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Judicial Review of Laws Enacted by Popular Vote

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JUDICIAL REVIEW OF LAWS ENACTED BY POPULAR VOTE*

The initiative and referendum[1] are enjoying a political renaissance in America. These instruments of direct democracy are appearing on state and local ballots with increasing frequency and subject matter variety.[2] While the historical rationale for the initiative and referendum was to

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1. Political scientist George S. Blair defines the initiative and referendum as follows:

> [T]he initiative is a device whereby a prescribed number or percent of the qualified voters, through the use of a petition, may have an amendment or legislative proposal placed on the ballot for adoption or rejection by the electorate of the state or local community. The referendum, on the other hand, is a means by which decisions of legislative bodies do not become public policies until the electorate votes its concurrence with the policies and accepts them by the required affirmative vote.

G. BLAIR, AMERICAN LEGISLATURES: STRUCTURE AND PROCESS 392 (1967).

Initiatives may be *constitutional*, allowing citizens to amend their state's constitution, or *statutory*. Statutory initiatives may be *direct*, permitting citizens to enact a statute without the involvement of the legislature, or *indirect*, giving the legislature an opportunity to enact a proposed or a substitute measure or to resubmit the question to the voters. *See generally* H. BONE, THE INITIATIVE AND THE REFERENDUM 1–3 (National Municipal League, State Constitutional Studies Project, 2d ed. 1975). A referendum may be required by petition of the voters or by state constitution, or the legislature itself may order a statute it has enacted submitted to the voters for approval or rejection. *Id.* at 2; THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1978–79, at 245 n.a (1978) [hereinafter cited as THE BOOK OF THE STATES].

Twenty-one state constitutions provide for *statutory* initiatives. ALASKA CONST. art. XI, § 1; ARIZ. CONST. art. 4, pt. 1, § 1; ARK. CONST. amend. 7, § 1; CAL. CONST. art. 4, § 1; COLO. CONST. art. V, § 1; IDAHO CONST. art. 3, § 1; ME. CONST. art. IV, pt. 3, § 18; MASS. CONST. amend. XLVIII, pt. I, § 150; MICH. CONST. art. II, § 9; MO. CONST. art. 3, § 49; MONT. CONST. art. III, § 4; NEB. CONST. art. III, § 2; NEV. CONST. art. 19, § 2; N.D. CONST. art. II, § 25; OHIO CONST. art. II, § 1; OKLA. CONST. art. V, § 2; OR. CONST. art. IV, §§ 1, 2(a); S.D. CONST. art. III, § 1; UTAH CONST. art. VI, § 1; WASH. CONST. art. II, § 1(a); WYO. CONST. art. 3, § 52. *See generally* H. BONE, *supra* at 20–53; THE BOOK OF THE STATES, *supra* at 243; PEOPLE'S LOBBY, NATIONAL INITIATIVE AND VOTE OF CONFIDENCE (RECALL) 99–200 (1974). Voters may initiate legislation directly in 13 of these states, indirectly in five, and by either process in three. THE BOOK OF THE STATES, *supra* at 243.

Fifteen of the aforementioned states, plus Florida and Illinois, provide for constitutional amendment by initiative. *Id.* at 210. Twenty-three states authorize a *direct* referendum by petition of the people. In an additional 16 states, the referendum is available subject to significant procedural or substantive constraints, *e.g.*, only upon referral by the legislature, or only upon certain issues. *Id.* at 244–45. *See also* H. BONE, *supra* at 20–53. Concerning procedural mechanics of initiatives and referenda, see generally Note, *Initiatives and Referendum—Do They Encourage or Impair Better State Government?*, 5 FLA. ST. U.L. REV. 925, 926–37 (1977).

The discussion which follows emphasizes the initiative, which is used much more extensively than is the referendum. Price, *The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon*, 28 W. POL. Q. 243, 245 (1975).

2. *See* notes 30–40 and accompanying text *infra*.

check the abuses of representative government,[3] these legislative devices also allow circumvention of the procedural safeguards attending legislation through representative processes.[4] Without these safeguards the rights of minorities, and civil liberties generally, are acutely vulnerable to oppression by an anonymous majority of voters. Recent experience with the initiative and referendum indicates that this dangerous potential is being realized.[5]

This comment examines the thesis that the political process by which laws are enacted has constitutional significance and concludes that legislation enacted directly by voters warrants heightened judicial scrutiny under the fourteenth amendment. Part I chronicles the historical development of the initiative and referendum and surveys contemporary applications. Parts II and III examine the political underpinnings and ramifications of direct democracy and the constitutionality of the initiative process. Finally, Part IV proposes a constitutional law framework for heightened judicial scrutiny of laws enacted by popular vote.

I. EVOLUTION AND CONTEMPORARY USE OF THE INITIATIVE AND REFERENDUM

A. *Historical Context*

The antecedents of the modern initiative and referendum predate recorded history. Pre-Roman European tribes legislated by "clash of arms";[6] popular assemblies governed Athens;[7] and the Romans conducted referenda as early as the eighth century B.C.[8] and contributed the word "plebiscite" to the lexicon of direct democracy.[9]

The Swiss were the architects of the modern initiative and referendum. The cantonal Landsgemeinde (folkmoot), an annual territorial assembly

3. *See* notes 20–22 and accompanying text *infra*.

4. *See* notes 49–55 and accompanying text *infra* and Part II *infra*.

5. *See* notes 41–48 and accompanying text *infra*.

6. Shafer, *A Teutonic Institution Revived*, 22 YALE L.J. 398, 399 (1913). At tribal meetings only the chiefs spoke, but all freemen could "vote" in this ancient version of "sabre-rattling"; the side making the greater clamor prevailed on the issue. S. ALDERSON, YEA OR NAY? REFERENDA IN THE UNITED KINGDOM 10 (1975).

7. D. WILCOX, GOVERNMENT BY ALL THE PEOPLE 3–4 (1912).

8. S. ALDERSON, *supra* note 6.

9. *Id.* A plebiscite, which is a general expression of public opinion not confined to a particular issue, may be distinguished from a referendum in that the former is broader in scope and usually advisory rather than binding. J. GRIMOND & B. NEVE, THE REFERENDUM 53–54 (1975). For an account of the plebiscite as a totalitarian device, see *id.* at 54–57.

of citizens with supreme legislative authority, dates back to 1309.[10] Statutory initiatives and referenda appeared in the early nineteenth century at the canton level.[11] The referendum was incorporated into the Swiss federal Constitution in 1874, and the right to amend the constitution by initiative was established in 1891.[12] The Swiss model has garnered both admirers and detractors,[13] but there is consensus on the point that American initiatives and referenda were patterned on the Swiss prototypes.[14]

The Declaration of Independence predicates government legitimacy upon "the consent of the governed."[15] The New England town meeting is routinely cited as a colonial institutionalization of this concept and as a forerunner of modern direct democracy,[16] although the notion may be more romantic than factual in light of the localized scope, homogenous demographics, and premeeting consensus that characterized the town meeting.[17] Sporadic American experimentation with initiatives and referenda, particularly on a local level, occurred in the eighteenth and nineteenth centuries,[18] and state constitutions and amendments have generally been subject to popular ratification.[19]

In the 1890's direct democracy emerged as a full-blown American

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10. L. TALLIAN, DIRECT DEMOCRACY: AN HISTORICAL ANALYSIS OF THE INITIATIVE, REFERENDUM, AND RECALL PROCESS 10 (1977).

11. Note, *Zoning and the Referendum: Converging Powers, Conflicting Processes*, 6 N.Y.U. REV. L. & SOC. CHANGE 97, 109 n.130 (1977).

12. S. ALDERSON, *supra* note 6, at 18. The Swiss federal Constitution does not authorize national *statutory* initiatives, but there are no subject matter restrictions on *constitutional amendment* initiatives. "This explains why the Swiss Constitution contains a clause on the slaughter of animals." *Id.* Contrary to the American heritage of Marbury v. Madison, 2 U.S. (1 Cranch) 60 (1803), the Swiss have, by initiative, denied their Supreme Court the authority to examine laws for constitutionality. S. ALDERSON, *supra* at 5.

13. *Compare* S. ALDERSON, *supra* note 6, at 5 ("Critics of the referendum must reckon with the fact that Switzerland, which makes the most use of it, is noted for political stability, law-abidingness, respect for liberal values, and a lack of bellicosity—this despite profound linguistic and religious divisions.") *with* L. TALLIAN, *supra* note 10, at 16 ("A study of direct legislation in Switzerland will convince one that the initiative is a conservative force; for example, woman's suffrage came as late as 1971.").

14. 123 CONG. REC. S11,582 (daily ed. July 11, 1977) (remarks of Sen. Abourezk); S. ALDERSON, *supra* note 6, at 18. The Swiss devotion to direct democracy is exemplified by Rousseau's postulate: "Every law which the people in person have not ratified is invalid; it is not a law . . . ." J. ROUSSEAU, THE SOCIAL CONTRACT (1762), *quoted in* C. LOBINGIER, THE PEOPLE'S LAW 9 (1909). *See generally* E. OBERHOLTZER, THE REFERENDUM IN AMERICA 1–4 (1912).

15. "We hold these truths to be self-evident. . . . That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . ." Declaration of Independence (1776).

16. *E.g.*, D. WILCOX, *supra* note 7, at 4–5; Note, *supra* note 11, at 105–07.

17. Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 15–16 (1978); Note, *supra* note 11, at 106.

18. C. LOBINGIER, THE PEOPLE'S LAW 358 (1909).

19. J. GRIMOND & B. NEVE, *supra* note 9, at 61.

political movement, fueled by the philosophy and rhetoric of the Populists and the Progressives.[20] The purification of state politics, aimed at corrupt bosses and overreaching special interest groups,[21] was to be accomplished by making "every man his own legislature."[22] In 1898 South Dakota became, by constitutional amendment, the first state to provide for statewide statutory initiatives and referenda.[23] Amid spirited public debate[24] a succession of states, mostly western, enacted similar

20. *See generally* R. Benedict, Some Aspects of the Direct Legislation Process in Washington State: Theory and Practice 1914–1973 (August 7, 1975) (unpublished Ph. D. dissertation in Suzzallo Library, University of Washington).

The Populists and the Progressives conceptualized direct legislation somewhat differently. The Populists characterized ballot legislation as "interest group pluralism," according greater influence to groups on the periphery of power. *Id.* at 55. They were substantially responsible for the first state constitutional amendment, in South Dakota in 1898, authorizing initiatives. Note, *supra* note 11, at 109. *See* note 23 *infra* (text of South Dakota amendment). The Progressives embraced the concept of the " 'political man,' the rational being who by obtaining information and reflecting on issues under consideration by the community, would make decisions according to the criteria of the greatest good for the greatest number." Benedict, *supra* at 58–59. Although the Progressives were divided on the desirability of direct legislation, their leading spokesperson, Theodore Roosevelt, strongly advocated its careful and selective use. Note, *supra* note 11, at 110.

21. J. BARNETT, THE OPERATION OF THE INITIATIVE, REFERENDUM, AND RECALL IN OREGON 4 (1915); H. BONE, *supra* note 1, at 1.

22. J. BARNETT, *supra* note 21, at 16 (quoting The Oregonian, June 28, 1906, at 8, col. 2). The restriction of this remedy to men was underscored by the repeated refusal of Oregon voters to adopt women's suffrage by initiative in 1906, 1908, and 1910. It was finally enacted in 1912 *Id.* at 241–47.

