MISSOURI'S HEALTH CARE BATTLE AND DIFFERENTIAL JUDICIAL REVIEW OF POPULAR LAWMAKING

I. INTRODUCTION

The appeal of popular lawmaking, one of the few ways in which citizens of our country may make their wishes directly known without elected officials acting as intermediaries, is obvious.[1] Whether via citizen-initiated petition or propositions from the legislature, more than half the states currently provide their citizens with the opportunity to enact laws through the ballot box.[2] Popular participation in government is a principle that has been endorsed with lofty rhetoric by some of history's most gifted political theorists. Alexis de Tocqueville wrote, "The absolute sovereignty of the will of the majority is the essence of democratic government . . . ."[3] Abraham Lincoln asserted, "A majority . . . is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or to despotism."[4]

In 2010, Missouri voters opted to exercise their lawmaking prerogative by passing Proposition C ("Prop C"), a popularly enacted response to the now-infamous federal Patient Protection and Affordable Care Act.[5] As it appeared on the ballot, Prop C asked: "Shall the Missouri Statutes be amended to: *Deny the government authority* to penalize citizens for refusing to purchase private health insurance or infringe upon the right to

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1. I would like to thank Professor David Law for suggesting this topic.

2. HAREL ARNON, A THEORY OF DIRECT LEGISLATION 5 (Melvin I. Urofsky ed., 2008) (citing THE BATTLE OVER CITIZEN LAWMAKING 276 (M. Dane Waters ed., 2001)). The popular lawmaking process initially gained traction in a few states, beginning with South Dakota, toward the end of the nineteenth century; by 1918, eighteen or so states were using some form of popular lawmaking. AM. BAR ASS'N STANDING COMM. ON ELECTION LAW, INITIATIVES: PROGRAM PROCEEDINGS 4 (1991). While some of these states do not make significant use of popular lawmaking as a form of legislation, several states—including California, Oregon, and Colorado—make extensive use of popular lawmaking, particularly via voter initiative (as opposed to popularly made laws that find their way to the ballot via acts of state legislatures). *Id.* at 4–5. For further description of different kinds of popular lawmaking, see discussion *infra* note 76. For a more detailed history of the adoption and spread of popular lawmaking among the states, see ARNON, *supra*, at 9–15.

3. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 246 (J.P. Mayer ed., George Lawrence trans., Harper Collins 1988) (1850), *quoted in* Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 447 (1998).

4. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 5, 9 (James D. Richardson ed., 1897), *quoted in* Clark, *supra* note 3, at 447.

5. For a more in-depth discussion of the circumstances surrounding the bill's passage and subsequent voter approval, see discussion *infra* Part II.

offer or accept direct payment for lawful healthcare services?"[6] Missouri voters overwhelmingly answered "yes"; Prop C passed with more than 70 percent of the vote.[7] Prop C's chief sponsor in the Missouri Senate asserted, "The citizens of the Show-Me State don't want Washington involved in their health care decisions."[8] One Prop C supporter boasted that it was "the vote heard 'round the world."[9] However, the bill's critics denounced it as "a waste of time."[10]

It seems clear that a state law whose unequivocal purpose is to "deny" authority to the federal government will not be allowed to stand if and when it becomes subject to judicial review under the Supremacy Clause of the United States Constitution.[11] However, whether or not the outcome of judicial review of Prop C is a foregone conclusion, the questions of exactly *why* the law is invalid, and what process of inquiry a court should go through to invalidate it, remain. The pertinent analytic framework for

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6. H.B. 1764, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010) (emphasis added). I refer to both the bill and its subsequent ballot form as "Prop C" throughout this Note. The other question presented to the voters asked: "Shall the Missouri Statutes be amended to . . . Modify laws regarding the liquidation of certain domestic insurance companies?" *Id.* This second proposal does not relate to the issues discussed in this Note.

7. Tony Messenger, *Prop C Sails Through*, ST. LOUIS POST-DISPATCH, Aug. 4, 2010, at A1.

8. *Id.* (quoting State Senator Jane Cunningham).

9. *Id.* (quoting Missouri voter Dwight Janson).

10. Editorial, *Freedom, Fantasy, and Proposition C*, ST. LOUIS POST-DISPATCH, July 23, 2010, at A12. Critics of Prop C denounced the bill as a waste of time for two primary reasons: (1) the relevant provisions of the federal health care bill would not go into effect until 2014, and (2) many believed that Prop C would be "trumped" by the federal law. *See infra* notes 44–45. For more on the question of federal law "trumping" Prop C, see discussion *infra* Part III. Some critics also took a more cynical view of Prop C, characterizing it as manipulation of voters by Republican politicians to gain political favor and visibility. An editorial in the *St. Louis Post-Dispatch* claimed:

> They say Proposition C is about protecting individual freedom and states' rights. They tout the vote's symbolic value, which they see as the first shot in a battle to repeal the national reforms. . . . [But] Proposition C is nothing but a taxpayer-funded political exercise designed to raise cash for Republican candidates, consultants and causes.

Editorial, *supra*, at A12.

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> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. Media sources in Missouri observed this potential conflict between Prop C and the federal law: "The biggest question about Tuesday's results, of course, is what they mean to the national debate. Not much tangibly, we'd guess, because the Constitution's supremacy clause says federal law trumps state laws." Editorial, *"Big Megaphone" Muffled*, ST. LOUIS POST-DISPATCH, Aug. 5, 2010, at A14. Legal scholars also expressed skepticism about the state law's constitutional validity. *See* Messenger, *supra* note 7, at A1 ("Richard Reuben, a law professor at the University of Missouri School of Law, said that if the federal government sues on the issue, it would likely win. Several other Missouri legal and political scholars agreed."). Prop C's advocates, however, did not appear to be concerned with this potential conflict. *See infra* note 41.

judicial review of Prop C is most likely the federal preemption analysis—an analysis of whether or not the law presents sufficient conflict with federal law that it must be struck down as unconstitutional under the Supremacy Clause.[12] Potentially, the standard federal preemption analysis could be modified to account for the popular origins of Prop C by either relaxing or increasing the level of judicial scrutiny applied.[13] Does the mere fact of the law's conflict with federal law automatically render it impermissible? Do the popular origins of the law make it particularly suspect when weighed against the product of constitutionally dictated, representative government?[14] Or, should those origins bestow additional merit on the law?[15]

This Note will open with a brief history of the process leading up to Prop C's enactment,[16] and will then discuss the basic framework for federal preemption analysis and the history of judicial review of popularly enacted laws.[17] This Note will then present two opposing views regarding the appropriate standard for judicial review of popular legislation: (1) As legislation created outside constitutionally prescribed government structure, popular legislation is constitutionally suspect and should thus be subject to heightened judicial scrutiny,[18] and (2) As an expression of pure majority will, popular legislation occupies a unique position in our democratic society and should thus be accorded special judicial deference.[19] Finally, this Note will argue that neither of these approaches is appropriate, and that the proper way to balance the ideological weight of popular lawmaking with its non-constitutional status is to view popular legislation through the same lens as its traditionally enacted counterpart.[20]

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12. *See supra* note 11. The Commerce Clause is another relevant constitutional framework here, since it presents one possible basis for an evaluation of the federal health care law itself. *See* discussion *infra* note 35.

