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ARTICLES

JUDICIAL REVIEW, EQUAL PROTECTION AND THE PROBLEM WITH PLEBISCITES

Robin Charlow†

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INTRODUCTION

Plebiscites are becoming an increasingly significant source of law in states and localities around the nation.¹ Although at first glance the notion of the people directly deciding their fate seems quintessentially American,² several legal commentators decry this idea as contrary to the lawmaking structure envisioned by the architects of our constitution and embodied in its provisions.³ These commentators ar-

¹ See DANIEL R. MANDELKER ET AL., *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 761-62 (1990) (indicating that in 1990 almost all of the states had constitutional provisions authorizing referenda at the state level, most had such provisions authorizing referenda at the local level, and about half authorized initiatives at both levels; also commenting that "recent years have seen an explosion in the use of the initiative and referendum"). The number of statewide referenda ranged from about 45 to 400 per year in the decade 1972-1982. DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 205-06. More than 225 issues were put to state voters for decision in 1982, 1984 and 1986. THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 3 (1989). The total number of referenda nationally, including local measures, may have been as high as 10,000 to 15,000 annually around 1970. See Howard D. Hamilton, *Direct Legislation: Some Implications of Open Housing Referenda*, 64 AM. POL. SCI. REV. 124, 125 & n.11 (1970) (noting that the annual national average of school referenda alone was 13,000 from 1948 to 1959). The use of plebiscites tends to be concentrated in a limited number of mostly Western states. MANDELKER ET AL., *supra* at 762.

² Because the American system of governance is often hailed as a prime example of democracy—that is, with ultimate power emanating from the people—public lawmaking's clear connection to democracy makes it appear particularly American. See Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 2 (1978) (observing that criticism of "the trend toward direct democracy appears reactionary, if not un-American"); see also *James v. Valtierra*, 402 U.S. 137, 141 (1971) ("Provisions for referendums demonstrate devotion to democracy."); *Reitman v. Mulkey*, 387 U.S. 369, 391 (1967) (Harlan, J., dissenting) (describing a state initiative enactment as "one that has been adopted in this most democratic of processes").

³ Much of the work generated on this subject has focused on the differences between republicanism and democracy. Several writers have attempted to demonstrate that the framers were acutely aware of the different implications of both of these popular forms of government and that they purposely adopted the former while eschewing the latter. See, e.g., Bell, *supra* note 2, at 16 (1978) (indicating that Madison "preferred representative government because it fostered consideration and compromise of competing interests," while "popular democracy was prone to majority dictatorship because there were few checks on the temptation to sacrifice minority interests or disadvantage unpopular individuals"); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1514 (1990) ("The gap between the will of the majority and the voice of the legislature, it turns out, is there by constitutional design."); Hans A. Linde, *When Is Initiative Lawmaking Not "Republican Government"?*, 17 HASTINGS CONST. L.Q. 159, 164-65 (1989) ("The Federalists distinguished republican government . . . from direct democracy. They stood for government by

gue that the nation's laws are supposed to emanate from a system of representative democracy, not direct democracy, and the intended constitutional structure is breached by plebiscitary lawmaking.⁴

Some commentators maintain that this breach poses a particular danger to racial and ethnic minorities: they are in the most vulnerable position when the safeguards built into our representative system are not there to filter the bias or bigotry of the majority and to ameliorate its effects.⁵ In other words, our republican democracy is sup-

accountable representatives, . . . with the consent of the governed, not by the governed."); Marc Slonim & James H. Lowe, Comment, *Judicial Review of Laws Enacted by Popular Vote*, 55 WASH. L. REV. 175, 184 (1979) (arguing that the concern that direct democracy poses inherent dangers to individual rights and liberties "contributed to the selection of a system of representative government"). See also Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733, 738 (1988) (arguing that the foremost goal of government is "to ensure fair decision making to promote the best interests of society as a whole," and that this goal is best achieved through representative government, not direct democracy).

Despite its detractors, there appears to be widespread public support for the idea of direct democracy. See, e.g., CRONIN, *supra* note 1, at 4, 79 (reporting that in a 1987 Gallup survey two-thirds of those polled thought the electorate should be able to vote directly on some state and local laws). See generally *Voter Initiative Constitutional Amendment: Hearings on S.J. Res. 67 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) (concerning a possible federal constitutional amendment which would provide for the enactment of federal law by popular vote). For writings supporting the use of direct democracy despite its nonrepublican character, see Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 932 (1988) (concluding that critics of plebiscites "understate the capacity of participation and overstate the capacity of legislative processes to serve public interest"). See also Ronald J. Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 NEB. L. REV. 965 (1979) (discussing the deficiencies in the federal legislative process, the potential ameliorative effects of a national statutory initiative procedure, and the risks that such a procedure entails); Dennis W. Arrow, *Representative Government and Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment by Initiative Petition*, 17 OKLA. CITY U. L. REV. 3 (1992) (considering "the possibility that direct-democracy facilitation will result in a modification of the substantive outcomes of the status quo"); Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 709-710 (1991) (refuting the claim that "racial minorities are better served by representative than direct lawmaking processes"); Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347 (1985) (reviewing MAGLEBY, *supra* note 1).

⁴ See discussion *infra* part I.A. Briffault argues that, on the contrary, "direct democracy may enhance the representativeness of representative government." Briffault, *supra* note 3, at 1350.

⁵ See Bell, *supra* note 2, at 1 (stating that "the experience of black [voters] with the referendum has proved ironically that the more direct democracy becomes, the more threatening it is"). See also Eule, *supra* note 3, at 1555 ("The legislative process . . . affords minority groups a role that they lack in the substitutive plebiscite."); Fountaine, *supra* note 3, at 737 ("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" (citing Bell, *supra* note 2, at 2)); Priscilla F. Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URB. L. REV. 135, 135-37, 140 (1981); James J. Seeley, *The Public Referendum and Minority Group Legislation: Postscript to Reitman v. Mulkey*, 55 CORNELL L. REV. 881, 902 (1970) ("the referendum differs from other legislative methods because it provides a procedure whereby legislative decisions can be made exclusively along the lines of racial prejudice"); Slonim & Lowe, *supra* note 3, at 181-83,

posed to provide some measure of special protection for powerless or disfavored groups,⁶ and this protection is absent when the representative legislative scheme is bypassed by direct democracy. As recent evidence of the power of plebiscites to oppress particular groups, detractors of public lawmaking point to plebiscites that ban school busing for purposes of racial integration,⁷ permit private discrimination in the alienation of real property⁸ and declare English the official local language.⁹

One possible implication of this situation is that courts, as the ultimate guardians of individual constitutional rights and guarantees, must direct special attention to measures enacted by popular vote.¹⁰ Although the specific form that this extra attention should take is the focus of some disagreement,¹¹ scholars coalesce around the central premise that such special attention is necessary when racial or ethnic minorities raise constitutional challenges to popularly enacted laws that adversely affect them. These groups already receive special judicial solicitude under equal protection analysis, but more responsive judicial scrutiny is recommended. Some even suggest different judicial review for ballot legislation attacked on constitutional grounds by other "special" minorities, not composed of racial or ethnic groups.¹²

191 (discussing how "[t]he proliferation of issue balloting . . . places minority rights . . . in serious jeopardy"); cf. Tracy Resch, Note, *The Application of the Equal Protection Clause to Referendum-made Law: James v. Valtierra*, 1972 U. ILL. L.F. 408 (describing plebiscites as "potentially dangerous weapons" in "the hands of an aroused and biased majority," and supplying examples of recent plebiscitary attempts "to prevent the enactment of municipal and state civil rights legislation and to preserve de facto segregation") (footnote omitted). For historical examples of plebiscitary proposals considered particularly disadvantageous to African-Americans, see Bell, *supra* note 2, at 16-17.

⁶ Professor Eule argues that although the minority group the framers intended to protect was the wealthy and propertied class, the system they designed in fact protects the powerless and certain other disfavored minority groups. See Julian N. Eule, *Checking California's Plebiscite*, 17 HASTINGS CONST. L.Q. 151, 153 (1989); Eule, *supra* note 3, at 1555-58. The Constitution's guarantee of republicanism antedates both the substantive guarantees of the Bill of Rights and the Fourteenth Amendment, thus any group not afforded special protection by those later provisions may nevertheless be shielded from the dangers lurking within direct democracy. See Linde, *supra* note 3, at 168.

⁷ See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Crawford v. Board of Educ.*, 458 U.S. 527 (1982).

⁸ See *Reitman v. Mulkey*, 387 U.S. 369 (1967).

⁹ See Eule, *supra* note 3, at 1567.

¹⁰ "Enacted" is used here to refer to the product of all popular votes, whether this product takes the form of enactment or repeal of positive law.

¹¹ For varying proposals see part II.C.

¹² See, e.g., Eule, *supra* note 3, at 1576 (including the poor as an example of an unpopular minority); *id.* at 1572 (referring to the "powerless" as a group in need of special judicial protection).

Much has been written about the relative efficacies of the legislative and plebiscitary processes¹³ and it is not the goal of this discourse to add to that debate. The ensuing investigation approaches the issue from a different perspective. It evaluates the principle of special judicial review of plebiscites not by questioning its empirical premises or its underlying assumptions, but rather by determining whether the thesis is conceptually appropriate, internally consistent and possible to implement in a practical manner. The Article concludes that, even accepting the factual predicates of the analysis that has led some to propose special judicial review for popularly enacted law, there are problems with the idea of carving out this one decisionmaking institution for different treatment. Although a case might be made for tinkering with certain aspects of judicial review of plebiscites, the suggestion ought to be approached with a healthy dose of skepticism. The arguments presented in the debate thus far simply do not justify the poorly outlined and potentially wide-ranging calls for judicial intervention. More importantly, much of the opposition to judicial review of plebiscites stems from a mischaracterization of the underlying issue. The essence of the perceived problem with judicial review of plebiscites does not arise from any inherent differences in representative and plebiscitary lawmaking, but rather from what some view as cramped judicial interpretation of specific constitutional guarantees, particularly an overly restrained equal protection analysis.

Part I of this Article sets forth a condensed and consolidated version of the thesis that plebiscites are a problem that should be addressed by judicial intervention. Part II assesses each of the proposed methods of judicial intervention and the theoretical constructs on which they are based. In the course of these analyses, and in the conclusion, I set forth my views on the proper resolution of the problem with plebiscites.

I

THE CONSTITUTIONALLY SUSPECT NATURE OF PLEBISCITES

A few preliminary points need to be clarified before explaining the posited constitutional difficulty with direct democracy. First, what is a "plebiscite?" Although used differently in different jurisdictions, the term "plebiscite" usually refers to either an initiative—a measure placed on the ballot by securing a specified number of signatures¹⁴—

¹³ See MAGLEBY, *supra* note 1; Baker, *supra* note 3; Briffault, *supra* note 3; Gillette, *supra* note 3; Gunn, *supra* note 5; see also Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987) (containing a comprehensive discussion of the competence of the legislative process).

¹⁴ CRONIN, *supra* note 1, at 2; see e.g., *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 134 (1912). These come in two basic varieties: direct initiatives, or instances in which

or a referendum—a legislative measure that is referred to the electorate for ratification or disapproval.¹⁵ Professor Julian Eule, an advocate of special judicial review for plebiscites, applies his conclusion primarily to “substitutive direct democracy,” that is, those instances (such as initiatives) in which the public can completely bypass both the legislative and executive branches and make law.¹⁶ He proposes a different thesis for most forms of “complementary direct democracy,” or those instances (such as certain types of referenda)¹⁷ in which the public and the legislature must act together for a law to take effect.¹⁸ For the sake of argument, I will accept this distinction when discussing Professor Eule’s and like theories. Unless otherwise noted, I use the term plebiscite to refer only to substitutive forms of direct democracy.

Second, the arguments in the remainder of Part I are an amalgamation of points raised by proponents of the proposition that plebiscites are constitutionally suspect and require different judicial review.¹⁹ I recognize that there are significant dissenting views with regard to several of the underlying contentions asserted by these proponents,²⁰ and at this point I do not take a position on the various

the required petition signatures automatically trigger placement on the ballot, and indirect initiatives, instances in which adequate voter petitions result in the legislature having an opportunity to enact a measure within a specified time before it is placed on the ballot for popular consideration. See MAGLEBY, *supra* note 1, at 35-36, 38-40 (tbl. 3.1), 46-47 (comparing different processes and requirements in states that allow initiatives).

¹⁵ *Pacific States*, 223 U.S. at 134. Referrals may be made by the state constitution (termed “mandatory” or “compulsory”), the legislature (often called “voluntary”), or the public (of a measure previously enacted by the legislature, and termed “popular”). See MAGLEBY, *supra* note 1, at 36; CRONIN, *supra* note 1, at 2; Eule, *supra* note 3, at 1512.

Recalls—popular votes on removal of a public official—are sometimes included in treatments of direct democracy. See CRONIN, *supra* note 1, at 2; Allen, *supra* note 3, at 966 n.4; Slonim & Lowe, *supra* note 3, at 190 (lumping initiatives, referenda, and recalls together as “closely connected parts of the same political theory”) (quoting 47 CONG. REC. app. 63, at 67 (1911) (Speech of Rep. John E. Raker)). Recalls will not be considered in this article because they are more akin to elections than instances of lawmaking.

¹⁶ See Eule, *supra* note 3, at 1510. Eule contends that this category includes initiatives. Although indirect initiatives do not completely bypass the legislature, the public ultimately has complete control over whether a measure proposed by indirect initiative becomes law.

¹⁷ At first, Eule seems to include all referenda in this category. See *id.* at 1512. Later, he acknowledges that he would apply his thesis advocating special judicial review of plebiscites only to “negative” referenda, those in which voters “obstruct” legislative choice, and not to “positive” referenda, those in which voters approve the legislative choice. *Id.* at 1574-75. Thus, perhaps the category of “complementary direct democracy” ought only to include negative referenda.

¹⁸ *Id.* at 1512, 1573-79.

¹⁹ Most proponents of the different review thesis do not advance comprehensive arguments to justify their position, as does Professor Eule; they principally draw the conclusion and suggest methods of implementation. Hence, most of the remainder of this section is drawn from Eule’s article. See Eule, *supra* note 3.

²⁰ See, e.g., Baker, *supra* note 3; Briffault, *supra* note 3; Gillette, *supra* note 3. See also *infra* part I.A (describing the special review thesis that follows and noting of many specific points of disagreement on underlying issues).

controversies. My interest is only in examining whether the hypothesis advocating different judicial treatment of plebiscites squares with theories of judicial review and equal protection.

A. The "Special Review" Thesis

1. *The Risk of Faction*

The proposition that there is a constitutional problem with plebiscites stems from the idea that although our government derives its ultimate legitimacy from the will of the people, majoritarianism is not the central premise on which our government is based. The *Federalist Papers* amply demonstrate that a major source of concern to at least some of the framers was the threat of "faction," narrow interests acting contrary to the general public good.²¹ Minority faction, because of the limited power wielded by small numbers of citizens, was not especially feared,²² but majority faction was thought to present a clear danger of oppression.²³ Some proponents of the special review thesis argue that because James Madison and many of the Federalists were among the minority propertied classes,²⁴ they had a particular mistrust of the power of the majority, composed of the less affluent.²⁵

²¹ In support of ratification of the Constitution, Madison argued that a republican structure of government could break and control the violence of faction. THE FEDERALIST No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961). He defined faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.* at 78.

²² *Id.* at 80. Madison noted:

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution.

Id.

²³ *Id.* ("When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.").

²⁴ The term "propertied" is used to mean possessed of real property and other tangible forms of wealth.

²⁵ See Eule, *supra* note 3, at 1523 (indicating that Madison and delegates to the constitutional convention were "the 'haves'" whose individual property interests and rights as creditors were threatened by the "masses of 'have nots'"); Eule, *supra* note 6, at 153 ("it was the rights of the wealthy and the propertied minorities that the framers had in mind"). Eule recognizes Bruce Ackerman's point that there may have been majorities other than "materialistic special interests" of concern to Madison, such as religious or ideological groups or followers of a "spellbinding demagogue." Eule, *supra* note 3, at 1523 n.81 (discussing Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 n.16 (1984)).

2. *Constitutional Checks on Faction*

In response to this perceived threat, the framers devised a scheme of government containing several safeguards against majority tyranny.²⁶ Each of these safeguards was intended to filter bare majority preferences and to protect electoral minorities.²⁷ In order to understand what is constitutionally suspect about plebiscites, it is necessary to understand how these features are supposed to filter majority will.

First, majority faction was to be contained through representative as opposed to direct decisionmaking. It is debatable whether legislators are more inclined to advance the public welfare than other citizens,²⁸ but even if they are not more enlightened, the representative

²⁶ This is a somewhat disputed view of the motivation of the framers. Some historians maintain that the main impetus for implementation of the various process filters described in this section was an overriding mistrust of all forms of government, not any particular self-interest. Under this view, the framers instituted a system that would prevent change generally, especially radical or rapid change. Governmental filters on lawmaking were intended to protect the status quo, not necessarily the framers' property. *See, e.g.*, LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1-2, at 2 (2d ed. 1988) ("the Constitution's framers had derived the conviction that human rights could best be preserved by inaction and indirection—shielded behind the play of deliberately fragmented centers of countervailing power"). *See also* THE FEDERALIST No. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961) (supporting the design of the Senate as an "additional impediment" to enactment of law generally, and observing that "the facility and excess of lawmaking seem to be the diseases to which our governments are most liable"); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 187-88 (1991) (explaining that Publius (Madison), the author of *Federalist* No. 10, expressed concern with several different sorts of factional interests, only some of which espoused redistribution of wealth); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-87*, at 404-06, 520, 558-59, 604 (1972) (The author recounts the pre-Constitutional problems of an excessive profusion, overcomplication, and constant revision and repeal of law by representative legislatures. He further describes constitutional features motivated by anti-government sentiment and intended to interpose obstructions to government action. However, he notes that some Federalists complained about the substance of laws that obviated debt and infringed on private property.); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 44-45 (1985) (suggesting a correlation between "the federalists' hospitable view . . . toward political stalemate and government inaction" and their "desire to protect private property").

²⁷ The phrase "electoral minorities" is used to emphasize that it is not minorities in the modern colloquial sense that were to be the particular beneficiaries of the framers' scheme, but rather that the structural safeguards instituted by the framers were to benefit any group that would not get the result it desired if a simple popular majority vote were taken. *But cf.* Philip B. Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19, 20 (1969) ("The single institution in our system created for the purpose of protecting the interests of minorities—assuming that is what the Constitution is about, at least in part—is the Supreme Court.").

²⁸ Madison argued that factious individuals would be less likely to attain national than local office because of the larger number of constituents voting on such offices. THE FEDERALIST No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961). Madison described legislators as citizens "whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." *Id.* at 82; *accord* THE FEDERALIST No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961) (arguing that the national government would attract the "best men in

lawmaking process includes minority-protective features not found in popular lawmaking.²⁹ The legislative system is characterized by the opportunity for deliberation, including discussion and debate, time for reflection on and refinement of one's position, and exposure to the views and concerns of others.³⁰ In contrast, plebiscites merely ag-

the country"); cf. Eule, *supra* note 3, at 1526-27 (noting that the populace, as opposed to its representatives, may fail to consider the interests of others and is "overly susceptible to contagious passions and the deceit of eloquent and ambitious leaders").

Professor Gillette notes that self-interested voters may elect representatives who are themselves "unwilling to engage in the reflective processes relied on to mitigate electoral narrowness," and that there may be "nothing in the process of *being* a representative [to insure] that [the] narrow self-interest of the constituency will be overcome." Gillette, *supra* note 3, at 942. He acknowledges, however, the view that Madison may have expected "the nature of the institution, rather than the bona fides of the personnel who occupy it," to ensure public spirited action. *Id.* at 942 n.50 (citing HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* 195 (1967)); see *id.* at 978-79. Professor Bell goes so far as to argue that the deliberative legislative process can transform a racist politician into someone who votes for civil rights. Bell, *supra* note 2, at 13-15. Alternatively, Professor Baker argues that there is little reason to think representatives are systemically more likely than plebiscite voters to be guided by the public interest in their decisionmaking, and that representatives have an even greater incentive to ignore the public good. Baker, *supra* note 3, at 740-41.

²⁹ Gillette maintains that the dynamics that are characteristic of plebiscites substitute for the minority-protective features of the legislative process, effectively insuring against an excess of self-interested, factious voting. See Gillette, *supra* note 3, at 937.

³⁰ Eule, *supra* note 3, at 1520, 1527, 1555 (cautioning not to "discount the impact of deliberation and the opportunities for compromise and amendment [in the legislature]. Legislators may agree to debate until one side convinces the other or until someone offers up a new alternative.") (footnote omitted); see Gillette, *supra* note 3, at 942-43; see also Slonim & Lowe, *supra* note 3, at 188 (describing as one of the framers' intended safeguards of minority rights "the quality of elected representatives and the processes of debate and compromise integral to representative government"); MAGLEBY, *supra* note 1, at 188 (describing the legislative process as "more deliberative, substantive, and rational" than plebiscitary lawmaking); Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 879 (1992) (characterizing the legislative process as "one of mediation, compromise, and reconciliation of differing views and opinions"); Seeley, *supra* note 5, at 902 (indicating that representatives "must debate and discuss issues along somewhat rational lines if they hope to be re-elected"). But see Sunstein, *supra* note 26, at 49 ("We are far from Madison's deliberative democracy. Indeed, the evidence suggests that the factional struggle that Madison sought to escape more closely captures politics as it is generally practiced.").

On the opposite side, Professor Baker notes that "it is not at all clear that the median plebiscite voter is systematically inferior to the median representative in the extent to which she engages in thoughtful and rational consideration of the issues on which she votes." Baker, *supra* note 3, at 748. She says that a representative's interest in being re-elected will lead her to vote "according to the preference of the median voter in her constituency, [that is,] by voting 'the party line,' or by voting according to her own previous record on similar issues," rather than actually engaging in "thoughtful and rational consideration" of the issue on which she is voting. *Id.* Also, "the threat of being branded a 'shirker' at reelection time may induce representatives to vote . . . on legislation that they have not thoughtfully and rationally considered." *Id.* Baker discounts the existence of systematic differences in the extent of *opportunities* available to legislators and plebiscite voters to engage in discussion and debate, arguing that any differences that exist are simply differences of fora. *Id.* at 748-49. Additionally, she points out that representatives are concerned with much more than proposed legislation, and "are regularly confronted with de-

gregate individual opinion, without any particular structural provision for dialogue or dialectic.³¹ The continuing nature of the legislative process, which contrasts sharply with the one shot plebiscitary process, may also reduce the risk of majority faction. Legislators, because of their ongoing responsibilities, must be more cooperative; they must attend to the concerns of their colleagues if they expect colleagues to reciprocate on subsequent occasions. This often results in logrolling, or vote trading, which is not a feature of popular lawmaking.³²

cisions on many more issues than are plebiscite voters, vastly reducing the time and energy that [they] can devote to discussing any one issue with their legislative colleagues." *Id.* at 749. Finally, she notes that "the committee system of most legislatures means that an exchange of views on any given issue is likely to be concentrated in the small subset of representatives on the pertinent committee," and that even that discussion excludes committee members voting by proxy. *Id.*

³¹ See Gillette, *supra* note 3, at 943 (describing the view that deliberation is the "unique domain of the legislature," and that "[p]lebiscites merely aggregate"); Eule, *supra* note 3, at 1551 & n.209 ("Aggregation is all that [a plebiscitary system] cares about.") (citing Kateb, *The Moral Distinctiveness of Representative Democracy*, 91 *ETHICS* 357, 371 (1981) ("[T]he politics of direct democracy is pure numbers.")); Lawrence G. Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 *HARV. L. REV.* 1373, 1414 (1978) ("Legislation by plebiscite is not and cannot be a deliberative 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."). Gunn notes that aggregate voting dilutes minority voting strength in the same way as at large elections. Gunn, *supra* note 5, at 140-41. She adds that, when issues presented to the public are "clear-cut and emotional," the emotional fervor results in "a reduction in the care with which voters evaluate the issues," evoking prejudice and oversimplification of issues and solutions. *Id.* at 141; see also Fountaine, *supra* note 3, at 741 ("Debate . . . is replaced by short, catchy political slogans . . . and endorsements by highly visible celebrities."); Seeley, *supra* note 5, at 902 (arguing that "the individual [plebiscite] voter is responsible to no one for his decision, [that he] . . . need not be informed on the merits, and he may vote along whatever irrational lines sway him").

However, Baker points out that plebiscite voters have the same opportunity for discussion, debate, reflection and exposure to different views as voters in the legislative system. Baker, *supra* note 3, at 748-49. She notes that, although "discussion is part of a representative's paid job, . . . that does not necessarily mean that she will be systematically more likely than the ordinary voter to exchange views with fellow decisionmakers on a given issue." *Id.* at 749. For example, plebiscite voters may participate in town meetings and hearings held by local government agencies and they may discuss proposed legislation in their schools and workplaces, on radio talk shows, in the local press, at social and recreational clubs, with their friends and neighbors, and at meetings of civic and voluntary organizations. *Id.* Given the busy schedule and varied responsibilities of legislators, Baker concludes that "wide variation among both representatives and plebiscite voters—and across issues—seems more likely than systematic differences between the two groups in the extent to which individuals discuss a given issue with fellow decisionmakers prior to voting." *Id.* at 749-50.

³² Eule contends that "[i]solated decisions—like plebiscites—create few opportunities for trade-offs and little need for the establishment of continuing relationships. One just wins or loses. Representative government engenders cooperation because winners and losers return to meet again." Eule, *supra* note 3, at 1527 (footnote omitted); accord Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145, 182 (1977-1978) (noting that the assurance of broadly distributed long-term benefits that results from vote trading is suspended in plebiscites). In describing this same view, Gillette adds that "trading can occur only if the same

The representative system also provides greater opportunity or inducement to consider an entire course of conduct and formulate a cohesive theory of government, both of which may allay faction on individual issues, than does citizen lawmaking, which involves only isolated votes on single issues.³³ In addition, the existence of such legislative "derailment" mechanisms as committee hearings prevents most

potential traders are involved in multiple transactions" because there will be a need to monitor future votes in order to enforce the bargain. Gillette, *supra* note 3, at 968. Thus, because only a single issue is before plebiscite voters at any given time, they cannot make binding promises about votes on subsequent issues which they cannot be assured will materialize. Even in instances in which explicit plebiscitary bargains could occur, they "would be deterred by the inability to police . . . performance in the privacy of the voting booth." In contrast, "[m]onitoring and retaliation may be possible in a legislature, where defections can be observed and redressed." *Id.*

However, Gillette quarrels with both the premise and conclusion of this analysis. He describes the premise of logrolling as giving "those with the highest intensity of preference control over an electoral outcome." *Id.* Then he explains that the lack of incentive for voters to vote on ballot propositions in which they have little interest will insure that, even in the plebiscitary process, issues will not be decided by those without strong preferences. *Id.* at 968-69. Gillette further maintains that the supposed lack of devices for compromise in the plebiscitary forum is both inaccurate and unimportant. He argues that compromise is available only where political choices do not rest on binary alternatives, which excludes a "myriad" of situations, even in legislatures. *Id.* at 969. He also contends that compromise may be characteristic of the plebiscitary process as well as the legislative process. In the latter arena, Gillette asserts that it occurs *after* an initially more radical measure is proposed, whereas in the plebiscitary process, proponents of an initiative or referendum must necessarily compromise more radical views and moderate their proposal *before* it is placed on the ballot if they wish to achieve success. *Id.* at 971. Finally, Gillette explains that the public may be no more likely to dwell on short term rather than long term effects of a proposed law than its legislative counterpart. *Id.* at 971-74.

³³ See Briffault, *supra* note 3, at 1363-64 (conceding that "the initiative agenda is thin, presenting only a few isolated questions to the electorate seriatim," so that interested groups do not bargain with each other for exchange of support across different issues); Gillette, *supra* note 3, at 943 ("Plebiscites occur in staccato fashion on isolated and unrelated topics. The myriad issues on which the voters express themselves have only coincidental interconnection and provide voters with little means to formulate a unified idea of appropriate government action."); Sager, *supra* note 31, at 1415 (describing plebiscites as presenting "no occasion for individual commitment to a consistent or fair course of conduct"); cf. Gunn, *supra* note 5, at 141 (characterizing public campaigns as oversimplifying issues and promising simplistic solutions to complex problems); Randall L. Hodgkinson, Comment, *Executive, Legislative, and Judicial Power Over Direct Legislation in Arizona*, 23 ARIZ. ST. L.J. 1111, 1126 (1991) (reporting an Arizona Supreme Court decision holding that the legislature should be able to amend or repeal plebiscites "because many measures enacted by direct legislation become obsolete or fail to have the advantage of debate and compromise").

In the republican conception of the federalists' vision, representatives were supposed to engage in a form of collective reasoning, during the course of which they would transcend special interests and follow a larger vision of the public good. See Sunstein, *supra* note 26, at 46-47. Alternatively, according to the pluralist conception, representatives were to balance and negotiate issues based on more parochial concerns, with the common good amounting to "an aggregation of individual preferences." *Id.* at 32-33. These competing conceptions of the proper function of legislative representatives inform one's assessment of the propriety of the plebiscitary process. For example, plebiscitary voters' lack of concern with the place a given law might hold in the larger, long-term legal picture may like-

proposals, particularly those that may be unduly factious, from becoming law. These mechanisms are absent in plebiscitary decisionmaking.³⁴ Finally, the public nature of the representative's vote is designed to force a certain degree of moderation; a lawmaker who must account to all for her actions is somewhat less likely to vote in accordance with her own or her constituents' blatant biases, as she may find them difficult to defend openly.³⁵ In contrast, plebiscites permit individual voters to register their prejudices free from public scrutiny.³⁶

wise be characteristic of legislative actors in a pluralist universe, but would probably not comport with representatives in a republican vision.

³⁴ See Gillette, *supra* note 3, at 943-44. However, different obstacles, including difficulties in qualifying measures for the ballot and overcoming voter resistance to initiative proposals, prevent most populist ideas from becoming law as well. Briffault, *supra* note 3, at 1371; *id.* at 1351 (noting that, as a result of signature requirements, only 12% of the initiatives proposed in California since 1970 made it onto the ballot) (citing THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF STATES at 67 (tbl. 4.1) (1984)); *id.* at 1352 (citing MAGLEBY, *supra* note 1, for the observations that getting initiatives on the ballot often requires substantial money and many volunteers, and that voter apathy is a significant obstacle to enactment of law by plebiscite); *id.* at 1355-57 (indicating that, despite substantial and disproportionate expenditures by proponents, voters usually vote against initiatives, due in part to lack of information or uncertainty about effects); *id.* at 1357 (concluding that "it is far harder for proponents to pass a proposition than for opponents to defeat one"); *id.* at 1359 (arguing that because voters usually vote against initiatives, no new law is thereby enacted, so the status quo remains).

³⁵ See Gillette, *supra* note 3, at 944 ("The requirement of public voting and public explanation restricts the capacity of legislators to vote either their own dark urges or those of their constituents."). Bell uses the example that even public officials elected on overtly racist campaigns "are in the spotlight and do not wish publicly to advocate racism," so that they cannot openly attribute their opposition to civil rights laws to compliance with the desires of their "racist constituents." Bell, *supra* note 2, at 13-14.

Baker disagrees. She argues that overtly discriminatory legislation easily may be found unconstitutional by courts, causing "representatives to engage in sophisticated subterfuge, obfuscation, and rationalization when drafting such legislation and crafting its official history." Baker, *supra* note 3, at 736. The result is that, unlike the typical plebiscite voter, these "lawmaking experts" may fashion laws whose purpose and effects are ambiguous, allowing lawmakers publicly and disingenuously to disclaim discriminatory motive for what are actually discriminatory laws. *Id.*

Additionally, Baker explains that a nonracist representative with a majority of constituents who support a racist measure has an incentive to support racially disadvantageous legislation that he would not support if voting anonymously. *Id.* Conversely, a racist representative with a majority of constituents who oppose proposed legislation that disadvantages a racial minority has an incentive to oppose the legislation that he would support if his vote were anonymous. She concludes that it is difficult to determine which of these two situations occurs more frequently, implying that this factor may or may not affect the probability that public voting will cause legislators to vote less discriminatorily. *Id.* at 735.

³⁶ See Eule, *supra* note 3, at 1553 ("While public proclamations of racist attitudes have lost their respectability, prejudice continues to receive an airing in the privacy of the voting booth."); Bell, *supra* note 2, at 14-15 (stating that direct democracy "enables the voters' racial beliefs and fears to be recorded and tabulated in their pure form"); Sager, *supra* note 31, at 1414-15 (explaining that plebiscites involve "no individual record or accountability"); Seeley, *supra* note 5, at 902 (arguing that, while "representatives must take a public posi-

One must keep in mind that even advocates of this argument recognize that this is a theoretical view of the legislative process, and that the system may not perform in practice as it operates in theory.³⁷ But the representative structure nevertheless provides certain institutional

tion for which they are responsible," an individual plebiscite voter's "decision may never be known," enabling him "easily [to] discriminate on the basis of race").

On the opposite side, Baker suggests that "the median voter may be more willing to vote (anonymously) for representatives who openly support legislation that disadvantages a racial minority, than she would be to vote anonymously for the same legislation in a plebiscite." Baker, *supra* note 3, at 735. She explains that this may occur because the voter may be "less comfortable enacting discriminatory legislation directly than indirectly. Additionally, the voter will likely be able to justify (to herself and others) her choice of a 'racist' representative on the basis of his many policies and actions on non-racial issues." *Id.* at 735-36.

Moreover, Briffault maintains that the public regularly distinguishes between citizen-initiated ballot proposals, which it usually defeats, and proposals submitted by legislatures, which it regularly approves. This could indicate that "[t]he electorate seems to be able to make a reasonable discrimination," adopting those measures arguably certified as in the public interest and rejecting those "that are the product of the special-interest dominated initiative process." Briffault, *supra* note 3, at 1360 n.66. In short, voting patterns may suggest that the electorate is not particularly inclined to vote its personal biases any more readily than its representatives would.

³⁷ See, e.g., Eule, *supra* note 3, at 1549 ("It is undoubtedly true that many critics of the plebiscite overstate the deliberative capacity of the legislative process."). See also Briffault, *supra* note 3, at 1362 (observing the gap between the potential for deliberation and its actual occurrence: "much legislation is enacted without the informed, thoughtful analysis or extensive consideration contemplated by the legislative ideal"); Frederick Schauer, *Deliberating About Deliberation*, 90 MICH. L. REV. 1187, 1200 (1992) (book review) ("Normal politics, much of it taking place out of sight, might also . . . involve officials putting their hands in the till, literally and figuratively, to the detriment of the public interest."); Sunstein, *supra* note 26, at 48-49 ("Few would contend that nationally selected representatives have been able to exercise the [deliberative] role."). Eule even comments that "[t]he gap between theory and reality is probably most pronounced at the state and local levels." Eule, *supra* note 3, at 1549. This is precisely the level at which plebiscites occur. One state senator described the process as follows: "Every legislator has his own system for judging how he will vote, but reading the bill usually isn't part of the procedure, and listening to debate on the bill's merits certainly isn't either." HERBERT W. RICHARDSON, *WHAT MAKES YOU THINK WE READ THE BILLS?* 37-38 (1978) (cited in Briffault, *supra* note 3, at 1362-63 & n.83). Or, in the words of William Greider:

For several generations . . . Americans have been systematically taught to defer to authority and expertise in a complicated world. The modern political culture . . . teaches implicitly that those chosen to hold power have access to special knowledge and intelligence . . . and, therefore, their deliberations and actions are supposedly grounded in a firmer reality. . . . [I]f the real inside story were known, every statesman and politician would prove to be as recklessly human as the rest of us.

WILLIAM GREIDER, *WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY* 407 (1992). Cf. Farber & Frickey, *supra* note 13, at 874 (noting that "[s]ome of the public choice literature suggests that legislatures speak only for well-organized groups, and not for the general public").

