VOTING AS VETO

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I. 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 favorite 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. The question that viewers answer by voting is, “Which competitor do you think is the best?”

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 or outcomes. Rather than reflecting affirmative preference for a particular outcome, negative preferences represent an opposition against a particular outcome.\(^1\) 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, irrespective of voters’ negative preferences. When only affirmative preferences are formally counted as votes, each competitor’s success depends primarily on having a dedicated base of fans for whom she is their favorite, regardless how many voters dislike her intensely. In fact, a competitor with an dedicated fan base may survive in a multi-competitor field until the final round even if a majority of voters think that she is the worst singer in the field because all the voters’ negative preferences go entirely unrecognized as a formal matter in the voting process.

If American Idol were to change its voting process and recognize negative preferences as formal matter, the show would ask 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. A competitor would survive elimination only if she could avoid being voted as the very worst singer in the field. It would not necessarily hurt her chances, at least when there are more than two competitors remaining, even if she was no voter’s most

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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 the 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, influence voting decisions, and may deserve further recognition under certain circumstances.
preferred choice to be the ultimate winner. In a system that formally requests and recognizes negative preferences, the goal need be nothing more than to avoid being the worst.²

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 and appreciation for a particular candidate—an affirmative preference for the candidate—or vote for the same candidate based mainly on a strong disliking for the candidate’s competition—a negative preference against the opposition.³ “Affirmative” or “negative” describes the direction of the underlying preference motivating the vote choice. Although subjective motivation may be multifaceted, a voter might vote for Barack Obama in this year’s presidential election mainly because he likes Obama, or alternately mainly because he dislikes Obama’s opponent, John McCain, as well as other minor competitors such as Bob Barr and Ralph Nader.⁴ I argue that this distinction between such affirmative and negative preferences is substantively meaningful in terms of subjective motivation, and formal recognition of one preference rather than the other in voting may also result in different outcomes, at least when there are more than two alternatives from which to choose.

The familiar predominance of binary choices in American elections between only two meaningful alternatives obscures what might otherwise be a more intuitive distinction between voting based on affirmative rather than negative preferences. 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.⁵ When only two alternatives are offered to

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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.”).

³ See infra Part II.B (discussing anticandidate voting).

⁴ Imagine the following utility scores that two voters, Voter 1 and Voter 2, who would assign the following cardinal utility to the election of two competing candidates, Barack Obama and John McCain.

<table>
<thead>
<tr>
<th></th>
<th>Obama</th>
<th>McCain</th>
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<tbody>
<tr>
<td>Voter 1</td>
<td>10</td>
<td>-3</td>
</tr>
<tr>
<td>Voter 2</td>
<td>3</td>
<td>-10</td>
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Voters 1 and 2 share the same ordinal ranking of the two candidates, but their underlying tastes for the candidates are quite different. Voter 1 chooses Obama over McCain mainly because he has a strong affirmative liking for Obama, whereas Voter 2 chooses Obama over McCain mainly because he has a strong negative disliking for McCain, Obama’s opponent. The difference between the voters is not intensity of preference, but more important for my purposes, the valence of the combined affirmative and negative preferences. Of course, this hypothetical represents only what may be an extreme case, designed to illustrate the general principle, while many voters in practice will arrive at decisions that cannot be characterized quite so clearly as dominated by an affirmative or a negative preference.

voters, it makes no difference whether voters are asked to vote formally their affirmative or negative preferences, because voting on the basis of affirmative and negative preferences are complementary. A vote for the Democrat is effectively a vote against the Republican, and vice versa. The same competitor wins regardless how the question is posed.\(^6\) However, a substantive distinction between affirmative and negative preferences becomes clearer when voters confront more than two alternatives. In the 2000 presidential election, Green Party candidate Ralph Nader convinced many liberal voters to vote for him and presented voters with a three-candidate race among Nader, Democrat Al Gore, and Republican George W. Bush. Nader, as recounted elsewhere, split the liberal vote and ensured Bush’s victory in the decisive state of Florida.\(^7\) But it is likely that, on election day, a majority of the Florida electorate least preferred that Bush win the election.\(^8\) In a system that prioritizes negative preferences, Bush would not have been the winner in Florida or elected president.\(^9\) However, traditional voting formally recognizes only affirmative preferences, not negative ones. Bush probably would have attracted the most votes as least favorite candidate, but he also garnered the most votes in the field as most favorite candidate in Florida.\(^10\) Under a traditional system of voting directed toward affirmative preferences, Bush won the election despite being the least favored choice for a majority of voters.

The fact that negative preferences are not formally recognized in the traditional practices of voting and elections has meant that they have gone overlooked conceptually as preferences in voting. It is easy to conceptualize preferences as only affirmative preferences \textit{for} an alternative or outcome, in the absence of a linguistic label for negative preferences \textit{against} something, and a means for their exercise.\(^11\) Academic theory about voting and governance almost always regards recognition of affirmative preferences as the operative assumption, because when asked to cast a


\(^8\) See, e.g., Christopher Wlezien, \textit{On Forecasting the Presidential Vote}, 34 PS: Pol. Sci. & Pol. 24, 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).

\(^9\) Al Gore won the national popular vote by a narrow margin over Bush and Nader, with 48 percent of the vote.

\(^10\) There is considerable question, however, whether a decisive number of votes cast for Bush were cast in error as a result of the famous “butterfly ballot” in Palm Beach County. See Henry Brady et al., \textit{Law and Data: The Butterfly Ballot Episode}, 34 PS: Pol. Sci. & Pol. 59 (2001).

\(^11\) See Frederic G. Cassidy, \textit{A Note of Names and Censors}, 41 Names 262, 263 (1993) (arguing that “[n]othing exists concretely in human thought . . . until it exists as a word”).
vote, whether it is voting for the American Idol or American President, it is traditionally to be a vote in support of one’s most preferred alternative or candidate above the other eligible ones. As a result, although the notion of negative preferences should be intuitively familiar, there is only disconnected academic work exploring the negative preferences as a phenomenon in voting and as a potential tool in democratic governance. An aim of the Article is to give a name to negative preferences and offer a new realization of negative preferences’ ubiquity and importance where they would otherwise be overlooked.

Although traditional voting is formally constructed to request voters’ affirmative preferences, negative preferences frequently influence voters’ decisions about how to vote under all types of circumstances. Negative preferences help explain how many voting systems function in practice. Voting under many circumstances amounts not to an affirmative choice in favor of the most preferred option, but instead a pragmatic decision, based on a negative preference, to seek a veto of the least preferred option. Embedded in the notion of “voting for the lesser evil” is the affirmative ideal for voting, because the saying expresses a sense of disappointment. 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. But as a practical matter, it is not uncommon, across several different voting contexts, for voters to act on negative, rather than affirmative preferences. The 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.

Negative preferences offer an alternative model for democratic voting that brings new versatility and better suits practical realities of voting in ways that might be overlooked with an exclusive focus on affirmative preferences. Proper recognition of negative preferences in voting may provide new normative guideposts for the goals of voting and new criteria for judging the performance of elections and voting. Just as importantly in doing so, recognition of negative preferences may help suggest new prescriptive directions for current voting systems across a range of legal circumstances different from those suggested by traditional assumptions about what elections and voting. Moreover, reconceptualizing voting as veto may justify alternative voting arrangements that deviate from the traditional formulation of asking voters formally for their most preferred choices. Reconceptualizing voting as veto may offer its own instrumental benefits and better describe many circumstances under which elections and voting take place.

In addition to subverting the traditional conception of voting—from affirmative to negative—I also challenge the traditional conception of veto, which is typically exercised as an outright negative trump held by a single actor. The President of the United States, for instance, may exercise an 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 veto, exercised by the voting body, rather than the more familiar unilateral veto held by an individual executive. Reconceptualizing voting as veto therefore turns 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 as the process of determining collective choice.
This reconceptualization of voting as veto newly enables us to view elections and voting as existing along a larger continuum between the voting for purely as affirmative selection and voting purely as negative veto. In the Article, I discuss several overlapping manifestations of voting. Reference to affirmative or negative preferences cites 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 or “negative authority” to describe adapted 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” or “negative authority.” The main examples that I discuss in the Article are negative voting and approval voting, but other references are sprinkled throughout. “Formal recognition of negative preferences” or “negative authority” should be distinguished from “traditional voting” or “affirmative authority,” which describe the familiar formal recognition of affirmative preferences in voting.

In Part II, the Article defines negative preferences and provides background and a brief introduction to the concept. It argues that negative preferences are substantively meaningful and useful. In Part III, the Article discusses the potential benefits of voting based on negative preferences and discusses the conditions under which it may be more or less useful. Prioritizing negative preferences, at least under certain circumstances, may allow voting to better suit practical limitations and needs. In Part IV, the Article introduces instances where reconceptualizing voting as veto may be useful for understanding voting in contexts where the role of negative preferences has been neglected. It suggests that negative preferences may motivate voting, even when voting registers and records only affirmative preferences as a formal matter. Finally, the last section of Part IV suggests and discusses two voting procedures—negative voting and approval voting—that permit more direct recognition of negative preferences.

II. NEGATIVE PREFERENCES

A. An Introduction to Negative Preferences

Isaiah Berlin famously distinguished positive and negative liberty. Positive liberty constitutes the right to direct affirmatively one’s life and decisions. Positive liberty bestows the right of rational self-direction and of “conceiving goals and policies of [one’s] own and realizing them.” It is the ability to seek, choose, and decide one’s own course of action. By contrast, Berlin defined negative liberty as the “area within which a man can act unobstructed by others.” If positive liberty is the freedom to do to as one wishes, negative liberty is the freedom from

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13 Id. at 131.
14 Id. at 122.
external interference. Negative liberty is a guarantee not to subjected to external action and defines a right of noninterference inside a protected space.

This basic distinction between positive and negative liberty is ingrained in the American system of legal rights. Gordon Wood explains that early Americans conceived of democratic self-government mainly in furtherance of negative liberty to be free of government intrusion, and Judge Posner argues that the “Constitution is a charter of negative rather than positive liberties.” Commentators invoke Berlin to describe a diverse range of law, including among other things the right to vote, assisted suicide, international law, sexual harassment, and the system of judicial independence.

A new distinction between affirmative and negative preferences—which I seek to introduce here—maps nicely onto Berlin’s distinction between positive and negative liberty. Affirmative preferences are preferences for something, just as positive liberty is the right to do 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 effectuates a form of positive liberty, permitting voters to translate their affirmative preferences for something into positive liberty to direct action.

Negative preferences are preferences to be without some specified occurrence or

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23 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 Letter from Thomas Jefferson to Baron F. H. Alexander Von Humboldt (June 13, 1817), in The Writing of Thomas Jefferson 89 (Paul L. Ford ed., 1899) (“To consider the will of the society announced by the majority of a single vote as sacred as if unanimous is the first of all lessons of importance.”); Jesse 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.”); 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.”).
condition. Negative preferences are preferences against something, just as negative liberty is the right to be free from interference. 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 one. The most familiar form of negative authority would be the unilateral right of veto. The president, for instance, can exercise his executive veto to block disfavored legislation from being enacted into law. The unilateral veto instantiates negative preferences because it does not permit the president affirmatively to design legislation as he likes and instead permits him only to block what he does not like. Despite the fact that negative liberty is embedded in rights and law, the notion of negative preferences as a basis for voting has been neglected in voting theory and law.

The distinction between affirmative and negative preferences here is not simply a framing effect. As well-known from prospect theory, the same choice framed in different but substantively equivalent frames may elicit different, conflicting responses. People irrationally make different choices depending on whether the decision is framed in terms of gains or losses. 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 reflect not confusion on the voter’s part, but different slices of information from a voter’s individual ranking of alternatives.

