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## MAKING BALLOT INITIATIVES WORK: SOME ASSEMBLY REQUIRED

For over one hundred years, the ballot initiative or proposition<sup>1</sup> has been touted as a solution to some of the problems in the representative system of democracy in the United States.<sup>2</sup> Depending on a state's ballot initiative system, this mechanism enables citizens to make laws, to create or eliminate rights, or to amend the state's constitution through a popular vote. Popular initiatives were initially intended to allow ordinary citizens to intervene in the democratic process when their representative officials were not carrying out their wishes.<sup>3</sup> These proposition processes were supposed to "pour new meaning into the democratic experience" and to create a space for public deliberation.<sup>4</sup> Without such an opportunity, voters would be "caught up in a legislative strait jacket"; there could be "an 'informed, civically militant electorate' and 'an aroused popular conscience,'" but the limited opportunities for participation would not allow that electorate to "sear 'the conscience of the people's representatives.'"<sup>5</sup>

By allowing the universe of eligible voters to cast their ballots directly on a matter, instead of relying on their elected representatives to consider, advocate, and vote on behalf of the voters, the ballot initiative provides a more direct democracy. With initiatives, each person can cast his or her own vote instead of relying on a perhaps-unaccountable representative; thus, all eligible voters can participate in decisionmaking instead of only a select few. Furthermore, broader participation serves as a potential check on tyranny.<sup>6</sup> Finally, each person's vote is counted equally, so no one has more influence because of status or other factors.

However, even if propositions do assuage some of the problems of representation, a number of representative democracy's deficiencies are, at their core, problems inherent in the electoral system. These de-

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<sup>1</sup> The terms "ballot initiative" and "ballot proposition" are used interchangeably throughout this Note to signify systems by which an individual or group of people who are not necessarily elected officials can draft language and put it to a popular vote. These terms are distinct from a state referendum, a process through which a state legislature may choose to put a measure on a ballot for a popular vote. For a further description of mechanisms of direct democracy in the United States, see generally Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295 (2008).

<sup>2</sup> See BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 160-61 (2004).

<sup>3</sup> *Id.* at 161.

<sup>4</sup> *Id.* at 163.

<sup>5</sup> *Baker v. Carr*, 369 U.S. 186, 259 (1962) (Clark, J., concurring).

<sup>6</sup> See THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1999) ("[T]he smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.").

ficiencies therefore also plague ballot initiatives and might in fact be compounded by initiatives.<sup>7</sup> Decreasing the distance between individuals and a decision by allowing the individuals to vote directly does not ensure that there will be meaningful deliberation. Nor does it ensure that good public policy is likely to result from the decision, that those drafting, or voting on, the proposition have the necessary skills and information to be competent in those respective tasks, or that key segments of the population participate in the decision. Because ballot initiatives, like elections, are an aggregative voting mechanism, ballot initiatives are in this respect “more machinery of the same kind as that which already exists.”<sup>8</sup> It is counterproductive to attempt to fix the problems inherent in a majority-rule voting system by stressing voting systems and elections even more. Addressing these problems likely requires not that we increase the number of elections, but instead “that we stress elections less and supplement them with other forms of citizen interaction.”<sup>9</sup>

This Note discusses the feasibility of using citizens’ assemblies to improve the ballot initiative process. Affirmative action ballot initiatives can serve as a good model for discussing the feasibility of this new approach to propositions,<sup>10</sup> in part because the deficiencies of ballot initiatives have been particularly notable in the area of affirmative action. For more than a decade, groups in the affirmative action de-

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<sup>7</sup> With the increasing use of ballot initiatives, there has been much controversy over topics such as the limits — both substantive and procedural — that legislatures can or should impose on the ballot initiative process, *see, e.g.*, John Gildersleeve, Note, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437 (2007), judicial review and deference regarding ballot initiative outcomes, *see, e.g.*, Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1545 (1990); Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237, 253 (1999); Lori J. Rankin, Comment, *Ballot Initiatives and Gay Rights: Equal Protection Challenges to the Right's Campaign Against Lesbians and Gay Men*, 62 U. CIN. L. REV. 1055, 1079 (1994), and what types of groups benefit from or are disadvantaged by the availability of the mechanisms, *see, e.g.*, Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); *see also* JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY* (2004). Scholars have proposed a number of different challenges to ballot initiatives. These challenges range from calling for restrictions on, or modifications to, the initiative process or its substance, to calling for the elimination of ballot initiatives altogether. *See, e.g.*, Justin Henderson, Comment, *The Tyranny of the Minority: Is It Time To Jettison Ballot Initiatives in Arizona?*, 39 ARIZ. ST. L.J. 963 (2007).

<sup>8</sup> JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 144 (Swallow Press & Ohio Univ. Press 1991) (1927).

<sup>9</sup> Jane Mansbridge, Adams Professor, Harvard Kennedy Sch., Keynote Address Before the Austrian Political Science Association: The Fallacy of Tightening the Reins 4 (Dec. 10, 2004) (transcript available at <http://psweb.sbs.ohio-state.edu/intranet/poltheory/mansbridge.pdf>).

<sup>10</sup> This Note will not substantively address how race should factor into higher education admissions, but will instead explore an alternative form of democratic decisionmaking that might prove beneficial in the context of higher education admissions policies.

bate have been reinforcing the significance of elections by developing and refining electoral mobilization and litigation strategies to fight or promote propositions or initiatives that ban affirmative action. However, those organizations may better serve their goals not by focusing on improving their electoral or litigation campaigns, but rather by working toward a long-lasting solution based on informed and meaningful discussions among stakeholders and members of the public. Building some type of a deliberative community provides a possible route to developing such a solution. This type of community would enhance the deliberative ideals of face-to-face discussion, good public policy development, decisionmaking competence, and critical mass, making it a good candidate to supplement the ballot initiative process. By establishing a deliberative community before a proposition vote, a broader segment of the population would be informed about the issue, would have discussions with others on the issue, and would come up with more comprehensive solutions regarding important social concerns.

In an attempt to enhance the democratic and deliberative capacities of the ballot initiative, Part I outlines a proposal for establishing citizens' assemblies to develop and promote certain ballot initiatives. Part II utilizes core democratic and deliberative ideals to compare ballot initiatives with the citizens' assembly proposal. Much like the traditional representative electoral process, ballot initiatives tend to have significant shortcomings when evaluated on the basis of deliberative principles. Building on deliberative ideals through a citizens' assembly helps to turn society into a learning community, which better prepares people to participate in a ballot initiative's voting community. Part II also addresses why referenda are not a good substitute for citizens' assemblies as a supplement to ballot initiatives. Using affirmative action as an example, Part III discusses more specifically how such a citizens' assembly might be adopted and implemented prior to a ballot initiative. Beyond being superior to initiatives in the achievement of democratic and deliberative ideals, citizens' assemblies may achieve improved results for some controversial and technical issues.

#### I. CITIZENS' ASSEMBLIES: AN ALTERNATIVE APPROACH TO BALLOT INITIATIVES

Ballot initiatives were intended as an alternative to the flawed representative, legislative system because such a system does not always give citizens sufficient control over their elected officials. However, the best way to solve this problem is to supplement the electoral system with other forms of citizen interaction that do not share the prob-

lems inherent in aggregative voting.<sup>11</sup> Groups should preempt the initiative process by creating more inclusive and more educated deliberative bodies in anticipation of ballot initiatives. Even if implementing the proposed mechanism is not presently feasible in a particular state or for a particular issue, encouraging more deliberation than is encouraged in the current ballot initiative system would be a significant step in the right direction.

