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## Straw Polls

Daniel B. Rodriguez

*University of San Diego School of Law, danr@sandiego.edu*

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## **Public Law and Legal Theory Research Paper Series**

**September 2004**

**Straw Polls**

**Daniel B. Rodriguez**

STRAW POLLS  
Daniel B. Rodriguez\*

A key measure of the democratic quality of a political community is how its members vote. The design and implementation of voting arrangements can illuminate the nature, purposes, and even potential of a community of citizens. Whatever other values are attached by commentators to the activity of voting,<sup>1</sup> voting is, at the very least, used to sort out and implement preferences. Voting processes help in sorting out winners from losers and thereby provide a presumptively fair method for the implementation of public policy. At the same time, voting in a democratic policy is a coercive act. Voters are not merely expressing preferences; they are acting in order to transform their preferences into policy. How ought we to think about this coercive aspect of voting? The subject of my essay is one narrow aspect of this larger puzzle, that is, the consideration of a particular voting device--the straw poll--and its potential impact upon democratic decision-making.

The puzzle of voting as a democratic method of deciding in political communities that interests me here is this: How much difference does it make, and ought it to make, whether voters who make their views known in a particular decision-making episode know of the preferences of others? Of course, decision-making in light of other's preferences is a critical piece of game theory<sup>2</sup> and rational choice theories of politics more generally.<sup>3</sup> And from a practical political standpoint, the interdependence of decision-makers' preferences is a ubiquitous feature of politics, affecting logrolling, negotiations, and various aspects of political strategy. My basic normative claim is that to the extent that a political community ought to value the preferences, thoughts, and ideas of others, it ought to reflect upon community members' preferences before finally deciding. In discussions of participatory democracy, this other-regardingness is usually dealt with by some sort of "deliberation." Another way--more mechanical, but more realistic as a component of a decision-making process--is through the mechanism of a straw poll.

I.

To understand the nature of the issues raised, let me describe in some detail a couple of episodes: In my third year of law school, I took a class in Local Government Law. At a point late in the semester, a student proposed to the instructor that we ought to take action in strong solidarity with the students at

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\* Professor of Law and Dean, University of San Diego School of Law. Thanks to the participants in the "illiberal communities" conference for helpful comments on these ideas and especially to Maimon Schwarzschild and Jeremy Waldron for illuminating discussions which, perhaps unbeknownst to them, helped shape some of the ideas therein. This essay is dedicated to my late colleague, Professor Paul Wohlmuth, who was just the sort of colleague who appreciates the give-and-take on democracy and decision-making which this essay seeks to capture.

<sup>1</sup> See, e.g., Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. Rev. 330 (1993).

<sup>2</sup> See, e.g., Norman Schofield, *Coalition Politics: A Formal Model and Empirical Analysis*, 7(3) *Journal of Theoretical Politics* 245 (1995); John Harsanyi, *Rational-Choice Models of Political Behavior vs. Functionalist and Conformist Theories*, 21 *World Politics* 513 (1969).

<sup>3</sup> See, e.g., David Baron & John Ferejohn, *Bargaining in Legislatures*, 83 *Amer. Pol. Sci. Rev.* 1181 (1989).

the University who were protesting apartheid in South Africa and demanding the University to divest itself of investments in that country. As one form of protest, instructors were urged to move their classes to hastily assembled versions of South African shantytowns, actually large cardboard boxes shaped into faux classrooms and labeled "the open university." The instructor of our class decided to throw this option to the students and asked that we deliberate on this matter and then vote on whether we ought to move the class. A "rights" claim was made, that is, the insistence that students have a right to have their class conducted at the law school; there emerged little sympathy for this claim, however, and the class then proceeded to deliberate on the merits of the request. Before the final vote was taken, one student observed that she was truly torn as to the right outcome; the student felt strongly that the class ought to be moved and she was, therefore, inclined to vote to move to the shantytown. On the other hand, this student worried about the interests of those who disagreed with her decision. Although the students who held different views had not persuaded her that she was wrong in her beliefs, the fact of disagreement and the breadth of this disagreement gave her pause. She requested that a straw poll be conducted, followed by additional time for conversation and reflection.

