INCLUDING MINORITY PARTIES IN POLICYMAKING: A LEGISLATIVE REQUIREMENT TO ADDRESS MEMBER INTERESTS

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INTRODUCTION

Legislatures face a tension between legislative effectiveness and the inclusion of minority parties in policymaking.[1] On one hand, providing minority party members with a meaningful role in the development of legislation may decrease the efficiency of the policymaking process, decrease the extent to which legislation meets the interests of majority party members, and increase the likelihood of gridlock if minority parties have the power to block legislation.[2] On the other hand, excluding minority party members from the policymaking process may leave a significant portion of the public with no meaningful representation in the development of major legislation.[3] This effective lack of representation is problematic

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1. *See* Ulrich Sieberer, Julia F. Dutkowski, Peter Meißner & Wolfgang C. Müller, *'Going Institutional' to Overcome Obstruction: Explaining the Suppression of Minority Rights in Western European Parliaments, 1945–2010*, 59 EUR. J. POL. RSCH. 886, 886 (2020) ("Parliamentary minority rights are a core element of representative democracy but also a double-edged sword. They are essential for democratic competition because they guarantee that competing views are voiced in the legislative process and can subsequently affect electoral decisions. At the same time, minorities can use these rights to obstruct the majority's policy agenda and thus partly negate the outcome of electoral competition."). *But cf.* Wim Voermans, Hans-Martien ten Napel & Reijer Passchier, *Combining Efficiency and Transparency in Legislative Processes*, 3 THEORY & PRAC. LEGIS. 279, 281 (2015) (arguing that an inclusive, transparent process contributes to legislative effectiveness).

2. *See* Sieberer et al., *supra* note 1, at 886, 888–89; Cathie Jo Martin, *Negotiating Political Agreements*, *in* POLITICAL NEGOTIATION 7, 25 (Jane Mansbridge & Cathie Jo Martin eds., 2016) (arguing that in the U.S. political system "the anticipation of winning the next election makes it strategically rational for the minority leadership to block the policy ambitions of the majority party"); RICHARD A. ARENBERG & ROBERT B. DOVE, DEFENDING THE FILIBUSTER 7 (2012); Christian Fong & Keith Krehbiel, *Limited Obstruction*, 112 AM. POL. SCI. REV. 1, 1–4 (2018). *But cf.* DOUGLAS DION, TURNING THE LEGISLATIVE THUMBSCREW 8 (1997) (arguing that obstruction is a minority right).

3. *See* Don Wolfensberger, *Majority Rule & Minority Rights (But to Do What?)*, WILSON CTR. (Nov. 15, 2010), https://www.wilsoncenter.org/sites/default/files/media/documents/event/minorityparties-intro.pdf [perma.cc/LP5C-MPXS] ("In a non-parliamentary democracy, it is difficult for a congressional minority to find its way, let alone for it to be heard and respected."); LICIA CIANETTI, THE QUALITY OF DIVIDED DEMOCRACIES 2–5 (2019).

for two reasons. First, legislation may fail to address interests held by minority party members and their constituents.[4] Second, a lack of meaningful representation undermines representative democracy and democratic legitimacy.[5]

The degree to which legislatures experience the tension between legislative effectiveness and minority party inclusion varies based on political context and institutional structure. Legislatures with higher levels of partisanship and political polarization may experience greater tension between legislative effectiveness and minority party participation in policymaking, as sharp divisions between political parties may increase the risk of obstruction and complicate cross-party collaboration.[6] In contrast, legislatures governed by multi-party coalitions may be particularly capable of maintaining both policymaking effectiveness and inclusiveness, at least within the governing coalition.[7] In certain political contexts, governments may be motivated to seek a particular tradeoff between effectiveness and inclusiveness. For example, postconflict transitional governments may rationally prioritize minority party inclusion over policymaking effectiveness, especially when inclusive governance may be necessary to ensure government stability.[8]

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4. *See* Ortwin Renn & Pia-Johanna Schweizer, *Inclusive Risk Governance: Concepts and Application to Environmental Policy Making*, 19 ENV'T POL'Y & GOVERNANCE 174, 177 (2009). *But see* CIANETTI, *supra* note 3, at 7–8 (arguing that high minority party presence "can polarize political debates and make compromise more difficult, resulting in policy outcomes that are less favorable").