#### A. *The British Columbia Citizens' Assembly*

This Note proposes that groups work with stakeholders and legislators to convene a citizens' assembly largely modeled on the British Columbia Citizens' Assembly (BCCA) and, in turn, that the assembly develop language for some ballot initiatives.<sup>12</sup> In response to a glaring disparity between the percentage of votes political parties garnered in the 1996 B.C. elections and the number of legislative seats the respective parties won,<sup>13</sup> B.C. Premier Gordon Campbell supported creating a citizens' assembly on electoral reform.<sup>14</sup> To create the assembly, the B.C. government appointed an expert on Canadian governance to draft a report on convening such a group, and the B.C. Legislature unanimously approved the plan to convene the BCCA on Electoral Reform.<sup>15</sup> The BCCA's mandate was to "assess models for electing members of the [B.C.] Legislative Assembly and issue a report recommending whether the current model for these elections should be retained or another model should be adopted."<sup>16</sup> The plan stated that

<sup>11</sup> See Mansbridge, *supra* note 9, at 12–16 (discussing various methods to increase representatives' public interest motivation and responsiveness to public concerns, none of which involve the electoral system).

<sup>12</sup> For a description of the British Columbia Citizens' Assembly, see Lani Guinier, *Beyond Electocracy: Rethinking the Political Representative as Powerful Stranger*, 71 MOD. L. REV. 1, 26–29 (2008).

<sup>13</sup> In the 1996 B.C. elections, the New Democratic Party won the majority of seats despite winning a lower percentage of the vote (39%) than the British Columbia Liberal Party (42%). R.S. Ratner, *British Columbia's Citizens' Assembly: The Learning Phase*, CANADIAN PARLIAMENTARY REV., Summer 2004, at 20, 20; see also Amy Lang, *But Is It for Real? The British Columbia Citizens' Assembly as a Model of State-Sponsored Citizen Empowerment*, 35 POL. & SOC'Y 35, 38 (2007). The ratio of seats won to percentage of votes won was still distorted in the 2001 election: the Liberal party won seventy-seven of the seventy-nine seats with only approximately 57% of the votes. Ratner, *supra*, at 20; see also Lang, *supra*, at 38.

<sup>14</sup> R. Kenneth Carty, *The Shifting Place of Political Parties in Canadian Public Life*, IRPP CHOICES, June 2006, at 3, 3. Premier Campbell had promised to institute such an entity after his previous electoral defeat. Henry Milner, *Electoral Reform and Deliberative Democracy in British Columbia*, NAT'L CIVIC REV., Spring 2005, at 3, 4.

<sup>15</sup> The legislature adopted the plan after making a few modifications to the report's proposal. Ratner, *supra* note 13, at 20–21. The expert who drafted the report was former politician Gordon Gibson. Keith Archer, *Redefining Electoral Democracy in Canada*, 3 ELECTION L.J. 545, 556 (2004).

<sup>16</sup> Ratner, *supra* note 13, at 21 (internal quotation marks omitted).

any resulting BCCA electoral reform proposal would be subjected to a popular vote.<sup>17</sup> To pass, the referendum would need to win a double supermajority of votes: at least 60% of all voters and a simple majority of voters in 60% of the province's seventy-nine districts.<sup>18</sup>

When establishing the BCCA, Elections BC — a nonpartisan, independent office of the Legislature that is responsible for administering B.C. elections — randomly selected people from the voters list, sent over twenty thousand letters to solicit volunteers, and held meetings to inform potential members of the assembly's duties.<sup>19</sup> Prior to sending out solicitation letters, Elections BC took steps to ensure age and gender diversity.<sup>20</sup> To attract volunteers and to ensure that no additional hardship was placed on low-income assembly members, BCCA members received a stipend in addition to reimbursements for the costs of travel to and from meetings, childcare during meetings, and room and board during meetings.<sup>21</sup> From the resulting volunteers, Elections BC randomly selected one man and one woman, both non-officeholders, from each of British Columbia's electoral districts.<sup>22</sup> The random process did not select any First Nations (native Canadian) people as BCCA members, but Elections BC added two First Nations people to the assembly before it was convened.<sup>23</sup> Overall, racial and ethnic minorities, which comprise 22% of the general B.C. population, comprised 11% of the BCCA.<sup>24</sup>

The BCCA's process included a learning phase, a public hearings phase, and a deliberation phase.<sup>25</sup> During the learning phase, BCCA members received reading materials from, and attended presentations by, experts on electoral systems in order to build a knowledge base among assembly members.<sup>26</sup> Besides ensuring that each of the assembly members was informed and became knowledgeable enough to engage in deliberations and brainstorm about proposals, the learning phase put participants in a position to take the lead in the rest of the process. Members also participated in group discussions and “devel-

<sup>17</sup> Archer, *supra* note 15, at 556.

<sup>18</sup> *Id.*

<sup>19</sup> B.C. CITIZENS' ASSEMBLY ON ELECTORAL REFORM, MAKING EVERY VOTE COUNT 10 (2004) [hereinafter BCCA FINAL REPORT].

<sup>20</sup> Ratner, *supra* note 13, at 22.

<sup>21</sup> See *id.* at 21–22. These expenditures are likely essential to making the citizens' assembly something in which a substantial number of people want to be involved, as opposed to a system like jury duty, which typically can only operate under a threat of penalty.

<sup>22</sup> BCCA FINAL REPORT, *supra* note 19, at 10; Archer, *supra* note 15, at 556.

<sup>23</sup> BCCA FINAL REPORT, *supra* note 19, at 10.

<sup>24</sup> Lang, *supra* note 13, at 41.

<sup>25</sup> BCCA FINAL REPORT, *supra* note 19, at 11–13.

<sup>26</sup> See *id.* at 11. The learning phase is one of the primary tools for ensuring that wealthier, more educated, or more politically active assembly members do not dominate the process.

op[ed] a set of Shared Values.”<sup>27</sup> During the public hearings phase, BCCA members traveled to different electoral districts to hold fifty public hearings and to meet with community organizations. Visitors to the BCCA website submitted over 1600 suggestions during this phase.<sup>28</sup> In the deliberation phase, small groups prioritized values for selecting an electoral system, and then members designed two detailed electoral reform models during televised plenary sessions that were open to the public.<sup>29</sup> BCCA members ultimately selected one model by a vote of 123–31.<sup>30</sup>

Unfortunately, despite the year-long assembly process, there was little public discussion regarding the upcoming BCCA referendum.<sup>31</sup> In May 2005, the BCCA referendum won seventy-seven of seventy-nine districts but narrowly missed the supermajority of votes it needed to pass.<sup>32</sup>

### *B. Suggested Modifications to Citizens’ Assemblies*

While the BCCA provides the necessary groundwork for a citizens’ assembly, a series of modifications would likely increase an assembly system’s chances of adoption and success elsewhere. For instance, replicating the BCCA in other locations might require a strategy to persuade, or make an end-run around, less supportive elected officials and legislators. New assemblies could also improve upon the inclusion of groups that were underrepresented in the BCCA and could establish a fourth phase to better promote the ballot initiative once the assembly has drafted the language.