23. The constitutional amendment passed by the South Dakota legislature in 1897 provided that:

> The legislative power of the state shall be vested in a legislature which shall consist of a senate and house of representatives except that the people expressly reserve to themselves the right to propose measures which measures the Legislature shall enact and submit to a vote of the electors of the state and also the right to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect (except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions).

1897 S.D. Sess. Laws, ch. XXXIX, § 2, *quoted in* C. LOBINGIER, *supra* note 18, at 359. The measure was popularly adopted in 1898 by a vote of 23,816 to 16,483. E. OBERHOLTZER, *supra* note 14, at 385, 392–93.

24. On the initiative and referendum as vehicles for governmental reform, compare the assessments of California Governor Hiram Johnson and Woodrow Wilson:

> If we can give to the people the means by which they may accomplish such other reforms as they desire, the means as well by which they may prevent the misuse of the power temporarily centralized in the Legislature . . . , then all that lies in our power will have been done in the direction of safeguarding the future and for the perpetuation of the theory upon which we ourselves shall conduct this government.

Inaugural Address of Governor Hiram Johnson (Jan. 4, 1911), *quoted in* The Sacramento Bee, Jan. 4, 1911, *reprinted in* PEOPLE'S LOBBY, *supra* note 1, at 29. In contrast, Wilson argued: "Where it [the initiative] has been employed it has not promised either progress or enlightenment, leading rather to doubtful experiments and to reactionary displays of prejudice than to really useful legislation." Woodrow Wilson, *quoted in* E. OBERHOLTZER, *supra* note 14, at 506. Often the debate, through the use of vituperative epithets, generated more heat than light:

provisions during the early 1900's.[25]

Despite the frenzied enactment of constitutional amendments to authorize initiatives, early experimentation with the device was surprisingly sparse. It occurred principally in Oregon,[26] where the test cases sustaining the constitutionality of initiatives and referenda were also generated.[27] While most states have used these devices sparingly,[28] California, Oregon, and Washington have utilized them extensively,[29] thereby providing most of the empirical data for the analysis which follows.

B. Contemporary Practice

The past several years have witnessed increasing exploration of the potential of direct legislation processes.[30] This "resurgence of the popu-

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> Any group of persons, from the cave of Adullam, or other groups of persons of ill-arranged intellects, can propose initiative measures or call the referendum; and there is danger always that the crudest measures may pass into law through the inattention of the voters, or that proper legislative measures may be turned down through the referendum. The situation is the crank's paradise.

The Oregonian, March 10, 1908, *quoted in id.* at 505.

25. Sixteen states had adopted the initiative by 1912, 123 CONG. REC. S11,582 (daily ed. July 11, 1977) (remarks of Sen. Abourezk), when direct democracy advocate Theodore Roosevelt polled 27% as the presidential candidate of the Progressive Party. J. GRIMOND & B. NEVE, *supra* note 9, at 61–62. Thereafter the movement subsided, with only seven additional states adopting either the statutory or the constitutional initiative process between 1913 and the present. 123 CONG. REC., *supra* at S11,582–83.

26. C. LOBINGIER, *supra* note 18, at 365. In five general elections (1904–1912) Oregon voters adopted via initiative a direct primary law, a local option law, a corrupt practices act, proportional representation, and women's suffrage. *Id.* at 362; note 22 *supra*. *See generally* J. BARNETT, *supra* note 21; E. OBERHOLTZER, *supra* note 14, at 397–412. By contrast, in South Dakota, the vanguard of the movement, the newly authorized initiative procedure remained dormant for a decade. *Id.* at 393.

27. In Kadderly v. City of Portland, 44 Or. 118, 74 P. 710, 719 (1903), the Oregon Supreme Court held the initiative and referendum devices not inconsistent with the republican government guarantee, U.S. CONST. art. IV, § 4. A similar challenge was dismissed as nonjusticiable by the U.S. Supreme Court. Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912). *See also* notes 100–11 and accompanying text *infra;* Baker v. Carr, 369 U.S. 186, 223 (1962).

28. Massachusetts, for example, has experienced only 26 proposed statutes, 2 proposed constitutional amendments, and 12 referenda during the 60 years from 1918 through 1977. Stewart, *The Law of Initiative Referendum in Massachusetts,* 12 NEW ENGLAND L. REV. 455, 455 (1977).

29. H. BONE, *supra* note 1, at 8. Washington citizens, for example, voted on 78 statutory initiatives and 61 referenda between 1914 and 1973. *Id.* at 52. For discussion of the experiences of California, Oregon, and Washington, see L. TALLIAN, *supra* note 10, at 172–210 (initiatives on the California ballot, 1912–1976); R. Benedict, *supra* note 20, at 373–86 (Washington initiatives and referenda, 1914–1973). *See generally* Price, *supra* note 1, at 247–52. The initiative passage rates have been 28% in California, 30% in Oregon, and 48% in Washington. R. Benedict, *supra* at 250–51.

30. *See, e.g.,* Ledbetter, *More and More, Voters Write Law,* N.Y. Times, Oct. 30, 1977, § A, at 1, col. 4 (quoting W. Boyd of the National Municipal League); Bone & Benedict, *Perspectives on Direct Legislation: Washington State's Experience 1914–1973,* 28 W. POL. Q. 330, 338 (1975).

list style''[31] has been attributed to citizen frustration with taxation,[32] and to a decline in issue formulation by political parties, combined with heightened activism by special interest organizations and enhanced access to the media on public issues.[33] In this context, the highly publicized passage of California's property tax-limiting Proposition 13 in June 1978 brought initiatives to the forefront of the national consciousness.[34] In the November 1978 elections, the proliferation of ballot proposals reached a thirty-year high for an off-year election, numbering 350 in thirty-seven states and including forty statewide initiatives.[35]

Complementing the trend toward increased use of the initiative are attempts to provide for its authorization in the legislatures of many states whose constitutions do not yet provide for the device.[36] Furthermore, a federal constitutional amendment authorizing a national direct voter initiative, similar to that proposed in 1977 by Senators Abourezk and Hatfield,[37] has attracted forty-nine congressional cosponsors,[38] as well as

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31. Ledbetter, *supra* note 30. One California bureaucrat, disputing the characterization of initiative proliferation as "populist," claimed that he could put any issue on the California ballot for $325,000. *Id.*

32. Herbers, *Deciding by Referendum is a Popular Proposition*, N.Y. Times, Nov. 12, 1978, § 4, at 4, col. 4.

33. Stewart, *supra* note 28, at 455.

34. In November 1978, restraints on taxation or spending were passed in 13 states. Herbers, *supra* note 32.

35. *Id.* In 80 years of state initiative use, approximately 1,200 issues, or an average of 15 per year, have been submitted to voters. Initiative America, Questions and Answers About National Voter Initiative (pamphlet on file with *Washington Law Review*).

36. Peirce, *'Tolerable Compromise' on Initiatives*, Seattle Post-Intelligencer, Feb. 9, 1979, § B, at 3, col. 1.

37. S.J. Res. 67, 95th Cong., 1st Sess., 123 CONG. REC. S11,494 (daily ed. July 11, 1977). The text of the proposed amendment provides as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled* (two-thirds of each House concurring therein). That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States:
>
> "ARTICLE ———
>
> "SECTION 1. The People of the United States shall have the power to propose and enact laws in accordance with this article, except with respect to carrying out the powers granted to Congress in clauses eleven and fifteen of article I, section eight of this Constitution. This article does not grant the people of the United States the power to propose amendments to this Constitution.
>
> "SECTION 2. A law is proposed by presenting to the chief law enforcement officer of the United States a petition that sets forth the text of the proposed law and contains signatures, collected within the eighteen months prior to such presentation, of registered voters equal in number to three percent of the ballots cast in the last general election for President and which includes the signatures of registered voters in each of ten States equal in number to three percent of the ballots cast in the last general election for President in each of the ten states. Within ninety days of such presentation, the chief law enforcement officer of the United States shall

extensive organizational[39] and popular[40] support.

The proliferation of issue balloting described above, together with the objectives sought by many of the proposals, places minority rights and individual liberties in serious jeopardy. While the original advocates of American direct democracy may have emphasized progressive governmental reforms,[41] such applications are less common in modern practice than are measures by which civil rights, and personal lifestyle and moral choices, are threatened by an amorphous, anonymous majority.[42] In the

determine the validity of the signatures contained in such petition through consultation with the appropriate States. Upon determination that such petition contains the required number of valid signatures, he shall certify such petition. He shall then direct that the proposed law be placed on the ballot at the next general election held for choosing Members of the House of Representatives occurring at least one-hundred and twenty days after such certification. The Congress shall provide by law reasonable procedures for the preparation and transmittal of such petitions, and for the certification of signatures on such petitions. For the purposes of this section, the term 'State' shall include the District of Columbia.

"SECTION 3. A proposed law shall be enacted upon approval by a majority of the people casting votes with respect to such proposed law and shall take effect thirty days after such approval except as otherwise provided in the proposed law. Any law enacted pursuant to this article shall be a law the same as any other law of the United States, except that any law to repeal or amend a law enacted pursuant to this article during the two years immediately following its effective date must receive an affirmative roll-call vote of two-thirds of the members of each House duly elected and sworn. No law, the enactment of which is forbidden the Congress by this Constitution or any amendment thereof, may be enacted by the people under this article.

"SECTION 4. The Congress and the people shall have the power to enforce this article by appropriate legislation."

123 CONG. REC. S11,584 (daily ed. July 11, 1977) (emphasis in original). A similar resolution was introduced in the House of Representatives, H.R.J. Res. 658, 95th Cong., 1st Sess., 123 CONG. REC. H12,305 (daily ed. Nov. 8, 1977). The case for a national initiative was also argued in the Progressive era. *See, e.g.*, D. WILCOX, *supra* note 7, at 305–12.

38. Herbers, *supra* note 32.

39. The campaign in Congress is being monitored by Initiative America, 606 Third Avenue, N.W., Washington, D.C. 20001. *See generally* PEOPLE'S LOBBY, *supra* note 1.

40. A survey by the Gallup Organization found that 57% of those surveyed favored a national initiative, 21% opposed it, and 22% were undecided. Initiative America, *supra* note 35.

41. *See* notes 20–22 and accompanying text *supra*.

42. Significant governmental reforms, such as California's open government initiative, echo the historical imperative behind initiative use. *See generally* PEOPLE'S LOBBY, PROPOSITION 9: THE POLITICAL REFORM ACT (1974). However, such measures are comparatively infrequent in modern practice. Bell, *supra* note 17, at 18.

In Washington, issues of morality and lifestyle have constituted 24.4% of initiatives certified to the ballot, whereas governmental reforms have comprised only 19.2%. Bone & Benedict, *supra* note 30, at 334. In 1978 Californians were urged to increase the availability of the death penalty and to abridge the rights of homosexuals and smokers, *see* SECRETARY OF STATE, 1978 CALIFORNIA VOTERS PAMPHLET 24–25, 41–46, and Washington voters were asked to prohibit busing for racial integration, *see* Secretary of State, 1978 Voters and Candidates Pamphlet 4–6 (this measure was enacted by overwhelming popular vote but subsequently was held unconstitutional in Seattle School Dist. v. Washington, No. C78–753V (W.D. Wash. June 15, 1979) (mem.), *appeal docketed*, No. 79–4679 (9th Cir. Sept. 19, 1979), discussed in note 122 *infra*); *The New Issues*, NEWSWEEK, Oct. 2, 1978, at 56. In 1977 Washington voters enacted a stringent prohibition on pornography which has since been declared unconstitutional. Spokane Arcades, Inc. v. Ray, 449 F. Supp. 1145 (E.D. Wash. 1978).

