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Constitutional Constraints on Initiative and Referendum

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TABLE OF CONTENTS

I. INTRODUCTION

In *The Federalist*, James Madison extolled the virtues of representative government and decried the dangers of mobocracy and factionalism inherent in popular democracy.[1] In the November 1978 general election, however, over 200 measures of initiative and referendum appeared on the ballot in thirty-eight states.[2] That experience is representative of a national trend towards increasing direct participation in lawmaking.[3] As direct legislative methods increase in popularity, the fears expressed by Madison at the nation's inception take on renewed currency in the minds of many.

This Note examines possible constitutional constraints on initiative and referendum. Part II briefly discusses typical initiative and referendum procedures and contrasts these with representative legislative processes. Part III examines the constitutional significance of the differences highlighted in Part II. Finally, Part IV concludes that because of the peculiar political dynamics of initiative and referendum, which diminish normal safeguards of minority interests, courts may appropriately apply heightened due process and equal protection standards when reviewing direct legislation.

1. THE FEDERALIST No. 10 (J. Madison).
2. NEWSWEEK, Nov. 20, 1978, at 53.
3. *Id.*

II. THE INITIATIVE AND REFERENDUM PROCESSES

A. *Procedural Overview*

Initiative may be defined as the process in which legislation proposed by a specified number of voters is submitted to the electorate for approval. Referendum is the process of submitting for voter approval matters proposed or already passed upon by a legislative body. These methods of direct legislation, while of ancient origin,[4] did not enjoy popularity in the United States until the end of the nineteenth century.[5] Direct legislation was initially argued to be derogative of the federal constitution's guarantee of a "republican form of government."[6] The first statewide initiative and referendum procedures were adopted by South Dakota in 1898 and by 1924 eighteen states had adopted some form of statewide initiative or referendum.[7] Many of those states expressly extend the initiative and referendum powers to municipalities. Direct legislative methods are also available at the local level in some states that have not adopted statewide procedures.[8]

The procedures governing initiative and referendum may be established in a state's constitution, statutes, or local charters. Although specifics vary considerably from state to state[9] and between the state and local level, some typical procedures are identifiable. Both initiative and referendum are characteristically commenced by circulation of a petition[10] setting forth the matter to be consid-

4. Democracy by plebiscite was practiced in the Greek city-states. *See* Munro, *Introduction*, in THE INITIATIVE, REFERENDUM, AND RECALL 4 (W. Munro ed. 1920).

5. *See generally* R. LUCE, LEGISLATIVE PRINCIPLES 572 (1930). Direct legislation was conceived as a check on representative government.

> The Progressive movement of the early twentieth century was disdainful of legislatures and legislators. [Reformers] considered them purchaseable, greedy, and dominated by political bosses and ruthless machines which sought to exploit the public for the benefit of the monopolists, railroads, and industrial empires. With legislative channels blocked and public officials deaf to the demands of the voters, the ills of democracy could only be cured by more democrary—by letting the people legislate directly rather than indirectly.

G. MITAU, STATE AND LOCAL GOVERNMENT: POLITICS AND PROCESSES 90 (1966).

6. U.S. CONST. art. IV, § 4. In Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912), the Supreme Court considered a challenge to initiative and referendum under the representative form of government clause and held that the issue presented a nonjusticiable political question. *See* notes 37-40 *infra* and accompanying text.

7. TIME, Oct. 30, 1978, at 34.

8. *See* Note, *Initiative and Referendum—Do They Encourage or Impair Better State Government?*, 5 FLA. ST. U. L. REV. 925, 936-37 (1977) [hereinafter cited as *Initiative and Referendum*].

9. For a detailed description of state procedures, see THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 225-28, 243-45 (1978-79) and *Initiative and Referendum*, *supra* note 8, at 928-29.

10. In some states, a designated government agency must approve a formal application

ered by the electorate.[11] The petition must then be signed by a specified number of voters[12] and filed with the appropriate government agency to qualify for placement on the ballot. In most statewide initiative and referendum procedures a simple majority is required for passage.[13]

Initiative procedures are of two basic types: direct and indirect. In the indirect initiative, the proposed measure is submitted to the legislature which may pass the measure into law, propose alternative measures to be included on the ballot, or refrain from any action.[14] In the direct initiative, the legislature plays no intermediary role and properly proposed measures are placed directly on the ballot.[15] Constitutional or statutory grants of initiative power commonly exclude appropriation measures and court procedural matters from the scope of the power.[16]

Referendum procedures are also of two basic types. In states employing the first type, filing a referendum petition[17] suspends any prior legislative action until the referred matter is considered by the electorate.[18] In those states utilizing the second type, legislative acts remain in effect unless rejected by the electorate.[19] As with initiative, appropriation measures are often excluded from the referendum power.[20] In addition, "emergency measures" relating to the immediate preservation of the public health and safety are frequently exempted from referendum.[21]

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before a petition may be circulated. Such applications typically contain the text of the proposed measure and the signatures of a relatively small number of voters. *See Initiative and Referendum, supra* note 8, at 927-28.

11. In some states the legislature may refer legislation to the electorate without a voter petition. *See Initiative and Referendum, supra* note 8, at 928-29.

12. The requisite number is often expressed as a percentage of the voters in the last general election. *See, e.g.*, CAL. CONST. art. II, §§ 8(b), 9(b). Some states also require a certain geographic distribution among the residences of those signing the petition. *See, e.g.*, ALASKA CONST. art. XI, § 3.

13. *See, e.g.*, OR. CONST. art. IV, § 1(4)(d). Furthermore, in some states, a specified minimum number of persons must vote on the proposed measure. *See, e.g.*, WYO. CONST. art. III, § 52(f).

14. *See, e.g.*, ALASKA CONST. art. XI, § 4.

15. *See, e.g.*, CAL. CONST. art. II, § 9. Direct initiative measures must typically be filed at least four months prior to the next general election. In some states provision is made for the calling of a special election to consider the proposed matter. *See, e.g.*, ARK. CONST. amend. 7, § 1.

16. *See, e.g.*, ALASKA CONST. art. XI, § 7.

17. All states require that the petition be filed within a specified period, typically either 90 days after the legislature passes the measure, *e.g.*, CAL. CONST. art. II, § 9(b), or before the adjournment of the current session of the legislature. *E.g.*, WYO. CONST. art. III, § 52(e).