Although there is a dearth of contemporary voting practices that formally recognize negative preferences explicitly in voting, the ancient Athenian institution of ostracism provides an vivid, if limited, example of a formal focus on negative preferences that is rare among modern American voting systems. Unlike any domestic political practice in the United States, Athenian ostracism allowed citizens to vote, not their first preference for elected leadership, but their negative preference against particular candidates. Citizens selected their choice of individuals, not to be placed into leadership, but to be barred from leadership. “Winners” of the ostrakophoria were disqualified from holding office and actually exiled from the city. Citizens voted by etching on pieces of pottery shards, or ostraka, the name of a person whom they wanted banished from Athens for ten years. Ostracism was intended as a check on tyranny by deterring or exiling

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24 See infra.

25 The ostracism vote, or ostrakophoria, 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 (2001). 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.
potential tyrants before they aggrandized a dangerous level of political power. Ostracism asked voters to register what were negative preferences, distinctly different from the registering of affirmative preferences in the more familiar method of candidate elections in the United States.

The actual practice of ostracism in ancient Athens illustrates how recognition of negative preferences is insensitive to and independent of affirmative preferences. As a safeguard against ambitious leaders, the institution of ostracism effectively targeted high-status politicians, generals, and public figures regarded as most influential. As one observer remarks, “[t]o be the subject of an ostracism was actually something of an honor” because “[i]t meant that a man was deemed too influential, too capable of persuading his fellow citizens, to be allowed to participate in the democratic processes of governing Athens.” Indeed, during the fifth century B.C.E., Athens exiled a series of its most successful politicians and generals, including Themistocles, engineer of Greek victory in the great Persian War. Ostracism, by formally recognizing only negative preferences without regard to affirmative preferences, served to disadvantage polarizing candidates subject to both strong affirmative and negative preferences. As a consequence, the formal recognition of negative preferences through ostracism served as a check against unfiltered deference to affirmative preferences through popular election. The combination of the two practices 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. Ostracism thus added value by blocking from office the subset of popular candidates who carried with them a troubling degree of opposition as well.

Negative preferences are real and substantively important in their own right. Although democratic voting today tends to focus nominally on affirmative preferences, voters also possess real preferences about what they least prefer, 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 a strong affirmative preference about those matters. Indeed, prospect theory suggests that negative preferences may take general cognitive precedence over affirmative preference.

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. To begin, a well-known finding of prospect theory is that people subjectively value the avoidance of losses more highly,

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27 See Lionel Pearson, *Party Politics and Free Speech in Democratic Athens*, 7 Greece & Rome 41, 44 (1937). Of course, in theory, a system of negative preferences simply disadvantages unpopular candidates with strong negative preferences, irrespective of what affirmative preferences they attract. For instance, Thucydides explains that Hyperbolus was ostracized “not because anyone feared his power or influence, but because he was a useless wretch and a disgrace to the city.” See Thucydides 8.73; but see Charles Fuqua, *Possible Implications of the Ostracism of Hyperbolus*, 96 Transactions & Proceedings of the Am. Philological Ass’n, 165, 170-172 (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). After Hyperbolus’s ostracism, the institution fell into disuse for lack of purpose.
perhaps twice as highly,\textsuperscript{28} than gains of the same objective magnitude.\textsuperscript{29} When presented with choices of equivalent monetary value, subjects are consistently more likely to be fearful of the prospect of losing a sum of money than attracted to the prospect of winning the same sum. Subjects tend to be risk-seeking with respect to the avoidance of losses and risk averse with respect to seeking gains, such that they effectively willing to pay more to avoid a loss but unwilling to pay as much for the same gain.\textsuperscript{30} What is more, people display an “endowment effect” that likewise reflects a stronger desire to avoid losses than acquire gains.\textsuperscript{31} Subjects in experimental settings demand a higher value for the relinquishment of an item that they have just acquired than the maximum price that they would have paid for the item before they acquired it.\textsuperscript{32} Put another way, people subjectively place greater value on avoiding the loss of an item than they place on its acquisition. In short, if anything, people may place greater value on their negative preferences—their desires to avoid negative outcomes—than their affirmative preferences to achieve positive ones.

Furthermore, as a cognitive matter, people appear to decide upon their negative preferences before their affirmative preferences and rely upon them more heavily to reach all 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.”\textsuperscript{33} The heightened response to negative stimuli occurs at a neural level,\textsuperscript{34} appears as

\textsuperscript{28} See Chip Heath et al., Goals as Reference Points, 38 COGNITIVE PSYCHOL. 79, 87 (1999).


\textsuperscript{30} As a result, subjects are highly affected by whether a choice is framed in terms of losses or gains, even if they should be rationally indifferent. 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 NOTRE DAME L. REV. 313 (2006) (discussing framing effects in public perceptions of environmental regulation).

\textsuperscript{31} See generally Russell Korobkin, The Endowment Effect and Legal Analysis, 97 NW. U. L. REV. 1227 (2003) (reviewing the literature on the endowment effect)


early as infancy, and has been described by one set of psychologists as “one of the most basic and far-reaching psychological principles.” Across a wide range of domains, psychologists find that negative information regularly assumes cognitive priority over positive information for decision-making and affective response. For instance, studies consistently find that people weight negative information more heavily than positive information in evaluation and impression formation. 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. In addition, empirical studies find 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, negative information is more likely to attract people’s attention to be processed as a threshold matter. People voluntarily elect to spend more time mulling negative information than positive information and elaborate more extensively on negative information in terms of counterargument and causal attribution. This tendency to focus more heavily on avoidance of bad outcomes, may be adaptive, because “[s]urvival requires avoiding catastrophes” more so than maximizing good outcomes.

In short, consideration of negative preferences in voting, at least under certain circumstances, may more closely map onto people’s most salient wishes and concerns than

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exclusive consideration of affirmative preferences. Recent studies in neuropsychology also suggest that affirmative and negative preferences are even more independently and distinctly derived than previously understood. Although overall evaluation may require integration of both positive and negative information, research is discovering that positive and negative stimuli appear to be processed through separate cognitive systems of activation and motivation. In other words, positivity and negativity operate separably such that each is best viewed as an independent process, rather than as operating as opposite poles capping a single continuum. Affirmative and negative affect, in particular, appear to be uncoupled, such that positive affect does not imply the absence of negative affect, and negative affect does not imply the absence of positive affect. Negative preferences thus may draw on different pathways for reaching decisions and evaluations than the exclusive use of affirmative preferences.

B. The Invisibility of Negative Preferences

Given the intuitive prominence of negative preferences, it is remarkable that formal recognition of negative preferences is virtually absent in American systems of voting. Modern commentary on voting rests on the premise that voting in elections provides a means for providing the median voter what she wants—fulfilling the majority’s affirmative preferences. 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. When the field produces only two viable candidates—the usual 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 only 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. This functional equivalency in many elections obscures the pervasive role that negative preferences play in candidate elections.

Negative preferences are influential in practice as a subjective motivation underlying

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44 Commentary on voting regularly relates back to the assumptions and predictions of the median voter theorem. For instance, the structural approach in election law contends that competitive elections lead to satisfaction of the median voter’s affirmative preferences. See generally Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 STAN. L. REV. 643 (1998).
voting in candidate elections.\textsuperscript{45} Even though American voters are asked to register a vote for their most preferred candidate among the field, voters are regularly motivated by negative preferences against the incumbent or other eligible candidates, rather than motivated mainly by affirmative preferences in favor of any particular candidate. 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.\textsuperscript{46} 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 opponents.\textsuperscript{47} 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.\textsuperscript{48} A yet more vivid example of anticandidate voting in candidate elections is the 1991 runoff election for Louisiana governor between David Duke and Edwin Edwards.\textsuperscript{49} Nearly 80 percent of African-American voters turned out in the runoff election and voted overwhelmingly against Duke.\textsuperscript{50} Seventy percent of those who voted for Edwards reported that their vote was “mainly against” Duke.\textsuperscript{51} Observing similar, perhaps less dramatic, phenomena in other elections, political scientist V.O. Key invoked the “journalistic superstition” that “people vote only against; never for.”\textsuperscript{52}

Consistent with these intuitions, social scientists find that people tend to weight negative political information more heavily than they do positive information.\textsuperscript{53} To start, people appear

\begin{itemize}
\item \textsuperscript{46} See Lee Sigelman & Michael M. Gant,\textit{ Anticandidate Voting in the 1984 Presidential Election}, 11 POL. BEHAVIOR 81 (1989) (describing “anticandidate voting”).
\item \textsuperscript{47} See Michael M. Gant & Lee Sigelman,\textit{ Anti-Candidate Voting in Presidential Elections}, 18 POLIT 329, 333 (1985). Anticandidate voting is also referred to as “negative voting” in the literature, see, e.g., Kernell, supra note, 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 Part IV.B.
\item \textsuperscript{48} See Sigelman & Gant, supra note, at 85. By contrast, only 15 percent of Reagan voters reported that their vote was motivated mainly by dislike for Mondale. \textit{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.
\item \textsuperscript{50} See id. at 227-28
\item \textsuperscript{51} See id. at 229.
\item \textsuperscript{52} V.O. Key, Jr., \textit{The Responsible Electorate} 60 (1966).
\end{itemize}
motivated by concern and anxiety to begin engaging with voting issues and pay more attention. As George Marcus and Michael MacKuen demonstrate empirically and explain succinctly, “when politics makes people anxious, people sharpen their eyes and pay careful attention.” Once engaged, people are attracted to negative political information and focus more intently on negative information when presented with it. What is more, the general negativity bias of cognitive psychology applies in politics as well. People place greater weight on negative information than positive information and are more likely to remember negative information over time.

For this reason, the popularity and growing use of negative campaign advertisements is unsurprising. Negative advertising appears to have doubled from 1998 to 2000 and continues to increase since. Campaign strategists believe overwhelmingly that negative advertisements are

54 See, e.g., George E. Marcus & Michael B. MacKuen, Anxiety, Enthusiasm, and the Vote: The Emotional Underpinnings of Learning and Involvement During Presidential Campaigns, 87 AM. POL. SCI. REV. 672, 673 (1993) (noting that people “abandon complacency and start to pay attention when the world signals that something is not right”).
55 See id. at 680-81.
critically effective and useful in political campaigning.\textsuperscript{60} Susan Estrich, campaign manager of Michael Dukakis’s 1988 presidential campaign, explains simply that “[c]andidates engage in negative campaigning because it works.”\textsuperscript{61} Former U.S. Senator John Danforth adds, consistent with this professional consensus, that “[i]f one candidate goes negative and the other doesn’t respond very quickly, he’s going to lose.”\textsuperscript{62} Negative advertising builds on the belief that “[i]t is not always the most liked candidate, but more the least disliked candidate who wins the election.”\textsuperscript{63} Negative advertising caters to voters’ 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. In fact, 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.\textsuperscript{64} If anything, negative advertising may work despite the fact that it also can increase the viewers’ disliking for the sponsor as well.\textsuperscript{65} Nonetheless, consistent with findings in psychology that people place more importance on negative information,\textsuperscript{66} 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.\textsuperscript{67} Negative advertisements may not only

\textsuperscript{60} See, e.g., JAMES A. THURBER & CANDICE J. NELSON, CAMPAIGN WARRIORS: POLITICAL CONSULTANTS IN ELECTIONS (2000); Owen G. Abbe, Paul S. Herrnson, David B. Magleby, & Kelly D. Patterson, Are Professional Campaigns More Negative?, in PLAYING HARDBALL: CAMPAIGNING FOR U.S. CONGRESS (Paul S. Herrnson ed., 2001); David Doak, Going Negative! Attack Ads: Rethinking the Rules, CAMPAIGNS & ELECTIONS, July 1995, at 21; see also John Theilmann & Allen Wilhite, Campaign Tactics and the Decision to Attack, 60 J. POL. 1050 (1998) (showing that campaign consultants advise negative campaigning particularly in close races or when the incumbent is far behind, and that Republican consultants more likely to advise negative campaigning than Democrats).