Sixties efforts to repeal fair housing laws reached epidemic proportions.[43] In the Seventies desegregative busing[44] and antidiscrimination ordinances protecting homosexuals have fallen prey to this "tyranny of the majority."[45] Even facially neutral measures such as California's Proposition 13[46] may adversely affect the poor by curtailing government services on which the poor, and hence minorities, are disproportionately dependent.[47] In addition to discrimination against minorities, the list of personal liberties sought to be regulated or constrained by initiative is both voluminous and alarming.[48]

The problem has been characterized as follows:

> Direct democracy not only promoted the expression of the majority will on general political legislation, but also permitted oppression of minorities and the imposition of a particular set of social or moral values. The history of direct democracy is permeated with this tension between effecting the will of the majority and protecting the rights of the minority.

Note, *supra* note 11, at 106 (footnote omitted).

43. The developments of the Sixties have precedents in pioneer America. For example, in 1857 voters in the Oregon Territory overwhelmingly approved a law intended to exclude all free blacks. E. BERWANGER, THE FRONTIER AGAINST SLAVERY: WESTERN ANTI-NEGRO PREJUDICE AND THE SLAVERY EXTENSION CONTROVERSY 85–93 (1967). In 1912 the threat to racial minorities allegedly posed by initiatives was dismissed with the facile assurance that racial prejudice would soon disappear. D. WILCOX, *supra* note 7, at 67. In 1963–68, in 10 cities and the State of California open housing referenda were sponsored by opponents of open housing, including rightwing groups such as the John Birch Society. J. GRIMOND & B. NEVE, *supra* note 9, at 63; Hamilton, *Direct Legislation: Some Implications of Open Housing Referenda*, 64 AM. POL. SCI. REV. 124, 125 (1970). In Reitman v. Mulkey, 387 U.S. 369 (1967), the California measure (Proposition 14; CAL. CONST. art. I, § 26), which passed by a vote of 4,526,460 to 2,396,747, was overturned by the U.S. Supreme Court, although the Court carefully pointed out that mere repeal of open housing legislation did not violate the fourteenth amendment. 387 U.S. at 376. *See* notes 149–154 and accompanying text *infra;* Seeley, *The Public Referendum and Minority Group Legislation: Postscript to* Reitman v. Mulkey, 55 CORNELL L. REV. 881, 883–84 (1970). The *Reitman* decision may be cold comfort to discrimination victims other than racial minorities; Professor Charles L. Black, Jr. asserts that if Proposition 14 had been directed at age or sex discrimination its constitutional validity would have been upheld. Black, *The Supreme Court, 1966 Term—Foreword; "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 82 (1967).

44. *See* note 42 *supra*.

45. *See generally* Williams, *Turning the Tide on Gay Rights*, SATURDAY REVIEW, Feb. 17, 1979, at 21; Lichtenstein, *Laws Aiding Homosexuals Face Rising Opposition Around the Nation*, N.Y. Times, April 27, 1978, § A, at 1, col. 3.

The most homophobic initiative appeared in California in November 1978 as Proposition 6, sponsored by State Senator John Briggs. Had it been enacted, any public school teacher, teacher's aide, administrator or counselor would have been subject to dismissal for "advocating, soliciting, imposing, encouraging or promoting of private or public homosexual activity directed at, or likely to come to the attention of, schoolchildren and/or other employees . . . ." SECRETARY OF STATE, 1978 CALIFORNIA VOTERS PAMPHLET 29 (text of proposed statute, § 3(b)(2)).

46. CAL. CONST. art. XIII, § A. *See* note 34 and accompanying text *supra*.

47. "Voters can cut taxes, as they did in California, Nevada, Idaho and other states, without bearing the responsibility of also deciding which services are to be cut." Herbers, *supra* note 32. In a poll of Californians conducted after the passage of Proposition 13 the respondents selected welfare and day care as the public services most preferred for cutbacks. Education Commission of the States, Public Opinion and Proposition 13 (1979).

48. *See, e.g.*, note 42 *supra*.

Compounding this threat is the lack of procedural safeguards governing initiative and referendum use. Ballot certification can easily be obtained by a well-financed interest group.[49] "Tumultuous, media-oriented"[50] campaigns often replace legislative hearings and debate, reducing sensitive, complex political questions to simplistic moral judgments[51] and depriving a reviewing court of a coherent legislative history.[52] Once enacted, a ballot proposition may be more difficult to amend or repeal than a legislative enactment, either because of statutory restraints[53] or because of legislators' pragmatic reluctance to defy the *vox populi*. While this lack of procedural safeguards facilitates enactments hostile to minorities and individual liberties, the victim seeking judicial redress is likely to encounter judicial deference,[54] or paralysis,[55] in dealing with direct legislation. An appropriate judicial response,[56] based on American constitutional and political history,[57] is the focus of the analysis which follows.

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49. *See* note 31 *supra*.

50. Bell, *supra* note 17, at 18–19 (describing the campaign surrounding the passage of Washington's antipornography initiative).

51. Fairlie, *Taking Issue with the Initiative Process*, L.A. Times, Nov. 14, 1978, pt. II, at 7, col. 4. Morals issues elicit greater voter turnout than any other type of proposition. H. BONE, *supra* note 1, at 11. While politicians in the legislature may be moderated by their accountability to various constituencies, in direct legislation no political factors counsel restraint on voters' anonymous expression of irrational fears and prejudices. Bell, *supra* note 17, at 14–15. *See* note 93 and accompanying text *infra*.

52. In evaluating the constitutionality of the initiative measure at issue in *Reitman*, the Court examined the " 'historical context and conditions existing prior to . . . enactment,' " as well as the objective and effect of the measure. 387 U.S. at 373. Courts will also look to published arguments, such as those in the voters' pamphlet, to construe voters' intent in adopting an initiative or referendum. Port of Longview v. Taxpayers, 85 Wn. 2d 216, 533 P.2d 128 (1975).

53. For example, WASH. CONST. art. II, § 41 forbids legislative amendment or repeal of a popular enactment within two years unless a two-thirds majority of each house is obtained. Thus "the legislative power of the people is superior to that of the legislature itself . . . . " Trautman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55, 66 (1973).

54. *See, e.g.*, City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 678–79 (1976) (Burger, C.J.); James v. Valtierra, 402 U.S. 137, 141 (1971) (Black, J.). *See* notes 123–26, 142–45 & 162–64 and accompanying text *infra*.

55. In the early years of this century, the constitutions of Colorado and Nevada, and perhaps of other states, prohibited judicial invalidation of direct legislation. *See* J. BARNETT, *supra* note 21, at 174–75. The Colorado Constitution also provided that trial courts lacked jurisdiction to pass on constitutional questions, *see* People v. Max, 70 Colo. 100, 198 P. 150 (1921) (provision found unconstitutional), and that decisions of the state supreme court on constitutional questions could be reviewed by popular vote, *see* People v. Western Union Tel. Co., 70 Colo. 90, 193 P. 146 (1921) (provision found unconstitutional).

56. *See* Part IV *infra*.

57. *See* Part II *infra*.

II. DIRECT DEMOCRACY AS A POLITICAL PROCESS

A. *The Founders' Aversion to Direct Democracy*

Concern that direct democracy poses inherent dangers to individual rights and liberties is not of recent origin.[58] The same concern was voiced in the critical period prior to the adoption of the federal constitution,[59] and was one of the central themes repeatedly expressed in the debates in the Federal Convention of 1787.[60] Significantly, this concern contributed to the selection of a system of representative government.[61] Initiatives, because they circumvent legislation by representative assembly, embody the dangers of direct democracy recognized two centuries ago.[62]

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58. "The concern that democratic government will provide inadequate protection for minorities is as old as the nation—perhaps as old as the idea of democracy itself." Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1164 (1977).

The historical analysis presented here is not intended to prove that because direct democracy has been criticized in the past it is necessarily an evil to be scorned today. However, in Part IV this comment will contend that the political process by which legislation is enacted has constitutional significance and that the characteristics of the initiative process call for heightened judicial scrutiny under the fourteenth amendment. This part explores the differences between legislation by representative assembly and legislation by popular vote. The views expressed in the 18th century, preceding the adoption of the federal constitution, are particularly helpful in illustrating the fundamental differences between the two processes. At that time, Americans most carefully scrutinized the nature of government, recognizing that they possessed the unique "opportunity of making an election of government." B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 272 (1967) (quoting John Adams). "[The founding fathers] were closer than we to those basic structural arrangements by which individual rights in a free society must be protected against the tyranny of the majority." Bell, *supra* note 17, at 29. *Cf.* Buckley v. Valeo, 424 U.S. 1, 120 (1976) ("Our inquiry of necessity touches upon the fundamental principles of the Government established by the Framers of the Constitution . . . .").

59. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 409–13 (1969). Historians have labeled the 1780's the 'critical period' of the American Revolution:

> The belief that the 1780's, the years after the peace with Britain, had become the really critical period of the entire Revolution was prevalent everywhere during the decade. . . . The evidence is overwhelming from every source—newspapers, sermons, and correspondence—that in the minds of many Americans the course of the Revolution had arrived at a crucial juncture.

Id. at 393–94.

60. *See generally* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1911). For examples, see note 67 and accompanying text *infra*.

61. A representative government differed from a pure democracy in "the delegation of the government . . . to a small number of citizens elected by the rest." THE FEDERALIST No. 10 (J. Madison), at 59 (Bicentennial ed. 1976).

62. Of course, recognition of the dangers of direct democracy was not novel in the 18th century. In seeking to understand the nature of government and politics and in fashioning a system of government, Americans relied heavily on the lessons of history. G. WOOD, *supra* note 59, at 3–10. The broad scope of their inquiry was indicated by John Adams' directive:

> Let us study the law of nature; search into the spirit of the British constitution; read the histories of ancient ages; contemplate the great examples of Greece and Rome; set before us the conduct

In the 1780's the success of the American revolution was open to serious question.[63] While the revolution had thrown off the tyranny of the British monarchy, "[a]n excess of power in the people was leading . . . to a new kind of tyranny, not by the traditional rulers, but by the people themselves—what John Adams in 1776 had called a theoretical contradiction, a democratic despotism."[64] By 1788 James Madison concluded that rather than the oppression of the majority by a minority, "[i]t is much more to be dreaded that the few will be unnecessarily sacrificed to the many."[65]

Both the *Federalist Papers* and the records of the Federal Convention of 1787 suggest that the federal constitution was designed to fashion a

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of our own British ancestors, who have defended for us the inherent rights of mankind against foreign and domestic tyrants and usurpers . . . .

3 J. ADAMS, THE WORKS OF JOHN ADAMS 462 (1851). Alexander Hamilton's conclusions were typical:

It has been observed, by an honorable gentleman, that a pure democracy, if it were practicable, would be the most perfect government. Experience has proved that no position in politics is more false than this. The ancient democracies, in which the people themselves deliberated, never possessed one feature of good government. Their very character was tyranny; their figure, deformity.

2 J. ELLIOT, THE DEBATES IN THE STATE CONVENTIONS 253 (1866). *See* Rice v. Foster, 4 Del. (4 Harr.) 479, 485 (1857) ("[The founders] had been taught by the lessons of history, that equal and indeed greater dangers resulted from a pure democracy, than from an absolute monarchy. Each leads to despotism.").