Episode number two: The law school at which I taught before coming to San Diego had an unusual rule for faculty decision-making with regard to candidates for the regular faculty. It was as follows: After suitable discussion, the faculty would vote on the question whether an offer ought to be extended to the candidate. If the candidate received "yes" votes constituting more than 80% of the regular faculty, an offer would be recommended; if he received fewer than 60% support, no offer would be recommended. If, however, the tally was between 60% and 80%, the faculty would proceed to discuss the question whether there was present "a substantial minority" of faculty opposed to the making of an offer. The phrase "substantial minority" was nowhere defined in the law school faculty's decision rules. At the end of some period of time, the faculty would vote upon the question whether a "substantial minority" existed and, if the "yes" vote on this question was less than 50%, an offer would be recommended.

The first example and, in particular, the student's quandary, highlight the bifurcated nature of voting in a participatory democracy. Think of the two different types of questions raised by the class episode:

*Q1: VOTE ON THE QUESTION "DO YOU WANT TO MOVE THE CLASS?"*

*Q2: VOTE ON THE QUESTION "DO YOU WANT THE RESULT TO BE THAT THE CLASS IS MOVED?"*

Typically, we would think of these questions as equivalent. Indeed, we will likely vote only once, so these questions will inevitably be merged into one another. But notice that they raise fundamentally different issues. Q1 asks you to consider merely your own preferences on the subject. Assuming no amount of strategic voting and assuming that you care in the slightest about the issue raised, it is completely sensible to ask you to consider, in casting your vote, how you feel about the underlying issue. Q2, however, introduces the factor of coercion.<sup>4</sup> Here, you are asked to communicate not only a preference about the basic issue, but also a preference about whether you think that your

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<sup>4</sup> I am using "coercion" here to refer merely to the actual fact of majority will and the result that losers' preferences will be subordinated to the will of the majority.

will, if shared with a majority of your students, should govern. This is precisely what makes Q2 especially interesting. We need to have in mind a conception of democratic governance, that is, at least some impression of whether coercion of the minority is appropriate under certain circumstances, before we can answer the second question. This question is understandably central to both classical and modern democratic theory. All I aim to suggest here is that our perspective on this question will not necessarily be informed by our perspective on the first.

We could just see these two questions as dealing with different aspects of the exact same type of preferences and preference ordering. From one perspective, Q1 asks about your preferences for a particular outcome, while Q2 concerns how strongly one holds these preferences. But notice that this assumes its own conclusion. To know whether the answer to the question "do you want the result to be that the class is moved" reflects merely the intensity of your preferences, we need to know whether there may be a preference to respect the views of those with whom you disagree. Maybe you really, really want to have the class at the shantytown, but you also care greatly that your preferences will not be enshrined into policy over the broad objections of your other community members.<sup>5</sup> The consideration that goes into this judgment may or may not reflect intensity of preferences; it may, instead, reflect a view on participatory democracy and, more generally, the proper role of majoritarian coercion.

With respect to episode number two, the issues raised here concern the ways in which decision-makers in a collective process reach closure on the question of whether there is substantial disagreement with the proposed policy. Of course, voting tells us, in the final analysis, whether there is substantial dissent; we need only count the votes. However, the interesting feature of the faculty decision-making scheme described above is that the faculty pauses and considers, in light of the first vote, whether and to what extent there is substantial disagreement before taking the final vote. In design, this gives an opportunity for further deliberation; yet, it also plays a role even if no additional deliberation is forthcoming. Indeed, if we think of substantiality as something that can be measured precisely, then we will know whether there is "substantial" dissent (and will vote accordingly in the second vote) just as soon as the first vote is completed. If, instead, substantiality is more subjective, then we are led back to a predicament not unlike the class move episode, that is, what should our attitude be toward those with whom we disagree? And should this attitude affect our final vote?

