressly specify the exclusion of a particular person from intestate distribution). Thanks to my colleague Jeff Pennell for this example.

stipulates that there are many circumstances when voters' affirmative preferences are incomplete, inarticulate, or altogether absent. This Article considers the utility of voting based on negative preferences that more closely maps what voters actually prefer under some circumstances.

In this Article, I discuss several overlapping manifestations of voting as veto. Reference to affirmative or negative preferences denotes citation of them as subjective motivation for the voter underlying whatever the specific vote choice made. I discuss "voting based on negative preferences" or "effectuating negative preferences" to describe voting that is subjectively motivated by negative preferences, as voters approach voting as a practical exercise in negative veto, irrespective of the specific voting procedures. By contrast, I discuss "formal recognition of negative preferences" in voting to describe voting procedures that formally permit the voter to express negative preferences more directly. "Voting based on negative preferences" may occur under virtually any voting procedure to varying degrees, but it may occur more directly with "formal recognition of negative preferences." "Formal recognition of negative preferences" should be distinguished from "traditional voting," which describes the familiar formal recognition of affirmative preferences in voting.

In Part I, I introduce the notion of negative preferences, and drawing heavily from the study of psychology and political science, I argue for their meaningfulness and salience. I then describe how negative preferences, though usually not recognized directly in voting as a formal matter, can be effectuated through different voting procedures in varying degrees. In Part II, I develop the idea of voting as veto and begin sketching out a positive and normative account of negative preferences in voting. I explore three sets of interests implicated by greater formal recognition of negative preferences—internal, expressive, and instrumental—and explore the tradeoffs that they present. Finally, in Part III, I examine the implications of affording new attention to negative preferences in three different contexts of collective choice—the jury selection process, racially polarized voting, and direct democracy.

## I. NEGATIVE PREFERENCES IN THEORY AND PRACTICE

### A. *Introduction to Negative Preferences*

Affirmative preferences are preferences *for* something. A voter has an affirmative preference for a particular candidate to be elected, or for a particular ballot measure to be enacted. For instance, traditional voting entails the familiar practice of voting for one's most preferred alternative—one's first choice. In the American practice of "first past the post" plurality voting, each voter chooses the candidate that she wants in office, with the candidate who wins a plurality of votes elected to office. Traditional voting thus



permits voters to translate their affirmative preferences for something into direction for positive action.<sup>11</sup>

Negative preferences are preferences *against* something. Negative preferences are preferences to be without some specified occurrence or condition. A voter has a negative preference that a particular candidate not be elected, or that a particular course of action be rejected. Negative preferences track a distinctly oppositional desire to avoid a particular alternative, rather than a desire for any other alternative. The most familiar form of effectuating negative preferences is the unilateral right of veto exercised by the president. The unilateral veto instantiates negative preferences because it does not permit the president affirmatively to design legislation as he likes, but instead permits him only to block what he does not like. The notion of negative preferences as a basis for voting as a more a general matter, however, has been surprisingly neglected in voting theory and law.<sup>12</sup>

The distinction between affirmative and negative preferences here is not simply a framing effect. As is well-known from prospect theory, the same choice framed in different but substantively equivalent frames may elicit different, conflicting responses.<sup>13</sup> People irrationally make different choices depending on whether the decision is framed in terms of gains or losses.<sup>14</sup>

11. William Riker describes this view of democratic voting as the "populist interpretation" in which voting "embod[ies] the will of the people." WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 11 (1982); see also JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 4 (1980) ("[M]ajority rule has been considered the keystone of a democratic political system in both theory and practice."); Letter from Thomas Jefferson to Baron F. H. Alexander Von Humboldt (June 13, 1817), in 10 *THE WRITINGS OF THOMAS JEFFERSON* 88, 89 (Paul Leicester Ford ed., New York & London, G.P. Putnam's Sons 1899) ("[T]o consider the will of the society enounced by the majority of a single vote, as sacred as if unanimous, is the first of all lessons of importance . . ."); Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, 2 U. PA. J. CONST. L. 609, 609 (2000) ("In America—a democracy founded on a belief in popular sovereignty—most people agree that, at least at some level, the fundamental principle of majority rule should prevail, and that political decisions may be made by the majority simply because it is the majority.") (citation omitted).

12. Negative preferences are preferences *against* something, much as the notion of negative liberty could be understood as the right to be free *from* interference. Although negative preferences are not familiar, negative liberty is firmly ingrained in American law. For instance, Gordon Wood explains that early Americans conceived of democratic self-government mainly in furtherance of negative liberty to be free of government intrusion. See, e.g., Gordon S. Wood, *The Origins of American Democracy, or How the People Became Judges in Their Own Causes*, 47 CLEV. ST. L. REV. 309, 310 (1999); Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1426 (1999). Richard Posner argues that the "Constitution is a charter of negative rather than positive liberties." *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983). See generally Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001); Garrett Epps, *The Bill of Rights*, 82 OR. L. REV. 517 (2003).

13. See John M. Athowe, *Types of Conflict and Their Resolution: A Reinterpretation*, 59 J. EXPERIMENTAL PSYCHOL. 1 (1960); Daniel Kahneman & Amos Tversky, *Choice, Values, and Frames*, 39 AM. PSYCHOLOGIST 341 (1984); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

14. See generally Daniel Kahneman & Amos Tversky, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981) (explaining framing effects); see also Jeffrey J. Rachlinski, *Gains, Losses and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996) (discussing framing effects in litigation); Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82

But as I describe them, affirmative and negative preferences differ because they describe from opposite ends what can be a perfectly consistent, rational ranking of alternatives, to the degree that voters possess a full ranking of alternatives in any given setting. Knowledge of a voter's top choice, among a field of several alternatives, does not necessarily signal much information about the voter's least preferred choice. Under traditional voting, the voter supplies her most favored choice among available alternatives but says nothing at all about any of the other alternatives, except that they are not the most favored choice. Similarly, under formal recognition of negative preferences, the voter need not indicate anything about affirmative preferences, except that the selected outcome is not the most favored choice. In other words, the distinction between affirmative and negative preferences reflects not confusion on the voter's part, but different slices of information from a voter's full ordinal ranking of the eligible alternatives.

Negative preferences are substantively meaningful in their own right. Although democratic voting today tends to focus mainly on affirmative preferences, voters also possess real preferences about their least favored alternative, and those negative preferences can be salient and even more intensely held than affirmative preferences. It may be surprisingly common for people to have *mainly* negative preferences about important questions, without having strong affirmative preferences about those matters. Experimental psychology underscores the subjective importance of negative preferences. A wide body of research finds that people place greater value, importance, and weight on events that have negative, rather than positive consequences for them. People appear to decide upon their negative preferences before their affirmative preferences and rely upon those negative preferences more heavily to reach many types of decisions. Psychologists have documented a robust "negativity bias," defined as the "propensity to attend to, learn from, and use negative information far more than positive information."<sup>15</sup> The heightened response to negative stimuli occurs at a neural level,<sup>16</sup> appears as early as infancy,<sup>17</sup> and has been described by one set of

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NOTRE DAME L. REV. 313 (2006) (discussing framing effects in public perceptions of environmental regulation).

15. Amrisha Vaish et al., *Not All Emotions Are Created Equal: The Negativity Bias in Social-Emotional Development*, 134 PSYCHOL. BULL. 383, 383 (2008). See generally Roy F. Baumeister et al., *Bad Is Stronger Than Good*, 5 REV. GEN. PSYCHOL. 323, 362 (2001) (reviewing the literature).

16. See John T. Cacioppo et al., *The Affect System Has Parallel and Integrative Processing Components: Form Follows Function*, 76 J. PERSONALITY & SOC. PSYCHOL. 839 (1999) (finding larger late-positive potential in response to negative stimuli); William A. Cunningham et al., *Implicit and Explicit Evaluation: fMRI Correlates of Valence, Emotional Intensity, and Control in the Processing of Attitudes*, 16 J. COGNITIVE NEUROSCIENCE 1717 (2004) (finding greater fMRI activity in response to negative stimuli); Tiffany A. Ito et al., *Negative Information Weighs More Heavily on the Brain: The Negativity Bias In Evaluative Categorizations*, 75 J. PERSONALITY & SOC. PSYCHOL. 887 (1998) (finding larger event-related brain potentials in response to negative stimuli).

17. See Vaish et al., *supra* note 15, at 383.

psychologists as "one of the most basic and far-reaching psychological principles."<sup>18</sup>

Across a wide range of domains, psychologists find that negative information regularly assumes cognitive priority over positive information for decision making and affective response. When asked to evaluate a target based on positive, negative, and neutral information, subjects process, use, and ultimately rely on the negative information more heavily than positive and neutral information, even when negative information is no greater in quantity or intensity.<sup>19</sup> In addition, empirical research finds that people are not only more affected and influenced by negative information once processed, but they are more sensitive and attentive to negative information in the first place. In other words, as a threshold matter, negative information is more likely to attract people's attention and to be processed.<sup>20</sup> People voluntarily elect to spend more time mulling negative information than positive information<sup>21</sup> and elaborate more extensively on negative information in terms of counterargument and causal attribution.<sup>22</sup> This tendency to focus more heavily on avoidance of bad outcomes is arguably adaptive, because "[s]urvival requires avoiding catastrophes" more than maximizing good outcomes.<sup>23</sup>

Such psychological desire to avoid particular alternatives typically coincides with the ranking of those alternatives as least- or lower-ranked in one's ordinal preferences, though not always. Disliked alternatives that a voter actively seeks to avoid are also likely to be ranked low among the available choices. However, the psychological dislike and low ordinal ranking for a particular alternative will sometimes diverge to some degree, rather than perfectly coincide. For instance, a voter may dislike all available alterna-

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18. Baumeister et al., *supra* note 15, at 362.

19. See, e.g., David L. Hamilton & Mark Zanna, *Differential Weighting of Favorable and Unfavorable Attributes in Impressions of Personality*, 6 J. EXPERIMENTAL RES. IN PERSONALITY 204 (1972); Robert S. Wyer Jr. & Ronald L. Hinkle, *Informational Factors Underlying Inferences About Hypothetical Persons*, 34 J. PERSONALITY & SOC. PSYCHOL. 481 (1976).

20. See Christine H. Hansen & Randal D. Hansen, *Finding the Face in the Crowd: An Anger Superiority Effect*, 54 J. PERSONALITY & SOC. PSYCHOL. 917 (1988); Tokihiro Ogawa & Naoto Suzuki, *On the saliency of negative stimuli: Evidence from attentional blink*, 46 JAPANESE PSYCHOL. RES. 20 (2004); Felicia Pratto & Oliver P. John, *Automatic Vigilance: The Attention-Grabbing Power of Negative Social Information*, 61 J. PERSONALITY & SOC. PSYCHOL. 380 (1991).

21. See Andrea Abele, *Thinking about thinking: Causal, evaluative and finalistic cognitions about social situations*, 15 EUR. J. SOC. PSYCHOL. 315 (1985); Susan T. Fiske, *Attention and Weight in Person Perception: The Impact of Negative and Extreme Behavior*, 38 J. PERSONALITY & SOC. PSYCHOL. 889 (1980); William G. Graziano et al., *Attention, Attraction, and Individual Differences in Reaction to Criticism*, 38 J. PERSONALITY & SOC. PSYCHOL. 193 (1980).

22. See Gerd Bohner et al., *What triggers causal attributions? The impact of valence and subjective probability*, 18 EUR. J. SOC. PSYCHOL. 335 (1988); Neal J. Roese & James M. Olson, *Counterfactual Thinking: The Intersection of Affect and Function*, 29 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1, 2 (1997).

23. Paul M. Romer, *Preferences, Promises, and the Politics of Entitlement*, in INDIVIDUAL AND SOCIAL RESPONSIBILITY: CHILD CARE, EDUCATION, MEDICAL CARE, AND LONG-TERM CARE IN AMERICA 195, 224 (Victor R. Fuchs ed., 1996); see also Richard R. Lau, *Two Explanations for Negativity Effects in Political Behavior*, 29 AM. J. POL. SCI. 119 (1985) (ascribing adaptive value to a negativity bias in cognition).

tives, compared to some hypothetical but unavailable alternative off the agenda, such that even intensely disliked alternatives may not be ranked low among the eligible field of wholly unattractive possibilities before the voter. Conversely, a voter may like all the available alternatives, finding all of them reasonably attractive, such that even the least preferred alternative in her ordinal ranking is quite acceptable. When psychological dislike and ordinal rank diverge to a significant degree, the case for formally prioritizing negative preferences in voting may be much weaker. In practice, though, psychological dislike and low ordinal ranking will frequently coincide, and as I discuss further in Part I.B, voting procedures designed to avoid least preferred alternatives may be tailored both in design and application to appropriate context in ways that effectuate these negative preferences when they are most intense, certain, or meaningful. In short, consideration of negative preferences in voting can be adapted under many circumstances to map negative preferences, when doing so helps recognize people's most salient concerns, and may do so more effectively than would the exclusive consideration of affirmative preferences.

Of course, there already exist many voting and decision-making structures that accommodate negative preferences and enable the more direct blocking of collective choice. Implicit in the basic democratic requirement of approval is the capacity for negative action by disapproval. As I discuss in Section I.B, political scientists have studied how certain voting rules, structures, and institutions enable various actors to accomplish their goals by blocking the affirmative choices of others, as opposed to effectuating their own affirmative preferences.<sup>24</sup> Instead of identifying voting procedures that have already been examined individually by political science, this Article draws out the commonality among these procedures in effectuating negative preferences, through different mechanisms, and analyzes the tradeoffs inherent in doing so. I suggest that such structures, by more directly effectuating negative preferences, may be particularly useful when they actually map more closely onto people's clearest or most important preferences. To the degree that any structure for voting requests only limited information from voters, as opposed to a complete ordering of available alternatives, voting formally records only a fraction of a voter's full preference-ordering. Traditionally, voting looks to voters' most preferred, affirmative preferences. Although it would be silly to argue that negative preferences always deserve priority over affirmative preferences, it would be equally silly to argue that affirmative preferences always deserve priority over negative ones. There is a sensible place for negative preferences in voting: when collective decision making as a normative matter should consider

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24. The negative power to block the affirmative choices of other actors can be leveraged to coerce accommodation of one's own affirmative preferences. The president's negative authority through the exercise of the executive veto, for example, forces Congress to account for his affirmative preferences in the formulation of legislation. Similarly, supermajority voting requirements for passage give leverage to a minority faction that can exercise an effective veto simply by voting against proposed legislation.

the avoidance of voters' least-preferred alternatives and effectuation of their negative preferences.

### *B. Negative Preferences in Practice: Voting Procedures*

A wide variety of voting procedures have developed to meet the need for recognizing negative preferences. Although the commonality across this diverse set of institutions has not been explored, voters can express their negative preferences formally through voting, to varying degrees and through many different forms of voting procedures. In this Section, I connect a large number of seemingly unrelated voting procedures, used across many different domains of voting, that differ along important dimensions. The voting contexts differ in terms of the number of voters, from a single "voter" in the example of a unilateral veto to a large electorate for the typical political election. The voting contexts also differ in the type of choice presented to voters, from the selection of a single choice among a full slate of alternatives, to a binary choice between approval or disapproval of a single alternative. But I lump together a diverse collection of voting procedures that, despite their differences, offer a variety of formal mechanisms for the expression of negative preferences through voting. These voting procedures offer different paths for the use of voting as a form of veto and as an exercise of negative preferences.

#### *1. Voting on Affirmative Selection*

Even when the question under voting consideration is a matter of affirmative selection, voting procedures may incorporate to greater or lesser degrees the individual expression of negative preferences. Of course, in such cases, the election outcome in the end can be expressed most intuitively as an affirmative one—the electorate's approval of a particular alternative. However, individual decisions about how to vote on the question may be motivated by negative preferences, in addition to affirmative preferences, about the alternatives presented to the voter. Different voting procedures offer voters different opportunities to express those negative preferences in the process of affirmative selection.

##### *a. Traditional Plurality Voting*

At one extreme, the practice of traditional plurality voting offers little opportunity to express individual negative preferences as a formal matter. Voting for elected office in the United States, as the most prominent example, is based formally on affirmative preferences—voters record only a single vote in each race for their most preferred candidate among the eligible field, with the highest vote recipient winning office. Traditional plurality voting thus can be inhospitable to the expression of negative preferences, because it formally recognizes only an affirmative preference for the voter's most preferred candidate. In other words, "[v]oters have the right to say

YES to one of the candidates, but not the right to say NO.”<sup>25</sup> Traditional plurality voting may enable a candidate with narrow minority support to win if more popular candidates split the remaining vote. David Duke’s second-place finish in the October 1991 election for Louisiana governor is a classic example.<sup>26</sup> Despite the fact that many Louisiana voters detested Duke’s racial politics, Duke won a third of the popular vote while a multicandidate field split the rest of the vote.<sup>27</sup>

As a practical matter, however, traditional plurality voting may allow voters to act directly on negative preferences when voters are presented with only a binary choice. When the field produces only two viable candidates—the typical case in general elections under Duverger’s law—the practical distinction between voting on the basis of affirmative or negative preferences is erased. In the zero-sum game between exactly two candidates, a vote subjectively motivated by a negative preference against the Republican candidate gives rise to the same ultimate vote choice in the ballot booth as a vote subjectively motivated by an affirmative preference for the Democratic candidate—both produce a Democratic vote even if the underlying motivation and substantive preference are different. Voters therefore can act on a negative preference against one candidate simply by voting for that candidate’s only opponent. As a result, although American voters are traditionally asked to register an affirmative vote in elections for public office, voters routinely vote on the basis of their negative preferences against the incumbent or other eligible candidates.<sup>28</sup>

A simple modification to traditional plurality voting is the runoff system, which facilitates a binary choice between two candidates and thereby allows

25. Daniel Ferguson & Theodore Lowi, *Reforming American Electoral Politics: Let’s Take “No” for an Answer*, 34 PS: POL. SCI. & POL. 277, 277 (2001); see also WILLIAM POUNDSTONE, *GAMING THE VOTE: WHY ELECTIONS AREN’T FAIR (AND WHAT WE CAN DO ABOUT IT)* 276 (2008) (arguing that traditional plurality voting “pays no attention at all to how many people *dislike* a candidate”).

