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THE REFERENDUM: DEMOCRACY'S BARRIER TO RACIAL EQUALITY

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"Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."

—Justice Hugo Black***

For most Americans, whether or not legally trained, Justice Black's statement is unexceptional, accepted as a truism in harmony with the principles of life in a free society. As proponents of referenda and initiatives never tire of asking, if voters are smart enough to elect representatives to make their laws, are they not just as able to make the laws themselves? At first glance, this seems logical. But blacks and other nonwhite groups in this society cannot afford the luxury of reliance on either truisms or the appearance of logic. Their status, success, and sometimes even survival may depend on an instant recognition of the real danger lurking behind what whites might consider "generally accepted principles." Experience is a far safer guide than rhetoric; and the experience of blacks with the referendum has proved ironically that the more direct democracy becomes, the more threatening it is.

The threat is growing. Fueled by frustration with elected representatives whose performances consistently fall far below their expenditures, voters are increasingly turning to "do-it-yourself" government. In the twenty-three states and hundreds of cities that authorize direct

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*** James v. Valtierra, 402 U.S. 137, 141 (1971).

legislation, citizens are using referenda to reject existing laws and initiatives to enact new statutes and ordinances.[1] The *New York Times* reported that "[a]cross the nation, and especially in the West, in a manner and number not seen before, the ballot is increasingly being used for recalls, initiatives, referendums and constitutional amendments that were once left to local legislatures."[2]

Senators James Abourezk, Democrat from South Dakota, and Mark Hatfield, Republican from Oregon, aware of citizen disenchantment with the unresponsive, often unwieldy, and sometimes corrupt legislative process, have taken the first steps toward introducing direct democracy on a national level. In July 1977 they cosponsored a joint resolution proposing a constitutional amendment to establish a national initiative through which federal laws could be enacted by popular vote.[3] Senator Abourezk described the initiative process as "unique among our democratic rights, [and] founded on the belief that the citizens of this country are indeed as competent to enact legislation as we are to elect public officials to represent us."[4]

To criticize the trend toward direct democracy appears reactionary, if not un-American. Yet, as suggested earlier, the growing reliance on the referendum and initiative poses a threat to individual rights in general and in particular creates a crisis for the rights of racial and other discrete minorities. This article seeks to explain why this is so and how courts might use existing constitutional principles to recognize legitimate interests in direct legislation, yet protect minority rights against majoritarian abuse.

I. THE REFERENDUM THREAT DEFINED

When Justice Black hailed referendum provisions as reflecting a devotion to democracy, and not proof of "bias, discrimination, or prejudice," his was not simply a rhetorical flourish. The statement embo-

1. Ledbetter, *More and More, Voters Write Law*, N.Y. Times, Oct. 30, 1977, § 1, at 1, col. 4.
2. *Id.*
3. S.J. Res. 67, 95th Cong., 1st Sess., 123 Cong. Rec. S11,494 (daily ed. July 11, 1977). Two days of hearings on the resolution were held before the subcommittee on the Constitution of the Senate's Judiciary Committee on December 13–14, 1977. The Initiative Resolution, which would require a constitutional amendment, is discussed in more detail at notes 79–84 and accompanying text *infra*. A similar bill has been introduced in the House by Rep. James R. Jones, Democrat of Oklahoma. H.J. Res. 658, 95th Cong., 1st Sess., 123 Cong. Rec. H12,305 (daily ed. Nov. 8, 1977).
4. 123 Cong. Rec. S11,582 (daily ed. July 11, 1977).

died a central principle of his 1971 majority opinion in *James v. Valtierra*.[5] In that case, black and Mexican-American indigents had challenged Article 34 of the California constitution, which required prior approval in a local referendum before a state public body could develop a federally financed low-rent housing project.[6] They argued that Article 34 unreasonably discriminated, explicitly against the poor and implicitly against minority groups, because it mandated special voter approval for low-income housing. A three-judge federal court held that the provision imposed a special procedural burden on the legislative capacity to assist minorities, an action previously barred by the Supreme Court in *Hunter v. Erickson*.[7] Consequently, the lower court ruled that Article 34 denied the plaintiffs equal protection.[8] On direct appeal, Professor Archibald Cox, the Jurisprudential Lecturer of 1976,[9] argued to the Supreme Court that the lower court's decision was correct.

The Supreme Court, however, reversed. Justice Black, writing for a 5–3 majority, distinguished *Hunter* as involving a referendum that specifically burdened racial minorities.[10] He perceived little evidence that the housing referendum required by Article 34 relied on "distinctions based on race."[11] Noting that mandatory referenda were required by California law for other actions, albeit not connected with housing,[12] Justice Black viewed the referendum as a legitimate vehicle for ensuring "that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues."[13] It is obvious, however, that low-income housing is not the only change in existing land uses which may adversely affect property owners and residents or lead to large expenditures of public funds. Real estate developers need not submit their plans to the populace once they obtain approval under local zoning procedures, and even governmental

5. 402 U.S. 137, 141 (1971).
6. *Id.* at 139.
7. 393 U.S. 385 (1969). *See* note 33 *infra* for a discussion of *Hunter*.
8. Valtierra v. Housing Authority, 313 F. Supp. 1, 4–6 (N.D. Cal. 1970).
9. Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791 (1976).
10. 402 U.S. at 140–41.
11. *Id.* at 141.
12. The three mandatory referenda cited by Justice Black, *id.* at 142 (constitutional amendments, certain municipal annexations, and local issuance of general-obligation, long-term bonds) are unexceptional and clearly distinguishable from Article 34.
13. *Id.* at 143.

construction projects, including mental hospitals and prisons, are not subject to popular veto.

The burden which Article 34 imposed on the poor who rely on public housing seems clear. Yet the *Valtierra* majority ignored the *de jure* wealth classification created by the referendum requirement, despite the chiding of the dissenters, who, speaking through Justice Thurgood Marshall, thought it "far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination."[14] In Justice Marshall's view, the amendment was equally violated by laws singling out the poor to bear burdens not placed on other classes of citizens.[15]

The *Valtierra* majority not only refused to subject Article 34 to "exacting judicial scrutiny"[16] because wealth was not a suspect state classification but also failed to subject Article 34 to even a token review for a rational relationship between the means employed and the state purposes purportedly served by the measure. As one commentator noted, "That referenda demonstrate a laudable devotion to principles of popular sovereignty is no justification for mandatory referenda in some instances but not in others."[17]

Judicial obsequiousness in housing referendum cases where the result does not overtly and invidiously burden racial minorities is not justified even when viewed in the light of the erosion of protection of the poor in more recent Supreme Court decisions.[18] The poor may be permitted a measure of bitter confusion over constitutional interpretations that guarantee them entry into the state of California,[19] even though their presence will impose "staggering" fiscal and other burdens,[20] yet condone their exclusion from decent housing within the state if communities, by referendum, refuse to ratify government ap-

14. *Id.* at 145.
15. *Id.*
16. *Id.* at 144-45. The dissenters urged that the measure was not merely a law of general application which may affect the poor more harshly but an explicit burden on one group of citizens based on economic status and that, therefore, the classification was suspect.
17. *The Supreme Court, 1970 Term,* 85 HARV. L. REV. 3, 126 (1971).
18. *See, e.g.,* Ross v. Moffitt, 417 U.S. 600 (1974) (state not required to appoint counsel for discretionary appeals); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (sequestration of goods valid where procedural protections provided), Ortwein v. Schwab, 410 U.S. 656 (1973) (filing fees valid for judicial review of administrative reduction in old-age benefits); United States v. Kras, 409 U.S. 434 (1973) (filing fees in bankruptcy cases not waivable for indigent petitioners).
19. Edwards v. California, 314 U.S. 160 (1941).
20. *Id.* at 173.

proved and subsidized housing the poor can afford. Perhaps they may take comfort in the fact that even if frustrated in their efforts to find low-income housing in suburban areas, where more and more job opportunities are located, they have available the impressive list of protections for indigent criminal defendants.[21] In civil actions the poor are protected by the Constitution from overreaching by creditors using wage garnishments[22] or summary repossession statutes.[23] Access to the ballot is protected against the barrier of poll taxes,[24] and access to the courthouse for a divorce may not be barred because of filing fees.[25] But access to affordable housing is not secure. The poor may be excused if they do not understand an equal protection doctrine that is consistent only in its ability to divide the Supreme Court and confuse the Court's commentators.[26]

The *Valtierra* decision was thus not only wrong; it was, in the context of other equal protection decisions affecting the poor and minority groups, also capricious because it eschewed even the most casual equal protection scrutiny. The decision can be explained only by a deep-seated faith in the sanctity of referenda results, even when the action taken seriously disadvantages minorities and the poor. As long as the disadvantage to minorities is not intentionally racial and arguably furthers a reasonable interest, judicial intervention is not forthcoming.