Sunstein posits, as a criticism of his call for a new, civic republicanism, that "the failure of representatives to act deliberatively may be a positive good, for it guarantees their accountability to the electorate." Sunstein, *supra* note 26, at 76. A conclusion to be drawn from this view of proper legislative process is that "[d]efects in the processes of pluralism should be remedied with an effort to increase access to government authority for those

minority-protective mechanisms, making it at least more likely that these protections will actually function in the legislative arena than in the plebiscitary process, which lacks similar minority-protective, institutional features.³⁸

The second constitutional check on majority faction is found in the separation of powers, including the separations between the federal and state governments, among the federal branches, and even within federal branches. Each governmental unit represents a different popular constituency.³⁹ Because two or more power centers must essentially agree in order to effectuate the majority's will, the division of power among several constituencies limits the popular majority's ability to act in a unified, collective fashion.⁴⁰ For example, bicameralism and presentment require that both houses of the legislature and the executive favor a proposal for it to become law, thus compelling a rather wide measure of support before legislation is enacted. A proposal reflecting majority faction that makes it through one house or through another step in the legislative process might fail at the next stage or be diluted by the compromise that is necessary to secure sufficient backing for ultimate passage.⁴¹

who are otherwise unable to participate, rather than by requiring politics to assume a deliberative form." *Id.*

³⁸ *But see* Baker, *supra* note 3, at 712-15 (arguing that the special features of the legislative process claimed to benefit minorities "do not constitute *a priori* reasons for a racial minority generally to prefer representative to direct democracy," because the same differences in the legislative and plebiscitary processes that make it more difficult for a racial minority to block disadvantageous legislation in a plebiscitary than in a legislative process also "make it easier for the minority to pass *advantageous* legislation in a plebiscitary than in a representative process"); Gillette, *supra* note 3, at 956-57 (claiming that plebiscitary voting has "similar or alternative mechanisms [as compared with those found in legislative deliberation] for neutralizing socially suboptimal effects of self-interested behavior"); *id.* at 968-69 (deducing that one need not worry about the absence of logrolling in plebiscites because those with little interest in ballot proposals are unlikely to vote, leaving such issues, like logrolled legislation, to be decided by those with strong preferences); *id.* at 972-88 (describing several other features of plebiscitary voting that indicate that plebiscitary outcomes are not more likely than legislative outcomes to be disadvantageous to minorities).

³⁹ *See e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 642 & n.328 (1993).

⁴⁰ *See* Eule, *supra* note 3, at 1528 (describing the structure as "a horizontal line of separate representation filters, each of which receives input from a different source but the cumulative outputs of which are needed to generate sufficient power to make the machine run"); THE FEDERALIST NO. 51, at 324-25 (James Madison) (Clinton Rossiter ed., 1961). The idea that it would be difficult for several power centers to combine to support one particular special interest stems from Madison's notion that our federal republic would encompass so many "interests and classes of citizens" that the rights of individuals or minorities would be "in little danger from interested combinations of the majority." *Id.* at 324.

⁴¹ Gillette, *supra* note 3, at 943-44. Professor Baker, however, concludes that "bicameralism and the possibility of an executive veto in the representative lawmaking process do not alone provide *a priori* reasons for a racial minority to prefer representative to direct democracy." Baker, *supra* note 3, at 721. She bases this conclusion on a numerical analysis

Because both the legislative and executive authorities are still answerable to the electorate, these first two lines of defense against majority faction could prove to be unavailing.⁴² Consequently, certain private rights were specially noted in the Constitution⁴³ and the Bill of Rights⁴⁴ to be protected against government intrusion, which could reflect majoritarian excess.⁴⁵ Thus, when the influence of majority faction manages to slip through the first two safety nets, the more politically independent federal judiciary steps in to ensure these constitutionally "entrenched" rights of minorities.⁴⁶

In summary, the product of the legislative process is "refined or filtered majoritarianism," as opposed to the raw majoritarianism of the populace.⁴⁷ Plebiscites are constitutionally suspect because they are not the product of the intended filtering processes, and, therefore, pose a greater threat to minorities than laws enacted by legislatures.⁴⁸

illustrating that "very similar percentages of voters are likely to be necessary in a plebiscite and a representative body both to block legislation that disadvantages a racial minority and to enact legislation that advantages it." *Id.* at 716. For example, she explains how "only approximately 39 percent of the voters could, in theory, be necessary (in the absence of an executive veto) for a bicameral representative body to pass legislation that disadvantages a racial minority," while, "[i]n contrast, a . . . majority of voters is always necessary for a plebiscite to enact legislation." *Id.* at 717. For a fuller explanation of her theory, see *id.* at 716-21.

⁴² See Eule, *supra* note 3, at 1529 (offering examples of possible failures of the system that might have concerned the framers, such as the northern majority prohibiting the slave trade, a large group of states joining forces against a particularly successful neighboring trading state, and the debtor majority's backlash against creditor minorities).

⁴³ See, e.g., U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the obligation of Contracts. . .").

⁴⁴ See, e.g., U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech. . ."). Eule notes that Madison originally opposed the inclusion of a bill of rights but later came to recognize its potential as "yet another device for filtering majoritarian preferences. . ." Eule, *supra* note 3, at 1530.

⁴⁵ See Eule, *supra* note 3, at 1529-30.

⁴⁶ See *id.* at 1525 (noting that courts "serve predominantly as a safety net to catch those grains of tyrannical majoritarianism that slip through when the constitutional filtering system malfunctions"); *id.* at 1530 (describing Madison's support for a bill of rights as "afford[ing] a role for the judiciary in curbing the more immediately responsive and accountable branches").

⁴⁷ See *id.* at 1532 ("Refined, or filtered majoritarianism, captures the virtues of popular sovereignty without being tainted by its vices.").

⁴⁸ See discussion *infra* part II.A. See also Bell, *supra* note 2, at 23 ("[P]opular sovereignty processes do present a threat to minority rights."); Eule, *supra* note 3, at 1549 ("[D]irect democracy bypasses internal safeguards designed to filter out or negate factionalism, prejudice, tyranny, and self-interest," thus requiring special judicial oversight to serve as a defense for minority interests.); Gunn, *supra* note 5, at 141 ("[D]irect democracy eliminates the procedural safeguards which protect minority rights in representative government.").

3. *The Guarantee Clause: Applying the Checks to the States*

The analysis thus far applies only to the structure of the federal government. Yet plebiscites are a form of state and local, not federal, lawmaking.⁴⁹ Proponents of heightened judicial scrutiny for popularly enacted law use the Guarantee Clause to connect the guarantees of the federal representative model with state government.⁵⁰ It is argued that, although the Guarantee Clause does not clearly require any particular system for state governance, it nevertheless guarantees that the basic structure of state government be representative, or mirror the federal government's republican axiom of accountability to the majority with filters to protect minorities.⁵¹ Essentially, the Guarantee Clause is meant as a check against both monarchy, at one extreme, and "pure" democracy (unfiltered majoritarianism) at the other.⁵²

Under this view of the Guarantee Clause, plebiscites are not constitutionally forbidden; rather, they are constitutionally problematic.⁵³

⁴⁹ A resolution proposing a federal constitutional amendment instituting a national initiative process was introduced in Congress in the late 1970s. See S.J. Res. 67, 95th Cong., 1st Sess. (1977); H.R.J. Res. 658, 95th Cong., 1st Sess. (1977). The resolution attracted much support. See Allen, *supra* note 3, at 1001-06 (lauding national initiative as augmenting checks and balances, defusing single issue politics, and providing a voice to minority groups); Slonim & Lowe, *supra* note 3, at 180-81 & nn.37-40; but see Charles L. Black, Jr., *National Lawmaking by Initiative? Let's Think Twice*, 8 HUM. RTS. 28 (1979) (describing a national initiative process as eviscerating significant organs and aspects of federal lawmaking). For the text of the proposed amendment, see 123 CONG. REC. 22, 279 (1977). The push for a federal initiative dates back at least to a 1921 proposed Labor Party platform. See MAGLEBY, *supra* note 1, at 23.

In 1992 President Bush proposed a system whereby federal taxpayers could check a box on their returns to have up to 10% of their tax liability allocated to reduce the national debt. Under the proposed plan, checking the box would trigger automatic spending cuts in a wide variety of federal programs. See Llewellyn H. Rockwell, Jr., *Bush Finally Comes Up With a Winner; 'Debt Check-off' Would Raise Taxpayer Consciousness and May Lead to Budget Democracy*, L.A. TIMES, Sept. 13, 1992, at M5; Rick Wartzman, *Bush's Debt-Faring Plan for Checkoffs By Taxpayers Has Weak Track Record*, WALL ST. J., Aug. 24, 1992, at A10. Depending on how it was implemented, one might view such a system as a form of national plebiscite. See Rockwell, *supra*, at M5 (describing the plan as "[p]lebiscitary budgeting"); *Houston's Two Conventions*, N.Y. TIMES, Aug. 23, 1992, at A14 (editorial) (deriding President Bush's proposed deficit reduction check-off for "empower[ing] individuals to decide" how much to reduce the deficit "[i]nstead of . . . Congress, [which is] elected on the basis of one person one vote," because "in his scheme, votes are proportional to income—in effect giving the rich the power to kill programs for the poor").

⁵⁰ See Eule, *supra* note 3, at 1539-45; Seeley, *supra* note 5, at 905-10; Slonim & Lowe, *supra* note 3, at 759-65. The Guarantee Clause provides: "The United States shall guarantee to every state in this Union a Republican Form of Government. . . ." U.S. CONST. art. IV, § 4.

⁵¹ See Eule, *supra* note 3, at 1539-41; Seeley, *supra* note 5, at 908-09.

⁵² See Eule, *supra* note 3, at 1540-41 & n.159 and sources cited therein. See also Seeley, *supra* note 5, at 909 ("one element in the definition of republican form is clear—the government must be a *representative* one," and inherent in that concept is the protection of the minority from capricious majority rule).

⁵³ See Eule, *supra* note 3, at 1544-45. Professor Bell might not agree with this assessment. He argues that, in subjecting plebiscites to special scrutiny, courts "would be pro-

Because the clause requires that state government *as a whole* be representative, a provision for citizen lawmaking within a system that is otherwise basically republican does not give rise to a violation of the Guarantee Clause itself.⁵⁴ But the clause's guarantee of minority-protective filtering does call for a different judicial role when the court is faced with challenges to plebiscites based on constitutional provisions other than the Guarantee Clause.⁵⁵ The argument is made that unrefined majoritarianism—the product of a plebiscitary process—may

tecting . . . the integrity of the representational system, rather than directly remedying racial discrimination," thus suggesting that he may indeed be objecting to plebiscites on Guarantee Clause grounds. See Bell, *supra* note 2, at 26. Accord Seeley, *supra* note 5, at 909 (arguing that a "system that subjects pro-majority group legislation already passed by representative government to approval by absolute majority vote" is a sure denial of a republican form of government) (footnote omitted).

⁵⁴ See Eule, *supra* note 3, at 1544; Louis J. Sirico, Jr., *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637, 654-59 (1980); Note, *Constitutionality of the Referendum*, 41 YALE L.J. 132 (1931). Some conclude that direct democracy does, in fact, violate the Guarantee Clause. See, e.g., Fountaine, *supra* note 3, at 772-76.

For a different analysis of the constitutionality of initiatives and referenda in light of the Guarantee Clause, see Linde, *supra* note 3, at 163-69, and Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993) [hereinafter Linde, *Campaign Against Homosexuality*]. Professor Linde asserts that the clause invalidates some, but not all, plebiscites; only those initiatives based on motives most feared by the framers, including economic self-interest and collective "passion" (meaning communal bigotry) run afoul of the clause. Linde, *Campaign Against Homosexuality*, *supra*, at 31-35. For a list of the specific types of initiatives that Linde would find unconstitutional, see *id.* at 41-43.

The Supreme Court has decided that the constitutionality of plebiscites under the Guarantee Clause is a nonjusticiable political question. *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569 (1916); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 149 (1912). The Court did not always adhere, however, to the view that all Guarantee Clause cases are nonjusticiable. See, e.g., *Michigan ex rel. Kies v. Lowrey*, 199 U.S. 233, 239 (1905); *Forsyth v. Hammond*, 166 U.S. 506, 519 (1897); *In re Duncan*, 139 U.S. 449, 461-62 (1891); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175-76 (1874). The Court may not find nonjusticiability in every future instance in which such claims are raised. See *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) ("some questions raised under the Guaranty Clause are nonjusticiable") (emphasis added). Cf. *New York v. United States*, 112 S. Ct. 2408, 2433 (1992) (discussing that the view that the Guarantee Clause implicates only nonjusticiable political questions may not hold true according to recent cases); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 553-57 (1962) (asserting that, while the Court in *Pacific States* may have been correct to find a nonjusticiable political question, the decision incorrectly has been used to support the far broader proposition that all Guarantee Clause questions are nonjusticiable); Linde, *Campaign Against Homosexuality*, *supra*, at 20-21 (arguing that the Supreme Court's ruling in *Pacific States* does not preclude state officials and courts from considering the substantive issue of whether state governmental structures, like plebiscites, violate the Guarantee Clause). Were the Court to reconsider the issue today, as some urge it might well do, the remarkable resemblance between the constitutionally prescribed federal governmental structure and the actual structure in virtually every state might contribute to a finding that the republican government guaranteed to the states by the Guarantee Clause requires something very similar to the federal-state representative system. See, e.g., Fountaine, *supra* note 3, at 762-65 (urging Court to reconsider justiciability of Guarantee Clause cases).

⁵⁵ See Eule, *supra* note 3, at 1545.

warrant less judicial deference than refined majoritarianism—the product of a representative lawmaking process.⁵⁶ Therefore, when a state or local measure enacted by plebiscite is challenged on the basis of a federal constitutional provision,⁵⁷ other than the Guarantee Clause, the Guarantee Clause's promise of filtered lawmaking suggests that the judiciary ought to examine the law more closely than if the law had passed through a representative filtering process.⁵⁸

4. *The Judicial Role: "A Harder Look"*

As for the judicial role, proponents of the special review thesis maintain that the usual justifications for judicial restraint do not apply to popularly enacted law. The notion that courts should defer to lawmakers out of respect for the work of coequal branches of government in which the framers reposed their trust does not inhere when the decisionmaker resides outside of the framers' carefully constructed scheme.⁵⁹ Moreover, while legislative representatives have an explicit constitutional obligation to conform their product to constitutional requirements,⁶⁰ the public as lawmaker has no similar obligation, nor any particular incentive ability to determine constitutional standards.⁶¹ Finally, deference to the legislature is often attributed to

⁵⁶ See *id.* at 1532-33 (explaining that legislative enactments reflect "majoritarianism *plus*" and "it is the plus that warrants judicial caution in substituting its own judgment," while "judicial deference looks different when applied to electoral decisionmaking" because deference is "not grounded in a deification of unfiltered majority preferences").

⁵⁷ Professor Eule explains that his argument that plebiscites should receive greater judicial scrutiny than legislation "makes sense only when an attack is mounted under a provision of the Federal Constitution." *Id.* at 1547-48. "The preference for representative government revealed in the history and structure of the Federal Constitution has no equal in the constitutions of the states where voters enjoy lawmaking power." *Id.* at 1545. Thus, he concludes, "[w]here the state constitution is the source of a judicial challenge, the absence of a representational bias . . . render[s] the argument inappropriate." *Id.* at 1548. This would be true especially where the public can amend the state constitution by popular vote. See, e.g., MAGLEBY, *supra* note 1, at 38-40 (tbl. 3.1) (listing places in which the state constitution may be amended by popular vote and including Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota).

⁵⁸ See Eule, *supra* note 3, at 1544-45, 1549.

⁵⁹ See *id.* at 1533-36.

⁶⁰ "The Senators and Representatives . . . , and the Members of the several State Legislatures . . . shall be bound by Oath or Affirmation, to support this Constitution" U.S. CONST. art. VI. See also William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1, 25-26 (quoting Justice Gibson's famous dissent for the proposition that not only judges, but also every officer of the government, takes an oath to support the Constitution) (citing *Eakin v. Raub*, 12 Serg. & Rawle 330, 352-53 (Pa. 1825) (Gibson, J., dissenting)).

⁶¹ Eule, *supra* note 3, at 1537 (noting that "Article VI imposes the obligations of constitutional compliance on public officers, not the electorate," and that "[e]ven if voters were made aware of . . . issues [of constitutionality], the knowledge or information necessary to such a decision [such as testimony of legal experts] would be missing"). One could argue that lawmakers likewise have little incentive to determine constitutionality, as this issue may

the legislature's superior factfinding ability; deference to the public is unwarranted because it lacks the legislature's unique factfinding tools, including "staff, resources, time and understanding."⁶² In short, it is argued that initiatives and referenda should "trigger[] a harder judicial look[],"⁶³ given the absence of grounds for judicial deference and the special danger that pure democracy poses for minorities.

B. The Thesis' Corollary

One inference that supporters of the special review thesis draw from the above arguments is that courts should apply a different analysis to popularly enacted measures that have a differential, burdensome impact on certain electoral minorities. The reasons cited for the special review of plebiscites,⁶⁴ it is argued, may be particularly compelling for popularly enacted measures that touch upon the rights of minorities. This is because the representative legislative process provides special protections to minority groups in several important ways that are absent in the case of substitutive plebiscites.

For example, it barely requires citation to assert that some racial and ethnic minorities often are not afforded the same level of regard by the majority as the majority group accords its own members.⁶⁵ This may stem from animus, unfamiliarity, or even animus resulting from unfamiliarity.⁶⁶ The legislative process contains institutional provisions for exposure to different attitudes and opinions. At the very least, such exposure ameliorates unfamiliarity with "outsiders,"⁶⁷ and it may even reduce partiality by increasing sensitivity to and understanding of others.⁶⁸ Committee hearings, for example, provide fora

be, and often is, deferred for later judicial determination. See Linda Greenhouse, *What's a Lawmaker to Do About the Constitution?*, N.Y. TIMES, June 3, 1988, at B6.

⁶² Eule, *supra* note 3, at 1538.

⁶³ *Id.* at 1545.

⁶⁴ See, e.g., *supra* part I.A. (discussing the increased potential for bias reflected in a secret ballot).

⁶⁵ See Bell, *supra* note 2, at 10 (describing an "historic pattern" of whites voting on the basis of racial rather than economic or class identification); Gunn, *supra* note 5, at 140 (asserting that voters generally "analyze issues from a personal perspective, and ignore the concerns of interested minority groups").

⁶⁶ See Eule, *supra* note 3, at 1555 ("Racism is not always conscious. More often than not it occurs because of ignorance, oversight, or insensitivity.").

⁶⁷ The term "outsiders" is used in current legal literature to refer to "the constituencies typically excluded from jurisprudential discourse." See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 n.15 (1989). Examples of outsiders include women, the poor, racial minorities, and combinations of these groups. See, e.g., Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 740 (1991) (referring to individuals in all these groups and their combinations as "outsiders").

⁶⁸ Eule, *supra* note 3, at 1555 ("Knowledge and exposure are effective weapons against prejudice. . . . Enlarging one's exposure to competing ideas and perspectives induces

for minority interest groups to testify before those who will vote.⁶⁹ Also, assuming that the legislature has a diverse membership, representatives who are members of minority groups may continually air common interests and views.⁷⁰ Additionally, their very presence in the legislative hall may make it more uncomfortable for others publicly to support and vote on measures detrimental to racial and ethnic minorities.⁷¹ They may also secure compromises favorable to their interests by taking part in the logrolling that occurs over a broad agenda.⁷² In plebiscites, on the other hand, exposure to minority views is usually accidental, if it occurs at all, and there is no vote trading or public accountability.⁷³

Furthermore, the legislative process serves to amplify the power of minority voices beyond their simple numerical strength among the

greater sensitivity and checks partiality."); see *id.* at 1555 n.232 (citing JOHN RAWLS, *A THEORY OF JUSTICE* 358-59 (1971)).

⁶⁹ See *id.* at 1555.

⁷⁰ *Id.* It is possible that legislative representatives who have significant minority constituencies, but are not themselves members of those constituent minorities, might actively advocate for their minority groups' interests. Proponents of the point expressed in the text, however, would probably not consider such a representative presence as effective as an actual, personal presence. See *id.* ("When minorities are part of the legislative 'we,' subordination of the 'other' becomes both more visible and less comfortable."); *id.* at 1555 n.233 (citing Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1588 (1989)).

⁷¹ *Id.*

⁷² See *id.* at 1556 (borrowing the phrase from Briffault, *supra* note 3, at 1363). Baker agrees "that legislatures provide more opportunities of logrolling than do plebiscites," but contends that "the legislature's greater number of logrolling opportunities will *not necessarily* mean that a racial minority will be better able to block the passage of disadvantageous legislation in a representative body than in a plebiscite." Baker, *supra* note 3, at 725. According to Baker, there are three constraints that reduce the usefulness of logrolling. "First, logrolling can alter the results of a vote only if the minority feels more intensely about an issue than the majority," and even then only when the intensity of minority preference "is *sufficiently greater* than that of the majority to make the minority willing to sacrifice *enough votes* on other issues to detach marginal voters from the majority." *Id.* at 728. Second, "prejudice can severely . . . constrain the logrolling opportunities available to certain interest group representatives within a legislature"; empirical evidence supports the proposition that "a discrete and insular electoral minority often remains an outvoted legislative minority." *Id.* at 729 & n.75 (quoting Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1416 (1991) and Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1116-28 (1991) (offering empirical evidence)). Third, "[d]epending on the number and size of competing coalitions, the minority group representatives may actually be *numerically incapable* of affecting the outcome no matter how they vote," so that they "lack the bargaining power necessary for successful coalition-building and logrolling." *Id.* at 730.

⁷³ Eule, *supra* note 3, at 1555-56. See also MAGLEBY, *supra* note 1, at 180-81 (arguing that direct democracy "is structured in ways that limit effective participation for some voters" and that serve to intensify conflict, while indirect democracy "is generally structured to facilitate compromise, moderation, and a degree of access for all segments of the community"); Gunn, *supra* note 5, at 141 (stating that majority perception is often manipulated by public campaigns that appeal to prejudice); discussion *supra* notes 31-36 and accompanying text.

electorate. Minorities attain disproportionate influence as members of legislative committees, whose approval is necessary to place proposals before the larger body.⁷⁴ They aggregate and then intensify their voting authority through political parties, which are an integral part of the legislative system but effectively absent from plebiscites.⁷⁵ Additionally, bicameralism and executive veto provisions may act like supermajority requirements because broader support becomes necessary to secure passage in these different constituencies, thereby forcing those voting on legislation to consider more diverse views.⁷⁶ In contrast, direct democracy dilutes minority voting strength in the same manner as at-large elections,⁷⁷ and plebiscite voters do not respond to the intensity of viewpoint on an issue in the same way as legislators. This causes "[m]atters of extreme consequence to minorities, but of marginal importance to the majority," to remain dependent on the majority's perception of the issue.⁷⁸

⁷⁴ Eule, *supra* note 3, at 1557. But see William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 399 (1988) (arguing that "the process of agenda selection by congressional committees affords minorities little protection against the violation of their rights").

⁷⁵ Eule, *supra* note 3, at 1557.

⁷⁶ *Id.* at 1557 ("Bicameralism forces majorities to seek broader coalitions. It imposes something like a supermajority voting rule. The executive veto not only affords minority groups an additional ear on legislation that affects them, but because legislative override demands supermajority votes, the veto also enhances minority currency.") (footnote omitted). But see Baker, *supra* note 3, at 716-21 (suggesting how bicameralism and the executive veto may not result in a systematic difference in the tendency of legislation versus plebiscites to disadvantage racial minorities).

It is not clear whether these supposed advantages of legislative lawmaking extend to minorities who have little or no representation in the legislature. Eule's "under-represented" groups, whoever they may be, may not reach a level of representation, and hence power, in legislative halls, that would render their legislative situation significantly different from their plebiscitary situation.

⁷⁷ Bell, *supra* note 2, at 25.

⁷⁸ Gunn, *supra* note 5, at 140-41. See also MAGLEBY, *supra* note 1, at 184-85 (noting that intensity of opinion has little effect on direct legislation, but a measurable effect on representative legislation); Bell, *supra* note 2, at 25 (same); Slonim & Lowe, *supra* note 3, at 191 (considering the relative responsiveness of legislative assemblies to intensity of viewpoint, and the resulting negative affect on minority group influence in the relatively unresponsive plebiscitary process). But see Briffault, *supra* note 3, at 1355-57 (implying that intensity of interest may indeed register in plebiscites and explaining that there is an exceptionally strong voter reluctance to pass ballot measures except in those instances in which plebiscites are well publicized or concern subjects on which voters have particularly strong opinions).

Briffault argues that, overall, "the greater *potential* for [legislative] attentiveness to minority groups has not always been matched in *practice* Racial discrimination was largely a product of state legislative action, not initiative votes." *Id.* at 1364. He adds that minority groups benefit from the "negative bias" in the plebiscitary system, that is, the difficulty of getting measures on the ballot and the tendency of initiative voters to reject rather than enact ballot proposals. *Id.* at 1366. Additionally, Briffault criticizes Magleby for overstating

C. Implementing the Thesis & Its Corollary

One conclusion some draw from this analysis is that courts should exercise a different and possibly more searching review when minorities attack plebiscites unfavorable to their interests on, for example, equal protection grounds.⁷⁹ Different writers suggest different remedies to implement this conclusion.

Professor Bell argues for "heightened scrutiny" of plebiscites, "similar to that recognized as appropriate when the normal legislative process carries potential harm to the rights of minority individuals."⁸⁰ Bell does not specify what heightened scrutiny would mean in this context.⁸¹ At one point he seems to suggest something similar to the strict scrutiny standard applicable to certain equal protection claims of racial discrimination.⁸² Bell acknowledges that in order to implicate strict scrutiny where legislation is "couched in racially neutral terms" the plaintiff must show that the legislature had a purpose to discriminate against the disadvantaged race.⁸³ He recognizes, as

the defects of direct democracy "while ignoring the possibility that representative democracy suffers from many of the same problems." *Id.* at 1373.

⁷⁹ Professor Eule suggests that this special judicial review should apply beyond the equal protection context, but concentrates on equal protection cases in developing his argument. *See, e.g.,* Eule, *supra* note 3, at 1559-67 (using several United States Court of Appeals and Supreme Court cases raising equal protection challenges to plebiscites to illustrate his thesis). For a more complete discussion of the possible reason Eule focuses on equal protection problems, see *infra* notes 101-112 and accompanying text. Equal protection methodology already includes provision for a harder or closer judicial look in certain instances; later sections of this article will explore what Eule might mean by an even closer closer look. *See infra* notes 93-112 and accompanying text.

⁸⁰ Bell, *supra* note 2, at 23.

⁸¹ Under present law, enactments would be subjected to the same constitutional analysis regardless of whether they were passed by plebiscite, routine legislative procedure, or a combination of both. *See* *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) ("The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed."); Briffault, *supra* note 3, at 1364 ("The electorate-as-legislature can no more infringe upon constitutionally protected rights than can the representative legislature."). Thus, the same equal protection scrutiny would be applied to legislative and plebiscitary enactments.

⁸² *See* Bell, *supra* note 2, at 23. Bell suggests that the proper level of protection for racial minorities in certain plebiscitary situations is the level of protection received by individuals in voting rights and legislative representation cases. *Id.* at 24-28. He argues that legislative representation issues involve "preferred value[s]," and cases raising such issues received special minority-favorable treatment, even though the Supreme Court majority refused to apply the strict scrutiny standard. *Id.* at 28. Read in context, Bell seems to be implying that these cases involved something like strict scrutiny even though strict scrutiny per se was not applied, and that a similar type of more searching or favorable review should inhere when minorities are disadvantaged by repeal of protective legislation through initiatives and referenda. *Id.* at 23-28.

⁸³ *Id.* at 24. *See also* *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (proof of racially discriminatory purpose is required to show a violation of the Equal Protection Clause); *Washington v. Davis*, 426 U.S. 229, 239-42 (1976) (racially disproportionate impact is insufficient to establish a violation of the Equal Protection Clause; proof of racially discriminatory purpose is required).

others have argued, that where ballot measures are likewise worded in racially neutral language it is particularly difficult to prove the existence of the required discriminatory purpose on the part of the vast, silent electorate.⁸⁴ It is not clear whether Professor Bell means to say that strict scrutiny should be applied to ballot initiatives without requiring proof of discriminatory purpose, and, if so, in what instances.⁸⁵ Bell suggests that "[a]s a first step, Court scrutiny of ballot legislation might arguably be limited to" cases in which "the majority attempts through the direct ballot to take away something the minority obtained through the representative system."⁸⁶

Another proposal maintains that courts ought to use a different standard of review to examine laws enacted by initiative, but in this case the suggested standard is similar to the intermediate level of review used in evaluating equal protection challenges to gender-based statutory classifications.⁸⁷ Under this recommendation, courts would require that the statutory classification bear a "substantial relationship to a legitimate, *articulated* state purpose."⁸⁸ The purpose of the articulation requirement is to avoid problematic inquiries into voter intent in order to ascertain whether silent citizen lawmakers were improperly motivated by bias.⁸⁹ The requisite "means scrutiny"—the condition

⁸⁴ Bell, *supra* note 2, at 24. Briffault notes that:

The substantial difficulties of proving discriminatory intent on the part of legislatures pale in comparison to the challenge of demonstrating that a ballot proposition was enacted with an invidious purpose. It is far from clear whose intent is relevant—that of the drafters of the proposal, the thousands who signed the qualification petitions, or the [possibly millions of] voters.

Briffault, *supra* note 3, at 1365 n.95; see also Slonim & Lowe, *supra* note 3, at 203 (observing that the required showing of discriminatory motive necessitates inquiry into legislative purpose, and that such inquiry "often would be speculative in the case of [plebiscites]," rendering judicial review "improbable"); cf. Galler, *supra* note 30, at 877 & n.194 (suggesting the difficulty of determining congressional intent "in the same sense that a single individual intent can be ascertained" which "itself is doubtful.").

⁸⁵ Bell does not specify the particular form that such special consideration should take. He may mean to argue that courts ought to shift the burden of proof in race-based equal protection cases, requiring that the defendant disprove discriminatory purpose.

⁸⁶ Bell, *supra* note 2, at 26. Examples of a plebiscitary majority's attempts to rescind legislative minority gains may be found in *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (following school district's adoption of desegregation plan that included mandatory busing, state initiative passed effectively prohibiting busing to other than neighborhood school for purposes of integration); *Hunter v. Erickson*, 393 U.S. 385 (1969) (following city council's passage of a fair housing ordinance, city charter amended to require popular vote approval of any fair housing legislation); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (following passage of antidiscrimination in housing laws, state constitution amended by initiative to prohibit enforcement of such laws).

⁸⁷ See Slonim & Lowe, *supra* note 3, at 206-09.

⁸⁸ *Id.* at 206 (emphasis added).

⁸⁹ *Id.* Slonim and Lowe recognize that an articulated purpose might be a sham, intended to mask the statute's true purpose. *Id.* at 206 n.178. They attempt to resolve this dilemma by concluding that the reviewing court could simply reject the stated purpose

that the means chosen to effectuate the state's purpose be substantially related to the articulated purpose—is intended to “prevent majorities from promoting their own interests without adequately considering minority interests.”⁹⁰

Professor Gunn, in identifying possible solutions to what she perceives to be the special antiminority bias of plebiscites, also focuses on a different standard of review. She suggests “an automatic heightened level of scrutiny when lawmaking procedures deprive minority groups of fundamental safeguards.”⁹¹ Pursuant to this higher scrutiny, those who attack plebiscites (presumably under the equal protection guarantee) would be exempt from the usual requirement of establishing that a measure was passed with a purpose to discriminate. Instead, “disproportionate impact upon minorities alone would trigger strict scrutiny.”⁹²

Professor Eule's proposal is the most complex, and incorporates some of the earlier ideas. He suggests that courts take a “harder judicial look” at plebiscites. The nature of this harder look, Eule argues, would differ from case to case, depending on the substantive nature of the plebiscite involved.⁹³ When the plebiscitary result “improves” the legislative process, as in the case of ethics in government laws, regulation of lobbyists, and campaign finance reform, there is no need for extraordinary judicial scrutiny. In these instances, new filters have

where it appeared unreasonable to assume it was the actual motivation behind the measure. They do not explain how the court is supposed to ascertain the electorate's actual purpose, a task which would require the very same problematic inquiry that the articulation requirement was intended to obviate. These omissions are significant because, as judicial decisions themselves illustrate, it does not take a great deal of ingenuity to formulate an acceptable purpose for most discriminatory legislation. *See, e.g.,* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 178-79 (1980) (speculating that Congress could have had a rational reason for denying dual retirement benefits to certain long-term railroad employees but allowing such benefits to newer employees with a more recent connection to the railroad, and adding that “[i]t is . . . ‘constitutionally irrelevant whether this reasoning in fact underlay the legislative decision’”) (quoting *Fleming v. Nestor*, 363 U.S. 603, 612 (1960)).

⁹⁰ Slonim & Lowe, *supra* note 3, at 207 (footnotes omitted). Slonim and Lowe do not clearly explain how this requirement would actually work to its intended end. Presumably, the simple fact that there was less judicial deference to the lawmaking institution (here, the electorate) would in itself assure greater minority protection.

⁹¹ Gunn, *supra* note 5, at 158.

⁹² *Id.* at 158-59. Alternatively, Gunn notes that “a second set of guidelines,” in lieu of those used in cases involving legislation, could be developed from which courts “could draw a presumption of discriminatory intent” when examining whether plebiscites violate equal protection rights. No such specific guidelines are suggested, and Gunn dismisses this alternative as unlikely to be adopted. *Id.* at 159.

⁹³ *See* Eule, *supra* note 3, at 1558-59, 1572. Eule also seems to suggest that the proper harder judicial look differs depending upon the procedural nature of the plebiscite involved. *See id.* at 1510-18. In formulating his thesis, he deduces that different remedies should apply to substitutive and complementary plebiscites, which are distinguished by their procedural characteristics. *See* discussion *supra* notes 16-18 and accompanying text.

been added against potential faction, thereby limiting the threat of majority tyranny.⁹⁴ In contrast, according to Eule, a closer look is probably warranted when the nature of the plebiscite raises concerns for individual rights or equal application of the law.⁹⁵

Eule's thesis is clearest when he applies it to equal protection challenges raised by groups traditionally given special solicitude under the Equal Protection Clause of the Fourteenth Amendment.⁹⁶

⁹⁴ Eule, *supra* note 3, at 1559-60. Cf. Briffault, *supra* note 3, at 1368 (citing "government[al] structures and regulation of the political process, taxation, and spending" as presenting the "best case[s] for direct legislation" because they are "areas in which institutional pressures cause representatives to stray from the interests of popular majorities").

The notion of "improving" the legislative process is a value-laden concept. For example, what is one to make of recent efforts to use direct democracy to impose term limits on members of state and federal legislatures? See, e.g., Recent Case, 105 HARV. L. REV. 953 (1992) (discussing California initiative limiting number of terms state legislators may serve); Don DeBenedictis, *Voters Limit Politicians' Terms*, A.B.A. J., Jan. 1993, at 26 (reporting that, in the 1992 election, "some 20 million people in 14 states voted to cap how long their senators and congressional representatives may serve"); Timothy Egan, *House Speaker and Ex-Attorney General Dueling Over Term Limits*, N.Y. TIMES, July 29, 1993, at A16 (describing state initiatives designed to impose term limits on members of Congress). Eule himself seems to acknowledge this difficulty by exempting "alterations of government structure," "reapportionment efforts," and "taxation and spending limitations" from the category of governmental reforms not subjected to a harder judicial look. Eule, *supra* note 3, at 1560. In the first two instances, he argues that reform is often "a facade for disfranchising minorities," and in the latter case, he states that the beneficiaries of taxpayer revolts are "principally upper and upper-middle class white citizens" while the brunt of the burdens fall on "the underrepresented poor" and "racial minorities." *Id.*

It is not entirely clear why the regulation of lobbyists poses no distinctive threat of majoritarian tyranny, as some of the minorities about which Eule seems so concerned maintain quite extensive lobbying efforts. See, e.g., *Reynolds Wrap*, NAT'L REV., July 26, 1985 at 19 ("The defeat of [William Bradford Reynolds, then-President Reagan's nominee for Associate Attorney General for Civil Rights,] has shown the black-power lobby . . . to be one of the strongest in the country."); Jessica Lee, *NAACP Revels in Renewed Clout*, USA TODAY, July 14, 1993 at 4A (describing conditions conducive to increased black lobbying power); Jessica Lee, *Black Staffers Giving Lobbying Lessons*, USA TODAY, Mar. 18, 1993 at 4A (reporting on conference organized by the Black Senate Legislative Staff Caucus to provide lobbying lessons for "middle-class African-Americans"). It is also unclear why Eule perceives spending limits as a category of reform that is threatening to minorities when these limits are often imposed on programs of no particular benefit to the poor and racial minorities. See, e.g., Adam Clymer, *Campaign Spending Bill Is Passed by the House*, N.Y. TIMES, Apr. 10, 1992, at A27 (reporting on House passage of a bill limiting spending in Congressional elections, purportedly to facilitate the political influence of those without resources). In other words, even process-"improving" reforms may be disadvantageous to Eule's minorities in particular factual contexts, and even those process-improving reforms exempted from his harder look may sometimes be advantageous to his special groups. Moreover, Eule's distinctions in this regard appear to assume that some minorities are special and are to be protected while others are not, although he does not explain how he chooses which groups fall into each category. See *infra* note 100 and accompanying text.