26. See generally TYLER BRIDGES, *THE RISE OF DAVID DUKE 194–237* (1994) (recounting Duke’s gubernatorial campaign); Douglas D. Rose & Gary Esolen, *DuKKKe for Governor*, in *THE EMERGENCE OF DAVID DUKE AND THE POLITICS OF RACE* 197 (Douglas D. Rose ed., 1992) (same). A similar, and related, example is Ralph Forbes’s candidacy in the 1990 Republican primary for Lieutenant Governor in Arkansas. Forbes finished first in the first-stage election with 46 percent of the vote but lost by a landslide with only 14 percent of the vote in the head-to-head runoff election. Forbes had played leadership roles in the American Nazi Party, Ku Klux Klan, and Christian Identity movement, in addition to managing Duke’s 1988 presidential campaign. See Associated Press, *Arkansas Runoff Offers Foes at Polls who Are Poles Apart*, ORANGE COUNTY REG., June 12, 1990, at A5; Clay Hathorn, *An ‘Unbelievable’ Runoff: Ex-Nazi faces black in Arkansas GOP race*, DALLAS MORNING NEWS, June 11, 1990, at 6D; Robert Marquand, *Which Candidates Get to Speak on TV?*, CHRISTIAN SCI. MONITOR, Oct. 9, 1997, at 1; John Reed, *Forbes Softens Racist Rhetoric to Gain Votes*, ARK. DEMOCRAT—GAZETTE (Little Rock, Ark.), June 10, 1990, at 1A.

27. See generally John C. Kuzenski, *David Duke and the Nonpartisan Primary*, in *DAVID DUKE AND THE POLITICS OF RACE IN THE SOUTH* 3, 22 (John C. Kuzenski, Charles S. Bullock III & Ronald Keith Gaddie eds., 1995) (explaining how Duke was helped by the fact that the Louisiana Cajun primary made it difficult for voters to vote “an ‘anti-candidate X’ strategy”).

28. See e.g., Samuel Kernell, *Presidential Popularity and Negative Voting: An Alternative Explanation of the Midterm Congressional Decline of the President’s Party*, 71 AM. POL. SCI. REV. 44 (1977); Richard R. Lau, *Two Explanations for Negativity Effects in Political Behavior*, 29 AM. J. POL. SCI. 119 (1985); Richard R. Lau, *Negativity in Political Perception*, 4 POL. BEHAV. 353 (1982).

direct effectuation of voters' negative preferences. A candidate who receives majority support in a first-stage election, under traditional plurality voting, wins office without the necessity of a second-stage "runoff" election. But when no candidate wins a majority during the first-stage election, runoff systems require a second-stage runoff between the two highest finishers, thus presenting a binary choice. As a consequence of Louisiana's runoff system, for example, Duke faced a runoff election after his second-place finish in the first-stage election during October 1991. In the November runoff election between only Duke and Edwin Edwards, African-American voters turned out in record numbers, motivated mainly by negative preferences against Duke, and carried Edwards to a landslide victory.<sup>29</sup> Roughly the same third of the electorate that supported Duke in the October election voted for him again in the November runoff, but in the runoff, the rest of the electorate voted together for Duke's opponent instead of splitting its vote across several candidates. Roughly 80 percent of African-American voters turned out in the runoff election and overwhelmingly defeated Duke.<sup>30</sup> Seventy percent of those who voted for Edwards reported that their vote was "mainly against" Duke.<sup>31</sup> Although the runoff election did not commit voters to vote on the basis of their negative preferences, the simplified binary choice facilitated the ability of voters to eliminate a heavily disfavored candidate like Duke.<sup>32</sup>

### b. Up-or-Down Approval

Voters can directly effectuate negative preferences when they face a binary choice on individual alternatives that are presented for an up-or-down vote. Voters are not always asked to select their most favored alternative

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29. See Rose & Esolen, *supra* note 26, at 227–31. It is worth noting that Duke still managed to win 55 percent of the white vote, including 48 percent of whites who attended college. See D. Stephen Voss, *Beyond Racial Threat: Failure of an Old Hypothesis in the New South*, 58 J. POL. 1156, 1157 (1996).

30. See Rose & Esolen, *supra* note 26, at 227.

31. *Id.* at 229.

32. The two-stage process of runoff systems might be further adapted to accommodate negative voting. The familiar form of the runoff system, used extensively in municipal elections and across the American South, begins with a primary election in which voters vote their affirmative preference among a large field of eligible candidates for office. See generally CHARLES S. BULLOCK III & LOCH K. JOHNSON, *RUNOFF ELECTIONS IN THE UNITED STATES* (1992). Under certain circumstances, however, it may be sensible to adapt this runoff format to negative voting by allowing more than two candidates to advance into the runoff and applying negative voting for the runoff election.

Similarly, negative voting of a sort can be incorporated into instant runoff voting. Under instant runoff voting, voters rank the entire field of candidates by order of preference, with the winning candidate receiving a majority of first-place rankings. See generally Robert Richie, *Instant Runoff Voting: What Mexico (and Others) Could Learn*, 3 ELECTION L.J. 501, 506–07 (2004) (describing instant runoff voting). If no candidate receives a majority, then the candidate with the fewest first-place rankings is eliminated, and votes for the eliminated candidate are reallocated with reference to the second-place rankings on those ballots. The process of elimination continues until a candidate emerges with a majority of top-place rankings. However, the process of elimination could be conducted from the bottom up with reference to last-place rankings. Candidates could be eliminated when they receive the most last-place rankings, instead of the fewest first-place rankings.

among a multicandidate field. Particularly with respect to substantive policy decisions, proposals may be presented individually for majority approval in seriatim. For instance, as a formal matter, legislators vote either yea or nay on individual legislative matters, and voters in direct democracy vote either in favor of or against individual ballot measures. Here, the choice is simply binary—approval or rejection—such that voters can directly effectuate a negative preference against the particular alternative simply by voting no.

When voting decisions are presented as binary questions of approval or disapproval, supermajority requirements and unilateral veto rights make it even easier for voters to block passage. Both supermajority requirements and unilateral vetoes demand greater consensus for approval by giving greater voting power to individual voters to block action. Supermajority requirements do so by demanding that greater than a majority of the electorate vote in favor of passage. They therefore allow a minority of the electorate, depending on the magnitude of the supermajority requirement, to block approval even when a bare majority votes in favor of approval. For instance, the legislative requirement of sixty votes to defeat a filibuster in the United States Senate effectively permits a minority of forty-one votes to block legislation favored by a safe majority. Supermajority requirements give greater recognition to the negative preferences of voters against the proposed action by giving disproportionate weight to their votes.

A right of unilateral veto is a kind of hypermajority requirement that allows a single voter to block approval. A unilateral veto is effectively a requirement of unanimity because it enables one negative vote to override the approval of all other voters. It is a descendant of the unilateral veto right of ancient Roman consuls and tribunes to forbid government action approved by other actors.<sup>33</sup> Most prominently today, the president and state governors exercise a unilateral veto over legislative action, subject to the possibility of legislative override, and the permanent members of the United Nations Security Council possess a veto right over Council resolutions.<sup>34</sup> Jurors in criminal trials also exercise a form of veto by virtue of the unanimity requirement for criminal verdicts.<sup>35</sup> A single dissenting juror can effectively veto a verdict of guilt or innocence and cause a mistrial.

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33. See generally David J. Bederman, *The Classical Constitution: Roman Republican Origins of the Habeas Suspension Clause*, 17 S. CAL. INTERDISC. L.J. 405, 423, 431–34 (2008); Louis J. Sirico, Jr., *The Federalist and the Lessons of Rome*, 75 MISS. L.J. 431 (2006). The word “veto” derives from the Latin term “*vetare*,” which means “to forbid or prohibit.” See Roy E. Brownell II, Comment, *The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration’s Costly Failure to Seek Acknowledgment of “National Security Rescission”*, 47 AM. U. L. REV. 1273, 1278 n.12 (1998).

34. U.N. Charter art. 27, para. 3.

35. See Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J.L. REFORM 569, 570 (2007) (noting that forty-eight states require unanimous verdicts for criminal trials).



*c. Alternative Voting Systems*

Several alternative voting systems modify traditional plurality voting to allow greater individual expression of negative preferences. Most of these alternative voting systems permit greater expression of negative preference by integrating more detail about voter preferences. The alternative voting systems discussed here—approval voting, Borda count, preference voting, and negative voting—are not commonly used but offer means for formally recognizing negative preferences.

Approval voting asks voters to vote for, and thus approve, as many candidates as they wish.<sup>36</sup> Approval voting does not limit the voter to a single expression of affirmative preference and therefore allows voters to express or withhold approval for multiple candidates.<sup>37</sup> More importantly, the voter also has the concomitant ability to register a negative preference against unacceptable candidates by withholding approval from them.

Approval voting then aggregates the voters' binary decisions of approval or disapproval across the entire field of alternatives to select the alternative with the greatest approval. Other alternative voting systems demand even more information from voters about their preferences. The Borda count asks voters to rank-order all available alternatives.<sup>38</sup> The Borda count incorporates this information about voters' ordinal rankings beyond the most preferred choice and seeks a more sophisticated outcome by requiring a richer account of voters' affirmative preferences.

Similarly, preference voting systems—instant runoff (for voting to fill a single opening) and single-transferable voting (for voting to select multiple openings)—permit voters to register ordinal preferences across the entire slate of alternatives. When an individual voter's higher ranked alternative either wins selection or is eliminated in the voting process, the individual voter's vote is transferred to her next-highest-ranked alternative such that her vote is not wasted.<sup>39</sup> Voters inarticulately register a kind of negative preference against candidates by failing to rank them more highly. But they do so only indirectly, and the demands on voters are greater when voters register a full set of ordinal preferences over the field of available alternatives.

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36. See generally Steven J. Brams & Peter C. Fishburn, *Approval Voting*, 72 AM. POL. SCI. REV. 831 (1978).

37. As a result, formal theory establishes that approval voting advantages centrist candidates. Gary Cox, *Electoral Equilibrium under Alternative Voting Institutions*, 31 AM. J. POL. SCI. 82, 95–97 (1987); Gary W. Cox, *Electoral Equilibrium under Approval Voting*, 29 AM. J. POL. SCI. 112, 116–17 (1985). I discuss the centrist tendencies of negative voting further below. See *infra* Section II.C.

38. Under the Borda count, the rank-orderings for each alternative are summed, and the winning alternative is that which receives the highest total across the electorate.

39. Preference voting can be modified to give greater deference to negative preferences. Under the Coombs rule, the candidate with the most votes ranking her in last place is eliminated, rather than the candidate with the fewest votes ranking her in first place. See Bernard Grofman & Scott L. Feld, *If you like the alternative vote (a.k.a. the instant runoff), then you ought to know about the Coombs rule*, 23 ELECTORAL STUD. 641 (2004).

Negative voting, by contrast, offers a singular focus on negative preferences without necessarily increasing the demands on voters.<sup>40</sup> The process of negative voting affirmatively selects a winner out of a larger set of alternatives, but it does so by asking voters to register their negative preference against their least preferred alternative, rather than recording their affirmative preference for their most preferred alternative. The winning alternative is the one that receives the fewest negative votes as a least preferred choice. For instance, *American Idol* could ask voters to register a negative preference for their least favorite contestant, instead of asking voters to vote for their most favorite. Each week, the show would eliminate the contestant with the most negative votes as the contestant whom the most voters deemed the least favorite, instead of eliminating the contestant whom the least voters deemed their most favorite. Negative voting offers a process of affirmative selection through reference only to negative preferences and thereby helps ensure that the most disfavored alternatives will not be chosen, even if there is no guarantee that the most favored alternative will be chosen.

Negative voting is most familiar for sequential processes of elimination, where choices for elimination must be made seriatim. For such situations, when the question posed is which alternative to eliminate (rather than to select) negative voting taps directly into voters' negative preference about which alternative should be removed from consideration. Negative voting need not demand more than the minimum assertion of the most extreme preference with respect to a single alternative. Negative voting, as a result, is common for television game shows with similar processes of elimination based on voting, such as *Survivor* and *The Weakest Link*. However, negative voting is infrequently implemented as a practical matter in political elections, with the interesting exceptions of Eastern Europe and Russia during the late 1980s in local elections. In an early wave of Gorbachev-era electoral reform, voters were permitted to vote on the basis of disapproval against unacceptable candidates from a multi-candidate ballot.<sup>41</sup> Voters did not vote for their most preferred candidate; instead, they literally scratched out the names of any disfavored candidates from the face of the ballot.

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40. The late George Boehm, a mathematician, apparently presented a voting system that would give voters the option of a positive vote or negative vote against candidates in an unpublished mimeograph, written twenty years ago, called "One Fervent Vote Against Wintergreen." POUNDSTONE, *supra* note 25, at 187. "Negative voting," as I use the term here, describes voting in which voters can cast only a negative vote, without the option of a positive vote. In the following section, I describe bipolar voting that resembles Boehm's system more closely. Negative voting should be distinguished sharply from what has been called negative voting in the corporate context, which is the exercise of shareholder voting rights by a party who would benefit economically from negative corporate performance. See, e.g., Jonathan Cohen, Note, *Negative Voting: Why It Destroys Shareholder Value and a Proposal to Prevent It*, 45 HARV. J. ON LEGIS. 237, 237 (2008).

41. See Stephen White, *Reforming the Electoral System*, J. COMMUNIST STUD., Dec. 1988, at 1; Theodore Shabad, *Soviet to Begin Multi-Candidate Election Experiment in June*, N.Y. TIMES, April 15, 1987, at A6.

## 2. Voting on Negative Disqualification

A different channel for the effectuation of negative preferences is when the electorate decides a question of negative disqualification. Unlike a question of affirmative selection, here the question is whether to disqualify a particular alternative or candidate from approval, selection, or continuation. Negative preferences in this context still represent preferences against a particular alternative. For questions of affirmative selection, as discussed above, a voter effectuates her negative preferences by voting against disfavored alternatives and trying to defeat the selection of disfavored alternatives. For questions of negative disqualification, as discussed below, a voter effectuates her negative preferences by voting in favor of disqualification for her disfavored alternatives. The framing of the question reverses the necessary direction of the vote, but the negative preference against the disfavored candidate remains the same across both questions.

The ancient Athenian institution of ostracism provides a vivid example of formal disqualification. Unlike any domestic political practice in the United States, Athenian ostracism allowed citizens to vote not their first preference for elected leadership, but rather their negative preference against particular candidates. Citizens voted by etching on pieces of pottery shards, or *ostraka*, and selected fellow citizens who were not to be placed into leadership, but instead barred from leadership.<sup>42</sup> “Winners” of the *ostrakophoria* elections were disqualified from holding office and actually exiled, or ostracized, for ten years. Ostracism was intended as a check on tyranny by deterring or exiling potential tyrants before they aggrandized a dangerous level of political power.<sup>43</sup> It simply decided which candidates were negatively disqualified from holding office; the subsequent process to decide which candidates would be affirmatively chosen for office was conducted separately and decided by affirmative votes.

Modern examples of negative disqualification against political candidates involve not prospective disqualification in the first instance, as could occur with ostracism, but retrospective rescission of a previous election. Familiar institutions such as recall, impeachment, and a vote of no confidence pose the question of removal from office of a candidate who had previously won election. A recall election allows the general electorate, if sufficient eligible voters agree to place the question on the ballot, to remove an elected official before the current term has expired.<sup>44</sup> Impeachment allows the legislature to decide whether to remove an officeholder, usually for

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42. The ostracism vote required prior authorization from both the Senate and the public assembly. See GEORGE GROTE, *A HISTORY OF GREECE: FROM THE TIME OF SOLON TO 403 B.C.* 94 (J.M. Mitchell & M.O.B. Caspari eds., Routledge 2001) (1907). The Senate judged whether the polity as a whole demanded the *ostrakophoria*, rather than determining the merits of the case against a particular person, and decided whether “the state of the Republic was menacing enough to call for such an exceptional measure.” *Id.*

43. See Antony E. Raubitschek, *The Origin of Ostracism*, 55 AM. J. ARCHAEOLOGY 221, 221–26 (1951) (discussing the political origins of Athenian ostracism).

44. See generally THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* (1989) (discussing the history of recall elections in the United States).

cause. Similarly, a parliamentary vote of no confidence against the governing coalition represents a negative legislative action to withdraw effective majority control of the government. Each institution incorporates negative preferences, not as part of the process of initial selection, but as a second-stage repeal of the initial selection itself. Voters can act on their negative preferences by voting for the negative disqualification, in the form of recall, impeachment, or withdrawal of confidence.

The framing of the voting decision as negative disqualification focuses squarely on negative preferences and allows voters to remove officials who previously won affirmative selection despite considerable negative preferences against them. In 2003, Gray Davis, then-Governor of California, was recalled from office when only 45 percent of California voters voted against Davis's recall, short of the 50 percent threshold necessary to defeat it.<sup>45</sup> A similar percentage of the electorate had voted to re-elect Davis the year before.<sup>46</sup> However, the 2002 election presented a choice between Davis and his opponent, Bill Simon, when Davis needed only to surpass Simon's vote total to win. The recall election posed the voting decision slightly differently, as a disapproval decision about Davis alone, and thus offered a clearer opportunity to express a negative preference against Davis. The 2002 election, focused on the electorate's affirmative preferences, featured a scattering of the anti-Davis vote across several candidates, with more than 10 percent of all votes going to minor party and independent candidates. By contrast, the recall election helped voters to pool their dissatisfaction with Davis in a bloc vote that removed Davis from office.

A vote on negative disqualification need only decide whether to act negatively, without necessarily deciding on an affirmative replacement for a recalled official or a displaced majority coalition. In other words, the vote on negative disqualification is disjoined from a new vote to choose a succeeding winner. This disjunction can result in what may appear to be quizzical outcomes. For instance, in Davis's recall, Californians voted first on whether to recall Davis, and then separately voted for a successor who would take office only if the recall was authorized. Under California law, a majority was required for Davis's recall, but only a plurality was needed to elect Davis's successor.<sup>47</sup> It was therefore possible that Davis could have been replaced by a successor who received less affirmative support than he did in the recall election. More voters could have unsuccessfully opposed recall, and therefore voted in favor of Davis's continued service, than voted for Davis's successor in office. Again, the disjunction between the first vote on negative disqualification and the second vote on affirmative selection,

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45. Vikram David Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 CAL. L. REV. 927, 947 (2004). See generally Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239 (2004) (discussing the 2003 California recall election).

46. See Amar, *supra* note 45, at 947–48.

47. See Garrett, *supra* note 45, at 260 (warning about this possibility under California law).

whereby two elections recognize different types of preferences, can lead to what appear to be conflicting results.

The actual practice of ostracism in ancient Athens also helps illustrate this tension. Ostracism barred from office, on the basis of negative preferences, some of the most popular men in Greece, because it effectively targeted high-status politicians, generals, and public figures regarded as the most influential and therefore potentially the most dangerous. During the fifth century B.C.E., Athens exiled a series of its most successful politicians and generals, including Themistocles, engineer of the Greek victory in the great Persian War.<sup>48</sup> As a safeguard against ambitious leaders, ostracism served as a check against unfiltered deference to affirmative preferences through popular election by disqualifying the very candidates who otherwise would have won election. Popular election and ostracism, by looking to different types of preferences, complemented each other to ensure that candidates who were not only popular, but also without significant disapproval from other segments of society, were selected for leadership.