13. Numerous scholars have proposed differential levels of judicial analysis when courts evaluate popularly enacted laws. *See, e.g.*, K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221 (2005), which will be discussed in significantly greater detail *infra* Part V; Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990), which will be discussed in significantly greater detail *infra* Part IV; *see also* ARNON, *supra* note 2; Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527 (1994); Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1996 N.Y.U. ANN. SURV. AM. L. 373.

14. *See* Eule, *supra* note 13; *see also* discussion *infra* Part IV.

15. *See* DuVivier, *supra* note 13; *see also* discussion *infra* Part V.

16. *See* discussion *infra* Part II.

17. *See* discussion *infra* Part III.

18. *See* discussion *infra* Part IV; *see also* Eule, *supra* note 13.

19. *See* discussion *infra* Part V; *see also* DuVivier, *supra* note 13.

20. *See* discussion *infra* Part VI.

Throughout this discussion, this Note will highlight specific features of Prop C that illustrate the pros and cons of each standard of judicial review.

II. HISTORY AND BACKGROUND OF PROPOSITION C

Missouri House Bill 1764, which would later become Prop C, was introduced in the State House of Representatives on January 21, 2010.[21] In its original form, the bill was a relatively innocuous revision of section 375.1175 of the Missouri Statutes—a provision containing liquidation guidelines for certain insurance companies.[22] However, the bill would soon become the nexus of a statewide struggle against "the unconstitutional encroachments of the federal government."[23]

While House Bill 1764 was working its way through the legislative process, a resolution was introduced in the House that would have submitted to the voters of Missouri a proposal to amend the state constitution to address health care laws.[24] The pertinent part of the proposed amendment would read: "To preserve the freedom of citizens of [Missouri] to provide for their health care, no law or rule shall compel, directly or indirectly or through penalties or fines, any person, employer, or health care provider to participate in any health care system."[25] This resolution never made it past the initial stages.[26] However, on May 4, 2010, State Senator Jane Cunningham proposed a bill that substituted the original, innocuous text of House Bill 1764 with her own radically revised language.[27] Senator Cunningham's substitute language maintained the repeal of section 375.1175, but would also "enact in lieu thereof *two* new

21. H.R. JOURNAL, 95th Gen. Assemb., 2d Reg. Sess. 128 (Mo. 2010).

22. H.B. 1764, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010); MO. REV. STAT. § 375.1175 (2010).

23. Video: January 13, 2010 - Senator Jane Cunningham Speaks at Patriotic Rally at State Capitol (Mo. Senate 2010), *available at* http://www.senate.mo.gov/media/10info/Cunningham/Cunningham-RallySpeech-011310.wmv.

24. H.R.J. Res. 48, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010).

25. *Id.*

26. *See* S. JOURNAL, 95th Gen. Assemb., 2d Reg. Sess. 603 (Mo. 2010) (last Senate journal entry in which H.R.J. Res. 48 appears).

27. S. JOURNAL, 95th Gen. Assemb., 2d Reg. Sess. 1254 (Mo. 2010). Senator Cunningham, an elected legislator since 2000, had primarily sponsored bills pertaining to education and labor regulation prior to stepping into the spotlight for Missouri's health care battle. SENATOR JANE CUNNINGHAM, http://www.senate.mo.gov/11info/members/mem07.htm (last visited Sept. 18, 2011). More recently, she sponsored Senate Resolution 27 that urged the Attorney General of Missouri to file a lawsuit challenging the validity of the federal health care law to which Prop C was addressed. S. Res. 27, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011). The Senate adopted her resolution. S. JOURNAL, 96th Gen. Assemb., 1st Reg. Sess. 106 (Mo. 2011).

sections relating to insurance, *with a referendum clause*."[28] While the revised bill did not aim to amend the state constitution, it clearly adopted the language of Resolution 48.[29] This revised bill would become known as the Health Care Freedom Act. Senator Cunningham's revision of House Bill 1764, despite its significant departure from the original bill's purpose, passed overwhelmingly in the Senate by a vote of 26–8 and was subsequently adopted by the House.[30] Just a few weeks later, the bill was delivered to the Secretary of State for inclusion on the August 3 state ballot as Proposition C.[31]

Prop C and its predecessor, Resolution 48, were both responses to the then-pending Patient Protection and Affordable Care Act, a massive health care reform effort by the federal government that was signed into law on March 23, 2010.[32] Given Prop C's language regarding compulsory participation and penalties, it seems clear that the referendum was primarily concerned with section 1501 of the health care bill, which amended the I.R.S. Code to impose a tax penalty on individuals failing to meet certain minimum coverage requirements.[33]

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28. H.B. 1764, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010) (emphasis added).

29. "No law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system." *Id.* Moreover, the attached referendum clause posed the pertinent question directly to Missouri voters: "Shall the Missouri Statutes be amended to [d]eny the government authority to penalize citizens for refusing to purchase private health insurance or infringe upon the right to offer or accept direct payment for lawful healthcare services?" *Id.*

30. S. JOURNAL, 95th Gen. Assemb., 2d Reg. Sess. 1254 (Mo. 2010); H.R. JOURNAL, 95th Gen. Assemb., 2d Reg. Sess. 1455–58 (Mo. 2010).

31. H.R. JOURNAL, 95th Gen. Assemb., 2d Reg. Sess. 1973 (Mo. 2010).

32. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

33. Patient Protection and Affordable Care Act § 1501 (to be codified at I.R.S. Code § 5000A(b)). The bill requires that:

> (a) REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE.—An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.
>
> (b) SHARED RESPONSIBILITY PAYMENT.—
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> (1) IN GENERAL.—If an applicable individual fails to meet the requirement of subsection (a) for 1 or more months during any calendar year beginning after 2013, then, except as provided in subsection (d), there is hereby imposed a penalty with respect to the individual in the amount determined under subsection (c).

Id. State Representative Tim Jones, one of Prop C's major proponents, described the Health Care Freedom Act as follows:

> The Act contains two major provisions: protections for Missourians from being forced to purchase health insurance and a prohibition against government fines and penalties for refusing to purchase insurance. This legislation was crafted because Missourians are far more capable of making their own health care decisions than Washington politicians and bureaucrats.

However, despite voters' concerns about potential penalties for failure to purchase health insurance, the rhetoric surrounding Prop C in the months leading up to the election made clear that there were more significant concerns at stake.[34] From the beginning, the bill's supporters called into question the constitutionality of the Patient Protection and Affordable Care Act.[35] Voters echoed these sentiments: as one Prop C

Timothy W. Jones, *The Case for Health Care Freedom*, TENTH AMENDMENT CENTER (July 13, 2010, 9:03 AM), http://blog.tenthamendmentcenter.com/2010/07/the-case-for-health-care-freedom.

34. *See* discussion *infra* Part II.