63. G. WOOD, *supra* note 59, at 393–429.

64. *Id.* at 404. Adams' statement in 1776 was consistent with the contemporary Whig theory of government, which posited "a perpetual battle between the passions of the rulers . . . and the united interest of the people." *Id.* at 18. The people were presumed to be a homogeneous entity, and thus it was possible to equate public liberty (the ability of the people to participate in government) with private liberty (protection of the individual from oppressive government). *See* Buel, *Democracy and the American Revolution: A Frame of Reference*, 21 WM. & MARY Q. 165 (3d ser. 1964).

This equation was no longer possible once the reality of popular government had been experienced. In the debates in the Connecticut convention on the adoption of the federal constitution, Governor Huntingdon explained:

The great secret of preserving liberty is, to lodge the supreme power so as to be well supported, and not abused. If this could be effected, no nation would ever lose its liberty. The history of man clearly shows that it is dangerous to intrust the supreme power in the hands of one man. The same source of knowledge proves that it is not only inconvenient, but dangerous to liberty, for the people of a large community to attempt to exercise in person the supreme authority. Hence arises the necessity that the people should act by their representatives . . . .

2 J. ELLIOT, *supra* note 62, at 198. *See* G. WOOD, *supra* note 59, at 606–07; Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 456–61 (1978).

65. Letter from Madison to Jefferson (Oct. 17, 1788), 14 JEFFERSON PAPERS 20 (J. Boyd ed. 1945), *quoted in* G. WOOD, *supra* note 59, at 413. Madison elaborated on this theme on another occasion:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.

5 WRITINGS OF JAMES MADISON 272 (G. Hunt ed. 1904) (emphasis in original).

political system which could prevent a tyranny of the majority as well as a tyranny of the few.[66]

> The members most tenacious of republicanism, he [Alexander Hamilton] observed, were as loud as any in declaiming agst. the vices of democracy . . . . Give all power to the many, they will oppress the few. Give all power to the few they will oppress the many. Both therefore ought to have power, that each may defend itself against agst. the other.[67]

No attempt is made here to explore fully the panoply of political devices employed to strike the desired balance;[68] unquestionably, however, representation was a central and pervasive element[69] of the balanced govern-

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66. *See* C. BEARD, THE SUPREME COURT AND THE CONSTITUTION 93 (1912). The fundamental tension inherent in the American political system between majority rule and limitations on majority power was observed by Tocqueville. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 269 (1945). Tocqueville also perceived the greater danger of popular government to be majority tyranny rather than weakness resulting from the absence of a strong central authority. *Id.* at 270–71, 279.

67. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 60, at 288. A variety of proposals were offered to cure the evils perceived, *see* note 68 *infra*, but the delegates agreed that the excesses of democracy were the source of the nation's troubles. For example:

> Mr. Gerry. The evils which we experience flow from the excess of democracy. . . . In Massts. it has been fully confirmed by experience that they [the people] are daily misled into the most baneful measures and opinions by the false reports circulated by designing men, and which no one on the spot can refute.
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> . . . .
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> . . . [Mr. Randolph] observed that the general object was to provide a cure for the evils under which the U.S. laboured; that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy: that some check therefore was to be sought for agst. this tendency of our Governments: and that a good Senate seemed most likely to answer the purpose.

RECORDS OF THE FEDERAL CONVENTION, *supra* note 60, at 48, 51.

68. Many such devices concerned the structure of representative government: a bicameral legislature, executive veto power, other separation of powers, limited terms of office for representatives, and so forth. *See* G. WOOD, *supra* note 59, at 430–68, 519–62.

69. *Id.* at 596–600. *See* Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1412 n.162 (1978).

As a device to filter the desires of the majority, representative government was reconciled with the theory of popular government through the institution of the constitutional convention.

> There were two levels of law, a higher law or constitution that only the people could make or amend, through constitutional conventions or bodies similarly empowered; and a statutory law, to be made and unmade, within the assigned limits, by legislators to whom the constitution gave this function.

1 R. PALMER, THE AGE OF DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760–1800, at 215 (1959). *See* G. WOOD, *supra* note 59, at 306–43.

The notion that once the people participate in setting the structure of government they retire from direct participation therein was articulated by Chief Justice Marshall in Marbury v. Madison:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so estab-

ment designed by the founding fathers. Perhaps the most eloquent statements of the theory that a representative assembly is a political tool to check abuse of the minority by the majority were authored by James Madison. In *The Federalist* No. 10, Madison explored the evils of factions to which he attributed the "distresses under which we labor."[70] The problem presented was to devise a governmental structure that could reconcile popular government with the threat to individual liberties posed by a faction which is able to gain majority support:

> When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.[71]

Madison was convinced that a pure democracy "can admit of no cure for the mischiefs of faction."[72] The solution was to be found, rather, in a republic: "a government in which the scheme of representation takes place."[73]

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lished, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

2 U.S. (1 Cranch) 60, 73 (1803).

70. THE FEDERALIST No. 10 (J. Madison), *supra* note 61, at 54. Of course, a scheme of representation alone is not enough to safeguard minority rights. *See* Ely, *supra* note 64, at 461. One response to the dangers of democracy following the Revolution was an increased role for the judiciary. *See* G. WOOD, *supra* note 59, at 453–63. The power of the judiciary to review the constitutionality of laws enacted by the legislature, *see* Marbury v. Madison, 2 U.S. (1 Cranch) 60 (1803), gave the courts a central role in checking the dangers of majority rule. "[T]he power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies." 1 A. DE TOCQUEVILLE, *supra* note 66, at 107.

71. THE FEDERALIST No. 10 (J. Madison), *supra* note 61, at 57–58. It is difficult to overestimate the importance which Madison attached to the task of devising a governmental structure which derived its authority from the people but was able to protect the rights of individuals. Fulfillment of that objective was "the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind." *Id.* at 58.

72. *Id.* Initiatives would provide a faction which gains majority support an opportunity to enact oppressive legislation, an opportunity Madison perceived and sought to prevent:

> The lesson we are to draw from the whole is that where a majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure. . . . It was incumbent on us then to try this remedy, and with that view to frame a republican system on such a scale & in such a form as will controul all the evils wch. have been experienced.

1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 60, at 136 (footnote omitted).

73. THE FEDERALIST No. 10 (J. Madison), *supra* note 61, at 59. Whether, as a matter of definition, representation is a necessary element of a republic has been the subject of some judicial debate. *See* Part III–A *infra;* Seeley, *supra* note 43, at 905–10 & n.96; Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude,* 46 MINN. L. REV. 513, 558–60

Representative government safeguards minority rights in two important ways. First, representatives act as a filter through which the views of individuals or factions flow prior to being enacted into law. In Madison's words, the function of representative government is "to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens."[74] The framers believed that in contrast to direct democracy, the quality of elected representatives and the processes of debate and compromise integral to representative government would diminish the likelihood of an oppressive majority imposing its will on a minority.[75]

Second, representative government protects minority rights because, under the theory of government developed by the founders, representatives have a duty to govern on behalf of all the people, including those in a minority.

> The "republic" [the founders] sought to create was not one in which the government pursued the interests of a priviledged few or even only the interests of those groups that could work themselves into some majority coalition, but rather one in which *the majority would govern in the interest of the whole people*.[76]

Whereas direct democracy would allow a majority to govern exclusively in its own interest, representative government provides for consideration of all interests in the legislative process.

The Founding Fathers thus eschewed direct democracy in selecting a form of government. Speaking at the Constitutional Convention, Alexander Hamilton proclaimed: "We are now forming a republican govern-

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(1962). In any case, it is clear that representative government was seen as critical to alleviation of the dangers of democracy. "In truth, said Madison, representation was 'the pivot' on which the whole American system moved." G. WOOD, *supra* note 59, at 597.

74. THE FEDERALIST No. 10 (J. Madison), *supra* note 61, at 59.

75. Public debate on an initiative can clarify the proposal's impact on minority groups, but cannot lead to compromise or political tradeoffs which are possible in a legislative assembly. *See* notes 91–93 and accompanying text *infra*.

76. Ely, *supra* note 64, at 458 (emphasis in original). The duty of a representative to represent minorities has been explicitly recognized by the Supreme Court in other contexts as a means of preventing a tyranny of the majority. In Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975), the Court noted that national labor policy

> 'extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. . . .'
>
> In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests. . . . [B]y the very nature of the exclusive bargaining representative's status as representative of *all* unit employees, Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit.

Id. at 63–64 (emphasis in original). *See* Steele v. Louisville & N.R.R., 323 U.S. 192, 202 (1944); note 171 and accompanying text *infra*.

ment. Real liberty is neither found in despotism or the extremes of democracy, but in moderate governments.''[77]

B. Contemporary Political Theory

The framers' opposition to direct democracy is not outmoded today. On balance, the arguments advanced by contemporary political scientists for and against popular legislation may undercut the historical aversion to *any* exercise of direct democracy, but at the same time confirm the need for an effective restraint on its use.

The current debate over the use of initiatives can be organized in terms of the two fundamental and conflicting values with which the framers struggled: government by the people (majority rule) versus protection of individual rights and minority interests.[78]

Proponents of the initiative emphasize the former value and contend that a direct vote of the people on legislative proposals promotes that value.[79] They argue, *inter alia,* that direct legislation avoids flaws in representative government, increases voter involvement in the political process,[80] and is a purer expression of the will of the people than is legislation by representative assembly.[81] Central to these arguments is ''an emphasis on 'the people' and their role in decision-making;''[82] initiatives and referenda permit the people to exercise their sovereignty in a legislative manner, and help effectuate majority rule.[83] One advocate explained:

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77. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 60, at 432.

78. *See* note 66 and accompanying text *supra;* Note, *supra* note 11, at 106.

79. A clear statement of this view was penned by Justice Black: "Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." James v. Valtierra, 402 U.S. 137, 141 (1971).

80. Although it may be impossible to measure, citizen education is one of the most important benefits to be derived from the initiative process. *See* H. BONE, *supra* note 1, at 7; Bone & Benedict, *supra* note 30, at 349.

81. Note, *supra* note 1, at 938–40. *See* H. BONE, *supra* note 1; Bone & Benedict, *supra* note 30, at 331–32. The last argument encompasses two contentions. First, by avoiding the mediating, and potentially antimajoritarian role of a legislative assembly, direct action by the electorate provides a clearer expression of the will of a majority of the people. Second, a clearer expression of the popular will is afforded by focusing on issues rather than personalities, as is more likely the case when representatives are elected. *Id.* at 331–32. In both respects, popular democracy is seen as providing a check on the legislature when it deviates from the will of the majority.

82. H. BONE, *supra* note 1, at 5. *See* Bone & Benedict, *supra* note 30, at 28; notes 20–22 and accompanying text *supra.*

83. [T]he theory went that by denying the right of persons to initiative laws, an inherent contradiction arises. Our government rests upon the premise that all sovereignty rests in the people. In turn, the people delegate certain powers to the government. If a sovereign can grant a power, then it most certainly has the right to exercise that power.

H. BONE, *supra* note 1, at 5. The theory overlooks a central aspect of American government dis-

> [T]he initiative, the referendum, and the recall are closely connected parts of the same political theory. The people elect their representatives. If those representatives do not carry out the will of the people, then the people initiate legislation. If their representatives transgress the will of the people, then the people, through the referendum, repeal the laws which their representatives have made.[84]

Opponents of increased use of direct democracy contest both the assertion that the initiative is a better means of effectuating majoritarian desires, and the value judgment which elevates majority rule above protection of individual liberty.[85] On the basis of statistics compiled by political scientists, it is argued that low voter turnout,[86] lack of voter knowledge of the issues posed,[87] and a tendency of voters not to consider underlying policy questions[88] all weaken the claim that the initiative better effectuates majority rule than does legislation by representative assembly.[89] Moreover, opponents argue that "substantial distortions of public choice may arise from putting some questions to a direct vote of the people"[90] because of the absence of legislative deliberation and compromise and the necessity of making a yes or no choice on complex issues.[91]

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closed in the records of the Constitutional Convention—once the people create the machinery of government, they let their theoretical sovereignty lapse, except to the extent necessary to alter the machinery. *See* note 69 *supra*.