Justice Black's assertion that referenda demonstrate devotion to democracy was not completely unexpected. His commitment to the referendum had been amply demonstrated in earlier decisions[27] and he has since bequeathed his faith to a solid majority of the Court,

21. *See, e.g.*, Williams v. Illinois, 399 U.S. 235 (1970) (imprisonment cannot exceed statutory maximum for inability to pay fine); Anders v. California, 386 U.S. 738 (1967) (diligent representation by court-appointed counsel); Douglas v. California, 372 U.S. 353 (1963) (counsel on appeal); Gideon v. Wainwright, 372 U.S. 344 (1963) (right to counsel in criminal cases); Griffin v. Illinois, 351 U.S. 12 (1956) (free transcript on appeal). Indigents were seen as the primary beneficiaries of the right-to-counsel cases, as made clear in Miranda v. Arizona, 384 U.S. 436, 472 (1966). *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-38 to 16-40 (1978).

22. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

23. Fuentes v. Shevin, 407 U.S. 67 (1972).

24. Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

25. Boddie v. Connecticut, 401 U.S. 371 (1971).

26. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 2-4 (1977).

27. Justice Black dissented in both Reitman v. Mulkey, 387 U.S. 369 (1967), and Hunter v. Erickson, 393 U.S. 385 (1969). *See* notes 32 & 33 *infra*.

whose devotion to the referendum presents a serious danger to the civil rights of minority groups.

Chief Justice Burger relied heavily on Justice Black's *Valtierra* opinion in *City of Eastlake v. Forest City Enterprises, Inc.*[28] That decision upheld a charter provision of the suburban town of Eastlake, Ohio, which required approval of all zoning changes by a fifty-five percent referendum vote. The Ohio Supreme Court had found that the requirement frustrated a multifamily, high rise apartment project, in violation of the owner-developer's due process rights.[29] Calling the referendum process "a basic instrument of democratic government,"[30] Chief Justice Burger adopted Justice Black's view that "[t]his procedure ensures that *all the people* of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services."[31]

28. 426 U.S. 668 (1976).
29. 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).
30. *City of Eastlake*, 426 U.S. at 679.
31. *Id.* at 678–79 (emphasis by Burger, C.J.). The majority distinguished two earlier Supreme Court zoning decisions finding due process defects in delegations of legislative power to narrow segments of the community. Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) (striking down an ordinance requiring the written consent of two-thirds of the property owners within 400 feet of the proposed site of a home for the aged in a residential area); Eubank v. City of Richmond, 226 U.S. 137 (1912) (striking down city ordinance granting power to establish building setback lines to the owners of two-thirds of the property abutting any street). Chief Justice Burger stated that "the standardless delegation of power to a limited group of property owners condemned . . . in *Eubank* and *Roberge* [was] not to be equated with decision-making by the people through the referendum process." If the results of such referendum action were deemed unreasonable or arbitrary, the property owner could challenge it in the state courts. 426 U.S. at 677–79.

In a brief dissent, Justice Powell approved the general use of referenda for zoning decisions but said that its use to determine the status of a single parcel of land provided no real chance for the owner to be heard. He feared the single-parcel referendum would "open disquieting opportunities for local government bodies to bypass normal protective procedures for resolving issues affecting individual rights." *Id.* at 680.

Justice Stevens also dissented. He deemed the challenged referendum process "manifestly unreasonable" and a denial of "fundamental fairness." *Id.* at 694. Quoting from a concurring opinion in the Ohio Supreme Court's decision in the case, Justice Stevens agreed that "[t]here can be little doubt of the true purpose of Eastlake's charter provision—it is to obstruct change in land use, by rendering such change so burdensome as to be prohibitive." *Id.* at 689.

The *Valtierra* and *City of Eastlake* decisions have been criticized by zoning and planning experts who believe the voter referendum requirements in both cases, like that in Hunter v. Erickson, 393 U.S. 385 (1969), "were not imposed out of devotion to abstract principles of direct democracy. They were imposed to raise difficult, and frequently insuperable, barriers to the provision of needed lower income housing or to any change in the municipality's existing land-use regulations." ABA ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, HOUSING FOR ALL UNDER LAW 93 (R. Fishman, ed. 1978). *See also* Wolfstone, *The Case for a Procedural Due Process Limitation on the Zoning Referendum:* City of Eastlake *Revisited*, 7 ECOLOGY L.Q. 51 (1978).

Thus, in both *Valtierra* and *City of Eastlake,* the seemingly neutral, proper encouragement of direct community control implemented through a popular referendum established direct democracy as a constitutionally sanctioned vehicle for excluding the poor and, therefore, minorities. The impressive protection provided a few short years before in *Reitman v. Mulkey*[32] and *Hunter v. Erickson*[33] has been circumvented.

Justice Black, in a lone dissent to *Hunter,* had expressed regret that in a government "of the people, by the people, and for the people" a city could not constitutionally condition the enactment of a law on popular approval.[34] The language was excessive, but Justice Black had a point. Both *Reitman* and *Hunter,* to an extent not acknowledged fully by the majority opinions of Justice White, involved the difficult task of balancing the statutory rights of minorities against the majority's desire to implement its will.

Justice Harlan, concurring in *Hunter,* indicated that local communities could exercise what he considered to be their democratic right to repeal antidiscrimination laws by passing a referendum which was "grounded in neutral principles," even though it "might occasionally operate to disadvantage Negro political interests."[35] To underscore this lesson, the Court shortly thereafter denied review of a Toledo,

32. 387 U.S. 369 (1967). In the famous Proposition 14 referendum, California voters repealed the state's fair housing laws with a constitutional amendment that barred any restriction on a property owner's discretion to sell or lease to any person "in his absolute discretion." The Supreme Court found the amendment was more than a mere repeal of the fair housing laws. It had involved the state in "authorizing" and "encouraging" illegal racial discrimination in violation of the equal protection clause. *Id.* at 375–76.

33. 393 U.S. 385 (1969). The Supreme Court struck down an Akron, Ohio, charter amendment that had been proposed and quickly ratified in the wake of the city council's passage of a fair housing ordinance. The amendment required approval of any fair housing legislation "by a majority of the electors voting on the question at a regular or general election." *Id.* at 387. The Court found the law "drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." *Id.* at 390. The former were subject to more complex procedures of lawmaking than were the latter and thus were denied equal protection. *Id.* at 390–93. In effect, the provision made it virtually impossible for certain minorities to secure protective housing legislation.

34. 393 U.S. at 397.

35. *Id.* at 393–95. Again, the nation's impoverished blacks may require instruction in the niceties of constitutional law. Otherwise, they might conclude that Justice Harlan added insult to injury when he first spelled out a means of perpetuating discriminatory housing practices by enshrouding repeal of a fair housing ordinance in a mantle of neutrality, and then denigrated the hard-won—and now lost—protection by characterizing it as merely a "Negro political interest."