5. *See* Sieberer et al., *supra* note 1, at 888 ("Minority rights also increase the legitimacy of parliamentary decisions among current losers and constitute a necessary basis for democratic competition more broadly."); Mark E. Warren & Jane Mansbridge, *Deliberative Negotiation*, *in* NEGOTIATING AGREEMENT IN POLITICS 86 (Jane Mansbridge & Cathie Jo Martin eds., 2013); Mike Lee, *Curing the Cancer of Congressional Dysfunction*, 49 PS: POL. SCI. & POL. 481 (2016).

6. *See* Sieberer et al., *supra* note 1, at 889 ("Opposition parties that pursue very different policies than the government are more likely to use minority rights for obstructive purposes to impede government policies with which they strongly disagree.").

7. *See* Lanny W. Martin & Georg Vanberg, *Coalition Policymaking and Legislative Review*, 99 AM. POL. SCI. REV. 93, 104–05 (2005); Lanny W. Martin & Georg Vanberg, *Parties and Policymaking in Multiparty Governments: The Legislative Median, Ministerial Autonomy, and the Coalition Compromise*, 58 AM. J. POL. SCI. 979, 995 (2014). Indeed, parliamentary democracies are frequently governed by legislative minorities. *See* KAARE STROM, MINORITY GOVERNMENT AND MAJORITY RULE 59 (1990).

8. *See* CAROLINE A. HARTZELL & MATTHEW HODDIE, POWER SHARING AND DEMOCRACY IN POST-CIVIL WAR STATES 12 (2020) ("The security-enhancing and stabilizing effects of power sharing come at the cost of allowing the majority's will occasionally to be frustrated."); Andrew Reynolds, *Majoritarian or Power-Sharing Government*, *in* DEMOCRACY AND INSTITUTIONS 155, 169 (Markus M.L. Crepaz, Thomas A. Koelble & David Wilsford eds., 2000) ("Lijphart's 1985 analysis of Lebanon could well be transposed to Bosnia today . . . . The choice is not between consociational and majoritarian democracy, but between consociational democracy and no democracy at all.").

Existing approaches to managing the tension between legislative effectiveness and minority party inclusion focus on striking an acceptable balance between the two objectives. However, existing approaches do not allow legislatures to fully achieve both objectives, because these approaches—deliberation, procedural powers, committee composition, and decision rules—favor efficiency over the balanced inclusion of perspectives. This Essay aims to identify a way for legislatures to provide minority parties with the power to influence policy outcomes while also ensuring that policymakers are able to advance legislation effectively and efficiently.

For the sake of simplicity, this Essay will frequently refer to legislatures or governments as the primary decisionmakers in legislative process design. However, these references should not be taken to imply that legislative processes are always the result of conscious decisions made by an internally cohesive institutional actor. In fact, legislative processes may be the result of political compromise, ad hoc decisions by multiple actors, or sheer accident.[9] Indeed, it is possible that certain processes were never consciously designed but rather emerged over time in response to political opportunities and constraints.[10]

The Essay is divided into two parts. Part I identifies and evaluates existing legislative options to promote minority party inclusion in policymaking. Part II proposes a requirement to address member interests as a way to achieve both legislative effectiveness and minority party inclusion and identifies considerations for legislatures regarding the implementation of such a requirement.

I. EXISTING LEGISLATIVE PRACTICES

Legislatures may rely on four categories of options to promote minority party inclusion: deliberation, procedural powers, committee composition, and decision rules.[11] While options in each category offer benefits,

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9. *See Examining the Filibuster: Hearing Before the S. Comm. on Rules and Admin.*, 111th Cong. 17 (2010) (statement of Sarah A. Binder, Professor, George Washington University) ("[W]hen we dig into the history of Congress, it seems that the filibuster was created by mistake."); *cf.* Edward L. Rubin, *Statutory Design as Policy Analysis*, 55 HARV. J. ON LEGIS. 143, 143 (2018) ("The process that the U.S. Congress follows is haphazard and obscure."); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 583 (2002) ("Our responses indicate quite strongly that there is no uniform process of legislative drafting followed in all cases.").

10. *Cf.* Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 84 (2015) ("Legislative staff are constantly innovating, finding creative ways to advance legislative goals in a hotly contested and complex political environment. As a result, the origin stories [of legislation] presented here can be combined, and new origin stories may emerge in the future.").