⁹⁵ Eule, *supra* note 3, at 1559. Eule supports applying special scrutiny to substitutive plebiscites in the areas of individual rights and equal application of laws because a concern for these issues prompts heightened scrutiny in the first instance. *Id.*

⁹⁶ See, e.g., *id.* at 1561-67 (applying thesis to cases involving racial discrimination, including *Kirksey v. City of Jackson*, 663 F.2d 659 (5th Cir. 1981), *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), and *Crawford v. Board of Educ.*, 458 U.S. 527 (1982)).

He repeats the problem raised by others regarding the difficulty of proving discriminatory purpose behind a law when the law is passed by the populace rather than by the legislature.⁹⁷ Eule notes two possible solutions to this evidentiary dilemma: either relaxing the burden of proving discriminatory purpose and allowing introduction of non-traditional sources to establish bias,⁹⁸ or abandoning the discriminatory purpose requirement altogether.⁹⁹ But Eule does not limit application of his thesis to equal protection claims raised by minority groups already receiving special solicitude under strict scrutiny review. For reasons that are not explained, he seems to apply his analysis in this area to other groups as well, such as the "underrepresented poor."¹⁰⁰

Eule's proposal becomes murky when he moves to areas in which equal protection challenges would traditionally receive only rational basis review, such as economic regulation. In these cases, Eule argues

⁹⁷ *Id.* at 1561 (noting that "[t]he search for a bigoted decisionmaker seems particularly elusive in the context of substitutive plebiscites" because "[p]ublic debate is minimal," "voting is private," and "lower courts have barred inquiry into motivations of individual voters"). See also Bell, *supra* note 2, at 24 (noting similar difficulties).

⁹⁸ Eule, *supra* note 3, at 1562. Eule uses "ballot pamphlets, exit polls, [and] campaign advertising" as examples of "imaginative" sources of discriminatory bias. *Id.* These same sources are noted in an earlier student article as sources for discovering statutory meaning (by examining lawmaker-voter intent) when interpreting plebiscitary law. See Elizabeth A. McNellie, Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157, 174-76 (1989). According to McNellie, courts should apply a different model of statutory interpretation to popularly enacted laws than that applied to ordinary legislation. This model would use "extrinsic aids" to determine the intent of the populace as lawmaker. Extrinsic aids indicative of electoral intent are grouped into two tiers. Those in the first tier, including voter pamphlets, statutory statements of intent, and exit polls, are more reliable indicators. *Id.* at 174-76. The "remainder of the materials produced for public consumption during the initiative campaign," including "media editorials, advertising, bumperstickers, and other promotional devices," comprises the second tier. *Id.* at 176. McNellie contends that courts should "exercise caution in relying on [second tier] materials" because they are less dependable. *Id.* at 176.

⁹⁹ Eule, *supra* note 3, at 1562. Eule does not indicate whether one particular approach (or a combination of these) is to be preferred. Rather, he seems to advance the view that either or both could be used, depending on which appeared relevant in any individual case. See *id.* at 1562-67 (analyzing both *Washington v. Seattle Sch. Dist. No. 1* and *Crawford v. Board of Educ.*).

¹⁰⁰ *Id.* at 1560. Eule's reference to the "underrepresented poor" as a group deserving special scrutiny may be based on his conclusion that there are unofficially recognized "suspect" factors in equal protection rational basis review that also trigger a more demanding judicial examination. See *id.* at 1568. The inference is that poverty is one such suspect factor.

With regard to this point, Professor Bell chides the Supreme Court for inconsistently requiring special protection for the poor in areas such as interstate travel, criminal defendants' rights, wage garnishment, summary repossession, ballot access, and access to courts for divorce actions, while withholding heightened Equal Protection Clause scrutiny in a case involving a referendum that blocked government-subsidized housing for the poor. Bell, *supra* note 2, at 4-5 (citing *James v. Valtierra*, 402 U.S. 137 (1971) (Marshall, J., dissenting)).

that the court should normally defer to whatever the legislature decided because of the lawmakers' superior factfinding ability and the judiciary's inability to review the vast quantity of information considered by the legislature.¹⁰¹ He notes that, despite its usual deference, when certain "suspect" factors are involved, the court engages in a somewhat heightened review of the relationship between the legislature's ends and the means chosen to effectuate those ends.¹⁰² He suggests that similar heightened means-end examination may be warranted in cases involving substitutive plebiscites because there is no structured factfinding to which to defer, and because of the "dangers of classification inherent in . . . naked aggregation."¹⁰³ In the end, he suggests a "more modest form of review" where "the burden of plebiscitary action falls on political actors able to defend their interests in the popular arena,"¹⁰⁴ and a more searching review "to protect the powerless whose voices are stifled in the unfiltered setting of the substitutive plebiscite."¹⁰⁵ In short, because courts have a limited quantity of antimajoritarian good will to expend, they should defer to the electorate when those adversely affected by a plebiscite have had their say in the plebiscitary process, and courts should sharpen their inquiry when initiatives disadvantage the "powerless."¹⁰⁶

As for complementary plebiscites,¹⁰⁷ Eule argues that there is no need for heightened judicial review when voters approve the legislature's choice; these cases involve filtered lawmaking *plus* popular endorsement.¹⁰⁸ When a minority group manages to exercise sufficient influence in the representative system to secure passage of a proposal by the legislature, however, the court should take a harder look if the electorate then votes against the enactment of the measure.¹⁰⁹ In

¹⁰¹ Eule, *supra* note 3, at 1568. For additional reasons why courts defer to legislative decisions, see discussion *infra*, part II.B.2.a.

¹⁰² Eule, *supra* note 3, at 1568 ("Courts sporadically move away from this deferential stance to a heightened scrutiny in response to factors they regard as suspect in some sense but are unwilling to label as such.") (citing TRIBE, *supra* note 26, at 1445). See also Gunn, *supra* note 5, at 148 (finding that wealth is a suspect criterion for legislative classification and therefore compels strict scrutiny).

¹⁰³ Eule, *supra* note 3, at 1568. Eule is presumably referring to the danger of invidious discriminatory classification that he believes follows from the plebiscite's aggregation of votes without the deliberative and other bias-ameliorating features of filtered lawmaking.

¹⁰⁴ *Id.* at 1573.

¹⁰⁵ *Id.* at 1572.

¹⁰⁶ *Id.* at 1571-72.

¹⁰⁷ For a definition of this term, see *supra* notes 16-18 and accompanying text.

¹⁰⁸ Eule, *supra* note 3, at 1573-74.

¹⁰⁹ See *id.* at 1574-75 (noting that, although "negative complementary plebiscites"—in which voters reject a legislatively approved choice—result in preservation of the status quo rather than the enactment of new law, they nonetheless pose a threat of majority tyranny in instances in which a popular majority rejects legislation that a minority group managed to convince the legislative majority to enact). This analysis essentially incorporates Professor Bell's proposed first step in resolving the problem of antiminority plebiscites. See Bell,

these cases, the court's extra scrutiny should be addressed not to the substance of the legislation, but to the fairness of the selection process used to determine which proposals are referred to the electorate for ratification.¹¹⁰ This is because selective referral may indicate a desire to burden minority interests.¹¹¹ Once again, in this context and for reasons not explicitly stated, Eule appears concerned with the effects that referenda referral choices have on "unpopular minorities," such as "blacks, latinos, aliens, or the poor."¹¹²

II

REEXAMINING THE CONSTITUTIONAL QUESTION

A. Questioning Process, Answering Substance

The essence of the arguments and proposals just discussed is that there is a constitutional problem with plebiscites, and that as a result, courts should sometimes treat them differently than legislation. One of the flaws in the special review thesis is that it combines several different constitutional issues arising in the context of judicial review of plebiscites. One could focus on at least three different issues regarding constitutional scrutiny of citizen lawmaking: first, the constitutionality of using a plebiscitary process—any plebiscitary process—as a lawmaking institution;¹¹³ second, the constitutionality of a specific enabling provision, statutory or constitutional, that allows a plebiscite as a form of lawmaking within a given state or locality;¹¹⁴ or third, the constitutionality of the substance of individual plebiscites, that is, the

supra note 2, at 9, 26 (arguing for special judicial scrutiny of plebiscites in which the majority attempts to take away something that the minority obtained through the representative legislative process).

¹¹⁰ Eule, *supra* note 3, at 1577.

¹¹¹ *See id.* at 1576-77 ("The difficulty arises when subjects that disproportionately affect unpopular minorities . . . are singled out for an augmented checking system," because "the selective use of the voter veto is fraught with danger to unpopular minorities.").

¹¹² *Id.* at 1576.

¹¹³ *See, e.g.,* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (ruling that the issue of whether plebiscites violate the Guarantee Clause is a political question). *See supra* notes 50-58 and accompanying text. This issue is really a subset of the next, in that it considers whether a plebiscitary enabling provision violates the federal constitution. I present it separately because it stands out as an issue of first instance—could *any* enabling provision, no matter how drafted or administered, *ever* meet constitutional requirements if it imposed plebiscitary lawmaking?

¹¹⁴ *See, e.g.,* City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976) (upholding, against a challenge of improper delegation of legislative authority, a city charter amendment requiring that any changes in land use agreed to by the city council be approved by a referendum vote); James v. Valtierra, 402 U.S. 137 (1971) (upholding, against an equal protection challenge, a California constitutional provision requiring referendum approval for low-rent public housing projects); Hunter v. Erickson, 393 U.S. 385 (1969) (striking, as violative of the Equal Protection Clause, a city charter amendment preventing the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of voters).

constitutionality of the plebiscitary result.¹¹⁵ The special review thesis asserts that state and local plebiscitary processes are constitutional forms of lawmaking, and seems to assume that enabling provisions and particular local structures may also pass constitutional muster. Proponents of special judicial review direct their proposal to the third issue, the substantive constitutionality of individual measures enacted through the ballot.

Their real grievance, however, appears to lie with the constitutionality of the plebiscitary process as a governmental decisionmaking institution.¹¹⁶ They maintain that there are three constitutionally imposed checks on lawmaking at the federal level: a representative legislature, separation of powers, and entrenched individual rights protected by the judiciary.¹¹⁷ The problem with the plebiscitary process, argue proponents of special judicial review, is that it obliterates the first two structural filters. These filters, however, are not imposed on state government by the federal constitution's legislative plan. Hence, proponents, concerned about the majority running rampant over minority interests, assert that the federal filters nevertheless form the backdrop against which state structures are to be evaluated because the federal plan gives meaning to the Guarantee Clause.

At this point proponents are faced with another analytical predicament. The Supreme Court has not been willing to rule on the constitutionality of state governmental structures under the Guarantee Clause, finding that such issues raise nonjusticiable political questions.¹¹⁸ Apparently wary of getting caught in the thicket of determining precisely what the Guarantee Clause guarantees, proponents enter the issue at the far less controversial outer perimeter. Whatever the Guarantee Clause means, they maintain, it surely protects states

¹¹⁵ See, e.g., *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992) (upholding, against an equal protection challenge, a California constitutional amendment adopted by initiative that embodied an acquisition value system of real property taxation); *Crawford v. Board of Educ.*, 458 U.S. 527 (1982) (upholding, as not violative of equal protection, a state constitutional amendment adopted by referendum that limited court-ordered busing, for school desegregation purposes, to cases in which a federal court could order busing to remedy a Fourteenth Amendment violation); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (striking, as violative of equal protection, a statewide initiative that prohibited school boards from requiring any student to attend a school that was not geographically nearest to his residence, except for a wide variety of purposes other than racial desegregation); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (striking down, on equal protection grounds, a statewide initiative designed to prevent enforcement of housing antidiscrimination law). See also James E. Castello, Comment, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 CAL. L. REV. 491 (1986) (examining the constitutionality of a California statutory initiative that altered state legislative procedure).

¹¹⁶ As will be explained in the next subpart, the fact that those who argue for a harder judicial look at plebiscites focus their resolutions of this process problem on a different issue creates analytical difficulties. See discussion *infra* at part II.B.

¹¹⁷ See Eule, *supra* note 3, at 1549.

¹¹⁸ See discussion *supra* note 54 and accompanying text.

against the extremes of pure democracy and monarchy, and plebiscites are the purest form of pure democracy.¹¹⁹

But now proponents face a third analytical difficulty. Plebiscites do not form the whole of state government; they are only part of what is, in the main, a republican or representative state system. In other words, states allowing plebiscites, but maintaining representative legislatures, are only partially pure democracies, and thus they may satisfy the republican guarantee of a basically representative state government.¹²⁰ Proponents work their way over this analytical hurdle by concluding that, although state systems that provide for plebiscites do not actually violate the Guarantee Clause, these systems are, nevertheless, constitutionally suspicious. Therefore, some of the products of such suspicious systems should be examined with extra attention by the court.

The analysis outlined above suggests that the real problem that proponents of special judicial review have with plebiscites lies with the plebiscitary process, not with plebiscitary results.¹²¹ But, having concluded that the process, although undesirable, is constitutional, they are left with no constitutional recourse but to attack the results.¹²²

¹¹⁹ See Eule, *supra* note 3, at 1540-41. See also Slonim & Lowe, *supra* note 3, at 185-89 (arguing that the founding fathers, in selecting a form of government, sought to avoid the extreme of direct democracy as much as the extreme of monarchy).

¹²⁰ But see discussion *supra* note 54 and accompanying text (a finding that the republican government guaranteed to the states by the Guarantee Clause requires findings quite similar to those of the federal state representative system).

¹²¹ Professor Eule might dispute this. He maintains that he would retain the plebiscitary process to resolve the kind of political logjams for which it was originally created, but subject certain other plebiscites to more searching judicial review. Eule, *supra* note 3, at 1558-60. He seems, however, more concerned with results than with process, in that he only worries about the process in those instances in which he is dissatisfied with its results.

¹²² Perhaps advocates of a harder look for plebiscites should not be so quick to abandon what is apparently their true cause. They are willing to posit that the Guarantee Clause proscribes state government that is entirely a monarchy or entirely a pure democracy. One wonders whether they would be willing to accept a partial monarchy quite so readily as they are willing to accept a partial pure democracy.

If partial monarchy violates the Guarantee Clause, would this mean that partial direct democracy is likewise unconstitutional? Monarchy may have constituted a greater anathema to the framers than direct democracy. Cf. Bonfield, *supra* note 54, at 516-30 (indicating that one primary historic motivation for inclusion of the Guarantee Clause was fear of monarchical or other autocratic state government). By placing ultimate power with the people, the system designed for the federal government recognized a positive role for the populace, but no comparable role for monarchy. See also U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people") (emphasis added); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people") (emphasis added). Nevertheless, pure democracy, like pure monarchy, poses a danger of totalitarian excess, albeit of the many over the few rather than the few over the many. Thus, if the Guarantee Clause means neither pure monarchy nor pure democracy is permissible because of the dangers of totalitarianism at either extreme, could it not also mean partial pure democracy is disallowed, as is partial monarchy? In

Either state and local plebiscitary processes are constitutional forms of lawmaking or they are not. If they are constitutional, a particular group's dissatisfaction with the perceived efficacy of these processes should not, in and of itself, warrant different constitutional treatment of the products of such processes. In other words, if plebiscitary lawmaking does not violate the Guarantee Clause, it should not matter whether state and local plebiscitary schemes fulfill the structural goals of the system prescribed for federal decisionmaking. That federal structure, and its tripartite, minority-protective safeguards, could have been, but was not, imposed on the states. In terms of the structure of state governments, the federal constitution imposes no limits beyond those contained in the Guarantee Clause. If that clause condemns only the extremes of state government excess (pure democracy and monarchy),¹²³ then that is all the structural protection against state and local majoritarianism that minorities were intended to receive under the Constitution.¹²⁴

One could speculate as to why minority-protective safeguards similar to those required at the federal level were not imposed on state policymakers. Perhaps it was thought that majoritarian faction at the

other words, one need not take it as a given that partial pure democracy, in the form of an adjunctive plebiscitary process, can never violate the Guarantee Clause because it is only part of a total state governmental structure, the remainder of which is representative, because partial monarchy might well violate the clause in like circumstances, and the prohibition on both monarchy and pure democracy stemmed from similar fears of tyranny. [My thanks to Eric Freedman for raising this issue.]

The question still remains whether partial pure democracy—a legislature plus a plebiscitary process—violates the Guarantee Clause. Although plebiscites are not representative government, they may operate only in a particularly appropriate and limited sphere. Plebiscites could be confined to certain issues over which a conflict of interest arises if the legislature is asked to resolve the question (such as Eule's exemption for campaign finance reform). Plebiscites might also be structured to provide enough of the safeguards against majoritarian excess that a representative form supposedly provides, thereby satisfying the essence of the republican guarantee; for example, enabling provisions could require public education and supermajority votes. Finally, the already extant judicial review of plebiscites may be a sufficient filter to satisfy whatever structural minority-protective criteria the Guarantee Clause might embody.

On the other hand, if a state permits plebiscites over the full range of governmental areas of authority, and the plebiscitary process is broad enough and accessible enough, potentially or even actually, to overtake the legislative process as the primary lawmaking institution, one might find that the state's governmental system, although partially representative, nevertheless violates the Guarantee Clause. *But see* Briffault, *supra* note 3, at 1371 (arguing that the difficulty of qualifying ballot proposals and the tendency of the electorate to reject initiatives means that relatively little law will be enacted by ballot). Or, as proponents of the special review thesis could argue, plebiscitary lawmaking as an adjunct to legislative decisionmaking, checked only by the judicial filtering of antimajority sentiment, is insufficient insurance against tyranny.

¹²³ For a different view, see Linde, *supra* notes 3 and 54.

¹²⁴ Of course, minorities receive more than this structural constitutional protection against state and local faction. Specifically, enumerated constitutional rights were established to protect minorities from the tyranny of state and local majorities.

state or local level could be adequately ameliorated by the interposition of federal authority in areas where the federal government had power.¹²⁵ More likely, political considerations of the day prevented any further federal encroachment on state and local authority beyond that contained elsewhere in the Constitution.¹²⁶ Maybe the task of ensuring the existence of an appropriate minority-protective republican form of government was to be left to state officials.¹²⁷ Perhaps the issue of state safeguards against factional interests simply did not occur to the framers, or was viewed as beyond their charge. Whatever the reason for failing to include the same protections at the state level as were imposed at the federal level, the fact remains that even proponents of the special review thesis do not claim either that the Constitution requires such safeguards, or that it is unconstitutional for states to fail to provide all of the protections that the federal model provides.

The issue raised by the special review thesis is analogous to the issue that arose in *Baker v. Carr*.¹²⁸ *Baker* involved an equal protection challenge to a law governing the apportionment of the Tennessee legislature. After the Supreme Court concluded that Tennessee's malapportioned legislature violated the Equal Protection Clause, *Baker* was remanded to the district court, which ultimately ordered appropriately tailored relief in the form of a legislative reapportionment.¹²⁹

¹²⁵ An early example of federal intervention to allay factional interests can be found in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). *Ogden* was in possession of an exclusive license awarded by the New York legislature to navigate between Elizabethtown, New Jersey and New York City. *Id.* at 1-3. *Gibbons* obtained a conflicting federal license, pursuant to an act of Congress authorizing the grant of such licenses, that enabled him to use the coastal waters around New York and New Jersey. *Id.* The New York license was apparently aimed at satisfying the state's parochial interest in maintaining a monopoly on steamboat trade in the area. The federal statute appears to be an attempt to abate such local faction for the larger, national good.

¹²⁶ See, e.g., U.S. CONST. art. I, §§ 8, 10 and art. II, § 2 (empowering the federal government and restricting state governmental authority in several major areas, including entering into treaties (art. II, § 2, cl. 2, and art. I, § 10, cl. 1), coining money (art. I, § 8, cl. 5, and art. I, § 10, cl. 1), maintaining troops (art. I, § 8, cl. 12, and art. I, § 10, cl. 3), and waging war (art. I, § 8, cl. 11, and art. I, § 10, cl. 3)).

¹²⁷ See Linde, *supra* note 54.

¹²⁸ 369 U.S. 186 (1961). In *Baker*, the plaintiffs sought a declaratory judgment that a 1901 Tennessee statute providing for the apportionment of the state's legislature violated the Fourteenth Amendment's Equal Protection Clause; they also sought an injunction restraining the state from conducting any further elections under the statute. *Id.* at 192-95. The dispute stemmed from the continuing failure of the state legislature to reapportion itself since 1901, despite state constitutional provisions calling for apportionments at ten year intervals, and despite substantial shifts in the residency of the voting population between 1901 and 1961. *Id.* at 189-92. The result of this failure to reapportion was a perceived underrepresentation of predominantly urban areas. See *id.* at 254-56 (Clark, J., concurring); *id.* at 331-32, 335 (Harlan, J., dissenting).

¹²⁹ See *Baker v. Carr*, 206 F. Supp. 341, 348-51 (M.D. Tenn. 1962) (allowing the Tennessee General Assembly an opportunity to reapportion itself in order to eliminate the equal protection violation caused by its discriminatory malapportionment, and implying that a failure to do so would result in a court-imposed reapportionment).

What is significant about *Baker* in this context is that it involved an unconstitutional lawmaking structure, and that the relief considered suitable was structural reform. Similar to the objection in *Baker*, the complaint voiced by proponents of a harder judicial look at plebiscites also addresses the constitutional adequacy of an aspect of the state lawmaking structure—plebiscites. Yet the relief requested is substantive, not structural, reform.

Granted, the grievances here and in *Baker* are not exactly the same. The criticism of plebiscites focuses on the constitutionality of the *process* of lawmaking, while the complaint in *Baker* was not with the lawmaking process itself, but rather, with the composition of the lawmaking body.¹³⁰ Yet both protests focus on the constitutionality of governmental structures, not on the substantive constitutionality of the resulting actions taken by governmental authorities which were arguably unconstitutionally authorized or comprised. The constitutional attack in *Baker* was on the structure of the lawmaking body, so the remedy addressed that structure; the Court did not order as suitable relief a new and different examination of the resulting actions taken by the unconstitutional body. Similarly, in the present instance, the attack focuses on the structure of the lawmaking process, but the remedy urged is not reformation of that process. The courts are advised to address the substantive results of the process rather than the faulty process itself.¹³¹

¹³⁰ One could argue that the objection to legislative composition in *Baker* was ultimately an objection to process. The essence of the disgruntled plaintiffs' grievance in *Baker* was that the malapportioned legislature did not contain adequate representation of their point of view, or, to put this claim in process terms, they feared they would not receive their appropriate due regard from a legislature disproportionately comprised of representatives of rural, rather than urban, districts.

¹³¹ Sanford Gabin argues that the court ought not step in even to remedy antidemocratic defects in the political process. SANFORD BYRON GABIN, JUDICIAL REVIEW AND THE REASONABLE DOUBT TEST (1980). He criticizes the logic of Justice Stone's famous footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), for its suggestion that the Court "has a special duty to undo the undesirable outcome of an impure political process, and even to *purify an impure political process*." *Id.* at 76 (emphasis added). Gabin contends that:

The political process argument, then, proves either too little or too much: too little since it begs the question why the Court should exercise its independent judgment to determine the character of the political process and of its outcome when the Constitution prescribes its own procedures for change, and when, moreover, reasonable men surely differ over the desired scope of political and social democracy; too much since the political process argument alone might well logically justify the judicial excision from the American political system of such antimajoritarian, yet clearly constitutional, institutions as the United States Senate, the Electoral College, even the Supreme Court itself.

Id. (footnote omitted).

Professor Eule notes the relationship between the special review thesis and the famous *Caroline Products* footnote: "In a sense I am proposing a new paragraph for the *Caroline*

To put it another way, proponents of the special review thesis maintain that in constitutional challenges to plebiscites, courts ought to respond to the third constitutional issue (the substantive constitutionality of laws enacted by plebiscite) differently than they would in the case of legislation, even though the rationale for doing so, based on something short of unconstitutionality, lies with the first constitutional issue (the legitimacy of the plebiscitary process as a form of lawmaking). There may in fact be reasons for courts to address the substantive constitutionality of laws enacted by plebiscite differently than they address the substantive constitutionality of laws enacted by legislatures. These reasons, however, should be based on the nature of and justifications for judicial review, or on differences in these law-making processes that relate to the nature of the particular constitutional provision claimed to be violated.¹³² They should not be based on the general undesirability of plebiscitary lawmaking as a governmental institution. Alternative arguments for different judicial review of plebiscites will be explored in the following sections.

B. Judicial Review

Having concluded that the plebiscitary process is constitutional, but still disturbed by the special ability of the process to produce results harmful to certain minority interests, proponents of the special review thesis refocus their concern. They argue that plebiscites tear at the root of representative government, violate the purposes of filtered lawmaking, and hence breach the spirit, if not the letter, of the Guarantee Clause. Because the first two filters found in the desired federal screening process have been eliminated from plebiscites,¹³³ the Guarantee Clause does not require the reinstatement of these missing factors, special review proponents repose their trust in the only remaining filter—the judiciary. Under the federal plan, the judiciary is already supposed to provide antimajoritarian protection for minorities by enforcing entrenched, constitutionally protected rights. Yet, concerned that, in its present form, this protection is too limited and will inadequately shelter the intended beneficiaries of filtering, propo-

Products footnote: a fourth situation where the presumption of constitutionality should be relaxed." See Eule, *supra* note 3, at 1558-59 (footnote omitted).

¹³² In this regard, there may well be cause to treat equal protection challenges to plebiscites differently than equal protection challenges to legislation, because the equal protection guarantee can be understood to require the kind of process protection that is present in one lawmaking system but not the other. See discussion *supra* note 32 and accompanying text.

¹³³ I refer here to the desired process as the "federal" process only because the model that proponents of special review hold up as an example, if not an ideal, is that set forth for the federal government in the Constitution. This is not to diminish the significance of the fact that almost every state adheres to a nearly identical model, except to the extent that states provide for lawmaking by plebiscite.

nents propose to revamp the last remaining filter. The judiciary is to be charged with ameliorating the effect of the absence of the first two antimajoritarian checks.

Proponents of the special review thesis seem to propose that the judiciary accomplish this task by doing one or more of the following when evaluating plebiscites: first, alter the rules or standards for finding violations of constitutional rights; second, afford less deference to the judgment of the electorate as lawmaker; and third, alter the list of groups that receive special constitutional protection. Although there is some overlap between these proposals, the propriety of each depends on different considerations.

1. *Altering Rules or Standards for Finding Constitutional Violations*

- a. *A change in the meaning of constitutional rights?*

Several of the proposals suggested by proponents of special judicial review for plebiscites would alter the rules or standards that courts use to ascertain whether or not a constitutional violation has occurred. Before examining whether the specific suggested changes are advisable, it should be determined whether the whole enterprise is a permissible one. In other words, is there anything wrong with courts changing the rules for assessing the constitutionality of the acts of one class of lawmakers from those applied in evaluating the acts of a different class of lawmakers? As long as the alteration does not change the essential, underlying meaning of the constitutional right or provision in issue, the answer is probably "No."

To the extent that there are constitutional provisions other than the Guarantee Clause providing special protection for minorities against state and local majorities—such as the First Amendment or the Equal Protection Clause—each of these provisions has some basic, particular meaning. One could argue about what each means, and a great deal of legal scholarship is devoted to that enterprise,¹³⁴ but each of these exegeses has at its core some specific conception of the essential meaning of the particular constitutional provision under examination. For example, Cass Sunstein argues that the essence of the equal protection guarantee is that government may not distribute resources or opportunities based on "naked preferences," that is, afford such benefits "to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want."¹³⁵ To ascertain whether the government has trans-

¹³⁴ See, e.g., *infra* note 260 (citing articles containing varying conceptions of the meaning of the equal protection guarantee).

¹³⁵ See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

gressed this basic equal protection prohibition, courts use various shortcuts—namely, rules of thumb or standards of review.¹³⁶ For example, using Sunstein's formulation, courts apply heightened scrutiny to statutes that facially discriminate along racial lines because it is highly likely in such instances that a naked preference is at work.¹³⁷ Minimal rational basis review, on the other hand, "embodies a weak version of the prohibition" against naked preferences; using this "rule," courts invalidate classifications "for which the government is unable to invoke a plausible public value justification" because the failure to identify such a justification also indicates that a naked preference is probably at work.¹³⁸ Although the standard of review applied changes from one circumstance to another, both standards operate to effectuate the same basic, underlying meaning of the equal protection provision. Thus, standards of review and rules used to assess constitutional compliance may change without altering the essential meaning of constitutional rights.

Extrapolating to the difference between plebiscites and legislation, the fact that plebiscites do not afford electoral minorities the extra protection that the federal legislative structure provides them should not alter the essential meaning of the Equal Protection Clause or any other constitutional right or prohibition. This does not necessarily mean, however, that every measure passed by a legislature that complies with equal protection or First Amendment principles would also comply if passed by plebiscite. It may be so much more likely that an equal protection violation will occur in a plebiscitary forum than in a legislative forum that courts should use a different rule in ascertaining whether a violation has occurred. Thus, although the essence of provisions like the Equal Protection Clause or the First Amendment should not change when applied to the actions of different governmental bodies, it does not necessarily follow that the constitutional result, or even the expressed principle or standard for finding a constitutional violation, must always remain the same.¹³⁹

For example, in *Regents of University of California v. Bakke*¹⁴⁰ Justice Powell implied that the policy of the Medical School of the University of California at Davis, to the extent that it was designed to redress past societal discrimination against minorities, violated the Equal Protec-

¹³⁶ See *infra* part II.B.2.b (discussing deference and standards of review).

¹³⁷ See Sunstein, *supra* note 135, at 1711.

¹³⁸ *Id.* at 1713.

¹³⁹ See discussion *infra* notes 182-83 and accompanying text (noting that different standards of review are indicative of different levels of deference to different decisionmakers). See also Julian N. Eule, *Representative Government: The People's Choice*, 67 CHI.-KENT L. REV. 777, 783 (1991) ("It seems entirely logical . . . that levels of deference and distrust should be influenced by the nature of the lawmaker . . .").

¹⁴⁰ 438 U.S. 265 (1978).

tion Clause, but that the very same policy imposed for the very same purpose affirmative action admissions by the state legislature or by the judiciary might be constitutional.¹⁴¹ One proffered rationale for this distinction was the fact that the university, unlike the legislature or the judiciary, was "in no position" to make the requisite preliminary findings of constitutional or statutory violations that would permit a governmental body to aid one group at the expense of another. An additional explanation was that the university lacked the "authority and capability" to fashion an appropriate remedy for such wide-ranging societal discrimination.¹⁴²

One could argue that, in the instances described by Justice Powell, the Equal Protection Clause looks differently for one governmental unit than it does for another governmental unit.¹⁴³ One might even conclude that the Court was applying a different rule or standard to assess the constitutionality of the actions of these various governmental bodies. Even though the existence of an equal protection violation is assessed using entirely different rules or standards, the basic, underlying meaning of the Equal Protection Clause, or the essential nature of what constitutes an equal protection violation, has not really changed. Under the Court's formulation, in all of these instances, the Equal Protection Clause protects individuals against state-sponsored invidious discrimination,¹⁴⁴ even though some state entities may exhibit such discrimination in different ways than others, and even though some entities may be in a better position than others to obviate, identify or rectify such discrimination.¹⁴⁵ In other words, the

¹⁴¹ See *id.* at 307-10.

¹⁴² *Id.* at 309-10. See also Sunstein, *supra* note 26, at 67 & n.172 (explaining the Court's notion that "only proper decisionmakers, susceptible to special electoral control or reflecting broad deliberation, may undertake 'affirmative action' " as attributable to a "general requirement[] of deliberation or electoral accountability in cases concerning intrusions on constitutionally sensitive interests").

¹⁴³ The notion that a constitutional provision may operate differently when applied to different governmental units is not novel. For example, as between state and federal governmental units, Justice Harlan's opinion in *Roth v. United States* surmised that federal anti-obscenity restrictions should be evaluated more harshly under the First Amendment than the same restrictions might be if imposed by a state. 354 U.S. 476, 504-06 (1957) (Harlan, J., concurring and dissenting). Harlan argued that this should occur in part because the "interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality." *Id.* at 504. Justice Harlan also noted that "the dangers of federal censorship in this field are far greater than anything the States may do." *Id.* at 504. See also Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1193 (1977) ("Doctrines that would permit courts to take account of differences in the decisionmaking processes leading to challenged governmental action would . . . contribute to the courts' ability to protect minorities in those situations in which that protection is most likely to be needed.").

¹⁴⁴ See discussion *supra* II.A.

¹⁴⁵ Exploring the thesis that governmental action is constitutional if it is "the product of a process that can reasonably be understood as establishing societal norms," Sandalow

Equal Protection Clause guarantees whatever it is that it guarantees, and what it guarantees does not vary depending on how a decision to infringe on its guarantee is reached. Nevertheless, the clause could "mean" the same thing but "operate" differently to effectuate its meaning in different contexts, thereby producing different results with regard to the same action taken by different governmental decisionmakers.¹⁴⁶

None of the proposals for implementing the special review thesis purports, on its face, to alter the substantive meaning of constitutional provisions when evaluating plebiscites. In effect, however, some of the suggestions seem to assume a change in the essential nature of what constitutes a constitutional violation in the special case of direct democracy. To the extent that these suggestions profess to do something else, such as change the level of deference afforded by the court to the decisionmaker (usually by modifying the standard of review applied),¹⁴⁷ or alter the group protected,¹⁴⁸ they will be discussed in the following sections.¹⁴⁹

concludes that constitutionally challenged governmental decisions often "have been taken by administrative bodies that lack direct political responsibility." Sandalow, *supra* note 143, at 1187. Sandalow also concludes that "[e]ven when political responsibility is more direct, the limited functional responsibilities of, say, a school board or the limited constituency of a city council or even a state legislature preclude a claim that their decisions can be taken as establishing societal norms." *Id.*

¹⁴⁶ See *id.* at 1184-89. Sandalow begins with the proposition that constitutional law should be understood as the expression of evolving societal norms, and deduces that the decisionmaking process that precedes governmental action is quite relevant to the determination of whether the action is constitutional. Thus, "it seems entirely appropriate that the Supreme Court might hold, as it did in *Barnette*, that a compulsory flag salute ceremony adopted by an administrative agency is an impermissible burden upon religious freedom and yet sustain precisely the same requirement if it were to be subsequently enacted by Congress." *Id.* at 1189 (discussing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

¹⁴⁷ See discussion *infra* part II.B.2.b.

¹⁴⁸ See *infra* discussion part II.B.3.