In sum, there are many past, existing, and proposed practices, in the form of both affirmative selection and negative disqualification, that incorporate and effectuate negative preferences in voting. Thus far, however, there has been little scholarly exploration of the commonalities connecting these very different practices, executed across very different domains, as processes of recognizing negative preferences. More importantly, there is virtually no normative literature that systematically attempts to identify the costs, benefits, and tradeoffs from recognizing negative preferences across these different practices and across different contexts.

## II. VOTING AS VETO: THE COSTS, BENEFITS, AND TRADEOFFS OF RECOGNIZING NEGATIVE PREFERENCES

This Part begins the project of building a positive and normative account for what I call voting as veto—avoidance of least preferred alternatives through the recognition of negative preferences in voting. Voting based on negative preferences contributes to the avoidance of the electorate's least

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48. Lionel Pearson, *Party Politics and Free Speech in Democratic Athens*, 7 GREECE & ROME 41, 43–45 (1937). Of course, a system of negative preferences disadvantages candidates with strong negative preferences against them irrespective of what affirmative preferences they attract. For instance, Thucydides explains that Hyperbolus was ostracized “not from fear of his influence or position, but because he was a rascal and a disgrace to the city.” THUCYDIDES, *THE PELOPONNESIAN WAR* bk. 8, ch. 25 (Richard Crawley trans., Project Gutenberg 2004) available at [www.gutenberg.org/files/7142/7142.txt](http://www.gutenberg.org/files/7142/7142.txt). But see Charles Fuqua, *Possible Implications of the Ostracism of Hyperbolus*, 96 TRANSACTIONS & PROC. OF THE AM. PHILOLOGICAL ASS'N 165, 170–72 (1965). However, exercise of ostracism against unpopular candidates with virtually no affirmative support was unnecessary. Universally scorned men, though, presented no threat to be chosen for leadership by affirmative acclamation in the first place, so there was no need to block their selection by ostracism. For this reason, Plutarch reported that Athenians were “vexed to think that the ordinance of ostracism had been degraded by its application to so unworthy a man.” W. Robert Connor & John J. Keaney, *Theophrastus on the End of Ostracism*, 90 AM. J. PHILOLOGY 313, 313 (1969) (quoting 3 PLUTARCH'S LIVES 249 (T.E. Page et al. eds., Bernadotte Perrin trans., G.P. Putnam's Sons 1932) (1916))). After Hyperbolus's ostracism, the institution fell into disuse for lack of purpose.

preferred outcomes and invites a reconceptualization of voting as veto that has gone underappreciated under the dominant focus on affirmative preferences. I argue not that negative preferences should be privileged above, or instead of, affirmative preferences as a general matter. Instead, I offer the more limited contention that negative preferences may be valuable in ways that have not been fully explored and damaging in other ways that have not been systematically understood, depending on the circumstances. I begin to sketch an account of the costs and benefits of their recognition in voting across various domains where those costs and benefits become more or less salient.

I start by noting that it may seem counterintuitive, in a process of affirmative selection, to give greater leverage to voters' oppositional preferences, rather than focusing on their affirmative preferences. A main instrumental purpose of voting is the actual selection of an alternative or candidate as the culmination of collective decision making. Traditional plurality voting maps easily onto this purpose, because it is based most directly on voters' affirmative preferences in support of a particular alternative or candidate. A concern about greater formal recognition of negative preferences in voting is that negative preferences represent only opposition to alternatives or candidates. When voting is directed toward the selection of a winning choice, negative preferences may provide no affirmative answer. An initial puzzle, as a result, is why processes of collective choice look to negative preferences at all.

This Part considers the conditions under which greater recognition of negative preferences may be nonetheless attractive and describes several normative tradeoffs involved with greater recognition of negative preferences. As a consequence, this Part sketches what I hope will be not just the beginning of a positive account of negative preferences, but also a normative one. The costs and benefits of recognizing negative preferences give at least a partial positive account for why they are used, or not used, in voting practices. But just as important, the analysis begins to offer a better understanding about when it makes more or less sense to recognize negative preferences in voting as a normative matter. This Part surveys three sets of considerations—internal, expressive, and instrumental—that present tradeoffs regarding the greater recognition of negative preferences in voting.<sup>49</sup>

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49. A quick, necessary caveat is that the expression of negative preferences usually is embedded institutionally within a multilayered system for collective decision making that gives voice to different types of preferences at different stages of the process. That is, the choice between recognition of affirmative or negative preferences in voting is rarely a stark binary choice between recognition of one or the other, but instead more often a measured judgment about the balance between recognition of one or the other over the construction of a multilayered process. Nonetheless, this Part begins the project of setting out the important considerations for both types of decisions, whether it is across or within layers of decision making.

### A. *Internal Considerations: Voter Sovereignty and Negative Preferences*

A fundamental motivation behind voting procedures is to best track "the real level of support among the electorate."<sup>50</sup> The argument for proportional and semiproportional representation systems, for instance, is that they enable voters to express several degrees of preference and therefore "give[] a photographic image of public opinion that is as faithful a likeness as possible."<sup>51</sup> To the extent that such an approach carries normative weight, it is useful to mirror preferences not only in the affirmative direction, but to incorporate what can be salient negative preferences as well.

#### 1. *Satisficing Incomplete Preferences*

As a practical matter, individual preferences are regularly dominated by indifference or uncertainty such that negative preferences may be the only preferences worth registering formally. It is simply not the case that we always know what alternative among all possibilities we most prefer. Just as Joseph Schumpeter doubted that people "hold a definite and rational opinion about every individual question,"<sup>52</sup> people also do not necessarily have definite and rational opinions about what they most prefer over a great deal of choices. People are frequently unengaged, uninterested, and uninformed. Voters therefore often have not carefully considered and developed a rank-ordering of all available alternatives. Whatever the reason for uncertainty, the point is that people do not always know for sure what they affirmatively want. A traditional assumption of rational choice theory is that people have well-ordered, complete preferences over all possible alternatives, and that voting simply effectuates these preferences as they stand; but this assumption often fails in practice.<sup>53</sup> Instead, voters often have incomplete preferences.

For this reason, demanding voters' affirmative preferences does not always map most closely voters' subjective motivations in voting. Voters have in practice only imperfect information about many questions of voting and may develop their preference-ordering over alternatives only to the degree

50. Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 439 (1995) (reviewing LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994)).

51. Maurice Duverger, *Which Is the Best Electoral System?*, in CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES 31, 34 (Arend Lijphart & Bernard Grofman eds., 1984); see also Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 Hous. L. REV. 1119, 1188 (1998) (noting that "the wider spread of views obtained is one of the main advantages of proportional representation" such that the representative body "more accurately mirrors the true views of an even larger part of the electorate").

52. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (3d ed. 1950).

53. See, e.g., Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2144 (1990) ("[T]he assumption of social choice theory that citizens arrive at the process of democratic decision making with their preferences [is] already well-ordered: the central task of democracy is merely to aggregate already rationally-ordered individual preferences into a rationally-ordered collective preference.").

that their imperfect information permits. To develop a more complete ordering, they would need to acquire more information and invest additional time and resources to reach conclusions about the relative attractiveness of the available alternatives. Given that most questions of voting are not personal priorities for voters, at least relative to the many other demands in their lives, it is no surprise that the costs of information are regularly great enough that voters are rationally ignorant about many voting questions. With respect to politics, for instance, voter ignorance is "a central part of political science's intellectual heritage."<sup>54</sup> The average voter does not judge learning more about politics and public policy as worth the necessary time and effort given the many other pressing demands of life.<sup>55</sup> This calculation reflects the costliness of information as well as a measure of complacency about the status quo. Voting based on negative preferences thus may be useful particularly when there is incomplete ordering of affirmative preferences and negative preferences happen to be more subjectively certain.

Indeed, there is evidence from psychology that, for many decision-making contexts, people are happier when they are allowed to "satisfice" and simply choose an acceptable alternative from a limited set of eligible choices, rather than being asked to "maximize" and select the most attractive alternative from a larger set of choices.<sup>56</sup> That is, at least for certain decisions, people may be content not to invest greater thought and resources into developing articulated preferences beyond a basic negative preference that permits a simplified satisficing decision. In other words, for some but not all voting decisions, voting based on negative preferences best respects voters' calculation about the relative importance of the voting decision and the costs of developing more complete affirmative preferences.

This economizing approach to voting is more evident for political candidate elections on the bottom of the ballot than for those at the top. Although voters know more about candidates running for national and statewide office, they regularly know almost nothing about lesser state and local races. When provided voting heuristics such as party identification, voters rely heavily upon them to decide their vote for these positions.<sup>57</sup> In the absence of heuristics, most prominently for nonpartisan judicial offices, voters may have no

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54. Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 63 (1994). See generally BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (2007); MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996).

55. E.g., RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 174 (1999) (arguing that personal engagement with politics cannot be critically important "unless most people are to have no life or unless politics is disastrously intrusive").

56. E.g., Jane Beattie et al., *Psychological Determinants of Decision Attitude*, 7 J. BEHAV. DECISION MAKING 129 (1994); Sheena S. Iyengar & Mark R. Lepper, *When Choice is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY & SOC. PSYCHOL. 995 (2000); Barry Schwartz et al., *Maximizing Versus Satisficing: Happiness Is a Matter of Choice*, 83 J. PERSONALITY & SOC. PSYCHOL. 1178 (2002).

57. See David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419 (2007).



meaningful affirmative preferences on which to vote. As a result, voters seem to approach most of these low-intensity races as effectively a negative decision about whether to veto the incumbent's re-election only in the exceptional cases when judges "stray substantially from voters' preferences"<sup>58</sup> or err in the "rare sensational case."<sup>59</sup> In the absence of such indication, voters simply do not register a vote for these races or re-elect the incumbent.<sup>60</sup>

The case of low-intensity retention elections offers insight into certain conditions when negative preferences may be more certain to voters than affirmative preferences. First, voters have better information about their negative preferences in these elections than their affirmative ones. Monitoring of judicial performance is difficult for most citizens, who lack information about judicial decisions and activity. But they have better information about certain outrageous conduct by particular judges or certain extraordinary judicial decisions that attract media coverage. Voters believe that they have sufficient information to develop clear negative preferences, which they credit, even if they lack richer information to form affirmative preferences more generally about the wider field of candidates.

Second, the limited civic significance of these elections, particularly relative to the top of the ballot, does not require an affirmative public mandate that exceeds what a satisficing approach to voting can provide. Realistic expectations regarding the civic importance of these elections, and the need for a richer experience of democratic engagement and expression, are reasonably low. We do not expect public attention to these elections, nor do these elections tend to be invested with great aspirational moment. These elections, in sum, generally do not require the type of collective deliberation, mobilization, and decision that makes normatively inopportune the formal recognition of incomplete, mainly negative preferences, on the basis of minimal information. The absence of a thicker affirmative statement of democratic direction through the election, as opposed to a simple veto decision, is not disappointing or costly.

Third, on a related note that I develop later, recognition of negative preferences here makes particular sense if there is institutional value in more moderate candidates and the exclusion of what voters would see as outlier candidates. There may be institutional preference for moderate judges who do not attract the negative attention that provokes an electoral veto. Voters may be satisfied with elections that eliminate whom they see as outlier candidates and encourage judges to remain moderate, uncontroversial actors, even if voters have uncertain affirmative preferences about what constitutes an ideal judge.

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58. Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 635 (2009).

59. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 297 (2008).

60. The traditional pattern of high retention rates in judicial elections may be changing with an increase in campaign spending that is making these races more like elections for nonjudicial positions. *See id.* at 300.

Under a conception of voting as veto, the fact that voters do not develop nor act on affirmative preferences is therefore not necessarily troubling for these races. Voters merely go along with the status quo in the absence of any ready information to veto the status quo. The cost of information is high, and voters judge the potential payoff as too low. Voters do not consistently cultivate and base their votes for these down-ballot races on well-developed affirmative preferences, but instead retain a residual veto power whose limited decision costs for exercise better matches the voters' desired investment for those races.

## 2. *Salient Negative Preferences*

Even when voters possess both affirmative and negative preferences, voters may care sufficiently about the effectuation of their negative preferences to justify formal recognition of negative preferences through voting. Simply put, for particular questions or sets of questions, voters may have salient negative preferences that they want formally registered in the voting process. The usual practice of traditional plurality voting, over a multicandidate field, allows voters to express only their affirmative preference without any outlet to record a negative preference against their least preferred candidate. But voters may legitimately care as much or more about the avoidance of their least preferred outcomes than the selection of their most preferred outcomes. Voting procedures can ensure that voters have the opportunity to record their negative preferences more directly through voting, and thus increase the likelihood that their least preferred outcomes do not occur as an instrumental matter.

The point does not depend on an interpersonal comparison of utility between an intense minority and an apathetic majority.<sup>61</sup> The relevant comparison is not at all an interpersonal comparison between negative preferences of one group and affirmative preferences of another. Instead, the electorate as a whole, in voters' intrapersonal comparisons of their negative and affirmative preferences, may hold most dearly their negative preferences over their affirmative ones. Voters may have in effect meta-preferences about which preferences should be secured at the margin, or at least the degree to which negative preferences should be incorporated formally into voting. Negative preferences may demand more attention when, as a system-level judgment about what voters care about, the relevant electorate as a whole desires to effectuate its preference-ordering from the least preferred upward, as well as, or rather than, from the most preferred downward. Under these circumstances, recognition of negative preferences in voting serves an instrumental interest in giving voice to voters' negative preferences.

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61. See, e.g., Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 463–66 (1998) (making such comparison in the context of direct democracy voting); see also Douglas W. Rae, *The Limits of Consensual Decision*, 69 AM. POL. SCI. REV. 1270, 1274–75 (1975) (presenting the standard criticism of this approach).

Salient negative preferences in voting are hardly unfamiliar. What political scientists call "anticandidate voting" is familiar in candidate elections with reference to the voters' underlying motivation for their vote choice—voting driven by antipathy for a disfavored candidate rather than positive support for that candidate's opponent.<sup>62</sup> To give a prominent example, voters were asked before the 1980 presidential election whether they decided to vote for their favored candidate "mainly because you liked him, or because you didn't like the others?" Only 54 percent said they were motivated mainly by an affirmative liking for their candidate, while 46 percent reported that they were motivated mainly by their dislike for their candidate's opponent.<sup>63</sup> In the next presidential election in 1984, 48 percent of those voting for Walter Mondale reported that their vote was motivated mainly by dislike for Mondale's opponent, incumbent President Ronald Reagan.<sup>64</sup> The binary choice between Reagan and his Democratic opponent in each election made it easy for voters to effectuate directly any negative preference against Reagan.

When voting involves selection beyond two alternatives, formal recognition of negative preferences may be necessary to allow the effectuation of negative preferences. Traditional plurality voting may enable "the candidate who, with only narrow minority support, succeeds because more acceptable candidates split the remaining plurality vote."<sup>65</sup> In the 2000 presidential election, Green Party candidate Ralph Nader swayed meaningful numbers of liberal voters and presented voters with a three-candidate race among Nader, Democrat Al Gore, and Republican George W. Bush.<sup>66</sup> Nader, as recounted elsewhere, split the liberal vote and ensured Bush's victory in the decisive state of Florida.<sup>67</sup> Under a traditional system of voting directed toward af-

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62. See Lee Sigelman & Michael M. Gant, *Anticandidate Voting in the 1984 Presidential Election*, 11 POL. BEHAV. 81, 82 (1989) (describing "anticandidate voting").

63. See Michael M. Gant & Lee Sigelman, *Anti-Candidate Voting in Presidential Elections*, 18 POLITY 329, 333 (1985). Anticandidate voting is also referred to as "negative voting" in the literature, see, e.g., Kernell, *supra* note 28, but I decline to use this phrase in reference to anticandidate voting and instead use the term "negative voting" to describe a procedure of voting on negative preferences in Section I.B.

64. Sigelman & Gant, *supra* note 62, at 85. By contrast, only 15 percent of Reagan voters reported that their vote was motivated mainly by dislike for Mondale. *Id.* The 1984 presidential election thus appeared to be mainly a referendum on Reagan, with Reagan voters motivated by their approval of Reagan and Mondale voters motivated by their disapproval of Reagan.

65. Steven J. Brams, *Run Jesse Jackson, But Under Approval Voting*, 16 PS: POL. SCI. & POL. 711, 712 (1983).

66. See, e.g., Christopher Wlezien, *On Forecasting the Presidential Vote*, 34 PS: POL. SCI. & POL. 25, 28 (2001) (reporting that 47 percent of Nader voters said they would have voted for Gore otherwise, and 21 percent said that they would have voted for Bush, with 30 percent saying that they would have abstained).

67. In a system that prioritizes negative preferences, such as negative voting, Bush would not have been the winner in Florida or elected president. See generally POUNDSTONE, *supra* note 25, at 76–91. A less known but more studied example of vote splitting was the 1970 New York Senate election in which Conservative Party candidate James R. Buckley defeated Republican Charles Goodell and Democrat Richard Ottinger. See Steven J. Brams & Peter C. Fishburn, *Approval Voting*, 72 AM. POL. SCI. REV. 831, 832 (1978); Irving Roshwalb & Leonard Resnicoff, *The Impact of Endorsements and Published Polls on the 1970 New York Senatorial Election*, 35 PUB. OPINION Q. 410

firmative preferences, Bush won the election even though he appeared to be the least favored choice for a majority of voters.

The tension between affirmative and negative preferences is exaggerated further in at least one sense under systems of proportional or semiproportional representation. For elections to representative bodies, such systems guarantee seats based on a threshold percentage of the vote, assigned across a multimember jurisdiction. Depending on the applicable threshold of exclusion, candidates and parties with narrow affirmative support can win seats despite being quite unpopular with many more voters.<sup>68</sup> As a relative matter, proportional and semiproportional representation therefore encourage the election of more extreme candidates with broad negative opposition against them. Absent the usual binary choice of traditional plurality elections, voters under proportional and semiproportional systems lose the ability to vote directly against disfavored parties and candidates. A basic tradeoff, as a result, is that proportional representation provides a more fine-grained mirror of the electorate's preferences in the affirmative direction, granting candidates and parties a greater measure of representation for being most preferred by a smaller segment of voters, but it does so without regard for voters' negative preferences and thus awards seats to candidates even if they are deeply unpopular with a majority of the entire electorate.