11. Simone Wegmann categorizes types of opposition power somewhat differently as initiation power, debate power, and veto power. Simone Wegmann, *Policy-Making Power of Opposition Players: A Comparative Institutional Perspective*, 28 J. LEGIS. STUD. 1, 4–5 (2022). *See generally* JENNIFER HAYES CLARK, MINORITY PARTIES IN U.S. LEGISLATURES

none fully ensures both that minority parties have meaningful input in policymaking and that the legislature is able to develop and pass legislation efficiently.[12]

A. *Deliberation*

Legislatures may provide space for minority party members to participate in policymaking through deliberative practices.[13] Most simply, legislatures may provide opportunities for formal debate at various points in the legislative process.[14] Legislatures may further promote deliberation by requiring proponents of legislation to respond to questions and critiques presented by other members.[15] Collective policy design involving large-scale interest mapping also offers a form of indirect deliberation, possibly mediated by process facilitators and collaboration technologies.[16]

While deliberative practices provide minority party members with a voice in the legislative process, deliberative practices do not directly grant minority party members the power to influence legislation. Minority party members may use deliberation to persuade or pressure majority party members to incorporate minority party interests into legislation. However, depending on the political context, members of the majority may be able

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(2015) (discussing institutional structures associated with the allocation of legislative authority such as centralization and leadership powers, as well as behavioral components such as elite party polarization and the availability of staff).

12. *Cf.* Andrew O. Ballard & James M. Curry, *Minority Party Capacity in Congress*, 115 AM. POL. SCI. REV. 1388, 1402–03 (2021) (arguing "that minority parties have capacity [to influence legislative outcomes] when the majority party is *constrained* and the minority party is both *cohesive* and *motivated* to engage in legislating rather than electioneering").

13. *See* Wegmann, *supra* note 11, at 8; Sergiu Gherghina, Monika Mokre & Sergiu Miscoiu, *Introduction: Democratic Deliberation and Under-Represented Groups*, 19 POL. STUD. REV. 159, 160–61 (2021) ("[D]eliberation is appealing to under-represented groups for two main reasons. First, it encourages the participation of primarily organized groups, including those who rarely have a relevant voice in the public debates on matters of common interest . . . . Second, the consensus culture involved by deliberation can accommodate claims of under-represented groups."). *See generally* Edward L. Lascher, Jr., *Assessing Legislative Deliberation: A Preface to Empirical Analysis*, 21 LEGIS. STUD. Q. 501 (1996); Ann W. Seidman, Robert B. Seidman & Valeriy Matsiborchuk, *Legislative Deliberation and the Drafting Process: The Drafter's Role*, 1 THEORY & PRAC. LEGIS. 341 (2013); Steven Wheatley, *Deliberative Democracy and Minorities*, 14 EUR. J. INT'L L. 507 (2003); Sergiu Gherghina & Vincent Jacquet, *Why Political Parties Use Deliberation: A Framework for Analysis*, ACTA POLITICA, Feb. 2022.

14. *See generally* THE POLITICS OF LEGISLATIVE DEBATES (Hanna Bäck, Marc Debus, & Jorge M. Fernandes eds., 2021).

15. *See* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1278 (2009) (arguing "that public officials in a democracy can be held accountable by a requirement or expectation that they give reasoned explanations for their decisions").

16. *See* Joseph Crupi, *Collective Policy Design: An Inclusive Approach to Legislative Negotiation*, 24 CARDOZO J. CONFLICT RESOL. 29, 50–59 (2022) (proposing an approach to negotiating policy by surveying members' interests and iteratively developing and evaluating policy proposals).

to ignore minority party input with few repercussions. A structured policy design process that considers all members' interests may help establish minority party inclusion as a default option, but it does not guarantee that the majority party would incorporate minority party interests in legislation.[17]

B. *Procedural Powers*

Legislatures may provide procedural powers that grant minority parties a degree of influence in policymaking.[18] For example, legislatures might require less than majority support to force a vote on legislation, potentially allowing minority parties to influence the legislative agenda.[19] Procedural powers may increase minority party influence over the legislative process;[20] however, influence over the legislative process does not necessarily translate into influence over policy outcomes. Unless procedural powers allow the minority party to obstruct legislation, these powers often do not require the majority party to consider minority party proposals seriously.[21]

C. *Committee Composition*

Legislatures may also provide minority parties with certain rights at the committee level.[22] Such rights may include proportional representation within each committee or, more consequentially, committee majorities and committee chair positions.[23] Minority party committee control could support minority party inclusion by forcing the majority party to negotiate with minority party members to advance a bill out of committee. However, potential problems remain. Minority party committee control may allow the minority party to obstruct majority-supported legislation in the committee, hindering effective policymaking. A majority party may be able to

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17. *See id.*

18. FAIRVOTE & BIPARTISAN POL'Y CTR., BEST PRACTICES FOR COLLABORATIVE POLICYMAKING 26–33 (2015); *see* Sieberer et al., *supra* note 1, at 888; Nancy Martorano, *Cohesion or Reciprocity? Majority Party Strength and Minority Party Procedural Rights in the Legislative Process*, 4 STATE POL. & POL'Y Q., Spring 2004, at 59–60 (2004); Keith Krehbiel & Adam Meirowitz, *Minority Rights and Majority Power: Theoretical Consequences of the Motion to Recommit*, 27 LEGIS. STUD. Q. 191, 211 (2002).