Although Premier Campbell was instrumental in establishing the BCCA, it is unlikely that such unique circumstances will regularly arise to prompt a governor and legislature to make a similar commitment to establishing a citizens’ assembly. Given that efforts to persuade officials to create a citizens’ assembly may encounter a number of the same difficulties as efforts to influence representative officials through traditional means, perhaps interested groups could secure gu-

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 12.

<sup>29</sup> *Id.* at 13; Lang, *supra* note 13, at 46; Milner, *supra* note 14, at 6.

<sup>30</sup> BCCA FINAL REPORT, *supra* note 19, at 13.

<sup>31</sup> Prior to the referendum vote, approximately half of the electorate had not heard of the model, J.H. Snider, *Solving a Classic Dilemma of Democratic Politics: Who Will Guard the Guardians?*, NAT’L CIVIC REV., Winter 2005, at 22, 25, and one-third had not even heard of the BCCA, Lang, *supra* note 13, at 36. The lack of public awareness is unsurprising given that neither major political party took a position on the model, the assembly’s voter education budget was negligible, and the assembly disbanded five months prior to the election. See Snider, *supra*, at 25.

<sup>32</sup> The referendum received 57.4% of the overall vote, instead of the necessary 60%. Snider, *supra* note 31, at 25.

bernatorial or legislative approval by scaling back the power of the citizens' assembly.<sup>33</sup> If neither gubernatorial nor legislative approval is possible, then interested groups could collaborate to put an initiative creating a citizens' assembly on the ballot or to create an unofficial citizens' assembly without government assistance, which would mean that the assembly would only be developing a proposal for a ballot initiative and would not be guaranteed a spot on the ballot.

While the BCCA did make some attempts at achieving an adequate representation of different groups, the process for selecting assembly members should ensure adequate racial, ethnic, and other types of representation in addition to adequate representation of different genders and ages. A "critical mass"<sup>34</sup> of representatives from different groups is required for deliberation to achieve legitimacy.<sup>35</sup> To meet this goal, voter registration lists might be a good source of potential assembly members; furthermore, having a period of targeted voter registration drives prior to assembly selection could make the lists more accurate reflections of the population. Additionally, after random selection from voter lists, a citizens' assembly should have some mechanism to ensure adequate representation of various groups, possibly including different races, religions, and sexual orientations, prior to sending out letters to recruit potential volunteers. Although it would

<sup>33</sup> For instance, a governor or state legislature might be more likely to support the citizens' assembly if the resulting initiative were subjected to the same (or stricter) procedural requirements for inclusion on the ballot and for passage as any other ballot initiative would be. Depending on the state constitution, the governor or legislature might not have the power to permit ballot initiative language developed by a citizens' assembly to be included on a ballot or adopted by procedures different from any other ballot initiative. These states could either amend their constitutions to allow for a full citizens' assembly, or they could adopt a citizens' assembly whose power is somewhat more limited than it would be in another state.

<sup>34</sup> The scientific realm is the origin of the term "critical mass." Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 CARDOZO L. REV. 97, 98 (2007). In that area, the term refers to the minimum level of fissionable material required to start and sustain a chain reaction that will lead to a nuclear explosion. *Id.* Critical mass describes three conditions:

[T]he existence of a precise minimum level of the required material for a change to take place; a change that is sudden and transformative; and that the change is not simply a function of a minimum level of the resource but also a function of how elements of that resource interact with one another.

*Id.* at 98–99. The term is commonly used in social and legal arenas, sometimes to refer to "some threshold of participants . . . [that] has to be crossed before a social movement 'explodes' into being." Pamela Oliver, Gerald Marwell & Ruy Teixeira, *A Theory of the Critical Mass* (pt. I), 91 AM. J. SOC. 522, 523 (1985). For more discussion of the concept of critical mass, see *infra* section II.B.4, pp. 972–73.

<sup>35</sup> See Michael Rabinder James, *Descriptive Representation in the British Columbia Citizens' Assembly*, in *DESIGNING DELIBERATIVE DEMOCRACY: THE BRITISH COLUMBIA CITIZENS' ASSEMBLY* 106, 122 (Mark E. Warren & Hilary Pearse eds., 2008) [hereinafter *DESIGNING DELIBERATIVE DEMOCRACY*]. Achieving legitimacy entails more than just token representation because a high degree of representativeness increases the public perception that a body is fair and legitimate. *Cf.* ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA* 109 (2004) (discussing the representativeness of juries).

be best to have a high level of representation across the board in a number of categories for every assembly, if there are limited time, resources, and volunteers (as there typically are), decisions regarding which groups must be represented and at what levels should be tailored to the issue of that particular assembly. For instance, having adequate representation of lesbian, gay, bisexual, and transgendered groups would likely be more important than that of some other groups for an assembly on same-sex marriage.

In order to avoid results similar to the narrow defeat of the BCCA proposal, a citizens' assembly should have a funded fourth phase: promoting the ballot initiative. This phase should include the components of a more traditional electoral campaign, such as voter registration, education, and mobilization. The assembly plan should earmark funds for informational materials, educational meetings, and door-to-door canvassing. It might seem that there is not a need for public funding in this phase because interest groups will step in to campaign for or against the ballot initiative as they do in the current system. Yet such strong interest group support is unlikely because either the ballot initiative proposed by the assembly will be a different or more moderate initiative than partisan groups would support, or there will be a false sense that an initiative developed in such a legitimate process will win without any campaign.<sup>36</sup> A citizens' assembly with a funded voter-education phase that includes debates and information sessions (and not just mass media soundbites) could help ensure that voters better understand the proposition and do not "vote in ways inconsistent with their preferences on the issue generally."<sup>37</sup>

## II. EVALUATIONS OF BALLOT INITIATIVES AND CITIZENS' ASSEMBLIES

Citizens' assemblies may seem like an unnecessary supplement to initiatives, but the more deliberative process of assemblies offers improvements on initiatives in terms of both democratic and deliberative goals. If one agrees that citizens' assemblies would at least partially rectify ballot initiatives' inability to fulfill democratic and deliberative ideals, replacing ballot initiatives with state referendum processes, in which the legislature develops language that is put to a popular vote, may seem to render citizens' assemblies unnecessary. It is unlikely,

<sup>36</sup> When voters are confused or unsure, they tend to support the status quo and would thus be less likely to vote in favor of such a referendum. Snider, *supra* note 31, at 25.

<sup>37</sup> LEIB, *supra* note 35, at 16–17 (quoting David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 38 (1995)). There is evidence that most voters "face an informational vacuum," which might lead them to be suspicious of a proposition and confused about what a yes or no vote would mean. *Id.* at 16 (quoting Magleby, *supra*, at 38).



however, that states would supplant all ballot initiative processes with referenda. Assuming, *arguendo*, that this were likely, citizens' assemblies still have some advantages over referenda.

#### A. *Democratic Ideals*

The necessary conditions for an ideal democratic system — which supporters of using ballot initiatives claim to be promoting — include participation, nontyranny, and political equality.<sup>38</sup>

1. *Participation.* — Significant involvement of the citizenry is one of the primary ideals of a democratic system.<sup>39</sup> A lower level of participation in a system results in a weaker mandate for the result of the system's process.<sup>40</sup> Judged under this participation ideal, ballot initiatives would seem to fare about the same as traditional electoral representation. For most propositions, the only structured citizen involvement is the potential of casting a vote on election day. There is little to no involvement before or after that moment of choice. One participatory aspect of ballot initiatives that is not a component of traditional representational politics is that all states require a certain percentage of citizens to sign a petition before a proposition can be put on the ballot.<sup>41</sup>

Establishing a citizens' assembly before an initiative would significantly increase the involvement of the public in decisionmaking. The assembly members would draft the ballot initiative, the public hearings phase would engage others who were interested, and, of course, voters would still be participating on election day. Implementing a citizens' assembly would increase both the breadth and depth of participation in the decision, making the process substantially better in terms of participation than either traditional electoral representation or a ballot initiative alone.