Ohio, city charter provision which had been used to repeal a recently enacted fair housing ordinance.[36] That charter provision enabled voters by referendum to legislate for themselves or to pass on legislation enacted by any governmental body and provided that the action taken would not be subject to amendment or repeal without a general vote of the people. The effect of the referendum was to remove the question of fair housing practices from the city council's jurisdiction and to place it in the hands of the electorate. The Ohio Supreme Court affirmed the procedure, finding no substantial constitutional question.[37]

Thus, Justice Harlan's advice has been heeded. Referendum provisions simply repealing fair housing ordinances or laws and upsetting city council or zoning commission approval to build low-income housing have become a standard means of barring minorities from suburban, residential communities.[38] The Supreme Court's approval

36. Holland v. Lucas County Bd. of Elections, 393 U.S. 1080 (1969) (petition for writ of certiorari denied).

37. Petitioner's Brief for Certiorari at 1a-23a. Holland v. Lucas County Bd. of Elections, 393 U.S. 1080 (1969) (reprinting the decisions of the Ohio courts and the text of the local provisions involved).

38. *See, e.g.*, Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9th Cir. 1970). Declining to consider the issue of racial motivation in a city-wide vote that nullified city council approval of a low-income housing project, the court rejected arguments that the referendum subjected zoning decisions to voter bias, caprice, and self-interest. *Id.* at 294-95. "A referendum . . . is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest." *Id.* at 294. The *Union City* court relied on the Fourth Circuit's refusal to enjoin a referendum repealing a recently enacted fair housing statute in Maryland. Spaulding v. Blair, 403 F.2d 862 (1968). *See also* Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970); Yarborough v. City of Warren, 383 F. Supp. 676 (E.D. Mich. 1974).

A few federal district courts followed *Reitman* and enjoined referenda which repealed fair housing ordinances. *See, e.g.*, Holmes v. Leadbetter, 294 F. Supp. 991 (E.D. Mich. 1968); Otey v. Common Council, 281 F. Supp. 264 (E.D. Wis. 1968).

State courts, in zoning cases, have often enjoined referenda seeking to overturn decisions by zoning or planning commissions in order to further uniformity of standards and protect the integrity of master plans prepared by experts. *See, e.g.*, City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968); West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974); Kelley v. John, 162 Neb. 319, 75 N.W.2d 713 (1956); Township of Sparta v. Spillane, 125 N.J. Super. 519, 312 A.2d 154 (1973); Leonard v. City of Bothell, 87 Wn. 2d 847, 557 P.2d 1306 (1976). One ground of decision in these cases is that the zoning activities of municipal bodies, especially amendments to a zoning plan, are not legislative actions but administrative, and therefore not subject to referendum or initiative. *See, e.g.*, West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303, 305-06 (1974); Leonard v. City of Bothell, 87 Wn. 2d 847, 850-51, 557 P.2d 1306, 1308-09 (1976). The basis for judicial concern when communities turn to direct legislation in zoning matters is reviewed in two recent student pieces. Note, *Zoning and the Referendum: Converging Powers, Conflicting Processes*, N.Y.U. REV. L. & SOC. CHANGE 97, 113-14 (1977); Note, *The Proper Use of Referenda in Rezoning*, 29 STAN. L. REV. 819 (1977).

of the referendum technique in *Valtierra* and *City of Eastlake* illustrates that in the post-civil rights era overt discrimination is rendered unnecessary by the adoption of standards facially neutral as to race and arguably legitimate in purpose, but which even the most unsophisticated voters recognize as effective in excluding poor and nonwhite groups.

Despite the broad reading given Title VII of the Civil Rights Act of 1964[39] and the impressive efforts of legal scholars,[40] the Supreme Court, in reviewing equal protection challenges, has refused to disfavor laws and policies that are not overtly discriminatory even though those laws and policies disproportionately disadvantage the members of racial minorities.[41] The question then is whether, in the practice of popular sovereignty, there are unacknowledged aspects of racial discrimination or some other basis, such as a serious danger to our legislative form of government, which entitle minority groups to special protection when their interests are disadvantaged by repeal of protective legislation through the use of initiative or referendum. In Parts II and III, I shall suggest reasons for answering both portions of this question in the affirmative.

II. POPULAR DEMOCRACY AND THE SOCIAL-CLASS ORIGINS OF RACIAL CONFLICT

Racial equality in this society is a goal long sought but still not achieved. More than a century after the Emancipation Proclamation, equality remains so fragile a value that those who would preserve it must be alert to every nuance of societal behavior that could pose a threat. Thus, social attitudes toward racial equality are an appropriate

39. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

40. *See, e.g.*, Brest, *The Supreme Court, 1975 Term—Foreward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

41. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). The *Washington v. Davis* principle has been applied in recent cases in several areas. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (school desegregation); Castaneda v. Partida, 430 U.S. 482 (1977) (jury discrimination); Austin Independent School Dist. v. United States, 429 U. S. 990 (1976) (school desegregation); Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978) (voting). *See generally* Schwemm, *From* Washington *to* Arlington Heights *and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L. FOR. 961, 1051 (concluding that discriminatory purpose will be very difficult to prove in all but the most egregious cases).

litmus to measure the danger to blacks and other minorities which may result if those urging greater reliance on the referendum prevail.

Racism is not simply a disease that afflicts some whites and leaves the rest untouched. It is a pervasive influence, though it manifests itself most virulently among those lower-class whites who have been and remain convinced that their own insecure social status may best be protected by opposing equal rights for blacks. This view is contagious and perhaps incurable. It results in white support for policies limiting the rights of blacks even while simultaneously, if more subtly, those policies also limit opportunities for less advantaged whites.

This, at least, has been the historic pattern. In seventeenth-century Virginia small farmers, chafing at the high rents charged by the major landowners and the low rates paid for their crops, threatened rebellion. The large planters, who controlled the legislature, ended the threat by easing voting restrictions so that the lower-class whites could participate in, but not control, the election process. The wealthy landowners then extended the indentured servitude of blacks to life terms and enacted laws giving all whites dominion over all blacks. This action both ensured a stable and controllable work force for those whites who could afford large holdings of slaves and rendered effective competition by small farmers impossible. The strategy worked because white farmers became more concerned with identifying with the large planters on the basis of race than in continuing their rebellion against economic exploitation by the upper class.[42]

As the United States evolved from an agrarian to an industrial society, racism continued to distort economic class alignments. Consider, for example, the additional difficulties the labor movement accepted during its nineteenth-century organizing efforts because of its refusal to unionize nonwhite workers. Excluded from the normal work force even in trades which they once dominated, black workers were forced to take those jobs whites would not accept and, during strikes, those jobs which whites had vacated. In both instances the presence of an unorganized black work force served to depress the wages of white workers and reduce the unions' leverage in negotiations with management.[43] Preserving white superiority rather than mounting a unified

42. *See generally* E. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA ch. 15–17 (1975).

43. *See* 1 H. HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW 14–21 (1977).

attack against shared economic disadvantages meant that poorer whites maintained their dominance over blacks, but meant also that upper-class whites maintained their control and exploitation of both blacks and poor whites.

Little has changed. Today, for example, labor unions are usually the major defendants in employment discrimination litigation. They argue, without apparent shame, that testing procedures and seniority rules should be retained despite the fact that these rules perpetuate the overtly racist employment practices demanded by an earlier generation of union leaders and the workers they represented.[44]

School desegregation battles are waged at the street level between lower-class whites and poor blacks competing for admission to schools whose resources are inadequate to educate either group effectively.[45] At the college and professional school levels, upwardly mobile whites like Marco DeFunis[46] and Allan Bakke[47] and their hosts of lower and middle-class supporters focus their legal and political attacks on the miniscule ten percent minority admissions programs carved out after much effort and sacrifice by blacks, ignoring the obvious fact that traditional admissions criteria favoring family and class contacts effectively provide upper-class, mainly white, applicants with preferential access to ninety percent of the available positions.