19. *See* Wegmann, *supra* note 11, at 6–7.

20. *See id.*

21. *See* Charles Babington, *Pelosi Seeks House Minority "Bill of Rights,"* WASH. POST (June 24, 2004), https://www.washingtonpost.com/archive/politics/2004/06/24/pelosi-seeks-house-minority-bill-of-rights/5a4584cc-3c65-4891-bef8-64011f136f7c/ [perma.cc/9QWQ-K96H] ("Democrats and several analysts say recommittal votes are largely meaningless.").

22. *See* Wegmann, *supra* note 11, at 8–9.

23. *See* Ingvar Mattson & Kaare Strøm, *Parliamentary Committees*, *in* PARLIAMENTS AND MAJORITY RULE IN WESTERN EUROPE 249, 276–78 (Herbert Döring ed., 1995); David Fortunato, Lanny W. Martin & Georg Vanberg, *Committee Chairs and Legislative Review in Parliamentary Democracies*, 49 BRIT. J. POL. SCI. 785 (2017).

avoid such an outcome by ensuring that important legislation is not assigned to committees controlled by the minority party, even though circumventing minority-party-controlled committees undermines the inclusive benefits of committee-level rights.

D. *Decision Rules*

Legislatures may provide minority parties with the ability to block legislative outcomes through supermajority or consensus decision rules.[24] Such decision rules may be in place for final votes on legislation or for procedural votes earlier in the legislative process.[25] In the U.S. Senate, for example, a procedural vote to end debate requires supermajority support, often allowing the minority party to obstruct legislation through the threat of a filibuster.[26] In contrast, many U.S. state legislative bodies require only majority support to end debate, and among those with supermajority requirements, many chambers place limits on speaking opportunities or time.[27] In cases where the majority party does not have the required supermajority, supermajority or consensus decision rules may effectively grant minority parties the power to constrain the majority party's legislative agenda.[28] In some legislatures, minority party members may also have opportunities to exercise veto power or initiate referendums to block legislation.[29]

II. A REQUIREMENT TO ADDRESS MEMBER INTERESTS

While existing practices do not fully resolve the tension between inclusiveness and legislative effectiveness, legislatures may be able to establish process requirements to incorporate minority party interests while still

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24. *See* MELISSA SCHWARTZBERG, COUNTING THE MANY 3–4 (2014).

25. *See* ARENBERG & DOVE, *supra* note 2, at 4–6.

26. Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 184 (1997).

27. *Is Your State as Gridlocked as the U.S. Senate?*, REPRESENTUS (Sept. 8, 2021), https://represent.us/state-filibuster-rules/ [perma.cc/4VFR-3A2C]; Meghan Reilly, *States Limiting Legislative Debate*, CONN. GEN. ASSEMBLY OFF. OF LEGIS. RSCH. (July 8, 2009), https://www.cga.ct.gov/2009/rpt/2009-r-0249.htm [perma.cc/H769-4ZM5].

28. Zoltán Pozsár-Szentmiklósy, *Supermajority in Parliamentary Systems – A Concept of Substantive Legislative Supermajority: Lessons from Hungary*, 58 HUNG. J. LEGAL STUD. 281, 283 (2017) ("Supermajority rules, according to this classic approach, can protect the interests of minority groups. Minority groups can have not only the chance to raise their voice but also the possibility to take part in the decisions as some decisions require the support of more than a simple majority of MPs. Conversely, the classic critical approach argues that in these cases minorities can even block decisions and that is why their votes, from the substantive point of view, have more weight, in contradiction to the equality of mandates."). *But see* A.J. McGann, *The Tyranny of the Supermajority: How Majority Rule Protects Minorities*, 16 J. THEORETICAL POL. 53, 73-74 (arguing that supermajority decision rules disadvantage minorities opposed to the status quo).