35. While this Note focuses on a constitutional analysis of Prop C itself with respect to federal law under the Supremacy Clause, supporters of Prop C invoked a number of other constitutional issues. Senator Cunningham called the federal bill "an attack on our freedom and an effort to control our very lives." Video: January 13, 2010 - Senator Jane Cunningham Speaks at Patriotic Rally at State Capitol, *supra* note 23. Senator Cunningham promised her supporters that the bill would "protect[] your rights, your *constitutional* rights, to choose your medical and your insurance providers." *Id.* (emphasis added). State Senator Jim Lembke characterized the federal legislation as a "taking over of powers that were not delegated to the federal government." Audio: Week of 01.11.10 - Senator Jim Lembke Discusses State Sovereignty (Mo. Senate 2010), *available at* http://www.senate.mo.gov/media/10info/Lembke/Lembke-Podcast-Sovereignty-011410.mp3. He argued, "[Prop C will] allow us to start the debate about what is a proper role of federal government and what are the powers that are afforded the federal government in our Constitution, Article I, section 8, the enumerated powers." *Id.* Representative Jones expounded at length upon the constitutionality of the Patient Protection and Affordable Care Act:

> The authority of the federal government to pass legislation that requires the purchase of a private product is highly questionable. While the Commerce Clause of the United States Constitution has been used to justify federal regulation of private enterprise [*see* discussion *infra*], never before in our nation's history has "inactivity" been regulated. That is, while the active participation in commerce and private enterprise has been regulated by the federal government for years, individuals have never been forced to participate "in" commerce, as the federal health care law would require. This expanded power creates a dangerous precedent for government overreach, and has the potential to dramatically expand the size and scope of government.

Jones, *supra* note 33. Included among the "enumerated powers" of Article I, section 8, the Commerce Clause states: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8. This clause has been expansively interpreted over time as granting the federal government authority to regulate an extremely wide range of activities, from discrimination at roadside motels, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), to private production of medical marijuana, Gonzales v. Raich, 545 U.S. 1 (2005). Generally, the Commerce Clause allows the federal government to regulate activities having a *substantial relation to* or *substantial effect on* interstate commerce. *See* United States v. Lopez, 514 U.S. 549 (1995). Congress did, in fact, assert within the text of the Patient Protection and Affordable Care Act that the Act itself was an appropriate exercise of its Commerce Clause powers: "The individual responsibility requirement provided for in this section . . . is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph 2." Patient Protection and Affordable Care Act § 1501(a) (to be codified at 42 U.S.C. § 18091). The effects listed in the Act include economic decisions made by consumers regarding health care, the significant role played by the health care industry within the national economy, the creation of a new consumer class, the regulation of employee relations, and the impact of medical expenses on bankruptcy proceedings. *Id.* The Act also cites Supreme Court precedent holding that "insurance is interstate commerce subject to Federal regulation." *Id.* (citing United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944)).

supporter at a local rally bluntly put it, the federal government's health care regulation attempts were "constitutionally wrong."[36]

In addition to questioning the basis for federal authority behind the health care bill, Prop C's supporters also couched their arguments in terms of broader constitutional concepts concerning federalism, state sovereignty, and the very structure of American government.[37] At a "state sovereignty rally" around the introduction of Resolution 48, Senator Cunningham asserted, "This is not about health care. It's about power."[38] One promotional video, created by advocacy group United for Missouri, declared that "state sovereignty and state rights are on top of Missourians' priorities."[39] Prop C's primary advocacy group, Missourians for Health Care Freedom ("MHCF"), sought to sway voters by equating the passage of Prop C with "freedom" from "government control."[40] MHCF also

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36. United For Missouri, *Missourians for Prop C: At the Top of Missourian's Priorities*, YOUTUBE (Aug. 2, 2010), http://www.youtube.com/watch?v=XpOrJ6YfWkM. Another Missouri voter couched his constitutional objections in different terms:

> That the federal government can require an individual to buy health insurance, as mandated in the health care reform bill enacted by Congress in March, is a ludicrous and a gross violation of the First Amendment right of free speech, not to mention an intrusion into the private lives of U.S. citizens.

Gene Carton, *Letter to the Editor*, ST. LOUIS POST-DISPATCH, July 27, 2010, at A10. I do not address Mr. Carton's First Amendment concerns.

37. *See* discussion *infra* Part II.

38. Video: January 13, 2010 - Senator Jane Cunningham Speaks at Patriotic Rally at State Capitol, *supra* note 23. Senator Lembke, whom Senator Cunningham dubbed "The Sovereignty King," *id.*, stated in a podcast: "[I]f you go back and study our Founding Fathers, you'll see that the states were afforded traditionally more power than the federal government, and over time that has been flipped on its head." Audio: Week of 01.11.10 - Senator Jim Lembke Discusses State Sovereignty, *supra* note 35. Senator Lembke also sponsored Senate Concurrent Resolution 34, which was introduced into the Missouri Senate several weeks before the introduction of Prop C. Resolution 34 boldly stated:

> NOW THEREFORE BE IT RESOLVED that the members of the Missouri Senate, Ninety-fifth General Assembly, Second Regular Session, the House of Representatives concurring therein, hereby affirm the sovereignty of the people of Missouri under the Tenth Amendment to the Constitution of the United States over all powers not otherwise delegated to the federal government by the Constitution of the United States; and
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> BE IT FURTHER RESOLVED that this resolution shall serve as a notice and demand to the federal government to cease and desist any and all activities outside the scope of their constitutionally-delegated powers.

S. Con. Res. 34, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010).

39. United For Missouri, *supra* note 36 (description of video).

40. "Government control means you will have less freedom to make the health care choices that are best for you and your family." *FAQ*, MISSOURIANS FOR HEALTH CARE FREEDOM (on file with author).

couched its arguments in terms of broader ideology about the relationship between federal and state governments.[41]

Above all, Prop C's proponents touted it as an opportunity to make a genuinely powerful statement regarding states' rights—a statement for which health care reform was merely a topical backdrop. "The world is watching[!]" declared an MHCF promotional video.[42] In the same video, Senator Cunningham called Prop C "the most important vote in the entire nation."[43]

Of course, the bill was not without its detractors. Criticism of the bill focused primarily on its meaninglessness, given its likely unenforceability as well as the fact that the most pertinent provision of the federal health care legislation—the individual mandate—would not go into effect until 2014.[44] Critics were also quick to remark that Prop C itself appeared

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> States have the rights to assert their 10th Amendment powers and affirm those rights in the state constitution. Two hundred and twenty years ago, some founders questioned the need for the First and Second Amendments, and the rest of the Bill of Rights, to be in the U.S. Constitution. Our rights have been preserved by the First and Second Amendments. The Health Care Freedom Act will protect the right to health care freedom in the same way.

Id. The Tenth Amendment states: "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. Interestingly, Missourians for Health Care Freedom also addressed the issue of federal preemption. In response to the question, "Why do the media diminish the strength of state sovereignty by stating that federal law usually trumps state law?," the group answered:

> For well over 100 years, case law and legal battles have contained conflicts between federal laws and state laws. States have frequently questioned the legitimacy of federal statutes in many different areas . . . [T]his is nothing new. Depending on the issue and the way the federal statutes have been challenged, sometimes the Courts have ruled in favor of the federal law (Supremacy Clause, federal pre-emption, interstate commerce). But there are many examples of federal courts ruling in favor of the States. Being that the HCFA begs a question that has never before been presented to the Courts (whether or not the federal government can force a citizen of a state to purchase a product, health insurance), it is perfectly sensible to argue that Obamacare will be ruled upon as unconstitutional by the Courts. The HCFA will force that question.