The puzzle, then, I am addressing concerns the relationship between these two considerations--on the one hand, "mere preference," and, on the other, "preference to coerce." To develop the argument in favor of caution in manifesting a preference to coerce, I would need to examine in greater detail and with a richer political-theoretic framework, the notion of majoritarian decision-making and what ought to go into the considerations of choice in a political community. What I want to do in the remainder of this paper is more modest than this. I want to explore how the additional thinking about this puzzle of voting helps us to understand the role and function of decision-making in political communities. I also want to point to a voting mechanism that will help in keeping properly separate the two distinct voting considerations described above.

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<sup>5</sup> Ken Binmore raises this issue, within a game-theoretic framework, in his extended discussion of sympathetic and empathetic preferences. In this, he follows Hume in his emphasis on the importance of sympathetic identification between human beings and its connection to some notion of rationality. *See* K. G. BINMORE, *GAME THEORY AND THE SOCIAL CONTRACT--VOLUME 1: PLAYING FAIR* 285-96 (1994).

## II.

The preoccupation with mere voting in the previous discussion ignores what is often viewed as central in discussions of democratic decision-making, namely, deliberation.<sup>6</sup> However contested is the notion that deliberation is a characteristic of contemporary legislative policymaking, there is a much clearer sense that some sort of deliberation, however dysfunctional, occurs-- and needs to occur--in small communities that make policy choices in a democratic fashion.<sup>7</sup> To take an example close to home, think of decision-making within academic faculties or within homeowner's associations. Where participatory democracy reigns, we see not only voting schemes but also some space for deliberation as part of "voice."<sup>8</sup>

Whatever other functions that deliberation performs in framing issues for choice, in fostering feelings of inclusion, in promoting a sense of fairness, in expanding the scope of information, and in other values noted in discussions of democratic theory, another key function of deliberation is the elaboration of the depth and breadth of disagreement.<sup>9</sup> The invitation for discussion is not only an invitation for community members to join in to provide evidence, argument, and reasons to justify a decision in one direction or another; this invitation may also call for a statement of position, as well as an articulation of how strongly one feels about this position. While we may be inclined to characterize such a statement as "unreasoned," as not properly part of the deliberative process, it is striking how often this forms a part of the deliberative process in real decision-making settings. Is this so clearly evidence of unreasoned debate? Or might this position-taking be consistent with a model of participatory democracy in which one's preferences on a particular matter may well factor into the choice set of another voter? In other words, the taking of a position in the context of a deliberative process may inform the Q2 position, even if it does not shed any useful light on the issue of Q1 preference.

Let us return to our example of the "substantial minority" rule. The substantiality of dissent need not be based on an objective assessment of whether the arguments of the dissenters have substance, that is, are well-reasoned, based upon sufficient evidence, and the like. Indeed, our intuitive take on substantiality would, I suggest, be that this is a mostly subjective, not objective, criterion. To be sure, we would need to know more from the individuals who express dissent than the mere fact that they voted "no." Otherwise, the inquiry in the second round will be perfectly symmetrical with the first and,

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<sup>6</sup> Lynn Baker defines deliberation thusly: "[T]hat decisions be motivated by a concern with 'the public good'; that they be explicitly justified by appeals to 'the public good'; and that the goal of deliberation be agreement among the decision-makers."). Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 Chi-Kent L. Rev. 707, 738 (1992). A proceduralist rendering is given by Joshua Cohen. He defines deliberation as a process whereby participants "regard one another as equals; they aim to defend and criticize institutions and programs in terms of considerations that others have reason to accept, given... that those others are reasonable; and they are prepared to cooperate in accordance with the results of such discussion." Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in *DEMOCRACY AND DIFFERENCE* (S. Benhabib ed. 1996).

<sup>7</sup> See the discussion in Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 666-68 (2001).

<sup>8</sup> See ALBERT HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSE TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1972).

<sup>9</sup> See the discussion in John Ferejohn, *Instituting Deliberative Democracy*, in *DESIGNING DEMOCRATIC INSTITUTIONS* 75, 79-82 (I. Shapiro & S. Macedo eds., 2000).

therefore, no deliberation would be necessary. It would suffice to simply proceed with the second vote immediately. Instead, this peculiar voting rule works only if there is added deliberation between the first and second round of voting, albeit deliberation which goes to the question of whether there are substantial objections, presumably reflected in the views of a substantial numbers of persons. The reasons advanced for these objections go to substantiality and concern directly the Q2 inquiry noted above; they are less likely to go to the Q1 question. It is highly unlikely, in other words, that one's preference as to a particular faculty candidate will be altered by the declaration of a colleague after the first vote that they have substantial objections to an offer being made.