29. *See* Wegmann, *supra* note 11, at 10–11.

maintaining an effective legislative process. Specifically, legislatures could require that legislation addresses members' stated interests absent a compelling reason not to. Such a requirement could provide minority party members with the power to provide input on legislation that the majority party could not simply ignore. At the same time, such a requirement could also allow a majority to advance legislation without the threat of obstruction from a legislative minority.

However, establishing a process requirement that ensures both inclusiveness and legislative effectiveness is not a simple task. A requirement to address member interests must be strong enough to ensure that members' interests are actually incorporated in legislation. It must also be flexible enough to ensure that a legislative majority can advance legislation efficiently. Whether such a requirement would meet both objectives adequately may depend on how a legislature chooses to structure it. The remainder of this Section identifies decisions that legislatures might face when establishing a requirement to address member interests.

A. *How Would Members Identify Their Interests?*

A legislative process requirement that focuses on interests may facilitate the inclusion of multiple perspectives in policy.[30] Interests refer to underlying desires and concerns, and interests are often contrasted with positions, which refer to particular desired outcomes.[31] Positions are frequently inflexible, and negotiations in which participants focus on positions may be time-consuming and ineffective at producing agreements.[32] In contrast, interest-based negotiation may give negotiation participants greater flexibility by allowing them to consider a range of potential options that address the interests of multiple participants.[33] By negotiating based on interests rather than positions, participants in a negotiation may increase the odds of an agreement, the total value created by an agreement, and the likelihood that participants perceive the agreement as a win-win outcome.[34]

For members' interests to be addressed in legislation, members would likely need to communicate their interests to bill sponsors.[35] However, to address an interest adequately, bill sponsors may need information beyond

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30. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES 42–45 (Bruce Patton ed., 3rd ed. 2011); *see also* David A. Lax & James K. Sebenius, *Interests: The Measure of Negotiation*, 2 NEGOT. J. 73 (1986); Philippe Pasquier et al., *An Empirical Study of Interest-Based Negotiation*, 22 AUTONOMOUS AGENTS & MULTI-AGENT SYS. 249 (2010); Gregory Brazeal, *Against Gridlock: The Viability of Interest-Based Legislative Negotiation*, HARV. L. & POL'Y REV. ONLINE, Apr. 23, 2009, at 1.

31. FISHER & URY, *supra* note 30.

32. *See id.*

33. *See id.* at 44.

34. *See id.* at 44–45.

35. *See id.* at 52.

a simple statement identifying that interest. To meet this need, legislatures could establish requirements for the information that members must include when submitting an interest. Members might be required to explain in detail what the interest is, how the interest is relevant to the legislation under consideration, and why the interest is important in the context of this legislation. Members might be permitted or required to identify options for addressing the interest through legislation. Members might also provide a formal justification for incorporating identified options into legislation. For example, legislators could offer a benefit-cost analysis or cost effectiveness analysis of possible options.

Establishing requirements for submitted interests presents members with additional benefits. Well-explained interests accompanied by policy options may decrease the research that bill sponsors must do to address the interest. Requiring members to include policy options with submitted interests may provide a way to limit the approaches that bill sponsors must consider before deciding whether there is a compelling reason to decline to address the interest in legislation. Demanding requirements for submitting interests may also serve a gatekeeping function. If members must devote significant time to explaining interests and justifying policy options, members may be less likely to submit frivolous interests to impede legislation. Presenting extensive information about an interest and potential options may also be useful in adjudicating or even avoiding disputes later in the process.

B. *To What Extent Must Bill Sponsors Address Interests?*

Determining the extent to which bill sponsors must address interests is perhaps the most critical process decision related to a requirement to address member interests. Bill sponsors cannot be obligated to indulge every demand made by minority party members. Indeed, in situations where members have conflicting interests, bill sponsors may not always be able to address all interests adequately. However, if bill sponsors could decline to address an interest for any reason, a requirement to address interests would be little more than a deliberative reason-giving requirement. Legislatures might therefore wish to clarify the extent of a bill sponsor's obligation to address an interest. Such clarity might both reduce overall disputes and help ensure the requirement is consistent with the legislature's intent. Moreover, additional interpretive decisions could still be made during a later dispute resolution process.

To establish standards regarding the extent to which bill sponsors must address member interests, a legislature would likely need a way to express the extent to which an interest is addressed. One approach legislatures might consider is a rating system indicating the extent to which a policy proposal would meet a given interest. For example, bill sponsors might rate a policy proposal as (1) a comprehensive achievement of the interest, (2) substantial progress toward the interest, (3) moderate progress toward the interest, or (4) some progress toward the interest. To prevent abuse of the

rating system, members might be permitted to challenge a bill sponsor's rating, and bill sponsors might then be required to justify or modify their original rating.