Formal recognition of negative preferences can enable a majority, or any voting faction, to express not simply degrees of affirmative preference, but act on a distinct negative preference against disfavored alternatives among a large eligible field. Voters motivated by negative preference can strike directly against their least and lesser preferred alternatives, rather than act against them only indirectly by favoring one of the competition. Two examples discussed earlier in the Article illustrate this point—David Duke's defeat in a 1991 runoff election and the 2003 recall of Gray Davis. Under Louisiana's nonpartisan primary, African-American and liberal voters could not vote directly against David Duke, who finished second overall in a multicandidate field; these voters split their vote across several candidates. But in the subsequent runoff election, when presented with a binary choice, those voters buried Duke's prospects by voting against him in an easily coordinated bloc opposition. Similarly, Gray Davis managed to win re-election as California's governor in 2002 with a winning plurality of the vote against an uninspiring Republican opponent, with more than 10 percent of the total vote going to minor candidates. But when presented with a binary choice just a year later, framed in the negative—whether to recall Davis as

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(1971); William C. Stratmann, *The Calculus of Rational Choice*, 18 PUB. CHOICE 93, 95–105 (1974). Buckley appeared to be the least preferred choice for a majority of voters but still received 39 percent of the vote under plurality voting and won the election. Ottinger was the likely Condorcet winner, but he and Goodell split the majority vote, leaving Buckley, a Conservative Party candidate in a liberal New York, to win narrowly based on a minority core of support. Brams & Fishburn, *supra*, at 832; Stratmann, *supra*, at 98–99.

68. See, e.g., Dan S. Felsenthal, *Proportional Representation Under Three Voting Procedures: An Israeli Study*, 14 POL. BEHAV. 159, 185–87 (1992) (showing that extreme parties and candidates succeed under proportional representation at least in part because voters do not possess a capacity for negative voting that voters otherwise would exercise against them).

governor—California voters with negative preferences against Davis easily pooled their opposition to him and voted against him.

Recognition of negative preferences not only allows voters to effectuate more directly what may be their most salient voting preference, it also may thereby broaden the appeal of voting and engage new voters who otherwise would not participate. Recognition of negative preferences provides outlet to salient negative preferences that are traditionally neglected and thus invites voters with mainly negative preferences into the process of collective decision making. Presented with the opportunity to block the election of a former Ku Klux Klan official as their state's governor, African-American voters in Louisiana turned out in record numbers to vote against Duke in the runoff election after weak turnout in the preceding nonpartisan primary. Gray Davis won a 2002 gubernatorial election marked by low turnout and little excitement about Davis. However, given the opportunity to disqualify Davis, many more voters turned out for the 2003 recall election, in an off-year special election.<sup>69</sup> In other words, the opportunity to vote negatively permits voters to reconceptualize what can be accomplished through voting and changes how potential voters think about their efficacy in ways that may invest them in greater participation.

The salience of negative preferences within a particular voting context depends in part on the social-payoff structure presented. The importance of avoiding the least preferred outcome relative to the importance of selecting the most preferred outcome is contingent on how much better the most preferred alternative is relative to close alternatives, and how much worse the least preferred alternative is relative to close alternatives. Voters should feel more strongly about their negative preference to avoid the least preferred outcome when most of the eligible alternatives tend, at least in their view, to be similar in attractiveness, with only negative outliers to be avoided.<sup>70</sup>

Returning to the example of retention elections for judges, voters appear there to care little about picking the best judge and more about avoiding the worst ones. Although the objective difference between the best judges and lesser or average judges may be great in terms of aptitude, skill, and judgment, voters may not perceive those differences as particularly meaningful or valuable to them. By contrast, voters may subjectively care more about

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69. Of course, turnout for the 2003 recall election was boosted by the entry of the popular Arnold Schwarzenegger as a replacement candidate, as well as the publicity surrounding the 135-candidate field.

70. In other circumstances, it is more important to maximize the likelihood of selecting the best possible alternative. For instance, fan voting for *American Idol* may correctly be oriented toward choosing the best contestant on the basis of affirmative preferences. It appears that quality differences among pop singers, at least as measured by commercial popularity, are largely insignificant except for the staggering successes of a small number of superstars. *E.g.*, Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845, 846 (1981) (arguing that certain labor markets, including pop music, contain little diversity in relevant quality, punctuated by a small number of "superstars" who enjoy disproportionate success). Considering the market dynamics of pop stardom, *American Idol* rightly may focus on choosing the single most promising contestant, rather than satisficing on the basis of negative preferences. Many thanks to John Matsusaka for this insight.

vetoing bad judges who seem to them measurably worse than the average judges. Voters reasonably want to focus on effectuation of their negative preferences when presented with such a payoff structure. Voters are content to satisfice in terms of outcomes, rather than maximizing for the best possible outcome, because it secures a higher payoff over the range of cases to focus on the elimination of the negative outliers.

Voting procedures that permit the selective removal of candidates, such as recall, impeachment, or ostracism, are tailored to operate only in situations where a similar social-payoff structure is presented, and negative preferences therefore are particularly salient. These procedures call for a vote only when sufficient numbers of voters judge the particular candidate in question to be an exceptionally unfavorable outlier in the negative direction. In other words, these procedures operate somewhat outside of everyday practice but permit a veto vote when a particular candidate emerges who is sufficiently less preferred than many other candidates. They do not require the *ex ante* identification of voting contexts where the social-payoff structure is typically such that negative preferences will be particularly salient, but instead they are responsive to the periodic occurrence of social-payoff structures in which negative preferences turn out to be salient and important to effectuate. The recall election is not a regular event, but it provides an occasional outlet for the disqualification and removal of candidates when certain ones become exceptionally unpopular.

## *B. Expressive Considerations and the Problem of Ugly Negativity*

### *1. Expressive Considerations*

When negative preferences are salient, voters have expressive interests in articulating those negative preferences more clearly through their voting. As discussed in Part I, traditional voting tends to obscure the influence of negative preferences. But if voting is restructured with greater formal focus on negative preferences, the influence of those negative preferences can become easier to see. When allowed to act more directly on negative preferences, voters are able to express their negative preferences more clearly as well.

Voting is an inherently expressive activity. Aside from the instrumental purpose of selecting an election winner, voting is an opportunity for voters to express themselves and their views about a concrete question put to collective judgment. The act of voting is a constitutive exercise that communicates the voters' individual preferences and gives clear expression to their personal decisions. Although voting may occur anonymously, it takes on a public dimension of expression when it is not anonymous.<sup>71</sup> Voters announce their decision to their peers and affected constituencies. They

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71. Although the secret ballot is nearly universal practice in the United States for political elections, it is worth noting that much voting is done publicly. To take the most salient example, legislatures and formal decision-making bodies conduct roll-call votes on the public record.

take a visible position, with collective consequences, that helps define them within the community and exposes them for public scrutiny.

Formal recognition of negative preferences allows voters to express what may be their most meaningful preferences through voting. Voters are able to act directly and concretely on negative preferences that can be as equally self-defining and compelling as affirmative preferences. When voters are motivated by negative preferences, formal recognition of negative preferences allows voters to communicate more precisely their positions and judgments. It provides a means for expression of opposition at the moment of collective decision. Voters can define themselves against disfavored candidates, proposals, and outcomes by voting expressly against them. They define themselves as opponents, not just as supporters of a different alternative, and they can give voice more clearly to specify their opposition against particular alternatives in the process of collective decision making.<sup>72</sup>

Formal recognition of negative preferences gives institutional cognizance to negative preferences. By opening formal channels for the voting of negative preferences, voting procedures acknowledge the influence and relevance of negative preferences within a voting context. They recognize and carve out an institutional space for the expression of negative preferences that may, depending on the circumstances, imbue negative preferences with legitimacy as a subjective motivation in relation to the voting question.<sup>73</sup> Voters can be motivated by negative preferences not just internally, but they can act openly on them and have those preferences carry formal effect. These voters can identify themselves as oppositional—not as subversively strategic voters who vote insincerely for instrumental purposes, but rather with the respect of institutional accounting that their negative preferences are deserving of recognition.<sup>74</sup>

When there is intense minority opposition to the majority's affirmative preference, recognition of negative preferences through voting can serve the functions and values of dissent.<sup>75</sup> It operates within the process of collective decision making, rather than in ex post opposition to the outcome of collective decision making. As a result, formal recognition of negative preferences

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72. The Supreme Court has recognized at the collective level, for political parties, a negative right of disassociation. See generally Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131 (2005); Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750 (2001). The Court generally permits the major parties to exclude candidates and voters from their candidate nomination process on the grounds that they have a First Amendment right not to associate with those who share different political beliefs. E.g., *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (“[A] corollary of the right to associate is the right not to associate.”).

73. See CHARLES R. BEITZ, *POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY* 92 (1989) (noting the importance “of the formal properties of political procedures in their expressive or symbolic function rather than in their consequences for legislation and policy”).

74. See DENNIS F. THOMPSON, *JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES* 22–25 (2002) (arguing that elections should offer opportunity to express minority dissent as a principle of equal respect).

75. See generally Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1749 (2005) (arguing that dissent is valuable for its contribution to the marketplace of ideas, engagement with self-governance, and facilitation of self-expression).

in voting gives greater institutional leverage to dissenters. It enables dissenters to influence the likelihood of a collective decision in the first place, by voting against its approval or selection, and it enables dissenters to air their opposition in a highly public and salient manner, at the moment of collective decision when dissent may be most influential.

Finally, formal recognition of negative preferences opens space for the expression of comprehensive protest in voting that otherwise may be unavailable. For many voters, a negative preference against all available candidates, the current state of government, or other instantiations of the status quo, is the meaningful preference to be expressed through voting. The expressive motivation is neither an affirmative preference for any candidate, nor a negative preference against any particular candidate, but instead a different form of negative preference—one against all candidates compared to some ideal currently unavailable to voters. Dissatisfaction with all available candidates may be expressed only through a “protest” vote for an obviously nonviable candidate, if there is one.<sup>76</sup> Voters who take the time and effort to actually vote, but then cast a protest vote with no instrumental value, may effectively signal the depth of their disaffection. American voters typically do not have the option of explicitly voting against candidates, but Nevada law requires that every ballot for statewide office provide the option of voting for “None of these candidates.”<sup>77</sup> Ralph Nader, the regular Green Party presidential nominee, also has long campaigned for a “none of the above” option for voters.<sup>78</sup>

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76. A disaffected voter might alternatively attempt to express dissatisfaction by refusing to vote and abstain entirely, but abstention sends an ambiguous signal at best. Many registered voters abstain, or simply fail to vote, for all types of reasons unrelated to protest against the available candidates. In any event, whether the voter intends a protest vote or angry abstention, communication of negative preference against candidates can be only indirect under traditional voting because it must be rendered as a vote (or nonvote) in terms of affirmative preference.

77. NEV. REV. STAT. ANN. § 293.269 (LexisNexis 2008). The eligible candidate who receives the most votes still wins office, regardless of the number of votes cast for “None of these candidates,” *id.*, but the Nevada option provides an official method of expressing protest and voting negatively. The number of votes for “None of these candidates” is typically small but occasionally nontrivial, including first place finishes in several statewide primary contests. See Robert T. Garrett, *Prop. 23 Backers Tout ‘None of the Above’: Critics Call the Ballot Measure a Meaningless Gesture*, PRESS ENTERPRISE (Riverside, Cal.), Feb. 14, 2000, at A1; Clayton Jones, *A Choice for Those Who Can’t Decide: No One*, CHRISTIAN SCI. MONITOR, Oct. 21, 1980, at 6; Nita Lelyveld, *A Push for ‘None of the Above’ on Ballots: A Calif. Initiative Would Give Voters a Way to Voice Disapproval of Candidates*, PHILA. INQUIRER, Feb. 20, 2000, at A3; Brendan Riley, *Nevada’s ‘None of These Candidates’ Makes Strong Showing*, ASSOCIATED PRESS, Nov. 9, 2006; see also Ellen Goodman, Op-Ed., *The Perennial Candidate*, BOSTON GLOBE, Sept. 23, 1990, at A7 (noting that “None of These Candidates” received more votes than Ted Kennedy during his 1980 presidential primary race in Nevada).

Other states have considered similar provisions. *E.g.*, Fred Brown, Op-Ed., *Who Wants to Be Second to None?*, DENVER POST, Feb. 19, 1997, at B7 (describing a proposal in Colorado); Lelyveld, *supra* (describing efforts to enact a similar provision in California through the initiative process); *Voters May Get to Pick ‘None of These Candidates’*, COLUMBUS DISPATCH, May 13, 1995, at 5E (describing proposed legislation in Ohio).

78. See Nader: *Protest Vote Is Needed*, CHI. SUN-TIMES, July 28, 1996, at 25; Phil Rooney, *Nader Criticizes 2-Party System*, LINCOLN J. STAR (Lincoln, Neb.), July 17, 2000, at B3; Niki Sullivan, *If not Him, ‘None of the Above’*, NEWS TRIB. (Tacoma, Wash.), May 15, 2008, at A1; David Von



Ironically, Russian voters had long enjoyed an even more robust option of voting "Against All" until it was recently ended. Surprisingly, even for single-candidate elections in the Soviet Union, a consistent 1 percent of voters registered protest by crossing out the name of the lone candidate on the ballot.<sup>79</sup> At least one commentator observed that the Soviet leadership recognized the value of this limited outlet for dissent and tolerated this low level of protest voting.<sup>80</sup> A form of this practice carried over to democratic elections in Russia after the fall of the Soviet Union. The candidate who received the most votes in a race won office in early Russian elections only if he or she received more votes than all other voting options on the ballot, including "Against All."<sup>81</sup> A practical problem arose when no candidate received more votes than "Against All"—the election yielded no victor, and legislative seats simply went unfilled.<sup>82</sup>

Such provisions for explicit protest voting open up space for the expression of negative preferences in a democratically visible fashion. Voters are able to record their protest publicly through voting, rather than ambiguously through nonparticipation or abstention. Their protest voting serves both expressive and informational interests. Unhappy voters satisfy their individual interests in giving voice to their negative preferences through active participation. Their protest votes also inform other voters and the candidates about what may be growing discontents that otherwise might go unnoticed longer, with less opportunity for remedy, without clear public channels for protest. Negative preferences matter to voters, have collective consequences, and thus can be useful to express views for public recognition as part of a healthy electoral process of accountability and accommodation.

## 2. Ugly Preferences

Even when negative preferences are salient for voters, it is not necessarily advisable from a normative standpoint to recognize more directly in voting the "ugly" negative preferences that sometimes motivate voters; these preferences are socially disruptive, divisive, or otherwise morally question-

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Drehle, *Nader, the Non-Candidate, Presses His 'None of the Above' Campaign*, WASH. POST, Feb. 16, 1992, at A33.

The potential popularity of a "none of the above" option on the ballot is underscored by the attempt by one candidate, ultimately unsuccessful, to appear on the ballot under her new legal name, "None of the above." See *None of the Above v. Hardy*, 377 So. 2d 385 (La. Ct. App. 1979).

79. See Jerome M. Gilson, *Soviet Elections as a Measure of Dissent: The Missing One Percent*, 62 AM. POL. SCI. REV. 814 (1968).

80. See Howard R. Swearer, *The Functions of Soviet Local Elections*, 5 MIDWEST J. POL. SCI. 129, 143-44 (1961).

81. See generally Derek S. Hutcheson, *Disengaged or Disenchanted? The Vote 'Against All' in Post-Communist Russia*, 20 J. COMMUNIST STUD. & TRANSITION POL. 98 (2004) (describing the "Against All" option and discussing its political consequences); Hans Oversloot et al., *Against All: Exploring the Vote 'Against All' in the Russian Federation's Electoral System*, 18 J. COMMUNIST STUD. & TRANSITION POL. 31 (2002) (same).

82. Hutcheson, *supra* note 81, at 99-101; see also Ferguson & Lowi, *supra* note 25, at 278 (acknowledging that allowing voters to vote against all "provides for no sensible procedure in the unlikely case that 'none of the above' actually wins").

able. Structuring voting procedures to give greater recognition to negative preferences also may channel voters toward the greater development and expression of negative preferences instead of affirmative preferences. In other words, negative preferences are not entirely exogenous. They may develop in response to the structure of choices presented to voters.<sup>83</sup> An increased focus on the negative, and voters' negative preferences, can be quite undesirable as a normative matter.

The bare fact that negative preferences are salient therefore does not cement a normative case for their public recognition in voting. On one hand, the recognition of ugly negative preferences can be helpful if it is necessary to smoke them out. When votes are publicly known and based on negative preferences, voters may abandon their illicit negative preferences as bases for voting to avoid sanction in ways that may ultimately be healthy. Formal recognition of negative preferences may therefore force voters to "launder" their revealed preferences when their preferences are ugly and socially shameful.<sup>84</sup> On the other hand, highlighting negative preferences may not force voters to launder ugly preferences but instead encourage them to flaunt their preferences and provoke their opponents. Particularly in the context of candidate elections in parts of the United States, recognition of negative preferences may harmfully underscore deep disagreement and ultimately reinforce entrenched patterns of political division, perhaps most harmfully in the case of racially polarized voting.<sup>85</sup> In short, highlighting negative preferences is hardly a worthwhile goal across the board, across all domains, and irrespective of the negative preference to be expressed.

Indeed, it may regularly be socially disruptive to encourage a greater focus on negative preferences by giving them greater recognition. If so, the way that formal recognition of a particular type of preference highlights those preferences may reveal why traditional voting, focusing on affirmative preferences, is so prevalent. Part of the reason that traditional voting seems ubiquitous is that it is used in most contexts where it would be socially disruptive to highlight negative preferences. Forms of negative voting require voters to identify expressly their view about the least attractive option in a way that may be unduly upsetting among interested parties, or otherwise cast a negative tone on the voting process. It may explain why *American Idol* asks voters to vote for their favorite, rather than vote against their least favorite. The show hopes to generate affirmative excitement among fans and encourage individual fan bases for the performers, rather than asking

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83. See BEITZ, *supra* note 73, at 172 (acknowledging that the formation of preferences is at least partially endogenous); Mark Kelman, *Defining the Antidiscrimination Norm to Defend It*, 43 SAN DIEGO L. REV. 735, 771 (2006) (arguing that law should refuse recognition of certain negative preferences to avoid empowering and encouraging socially undesirable tastes).

84. See generally Robert E. Goodin, *Laundering preferences*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 75, 75–77 (Jon Elster & Aanund Hylland eds., 1986).

85. See generally Richard Pildes & Richard Niemi, *Expressive Harms*, "Bizarre Districts" and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 MICH. L. REV. 483 (1993) (identifying expressive harms from the visible recognition of racially polarized voting through majority-minority districting).

viewers instead to focus on which performer is the worst on the show. Similar understandings may undergird the presumptive use of traditional voting in most decision-making contexts where voting represents a form of evaluation and sends social signals about the worthiness of the eligible alternatives.