¹⁴⁹ See discussion *infra* parts II.B.2.b, II.B.3. This analysis of the relationship between constitutional rights and constitutional results may be built upon any one of several conceptions of constitutional rights. Constitutional rights may be viewed as limitations on governmental actors or actions. See *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir.), *cert. denied*, 465 U.S. 1049 (1984) (characterizing the Constitution as "a charter of negative rather than positive liberties"); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 12 (1988) ("Constitutional rights can be conceived as 'power-constraints' that regulate the exercise of power by Congress and the executive branch . . ."); cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 133 (1977) (referring to some constitutional rights as "restraints" on "certain decisions that a majority of citizens might want to make"). Alternatively, constitutional rights can be seen as affirmative guarantees residing in individuals. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 69 (1993) (alluding to the "considerable debate" distinguishing negative and positive constitutional rights); Archibald Cox, *The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 93, 114 (1966) (noting shift in conception of rights from constraints upon state authority to affirmative obligations of state action); see also Frank I. Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through*

b. *Proof of discriminatory purpose*

In Professor Eule's exposition of what might constitute a harder judicial look, he analyzes a number of cases raising equal protection claims of discrimination against minorities in the enactment of plebiscites. He suggests that courts could resolve the problem of establishing the required discriminatory purpose necessary to support such claims by "relax[ing] the burden of proving discriminatory purpose and be[ing] more imaginative about the sources we canvass,"¹⁵⁰ or by "abandon[ing] the purpose requirement altogether in certain plebiscitary settings." Both of these suggestions involve changes in the rules

the Fourteenth Amendment, 83 HARV. L. REV. 7, 13 (1969) (asserting that, under a theory of "minimum protection against economic hazard," . . . persons are entitled to have certain wants satisfied—certain existing needs filled—by government").

If rights are defined from the perspective of rightholders, the constitutional result should not depend on who violates the right or how it is violated. For example, if one has the First Amendment right to make a certain speech in a certain forum, one has that right no matter which governmental actor attempts to restrict that right and no matter how that governmental actor arrives at the decision to interfere. On one level, Professor Eule's analysis seems to assume this latter view of rights, in that his focus is on the impact on the rightholders rather than the process through which the governmental unit has exercised its authority.

Conversely, if constitutional rights are defined as limits on government action, then it is entirely possible that a particular constitutional right may affect different governmental actors or actions differently. This is tantamount to saying what was said above: the essential meaning of a constitutional provision remains the same in different contexts, but the provision may operate differently to effectuate its meaning, thereby producing different results with regard to the same action in different contexts. This might occur when different governmental actors are challenged for having taken the same action. Simply stated, a constitutional right does not change when the actions of different governmental bodies are challenged for violating that right, but the standard for determining whether the right has been violated may change, and the constitutional result may differ. Professor Eule's analysis seems to assume this view of constitutional rights because he suggests that the same action taken by a different lawmaking process should, for that very reason, sometimes produce a different constitutional result.

Finally, it is entirely possible that some constitutional rights, such as the First Amendment, are rightholder-based, while other constitutional rights, such as the equal protection guarantee, are limitations on government action. See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864-65 (1986). It may even be possible that a single right, such as equal protection, may be characterized both ways. See, e.g., SUNSTEIN, *supra*, at 69-70. Eule's thesis does not distinguish between particular constitutional rights in this manner, and does not propose one type of remedy for limitation-based rights and a different type of remedy for rightholder-based rights. Rather, it appears to subject the same right to two different treatments. That is, a measure enacted by substitutive plebiscite should be scrutinized differently than the same measure enacted by a legislature (which assumes that the measure is attacked as violating a governmental limitation-based right), while the existence of a constitutional violation should depend on how the rightholder fares and not on how the governmental body acted (which assumes that the measure is attacked as violating a rightholder-based right).

¹⁵⁰ Eule, *supra* note 3, at 1562. In a footnote, Eule then attacks the "imaginative sources" he advocates using—for example, ballot pamphlets, exit polls, and campaign advertising—as imperfect indicators of the "illicit motivation" of voters. *Id.* at 1562 n.264.

or standards for finding constitutional violations in the special case of plebiscites.

Eule never elaborates on the latter proposal, so there is no indication of when it might be appropriate to abandon the purpose requirement, or how one would establish an equal protection violation in the absence of discriminatory purpose. To illuminate the first proposal, he runs through several Supreme Court decisions in which allegedly discriminatory plebiscites were attacked on equal protection grounds. In a number of these cases, the Court found the offending plebiscites unconstitutional.¹⁵¹ Thus, the short answer to his call for increased judicial attention might be that the traditional level of attention seems to be working just fine.¹⁵² In most of the examples he cites, the Justices managed to take into consideration the evidentiary sources that have always been relevant and to uncover the necessary proof of discriminatory purpose without either going beyond the usual inquiry or relaxing the plaintiff's burden of establishing a discriminatory purpose.¹⁵³

¹⁵¹ See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967).

¹⁵² I do not mean to suggest that all of the Court's decisions involving equal protection claims against plebiscites are coherent, cohesive or correct. Rather, I mean only to say that, to the extent that traditional equal protection analysis works fine when analyzing legislation, it seems to work comparably fine when analyzing plebiscites. As I later conclude, Professor Eule's problem with plebiscites really seems to center on his frustration with the limitations of traditional equal protection jurisprudence *per se*, and not on some special difficulty in applying such jurisprudence to plebiscites.

¹⁵³ Eule hints that he would dispute the assertion that the Justices resorted to traditional strict scrutiny standards in deciding these cases. See Eule, *supra* note 3, at 1562-65; Eule, *supra* note 139, at 780-81 & n.22. But, according to his own account of the possible readings of the majority opinion in the case he uses to illustrate this point—*Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982)—the case may be nothing more remarkable than an instance in which the Court found that “the initiative is facially neutral but triggers strict scrutiny since it was purposefully enacted ‘because’ of its adverse impact on minorities.” Eule, *supra* note 3, at 1564.

Seattle involved a statewide initiative prohibiting school districts from requiring students to attend schools outside of their neighborhoods. The initiative was adopted in response to school authorities' attempts to achieve racial balance through a busing program. 458 U.S. at 461-62. The measure contained exceptions to the neighborhood school policy for a variety of purposes other than integration. *Id.* at 462-63. Not surprisingly, the trial court found the initiative to have been racially motivated at least in part, given its racially disproportionate impact, the historical background of the measure (including the sequence of events leading to its enactment), and its departure from Washington's procedural norm of local school board autonomy in such matters. *Seattle Sch. Dist. No. 1 v. State*, 473 F. Supp. 996, 1013-16 (W.D. Wash. 1979). In doing so, it followed the Supreme Court's list of relevant factors for determining discriminatory purpose set forth in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). The Supreme Court appears to have endorsed this reasoning. See *Seattle*, 458 U.S. at 471-80.

To the extent that Eule characterizes the Court's finding of purposeful discrimination in *Seattle* as somehow unusual, it seems that what he really questions is the Court's failure to find the same illicit motivation in other cases, including a similar case decided the same day. See, e.g., Eule, *supra* note 3, at 1565 n. 279 (discussing *Crawford v. Board of Educ.*, 458

Supplying a more detailed response to Eule's argument is complicated by the lack of clarity as to what is meant by discriminatory purpose.¹⁵⁴ When the Court says it looks for evidence of discriminatory purpose behind a governmental action, it is attempting to determine whether governmental actors failed to give due regard to the interests of members of the adversely affected group relative to their concern for, or consideration of, the interests of others.¹⁵⁵ To prove that ac-

U.S. 527 (1982)); see also *id.* at 1566 & n.286. *Crawford* involved a state constitutional amendment, passed by the legislature and ratified by referendum, that stripped the state courts of the authority to order busing, except where permitted to remedy a federal equal protection violation. 458 U.S. at 531-32. The measure was apparently motivated by a California Supreme Court decision finding racial discrimination under the state constitution and ordering student reassignment as a remedy. *Id.* at 529-31. It is certainly possible that the Court did not properly examine or credit relevant evidence of discriminatory electoral purpose in *Crawford* and other cases involving plebiscites. The Court may even have decided some of these cases incorrectly. But this indicates only that the Court should consistently and accurately follow traditional equal protection analysis in all instances, not that it should be more skeptical of plebiscites than of legislation.

Eule points to the difference in the results reached in *Seattle* and *Crawford* as possibly evidencing the Court's unconscious (but correct) distinction between the suspiciousness of substitutive plebiscites, like the one at issue in *Seattle*, and the nonsuspiciousness of complementary plebiscites, like that in *Crawford*. *Id.* at 1566-67. But then he intimates that *Crawford* was nevertheless wrongly decided. *Id.* at 1566-67 & n.288. This concession supports my conclusion that his problem really lies with the Court's stingy or inconsistent application of equal protection principles, rather than with the nature of the lawmaking process under review, which he himself indicates was significantly different in the two cases. He alludes to, but does not fully explore, a related but different way to understand the seeming incongruity in these two decisions: that even under traditional equal protection analysis, it may matter which governmental decisionmaker makes a particular decision. See *id.* at 1565; see also discussion *supra* in part II.B.1.a. There may be an important equal protection difference between a measure enacted by the electorate and one enacted by both the legislature and the electorate.

For a different explanation of the *Seattle* case, see John F. Niblock, Note, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 U.C.L.A. L. REV. 153, 180-81 (1993).

¹⁵⁴ See Resch, *supra* note 5, at 418 ("The relevance of motive to the application of the equal protection clause is one of the mysteries of constitutional law.").

¹⁵⁵ See Sunstein, *supra* note 135 at 1715. Sunstein notes that:

In ascertaining the prohibited intent, the relevant question is not whether the state intended to hurt the group in question, but whether the state would have enacted the measure under attack regardless of which groups were helped and which hurt. The question, in short, is whether the state operated in a way that was unaffected by the fact that a particular group benefitted from or was burdened by the measure in question. In all cases in which no such neutrality is shown, it is likely that an impermissible motivation in fact accounted for the measure.

Id. See also *infra* notes 270-71 and accompanying text.

Some Supreme Court opinions use language that at least implies that subjective animus constitutes purpose. See, e.g., *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose[]' . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (footnote omitted). But an examination of cases discussing discriminatory purpose seems to indicate that something less than subjective animus will suffice to show a violation. See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 937 (1989) (contending that the Court's "dis-

tors did or did not have such a "purpose" to discriminate, one might, but need not necessarily, look for evidence of their subjective intent, motivation, or bias in acting as they did, to the extent that such evidence is available.¹⁵⁶ Personal prejudice against the group that is adversely affected could be relevant to this inquiry, but it is neither necessary nor determinative.¹⁵⁷

If, in plebiscitary instances, voter intent is relevant to prove discriminatory purpose, it may or may not be difficult to locate materials that speak to that point and that are sufficiently reliable indicators of the subjective motivation of voters.¹⁵⁸ Commonly discussed sources of

criminatorial intent test reflects a requirement of impartiality: . . . invidious discrimination consists of a failure to be impartial"); but see Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 299 & nn.381-91 (1991) (asserting that the Court has refused "to treat selective indifference as an equal protection violation").

¹⁵⁶ See *Seattle Sch. Dist. No. 1 v. State*, 473 F. Supp. at 1014 (noting that, in the plebiscite involved in the case, "it is impossible to determine whether there was subjectively a racially discriminatory intent or purpose," but that the court still had to determine "whether there was in fact such an intent or purpose," and that it could do so "in an objective fashion" by looking "elsewhere than within the minds of the voters"); Resch, *supra* note 5, at 419 ("[O]n those few occasions when the purpose of the law is considered, the Court is careful to avoid an examination into the subjective intention of legislators or proponents of the law. Instead, an objective examination of the type conducted in *Reitman v. Mulkey* explores the law['s] purpose in terms of the historical context in which it was enacted.") (discussing *Reitman*, 387 U.S. 369 (1967)); see also Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 5-6 (1992) (distinguishing between legislative purpose, which "is an objective, collective concept and is identified through 'the terms of the statute, its operation, and [its] context,'" and legislative motive, which refers to "the subjective motivations of individual legislators," but then concluding that this distinction is "unworkable as a tool to understand constitutional adjudication") (footnotes omitted). Professor Farrell notes that, "[i]n constitutional adjudication, . . . the intent [or purpose] of the legislature is important . . . to determine what the legislature was trying to accomplish," or "the end at which a law is directed," so that "a facially neutral statute enacted with an intent to promote racial discrimination is unconstitutional." *Id.* at 3, 8. He adds that courts may consider "individual [legislators'] motives as some weak evidence of this [legislative] purpose." *Id.* at 21. But see Sager, *supra* note 31, at 1421 ("proof of racial animus will presumably be essential to a finding that exclusionary [zoning] decisions constitute racial discrimination prohibited by the [F]ourteenth [A]mendment").

¹⁵⁷ See Farrell, *supra* note 156, at 14 ("The reasons why an individual legislator voted for a bill are relevant, if at all, only as evidence to be weighed in determining legislative purpose."). Cf. Sunstein, *supra* note 26, at 79-80 ("The concept of legislative motivation is as much a judicial construct as it is an inquiry into some actual state of mind. No unitary legislative motivation underlies statutory enactments; in identifying the relevant motivation, courts are, to some degree, creating a fiction.") (footnote omitted).

¹⁵⁸ See Eule *supra* note 150 and accompanying text (describing the "imaginative sources" available as evidence of voter intent and explaining their failings); see also *supra* note 82 and accompanying text (discussing the difficulties of ascertaining discriminatory purpose in legislative and plebiscitary contexts); *Seattle*, 473 F. Supp. at 1013-14 (explaining that it was impossible to ascertain the subjective intent of the voters who enacted a particular initiative); Resch, *supra* note 5, at 420 (discussing the impracticality of examining the motives of "hundreds, thousands, or even millions of voters who cast their ballots in a referendum"); Sager, *supra* note 31, at 1421 ("In the context of a decision by the electorate as a whole, any attempt to identify [a racially discriminatory] motive raises serious problems," including "whether it is appropriate to examine motivation in the electoral

voter intent include ballot pamphlets (explaining proposals), exit polls and campaign advertising.¹⁵⁹ As several commentators note, all are inadequate or unreliable. Statements of intent supplied in polling and ballot pamphlet explanations will seldom overtly express unacceptable bigotry. Campaign documents, often drafted for the tactical purpose of reeling in voters, do not necessarily reflect the true motivation of a proposition's authors or of most of those who vote for it. Additionally, most voters will not have read or understood the material supporting ballot proposals.¹⁶⁰ Even a public statement of personal intent from each voter would not be satisfactory, as voters may not be honest or aware of their own motivations.¹⁶¹

Yet there are instances in which discriminatory voter purpose could be, and has been, established without more "reliable" evidence. *Reitman v. Mulkey*¹⁶² poses such a case. Between 1959 and 1963 the California state legislature enacted a series of laws banning housing discrimination on the basis of race.¹⁶³ Immediately following passage of the last of these controversial measures efforts were made to introduce a ballot proposal that permitted private parties within the state to alienate their real property to whomever they wished.¹⁶⁴ In *Reitman*, the United States Supreme Court accepted the California Supreme Court's finding that the circumstances themselves were indicative of a voter purpose to discriminate on the basis of race.¹⁶⁵ The

process" and "the practical difficulties of establishing that racial animus plays an instrumental part in a given initiative or referendum;" the latter of these problems seems "insurmountable in all but the most remarkable of situations."). Cf. Fountaine, *supra* note 3, at 750-51 & n.72 (stating that according to *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986), "a facially neutral initiative or referendum will be held to violate the equal protection clause only if the challenger can prove that racial discrimination was the *only* possible rationale for the law," but then citing several seemingly contrary Supreme Court decisions).

¹⁵⁹ See, e.g., Eule, *supra* note 3, at 1562 & n.264; Fountaine, *supra* note 3, at 757; McNellie, *supra* note 98, at 164-65; Resch, *supra* note 5, at 421 (citing a court that "discovered discriminatory motive in the newspaper advertisements of proponents of a referendum").

¹⁶⁰ Eule, *supra* note 3, at 1562 & n.264; Fountaine, *supra* note 3, at 757.

¹⁶¹ See also Resch, *supra* note 5, at 420 (noting that, even if a poll of voters could be conducted, it would still be difficult to assess individuals' racially discriminatory motivation).

¹⁶² 387 U.S. 369 (1967).

¹⁶³ *Id.* at 374.

¹⁶⁴ See *id.* at 370-71 & n.2; Seeley, *supra* note 5, at 882 ("The open housing issue had been the subject of considerable public debate and the campaign that surrounded the introduction and approval of Proposition 14 was clearly directed toward repeal of the then recently enacted California open housing laws . . .").

¹⁶⁵ *Id.* at 373. See also *Mulkey v. Reitman*, 413 P. 2d 825, 828-29 (Cal. 1966) (considering the "historical context and the conditions existing prior to [the] enactment" of the initiative in determining that it was enacted for an unconstitutional discriminatory purpose); Seeley, *supra* note 5, at 883 (Although the United States Supreme Court found "no persuasive considerations indicating that the[] judgments [of the California Supreme Court] should be overturned," it "refrained from wholesale adoption of the California

passage of the discrimination-permitting initiative directly on the heels of the enactment of antidiscrimination statutes supplied the proof of improper discriminatory purpose needed to suspend the presumption of constitutional purpose that would normally exist.¹⁶⁶

Despite decisions like *Reitman*, the original observation that electoral intent may be difficult to prove is a strong and valid criticism. *Reitman* may be a rare case.¹⁶⁷ In many instances, it will not be possible to establish a discriminatory purpose in the enactment of a ballot initiative, even if such a purpose exists.

But this difficulty may also exist in relatively equal measure with regard to legislation. Theoretically, one might find evidence of discriminatory purpose in the legislative record—that is, in comments made by legislators during committee hearings, in the testimony of hearing witnesses, in committee reports or dissents, in comments made on the floor (or off the floor but inserted in the official record) during debates, and in other public statements made by members of

court's opinion." Nevertheless, the Court paid "[c]onsiderable deference" to the California court's findings "concerning the design and intent behind Proposition 14 and its ultimate impact of encouraging discrimination in the total social milieu.").

¹⁶⁶ See *Mulkey*, 413 P.2d at 828-30 (identifying as evidence of discriminatory purpose the sequence of events leading to the enactment of the initiative, along with the very fact and nature of the suit at hand, in which the defendants argued that they had "a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved"). Seeley observes that:

The California court looked to both the immediate objective and the ultimate effect of Proposition 14 in light of its historical background and the social milieu surrounding its adoption: It found the intent to be the facilitation of discrimination through repeal of existing open housing legislation and the effect to be the placing of state authorization behind private discrimination

Seeley, *supra* note 5, at 883.

Additionally, the Supreme Court may have relied on the fact that, as the initiative adopted a constitutional amendment, it "immunized housing discrimination from legislative, executive, or judicial regulation." *Id.* at 884 (indicating that "[t]his 'increased legislative burden' argument has been recognized as a basis underlying the *Reitman* opinion," but "actual reliance upon it by the Court is speculative . . . at best").

¹⁶⁷ Similar circumstances, however, were found in other cases. See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (echoing findings of the trial court that the initiative was carefully drafted and enacted to hinder desegregative busing, as evidenced, in part, by the timing of a busing plan followed closely by the initiative); *Hunter v. Erickson*, 393 U.S. 385, 390-93 (1969) (finding as evidence of a discriminatory purpose the fact that an initiative-based amendment to the city charter, requiring ordinances that prohibit racial, religious and certain other discrimination in real property transactions to be enacted by referendum, placed a greater obstacle in the way of those seeking to address racial and religious discrimination than of those seeking to address innumerable other sorts of housing issues). In the context of these similar cases, the type of evidence found in *Reitman* may not be so rare.

the legislature.¹⁶⁸ In reality, these sources often are not any more reliable indicators of the legislature's true purpose than the evidence that might establish voter purpose in the case of plebiscites.¹⁶⁹ Legislators, aware of public opinion and currently acceptable social convention, may not honestly verbalize their discriminatory intent.¹⁷⁰ In some cases, they might not even be aware it exists. And, as others have argued, the public statements made by individual legislative proponents of a measure are not necessarily indicative of the thoughts or purposes of the larger body of legislators who vote in favor of a bill.¹⁷¹ Comments by hearing witnesses, not even having been made by the legislators themselves, do not really speak to the issue of legislative intent.¹⁷² Hence, as in the case of plebiscites, the usual manifestations of legislative purpose are not terribly reliable.

The problem in this regard appears to relate to the practicality or usefulness of requiring proof of discriminatory purpose in equal pro-

¹⁶⁸ See Fountaine, *supra* note 3, at 757 (indicating that legislative bodies keep "records of [their] committee hearings and thought processes"). But see *id.* (conceding that "state legislatures often keep inadequate legislative history records").

¹⁶⁹ See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 200-06 (1982) (noting that "[w]e really do not know from the printed record all that occurred during a bill's passage" because deals are often "made in corridors and behind closed doors," "[m]uch of the pertinent legislative discussion is unrecorded or inadequately recorded," "what is said by the opponents of a proposed bill cannot be trusted and many proponents will not have read or understood the bill," "[t]hose who do understand the bill may be impulsive and careless speakers," and "debate [may be] kept to a minimum[] to achieve consensus").

¹⁷⁰ See DONALD E. LIVELY, JUDICIAL REVIEW AND THE CONSENT OF THE GOVERNED: ACTIVIST WAYS AND POPULAR ENDS 93 (1990) ("If a motive is unlawful, . . . it likely will be disguised."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) (noting that "[i]mproper motives are easy to hide"); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 247 (1983) (characterizing "'[m]anufactured' legislative history" as "legislators' statements not intended to persuade other legislators, but to induce a later court to adopt an interpretation of . . . [a] statute not derived from the actual consensus of the legislature").

¹⁷¹ See Wald, *supra* note 169, at 206 (describing legislative history as "a cacophony of many voices and many themes"). See also Galler, *supra* note 30, at 877 (noting the difficulty of ascertaining the intent of a body as large as Congress); Sunstein, *supra* note 135, at 1714 (citing as one of the difficulties in divining legislative purpose the fact that "legislatures always act on the basis of mixed motives"). As in the case of plebiscites, it is not even clear whose purpose or intent is at issue—that of a law's sponsors, its drafters, the entire Congress, those who voted on it, or those who voted in favor of it. Compare Briffault, *supra* note 3, at 1365 n.95 (indicating that, when ascertaining plebiscitary intent, it is not clear whether the relevant intent is "that of the drafters of the proposal, the thousands who signed the qualification petitions, or the [possibly millions of] voters") with Fountaine, *supra* note 3, at 757 (noting, in the plebiscitary context, the problem of ascertaining "the collective intent of millions of voters" and also observing that "a vote for the law does not necessarily imply a vote for the purposes and intentions of the law as expressed in the ballot pamphlet").

¹⁷² These might be comparable to the "second tier" evidence discussed with regard to plebiscites. See e.g. Eule, *supra* note 3, at 1561-67.

tection cases, and not to the issue of whether plebiscites present a different problem and deserve different treatment than legislative action. Similar to the criticism with regard to plebiscites, many decry the discriminatory purpose requirement in cases raising equal protection challenges to executive actions or legislative enactments for precisely the same reason—impossibility of proof.¹⁷³ Indeed, it seems that the gist of the difficulty that proponents of the special review thesis have with plebiscites rests on the limitations of current equal protection doctrine, and not on any difference between plebiscites and legislation.

c. *Enhanced sensitivity to suspectness*

In his explanation of why plebiscites warrant a harder judicial look, Eule indicates that "traditional equal protection doctrine may be ill-equipped to afford" non-English speaking minorities protection from initiatives declaring English to be the official language.¹⁷⁴ In addition to the difficulty of proving discriminatory purpose discussed above, it is not clear that language-based classifications would engen-

¹⁷³ See Sager, *supra* note 31, at 1421 & n.198 (admitting that "establishing that racial animus play[ed] an instrumental part" in a challenged governmental action "will be difficult enough when centered on a legislative or administrative body"); Sunstein, *supra* note 135, at 1714 (pointing to "the familiar difficulties in divining legislative purpose," and the fact that "legislatures always act on the basis of mixed motives"); Sunstein, *supra* note 26, at 77 (noting that "[t]he problem becomes truly intractable when the issue is the 'motivation' of a multimember decisionmaking body"); Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 138-39 (noting that the requirement of establishing discriminatory purpose "has encountered skepticism, largely because it is so difficult to prove subjective motivations, especially those of institutional decisionmakers") (footnotes omitted); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949). Tussman and tenBroek observe that:

To become involved in the search for [legislative] motives, in the analysis or psychoanalysis of legislative behavior, is a task any sensible mortal might well shun in the easiest of circumstances. Add the fact that we are dealing with a sizeable body of men and the task becomes virtually hopeless. For it cannot be taken for granted that any particular law is the product of a common rather than the resultant of conflicting motives.

Id. at 359. See also *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971) (stating that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it," because "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment," "[i]t is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators," and "there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters" when the law "would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons"); Lively, *supra* note 170, at 93 ("Efforts to determine illegal purpose behind policies . . . regularly have been depicted as vain because a collective intent seldom exists. If a motive is unlawful, moreover, it likely will be disguised.") (footnote omitted). Cf. Strauss, *supra* note 155, at 1014 (concluding that "[t]he discriminatory intent standard is not adequate as a comprehensive account of discrimination").

¹⁷⁴ Eule, *supra* note 3, at 1567.

der heightened scrutiny under current doctrine.¹⁷⁵ Eule's suggested solution includes the same factor mentioned above—"a relaxed standard for assessing [discriminatory] motivation"—but adds a new possibility—"enhanced sensitivity to the quality of suspectness."¹⁷⁶ This is another call for changing the rules or standards for finding constitutional violations.

Eule follows the suggestion with a puzzling admonishment that seems to obviate his proposal: "It is obviously unmanageable for courts to maintain different lists of suspect classifications depending on the nature of the lawmaker doing the classifying."¹⁷⁷ First of all, it is not at all clear why courts could not manage to derive and adhere to different lists of suspect classifications to apply in different contexts. More to the point, it is difficult to imagine what enhanced judicial sensitivity to suspectness means if not to render new categories suspect. If these categories are suspect when plebiscites are involved but not when legislation is involved, then courts would certainly need to maintain different lists of suspect classifications depending on the nature of the lawmaker doing the classifying.

There is nothing particularly odd about concluding that classifications disadvantaging certain groups might be suspect when one type of governmental body acts but not when another acts. Under traditional equal protection jurisprudence, this could occur if there is good reason to think that the same group would not be treated the same way by both bodies. Indeed, the special review thesis seems to be premised on the very notion that different lawmaking bodies—plebiscite voters and legislatures—will treat the same group differently.¹⁷⁸ This issue will be explored in more detail in Part II.B.3.b of this Article.¹⁷⁹

2. *Different Deference to a Different Decisionmaker*

If the reasons for according deference to legislative decisionmaking are not applicable in the plebiscitary context, it would be appropriate for courts to afford less deference to the public as lawmaker

¹⁷⁵ *Id.* at 1567-58.

¹⁷⁶ *Id.* at 1568.

¹⁷⁷ *Id.*

¹⁷⁸ Eule seems to assume that the way to test for suspect classifications in the *plebiscitary* process is to examine the *legislative* response to the problems of an arguably suspect class. See Eule, *supra* note 3, at 1568. Following traditional equal protection analysis, there would be no particular reason to focus solely (or possibly at all) on legislative response to determine whether a particular minority was treated with such a lack of regard in the plebiscitary process as to warrant the heightened protection that comes with suspect class status. Legislative response might be useful as some evidence of general societal discrimination against the minority, but legislative regard of the group is not coextensive with plebiscitary regard, just as legislators are not the equivalent of those they represent.

¹⁷⁹ See discussion *infra* part III.B.3.b.

than to the legislature. In theory, the issue with regard to deference is not one of substance, but one of responsibility: should the body that acted be given the benefit of the doubt in making determinations of constitutionality?¹⁸⁰ The substance of the Constitution is supposed to remain the same, regardless of who has the responsibility for interpreting it. In other words, the degree of deference that a court employs in determining the constitutionality of the action of another branch of government should not alter the substantive meaning of the constitutional provision under examination. In reality, however, requirements that purportedly relate to deference—such as levels of scrutiny in equal protection cases—may turn out to alter the substantive nature of constitutional violations.¹⁸¹ The sections that follow illustrate these principles.

a. *Justifications for deference*

Several different rationales are offered for judicial deference to decisions made by the legislative branch. Notions of separation of powers may suggest deference both within the federal system and, usually, within state systems. By exercising restraint, courts respect the role and province of other, coequal branches of government, including the legislature's exclusive responsibility for making law.¹⁸² This

¹⁸⁰ See *Eule*, *supra* note 3, at 1533 n.124 (stating that "theories of judicial review can no more ignore the 'who' than the 'how' and the 'what' of the governmental action subjected to a court's scrutiny"); *id.* at 1535 ("One cannot talk of judicial deference in a vacuum. One first has to know who or what demands the deference."); *Eule*, *supra* note 139, at 783 ("It seems entirely logical for me that levels of deference and distrust should be influenced by the nature of the lawmaker, just as it is influenced by the nature of the right implicated and by the nature of the group that is targeted."). Cf. Hans A. Linde, *The Shell Gamer of "Interest" Scrutiny: Who Must Know What, When and How?*, 55 ALB. L. REV. 725, 728-29 (1992) (comparing the Court's treatment of Congress, which "gets to act without any showing of a factual predicate in affirmative action cases," and local lawmakers, who "do not get that kind of deference").

¹⁸¹ See *Baker*, *supra* note 3, at 762-63 (finding it "well established that the level of scrutiny . . . applied also dictate[s] the result in equal protection cases"). Cf. *LIVELY*, *supra* note 170, at 17 ("deference in an individual instance or as a general rule may reflect concern primarily with convenience of result").

¹⁸² See *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); *TRIBE*, *supra* note 26, § 3-7, at 67 (describing Article III's case or controversy justiciability requirement as defining "the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government"); *Farber & Frickey*, *supra* note 13, at 920 ("Absent compelling circumstances or express constitutional requirements, respect for a coordinate branch at the federal level has inhibited judicial intrusion into congressional processes."); *Sunstein*, *supra* note 26, at 65 (owing to "conventional understandings of the separation of powers . . . in reviewing legislative action, especially when the relevant questions concern the motivations for such action, courts ought to give legislators the benefit of every doubt"); *Sunstein*, *supra* note 135, at 1714 ("There is considerable awkwardness in attributing an impermissible motivation to a coordinate branch of government."). For an earlier exposition of this point, see also James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 150 (1893) (arguing that courts must not revise the work of coordinate departments

acquiescence to the acts of other branches is intended, among other things, to insure that power remains divided among several bodies so that no single branch becomes too dominant or tyrannical.¹⁸³ Although this aspect of separation of powers technically is not at issue when a federal court reviews the action of a state legislature, notions of federalism may suggest similar deference to a state's lawmaking institutions.¹⁸⁴

Also related to separation of powers principles is the controversial issue of the judiciary assuming a policymaking role not assigned to it. This may seem particularly problematic where judges are appointed, not elected. Courts are supposed to use moderation in reviewing decisions of the lawmaking body in order to avoid engaging in policymaking, because determining policy which is not a function allocated to the judicial branch.¹⁸⁵ When the federal judiciary reviews

of government; must not, "even negatively, undertake to legislate;" and must not act unless the unconstitutionality of the action of another branch is clear).

¹⁸³ See THE FEDERALIST No. 51 (James Madison) (Clinton Rossiter ed., 1961); CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 211 (1960) (describing the separate but interrelated checking roles of the Supreme Court and Congress); GABIN, *supra* note 131, at 4 (noting that its defenders saw judicial review as "a means for checking unconstitutional legislative and executive power," and that judicial restraint, in invalidating only "clearly unconstitutional acts," may be viewed as "a vital mechanism for maintaining a middle ground between legislative and executive supremacy on one hand and judicial supremacy on the other"); TRIBE, *supra* note 26, § 1-2, at 2-3 (describing the vertical and horizontal separations of powers within government as the framers' means of preventing overconcentration of power in any person or group of people in order to prevent tyranny); WOOD, *supra* note 26, at 604 ("Separation of powers . . . was simply . . . the creation of a plurality of discrete governmental elements, . . . checking and balancing each other, preventing any one power from asserting itself too far."). See also, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 46 (1962) (relating Judge Learned Hand's justification for judicial review as necessary to "keep the states, Congress, and the President within their prescribed powers") (quoting LEARNED HAND, THE BILL OF RIGHTS (1958)).

¹⁸⁴ See Eule, *supra* note 3, at 1534-35. But see BLACK, *supra* note 183, at 214-15 (arguing that, when federal courts review acts of state legislatures, "[n]o issue of 'deference to the legislature' or to the 'people' is legitimately involved, for the relevant legislature and people have not spoken"); Thayer, *supra* note 182, at 154-55 (noting that review of state legislatures by the national judiciary involves limited deference because "the departments are not co-ordinate.").

¹⁸⁵ See *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) ("Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation."); GABIN, *supra* note 131, at 4 ("supporters and opponents of judicial review alike, repudiated judicial policy-making (indeed, I am aware of no Framers who defended [it])"); *id.* at 10 (quoting several of the framers as insisting that the separation of powers precluded judicial policymaking); Sager, *supra* note 31, at 1411-12 ("Central to the justification for judicial deference is the proposition that the governmental body which has enacted a regulatory measure is best equipped to make judgments of policy and strategy . . .") (footnote omitted). Cf. Sandalow, *supra* note 143, at 1166 ("Courts commonly exercise lawmaking responsibilities. But they do so, except when they speak in the name of the Constitution, subject to the revising authority of the legislature."). But see LIVELY, *supra* note 170, at 14 (taking issue with complaints that the judiciary sometimes "is legislating" because "[c]ourts make law even when they merely uphold a challenged action").

acts of the federal legislature, life-tenured judges perform the theoretically sensitive task of questioning the policy determinations of the majority's elected, representative decisionmakers.¹⁸⁶ Likewise, the federal judiciary must be careful not to trespass onto policymaking territory when it reviews the determinations of elected state lawmaking bodies, which reflect more localized majorities.¹⁸⁷ Thus, given the delicacy of entering the policymaking arena, particularly in cases in which unconstitutionality is not clear, it may be appropriate for courts to defer to the decision of the majoritarian lawmaking body.¹⁸⁸

¹⁸⁶ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 4-5 (1980) ("[T]he central problem[] of judicial review [is that] a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like."); LIVELY, *supra* note 170, at 8-9 ("While the process of legislating is accepted as the essence of a representative system, the role of an unelected judiciary in reviewing, and sometimes invalidating popular law may be regarded as discomforting at best and antidemocratic at worst.") (footnote omitted).

Some commentators do not consider this state of affairs problematic. See, e.g., Friedman, *supra* note 39, at 582 (asserting that "courts are not systematically less majoritarian than the political branches of government" and suggesting that "the entire concept of majoritarianism is sufficiently incoherent that it cannot serve as a useful basis for comparing courts to other governmental actors").

¹⁸⁷ See Ferguson, *supra* note 185, at 729. Ferguson notes that:

[A] state legislature can do whatever it sees fit . . . unless it is restrained by some express prohibition in the Constitution . . . and . . . Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.

Id. (quoting with approval *Tyson & Bro. v. Banton*, 273 U.S. 418, 445-46 (1927) (Holmes, J., dissenting)).

¹⁸⁸ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984) *reh'g denied*, 468 U.S. 1227 (1984) ("Judges . . . are not part of either political branch of the Government." Therefore, "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."); LIVELY, *supra* note 170, at 53 ("Concern that the judiciary is an antidemocratic institution . . . continues to fuel the notions that it must be subject to special process restraints."); Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1, 4 (1986) ("judges owe deference to the political branches of government"); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 308 (1986) ("because federal judges are not directly accountable to any electorate, I believe they have a duty voluntarily to exercise 'judicial restraint,' that is, to avoid intrusions not clearly mandated by Congress or the Constitution into the processes and decisions of any other branch"). See also GABIN, *supra* note 131, at 4 (arguing that judicial policymaking, including "the judicial veto of legislation not *clearly* unconstitutional," was repudiated by the framers); Thayer, *supra* note 182, at 144 (arguing that courts should find legislative acts unconstitutional only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—[sic] so clear that it is not open to rational question").