FAQ, MISSOURIANS FOR HEALTH CARE FREEDOM, *supra*. This idea of "forcing the question" is compelling and will be addressed *infra* Part VI. For an example of "the media diminish[ing] the strength of state sovereignty by stating that federal law usually trumps state law," see note 11 *supra*.

42. Missourians for Health Care Freedom, *COMING AUGUST 3rd: "YES" on Prop C for FREEDOM!*, YOUTUBE (July 29, 2010), http://www.youtube.com/watch?v=HH6a-kEwVas.

43. *Id.*

44.

> They say Proposition C is about protecting individual freedom and states' rights. They tout the vote's symbolic value, which they see as the first shot in a battle to repeal the national reforms. But the truth is that regardless of what happens in Missouri on Aug. 3, the health care reform will remain in effect on Aug. 4.

Editorial, *supra* note 10; *see also* Kevin Sack, *Missouri Voters To Have Say On Health Law*, N.Y. TIMES, Aug. 1, 2010, at A14.

unconstitutional.[45] The primarily "symbolic" nature of Prop C—a nature underscored by much of its proponents' rhetoric—also prompted criticism that the bill was merely a cynical manipulation of conservative voter sentiment.[46] The targeted use of radio ads (which appeared on conservative talk stations) and primarily Republican voter turnout in the August 3 election provided some support for critics' characterization of the referendum as "a Republican straw poll with a foregone conclusion."[47]

Still, whether or not the results were truly reflective of the will of the general populace of Missouri, Prop C did pass by an overwhelming margin on August 3.[48] The evidence demonstrates that this vote was about more than health care.[49] More to the point, Prop C may properly be described as a plebiscite effort of constitutional proportions:[50] an effort to force resolution of contentious constitutional issues.[51]

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45. "The proposition will have no legal standing . . . . From the beginning, we've said it's meaningless and unconstitutional." Brian B. Zuzenak, Executive Director of the Missouri Democratic Party, *quoted in* Sack, *supra* note 44, at A14.

46. "Proposition C is nothing but a taxpayer-funded political exercise designed to raise cash for Republican candidates, consultants and causes." Editorial, *supra* note 10, at A12. One Missouri voter dismissed Prop C as "a meaningless effort meant to energize Tea Party voters [a loosely organized conservative grassroots political coalition] for the primary elections." Bunnie Gronborg, *Letter to the Editor*, ST. LOUIS POST-DISPATCH, July 25, 2010, at A16.

47. Sack, *supra* note 44; *see also* Editorial, *supra* note 11.

48. Messenger, *supra* note 7.

49. *See supra* text accompanying notes 35–41.

50. While there are other compelling constitutional grounds on which the federal health care law itself could be examined, *see* discussion *supra* note 35 and *infra* note 51, this Note focuses on preemption analysis as a way of more closely examining the procedural relationship between a controversial federal law and a popularly enacted state law challenging it.

51. Missouri was not alone in its decision to challenge the constitutional validity of the federal health care legislation. Other states took a variety of measures to attack the law. The Idaho state legislature passed the Idaho Health Freedom Act, which Governor Butch Otter signed into law on March 17, 2010. Nick Draper, *Otter: No Contradiction Here in Idaho*, IDAHO FALLS POST REGISTER, Mar. 18, 2010, at A1. The law prevented Idaho state officials from enforcing health care–related penalties and imposed an affirmative duty on the Attorney General to act in defense of the health care rights of Idahoans. H.B. 391, 60th Leg., 2d Reg. Sess. (Idaho 2010). The Idaho legislature offered this by way of rationale:

> STATEMENT OF PUBLIC POLICY.
>
> (1) The power to require or regulate a person's choice in the mode of securing health care services, or to impose a penalty related thereto, is not found in the Constitution of the United States of America, and is therefore a power reserved to the people pursuant to the Ninth Amendment, and to the several states pursuant to the Tenth Amendment. The state of Idaho hereby exercises its sovereign power to declare the public policy of the state of Idaho regarding the right of all persons residing in the state of Idaho in choosing the mode of securing health care services.
>
> (2) It is hereby declared that the public policy of the state of Idaho, consistent with our constitutionally recognized and inalienable rights of liberty, is that every person within the state of Idaho is and shall be free to choose or decline to choose any mode of securing health care services without penalty or threat of penalty.

III. STANDARD JUDICIAL REVIEW OF FEDERAL PREEMPTION AND POPULAR LAWMAKING

A. Federal Preemption Analysis Under the Supremacy Clause

Regardless of the ideological intent behind Prop C, the law creates a clear—even deliberate—conflict with the federal health care law, and is thus very likely subject to preemption by the federal law under the Supremacy Clause.[52] The judiciary may strike down a state law under the Supremacy Clause for one of three reasons: (1) express preemption, (2) field preemption, or (3) conflict preemption.[53]

Id. At least three other states sought to address the health care law via ballot measure. The Arizona Health Care Freedom Act, an amendment to the state constitution using language substantially similar to that of Prop C, *see* H.R. Con. Res. 2014, 48th Leg., 1st Reg. Sess. (Ariz. 2010), passed with 55 percent of the vote on November 2, 2010, *see* Dianna M. Náñez, *Pollster: Arizona Voters Mirror U.S. Trends*, ARIZ. REPUBLIC, Nov. 7, 2010, at B3. Oklahoma passed a similar constitutional amendment, *see* S.J. Res. 59, 52d Leg., 2d Sess. (Okla. 2010), by nearly 65 percent of the vote in the same election, *see Election Results*, OKLAHOMAN, Nov. 3, 2010, at 9A (results for State Question No. 756). Colorado failed to pass a proposed amendment to block the national health care reform. Nancy Lofholm, *The Colorado Vote: Amendment 63*, DENVER POST, Nov. 3, 2010, at B2.

Lawsuits were by far the most common challenges to the federal legislation, however. As of the writing of this Note, a massive lawsuit whose plaintiffs comprise attorney generals and/or governors of twenty-six states, two private citizens, and the National Federation of Independent Business is working its way through the federal courts. Florida *ex rel.* Bondi v. U.S. Dep't of Health and Human Servs., No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011). In this case, the district court judge granted summary judgment to the plaintiffs on the first count of their complaint, which challenged the constitutionality of the individual health insurance mandate under the Commerce Clause. In granting declaratory and injunctive relief to the plaintiffs, the court wrote:

> Having found that "activity" is an indispensable part [sic] the Commerce Clause analysis (at least as currently understood, defined, and applied in Supreme Court case law), the Constitutionality of the individual mandate will turn on whether the failure to buy health insurance is "activity.". . . Preliminarily, based solely on a plain reading of the Act itself (and a common sense interpretation of the word "activity" and its absence), I must agree with the plaintiffs' contention that the individual mandate regulates inactivity. Section 1501 states in relevant part: "If an applicable individual fails to [buy health insurance], there is hereby imposed a penalty." By its very own terms, therefore, the statute applies to a person who does not buy the government-approved insurance; that is, a person who "fails" to act pursuant to the congressional dictate. . . . And because activity is required under the Commerce Clause, the individual mandate exceeds Congress' commerce power, as it is understood, defined, and applied in the existing Supreme Court case law.