I do not want to be entirely pollyannaish, however, about the reality of deliberation under the scheme just described. Often, in practice, the discussion following the first round of voting entails merely going around the room and counting up objectors (along with silent and pernicious assessments of whether one or another objector ought to be "taken seriously into account"). It does not follow from the temporary pause between the first and second vote that there will be illumination concerning the scope of individual disagreement and thus information which will help one who struggles with the Q2 decision to make up their mind concerning whether to join with the majority to coerce the losers. The "substantial majority" rule merely reflects a mechanism which enables, but does not ensure, deliberation concerning the key issues raised by Q2.

One other point should be raised here. Although I have been supposing, up until now, that knowing the views of others in the first instance is valuable insofar as it foments deliberation, we might yet argue that even the mere fact that an individual expresses a preference is significant in evaluating one's own view on the matter. The connection between one's own preferences and the imposition of these preferences on individuals with a different view is a tension commonplace in democratic theory. The related, seeming paradox noted famously by Richard Wollheim in 1962--that individuals will accept or even, as Wollheim precisely put it, "want" an outcome supported by a majority, even in the face of an opposite personal preference--is a conspicuous part of the enduring academic debate over the nature and scope of democracy and democratic decision-making.<sup>10</sup> What is not as frequently explored, however, is the micro-question of whether one's individual preferences ought to be shaped by the preferences of another. This question is distinct, indeed, analytically prior, in my view, to the question of whether one's views can be effectively shaped by persuasion developed in the crucible of collective deliberation.

### III.

If you are persuaded that there is a difference worth acknowledging in democratic theory between the type of considerations which go into Q1 (mere preference) decisions and Q2 (preference-as-coercion) decisions, then we have a dilemma with regard to typical voting situations. Ordinarily, participatory democracy entails the following sequence: proposal, discussion/deliberation, vote. Robert's Rules of Order, for example, provides for an elaborate schema of voting, yet the sequence remains essentially "proposal-discussion-vote." This means that a member of the community who is truly

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<sup>10</sup> See Richard Wollheim, *A Paradox in the Theory of Democracy*, in *PHILOSOPHY, POLITICS AND SOCIETY* (P. Laslett & W. Runciman eds., 1962); Donald D. Weiss, *Wollheim's Paradox: Survey and Solution*, 1 *POL. THEORY* 154 (1973).

concerned with the preferences of others, a concern that is critical to the determination of how they will vote on the ultimate question before them, must depend entirely upon the willingness of dissenters to express their views. What they do not know with confidence is in fact what these individuals prefer, as measured in an actual vote.

The most useful mechanism for discovering these preferences is the straw poll. A straw poll, by its very nature, is designed to give information concerning the preferences of the body. Even an anonymous straw poll gives some indication of the breadth of dissent. A straw poll, combined with pre-poll and post-poll deliberation, adds a more formal element to the expressions of viewpoint in the deliberative process. Moreover, the straw poll frees everyone in the collectivity to vote their true preferences, holding to one side the question (i.e., Q2) of whether these preferences ought to be the final will of the body.

In the shantytown/class move example, a straw poll would have enabled all the students to develop a sense of how general was the support for a move to another location. This poll might have revealed only a smattering of disagreement; presumably this would have improved the likelihood that the class majority--or perhaps even everyone--would finally vote to move the class. In certain circumstances, however, a straw poll might have the opposite result. For example, a poll that, by contrast, reflected a close contest might illuminate the broad scope of disagreement and keep at bay the second vote altogether. At the very least, the mechanism of the straw poll frames the breadth of disagreement. In so doing, the poll enables a body to come directly to terms with the essential question of whether there is a majority for the decision to move the class, a choice that inevitably involves the issue of coercion and winners versus losers.