Some question whether the legislature really is a majoritarian body. See Friedman, *supra* note 39, at 610-11. Some question whether the court really is antimajoritarian. See *id.* at 609-14 (concluding that several factors, including the appointments process, inject an element of majoritarian responsiveness and accountability into the federal judiciary). See also LIVELY, *supra* note 170, at 2-4 (discussing the lack of appreciation of how majoritarian a force the judiciary tends to be); Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1889-90 (1991) (exposing "the incon-

Another explanation for deference stems from the fact that the judiciary is not the only branch charged with obeying the Constitution, and therefore is also not the only branch responsible for interpreting the Constitution. Every federal and state legislative, executive and judicial officer must take the same oath to adhere to the Constitution.¹⁸⁹ Observing this oath impliedly means acting in conformity with the Constitution in one's official role, which necessitates ascertaining what the Constitution requires.¹⁹⁰ Thus, judicial interpretation of the Constitution is not intended to be exclusive.¹⁹¹ For this

gruity of a system that seriously expects the courts to act in countermajoritarian ways in order to to [sic] protect minority interests" when "judges are entirely *dependent* on the cultural understandings that make meaning possible" and when "the unarticulated normative orientations immanent in these background conceptions shape and produce deeply majoritarian legal outcomes"). Still others disagree with the idea that courts ought only question legislation that is clearly unconstitutional. *See, e.g.,* BLACK, *supra* note 183, at 192 (noting "the necessity and propriety of [deciding] doubtful questions of law [that] run[] through the whole judicial process").

Sunstein suggests that, in addition to reflecting separation of powers concerns, judicial deference to legislative action "might also reflect judicial ambivalence about the notion that pluralist compromise is impermissible in the legislative realm." Sunstein, *supra* note 26, at 66. He argues that such deference stems in part from "skepticism toward the view that the Constitution forbids legislation that is based on the power of self-interested private groups." *Id.* at 66.

¹⁸⁹ U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives beforementioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . ."). *See* LIVELY, *supra* note 170, at 14 ("Legislators and judges alike are sworn to uphold the constitution."); Erwin Chermersky, *The Supreme Court 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 97 (1989) ("all government officials take an oath to uphold the Constitution"); Van Alstyne, *supra* note 60, at 25-26 (quoting *Eakin v. Raub*, 12 Serg. & Rawle 330 (Pa. 1825) (Gibson, J., dissenting)).

¹⁹⁰ *See* Eakin, 12 Serg. & Rawle at 353 (Gibson, J., dissenting); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975) (arguing that the legislative obligation to support the Constitution involves enacting only constitutional legislation); Eule, *supra* note 3, at 1536; Sager, *supra* note 31, at 1411-12 ("Central to the justification for judicial deference is the proposition . . . that the body in question [to whom the court is deferring] can and will measure its own conduct against constitutional requirements.") (footnote omitted).

¹⁹¹ *See* Chermersky, *supra* note 189, at 86 ("legislators are forbidden by their oaths of office to enact laws that they believe to be unconstitutional"); Van Alstyne, *supra* note 60, at 36 (arguing that neither "Congress [n]or the President need defer to Supreme Court interpretations of the Constitution so far as their own deliberations are concerned and so far as the efficacy of their power does not depend upon judicial co-operation"). Lawrence Sager maintains that many constitutional norms are underenforced by the courts, and that the obligation of other governmental officials to obey constitutional norms, even at their underenforced margins, requires such officials "to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions." Sager, *supra* note 31, at 1226-27. Judge Gibson, dissenting in *Eakin v. Raub*, argued that legislators have a "superior capacity to judge the constitutionality of [their] own acts," while Hamilton worried that political actors assessing the constitutionality of their own acts was much like the proverbial fox guarding the henhouse. GABIN, *supra* note 131, at 14, 19 (quoting *Eakin*, 12 Serg. & Rawle at 350 (Gibson, J., dissenting)). Regardless of which side has the better argument in theory, in reality, many legislators have abandoned this responsibility. *See*

reason, it is argued that courts ought to defer to determinations of constitutionality that are implicitly made when other branches act pursuant to their oath.¹⁹²

A common justification for judicial deference to the legislature is the latter's unique expertise in performing the factfinding function essential to determinations of policy.¹⁹³ To the extent that factfinding and fact evaluation informs a constitutional inquiry as well, legislatures are often considered superior to courts in educating themselves on and calculating the relative weight of the necessary background data.¹⁹⁴ Legislatures, unlike courts, have substantial staff, funds, time and procedures to devote to effective information gathering and sorting.¹⁹⁵ Additionally, deference with regard to some legislative matters

Brest, *supra* note 190, at 587 (noting that many legislators have assumed "that their job is to make policy without regard to questions of constitutionality"); Chermersky, *supra* note 189, at 97 ("Observers almost unanimously conclude that officials outside the judiciary rarely reflect on the meaning of the Constitution."); Greenhouse, *supra* note 61 (quoting Judge Abner J. Mikva as saying, with respect to considerations about the constitutionality of a bill, "Members of Congress believe that's what courts are for.").

¹⁹² Early proponents of judicial restraint maintained that legislatures should be presumed to have reviewed laws for constitutionality and thus, should be afforded judicial deference by presuming that the legislative judgment of constitutionality was correct. Thayer, *supra* note 182, at 135-36. See also Sager, *supra* note 191, at 1223 ("The heart of Thayer's argument is that the legislature is charged with the responsibility of measuring its own conduct against the Constitution and that the judiciary should therefore not lightly reach a judgment on the constitutionality of a legislative act contrary to the prior constitutional judgment of the legislature . . .").

Eule questions whether legislators actually make determinations of constitutionality or, more significantly, vote to avoid unconstitutionality. See Eule, *supra* note 3, at 1536-37 & nn.138-139, and authorities cited therein. Indeed, even Thayer recognized a tendency of legislatures to "shed the consideration of constitutional restraints, . . . turning that subject over to the courts." JAMES B. THAYER, JOHN MARSHALL 103-04 (Da Capo ed. 1974). See also BICKEL, *supra* note 183, at 22 (noting that Congress has, on hundreds of occasions, enacted measures that it deemed expedient after abandoning attempts to consider constitutionality "in the declared confidence that the Court [would] correct errors"). On occasion legislators go so far as to pass lawmaking responsibility on to courts in order to avoid difficult or controversial decisions. See LIVELY, *supra* note 170, at 51.

¹⁹³ See Eule, *supra* note 3, at 1538 ("The superior legislative ability to collect information and to sort it out is routinely invoked by courts deferring to legislative judgment.") (footnote omitted); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N. C. L. REV. 707, 747 (1985) ("Much of constitutional law depends on factfinding and the balancing of competing values, areas in which Congress justifiably can claim substantial expertise.").

¹⁹⁴ But see Saul M. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 362-63 (1984) (arguing that neither the federal courts nor Congress "has an absolute claim to factfinding superiority," as "there are only nominal differences in their factfinding capacities"); *id.* at 374 (concluding that "it does not follow that courts suffer from an inability to discover and evaluate facts relative to legislatures").

¹⁹⁵ See *id.* at 365 (describing how the committee system, "a structure peculiar to legislatures and not possessed by courts, enables Congress to acquire extensive knowledge in a myriad of areas") (footnote omitted). See also Kurland, *supra* note 27, at 38 (arguing that the Supreme Court "lacks machinery for gathering the wide range of facts and opinions

reduces what would otherwise be an unmanageable burden on limited judicial resources.¹⁹⁶

Having identified several reasons cited for deference to legislative lawmaking, the question is whether any of these rationales extend to the public as lawmaker. The following subsections consider each rationale individually.

i. Separation of powers to prevent tyranny

As for the first separation of powers explanation, Professor Eule argues that the electorate is not one of the three branches of government from which separation of powers notions derive. In fact, it seems to occupy the lowliest position in the constitutional hierarchy of trust. Thus, laws passed by the electorate directly should not warrant the same hands-off attitude from courts.¹⁹⁷

that should inform the judgment of a prime policymaker," in part because its decisions "have to rest on the evidence and materials brought before it by the litigants or such similar information as may be garnered by its very small staff from already existing published data"). *But see* Pilchen, *supra* note 194, at 369-75 (explaining how "courts, like legislatures, possess significant ability to find and evaluate facts through their regularized procedures," including pretrial discovery, testimony of witnesses (who may be parties or intervenors), cross-examination, and appellate and amicus briefs). Pilchen argues that, although "Congress has an excellent institutional capacity to discover and use facts," as a political institution, it is limited in "its ability to be straightforward in its investigations." *Id.* at 366. Pilchen notes that in some situations Congress "has institutional incentives to ignore or distort" facts. *Id.* at 369. Hearings may be arranged to frustrate, rather than to promote, the search for facts, and the format for questioning witnesses does not lend itself to "extended exchanges between members and witnesses, analysis of different points of view, or in-depth probing of one witness's views by another." *Id.* at 367 (quoting WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 67 (1978)). *See also* Eule, *supra* note 3, at 1538 (indicating that, whatever the relative factfinding competence of courts versus legislatures, both are superior to the public).

Note Thomas Merrill's examination of the comparative expertise of courts and executive agencies:

Executive interpreters have greater expertise on matters that are highly technical or complex; they have more familiarity with the overall structure of a statutory program, and with the policies followed under those programs; and they are more accountable to the public. On the other hand, courts are more insulated from political pressures than agencies; their members are more likely to be selected for their legal abilities than are agency heads; they may be able to hire better law clerks; and they may have more time to do research and write opinions, if only because they are exempt from the statutory deadlines often imposed on agencies.

Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1009 (1992).

¹⁹⁶ *See, e.g.*, Michael W. Dowdle, Note, *The Descent of Antidiscrimination: On the Intellectual Origins of the Current Equal Protection Jurisprudence*, 66 N.Y.U. L. REV. 1165, 1203 (1991) (asserting that "the opaque wording of 'equal protection' conceivably could require judicial supervision over a potentially unlimited range of social behavior"). *But cf.* Riker & Weingast, *supra* note 74, at 400 (advocating nondeferential judicial review of "all legislative outcomes" to determine whether they resulted from "arbitrary processes" and contain "violations of rights").

¹⁹⁷ Eule, *supra* note 3, at 1533-36.

Underlying this argument is the unstated assumption that the public as lawmaker has no official power-checking function comparable to that of the other three players in the separation of powers scheme. With regard to the federal government, this is probably the case. Given that the national governmental structure is established in the Constitution without provision for plebiscites, the only power-checking function assigned to the public is exercised indirectly, through the election of legislative and executive representatives.¹⁹⁸

But the same may not be true with regard to state governments that have adopted plebiscitary processes. It could be said that the implementation of plebiscites was motivated by a desire to have the populace perform in a new power-checking capacity. Plebiscites grew out of the populist Progressive reform movement of the late 19th and early 20th centuries.¹⁹⁹ According to conventional historical analyses, public lawmaking was approved in an effort to break the perceived stranglehold that certain minority, monied interests—in particular, wealthy corporations—had managed to secure over elected state and local legislatures.²⁰⁰ The plebiscitary institution, therefore, like conventional branches of government, has a tradition of serving a distinct

¹⁹⁸ The Tenth Amendment may have some relevance in this regard. It could be read to assign some federal governmental responsibility to the people. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X (emphasis added). Despite language that might lend itself to an alternative interpretation, this clause is not generally understood to give the people any direct role in curbing the power of governmental units. To the extent that it purports to limit the authority of federal governmental bodies, even in its heyday it was asserted essentially by states and not by the people at large. In fact, Supreme Court precedent appears to indicate that individual members of the public would often lack standing to raise a Tenth Amendment challenge to governmental exercise of power. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 104-05 (1968) (explaining that, in *Frothingham v. Mellon*, 262 U.S. 447 (1923), an individual taxpayer did not have standing under the Tenth Amendment to sue for a claimed violation of the federal government's taxing authority).

¹⁹⁹ CRONIN, *supra* note 1, at 43-59; MAGLEBY, *supra* note 1, at 20-22; Briffault, *supra* note 3, at 1348.

²⁰⁰ See CRONIN, *supra* note 1, at 54-56; MAGLEBY, *supra* note 1, at 21; MANDELKER ET AL., *supra* note 1, at 761 (stating that the growth of plebiscites as a source of law began early in this century, and sprang from the "dominant populism of that period, which favored a variety of changes that would return the management of the government to the people, as well as serious concern over the domination of state legislatures by interest groups and lobbyists"); Briffault, *supra* note 3, at 1348 (indicating that the Progressives believed that representative institutions had been seduced away from serving the public interest by "party bosses, political machines, and special interests," the same "powerful and rapacious combinations" that controlled the marketplace of that era); Fountaine, *supra* note 3, at 736 (stating that "the initiative was supported by the Progressive movement as a tool that could overcome the power of [large corrupt] corporations" over legislatures); Resch, *supra* note 5, at 410. But see Eule, *supra* note 3, at 1512-13 n.38 (reviewing those authorities claiming that middle and upper class groups, with parochial interests of their own, were behind the Progressive movement in some areas and were sometimes major proponents of direct democracy).

part in assuring against the overconcentration of power in one governmental body.²⁰¹

Plebiscites are not exactly like other governmental branches in this regard. Separation of powers was designed to prevent one branch from becoming omnipotent over another branch, while plebiscites were instituted to prevent one interest represented within a single branch from securing excessive power. In other words, separation of powers usually addresses an interbranch power problem, while plebiscites usually address an intrabranched power problem.²⁰²

Nevertheless, power presents a problem in both interbranch and intrabranched contexts primarily because there is a danger of its tyrannical exercise. One purpose of separating power among the three branches of government was to diminish the influence of majoritarian faction expressed in the politically responsive legislative branch.²⁰³ The special review thesis seems to conclude that the populace must be checked by the judiciary precisely because it presents a similar and even more exceptional threat of majoritarian tyranny. Thus, with regard to the peril of majoritarian tyranny, plebiscites are supposedly worse than legislatures, and therefore more in need of judicial oversight or, conversely, less deserving of judicial deference.

However, it could also be said that separation of powers was adopted to prevent minoritarian tyranny, for example, in the unelected judicial branch. This would support the separation of powers explanation for the judiciary's deference to the will of the majoritarian legislative branch.²⁰⁴ Plebiscites were likewise instituted

²⁰¹ See GABIN, *supra* note 131, at 9 (explaining John Locke's view of the people as the appropriate ultimate check on legislative excess); Briffault, *supra* note 3, at 1375 (describing the initiative "as a sobering means of obtaining genuine representative action on the part of legislative bodies") (quoting Woodrow Wilson, *The Issues of Reform, in THE INITIATIVE REFERENDUM AND RECALL*, 88 (William B. Munro ed., 1912)); Fountaine, *supra* note 3, at 755 ("One of the justifications for direct democracy is that it provides a check on the power of the legislature.").

²⁰² The constitutional requirement of bicameralism, often cited as one of the separation of powers "checks," is also an intrabranched protection.

²⁰³ See ACKERMAN, *supra* note 26, at 192-93 (citing THE FEDERALIST No. 78 (Alexander Hamilton) as illustrative of the framers' fear that judges would be overly deferential to legislative enactments that are "instigated by the major voice of the community"); Friedman, *supra* note 39, at 617-18 & n.192. Friedman argues that, while the framers never envisioned the scope and legitimacy of majoritarianism today, our modern expansion of both judicial review and majoritarianism function together as "precisely the kind of checks and balances the Framers favored." *Id.* at 627. Cf. GABIN, *supra* note 131, at 4 (arguing that Hamilton and other framers envisioned "impartial judges, removed from participation in law-making," as necessary to enforce "constitutional limitations on members of political institutions whose very participation in law-making rendered them" unable to monitor their own behavior).

²⁰⁴ See BICKEL, *supra* note 183, at 16-17 (observing that judicial review is counter-majoritarian in that it allows an unelected, unaccountable minority to "thwart [] the will of representatives of the actual people" and thereby control against the prevailing majority);

to allay minority faction, albeit in the usually majoritarian legislative body rather than in the judiciary. Therefore, if courts are supposed to defer to legislatures in order to guard against an excessive concentration of their own minoritarian power, perhaps they ought likewise defer to the electorate in the case of plebiscites in order to ensure against the overconcentration of minoritarian power within the usually majoritarian legislature. Indeed, in theory²⁰⁵ plebiscites embody the will of the ultimate politically responsive body—the electorate itself—so courts should defer to them even more readily than they do to legislative action in order to avoid minority tyranny.

To summarize, whatever the impetus for the initial embrace of plebiscites, once they were adopted, state governmental power was even further subdivided for optimum dispersion of authority among the executive branch, the judicial branch, and the dual-part legislative branch, composed of both the representative legislature and the electorate. The public as lawmaker, therefore, plays an official part in the separation of powers structure of the governments in those states that provide for plebiscites. Both legislatures and the electorate are charged with dissipating minoritarian faction and checking minority power centers.²⁰⁶ Thus, if the judiciary defers to the legislature in order to avoid excessive concentration of minoritarian authority in an official governmental organ (the judiciary itself), something similar may be said for judicial deference to the electorate in a plebiscitary state: the judiciary would be deferring to the electorate in order to avoid excessive concentration of minoritarian authority in an official government organ (in this case, the legislature).²⁰⁷

GABIN, *supra* note 131, at 4 (noting that the confinement of judicial review to invalidating only clearly unconstitutional acts may have been a means for checking "unbridled judicial power"); Chermerinsky, *supra* note 189, at 86 (asserting that "the insulation of the federal judiciary from direct control raises concern that its abuses could go unchecked"); Ronald Dworkin, *The Jurisprudence of Richard Nixon*, N.Y. REV. OF BOOKS, May 4, 1972, at 27, 32 (recognizing that "[j]udicial activism involves risks of tyranny"). Cf. Friedman, *supra* note 39, at 592 n.71 (citing Barry Friedman, *Trumping Rights*, 27 GA. L. REV. 435 (1993), for the proposition that "notions of countermajoritarian difficulty cause courts, when balancing, to defer to assertions of government interests").

²⁰⁵ A proviso is added here to indicate that individual plebiscitary votes may not in fact represent the will of the body politic as a whole, depending, for example, on the number of those who choose to exercise their right to vote.

²⁰⁶ On occasion, plebiscites themselves may alter the legislative process, and they may do so in a manner that affects the protection that the legislative process would otherwise afford to minorities. Cf. Eule, *supra* note 3, at 1560 (noting that "alterations of government structure" are sometimes "a facade for disfranchising minorities"). This subject will be explored later as part of the general discussion of the bases for minority attacks on plebiscites. See *infra* part II.B.3.

²⁰⁷ The implication one might draw from this conclusion could be that courts ought to defer to the electorate in the case of plebiscites only when a plebiscite is motivated by the need to break a minoritarian stranglehold over the legislative process. However, to the extent that concern about minoritarian tyranny is a rationale for judicial deference to legis-

ii. Separation of powers and the judicial role

The second facet of the separation of powers argument for judicial deference to the legislature focuses on the proper authority of the judiciary, rather than on its power-checking function.²⁰⁸ The legislature has an assigned, lawmaking role, principally because policymaking in our republic, at least in our federal republic, is left to the most democratic institution of government.²⁰⁹ For the most part, the judiciary does not maintain a lawmaking function because it is the farthest removed from the designated policymakers—namely, the people.²¹⁰

latures, it operates on the wholesale level—that is, there is *generally*, or theoretically, a danger of minoritarian tyranny in judicial review of legislation that calls for judicial deference, although there may not *always* be, in each individual lawmaking instance, a particular reason to be concerned about the court exercising tyrannical control. Likewise, if plebiscites *generally* operate to protect against minoritarian tyranny, they ought to receive like deference from courts, even if every plebiscite is not aimed at wresting power from some out-of-control legislative minority.

²⁰⁸ Limiting the role of each body in the separation of powers scheme may also, ultimately, be premised on checking overconcentration of power. No single branch can become all powerful if each branch may perform only its assigned tasks, and not those assigned to other branches, and if the designated tasks are balanced in terms of significance.

²⁰⁹ See Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203, 2205 (1991) (arguing that “the principle of democracy and the separation of powers [is] a principle of political morality that vindicates the right of majorities to be self-governing by assigning policymaking powers to a democratic legislature”). But see LIVELY, *supra* note 170, at 50 (“The argument that law-making should be an exclusive preserve of the legislature, because it is more directly accountable to the people, also does not accurately reflect political reality.”); *id.* at 50-51 (articulating the fallacy of the assumption that representatives are primarily accountable to their local constituents rather than to broader-based special interest groups, and concluding that the assumption of legislative accountability is increasingly “mythical”); Friedman, *supra* note 39, at 610-11 (suggesting that high legislative incumbency rates and low possibility for the electorate to monitor legislative performance raise doubts about how accountable and representative legislators really are). Public participation, through the notice and comment process, may legitimate policy made by administrative agencies. See Galler, *supra* note 30, at 866-67.

²¹⁰ See Dowdle, *supra* note 196, at 1194-95. Dowdle notes that:

[O]nly a relatively pristine democratic process, such as that embodied in the legislative and executive branches, could distribute fairly and efficiently governmental attention to the many competing interests that comprise the political community. The Court, shielded as it was from both popular review and political expertise, was ill-equipped to respond legitimately to these competing interests and their necessary compromises and thus was particularly vulnerable to the ideological dispositions and irrational prejudices of the Justices.

Id. at 1194 (footnotes omitted).

The creation of common law by courts would pose an exception to this general proposition. See *id.* at 1174 (indicating that early American common law was considered an appropriate type of judicial policymaking); Kurland, *supra* note 27, at 21 (“[O]ur legal heritage derives from the great tradition of the common law which originated at a time when the courts were the prime lawmakers and the legislature was new to the function.”). But see LIVELY, *supra* note 170, at 49 (“The assumption that judges are removed from the electoral process and thereby detached from the ultimate source of legitimacy disregards or discounts the manifold influences that ensure answerability to the citizenry.”); *id.* at 97

Because judicial policymaking is improper, when courts "review" legislative acts they must accord maximum deference to legislators in order to avoid substituting their own policy determinations for those made by the lawmakers.

This justification for judicial restraint in reviewing acts of lawmaking would appear to apply with equal force to plebiscites. In plebiscitary states, the populace performs an assigned policymaking function, just like the legislature. It, too, is much closer to the specified policymakers—the people—than is the judiciary. There is reason to fear the judiciary overstepping its designated role no matter whose policy determination is under investigation, the legislature's or the electorate's. Consequently, both aspects of the separation of powers rationale for judicial deference to legislative acts seem to suggest equivalent deference to plebiscitary action.

Yet, there is more to this aspect of separation of powers in the context of plebiscites than the analysis thus far implies. Even though judicial deference to lawmakers is generally appropriate, the judiciary is supposed to check majoritarian policymaking in certain circumstances, particularly when constitutionally protected individual rights are violated by the majority's preference. In these instances, the presumption that the policymaking body acted in a constitutional fashion is suspended, and the will of the body politic is not assumed to be the proper rule of law. Because courts do not accord deference to legislative lawmakers in such circumstances, neither should they defer to citizen lawmakers in similar circumstances. Moreover, if plebiscites somehow pose an even greater danger of embracing majoritarian faction that contravenes individual rights than is posed by legislative actions, then they may be more worrisome with respect to majoritarian tyranny.²¹¹ This could indicate that less judicial deference is appropri-

(characterizing the judiciary as "an institution tightly bound to dominant sentiments"); *id.* at 125 (indicating that the judiciary "functions within a system of checks and balances that largely are effective in harnessing and sometimes even enslaving it to popular sentiment"); *id.* at 136-40 (generally articulating dynamics of legislative, executive and public control over the judiciary). See also LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 11-15 (1988) (discussing the influence of the social environment on constitutional law).

²¹¹ Some argue that plebiscites do not necessarily pose a greater threat to minority interests. See, e.g., Baker, *supra* note 3, at 709-12; Briffault, *supra* note 3, at 1366 (asserting that "representative and direct democracy in the United States today suffer in varying degrees from similar defects of wealth-based and organization-based barriers to access, low levels of popular participation, unreasoned decision making, and potential for anti-minority abuses"); *id.* at 1361-62; Gillette, *supra* note 3, at 936-37. See also Briffault, *supra* note 3, at 1365 (arguing that judicial enforcement of state and federal constitutional rights "goes far to constrain whatever threat direct legislation may pose to minority interests," and assures that plebiscites present no greater danger of majority tyranny than legislation).

ate in reviewing popularly-enacted law than in reviewing legislation when certain minoritarian rights are implicated.²¹²

At least in theory, plebiscitary law may reflect majoritarian faction more often than legislative enactments.²¹³ The special review thesis argues as much by analyzing the legislative process, comparing it to the plebiscitary process, and concluding that the former is more amenable to and protective of minority interests.²¹⁴ One could reach the same conclusion by approaching the issue from a different angle, that is, by considering how certain minority constituents (wealthy business interests) were able to achieve the stranglehold they obtained over the legislative process that led to the institution of plebiscites in the first instance.²¹⁵ Presumably, this could have occurred because, as the special review thesis explains, it takes an especially broad consensus to enact legislation. Plebiscites were adopted when it did not seem possible to summon the supermajority needed to pass laws in the interests of the populace that were also contrary to the interests of influential corporations. Minority interests were able to control legislative outcomes because more than a simple majority was required for the legislature to act contrary to their position. To overcome this legislative gridlock,²¹⁶ the people turned away from their elected representatives and back to themselves.

In other words, plebiscites became a check on the legislative process when it was not responsive to the majority's will.²¹⁷ Plebiscites were used to break the legislative logjam caused by the inability to develop a broad consensus because, among other things, they require only a *bare* majority, not the supermajority required in the legislature. If a bare majority is more likely than a supermajority to reveal a factious spirit, plebiscites pose a greater danger of majoritarian tyranny than legislative actions. If this is the case, courts would be justified in affording less deference to plebiscitary actions than to legislative actions in circumstances in which they would not normally bow to majority will, that is, when certain constitutionally protected rights are at risk.

²¹² Less deference may mean that, when the presumption of constitutionality accorded to legislative action is challenged on grounds of individual constitutional rights, it should be more readily suspended.

²¹³ *But see* discussion *infra* notes 284-90 and accompanying text.

²¹⁴ *See* Baker, *supra* note 3; Gillette, *supra* note 3.

²¹⁵ *See* discussion *supra* notes 200-01 and accompanying text.

²¹⁶ Where a supermajority is necessary to pass a law, a powerful minority will find it easier to block legislation than to get legislation enacted.

²¹⁷ *Cf.* Briffault, *supra* note 3, at 1372-73 (suggesting that the most important function of plebiscites may be "to get certain subjects on the legislative agenda" when representatives "pursuing their own self-interests stray too far from what a popular majority conceives of as the public interest").

It would seem logical that a bare majority is usually less likely than a supermajority to act for the public good. The larger the constituency that must approve of a measure, the more likely the measure will reflect what is best for the greater number, or for society as a whole.²¹⁸ Thus, a bare majority is usually more likely than a supermajority to reflect faction and, consequently, to be in need of some sort of oversight.²¹⁹ Therefore, when certain constitutionally protected individual rights are at issue and there is a special risk of improper majoritarian tyranny, courts ought to defer even less to plebiscitary action than to legislative action.

The above conclusion resembles, although is more limited than, the conclusion drawn by proponents of the special review thesis. However, it need not be implemented in the fashion they suggest. For one thing, courts may already decline to defer to legislatures in many instances in which constitutionally protected minority rights are in issue. It is not clear what it means to say that they ought to defer "less" to the electorate. This issue will be explored in more detail in Part II.B.2.b of this Article.

iii. Constitutional obligations

Other traditional explanations for judicial deference similarly fail to support the notion that plebiscites deserve heightened judicial scrutiny, even though initially they may appear to lead to the opposite conclusion. For example, unlike the federal and state governmental officials named in the Constitution, the public is not "bound by Oath or Affirmation[] to support [the] Constitution."²²⁰ Hence, the public, unlike the court and the legislature, has no constitutional responsibility to interpret the document.²²¹ And as Professor Eule notes, the electorate is far less prepared than the legislature to perform such a

²¹⁸ See THE FEDERALIST No. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961) ("Extend the sphere [of democratic government] and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to . . . act in unison with each other."). Note, however, that what seems to appeal to the greatest number of individuals is not necessarily what is in the public interest or for the public good. See discussion *infra* note 281 and accompanying text.

²¹⁹ Although this proposition seems logically reasonable, empirically supporting the hypothesis is another matter. Establishing that plebiscites pose a greater danger of majoritarian tyranny than legislation, or that a bare majority is more likely than a supermajority to adopt a factious spirit, would require defining the public good, a difficult, if not impossible, task. See discussion *infra* part II.B.3.b.ii.

²²⁰ U.S. CONST. art. VI, cl. 3.

²²¹ See Eule, *supra* note 3, at 1537-38. But see Fisher, *supra* note 193, at 746 ("No single institution, including the judiciary, has the final word on constitutional questions. All citizens have a responsibility to take a 'hard look' at what judges decide.").

function.²²² Most members of the populace lack the background and sophistication required to give meaning to the broad language of our governing instrument, and few have or would spare the time necessary to devote to such an endeavor.²²³ Consequently, it is likely that the body politic is inclined or able to consider constitutionality when it votes on plebiscites. To the extent that judicial oversight responsibility requires reviewing implied electoral determinations of constitutionality, it may be wholly proper for courts not to defer to decisions made by plebiscite, just as they might defer to similar determinations made by legislatures. Courts may fairly assume that the electorate has not taken the constitutionality of its action into account.

This factor would not appear to lend much weight to the thesis advocating special judicial review of plebiscites, however, because it is usually not regarded as a particularly significant justification even for judicial deference to legislative acts. As modern realists (and Professor Eule) recognize, legislators, despite their superior resources and ability, likewise do not consider or vote on the basis of a proposed law's constitutionality.²²⁴ Thus, the fact that the public may be less able to make a constitutional determination is irrelevant because judicial deference even to legislative acts is not warranted on this ground, except perhaps on a purely theoretical and unrealistic basis.

iv. Expertise in factfinding

As for legislative expertise in factfinding, the public is probably deficient in this regard as well, in part for reasons similar to those just mentioned. In the main, the electorate does not possess information gathering resources comparable to those of the legislature, such as funds, staff and institutionalized educational processes (e.g., committee hearings).²²⁵ Moreover, the legislator's job is to learn about the issues on which she is to vote, while the vast majority of members of

²²² Eule, *supra* note 3, at 1537-58.

²²³ See *id.* at 1538 (asserting that voters lack the knowledge or information necessary to make determinations of constitutionality); Fountaine, *supra* note 3, at 754 (arguing that "the legislature is better qualified [than voters] to make initial determinations on the constitutionality of a bill since legislators generally have experience in analyzing proposed laws").

²²⁴ See Eule, *supra* note 3, at 1536-37 & nn.138-39.

²²⁵ See *Id.* at 1538; Pilchen, *supra* note 194, at 365 (identifying investigative potential of the congressional committee system). See also Fountaine, *supra* note 3, at 740-41 (contrasting legislators, who "often have advanced educations in specialized fields" and "can hire a staff with the . . . [necessary] expertise," and voters, who "are generally not exposed to informative communication" and are "bombarded with political advertising designed to manipulate opinions by appealing to . . . emotions"). But see Arrow, *supra* note 3, at 40-41 (highlighting the active public education on issues that occurs in a plebiscitary setting); Baker, *supra* note 3, at 747-50 (describing features and dynamics of both lawmaking systems that render it no less likely that plebiscite voters will be educated on the issues and make thoughtful choices than their representatives).

the voting public have other occupations and are not likely to allot the same time and attention to matters of public policy.²²⁶ Hence, there is no particular reason for courts to defer to the superior factfinding ability of the electorate as lawmaker.

But the real basis for judicial deference to legislative factfinding may not be the fact that superior resources lead to superior expertise; it could stem from the respective roles of lawmaking institutions and the courts. Courts regularly gather and evaluate relevant information, albeit in the context of specific factual settings.²²⁷ If early decisions had perceived constitutional factfinding to be part of the judges' role in constitutional adjudication, rather than the duty of the lawmaking body,²²⁸ the allocation of factfinding resources among governmental bodies would undoubtedly have been adjusted accordingly, and courts would be far more proficient than they presently are at performing this assignment. There is no inherent reason why judges as individuals could not find and evaluate facts as readily as legislators. Indeed, some judges cannot seem to control their inclination to do just that.²²⁹

Rather, it appears that courts defer to legislatures with regard to factfinding in part because they consider factfinding properly to be tied up with policymaking, and thus part of the legislative and not the judicial function. As a result, where the constitutionality of a provision is fact-dependent, it may be proper for courts to grant the legislature the benefit of the doubt as to those facts and their relative significance.²³⁰ Consequently, deferring to legislative expertise in factfinding may be just another way of saying separation of powers

²²⁶ See Baker, *supra* note 3, at 745-46. See also Fountaine, *supra* note 3, at 740-41 (noting that ballot pamphlets are "written at a level of difficulty beyond most voters' level of education," "the length of ballot measures is often very unwield[y]," and "most citizens simply do not have the amount of time or interest necessary to study and understand the numerous complex issues with which they are faced," in contrast to legislators, who, "unlike members of the general public who have other responsibilities, can devote the time necessary to thoroughly read and study lengthy, complex bills") (footnote omitted); but see Arrow, *supra* note 3, at 41.

²²⁷ See Pilchen, *supra* note 194, at 369, 371-75.

²²⁸ Cf. Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966) (urging greatly increased judicial immersion in the review of legislative factfinding so that courts may fulfil their "legitimate political function").

²²⁹ Witness the Supreme Court's detailed discussion of "slack action" with regard to the operation of trains in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775-79 (1945). The Court in *Southern Pacific* concluded that an Arizona law limiting the length of trains "affords at most slight and dubious advantage, if any, over unregulated train lengths, because it results in an increase in the number of trains and train operations and the consequent increase in train accidents of a character generally more severe than those due to slack action." *Id.* at 779.

²³⁰ The same proviso would apply here as applied in the earlier discussion of the separation of powers rationale: The benefit of the doubt may be suspended when specific, constitutionally-protected, usually minority-protective, individual rights are implicated.

calls for the most politically responsive body to make policy.²³¹ If so, once again, the electorate, even more so than the legislature, is closer to the specified policymakers than the courts. Hence, judicial deference to plebiscites ought not differ from deference to legislation on this particular ground.

v. Volume

The last factor sometimes mentioned with regard to deference is an entirely practical one, and seems to call for similar deference for legislation and plebiscites. If courts were to reexamine every law passed by the legislature and make an independent evaluation of its merits, they would soon be overwhelmed.²³² A corresponding concern may exist in the case of plebiscites, depending on the number of or frequency with which ballot proposals are or could be enacted.²³³

Consider the example of rational basis equal protection review. Virtually every law could be challenged on equal protection grounds because it treats some group differently than another group.²³⁴ The group treated less favorably could assert that the state has denied it the equal protection of the laws.²³⁵ Courts have ruled that, unless a special suspect classification or fundamental right is at issue, such laws need only attempt to achieve a legitimate state purpose through rationally related means.²³⁶ In deciding whether laws meet this stan-

²³¹ See Pilchen, *supra* note 194, at 376-77 ("The issue, rhetorically cast in terms of facts and factfinding competence, is really whether a political majority or the Supreme Court should have the last word in establishing a particular policy. Arguments [based on legislative expertise in factfinding] serve to mask their proponents' value preference that Congress have the primary if not sole responsibility for formulating national policy . . .") (footnote omitted). *But see* Tussman & tenBroek, *supra* note 173, at 373 (indicating that the Court defers more readily to legislative determinations in the economic sphere than in the area of civil and individual rights because knowledge about the latter "is not so constitutionally a matter of time or place, not so dependent upon community variants [sic] peculiarly within the knowledge of the legislatures on the spot," and, "unlike some economic data, . . . neither so technical nor so esoteric as to lie beyond the legitimate cognizance of the Court") (footnotes omitted).

²³² Of course, there are other reasons courts do not reexamine the merits of every legislative act. Legislatures might well respond to such usurpation of their authority by using all means at their disposal to curtail the jurisdiction of and the resources available to courts, perhaps even resorting to impeachment where possible. Additionally, it is highly unlikely that the public would stand for such a complete abrogation of legislative power.

²³³ For information on the widespread use of the plebiscitary process, see *supra* note 1 and accompanying text. Note, however, that the difficulty of qualifying measures for the ballot and the tendency of the electorate to vote against initiatives ensure that "most laws . . . will remain the product of legislative lawmaking." Briffault, *supra* note 3, at 1371.

²³⁴ See, e.g., Lively, *supra* note 170, at 63 ("Because government regularly classifies when it enacts legislation," it is necessary to engraft "limiting principles" to prevent all law "from being swallowed by equal protection.").

²³⁵ U.S. CONST. amend. XIV, § 1.