2. *Nontyranny.* — A democratic process should protect minorities from a tyranny of the majority and minority alike.<sup>42</sup> The process should, whenever possible, avoid “depriving any portion of the citi-

<sup>38</sup> Although a number of scholars probably refer to different iterations of these principles, this Note draws upon Professor James Fishkin's descriptions of these ideas. See JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION* 29–41 (1991); JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE* 34 (1995).

<sup>39</sup> See FISHKIN, *THE VOICE OF THE PEOPLE*, *supra* note 38, at 34.

<sup>40</sup> *Id.* at 45.

<sup>41</sup> See RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 45 (2002). The required percentage of signatures varies from 2% to 15% of the population depending on the state. *Id.* at 46.

<sup>42</sup> The idea of tyranny discussed in this Note is not limited to minoritarianism, but is expanded to also reference tyranny by a majority. Additionally, the concept of nontyranny discussed here is aimed at reducing tyranny regardless of whether it is imposed on a majority or a minority.

zenry of rights or essential interests.”<sup>43</sup> The existence of tyranny would call the legitimacy of the democratic process into question and would “invite[] resistance and protest rather than acceptance” of the process’s results.<sup>44</sup>

Ballot initiative processes might provide racial, ethnic, and other minorities with inadequate protection from tyranny.<sup>45</sup> A number of scholars claim that propositions negatively affect people of color and other minorities.<sup>46</sup> In general, people of color are less likely to be on the winning side of propositions than are white people.<sup>47</sup> This phenomenon is particularly true of ballot initiatives on explicitly racial issues, such as affirmative action.<sup>48</sup> Because propositions allow local communities to exercise their democratic right to repeal antidiscrimination laws, some commentators argue that minority groups should be entitled to special protection when their interests are threatened by a proposition.<sup>49</sup> Unfortunately, courts cannot be relied on to adequately

<sup>43</sup> FISHKIN, THE VOICE OF THE PEOPLE, *supra* note 38, at 34.

<sup>44</sup> *Id.* at 50.

<sup>45</sup> See, e.g., Zulmara Cline, Juan Necochea & Francisco Rios, *The Tyranny of Democracy: Deconstructing the Passage of Racist Propositions*, 3 J. LATINOS & EDUC. 67 (2004) (presenting a case study on California’s Proposition 227, which limited bilingual education). In addition to bans on affirmative action, the ballot initiative process has been used to implement bans on same-sex marriage. Jennifer L. Levi, *Marriage Equality for Same-Sex Couples: Where We Are and Where We Are Going*, 22 J. AM. ACAD. MATRIM. LAW. 55 (2009).

<sup>46</sup> See, e.g., Bell, *supra* note 7; Elizabeth R. Leong, Note, *Ballot Initiatives & Identifiable Minorities: A Textual Call to Congress*, 28 RUTGERS L.J. 677 (1997). According to Professor Derrick Bell, propositions are dangerous to the interests of people of color: “[T]he more direct democracy becomes, the more threatening it is” to black people. Bell, *supra* note 7, at 1.

<sup>47</sup> See Zoltan L. Hajnal, Elisabeth R. Gerber & Hugh Louch, *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. POL. 154, 163 (2002).

<sup>48</sup> See *id.* at 170 (stating that in every initiative the authors studied in this category, “the majority of white voters voted for the winning side of the initiative,” and “[i]n most cases, the majority of the voters from the three major racial/ethnic minority groups voted for the losing side”). In a political science study of civil rights initiatives, Professor Barbara Gamble showed that of the seventy-four civil rights initiatives voted on by that time, 78% had resulted in “a defeat of minority interests.” Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 254 (1997). Some may argue that recent events such as the election of President Obama show that people are no longer voting along racial lines. Unfortunately, the 2008 election may not be as good a sign of racial progress as it might first appear. There is still “persistent racial polarization in the Deep South and elsewhere,” Peter Wallsten & David G. Savage, *Obama Win Used Against Rights Laws*, CHI. TRIB., Mar. 15, 2009, at 5, and significant differences continue to exist between whites and people of color in voting patterns. Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Race, Religion, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. (forthcoming Apr. 2010). In some states, President Obama won only one-tenth of the white vote — less than Senator John Kerry, the unsuccessful, white, Democratic nominee in 2004. Wallsten & Savage, *supra*, at 5.

<sup>49</sup> See, e.g., Bell, *supra* note 7; Leong, *supra* note 46 (arguing that Congress should protect identifiable minority groups from racially motivated ballot initiatives). This concern is especially relevant in the area of affirmative action and racial protections because some argue that President Obama’s election “proves that some of the most protective civil rights laws can now be erased.”

“limit[] the ability of majority voters to disregard minority concerns,” perhaps because it is not always within courts’ power to do so.<sup>50</sup>

A citizen’s assembly and the attendees at public hearings would also serve as a check on majority rule through ballot initiatives, helping to ensure that the process and the result did not imperil the rights of minorities. Instead of one interest group drafting a ballot initiative that serves its own needs, perhaps to the detriment of other groups, a broader group of people would be working together to reach a solution that best meets the needs of various groups.<sup>51</sup>

3. *Political Equality*. — That “citizens’ preferences count equally” is another key principle of a democratic system.<sup>52</sup> In U.S. jurisprudence, this ideal is supposed to be embodied by the “one-person-one-vote” concept.<sup>53</sup> While voting equality is important, it is but one of many components needed for political equality.<sup>54</sup> Even if the political process is designed to give each person’s preferences equal weight

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Wallsten & Savage, *supra* note 48. To some, “Obama’s election heralds the emergence of a color-blind society in which special legal safeguards for minorities are no longer required.” *Id.*

<sup>50</sup> Priscilla F. Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URB. L. ANN. 135, 158 (1981). Most ballot initiative systems place the responsibility for checking the majority will on the courts alone — “the least accountable branch,” and perhaps the branch most poorly suited to the task of “the more subtle screening and filtering of popular interests and passions that take place in the normal legislative process.” ELLIS, *supra* note 41, at 176. Generally, state courts can strike down statutory initiatives on procedural grounds or on state and federal constitutional grounds. However, for an initiative that changes the state constitution, courts typically only strike down the initiative on procedural or federal constitutional grounds because one state constitutional provision is not sufficient to render another unconstitutional.

<sup>51</sup> This proposal is not meant to suggest that an assembly will always protect the rights or interests of a minority. For example, an assembly on an issue such as same-sex marriage, for which people’s opinions are largely influenced by religious beliefs, might still draft language limiting the rights of a minority.

<sup>52</sup> FISHKIN, THE VOICE OF THE PEOPLE, *supra* note 38, at 34; see also Patricia Gurin, *Selections from The Compelling Need for Diversity in Higher Education, Expert Reports in Defense of the University of Michigan*, EQUITY & EXCELLENCE IN EDUC., September 1999, at 36, 40 (1999) (noting that “equality among peers” is one of the “dimensions of develop[ing] the capacity for democracy”). A more rigorous definition of political equality is that “every voter has an equal probability of being the decisive voter.” FISHKIN, DEMOCRACY AND DELIBERATION, *supra* note 38, at 31.