18. *See, e.g.*, COLO. CONST. art. V, § 1.

19. *See, e.g.*, NEV. CONST. art. XIX, § 1(2).

20. *See, e.g.*, MONT. CONST. art. III, § 5.

21. *See, e.g.*, OR. CONST. art. IV, § 1(3)(a).

The action of the electorate through initiative or referendum is typically not subject to the veto power of the executive.[22] Some states also restrict the power of the legislature to amend or repeal initiative or referendum statutes.[23]

B. Contrasts: Direct versus Representative Legislation

The above overview of initiative and referendum processes suggests several contrasts to the more familiar representative model of legislation. First, the electorate as a whole cannot function as a deliberative body in the same manner as a limited number of representatives. Moreover, the public at large does not have the same opportunity to develop expertise on legislative matters as do their representatives. These limitations have led to the criticism that the electorate is often unable to adequately understand the full significance of proposed legislation and therefore may be incapable of formulating a rational "public will."[24]

Second, differences in the mechanics and psychology of voting exist between direct and representative legislative processes. In the representative model, voting does not purport to always reflect popular opinion. Central to the representative model is the principle that legislators are free to vote according to their own perception of the long range best interest of the polity.[25] In the direct legislation model, however, voting theoretically mirrors the true consensus of popular opinion. The accuracy of this assumption has been questioned by critics of initiative and referendum who argue that the high abstention rate characteristic of direct legislative voting[26] permits lawmaking by relatively small special interest groups.[27]

A third significant difference is that initiative and referendum statutes are typically not subject to the executive veto power.[28] A further difference may exist in states that restrict the legislature's ability to repeal or amend direct legislation.[29] In contrast, the executive veto and the authority of the legislature to reverse itself serve,

22. *See, e.g.*, ARIZ. CONST. art. VI, pt. 1, § 1(6).

23. The extent of these restrictions vary considerably from state to state. For a summary of the subject see *Initiative and Referendum, supra* note 8, at 935-36.

24. *See* Campbell, *The Initiative and Referendum*, 10 MICH. L. REV. 427, 428 (1912).

25. *See generally*, E. BURKE, WORKS 89, 96 (7th ed. 1881); J. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1875).

26. *See* Schmacher, *Thirty Years of People's Rule in Oregon: An Analysis*, 47 POL. SCI. Q. 242, 245 (1932).

27. Holman, *The Unfavorable Results of Direct Legislation in Oregon*, in THE INITIATIVE, REFERENDUM, AND RECALL, *supra* note 4, at 283.

28. *See* text accompanying note 22 *supra*.

29. *See* text accompanying note 23 *supra*.

in the representative model, to check legislative excesses and mistakes.

A fourth and related difference between the two models exists in the relative absence of separation of powers concerns in the direct legislation model. The electorate at large is not a coordinate branch of the government that the judiciary and executive branches must treat deferentially to prevent institutional conflicts and preserve the separation of powers balance.[30]

The remainder of this Note is largely devoted to examining the federal constitutional significance of these distinctions between the direct and representative legislation models. The standards for testing the constitutionality of legislative acts have developed chiefly in the context of the representative legislation model. The issue addressed in the following analysis is whether those standards should be modified in the direct legislation context.

III. CONSTITUTIONAL CONSTRAINTS ON INITIATIVE AND REFERENDUM

A. *Introduction: The Guaranty Clause*

The controversy over direct versus representative lawmaking is an ancient polemic. Rousseau asserted, "[e]very law which the people in person have not ratified is invalid; it is not a law."[31] Some of the founders, however, viewed the pure democracy advocated by Rousseau as a dangerous impetus to factionalism and majoritarian oppression.[32] In *The Federalist*[33] Madison argued that the evil of faction could be best checked by a republican form of government. A republic he defined as "a government in which the scheme of representation takes place."[34] In Madison's view, representation would serve:

> to refine and enlarge the public views, by passing them through the medium of a chosen body of 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.[35]

Given this philosophical background,[36] it is not surprising that when initiative and referendum began to gain popularity in the

30. *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 15-19 (1978).
31. ROUSSEAU, CONTRAT SOCIAL, c. XV (1762).
32. THE FEDERALIST No. 10 (J. Madison).
33. *Id.*
34. *Id.*
35. *Id.*
36. *See* Rice v. Foster, 4 Del. (4 Harr.) 479, 487 (1847). The court observed that representative government serves to guard against "rashness, precipitancy, and misguided zeal; and to protect the minority against the injustice of the majority."

early 1900's, critics of the movement seized upon the guaranty clause in Article IV, section 4[37] of the Constitution as a basis for challenging the direct legislative method. In *Pacific States Telephone & Telegraph Co. v. Oregon*,[38] the Supreme Court considered a guaranty clause challenge to a tax statute enacted pursuant to a provision of the Oregon constitution reserving the power of initiative and referendum to the people. Appellant argued in the classic Madisonian tradition that it had been denied a republican form of government by the direct legislative process.[39] The Court, however, refused to consider the issue, labeling it a "political question" committed exclusively to Congress.[40] The Court's refusal to entertain a direct constitutional challenge to the direct legislative method relegates any attack to the more generalized constraints of the due process and equal protection clauses of the Fourteenth Amendment.

B. Substantive Due Process Constraints

As early as *Calder v. Bull*[41] in 1798, the Supreme Court recognized constitutional limits on governmental power to invade individual autonomy. Later, these limitations were expressly embodied in the due process clause of the Fourteenth Amendment, which has been interpreted as imposing substantive as well as procedural limitations on governmental power.[42] This substantive prong guarantees freedom from arbitrary governmental action, requiring that legislation be in pursuit of a legitimate end and that the means employed bear some relation to that end. With the demise of the "era of substantive due process"[43] in the 1930's, the Court abandoned its strict scrutiny of both legislative means and ends and adopted instead an extremely deferential standard of review. Under this standard the Court upheld legislation if it was able to hypothesize a

37. Article IV reads, in part: "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." U.S. CONST. art. IV, § 4.

38. 223 U.S. 118 (1912).

39. *Id.* at 124.

40. *Id.* at 151. An interesting question remains whether Congress could enact legislation forbidding the use of initiative and referendum by the states and their political sub-units.

41. 3 U.S. (3 Dall.) 386 (1798). *Calder* invalidated a Connecticut law which had the effect of reversing a probate court's disposition of property under a will. Justice Chase declared that the government was without authority to enact a law that "takes property from A. and gives it to B." *Id.* at 388.