Thus, the great tragedy of *Bakke*-type litigation for both blacks and poorer whites is that both disadvantaged groups are competing for a

44. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied,* 98 S. Ct. 3145 (1978); United States v. International Longshoremen's Ass'n, 460 F.2d 497 (4th Cir. 1972), *cert. denied,* 409 U.S. 1007 (1972); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). *See generally* W. GOULD, BLACK WORKERS IN WHITE UNIONS (1977).

45. The Boston school desegregation litigation is a classic illustration. Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975). *See* Bell, *The Burden of* Brown *on Blacks: History-Based Observations on a Landmark Decision,* 7 N. CAR. CENT. L. REV. 25, 30–32 (1975).

Of course, where the interests of middle and upper-class whites appear to them threatened by school desegregation, they vote for referenda issues intended to frustrate or delay desegregation in percentages quite close to those of lower-class whites. Vander Zanden, *Voting on Segregationist Referenda,* 25 PUB. OP. Q. 92 (1961).

46. DeFunis v. Odegaard, 82 Wn. 2d 11, 507, P.2d 1169 (1973), *vacated as moot and remanded,* 416 U.S. 312 (1974), *no action taken on remand,* 84 Wn. 2d 617, 529 P.2d 438 (1974).

47. Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), *aff'd in part and rev'd in part,* 98 S. Ct. 2733 (1978).

clearly inadequate share of the educational pie. There is no satisfactory legal solution to the problem of special admissions programs as presently constituted. Had the Supreme Court declared all minority admissions programs invalid, the decision could well have been a signal to many agencies and institutions to roll back much of the progress blacks have made during the past twenty-five years. On the other hand, had the racial quotas and separate admissions standards adopted in the absence of proven discrimination won Court approval, the decision would have legitimated the existing admissions arrangements by which minorities are relegated to an inadequate share of the places in our colleges and professional schools, while all but the most extraordinarily able poorer whites would be entirely excluded.

History as well as contemporary experience teaches that less advantaged whites, bitter at this outcome, would likely direct their anger at the blacks with whom they see themselves competing, rather than at those upper-class whites whose policies in admissions, as in employment, render white competition with blacks so virulent and hopeless.

The success of this racially oriented policy-making is made possible, at least in part, because in America race is more important than class. Marxian analysis notwithstanding, the stratifying role of race prevents many working-class Americans from perceiving much difference in, or manifesting any concern about, the built-in advantages of wealth and class position.[48] The economist Robert Heilbroner has suggested that, despite our wealth, we lag behind countries like Norway, Sweden, Denmark, England, and even Cuba and China in addressing basic problems of poverty, slum housing, public health, and prison reform, because in those countries, "there is no parallel to the corrosive and pervasive role played by race in the problem of social neglect in the United States."[49] According to Dr. Heilbroner, Americans refuse to support social reforms because they

48. Justice Blackmun commented on the phenomenon in his *Bakke* opinion:
> It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.

98 S. Ct. at 2807.

49. Heilbroner, *The Roots of Social Neglect in the United States*, in Is LAW DEAD? 288, 296 (E. Rostow ed. 1971).

sense such reforms would mainly aid undeserving blacks. Although statistics reveal the error in such thinking, "the fear and resentment of the Negro takes precedence over the social problem itself. The result, unfortunately, is that the entire society suffers from the results of a failure to correct social evils whose ill effects refuse to obey the rules of segregation."[50]

The high priority many whites give to maintaining racial superiority will undoubtedly be expressed at the ballot box. Throughout this country's history, politicians have succumbed to the temptation to wage a campaign appealing to the desire of whites to dominate blacks. More recently, however, the growing black vote has begun to have an impact and even effected "Road to Damascus" conversions on more than a few political Pauls, some of whom even claim "born again" experiences during mid-term.[51] This impact may be subverted if voting majorities may enact controversial legislation directly.

III. A SOCIAL SCIENCE ASSESSMENT OF PLEBISCITE PROCESSES

Public officials, even those elected on more or less overtly racist campaigns, may prove responsive to minority pressures for civil rights measures once in office or, at least, be open to the negotiation and give-and-take that constitutes much of the political process. Thus, legislators may vote for, or executive officials may sign, a civil rights or social reform bill with full knowledge that a majority of their constituents oppose the measure.[52] They are in the spotlight and do not

50. *Id.*

51. Mississippi Senator James Eastland, a modern archetype of the post-Populist Southern politician, and long a leader in opposing civil rights legislation, indicated his desire for black voting support as he faced a challenge from a more liberal candidate. Subsequently, Senator Eastland decided not to seek re-election to the seat he has held for 36 years. N.Y. Times, Mar. 22, 1978, § A, at 18, col. 1.

52. The dilemma for public officials is not recent. Racial prejudice in the North, especially virulent prior to the Civil War, did not cease when the Union victory resulted in the abolition of slavery. Between 1865 and 1870 proposals for Negro voting were defeated in at least 14 Northern states. *See* Dykstra & Hahn, *Northern Voters and Negro Suffrage: The Case of Iowa, 1868,* 32 PUB. OP. Q. 202 (1968). The authors advise:

> Rejection of Negro suffrage by Northern states in the Reconstruction era placed the Republican "radicals" in Congress in a serious dilemma. At the same time that most of them demanded the right to vote for Southern Negroes, some on the grounds of principle, others to establish a Republican foothold in the South, their constituents blocked similar plans in the North.

Id. at 203.

wish publicly to advocate racism; they cannot openly attribute their opposition to "racist constituents." The more neutral reasons for opposition are often inadequate in the face of serious racial injustices, particularly those posing threats not confined to the minority community.[53]

When the legislative process is turned back to the citizenry either to enact laws by initiative or to review existing laws through the referendum, few of the concerns that can transform the "conservative" politician into a "moderate" public official are likely to affect the individual voter's decision. No political factors counsel restraint on racial passions emanating from longheld and little considered beliefs and fears. Far from being the pure path to democracy that Justice Black proclaimed, direct democracy, carried out in the privacy of the voting booth, has diminished the ability of minority groups to participate in the democratic process. Ironically, because it enables the voters' racial beliefs and fears to be recorded and tabulated in their pure

53. *See* Wolfinger & Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 753, 768–69 (1968). Reviewing Proposition 14, the authors express doubt that the state's fair housing law (the Rumford Act) would have passed in the first place if the politicians had fully known how unpopular it was. But they report that civil rights interests had pushed hard for the bill and some activists had chained themselves to the state capitol for a four-week sit-in that ended only when the act passed. In assessing these developments, the authors note that the legislative decision-making process is characterized by compromises between the initial demands of groups of varying size and intensity. They continue as follows:

> In referenda, of course, compromise is impossible once the issue has been formally posed. 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 forms of campaign support will be of disappointing one side or the other.
>
> Calculations about intensity are relevant to considerations other than electoral advantage. First, a politician may feel on principle that, all things being equal, he would rather respond to an intense minority than a more or less lukewarm majority particularly if he thinks the minority's claim is legitimate. It appears that Governor Brown's strong support of the Rumford Act was based on such a view, along with a belief that fair housing was essential to any strategy of coping with the Negro problem. Second, as the history of California race relations since Watts reminds us, judgments about intensity are crucial data for the enterprise of making policies designed to minimize civil strife. A key consideration in assessing civil rights proposals is whether their passage or failure will increase or reduce the likelihood of racial disturbance.

Id.