Voting in political elections may be particularly sensitive to ugly negativity. Political elections are more than means for counting standing preferences, but a generative, participatory process for fostering collective affiliation and civic efficacy. Political elections, at their best, ought to inspire voters about the choices they have collectively authorized and about their future prospects. It may be important to encourage voters toward these affirmative preferences even when voters in fact possess mainly negative preferences. This affirmative aspiration for political voting is implicit in the notion of "voting for the lesser evil," because the idea expresses disappointment about settling for the least bad candidate rather than electing a particularly good one. The voter aspires to vote for what she prefers most, in an ideal world, not simply to settle for the best of several lousy alternatives, none of which she necessarily much likes. Indeed, research suggests that the process of voting itself invests voters with a sense of commitment to the fairness of the process and greater support for the winning candidates.<sup>86</sup> Elections, in other words, are legitimating institutions that build up public hope for the incoming winners. To the degree that voting is restructured to focus voters more squarely on negative preferences, it may come at a painful cost to these aspirational qualities of elections, such as they are. Voters may be demobilized by a process more focused on negative preferences, much as voters often appear discouraged by negative campaign advertising. These costs to voting as a collective process would be prohibitive under a deliberative or participatory vision of politics, focused more on the civically generative aspects of voting and less on the individual mapping of preferences to votes.

Negative campaign advertising in political elections demonstrates both the potential importance of negative preferences in voting and their potential distastefulness. Negative advertising builds on the belief that "it is not always the most liked candidate, but more the least disliked candidate who wins an election."<sup>87</sup> Negative advertising caters to voters' salient negative preferences by depicting in vivid terms the negative consequences that may result from electing the opposing candidate. They encourage voters to think in terms of their negative preferences by channeling attention toward negative outcomes to be avoided. Consistent with findings in psychology that

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86. Richard Nadeau & André Blais, *Accepting the Election Outcome: The Effect of Participation on Losers' Consent*, 23 BRIT. J. POL. SCI. 553 (1993).

87. L. Patrick Devlin, *Political Commercials in American Presidential Elections*, in *POLITICAL ADVERTISING IN WESTERN DEMOCRACIES* 186, 197 (Lynda Lee Kaid & Christina Holtz-Bacha eds., 1995).

people place more importance on negative information,<sup>88</sup> viewers find more salient and pay more attention to advertisements by a candidate that criticize her opponent than positive advertisements that tout her own achievements.<sup>89</sup>

However, negative advertising tends to disillusion many voters as well. Empirical research finds that negative advertising tends to suppress voter turnout among independent voters who are not committed to a candidate.<sup>90</sup> Negative advertising appears to feed voter cynicism by decreasing confidence in the election process and estimates of political self-efficacy.<sup>91</sup> Although negative advertising tends to be effective in influencing voters' choices, negative advertising appears to work almost exclusively by increasing disliking for the opponent and not at all by increasing liking for the candidate sponsoring the ad.<sup>92</sup> If anything, negative advertising may work despite the fact that it also can increase the viewers' disliking for the sponsor as well.<sup>93</sup> In other words, negative advertising demonstrates the influence and salience of negative preferences in politics, but it also suggests the risks that politics too oriented toward negative preferences may disaffect voters and may undermine confidence in the process.

### 3. Weighing Expressive Considerations Within Institutional Context

As a general matter, the very familiar example of candidate elections may be misleading here as a paradigmatic model. The usual binary choice between the major parties in many American candidate elections already offers greater opportunity in the run of cases to vote on the basis of negative preferences in the form of anticandidate voting. A voter can act directly against one candidate by voting for her opponent, at least when there are only two viable candidates. So, the proposition of greater recognition of negative preferences may bring little added value and instead raise the

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88. See, e.g., Shelley E. Taylor & Susan T. Fiske, *Salience, Attention, and Attribution: Top of the Head Phenomena*, in 11 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 250 (Leonard Berkowitz ed., 1978); Fiske, *supra* note 21; Hamilton & Zanna, *supra* note 19; Pratto & John, *supra* note 20; John J. Skowronski & Donal E. Carlston, *Negativity and Extremity Biases in Impression Formation: A Review of Explanations*, 105 *PSYCHOL. BULL.* 131 (1989).

89. See Paul Freedman & Ken Goldstein, *Measuring Media Exposure and the Effects of Negative Campaign Ads*, 43 *AM. J. POL. SCI.* 1189 (1999); Paul S. Martin, *Inside the Black Box of Negative Campaign Effects: Three Reasons Why Negative Campaigns Mobilize*, 25 *POL. PSYCHOL.* 545 (2004); Michael F. Meffert et al., *The Effects of Negativity and Motivated Information Processing During a Political Campaign*, 56 *J. COMM'N* 27, 44 (2006).

90. See STEPHEN ANSOLABEHRE & SHANTO IYENGAR, *GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE* (1995).

91. See *id.* at 199–201.

92. See, e.g., Michael Basil et al., *Positive and Negative Political Advertising: Effectiveness of Ads and Perceptions of Candidates*, in 1 *TELEVISION AND POLITICAL ADVERTISING* 245 (Frank Biocca ed., 1991); Kim Leslie Fridkin & Patrick J. Kenney, *Do Negative Messages Work? The Impact of Negativity on Citizens' Evaluations of Candidates*, 32 *AM. POL. RES.* 570, 580–82 (2004) (finding that “mudslinging” can reduce citizens' evaluations of the sponsors of such advertisements).

93. See, e.g., Basil et al., *supra* note 92, at 256–59 (finding negative advertisements “turn voters off” to both candidates); Fridkin & Kenney, *supra* note 92, at 583–84; Gina M. Garramone, *Voter Response to Negative Political Ads*, 61 *JOURNALISM Q.* 250 (1984).

unattractive specter of an exaggerated turn to more negative campaigning and political cynicism than already predominates.<sup>94</sup> Campaigning, already too negative in many people's eyes, might become even more negative in efforts to appeal to voters' negative preferences.

However, today's candidate elections also help identify some potential benefits of recognizing negative preferences, and offer caution about reforms designed to reduce campaign negativity. Advocates of proportional or semiproportional representation sometimes base claims on an expected reduction in negative campaigning, as voters have reduced opportunities to vote squarely against candidates.<sup>95</sup> But voters in plurality systems tend to learn more from negative campaigning than from positive campaigning, even if many observers find the negativity unpleasant.<sup>96</sup> While negative campaigning tends to de-mobilize some voters in the center, a growing empirical literature finds that negative campaigning also may energize and mobilize committed voters to greater participation and engagement.<sup>97</sup> Voters are interested in negative information that speaks to their negative preferences, and they find identity and motivation in oppositional politics. Rather than pushing for greater recognition of negative preferences in traditional plurality elections where voters already enjoy a binary choice, the case for negative preferences helps identify existing conditions of negative campaigning and anticandidate voting as speaking to meaningful preferences that commonly motivate voters.

Indeed, a greater focus on negative preferences need not be as troubling outside the familiar context of political candidate elections. For instance, voting directly on questions of policy generally does not entail the same types of social disruption and personal animus as voting on candidates for office. When voting directly decides questions of policy, instead of assessing candidates for office, it represents a choice on the substantive merits of the

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94. See generally ANSOLABEHRE & IYENGAR, *supra* note 90 (criticizing negative advertising as a cause of voter cynicism in politics); LARRY J. SABATO, *FEEDING FRENZY: HOW ATTACK JOURNALISM HAS TRANSFORMED AMERICAN POLITICS* 206–09 (1991) (criticizing the negative tone of media coverage in politics); Lynda Lee Kaid, *Political Advertising: A Summary of Research Findings*, in *HANDBOOK OF POLITICAL MARKETING* 423 (Bruce I. Newman ed., 1999) (describing upward trend in negative advertising since 1952).

95. See, e.g., Enid Lakeman, *The Case for Proportional Representation*, in *CHOOSING AN ELECTORAL SYSTEM*, *supra* note 51, at 41, 48–49. The inability to veto candidates or parties by voting directly against them under proportional or semiproportional representation can also be seen as a liability. Proportional and semiproportional representation therefore provide a better mirror of voters' affirmative preferences for their most preferred outcomes, but without regard to what might be widely held negative preferences.

96. Kim Fridkin Kahn & Patrick J. Kenney, *How Negative Campaigning Enhances Knowledge of Senate Elections*, in *CROWDED AIRWAVES: CAMPAIGN ADVERTISING IN ELECTIONS* 65, 68 (James A. Thurber et al. eds., 2000) (finding that "people's understanding of the electoral campaign and its political contestants will increase if they are exposed to campaigns featuring a higher proportion of negative commercials than if they are exposed to campaigns with more positive commercials").

97. See, e.g., Steven E. Finkel & John G. Geer, *A Spot Check: Casting Doubt on the Demobilizing Effect of Attack Advertising*, 42 AM. J. POL. SCI. 573 (1998); Freedman & Goldstein, *supra* note 89; Ken Goldstein & Paul Freedman, *Campaign Advertising and Voter Turnout: New Evidence for a Stimulation Effect*, 64 J. POL. 721 (2002).

policy question, rather than a personal judgment about the suitability and individual qualities of a particular person. Those choices, even when negative preferences are the subjective motivation underlying the vote, are less likely to be taken personally and be socially disruptive. Of course, any vote may be socially disruptive to a degree, and taken personally as individuals identify themselves closely with one side, but by comparison to voting on candidates for office, those risks are less daunting and less likely to counter-prevail over the possible benefits of greater focus on negative preferences within a particular context.

There may be greater opportunity for expression of negative preferences if it is not likely to become socially disruptive, particularly when there is not a high expectation of social harmony among interested participants. Many types of organizations do not prioritize social harmony as a primary value, or they at least balance the interest of social harmony against many other competing values. Particularly for politically oriented organizations, such as legislatures or political parties, internal conflict is familiar and expected. Within such organizations, participants understand that disagreements legitimately exist among colleagues and accept that negative preferences are legitimately pursued through the process of collective decision making. Although the greater recognition of negative preferences in such settings may affect morale and intragroup relations, these costs are less significant and easier to bear when the baseline expectation of social harmony is low. In short, sensitivity about the expression of negative preferences in voting need not become socially disruptive or require voters to fixate negatively, but instead simply provides sufficient opportunity for voters to express negative preferences where they may be particularly salient.

Along the same lines, the costs of social disruption from greater recognition of negative preferences may be at their minimum in impersonal contexts, such as corporate shareholder voting. In the context of a publicly traded company, the shareholders are far flung, have little interpersonal contact with the company or other shareholders, and prioritize the maximization of shareholder profit. Encouraging the expression of negative preferences by shareholders would risk little social disruption in what appears to be a purely economic context where shareholders should be expected to demand performance from management. However, shareholder voting is one area where it is difficult to express negative preferences effectively through voting for board candidates. Given the expense of nominating a board nominee without the board's assent, the incumbent board's nominee is usually the only candidate for a board seat.<sup>98</sup> Even if every shareholder vote but one is withheld—that is, not cast for the lone candidate as the only

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98. See generally Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 688–94 (2007) [hereinafter Bebchuk, *Shareholder Franchise*] (reviewing obstacles, legal and practical, to shareholder electoral challenges); Lucian Arye Bebchuk et al., *The Powerful Anti-takeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887 (2002) [hereinafter Bebchuk, *Staggered Boards*]. See also Bebchuk, *Shareholder Franchise*, *supra*, at 702 (“Under existing default arrangements, shareholders do not have any meaningful power to veto candidates put forward by the board in an uncontested election.”).

available signal of disapproval—the board’s candidate still will be elected. If shareholder interests in corporate governance are primarily negative preferences at their heart,<sup>99</sup> then shareholders may desire stronger mechanisms for veto oversight,<sup>100</sup> but without necessarily wishing stronger affirmative rights of initiation, as some commentators propose.<sup>101</sup> Within the corporate setting, it seems unlikely that social disruption between shareholders and management arising from the expression of negative preferences would be a salient concern, and instead, the stronger expression of affirmative preferences through rights of initiation might actually be more practically disruptive to corporate operations.<sup>102</sup>

Admittedly, certain organizations, such as social clubs, religious groups, or sports teams, may prioritize social harmony among members, because these organizations are particularly close-knit, involve a high level of interpersonal contact, and operate from a normative assumption of unified interests.<sup>103</sup> Organizations that prioritize social harmony might forgo the greater expression of negative preferences to the degree that it would

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99. See K.A.D. Camara, *Shareholder Voting and the Bundling Problem in Corporate Law*, 2004 WIS. L. REV. 1425, 1472 (arguing that individual shareholders have inadequate economic incentive to investigate the optimal corporate actions to be undertaken); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 402–03 (1983) (explaining that the costs of monitoring and even voting are expensive such that shareholders generally prefer oversight to control).

100. For instance, a requirement that uncontested candidates receive at least a majority of shareholder votes cast might ensure that unhappy shareholders are able to veto the election of disfavored candidates. See generally Bebchuk, *Shareholder Franchise*, *supra* note 98, at 702; Jay Razzouk, *The Momentum, Motive, and Mouse-Kapades of the Majority Vote Movement*, 1 J. BUS. ENTREPRENEURSHIP & L. 391 (2008) (discussing the majority-vote movement in corporate law); Julian Velasco, *Taking Shareholder Rights Seriously*, 41 U.C. DAVIS L. REV. 605, 611–12 (2007). In practice, a majority rule may need to be flexible to different circumstances. For instance, it may be unduly difficult for a leading candidate to win a majority if the election features a legitimately competitive field of more than two candidates. A three candidate field may split the vote such that a majority is difficult to garner, even for a strong candidate. As a result, a lower threshold may be more fitting, either as a general rule or as a rule under special circumstances of a competitive multi-candidate field. A number of major companies have adopted instead by bylaw or charter a modified plurality rule that requires directors to proffer their resignation if they receive less than a majority of votes.

101. See Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 895–907 (2005).

102. Oversight through negative veto allows the board to operate on a regular basis without the interference of the shareholders, who lack the information and operational expertise of the company’s board and management. Oversight through negative veto, in other words, empowers the board to act on its discretion, as advocates of “director primacy” so value about the American corporate model, subject only to the possibility of veto in the background. See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006). By contrast, advocates of director primacy find troubling affirmative rights of initiation for shareholders, which allow shareholders to act on their affirmative preferences, squarely because they permit shareholders to interfere with the board and management’s centralized operation of the company. Unlike the *ex post* review of a shareholder veto, affirmative rights of initiation might pose *ex ante* interference with the management discretion in the best interests of the corporation.

103. See, e.g., Lawrence S. Rothenberg, *Organizational Maintenance and the Retention Decision in Groups*, 82 AM. POL. SCI. REV. 1129 (1988) (explaining different motivations for group memberships, including solitary incentives).

encourage intragroup animus and disruptive conflicts among otherwise agreeable colleagues. But even for such groups, deference to negative preferences may be important precisely because of the need for social harmony. Social clubs, for instance, may place particular emphasis on avoiding outcomes that would upset segments of their membership and therefore defer to strong negative preferences, particularly if such negative preferences can be expressed anonymously. In fact, along with their concomitant costs, systems of "black ball" voting appear relatively common in the processes of membership admission for private social clubs, such as fraternities, that prize their exclusiveness and social cohesion.<sup>104</sup>

In sum, the institutional context matters a great deal in deciding which way expressive considerations cut regarding the formal recognition of negative preferences. Expression of negative preferences through voting may give voice to self-defining and compelling motivations within the right contexts for voting, but it may do so in some of those settings only at great cost in terms of social disruption and de-mobilization that cuts against recognition of negative preferences.

### *C. Instrumental Considerations: Consensus Centrism and Status Quo Bias*

Formal recognition of negative preferences not only maps onto voter preferences and serves expressive interests, but it also serves the instrumental purpose of requiring consensus and producing more centrist outcomes. Prioritization of negative preferences in voting is more likely to avoid a choice that is intensely opposed by a segment of voters, even if it may produce a choice that is not most preferred by anyone. If every voter has a right to veto her least favored (or most disfavored) choice, the field of alternatives would be stripped bare of everyone's worst-case scenario. As a result, when negative preferences are prioritized, voting almost by definition weeds out alternatives that are least favored choices. A choice in favor of consensus centrism, of course, is not obvious. It is value contingent, and its usefulness depends heavily on the voting context. In other words, I argue not that centrism is always or even usually the right choice, but when centrism is a priority, the formal recognition of negative preferences can be designed to help produce it.

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104. See, e.g., *La. Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1496 (5th Cir. 1995) (describing the black ball exclusion rules for several private associations); Jason Mazzone, *The Creation of a Constitutional Culture*, 40 TULSA L. REV. 671 app. A at 697 (2005) (appending the constitution of the Washington Benevolent Society of Oneida County from 1812, which barred membership for a candidate who receives at least five black balls as votes against admission). Courts actually consider the use of a "blackball system by which individual members can reject an applicant" as a factor in determining whether an organization is a private club with a right to exclude. *E.g.*, *United States v. Jordan*, 302 F. Supp. 370, 375 (E.D. La. 1969).



1. *Consensus Centrism*

The most robust countermajoritarian form of respecting negative preferences is a unilateral right of veto. Dennis Mueller demonstrates this centrist tendency from formal recognition of negative preferences in his exploration of a "voting by veto" system for committee votes.<sup>105</sup> He proposes a two-step procedure by which each committee member first makes a proposal to be considered and second, once all proposals are announced, each committee member may veto a proposal under consideration until either a proposal or the status quo is selected.<sup>106</sup> In Mueller's example, he postulates a seriatim vote over the distribution of a monetary sum among the committee.<sup>107</sup> As voting by veto plays itself out, committee members would exercise their individual vetoes against the most unequal distributions, such that ultimately the most egalitarian (i.e., most centrist) distribution would remain at the end as the selected outcome.<sup>108</sup>

But even under collective voting in which a larger electorate casts votes, the formal recognition of negative preferences favors centrist alternatives over extreme ones.<sup>109</sup> Under traditional plurality voting, "candidates care

105. DENNIS C. MUELLER, *CONSTITUTIONAL DEMOCRACY* 161–64 (1996); Dennis C. Mueller, *Voting by Veto*, 10 J. PUB. ECON. 57 (1978); see also GORDON TULLOCK, *ON VOTING* 163–66 (1998) (discussing Dennis Mueller's system of voting by veto). The committee in this context can be understood as a small multimember group in which each member may introduce and vote on proposals.