\textsuperscript{64} See, e.g., Fridkin & Kennedy, supra note; Michael Basil, Caroline Schooler, & Byron Reeves, Positive and Negative Political Advertising: Effectiveness of Ads and Perceptions of Candidates, in TELEVISION AND POLITICAL ADVERTISING Vol. 1 245 (Frank Biocca ed., 1991).

\textsuperscript{65} See, e.g., Fridkin & Kennedy, supra note, at 583-84 (finding that “mudslinging” can reduce citizens’ evaluations of the sponsors of such advertisements); Basil, Schooler, & Reeves, supra note, at 256-59 (finding negative advertisements “turn voters off” to both candidates); Gina M. Garrmone, Voter Response to Negative Political Ads, 61 JOURNALISM Q. 250 (1984).


\textsuperscript{67} See Meiffert et al., supra note, at 44; Paul Freedman & Kenneth M. 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.
be more effective at influencing how voters decide what to do on election day, they also may help mobilize the candidate’s most committed supporters during the campaign. Politicians use negative advertising, because they believe that voters’ negative preferences influence how voters ultimately decide to vote.

Incumbents in particular are sensitive to voters’ negative preferences regarding their performance. In his classic study of Congress, Richard Fenno found that incumbents quickly adopt a protectionist outlook to re-election in which the “dominant impulse is conservative.” Congressional incumbents realize that they have been successfully elected, own advantages by virtue of their incumbency, and hope simply “to keep the support they had ‘last time.’” Indeed, incumbents are hurt by poor performance in office, and the empirical literature makes clear that federal officeholders are regularly held accountable by voters for a weak economy. There is some evidence that they tend to be punished more for bad performance than they are rewarded for virtue of their incumbency, and hope simply “to keep the support they had ‘last time.’” Indeed, incumbents are hurt by poor performance in office, and the empirical literature makes clear that federal officeholders are regularly held accountable by voters for a weak economy. There is some evidence that they tend to be punished more for bad performance than they are rewarded for virtue of their incumbency, and hope simply “to keep the support they had ‘last time.’” Indeed, incumbents are hurt by poor performance in office, and the empirical literature makes clear that federal officeholders are regularly held accountable by voters for a weak economy. There is some evidence that they tend to be punished more for bad performance than they are rewarded for virtue of their incumbency, and hope simply “to keep the support they had ‘last time.’” Indeed, incumbents are hurt by poor performance in office, and the empirical literature makes clear that federal officeholders are regularly held accountable by voters for a weak economy.

A separate but related debate revolves around the issue whether unhappy voters focus mainly on their own personal financial fortunes or on the general state of the macroeconomy. Compare Donald R. Kinder & D R. Kiewiet, Economic Discontent and Political Behavior in Congressional Voting, 23 AM. J. POL. SCI. 495 (1979) (arguing that voters attend sociotropically to general economic conditions), with Gregory B. Markus, The Impact of Personal and National Economic Conditions on the Presidential Vote: A Pooled Cross-Sectional Analysis, 32 AM. J. POL. SCI. 137 (1988) (arguing that personal financial well-being influences incumbent approval as well).
good performance, but the empirical literature is ambiguous about the asymmetry of public responses to negative results.\textsuperscript{74} It is clear, though, that incumbents tend to suffer more from anticandidate voting than challengers, as voters punish poor performance in office but seem to exhibit weaker negative preferences regarding less known challengers.\textsuperscript{75}

Despite their practical importance in elections, the influence of negative preferences can become overlooked, even invisible as voting preferences. The traditional practice of plurality voting is inhospitable to the expression of negative preferences, because they formally recognize votes only in the form of an affirmative preference. Traditional plurality voting formally recognizes only affirmative preferences such that “[v]oters have the right to say yes to one of the candidates, but not the right to say no.”\textsuperscript{76} The mismatch between negative preferences, and traditional voting only in terms of affirmative preferences, can obscure even the most salient cases of negative preferences at work. One goal of the Article is simply to reify negative preferences, which have been discussed only irregularly, without a common name.\textsuperscript{77} By giving a label to negative preferences, the Article may help highlight their overlooked influence and potential value.

\section*{III. The Value of Voting as Veto}

In this Part, I argue that reconceptualizing voting as veto presents an alternate model for democratic choice that brings its own benefits. Voting based on negative preferences contributes to avoidance of the electorate’s least preferred outcomes, which is a useful democratic aim in itself under certain circumstances but which has gone underappreciated with the current, nearly exclusive focus on affirmative preferences. As I discuss later in the Article, reconceptualizing voting as veto gives new perspective on current debates about voting where voting may be


\textsuperscript{76} Daniel Ferguson & Theodore Lowi, \textit{Reforming American Electoral Politics: Let’s Take “No” for an Answer}, 34 PS: Pol. Sci. & Pol. 277, 277 (2001); see also Poundstone, supra note, at 276 (arguing that traditional plurality voting “pay no attention at all to how many people dislike a candidate”).

\textsuperscript{77} See, e.g., DAME SPENDER, \textit{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.”); MARK KELMAN, \textit{A GUIDE TO CRITICAL LEGAL STUDIES} 269 (1987) (arguing that “as soon as we name, we invariably reify”); Barbara DuBois, \textit{Passionate Scholarship: Notes on Values, Knowing and Method in Feminist Social Sciences}, in \textit{THEORIES OF WOMEN’S STUDIES} 105, 108 (Gloria Bowles & Renate Dduelli Klein eds., 1983) (“That which has no name, that for which we have no words of concepts, is rendered mute and invisible”).
subjectively and practically motivated by negative preferences. What is more, where negative preferences are particularly useful to prioritize, circumstances may justify the adoption of voting procedures that more explicitly and directly effectuate negative preferences.

In this Part, I begin introducing the benefits of voting based negative preferences that may be more useful than exclusive consideration of affirmative preferences. First, negative preferences simply may be more salient or certain than affirmative preferences. It may be difficult to identify affirmative preferences because people may not possess strong affirmative preferences for a variety of reasons. Second, recognition of negative preferences in voting facilitates divisions of power and labor in structuring collective decisionmaking, particularly valuable for diffuse electorates. Third, recognition of negative preferences in voting may encourage centrist in outcomes, which may be attractive under certain conditions. Fourth, recognition of negative preferences in voting opens up space for protest through voting.

It is important to acknowledge that during the remainder of the Article, I discuss voting across a wide variety of contexts that differ along several important dimensions. The voting contexts differ by subject matter. I use examples from political elections, both candidate and ballot measure elections, as well as legislative, corporate, and judicial settings. The voting contexts also differ in terms of the number of voters, whether it is a single voter for the example of a unilateral legislative veto or a larger electorate for the typical political election. In addition, the electoral choices for voters may differ in that some voting contexts offer a voter a choice among more than alternative, while others offer a voter only a choice between approval or disapproval regarding a single alternative. What is more, voting may occur in a one-shot election, or occur in multiple stages in seriatim. Instead of analyzing how negative preferences behave differently between different settings, I focus mainly on the influence that negative preferences can play across different contexts, each of which represents a setting for collective decisionmaking where negative preferences may be useful to recognize.

A. Incomplete Preferences

Under many circumstances, negative preferences may be more subjectively certain or salient to voters than their affirmative preferences. When uncertainty or ignorance about affirmative preferences prevail, it may become worthwhile to recognize and focus more on negative preferences. In short, voters may be more certain and perhaps feel more intensely about their negative preferences than their affirmative ones. Under these conditions, it may be important to fulfill through voting and elections these more salient or intense negative preferences than affirmative ones. Reconceptualizing voting as veto helps adapt democratic voting and achieve democratic input under real-world circumstances.

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,” 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,

78 JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269 (3d ed. 1950).
uninterested, and uninformed. The reasons for uncertainty may be simple or complex. Sometimes the matter is quite difficult. Sometimes people have not given a matter much thought. Sometimes voters actually do not think the matter subject to a vote is terribly important. Whatever the reason for uncertainty, the point is that people do not always know for sure what they affirmatively want. Put simply, demanding voters’ affirmative preferences does not always map most closely onto voters’ most salient and certain motivations for voting.

In fact, voters can often be expected to be rationally ignorant about their affirmative preferences. 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.” 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. This calculation reflects the costliness of information, as well as a measure of complacency about the status quo. Just so, as I have demonstrated earlier, voters in direct democracy attempt to economize their information costs by employing a default “no” response in the absence of affirmative knowledge in support of a ballot measure. It is often the case that voters know little about the range of candidates or alternatives under consideration and have scant opinion about any or all of them. It is only with the assistance of voting heuristics and the two-party system that voters can reduce complex decisions among alternatives into reasonably familiar and accessible binary choices. Voters may not possess affirmative preferences about political questions because it simply is not worth their time and effort, at least in the voters’ subjective views, to learn enough to develop them.

When voters are rationally ignorant or otherwise do not know much, negative preferences regarding particular alternatives that are certainly disliked, and would certainly be avoided if possible, become more valuable to recognize. Of course, rationally ignorant voter may not develop firm or salient negative preferences either. However, given imperfect information and uncertain preferences, voters may know best what they certainly do not want and find unacceptable. It may be easier to identify what is disliked and unacceptable than identify what is liked and most attractive. Depending on the circumstances, a voter may have very strong feelings about what alternatives she definitely would not want, while remaining relatively indifferent about a large number of alternatives all of which would be generally acceptable. Voting based on negative preferences thus may be useful when there is voter ignorance and incomplete ordering of

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80 See, 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”).

81 See supra Part III.B. The usual voting heuristics that aid voters with candidate elections are often absent in direct democracy. See Kang, supra note, UCLA at 1151-56.

82 Even so, many voters further simplify voting down to a retention decision based on retrospective judgments of the incumbent, which may be one reason that retention elections suffice for certain low-level offices and judgeships.
affirmative preferences and negative preferences are either more certain or salient.

To be sure, though, voting based on negative preferences is not always appropriate even when voters are uninformed or unengaged. Voters often possess affirmative preferences, at least an affirmative preference about the most preferred alternative. Voters also develop simplifying strategies, such as partisan identification in the political context, and manage to effectuate their negative preferences even when voting formally requests their affirmative ones. Nonetheless, negative preferences offer a new perspective about incorporating democratic input from what may be a disengaged, diffuse electorate interested only intermittently in collective governance and decisionmaking. Reconceptualizing voting as veto may enable democratic oversight by the electorate without requiring deeper involvement or informedness about the specifics of management. It does not require a robust affirmative vision of majority will, but instead perhaps a more modest sensibility about what is not the correct choice. Voting as veto carves out a zone of consensus by eliminating from consideration first of all options that are least preferable, without jumping quickly or too ambitiously to a judgment about what is most preferred.\footnote{Indeed, William Riker argues from public choice perspective that this modesty, focused on only a consensus of negative preferences, is the genius of American democratic design. \textit{Riker, supra note; see also Hardin, supra note, at 174 (“What makes democracy work makes it fail the test of the ideal conception.”).}}

Recognition of negative preferences may be the best way to serve democratic legitimacy and input when negative preferences may better match what voters actually know they want. It may facilitate a viable practice of democracy tailored to the practical requirements of complex circumstances.