Once a rating has been established, bill sponsors might be required to provide a justification for not addressing the interest at a higher rating level. Legislatures could require bill sponsors to demonstrate either that addressing the interest at a higher level would not be possible or that the costs of doing so would outweigh the benefits. Alternatively, legislatures could consider less exacting standards. For example, legislatures could require bill sponsors to demonstrate only that addressing the interest at a higher level would conflict with other interests or increase costs. Legislatures might also establish conditions under which bill sponsors may decline to address an interest entirely—for example, if members did not follow proper procedures for submitting an interest, if the interest is perceived as objectionable, or if the interest is adequately addressed by existing policies.

An example illustrates how members might navigate the demands of a requirement to address interests. Imagine a state legislature is considering a bill to fund construction of a highway through the northern part of the state. Now imagine that two members formally submit interests related to the bill.

The first interest, submitted by a member from the northern part of the state, is that rural communities have easy access to the highway. The member presents an alternative route for the highway as an option that would fully satisfy this interest. In response to this interest, the bill sponsor might argue that any route that would pass closer to a greater number of rural communities would compromise other important interests, resulting in higher travel times between major cities and higher construction costs. The member might then propose an option to address the interest to a lesser degree by building access roads between the highway and rural communities. The bill sponsor might respond by arguing that such access roads would not meet the standard for cost effectiveness used in state transportation planning. The member might follow up with a proposal to address the interest at yet a more modest scale by funding access ramps to connect the highway to access roads constructed by local governments, arguing that the benefits of greater access would outweigh the modest cost to the state. Absent a compelling reason why the member's argument is flawed, the bill sponsor might be required to address the interest by incorporating the identified option or a similar option into the bill.

The second interest, submitted by a member from the southern part of the state, is that transportation funding be equitable. As an example of an option that would be equitable, the member proposes that residents of the southern part of the state receive a tax credit because their taxes would otherwise pay for a highway that would not directly benefit them. The bill sponsor could argue that they are not obligated to address the interest at all by contesting the assumption that funding the highway would be inequitable. The bill sponsor might point out that previous or planned state-

funded transportation projects disproportionately benefited residents of the southern part of the state, that many southern residents frequently travel through the northern part of the state and would directly benefit from the highway, or that unique characteristics of the northern part of the state, such as a larger population, justify more spending on transportation projects in the north. Suppose, however, that the member was able to demonstrate that the state had unjustifiably spent substantially more on transportation projects in the northern part of the state. The bill sponsor might still argue that providing tax credits to residents in different regions to offset differences in state transportation funding would unduly complicate the state's tax system and undermine the state's ability to fund transportation projects. While such reasons may provide a justification for not adopting the member's proposal, the bill sponsor might still be required to address the interest at a smaller scale, perhaps by incorporating a mandate for a study of transportation funding equity in the bill.

C. *When Would Members Submit Interests?*

To ensure that consideration of member interests would not impede the legislative process, legislatures might limit the time during which members could submit interests. Legislatures might also need to decide when members would submit interests before or after legislation is introduced.

A legislature might allow members to initiate an interest submission period prior to the introduction of legislation by formally declaring an intent to develop legislation on a particular issue. Establishing an interest submission period prior to the introduction of legislation may provide several benefits, such as allowing members to identify opportunities to address a wider range of interests before committing to a particular policy approach. Identifying interests early on might also streamline the legislative process by reducing the need for later revisions. However, submitting interests early in the process also carries risks: members might have difficulty identifying which of their interests might be implicated by planned legislation, and the scope of legislation could also change during the drafting and negotiation process.

Alternatively, a legislature might establish an interest submission period after the introduction of legislation. Submitting interests after legislation is introduced may allow members to identify more effectively the full range of interests implicated by the legislation. However, identifying interests only after legislation is introduced may increase the time needed for revisions if the full range of member interests is not incorporated during the development of initial legislation.

A legislature could also adopt a hybrid approach—allowing members to submit interests both before and after the introduction of legislation. While a hybrid approach might increase the length of the process, it could provide members with opportunities to influence the initial development of legislation while ensuring that all interests relevant to the legislation are

identified. A hybrid approach might also allow for interest submissions at different levels of detail at different points in the legislative process. For example, legislatures might establish a high-level, legislature-wide interest-mapping process to support the development of legislation followed by a period for more in-depth interest submissions after the introduction of legislation.