84. 47 CONG. REC. app. 63, at 67 (1911) (speech of Rep. John E. Raker).

85. H. BONE, *supra* note 1, at 6–7. *See* Note, *supra* note 1, at 940–42.

86. Hamilton, *supra* note 43, at 128. "Low [voter] participation rates not only are at variance with the premise of direct democracy that the people wish to be legislators, but also vitiate somewhat its claim to be a more authentic expression of the 'general will' than the representative body whose decision is being challenged." *Id.*

87. *Id.* at 133. The Washington State Supreme Court has stated that it "can safely assume that not all voters will read the text of the initiative or the explanatory statement." *In re* Ballot Title for Initiative 333, 88 Wn. 2d 192, 198, 558 P.2d 248, 252 (1977).

88. Hamilton, *supra* note 43, at 131.

89. Wolfinger & Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 753 (1968).

> Among contemporary political scientists it is more common to assume that asking voters to pass judgment on substantive policy questions strains their information and interest, leading them to decisions that may be inconsistent with their own desires. The consequence is subversion of representative government and the exercise of undue influence by groups that can afford to gather the signatures to qualify a measure for the referendum ballot and then wage a publicity campaign that will have an impact on the voters.

Id. at 767 (footnotes omitted).

90. Andersen, *A Washington Income Tax Without Constitutional Amendment*, 6 WASH. PUB. POL'Y NOTES No. 2 (1978).

91. *Id.* The defects of the initiative process may be more significant in regard to certain issues: Issues which appeal to narrower, pocketbook interests of the voters, issues which are easily oversimplified, issues easily distorted in publicity campaigns, issues which are parts of a set of complex interrelationships difficult to respond to with yes or no answers, issues which can be cast by advocates in inflammatory or emotional terms, issues on which stable majority and mi-

Opposition to initiatives also stems from the potential abuse of minority rights.[92] Political scientists have noted that legislation by popular vote increases the majority's ability to override minority interests, observing that direct democracy is not responsive to the intensity of a particular viewpoint in the community. While a legislative assembly may be swayed by strong views held by a minority on a particular issue, the intensity of the views held by one group or one individual is not reflected in the one-person one-vote initiative process.[93] As a result, a minority group has less influence on the outcome of an initiative than on the success of a bill in the legislature.

The failure of the initiative process adequately to consider minority

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nority interests are opposed—all such issues pose special risks in public referenda and are arguably more safely left to the cooler and more deliberative legislative process.

Id. The argument, however, can be made more generally:

> We noted earlier one of the advantages of the legislative over the plebiscitory decision-making process: the former not only permits but is characterized by compromises between the initial demands of groups of varying size and intensity. In referenda, of course, compromise is impossible once the issue has been formally posed.

Wolfinger & Greenstein, *supra* note 89, at 768. Professor Sager makes a similar point:

> Legislation by plebiscite is not and cannot be a deliberate process. We expect and presumably derive from an initiative or referendum an expression of the aggregate will of the majority, or the majority of those who vote. But there is no genuine debate or discussion, no individual record or accountability, no occasion for individual commitment to a consistent or fair course of conduct.

Sager, *supra* note 69, at 1414–15 (footnote omitted).

92. For a thorough discussion of the use of direct democracy and its impact on racial minorities, see Bell, *supra* note 17. Professor Bell argues that "the experience of blacks with the referendum has proved ironically that the more direct democracy becomes, the more threatening it is." *Id.* at 1.

Racial minorities lose the protection afforded by representative assembly and suffer from different voting patterns characteristic of initiatives and referenda. "Comparison of the voters and nonvoters confirms that direct democracy also has distinct social bias. Because of low turnouts, local referenda are likely to have more class bias than major elections." Hamilton, *supra* note 43, at 129.

93. Wolfinger & Greenstein, *supra* note 89, at 768–69. The authors, in comparing legislation by popular vote with that by representative assembly, observe:

> A second, closely related advantage of legislatures is that they typically take account of the intensity of demands as well as their numerical support, while in referenda every voter's preference, no matter how casual, is equally weighted. The legislative process is responsive to intensity because legislators (consciously or unconsciously) ask themselves how much the interested parties care about the issue since they want to find out what the cost in votes and other campaign support will be of disappointing one side or the other.
>
> . . . .
>
> While politicians inevitably are imperfect in their calculations about intensity, voters are unlikely to make such judgments at all, particularly when their views are channeled through the referendum process.

Id. See Bell, *supra* note 17, at 25; Kendall & Carey, *The "Intensity" Problem and Democratic Theory*, 62 AM. POL. SCI. REV. 5 (1968).

This analysis underscores one of the fundamental differences between representative government and direct democracy which was observed by the founding fathers. The representative assembly provides an institutional setting for weighing competing interests of all the people, whereas the majority need not, and apparently does not, consider minority viewpoints in the initiative process.

viewpoints, coupled with the absence of those institutional safeguards for individual rights and liberties which inhere in representative government, suggests the need for some restraint upon the increasing use of this brand of popular democracy. The extent to which the courts have provided and are able to provide this restraint is the subject of the remaining sections.

III. THE JUDICIAL RESPONSE TO DIRECT DEMOCRACY—THE CONSTITUTIONALITY OF THE INITIATIVE PROCESS

Throughout its history, use of the initiative has been subject to legal challenges. However, the courts, and particularly the United States Supreme Court, have been unable to arrive at an analytical framework which provides adequate protection for threatened minority rights. This section examines those cases which have challenged the initiative process itself. In those cases it has been argued that the process is in all or at least some instances unconstitutional.[94] Part IV examines judicial review of laws enacted by initiative, and proposes a standard of review which would provide an effective restraint on the potential abuse of direct democracy.

A. The Republican Guarantee Clause

In 1847 the Delaware legislature passed a local option law[95] authorizing the citizens of each county to "decide by their votes whether or not the retailing of intoxicating liquors shall be permitted in said counties."[96] In *Rice v. Foster*,[97] the Delaware Supreme Court held the law unconstitutional. The court did not specifically rely on the republican guarantee clause of the United States Constitution, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[98] However, the court made clear its belief that direct democracy was not to be tolerated under either the federal or state constitutions:

The nature and spirit of our republican form of government . . . have estab-

94. Limitations as to when, and on what subjects, direct democracy may operate could be provided by statute. For examples of such statutory limitations, see Note, *Limitations on Initiative and Referendum*, 3 STAN. L. REV. 497 (1951). Additional limitations are discussed in Note, *The Proper Use of Referenda in Rezoning*, 29 STAN. L. REV. 819, 845–50 (1977).

95. A local option law was an enactment by a state legislature which took effect in counties or towns only after being approved by local voters. Note, *supra* note 11, at 107–09.

96. Rice v. Foster, 4 Del. (4 Harr.) 479, 479 (1847).

97. *Id.*

98. U.S. CONST. art. IV, § 4.

> lished limits to the exercise of legislative power, beyond which it cannot constitutionally pass. . . .
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> . . . Wherever the power of making laws, which is the supreme power in a State, has been exercised directly by the people under any system of polity, and not by representation, civil liberty has been overthrown.[99]

The argument that direct democracy violates the republican guarantee clause was presented to the United States Supreme Court in *Pacific States Telephone and Telegraph Co. v. Oregon*.[100] The company challenged a tax measure enacted through the initiative process, arguing that:

> The initiative is in contravention of a republican form of government. Government by the people directly is the attribute of a pure democracy and is subversive of the principles upon which the Republic is founded. Direct legislation is therefore repugnant to that form of government with which alone Congress could admit a state to the Union, and which the state is bound to maintain.[101]

The Court did not reach the merits of this argument, holding that the issues raised were "in their very essence . . . political and governmental," and therefore nonjusticiable.[102] Although the Court's reasoning has been criticized,[103] its holding has endured.[104]

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99. Rice v. Foster, 4 Del. (4 Harr.) at 485–86. State courts did not reach uniform results in reviewing local option laws. *Compare, e.g.*, Parker v. Commonwealth, 6 Pa. 507 (1847) (holding local option law invalid under Pennsylvania constitution) *with* Caldwell v. Barrett, 73 Ga. 604 (1884) (upholding constitutionality of local option laws).

100. 223 U.S. 118 (1912).

101. *Id.* at 138.

102. *Id.* at 151.

103. The thrust of the criticism is that the Court overstated the challenge that was being made. The Court asserted that:

> [t]he propositions each and all proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon. This being so, the contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed, the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is, at one and the same time, one and the same government, which is republican in form, and not of that character.

Id. at 141. In fact, the telephone company was only challenging a particular statute; nonetheless, to accept the argument that the statute was invalid because enacted by initiative would invalidate all statutes so enacted. *See* Bonfield, *supra* note 73, at 555; Sager, *supra* note 69, at 1403–04; Seeley, *supra* note 43, at 905–10.

104. *See* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565 (1916); Kiernan v. Portland, 223 U.S. 151 (1912). Although the Court, in Baker v. Carr, 369 U.S. 186 (1962), and Reynolds v. Sims, 377 U.S. 533 (1964), held that the nonjusticiability of "republican form" questions is the result of the Court's discretionary application of the political question doctrine, and not of constitutional compulsion, *Pacific States'* rejection of a direct challenge to the initiative as nonjusticiable has not been impaired. *See* Bell, *supra* note 17, at 27 n.99.

Since *Rice v. Foster*, state courts which have reached the merits of whether direct democracy is inconsistent with a republican form of government generally have upheld the use of initiatives.[105] The issue arose in Oregon nine years before the Supreme Court decided *Pacific States*. In *Kadderly v. City of Portland*[106] the state supreme court held that "the initiative and referendum amendment [to the Oregon Constitution] does not abolish or destroy the republican form of government, or substitute another in its place."[107] The Oklahoma Supreme Court cited *Kadderly* in reaching the same conclusion five years later.[108]

The courts thus rejected the republican guarantee clause as a doctrinal device for preventing abuses of the initiative process.[109] In order to uphold a direct "republican form" challenge to a statute enacted by the people, a court would have had to invalidate the initiative process and all laws enacted thereunder. Given that article IV, section 4, does not by its terms compel such a result,[110] and particularly in light of the democratic virtues of the initiative process,[111] it is not surprising that the courts avoided that result.

B. The Equal Protection Clause of the Fourteenth Amendment

On several occasions the United States Supreme Court has found that certain provisions for direct democracy violated the fourteenth amendment. Although the doctrinal bases for striking down such provisions, if expanded, had the potential to prevent abuses of direct democracy, they shared the infirmity of the republican guarantee clause of leading to more extensive prohibition of direct democracy than is necessary to curb potential abuses. They have been limited in application by the Court for a variety of reasons, including a general deference to the processes of direct democracy.

105. *See* Note, *Constitutionality of the Referendum*, 41 YALE L.J. 133 (1931).

106. 44 Or. 118, 74 P. 710 (1903).

107. *Id.*, 74 P. at 720.

108. *Ex parte* Wagner, 21 Okla. 33, 95 P. 435 (1908).