<sup>53</sup> This principle was announced in *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>54</sup> As Professor Lani Guinier has pointed out, “one person, one vote” means very little for political equality when the people counted for redistricting are not necessarily even of voting age or eligible to vote and when the preferences of a number of voters are disregarded by the outcome in a winner-take-all electoral system. See LANI GUINIER & GERALD TORRES, THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 179–82 (2002); Guinier, *supra* note 12, at 11 n.46. The ideal of political equality may be met by a measure as minimal as only allowing one vote per person instead of allowing for the “plural voting” that John Stuart Mill proposed. FISHKIN, THE VOICE OF THE PEOPLE, *supra* note 38, at 35 (internal quotation marks omitted). In Mill’s plural voting, certain people would have multiple votes to cast, perhaps because they have a higher level of education or some such factor, while others would have fewer votes or maybe just one vote to cast. See *id.*

at the polls, there should be measures to make sure that other factors do not interfere with that equality.<sup>55</sup>

Many are concerned that the initiative process — which involves expenses including paying signature-gatherers and paying for commercials targeted at voters — is too easily captured by those with money and too exclusive of those without it.<sup>56</sup> Wealthy interest groups can, and sometimes do, dominate the initiative process, and groups that lack substantial capital might be unable to participate fully.<sup>57</sup> Much like the idea of the government providing funding for the campaigns of elected officials, government funding for the citizens' assembly process would help to prevent the dominance of the preferences of the wealthy in the initiative process.

### B. *Deliberative Ideals*

Deliberation promotes a number of ideals that are usually neglected, and thus undermined, by proposition processes. The central principles of deliberation are especially relevant for important social decisions because they expand the pedagogical goal of diversity as a tool for better decisions in settings ranging from the formal classroom of a university to the larger society's democracy. Deliberative ideals include face-to-face discussion, the implementation of good public policy, decisionmaking competence, and critical mass.

1. *Face-to-Face Discussion.* — That citizens have face-to-face discussions about the issues up for decision is a key component of a deliberative system.<sup>58</sup> The discussions should ideally be face to face in groups; although deliberation over the internet or engagement through phone conversations may be better than no discussion at all, those less personal forms of interaction are not substitutes for in-person interaction.<sup>59</sup> Deliberation makes people more informed and can also change people's opinions.<sup>60</sup> Additionally, deliberation encourages people to take more responsibility for solving social problems, and people find the discussion satisfying.<sup>61</sup> Some have called for state-sponsored hearings, debates, or caucuses prior to voting on ballot initiatives, but it

<sup>55</sup> See FISHKIN, DEMOCRACY AND DELIBERATION, *supra* note 38, at 30. Such other factors include people's votes being determined by bribes or threats instead of by their own preferences. *Id.* at 32–33.

<sup>56</sup> See ELLIS, *supra* note 41, at 44–45, 49–61.

<sup>57</sup> *Id.* at 49–54; Henderson, *supra* note 7, at 965–70.

<sup>58</sup> Gurin, *supra* note 52, at 40 (noting that “discussion under rules of civil discourse” is essential for “develop[ing] the capacity for democracy”). Thomas Jefferson thought that the lack of popular deliberation required by the Constitution, outside of its own ratification process, was “the single greatest failing in the Founding design.” ACKERMAN & FISHKIN, *supra* note 2, at 159.

<sup>59</sup> See FISHKIN, THE VOICE OF THE PEOPLE, *supra* note 38, at 34.

<sup>60</sup> ACKERMAN & FISHKIN, *supra* note 2, at 52–54.

<sup>61</sup> *Id.* at 59.

does not seem that any statewide initiative process requires such dialogue. One of the most significant improvements a citizens' assembly would provide is an increase in deliberation about the substance of a ballot initiative. Not only would assembly members be involved in conversations, but the general public would also be included in the dialogue during the public hearings phase.

2. *Implementation of Good Public Policy.* — Deliberation increases our ability to “devis[e] and implement[] public policies that ground a productive economy and healthy society.”<sup>62</sup> Deliberation does this by “enlarg[ing] the pools of ideas and information,” helping people separate good arguments from bad ones, and “lead[ing] to a consensus on the ‘better’ or more ‘reasonable’ solution.”<sup>63</sup> A deliberative process serves to aggregate different perspectives and to increase the decision-making competence of the people involved.<sup>64</sup> Many people deliberating over a decision may be more effective than a small number of people deliberating because having more people in a group generally leads to a higher “collective intelligence,” which is greater than the sum of its parts.<sup>65</sup> Cognitive diversity — the idea that there are differences in how people in a group will approach a problem or a question — allows discussion in groups to increase and harness collective intelligence.<sup>66</sup> The optimal cognitive diversity of a group — meaning the ability to view the world from different perspectives<sup>67</sup> — can only be attained by having multiple people involved in a discussion.<sup>68</sup>

Ballot initiatives have few if any mechanisms to promote the creation of good public policy. But through deliberation, BCCA participants gained a better understanding of the concerns facing a broader range of people and were thus able to design a redistricting process that better addressed more of those concerns.<sup>69</sup> Citizens' assemblies on other topics could potentially realize these same benefits.

<sup>62</sup> Archon Fung & Erik Olin Wright, *Thinking About Empowered Participatory Governance*, in *DEEPENING DEMOCRACY* 3, 3 (Archon Fung & Erik Olin Wright eds., 2003). Within this goal, this Note would also include the principle of “assuring that all citizens benefit from the nation’s wealth.” *Id.*

<sup>63</sup> Hélène Landemore, *Democratic Reason: The Mechanisms of Collective Intelligence in Politics* 8 (May 22, 2008) (unpublished manuscript, on file with the Harvard Law School Library).

<sup>64</sup> *Id.* at 5–6.

<sup>65</sup> *Id.* at 3–4.

<sup>66</sup> See SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007).

<sup>67</sup> See *id.* at 23–51.

<sup>68</sup> Landemore, *supra* note 63, at 3–4.

<sup>69</sup> For instance, one participant learned about the problems facing people in rural districts. Guinier, *supra* note 12, at 28. Assembly members learned that voters wanted “more nuanced representation[.]” *Id.* (quoting interview by Lani Guinier with Shoni Field, Former Member, B.C. Citizens' Assembly (Nov. 2, 2006)).

3. *Decisionmaking Competence.* — The people participating in a democratic process should have the information and skills necessary to make a meaningful decision. Making a thoughtful decision often requires background information on a policy area or a candidate. For drafting legislation or constitutional amendments, competence requires that the drafters write in a way that will allow the legislation or amendment, if passed, to achieve its purpose.

Laws passed through the initiative process are often poorly drafted and difficult to interpret.<sup>70</sup> In these situations, the electorate is frequently misled and unprepared to make wise choices.<sup>71</sup> The education, public opinion-gathering, and promoting-the-ballot-initiative phases of the citizens' assembly would ensure that the decisionmaking competence of the drafters and the voters is much higher than it has been in other ballot initiatives.