²³⁶ See *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (indicating that, for a legislative classification not to violate the Fourteenth Amendment, it "must be reason-

dard, courts regularly defer to the legislature's implicit judgment that such measures have a rational purpose and that the means chosen to effectuate that purpose represent a rational method of achieving it.²³⁷ Courts go so far as to speculate on what rational purpose might have motivated a legislature to act as it did, without proof that the conjectured purpose was the actual one motivating the act.²³⁸ The extreme deference that courts award to legislative action in such instances may reflect, at least in part, the courts' concern with the prospect of otherwise having to reexamine the merits of every legislative enactment in order to assess its substantive constitutionality against some broad, unspecified constitutional standard.²³⁹

Plebiscitary results are also potentially subject to substantive equal protection challenges.²⁴⁰ If publicly-enacted laws are, or could be, substantial in number, courts would be faced with the same daunting prospect of scrutinizing an enormous quantity of material for substantive constitutional legitimacy. Hence, deference to the public could stem from the same pragmatic consideration as deference to the legislature. On the other hand, it may be, once again, that this factor is really just another way of saying that when there is any constitutional doubt, courts should defer to the most politically responsive—and therefore the proper policymaking—body.²⁴¹

vi. Consensus

There is an additional practical consideration that may play a part in judicial deference where legislative activity is concerned, and it relates to the special review thesis. It may be that courts are loath to overturn measures that have successfully completed the journey through the filtering and blocking machinery of traditional government because such laws reflect considerable political consensus. Structural filtering mechanisms generally result in statutes with broad backing that have taken into account minority, as well as majority,

able, 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"); *TRIBE*, *supra* note 26, § 16-2 at 1439-43 (discussing the rationality requirement).

²³⁷ See *TRIBE*, *supra* note 26, § 16-2 at 1440 (indicating that extreme judicial deference to the legislative definition of the public good arises "either out of judicial sympathy for the difficulties of the legislative process, or out of a belief in judicial restraint generally").

²³⁸ See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 177-79 (1980). See also *LIVELY*, *supra* note 170, at 118 (describing the Court's rational basis test as "essentially transl[ati]ng into consideration of whether any conceivable reason would justify the government's action").

²³⁹ See *supra* note 196 and accompanying text.

²⁴⁰ See *supra* note 79 and accompanying text.

²⁴¹ Once again, this proposition is subject to the proviso that deference may not be warranted when the entrenched, constitutionally protected rights of certain minorities are at stake. See *GABIN*, *supra* note 131, at 17-22.

concerns.²⁴² When this mix of interests comes together, courts may be less willing to expend their limited good will to overturn such a concordance, especially because it is less likely to reflect faction.²⁴³ In other words, the breadth of agreement behind a legislative result may motivate judicial deference.

If this is a factor underlying judicial deference toward legislative enactments, it seemingly does not suggest any particular deference with regard to popularly-enacted laws. For the reasons outlined in the explanation of the special review thesis, one could conclude that statutes passed by ballot are not likely to be supported by the broad consensus that one finds in the legislative process.²⁴⁴ They usually require no more than bare, or simple, majority support, as opposed to supermajority backing.²⁴⁵ Therefore, there should not be an analogous aversion on the part of courts to jettison plebiscitary enactments because of their extraordinary political harmony. This conclusion might have to be suspended, however, on a case-specific basis if, for example, a particular law was enacted by a vote of ninety percent of the public; in such an instance, one could safely speculate that broad concordance, like that assumably evidenced by legislation, actually did exist.

In other words, the meager "bare majority" support behind many plebiscites, in contrast with the "supermajority" support behind much legislation, may be significant not simply because of the numerical difference, but because it may indicate a greater likelihood that the plebiscitary vote was captured by a factious majority. In contrast,

²⁴² See Sandalow, *supra* note 143, at 1192 ("The balance struck by Congress, just because the enactment of legislation confronts so many hurdles, may fairly be understood to be supported by a broad popular consensus."); *id.* at 1187 ("A consensus achieved through a broadly representative political process is . . . as close as we are likely to get to the statement of a norm that can be said to reflect the values of the society."); Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 695 (1975) ([T]he political responsibility of the legislature creates an incentive for compromise and accommodation that facilitates development of policies that maximize the satisfaction of constituents' desires.").

²⁴³ See Sandalow, *supra* note 143, at 1192 (arguing that, given the "broad popular consensus" for legislation that results from congressional filtering, "[i]t is . . . difficult to understand what warrant courts can claim for setting their judgment against such a consensus"). Because factious minorities are better able to defeat law than to enact it, legislation that actually succeeds in a filtered lawmaking system is especially unlikely to reflect minoritarian faction.

²⁴⁴ But cf. Briffault, *supra* note 3, at 1350-52, 1356-57, 1359-60 (implying that, given the notable difficulty of enacting law through the plebiscitary process, plebiscites may need to reflect broad consensus if they are to succeed on election day).

²⁴⁵ But see MAGLEBY, *supra* note 1, at 47 ("[S]ome states require more than a simple majority affirmative vote (usually 55-75%) on a referendum for it to be approved. The rationale for such rules is that some referendums should require an unmistakably popular and unequivocal verdict.").

legislative action, to the extent that it requires supermajority support,²⁴⁶ is more apt to be public-spirited and less motivated by individual self-interest, and, hence, less prone to faction. The special review thesis suggests that several dynamics peculiar to legislative decision-making render it more likely that representatives will consider what is good for society as a whole, rather than what is good for themselves or some subset of their constituents. Whether one analyzes the problem in terms of institutionalized processes that are conducive to the consideration of minority views, or in terms of the voting strength required for institutionalizing majority views, the outcome is essentially the same: plebiscites that reflect a close majority vote may be less deserving of judicial deference than legislation or plebiscites with wide endorsement.

In sum, several of the components of judicial deference applicable to legislative efforts are equally applicable to popular acts. Which, if any, of these rationales plays a decisive part in the decision to defer is difficult, if not impossible, to ascertain. Consequently, on both a pragmatic and an abstract level, the question of different deference for a different decisionmaker is nearly impossible to resolve.

It seems fair to assert that there are several reasons why courts might grant less deference to the public than they bestow upon the legislature when they consider the substantive constitutionality of laws.²⁴⁷ All of these reasons for deference are situationally dependant. Perhaps, then, the issue of different deference ought to be resolved in a context-specific fashion. For example, lawmaking determinations that are particularly fact-dependent might be more suitable subjects for judicial deference to the legislature than for deference to the electorate. On the other hand, plebiscites that appear to reflect an extraordinary consensus ought to occasion the same judicial deference as legislative acts that enjoy supermajority support.

Professor Eule's special review thesis also calls for ad hoc application of a harder judicial look, perhaps even at the case-specific level, but it seems as though the factors that he advocates using to determine whether to afford such a look in a given circumstance are based on entirely different considerations than those just suggested. For the most part, they appear to relate to equal protection concerns and not

²⁴⁶ But see discussion *infra* part II.B.3.a.

²⁴⁷ These include several reasons. First, there is an increased likelihood of faction in plebiscites that are passed by only a bare majority and that implicate constitutionally protected individual rights. See *supra* notes 217-19 and accompanying text. A second reason is the lack of broad consensus required for passage of plebiscites. See *supra* notes 244-45 and accompanying text. There is also the absence of factfinding expertise in the electorate. See *supra* notes 225-26 and accompanying text. But see *supra* notes 227-29 and accompanying text (questioning whether factfinding expertise is really a significant ground for deference).

to the rationales underlying judicial review and deference.²⁴⁸ To the extent that his different look means affording plebiscites a different level of deference than comparable legislative acts, it would seem that it ought to have some direct relationship to the justifications for deference, rather than to considerations more typical of equal protection analysis. The following sections will discuss whether other factors, including factors relating to the nature of equal protection analysis, might also indicate that a different standard of deference is warranted for plebiscitary action.

b. *Deference and standards of review*

A number of writers suggest that courts should use a different standard of review when examining popularly enacted laws as opposed to legislatively enacted laws. Some implicitly add the proviso that this should occur when courts analyze equal protection claims, and some implicitly add an additional proviso that it only occur when such claims are made on behalf of certain minorities.²⁴⁹ This section will explore whether it is appropriate to employ a different standard of review in equal protection cases because a law is enacted by plebiscite rather than by a legislature.²⁵⁰

²⁴⁸ For example, Eule suggests that alterations of government structure, reapportionment, and taxing and spending limitations are appropriate candidates for special review because they commonly disenfranchise or disadvantage minorities. Eule, *supra* note 3, at 1560. The criterion for receiving special judicial scrutiny thus appears to be the fact that such measures disadvantage minorities, a factor certainly significant within, if not actually stemming from, equal protection jurisprudence. At another point, Eule uses school busing bans and English only initiatives as examples of measures requiring special review. *Id.* at 1565-68. Once again, his concern appears to focus on the same types equal protection claims by minorities.

²⁴⁹ See discussion *supra* part I.C.

²⁵⁰ It is not entirely clear whether any of the proponents of the special review thesis would advocate that different standards of review be employed in any area other than equal protection analysis. It would seem that a differential application of standards of review similar to that employed with regard to equal protection claims would not be warranted in cases raising most, if not all, other constitutional claims.

This conclusion stems from the fact that, if there is any significant difference between plebiscitary and legislative action, it is a difference in the nature of the lawmaking process. Equal protection, in essence, is a process-protective guarantee, at least as most often interpreted by the Supreme Court when applied to lawmaking. See *infra* notes 262-73 and accompanying text; cf. Sandalow, *supra* note 143, at 1182 (distinguishing "decisions that rest upon the equal protection clause" from such "substantive" provisions as "the first amendment or the due process clause," because the former permit "courts to provide significant protection for the interests of minorities without arrogating to themselves power to make value choices"). If, as argued later in this section, equal protection standards are really assumptions about the propriety of governmental process, different lawmaking processes may justify different assumptions, and a process-protective constitutional provision may imply different standards for different governmental processes. Cf. Sandalow, *supra* note 143, at 1183-90 (suggesting that courts apply different standards of review to legislative action and to the results of other lawmaking procedures because the former is more likely to reflect societal consensus). Thus, if equal protection is a process-protective constitutional

In part, courts use different standards of review as a means of applying different degrees of deference to the decisionmaker whose determination is under review.²⁵¹ Thus, in those specific instances where a different level of deference to plebiscites is warranted,²⁵² it would seem defensible to subject plebiscites to different standards of review.²⁵³

However, different standards of review involve more than different deference. They also invoke different substantive rules for establishing violations of the equal protection guarantee, which often leads to different substantive conclusions. Nevertheless, as explained earlier, the ultimate, underlying inquiry that these substantively different standards of review seek to answer remains the same—that is, the meaning of the equal protection provision remains the same—and the standards are essentially shortcuts used to arrive at the proper equal protection determination.²⁵⁴ If there are differences in the two lawmaking processes, legislative and plebiscitary, that implicate the rationale for using such rules of thumb, then it might be appropriate to alter the standard of review when examining plebiscites.

In order to explain these propositions, it would be helpful to begin with a synopsis of different equal protection standards of review. Courts use standards ranging from minimal rational basis review to strict scrutiny to determine whether a governmental action runs afoul

guarantee, that fact could well justify application of different standards of review for two different lawmaking processes, legislative and plebiscitary.

When a constitutional guarantee does not protect process, but instead protects substance (like substantive due process), standards of review used to evaluate whether such a guarantee has been violated do not necessarily indicate anything in particular about the governmental process (for example, the lawmaking process) that produced the alleged constitutional violation. Differences in lawmaking processes, in and of themselves, should have no logical bearing on whether the substantive right has been infringed. Consequently, despite the broad language used to describe the special review thesis, its proponents either do not really mean to apply it in contexts other than equal protection (or other process-protective guarantees), or have some other (as of yet unclear) rationale for applying it in such instances. Therefore, the remainder of this section will focus only on equal protection claims, and will examine the relationship of deference to standards of review in that context.

²⁵¹ See *LIVELY*, *supra* note 170, at 118 (“[The rational basis test] is a standard overtly calibrated against disrupting representative governance”); *Eule*, *supra* note 139, at 782-83 (explaining that courts begin with a presumption of constitutionality for legislation, but “the presumption lightens and the deference fades” in instances in which there is “an increase in the distrust of the decisionmakers”); *id.* at 783 (observing that “deference and distrust are in inverse correlation”).

²⁵² See *supra* note 247 and accompanying text.

²⁵³ Apparently, none of the advocates of different standards of review for plebiscites would limit their application of different standards to these specific cases. *Eule* states that his suggested harder look would vary from one case to another, but nowhere does he indicate that deference would be the reference point for any such distinction. See *supra* note 93 and accompanying text.

²⁵⁴ See discussion *supra* part I.B.1.a.

of the Fourteenth Amendment's Equal Protection Clause or the equal protection component of Fifth Amendment due process.²⁵⁵ In a typical case, the court employs very deferential rational basis review to assess the constitutionality of the actions of the legislative branch.²⁵⁶ It will only overturn the legislative result as violative of the equal protection guarantee if the legislature has sought a goal that is not "legitimate," or has attempted to achieve a legitimate goal by means that do not represent a rational method of securing that goal.²⁵⁷ In contrast, when using strict scrutiny review the court requires that the law under examination be enacted to achieve a compelling government interest, and that the means chosen by the legislature to achieve that interest be necessary.²⁵⁸

The different determination in these two instances is founded, in part, on a different level of deference accorded to the decisionmaker. In the lawmaking context, courts applying minimal rational basis review afford maximum deference to the implied legislative determination that the law was enacted for a rational, legitimate purpose and that the means chosen are rationally suited to achieving that purpose.²⁵⁹ No similar deference is given in the application of strict scrutiny. To explain why this is so, it is necessary to understand how the Equal Protection Clause is intended to work. Theories explaining the proper operation of the clause abound,²⁶⁰ making it difficult to dis-

²⁵⁵ Some maintain that so many different standards are now in use that the Supreme Court is really employing Justice Marshall's suggested sliding scale of scrutiny. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 108-10 (1973) (Marshall, J., dissenting); Chermerinsky, *supra* note 189, at 73 (describing the sliding scale approach as an "alternative analytical framework" for equal protection analysis that "would require much more judicial discussion of the competing interests and the basis for the Court's holding").

²⁵⁶ See Chermerinsky, *supra* note 189, at 73 (noting that, under the Court's "tiered" equal protection framework, there is "a strong presumption in favor of rationality review").

²⁵⁷ See *supra* notes 236-38 and accompanying text.

²⁵⁸ See, e.g., *Bernal v. Fainter*, 467 U.S. 216, 219 (1984); see JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.3, at 575 (4th ed. 1991).

²⁵⁹ See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (characterizing the rational basis standard as "reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task"); Resch, *supra* note 5, at 422 (describing minimal rational basis review).

²⁶⁰ See, e.g., ELY, *supra* note 186, at 30-32, *passim* (suggesting that the proper function of the Equal Protection Clause is to ensure that the political process has provided true representation for minorities who are the subjects of legislative classification); Lawrence, *supra* note 170, at 356 (asserting that the Equal Protection Clause requires the courts to apply heightened scrutiny to classifications that carry "cultural meaning" in order to "evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance"); Sunstein, *supra* note 135, at 1689 (finding that equal protection, like other constitutional guarantees, prohibits governmental exercise of "naked preferences," or, "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want"); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1304 (1985) (proposing that the "core" of equal pro-

cuss the relationship between equal protection analysis and this issue. Because the special review thesis is premised on a process-based analysis of the supposed constitutional problem with plebiscites,²⁶¹ and because most Supreme Court decisions appear to adopt a process-based view of the equal protection guarantee,²⁶² it might make sense to approach the issue from a process theory perspective.

Under a process view, those in the minority with regard to an issue must fight it out in the political or legislative arena, and the equal protection commitment does not guarantee anyone a particular substantive result. Numerical minorities may try to obtain desirable results through any available means built into the process, such as, by persuasion, vote-trading or the like.²⁶³ These resources often fail, and minorities often lose, all without equal protection implications.²⁶⁴ In other words, absent defects in the legislative process, the system assumes that legislative actions that treat different groups differently are

tection doctrine is "the comprehensive sense of personhood as the confluence of individual, group, and social identities," and that the Clause protects "individual identity or . . . group identity").

²⁶¹ See Eule, *supra* note 139, at 779 (characterizing his special review thesis as "process-oriented").

²⁶² Although the Court seems to have seized upon a process-based notion of equal protection when dealing with cases involving racial and ethnic discrimination and most cases involving rational basis review, its treatment of gender-based discrimination and affirmative action cannot readily be explained in process theory terms. See Klarman, *supra* note 155, at 308 & n.438 (finding that judicial scrutiny of gender classifications that disadvantage women is not "plainly justifiable on political process grounds," although "the Court initially relied in part on political process theory to justify the application of heightened scrutiny to such classifications" and also observing that it is "virtually impossible" to produce a process-based justification for applying heightened scrutiny to classifications that disadvantage men); *id.* at 311 (concluding that the Court's affirmative action cases are inconsonant with process theory because "[w]hites . . . , who ostensibly bear the brunt of affirmative action, can amply defend themselves in the political arena, and thus should not qualify for special judicial protection," even though "the Court frequently has deployed [process theory] arguments" to explain its use of heightened scrutiny in such cases).

Nevertheless, the predominant rhetoric of Supreme Court equal protection analysis remains process-based. See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) (recognizing the lure of process-based constitutional analysis, but criticizing it as "indeterminate" and "incomplete").

²⁶³ See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 145 (1956) (defining the "normal" American political process as one in which there is a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision"); ELY, *supra* note 186, at 135 (noting the premise of pluralist political theory that "any group whose members were not denied the franchise could protect itself by entering into the give and take of the political marketplace," and observing that, although this theory has recently been under attack, "minorities can protect themselves by striking deals and stressing the ties that bind the interests of other groups to their own"); GABIN, *supra* note 131, at 77 ("[T]he passage of all legislation normally requires a coalition of various minorities which then prevail over other minorities.") (footnote omitted).

²⁶⁴ See GABIN, *supra* note 131, at 77 ("[W]hatever the nature of the political process, however unimpeded, minorities inevitably lose, in the sense of not prevailing politically.").

constitutional. Hence, in the usual case, the court employs very deferential rational basis review to assess the constitutionality of the actions of the legislative branch precisely because it assumes the correctness of the implied legislative determination that the law under examination was rationally motivated and effectuated.²⁶⁵ The minimal standard of review is the court's way of saying that the legislature rightfully retains the responsibility for making constitutional determinations.²⁶⁶

Heightened scrutiny comes into play when there is reason to be concerned that a group, usually one comprising a numerical minority within the policymaking scheme,²⁶⁷ is not treated the same as others in the process.²⁶⁸ What courts seem to look for, and what process theory would deem relevant, is something like bias skewing the proper functioning of the process, that is, lawmakers disadvantaging a particular group either due to outright hatred for group members or a marked lack of concern or regard for that group's well-being.²⁶⁹ This

²⁶⁵ See *supra* notes 236-37, 256 and accompanying text.

²⁶⁶ See *LIVELY*, *supra* note 170, at 118 (describing the rational basis test as "a standard overtly calibrated against disrupting representative governance").

²⁶⁷ Gender-based discrimination would not fall within the category of improper treatment of a numerical minority. See, e.g., *ELY*, *supra* note 186, at 164 ("[W]omen have about half the votes, apparently more."). Nevertheless, classifications based on sex often command heightened judicial scrutiny. See *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 467 n.18 (1984) ("[I]t is now well established that gender classifications receive heightened scrutiny."); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 273 (1979). Process theory can account for this phenomenon in other ways, see *ELY*, *supra* note 186, at 164-69, but only on a temporary basis, *id.* at 169. According to Sunstein, the phenomenon departs from heightened scrutiny based on process analysis and "employs the device of impermissible ends," pursuant to which "measures are presumed invalid because of a concern not that they are based on raw political power, but that they depend on impermissible attitudes towards [certain groups]." Sunstein, *supra* note 135, at 1712.

²⁶⁸ See *ELY*, *supra* note 186, at 103 ("Malfunction occurs when the *process* is undeserving of trust, when . . . though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system."); Sandalow also notes that:

When legislation singles out a minority for disadvantageous treatment, . . . there is less basis than normally exists for confidence in the underlying assessment of costs and benefits by the legislature: since the costs of the legislation are not broadly distributed through the society, but are imposed only upon a minority, there is reason to fear that they have been undervalued. Hence, the balance of interests struck by the legislature is likely to be based upon a distorted assessment of the relative weight of the costs and benefits of the legislation.

Sandalow, *supra* note 143, at 1174-75. See also Sunstein, *supra* note 173, at 140. Cf. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 628 (1969) ("The presumption of constitutionality and the approval given 'rational' classifications . . . are based on an assumption that the institutions of state government are structured so as to represent fairly all the people.").

²⁶⁹ See, e.g., *Cleburne*, 473 U.S. at 443 (indicating that "continuing antipathy or prejudice" evokes "a corresponding need for more intrusive oversight by the judiciary"); *ELY*, *supra* note 186, at 103 (citing, as an example of the malfunctioning of the political process, representatives "disadvantaging some minority out of simple hostility or a prejudiced re-

kind of bias reverses the assumption that the particular minority had the same opportunities as the majority or other minorities to secure its interests.²⁷⁰ Thus, when the court determines that the legislature acted with a forbidden motive in passing a law that disadvantages a special, disfavored group, it will not engage in the usual presumption that the legislature acted constitutionally.²⁷¹ Instead, it subjects the legislature's action to strict scrutiny, and does not give deference to the implied legislative determination that its action is constitutional. Here the court is not willing to allow the legislature the responsibility for making the decision on constitutionality.

Again, the nature of what essentially constitutes a violation of the Equal Protection Clause is supposed to remain the same, independent of the standard of review applied. What changes from one level of review to another is that the court abandons the assumption that the legislature has acted in the proper manner in considering all of the affected parties before reaching its decision.²⁷² When applying the strict scrutiny standard, the court reviews the law more carefully in order to expose instances in which the legislature has not acted in the proper fashion by considering all interests with an unjaudiced eye.²⁷³

fusal to recognize commonalities of interest"); Sunstein, *supra* note 135, at 1711 ("One reason for heightened scrutiny is a belief that when a statute discriminates on its face against racial minorities, a naked preference is almost certainly at work."). Cf. Sandalow, *supra* note 143, at 1181 ("If the values expressed in constitutional law are . . . derived from . . . 'the evolving morality of our tradition,' it is not apparent what courts are to look for when they subject legislation directed against minorities to close scrutiny.") (footnote omitted).

²⁷⁰ For example, other groups will not readily trade votes with the hated or disfavored group. See ELX, *supra* note 186, at 161 (noting that despite technical access to the political process, "other groups may just continue to refuse to deal [with a disliked minority], and the minority in question may just continue to be outvoted"); Lawrence, *supra* note 170, at 347 ("Other groups in the body politic may avoid coalition with blacks.").

²⁷¹ Cf. Sandalow, *supra* note 143, at 1179 ("Courts may safely defer to the judgments underlying legislation that touches upon constitutionally protected interests *if* the burden of the legislation is broadly distributed through the population.") (emphasis added).

²⁷² See Dowdle, *supra* note 196, at 1169 ("The Court *presumes* certain types of legislation to be rational and other types to be irrational . . ."). Sunstein notes that:

The equal protection clause forbids naked preferences, but the standard of review indicates the Court's belief that it ought to be extremely reluctant to conclude that a naked preference has in fact occurred. Undoubtedly, this reluctance can be attributed in part to separation of powers concerns, reflecting a judgment that although naked preferences are prohibited the courts ought to create a strong presumption that they hardly ever occur. There is a considerable awkwardness in attributing an impermissible motivation to a coordinate branch of government.

Sunstein, *supra* note 135, at 1714 (footnote omitted).

²⁷³ Cf. TRIBE, *supra* note 26, § 16-6, at 1451 (Although strict scrutiny ordinarily appears as a standard for judicial review, "it may also be understood as admonishing lawmakers and regulators as well to be particularly cautious of their *own* purposes and premises and of the effects of their choices.").

But the different levels of scrutiny do something else as well; they invoke different substantive rules or norms for determining whether the Equal Protection Clause has been violated. Applying these different rules to the same facts could lead to different results. Suppose, for example, that a state legislature adopts a statute funding garbage collection but, owing to limited funds, only provides for collection in certain counties. Collection is cheaper in the included counties, allowing more locations to be covered, because there are fewer residents in these locations. If the law is challenged by the excluded residents on the ground that the state has denied them the equal protection of the law, and the court reviews the statute under a rational basis level of scrutiny, the law could easily be upheld. The state might be able to assert that it was attempting to effectuate the legitimate aim of providing maximum sanitation for the dollar. It could argue that the chosen means—including the most locations possible—is a reasonable method of achieving the goal of maximizing sanitation services. Owing to the extreme deference usually afforded in such instances, courts would most likely find the state's rationale satisfactory.

Suppose, instead, that the court were to apply strict scrutiny to the same facts. It would then require the state to establish that it had a compelling reason for adopting the garbage collection funding statute, and that selecting only the chosen counties for the program was a necessary means of achieving that compelling goal. A desire to secure as much sanitation as possible for the tax dollar might not be a compelling governmental goal, and even if it were, the court could find that excluding counties with more residents in order to cover more counties is not a necessary means of achieving that goal.²⁷⁴ Under this standard of review, the law would likely fail.

Both analyses are aimed at flushing out the existence of untoward bias that skews the proper functioning of the lawmaking process. Under either level of scrutiny, an equal protection violation consists of the failure of the legislature to consider the interests of all groups with due regard. Thus, given identical facts, the result should not change from one level of review to another: either the legislature afforded the excluded residents the requisite unbiased consideration or it did not. The ultimate question remains the same—was the group in question treated fairly in the legislative process—and the different standards of review act almost like evidentiary shortcuts to answering that question.

Yet what the court actually looks for to determine whether the Equal Protection Clause has been violated is entirely different when it

²⁷⁴ For example, a reasonable alternative that would pass strict scrutiny analysis might involve the collection of the same limited amount of garbage from every location.

applies different standards of review. In the case of rational basis review, a violation is premised on a finding that the state's reason for acting as it did is totally unreasonable; only an irrational state action violates the Equal Protection Clause. In the case of strict scrutiny, however, a violation is based on a finding that motivation for the state's action was less than compelling; any state action not necessary to serve a compelling goal violates the Equal Protection Clause. The state's burden in passing the strict scrutiny standard is considerably harder to meet. As a result, the determination of whether the Equal Protection Clause will provide relief to an individual may change from one standard to the next, as the garbage collection statute example illustrates. Thus, although in theory the different equal protection standards of review are merely expressions of different assumptions about the constitutionality of governmental process, in application these standards invoke different substantive norms for finding constitutional violations.²⁷⁵

The reason we apply different rules or norms (and permit different substantive results) is that the facts relevant to whether the equal protection guarantee has been violated are always different in a very significant respect when a higher standard of review is invoked. Although the two standards could produce different results if applied to the same set of facts, one would never apply both standards to a single given set of facts. Strict scrutiny is used only when it is far more likely that there has actually been an equal protection violation. This occurs when the group disadvantaged by the government's action is one we have good reason to suspect did not get its fair shake in the legislative process.²⁷⁶ In other words, the ultimate question remains the same—did the group in question receive the proper attention in the lawmaking process—but we apply a higher standard of review, resulting in more violations, because, *given the group involved*, it is far more likely that the group did not get its due.²⁷⁷

²⁷⁵ See *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985) ("Heightened scrutiny inevitably involves substantive judgments about legislative decisions . . .").

²⁷⁶ See Sunstein, *supra* note 135, at 1711 (contending that, because "a naked preference is almost certainly at work" when a statute is facially discriminatory, heightened scrutiny is justified); Sunstein, *supra* note 173, at 140.

²⁷⁷ See Dowdle, *supra* note 196, at 1202 (describing the Court's equal protection methodology as "class scrutiny," which involves "differentiat[ing] between classes of citizens in order to determine who was constitutionally entitled to . . . expanded protections"). Sunstein observed that:

The relative political powerlessness of members of minority groups is a classic reason for active judicial scrutiny of statutes that disadvantage them. The notion is that the ordinary avenues of political redress are much less likely to be available to minorities, and the danger that such statutes will result from an exercise of raw political power is correspondingly increased.

Sunstein, *supra* note 135, at 1711 (footnote omitted). See Tribe, *supra* note 262, at 1073 ("Governmental action that burdens groups effectively excluded from the political process

The final question is whether there is any reason to change the standard of review—requiring the state to give a better substantive justification for its action—because a measure alleged to violate the Equal Protection Clause was enacted by the public instead of its representatives. The answer is that, as a general rule, there is no reason connected to the inherent differences in these two lawmaking processes that would call for different standards of review. Assuming a process-based equal protection analysis, the standard of review should change only if the processes differ in their systematic treatment of particular groups.

Under process theory, different standards of review are applied because different groups are involved; when different groups are involved, we cannot assume that the lawmaking process—whatever it was—treated them the same. But applying a different standard of review to plebiscites than to legislation is equivalent to saying that the Equal Protection Clause should be assumed to be more easily violated whenever the people enact a law than whenever the legislature does so, regardless of who is negatively affected by the law. Process theory would not account for this; there is nothing inherent in the different lawmaking processes that would warrant the blanket assumption that normally everyone fails to get their due regard in plebiscites, and everyone usually gets fair treatment in the legislature. If the strict scrutiny standard of review is applied to legislative action because *the nature of the group affected* is such that we no longer assume that the process worked properly, we should also apply higher scrutiny to evaluate the constitutionality of a plebiscitary act only if there is similar

is constitutionally suspect . . . [and] the resulting judicial scrutiny is seen as a way of invalidating governmental classifications and distributions that turn out to have been motivated either by prejudiced hostility or by self-serving stereotypes”).

A similar phenomenon occurs in substantive due process analysis, in which different standards of review effectively alter the nature of what amounts to a constitutional violation. Courts apply rational basis review to laws that burden certain due process rights, requiring only that the law impinging on the right be enacted for a rational purpose and employ rational means to achieve that purpose. *See* NOWAK & ROTUNDA, *supra* note 258, at 370. In contrast, courts apply strict scrutiny when the state has burdened a fundamental right, like the right of married persons to use contraceptives, requiring the state to show that it had a compelling reason for impinging on the right and used necessary means to accomplish its end. *Id.* at 370-71; *see, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965) (applying strict scrutiny review of law that implicated privacy rights of married people). In both of these instances, the essence of a due process violation is the state's impairment of a right that it does not have the prerogative to impair. The state easily infringes on certain rights under rational basis review because rights subjected to this level of scrutiny are not important or well-protected rights under the Constitution. The state has more difficulty denying rights requiring strict scrutiny review because these rights are constitutionally favored. In short, it is more difficult to establish a constitutional violation, not because the nature of what constitutes a due process violation changes from one standard of review to the other, but because there is much more likely to be a violation in one instance than in the other.

reason to suspect that a group has not received the process protection to which it is entitled.²⁷⁸

In other words, there is nothing about the difference in these two processes that, in and of itself, would call for a different standard of review as a general matter when evaluating equal protection claims. However, certain groups may receive different consideration in plebiscites than in legislatures. If so, and if these groups are not receiving their requisite due regard in the plebiscitary process, then plebiscites negatively affecting those groups, and *only* plebiscites affecting those groups, should be subjected to a higher standard of review than similar measures enacted by a representative lawmaking body. This proposition will be examined in the following section.

3. *Same Rights, Different Groups*

This segment explores whether courts ought to apply different (and probably more searching) review when examining measures enacted by plebiscite that affect certain groups. Here, once again, it is important to distinguish between arguments that concern constitutional rights generally and those that specifically implicate the equal protection guarantee.²⁷⁹ The first part of this section will discuss the issue in more general terms, and the second part will explore the question in the specific context of equal protection challenges.

a. *Majorities and minorities*

Some sort of different or special treatment of plebiscites may be in order, no matter what constitutional claim is asserted against certain plebiscites, if they embody the will or desires of parties other than the constitutionally proper policymakers. Thus, an examination of the issue of whether the different roles of certain groups in different lawmaking systems should occasion different judicial treatment of the decisions made by these systems requires exploration of a more general question, which was touched upon earlier: Who ultimately is supposed to determine policy embodied in law? This is both the crux of and the most difficult part of the question regarding different treatment for plebiscites.

²⁷⁸ See Dowdle, *supra* note 196, at 1169 (arguing that the Court defines "its vision of equality [protected by the Fourteenth Amendment] solely through formulaic . . . analyses of protected classes of persons").

²⁷⁹ It is important to separate these two types of claims for reasons outlined in the previous discussion of judicial deference and standards of review. See *supra* note 250 and accompanying text. Proponents of the special review thesis do not distinguish between these two types of claims.

If the answer is "the people,"²⁸⁰ clearly it cannot be all of the people all of the time, as they undoubtedly would not all agree on anything. It thus remains to be determined whose opinion should control.

One could argue that the will of the majority of the people should govern.²⁸¹ This response requires identification of who comprises the majority. If we conceive of the majority in purely numerical terms, it is not a monolithic group that remains constant in composition for anything more than a fleeting moment. We witness, rather, shifting alliances that come together on specific issues for limited periods.²⁸² As time progresses, or as the definition of the issue at hand changes in even the slightest degree, those among the electorate who might vote a particular way on a particular issue change as well. Thus, even if a poll of the entire public on an issue would result in the same

280 See Riker & Weingast, *supra* note 74, at 397 (distinguishing between the "populist" conception of democracy, in which "democracy consists of embodying the 'will of the people' into law," and the "liberal (or Madisonian)" conception, in which "democracy consists of holding regular elections and hence providing a popular veto on recent legislative action"); see also Farber & Frickey, *supra* note 13, at 874 (relating that some public choice literature "suggests that legislators passively reflect the public's interests" and that they "are merely passive gauges of public opinion"); Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 880 (1993) (noting that "[c]ivic republican theory gives virtually complete deference to the exercise of popular will through government," but that it "ascribes legitimacy to value determinations only if they are the product of public dialogue and 'self-legislation'"); Sandalow, *supra* note 143, at 1166 ("law should be responsive to the interests and values of the citizenry").

281 See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 46 (1980) (identifying the fundamental principle of democracy as majority rule in conditions of political freedom); ELY, *supra* note 186, at 7 (describing majority rule as "the core of the American governmental system"). But see Friedman, *supra* note 39, at 641 ("The assumption that there is a 'majority' whose 'will' is embodied in governmental decision is, at best, overstated."); but cf. Chermersky, *supra* note 189, at 76 (arguing that American constitutional democracy is supposed to include "both substantive constitutional values as well as the procedural norm of majority rule"); Riker & Weingast, *supra* note 74, at 380 (noting that the grammatical and philosophical inaccuracy of using the term "will of the people," because it assumes that a collective group that is itself not human can have a "will").

282 See DAHL, *supra* note 263, at 146 ("[T]he making of governmental decisions is not a majestic march of great majorities united upon certain matters of basic policy. It is the steady appeasement of relatively small groups."); Carl A. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 52 ("[T]he 'monolithic' majority . . . does not exist; the majority is but a coalition of minorities which must act in a moderate, broadly representative fashion to preserve itself."); Friedman, *supra* note 39, at 641 ("At best, there may be one brief moment when a governmental decision does represent majority will, though that moment may come and go in an instant as views and choices change."); see also Riker & Weingast, *supra* note 74, at 384 (arguing that "the conception of a single, controlling 'majority' does not make any sense" because, according to the authors' "cycling" theory, "there are too many majorities" even on a single issue, because each issue has several alternatives that would occasion majority support); *id.* at 395 ("[T]he notion of a 'will of the people' has no meaning. An equilibrium of tastes is rare and, even when it exists, it is easily upset and quite untrustworthy.") (footnote omitted). See generally Farber & Frickey, *supra* note 13, at 901-06 (describing and then critiquing cycling theory).

numerical up or down vote at an interval of several hours, or even if two slightly different versions of an issue received the identical total popular vote, the chance that all of the same people would vote exactly the same way each time on the same issue, or that all would vote exactly the same way at the same time on closely related issues, is extremely remote. When we say a measure enjoys majority support, we may mean simply that, if asked to state an opinion at some time, more than fifty percent of the public would vote in favor of the measure.²⁸³ Thus, if the majority is supposed to make law, and by that we mean a numerical majority, then perhaps a law is supposed to be nothing more than a measure supported by more than fifty percent of the public at a given moment.