42. This development occurred early in the post-civil war period with such cases as Barbier v. Connolly, 113 U.S. 27 (1885), and found its broadest expression in the era of Lochner v. New York, 198 U.S. 45 (1905) (invalidating maximum-hour legislation for bakers). For a detailed discussion of these developments, see L. TRIBE, *supra* note 30, at 427-34.

43. *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1933) (upholding minimum wage legislation). *See generally*, L. TRIBE, *supra* note 30, at 450-55.

legitimate legislative purpose and any conceivable connection between that hypothetical end and the chosen means.[44] Eventually the Court evolved a second tier of substantive due process analysis that requires a strict level of scrutiny to both means and ends when the legislation infringes upon so-called fundamental rights.[45]

The Court has consistently attributed its use of the deferential "rational basis test" in socio-economic matters to concern over the lack of judicial competence to evaluate legislative choices among conflicting social values.[46] The adequacy of this explanation is drawn into question, however, by the Court's willingness to engage in precisely such interest-balancing when fundamental rights are at issue.[47] The apparent judicial abdication under the rational basis test can perhaps more accurately be explained in either of two ways. First, the Court can be described as having adopted a pluralistic philosophy of lawmaking with regard to socio-economic matters. Under pluralist dogma "no public interest exists beyond the log-rolling result of the legislative process."[48] Accordingly, judicial scrutiny of legislative ends is meaningless because any end chosen through proper political processes is by definition permissible. In a pluralistic scheme, judicial review of legislative means is equally hollow. Means scrutiny is conceived to test the rationality of the legislatively perceived relationship between ends and means; but when any end is appropriate, any means is also justified, because every means must in logic effectuate some permissible end.[49] Such a pluralist approach reduces the rational basis test to no test at all.

The second explanation for the Court's policy of selective deference is that legislative judgments in socio-economic affairs have been sustained because political processes have characteristically produced results that are substantively acceptable to the Court. This explanation allows for continued scrutiny of legislative ends to ensure that legislation pursues a public good beyond "the shifting summation of private interests through the political process."[50] This

44. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

45. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

46. *See* Olsen v. Nebraska, 313 U.S. 236 (1941); L. TRIBE, *supra* note 30, at 451-53.

47. *See* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

48. L. TRIBE, *supra* note 30, at 451.

49. In the analogous equal protection context, Professor Gerald Gunther has advocated the application of heightened means scrutiny as a meaningful constraint on lawmaking, while rejecting review of legislative ends. The logical difficulty in maintaining that means may be scrutinized without engaging in a concomitant review of the ends has been pointed out in Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 208 (1976).

50. L. TRIBE, *supra* note 30, at 451. Tribe advocates the explicit adoption of the latter approach by the Court.

explanation would account for the Court's description of legislative ends in terms of the general public interest when hypothesizing the purpose of a challenged statute.[51] This explanation is also more compatible with the Court's willing application of ends scrutiny in cases involving fundamental rights.

The current judicial policy of highly deferential scrutiny of socioeconomic legislation has been developed almost exclusively in the review of the acts of representative legislatures. The Court has never expressly spoken on whether that same deferential standard of review is appropriate in the direct legislation context. If one attributes judicial deference to the adoption of a pluralist philosophy, then scrutiny must be as toothless in the direct legislative model as it is in the representative model. If, however, one believes that judicial deference is attributable to the Court's substantive satisfaction with legislative results, then several considerations suggest that a heightened level of scrutiny might be appropriate in the review of direct legislation.

One of the great dangers of direct democracy perceived by Madison was its propensity to reflect solely the majoritarian self-interest rather than some broader concept of the "public good."[52] This potential for majoritarian oppression of the minority is exacerbated by characteristically high abstention rates on direct legislation ballots.[53] This voting pattern makes possible lawmaking by special interest bodies that do not command the support of even a majority of the electorate. The Supreme Court has demonstrated sensitivity to such voting power dynamics in the equal protection context. In equal protection analysis, the level of scrutiny is significantly raised when the Court determines that the legislation in question particularly affects the politically disadvantaged.[54] While not deciding the issue in his opinion, Justice Stone articulated this political process theme in his famous footnote in *United States v. Carolene Products Co.*:[55]

> [L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, [may] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.
>
> . . .[S]imilar considerations [may] enter into the review of statutes

51. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976) (sustaining a statute forbidding the entrance of new businesses into the French Quarter as a means to preserve the "tourist-oriented charm" and hence the economy of the city).

52. *See* notes 32-35 *supra* and accompanying text.

53. *See Initiative and Referendum*, *supra* note 8, at 941.

54. *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

55. *Id.*

> directed at particular religious, or national, or racial minorities: prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[56]

The same concerns for majoritarian oppression expressed by Justice Stone are also relevant in the due process context. Just as legislation that promotes the self-interest of the majority or plurality at the expense of the minority may violate equal protection,[57] it also may constitute a denial of due process in that the end pursued is not the general public good. The convergence of equal protection and due process principles was pointed out by the Court in *Bolling v. Sharpe*:[58] "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . . [D]iscrimination may be so unjustifiable as to be violative of due process."[59] Because the direct legislative method tends "to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"[60] it arguably falls within the spirit of Justice Stone's footnote. The extent to which bypassing "the medium of a chosen body"[61] of representatives diminishes ordinary political safeguards may not be so great as to warrant the strict scrutiny suggested by Justice Stone, but the loss of those safeguards may still justify a more searching level of review than is typically applied in "rational basis" scrutiny.[62]

A second consideration that might lead a court to more carefully review the substance of initiative statutes is recognition of the limitations that exist on the public's ability to adequately evaluate the impact of complex legislation. Such a paternalistic approach may be inappropriate in the representative legislation context be-

56. *Id.* (citations omitted).

57. *See* text accompanying notes 127-151 *infra.*

58. 347 U.S. 497 (1954)(holding racial segregation in public schools violative of Fifth Amendment due process).

59. *Id.* at 499.

60. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

61. *See* text accompanying note 35 *supra.*

62. Perhaps some precedent for such a heightened level of review exists in a line of zoning cases in which state courts have carefully scrutinized local zoning regulations that have an impact beyond the boundaries of the enacting jurisdiction, *e.g.*, exclusionary zoning prohibiting low income housing, thereby putting increased pressure on surrounding communities. The political impotence of neighboring communities seems to be the justification for the more exacting scrutiny applied by the courts. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); Golden v. Planning Board of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). For a discussion of the case law in this area, see Wolfstone, *The Case for a Procedural Due Process Limitation on the Zoning Referendum:* City of Eastlake *Revisited*, 7 ECOLOGY L.Q. 51, 70-76 (1978).

cause legislators have the opportunity to educate themselves on proposed matters during hearings and debate. In the direct legislation context, however, greater judicial scrutiny may serve to assure that the electorate acts in its own best interest.[63]

The argument for heightened scrutiny based upon either impairment of political safeguards or a paternalistic perspective of the electorate is strengthened by the special status sometimes granted to initiative and referendum statutes under state law. For example, direct legislation is typically exempt from the executive veto and may also enjoy limited immunity from repeal or preemption by the representative legislature.[64] Justice Stone's renowned footnote[65] again supplies support for a higher standard of review: "[l]egislation which restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation, [may] be subject to more exacting scrutiny."[66] Thus, since direct legislation often has a more permanent effect than representative legislation, the former should be subject to a "more exacting" standard.

A more demanding standard of review is also justified by the relative absence of separation of powers concerns in the direct legislation context.[67] Free from fears of treading on the institutional toes of a coordinate branch, the judiciary can more actively assert its perception of the public good, at least to the limits permitted by judicial competence.

Admittedly, a heightened standard of substantive due process scrutiny entails that certain degree of the social value-judging that characterized the *Lochner* era. Nevertheless, as has been suggested above, the same value judgments are routinely employed in fundamental rights cases and, indeed, have never really been wholly abandoned in socio-economic matters.[68] Lower courts, however, may be reluctant to venture into a role that could be perceived as

63. Analogy can usefully be made to the protectionist role courts play pursuant to state law in carefully reviewing ballot titles and other literature distributed to voters regarding a proposed initiative or referendum matter. If the court finds this material deceptive or misleading it may order the ballot reformed, strike the measure from the ballot, or even overturn the results of a vote already held. This subject is discussed in greater detail in the text accompanying notes 69-126 *infra,* discussing procedural due process.

64. *See* notes 22-23 *supra* and accompanying text.

65. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4. (1938).

66. *Id.*

67. *See* text accompanying note 30 *supra.*

68. *See* L. TRIBE, *supra* note 30, at 454-55. Tribe suggests that our constitutional system inevitably places the judiciary in the position of making substantive judgments and argues that courts should openly acknowledge that responsibility rather than operating behind the facade of selective deference.

"Lochneresque" without some signal from the Supreme Court. Given such reluctance, constraints on direct legislation may more practically be achieved through the procedural prong of the due process clause.

C. *Procedural Due Process Constraints*

Procedural due process in its most familiar application compels governmental adherence to specified substantive standards in the enforcement of legislative dictates. In this context, due process requires that persons against whom a particular law is to be enforced receive notice and an opportunity to be heard.[69] A less familiar application of procedural due process is in the lawmaking as opposed to the law-enforcing context.[70] The substantive standards with which a lawmaking body must comply are generally prescribed by a higher legislative authority or are self-imposed. These standards typically include the number of members necessary to constitute a quorum or the number of votes required for enactment. In addition to these express requirements, principles of due process may impose a minimal level of fundamental fairness or lawmaking procedures. Alluding to this concept of a fundamental fairness floor in due process of lawmaking, the Supreme Court observed at an early date that due process "is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress [or the states] free to make any process 'due process of law,' by its mere will."[71]

The primary purpose of due process in lawmaking is to provide governmental regularity.[72] Regularity serves to promote two desired goals. First, regularity encourages rationality. Requiring lawmakers to observe certain procedural standards increases the likelihood that the factors that in logic and fairness should affect the decisionmaking process are actually taken into consideration.[73] The second value promoted by regularity is the element of justice that derives from proceeding in a similar manner in similar situations.

Although it is clear in theory that procedural due process ap-

69. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

70. For a detailed discussion of procedural due process in lawmaking, see Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). *See also* L. TRIBE, *supra* note 30, at 1141 & n.7.

71. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856).

72. *See* L. TRIBE, *supra* note 30, at 456.

73. In this manner, procedural rules encourage more desirable substantive outcomes. As the Court observed in McNabb v. United States, 318 U.S. 332 (1943), "The history of liberty has largely been the history of observance of procedural safeguards." *Id.* at 347.

plies to lawmaking,[74] what "process" is due has not been the subject of frequent Supreme Court consideration. The limited case law does demonstrate that legislators are not required to employ a rational decisionmaking process to arrive at their substantive result. They need not consider all or even any of the relevant facts, nor are they required to analyze those facts they do consider in any accurate or logical fashion. This striking truth is made abundantly clear from cases like *Townsend v. Yeomans.*[75] In *Townsend,* tobacco warehousemen challenged a Georgia rate-fixing statute on the grounds that the state legislature made no effort to ascertain information relevant to the legislation. The Court rejected the attack, stating simply that "the legislature . . . is presumed to know the needs of the people of the State. Whether or not special inquiries should be made is a matter for the legislative discretion."[76]

The Court's refusal to police the decisionmaking processes of legislatures can be attributed, in part, to a reluctance to intrude upon a coordinate branch. This reluctance is so pronounced that even when it appears likely that due process has been violated, the Court will refuse to scrutinize the challenged procedure. For example, in *United States v. Ballin,*[77] the Supreme Court assumed that the validity of a statute was dependent upon the presence of a quorum and the requisite number of votes[78] but refused to question the accuracy of the speaker's count of the quorum. *Fletcher v. Peck*[79] is illustrative of the same judicial reluctance. Although it appears clear that due process is violated if a legislative enactment is procured by bribery, when confronted with a clear case of corruption in lawmaking, the Court in *Fletcher* refused to set aside the tainted statute. Commenting on the unavailability of judicial review in such a case, Justice Marshall observed:

> If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption? or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority? or on what number of the members? Would the act be null, whatever might be the wish of the the nation? or would its obligation or nullity depend upon the public sentiment? If the majority of the legislature

74. *See* text accompanying note 71 *supra.*

75. 301 U.S. 441 (1937).

76. *Id.* at 451.

77. 144 U.S. 1 (1892).

78. For an example of a circumstance in which the Court did insist upon compliance with procedural rules, see Powell v. McCormack, 395 U.S. 486 (1969) (holding that proper procedures were not employed in refusing to seat Representative Adam Clayton Powell).