For other studies reaching generally similar conclusions, *see* Clubb & Traugott, *National Patterns in Referenda Voting: The 1968 Election*, in 6 URBAN AFFAIRS ANNUAL REVIEW, PEOPLE AND POLITICS IN URBAN SOCIETY 137 (H. Hahn ed. 1972); Kendall & Carey, *The Intensity Problem and Democratic Theory*, 62 AM. POL. SCI. REV. 5 (1968).

form, the referendum has been a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day.[54]

A. Historical Considerations

Courts have been reluctant to grapple with or even acknowledge the plethora of racist influences and status and class concerns which come into play when the future of a fair housing law is to be decided at the voting booth, or when the electorate must approve, perhaps as in *City of Eastlake* by some super-majority, a legislative or administrative decision to construct a low-income housing project. Any serious consideration of the degree to which prejudice affects the outcome of race-related referenda must at the very least bring an end to the uncritical acceptance and repetition of the unproved assumptions that direct voting techniques are fair and faithful reflections of the country's highest democratic values.

Chief Justice Burger's majority opinion in *City of Eastlake,* for example, relied too heavily on the fiction that the referendum process is the exercise of a nondelegated legislative power which, for some unexplained reason, gains legitimacy and need not even be scrutinized to insure regularity, merely because it is exercised directly by the people.[55] For support, the Chief Justice turned to history, comparing the referendum with the New England town meeting, which he deemed "both a practical and symbolic part of our democratic processes."[56] But, as several historians have pointed out, the colonial town meeting's effectiveness was due largely to the cultural and political homo-

54. Between 1963 and 1968, 10 cities and the state of California conducted open housing referenda. All were initiated by opponents of fair housing measures who were successful in every case until 1968, when the Flint, Michigan, ordinance was upheld by a paper-thin margin on recount. Hamilton, *Direct Legislation: Some Implications of Open Housing Referenda,* 64 AM. POL. SCI. REV. 124, 125 (1970).

Another critical analysis of the referendum found:

> Not only does the referendum hold great potential for racial divisiveness and for worsening inter-group relations, but it can also be employed by relatively small, organized groups to prevent achievement of the legitimate hopes and aspirations of underprivileged minorities.

Scott & Nathan, *Public Referenda: A Critical Reappraisal, 5* URB. AFF. Q. 313, 319 (1970).

55. 426 U.S. at 672. *See* Note, *Zoning and the Referendum: Converging Powers, Conflicting Processes,* 6 N.Y.U. REV. L. & SOC. CHANGE 97, 106–07, 122–23 (1977).

56. 426 U.S. at 673.

geneity of its participants.[57] The town meeting was less a forum for conflicting opinions than a place for ratifying, usually by unanimous vote, prior understandings of the community. The meeting expressed the will of a homogenous electorate shaped by exclusionary controls on the admission of new residents.[58] Such exclusionary controls were as tight as those now achieved by zoning referenda in modern suburbs.

Subtle social pressures in those small communities tended to minimize dissent, and even though the communities were small, they often lacked adequate information. James Madison, who preferred representative government because it fostered consideration and compromise of competing interests, believed that popular democracy was prone to majority dictatorship because there were few checks on the temptation to sacrifice minority interests or disadvantage unpopular individuals.[59]

Madison's eighteenth-century fears became nineteenth-century reality when, for example, voters in the Oregon territory overwhelmingly approved an 1857 referendum law intended to exclude all free blacks.[60] Despite its very small black population, residents of the territory had discussed barring blacks for several years, but neither the

57. *E.g.*, Zuckerman, *The Social Context of Democracy in Massachusetts*, 25 WM. & MARY Q. (3d Ser.) 523, 538–40 (1968). *See also* Note, *supra* note 55, at 106–07. Moreover, the New England town meetings were relatively small groups, thus making debate feasible.

58. Zuckerman, *supra* note 57, at 538–40.

59. THE FEDERALIST No. 10 (J. Madison) at 133 (B. Wright ed. 1961). Madison frequently expressed his preference for a "republic" which he defined as "a government in which the scheme of representation takes place," over a "pure democracy." He discussed the dangers of pure democracy as follows:

> [A] society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself: and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies . . . have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

Id. See also Reitman, 387 U.S. at 387 (1967) (Douglas, J. concurring) (quoting 5 WRITINGS OF JAMES MADISON 272 (Hunt ed. 1904)); THE FEDERALIST No. 51 (J. Madison) at 356 (B. Wright ed. 1961).

60. E. BERWANGER, THE FRONTIER AGAINST SLAVERY: WESTERN ANTI-NEGRO PREJUDICE AND THE SLAVERY EXTENSION CONTROVERSY 85–93 (1967).

legislature nor constitutional conventions would approve such a measure because each political party feared that another would be able to exploit the issue.[61] When the proposal was finally submitted to a popular vote, however, it received more support than an accompanying antislavery proposition.[62] Voting on both issues reflected the whites' belief that they should not have to compete with slaves or free blacks for jobs, that blacks would bring crime and disease, and that Oregon should be preserved for the white race.[63] The same motivation prompted the citizens of Kansas to adopt a similar restriction against blacks in 1855.[64] Even earlier, Indiana and Illinois had voted by large majorities to include anti-black immigration provisions in their constitutions.[65] Although anti-black immigration laws were seldom enforced, historian Leon Litwack regards them both as a constant reminder to Negroes of their inferior position in society and as a convenient excuse for whites to engage in mob violence and frequent harassment of the black population.[66]

No court seems to have considered the potential of present-day barriers against low-income housing to convey the same message or similarly to encourage harassment of those minority families who manage to move into such areas. Certainly, the Court majorities in *Valtierra* and *City of Eastlake* failed to grasp the point, although Justice Stevens, dissenting in the *Eastlake* case, recognized the exclusionary impact of the referendum requirement.[67]

B. Structural Considerations

A realistic assessment of referenda and initiatives must include an examination of how they have developed in practice as well as a description of their theoretical democratic virtues. Direct legislation, the creation of progressives of another era, today poses more danger to social progress than the problems of governmental unresponsiveness it

61. *Id.*
62. The exclusion of free blacks was approved by an 8,640 to 1,081 vote. The antislavery provision was favored by 7,727 to 2,645. *Id.* at 93. The Oregon statehood bill was passed including both provisions. *Id.* at 95.
63. *Id.* at 93–94.
64. *Id.* at 111–12.
65. L. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860, 69–72 (1961). Under strong pressure from their constituencies, several state legislatures had enacted similar provisions. *Id.* at 70 nn.12 & 13.
66. *Id.* at 72.
67. 426 U.S. at 689 (Stevens, J. dissenting).

was intended to cure. This is not to suggest that we ought to ignore the defects and disappointments of the representative system which today, as in the past, have spurred public recourse to direct legislation. All too often, both Congress and the President become targets and, one fears, the captives of powerful business interests.[68] It is also undeniable that representatives may vote on bills which they do not understand or concerning which they have been improperly influenced.

Nevertheless, our distrust and dissatisfaction with the Congress, with state and local representatives, and with executive officials should not so quickly lead us to conclude that increased reliance on direct democracy will avoid those evils to which legislatures and Congress seem so vulnerable. Supporters of minority rights must be concerned that both the initiative and the referendum often serve those opposed to reform. It is clear, for example, that direct legislation is used effectively by residents of homogenous middle-class communities to prevent unwanted development—especially development that portends increased size or heterogeneity of population.[69]

Today, direct democracy is used comparatively infrequently to curb abuses in government or otherwise to control elected officials. Rather, intense interest is generated when the issues are seemingly clear-cut and often emotional matters such as liquor, gun control, pollution, pornography, or race. Complicated taxation problems and matters of governmental structure, on the other hand, typically evoke little voter response.[70]

The emotionally charged atmosphere often surrounding referenda and initiatives can easily reduce the care with which the voters consider the matters submitted to them. Tumultuous, media-oriented campaigns, such as the ones successfully used to repeal ordinances recognizing the rights of homosexuals in Dade County, Florida, St. Paul, Minnesota, and Eugene, Oregon, are not conducive to careful thinking and voting.[71] A similar furor surrounded the innovative

68. *See generally* T. LOWI, THE END OF LIBERALISM (1969).