Many, including proponents of the special review thesis, argue that even this is an inaccurate description of who is supposed to make law.²⁸⁴ At least at the federal level, the framers' distrust of majority rule, which stemmed from a fear of majoritarian faction and tyranny,²⁸⁵ led them to design a representative lawmaking system, the previously described "filtered" lawmaking structure,²⁸⁶ that would ensure that a bare or simple majority of the public would not be able to determine national policy. Rather, the people's representatives were to make law, and that law might sometimes, but not always, reflect the will of the majority of the people at a given moment.²⁸⁷ Often that law would reflect a supermajority view,²⁸⁸ that is, given the difficulty of securing passage of any measure in the filtered lawmaking system, if polled, substantially more than fifty percent of the public would vote in favor of that law at the definitive moment.²⁸⁹ The fundamental operative notion seemed to be that it should be difficult to make law,

²⁸³ See DAHL, *supra* note 263, at 146 ("Even when these [relatively small] groups add up to a numerical majority at election time it is usually not useful to construe that majority as more than an arithmetic expression."); Riker & Weingast, *supra* note 74, at 396 ("In modern political science . . . electoral majorities are seen as evanescent . . ."). We might also mean that support is sufficiently strong if more than 50% of the public would vote in favor of the measure if asked at intervals, over a period that is longer than a single moment.

²⁸⁴ See Eule, *supra* note 3, at 1524 (observing that "the people were to have no . . . direct role when it came to ordinary lawmaking—at least not at the Federal level"); cf. Friedman, *supra* note 39, at 617-20 ("[T]he Constitution is shot through with provisions that in effect might defeat the decisions of a popular majority. To call the Constitution majoritarian, therefore, simply is inaccurate.").

²⁸⁵ See *supra* notes 21-25 and accompanying text.

²⁸⁶ See *supra* notes 26-38 and accompanying text.

²⁸⁷ Sunstein, *supra* note 135, at 125 ("There is significant slippage between constituent pressures and legislative outcomes. What happens in Congress does not always track 'what the people want.'").

²⁸⁸ See *supra* note 40 and accompanying text.

²⁸⁹ See CHOPER, *supra* note 281, at 26-27 (arguing that "a distinguishing feature of our system . . . is that our governmental structure, institutional habits, and political parties . . . have combined to produce a system in which major programs and major new directions cannot be undertaken unless supported by a fairly broad popular consensus . . . far

so that any change would require wide consensus and thereby deflect faction.²⁹⁰

On the other hand, the representative system also, and very significantly, allows for an entirely different phenomenon: the less-than-majority-backed law. Owing to a great number of factors, principle among them vote trading and the varying intensity of concern on different issues, laws may be enacted by legislatures even though they do not truly enjoy the support of a majority of either legislators or the public.²⁹¹ Yet, even this phenomenon does not necessarily mean that the system is at odds with public majority will. It could be said that, given the varying intensity of concern among the public, as well as its representatives, on different issues, the will of the public majority, like that of its representatives, would be to engage in vote trading or to back measures that one might otherwise oppose, either because the issue is not personally of great moment or because a vote might buy support for some other measure about which one feels very strongly. In other words, the public majority might in fact desire to vote in the same seemingly counterintuitive way as its representatives vote. Thus, what seem at first glance like less-than-majority-backed laws may in fact

broader than 51 percent'") (quoting ROBERT G. DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 10 (1968)).

²⁹⁰ See *supra* note 26 and accompanying text.

²⁹¹ See CHOPER, *supra* note 281, at 14 (concluding that "averaging and compromising," along with intraparty "disagreements," result in the lack of a "guarantee in representative government that a legislative vote on any single matter will produce the same result as would a popular referendum, even assuming equal knowledge and interest of all participants in both instances"); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 32 (1991) (describing interest group theory as explaining "that the political system allows the exploitation of large diffusely interested majorities because they are less able to police free riding in political effort than smaller, intensely interested groups," resulting in our political institutions producing "results that appear contrary to the interests of the general public"); Riker & Weingast, *supra* note 74, at 395 ("[A]fter an alternative has been adopted or defeated by strategic voting, it cannot be said for certain that the outcome is 'what people want.' It may instead be the case that the opposite of what is truly wanted is in fact adopted."); see also Chermersky, *supra* note 189, at 77 (citing "an impressive wealth of economics and political science literature" for the proposition that "the politically accountable branches do not necessarily act in a way that reflects the majority's views"). Chermersky also observed that:

Political science and economics research, especially the public choice literature, has powerfully demonstrated that legislative action frequently does not reflect the sentiments of society's majority for two reasons. First, individual legislators often do not vote in accord with the preferences of a majority of their constituents. Second, the nature of decisionmaking by multi-member bodies makes it unlikely that their decisions will accurately reflect the preferences of a majority of those represented.

Id. at 78. See generally *id.* at 77-81; Farber & Frickey, *supra* note 13, at 901-02 (describing the cycling theory of some public choice commentators, pursuant to which "legislatures are incapable of formulating policy of any kind" and instead vote in a "chaotic and unpredictable" fashion).

be measures for which greater than fifty percent of the public would vote, just as its representatives voted.

But such laws also result because representative lawmaking involves "bulk" representation.²⁹² Each individual voter, even if he voted for the candidate who is ultimately elected (which many probably did not), gets a representative who surely does not share the voter's views on all issues. And if by some miracle your representative fully agrees with you about everything, she will represent many others with whom she is not in such perfect harmony. Moreover, the constantly shifting nature of the public's support for individual measures²⁹³ effectively obviates any possibility that even a representative who wished to do so could achieve the goal of reflecting precisely the will of the majority of her constituents on any individual measure. Hence, representatives make no pretense of voting exactly as a numerical majority of their constituents would vote at the designated moment, and no one really expects that they will do so.²⁹⁴ To put it another way, representative lawmaking often does not produce laws that reflect even the temporal or momentary will of the majority of the public.²⁹⁵

Thus, the answer to the question of who, ultimately, is supposed to have the authority to determine national law, and hence national policy, varies a great deal. Sometimes it might be a supermajority of the public, sometimes a bare majority of the public, and sometimes less than a majority of the public, with the precise composition of that

²⁹² See CHOPER, *supra* note 281, at 13 (explaining that "it is inherent in the system of representative government that the electorate must buy its political representation in bulk form"); Friedman, *supra* note 39, at 639-40.

²⁹³ See Friedman, *supra* note 39, at 638 (observing that "there is a constantly shifting tide of public opinion" and also noting that "the viewpoint of the populace is fluid and dynamic").

²⁹⁴ Riker and Weingast describe legislators as "placeholder[s] opportunistically building up an ad hoc majority for the next election." Riker & Weingast, *supra* note 74, at 396. Rather than "mechanistically transmit majority opinion," legislators "calculate the intensity of opinion, choosing their positions in such a way as to maximize the probability of subsequently garnering citizens' votes." *Id.* Thus, they "build coalitions of minorities, each one of which is especially concerned with a particular subset of issues," and each of which may be part of a "momentary majority" on a particular issue. *Id.* See also Farber & Frickey, *supra* note 13, at 894-95 (explaining that "legislators act as agents for other actors [including voters and interest groups]," and "agents achieving perfect compliance with the preferences of their principles is almost impossible," so that, "[o]n the basis of general economic theory, . . . it seems likely that legislators sometimes will act on the basis of their own preferences, rather than those of the voters or interest groups").

²⁹⁵ See Chermersky, *supra* note 189, at 77-81 (arguing that legislative action frequently does not reflect majority sentiments); Jesse Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 817 (1974) (indicating that neither the method of selecting members of Congress nor its modes of behavior guarantee the popular representativeness of Congress on every issue); Elhauge, *supra* note 291, at 32 (concluding that "our democratic system regularly produces some results that appear contrary to the interests of the general public").

group constantly shifting with time and varying issues. Consequently, it would seem that the fact that plebiscitary law is sometimes made by a bare majority or even less than a majority of the public is neither unusual nor troublesome.

Putting aside for a moment the problem of different constitutional restrictions on federal and state lawmaking,²⁹⁶ what might remain constitutionally problematic is that, as the special review thesis argues, plebiscitary law is made directly by the public, and not that the public's numerical support behind it is improper. In the most fundamental sense, why should it matter whether law is made directly or indirectly by the public, when in either case law need not reflect the desires of any specific number of the populace? It appears that proponents of the special review thesis attack this prospect principally because they worry that certain groups will be less successful in promoting their interests when policy is determined by the populace directly. They fear that this will occur because they assume that direct citizen voting will more often reflect the will of the popular majority than legislation does (a point that has not been empirically established) and will reflect majoritarianism at its worst.²⁹⁷

But, if this were really the problem, then every plebiscite would have to occasion special judicial review. Some minority, that is, some group comprised of less than fifty percent of the public, loses virtually every time a plebiscite is enacted.²⁹⁸ Therefore, every plebiscite potentially poses a special danger of majoritarian tyranny and should require special judicial attention. Not surprisingly, proponents of special review do not advocate special treatment of every plebiscite, and do not even advocate the same treatment of every supposedly suspicious plebiscite. Their agenda does not appear to be the elimination of the dreaded plebiscite, but rather a selective, differential oversight of plebiscitary results. The questions that naturally follow are: precisely which plebiscites deserve special scrutiny; why those; what oversight; and, why that particular oversight? Interestingly, these

²⁹⁶ See *supra* notes 49-58 and accompanying text.

²⁹⁷ See, e.g., Eule, *supra* note 3, at 1549 (contending that "direct democracy bypasses internal safeguards designed to filter out or negate factionalism, prejudice, tyranny, and self-interest").

²⁹⁸ Of course, some individuals will lose frequently and others will lose only occasionally. If there is a consistency in the composition of those who lose frequently, there may be reason to provide special judicial attention when such groups or individuals lose. But the real question here, as throughout consideration of the proposals made by proponents of special review, is why this phenomenon is not adequately and appropriately accounted for and ameliorated under traditional equal protection analysis, or at least as adequately addressed, as in the case of legislation having similar characteristics.

questions do not get answered except in the most vague and anecdotal fashion.²⁹⁹

Many, if not all, of the proposals appear to attack plebiscites affecting certain identified groups, such as African-Americans, Latinos, aliens, the poor, and the powerless. The crucial issue thus becomes whether there is something especially hostile about the plebiscitary process to these or other groups, such that they should be singled out from the innumerable "minorities" that lose in plebiscitary votes. One cannot answer this question on a wholesale level. Each group must be examined separately to see whether there is something about it and about its role in the functioning of the plebiscitary process that results in a special disadvantage to the group. This disadvantage must distinguish this minority from other minorities that routinely lose plebiscitary votes. More importantly, to justify different judicial treatment of plebiscites than of legislation, the characteristics must render the group generally more ineffective in the plebiscitary process than in the legislative process. In other words, what is really called for is nothing more than traditional equal protection analysis to determine whether the groups or individuals in question receive their fair shake in the plebiscitary, rather than in the legislative, process. If they do not, then the situation would call for judicial review analogous to that accorded to groups that do not receive proper consideration in the legislative process. The problem thus becomes one of applying standard equal protection analysis to certain groups within the plebiscitary process, and it is unclear how this analysis would differ from the traditional equal protection analysis of legislative laws that run afoul of the equal protection principle.³⁰⁰ The following section will attempt to

²⁹⁹ See, e.g., Eule, *supra* note 3, at 1559-73. Eule suggests a harder look in the areas of "individual rights and equal application of laws," "alterations of government structure," "reapportionment," and "taxation and spending limitations." *Id.* at 1559-60. He describes the "look" as "a general notion that courts should be willing to examine the realities of substitutive plebiscites," which, given the examples he uses to illustrate his point, seems to mean that when certain chosen groups (how they are selected is not specified) are unable to defend their interests in the public arena, courts should candidly admit "We know what's going on here and we won't allow any of it." *Id.* at 1573. This hardly presents a principled blueprint for action, which Eule admits was not part of his plan. *Id.* at 1559 ("I shall not attempt here to provide a detailed primer for judicial application of such an intensified review."). See also Bell, *supra* note 2, at 23-26 (advocating "heightened scrutiny" for an unspecified body of plebiscites, but then limiting court scrutiny of plebiscites to majority attempts to take away minorities' legislative gains).

³⁰⁰ If it is appropriate to apply a more searching standard of review to plebiscites affecting certain groups than to legislation affecting the same groups, then in the case of groups already engendering strict scrutiny—such as African-Americans—it is not clear what higher scrutiny would entail. What is stricter than strict scrutiny, yet presumably short of automatic invalidation? If what is meant is that the burden of proof should shift to the government upon a showing of discriminatory impact, without the affected minority group member having to establish discriminatory intent, then this solution is problematic for the same reasons that it would be problematic when legislation is involved. First of all, it might

apply this familiar type of analysis to some of the groups mentioned by special review advocates.

b. *Specific groups and equal protection claims*

Under the Equal Protection Clause, some groups, such as blacks, may receive different judicial protection than others, such as whites, when the legislative process is involved.³⁰¹ This is because the clause guarantees equal treatment for all, while the legislative process treats the former group differently than it treats the latter. By analogy, perhaps some groups should receive different judicial protection than others when the plebiscitary process is involved.

i. "Special" groups

Some of the suggestions for implementing the special review thesis involve applying more protective modes of constitutional analysis, and applying them not only for some of the groups that currently receive extra protection, but also for different groups than those that currently engender special judicial solicitude.³⁰² For example, Professor Eule seems to suggest applying heightened scrutiny to review equal protection challenges to plebiscites raised by the poor and the

mean that the court is effectively altering the essential nature of what constitutes an equal protection violation, from discriminatory intent to discriminatory impact. The court may change its mind about the basic meaning of equal protection, but there is no particular reason to do so for plebiscites and not for legislative or executive action. If the essence of a violation is still discriminatory intent and not impact, but the burden of proving the absence of such intent is simply shifted to the government (presumably because it is more likely there is a violation in a plebiscite), then the same difficulty of sorting out intentional from nonintentional discrimination arises as that which arises in cases involving legislation with a discriminatory impact. In most instances, the government will be able to articulate some nondiscriminatory justification for its action. If these justifications are routinely accepted, then shifting the burden of proof is ineffective; on the other hand, if the justifications are routinely rejected, then the government becomes incapable of imposing even reasonable requirements that have a discriminatory impact (such as a certain level of education for a technical job).

³⁰¹ Sunstein, *supra* note 135, at 1710-12 & n.106 (indicating that strict scrutiny is applied "[w]hen a statute discriminates on its face against blacks," but that "the same degree of scrutiny is not applied" "when discrimination is worked against whites, as in affirmative action legislation"). However, in some of the Supreme Court's affirmative action, or reverse discrimination, decisions, laws that disadvantage whites are also subjected to heightened scrutiny, although not as "high" a heightened scrutiny. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91 (1978).

³⁰² See, e.g., Bell, *supra* note 2, at 25-26 & n.94 (setting forth new criteria for ascertaining "representational subordination," which should trigger heightened judicial review); Eule, *supra* note 3, at 1560, 1567-68 (suggesting closer scrutiny of plebiscites disadvantaging the "underrepresented poor and . . . racial minorities" and implying that heightened review is also appropriate for initiatives targeting groups such as non-English speakers); Gunn, *supra* note 5, at 158-59 (indicating that "minority groups" warrant special judicial protection from plebiscites, without defining these "groups" more precisely).

powerless.³⁰³ The question in this regard is whether it is appropriate to afford some special sort of protection only to certain groups that are adversely affected by plebiscites, but not to other groups that are similarly adversely affected. The propriety of different treatment may be context-based; therefore, it may be difficult to resolve this issue outside of the context of a particular constitutional objection to a particular type of measure. Because the emphasis in the examples proffered by special review proponents is on equal protection claims, and because I conclude that equal protection is the only basis upon which an attack on plebiscites by certain specified groups may be justified,³⁰⁴ I will use equal protection claims as the general context for discussion.

The first step in evaluating the suggestions of thesis proponents is to identify their "special" groups.³⁰⁵ In his explanation of the special scrutiny principle, Professor Bell concerns himself primarily with ballot measures adversely affecting racial minorities.³⁰⁶ Similarly, the initial cases Professor Eule uses to illustrate his point involve allegations that racial prejudice was the motivating force for some initiative measure, giving rise to claims of an equal protection violation.³⁰⁷ Applying special scrutiny in cases of alleged racial prejudice challenged on equal protection grounds strikes a sympathetic cord. After all, it is by now well established constitutional doctrine that laws that differentially disadvantage racial minorities may be subjected to heightened scrutiny under the Equal Protection Clause.³⁰⁸

But there is nothing in the theoretical analysis leading up to these examples that would limit the application of the special scrutiny principle to cases of apparent racial discrimination. Indeed, at one point Eule makes reference to the "underrepresented poor," along with racial minorities, in describing the victims of majority tyranny that might enjoy the protection of special scrutiny.³⁰⁹ Later, in discussing a harder judicial look for popularly enacted economic regula-

³⁰³ See *supra* notes 98, 105-06.

³⁰⁴ See discussion *supra* at 608-09. The Court's "method of juridical inquiry" in equal protection cases has been described as "class scrutiny," because it involves "differentiat[ion] between classes of citizens in order to determine who [is] constitutionally entitled to . . . expanded protections." Dowdle, *supra* note 196, at 1202.

³⁰⁵ See Dowdle, *supra* note 196, at 1231 ("Equal protection has devolved into a kind of 'ad hominem' jurisprudence . . .").

³⁰⁶ See Bell, *supra* note 2, at 22-26 (mentioning "Blacks and other minorities," but essentially focusing on African-Americans).

³⁰⁷ See Eule, *supra* note 3, at 1562-67 (discussing *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), and *Crawford v. Board of Educ.*, 458 U.S. 527 (1982)).

³⁰⁸ *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring); NOWAK & ROTUNDA, *supra* note 258, § 14.8(a) at 613; Resch, *supra* note 5, at 422. There may be problems, however, with altering the substantive standard for finding a constitutional violation in the special case of plebiscites, even when racial minorities are affected. See *supra* note 235 and accompanying text.

³⁰⁹ See Eule, *supra* note 3, at 1560.

tion, which would normally be subjected to rational basis review, Eule suggests a "more modest form of review" in which "the burden of plebiscitary action falls on political actors able to defend their interest in the popular arena."³¹⁰ Eule also advocates a more searching review "to protect the powerless whose voices are stifled in the unfiltered setting of the substitutive plebiscite."³¹¹ Additionally, when analyzing complementary plebiscites, Eule appears concerned with the effects of referenda referral choices on "unpopular minorities," using as examples "blacks, latinos, aliens, or the poor."³¹² Apparently, Eule understands his special scrutiny principle to cover plebiscites affecting groups other than racial minorities, but would not assert that every minority group should enjoy the benefit of a hard, or harder, look.³¹³

The principle upon which advocates of a harder judicial look rely in selecting the groups that are to receive the most, or any, special solicitude in this context remains to be determined. Proponents could not mean to afford extra protection only to groups about whom the framers were concerned when they instituted the federal filtering process. This would undoubtedly rule out African-Americans,³¹⁴ a group all seem to believe ought to be covered. Not surprisingly, advocates do not adopt this particular originalist view of the intended beneficiaries of federal structural protection.

One could say, however, that the constitutional plan was to supply the protection of the filtering process to any electoral minority, because any electoral minority could suffer from majority electoral tyranny and could benefit from the added power or influence it might obtain from filtered lawmaking. Now that blacks have become a part of the electorate, they often comprise an electoral minority. Under this view, African-Americans would now be covered beneficiaries of the federal system of filtered lawmaking, following the original design of the constitutional filtering scheme.

Presumably, then, thesis advocates might mean to include all electoral minorities that stand to benefit from the constitutionally-imposed federal legislative filtering process. Such a group, however, would be far more inclusive than the class Professor Bell points to or the collection of classes that Professor Eule identifies as deserving of

³¹⁰ *Id.* at 1573.

³¹¹ *Id.* at 1572.

³¹² *Id.* at 1576.

³¹³ *See id.* at 1572-73 (indicating that plebiscites adversely affecting groups "able to defend their interests in the popular arena" would not warrant increased judicial scrutiny).

³¹⁴ *See* Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1594 (1988) ("the framers' idea of majoritarianism . . . excluded women and blacks"). As the infamous decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856), so frankly states, blacks were considered to be no more than chattel when the Constitution was framed and adopted.

the hardest harder look. Furthermore, the group could vary from plebiscite to plebiscite.

Consider the recent Supreme Court case of *Nordlinger v. Hahn*.³¹⁵ *Nordlinger* involved a challenge to California's Proposition 13, a ballot initiative that established a system in which real property is valued for tax purposes at its assessed value as of 1975-76 or, if purchased after the 1975 assessment, at its value at the time of acquisition.³¹⁶ Ms. Nordlinger, one among a class of property owners who acquired their property after 1975, argued that the initiative violated the Equal Protection Clause by placing her and other later-acquirers at a grossly disproportionate tax disadvantage vis-a-vis pre-1976 acquirers who own property of like market value.³¹⁷ Having lost at the ballot box, the plaintiff class is likely to be an electoral minority. Furthermore, there is substantial evidence that Proposition 13, often considered the granddaddy of the taxpayer revolt, was passed at the height of an emotional furor over what the populace considered to be out-of-control government taxing and spending.³¹⁸ Had all the proposition's provisions been subjected to more careful legislative deliberation, Nordlinger and her class might well have benefitted from the presumably informed, reflective discussion and debate over the wisdom, comparative fairness, and long-term effects of an acquisition value tax system, especially in a highly inflationary real estate market. Consequently, the real property owners who raised equal protection claims in *Nordlinger* should be a specially protected group, receiving the benefit of a harder judicial look.

The problem with this conclusion is obvious. Almost every group that loses as a result of an electoral initiative could be viewed as a protected electoral minority deserving of some sort of special judicial solicitude. Or, to bring the argument back to an earlier point, every substitutive plebiscite would engender special judicial review—a daunting prospect.³¹⁹

It does not appear that proponents of the harder look theories intend that all electoral minorities on any issue should receive special judicial solicitude of some sort. There is a pattern in the groups

³¹⁵ 112 S. Ct. 2326 (1992).

³¹⁶ *Id.* at 2329.

³¹⁷ *Id.* at 2330.

³¹⁸ See Briffault, *supra* note 3, at 1369 (indicating that Proposition 13 "may have sparked the 'Taxpayer Revolt' of the late 1970s," and characterizing it as an example of direct legislation's success in "bringing the electorate into the otherwise relatively closed process of state finance and taxation").

³¹⁹ How daunting might depend on the number of successful plebiscites and the nature of the special judicial consideration each initiative is to receive. See *supra* note 34 and accompanying text. Presumably, special review must be something more than deferential rational basis review, which comprises a "regular" judicial look.

named as beneficiaries. The composition of the groups targeted for special review is reminiscent of classes that have been considered for special protection under traditional equal protection analysis—racial and ethnic minorities, aliens, and the poor.³²⁰ Not all of these groups, however, have been afforded special protection by the Supreme Court in the equal protection context.³²¹ Nevertheless, the rationale pursuant to which certain groups receive special judicial consideration when they challenge government action on equal protection grounds may have relevance to the inquiry at hand.

As noted earlier, there are a number of theories explaining which classifications should be covered by heightened judicial scrutiny pursuant to the Equal Protection Clause.³²² For the sake of comparison, I will use a process view of the clause because it appears most regularly in Supreme Court cases³²³ and because the special review thesis is premised on a process analysis. In process theory, several elements are identified as possible indicators that lawmakers are acting out of a lack of due regard toward a particular minority group.³²⁴ Courts apply special scrutiny to measures that treat blacks poorly because of a substantial history of significant animus toward African-Americans.³²⁵ In

³²⁰ Traditional equal protection review has identified some groups that advocates of a harder look for plebiscites have not identified as deserving of greater judicial protection. These include, for example, women, *see, e.g.*, *Reed v. Reed*, 404 U.S. 71 (1971), and illegitimate children, *see, e.g.*, *Levy v. Louisiana*, 391 U.S. 68 (1968). Theoretically, women may actually fare *better* in the plebiscitary process than in the legislative arena. In the context of legislative lawmaking, women must be concerned with the degree to which their representatives—who most often are not women—consider and reflect their concerns. Conversely, in the context of plebiscitary voting, women comprise roughly half of those who may vote, so they may be better able to control the outcome on individual issues by directly registering their personal, unfiltered preferences.

³²¹ *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28-29 (1973) (finding that classifications based on wealth are not suspect and are not subjected to strict scrutiny).

³²² *See supra* note 260 and accompanying text.

³²³ *See supra* note 262 and accompanying text.

³²⁴ *Cf. ELX, supra* note 186, at 148-70 (maintaining that concern for the political vulnerability of Justice Stone's "discrete and insular" minorities was the theoretical basis for the antidiscrimination principle). *Contra* Dowdle, *supra* note 196, at 1223-24. Dowdle argues that "[u]nder the [Court's] antidiscrimination principle, class scrutiny came to define the constitutional demands of equal protection," but that "the antidiscrimination principle came about not so much from judicial recognition of the dynamics of majoritarian tyranny, as from the Court's desire to avoid the increasingly divisive debate over the substance of constitutional equality." *Id.* (footnote omitted). Dowdle concludes that class scrutiny allows the Court "to engage in potentially usurpative analyses of legislative technique while at the same time assuming a deferential posture toward legislative competence." *Id.* at 1228.

³²⁵ *See* *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (indicating that a "history of purposeful unequal treatment" is one justification for application of heightened scrutiny to classifications based on race); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (same, without specific racial reference). *See also* *Fullilove v. Klutznick*, 448 U.S. 448, 486-87 (1980) (noting that "[t]he history of governmental tolerance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an

process terms, it might be said that blacks do not receive the same regard in the political or legislative process as others receive because of entrenched, long-standing, societal prejudice. Society's marked lack of concern for their well-being, it is argued, causes lawmakers to care less when blacks are harmed than when other groups are disadvantaged. This does not mean that legislators are prevented from passing laws that disadvantage blacks. Rather, it means that the presumption of constitutionality that normally attaches to statutes does not attach to laws that treat African-Americans in a different and disadvantageous way.³²⁶ It could not be said for this group, as it could for other numerical minorities without a like history, that it had its say in the legislative arena and simply lost; there is reason to suspect that African-Americans do not lose as a result of the usual give and take, but that they lose because legislators either hate or inappropriately neglect them.

Other characteristics are sometimes mentioned as useful in identifying groups that are to receive special judicial solicitude under the Equal Protection Clause. One is the presence of obvious, immutable traits (such as skin color) used to distinguish group members, even though these traits are not normally relevant to the determination of who ought to be treated differently in order to accomplish a legitimate governmental goal.³²⁷ Although this factor is sometimes noted, in process terms it serves more as evidence that those with animus can readily single out the objects of their hatred and direct their contempt at the chosen party than as an independent reason for suspending the presumption of constitutionality. It is not the presence of the immutable trait itself that raises concern about bias; rather, it is the animus that is directed at individuals who exhibit that trait.

invidious discrimination" has alerted the Court "to the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications"; Sunstein, *supra* note 173, at 140 (observing that history suggests that "[w]hen a classification is drawn against blacks, . . . the forbidden sort of discrimination is likely").

³²⁶ See Sunstein, *supra* note 173, at 141. Where the disparate treatment of African-Americans is overt, the Court will suspend the presumption of constitutionality. Sunstein, *supra* note 135, at 1710-11 ("When a statute discriminates on its face against blacks, the Court applies a *per se* rule or strong presumption of invalidity."). However, where a measure does not purport to disadvantage this group, but has a disparate impact on its members, the presumption of constitutionality is not suspended unless it is established that the governmental actor acted without due regard for how blacks would be affected. NOWAK & ROTUNDA, *supra* note 258, § 14.4, at 591-92.

³²⁷ See Note, *supra* note 260, at 1302-03. But see ELY, *supra* note 186, at 150 ("[I]t is often said that the immutability of the classifying trait ought to make a classification suspect," but because "classifications based on physical disability and intelligence are typically accepted as legitimate, . . . there's not much left of the immutability theory.") (footnote omitted); Tribe, *supra* note 262, at 1073 (contending that "features like immutability are neither sufficient nor necessary" to determine which classifications should receive heightened scrutiny) (footnotes omitted).

A final factor sometimes discussed in this context is political powerlessness.³²⁸ This factor is troublesome, in part because of problems in defining powerlessness. It is also problematic because, at least under a process view, the representative system is designed to empower the powerless to a certain extent. Thus, extra judicial solicitude for the powerless, on top of that afforded by the process itself, may not be suitable—unless, of course, they are also the objects of animus. Process theory assumes a level playing field, not players possessing equal influence, resources and ability.³²⁹

In equal protection terms, it is easy to see why African-Americans and certain other racial and ethnic minorities receive special judicial attention. They are often a numerical minority within the body exercising decisionmaking power—for purposes of this comparison, the legislature—and there is significant evidence of historic, governmental animus against them.³³⁰

Poverty, on the other hand, has not been recognized by the Court as a suspect classification under the Equal Protection Clause.³³¹ Putting aside the problem of distinguishing the class (that is, defining “poor”),³³² the poor are most likely a numerical minority within legis-

³²⁸ See *Rodriguez*, 411 U.S. at 28 (characterizing “a position of political powerlessness” as one of “the traditional indicia of suspectness”); Sunstein, *supra* note 135, at 1711 (“The relative political powerlessness of members of minority groups is a classic reason for active judicial scrutiny of statutes that disadvantage them.”); *id.* at 1715 (A “partial justification for applying heightened scrutiny” to groups such as women, illegitimates, and aliens, “is a perception that such groups have relatively little political power”); Comment, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1125 (1969) (stating that “when politically disadvantaged minorities are affected, the legislative judgment should be more critically regarded, for such disadvantaged groups wield less influence in legislative councils than their proportion in the population would seem to warrant”).

³²⁹ Query whether powerlessness is a characteristic of the individual player or whether it could be viewed as a characteristic of the field.

³³⁰ See, e.g., *City of Richmond v. United States*, 422 U.S. 358, 379-80 & n.3 (1975) (Brennan, J., dissenting) (recounting that “[t]he Voting Rights Act of 1965 grew out of a long and sorry history of resistance to the Fifteenth Amendment’s ringing proscription of racial discrimination in voting,” which was evidenced by “a persistent and often ingenious use of [state imposed] tests and devices to disenfranchise black citizens,” including “literacy tests, requirements of ‘good moral character,’ . . . voucher requirements, . . . [and] poll taxes”) (footnote omitted). Such groups also are often politically powerless and display an obvious, immutable characteristic used to classify them that is normally irrelevant to any legitimate purpose for classification, but these factors are less important or possibly unimportant. See *supra* text accompanying notes 324-25.

³³¹ See *supra* note 321 and accompanying text. Note, however, that the Supreme Court has at times considered poverty to occasion higher scrutiny when viewed in conjunction with limited access to an important right. See, e.g., *Douglas v. California*, 372 U.S. 353 (1963) (requiring the state to provide counsel on appeal to an indigent criminal defendant); *Griffin v. Illinois*, 351 U.S. 12 (1956) (requiring the state to make access to a criminal appeal available to the indigent).

³³² The difficulty in defining the class stems from the lack of legislative definition of a specific class called the “poor” who officially receive different treatment. *But see* *James v. Valtierra*, 402 U.S. 137, 144 (1971) (Marshall, J., dissenting) (quoting a California enact-

lative halls. But the history of legislative treatment of this group is not definitively negative, as it had long been for racial minorities. On occasion, the poor have not been treated as well as others,³³³ yet at other times they have been the subject of substantial legislative largess.³³⁴ Perhaps for this reason, the poor are not accorded suspect classification status and legislative classifications that disadvantage the poor as a group are still presumed constitutional.³³⁵

One could apply a similar analysis to plebiscites to determine whether there is reason to suspect that certain groups are not accorded due regard by that decisionmaking body. When dealing with direct democracy, the decisionmakers are no longer legislative representatives, but are "the electorate"—those eligible to vote on initiatives and referenda in the location in which a plebiscite is enacted. The relevant questions then become whether a given group is a numerical minority within the electorate, and whether the public harbors such historic animus against that group that we are not willing to assume that the group received its due regard from members of the electorate.

ment defining "persons of low income" as "persons or families who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding," and then imposing a special obstacle to the interests of this particular class). The fact that legislatures usually do not classify overtly on this basis not only results in the lack of a legislative definition, but also could mean that legislatures are not thinking in these terms, and, hence, that there is no legislative purpose to disadvantage the poor. On the other hand, the absence of an overt description of the class could also result from a lack of due regard for the group, in which case, the legislature's equal protection oversight might be its failure to consider this particular class at all when assessing the impact of a proposed action.

³³³ See, e.g., *id.* at 139 (upholding an amendment to the California Constitution requiring low-income housing projects to be approved by local referendum).

³³⁴ See, e.g., Thomas L. Friedman, *President Allows Flexibility on Medicaid Funds*, N.Y. TIMES, Feb. 2, 1993, at A1, A13 (indicating that the federal and state governments "pay for health care for 30 million low-income Americans, welfare recipients and blind or disabled people," that under the Medicaid program, "Medicaid is the fourth-largest item in the Federal budget," and that last year's Medicaid spending was \$67.8 billion from the federal government and more than \$50 billion from the states); Robert Pear, *Poor Win Right To Legal Aid To Fight Redistricting Plans*, N.Y. TIMES, July 3, 1990, at A14 (noting that Congress established the "Legal Services Corporation . . . in 1974 to finance legal aid for poor people in civil cases," and that it received \$316 million in 1990 from the federal government).

³³⁵ See *supra* notes 321-31 and accompanying text. Gender-based classifications could be described in the same terms. Congress sometimes overtly disadvantages women, and at other times treats them with legislative largess. Yet gender classifications are nevertheless subjected to heightened scrutiny. In fact, the Court has found equal protection violations where the supposed largess resulted from stereotyped thinking about women. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring) (concluding that unequal distribution of benefits that is "merely the accidental byproduct of a traditional way of thinking about females" is insufficient "to justify the disparate treatment"); *but see Kahn v. Shevin*, 416 U.S. 351, 360 (1974) (Brennan, J., dissenting) (suggesting that there would be no Equal Protection violation when legislation benefits "widows for whom the effects of past economic discrimination against women have been a practical reality").

Applying this standard to the plebiscitary process may, in some instances, prove more difficult than applying it to the legislative process. Legislatures have substantial histories of discussing and enacting a plethora of measures over a broad agenda, leaving a long record that defines minority groups and exhibits either animus, good will, or both toward them.³³⁶ The frequency and coverage of plebiscites is usually narrower, and most members comprising the electorate do not speak up or vote. Thus, animus may be more difficult to measure or detect in the case of plebiscites, and evidence of the requisite animus needed to justify suspending the process theory's presumption of constitutionality could be missing.

On the other hand, it appears that legislative animus is sometimes assumed on the basis of general societal animus.³³⁷ If this is the measure of legislative animus implicating equal protection concerns,³³⁸ the same evidence of general societal animus certainly ought to implicate equal protection concerns when plebiscites are under consideration for unconstitutionality. Indeed, the composition of the electorate, relative to the composition of the legislature, is certainly more reflective of the composition of society generally. It would seem that extending the animus inquiry to include evidence of general voter (or societal) animus could in fact make it easier to establish the requisites for suspect classification in some cases. All of the sources available to prove the existence of a lack of legislative regard would seem relevant, because legislators are members of the electorate and, at least sometimes, attempt to reflect the attitudes and desires of their constituents. Additional sources might be used as well. The work of sociologists and pollsters documenting the existence of substantial public opprobrium for, or social marginalization of, certain groups—such as homosexuals or even Eule's example of the non-English speaking—might be used to demonstrate that suspect classification is in order. Similar evidence would seem irrelevant in the case of legislation.

If an initiative is enacted in a community in which African-Americans comprise an electoral minority, there may be good reason to do

³³⁶ One might question how accurate legislative materials are in reflecting actual bias. See Lawrence, *supra* note 170, at 319 (asserting that "[i]mproper motives are easy to hide").