79. 10 U.S. (6 Cranch) 87 (1810).

> be corrupted, it may well be doubted, whether it be within the province of judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, it is not clearly discerned.[80]

In summary, procedural due process in lawmaking does not require legislators to employ rational decisionmaking processes, and although in theory it may prohibit deviation from fixed procedural rules and basic notions of fairness, the courts are very reluctant to probe the inner-workings of a coordinate branch.[81] Consequently, tainted statutes are permitted to remain in effect.[82] The low level of "process" required in lawmaking and the highly deferential standard of review employed by the courts have been articulated largely in the context of challenges to the acts of representative legislatures. Courts that have considered whether the same standards should be applied to direct legislation have reached conflicting results.

The cases in which challenges to the direct legislation process arise usually concern local zoning regulation. To understand the case law in this area, it is first necessary to understand the structure of decisionmaking in local land use planning. In the municipal context the decisionmaking authority is typically exercised by a zoning board[83] or a city council acting on the board's recommendation. The zoning board as an administrative agency acts sometimes in a quasi-legislative capacity and sometimes in a quasi-adjudicative capacity. When the board serves in an adjudicative role, it must observe the same due process standards required in any other administrative enforcement proceeding.[84] However, when the board acts in a legislative role, the aforementioned due process standards for lawmaking apply,[85] together with any additional procedures required by state law.[86]

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80. *Id.* at 130.

81. *See, e.g.*, City of Miami Beach v. Schauer, 104 So. 2d 129 (Fla. Ct. App. 1958), *cert. discharged*, 112 So. 2d 838 (Fla. 1959); Coffin v. City of Lee's Summit, 357 S.W.2d 211 (Mo. Ct. App. 1962).

82. *See* Linde, *supra* note 49, at 244-51. Professor Linde is careful to distinguish between a violation of due process and the availability of a remedy for that violation through judicial review.

83. *See* ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926), *reprinted in* J. METZENBAUM, THE LAW OF ZONING 303-07 (1930).

84. *See, e.g.*, Londoner v. County of Denver, 210 U.S. 373 (1908) (requiring that notice and an oral hearing be afforded landowners contesting the city's valuation of their property).

85. *See* text accompanying notes 74-82 *supra*. *See, e.g.*, Bi-Metalic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (state-wide change in method of calculating property tax held not to require prior hearing).

86. State law frequently imposes certain notice and hearing requirements on the zoning board even when it is acting in a quasi-legislative capacity.

It is clear that subjecting a quasi-adjudicative matter to initiative or referendum would constitute a denial of due process because the requisite notice and hearing would be lacking.[87] In comparison, quasi-legislative matters could be subject to initiative and referendum. Some courts, however, have placed an additional limitation on the use of direct legislation in the quasi-legislative context, holding that certain matters, although not adjudicative, are "administrative" in character and therefore not subject to initiative or referendum.[88] In sharp contrast, other courts have insisted that all non-adjudicative matters are subject to initiative and referendum, regardless of the procedural limitations imposed by state law on zoning boards when acting on identical matters.[89]

The question whether the direct legislation method affords due process in lawmaking was confronted directly by the Supreme Court in *City of Eastlake v. Forest City Enterprises, Inc.*[90] In *Eastlake* a real estate developer challenged the constitutionality of a city charter amendment providing for mandatory referendum on all zoning changes. The developer had applied to the local planning commission for reclassification of his property to permit construction of a multi-family, high-rise apartment building. The planning commission recommended the proposed change and the city council accepted their recommendation. When the council's decision was referred to the electorate, however, it was defeated. The developer

87. *See* Londoner v. County of Denver, 210 U.S. 373 (1908).

88. *See, e.g.*, Kelly v. John, 162 Neb. 319, 75 N.W.2d 713 (1956) (city ordinance rezoning ten contiguous parcels from residential to commercial held administrative in character and therefore not subject to referendum); Ruano v. Spellman, 81 Wash. 2d 820, 505 P.2d 447 (1973) (court ordered removal from the municipal ballot of an initiative measure cancelling construction of a stadium labeling the matter "administrative").

The exemption of "administrative" matters from initiative and referendum is usually based on state law although some courts have indicated that federal due process might require the same result. *See, e.g.*, Taschner v. City Council, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973) (holding that enactment of building height limitation by initiative violated 14th Amendment due process); People's Lobby, Inc. v. Board of Supervisors, 30 Cal. App. 3d 869, 106 Cal. Rptr. 666 (1973) (proposed initiative ordinance concerned with environmental matters would violate 14th Amendment due process). In Associate Home Builders, Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976), the California Supreme Court expressly disapproved of the language in *Taschner* and *People's Lobby* which prohibited the use of initiative and referendum in all zoning matters. 18 Cal. 3d at 596 n.14, 557 P.2d at 480, n.14, 135 Cal. Rptr. at 48, n.14. The court, however, was careful to preserve the legislative-administrative dichotomy, stating that direct legislation was not available when "the state's system of regulation over a matter of statewide concern is so pervasive as to convert the local legislative body into an administrative agent of the state." *Id.* (citations omitted).

89. *See* San Diego Building Contractors Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974) (holding that the 14th Amendment did not prohibit enactment of building height restriction ordinance by initiative).

90. 426 U.S. 668 (1976).

brought suit challenging the referendum procedure as a denial of due process. The Ohio Supreme Court[91] upheld the challenge holding that a popular referendum, "lacking standards to guide the decision of the voters, permitted the police power to be exercised in a standardless, hence arbitrary and capricious manner."[92] The Ohio court characterized the constitutional deficiency as an "unlawful delegation of legislative power" to the people.[93]

In a 6-3 decision the United States Supreme Court reversed. The Court initially dismissed the contention that the referendum procedure was an unlawful delegation of legislative power, observing that because direct legislative power was reserved to the people by the Ohio constitution,[94] there was no issue of delegation.[95]

The Court next considered the true gravamen of the constitutional challenge—whether the referendum procedure deprived the land developer of due process in lawmaking. The Court initially observed that under Ohio law the proposed zoning change was classified as a "legislative" rather than an "administrative" matter. Having accepted that classification, the Court had no need to consider the body of case law dealing with due process in quasi-adjudicative decisionmaking.[96] The Court rejected the contention that the referendum procedure constituted a denial of due process, stating that the direct legislative method is "both a practical and symbolic part of our democratic processes."[97] The Court gave little weight to the Ohio Supreme Court's observation that, "[u]nder Eastlake's procedure, . . . no mechanism existed, nor indeed could exist, to assure that the voters would act rationally in passing upon a proposed zoning change."[98] In a footnote the Court indicated that there is no enforceable guarantee of rationality in the *process* of lawmaking, whether it be direct or representative.[99] The Court stated: "[E]xcept as a legislative history informs an analysis of legislative action, there is no more advance assurance that a legislative body will act by conscientiously applying consistent standards

91. 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).