It is important to remember that straw polls suffer from the same defects of ordinary voting as preference aggregation and decision-making. Straw polls can, of course, be subject to cycling difficulties,<sup>11</sup> and can be vulnerable to strategic voting. They are, in short, as flawed as any other type of voting system in terms of reflecting true preferences and the will of the majority when faced with multiple options. Moreover, we should note that a straw poll cannot give us information about the depth and nature of disagreement. If we suppose that decision-making takes place with ordinary, up-or-down voting, a discussion of some sort is required to unpack the nature and depth of disagreement. Nevertheless, straw polls can perform the quite useful function of framing the democratic decision-making process as two separate questions, rather than one. In doing so, the straw poll fixes our attention on the difficult, but important, question of whether majoritarian coercion in the interest of pursuing the majority's preferences is appropriate.

There are further considerations, though, which also bear on the utility, and perhaps even the advisability, of straw polls as a device for improving democratic decision-making. One key question is whether straw polls are useful in the absence of an appropriate time for deliberation and debate. Deliberation is essential, as previously noted, to provide further information concerning the nature and depth of disagreement. In certain circumstances, this might be absolutely essential to the choices made by those in the majority and in the minority. For example, the dissenter may raise a rights claim; in the shantytown episode, it was asserted that a law student has a right to have his or her class held at the

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<sup>11</sup> See Kenneth J. Arrow, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2nd ed. 1963).



appointed time and place. A straw poll would, in the absence of deliberation, give us no basis to evaluate this rights claim. Yet, deliberation without a straw poll would not communicate as effectively the fact that the complaining student is doing more than simply invoking a right-- i.e., is also declaring a preference, namely that the class be moved. Hence, the straw poll goes hand-in-hand with the space for deliberation. In other circumstances, however, deliberation would be unnecessary. The mere fact of substantial dissent, as measured by the straw vote, may be enough to convince a slender majority to abandon a particular tack.

A related question is whether straw polls are useful only in connection with face-to-face interactions. As with the deliberation issue above, much depends upon the context in which the decision arises. It is uncommon to see straw polls deployed in situations in which a ballot is distributed by mail. Indeed, where straw polls are utilized in those circumstances, it is usually an advisory vote that being conducted and not a prelude to a final determination by the community members taking the poll. We see straw polls in face-to-face settings primarily because of the nature of participatory democracy and the need to get information about community members' preferences. We care so much about Q2 because we worry about coercion of those community members in the minority with whom we are participating collectively. Surely it is a more difficult prospect, as any sociologist would tell us, to disregard the will of those with whom we are participating directly and actively in a community decision-making process. It is therefore in those circumstances in which more information relevant to the Q2 determination is appropriate. Hence, straw polls are especially likely to be employed in these smallish, face-to-face settings. Not surprisingly, we find this device employed in faculty meetings, homeowners association meetings, and town hall meetings of various types; we do not see them in large, multi-member legislatures, in initiative and referenda voting, and in mail balloting.

One last consideration to mention is the value of straw polls vis-a-vis other democratic devices which might also be employed to uncover preferences and, therefore, illuminate Q2 decisions. For example, we could have some sort of forced deliberation, that is, someone going around the room asking community members to express a preference. We see this device more commonly (and perhaps not surprisingly) in school classrooms. Interestingly, we see this device as well in jury deliberations, where straw polls are often used along with expected declarations of preference (if we can call a juror opinion a true "preference"). The virtue of some sort of forced deliberation is two-fold. First, it connects the voter with a face. This is valuable to the extent that we eschew anonymity and prefer the accountability that comes from declaring one's preference publicly (this value is, of course, very much context-dependent). Second, it is valuable in bridging the declaration of preference with the call for some sort of deliberation.<sup>12</sup> The disadvantage of forced deliberation is that it is forced; that is, it hardly provides for the free expression of views by a self-selected group of community members who feel strongly about the particular issue in question. In addition, it raises all the difficulties associated with public declaration of views, which difficulties are more vexing in some settings than others. Straw polls indicate the breadth of dissent without locating that dissent in certain individuals. Under some appealing