69. Glenn, *State Law Limitations on the Use of Initiatives and Referenda in Connection with Zoning Amendments*, 51 S. CAL. L. REV. 265, 267 n.10 (1978).

70. A study of initiative use in Washington State indicated that in the 60 years from 1914 to 1973, public morals were the most likely subject for direct legislative proposals, followed by revenue and tax measures and, finally, government reforms. Bone & Benedict, *Perspectives on Direct Legislation: Washington State's Experience* 1914–1973, 28 W. POL. Q. 330, 332-34, 347 (1975).

71. Lichtenstein, *Laws Aiding Homosexuals Face Rising Opposition Around Na-*

"anti-pornography" law enacted by initiative in the State of Washington but promptly declared unconstitutional in *Spokane Arcades, Inc. v. Ray*.[72]

Appeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns.[73] Of course, politicians, too, may offer quick cure-alls to gain

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tion, N.Y. Times, Apr. 27, 1978, § 1, at 1, col. 3. At this point, debate is better avoided as to whether civil rights statutes intended to protect blacks from discrimination in schools, employment, and public facilities would be more respected if faced with repeal in referenda, than were first amendment rights of pornographic store owners or civil rights protections for homosexuals. It may be significant, though, that the Dade County and St. Paul voters amended their civil rights ordinances by simply deleting "affectional or sexual preference" language from the provisions prohibiting discrimination "based on race, creed, sex, color, national origin or ancestry." Ballot Question, Dade County, Fla. (June 7, 1977) (repealed Dade County Ordinance No. 77-4 which had added "affectional or sexual preference" language to section 11A of the Dade County Code) (on file with *Washington Law Review*); Initiative to Amend Chapter 74 of the St. Paul Legislative Code, City of St. Paul, Minn. (April 25, 1978) (struck similar language which had been added to Chapter 74 by Ordinance No. 15153) (on file with *Washington Law Review*). The Dade County vote in favor of repeal was 208,504 to 92,212. Certificate of County Commissioners, Dade County, Fla. (June 8, 1977) (on file with *Washington Law Review*). The St. Paul vote was 54,101 to 31,689. City of St. Paul. Minn., Council Resolution, Ordinance No. 16436 (April 28, 1978) (on file with *Washington Law Review*). A measure of the issue's emotional component can be gained by a reading of the two ordinances, neither of which contains enforcement authority or penalties for civil rights violators.

72. 449 F. Supp. 1145 (E.D. Wash. 1978). Even tax initiatives may carry other overtones. The success of California's initiative limiting property taxes, Proposition 13, can be seen as a response not only to high tax rates but also to the belief of many voters that approval would result in reduction of funds paid to unwed mothers and other welfare recipients.

73. This fate, as Ralph Nader has suggested, often dooms liberal measures intended to enact apparently popular reforms, which, because of industry lobbying, cannot be enacted by legislatures. Nader, *Direct Democracy via Referenda*, Washington Star, Nov. 6, 1976, § C, at 2, col. 1. In Massachusetts, initiatives designed to equalize electric rate structures for large and small users, to prohibit possession or sale of handguns, and to ban no-return beverage containers were placed on the November 1976 ballot. All went down to defeat, the first two by enormous margins, literally buried in an avalanche of industry-sponsored ads suggesting that enactment of the measures would result in the loss of jobs, manhood, and the opportunity to grab gusto. Even where industry interests do not influence the outcome with well-financed media campaigns, voters often refuse to approve measures clearly in their own interest. In Massachusetts, efforts to win approval for a graduated state income tax are defeated year after year with low income voters often more opposed than those in the upper income brackets. As one cab driver explained his opposition to me, "I don't trust them. If we give them a chance to change the tax laws around, we will end up on the short end."

In testifying before the Senate Subcommittee considering Senate Joint Resolution 67, the proposed constitutional amendment for the National Voter Initiative, Professor Peter Bachrach opposed the measure in terms that define the attitude of poor voters like the just-quoted cab driver:

> We have case after case within the municipalities where the initiative and referendum has been used where voters who stood to gain from a vote on a bond would

electoral support and may spend millions on election campaigns that are as likely to obfuscate as to elucidate the issues. But we vote politicians into office, not into law. Once in office, they may become well-informed, responsible representatives; at the least, their excesses may be curtailed by the checks and balances of the political process.

The success or failure of ballot-box legislation, therefore, may depend less on the merits of the issue than on who is financing the campaign. One California public relations official boasted that he could put any issue on the California state ballot for $325,000.[74] Even before the Supreme Court's rejection of spending regulations in *First National Bank of Boston v. Belloti*,[75] large corporations were investing huge sums in referenda campaigns.[76] With so much at stake it is not surprising to find direct voting procedures criticized for phrasing proposals deceptively, for abusing the signature gathering process, especially by professional signature gathering organizations, and for political sloganeering intended to obscure and confuse public discussion.[77]

The Court's failure to review more closely the many opportunities for misrepresentation, financial abuse, and outright fraud can only encourage campaigners to appeal to prejudice. The record of recent ballot legislation reflects all too accurately the conservative, even intolerant, attitudes citizens display when given the chance to vote their fears and prejudices, especially when exposed to expensive media

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vote against it because of their feeling of powerlessness and their feeling of being ripped off by the government. They cannot understand that this bond issue might actually be used for their benefit. They are that much turned off that it makes them quite irrational.

Hearings on S.J. Res. 67 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 61 (1977) [hereinafter cited as *Hearings*]. To illustrate his point, Professor Bachrach reported that in a recent referendum in Maine, the voters nullified a court order requiring the state to distribute school funds on a statewide basis to equalize funds among rich and poor districts. The school financing reform was defeated two to one, and, according to Professor Bachrach, voters from the poorer districts also voted against the equalization measure. *Id.* at 61.

74. Ledbetter, *supra* note 1, at 22.

75. 435 U.S. 765 (1978).

76. Ralph Nader approves the growing number of citizen groups, usually operating with little money, who are organizing referenda on consumer, tax, environmental, spending, energy and government disclosure subjects. He reports that the defeat of many consumer and environmental referenda is usually caused by major television campaigns which distort the issue and raise the false spectre of massive unemployment. He accused the atomic power industry and its allies of using such scare tactics promoted at a cost of millions of dollars. Nader, *Direct Democracy via Referenda*, Washington Star, Nov. 6, 1976, § C, at 1, col. 1.

77. *See generally* Note, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922 (1975).

campaigns. The security of minority rights and the value of racial equality which those rights affirm are endangered by the possibility of popular repeal.[78]

The damage could be far-reaching indeed if Senator Abourezk's resolution for a national referendum becomes law.[79] The safeguards in the proposed referendum process are wholly inadequate to protect

78. We have been considering the use of the referendum to bar low-income housing, but a state's affirmative action policies in public colleges and professional schools could easily become the subject of an initiative as well. In such a case it is unlikely that the public's action would accord with the legal approval voiced by the Washington Supreme Court in DeFunis v. Odegaard, 82 Wn. 2d 11, 507 P.2d 1169 (1973). How many California voters would support Justice Powell's compromise of the issues involved in the *Bakke* case? Regents of the Univ. of Cal. v. Bakke, 98 S.Ct. 2733 (1978). Would the result be different if affirmative action programs had to win approval in a national referendum?

79. S.J. Res. 67, 95th Cong., 1st Sess. (1977). The text of the proposed amendment provides:

S.J. RES. 67 . . . *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 11 and 15 of article I, section 8 of this Constitution. This article does not grant the people of the United States the power to propose amendments to this Constitution.

"SEC. 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 per centum 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 per centum 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 determine the validity of the signatures contained in such petition through consultation with the appropriate States. Upon a 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.