92. 426 U.S. at 672.

93. *Id.*

94. OHIO CONST., art. II, § 1(f).

95. 426 U.S. at 675.

96. *See, e.g.*, Londoner v. County of Denver, 210 U.S. 373 (1908). Justice Powell's one paragraph dissent in *Eastlake* indicated dissatisfaction with the Court's acceptance of Ohio's "legislative" label. Powell apparently regarded the proposed zoning change as a quasi-adjudicative matter requiring the panoply of procedural safeguards associated with that form of decisionmaking.

97. 426 U.S. at 673.

98. *Id.* at 675.

99. *Id.* at 675-76 n.10.

than there is with respect to voters."[100] In the same footnote the Court remarked that petitioner's constitutional relief, if any, lay in challenging the product of the lawmaking process if it failed to meet substantive due process standards.[101] The Court concluded that "[a]s a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth Amendment when applied to a rezoning ordinance."[102]

Justice Stevens filed a lengthy dissent to the majority opinion in *Eastlake*.[103] For Justice Stevens, the "legislative" label on the zoning change decision did not alter its quasi-adjudicative character. Justice Stevens distinguished questions of broad community policy, for which he conceded that a referendum was appropriate, from matters narrowly involving the interests of particular persons in particular property. Justice Stevens concluded that, because the referendum procedure did not provide the property owner with "a fair opportunity to have his claim determined on its merits," it violated due process.[104]

The disagreement between the majority and dissenting opinions in *Eastlake* was facially whether the proper characterization for the decisionmaking process was legislative or adjudicative. Beneath that disagreement, however, may lie a more subtle difference of opinion over the appropriate role of initiative and referendum in republican government.[105] Certainly the majority's praise of direct legislation as "a classic demonstration of 'devotion to democracy' "[106] demonstrates a basic trust for that method of lawmaking that is not evident in Justice Stevens' opinion. The level of the majority's trust in initiative and referendum is further demonstrated by their unwillingness to distinguish between the requirements of procedural due process in the direct and representative legislation contexts.[107] Apparently, for the majority, rationality in the decisionmaking process is not required, or at least is judicially unenforceable, in either setting.[108]

Resort once again to some fundamental distinctions between

100. *Id.*
101. *Id.*
102. *Id.* at 679.
103. *Id.* at 680. Justice Stevens was joined in his dissenting opinion by Justice Brennan.
104. *Id.* at 693-94.
105. *See* Wolfstone, *supra* note 62, at 94-95 (citing Williams & Doughty, *Studies in Legal Realism:* Mount Laurel, Belle Terre *and* Berman, 29 RUTGERS L. REV. 73 (1976)).
106. 426 U.S. at 679 (quoting James v. Valtierra, 402 U.S. 137, 141 (1971)).
107. *See* text accompanying notes 97-100 *supra.*
108. *See* text accompanying notes 74-76 *supra.*

the direct and representative legislation methods suggests that different procedural due process standards should be applied to direct and representative legislation. In *Bi-Metalic Investment Co. v. State Board of Equalization,*[109] Justice Holmes, writing for a unanimous Court, held that due process did not require the state to afford notice and a hearing to taxpayers before increasing the valuation of all taxable property in Denver. Explaining the requirements of due process in this context, Justice Holmes stated:

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. *Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.*[110]

Holmes clearly delineated the dynamics of the political process as the procedural safeguard of individual rights. But, the political dynamics of the direct and representative legislation models are not the same.[111] If the processes of initiative and referendum afford less protection against the selfish pursuit of majoritarian self-interest, then Justice Holmes' statement arguably supports the proposition that a higher level of procedural safeguards may be required in direct legislation.

Justice Marshall's opinion in *Fletcher v. Peck*[112] expressed two basic concerns that inhibited judicial review of legislative processes.[113] The first was that the judiciary lacked standards by which to evaluate the validity or invalidity of a particular legislative process. The same concern for lack of standards may be raised with respect to the feasibility of requiring additional procedural safeguards in the direct legislation context. A potential answer to this concern is to require that the level of procedure increase in proportion to the risk of majoritarian political oppression. To illustrate this analysis, governmental decisionmaking may be visualized as a spectrum. At one extreme are those legislative decisions in which the risk of majoritarian oppression inheres to a relatively low degree. As one moves along the spectrum toward the opposite pole the risk of unfairness produced by majoritarian oppression increases. Accordingly, under such an approach the need for procedural protection

109. 239 U.S. 441 (1915).
110. *Id.* at 445.
111. *See* text accompanying notes 24-30 *supra.*
112. 10 U.S. (6 Cranch) 87 (1810).
113. *See* text accompanying note 80 *supra.*

would increase as the size of the electorate decreased.[114] A further increase would be necessary as the number of persons adversely affected by the legislation decreased. At some point the need for procedural safeguards would become so great that the availability of initiative and referendum as the lawmaking method would be ruled out. Continuing along the spectrum one eventually reaches the point at which decisions become so particularized that they are classified as adjudicative and may no longer be resolved by legislative processes in any form.

The decisions of the Supreme Court in *Eubank v. City of Richmond*[115] and *Washington v. Roberge*[116] may lend indirect support to the above suggested approach. In *Eubank* "the Court invalidated a city ordinance which conferred the power to establish building setback lines upon the owners of two-thirds of the property abutting any street."[117] In *Roberge* "the Court struck down an ordinance which permitted the establishment of philanthropic homes for the aged in residential areas, but only upon the written consent of the owners of two-thirds of the property within 400 feet of the proposed facility."[118] The *Eastlake* Court distinguished *Eubank* and *Roberge* on the basis that in those cases legislative power had been exercised by "a narrow segment of the community" rather than by "the people at large."[119] *Eubank* and *Roberge* arguably evidence a concern for the likelihood of political oppression that inheres when legislative power is vested in a group of self-interested individuals. It is this same concern that would dictate the inappropriateness of initiative and referendum in some decisionmaking settings.