109. *But see* Seeley, *supra* note 43, at 909.

> A system that subjects pro-minority group legislation already passed by representative government to approval by absolute majority vote is similarly an obvious denial of a republican form of government. It is not representative at all, and it subjects the minority to exactly the kind of capriciousness that the guarantee clause was intended to prevent. Thus, the discrimination-prone referendum should not be liable to political question objections for lack of an applicable standard.

Id. (footnotes omitted). Despite the theoretical possibility of this limited use of article IV, section 4, Professor Seeley himself thought it "unlikely that the Court will abandon its traditional view of the guarantee clause." *Id.* at 910.

110. *See* Bonfield, *supra* note 73, at 558.

111. *See* notes 80–84 and accompanying text *supra*.

In *Hunter v. Erickson,*[112] the Supreme Court held that a provision of the city charter of Akron, Ohio violated the equal protection clause of the the fourteenth amendment. The provision prohibited "the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of voters of Akron."[113] The Court's holding was premised on the explicit racial classification drawn by the charter provision. By making popular approval of ordinances aimed at eliminating racial discrimination in housing mandatory, the provision "disadvantage[d] those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor."[114]

Writing for the Court, Justice White stated:

> [A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot, [the charter provision] places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others.[115]

This recognition in *Hunter* that a requirement of public approval of legislation places special burdens on minorities suggested that the equal protection clause might offer protection whenever any legislation involving minority group interests was subject to popular vote.[116]

However, two factors severely limit the effect of *Hunter*. First, *Hunter's* equal protection analysis was triggered because the provision for mandatory referenda was applicable only to a particular class of legislation.[117] Typical, nonmandatory initiative and referendum provisions,

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112. 393 U.S. 385 (1969).

113. *Id.* at 386.

114. *Id.* at 391. Justice Harlan, in a concurring opinion, spelled out the traditional equal protection analysis that was the basis for the holding:

> Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest. Since the charter amendment is discriminatory on its face, Akron must bear a far heavier burden of justification than is required in the normal case.

Id. at 395. *See* Seeley, *supra* note 43, at 893–96.

115. 393 U.S. at 391 (citations omitted).

116. *See* Seeley, *supra* note 43, at 895–96.

117. The court stated that

> Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its

which are invoked by petition regardless of the subject matter of the legislation involved,[118] would not run afoul of *Hunter*, even though minority group interests may be adversely affected.

Second, the classification in the Akron ordinance was based on race, a special concern of the fourteenth amendment.[119] When later presented with a challenge to a state constitutional provision requiring mandatory referenda prior to commencement of low rent public housing projects, the Court in *James v. Valtierra*[120] limited *Hunter* to referenda provisions which rest on racial classifications.[121] *Hunter* thus affords judicial protection from mandatory referenda provisions aimed at legislation which would prevent discrimination against racial, religious, or ethnic minorities, but it does not afford protection from the customary nonmandatory use of the initiative process.[122]

The Court's decision in *James* is significant not only for its doctrinal content, but also for what it indicates about the Court's attitude toward direct democracy. In sustaining article XXXIV of the California State Constitution, the Court, in an opinion by Justice Black, praised the referendum process: "Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice. . . . This procedure for democratic decisionmaking does not violate the constitutional com-

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behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

393 U.S. at 392–93 (citations omitted).

118. *See* note 1 *supra*.

119. *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 394 (1873). More recently, the Court has stated that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." Washington v. Davis, 426 U.S. 229, 239 (1976).

120. 402 U.S. 137 (1971).

121. *Id.* Justice Black, who had dissented in *Hunter*, wrote for the Court:

> Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." [393 U.S.] at 391. . . . The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. Cf. Gomillion v. Lightfoot, 364 U.S. 339 (1960). The present case could be affirmed only by extending *Hunter*, and this we decline to do.

Id. at 141. *See* Bell, *supra* note 17, at 3–6. *Cf.* Johnson v. New York State Educ. Dep't, 449 F.2d 871, 878 (2d Cir. 1971) (sustaining statute providing financial assistance for purchase of textbooks in grades seven through 12, but requiring voter approval of tax to pay for textbooks in grades one through six; claim of unfair burden on parents of children in lower grades "clearly foreclosed" by *James*).

122. The doctrinal content of *Hunter* was significant in a subsequent case involving an initiative. In Seattle School Dist. v. Washington, No. C78–753V (W.D. Wash. June 15, 1979) (mem.), *appeal docketed*, No. 79–4676 (9th Cir. Sept. 19, 1979), the constitutionality of a school busing initiative was at issue. The initiative adopted by the Washington voters prohibited the assignment of school children beyond the next-nearest neighborhood school, except for certain purposes. Racial

mand that no State shall deny to any person 'the equal protection of the laws.' "[123]

Arguably, this praise was dictum, since Justice Black found doctrinal support for his position in the lack of any explicit racial classification in article XXXIV.[124] But in a dissenting opinion, Justice Marshall observed:

> The Court, however, chooses to subject the article to no scrutiny whatsoever and treats the provision as if it contained a totally benign, technical economic classification. . . . Yet after observing that the article does not discriminate on the basis of race, the Court's only response to the real question in these cases is the unresponsive assertion that 'referendums demonstrate devotion to democracy, not to bias, discrimination or prejudice.' It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect.[125]

Thus, in addition to limiting the scope of *Hunter, James* stands as a statement of the Court's deference to the processes of direct democracy.[126]

C. The Due Process Clause of the Fourteenth Amendment

The due process clause of the fourteenth amendment has also been a device for judicial limitation of direct democracy. In *Eubank v. City of Richmond*[127] and in *Washington* ex rel. *Seattle Title Trust Co. v. Roberge*,[128] the Supreme Court held that zoning ordinances which delegated zoning decisions to property owners violated the due process clause.

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integration was not among the permissible purposes. *Id.* at 3–4. The court relied on *Hunter* in holding that by treating assignments for racial balancing differently than assignments for other purposes, the initiative drew a racial classification prohibited by the fourteenth amendment. *Id.* at 4.

123. 402 U.S. at 141, 143.

124. *Id.* at 141.

125. *Id.* at 145 (Marshall, J., dissenting).

126. One district court has noted that referenda have been accorded special deference, and that cases involving referenda therefore are not generally applicable:

> [C]ases involving referendums, though helpful in terms of standing, jurisdiction, and judicial attitudes towards discrimination in housing, are a category unto themselves. James v. Valtierra . . . and Ranjel v. City of Lansing . . . , heavily relied on by defendant are thus not dispositive of the issues. The voting rights involved in those cases inject quite a different constitutional ingredient, one not present in pure zoning cases, and courts are quite understandably more willing to uphold referendum procedures rather than second guess or interefere with the fundamental suffrage right.

Sisters of Providence of St. Mary of the Woods v. City of Evanston, 335 F. Supp. 396, 403 (N.D. Ill. 1971) (mem.).

127. 226 U.S. 137 (1912).

128. 278 U.S. 116 (1928).

The ordinance involved in *Eubank* permitted the owners of two-thirds of the property abutting any street to set the building line beyond which construction could not take place. The Court focused on due process considerations in holding the ordinance unconstitutional:

> The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised: in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously.[129]

Similarly, in *Roberge* the Court held invalid a Seattle ordinance permitting construction of a philanthropic home for the aged "when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building."[130] Noting that the exercise of zoning power by the property owners was not controlled by any standard and was not reviewable, the Court held that the attempted delegation violated the due process clause of the fourteenth amendment.[131]

Eubank and *Roberge* conceivably could protect minorities from abuses of direct democracy by prohibiting the use of initiatives and referenda, as deprivations of procedural due process, where the legislation involved could impair property or liberty interests.[132] However, the Supreme

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129. 226 U.S. at 144–45.

130. 278 U.S. at 118.

131. *Id.* at 123. In Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917), decided after *Eubank* but before *Roberge*, the Court upheld an ordinance permitting the erection of billboards only upon the approval of a majority of the affected property owners. The *Roberge* Court distinguished *Cusack*, noting that there "[t]he facts found were sufficient to warrant the conclusion that such billboards would or were liable to endanger the safety and decency of such districts." 278 U.S. at 122. Because the ordinance in *Cusack* was seen as providing a means by which a legislative restriction legitimately imposed could be rescinded by the people, it did not carry the due process implications of the ordinances involved in *Eubank* and *Roberge*, which gave the eligible voters the power to arbitrarily impose a restriction on an individual's use of property. *See* Sager, *supra* note 69, at 1405–06.

132. This would require an expansion of current doctrine, since procedural due process requirements extend only to adjudicative determinations, and not to legislative actions. *Compare* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) *with* Londoner v. Denver, 210 U.S. 373 (1908). *See Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1508 (1978). The distinction has been preserved in its application to initiatives by the California Supreme Court. San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 520, 118 Cal. Rptr. 146 (1974) (initiative procedure can be used to adopt a zoning ordinance constituting a general legislative, as distinct from adjudicative, act).

Professor Sager, however, has advocated a "due process of lawmaking":

> The claim for such a process requirement seems quite strong when two conditions are met: first, where substantial constitutional values are placed in jeopardy by the enactment at issue; and second, where substantive review of the enactment by the judiciary is largely unavailable and hence cannot secure these constitutional values.

Court limited the effect of these cases in *City of Eastlake v. Forest City Enterprises, Inc.*,[133] where it held that exercise of the zoning power by the people at large does not violate the due process clause.

The issue facing the Court in *Eastlake* was "whether a city charter provision requiring proposed land use changes to be ratified by 55% of the votes cast violate[d] the due process rights of a landowner who applies for a zoning change."[134] The Ohio Supreme Court, relying on *Eubank* and *Roberge*, held that the ordinance violated the due process clause of the fourteenth amendment.[135]

The United States Supreme Court reversed.[136] The Court noted that, to be subject to Ohio's referendum procedure, zoning action must be legislative in nature, and that the Supreme Court of Ohio had expressly found the specific action being challenged to fit that definition.[137] This "legislative" characterization was apparently sufficient to enable the majority to dismiss, without discussion, any claim that procedural due process requirements should apply.[138] The Court instead focused on, and rejected, the argument that the referendum provision was a standardless delegation of legislative power. Cases in which the delegation doctrine was articulated[139] "involved a delegation of power by the legislature to regulatory bodies, which are not directly responsible to the people; [the] doctrine is inapplicable where, as here, rather than dealing with a delega-

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Sager, *supra* note 69, at 1418. Professor Sager's proposal seems designed to meet the problems associated with popular exercise of zoning power, *see id.* at 1418–23, and would help prevent majoritarian abuse of that power. For additional discussion of direct democracy and zoning, see *Developments in the Law—Zoning*, *supra* at 1528–42; Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74 (1976); Note, *supra* note 11; Note, *The Proper Use of Referenda in Rezoning*, *supra* note 94.

133. 426 U.S. 668 (1976).

134. *Id.* at 670. While addressing the due process issue, the Court avoided any explicit recognition of the equal protection issues raised by the use of popular decisionmaking, notwithstanding that the case "presented the issue of direct democracy in almost unmistakable form." Sager, *supra* note 69, at 1408.

135. Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).

136. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. at 672. For criticism of the Court's decision, see, *e.g.*, Sager, *supra* note 69; Note, *supra* note 94, at 828–31.

137. 426 U.S. at 673.

138. *See* note 132 *supra*. The dissenters concluded that procedural due process requirements were applicable, because the case involved "the status of a single small parcel owned by a single 'person.' " 426 U.S. at 680 (Powell, J., dissenting). Justice Stevens argued that "the opportunity to apply for an amendment [of the zoning ordinance] is an aspect of property ownership protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 683 (Stevens, J., dissenting).