³³⁷ See *Frontiero v. Richardson*, 411 U.S. 677, 686-88 (1973) (considering that "women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena" as one of the factors leading the Court to hold that "classifications based upon sex . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny"). Despite this particular language, it is not at all clear that the Court would find the requisite history of governmental animus solely on the basis of evidence demonstrating societal (rather than governmental) ill-treatment.

³³⁸ See *supra* note 337 and accompanying text.

away with the usual deference or presumption of constitutionality that would attach to a plebiscite. It could probably be shown that, in most locations with a majority white population, there is a significant and long-standing hatred or mistrust of blacks among a substantial portion of the electorate. Courts have acknowledged that a number of plebiscites appear to have been motivated by racial animus.³³⁹ If one could establish the requisite lack of due regard for this group in the plebiscitary process by establishing that it exists generally in society, then there might be justification for suspecting popularly enacted laws that disadvantage blacks, thus withdrawing the usual deferential presumption of constitutionality.³⁴⁰ The same reasoning could probably be extended to certain other racial and ethnic minorities, although the conclusion would depend on the particular group and the community comprising the relevant electorate.

The poor are another issue. Once again there is the problem of definition: who are the poor? If we select some specific financial description for the purpose of argument (for example, assets and earnings below a given figure), it must then be determined whether there is evidence that the relevant electorate has harbored an historic animus toward this defined group. It would likely be difficult to make such a case. It is hard to conceive of instances in which the voting public has exhibited a long-standing history of mistreating a particular financially-defined group on a regular basis,³⁴¹ and in which it has not also evidenced significant public largess toward this class of poor. For much the same reason that it is difficult to make the requisite showing with regard to legislatures, it will probably be difficult to meet a similar standard with regard to plebiscitary electorates.³⁴²

³³⁹ See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470-71 (1982) (involving initiative regarding the busing of school children for integration); *Hunter v. Erickson*, 393 U.S. 385, 389-91 (1969) (discussing charter amendment limiting the opportunities to pass ordinances against housing discrimination); *Reitman v. Mulkey*, 387 U.S. 369, 374-76 (1967) (holding that proposition was intended to allow racial discrimination in housing).

³⁴⁰ Equal protection analysis is currently skeptical of laws that disadvantage African-Americans, whether enacted by legislatures or plebiscites and sometimes suspends the presumption of constitutionality that otherwise accompanies most legislation. Whether plebiscitary enactments that adversely affect members of this group need to be treated differently than legislative pronouncements will be discussed in part II.B.2.

³⁴¹ One example that comes to mind involves plebiscites establishing exclusionary zoning—for example, local ordinances requiring large tracts of land per dwelling or prohibiting construction of highrise buildings—that work to keep the poor out of certain neighborhoods. To establish an equal protection violation in these instances, one would have to prove a discriminatory intent to exclude the poor from the relevant community. A showing that many classes other than the poor, such as veterans and the blind, were also effectively fenced out by the local zoning regulations, as is often the case in exclusionary zoning situations, might undermine the inference of a discriminatory intent to exclude the poor.

³⁴² It is interesting to note, however, that at least in some limited studies, those who typically vote in plebiscites "are disproportionately well educated, affluent, and white," but

As for Eule's "unpopular minorities," it does not seem possible to analyze the process implications of such a group as a whole. One would need to know precisely which minorities this includes in order to determine whether there is reason to suspend the usual process presumption of constitutionality. To the extent that the phrase "unpopular minorities" means blacks, latinos, or the poor, the above analyses would apply, and one would not necessarily come to the same conclusion with regard to each such minority.

The "powerless" are an entirely different matter. Here the problem of definition may in fact be insurmountable, even more so in the plebiscitary arena than in the legislative sphere. Professor Eule identifies those with whom he is concerned as the powerless "whose voices are stifled in the unfiltered setting of the substitutive plebiscite." He supplies a clue as to who this might encompass his description of the enactment by plebiscite of California's Proposition 103, a complex initiative that reduced automobile insurance rates by twenty percent of the November 1987 rates, and froze rates at that level until November 1989, unless an individual insurer was found to be on the brink of insolvency.³⁴³ In the fight for passage, three alternative initiatives were proposed, some by the insurance industry, all lengthy and complex.³⁴⁴ Eule surmises that in this particularly confusing situation, many voted for Proposition 103 based solely on consumer advocate Ralph Nader's endorsement.³⁴⁵ He concludes, *inter alia*, that perhaps we need not concern ourselves with the insurance industry as an electoral minority that lost in the plebiscitary process because, although it lost, its voice did not go unheard. Eule notes that the insurance industry "effectively paralyzed every legislative effort to resolve the statewide insurance crisis" and then "mounted a well-financed and well-organized battle to stymie the electorate as well."³⁴⁶ Presumably, then, by negative inference, the "powerless" are those unable to mount a like effort, probably because of a lack of financial and similar resources.³⁴⁷

With enough money, it is hard to conceive of anyone being unable to execute a substantial public campaign. Hence, powerless may simply be another way of saying poor, or, to be more exact, not rich or otherwise extremely influential. If so, the relevant question to be ad-

the same is not true of those who typically vote in candidate races. MAGLEBY, *supra* note 1, at 145.

³⁴³ See Eule, *supra* note 3, at 1569.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 1569-70.

³⁴⁶ *Id.* at 1570. Eule later notes that the industry was able to spend "in excess of \$60 million conveying its message to the voters." *Id.* at 1572.

³⁴⁷ One dictionary defines "powerless" as "devoid of strength or resources." WEBSTER'S NEW COLLEGIATE DICTIONARY 902 (3d ed. 1975).

dressed would be whether the electorate as lawmaker harbors historic animus toward, or lacks due regard for, those who are not wealthy or who do not have an alternative means of mounting a substantial effort to influence the public vote. Assuming that this question could be answered at all, most localities would be comprised of people who themselves fit that very description. Thus, barring widespread self-loathing, the answer to the relevant question would probably be "No," and the "powerless" would probably not be a class deserving of special solicitude under a process view of the Equal Protection Clause.³⁴⁸

This analysis leads to the conclusion that the same groups considered to occasion special judicial concern in the case of legislation probably will occasion like concern in the case of plebiscitary action. Although it is conceptually possible that some groups not deserving of special attention in the context of legislation may deserve special consideration with respect to plebiscites, no such showing has been made.

ii. A different view of special groups

There may be another way to approach the issue of whether special judicial attention is warranted when certain groups are adversely affected by plebiscites. The special review thesis is based on a process analysis of lawmaking: the federal lawmaking process is supposed to provide certain protections for certain minorities, therefore we need to be wary when this process and its consequent protections are absent. The process is absent for all substitutive plebiscites.³⁴⁹ Hence, it would seem that wariness should be required with regard to all ballot initiatives that adversely affect the minorities that the desired federal filtering process is supposed to protect. Thus, the question comes back to an issue touched upon earlier: who is filtered lawmaking sup-

³⁴⁸ In fact, as Professor Briffault argues, "a significant number of ballot measures have been the product of forces outside the power elite who are not usually successful at the ordinary politics of working the lobbies of the State House." Briffault, *supra* note 3, at 1357. As examples he points to ballot proposals to regulate handguns, restrict smoking, ban nonreturnable beverage containers, limit nuclear power plants, and legalize the possession of marijuana. *Id.* He adds that groups not otherwise organized may account for one-fourth of recent California initiatives, concluding that, although "[t]he initiative process may be dominated by the rich and the well-organized[,] . . . it is not their exclusive preserve," and the ballot may be no "less accessible to citizens out of the usual channels of power than is the legislature." *Id.* at 1358. Briffault also observes that "grass-roots organizations will continue to compete successfully in the initiative process with relatively modest financial resources. *Id.* (citing, *inter alia*, Eugene C. Lee, *California, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY* 87, 118 (David Butler & Austin Ranney eds., 1978)).

³⁴⁹ Although the special review thesis would indicate that virtually all substitutive plebiscites are constitutionally suspect and deserving of some kind of special judicial oversight, in the end no one appears to advocate such a radical position. Professor Eule, for example, concludes that plebiscites that improve the filtering process are generally not troublesome in terms of process. Eule, *supra* note 3, at 1573-74.

posed to protect?³⁵⁰ Even if one could ascertain the intended beneficiaries of federal filtered lawmaking, it remains to be determined whether state legislative systems are supposed to protect these same groups.

It was suggested earlier that the federal filtering system was supposed to benefit electoral minorities. However, it is not entirely clear whether the filtering structure was imposed for the benefit of all electoral minorities. A few writers maintain that the framers were motivated by self-interest and instituted minority-protective filtering in order to safeguard the propertied class to which they belonged.³⁵¹ Under this view, one could argue that, in the absence of legislative filtering, additional judicial solicitude ought to be directed toward monied interests that lose out to the larger populace in the plebiscitary process, because these were the minorities that the framers had in mind. Putting aside for a moment the issue of the interpretive authority of original intent, there is some support for the idea that the filtered lawmaking structure was intended primarily to protect those with some form of wealth, but this notion is also somewhat questionable. For the most part, when the Constitution was adopted, only individuals with real or other property interests were permitted to vote in many states and communities.³⁵² Thus, an anti-money vote was not especially likely, even from the electorate at large. As a result, there should have been no driving need to install filters for the monied class against the non-voting poor.³⁵³

³⁵⁰ See *supra* part I.B.

³⁵¹ See *supra* notes 24-26 and accompanying text. See also Eule, *supra* note 3, at 1542 (noting that the minorities that the framers worried about were creditors, property owners and the wealthy). Eule argues that these groups have learned to take care of themselves and no longer need special protection. *Id.* at 1542. He is not concerned that the rich are more likely to be burdened in the plebiscitary process than in the filtered lawmaking setting because they will be able to use their "large sums of money" to block unfavorable initiatives. *Id.* at 1542 n.163 (citation omitted). Yet one of the examples he uses to prove his thesis indicates that all of the money and consequent power possessed by wealthy insurance interests did not prevent the public from blindly following Ralph Nader's advice and enacting California's Proposition 103. *Id.* at 1569-71.

³⁵² See CHILTON WILLIAMSON, *AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 1760-1860*, at 117-37 (1960) (indicating that at the time of the adoption of the Constitution the voting laws of many states, and, consequently, the federal plan for choosing some officials based on state voting status, limited voting to those with property or other financial resources); Bonfield, *supra* note 54, at 529 (indicating that, under post-Revolutionary War, pre-Constitution state governments, property qualifications on voting resulted in "[t]he norm . . . that the voters . . . were the wealthy minority"). But cf. John P. Kaminski, *Democracy Run Rampant: Rhode Island in the Confederation*, in *THE HUMAN DIMENSIONS OF NATION MAKING: ESSAYS ON COLONIAL AND REVOLUTIONARY AMERICA* 243, 244 (James K. Martin ed., 1976) (indicating that, during the Confederation years, Rhode Island's "[p]roperty qualifications were extremely low so that almost all male taxpayers could qualify to vote").

³⁵³ Alternatively, it is possible that the framers were concerned with the alteration of the status quo altogether. A prevalent attitude among founding Americans was a general anti-government libertarianism. See *supra* note 26 and accompanying text. Under this

If the articles in *The Federalist* are accepted as sincere, they indicate that at least some of the framers instituted filtered lawmaking for protection against majoritarian faction.³⁵⁴ Faction meant narrow self-interest that was opposed to the general public good.³⁵⁵ Thus, filtering was supposed to protect the general public good from self-interested majorities. This would seem to make the general public the intended protected minority, a somewhat confusing notion. Perhaps the basic idea was that the public good would encompass what was beneficial for various different minorities in various different instances. Thus, filtering was to protect all of these particular minorities in all of these particular instances.

The key, then, to determining who is supposed to benefit from filtered lawmaking is to ascertain what, more precisely, is in the public interest. Fortunately, others have already attempted to define this concept. Gillette, for example, describes the "public interest" as instances in which individual decisionmakers are able to justify their decisions by reference to the resulting increased welfare for society generally.³⁵⁶ He specifically excludes interest-induced beliefs—meaning irrational prejudice and impulse—and, usually, expropriation of wealth for the benefit of the expropriator from the category of publicly-interested lawmaking.³⁵⁷

Although this is about as close as one could probably get to delineating a concept of the public good, it is not particularly helpful in illuminating who are supposed to be the minorities protected by filtered lawmaking. The notion of public interest is simply too vague and too subjective to permit a consensus regarding the identity of the protected group or groups.³⁵⁸ Moreover, the group would necessarily

view, filtering may have been intended to prevent laws from being enacted in general, rather than to protect any particular monied group from the jealous masses.

³⁵⁴ See, e.g., *THE FEDERALIST* No. 63, at 384 (Clinton Rossiter ed., 1961) (arguing that the Senate, a "temperate and respectable body of citizens," would step in at critical moments to check majoritarian faction).

³⁵⁵ *THE FEDERALIST* No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (defining faction as "a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to . . . the permanent and aggregate interests of the community").

³⁵⁶ Gillette, *supra* note 3, at 932.

³⁵⁷ *Id.* at 932-33.

³⁵⁸ Gillette concludes that the public interest standard is too indeterminate to serve as a measuring stick for the relative efficacy of the legislative and plebiscitary processes. *Id.* at 938. Generally, we might assume that individuals voting in plebiscites will vote in their own self-interest and, therefore, will less often approximate the public interest, whereas representatives may more often vote for that which is good for the multitude because they represent many different views within their constituencies. Whether or not this is the case, it does not make differential judicial scrutiny of plebiscites either manageable or appropriate as a remedy. For one thing, the standard against which to measure the propriety of a given plebiscite would seem to be whether it promotes the public interest. That is still not a sufficiently definitive or objective yardstick. Moreover, if it is true that plebiscites are unde-

vary from situation to situation. On occasion, it could include the wealthy as well as the poor. Indeed, given the infinite number of potential circumstances, it could well include every conceivable group at some time or another. Perhaps the problem that proponents of the special review thesis seem to have in formulating a defensible principle to describe the groups deserving of special judicial concern stems from the fact that they appear to have selected the protected groups based on their personal, subjective vision of the public good.³⁵⁹

sirable (or unconstitutional?) because, by their very nature, they too often fail to achieve the public interest, then a more fitting remedy would be to abandon their use rather than to attempt to second guess their results against the amorphous standard of the public good.

³⁵⁹ See, e.g., Eule, *supra* note 3, at 1572 (describing the "highest aspirations of the initiative process" as overcoming "the impediments to public interest legislation posed by financially powerful lobby groups," thereby assuming that financially powerful lobbies do not act in Eule's conception of the public interest).

Another way to visualize the public good might be to adopt a pluralist conception. In this view, the common good might be defined as "an aggregation of individual preferences" resulting from "uninhibited bargaining among the various participants, so that numbers and intensities of preferences can be reflected in political outcomes." Sunstein, *supra* note 26, at 32-33. In other words, the common good is nothing more than that for which the majority votes after engaging in uninhibited bargaining. *But see id.* at 82 (concluding that "[t]here is . . . something like a 'common good' or 'public interest' that may be distinct from the aggregation of private preferences or utilities"). Presumably, then, the intended beneficiaries of filtered lawmaking would be whoever wins in the representative legislative process. Because legislative determination would be the only process through which the public good could be discovered, plebiscites would be superfluous. Indeed, plebiscites were instituted primarily to allow decisionmaking different from that which might result from a legislative determination; under a pluralist conception, this result would not further the common good. Thus, *if* filtered lawmaking was designed to be part of the state conception as well as the federal plan, plebiscites ought not be permitted at all, and it becomes unnecessary to ascertain who needs to be specially protected in the plebiscitary process. See *infra* notes 360-61 and accompanying text.

Another way to conceive of the public good might be to think of it in terms of who bears the relative benefits and costs of a particular measure. For example, when a measure produces benefits and costs widely distributed throughout the population, we may assume that the measure is in the public interest. Additionally, when few benefit and many pay the cost, the political process itself provides protection against that which might otherwise be unfair or unwise. However, when many benefit but few are required to bear the cost, the measure becomes problematic. When such a measure implicates certain economic interests, it may raise a Takings Clause issue. In other areas, the few who disproportionately bear the cost may be unprotected, at least without judicial intervention; it is in such areas that equal protection claims often arise. Finally, when few benefit and few pay, more must be known to determine whether such measures are public-spirited or privately privileged. One would need to know, for example, the relative political power of those who benefit as compared with those who pay.

Using this particular conception of the public good to evaluate whether plebiscites pose some special difficulty for certain groups or individuals is not especially helpful. It would not cause one to arrive at conclusions any different than those suggested in the accompanying textual discussion of Gillette's conception, *supra* notes 28-41 and accompanying text. Ascertaining the boundaries in the problematic cases is not possible without a personal, subjective determination of the public good. Most importantly, the constitu-

Even if it were possible to identify the particular minorities that are supposed to be protected by the federal system of filtered lawmaking, the issue comes back to an earlier weakness in the arguments made by thesis advocates. The federal system was not imposed on the states. Therefore, advocates must support the contention that certain special groups are supposed to be protected by state and local lawmaking structures as well. Unless the Guarantee Clause dictates such protection, which it may well not,³⁶⁰ it is difficult to see from where it emanates.³⁶¹

Perhaps the answer to who is supposed to be protected in state and local lawmaking structures lies in the very adoption of the plebiscitary process itself. Again, historical accounts indicate that the process was approved as a reaction by the general public to special interest control of local legislatures.³⁶² Legislatures were perceived to have been commandeered by financially powerful business interests, and it was understood that these business lobbies managed to prevent legislatures from acting in the public interest.³⁶³

This history can lead in two different directions. First, it could mean that no special judicial protection is warranted for any group because the plebiscitary process and the missing legislative filtering were intended to protect the same groups. Plebiscites were adopted to guard the majority against the tyranny of minority faction. Factions

tional bases for judicial intervention and relief would not differ as between plebiscites and legislative action.

In criticizing proponents of special judicial review for plebiscites on the ground that they choose the subjects for such review on a subjective basis, my complaint is similar to that voiced by Professor Elhauge in a related context. Elhauge argues that those advocating special judicial review of certain products of political processes—on the ground that interest groups have skewed those processes—are likewise acting under the mistaken notion “that value-neutral defects in the political process justify expanding judicial review.” Elhauge, *supra* note 291, at 49. As Elhauge points out, conclusions “depend implicitly on . . . baseline views of what degree of influence is appropriate for [a particular interest] group,” and “such baselines in turn reflect normative views about governmental policy that are often problematic or controversial.” *Id.* at 48.

³⁶⁰ See *supra* notes 49-58 and accompanying text.

³⁶¹ One could conclude that courts ought to apply total deference to federal legislation because the appropriate filters are in place in the federal system, but that a different rule ought to apply to state legislation. The Fourteenth Amendment was needed vis-a-vis state legislation either because of the absence of filters at the state level, or because filters are not as effective against majoritarian tyranny at that level given the small size of the electorate and its more homogeneous character. See THE FEDERALIST No. 10, at 83-84 (James Madison) (Clinton Rossiter ed., 1961) (“The same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic, and is enjoyed by the Union over the States composing it.”); Linde, *supra* note 180, at 728-29 (noting that Justice Scalia has adopted the Madisonian proposition that “the larger, more inclusive, unit can be more trusted to take account of competing interests than the local unit of government”).

³⁶² See *supra* notes 200-01 and accompanying text.

³⁶³ See *supra* note 200 and accompanying text.

consist of the self-interested whose interests do not correspond with those of the public as a whole. According to this line of reasoning, plebiscites were designed to benefit those among the majority who stand to benefit from the public good. Once again, this encompasses a rather amorphous collection of constantly changing individuals or minorities. In other words, the same undefinable groups of minorities which would stand to gain if policymakers acted for the public good are supposed to benefit from legislative filtering and from plebiscites. Consequently, if extra judicial solicitude for these minorities is justified in the case of plebiscites, these same groups ought also to receive extra attention when adversely affected by the legislative process. Given the inability to demarcate these groups in any general way, it may well be that no one should receive a judicial helping hand.

A second possible conclusion flowing from the adoption of plebiscites is one that Professor Eule seems to reach through a different route: a harder judicial look should not be extended to financially powerful interests because these were the very groups against which plebiscites were established.³⁶⁴ To prove the negative, however, is not to prove the positive. That is, to say that monied interests with the ability to influence the legislature need not be specially protected is not to say that all other minorities adversely affected by plebiscites should reap the benefit of special judicial attention. In fact, despite their failure to provide many specifics, proponents of special review clearly do not want everyone else to get that special helping hand.³⁶⁵ In sum, there does not appear to be any substantial reason to confer additional judicial protection on some groups disadvantaged by plebiscitary results that do not otherwise receive special judicial solicitude when adversely affected by legislative enactments.

CONCLUSION

Having meandered around the minefield of plebiscitary lawmaking, primarily on a theoretical level, it would seem that the overall impression one might be left with is that plebiscites are fine and no one should worry about them, particularly not courts. This is not, however, the conclusion I would draw. My instincts do not lead me to conjecture differently than Professors Bell, Gunn or Eule regarding the problem plebiscites might pose for some groups. But these oppo-

³⁶⁴ Eule, *supra* note 3, at 1572. A similar rationale would apply to any other group able to "capture" the legislature for its own self-interest.

³⁶⁵ One might imagine, for example, the reaction of various proponents of the special review thesis to the idea that ultra-conservative groups that are not particularly wealthy—such as small fundamentalist religious sects bent on burning books and banning contraceptives and abortion, the Posse Comitatus, or skinheads—ought to receive a harder judicial look when adversely affected by plebiscites.

nents of popular democracy have failed on several fronts to make a case for rushing in with judicial guns drawn.

For one thing, they have not supported their hunches that plebiscites are more often bad than good for some groups with sufficient empirical data.³⁶⁶ Using examples of "bad" plebiscites,³⁶⁷ even highly offensive ones like the one permitting racial discrimination in housing following a legislative prohibition on such,³⁶⁸ or the most recent attempts to bar laws that themselves ban discrimination against homosexuals,³⁶⁹ hardly makes a convincing case overall. There are thousands of plebiscites voted on each year in this country, and an inordinate number of proposals that fail even to make it to the ballot.³⁷⁰ I daresay one could pick and choose among them to illustrate an argument either way.³⁷¹ Constructing an elaborate theory for judicial fiddling with plebiscitary results before proving in any comprehensive way that they are a problem more often than they are a boon to particular electoral minorities seems premature.³⁷²

³⁶⁶ Even Eule, one of the special review theory's most ardent proponents, recognizes the "inevitable subjectivity" of his claim that substitutive direct democracy threatens minority interests more than legislative or representative democracy. See Eule, *supra* note 3, at 1552 (noting that assessing this claim "necessarily depends on judgments about whom we recognize as 'minorities,' what we view as their 'rights,' and how we measure voter 'disregard'").

³⁶⁷ See, e.g., *id.* at 1551 & n.216 (listing, for example, initiatives about English as the official language and government funding of abortion); Bell, *supra* note 2, at 18-20 & nn.70-73 (listing harmful initiatives); Fountaine, *supra* note 3, at 747-48 (enumerating examples of plebiscites that were unfavorable to low income groups, aliens, and others).

³⁶⁸ See *Reitman v. Mulkey*, 387 U.S. 369 (1967).

³⁶⁹ See, e.g., *Evans v. Romer*, 854 P.2d 1270, 1284-86 (Colo. 1993) (en banc) (upholding a preliminary injunction against enforcing a Colorado initiative that bars state and local authorities from enacting or enforcing antidiscrimination laws protecting homosexuals, on the ground that the initiative violates the Equal Protection Clause), *cert. denied*, 114 S. Ct. 419 (1993); Fountaine, *supra* note 3, at 749 (describing an initiative-based amendment to a St. Paul Minnesota ordinance prohibiting discrimination based on "affectional or sexual preference"); Linde, *supra* note 54, at 19 (noting the recent defeat of an Oregon initiative "aimed primarily against homosexuality"); Kathleen Monje, *Springfield Law Challenge Fails*, THE OREGONIAN, Aug. 4, 1993, at BO2 (relating an unsuccessful court challenge to a Springfield initiative that amended the city charter to forbid the city from promoting, encouraging or facilitating homosexuality); Niblock, *supra* note 153, at 157 (arguing that the Colorado antigay initiative violates the Equal Protection Clause of the Fourteenth Amendment).

³⁷⁰ See *supra* note 1 and accompanying text.

³⁷¹ See, e.g., Baker, *supra* note 3, at 708 ("Initiative-forced reforms include some of the turning points in American legal history: women's suffrage, the abolition of the poll tax, the establishment of the eight-hour work day, and campaign finance regulations.").

³⁷² This reproach of critics of plebiscites is hardly new. Over 50 years ago Max Radin noted that, in the work of those disparaging of plebiscites, "there is a paucity of reference to any extended practice in the many jurisdictions that have adopted direct legislation. The references to all actual experience are for the most part couched in very general terms and are often admittedly based on single incidents." Max Radin, *Popular Legislation in California*, 23 MINN. L. REV. 559, 564-65 (1939); accord Allen, *supra* note 3, at 1006. In the years since Radin's comments were published, plebiscitary detractors do not appear to have sup-

If it is in fact the case that popular polling has proven to be a bad lawmaking process, then at least two remedies outside of altered judicial review seem more fitting. The most obvious is to reform the process.³⁷³ If the public is poorly informed, remedies should be aimed at educating the electorate.³⁷⁴ If drafting is hopelessly inaccessible, require plain language proposals.³⁷⁵ If voter apathy allows a small portion of the public to determine policy through the ballot,³⁷⁶ invalidate plebiscites unless a certain minimum number of the electorate votes. And if the failure to secure a broad consensus is the problem, then require supermajority approval for passage.³⁷⁷

Surely the legislative process also does not operate in ideal fashion. Many of the touted minority-protective features described by proponents of special review are available only in theory.³⁷⁸ Should courts be charged with special review of all legislative statutes as well, judging each enactment against an unspecified notion of the public good, or should we instead direct our intellectual energies toward at-

plied any comprehensive study evidencing the net detrimental effect of direct democracy for particular interest groups.

³⁷³ See, e.g., Arrow, *supra* note 3, at 77-88; Gillette, *supra* note 3, at 975 & n.150 (citing "substantial calls for limits on financing plebiscites"). Eule implicitly acknowledges the appropriateness of this type of remedy when he discusses complementary direct democracy. See Eule, *supra* note 3, at 1573-79. He argues that the referendum process may be faulty when it requires referral of some, but not all, legislation to the public; specifically, he considers the process faulty when it refers legislation that "disproportionately affect[s] unpopular minorities—like blacks, latinos, aliens, or the poor." *Id.* at 1576. He states that, in these instances, the appropriate remedy is for the courts to "look harder at the fairness of the *selective use of the process*," implying that the process itself should be addressed, not the substantive results of the process. *Id.* at 1577. It is not clear why reformation of the referral process is appropriate for complementary plebiscites while the alteration of judicial review that addresses the substance of plebiscites is needed for substitutive plebiscites.

³⁷⁴ See Briffault, *supra* note 3, at 1360 n.67 (describing an effort to "upgrade the quality of voter understanding"); Robert J. Lowe, Jr., Comment, *Solving the Dispute Over Direct Democracy in Florida: Are Ballot Summaries Half-Empty or Half-Full?*, 21 STETSON L. REV. 565, 568 (1992) (proposing reform of Florida's requirements for, and court review of, ballot summaries in order to insure that these summaries "serve to aid . . . voter understanding").

³⁷⁵ See Briffault, *supra* note 3, at 1360 n.67 (detailing efforts by several states to "upgrade the quality of voter understanding," including efforts to limit initiatives to a single subject and striking or rewriting propositions that have a misleading title or description).

³⁷⁶ See Fountaine, *supra* note 3, at 758 (disparaging voter apathy in plebiscites).

³⁷⁷ Some states already require high levels of voter support for certain plebiscites to become law. See, e.g., MAGLEBY, *supra* note 1, at 46-47 (indicating that at least six states require more than a simple affirmative majority of votes cast on a ballot proposition for it to become effective, and that some states require up to a 75% affirmative vote to approve a referendum, on the rationale that "some referendums should require an unmistakably popular and unequivocal verdict"). The Supreme Court has held, in the face of an Equal Protection Clause challenge, that extraordinary majority requirements are not inherently unconstitutional. *Gordon v. Lance*, 403 U.S. 1, 7-8 (1971).

³⁷⁸ See *supra* notes 37-38 and accompanying text.

tempting to bring the process, or processes, back into line with their intended functions?³⁷⁹

Alternatively, scrap the process. It may be that, on balance, the occasional usefulness of plebiscitary lawmaking simply does not outweigh its shortcomings. For one thing, more direct registering of individual self-interest may render plebiscites less likely than legislation to approach the public good, whatever one conceives that to be.³⁸⁰ For another, it may be that plebiscites are a priori undesirable because, unlike representative lawmaking, they count persons in support of a proposal rather than registering the intensity of their interest, which is a proposition perhaps most troubling when that intensity exists among a minority.³⁸¹ If plebiscitary lawmaking is simply too flawed in these or other respects, then we should be done with it once and for all.

There is a third possible course available to deal with the vexatious plebiscitary process, one that is occasionally suggested in connection with alleged legislative deficiencies. Let the political process take care of itself. One thing that struck me as particularly telling in Professor Eule's example of the cigarette ban referendum was that the supposedly powerless, or certainly the less powerful and affluent, won.³⁸² Ralph Nader carried the day, despite a huge investment by

³⁷⁹ See Farber & Frickey, *supra* note 13, at 912 (noting that "judicial sensitivity to the overall factors that systematically may skew political outcomes is a more effective means of promoting legislative deliberation than is stricter scrutiny of the substance of particular statutes"); *id.* at 912 n.224 (expressing "skepticism about Sunstein's suggestions that courts review whether particular legislation is premised on public values," but endorsing "his suggestion that courts play a role in structuring the overall processes of representation to insulate representatives from pressures so that they can better deliberate in the public interest"). With regard to legislation, Farber and Frickey advocate a process-based reform to resolve a process-based problem, rather than judicial scrutiny of the substantive results of the faulty legislative process. *Id.* at 911-12. But see Mark V. Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809 (1983) (offering a critique of structural review of legislation by the judiciary). Farber and Frickey's legislative process reform appears to be judicially instigated, while the thesis expressed herein does not call for judicial oversight or intervention in order to reform the plebiscitary process. See generally Linde, *supra* note 3 (discussing when initiative lawmaking is not "Republican Government").

³⁸⁰ See *supra* note 356 and accompanying text.

³⁸¹ This is probably most readily apparent when minorities, like traditional equal protection "suspect classes," manage to secure passage of a measure in the legislature only to see their legislative effort overturned by a plebiscite. Often the initial legislative success may be attributed to a combination of the intensity of the minority's interest in one point of view and the far less intense interest in the opposing view on the part of the majority. When the same issue is then placed before the voters on an initiative or referendum, some (like Professor Bell, *supra* note 2, at 14) argue that it is significantly more difficult for the minority to prevail because plebiscites substitute numbers for intensity, in that they simply count up yeas and neas and do not reflect the intensity of feelings either way. Whether plebiscites in fact do this is a much disputed point; some maintain that plebiscites measure intensity because people only vote on such measures when they feel intensely about them. See *supra* notes 328-48 and accompanying text.

³⁸² See Eule, *supra* note 3, at 1517.

the rich and commanding cigarette lobby in influencing the outcome, and despite the cigarette producers' success even in obfuscating the issue as stated on the ballot. When policy contrary to the public good is threatened by plebiscite, it seems that the public, just like its representatives, may be quite capable of defeating it. Moreover, public opinion can be changed.³⁸³ Today's referendum can be tomorrow's rubbish, if there is sufficient interest in making it so.³⁸⁴ If the energy necessary to gather sufficient popular support cannot be marshalled to oppose something clearly contrary to the public interest, then perhaps the message is simply that people really do not want whatever it is that is being offered enough to expend the required energy on it.³⁸⁵ When they truly do, perhaps we need not be so skeptical about their ability to secure their desires.

As for those whose agendas do not match that of the public generally, equal protection challenges, as is the case with all other challenges based on constitutionally entrenched rights, are always open to improperly disadvantaged parties.³⁸⁶ To those to whom equal protec-

³⁸³ See Friedman, *supra* note 39, at 656-57 ("People take sides. They formulate opinions. They listen as others speak, and thus they change their opinions.") (footnote omitted).

³⁸⁴ Cf. Briffault, *supra* note 3, at 1360 (noting that defeated plebiscites may be reconsidered by the electorate or the legislature at a future date).

³⁸⁵ Another possibility, however, is presented by interest group theory: "a willingness to expend resources [is] an inaccurate proxy for the degree of group interest," owing to the problem of "free-riding." Elhauge, *supra* note 291, at 36. That is, individual members of a group that would benefit from a law "may be unwilling to volunteer [their] share of petitioning costs both because [their] failure to contribute will not exclude [them] from the benefits of successful group efforts and because any individual contribution would have little effect on the probability of group success." *Id.* at 36-37. According to this account, "large diffuse groups face greater collective action obstacles" than "small groups with concentrated . . . interests in lawmaking." *Id.* at 37-38.

³⁸⁶ See Briffault, *supra* note 3, at 1365 (stating that "judicial enforcement of the federal and state constitutions goes far to constrain whatever threat direct legislation may pose to minority interests and individual rights, assuring that direct legislation is no more a source of 'majority tyranny' than the legislature itself"). But see Fountaine, *supra* note 3, at 751 (identifying one possible area in which the equal protection guarantee will not be of benefit—when the "affected group [is] a political minority, rather than a racial or gender group, and therefore . . . not entitled to any special protection under the equal protection clause").

Both Seeley and Sager advance somewhat novel attacks based on specific, constitutionally protected rights. Seeley suggests two bases for equal protection attacks on plebiscites by racial minorities. First, "when [a] law being considered is one that is susceptible to racial bias, and the social milieu is such that it is highly predictable that referendum voting will be on the basis of race, . . . the procedure [of submitting the issue to the public] can be said to violate equal protection as a state-provided vehicle for discrimination." Seeley, *supra* note 5, at 903. Second, Seeley invokes the fundamental rights branch of equal protection jurisprudence. He argues that "legislation protecting racial minorities should not be submitted for ratification to a body likely to respond solely on the basis of irrational prejudice" because "access to the legislative process is no less important a right than access to the judicial system," which is recognized as a fundamental right. According to Seeley, the same "special treatment necessary to afford fair access [to the courts] is required by the four-

tion challenges seem inadequate, it is often not so much that plebiscites are different as it is that equal protection challenges probably appear generally inadequate to remedy discrimination, even when legislative or executive action is involved.³⁸⁷ A sounder approach in this regard would be to attack equal protection jurisprudence rather than plebiscitary lawmaking. Instead of urging courts to take a harder look at plebiscites, proponents of the special review thesis should be imploring judges to cast a piercing gaze in the direction of equal protection doctrine.

teenth amendment" to assure fair access to the legislature. *Id.* at 904. Seeley concludes that both of these equal protection arguments "extend beyond traditional lines and . . . to some degree torture the precedents," because "the equal protection clause is not the best means of treating the problem." *Id.* at 905.

Sager argues that due process challenges are open to plebiscites, following the rationale of "due process of lawmaking" set forth by Linde. See Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). Sager, *supra* note 31, at 1414 & n.170. Sager cites precedent for the proposition that there is a "right to procedural due process which requires that some legislative actions be undertaken only by a governmental entity which is so structured and so charged as to make possible a reflective determination that the action contemplated is fair, reasonable, and not at odds with specific prohibitions in the Constitution;" thus, "a plebiscitary process seems wholly improper" in circumstances where such a right exists. *Id.* at 1414-15. He reasons that a claim to due process of lawmaking "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." *Id.* at 1418; see *id.* at 1418-23 (applying this thesis to a requirement for public approval of potentially exclusionary zoning).

³⁸⁷ Briffault, *supra* note 3, at 1365 n.95 ("The real problem for minorities with the initiative process grows out of the limitations of federal constitutional doctrine [M]inorities may suffer from the limited substantive definition of their rights."). Cf. Klarman, *supra* note 155, at 299 ("The Court's refusal to treat selective indifference as an equal protection violation suggests a preference for a stingy process theory over one that invites surreptitious introduction of impact analysis.").