B. Division of Power and Division of Labor

A distinction between affirmative and negative authority, formally effectuating affirmative and negative preferences respectively, presents a salient method for divisions of power both within and across decisionmaking institutions that may be valuable under certain circumstances. When the goal is to distribute voting power among multiple players, a common method is to divide power horizontally by giving all players equivalent rights to vote. Everyone has the same right to vote, even if votes might be differentially weighted or if different players have different numbers of votes. In other words, everyone has the same type of power, though not necessarily the same amount of that power. But an alternate way of dividing power is to allow certain players to exercise voting power focused on affirmative preferences while allowing other players to exercise voting power focused on negative preferences. Reconceptualizing voting as veto offers an alternate conception of voting that enables a complementary division of power and labor between affirmative and negative authority.

One reason such divisions of authority may be necessary, at least for institutions that purport to invest democratic sovereignty in a diffuse electorate, is that diffuse electorates are inarticulate by their nature. A mass electorate struggles to act collectively and requires leadership from centralized authority, because diffuse electorates, “due to numbers, not to want of intelligence . . . . are a sovereign whose vocabulary is limited to two words, ‘Yes’ and ‘No.’”\footnote{E.E. Schattschneider, \textit{Party Government} 52 (1942).} Centralized authority can present a narrow menu for democratic review by the electorate that
lacks the attention or resources, aside from the basic challenge of collective action, to develop an affirmative agenda for action from scratch. Centralized authority also can specialize where voters have insufficient individual incentive and offer simplified choices for the electorate, enabling democratic input by the electorate that would otherwise be stymied by the challenges of collective action. In other words, diffuse electorates need external coordination that can be provided by delegating a portion of decisionmaking power to other institutions or subgroups that help organize choices for bodywide voting.

The distinction between affirmative and negative authority provides a useful way of mapping a division of power within democratic institutions, such as legislatures. A vertical division of power between an institution exercising affirmative authority and another exercising negative authority can be understood as also as a division between final policy specification and final policy approval. Regimes that separate affirmative and negative authority may more neatly decouple final policy specification from final policy approval. That is, recognition of negative preferences usually allows those voters the chance to veto, at least under the right circumstances, a policy option presented by someone else.\textsuperscript{85}

The Congress, for example, developed standing committees, at least in part, as a means of overcoming collective action problems suffered within the diffuse electorates that are the Senate and House of Representatives.\textsuperscript{86} Standing committees developed affirmative legislative agendas within areas of specialty that had been difficult to generate by the bodies of the whole. Committees engaged in a centralized process of policy specification, on behalf of the full voting body, and presented fully developed proposals for review by the full voting body. Although the full Senate and House retained authority to amend committee proposals under open rules, the delegation of affirmative policy specification to committees simplified legislative choices toward more limited oversight and review by the full voting body, with deference to the committee conditional on the composition of the committee.\textsuperscript{87} The full voting bodies held more than negative veto authority over committee decisions, but the committee system enabled a diffuse electorate to economize the costs of policy specification and exercise no more than a negative veto when convenient, while nonetheless withholding ultimate approval authority. Taking advantage of a negative conception of voting and authority may facilitate similar divisions of power that help overcome the inarticulateness of diffuse electorates but still permit the retention

\textsuperscript{85} A related variant is consociational democracy. \textit{See generally AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION} 25 (1977) (defining consociational democracy). 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 policymaking. \textit{See, e.g., DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT} (1985) (describing consociational democracy in Europe and Africa).


\textsuperscript{87} \textit{See, e.g., KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING} ch. 4 (1998) (finding representative heterogeneity of constituency interests on important standing committees); GARY W. COX & MATHEW D. MCCUBBINS, \textit{LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE} 159-229 (1993) (finding that party leadership distributed standing committee assignments based in part on party loyalty and representativeness of constituency interest).
of ultimate democratic authority of approval in large, dispersed voting bodies.

The complementary division between affirmative and negative authority also offers a means of instantiating checks and balances between competing decisionmaking institutions. For instance, federal lawmaking splits power as a matter of institutional design, in a system of checks and balances, by giving Congress the power of final policy specification and the President the power of final policy approval in the veto. Lawmaking power is split vertically in the sense that Congress and the President wield different kinds of power. The President, as a formal matter, does not participate in the congressional policymaking process of final policy specification.\(^88\) Instead, the President exercises final approval, which he can grant or deny through his right of veto. While Congress possesses the power of final policy specification, presenting the President with a chosen proposal, the President must assent for final approval. Put very roughly, the Congress acts and votes on its affirmative preferences, while as a formal matter, the President acts through the veto and votes his negative preferences. The President therefore can directly vindicate his negative preferences by vetoing disfavored legislation, but he can only indirectly fulfill his affirmative preferences, in the absence of any formal legislative authority beyond the right of final approval.\(^89\) Splitting power between an institution that exercises affirmative authority on one hand, and another institution that exercises negative oversight on the other hand, can be useful for the construction of a system of checks and balancing between those institutions.

C. Centrism

Voting based on negative preferences, as opposed to affirmative preferences, tends to favor centrist alternatives over more extreme ones. When negative preferences are prioritized, voting almost by definition weeds out alternatives that are least favored choices regardless whether they are most favored by many others. All that counts is the fact that an alternative is most disliked by the most number of voters even if many other voters see the same alternative as their favorite.

It is not clear whether the collective happiness of the electorate is optimized by privileging affirmative or negative preferences—which works best to maximize happiness may depend on the distribution and intensity of preferences in the electorate, as well as the intricacies of voting procedures and agenda setting. Nonetheless, holding everything else equal, a focus on affirmative preferences in voting is more likely to produce an ultimate choice that is strongly supported by a segment of voters, but also more likely as well to produce an ultimate choice that

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\(^{88}\) The President, as a formal matter, does not introduce legislative bills in Congress, propose or vote on amendments, or vote on final passage of the enacted legislation. Of course, as a practical matter, the political power of the presidency greatly exceeds the formal legislative authority of the office. See Richard E. Neustadt, Presidential Power (1980) (arguing that presidential power is based primarily on the power to persuade); Samuel Kernell, Going Public: New Strategies of Presidential Leadership (1986) (describing presidential power to “go public” and pressure Congress by mobilizing public opinion).

\(^{89}\) Nonetheless, the threat of the presidential veto casts a shadow over the legislative process. Congress must anticipate that the President will veto legislation that he does not want such that Congress considers the President’s preferences during the legislative process. See generally Charles M. Cameron, Veto Bargaining: Presidents and the Politics of Negative Power (2000); Keith Krehbiel, Pivotal Politics: A Theory of U.S. Lawmaking (1998).
may be strongly opposed by another segment of voters. While there is no guarantee of making everyone happy, the theory is that an emphasis on affirmative preferences will tend to maximize utility by tending to select the alternative that the most want most. By contrast, prioritization of negative preferences in voting is more likely to avoid a choice that intensely opposed by segment of voters, but also more likely to produce a choice that is not intensely supported 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.

The most robust countermajoritarian form of respecting negative preferences is an unilateral right of veto. For instance, Dennis Mueller likewise demonstrates this centrist tendency from formally recognizing negative preferences in his exploration of a “voting by veto” system for committee votes. Mueller proposes a two-step procedure by which each committee member first makes one 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. In Mueller’s example, he postulates a seriatim vote over the distribution of a monetary sum among the committee. 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.

But even under collective voting in which a larger electorate casts votes, the formal recognition of negative preferences almost by definition favors centrist alternatives over extreme ones. Under traditional plurality voting, candidates care only about placing first in any given voter’s ranking, but under formal recognition of negative preferences, “on the other hand, candidates care only about not placing last in a given voter’s ranking.” The ultimate choice may not be anyone’s favorite, but it would not be anyone’s least favorite either. 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. Just as with voting by veto, formal recognition of negative preferences in collective voting tends to eliminate extreme alternatives and leave more moderate alternatives that are less likely to be intensely disfavored. By contrast, the traditional practice of plurality voting appears least likely to induce centrism compared to several alternative voting methods, including negative voting and approval voting among others.97

By “centrist,” I mean only that an alternative is 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, relative position among viable alternatives competing for votes is usually indicative about the substance of the centrist alternative. If nothing else, the 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 are not always complementary or symmetric. A candidate in a multicandidate field, presented to a mass electorate, may be the most favorite and least favorite candidate at the same time. An extreme alternative will tend to do better if the voting process recognizes affirmative preferences, but do poorly if the process recognizes

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97 Cox addresses several alternative voting procedures, including two (negative voting and approval voting) that I discuss further infra in Part IV.B. Id. at 99; see also Dan S. Felsenthal, Proportional Representation Under Three Voting Procedures: An Israeli Study, 14 POL. BEHAVIOR 159, 185-87 (1992) (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).
negative ones. Conversely, moderate alternatives that draw out little intensity from the electorate would fare less well when affirmative preferences are the priority, because they do not arouse the passion of a dedicated base of voters for whom they are the top choice. They would do relatively well when negative preferences are the priority, because they also do not represent the most disliked choice for many voters. In sum, the difference between affirmative and negative preferences is significant and outcome-determinative, at least when there are multiple alternatives. A process of voting that tends to exclude least-preferred choices follows a max-min logic, maximizing the value of the worst-case scenario. Of course, pursuing a max-min strategy for outcomes is not always optimal, and under other circumstances, a blended system that mixes recognition of affirmative and negative preferences might achieve a better balance of relative risks. In any event, the centrist tendency of voting on the basis of negative preferences offers a tool that can be useful, at least under some circumstances.

The voir dire process for the selection of jurors in litigation offers a nice exploitation of this centrist tendency. The process of jury selection is structured as a process of negative selection. The litigants have the right only to challenge particularly disfavored potential jurors in the process of selecting the petit jury that hears their case. 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.”

99 A criminal defendant, however, is not entitled to a particular petit jury that is itself demographically representative of the larger community. 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.

100 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.

The logic of the cross section requirement is a puzzle at first glance—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 his particular case? 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.

But Heather Gerken,
among others, argues that the cross section requirement, as courts apply it, provides representativeness without needing to designate what demographic and other dimensions of differences are substantively meaningful. The random selection from the community to populate the jury pool ensures representativeness without identifying what differences are meaningful or needing to select any individual on the basis of group membership. For the smaller petit jury of twelve or fewer jurors, a more robust guarantee of representativeness might mandate an unworkable form of proportional representation for each petit jury. As a result, Eric Muller concludes that demanding cross-sectional representativeness for each petit jury as a constitutional matter is a “vain and impractical hope.”

Given these practical challenges, the voir dire practice of peremptory and for-cause challenges in jury selection helps ensure the representativeness of petit juries by taking advantage of the central tendency inherent in negative preferences. 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. 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. Each side would try to stack the jury with jurors holding the most extreme views in its respective favor. Such a process of affirmative selection in voir dire might lead to unrepresentative petit juries, even when the larger venire from which they are drawn are representative of the community.

But instead, voir dire does not allow the parties to seek inclusion of their most favored potential jurors and instead allows them only to veto the inclusion, thus exclude, the other’s most favored jurors. In other words, voir dire works to exclude the most extreme jurors, as the parties see it, and drives jury selection toward the median juror in the venire. This central tendency thus reinforces the representativeness of the petit jury by pushing selection toward the median of the jury venire, which must be a representative cross section of the community under the Sixth Amendment. The use of negative preferences in the selection of the petit jury collaborates with judicial enforcement of the cross section requirement at the level of the venire to provide representativeness at the level of the petit jury. The voir dire practice of effectuating negative preferences exploits the incentives of the litigants by empowering them to veto extreme jurors that might bias the representativeness of the petit jury.


See, e.g., M.I. FINLEY, DEMOCRACY ANCIENT AND MODERN 118 (rev. 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”).

See Batson, 476 U.S. at 86 n.6 (“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.