Id. at *23, *29.

52. U.S. CONST. art. VI. For a more detailed discussion, see *supra* note 11, as well as *infra* discussion in this section.

53. U.S. CONST. art. VI. "A fundamental principle of the Constitution is that Congress has the power to preempt state law." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000). Express preemption exists simply where the federal law in question contains "an express provision for preemption" of related state laws. *Id.* Field preemption will be found where "Congress intends federal law to 'occupy the field'" of the regulation in question. *Id.* (quoting California v. ARC Am. Corp., 490 U.S. 93, 100 (1989)). Conflict preemption may occur in one of two ways: "where it is impossible for a

Either field preemption or conflict preemption could be found in the case of Prop C. Type-1 conflict preemption is the most immediately obvious answer to the question of how, if at all, Prop C is preempted by the federal health care law, since it seems clear that no citizen could simultaneously "deny" the federal government's authority to impose tax penalties on individuals without health care and comply with a law imposing those same tax penalties.[54] A court could also find type-2 conflict preemption. Title I of the Patient Protection and Affordable Health Care Act, which contains the objectionable minimum coverage requirements,[55] is titled, "Quality, Affordable Health Care for *All Americans*."[56] The use of "All Americans" in this title indicates the intended scope of Congress's reform and suggests that a law exempting certain Americans from certain provisions of the bill would constitute an "obstacle to the accomplishment of the full purposes and objectives of Congress" under *Crosby*—the primary purpose being attainment of health care coverage for *all Americans*.[57] Finally, the expansive and comprehensive nature of the Patient Protection and Affordable Care Act could be read as evincing intent to "occupy the field" of health insurance, rendering Prop C invalid due to field preemption.[58]

B. Typical Judicial Evaluation of Popularly Enacted Laws

Something that a court may—and perhaps should—consider before embarking on a standard preemption analysis of Prop C, however, is the following: should the fact that the law was popularly enacted, rather than passed by the Missouri state legislature, render it subject to a different level of judicial analysis?[59] The plebiscite origin of laws has typically not

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private party to comply with both state and federal law," or "where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 372–73 (alterations in original) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). Hereinafter, I refer to these two modes of conflict preemption as "type-1 conflict preemption" and "type-2 conflict preemption," respectively.

54. H.B. 1764, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

55. Patient Protection and Affordable Care Act § 1501.

56. *Id.* § 1(b) (emphasis added).

57. *Id.*; *see Crosby*, 530 U.S. at 373.

58. *See Crosby*, 530 U.S. at 372 (quoting *ARC Am. Corp.*, 490 U.S. at 100).

59. *See supra* note 13. Mark Tushnet has described the possibility of "[d]ifferential judicial review of direct legislation" as follows:

> In some cases, the courts might be *more* aggressive in reviewing direct legislation. In other words, they might apply intermediate or strict scrutiny to direct legislation that would elicit only mere rationality review were it adopted by a legislature. Alternatively, they might be *less*

been a factor in Supreme Court evaluations of those laws for constitutionality under the Supremacy Clause or otherwise.[60] Essentially, the Court evaluates a law on its face without regard to the process that created the law.[61] Thus, if a court were to evaluate Prop C for preemption by the federal health care law tomorrow, it is unlikely that the popular origins of Prop C would affect or alter the standard federal preemption analysis.[62]

IV. APPLICATION OF HEIGHTENED SCRUTINY OR A PRESUMPTION AGAINST CONSTITUTIONALITY

A. The Presumption Against Constitutionality

One school of thought suggests that the non-constitutional origins[63] of popular lawmaking should elicit a heightened or enhanced level of judicial scrutiny when the products of such lawmaking are analyzed for

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> aggressive, applying rationality review to direct legislation that would elicit intermediate or strict scrutiny were it adopted by a legislature.

Tushnet, *supra* note 13, at 373 (footnote omitted). Tushnet's description pertains primarily to an analysis of popularly enacted laws that touch on areas of protected individual rights or similar topics; the pertinent differences between such an analysis and the federal preemption analysis will be explored *infra* Part IV.

60. Chief Justice Burger explained, "It is irrelevant that the voters rather than a legislative body enacted [this law] because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 295 (1981), *quoted in* Eule, *supra* note 13, at 1505–06. As Eule noted,

> Judicial opinions resolving constitutional challenges to laws enacted by plebiscite seldom explicitly address the matter of the appropriate standard of review. The unspoken assumption, however, seems to be that the analysis need not vary as a result of the law's popular origin. The nearly three dozen Supreme Court cases reviewing ballot propositions contain scarcely a word on the subject.

Eule, *supra* note 13, at 1505; *see also id.*, at 1505 n.5 (listing, *inter alia*, City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976); James v. Valtierra, 402 U.S. 137 (1971); Hunter v. Erickson, 393 U.S. 385 (1969)).

61. Presumably, the Court does still examine the process through which a law was created inasmuch as the legislative history of a law tends to aid in statutory interpretation.

62. Thus, Prop C would simply be evaluated under the standard preemption framework discussed *supra* Part III.A.

63. I use the word "*non*-constitutional" to describe popular lawmaking because, of course, the structures and processes used to conduct such lawmaking are described nowhere in the Federal Constitution. This should not be confused with calling popular lawmaking *un*constitutional, which would be to characterize it not only as outside constitutionally-defined government structures, but as actually in direct conflict with constitutional mandates. While the argument has been made that popular lawmaking is "unconstitutional" under the Guaranty Clause of Article IV, *see* discussion *infra* this section, that argument is not relevant here, as presumably a finding that popular lawmaking is unconstitutional *per se* would render any further judicial evaluation of the law produced by such lawmaking moot.

constitutionality.[64] Because popular lawmaking happens outside the standard, constitutionally dictated legislative channels, they are "constitutionally suspect" and should thus be scrutinized more carefully by a reviewing judicial body.[65]

Professor Julian Eule has suggested that, in reviewing the constitutionality of popularly enacted laws, the judiciary should do away with any deference that might otherwise be given to the products of standard state legislative processes.[66] He states: "In a sense, I am proposing a new paragraph for the *Carolene Products* footnote: a fourth situation where the presumption of constitutionality should be relaxed. On occasions when the people eschew representation, courts need to protect the Constitution's representational values."[67] In other words, a law produced via the non-constitutional popular lawmaking process should trigger the same heightened judicial scrutiny as a law interfering with the constitutionally protected right to free speech. Neither one is *per se* invalid, but both are constitutionally suspect.[68]

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64. As Eule contends:

> [A]ny evaluation of the appropriate scope of judicial review under the United States Constitution is highly dependent on the nature of the particular body and process that produces the governmental act under attack. On occasion we are sensitive to this need to contextualize. For example, in a system resting upon the principle of national supremacy, Federal judicial review of state legislation is generally seen as raising different questions than the oversight of congressional action. Judicial review of the plebiscite has not profited from such a sensitivity. Yet . . . a constitutional framework with a normative preference for representative government demands that we conceptualize a different judicial role when the law under review emanates from the electorate rather than a legislative body.