139. The Court cited cases (*e.g.*, Yakus v. United States, 321 U.S. 414 (1944)) holding that "a congressional delegation of power to a regulatory entity must be accompanied by discernible standards." 426 U.S. at 675.

tion of power, we deal with a power reserved by the people to themselves."[140] The Court distinguished *Eubank* and *Roberge* as involving a delegation "to a *narrow segment* of the community, not to the people at large."[141]

The Court's decision in *Eastlake* thus substantially limits the force of any due process challenge to direct democracy.[142] In addition, *Eastlake,* like *James,* reflects the Court's deferential posture toward direct democracy. In rejecting the due process challenge to the referendum provision, the Court characterized the referendum as " 'an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives,' "[143] and "a classic demonstration of 'devotion to democracy.' "[144] As a result of this posture, judicial prohibition of the use of initiatives or referenda as violative of either the equal protection or due process clause of the fourteenth amendment is an unlikely source of protection for those threatened with majoritarian abuse of direct democracy.[145]

IV. JUDICIAL REVIEW OF LAWS ENACTED BY POPULAR VOTE—A PROPOSED DOCTRINAL FRAMEWORK

A. Current Status of Judicial Review of Laws Enacted by Popular Vote

In *Lucas v. Forty-Fourth General Assembly,*[146] the United States Supreme Court invalidated a state legislative apportionment plan which had been adopted through the initiative process. With regard to the constitutional significance of enactment by the people, the Court stated: "Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a

140. *Id.* (footnote omitted).

141. *Id.* at 677 (emphasis in original).

142. State courts are a possible forum for such due process arguments. However, on remand, the Ohio Supreme Court declined to depart from the outcome reached by the United States Supreme Court. Forest City Enterprises, Inc. v. City of Eastlake, 48 Ohio St. 2d 47, 356 N.E.2d 499, 500 (1976) (per curiam) (on remand).

143. 426 U.S. at 678 (quoting from Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291, 294 (9th Cir. 1970)).

144. *Id.* at 679.

145. *See* notes 133–142 and accompanying text *supra.*

After analyzing *Eastlake* in conjunction with Warth v. Seldin, 422 U.S. 490 (1975), Professor Sager concluded that the two cases "can be understood as consistent products of the view that the legislative facilitation of the aggregate will of the members of a community is to predominate over virtually all other possible concerns in the land use planning process. . . . [M]ajority will—however insular, unjust, or irrational—prevails." Sager, *supra* note 69, at 1425.

146. 377 U.S. 713 (1964).

court of equity to refuse to act. . . . A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."[147] According to the Court in *Lucas,* laws enacted by popular vote should be subject to the same level of judicial review as legislatively enacted measures.[148]

This degree of protection for adversely affected minorities was sufficient in *Reitman v. Mulkey.*[149] There the Court held unconstitutional a provision of the California State Constitution,[150] adopted by initiative, which prohibited the state from denying the right of any person to sell, lease, or rent his real property to such person as he, in his absolute discretion, chooses. The Court affirmed the holdings of the California Supreme Court that the intent of the provision was to "authorize private racial discriminations in the housing market,"[151] and that the provision would "significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment."[152] The Court specifically noted that "[t]he assessment of §26 by the California court is similar to what this Court has done in appraising state statutes or other official actions in other contexts."[153] The use of an intitiative to adopt the provision did not enter into the Court's opinion.[154]

Notwithstanding the protection afforded minority rights in *Lucas* and *Reitman,*[155] judicial review of popularly enacted legislation is presently

147. *Id.* at 736–37 (citation and footnote omitted).

148. *See* Hunter v. Erickson, 393 U.S. 385, 392 (1969) (Court engages in scrutiny of the justifications offered in behalf of legislation enacted by popular referendum).

149. 387 U.S. 369 (1967). *See also* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (law enacted by initiative which required education in public schools held unconstitutional).

150. CAL. CONST. art. I, § 26.

151. 387 U.S. at 376.

152. *Id.*

153. *Id.* at 379. The major issue in the case was presented as a state action question. The majority concluded that "the Section will significantly encourage and involve the State in private discriminations." *Id.* at 381. The dissenters accused the Court of "contriving a new and ill-defined constitutional concept." *Id.* at 396 (Harlan, J., dissenting). For discussions of the case, see Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14,* 81 HARV. L. REV. 69 (1967); Note, *The Unconstitutionality of Proposition 14: An Extension of Prohibited "State Action,"* 19 STAN. L. REV. 232 (1966).

154. Justice White's majority opinion noted that the provision was adopted through the initiative process, *id.* at 370–71, but made no further mention of that fact. Justice Douglas, in a concurring opinion, responded to the argument that the Court should not upset an enactment of the people with the quotation from James Madison which is included in note 65 *supra. Id.* at 387.

155. Several district courts relied on *Reitman* to enjoin exercises in direct democracy designed to repeal or prevent the enactment of open housing legislation. *See* Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich.), *rev'd,* 417 F.2d 321 (6th Cir.), *cert. denied,* 397 U.S. 980; Holmes v. Leadbetter, 294 F. Supp. 991 (E.D. Mich. 1968); Otey v. Common Council, 281 F. Supp. 264 (E.D. Wis. 1968). The primary basis for the district courts' holdings in these cases was that the referendum would constitute state action authorizing or encouraging racial discrimination. This ap-

inadequate because it fails to consider the potential abuse of minority interests presented by such legislation. Except in those cases where some heightened level of scrutiny is triggered, classifications contained in legislation are subject only to cursory equal protection examination under the "rational basis" test.[156] Central to this branch of equal protection analysis is a judicial presumption of constitutionality, premised upon the safeguards inherent in the representational legislative process.[157] To treat initiatives in the same manner as other legislation is to afford them a presumption of constitutionality despite the absence of the very safeguards upon which that presumption is based.[158]

Moreover, even if a law enacted by initiative clearly has a dispropor-

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proach was rejected by the Sixth Circuit in *Ranjel* and by the Fourth Circuit in Spaulding v. Blair, 403 F.2d 862 (4th Cir. 1968). *See* Seeley, *supra* note 43, at 891–93 (analysis of *Spaulding*).

156. The test has recently been explained as follows:

> [T]his case, like equal protection cases recurringly do, involves a legislative classification contained in a statute. . . . In an equal protection case of this type . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

Vance v. Bradley, 440 U.S. 93, 110–11 (1979). *See* Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955) (statute upheld as against due process attack on the basis of what legislature "might have concluded"); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16–3 (1978) (discussion of the "conceivable basis" test).

157. "In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977). *See also* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 44 (1972).

A different justification for the presumption of constitutionality afforded legislative actions is premised on the doctrine of separation of powers. Judicial deference to the legislature results not because of any safeguards in the legislative process, but simply because it is not the function of the courts to legislate. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 778 (1977) (Rehnquist, J., dissenting). If courts defer to legislatures in order to preserve a separation of powers, the same degree of deference should be afforded to the people when they legislate through the initiative process.

However, extreme judicial deference, *see* note 156 *supra*, in the case of an initiative is inconsistent with the protections of the fourteenth amendment:

> The Equal Protection Clause of [the fourteenth] amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Reed v. Reed, 404 U.S. 71, 75–76 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). *See* Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). By creating a strong presumption of constitutionality at the outset, extreme judicial deference virtually eliminates the requirement of rational classification, and can be justified only by safeguards inherent in the representative legislative process.

158. *See* Part II *supra*.

tionate impact on a minority group protected by the fourteenth amendment, current equal protection doctrine will be difficult to apply if the law is neutral on its face.[159] An equal protection challenge to a facially nondiscriminatory statute requires a showing not merely of a discriminatory impact, but also of discriminatory motive,[160] and hence an inquiry into legislative purpose is mandated. Because that inquiry often would be speculative in the case of legislation enacted by vote of the people on an initiative,[161] effective judicial review is improbable.

The adequacy of judicial review of laws enacted by initiative is also open to question because of the Court's position in *James v. Valtierra*[162] and *City of Eastlake v. Forest City Enterprises, Inc.*[163] The deferential attitude toward the exercise of popular sovereignty which these cases exhibited,[164] coupled with the traditional deference of the rational basis test, makes it unlikely that the courts, in reviewing laws enacted by ini-

159. *See* Sager, *supra* note 69, at 1421. *See also* Yarborough v. City of Warren, 383 F. Supp. 676 (E.D. Mich. 1974) (equal protection challenge to referendum terminating urban renewal program rejected).

160. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977); *cf.* Washington v. Davis, 426 U.S. 229, 239–42 (1976) (plaintiffs' claim based on fifth amendment).

161. The same problem is present in judicial review of zoning ordinances in which a court is called upon to apply a standard of arbitrary and capricious conduct. *See* Note, *The Proper Use of Referenda in Rezoning, supra* note 94, at 837–38. *Cf.* Kanter Corp. v. City of Forest Park, 53 Ohio Misc. 4, 371 N.E.2d 848 (Ct. C.P. 1977) (upholding denial of zoning amendment by referendum).

Anything more than speculation as to intent, motivation, or factors considered by the voters would seem to involve an impermissible invasion of the voting booth:

> If the voters' purpose is to be found here, then, it would seem to require far more than a simple application of objective standards. If the true motive is to be ascertained not through speculation but through a probing of the private attitudes of the voters, the inquiry would entail an intolerable invasion of the privacy that must protect an exercise of the franchise.

Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291, 295 (9th Cir. 1970). *See* Sager, *supra* note 69, at 1421. The courts have resorted to factors other than the intent of the voters to ascertain legislative intent behind an initiative. *See* note 52 and accompanying text *supra*.

The problem of determining the intent behind an initiative was confronted in Seattle School District v. State of Washington, No. C78–753V (W.D. Wash. June 15, 1979) (mem.), *appeal docketed*, No. 79–4676 (9th Cir. Sept. 19, 1979). For a discussion of the case, see note 87 *supra*. The court observed that "as to [the] subjective intent [of the voters] the secret ballot raises an impenetrable barrier." Mem. at 6. However, the court used the five factors enunciated in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), to determine the intent behind the initiative. The court concluded that: "The racially disproportionate impact of the initiative when coupled with its historical background, the sequence of events leading to its adoption and the departure from the procedural norm demonstrate that a racially discriminatory intent or purpose was at least one motivating factor in the adoption of the initiative." Mem. Op. at 11–12.

162. 402 U.S. 137 (1971).

163. 426 U.S. 668 (1976).

164. *See* notes 123–26 and 142–45 and accompanying text *supra*.

tiative, will provide an adequate check on potential abuses of direct democracy.

B. The Doctrinal Justification for Heightened Scrutiny

In *United States v. Carolene Products Co.*,[165] Justice Stone, writing for the Court, suggested several areas where legislation should not be accorded the usual presumption of constitutionality, but instead should be subjected to more exacting judicial review. Footnote 4 states in part:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[166]

In suggesting that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" should be subjected to more exacting scrutiny, Justice Stone cited cases involving "restrictions upon the right to vote, . . . restraints upon the dissemination of information, . . . interferences with political organizations, . . . [and] prohibition of peaceful assembly . . . ."[167] The principle he established is that the fourteenth amendment requires judicial cognizance of the effect of legislation on the operation of political processes, and that, when that effect is to constrict political processes which serve as checks on undesirable legislative actions, heightened scrutiny is justified.

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165. 304 U.S. 144 (1938).