4. *Critical Mass.* — The concept of critical mass refers to an undefined number or percentage of people, specifically of a historically underrepresented group or a racial minority, whose participation is necessary to maximize the learning and level of thought taking place in a group discussion. In the affirmative action debate, the concept of critical mass was popularized by the Expert Report of Patricia Gurin,<sup>72</sup> which the University of Michigan Law School employed to successfully defend the use of race as a factor in admissions in *Grutter v. Bollinger*.<sup>73</sup>

Although the concept of critical mass did not arise out of a discussion of democratic processes, the concept's usefulness extends to democratic systems. Having a critical mass of students of color at the University of Michigan "prepare[d] young people for active participation in our democratic society."<sup>74</sup> Gurin's report showed that "[s]tudents learn more and think in deeper, more complex ways in diverse educational environments."<sup>75</sup> The presence of a critical mass of students of color at the University of Michigan "create[d] the discrepancy, discontinuity, and disequilibrium" that foster better learning.<sup>76</sup> In Gurin's study, "[s]tudents who had experienced the most diversity . . . showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and

<sup>70</sup> See Henderson, *supra* note 7, at 978–79.

<sup>71</sup> *Id.* at 981–83; cf. Mansbridge, *supra* note 9, at 4 (noting that electoral campaigns are "poor sources of information" and often "distort information").

<sup>72</sup> See Gurin, *supra* note 52.

<sup>73</sup> 539 U.S. 306 (2003) (upholding the University of Michigan Law School's use of race as a factor in admissions).

<sup>74</sup> Gurin, *supra* note 52, at 36.

<sup>75</sup> *Id.* at 38 (emphasis omitted).

<sup>76</sup> *Id.* at 39.

academic skills.”<sup>77</sup> If a critical mass of assembly members are people of color, the assembly could also tap into some of these benefits, producing assembly members better prepared to engage in democratic society, learn and think in complex ways, and think creatively about solving problems. Perhaps these benefits could also extend to voters, and diversity could serve to disrupt the more automatic thinking with which many voters might otherwise approach learning or problem solving.<sup>78</sup> These benefits of critical mass are not necessarily limited to racial representation; “members of heterogeneous working groups offer more creative solutions to problems than those in homogenous groups” and also “show greater potential for critical thinking.”<sup>79</sup>

Inclusion of many representatives of all potential groups may be neither necessary nor possible in an assembly due to a very low number of group members in a geographic area or perhaps because most members of a group have little or no interest in the topic at issue. However, lacking a critical mass for a group that is a substantial percentage of the population in an area or for a group that has a significant stake in the assembly topic would pose serious problems for an assembly as a democratic process. The concerns and ideas of people left out would not be added to the discussion,<sup>80</sup> nor would these people necessarily feel that they were a part of the community of consent that made the decision.

The selection process for the citizens’ assembly members would attempt to include critical masses of different underrepresented social groups within the decisionmaking process in a way that no other legislation-drafting process does. The BCCA illustrates that diversity measures beyond random selection are likely necessary to ensure that a critical mass of key underrepresented groups participates.<sup>81</sup> By contrast, general elections and ballot initiative votes obviously include no mechanisms to ensure a critical mass of any particular group.<sup>82</sup>

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<sup>77</sup> *Id.* at 45. Although diversity has a positive impact on black and Latino students, “[t]he results are especially impressive for [w]hite students,” and the learning outcomes “persisted across time.” *Id.* It is not diversity alone that promotes active thinking in white students, but rather “the quality of cross-racial interaction.” *Id.* at 46.

<sup>78</sup> *Cf. id.* at 38–39 (discussing this phenomenon in the university setting).

<sup>79</sup> *Id.* at 39.

<sup>80</sup> See FISHKIN, *THE VOICE OF THE PEOPLE*, *supra* note 38, at 37–38.

<sup>81</sup> Two First Nations people out of 161 assembly members is likely not a critical mass, but in trying to achieve diversity, the BCCA moved closer to achieving critical mass than a ballot initiative vote would have.

<sup>82</sup> Critical mass requires not only the presence of a significant number or percentage of a group in a process, but also substantive interaction between individual members of different groups. Thus, even if a significant percentage or number of various underrepresented groups vote on a proposition on election day, the ballot initiative process would still not necessarily meet this higher standard of diversity.

*C. Referenda and Citizens' Assemblies*

The availability of state referenda, or legislature-developed measures put to popular vote, may seem to present an alternative to ballot initiatives that renders citizens' assemblies unnecessary. Referenda do avoid some of the pitfalls of ballot initiatives and still allow a broad range of participation in legislative decisions. However, the cultural narrative that democracy requires an avenue for everyday people to directly develop and vote on legislation<sup>83</sup> does not allow referenda to fully replace ballot initiatives, leaving some ballot initiatives that citizens' assemblies could supplement. Moreover, even if it were feasible for referenda to replace ballot initiatives, citizens' assemblies still have some benefits that are absent from the state referendum process.

In addition to or instead of ballot propositions, some states have a referendum process,<sup>84</sup> which is comparable to a ballot initiative process in terms of achieving the democratic ideals of participation and political equality because both systems depend almost wholly on voting on election day to fulfill those criteria. However, referenda may fare better than ballot initiatives in terms of nontyranny. Elected officials, up for reelection at some point, could be more easily held accountable for drafting a measure that subordinates the interests of a majority or a minority group than a special interest group could be, as special interests are only accountable to their funders or members. When evaluated on the basis of deliberative ideals, referenda are comparable to ballot initiatives in achieving face-to-face discussion and critical mass, again because both mechanisms turn on elections, but referenda are likely better than ballot initiatives for implementing good public policy and for maximizing decisionmaking competence.<sup>85</sup>

These comparative strengths of referenda might suggest that referenda should replace ballot initiatives. However, ballot initiatives are by no means at risk of extinction, and it is unlikely that such a campaign would be successful. Despite the criticisms of ballot initiatives and the existence of referenda as an alternative, most states have not significantly curtailed their use of ballot initiatives.<sup>86</sup> Instead, the

<sup>83</sup> See *supra* p. 959.

<sup>84</sup> See, e.g., CAL. CONST. art. XVIII, §§ 2–4. Beyond making this referendum process available, California goes so far as to “prohibit[] its Legislature from amending or repealing many types of laws without voter approval.” Jennifer Steinhauer, *Lead Judge Denounces State's Glut of Measures*, N.Y. TIMES, Oct. 11, 2009, at A23 (paraphrasing the statement of Ronald M. George, Chief Justice of the California Supreme Court).

<sup>85</sup> Because crafting social policy is supposed to be part of a legislator's expertise and job, and also because legislators can be held accountable upon reelection for supporting bad policies, referenda seem more likely to result in good public policy and more decisionmaking competence than a ballot initiative system in the hands of largely unaccountable special interest groups.

<sup>86</sup> See Initiative & Referendum Inst., Univ. of S. Cal., A Brief the [sic] History of the Initiative and Referendum Process in the United States, [http://www.iandrinstitute.org/New\\_IRI\\_Website](http://www.iandrinstitute.org/New_IRI_Website)



number of initiatives reached an all-time high in the last decade.<sup>87</sup> Thus, states will likely still need the citizens' assembly as a partial solution to some of the shortcomings of ballot propositions.