Eule, *supra* note 13, at 1533; *see also* Charlow, *supra* note 13, at 533–54 ("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.").

65. Charlow, *supra* note 13, at 541.

66. Eule, *supra* note 13, at 1533–39.

67. *Id.* at 1558–59 (footnote omitted). The relevant portion of the footnote reads as follows:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . . . [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. . . .[Strict scrutiny may also apply to] statutes directed at particular religious, or national, or racial minorities . . . .

United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), *quoted in* Eule, *supra* note 13, at 1533 n.248 (quote edited by author). The *Carolene Products* footnote is a celebrated and frequently cited framework that some believe may "provide a principled basis for judicial intervention to protect minorities." GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 523, 524 (6th ed. 2009).

68. As Eule clarifies: "In the end, my claim is that direct democracy is constitutionally suspect, not impermissible. It triggers a harder judicial look." Eule, *supra* note 13, at 1545.

Of course, unlike the analysis of rights-burdening legislation envisioned by Justice Stone in *Carolene Products*, analysis of state laws for potential preemption by federal laws involves not a balancing of interests, but rather a process of statutory interpretation to identify potential conflicts.[69] Thus, the progression from standard to heightened scrutiny is not as linear in the context of federal preemption analysis.

For purposes of federal preemption analysis, heightened scrutiny could take the form of a presumption *against* constitutionality that states would have to rebut for potentially preempted popular legislation to stand.[70] Such a rebuttal could take the form of a demonstration that the state has a unique regulatory interest in the matter at hand, for example, or perhaps a showing of how the federal and state laws may complement each other sufficiently to overcome concerns about type-2 conflict preemption or field preemption.[71] Primarily, a presumption against constitutionality could operate procedurally to place the entire burden of proof of constitutionality on the state in cases where type-2 conflict preemption or field preemption is implicated.[72] It could also operate to require that courts

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69. *See* discussion *supra* Part III. The differential levels of analysis for rights-burdening legislation are as follows:

> In a typical case, the court employs very deferential rational basis review to assess the constitutionality of the actions of the legislative branch. 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. 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.

Charlow, *supra* note 13, at 595 (footnotes omitted); *see also* discussion *supra* note 59. As Tushnet describes it, the plebiscite origin of a law would shift it either forwards or backwards on the scrutiny continuum. *See* Tushnet, *supra* note 13, at 373. However, preemption analysis involves not a continuum, but rather a set of categories for preemption, each of which involves a qualitatively different process of statutory interpretation. *See* discussion *supra* Part III.A.

70. I propose the phrase "presumption against constitutionality" to contrast with DuVivier's proposed "presumption against preemption." *See* DuVivier, *supra* note 15, at 224. For further discussion of DuVivier's proposal, see *infra* Part V. My phrase also contrasts with the "presumption of constitutionality" afforded to non-problematic state laws in the *Carolene Products* footnote. *See Carolene Products*, 304 U.S. at 152 n.4; *see also* discussion *supra* note 67.

71. In *Maine v. Taylor*, for example, the Court upheld a Maine law regulating the sale of baitfish despite the burden the law placed on interstate commerce because Maine had unique knowledge of the ecosystems of its waterways and a clear need to protect those ecosystems. *See* Maine v. Taylor, 477 U.S. 131 (1986). Although *Maine v. Taylor* is really a dormant Commerce Clause case, concerning whether or not a state may promulgate regulations that tend to impinge upon interstate commerce, it provides a nice example of a case in which a state has a unique regulatory interest.

72. Presumptions operating to shift burdens of proof may be observed in other areas of law. In corporate law, for example, the business judgment rule operates as a presumption that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). Once invoked by the directors of a corporation, "[t]he burden is on the

construe any statutory ambiguity in favor of preemption (as opposed to in favor of constitutionality) in cases where express preemption or type-1 conflict preemption is implicated.[73]

Eule has suggested a two-part form of heightened judicial review that takes into account and corrects for differences among popular lawmaking processes.[74] First, Eule categorizes a plebiscite as either *substitutive* or *complementary*.[75] Second, he scrutinizes the specific processes that lead to the passage of the plebiscite to a varying degree depending on which category it falls into.

Substitutive plebiscites are initiated by voters, who must gather a requisite number of signatures in order to place their proposed law on the ballot.[76] Complementary plebiscites, by contrast, initiate with the state

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party challenging the decision to establish facts rebutting the presumption." *Id.* The presumption against constitutionality would operate similarly in the case of field or type-2 conflict preemption, both of which seem to allow room for argument that the state law in question can coexist with the federal law. Express or type-1 conflict preemption, by contrast, involves a more explicit, and thus less easily overcome, conflict between state and federal law. *See* discussion *supra* Part III.A.

73. It is a canon of statutory interpretation that, wherever possible, courts should construe ambiguities in a law in such a way as to maintain the law's constitutionality; this would simply involve resolving ambiguities in the opposite way where plebiscites are involved. *See, e.g.*, Sinking-Fund Cases, 99 U.S. 700 (1878).

> It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

Id. at 718. Again, I distinguish type-1 conflict and express preemption from other types of preemption because they both appear to foreclose the possibility of reconciling conflicting federal and state law, where found. *See* discussion *supra* note 72. If the federal law's language is indeed found to expressly preempt state law, there is no room for a showing that the laws can be reconciled; if one law renders compliance with another impossible, the result is similar. Thus, judicial scrutiny for these types of preemption is more readily heightened by expanding the reach of statutory interpretation than by burden-shifting.

74. Eule, *supra* note 13, at 1510–13, 1572–75. Given that Eule's primary objection to popularly enacted laws is the non-constitutional processes that create them, it makes sense that his proposed method of judicial review would account for varying degrees of non-constitutionality in those processes.

75. *Id.* at 1510–13.

76. Eule describes substitutive plebiscites as

> direct democracy in its purest current form. Here the voters can completely bypass the legislative and executive branches of government. . . . [T]he states and municipalities that permit this kind of direct democracy have a primary representational form of governance but afford voters the opportunity to substitute plebiscites for the ordinary process of lawmaking. In order to exercise this option the voters neither need legislative permission nor legislative assistance. A measure may be placed on the ballot by securing a specified number of signatures—usually set at some percentage of the votes cast in the preceding general election—and the measure is enacted if a majority of the voters signify their approval.

legislature and may then be either approved or vetoed by voters.[77] Eule's primary objection to substitutive plebiscites is that, almost by definition, they represent raw majority sentiment and may thus tend to trample the rights of minority groups.[78] It is this potentially rights-trampling feature of substitutive direct democracy that Eule identifies as demanding the heightened scrutiny from *Carolene Products*.[79] Essentially, under Eule's proposed analysis, popular legislation that implicates individual rights or equal protection issues would receive heightened scrutiny for

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Id. at 1510. Eule includes both direct and indirect voter initiatives in this category. *Id.* at 1511. Direct initiatives require only a certain number of voter signatures and are then placed on the ballot for popular vote, while indirect initiatives go before the legislature for approval once they accrue the requisite number of signatures. *See* INITIATIVES: PROGRAM PROCEEDINGS, *supra* note 2, at 15. Following an indirect initiative, the issue goes back to the voters if the legislature fails to act on it or rejects it; alternatively, the legislature may not be required to act on the initiative or may be able to amend it. *Id.* at 16.