166. *Id.* at 152–53 n.4. It is apparent from the language of the footnote that heightened scrutiny is closely related to the nature of the political process which produced the legislation in question. This emphasis on political process has been observed by Professor Ely:

> [B]oth Carolene Products themes are concerned with participation: They ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.

Ely, *supra* note 64, at 456.

167. 304 U.S. at 152–53 n.4.

These same considerations justify heightened judicial scrutiny of initiatives.[168] Initiatives reduce minority input into the legislative process and restrict the process of representative government, which was designed, in part, to protect minority interests. While a minority still participates in the legislative process when an initiative is used to enact a law, and thus is not deprived of a voice in the process to the same extent as in the case of a denial of voting rights, that participation is constricted, since there is no assurance of consideration of minority viewpoints and no possibility of compromise.[169] Similarly, while speech and assembly intended to affect the outcome of an initiative are not restricted per se, their effectiveness is curtailed.

The final paragraph of footnote 4 explicitly refers to a condition "which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities" as one which may call for heightened scrutiny.[170] Minorities are normally protected in the legislative process by their representation in legislative assemblies and their right to have their views considered therein. Six years after its *Carolene Products* decision, the Court had occasion to comment upon the duty of a legislature to protect the interests of all of its constituents:

> It is a principle of general application that the exercise of granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf. . . .
>
> . . . [T]he Constitution imposes [a duty] upon a legislature to give equal protection to the interests of those for whom it legislates.[171]

In the case of an initiative, where each individual can vote his own preference, there is no room for an assumption that the majority gives equal protection to the interests of the minority. Because initiatives do not merely curtail, but circumvent political processes (representative government) which are relied upon to protect minorities, they should be subject to heightened scrutiny under the rationale of the *Carolene Products* footnote.

Professor Tribe has noted that "the tendency has been to explain the occasions for strict scrutiny in terms of reasons to avoid deference to pol-

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168. Justice Black's majority opinion in James v. Valtierra, 402 U.S. 137, 142 (1971), noted that "a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection." The argument here is not that the initiative procedure is itself a denial of equal protection, but that because it lacks fundamental safeguards for minority rights, resulting legislation should be subject to careful judicial review under the equal protection clause.

169. *See* Part II–B *supra*.

170. *See* text accompanying note 166 *supra*.

171. Steele v. Louisville & N.R.R., 323 U.S. 192, 202 (1944).

itics."[172] Where such reasons exist, as here, a court could either invalidate the political process involved, or it could "leav[e] the political process intact but strik[e] down particular political outcomes as insufficiently justified . . . ."[173] The latter approach should be employed in reviewing legislation enacted by initiative.[174]

C. *Proposed Standard of Review*

The standard of review for laws enacted by initiative should require statutory classifications to have a substantial relationship to a legitimate, articulated state purpose.[175] This standard would protect minorities from majoritarian abuse of direct democracy in two ways. First, the requirement that the purpose of the law be articulated[176] should avoid problems involved in an inquiry into the voters' intent[177] and promote accountability of the initiative process.[178] "After-the-fact rationaliza-

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172. L. TRIBE, *supra* note 156, § 16-6, at 1001.

173. *Id.*

174. The California court, in holding a rent control ordinance adopted by initiative to be an unreasonable exercise of local police power, stated: "Judicial protection of landlords' rights with respect to rent control enactments such as the present charter amendment lies not in placing arbitrary restrictions upon the initiative power but in measuring the substance of the enactment's provisions against overriding constitutional and statutory requirements." Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 146, 550 P.2d 1001, 1014, 130 Cal. Rptr. 465, 478 (1976).

175. The "substantial relationship" test has been used by the Court in reviewing some types of legislation. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 279 (1979) ("classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives"). The standard has been characterized as an intermediate level of review, L. TRIBE, *supra* note 156, at § 16-30, or as an element of "newer equal protection," Gunther, *supra* note 157. Although the Court has applied it in reviewing only certain classifications, most notably those based on gender, the substantial relationship test should be applied in every case in which the interests of a minority group are adversely affected through the initiative process. *See* note 181 *infra*.

176. An articulated purpose could be found in a preamble to, or the text of the legislation, in statements by proponents in an official voters' pamphlet, or in an opinion of a state court or attorney general. Professor Gunther has argued that:

> If the Court were to require an articulation of purpose from an authoritative state source, rather than hypothesizing one of its own, there would at least be indirect pressure on the legislature to state its own reasons for selecting particular means and classifications. And that pressure would further the political process aims of the moderate intervention model.

Gunther, *supra* note 157, at 47. A requirement of an articulated purpose for initiatives likewise should bring pressure to bear on proponents to state their own purposes for the legislation.

Where there is evidence as to the actual intent of the voters it also should be considered. *See* Reitman v. Mulkey, 387 U.S. 369, 378-79 (1967) (accepting finding of California Supreme Court, "armed as it were with the knowledge of the facts and circumstances concerning the passage and potential impact of § 26," that the purpose of the measure was to authorize and encourage private discrimination); note 178 *infra*.

177. *See* note 161 and accompanying text *supra*.

178. Professor Tribe has described the conventional application of the requirement that a law be justified in light of its actual purposes:

tions"[179] should not be permitted to justify an invasion of minority interests by a majority.

Second, the requirement of a substantial relationship between the means employed and the objective to be achieved by a law enacted by initiative would provide an effective restraint upon arbitrary exercises of majority power. Professor Gunther has observed:

> A common defense of extreme judicial abdication is that the state has considered the contending considerations. Too often the only assurance that the state has thought about the issues is the judicial presumption that it has. Means scrutiny would provide greater safeguards that the presumed process corresponds to reality—and would give greater content to the underlying premise for deferring to the state's resolution of the competing issues.[180]

"Means scrutiny" of initiatives would prevent majorities from promoting their own interests without adequately considering minority interests,[181] and thus would be an appropriate check on the inherent dangers of direct democracy.[182]

When either the nature of the classification challenged or the character of the deprivation attacked warrants intermediate scrutiny, 'inquiry into the actual purposes' of the rule, as illuminated by its language, its structure, and its history, warrants the rule's invalidation when it can be defended only with considerations that did not in fact contribute to its enactment. In part, such a principle can be explained as enhancing political accountability: a legislature or agency that cannot count on the post-hoc rationalizations of those charged with responsibility to enforce and defend its enactments or promulgations might be motivated to ventilate more fully the considerations underlying those enactments.

L. TRIBE, *supra* note 156, § 16–30, at 1086 (footnotes omitted).

However, an articulated purpose for an initiative does not guarantee that that purpose motivated the majority in enacting the law. In certain cases, where it would be unreasonable to conclude that the law was enacted for the stated purpose, a court would be justified in rejecting the purpose advanced. "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Weinberger v. Weisenfeld, 420 U.S. 636, 648 (1975). *See* Eisenstadt v. Baird, 405 U.S. 438, 449 (1972) (deterrence of premarital sex could not "reasonably be regarded" as purpose of state statute prohibiting sale or distribution of contraceptives to non-married persons).

179. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 653 (1974) (Powell, J., concurring in result).

180. Gunther, *supra* note 157, at 44.

181. Cases in which the Court has invalidated laws or regulations because of a lack of substantial relationship between means and ends have involved the same type of majoritarian disregard for individual and minority rights which is threatened by use of the initiative process. *See* Trimble v. Gordon, 430 U.S. 762 (1977) (concern for orderly settlement of estates did not justify rule making it impossible for illegitimate children to inherit by intestate succession from their fathers); Craig v. Boren, 429 U.S. 190 (1976) (concern for public health and safety did not justify prohibition of sales of beer to 18–21 year old males while permitting sales to 18–21 year old females); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (concern for administrative convenience did not justify absolute prohibition of employment of aliens).

182. The "substantial relationship" standard advocated is not intended to provide a mechanical test to be applied to initiatives, but is designed to assure that effective means scrutiny takes place and to reject the extreme judicial deference associated with the rational basis standard. *See* note 156 *su-*

V. CONCLUSION

The use of direct democracy to enact legislation presents a clash of two fundamental values which are inherent in American political theory: (1) that the people are sovereign and should govern by majority rule, and (2) that individual and minority rights should be protected from majoritarian abuse.[183] The reconciliation achieved by the framers of the Constitution was centered upon representation—the people were sovereign, but actual conduct of government was delegated to representatives who would represent the interests of all the people. The courts had the responsibility for providing the final layer of protection for individual and minority rights in reviewing the constitutionality of governmental action.

Initiatives arguably enhance the people's role in government,[184] but they also undermine protections for individual and minority interests. Prohibition of popular enactment of legislation would avoid the dangers to minority rights but would unnecessarily sacrifice the democratic and educational values of the initiative process.[185] However, the increasing use of initiatives, coupled with judicial deference to expressions of majority will, needlessly endangers minority rights.

Heightened scrutiny of laws enacted by popular vote provides an ap-

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pra. The concern is primarily with the intensity or level of judicial review of initiatives. "Decision in this context, as in others, is very much a 'matter of degree,' . . . very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' " Storer v. Brown, 415 U.S. 724, 730 (1974) (sustaining a provision of the California Election Code).

For example, initiatives aimed at reform of representative governmental processes most likely would be sustained under the substantial relationship test. Campaign reform, open public meetings acts, and other legislation aimed at curbing political abuses advance important state interests, and the only 'minority' interest adversely affected in many cases would be the interest of the wealthy in purchasing political influence. Thus, one of the major uses of initiatives, *see* notes 20–22 and accompanying text *supra*, and the use most consistent with the rationale for direct democracy—providing a popular check on representative government—would not be hampered by heightened judicial scrutiny. *Cf.* Fritz v. Gorton, 83 Wn. 2d 275, 517 P.2d 911 (1974) (upholding public disclosure law enacted by initiative).

Conversely, initiatives which are aimed at discrete and disadvantaged minority groups (whether or not the classifications drawn trigger heightened scrutiny under existing equal protection analysis) more likely would be subject to judicial invalidation, particularly as the importance of the interest affected increases and the substantiality of the relationship of the classification to a legitimate state purpose decreases. *See* note 181 *supra*.

183. "[T]he democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future." Reynolds v. Sims, 377 U.S. 533, 566 (1964).

184. *But see* notes 86–91 and accompanying text *supra*.

185. There are circumstances where judicial review of the results of the initiative process would be impractical as an effective restraint on direct democracy. In these instances prohibition of the initiative process, under either the due process or equal protection clause of the fourteenth amendment, would be appropriate. *See* Parts III—B & C *supra*.

propriate reconciliation of these competing values. Initiatives would remain available as avenues for political reform and expression of popular will, while at the same time protection would be provided against majoritarian abuse of minority interests. The task the courts would be called upon to perform, evaluating means in light of articulated purposes, is one they have undertaken in other settings,[186] and it is consistent with the role of the judiciary as protector of individual and minority rights.[187] Fulfillment of that task in this setting is necessary to prevent the dangers to minorities posed by circumvention of representative government and to safeguard real liberty, which is "neither found in despotism or the extremes of democracy, but in moderate governments."[188]

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186. *See* note 181 *supra.*

187. It is noteworthy that the Supreme Court's deferential posture toward direct democracy has been articulated in cases involving provisions for referenda, whereas in prior cases the Court was willing to apply more conventional standards of constitutional adjudication to invalidate particular laws enacted by initiative. *Compare* James v. Valtierra, 402 U.S. 137 (1971) *and* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) *with* Reitman v. Mulkey, 387 U.S. 369 (1967).

188. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 60, at 432 (A. Hamilton).

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