106. DENNIS C. MUELLER, *PUBLIC CHOICE III* 174–81 (2003).

107. *Id.* at 176. Mueller predicts that every committee member would propose distributions of varying unequalness, but always providing slightly more to the proposer than to her committee colleagues. *Id.* at 177.

108. In this case, "egalitarian" means most centrist in that it would be the proposal least likely to draw a veto from any individual committee member. Of course, as Mueller notes, nothing would prevent a coalition of committee members from colluding for several proposals that discriminate against a particular targeted member who would be able to veto only one of the several discriminatory proposals. *Id.* at 179. For instance, two members could offer similar proposals, each of which gives a third member nothing and splits her share among them; the third member could veto only one of the two proposals. However, strategic behavior along these lines is not unique to voting by veto, or voting systems that recognize negative preferences. Similar outcomes are possible in virtually any voting system, and there is no reason to think that it is more likely to occur when negative preferences are recognized instead of affirmative ones.

109. The tendency to favor centrist alternatives over extreme ones depends on a critical assumption of rationality that voters' affirmative preferences are single-peaked along a unidimensional Euclidean policy space. With this assumption in place, candidates with relatively high numbers of voters who dislike them also tend to be candidates with relatively high numbers of voters who like them on the other end. Thus, by eliminating candidates with many negative votes, negative voting eliminates candidates who would attract many affirmative votes as well.

This assumption, though not always appropriate, is safe in a great number of contexts. Political scientists apply this assumption of rationality successfully in political voting. Keith T. Poole and Howard Rosenthal show that American congressional voting, as a prominent example, can be accurately analyzed over history as complying confidently with this assumption along a unidimensional liberal-conservative axis. See, e.g., Keith T. Poole & Howard Rosenthal, *A Spatial Model for Legislative Roll Call Analysis*, 29 AM. J. POL. SCI. 357 (1985); see also Bernard Grofman, *Public Choice, Civil Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71 TEX. L. REV. 1541 (1993) (explaining how much of American politics can be simplified along a single dimension). Of course, though, there may be settings where this assumption simply cannot be applied. First, voting preferences may be multi-peaked such that they are intransitive along the

only about placing first in any given voter's ranking[.]" but under formal recognition of negative preferences, "candidates care only about not placing last in a given voter's ranking."<sup>110</sup> Although formal recognition of negative preferences does not necessarily induce a dominant strategy among candidates of adopting the median voter's position, political scientist Gary Cox establishes formally that variants of negative authority tend to favor centrist outcomes in collective voting.<sup>111</sup> Just as with voting by veto, formal recognition of negative preferences in collective voting tends to eliminate extreme alternatives and result in more moderate outcomes that are less likely to be most disfavored. By contrast, the traditional practice of plurality voting appears least likely to induce centrism compared to several alternative voting methods which allow for the expression of negative preferences, including negative voting and approval voting.<sup>112</sup>

By "centrist," I mean only that an alternative is closer to the median choice among the arrayed set of alternatives. That is, "centrist" here denotes only the relative position of a particular alternative compared to the other alternatives along the relevant dimension of comparison. Centrist in this sense does not necessarily require that the centrist alternative be moderate or neutral in an absolute sense. Nonetheless, the median position among viable alternatives competing for votes is usually indicative of the substance of the centrist alternative. If nothing else, a centrist alternative is the "most" moderate among the available alternatives, even if not always moderate relative to any particular observer or other bases for comparison. The continuum represented by the available alternatives, after all, sets forth the only possible choices—the extent of the possible—currently under consideration.

Affirmative and negative preferences at the aggregate level are not always complementary. A candidate, presented to a mass electorate, may be

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single dimension. Favoring Bush over Gore and Nader, for instance, may not necessarily imply a preference for Gore over Nader. Second, voting preferences may be unpredictable along more than a single dimension. However, the assumption of rationality applies predictably and reliably enough that rational choice theorists successfully analyze voting behavior in myriad circumstances.

110. Cox, *supra* note 2, at 92.

111. *Id.*

112. Cox addresses several alternative voting procedures, including two (negative voting and approval voting) that I discuss in Section I.B. above. *Id.* at 99; see also Felsenthal, *supra* note 68, at 185–87 (finding on the basis of survey data that parties at the ideological extremes fare worse when voters possess a negative vote, because ideologically extreme voters at both ends of the spectrum tend to exercise their negative votes against each other, leaving centrist parties in better relative position).

Grofman and Feld offer similar support for the centrist effect of recognizing negative preferences. Grofman & Feld, *supra* note 39. They compare instant runoff voting, or "Alternative Vote" in their terms, with the Coombs rule. Instant runoff and the Coombs rule both require voters to register ordinal preferences across candidates. Both methods involve the sequential elimination of candidates, with the votes of eliminated candidates transferred to those respective voters' most preferred candidate among the ones remaining, until a single candidate possesses a majority. Instant runoff and the Coombs rule differ only in that instant runoff eliminates at each stage the candidate with the fewest votes ranking her as most preferred, whereas the Coombs rule defers more to negative preferences by eliminating the candidate with the most votes ranking her as the least preferred. Grofman and Feld find formally, under appropriate assumptions, that the Coombs rule is more likely to select the Condorcet winner, and indeed always does. *Id.* at 647–51.

chosen as both the most-loved and most-hated candidate in a multicandidate field at the same time. This possibility follows from the fact that, assuming single-peaked voter preferences that can be mapped along a single dimension, a strong liking for one extreme also dictates a strong disliking for the other extreme. For instance, a very conservative candidate will be loved by conservatives but hated by liberals, while the opposite will be true for a very liberal candidate. Both liberal and conservative candidates will tend to do better if the voting process recognizes the affirmative preferences of their supporters, but do poorly if the process recognizes the negative preferences of their enemies. They are the favorites of their ideological extremes but also the most disliked candidates of the other side's extremes. By contrast, moderate candidates are not hated by liberals or conservatives but also are not loved by either. Moderate candidates therefore would fare less well when affirmative preferences are the priority, because they do not arouse a dedicated base of voters for whom they are a clear top choice. Instead, they would do best if negative preferences are the priority, because they also do not represent the most disliked choice for many voters. A process of voting that tends to exclude least preferred choices pursues a "maxi-min" outcome, maximizing the value of the worst-case scenario. Of course, under other circumstances, a blended system that mixes recognition of affirmative and negative preferences might achieve a better balance of relative risks.

## 2. *Status Quo Bias*

For better or worse, a greater focus on negative preferences invites a bias toward the status quo. Formal recognition of negative preferences produces centrism by ruling out outlier alternatives that offer deviation from the median position. The encouragement of centrist outcomes thus almost by definition tends to reinforce majoritarianism and discourage the selection of alternatives that deviate from the majoritarian preference. Continuation of majoritarian control does not necessarily guarantee maintenance of the status quo, because the composition and preferences of the regnant majority fluctuate over time. Nonetheless, compared to traditional plurality voting, greater formal recognition of negative preferences tends to suppress sudden changes and reinforce the status quo by giving greater leverage to the controlling majority to block unwanted outcomes.

Runoff election systems, for example, guarantee a majority veto that blocks the selection of candidates who win with only a minority of support. Proponents of runoff systems applaud the fact that they "eliminate candidates with what pollsters call "high negatives," that is, a large share of the public who prefers anyone to this particular candidate."<sup>113</sup> By paring the field down to a binary choice, the runoff allows voters to exercise negative preferences against a disfavored candidate, who might otherwise squeak into victory by a plurality over a multicandidate field. However, runoff systems also tend to filter out less mainstream candidates with more extreme view-

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113. BULLOCK & JOHNSON, *supra* note 32, at 31.

points and less centrist constituencies. As a consequence, runoff systems were tools of the Jim Crow South and attacked by civil rights activists.<sup>114</sup> Runoff systems made it difficult for racial minorities to elect their candidates of choice, at least under patterns of racially polarized voting, because the white majority could veto the minority candidate in the runoff election and ensure the selection of a more "centrist," white candidate. Runoff systems under these circumstances reinforced the status quo and made the election of new, progressive candidates more difficult to achieve. They thus illustrate the costs of the consensus centrism that recognizing negative preferences can exact in the wrong setting.

Supermajority requirements raise the required threshold for approval and make it easier for voters with negative preferences against a proposal to block its passage. Supermajority requirements demand that any proposal garner more than a bare majority for approval and therefore require that a proposal attract broad consensus. Advocates of supermajority requirements favor them precisely for this reason. Catherine Fisk and Erwin Chemerinsky argue that the supermajority requirement, by threat of filibuster, is needed for federal judicial appointments because it forces the president to nominate more centrist candidates for the bench.<sup>115</sup> John McGinnis and Michael Rappaport advocate supermajority requirements for federal spending decisions for what they see as similar justifications.<sup>116</sup> They argue that supermajority requirements demand that spending bills must be more public-regarding and spread benefits more broadly. Of course, the effect of a supermajority requirement is also to make approval more difficult to achieve, because broader consensus is more difficult to attain than bare majority approval. Greater opportunities to effectuate negative preferences make affirmative collective action more difficult as a minority of opponents may be able to block approval, against a majority in favor, with fewer votes.<sup>117</sup> Indeed, by contrast to runoff voting, supermajority requirements are one way of effectuating negative preferences to the benefit of the minority, by providing what amounts to a minority veto.<sup>118</sup>

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114. See, e.g., *Jeffers v. Clinton*, 740 F. Supp. 585, 595–627 (E.D. Ark. 1990) (finding racial motivation in the enactment of runoff voting systems to block election of minority candidate of choice). In 1984, Jesse Jackson argued that "the runoff has devastated the impact of the Voting Rights Act" and proposed a Democratic Party rule calling on states to abolish runoff elections. BULLOCK & JOHNSON, *supra* note 32, at 71.

115. Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331, 342–43 (2005).

116. John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 401–07 (1999); see also John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115 (2007).

117. The minority gains not only the ability to block approval, but obtains a bargaining chip in the ability to thwart majority approval that can be exchanged for affirmative gains along other dimensions. See, e.g., GUINIER, *supra* note 50, at 16–17; Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 246–48 (1989).

118. Others also have proposed outright minority vetoes, at least with respect to a bounded set of issues of particular concern to a minority. See GUINIER, *supra* note 50, at 108; see also JOHN C.

Because greater recognition of negative preferences facilitates the blocking of action, it is likely to make it more difficult to effectuate changes through those avenues of collective decision making. For instance, the number of “vetogates” in the federal legislative process makes it difficult to enact federal statutes.<sup>119</sup> The institutional opportunities that members of Congress possess to block action through one of several vetogates make it easier to act directly on their negative preferences and kill disfavored proposals throughout the legislative process. As these negative opportunities to veto proposals increase, collective action is less likely, and therefore continuation of the status quo is more likely. The attractiveness of increased opportunities for effectuating negative preferences therefore depends at least in part on the attractiveness of the status quo.<sup>120</sup> Although greater opportunities to block action make it more likely that any approved action carries broader support among the electorate and requires the affirmative assent of more actors, it also increases the costs of collective action and reduces the likelihood of major changes being approved.

However, by providing the dissenting minority with a bargaining chip to trade, the facilitation of negative preferences need not always reduce the quantum of lawmaking to the degree that bargaining is successful. Supermajority requirements, to continue a previous example, allow the minority to block approval, but in practice they may simply force the majority to make concessions or exchanges that purchase minority assent. Although there are sensitive concerns on which a minority will not be amenable to concession or bargaining, supermajority requirements enable the minority to leverage its negative veto into gains that otherwise might be unobtainable. For instance, in a budget process where the majority party controls the agenda and amendments are commonly limited, the minority may be able to extract the addition of new concerns to the agenda by threatening veto, where otherwise a dissenting minority might have no effective share of agenda setting power.<sup>121</sup>

### 3. Negative Preferences and Entrenched Division

An irony is that greater recognition of negative preferences may make election discourse more divisive but also make election outcomes more ori-

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CALHOUN, A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 25–35 (Richard K. Cralle ed., Charleston, S.C., Steam Power-Press of Walker and James 1851).

119. William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–59 (2008) (presenting a vetogates model of national lawmaking). The Congressional Review Act grants to Congress a limited veto of agency rule making, subject to presidential assent, but the veto is rarely exercised. Paul R. Verkuil, *The Wait Is Over: Chevron as the Stealth Vermont Yankee II*, 75 GEO. WASH. L. REV. 921, 924–27 (2007); see also Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2165 (2009).

120. See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 742 (2002) (describing the benefit of a status quo bias when measured against an “attractive baseline”).

121. Thanks to Daryl Levinson for his thoughts on these issues.

ented toward consensus at the same time. Greater formal opportunity through voting to block collective action may focus voters more on oppositional politics and negative preferences. The campaign discourse therefore tends toward increased negativity and perhaps also divisiveness. However, the increased opportunities to block ultimate approval not only make it easier to block collective action, but also make it more likely that any successful collective action that satisfies those heightened requirements is more likely to be more centrist, enjoy broader consensus support, and perhaps in turn reduce social disruption. To the degree that greater recognition of negative preferences makes election discourse more negative and oppositional, it may come along with the potentially countervailing benefit of ensuring more consensus-oriented election outcomes.

How best to resolve this tradeoff likely depends, at least in part, on how deeply entrenched disagreements are within the relevant electorate. Every electorate contains disagreement that divides it on voting questions, but electorates vary significantly in terms of the severity and permanence of their disagreements. If disagreements within a particular electorate are notably recurrent, entrenched, and well-known, then a greater focus on negative preferences may be beneficial overall by encouraging consensus outcomes on what already appears to be a divided electorate predisposed toward oppositional politics. The benefits of consensus outcomes thus might outweigh the costs to discourse when the discourse already tilts in the direction of opposition and division. It is difficult to generalize too broadly across cases, but the general point is that different electorates benefit from different tradeoffs between election discourse and outcomes.

The question may pose its greatest normative challenges with respect to deeply ingrained group-based disagreements. The greater the opportunity for veto, and thus acting on potentially group-based negative preferences, the greater the tendency to encourage group-based opposition. On one hand, such recognition of negative preferences acknowledges the electoral relevance of those group-based divisions and may help negotiate a lasting political compromise among those groups. On the other hand, formal recognition of such divisions also may help further entrench what already can be unhealthy group-based oppositional politics.

“Consociationalism” represents a clear choice in favor of greater formal recognition of negative preferences when it comes to group-based divisions.<sup>122</sup> A number of societies characterized by deep, enduring ethnic cleavages have adopted consociational arrangements that provide for a mutual veto or “concurrent majority” rule such that each rival group exercises a form of veto over government policy making.<sup>123</sup> Consociational arrangements

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122. Arend Lijphart defines “consociationalism” as government by coalition of all significant segments of society, characterized by three basic elements: (1) mutual veto; (2) proportionality for political representation, civil service appointments, and allocation of public resources; and (3) a high degree of autonomy for each segment. *See generally* AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES* (1977); DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (2d ed. 2000) (describing consociational democracy in Europe and Africa).

123. LIJPHART, *supra* note 122, at 25.

predetermine allocations of political power across entrenched sociopolitical divisions to guarantee consensus rule where the severity of those divisions is thought to otherwise preclude it. Consociationalism encourages consensus-oriented outcomes in the sense that a broader consensus across divided groups is institutionally required for collective action. It yields to the notion that politics will be recurrently characterized by deep divisions that make particularly worthwhile the payoff in terms of consensus outcomes more acceptable across groups.

By contrast, voting rights law in the United States is much more ambivalent about the reification of group-based disagreement.<sup>124</sup> American courts and commentators are divided about the potential harms of giving formal recognition to race-based divisions despite what appear to be deeply entrenched political differences along racial lines.<sup>125</sup> Although American electoral structures stop well short of consociational arrangements seen in Europe and Africa, there are commonalities with American voting rights law in the spirit of predetermined government allocation of power across group-based divisions. Nonetheless, American ambivalence about even limited racial guarantees under the Voting Rights Act helps illustrate the possible concerns about further entrenching group-based divisions through greater formal recognition of negative preferences.<sup>126</sup> Formal opportunities for clearer expression of group-based opposition may invite deeper reification of the underlying divisions that becomes troubling even with the benefit of more consensus-oriented electoral outcomes.

Formal recognition of negative preferences in voting can help generate centrist outcomes, but the benefits of centrism are highly contingent and value-dependent. Recognizing negative preferences therefore can produce centrist outcomes supported by a broad consensus, but comes with worries about status quo bias, increased focus on opposition, and reification of entrenched disagreement that vary across voting contexts.

### III. THE NEW LENS OF NEGATIVE PREFERENCES: THREE APPLICATIONS

Understanding the importance of negative preferences as a subjective motivation for voting, as well as the way that different voting structures allow for greater or lesser effectuation of negative preferences, helps provide a

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124. See, e.g., Guy Uriel-Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1220 (2003) (discussing the Court's constitutional skepticism about "the state's ability to ascribe a political identity to an individual on the basis of the individual's group identity").

125. In other work, based on a rich social scientific literature, I argue that race-based differences under conditions of racial polarization override other voting considerations such that race-based guarantees are warranted under the Voting Rights Act. Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734 (2008).

126. See Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861, 1864–66 (2004) (comparing parallel concerns about consociationalism and *Shaw v. Reno*, 509 U.S. 630 (1993)).

new perspective on familiar questions and existing debates. This Part complicates and adds a new layer to the conventional debates about three forms of collective choice across varying circumstances.

### A. *Voir Dire*

The voir dire process of jury selection is structured as a negative process of elimination. Litigants do not have the opportunity to select their most preferred jurors from the jury venire in determining the petit jury that hears their case, and instead have only a negative right to challenge their least preferred jurors. Voir dire is not a conventional context for voting, in which the votes of several or more voters are aggregated to reach a collective judgment. Voir dire features only two decision makers, each of whom exercises a unilateral veto, but nonetheless, voir dire is a process of collective decision making, the examination of which helps illuminate the costs and benefits of structuring selection as a process of negative veto. There is very little positive identification in the literature of the potential value of structuring voir dire as a process of negative selection, rather than as a process of affirmative selection. Instead, there is much scholarly criticism of the system of peremptory challenges, and there have been several calls for restructuring voir dire instead as a more familiar process of affirmative selection.<sup>127</sup>

Understanding negative preferences may help explain the potential value of the negative structure of voir dire, at least in part because negative preferences are particularly salient in jury selection. Because criminal law generally requires a unanimous verdict for guilt, the government should be more concerned with avoiding a juror who is clearly biased against its respective case than trying to include a juror who is biased toward it. A requirement of unanimity tilts the burdens against the government because a single juror in dissent undermines the desired guilty verdict even if the rest of the jury decides in the government's favor.<sup>128</sup> Where negative preferences against a hostile juror are a structural priority for the government, the construction of jury selection as a process of negative selection aids the effectuation of the government's negative preferences and enables the government, already handicapped by the burden of unanimity, to act directly on them. Although the usual imperative in processes of selection is the fulfillment of the voters' affirmative preferences over the field of candidates,

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127. E.g., Edward S. Adams & Christian J. Lane, *Constructing a Jury That Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703 (1998); Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781 (1986); Tanya E. Coke, Note, *Lady Justice May Be Blind, But Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327 (1994); Clem Turner, Note, *What's the Story? An Analysis of Juror Discrimination and a Plea for Affirmative Jury Selection*, 34 AM. CRIM. L. REV. 289 (1996).