"SEC. 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

minority rights. The signatures of only three percent of the voters in the last general election are enough to place a measure on the ballot.[80] Although no constitutional amendment may be enacted by the people,[81] nor any law forbidden by the Constitution,[82] there is no barrier to an initiative designed to repeal all or portions of federal civil rights laws.[83] Congressional repeal of an anti-civil rights initiative would be possible, but, during the first two years after its enactment, such repeal would require a two-thirds vote of Congress.[84] During any such effort to repeal an initiative, certainty and predictability in the law would suffer. Even if the initiative proposal is rejected by the voters, a well-financed petition campaign itself might convey a most unfortunate message to blacks, the nation, and the world regarding the distance we have traveled toward racial equality since the Supreme Court rejected the hypocritical "separate but equal" standard of *Plessy v. Ferguson*.[85]

IV. REMEDIES FOR IRRESPONSIBLE REFERENDA

Blacks and other minorities neither seek nor need absolute protection against the dangers they face from direct democracy. There will

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this Constitution or any amendment thereof may be enacted by the people under this article.

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

Id. (emphasis in original).

80. *Id.* § 2.

81. *Id.* § 1.

82. *Id.* § 3.

83. The concern is not hypothetical. During the Senate hearings on Resolution 67, Professor Peter G. Fish suggested that the initiative might be used in some areas to repeal civil rights acts. *Hearings, supra* note 73, at 113-16. In an editorial supporting the national referendum proposal, the *Lynchburg, Va. News* saw no danger of majoritarian tyranny in a government founded on the principle of majority rule. The News thought that the concern for majoritarian tyranny expressed by opponents of the proposal (including Professor Fish) sprang from other sources:

The opponents of a national referendum see a great danger to some of their pet ideas—mandatory school busing, quotas for school assignment, hiring, firing, promotions, gun controls, et cetera—all issues which the national polls show the people oppose by strong majorities. Hence, their alarm at rule by the majority.

Lynchburg, Va. News, Jan. 2, 1978, *reprinted in Hearings, supra* note 73, at 121.

84. S.J. Res. 67, 95th Cong., 1st Sess. § 3 (1977).

85. 163 U.S. 537 (1896), *rejected*, Brown v. Board of Educ., 347 U.S. 483 (1954). In his testimony, Professor Fish agreed with a suggestion that Resolution 67 might prove a stimulant to societal conflict, stating, "I should think that if a proposal to repeal the Civil Rights Act of 1968 [42 U.S.C. §§ 3601-3619 (1968)] or even a petition campaign launched to do so, that would certainly not be conducive to a harmonious society." *Hearings, supra* note 73, at 116.

therefore be no call here for a ban on referenda and initiatives. Nevertheless, these popular sovereignty processes do present a threat to minority rights.

The threat persists largely because the Supreme Court, for the most part, refuses to alter or strike down laws which, although neutral in form, function to promote racial discrimination. The courts should at least recognize that the initiative and referendum may operate as a nonracial façade covering distinctly discriminatory measures. Moreover, lower-class whites will often support referenda advancing middle-class values, to the detriment of their own economic interests, in order to secure their racial status.[86] Thus, referenda and initiatives expose blacks to harm not only because referenda serve to enact racially hostile measures, but also because blacks are isolated from their class allies and thus have diminished electoral strength.

Although the racial motivation is hidden, its effects are not; and the damage to minorities and to the integrity of a representative government can be as severe as that of the overtly racist laws existing in this country before 1954.[87] The evidence, both historical and contemporary, justifies a heightened scrutiny of ballot legislation similar to that recognized as appropriate when the normal legislative process carries potential harm to the rights of minority individuals. This protection should be provided as a logical development of existing Supreme Court doctrine.

The referendum, while entitled to judicial respect, is not wholly beyond constitutional scrutiny. In *Lucas v. Colorado General Assembly*[88] the Court invalidated a reapportionment scheme apportioning one legislative chamber on a basis other than the population standard set forth in *Reynolds v. Sims*.[89] The fact that the scheme had been adopted by referendum did not insulate it from fourteenth amend-

86. For example, as we saw earlier, a referendum intended to protect the single family home status of a residential community by barring low-income housing will receive support from lower-class whites, although they thereby vote against their own opportunity to live in the lower-income apartments which would otherwise be built.

87. *See* Brown v. Board of Educ., 347 U.S. 483 (1954). Obviously public housing and urban renewal programs have great physical and social impact upon urban areas. This impact is sufficient to justify public scrutiny. It is urged, however, that this responsibility be placed on elected representatives rather than on plebiscites because of the danger of overt or covert exclusion of the poor and minorities from white, middle-class neighborhoods.

88. 377 U.S. 713 (1964).

89. 377 U.S. 533 (1964).

ment examination.[90] Unfortunately, the racial motivations and discriminatory impact of many modern referenda and initiatives cannot similarly be attacked directly because the measures are couched in racially neutral terms and may be viewed as serving some legitimate, nonracial public purpose. The current Court has refused to invalidate laws as invidiously discriminatory merely because they have discriminatory impact; the Court insists that a discriminatory purpose must be shown. Blacks and other minorities will encounter substantial difficulty when they challenge a referendum on race discrimination grounds because, as in *Valtierra,* they must show "that a law seemingly neutral on its face is in fact aimed at a racial minority."[91]

However, the racially discriminatory impact of ballot legislation is not the only constitutional problem presented. The initiative and referendum are participatory political processes; they involve *voting.* Therefore, the cases protecting the right to vote and the equal power of every person's vote can be brought to bear, and the reasoning of those cases applied. Although the Court's dominant concern in the "one person, one vote" cases was to prevent the dilution of the individual citizen's vote, the Court was also concerned with the proper functioning of the republican form of government by insuring equally weighted votes. This concern for republicanism was articulated by Chief Justice Warren in *Reynolds v. Sims:* "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[92]

This theme of protection of the republican system of government—and impliedly the protection of the society vouchsafed by that republican system—was announced more clearly in the cases involving at-large elections in multi-member districts. The Warren Court often expressed concern that at-large election schemes had long been used as a means of diluting the votes of minority groups or political parties. On more than one occasion, the Court warned that such legislative or

90. "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of the state's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause." *Lucas,* 377 U.S. at 736.

91. James v. Valtierra, 402 U.S. at 141. Such a showing might, in some cases, be attempted by using evidence of public opinion polls of the reasons that people voted, the advertising campaign in support of the referendum, or even statements by the supporters of the referendum.

92. 377 U.S. at 555.

local districts would be found unconstitutional where they were shown to operate "designedly or otherwise . . . under the circumstances of a particular case [to] minimize or cancel out the voting strength of racial or political elements of the voting population."[93]

Referenda and initiatives are "at-large elections" on issues instead of candidates. Just as multi-member districts have the potential of minimizing or cancelling out the voting strength of racial or political groups in the election of officials, referenda and initiatives have a similar effect on direct legislation. In both cases the strength of the minority will be diluted.

The same danger to the republican process which was present in the multi-district cases is present here. The danger is twofold. First, in a particular referendum on a particular issue, a matter extremely harmful to minority interests but only moderately beneficial to non-minority interests may be passed; the ballot does not easily register intensity of interest as the legislative process does. Second, the initiative and referendum processes in general prevent meaningful participation by minority groups. As more legislation is passed through direct ballot, minorities are increasingly excluded from participating in decisions affecting the entire society.[94] Of what value is it to protect

93. Fortson v. Dorsey, 379 U.S. 433, 439 (1965). *See also* White v. Regester, 412 U.S. 755 (1973); Gaffney v. Cummings, 412 U.S. 735, 751–54 (1973); Burns v. Richardson, 384 U.S. 73, 88 (1966). *Cf.* United Jewish Organizations v. Carey, 430 U.S. 144, 165–68 (1977) (opinion of White, Stevens, and Rehnquist, JJ.) (fact that there was no general fencing out of white population from participation in the political process of the county and that white voting strength generally was not minimized or cancelled out as reason permitting deliberate increase in nonwhite voting strength in particular districts).