D. Highlighting Negative Preference and Dissent

Voting based more directly on negative preferences tends to highlight the voters’ negative preferences. Just as traditional voting, as a process of affirmative selection, tends to obscure the influence of negative preferences, formal re-configuration of voting as a process of negative preferences tends to reveal it. For instance, in the context of jury selection, this result serves a particularly beneficial purpose, because voir dire exposes illicit racial motivations in selection process. The only outlet for either the defendant or the government to act on their racial motivations in voir dire is in the form of negative preferences, expressed through peremptory challenges to veto a particular juror. A litigant who does not want African-American jurors on the final jury, for instance, can veto African-American candidates with peremptory challenges. However, direct recognition of negative preferences lays bare their racially discriminatory character in a way that affirmative selection of only white jurors might not as clearly. 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 consistent pattern of challenging the few African-American jurors available in the venire. As a result, voir dire might more effectively smoke out the use of race as a screening criteria.

The way that formal recognition of a particular type of preference also highlights those preferences may reveal part of the reason that traditional voting, focusing on affirmative preferences, may be used in contexts where it is 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 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 decisionmaking contexts where voting represents a form of evaluation and sends social signals about the worthiness of the eligible alternatives. But under certain circumstances, such as voir dire, it may be valuable instead to highlight negative preferences through voting.107

A different type of negative preference that certain voters may particularly wish to publicize is a protest vote that expresses dissent against all the available choices. For many voters, a negative preference against all available candidates, the current state of government, or other instantiations of the status quo, is the only meaningful preference to be expressed through voting. But when voting is limited to formal recognition of only an affirmative choice for the most favored candidate, a voter who finds none of the several presented candidates to be acceptable and wishes to vote against the entire field has little option but to cast a protest vote. Her most salient voting interest is neither an affirmative preference for any candidate, nor a negative preference against any particular candidate, but instead negative preference against all

107 My colleague Jeff Pennell points to Uniform Probate Code § 2-302(b)(1) as an analogous example from the law of wills and trusts. The provision recognizes the use of a “negative will,” under which a decedent can expressly specify the exclusion of a particular person from intestate distribution.
candidates. To the extent that the expressive value of a protest vote, or perhaps the informational value, is important within a specific voting context, it may be useful to open avenues for the direct expression of such a comprehensive negative preferences through formal recognition of negative preferences.

The motivation underlying the protest vote is an intense negative preference that outweighs the instrumental value from selecting among the available candidates on the ballot. Dissatisfaction with all available candidates may be expressed only through a “protest” vote for an obviously non-viable candidate, if there is one. Voters who take the time and effort actually to vote, but then cast a protest vote with no instrumental value, may effectively signal the depth of their disaffection. A disaffected voter might alternatively attempt to express dissatisfaction by refusing to vote and abstaining entirely, but abstention sends only 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.

Traditional voting, at least when focused formally on affirmative preferences, generally fails to give importance to the negative preferences inherent to a protest vote. In Burdick v. Takushi, the plaintiff challenged the constitutionality of Hawaii’s prohibition on write-in voting, because it effectively denied him of his claimed “personal and fundamental right to say ‘no’ to all of the candidates listed on the ballot.” Hawaii was a one-party state in which ballot access for minor parties and independent candidates was restrictive and the general election frequently presented only a single Democratic candidate for a given elected office. In the absence of a right to cast a write-in vote for a candidate not on the ballot, the plaintiff argued that “where none of the listed candidates are acceptable to him—he is given no genuine opportunity to participate in the election” and “express his dissent from the candidates offered.” But the Supreme Court views voting and elections predominantly in terms of the instrumental purpose of winnowing the field down to select a victorious candidate. Consistent with this philosophy, the Court characterized the expressive claim as a trivial demand that “Hawaii [be] required to count a ‘protest vote’ for Donald Duck” and argued that protest voting merely “giv[es] vent to ‘short range political goals, pique, or personal quarrels.’” With voting framed exclusively as the expression of affirmative preferences for a favorite candidate, the Court saw no place for the

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110 See Issacharoff & Pildes, supra note, at 671-74.
111 Petitioner’s Brief, Burdick, supra note, at *12.
112 See generally XXX.
113 The plaintiff in Burdick, Alan Burdick, purportedly intended to case a write-in vote for a Democratic candidate for state representative who was not on the ballot, but this factual assertion was not raised before the Court. At oral argument, Burdick’s counsel agreed, when pressed by the Justices’ questioning, that the First Amendment ought to protect even a vote for “Mickey Mouse or Donald Duck.” See Transcript of Oral Argument, Burdick, 504 U.S. 428 (No. 91-535), 1992 WL 687562, at *5.
114 Burdick, 504 U.S. at 438.
expression of a negative protest vote against the entire slate.

The Court denied disaffected voters the opportunity to express clearly their most salient preferences because the expression of negative preferences does not fit with the traditional aim of aggregating affirmative preferences. It thereby missed the significance of the expression of negative preferences, particularly for voters whose negative preferences were most salient, that otherwise could not be expressed through a vote for the most-preferred candidate among an unattractive field. While the Court acknowledged the First Amendment expression inherent in political voting, the Court’s unwillingness to conceive of political preferences as other than affirmative in character undervalues the expression of legitimate preferences of a different, negative character. Along the same lines, the Court minimizes the relevance of minor parties and independent candidates who offer voters the chance to express protest with the major parties, even if they have a trivial chance of winning most races.

To the extent that opening avenues for protest is valuable within a decisionmaking context, voting rules can accommodate more direct expression of comprehensive negative preferences. American voters typically do not have the option of voting against candidates, but Nevada law requires that every ballot for statewide office provide the option of voting for “None of these candidates.” The eligible candidate who receives the most votes still wins office, regardless of the number of votes cast for “None of these candidates,” 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. Although other states have considered similar provisions, voters in Russia until recently had an even more robust option of voting “Against

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116 See Angus Campbell, Philip E. Converse, Warren E. Miller & Donald E. Stokes, The American Voter 552-58 (1960) (explaining support for minor parties in terms of negative feeling toward the major parties). Expression of dissent is important in the corporate context as well, perhaps particularly so when practical options for dissenters are even more limited. See, e.g., TSI Int’l Software, 683 A.2d at 46 (arguing that “it is nevertheless a not unimportant feature of corporate governance that a noticed annual meeting a form of discourse . . . among investors and between shareholders and managers is possible”).


119 See Nita Lelyveld, A Push for ‘None of the Above’ on Ballots a Calif. Initiative Would Give Voters a Way to Voice Disapproval of Candidates, PHILADELPHIA INQUIRER, Feb. 20, 2000, at A3; Brendan Riley, Nevada’s ‘None of These Candidates’ Makes Strong Showing, Assoc. Press State & Local Wire, Nov. 9, 2006; Clayton Jones, A Choice for Those who Can’t Decide: No One, CHRISTIAN SCI. MONITOR, Oct. 21, 1980, at 6; Robert T. Garrett, Prop. 23 Backers Tout ‘None of the Above’: Critics Call the Ballot Measure a Meaningless Gesture, PRESS ENTERPRISE, Feb. 14, 2000, at A1; see also Ellen Goodman, The Perennial Candidate, BOSTON GLOBE, Sept. 23, 1990, at A7 (noting that “None of these candidates received more votes than each received by George H.W. Bush and Ted Kennedy during their 1980 presidential primary races in Nevada).

120 See, e.g., Lelyveld, supra note, at A3 (describing efforts to enact a similar provision in California through the initiative process); Fred Brown, Who Wants to Be Second to None?, DENVER POST, Feb. 19, 1997, at B7 (describing a proposal in Colorado); Voters May Get to Pick ‘None of These Candidates’, COLUMBUS DISPATCH, May 13, 1995, at 5E (describing proposed legislation in Ohio); Micah L. Sifry, Let ‘Em Vote for ‘None
All.” Beginning with the fall of the Soviet Union in 1993, Russian voters were given the official right to vote “Against All,” instead of abstaining or voting for an eligible candidate. The candidate who received the most votes in a race won office in Russia only if he or she received more votes than all other voting options on the ballot, including “Against All.”

A basic limitation of voting that formally recognizes negative preferences in such manner is the problem of failed elections. In Russia, for example, legislative seats go unfilled when no candidate receives more votes than “Against All.” When too many voters decide to vote against all, the consequence may be that the election yields no victor and simply produces no affirmative result or requires another election. Likewise, in the corporate context, a practical concern about a requirement that directorial board candidates receive a majority of shareholder votes for election is that no candidate may receive enough votes to qualify for office. The commentary to the Delaware corporate code explains that the Delaware General Assembly adopted plurality voting in the first place, as a replacement for majority voting, “to address the concern that none of the candidates seeking office in a contested election would receive the required majority vote.” As a consequence, opening room for protest voting must be weighed against the potential costs of failed elections that select no one for office, to the degree that failed elections are costly. When the possibility of a failed election is both nontrivial and unacceptable, the expression of negative preferences may be less attractive and better channeled toward other directions than protest voting.

IV. APPLYING VOTING AS VETO

A new appreciation and understanding of negative preferences helps bring to light the
influence of negative preferences in voting and collective choice. In other words, negative preferences matter and affect voting even when they are not recorded nominally as a formal matter in the voting process. This Part attempts to provide a quick overview of two areas where negative preferences influence voting and where better appreciation of negative preferences may provide new perspective on existing debates. Then, in the final section of this Part, I briefly discuss two voting procedures by which negative preferences can be recognized more directly in voting: negative voting and approval voting.

A. Negative Preferences in Voting

1. Direct Democracy

The Progressive Era institution of direct democracy—by which voters directly decide whether to approve ballot measures into law—has become a widespread and common element of democratic lawmaking. Progressive reformers, such as Woodrow Wilson, proposed the referendum and initiative as means of checking the influence of wayward elected officials who could not always be trusted to legislate in the majority’s interest.126 These tools of direct democracy helped interject the voting public directly into legislative questions, allowing the public to correct the legislature’s “sins of omission”127. Where the legislature failed to act on popular legislation, the public could not only approve referenda placed on the ballot by the legislature, but in the case of initiatives, independently propose and qualify ballot measures for the ballot without any involvement of the legislature in the process. Today, about 70 percent of American voters live in a city or state where they are able to place initiatives directly onto the ballot and bypass their elected officials entirely.128

Direct democracy is commonly praised in theory as more “democratic” than representative democracy through election of candidates to office.129 To the degree that candidate elections satisfy the electorate’s policy preferences, any candidate can be only so ideal because no candidate is likely to mirror the individual voter’s preferences on every issue and every dimension.130 The voter must be content to vote for the candidate who best matches their affirmative preferences


129 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., SHERMAN J. CLARK, A POPULIST CRITIQUE OF DIRECT DEMOCRACY, 112 HARV. L. REV. 434, 463-66 (1998). 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 their preferences imperfectly, even under the best of circumstances. Direct democracy offers the hope of greater promise in fulfilling voters’ affirmative preferences by voting directly on policy.

130 See, e.g., SHERMAN J. CLARK, A POPULIST CRITIQUE OF DIRECT DEMOCRACY, 112 HARV. L. REV. 434, 463-66 (1998); see also MATSUSAKA, supra note at 88.
imperfectly, even under the best of circumstances. In direct democracy, by contrast, voters may be able to vote for exactly what they most want in terms of public policy. 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.” 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.” Likewise, Justice Antonin Scalia agreed that referenda are “the most democratic of procedures.” 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. Elizabeth Garrett concludes that these expenses of signature gathering, in addition to the usual costs of campaign advertising after ballot qualification, help ensure that direct democracy “turns largely on how organized interests spend their money to influence the media, to pay for advertising, and to put issues before the public.” Indeed, total spending on direct democracy campaigning can equal or exceed spending on candidate elections in states where direct democracy is heavily exercised.