Even if it were feasible for referenda or state constitutional conventions to completely replace ballot initiative systems, it would still be desirable to have citizens' assemblies develop some initiatives for popular vote, instead of limiting that ability to legislators. While a state constitutional convention is more similar to the citizens' assembly approach than is a ballot initiative vote alone (because the referenda would entail some popular deliberation), there are still significant advantages to a citizens' assembly. For referenda, the drafting of referendum language is limited to members of the state legislature, and a vote of the state legislature is necessary for the language to appear on the ballot. This requirement limits the choices available to citizens, who may then doubt whether the legislature has developed the initiative in the way they would most support.<sup>88</sup> Additionally, assembly members would be able to suggest the best solution without the influence of reelection pressures, and they would likely face less pressure from special interests than would elected officials since assembly members are not repeat players. Because citizens' assemblies would be very costly and time-consuming, however, it is understandable that not every ballot initiative would have an accompanying assembly. Thus, referenda could still provide an alternative to ballot initiatives in some situations.<sup>89</sup>

Although citizens' assemblies and constitutional conventions share a number of similarities, citizens' assemblies would provide benefits that state constitutional conventions lack because the convention participants are not necessarily selected randomly or in a way that ensures inclusion of critical masses of relevant groups. Additionally, state constitutional conventions do not necessarily entail the education of the

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Info/Drop Down Boxes/Quick Facts/History of I&R.pdf (last visited Jan. 9, 2010). For instance, the Colorado November 2008 ballot was comprised of fourteen ballot initiatives, including ten constitutional amendments. Valerie Richardson, *Obama Helped Defeat Anti-Affirmative Action*, WASH. TIMES, Nov. 8, 2008, at A02.

<sup>87</sup> *Id.* Although the majority of the initiatives occur in only six states — Arizona, California, Colorado, North Dakota, Oregon, and Washington — twenty-four states have an initiative process. *Id.*

<sup>88</sup> See Dennis F. Thompson, *Who Should Govern Who Governs? The Role of Citizens in Reforming the Electoral System*, in DESIGNING DELIBERATIVE DEMOCRACY, *supra* note 35, at 20, 28–29 (noting that such considerations “suggest that we should supplement the [ballot initiative], not with a royal commission, but with a process that gives ordinary citizens an opportunity to formulate the propositions,” *id.* at 29).

<sup>89</sup> Not all proposals for deliberative bodies make allowances for the referendum or initiative processes to coexist. See, e.g., LEIB, *supra* note 35, at 12 (stating that the deliberative proposal would replace initiatives and referenda).

assembly members or a public opinion-gathering phase before the convention that would develop a proposal.

### III. APPLICATION OF CITIZENS' ASSEMBLIES TO AFFIRMATIVE ACTION

#### *A. Evaluation of Anti-Affirmative Action Ballot Initiatives*

The BCCA was established to deal with the highly controversial and technical issue of electoral reform. Establishing citizens' assemblies may also be feasible and successful for ballot initiatives regarding other controversial social issues, specifically those that impact the interests of social minorities. These types of issues (such as affirmative action or same-sex marriage) can pose significant risks of tyranny of the majority because such issues are often ones that involve minority rights or minority views. Although the controversial nature of the issues means that assembly members may be more polarized, the dangers posed by a direct democratic vote are also particularly high — perhaps making the case for a citizens' assembly even stronger in such situations.

Ballot initiatives have likely become the primary arena for making decisions regarding race as a factor in higher education admissions.<sup>90</sup> Unfortunately, the shortcomings of the ballot initiative process in fulfilling democratic and deliberative ideals have also plagued initiatives to ban affirmative action. From 1996 to the present, five states have held statewide votes on propositions to end affirmative action in higher education, four of which have passed. Although the state context, demographics, and election results have differed,<sup>91</sup> each initiative largely failed to promote democratic or deliberative goals.

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<sup>90</sup> Although anti-affirmative action groups have employed judicial and legislative strategies, those efforts have not been as successful as the proposition approach. In the two years following the passage of anti-affirmative action Proposition 209 in California, thirteen states considered bills to eliminate affirmative action, but none of the states enacted the bills. Jodi Miller, "Democracy in Free Fall": *The Use of Ballot Initiatives To Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1, 9 (citing S. Reg'l Council, *Seeking an America as Good as Its Promise: Remedies for Racial Inequality: The Public's Views*, S. CHANGES, Winter 1998, at 8, 10).

Some anti-affirmative action activists have used President Obama's election as an added argument for the elimination of affirmative action programs. Ward Connerly, speaking about President Obama's inauguration, said, "We are here in the nation's capital a few days before an event that will demonstrate something most of us in this room have always believed: that America is a fair country and that the colorblind vision works." Cathy Young, *Obama May Boost Foes of Affirmative Action*, CHI. SUN-TIMES, Jan. 28, 2009, at 23 (internal quotation marks omitted).

<sup>91</sup> Initiatives to ban the use of race in admissions were voted on in California in 1996, Washington in 1998, Michigan in 2006, and both Colorado and Nebraska in 2008. All but the Colorado initiative passed. Not all efforts to get anti-affirmative action initiatives on the ballot have been

In terms of face-to-face discussion and critical mass, none of the anti-affirmative action ballot initiatives fared any better than a traditional election or ballot initiative would have.<sup>92</sup> Unfortunately, when analyzed on the basis of participation, nontyranny, political equality, and decisionmaking competence, anti-affirmative action ballot initiatives are probably worse than traditional elections or other ballot initiatives. Participation in the initiatives was even more narrow than other ballot initiatives because many of the same proponents pushed for the initiatives in each state (Ward Connerly being the most prominent).<sup>93</sup> Additionally, if using race as a factor in college admissions and hiring is necessary to ensure equal opportunity to some groups or to avoid denying them their civil rights, then as a democratic process, the ballot initiative process would not have fulfilled the ideal of nontyranny in the states where anti-affirmative action bans have passed. Without any requirement of a supermajority or other similar mechanism, a popular vote on an affirmative action ban is likely to involve a high risk of tyranny of the majority.

In terms of political equality, the confusing and misleading language of the initiatives resulted in votes that may not have reflected voters' true preferences. The language of each ballot initiative was completely or very nearly the same — none of the initiatives mentioned affirmative action by name, nor did they state that a "yes" vote would eliminate affirmative action.<sup>94</sup> Instead, the initiatives had names such as the "California Civil Rights Initiative" and associated themselves with Martin Luther King, Jr. and the civil rights movement, which may have misled some voters into thinking that a "yes"

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successful. See, e.g., Miller, *supra* note 90, at 9 (noting failed attempts in Florida, Michigan, Ohio, and Arizona).

<sup>92</sup> There may be resistance to ensuring that a citizens' assembly includes critical masses of different groups. However, an issue such as affirmative action is illustrative of how a homogenous citizens' assembly would suffer because it would lack the cognitive diversity and creative problem-solving ideas that are essential for its success. If the assembly does not have critical masses of key groups, the results might be in some ways worse than a ballot initiative alone because being a citizens' assembly in name may give it the appearance of legitimacy without having interested groups included in the deliberations or harnessing the collective intelligence necessary for making better decisions. For groups whose interests are at stake, "virtual representation is usually not regarded as sufficient by those who are virtually represented." Thompson, *supra* note 88, at 43. Furthermore, concerns about using race as a factor in university admissions (which are at least somewhat merit-based) should not apply to the random selection of a group of citizens that is intended to be representative of the population and not chosen for capabilities or skills.

<sup>93</sup> See Miller, *supra* note 90, at 10; Melissa Lee, *Affirmative-Action Ban Passes by Wide Margin*, LINCOLN J. STAR, Nov. 3, 2008, available at <http://www.journalstar.com> (search for "affirmative-action ban passes"; then follow second hyperlink to article); Henry Payne, *Prop 2: A Lesson for Republicans*, NAT'L REV. ONLINE, Nov. 9, 2006, <http://www.nationalreview.com> (search "National Review Online" for "Prop 2 A Lesson for Republicans"; then follow hyperlink to the article).