The *Fortson* formulation is, perhaps, too strong for current trends. In Whitcomb v. Davis, 403 U.S. 124 (1971), the Court declared that the mere lack of legislative representation by blacks proportionate to black voting population was not enough to show an unconstitutional dilution of voting strength by adoption of at-large districts. The blacks charging dilution must also show that the dilution was the result of intentional discrimination. In *Whitcomb*, a black area within a multi-member district had had fewer representatives than its proportion of the population. But, as the Court emphasized, this was more the result of the balance of Republican against Democratic power in the district rather than a scheme to exclude blacks. Indeed, for the Democrats to win in the district, they needed black support and campaigned strongly in the ghetto. *Id.* at 149–53.

Not surprisingly, outside the South, with its long history of official discrimination, few litigants have succeeded in meeting these standards of intent or motive which Justice Douglas rightly called "asking the impossible." *Id.* at 180. Accordingly, the argument of preserving the representative system of government may well be a stronger one for these voting cases.

94. Such representational subordination might also be defined as electoral action by the majority which decreases the opportunity of a minority group and its members to participate in the political, social, and economic mainstream of society (as do similarly situated members of the majority). A hard and inflexible formula for finding representational subordination would be difficult to construct and might be unwieldy in applica-

an individual's right to vote for elected officials if the important decisions are made in referenda rather than in the legislature?

Thus, there is reason to scrutinize measures passed by initiative or referendum. In doing so the Court would be protecting participation in the political process and the integrity of the representational system, rather than directly remedying racial discrimination, with the belief that as long as the representational system is sound and minorities are effectively participating in the decisionmaking process, minorities can safeguard their own interests.[95] Although in one sense any referendum or initiative operates counter to the representative system, the need for court protection of that system is strongest when the majority attempts through the direct ballot to take away something the minority obtained through the representative system. As a first step, Court scrutiny of ballot legislation might arguably be limited to such cases.

The theme that the Court protects access to the vote as a part of its protection of the representative process has been repeated in voting rights cases other than the "one person, one vote" and multi-member district cases. In 1969 the Court refused to permit a North Carolina county to reinstate its literacy tests for voter registration because the failure to provide black residents with "equal educational opportunities . . . deprived them of an equal chance to pass the literacy test."[96] The Court was concerned about the potential effect of unequal educational opportunities on the exercise of the franchise.[97] This concern manifested itself in relief for blacks who were exempted from the literacy test requirement, even though there was no proof of intentional wrongful action by either school or voting officials. Thus, in an action

tion. Rather, courts could review each case on its facts, considering (1) the history of overt or institutional discrimination to which the minority group has been subjected; (2) the degree to which the minority group continues to suffer from discrimination; (3) whether the referendum action increases the difficulty minorities will experience in overcoming past and/or present discrimination; and (4) whether the neutral goals sought to be achieved by the referendum could have been achieved through policies less harmful to minority interests.

95. Such protection of the representative system must have been the Court's aim in *Lucas* when it ordered a reapportionment remedy contrary to that the majority of voters had selected for themselves. 377 U.S. 713 (1964). *See* notes 88–90 and accompanying text *supra*.

96. Gaston County v. United States, 395 U.S. 285, 291 (1969).

97. *See id.* at 293–96. Despite the fact that official voting discrimination had ceased and significant strides had been made toward equalizing and integrating the public schools, the Court declared that " '[i]mpartial' administration of the literacy test today would serve only to perpetuate these inequities in a different form." *Id.* at 297.

brought under the 1965 Voting Rights Act,[98] the Court prevented what otherwise would have been a severe dilution of black voting strength with a concomitant weakening of the representative character essential to a republican form of government.[99]

Similarly, the Court has often expressed concern that the election process not be burdened by unnecessarily rigorous residence and registration requirements,[100] that elections not be unreasonably limited

98. Voting Rights Act of 1965, § 4, 42 U.S.C. § 1973b (1976).

99. Also relevant to this discussion is the republican form of government guarantee in the Constitution:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. CONST. art. IV, § 4. For a summary of the history of this provision, from its origins as a response to the Constitutional Convention's great fear of direct democracy and its members' preference for a republican or representative government to its present moribund status, see Seeley, *The Public Referendum and Minority Group Legislation: Postscript to* Reitman v. Mulkey, 55 CORNELL L. REV. 881, 905–10 (1970). In brief, while intended to insure governments in which majority authority would be tempered by representative considerations, the guarantee was early cited to the Court by conflicting political factions, each claiming to represent the majority. The Supreme Court determined that either the Congress or the President had the authority under the provision and should decide such political issues. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874); Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

The Court did define a republican form of government, in terms similar to those used by Madison, *supra* note 59, in Duncan v. McCall, 139 U.S. 449, 461 (1891). But later the Court reiterated its earlier position that such claims were nonjusticiable political questions. Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (claim that state has ceased to be republican in form because of adoption of the initiative and referendum is a political, not judicial, question which is for Congress to determine). Much later, both Baker v. Carr, 369 U.S. 186 (1962), and *Reynolds* made clear that the nonjusticiable conclusion represented only a discretionary decision not to hear "republican form" issues. As Professor Seeley points out, *supra* at 909, it would not have been easy to use a still nebulous standard to test the representativeness of the malapportioned legislatures under attack in those cases. But it is far easier, and more appropriate to the history of the republican guarantee clause, to use it in its absolute rather than in a comparative sense. While the republican guarantee clause is sufficiently elastic to enable occasional instances of "direct" as opposed to "representative" government, *see* Note, *Constitutionality of the Referendum,* 41 YALE L. J. 132, 133 (1931), Professor Seeley makes a point that deserves far more attention than it has received when he concludes as follows:

> 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.

Seeley, *supra* at 909 (footnotes omitted).

100. *Compare* Kusper v. Pontikes, 414 U.S. 51 (1973), Dunn v. Blumstein, 405 U.S. 330 (1972), & Carrington v. Rash, 380 U.S. 89 (1965) *with* Rosario v. Rockefeller, 410 U.S. 752 (1973) & Marston v. Lewis, 410 U.S. 679 (1973).

only to those voters deemed primarily interested,[101] and that no barrier of wealth limit access to either the ballot box[102] or a place on the ballot.[103] These holdings, particularly those striking down wealth barriers, survive even though a majority of the current Court has refused to measure differential impacts based on economic status by the strict scrutiny standard applicable to classifications based on race.[104] Protection of voting rights and the political process is evidently a preferred value.

Surely, within the parameters of decisions committed to protecting the integrity of the electoral system, so frequently designated as the heart of our representative government, there is doctrinal space to prevent an electoral majority from subverting the gains made by minorities through participation in representative government. These precedents provide the means to prevent the majority from abusing its power to uproot those protections against discrimination without which minority group members are as effectively prevented from meaningful participation in the electoral process as they earlier were by poll taxes and literacy tests.

V. CONCLUSION

Justice Black's declaration that referenda demonstrate devotion to democracy rather than to bias, discrimination, or prejudice, is in fact almost the opposite of the truth when the issue submitted to the voters suggests, even subtly, that majority interests can be furthered by the sacrifice of minority rights. The failure to recognize the special dangers to minority groups in the referendum process can be attributed to a reluctance to acknowledge either that there are minorities in society or that there is racism. Of course, both exist, and neither is likely to disappear in the near future. For ours is a heterogeneous society. There is ample reason today to give serious consideration to the

101. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969). *See also* City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969). *But see* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).

102. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

103. *See* Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1973). *Cf.* Buckley v. Valeo, 424 U.S. 1 (1976) (campaign contributions and expenditures).

104. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

founding fathers' cautious approach to direct democracy. They 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. Slavery has had permanent impact on American life. Among its effects are racial antagonism and a false sense of racial superiority for the great mass of whites which, if not curable, should at least be contained by a judicial preference for the representative mode of government, where its worst tendencies toward prejudice will be chastened in legislative debate and public scrutiny and diluted by political compromise.