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133 Philip Kurland & Gerhard Casper, eds., LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 668 (1975) (quoting Justice Black); see also Collins & Oesterle, 66 U. COLO. L. REV. at 55 (“If we want to know what the people want, a natural intuition is that we should take a vote.”).
137 See Michael S. Kang, Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus”, 50 UCLA 1141, 1146-48 (2003) (describing campaign spending in direct democracy, including an amount during 1998 in California alone that matched the total spent that year by all candidates for the California General Assembly and statewide office, as well as doubling the total spent that year by all congressional candidates in the United States); Shaun Bowler & Robert Hanneman, Just How Pluralist Is Direct Democracy? The Structure of Interest Group Participation in Ballot Proposition Elections, 59 POL. RES. Q. 557, 559-60 (2006) (showing that direct democracy campaign spending in California from 1998-2004 was greater than spending on gubernatorial campaigns during the period, and in 2002 exceeded total spending on legislative campaigns in every state that year).
As a result, critics of direct democracy worry that wealthy interests dominate direct democracy, with acute advantages in the expensive process of deciding which measures reach the agenda at all through ballot qualification.\footnote{BRODER, supra note, 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 to well how to subvert the process to their own purposes”); see also Jamin B. Raskin, Direct Democracy. Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform, 1996 ANN. SURV. AM. L. 393; Nicole Bremner Casarez, Corruption, Corrosion, and Corporate Political Speech, 70 NEB. L. REV. 689 (1991); John S. Shockley, Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?, 39 MIAMI L. REV. 377 (1985).}

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.\footnote{See generally Sherman J. Clark, A Populist Critique of Direct Democracy, 112 HARV. L. REV. 434 (1998); but see Lynn A. Baker, Preferences, Priorities, and Plebiscites, 13 J. CONTEMP. LEGAL ISSUES 317 (2004); Clayton P. Gillette, Plebiscites. Participation, and Collective Action in Local Government Law, 86 MICH. L. REV. 930 (1988) (arguing that direct democracy offers opportunity to express intensity of preference through voter turnout); 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).}

Each voter has the opportunity to register only an affirmative or negative vote, regardless how strongly the voter feels about the ballot measure. One voter, even a majority of the electorate, may feel mildly in favor of a ballot measure, and thus vote it into law, but a minority, perhaps a significant minority, may feel very strongly in opposition and suffer grievously from passage. 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.”\footnote{Clark, supra note, at 467.}

Underlying these criticisms is the assumption that direct democracy ought to pursue the realization of the public’s affirmative preferences. Agenda setting in direct democracy is troubled at base because it does not select 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.”\footnote{Clark, supra note, at 448.} 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.”\footnote{Id. at 450.} Similarly, critics of direct democracy concerned about the disproportionate influence of wealthy interests likewise predicate their indictment of direct democracy for 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 that voters rightly should expect little more than a modest, defensive expectation of effectuating negative preferences through voting in direct democracy. Voting paradoxes render elusive the identification of the mass public’s most preferred policy.\footnote{See generally WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM (1982).} Preference cycles, strategic voting, and the bias of agenda setting plague the determination of the public’s most preferred policy choice though the procedure of voting. As a
consequence, voting in direct democracy may embody, at best, a “negative ideal” without any assurance, perhaps any possibility of producing “a clear, consistent, meaningful statement of the popular will.” Critics of direct democracy are correct 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.

Regardless how well direct democracy performs with respect to the public’s affirmative preferences, direct democracy serves reasonably well in defending the public’s negative preferences. Voters can vote “no” in direct democracy and reject any measure that it disfavors. This is exactly what voters routinely do. The vast majority of ballot measures fail to win approval. Political scientists and economists find that voters tend to reject ballot measures as a default response. When voters are unsure about how they feel and how to vote on a ballot measure, they tend to vote “no” and reject it. As a result, because voters are often unsure and know little about many ballot measures, most ballot measures are rejected by the voters. Even when sponsored by wealthy interests able to fund campaigning in support of favored measures, voters still regularly vote against them. In other words, heavy campaign spending is much more successful at defeating ballot measures than proponent campaigns are at increasing support. Campaign spending appears to exacerbate the voters’ default response of rejecting ballot measures, thus helping to defeat ballot measures, but are basically ineffective at helping ballot

144 *Riker*, supra note, at 242. Riker also observes that “there has been considerable disillusionment with referenda” flowing from the misdirected populist belief that they “provide a ‘truer’ expression of the popular will,” when the only robust majoritarian guarantee is the negative avoidance of disfavored alternatives.” Id. at 251.

145 See, e.g., *Levmore*, supra note, at 122 (“In short, the plebiscite we know 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.

measures ultimately win. Voters may not get their ideal policy through direct democracy, but under a reconceptualization of voting as veto, it is worthwhile to recognize that voters manage to dispense routinely with ballot measures that they do not like or know little about.

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 preference against making things worse for the majority. The voters’ default response of “no” reflects a healthy distrust about an offered ballot measure that places the burden of persuasion on its proponents. With this adaptive orientation toward direct democracy, voters need not be intensely knowledgeable about public policy or the content of the various ballot measures. Direct democracy functions not as a means for the difficult task of identifying the public’s affirmative priorities about most desired policy, but instead, more defensively, offers voters with a simpler, more manageable comparison: Is the ballot measure certain to be preferable to doing nothing?\(^{150}\)

In practice, as a result, direct democracy in the end actually produces an incremental majoritarian improvement over the status quo in terms of policy.\(^{151}\) 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. For instance, notwithstanding any bias in ballot access, John Matsusaka demonstrates that direct democracy coaxes overall fiscal policy at the state and local level in the rough direction of median preferences.\(^{152}\) 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.\(^{153}\) Again, this finding does not imply that direct democracy realizes the electorate’s

\(^{150}\) See Saul Levmore, Ruling Majorities and Reasoning Pluralities, 3 THEORETICAL INQUIRIES L. 87, 122 (2002) (concluding with respect to plebiscites that “[i]f the task is not to find a Condorcet winner and not 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”).

\(^{151}\) 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; Ethan J. Lieb, 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); 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 Latina/o and Immigrant Communities, 96 CAL. L. REV. 1259 (2008).

\(^{152}\) See John G. Matsusaka, For the Many or the Few: The Initiative, Public Policy, and American Democracy (2004); see also Gerber, supra note (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, For the Many; and Smith & Tolbert, supra note); but see Edward L. Lascher, Jr., Michael G. Hagen, & Steven A. Rochlin, 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).

\(^{153}\) See Matsusaka, supra note, at 12 (“[T]he fact that narrow interests dominate the initiative process . . . does not necessarily imply that the final outcomes are nonmajoritarian.”).
most preferred policies, whatever they are, nor does it imply any gains will be large or impressive. Nonetheless, subject to more modest, 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.” 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. Despite these beliefs, roughly three out of four Californians approve of direct democracy in the state, and 68 percent of the public reports that it is “very satisfied” or at least “somewhat satisfied” with the initiative process in the state. 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.” 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 modest confidence about exercising its voting veto.

2. Corporate Shareholder Democracy

Distinguishing between affirmative and negative preferences also may help illuminate the ongoing debate in corporate law regarding the proper measure of shareholder control over public corporations. Debate in corporate law has only intensified after the Securities and Exchange Commission proposed Exchange Act Rule 14a-11, which would allow shareholders of public companies to nominate candidates for election as director. To be clear, however, my primary intention is not to choose sides in this debate or argue that more or less shareholder control over corporate management is advisable. Instead, I argue only that an understanding of affirmative and negative preferences clarifies the lines of agreement and disagreement in the debate and may help advance it.

Under American corporate law, there is little pretense of shareholder rights of initiation in corporate management. Instead, as Lucian Bebchuk summarizes, a “central and well-settled

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155 See id. at 911-12.
156 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).
158 Baldassare & Katz, supra note, at 23.
159 See Security Holder Director Nominations, 68 Fed. Reg. 60784 (proposed Oct. 23, 2003); see also Leo E. Strine, Jr., Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America, 119 Harv. L. Rev. 1759, 1778-82 (2006) (proposing that qualified shareholders of public companies be allowed periodically to add slates of director candidates to the company proxy card).
principle of U.S. corporate law is that all major corporate decisions must be initiated by the board [of directors]. As such, the board, and corporate officers subordinate to the board, manages corporate affairs without shareholder discretion or affirmative authority to command particular action. The corporate shareholders possess only limited rights to deny action on fundamental matters of corporate policy proposed by the officers and directors of the company. Although corporate codes vary across states, U.S. corporate law generally requires shareholder approval for a specified set of major corporate actions, such as amendments to the corporate charter, mergers, consolidations, sale of substantially all assets, and dissolutions. Shareholders also vote on the election of directors to the board, though the right to vote is limited to voting almost exclusively among candidates nominated by the incumbent board itself. Nonetheless, the Delaware Chancery Court has famously argued that this institution of “shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.” As a result, shareholders exercise what amounts to exclusively negative rights through corporate voting. Shareholders cannot direct an unwilling board affirmatively to pursue a merger or adopt a charter amendment, but allows only for the disapproval of an unwanted merger or charter amendment. The requirement of shareholder approval for certain corporate actions effectively constitutes a “shareholder veto” with respect to the limited set of actions. Shareholder approval instantiates an opportunity for the protection of only the shareholders’ negative preferences, at least for a small set of corporate actions.

Opponents of increased shareholder control, through reforms such as the proposed Rule 14a-11, argue that centralized corporate management by directors and officers of the public corporation is critical to American corporate success. First, at least for public companies with dispersed shareholders, management by the board places coordinated control in the hands of directors and officers with the best information about the corporation’s performance, opportunities, and best interests over the long run. Opponents of shareholder reform argue that greater shareholder input into corporate management would disrupt the important benefits of centralized control. Second, they contend that heterogeneity among shareholders is such that investing shareholders with greater authority would risk rent-seeking by those with particularistic agendas having little to do with the best long-term interests of the corporation. Proposals for shareholder control, such as Rule 14a-11, thus have been criticized for placing too much leverage in the hands of a few major shareholders who can take advantage of their consolidated control

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161 Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988); see also Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 959 (Del. 1985) (advising that “[i]f the shareholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out.”).


and the diffusion of the remaining market capitalization. After all, many shareholders may enjoy the separation of their ownership from active management of the corporation and would prefer not to possess and may prefer that their fellow shareholders not possess more management input. These shareholders may prefer ultimately to exit ownership and sell their stakes in companies whose management is so bad, rather than assume for themselves management of the company.

However, advocates of greater shareholder control support reforms that would increase shareholder input into corporate management to provide what they see as an absence of institutional accountability of directors and officers. Most prominently, Lucian Bebchuk advocates “[i]ncreasing shareholder power to intervene” affirmatively, giving shareholders the power “to initiate and vote on proposals regarding specific corporate decisions.” The shareholder veto “does not help shareholders to effect changes when the board prefers the status quo,” nor does it “secure the arrangement that would best serve shareholder interests.” Bebchuk would increase shareholder power by expanding it beyond effectuation of negative preferences to the effectuation of affirmative preferences. He proposes that shareholders, subject

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165 See Frank H. Easterbrook & Daniel R. Fischel, Voting in Corporate Law, 26 J.L. & ECON. 395, 402-403 (1983) (explaining that the costs of monitoring and even voting are expensive such that shareholders generally prefer delegation to control); K.A.D. Camara, Shareholder Voting and the Bundling Problem in Corporate Law, 2004 Wis. L. REV. 1425 (arguing that individual shareholder have inadequate economic incentive to investigate the optimal corporate actions to be undertaken); cf. Milton V. Freeman, An Estimate of the Practical Consequences of the Stockholder’s Proposal Rule, 34 U. DET. L.J. 549, 552-53 (1956-57) (conceding that the average shareholder has little interest in participating in corporate management).