> Fifteen states use only the direct initiative. Nine states use some form of the indirect initiative; five of the nine states that use the indirect initiative also use the direct initiative in some way or another. If you study the number of times the initiative has been used in the various states, it is obvious that the states who use the direct initiative use it much more than the states that use the indirect initiative.

Id. Within Eule's analysis,

> it is largely irrelevant which form of the initiative is used, so long as the voters ultimately vote on the measure. If the legislature adopts an indirect initiative, the resulting law should be seen as a product of representative government, not direct democracy. But, if the legislature rejects it, the ensuing voter effort must be considered substitutive. Since the legislature may not prevent the measure from being placed on the ballot, the voters still retain the ultimate right to displace completely the representational framework for lawmaking and substitute a direct one. The process simply takes a little longer.

Eule, *supra* note 13, at 1511 (footnote omitted).

77. Complementary plebiscites involve

> an additional tier. This form of direct democracy is commonly called a referendum because the legislation is referred to the electorate for ratification. Here the voters and the legislature must act in concert before a law may take effect. Legislative passage is prerequisite but inadequate: Without voter endorsement the legislative effort fails; without legislative passage the electorate has nothing to vote on.

Eule, *supra* note 13, at 1512 (footnote omitted). Thus, complementary plebiscites are still properly viewed as exercises of direct democracy.

78.

> Our worst tendencies toward prejudice . . . are chastened in legislative debate. . . . The substitutive plebiscite, on the other hand, has little capacity for deliberation. Public debate is infrequent. Exposure to minority perspectives occurs accidentally if at all. Voters may be confused and overwhelmed by the issues placed before them. Any efforts at self-education are thwarted by manipulative campaigns designed to oversimplify the issues and appeal to the electorate's worst instincts. Most important, voters register their decisions in the privacy of the voting booth. They are unaccountable to others for their preferences and their biases. Their individual commitment to a consistent and fair course of conduct can be neither measured nor questioned.

Id. at 1555–56.

79. *See supra* note 67.

discriminatory purpose, since popularly enacted laws are not entitled to the same deference to the law's stated purpose as are traditionally enacted laws.[80]

By contrast, under Eule's approach, complementary plebiscites are "birds of a different feather" that seem not to demand heightened judicial scrutiny because their "filtering" through the legislature presumably corrects for much of the rights-trampling that raw majority will might otherwise result in.[81] However, Eule distinguishes between positive complementary plebiscites and negative complementary plebiscites.[82] A positive complementary plebiscite, in which voters ratify the decision of a legislature, raises none of the concerns about unfiltered majority will and thus does not trigger the heightened scrutiny necessitated by substitutive plebiscites.[83] A negative complementary plebiscite, by contrast, involves a pure majority veto of legislature-enacted law and may thus "pose a distinctive threat of majority tyranny" that should prompt heightened judicial scrutiny.[84]

To summarize, Eule's proposed approach involves the judiciary applying *Carolene Products* heightened scrutiny to all popular lawmaking

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> Because the harder look is prompted by a concern for individual rights and equal application of laws, it is principally in these areas that the courts should treat substitutive plebiscites with particular suspicion. . . . This raises the problematic question of how to measure discrimination against minorities. . . . Two approaches are possible. We may relax the burden of proving discriminatory purpose and be more imaginative about the sources we canvass—for example, ballot pamphlets, exit polls, campaign advertising—or we may abandon the purpose requirement altogether in certain plebiscitary settings.

Eule, *supra* note 13, at 1559–62.

81. *Id.* at 1573.

82. *Id.* at 1573–74.

83. *Id.* at 1574 ("When voters ratify the legislative choice, judicial deference is well deserved. The statutory product reflects extraordinary consensus. A filtered legislative result has received popular endorsement. Supporters of participatory democracy and representative government can join hands to celebrate the result.").

84. *Id.* at 1575.

> When voters veto the legislative choice there is no electoral-legislative consensus. The participatory and representative processes arrive at competing conclusions and the electorate prevails. In the sense that it bypasses the legislative result, the "negative" complementary plebiscite operates very much like the substitutive plebiscite. . . . Complementary plebiscites enable popular majorities to prevent legislation that minorities have managed to convince legislative majorities to enact. Sometimes legislative sensitivity to minority interests, as well as debts incurred by the process of logrolling and compromise, result in minorities' being able to assert their legislative power in a positive rather than negative manner. Where the minority's legislative victory takes the form of passing rather than preventing legislation, complementary plebiscites—which make lawmaking more difficult—may deserve enhanced judicial attention.

Id. at 1574–75.

that (a) is not "filtered" through legislative consensus, and (b) burdens individual rights or equal protection. The more attenuated from constitutionally dictated legislative structures the popular lawmaking process gets, the more constitutionally suspect the products of that process become, thus meriting heightened judicial scrutiny. This two-part analysis could be combined with the presumption against constitutionality to provide a workable standard for differential judicial review of plebiscites that come under federal preemption analysis. In the context of federal preemption analysis, as opposed to rights-burdening analysis, the judiciary could simply apply the presumption against constitutionality to all popularly enacted laws that display the first criterion in Eule's analysis (while retaining standard preemption analysis for positive complementary plebiscites).

B. Why the Presumption Against Constitutionality Is Desirable

As noted above, one of the primary objections scholars have made to popularly enacted laws is that the processes that create them have no constitutional basis.[85] Clearly, the Federal Constitution does not prescribe lawmaking processes for the states; however, the described federal legislative process[86] coupled with the Guaranty Clause[87] suggests that state legislative processes should be at least somewhat analogous to their federal counterpart.[88] Indeed, there is evidence that direct democracy was not only not included in the Constitution, but that it was anathema to the very system the Framers were attempting to create.[89] Exclusion of the

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85. *See* discussion *supra* Part IV.A.

86. U.S. CONST. art. I.

87. U.S. CONST. art. IV, § 4.

88. As Eule puts it, "a constitutional framework with a normative preference for representative government demands that we conceptualize a different judicial role when the law under review emanates from the electorate rather than a legislative body." Eule, *supra* note 13, at 1533. For more on the Guaranty Clause as it relates to popular lawmaking, refer to the discussion *infra* Part IV.B.

89.

> If the Constitution's Framers were keen on majority rule, they certainly had a bizarre manner of demonstrating their affection. *The Federalist* No. 10 hardly qualifies as an ode to the virtues of simple majoritarianism. . . . Madison directs his venom at the threat of factions, "whether amounting to a majority or minority of the whole," but the latter, he believed, could be restrained "by regular vote.". . . Majority factions were far more to be feared, willing as they might be to sacrifice "the public good and the rights of other citizens" to their "ruling passion or interest." This theme runs throughout *The Federalist*. "If a majority be united by a common interest," wrote Madison in *The Federalist* No. 51, "the rights of the minority will be insecure."