The above suggested analysis is subject to the criticism that it requires arbitrary line-drawing to delineate the point on the decisionmaking spectrum at which direct legislation becomes an inap-

114. Madison observed that the propensity for majoritarian oppression decreases as the size of the polity increases:

> If an enlargement of the sphere is found to lessen the insecurity of private rights, it is not because the impulse of a common interest or passion is less predominant in this case with the majority; but because a common interest or passion is less apt to be felt and the requisite combinations less easy to be formed by a greater than by a smaller number. The Society becomes broken into a greater variety of interests, of pursuits of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert.

Madison, *Views of the Political System of the United States*, in FREE GOVERNMENT IN THE MAKING 172 (A. Mason ed. 1949).

115. 226 U.S. 137 (1912).

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

117. 426 U.S. at 677 (describing the *Eubank* holding).

118. *Id.* (describing the *Roberge* holding).

119. *Id.*

propriate process. But the line drawing that would be required under such an approach is not unlike that presently engaged in to differentiate legislative from quasi-adjudicative matters. Indeed, many of the same factors would be considered. At a minimum, distinguishing between representative and direct lawmaking may provide a principled explanation for the practice in some jurisdictions of labeling certain nonadjudicative matters as "administrative"[120] in order to exempt them from initiative and referendum.[121] It is these "administrative" decisions that fall between the point on the spectrum at which direct legislation becomes inappropriate and the point by which legislative process in any form must end.

Justice Marshall's opinion in *Fletcher v. Peck*[122] also expressed concern about the propriety of probing the decisionmaking processes of a coordinate branch of government.[123] As this Note has suggested, separation of powers problems, at least in the form of institutional conflict, are much reduced in the direct legislation model. It may be argued then, that in reviewing initiative and referendum statutes the judiciary may appropriately look behind the substantive result to the process from which it derived.

This more active judicial role is not without precedent. Under state statutory principles the courts presently review many aspects of direct legislative procedures to assure that they are not "unfair or deceptive."[124] Courts have even invalidated direct legislation when they found some aspect of the enacting process to be misleading to the electorate.[125] For example, in *Anne Arundel County v. McDonough*,[126] the Maryland Court of Appeals declared a referendum void because the ballot statement was so misleading that it prevented an exercise of intelligent choice by the voters. The intru-

120. *See* text accompanying note 88 *supra*.

121. *See* Wolfstone, *supra* note 62 (proposing a unitary standard that would merge the administrative and adjudicative classifications).

122. 10 U.S. (6 Cranch) 87 (1810).

123. *See* text accompanying note 73 *supra*.

124. *See, e.g.*, Markus v. Trumbull County Board of Elections, 22 Ohio St. 2d 197, 259 N.E.2d 501 (1970) (declaring a referendum ballot "null and void" because the description of the ballot question was "insufficient, ambiguous and misleading"); Oregonians for Nuclear Safeguards v. Myers, 276 Or. 167, 554 P.2d 172 (1976) (ordering certain misleading and unfair passages deleted from the voters' pamphlet).

125. *See, e.g.*, Anne Arundel County v. McDonough, 277 Md. 271, 354 A.2d 788 (1976) (declaring a referendum void because ballot statement found to be misleading); Troland v. City of Malden, 332 Mass. 351, 125 N.E.2d 134 (1955). *Cf.* Turner v. Barnhart, 83 N.M. 759, 497 P.2d 970 (1972) (ballot found not sufficiently misleading to set aside referendum). *See also* Comment, *Avoidance of an Election or Referendum When the Electorate Has Been Misled*, 70 HARV. L. REV. 1077 (1957).

126. 277 Md. 271, 354 A.2d 788 (1976).

siveness of judicial review required to assure constitutional due process standards would be no greater than presently necessary to enforce state law procedural requirements.

The above suggested analytical approach is based on the proposition that notions of fundamental fairness embodied in the due process clause restrict the processes that government may prescribe for legislative decisionmaking. Admittedly, the dearth of relevant Supreme Court cases makes support for this proposition largely theoretical. In the search to give content to the generality of the due process clause, courts should not overlook the policies that lie behind the guaranty clause. When those concerns are considered, it is both reasonable and constitutionally defensible to differentiate between those decisions that are properly subject to direct legislation and those that should be subject only to representative legislation.

D. Equal Protection Constraints

The equal protection clause has as its goal the assurance of even-handedness in governmental action.[127] Specifically, the equal protection doctrine requires that the government have sufficient justification for establishing legislative and administrative classifications. As in substantive due process analysis, the courts have developed a two-tiered model for determining the adequacy of the proferred justification for unequal treatment. For socioeconomic regulation, the governmentally drawn classification must be a rational means to effectuate a legitimate legislative end.[128] Classifications that distinguish between persons on the basis of suspect characteristics like race or that cause unequal treatment with regard to "fundamental rights" must be justified by a compelling governmental interest.[129] Under this "strict scrutiny" test, the means-end relationship also must be particularly close, allowing for very little over- or under-inclusiveness in the classification.

In this Note's discussion of substantive due process, it was suggested that because of the propensity for majoritarian oppression inherent in the direct legislative method, a heightened level of judi-

127. *See generally* L. TRIBE, *supra* note 30, at 991-1002.

128. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 191 (1964). Judicial scrutiny of both the rationality of the means and the legitimacy of the end has often been very deferential, with the court hypothesizing the character of the ends so as to assure the "fit" of the means. *See, e.g.*, Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947) (holding that promoting the "morale and *esprit de corps*" of harbor pilots "might" have been the legislative purpose). A high tolerance of underinclusiveness or overinclusiveness in the governmental classification is allowed. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).

129. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (striking down an anti-miscegenation statute).

cial review might be appropriate. Majoritarian oppression is arguably objectionable under the due process clause because it results in the pursuit of improper legislative ends.[130] The same evil may be addressed through the equal protection clause. Indeed, the equal protection doctrine is specifically calculated to protect political minorities. Accordingly, the lack of political safeguards for minority interests arguably warrants heightened judicial scrutiny of classifications drawn by direct legislation. In addition to challenges to the substance of initiative and referendum statutes, the equal protection clause may also be employed to attack a system of lawmaking that requires specified decisions to be made only by direct legislation. On several occasions the Supreme Court has considered whether subjecting some legislative matters but not others to mandatory referendum constitutes a denial of equal protection. In *Hunter v. Erickson,*[131] the Court considered the constitutionality of a municipal regulation which provided that any ordinance relating to racial discrimination was ineffective until accepted by a majority of the electorate in referendum.[132] The Court found that the regulation contained an explicit racial classification and therefore was subject to "most rigid scrutiny."[133] Unpersuaded by the proferred justification of permitting greater popular participation in decisions relating to race relations,[134] the Court struck down the ordinance.[135]

A similar challenge to a mandatory referendum system reached the Court in *James v. Valtierra.*[136] In *James,* plaintiffs challenged an article of the California constitution which provided that "no low-rent housing project should be developed, constructed, or acquired in any manner by a state public body until the project was

130. *See* text accompanying notes 48-51 *supra.*

131. 393 U.S. 385 (1969).

132. The text of the challenged ordinance was as follows:

"Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein." Akron City Charter § 137.

393 U.S. at 387 (quoting the Akron ordinance).

133. 393 U.S. at 391-92.

134. *Id.* at 392. The Court observed that the people of Akron already possessed the referendum power prior to the enactment of the challenged ordinance. The effect of that ordinance was to selectively increase the difficulty of enacting fair housing regulations by delaying their effectiveness until approved by referendum and by specifying that such referendum could be held only at a general rather than a special election. *Id.* at 392 n.7.

135. *Id.* at 393.

136. 402 U.S. 137 (1971).

approved by a majority of those voting at a community election."[137] The Court found that the challenged constitutional provision did not contain a racial classification and therefore was not required to withstand strict scrutiny.[138] The provision easily passed muster under a less demanding standard of review as a reasonable means to assure citizens a voice on questions of public policy.[139]

Commentators have observed that the facially race-neutral classification in *James* may mask a racially discriminatory purpose.[140] Although such an illicit intent might be inferred from a showing that the governmental classification had a racially disproportionate impact, the Supreme Court has recently indicated that more direct proof of improper motive is required. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[141] the Court declared that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[142] The Court added that disproportionate impact is insufficient, in itself, to prove illicit motive.[143] Other evidence of intent, the Court observed, might be found in the "specific sequence of events leading up to the challenged decision"[144] or in the "legislative or administrative history."[145] The Court also mentioned "departures from the normal procedural sequence"[146] of decisionmaking as evidence of improper motive. Although the Court's discussion of possible methods of proving discriminatory intent appears to invite probing of legislative decisionmaking processes, the Court, citing *Fletcher v. Peck*,[147] cautioned against inappropriate "intrusion into the workings of other branches of government."[148]

If the proof of intent standards announced in *Arlington Heights* are applied equally to direct and representative lawmaking the problems of proof in the initiative and referendum context will be formidable.[149] Again the distinctions between the direct and repre-

137. *Id.* at 139.

138. *Id.* at 141.

139. Justice Marshall dissented on the grounds that strict scrutiny should be applied to classification on the basis of poverty. *Id.* at 143-45.

140. *See* Comment, *The Application of the Equal Protection Clause to Referendum-Made Law:* James v. Valtierra, 1972 U. ILL. L.F. 408.

141. 429 U.S. 252 (1977).

142. *Id.* at 265.

143. *Id.*

144. *Id.* at 267.

145. *Id.* at 268.

146. *Id.* at 267.

147. 10 U.S. (6 Cranch) 87 (1810). *See* text accompanying notes 79-80 *supra.*

148. 429 U.S. at 268 n.18.

149. At least one court has noted the extreme difficulty in proving actual discriminatory

sentative lawmaking models discussed in Part II suggest that differing standards of proof might be appropriate. It is initially apparent that in the direct legislation context no legislative or administrative history will be available to a reviewing court—a circumstance that will further exacerbate problems of proof. It is also significant that the political dynamics of initiative and referendum are particularly prone to reflect the highly emotional, majoritarian self-interest commonly associated with racial discrimination. Additionally, insofar as it represents a departure "from the normal procedural sequence" of decisionmaking, use of direct legislation may indicate discriminatory intent.[150] Finally, in the direct legislation model, courts need not be inhibited in their motive scrutiny by the separation of powers concerns articulated in *Arlington Heights*.[151] The sum of these factors may justify the application of a less rigorous standard of proof in cases of alleged racial discrimination through a system of mandatory initiative or referendum.

IV. CONCLUSION

This Note's analysis of due process and equal protection constraints upon initiative and referendum may be distilled to a central thesis—because political safeguards of minority rights are diminished in the direct legislative model of lawmaking, courts may appropriately apply a heightened level of substantive and procedural review to assure that constitutionally guaranteed recognition of those interests is not ignored. The tenability of that thesis is predicated upon several assumptions. The substantive due process arguments presuppose that the "public good" represents a compromise of the panoply of individual and group self-interests in society[152] and not simply "the shifting summation of private interests through the political process."[153] In the procedural due process context, it is necessary to assume the existence of a fundamental fairness floor to the processes that a society may employ in lawmaking.[154]

The validity of this thesis is ultimately predicated upon the premise that within the generalized constraints of due process and equal protection there exists a principled basis for distinguishing

intent in direct legislation. *See* Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291, 294 (9th Cir. 1970).

150. In *Arlington Heights* the Court cited departures from established routines as indicia of such intent. *See* 429 U.S. at 267.

151. *Id.* at 268 n.18. *See* text accompanying notes 147-48 *supra*.

152. *See* text accompanying notes 48-51 *supra*.

153. L. TRIBE, *supra* note 30, at 451.

154. *See* text accompanying note 71 *supra*.

representative from direct lawmaking. In an effort to give content to the due process and equal protection clauses, the Court has customarily looked to other, more specific provisions of the Constitution. In this instance, the long-neglected guaranty clause can provide the principle that gives the content.

In Madison's view a legislative body of representatives possessed a special competence to perceive and pursue the long-range public interest in a way not possible for popular democracy.[155] When the Court refused to consider a guaranty challenge to the direct legislative method as a nonjusticiable political issue, it avoided the fundamental question of whether the Constitution incorporates a preference for representative lawmaking. That unanswered question must still be addressed in judicial application of the due process and equal protection clauses. Before answering in the negative it would be well to consider the wisdom of the framers.

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155. *See* text accompanying notes 32-35 *supra.*