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<sup>12</sup> Jury deliberations provide an interesting case study. From what we know of jury deliberations, it is typical (though certainly not universal) for jurors to be polled individually and called upon to explain themselves. Less typically, jurors simply conduct straw polls repeatedly, bracketed by opportunities for debate and discussion, until the appropriate consensus is reached.

theories of participatory democracy, this person-independent explication of community sentiment is itself valuable. Just think of the intrinsic value of anonymous applause

Another alternative to the straw poll is provided for expressly in Robert's Rules of Order, namely the device of a motion to reconsider.<sup>13</sup> According to Robert's Rules, motions to reconsider can be made by those who voted in the majority and are designed to enable the body to reconsider its decision. In an important sense, this motion can play the same role as a straw poll in that it can reflect unease on the part of the winning coalition when faced with the reality of its will trumping the minority. One reason for preferring the straw poll is that it stands between the preference vote--which can be styled as only a preference vote--and the final vote on the proposal. Where a motion to reconsider is contemplated, the body has already expressed its will to act and there is no particular space under Robert's Rules of Order to have post-vote deliberation on the choice just made. Moreover, by conflating Q1 and Q2 in the procession to a direct vote, the majority has spoken its mind as to the outcome (preference as coercion) without any information about the true preferences of the body as a whole. It becomes considerably messier to disentangle, from the standpoint of the "winners" who propose the motion to reconsider, whether they have regrets because of the declared preferences of the losers, or whether they have regrets for some other reason. In the end, then, the motion to reconsider is conceptually equivalent to a straw poll, but with considerably less to recommend it as a means of framing crisply the two sequential questions entailed in a decision-making process.

#### IV.

As this is a conference on liberalism and illiberalism, I want to comment briefly on the relationship between voting schemes and liberalism. What straw polls as a decision-making device do is to channel attention to the key question of whether the will of the majority should supplant minority preferences in a particular instance. This is both consistent with and facilitative of an appealing model of liberal democracy. Ultimately, however, the utility of straw polls depends fundamentally upon a theory of democracy in which some individuals care about the wishes of the minority. To be sure, if taken to its logical extreme, this "caring for" can undermine majoritarian values. The critical issue becomes one of balance--that is, balance between fidelity to one's own views and values and one's respect for the fact of disagreement and the views of others.<sup>14</sup>

Liberal democracy incorporates as a signal norm the idea of individual tolerance of diverse viewpoints. One way--perhaps the principal way--in which this tolerance is made manifest is through the creation and protection of individual rights. Yet, in many contexts, policymaking does not entail the consideration of rights, but, instead, involves "government by reflection and choice." Where majority will represents the decision-making method for implementing these choices, it is sensible to develop systems for encouraging respect of the preferences of minorities in a political community. Straw polls focus attention on these preferences and thereby facilitate respect for these different viewpoints.

This ethos of respect must be shared, however. Even supposing that citizens cast their votes in a sincere rather than strategic manner, we would not expect that individuals would long respect the views

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<sup>13</sup> See ROBERT'S RULES OF ORDER NEWLY REVISED 309-29 (H. Robert III & W. Evans eds., 9th ed. 1990).

<sup>14</sup> See JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

of those on the short end of the decision-making stick, as made manifest in a straw poll, if they could not depend upon that same sort of respect being paid to their preferences in subsequent actions. The point here is not that logrolling will take place-- although it very well might, in certain circumstances-- but, rather, that community members are usually repeat players. The value of straw polls, therefore, rests on the assumption that there is a basic level of trust and respect, not only for the diversity of views and preferences per se, but for the very idea, where appropriate, of deference and forbearance.

In the end, liberal democracies that practice majority rule succeed insofar as majority rule does not become a tool for expropriation of the resources of those who will likely find themselves perennially on the losing end of policy choices in the community. Rights protect minority interests to some extent, but significant protection must come in the ordinary, day-to-day experience of local community politics. This experience will involve issues that, while on the surface mundane, are the lifeblood of democratic politics. Where there are conflicts over policy decisions and where votes measure preferences and, ultimately, outcomes, straw polls can then perform the useful task of framing the liberal democratic considerations at stake in the decision-making process.