<sup>94</sup> Miller, *supra* note 90, at 26–27.

vote would protect affirmative action.<sup>95</sup> A number of voters in California were confused about the meaning of the initiative.<sup>96</sup> The initiative language is significant because “while the general public is adverse to ‘preferences’ and ‘quotas,’ it generally supports affirmative action.”<sup>97</sup> Part of the California ballot initiative asked, “Shall government entities be prohibited from discriminating . . . based on race, sex, color, ethnicity, or national origin . . . ?”<sup>98</sup> Requiring some sort of deliberation on the affirmative action bans would likely have improved voters’ understanding of what voting “yes” or “no” on the initiative would mean.

In terms of decisionmaking competence, because a number of voters did not understand the implications of the anti-affirmative action ballot initiatives, they did not have the information necessary to make an informed decision regarding their vote on the initiative or their signature on the initiative petition. Furthermore, if most voters in a state did not understand how race or gender factored into admissions and hiring decisions or the demographics of those admitted or hired, that would show a lower level of decisionmaking competence. Additionally, without a supplemental institution such as an assembly, the emotionally charged atmosphere of propositions on affirmative action may have led voters to take less care in understanding and thinking about the matter.<sup>99</sup>

Of all the democratic and deliberative goals, the affirmative action ballot initiatives perhaps fare the worst with the ideal of implementing good public policy. The binary tool of the electoral process makes it “an extremely blunt instrument,”<sup>100</sup> so voting itself, without additional supplementary measures, may not be a method suitable for making a meaningful decision regarding race as a factor in higher admissions. The ballot initiative process allowed a special interest group with an extreme view to title and word ballot initiatives misleadingly in numerous states, such that some would argue the initiatives seemed to voters that they would have the opposite effect of their actual intended goal. Having a large number of knowledgeable, randomly selected citizens draft the initiative language would serve as a check so that there is a good faith effort to make the initiative easily understood by other ordinary citizens, and so that votes more accurately match the preferences of the people who cast them.

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<sup>95</sup> See LYDIA CHÁVEZ, *THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION* 218–19 (1998); Miller, *supra* note 90, at 30.

<sup>96</sup> CHÁVEZ, *supra* note 95, at 246–47.

<sup>97</sup> Miller, *supra* note 90, at 26.

<sup>98</sup> *Id.* at 10 n.66 (internal quotation marks omitted).

<sup>99</sup> See Bell, *supra* note 7, at 12.

<sup>100</sup> Mansbridge, *supra* note 9, at 4.

*B. Feasibility and Potential Success  
of a Citizens' Assembly on Affirmative Action*

One concern about the results of a citizens' assembly for a controversial issue such as affirmative action is the possibility that many people's opinions are based on principle and not on ignorance; so education, opinion gathering, and deliberation may have only a negligible impact on the outcome. However, there is much that people do not know about how race is and is not used as a factor in different admissions systems and about other people's life experiences; gaining this information through a citizens' assembly makes it possible that a person's opinion may change.<sup>101</sup> Even if a person opposed a specific mode of using race as a factor (such as a quota), he or she may not necessarily oppose all uses of race. Assembly members may come in with a wide variety of opinions on the way in which race is being used in admissions and they, like the dissatisfied citizens of the BCCA, may still be able to reach a compromise.<sup>102</sup> It is likely that opinions will change and that a better decision will be reached through deliberation.<sup>103</sup> But even if the outcome of the initiative would be the same, the act of deliberating with a diverse group of people such as a citizens' assembly provides a democratic and social benefit to the individuals involved and to society at large.

To decrease the possibility that assembly members with extreme views could make the resulting initiative language just as misleading as it might have been without an assembly process, perhaps a supermajority of assembly members should be required to put any language on the ballot.<sup>104</sup> Additionally, the process of deliberation with a group

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<sup>101</sup> University admissions systems are complicated and there are a number of ways in which race can be used as a factor in admissions. Many people could have different reactions to affirmative action based on how race is considered. The types of affirmative action that a person would oppose may not even be in use.

<sup>102</sup> See André Blais, R. Kenneth Carty & Patrick Fournier, *Do Citizens' Assemblies Make Reasoned Choices?*, in *DESIGNING DELIBERATIVE DEMOCRACY*, *supra* note 35, at 127, 130–31 (noting that sixty-four percent of assembly members were dissatisfied with the electoral system and that the majority of members would propose a new system if it fit their values). Some moderate and improved policies that a citizens' assembly is more likely to propose than is a ballot initiative alone would include: specifying that race could be used as one factor among many in admissions but that it could not be a deciding factor; clarifying that regardless of any decision on whether race could or could not be used as a factor in admissions, the university could still recruit underrepresented groups; allowing the university to still sponsor or administer scholarships targeted at specific groups; and deciding that the university could still maintain services that were targeted at specific groups, such as a women's center.

<sup>103</sup> See *supra* p. 971.

<sup>104</sup> Although this did not seem to be a problem with the BCCA (its internal votes only required a simple majority, Thompson, *supra* note 88, at 39), this issue could arise with other controversial issues. A supermajority requirement would also help to "build in an acknowledgement of the sheer power of the institution," LEIB, *supra* note 35, at 83, and to ensure that members are making good faith attempts to discuss the issue and reach a reasonable compromise. This way citi-

of diverse people helps to move views toward meeting a common goal.<sup>105</sup> Publicizing parts of the process serves as another check on the possibility of a member trying to hold up the process because the public would be able to “see how their fellow citizens are doing their jobs as citizens.”<sup>106</sup>

### CONCLUSION

Although ballot initiatives were intended to alleviate the problems posed by electing representatives, they often compound those problems because proposition systems merely “refine” elections, inherently flawed machinery, instead of developing a communicative process that goes beyond the capacity of elections. In presenting an idea so different from the current ballot initiative process, this Note is not meant to imply that developing and implementing a citizens’ assembly would be without political or practical obstacles. Those difficulties notwithstanding, the bounds that restrict the current defective system should not similarly restrict ideas of what an ideal decisionmaking system would be. To do so would limit the potential to improve upon ballot initiative voting in much the same way as ballot initiatives are a limited improvement upon the system of representative politics. Having an eventual goal of ensuring that a large, representative group of people deliberates and develops a proposal for the ballot after becoming informed on the issue and consulting the general public should not seem such a radical notion in a democratic society. That this proposal may seem radical is perhaps the best evidence that voters should be debating this proposal and others like it that supplement the current electoral system. The goal of this Note is not to encourage organizations to ignore ballot initiatives should they arise. The goal is instead to prompt organizations to engage these issues even earlier, on a deeper level, with a broader focus, and with more stakeholders at the table. The choice of strategies on affirmative action and other social issues should be varied and more sophisticated, not just as binary as the yes-no, up-down vote on the proposition itself. The final tally on a ballot initiative is not all that matters. Regardless of the vote count, stakeholders need to imagine and attempt to implement processes that address shortcomings in the electoral system instead of intensifying the very problems that ballot initiatives and affirmative action were intended to remedy.

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zens’ assemblies will be less likely to be used in situations where a narrow majority might impose its will on others.

<sup>105</sup> See *supra* pp. 970–71.

<sup>106</sup> LEIB, *supra* note 35, at 78.