128. Of course, as a practical matter, a criminal defendant might strategically seek a mistrial, when an outright verdict of innocence seems unlikely, depending on the circumstances.



the institutional requirements of criminal jury trials arguably maps better, though with its own set of costs, onto a process of negative selection.

The negative structure of voir dire also reinforces the constitutional value of impartial representativeness. Courts interpret the Sixth Amendment guarantee of an impartial jury to require that juries be drawn in democratically representative fashion from a "fair cross section of the community."<sup>129</sup> A criminal defendant, however, is not entitled to a particular petit jury that is itself demographically representative of the larger community.<sup>130</sup> In fact, a criminal defendant may be barred from exercising peremptory challenges on the basis of race even if it would make his petit jury more representative of the community.<sup>131</sup> Instead, the defendant may object only that the larger juror pool, the venire from which his jurors were selected, is unrepresentative of the community. That is, under constitutional law, the venire must be a representative cross section of the community, but the defendant's petit jury, the one deciding the defendant's case, need not be.

Without an understanding of negative preferences and processes of negative selection, the logic of the cross section requirement may be a puzzle—if community representativeness is important, why require it constitutionally only for the venire, when it does not ensure that the representativeness of the actual petit jury that hears the defendant's particular case?<sup>132</sup> Indeed, many commentators argue that the cross section requirement ought to apply not only to the venire but apply in various forms to the defendant's petit jury as well.<sup>133</sup> However, for the smaller petit jury of twelve or fewer jurors, a more robust guarantee of representativeness might mandate what some view as an unworkable form of proportional representation for each petit jury.<sup>134</sup>

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129. *Tennessee v. Lane*, 541 U.S. 509, 523 (2004).

130. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (ruling that the Sixth Amendment does not require that "petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population").

131. *Georgia v. McCollum*, 505 U.S. 42 (1992) (prohibiting under the Sixth Amendment peremptory challenges based on race by the criminal defendant); see also *Holland v. Illinois*, 493 U.S. 474, 480 (1990) (noting that the Court has never held that the "initial representativeness [of the venire] cannot be diminished by allowing both the accused and the State to eliminate persons thought to be inclined against their interests"); Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1114 (2005) (observing that "*Batson* [*v. Kentucky*, 476 U.S. 79 (1986)] prohibits using peremptory challenges to add or subtract jurors so that individual juries reflect the makeup of the community").

132. See JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 129–31 (1994).

133. See Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 366–67 (1999); Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 75–83 (1992); Nancy J. King & G. Thomas Munsterman, *Stratified juror selection: cross-section by design*, 79 JUDICATURE 273, 274–76 (1996).

134. See *Batson v. Kentucky*, 476 U.S. 79, 86 n.6 (1986) ("Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society."). What is more, it would require the government to specifically decide on what constitutes meaningful representativeness and rationalize the affirmative selection of each juror on the basis of group memberships. Eric Muller concludes that a requirement of cross-sectional repre-

Given these practical challenges, the negative structure of voir dire takes advantage of the centrist tendency inherent in selection based formally on negative preferences. The random selection from the community to populate the jury pool ensures representativeness in the venire without identifying what differences are meaningful and without needing to select any individual on the basis of group membership.<sup>135</sup> From there, voir dire expressly relies on negative preferences in the jury selection process: the defendant and the State may challenge juror candidates under consideration for their individual jury, all of whom have been drawn randomly from the juror pool. Voir dire allows the litigants only to veto the inclusion, and thus exclude, the other's most favored jurors by exercising peremptory challenges against them. Voir dire therefore allows the litigants to veto whom they see as the most extreme jurors, who are the most likely to bias the representativeness of the petit jury. The central tendency of negative selection reinforces the representativeness of the petit jury by pushing selection toward the median of the jury venire, which itself must be a representative cross section of the community.<sup>136</sup> By contrast, if litigants were permitted to select affirmatively their most preferred jurors from the venire, the selection process might skew the representativeness of the ultimate petit jury selected. In fact, that would be each litigant's goal. Each side would try to stack the jury with jurors holding the most extreme views in its respective favor,<sup>137</sup> potentially leading to unrepresentative petit juries even when the larger venire is representative of the community.<sup>138</sup>

As a result of peremptory challenges, a jury is more representative of the average citizen's centrist view in this sense, but importantly, it is also less likely to include dissenting jurors who might challenge those conventional understandings.<sup>139</sup> To the degree that minority viewpoints correlate with

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sentativeness for each petit jury as a constitutional matter would be a "vain and impractical hope." Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 141 (1996).

135. See, e.g., M.I. FINLEY, *DEMOCRACY ANCIENT AND MODERN* 118 (2d ed. 1985) (referring to the ancient Athenian history of the jury as a democratic institution and explaining that a large jury chosen by lot from the population was viewed "as sufficiently representative to count as the *demos* itself in action").

136. See Edward P. Schwartz & Warren F. Schwartz, *The Challenge of Peremptory Challenges*, 12 J.L. ECON. & ORG. 325 (1996).

137. See Hans Zeisel, Comment, *Affirmative Peremptory Juror Selection*, 39 STAN. L. REV. 1165 (1987).

138. The new independent Citizens Redistricting Commission in California, approved by ballot measure during the 2008 election, follows the same logic. The Commission is similarly designed to "ensure fair representation" on a strict, nonpartisan basis and guarantee that redistricting "cannot be controlled by the party in power." Voters FIRST Act, Cal. A.G. No. 07-0077, § 2(c)-(d) (adopted by voters Nov. 4, 2008, as Cal. Proposition 11). Once a finalist pool of sixty citizens is named, legislative leaders of both major parties then have the right to exercise voir dire-type challenges against individual finalists as part of a complex process of selection. As with voir dire, the goal of impartiality and a form of centrist representativeness motivates a process of negative selection.

139. Cf. Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L.Q. 141, 167-68, 173 (2006) (noting that in a unanimous verdict system there is a greater need to use peremptory challenges "to remove bizarre jurors").

demographic characteristics, voir dire sacrifices descriptive representation for minorities of all sorts, and with particular sensitivity for racial minorities.<sup>140</sup> In the absence of alternate viewpoints, and with greater reinforcement of centrist ones, the negative structuring of voir dire is likely to filter out potentially valuable insights from minority jurors with different perspectives and different information. By allowing the litigants to act on their negative preferences about potential jurors, voir dire makes it less likely to include minority jurors as descriptive representatives of their communities, and less likely that juries will produce substantive decisions ultimately at variance with centrist opinion. Given current levels of residential segregation, voir dire ensures that many juries contain no members at all of important racial and other minority groups, which is precisely why so many commentators advocate restructuring voir dire to address racial underrepresentation.<sup>141</sup> The cross-sectional representativeness purchases centrist representativeness at the price of descriptive representativeness.

Within the context of jury selection, however, the attention to negative preferences might offer potential benefit: it draws attention to illicit motivations that are prohibited but otherwise difficult to detect. By formally recognizing negative preferences, voir dire focuses attention squarely on expression of negative preferences. The structuring of voir dire as a process of negative selection forces the litigants to put their cards on the table and helps expose what are illicit negative preferences based on race. Because race is a prohibited motivation for challenging a juror for cause, the only outlet for either the defendant or the government to act on racial motivations in voir dire is through peremptory challenges. Although a litigant who does not want African-American jurors on the final jury, for instance, can veto African-American candidates with peremptory challenges, the direct effectuation of negative preferences in voir dire, through a juror-specific veto, lays bare the racially discriminatory character of race-based challenges in a way that affirmative selection of only white jurors might not do as clearly. Bryan Stevenson and Ruth Friedman, for instance, rely on just such striking statistical evidence to establish persuasively that southern prosecutors have exercised their jury strikes in a racially discriminatory manner, even though courts have often chosen to disregard this evidence in practice.<sup>142</sup> A discriminatory litigant can justify on a variety of individual grounds a pattern of affirmative selection of whites more easily than she can justify a consis-

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140. See Adams & Lane, *supra* note 127.

141. See generally Forde-Mazrui, *supra* note 133, at 353 (discussing the effect of residential segregation on racial underrepresentation in jury participation and surveying reform proposals).

142. Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 524 (1994) (using statistical patterns of race-based exclusions persuasively to demonstrate systematic racial bias). Of course, to the degree that acceptance of racial bias is systematically ingrained, even powerful evidence of consistent exclusion may be disregarded regardless how clear the pattern. What is worse, blatant disregard can be understood as tacit approval at least in some cases that cuts against the smoking out of race where it would provide a venue for such legitimization. Thanks to Lani Guinier for this insight.

tent pattern of challenging the few African-American jurors available in the venire.<sup>143</sup>

In short, the structuring of voir dire as a process of negative selection contains a logic tailored for the institutional purposes of jury selection. It reinforces the representativeness of the petit jury in certain important respects, with countervailing costs, and the negative structure of voir dire potentially helps smoke out the use of race as a screening criterion for detection and possible sanction.

### B. Racially Polarized Voting

Racially polarized voting occurs under the Voting Rights Act<sup>144</sup> when white and minority voters form separate, opposed voting blocs such that the white majority consistently defeats the minority's candidate of choice.<sup>145</sup> Under conditions of racially polarized voting, the Voting Rights Act authorizes the drawing of safe majority-minority districts within which the cohesive racial minority will possess voting control and elect their candidates of choice into office over the opposition of white voters. Lani Guinier criticizes this remedy of safe districts for the racial minority.<sup>146</sup> On grounds of democratic flexibility and racial nonessentialization, among other considerations, Guinier argues instead for a new approach that discards the traditional plurality voting within single-member territorial districts.

Guinier advocates the use of cumulative voting as a remedy, on the theory that cumulative voting better respects the preferences of all voters by permitting more effective expression of preference intensity.<sup>147</sup> Cumulative voting, coupled with at-large elections, better reflects the intensity of preference by allowing the "plumping" of votes.<sup>148</sup> Each voter possesses as many votes as there are seats available at large, and each voter can allocate more than one vote to any given candidate if the voter feels intensely

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143. Indeed, this type of pattern is primary evidence for claims of racial discrimination in voir dire. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 103-04 (1986) (Marshall, J., concurring) (describing overwhelmingly disproportionate use of peremptory challenges against African-American jurors). Along similar lines, firing decisions in the employment context account for 60 percent of successful discrimination cases, while hiring decisions account for merely 6 percent. VINCENT J. ROSCIGNO, *THE FACE OF DISCRIMINATION: HOW RACE AND GENDER IMPACT WORK AND HOME LIVES* 28 (2007).

144. 42 U.S.C. §§ 1973-1973aa-6 (2006).

145. See *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986) (defining racially polarized voting under Section 2 of the Voting Rights Act).

146. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994).

147. *Id.* at 149; Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1461-65 (1991) (arguing that cumulative voting systems permit "recognition of both the existence and intensity of minority voter preference").

148. Guinier argues that territorial districting with first-past-the-post plurality voting should be replaced with cumulative voting conducted at-large to fill all available seats. Voters would therefore have as many votes as there are seats to be filled, and cumulative voting would permit a voter to allocate multiple votes to a single candidate, rather than being limited to one vote per candidate. GUINIER, *supra* note 146, at 149-56.

enough about the candidate. Guinier argues that cumulative voting in at-large elections better respects all voters' preferences, irrespective of race, by accounting for intensity of preferences. The happy coincidence, under Guinier's account, is that cumulative voting properly provides greater opportunity for minority representation as well, not by virtue of a race-specific guarantee, but by allowing any minority, including racial ones, to act on more intense preferences and express those intense preferences effectively through cumulative voting. Under cumulative voting, "political transactions would depend not just on the number of supporters and opponents but on the relative intensity of preferences."<sup>149</sup> In the context of racially polarized voting, Guinier argues that the racial minority, which has more intense preferences, can concentrate its votes on a single minority candidate of choice, thereby maximizing the candidate's chances of winning a seat, despite white opposition.

What is missing from Guinier's account is the vocabulary to describe voting preferences beyond the affirmative ones counted formally in traditional voting—namely, negative preferences. Intensity of preference by itself cannot explain cumulative voting's advantages for minority voters. There are both affirmative and negative preferences, and under conditions of racial polarization, it is likely the unfortunate case that the preferences of polarized white voters against any minority candidate are actually quite intense and can be regularly assumed to be as intense as the affirmative preferences of minority voters.<sup>150</sup> The twist is that white polarized preferences are mainly *negative* ones, less for a white candidate than *against* the minority's candidate of choice.<sup>151</sup> Guinier describes preferences as occurring only in the affirmative, but not in the negative direction. She may argue in these terms simply because traditional voting recognizes only affirmative preferences and, by ignoring negative preferences, renders them not cogni-

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149. Guinier, *supra* note 147, at 1465.

150. See generally Kathleen A. Bratton, *The Effect of Legislative Diversity on Agenda Setting: Evidence from Six State Legislatures*, 30 AM. POL. RES. 115 (2002) (finding evidence that an increase in African-American influence produces hostility among whites); Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869 (1995) (describing how, under racially polarized voting, the cohesive, opposed, and persistent voting patterns of the white majority frustrate minority voting); Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291 (1997) (describing white backlash against African-American voting influence in the South); Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1382 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994)) (arguing that racially polarized white voters are threatened by African-American influence and band together to frustrate it).

151. Multiple African-American candidates splitting African-American votes is bad in a system that advances the candidate with the greatest number of affirmative votes—the familiar case. But in a voting system that formally records negative preferences, the burdens of coordination would be reversed. African-American interests would be best served by running multiple candidates. Negative votes against African-American candidates from hostile white voters would be split across multiple candidates, such that any given candidate would likely have fewer negative votes and would become more likely to advance. Multiple African-American candidates would split not the African-American vote in support of them, but instead white votes against them—a good outcome for African-Americans.

zable. Negative preferences disappear from the analysis under a default understanding that is so familiar.

A clear understanding of negative preferences, and how well they are effectuated under different voting procedures, provides a stronger account of cumulative voting's potential advantages, particularly in the context of racially polarized voting. Under single-member district arrangements with plurality voting, the choice put to a racially polarized electorate is usually a binary one between the racial minority's candidate of choice, a Democrat, and the whites' candidate of choice, a Republican. Binary choices, as discussed above, permit the direct expression of negative preferences and enable polarized white voters to act immediately on their negative preferences against the racial minority simply by voting for the Republican. As a result, the only remedy that enables the racial minority to win elections under single-member district arrangements, which are likely to present voters with binary choices, is to construct the electorate as a majority-minority jurisdiction. Although polarized white voters still directly effectuate their polarized negative preferences, the race-conscious drawing of the district guarantees that their vote total will be insufficient to defeat the racial minority's candidate.

At-large cumulative voting makes it much more difficult to effectuate negative preferences in voting. Voters no longer face binary choices to fill a single seat. Under at-large cumulative voting, voters must vote to fill multiple seats at once and possess as many votes as there are seats to fill. Given a multicandidate field with only one minority candidate, minority voters can easily coordinate their affirmative preferences for the minority candidate simply by casting votes for their lone candidate. The task for the polarized white majority is more complicated, because they cannot as simply vote to veto the minority candidate. They can act on their negative preferences against the minority candidate only by casting affirmative votes for a different candidate. It is this mismatch between the type of preference held by white voters and the type of preference formally recognized under plurality voting that helps account for the inability of white voters to block minority representation under at-large cumulative voting. This insight becomes clear only with an appreciation of negative preferences and how well they can be effectuated under different voting procedures.

In fact, it is the absence of a binary choice or an equivalent means of acting on negative preferences, and not necessarily the capacity to express intensity of affirmative preference under cumulative voting, that is critical to advantaging the racial minority.<sup>152</sup> Once the role of negative preferences is integrated into Guinier's account, what matters most is the majority's ability to translate negative preferences into an effective veto. For this reason,

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152. Even with noncumulative voting, at-large multimember districts complicate the ability of polarized whites to vote against the racial minority's candidate to the degree that there are more (or fewer) white candidates than seats available. When the number of white candidates is exactly the same as the number of seats to fill, polarized white voters can just as effectively vote against the racial minority's candidate as they could with a binary choice in a single-member district, because their affirmative votes again are effectively votes against the racial minority's candidate.

limited voting just as effectively guarantees minority representation as cumulative voting and has been used extensively for those purposes under the Voting Rights Act,<sup>153</sup> even without any provision for intensity of preference.<sup>154</sup> Under limited voting, voters possess fewer votes than seats to be filled, and in contrast to cumulative voting, voters cannot express differences in intensity of preferences by plumping multiple votes for a single candidate.<sup>155</sup> Voters can cast only a single vote for any particular candidate. Nonetheless, minority voters very effectively can guarantee themselves a degree of proportionality by simply casting their limited votes for a few favored candidates, while it is difficult for the majority to block their election without significantly greater coordination.<sup>156</sup> The key consideration is that both cumulative voting and limited voting enable the minority to act directly on an affirmative preference for a candidate, but make it more complicated for the majority to fill all available seats and block the election of the minority's candidate. Even if white voters desire the defeat of the African-American candidate *more* intensely than minority voters desire the candidate's victory, it is not simply intensity of preference that determines election results. Rather, it is the incongruence of white voters' preferences to those formally recognized in voting that frustrates the exclusionary aims of polarized whites.

Racially polarized voting also presents a case that illustrates the potential costs of recognition of negative preferences through binary choices. The effective ability of polarized white voters to act directly on their negative preferences against the racial minority is precisely the problem that Guinier seeks to remedy by proposing voting procedures that make it harder to effectuate oppositional tastes based on race. The negative preferences of the

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153. See Adam J. Cohen, *Keeping the Promise: Establishing Nontransferable Election Systems in Jurisdictions Covered by Section Four of the Voting Rights Act*, 30 ST. MARY'S L.J. 655 (1999); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 163-64 (1985) (describing use of limited vote in the United States); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 223-31 (1989). Minority voters may be able to achieve similar results, when permitted, through single-shot voting by casting fewer votes per voter across a multi-seat race than allocated per voter. Chandler Davidson, *Minority Vote Dilution: An Overview*, in MINORITY VOTE DILUTION 1, 6 (Chandler Davidson ed., 1984).