166 Shareholders dissatisfied with management of a corporation may have little direct means to exercise “voice” within corporate management, but they can exercise “exit” and leave their troubles behind by simply selling their shares. See, e.g., Stephen A. Bainbridge, The Case for Limited Shareholder Voting Rights, 53 UCLA L. REV. 601, 619 (2006) (reciting the “Wall Street Rule”). However, the opportunity for exit may be less for certain institutional investors. See John C. Coffee, Jr., Liquidity Versus Control: The Institutional Investor as Corporate Monitor, 91 COLUM. L. REV. 1277, 1339-41 (1991) (arguing that opportunity for exit is limited because approximately one-third of equity investments are indexed and represent long-term holdings cannot be shed). In addition, the opportunity for voice may be greater for large institutional investors. See Marcel Kahan & Edward B. Rock, Hedge Funds in Corporate Governance and Corporate Control, 155 U. PA. L. REV. 1021 (2007); Bernard S. Black, Agents Watching Agents: The Promise of Institutional Investor Voice, 39 UCLA L. REV. 811, 874-76 (1992).


168 Bebchuk, supra note, HLR at 836.

169 Id. at 838.
to certain conditions, be permitted to dictate “rules-of-the-game decisions” to amend the corporate charter or reincorporate in another state. Under Bebchuk’s proposals, shareholders would be able to command corporate management to put the company up for sale, begin a process of dissolution, distribute dividends, or accept particular merger or consolidation proposals offered by a bidder—all decisions currently entrusted to management’s exclusive discretion.

Distinguishing between affirmative and negative preferences helps clarify the lines of disagreement over shareholder voting. The main disagreement may not be, and need not be, simply about the quantum of power that shareholders retain through shareholder voting. Instead, disagreement may center on the shape of power that shareholders ought to wield. Even if Bebchuk is correct that shareholder power should be enhanced, the nature of the remedy depends on whether the proper conception of shareholder interests in corporate governance effectuate only negative preferences, or affirmative preferences as well. One might agree that shareholder power ought to expand beyond current bounds, but nonetheless disagree, under a view of shareholder voting as veto, with Bebchuk that shareholder power naturally must be expanded to the pursuit of affirmative preferences. Under the institutional split of authority between shareholders and management, the board decides the policy agenda of the corporation, exercising affirmative authority over the direction of the corporation, with the shareholders exercising only negative oversight to check managerial discretion. There may be need to reinforce shareholder power, and expand it, but also reason to do so mainly by bolstering the shareholders’ familiar veto rights, which effectuate only negative, not affirmative, authority.

It is unclear that the right reform direction is to vest greater affirmative control with shareholders. Indeed, shareholders as a class may not wish themselves or their fellow shareholders to initiate affirmative courses of action. Shareholders, in fact, may not possess particular designs for the corporation’s best course of action, nor may they want to consider and invest in developing a sense of such. Shareholders, as a general matter, are rationally apathetic regarding the optimal course of action for a corporation, because the information costs are extremely high and the pro rata benefits unlikely to be commensurate. Particularly for investors in public corporations with dispersed ownership, it does not usually make economic sense to develop an affirmative agenda for the corporation when the directors and officers of the corporation have better information and more resources to do so on their behalf. As a consequence, like voters in direct democracy, shareholders may prefer and be content to boil down voting decisions to a simpler question of negative preference, where the binary choice between approval or rejection is simpler and more limited—namely, irrespective of the ideal, does the proposed nominee or corporate action in question cause harm? Instead, except in the

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170 Id.
171 Id. at 895-907.
172 See Martin Lipton & William Savitt, The Many Myths of Lucian Bebchuk, 93 VA. L. REV. 733, 742 (2007) (arguing that there is “no market demand for the ‘franchise reform’ Bebchuk advocates”); see also Robert B. Thompson & Paul H. Edelman, Corporate Voting 2 (forthcoming 2009) (“Shareholders seldom seem to care much about the vote even when they have it, usually preferring the ‘Wall Street rule’ (i.e. sell) when they disagree with a decision made by the corporation’s managers.”).
173 See Easterbrook & Fischel, supra note, at 402-03; Camara, supra note, at 1472-76; Bainbridge, supra note, UCLA at 623-24.
extraordinary case, shareholders appear to have mainly negative preferences about a direction that the directors and officers are considering.

This difference between formal recognition of affirmative or negative preferences matters in corporate law. Oversight through negative veto and affirmative rights of initiation differ significantly in the degree of interference with centralized management by the board. 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. 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 pose ex ante interference with the management discretion in the best interests of the corporation. Shareholder veto helps ensure that shareholder voting acts “not as a primary component of the corporate decisionmaking structure, but rather as an accountability device of last resort.”

Even under this narrower negative conception of shareholder voting as veto, the shareholders’ ability to veto an incumbent board may be too limited in practice. The combination of federal and state law make prohibitively expensive in most cases a shareholder effort to replace the incumbent board. Board challengers cannot force the corporation to include alternative director candidates on the corporate ballot. They must pay to have proxy materials mailed to shareholders as well as provide for the legal and administrative costs associated with the proxy filing and challenge process with the SEC. These costs are significant and often in excess of the expected financial return from successfully replacing the board. The regular staggering of board elections over several years multiplies the costs of winning board control by requiring two or more challenges, at least a year or more apart. Given the expense of nominating a board nominee without the board’s assent, the incumbent board’s nominee is usually the only candidate


175 See, e.g., Strine, supra note, at 1762 (“These constraints—that stockholders approve certain important transactions such as mergers, vote for directors annually . . . are vital.”); Stephen M. Bainbridge, Director Primacy and Shareholder Disempowerment, 119 Harv. L. Rev. 1735, 1750 (2006) (acknowledging that shareholder voting is useful, perhaps necessary, as a means of enforcing the norm of shareholder wealth maximization).

176 See Easterbrook & Fischel, supra note (arguing that shareholders are “unlikely to know better than the managers how to run the firms” but finding Bainbridge, supra note, HLR at 1750.

177 See generally Bebchuk, supra note Va. L. Rev. at 688-94 (reviewing obstacles, legal and practical, to shareholder electoral challenges).

178 See id. at 688 n.21 (citing a study finding that the average cost of a proxy contest was $368,000).

for a board seat.\textsuperscript{181} The result is that shareholders are rarely presented with more than one candidate per seat even when dissatisfied with that candidate’s performance.\textsuperscript{182} To honor the negative preferences of shareholders, corporate democracy must permit shareholders effectively to veto corporate activity that they do not want. That is, even under a skeptical account, shareholder voting must serve at least as “an accountability device of last resort” that can be exercised effectively in practice, if shareholder voting is to be useful at all. In other words, if shareholder interests in corporate governance are primarily negative preferences at their heart, then shareholders may desire stronger mechanisms for veto oversight without wishing at the same time for stronger affirmative rights of initiation.

A third way in shareholder democracy might be to enhance shareholder rights in corporate governance, but consistent with a view of shareholder voting as veto, do so in the negative, rather than the affirmative direction.\textsuperscript{183} For instance, some have proposed that corporate democracy empower shareholders’ negative preferences by requiring director candidates to receive at least a majority of eligible shareholder votes for election to the board.\textsuperscript{184} Although corporate law before the 1980s typically required a majority vote for election of a director to the board, Delaware and most states now require only that a board nominee receive a plurality of shareholder votes for election to the board, notwithstanding any abstentions or withheld votes.\textsuperscript{185} As a result, if the incumbent board nominates only one candidate, that candidate’s election is a \textit{fait accompli} with nothing more than a single vote. Even if every shareholder vote but one is withheld—that is, not cast for the lone candidate as the only available signal of disapproval—the board’s candidate still will be elected. The barriers to candidate nomination, combined with the plurality rule, conspire

\textsuperscript{181} See Bebchuk, \textit{supra} note, VA. L. REV. 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.”).

\textsuperscript{182} See Strine, \textit{supra} note, at 1775 (“These pro-incumbent features combine with the costs of running a proxy contest to produce a corporate election process that functions essentially only when a takeover bidder funds a slate to get around a poison pill.”); see also Lucian Arye Bebchuk, \textit{The Case for Shareholder Access to the Ballot}, 59 BUS. LAW. 43, 45-46 (2003).

\textsuperscript{183} Beyond the majority vote rule advocated by some commentators, discussed above, Robert Thompson and Paul Edelman propose that shareholder approval should be required for transactions that are the financial equivalent of mergers, such as triangular mergers and acquisition of assets. See Thompson & Edelman, \textit{supra} note. Expansion of the shareholder’s right of veto is consistent with what they call the “error correction” role of shareholders, without increasing the shareholders’ affirmative powers of initiation.

\textsuperscript{184} See Velasco, \textit{supra} note; Bebchuk, \textit{supra} note VA. L. REV., at 702. 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 bylaw or charter a modified plurality rule that requires directors to proffer their resignation if they receive less than a majority of votes.

\textsuperscript{185} See Del. Code Ann. Tit. 8, § 216(3) (2007) (“Directors shall be elected by a plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors”); ABA \textit{SECTION OF BUSINESS LAW, REPORT OF THE COMMITTEE ON CORPORATE LAWS ON VOTING BY SHAREHOLDERS FOR THE ELECTION OF DIRECTORS}, Mar. 13, 2006, at 6 (reporting that thirty-five jurisdictions provide expressly that directors be elected by plurality vote).
to assure the incumbent board’s preferred result—typically the re-election of incumbent directors—and quash all electoral pressure in all but the rarest, costliest circumstances. A new 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.\textsuperscript{186} Although the question is empirically complex, its supporters expect that unhappy shareholders would obtain a more meaningful veto to effectuate their negative preferences than they currently enjoy. If nothing else,\textsuperscript{187} shareholders gain an outlet to highlight lack of support for candidates by denying majority approval.

Robert Thompson and Paul Edelman suggest another related, but different approach consistent with a view of shareholder voting as veto, even though Thompson and Edelman do not discuss their approach in terms of negative preferences at all.\textsuperscript{188} In fact, they argue that shareholder voting should be understood as “no longer merely an aggregation of preferences, but rather an aggregation of information” about what will maximize share price.\textsuperscript{189} But shareholder voting occurs, and should occur only when it advances the goal of “error correction” vis-a-vis corporate management. Namely, Thompson and Edelman argue that shareholder voting improves the corporate decision-making process only when deployed as a veto against corporate management, but not if it were permitted to effectuate affirmative direction over corporate management. However, Thompson and Edelman explicitly disavow the goal of effectuating shareholder preferences, because they conceive shareholder preferences to include only affirmative preferences and not the negative ones that are the focus of their argument.

I mean here mainly to clarify the place of negative preferences within the corporate debate, rather than to advance any particular reform as the best approach. Understanding negative preferences and their role in this context may help clarify the lines of debate about the appropriate shape of shareholder prerogatives in corporate governance. If shareholders’ interests in corporate governance are mainly or exclusively negative in nature, any reforms ought to aim mainly or exclusively at reinforcing shareholder capacity to enforce negative preferences without any new shareholder rights of initiation. Although the goal is not to champion the case for shareholder democracy, negative preferences might help advance the debate toward an alternative framework for analyzing shareholder democracy going forward.

\textbf{B. Effectuating Negative Preferences Through Formal Recognition}

Although voters often vote on the basis of negative preferences under traditional voting, it may be difficult to realize the full benefits of negative preferences when traditional voting formally recognizes only affirmative preferences. Instead, it may be useful under certain circumstances to


\textsuperscript{187} A significant practical problem with proposals for a majority vote requirement is that, under the default holdover rule, incumbent nominees who fail to receive majority approval would nonetheless continue in office until a new nominee, one who is able to garner majority approval, is elected as replacement. In short, the rejected incumbent would likely remain in office despite the shareholder vote.