D. *Who Would Be Able to Submit an Interest?*

A legislature could permit any member to submit an interest. Such an inclusive approach would allow the legislature to identify a wide range of interests, including idiosyncratic interests held by only a small number of members. However, permitting any member to submit an interest may result in an overwhelming number of submissions, particularly for legislatures without extensive support staff.

An even more inclusive approach might permit any self-identified stakeholder to submit an interest. Allowing stakeholder interest submissions could work well in small local governments or legislatures with an existing participatory framework. In many large legislatures, however, such an approach could result in an unmanageable number of submissions.

Legislatures might choose to set eligibility requirements for submitting interests to ensure the efficient use of legislative resources or to promote a focus on widely held interests. Legislatures have several options for establishing eligibility requirements. Legislatures could require that an interest be submitted by a certain number of members. This approach would conserve legislative resources and would allow the legislature to focus on the most widely supported interests. However, some members' interests might be excluded, and members might also need to devote substantial resources to coordinating interest submissions with other members.

Legislatures could also choose to make political parties central actors in an interest submission process. For example, a legislature could allow political party leaders or a certain number of members in a party to submit interests on behalf of the party's members. Such an approach might increase the legislative power of political parties and create incentives to establish smaller, more ideologically cohesive parties. However, individual members whose interests diverge from the interests of their party could be marginalized in the interest submission process.

E. *How Would Legislatures Limit the Number of Interests Submitted?*

Legislatures might also benefit from limiting the number of interests submitted, even though such a limit could exclude some viewpoints from policy negotiations. Without a limit, bill sponsors could be forced to address an impossibly large number of interests, and members might be able to use the interest submission process to overwhelm bill sponsors and obstruct legislation. Legislatures have several options to limit the number of

interests submitted while still ensuring that members' most important interests are addressed by legislation.

A legislature could limit the number of interests that a member or political party could submit related to particular legislation. This approach would prevent a small number of members from obstructing legislation while still allowing all members to influence legislation. However, depending on the size of the legislature, bill sponsors could still be required to address hundreds of interests.

Alternatively, a legislature could limit the number of interests that a member or political party could submit over the course of a legislative session. For example, members might identify their highest priority interests and then identify any legislation to which those interests would be relevant. This approach might help reduce the total legislative workload while still requiring bill sponsors to address members' highest priority interests. By limiting the interests that members could submit, bill sponsors might also be better positioned to anticipate interest submissions and preemptively address those interests in early drafts of legislation. However, this approach might give members little influence on legislation not directly related to their highest-priority interests. Members might also be excluded from the policymaking process on major legislation if none of their prioritized interests are relevant to that legislation and the bill is introduced after members have already reached their interest limit for that session.

Legislatures might also consider a combination of these two approaches. A legislature could establish distinct limits for legislation-specific interests and for high-priority, general interests. A legislature might also allow individual members, groups of members, and parties to submit interests, providing each with their own limits. For example, a legislature might allow parties to identify a set number of high-priority interests each session that could be applied to any relevant legislation. The legislature might also allow groups containing a certain number of members to submit legislation-specific interests, with a limitation on the number of interests which an individual member could support on each bill. The legislature could further allow individual members to submit a certain number of legislation-specific interests each session to ensure that legislation also addresses members' unique interests.

F. *How Would a Requirement to Address Members' Interests Be Enacted?*

Legislatures have several ways to enact a requirement to address members' interests, including by a constitutional amendment, statute, or rule of the legislature. The options available may vary among legislatures. Three considerations may inform a legislature's choice of method to enact a requirement.

First, different methods of enacting a requirement likely require varying degrees of support. Constitutional amendments may require supermajority approval[36] or the approval of governmental entities outside the legislature. Statutes may require the approval of the executive, and, in bicameral legislatures, statutes typically require the approval of both houses.[37] In contrast, rules for each house of a bicameral legislature are often adopted separately by each house.[38]

Second, different enactment methods may provide greater flexibility or greater stability to the legislative process. Process flexibility or stability is related to the ease of enacting changes through each method. Rules of the legislature provide greater flexibility, constitutional amendments provide greater stability, and statutes may provide an intermediate position between the two extremes.