154. In fact, as an empirical matter, the use of cumulative voting appears to produce less descriptive representation for racial minorities than the use of the limited vote, at least in the United States. See David Brockington et al., *Minority Representation under Cumulative and Limited Voting*, 60 J. POL. 1108, 1120-21 (1998).

155. See generally Leon Weaver, *Semi-Proportional and Proportional Representation Systems in the United States*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 51, at 191. Of course, limited voting reflects intensity of preference to some greater degree than traditional plurality voting in the sense that voters under limited voting cast votes for only their most preferred candidates out of what is frequently a larger field of candidates. But Guinier's argument regarding expression of intensity of preference is focused on the ability of a voter to express at her discretion a stronger cardinal value for particular candidates by cumulating multiple votes for a single candidate. Cumulative voting allows a voter to express not only that a particular candidate is ranked highly as an ordinal matter but also how much more highly as a cardinal matter than the next most-preferred candidate.

156. An advantage of the limited vote is that it is likely to require less strategic coordination than cumulative voting for the minority group because the total number of votes per voter is usually lower. See Brockington et al., *supra* note 155, at 1112-13.

polarized white voters are classic ugly preferences that would not be attractive to highlight or encourage. In fact, Guinier's distaste for the traditional Voting Rights Act remedy of majority-minority districts is likewise based squarely on how clearly even such remedial arrangements highlight the need to counteract the ugly negative preferences of racial opposition. The concerns that motivate Guinier's responses to racially polarized voting are exactly those which the recognition of negative preferences always may pose as potential costs. But what has been missing from Guinier's account is an understanding of those costs within the context of larger tradeoffs presented by any recognition of negative preferences. Racially polarized voting presents a case where greater recognition of negative preferences seems quite normatively unattractive, and in fact suggests a need, and a clearer direction regarding possible remedies, for even less recognition of negative preferences in that particular context.

### C. Direct Democracy

Direct democracy is commonly praised in theory as more "democratic" than representative democracy.<sup>157</sup> In representative democracy, voters delegate authority to elected officials who offer voters only unenforceable assurances about their policy positions once in office. In direct democracy, by contrast, voters may be able to vote for exactly what they most want in matters of public policy.<sup>158</sup> Direct democracy thus has been described as "a way of perfecting democracy," because "[i]t is natural to assume that direct is better, more nearly perfect, than indirect—that the ideal of consent of the governed is better achieved by consenting to the laws themselves, rather than to representative lawmakers."<sup>159</sup> Justice Hugo Black declared that plebiscites move "in the direction of letting the people of the State—the voters of the State—establish their policy, which is as near to a democracy as you can get."<sup>160</sup> Likewise, Justice Antonin Scalia agreed that referenda are "the most

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157. Of course, in the context of candidate elections, each voter can get only so close to getting exactly what she wants in the sense of ultimate policy outcomes. To the degree that candidate elections are designed to satisfy the electorate's policy preferences, any single candidate can be only so ideal because virtually no candidate will match any individual voter's policy preferences on every issue and every dimension. See, e.g., Clark, *supra* note 61, at 463–66. Candidates are at best, in this view, a bundle of policy stances. The voter must be content to vote for the candidate who best matches her preferences imperfectly, even under the best of circumstances.

158. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1521 (1990).

159. Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 55 (1995).

160. Transcript of Oral Argument at 17, *Reitman v. Mulkey*, 387 U.S. 369 (1967) (No. 483), reprinted in 64 LANDMARK BRIEFS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, at 668 (Philip B. Kurland & Gerhard Casper eds., 1975); see also Clark, *supra*, note 61, at 438 ("If we want to know what the people want, a natural intuition is that we should take a vote.").



democratic of procedures.”<sup>161</sup> The operative intuition is that fulfillment of voters’ affirmative preferences is the democratic ideal.

Critics of direct democracy see its practice falling well short of this affirmative ideal. A source of criticism is the perception that wealthy interests dominate lawmaking through direct democracy, particularly the agenda-setting process by which certain initiatives gain access to the ballot in the first place. The task of gathering the large number of necessary signatures just to qualify an initiative for ballot placement regularly requires the expensive use of paid professionals, who charge more than \$1 million to qualify an initiative in California.<sup>162</sup> As a result, critics of direct democracy worry that wealthy interests dominate direct democracy by means of major advantages in the expensive process of deciding which measures reach the agenda at all through ballot qualification.<sup>163</sup> Another criticism of direct democracy, related again to agenda setting but distinct from the claim above, is that it distorts popular input by precluding the expression of priority among different issues. By presenting each measure in isolation as a binary decision, direct democracy does not reflect voters’ intensity of preference.<sup>164</sup> Each voter has the opportunity to register only an affirmative or negative vote, regardless how strongly the voter feels about the ballot measure. As a result, Sherman Clark concludes that “[b]y giving the people an ‘opportunity’ to consider issues in isolation, we may deny them the ability to tell us what they most want overall.”<sup>165</sup>

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161. *Romer v. Evans*, 517 U.S. 620, 647 (1996) (Scalia, J., dissenting).

162. See DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* 43–89 (2000) (describing the “initiative industry”); Elizabeth Garrett & Elisabeth R. Gerber, *Money in the Initiative and Referendum Process: Evidence of Its Effects and Prospects for Reform*, in *THE BATTLE OVER CITIZEN LAWMAKING* 73, 76 (M. Dane Waters ed., 2001); Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463, 471 (2004) (noting that paid signature collectors charge more than \$1 million to qualify an initiative in California and “are becoming nearly indispensable in many states”).

163. BRODER, *supra* note 162, at 243 (“[T]he experience with the initiative process at the state level in the last two decades is that wealthy individuals and special interests . . . have learned all too well how to subvert the process to their own purposes.”); see also Nicole Bremner Cásarez, *Corruption, Corrosion, and Corporate Political Speech*, 70 NEB. L. REV. 689 (1991); Jamin B. Raskin, *Direct Democracy, Corporate Power and Judicial Review of Popularly-enacted Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 393; John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377 (1985).

164. But see Lynn A. Baker, *Preferences, Priorities, and Plebiscites*, 13 J. CONTEMP. LEGAL ISSUES 317, 323–24 (2004) (arguing that direct democracy offers opportunity to express intensity of preference through voter turnout); Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988); Eli M. Noam, *The Efficiency of Direct Democracy*, 88 J. POL. ECON. 803 (1980) (arguing that inefficient outcomes are infrequent in direct democracy, even accounting for intensity of preference). See generally Clark, *supra* note 61 (arguing that initiatives and referenda cannot accurately or reliably reflect the popular will of voters).

165. Clark, *supra* note 61, at 467; see also Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949, 963–66 (2005) (criticizing direct democracy as a process of serial elimination that denies voters the ability to make tradeoffs and compare all available alternatives).

Underlying these criticisms is the assumption that direct democracy ought to pursue the realization of the public's *affirmative* preferences. The agenda-setting process in direct democracy troubles critics because it does not necessarily advance the public's most favored policies for direct democratic action. Clark, for instance, contends that in direct democracy "the goal is to hear the voice of the people as well and as fully as possible."<sup>166</sup> His critique thus is that "[i]f we want to listen to the people, we ought to try and let them speak as clearly as possible."<sup>167</sup> Similarly, critics of direct democracy concerned about the disproportionate influence of wealthy interests likewise predicate their indictment of direct democracy on its divergence from the public's affirmative preferences. The set of measures that win ballot placement is biased and does not reflect the public's priorities about what it most wants implemented as public policy.

In fact, public choice theory suggests little hope that direct democracy, however configured, can identify and fulfill the public's most preferred policies. Voting paradoxes render elusive the identification of the mass public's most preferred policy even within a single policy domain, let alone identification of priorities across policy domains.<sup>168</sup> Preference cycles, strategic voting, and the bias of agenda setting plague these determinations though the procedures of voting. As a consequence, voting in direct democracy may embody, at best, a "negative ideal" without any assurance, perhaps without much possibility, of producing "a clear, consistent, meaningful statement of the popular will."<sup>169</sup> Critics of direct democracy may be right that direct democracy fails to fulfill the public's affirmative preferences, in the sense of consistently producing its most preferred, ideal policies, but the standard for success may be wrongly directed toward the ambition of affirmative ideals, instead of the protective posture of vetoing harm.<sup>170</sup>

Regardless how poorly direct democracy performs with respect to the public's affirmative preferences, direct democracy serves reasonably well in defending the public's negative preferences. The binary choice in direct democracy with respect to each ballot measure enables voters to vote "no" and effectively reject any measure that it disfavors. This is exactly what voters

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166. Clark, *supra* note 61, at 448.

167. *Id.* at 450.

168. See generally RIKER, *supra* note 11.

169. RIKER, *supra* note 11, at 242. Riker also observes that "there has been considerable disillusionment with referenda" flowing from the mistaken progressive-era belief that they "provide a 'truer' expression of the popular will," when, in fact, referenda have "produced both inconsistent and bizarre legislation." *Id.* at 251.

170. See, e.g., Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES IN L. 87, 122 (2002) ("In short, the plebiscites we know do have many flaws, but a kind of incrementalist argument in their favor."). In practice, of course, voting in direct democracy may be more complicated. Voters might be confused or misled into voting contrary to their actual preferences, making fundamental voting errors. The bias in ballot access may be so exaggerated that a reasonable number of voting errors on so many unattractive ballot measures ultimately yields enactment of unpopular ballot measures. However, the available data finds that direct democracy, as expected in theory, does not move policy away from median preferences. See *infra* notes 179–180.

routinely do<sup>171</sup>: political scientists and economists find that voters regularly reject ballot measures as a default response when they are unsure about how they feel and how to vote on a ballot measure.<sup>172</sup> Although voters approve routine measures that do not raise uncertainty,<sup>173</sup> voters frequently reject nonroutine measures even when sponsored by wealthy interests that fund heavy campaigning in their support.<sup>174</sup> Campaign spending appears to exacerbate the voters' default response of rejecting nonroutine ballot measures, thus helping to defeat them, but is less effective at helping them ultimately win.<sup>175</sup>

The voters' default response of "no" reflects a healthy distrust about an offered ballot measure that places the burden of persuasion on its proponents. Voters need not invest heavily in learning about ballot measures, secure in the knowledge that direct democracy may not fulfill their most ideal wishes, but that they will effectively enforce their simple negative preferences.<sup>176</sup> With this adaptive orientation toward direct democracy as a mere supplement to the regular legislative process,<sup>177</sup> voters need not be knowledgeable about public policy, and direct democracy is economically responsive to the negative preferences that voters possess and not to an aspiration of affirmative preferences that they do not.

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171. See Elisabeth R. Gerber, *Pressuring Legislatures through the Use of Initiatives: Two Forms of Indirect Influence*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 191, 191 (Shaun Bowler et al. eds., 1998) (explaining that only 42 percent of statewide initiatives from 1981 and 1990 passed and success rate was less than 30 percent before the late 1970s).

172. See SHAUN BOWLER & TODD DONOVAN, *DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY* 43–66 (1998) (showing that voters resort to a default rejection of ballot measures under uncertainty); DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 142 (1984) (arguing that voters vote "no" when confused by ballot measures).

173. See Richard L. Hasen, *Assessing California's Hybrid Democracy*, 97 CAL. L. REV. 1501 (2009) (reviewing MARK BALDASSARE & CHERYL KATZ, *THE COMING AGE OF DIRECT DEMOCRACY: CALIFORNIA'S RECALL AND BEYOND* (2007)) (reporting that voters tend overwhelmingly to approve legislative ballot measures, most of which are routine bond measures, but tend to reject citizen-proposed initiatives).

174. See, e.g., MAGLEBY, *supra* note 172, at 148 (reporting that ballot measures won approval less than half the time when supporters spent two-thirds more than the opposition); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 518–19 (1982) (reporting that nine of ten propositions over twelve years that were opposed by large spending advantages were defeated, while seven of fifteen supported by large spending were approved).

175. See ELISABETH R. GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* (1999); Susan A. Banducci, *Direct Legislation: When Is It Used and When Does It Pass?*, in *CITIZENS AS LEGISLATORS*, *supra* note 171, at 109, 127.

176. See Levmore, *supra* note 170, at 122 (concluding with respect to plebiscites that "[i]f the task is not to find a Condorcet winner and not to find the correct answer, but to see whether a given option, X, is better than the status quo, S, then this familiar form of decisionmaking is not bad").

177. See Baker, *supra* note 164, at 318 (describing direct democracy as a beneficial supplement to representative democracy); Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096 (2005) (characterizing use of direct democracy as part of hybrid democracy that mixes together direct and representative democracy); Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1350 (1985) (reviewing MAGLEBY, *supra* note 172) (explaining that direct democracy, where it is used, interacts and co-exists with representative democracy).

In practice, as a result, direct democracy in the end actually produces an incremental majoritarian improvement over the status quo in terms of policy.<sup>178</sup> The set of ballot measures presented for public vote in direct democracy may be skewed by wealthy interests in ballot qualification, but the voters' default rejection of ballot measures appears to correct for this bias. A wealth of empirical research shows that direct democracy generally tends to bring public policy roughly closer to the median voter.<sup>179</sup> The reason is simple—whatever the set of ballot measures that gains ballot qualification, no matter how one-sided the menu presented on the ballot for a vote, only those measures that improve upon the status quo in the majority's eyes will win approval.<sup>180</sup> Again, this finding does not imply that direct democracy realizes the electorate's most preferred policies, whatever they are, nor does it imply any gains will be large or impressive. Nonetheless, subject to more modest, perhaps more appropriate expectations, direct democracy leaves the electorate no worse off and offers a chance to be better off.

The public's adaptive response to the realities of direct democracy might explain public opinion about direct democracy. For instance, in California, where direct democracy is used most, almost half of survey respondents believe that ballot measure elections come out the way "a few organized special interests want," compared to only a third of respondents who believe that they come out "the way most people want."<sup>181</sup> In addition, 52 percent of Californians believe the initiative process was controlled "a lot" by special interests, while another 44 percent believe it was controlled "somewhat" by special interests.<sup>182</sup> Despite these beliefs, roughly three out of four Californians approve

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178. My claim, however, is not necessarily that the policy results from direct democracy are objectively optimal in any other sense than that they accord with the general preferences of the majority. Many critics of direct democracy argue that it results in objectively bad policy and discriminates against minority groups. See, e.g., BRODER, *supra* note 162; Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latino and Immigrant Communities*, 96 CAL. L. REV. 1259 (2008); Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903 (2006); Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993).

179. See JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY* 140–41 (2004); see also GERBER, *supra* note 175, at 126–36 (finding that parental abortion notification and death penalty law is more responsive to majoritarian preferences in states where the initiative is available); Michael S. Kang, *Counting on Initiatives?: An Empirical Assessment*, 4 ELECTION L.J. 217 (2005) (reviewing MATSUSAKA, *supra*; and DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES* (2004)). But see Edward L. Lascher, Jr., et al., *Gun Behind the Door? Ballot Initiatives, State Policies and Public Opinion*, 58 J. POL. 760 (1996) (contending that initiative states do not produce more responsive policy).

180. See MATSUSAKA, *supra* note 179, at 12 ("[T]he fact that narrow interests dominate the initiative process . . . does not necessarily imply that the final outcomes are nonmajoritarian.").

181. Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 911 (2005) (reporting the results of a 2004 Field Research Corporation survey).

182. *Id.* (reporting the results of a 2001 Public Policy Institute of California survey).

of direct democracy in the state,<sup>183</sup> and 68 percent of the public reports that it is “very satisfied” or at least “somewhat satisfied” with the initiative process in the state.<sup>184</sup> About three out of four also think it is a “good thing . . . that a majority of voters can make laws and change public policies by passing initiatives.”<sup>185</sup> These seemingly dissonant beliefs may reflect ambivalence about the observable influence of special interests on one hand, particularly in ballot qualification, but also reflect on the other hand the public’s confidence about exercising its voting veto.

### CONCLUSION

This Article attempts to develop the notion of negative preferences, discuss how and when voting based on negative preferences may be advantageous, and then describe how negative preferences already influence different forms of voting in ways that have been easy to overlook. Two alternative conceptions—the traditional focus on affirmative preferences and a reconceptualization of voting as veto—offer relative advantages and disadvantages that suit different contexts for voting. Failure to achieve voters’ most preferred outcomes through elections is routinely viewed as a failure of the democratic process, but the alternative aim of avoiding least preferred outcomes has gone underappreciated. This Article identifies the relevant tradeoffs from recognizing negative preferences to a greater degree and describes cases where voting has evolved usefully to accommodate negative preferences, as well as cases where formal recognition of negative preferences is or would be less advantageous.

The development of a system for collective choice involves multiple layers of decision making. This Article thus is stylized in the sense that agenda setting is necessary before any vote, and almost all collective decision making occurs within a layered institutional context with numerous decision points. Collective decision making requires a multistage process in which formal recognition of affirmative and negative preferences can be blended together over the process as a whole, rather than looking exclusively to affirmative or negative preferences as all-or-nothing choices. It is still useful for any given stage to determine whether voting strikes the right balance for recognition of negative preferences, but in addition, it is important to consider the formal recognition of negative preferences in relation to the process as a whole. In other words, the tailoring of voting to circumstance occurs not only within any individual stage of voting, but also as a matter of striking a balance of affirmative and negative preference across component stages of voting and decision.

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183. See MARK BALDASSARE & CHERYL KATZ, *THE COMING AGE OF DIRECT DEMOCRACY: CALIFORNIA’S RECALL AND BEYOND* 31 (2008) (reporting an August 2006 survey finding that 72 percent of Californians were satisfied with the way the initiative process is working in California).

184. PUBLIC POLICY INSTITUTE OF CALIFORNIA, *SPECIAL SURVEY ON CALIFORNIANS AND THE INITIATIVE PROCESS* 25 (Aug. 2005).

185. BALDASSARE & KATZ, *supra* note 183, at 23.

What is more, this Article focuses on the incorporation of negative preferences in the process of collective decision making, rather than through a negative liberty not to participate or be bound by the outcomes of collective decision making. A different means of honoring negative preferences is the granting of a right to opt out.<sup>186</sup> Autonomy from both the process of decision making and the effects of the ultimate decision allows dissenters the ability not to be affected by the decision and therefore respects their negative preferences against particular outcomes. The Article, however, focuses on inclusion and incorporation of negative preferences, instead of the isolation and exclusion of those with negative preferences. Further work on negative preferences will need to explore their operation beyond voting as well.

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186. For instance, the Federal Rules of Civil Procedure give class members the opportunity to “opt out” of a class action settlement, in addition to and separate from the opportunity to object formally to the fairness of a proposed class action settlement. See Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529 (2004). Thanks to Bill Rubenstein on this point.