\textsuperscript{188} Robert B. Thompson & Paul H. Edelman, \textit{Corporate Voting} (forthcoming 2009)

\textsuperscript{189} Id.
adapt traditional voting methods and look directly to voters’ negative preferences in the formal voting process.

I conclude by offering a couple examples of voting methods that take greater formal account of negative preferences. First, under what I call negative voting, voters can be asked to register through their vote their least preferred alternatives, with the least disfavored alternative winning out in the end. Second, under a form of what is known as approval voting, voters formally record approval (or nonapproval) for candidates, with the most approved (or least disapproved) alternative winning out in the end. I present these examples not as ideal types of voting but instead as available examples of how negative preferences can be more directly recognized under a reconceptualization of voting as veto.

1. Negative Voting

Voting regimes can formally recognize negative preferences, much as they do affirmative preferences, in what I will call “negative voting.” Voters can be asked to register not their affirmative preference for their most preferred alternative, but instead to record their negative preference against their least, or lesser preferred alternative. For instance, the television show *American Idol* could ask voters to register their 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. Assuming that there are more than two alternatives among which to choose, the election result may be quite different under negative voting. Negative voting, as I will discuss further later in this Part, helps ensure that the most disfavored alternatives will not chosen, even if there is no guarantee that the most favored alternative will be chosen.

A negative vote requires no more information than voting that formally records an affirmative preference. Formal recognition of negative preferences in this fashion need not demand more than the minimum assertion of the most extreme preference with respect to a single alternative. A regime of negative voting could be the simple converse of traditional “first past the post” affirmative voting, so familiar to American voters. Negative voting might ask the voter to register only one negative vote for her least preferred alternative, with the alternative that garners the fewest negative votes emerging as the election winner. In this case, negative voting need not change the quantity of information demanded from voters. Like a traditional vote, a negative vote provides information about a voter’s most extreme single preference—the most disfavored, rather than the most favored—without providing information about the voter’s preferences regarding

190 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, twenty years ago, called “One Fervent Vote Against Wintergreen.” See POUNDSTONE, supra note 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 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. LEGIS. 127 (2008).
any other available alternatives.

In this sense, negative voting is not simply another type of alternative voting system designed to integrate more information about voter preferences into the election process. Alternative voting systems are frequently motivated by the desire to achieve more refined outcomes, closer to the electorate’s underlying affirmative preference, and thus demand more information from voters about their preferences beyond their most preferred choice. For instance, the Borda Count method asks voters to rank order all available alternatives. The Borda Count incorporates this information about voters’ ordinal rankings beyond the most preferred choice and seeks a more sophisticated outcome by requiring richer account of voters’ affirmative preferences. When such alternative voting systems ask voters to register multiple preferences over the field of available alternatives, the demands on voters are necessarily greater. By requesting no more than the voter’s least preferred choice, negative voting need not fall prey to the practical complication of voter confusion that besets many alternative voting systems. Counting negative preferences instead of affirmative preferences thus need not press voters for more information than traditional plurality voting to which American voters are already accustomed. Nevertheless, the versatility of different alternative voting systems can be transferred to negative voting as desired. A voting system is a simply a method of counting votes, whether they effectuate affirmative or negative preferences, and the difference between traditional and negative voting is a difference between different types of preferences formally registered, not the method of counting votes. As discussed in the previous Part, cumulative voting allows voters to cumulate their votes, “plump” them for a single candidate, instead of spreading their votes across a number of candidates. Cumulative voting dictates the way that votes will be counted, but it is agnostic about what type of preference should be counted and can be conducted with negative votes as well.

An important limitation on negative voting, however, is the heightened importance of the slate of alternatives among which to choose. Elections typically involve some method of winnowing the larger field of candidates down to a more manageable slate for voters to evaluate. Although the result in practice depend on the context-dependent facts, the winnowing process may be more important for formal voting recognition of negative preferences. For traditional voting, the inclusion of a new unattractive alternative to the slate is unlikely to affect the quality of the election outcome. However, for negative voting, the inclusion of a new unattractive alternative to the slate may add an unacceptable possibility that must be vetoed. In other words, when voters are asked to vote their negative preferences, the quality of the election results is more sensitive to the inclusion of more bad alternatives than it would be when voters are asked to vote their affirmative preferences. In contrast to traditional voting, the attractiveness of the electoral result thus does not improve as the number of eligible alternatives expands.

For this reason, negative voting may work best when the winnowing process reliably produces a reasonably limited field of contending alternatives from which to choose. When the

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191 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.
192 See supra Part II.B. (discussing cumulative voting).
193 Assuming independence of irrelevant alternatives, voters would simply disregard the new unattractive alternative and vote for their most preferred choice as beforehand.
field of alternatives is winnowed to only a few, a negative vote gains more leverage on the ultimate selection by eliminating a greater percentage of the eligible alternatives. With a field narrowed successfully to a more promising few, a negative vote against one among only a handful of candidates contributes to the defeat of the most unattractive candidate and also helps produce a noticeably greater chance of the most attractive candidate winning out. However, a negative vote against one among very many unattractive candidates may allow too much possibility for another unattractive candidate still to win. This fact exposes a tradeoff inherent in an unqualified conversion to negative voting. Greater formal recognition of negative preferences through negative voting may come at the concomitant cost of relinquishing the practical effectuation of affirmative preferences. In other words, where voters have greater ability to veto specific choices through negative voting, they may have less ability to ensure the selection of their most favored choice. This tradeoff will not be attractive under all circumstances of voting.

Nonetheless, as I have discussed, the design of voting and elections need not look formally to either affirmative or negative preferences exclusively. Instead, negative voting, and other means of formally recognizing negative preferences, may be integrated into a mixed system that exploits their benefits while mitigating their costs. For instance, negative voting may be particularly useful in two-stage elections that pare the full field of alternatives during the first stage to a limited few viable contenders for final selection by negative voting during the second stage. Traditional voting, based on affirmative preferences, may be used to winnow down a large field of alternatives, of varying quality and strength, with a final selection among the strongest surviving alternatives based on some form of negative voting.

Runoff systems offer a stylized illustration of how such a process might function. Under a runoff system, a candidate who receives majority support in a first stage election wins office without the necessity of a second stage “runoff” election. A polarizing candidate subject to strong affirmative and negative preferences may perform well, just as under plurality systems, because only affirmative preferences count formally during the first stage. In fact, a graphic illustration of how a polarizing candidate may succeed despite strong negatives is David Duke’s second-place finish in the October 1991 election for Louisiana governor. Despite the fact that many Louisiana voters detested Duke’s politics, Duke won a third of the popular vote by virtue of his supporters’ intensity and the fact that a multicandidate field split the rest of the vote.


195 See 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”).
Nonetheless, under Louisiana’s runoff system, Duke had failed to garner a majority of the vote and still faced a runoff election against Edwin Edwards, a former governor with strong negatives himself. In the November runoff election between only Duke and Edwards, African-American voters turned out in record numbers, motivated mainly by negative preferences against Duke, and carried Edwards to a landslide victory. The head-to-head matchup in the runoff election allows the electoral majority to veto the more extreme candidate simply by voting for the other candidate. 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 election, the rest of the electorate voted together for Duke’s opponent instead of splitting its vote across several candidates. Although the runoff election did not commit voters to vote on the basis of their negative preferences, the simplified binary choice facilitates the ability of voters to eliminate a heavily disfavored candidate like Duke.

2. Approval Voting

Another voting method that enables voters to act directly on negative preferences is approval voting. “Approval voting” asks voters to vote for, and thus approve, as many candidates as they wish. 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. A voter may register an affirmative preference not only for her most preferred candidate, but all acceptable candidates. More importantly, the voter also has the concomitant ability to register a negative preference against unacceptable candidates by withholding approval.

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197 The two-stage process of runoff systems might be further adapted to accommodate negative voting. The familiar form of runoff system, used extensively in municipal elections and across the American South, begins with a first primary election in which voters vote their affirmative preference among a large field of eligible candidates for office. See generally Bullock III & Johnson, supra note. 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 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 re-allocated 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.


Another innovation on approval voting might be to permit "disapproval" votes that could be subtracted from a candidate's approval votes, with the winner as the candidate who receives the highest net total. Steven J. Brams, Run Jesse Jackson, but Under Approval Voting, PS: POL. SCI. & POL. 711, 712 (1983).

of approval regarding a single prominent candidate. The recall election allows the electorate, if sufficient eligible voters agree to place the question on the ballot, to remove an elected official from office before his current term has expired.\textsuperscript{203} The recall election is therefore approval voting in a simplified form—voters are asked on election day whether they approve of a particular elected official already in office, who will be removed from office if a sufficient number of voters withhold approval. In 2003, Gray Davis, then-Governor of California, was recalled from office when only 45 percent of California voters registered approval in Davis’s recall election, short of the 50 percent threshold necessary to defeat recall.\textsuperscript{204} A similar percentage of the electorate voted to re-elect Davis in 2002 as voted against the recall in 2003, only a year later.\textsuperscript{205} 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, with just 48 percent of the vote, whereas the recall election posed the voting decision slightly differently, with clearer opportunity to express a negative preference against Davis. The 2002 election, by focusing on only affirmative preferences, split the anti-Davis vote across several candidates and thus dispersed its voting strength. By contrast, the recall election allowed voters to pool their dissatisfaction with Davis in terms of a bloc disapproval vote that was sufficient to remove Davis from office. The recall election is an example of a contemporary voting regime, as a variant of approval voting, designed expressly to effectuate negative preferences.

A further modified form of approval voting would take even greater account of negative preferences. Voters could be able to register more than simple approval or absence of approval under a proposal called “bipolar voting.”\textsuperscript{206} Bipolar voting is similar to approval voting, except that voters receive a new third option of disapproval, such that a voter could cast a vote of approval, disapproval, or neither approval nor disapproval for each candidate on the ballot. Under bipolar voting, voters thus have the ability to cast negative votes in addition to positive votes. Voters would gain a range of voting options “commensurate with the range of each voter’s passions—including negative ones.”\textsuperscript{207} Voters can express for any given candidate not just their absence of approval, but if their feelings are sufficiently intense, a negative preference against the candidate in the form of a disapproval vote. With bipolar voting, all positive (+1) and negative (-1) votes cast would be aggregated for each candidate, with the total for a candidate being the net sum of their positive and negative votes. Modified approval voting, such as bipolar

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\textsuperscript{204} 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). Putting aside the merits of the recall in theory, the specifics of the recall process in California were problematic. The recall process de-coupled the approval vote of the incumbent and the election of the incumbent’s replacement such that greater percentage could vote to retain the incumbent than vote in support of the replacement candidate into office.


\textsuperscript{206} See Ferguson & Lowi, supra note (proposing bipolar voting); see also supra note ___ (describing Boehm’s proposal for a system with a negative vote, basically identical to bipolar voting); Dan S. Felsenthal, On Combining Approval with Disapproval Voting, 33 Behavioral Sci. 53 (1989) (proposing a similar system).

\textsuperscript{207} Ferguson & Lowi, supra note, at 278 (explaining how the net differential effect that a single voter can effect would be greater under bipolar voting than for traditional plurality voting and the Borda count).
voting, recognizes the salience of negative preferences and enable voters to express them formally through their votes.

V. CONCLUSION

The Article attempts to define and introduce 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 and might be incorporated even more directly into voting. 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 failure of a democratic process, but the alternative aim of avoiding least preferred outcomes has gone underappreciated. Voting, under many circumstances, may be more valuable for protecting and fulfilling negative preferences than fulfilling affirmative preferences. Voting across a variety of domains have evolved tacitly to accommodate negative preferences where negative preferences are more salient, and it may be even more useful to ask voters formally for their negative preferences under certain circumstances.