Third, the extent to which a requirement is enforceable may depend on the methods chosen to enact it. Courts may have jurisdiction to adjudicate disputes involving constitutional law.[39] However, courts may be less willing to intervene in legislative process requirements rooted in statute or in rules of the legislature.[40]

G. *How Would a Requirement to Address Members' Interests Be Enforced?*

Legislatures cannot anticipate every scenario that might arise, and disputes involving the interpretation of a requirement to address members' interests would need to be adjudicated. Disputes over interpretation of law are generally adjudicated by courts. However, there are reasons to believe that courts may be unable or unwilling to resolve disputes related to a legislative process requirement. Judicial review of the legislative process has frequently been criticized as a threat to democracy and the separation of powers, and courts have often been hesitant to intervene in the legislative

36. JANE A. HUDIBURG, CONG. RSCH. SERV., 98–778, SUPERMAJORITY VOTES IN THE HOUSE 1 (2023).

37. *ArtI.S1.3.4 Bicameralism*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S1-3-4/ALDE_00013293/ [perma.cc/9SLH-FPUG].

38. HUDIBURG, *supra* note 36, at 2 (2023).

39. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution . . . .").

40. Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1917 (2011) ("For more than a century, federal courts have consistently refused to entertain challenges to legislation based on procedural defects in the enactment process, even when the alleged defects were violations of the Constitution's lawmaking requirements.").

process.[41] Legislatures may also prefer to limit judicial oversight, and legislatures might therefore avoid codifying process requirements in a way that could facilitate judicial intervention.

In the absence of robust judicial review of the legislative process, legislatures could establish their own mechanisms to adjudicate process disputes. Such mechanisms could include arbitration panels to resolve legislative process questions or, more simply, an expanded role for a legislature's parliamentarian. Legislatures could also enforce process requirements through existing informal mechanisms. For example, legislative gatekeepers such as committee chairs and legislative leadership might require that bill sponsors address member interests before allowing a vote on legislation. To balance process efficiency and equity concerns, legislatures could consider a hybrid system where existing gatekeepers make initial determinations with the possibility of appeal to a parliamentarian or dispute resolution panel.

CONCLUSION

A requirement that bill sponsors must address member interests may allow minority parties to influence policymaking while still allowing the majority party to implement its agenda. By promoting both legislative effectiveness and minority party inclusion, such a requirement may result in more broadly acceptable policy outcomes and strengthen democratic legitimacy. A process that requires engagement among members of different political parties might also have ancillary benefits such as reducing polarization. However, designing a requirement that fully ensures both legislative effectiveness and minority party inclusion is likely to be a difficult task, and legislatures may need to determine standards for identifying and addressing interests and a mechanism for resolving disputes.

While expanding the influence of minority parties may not always be advantageous to the majority party in the short term, majority parties may have incentives to implement an inclusive process requirement beyond safeguarding democracy.[42] In legislatures where the majority party might lose its majority party status, an inclusive process requirement could maximize the extent to which the majority party's interests are met over the long term by allowing the party to implement its agenda efficiently while

41. *See id.* at 1925–27; Edward Lui, *Piercing the Parliamentary Veil Against Judicial Review: The Case Against Parliamentary Privilege*, 42 OXFORD J. LEGAL STUD. 918, 918 (2022); Liora Lazarus & Natasha Simonsen, *Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference*, *in* PARLIAMENTS AND HUMAN RIGHTS 385, 386 (Murray Hunt, Hayley J. Hooper & Paul Yowell eds., 2015); *see also* Michael J. Teter, *Letting Congress Vote: Judicial Review of Arbitrary Legislative Inaction*, 87 S. CAL. L. REV. 1435, 1435 (2014) (arguing that "federal courts should review certain types of congressional inaction for arbitrariness").

42. *See* Sieberer et al., *supra* note 1, at 888.

in the majority and protect its core interests while in the minority.[43] In some legislatures, a requirement to address member interests might be more advantageous to the majority party than existing approaches to promoting process inclusiveness. For example, in legislatures that require supermajority support to advance legislation, the majority party could likely implement its agenda more effectively by replacing the supermajority requirement with a requirement to address member interests.

Given the complexity of designing a process requirement that ensures both legislative effectiveness and minority party inclusion, legislatures might benefit from testing various alternatives before establishing a new process requirement. For example, a legislature might test process requirements at the committee level before deciding whether and how to implement a process requirement for the entire legislature. Legislatures could also work with external organizations to run simulations to assess the effectiveness of different process options in a controlled environment. While the initial design of an inclusive process requirement may be determined by trial and error, emerging best practices may eventually simplify the decisionmaking process for legislatures seeking to establish a requirement to address member interests.

43. *See id.*