Id. at 1522 (quoting THE FEDERALIST No. 10, at 57 (James Madison) (J. Cooke ed., 1961), and THE FEDERALIST No. 51, at 351 (James Madison) (J. Cooke ed., 1961)). Moreover, "[a]s Charles Beard has

majority from direct participation in government may have been what "the Federalists believed might permit our government to succeed where other democracies had failed."[90]

This conflict between direct democracy and constitutional principles is heightened by the Guaranty Clause of Article IV, which states, "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."[91] The presence of the Guaranty Clause indicates that the highly representative, non-participatory federal government described in the Constitution was intended as a blueprint for state governments as well—a blueprint whose terms the federal government, including the judiciary, is empowered to enforce.[92] In its strongest form, this argument contends that any popular lawmaking activity is expressly unconstitutional under the Guaranty Clause.[93] However, the Supreme Court effectively silenced Guaranty Clause challenges to popular lawmaking in *Pacific States Telephone & Telegraph Company v. Oregon*.[94]

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cynically noted, simple direct majority rule 'was undoubtedly more odious to most of the delegates to the Convention than was slavery.'" *Id.* at 1522–23 (quoting DOCUMENTS ON THE STATE-WIDE INITIATIVE, REFERENDUM, AND RECALL 29 (C. Beard & B. Schultz eds., 1912)).

90. *Id.* at 1526.

91. U.S. CONST. art. IV, § 4.

92.

> The Constitution is not silent on the structure of state government. Article IV explicitly imposes an obligation on the United States—a term that ordinarily includes the judiciary—to "guarantee to every State in this Union a Republican Form of Government." The message appears clear. The clause says "Republican," not "Democratic." If we harbor any doubt about the difference, Madison is there to help out. "Democracy," he informs us, consists "of a small number of citizens, who assemble and administer the government in person." "A Republic," in contrast, is "a Government in which the scheme of representation takes place." The distinction is precisely what Madison hoped would bring the success that eluded earlier free societies. It is unlikely that the word "Republican" was loosely used. It came with a history and symbolized a vision. Its inclusion in Article IV is best understood as transporting that vision to the states. This interpretation is substantially bolstered by the consistent use of the term "Legislature" whenever the Constitution confers power on state government.

Eule, *supra* note 13, at 1539–40 (footnotes omitted) (quoting THE FEDERALIST No. 10, at 61–62 (James Madison) (J. Cooke ed., 1961)).

93. For a list of scholarship advancing this thesis, see Clark, *supra* note 3, at 438 n.13, including Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993), and Catherine A. Rogers & David L. Faigman, *"And To the Republic for Which It Stands": Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057 (1996).

94. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912). This case involved a challenge by an Oregon telephone company to a new tax law promulgated in accordance with a 1902 amendment to Oregon's Constitution, which stated the following:

> But the people reserve to themselves power to propose law and amendments to the Constitution, and to enact or reject the same at the polls, independent of the legislative

There are two primary counterarguments to these historical and structuralist objections to popular lawmaking. First, the Framers' generation did have a healthy respect for the sanctity of the popular voice—a respect evident in the same Federalist Papers in which Madison denounced majoritarian tyranny.[95] Second, a more practical argument is that the use of popular lawmaking has become so entrenched in many state governments that it makes little sense to only now begin wielding the Guaranty Clause as a sword against it.[96]

> assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly.

Id. at 133–34 (quoting OR. CONST. art. 4, § 1). In challenging the tax law, Pacific Telephone alleged the following:

> II. The initiative amendment and the tax in question, levied pursuant to a measure passed by authority of the initiative amendment, violates the right to a republican form of government which is guaranteed by § 4, article 4 of the Federal Constitution. . . .
>
> V. The Federal Constitution presupposes in each state the maintenance of a republican form of government and the existence of state legislatures, to wit: Representative assemblies having the power to make the laws; and that in each state the powers of government will be divided into three departments: a legislature, an executive, and a judiciary. One of these, the legislature, is destroyed by the initiative.

Id. at 137–39 (citing U.S. CONST. art. IV, § 4). After musing at length on "the anomalous and destructive effects upon both the state and national governments" that finding Oregon's popular lawmaking amendment unconstitutional would have, the Court held that it lacked jurisdiction to hear this claim. *Id.* at 141–51.

> As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not, therefore, within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.

Id. at 151.

95. In describing the scope and importance of judicial review, Hamilton stressed that the laws enacted via constitutionally prescribed legislative processes were still subject to invalidation if they conflicted with the Constitution—not simply because the Constitution trumps other laws, but because the Constitution represents popular will. *See* Alexander Hamilton, *The Federalist No. 78: The Judiciary Department*, INDEP. J., June 14, 1788, *available at* www.constitution.org/fed/federa78.htm. "[T]he power of the people is superior to both [the judiciary and the legislature]; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." *Id.* Moreover, Hamilton states that it is the people, and not their representatives, who ultimately retain the power to alter the Constitution "whenever they find it inconsistent with their happiness." *Id.* While the constitutionally dictated procedure for amendment does not actually allow for direct popular input, Hamilton's essay does suggest that a robust form of popular input is not necessarily incompatible with the basic structural tenets of a republican, federalist government.

96. Commentators have noted how significant popular lawmaking has become among the states. "There seemed to be fairly widespread agreement [at a California conference regarding the use of ballot initiatives] that the initiative had become more important in the law making process than in the legislature." INITIATIVES: PROGRAM PROCEEDINGS, *supra* note 2, at 5. A reluctance to wholly invalidate the process of popular lawmaking—and thereby its products—is evident in the Court's reluctance to rule on the Guaranty Clause issue presented in *Pacific States*. *See Pacific States*, 223 U.S. at 151; *see also* discussion *supra* note 94.

Apart from the immediate constitutional conflicts, various commentators have identified a number of more pragmatic concerns raised by popular lawmaking that could indicate a need for greater judicial moderation of such lawmaking. First, plebiscites tend to lack the "deliberative process" that characterizes and lends validity to legislature-enacted laws.[97] Plebiscites look more like statements of raw voter reaction to a topic than a calculated regulatory response to that topic.[98] Second, the majoritarian voting process is highly manipulable.[99] Third, as noted *supra*, lawmaking that is purely expressive of the majority may be rights-trampling for minority voters.[100] This feature in particular seems to demand an enhanced judicial role in policing the products of popular lawmaking, as it may be that "the judiciary stands *alone* in guarding against the evils incident to transient, impassioned majorities that the Constitution seeks to dissipate."[101]

There are also other, more basic procedural flaws in the popular lawmaking process that may make its products more suspect from a judicial standpoint than those of traditional legislative processes.[102] These include "low and uneven voter turnout, voter ignorance, the influence of money, and special-interest capture."[103] Interestingly, Professor Sherman

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97.

> Our worst tendencies toward prejudice . . . are chastened in legislative debate. Knowledge and exposure are effective weapons against prejudice. Debate and deliberation inevitably lead to better informed judgment. Enlarging one's exposure to competing ideas and perspectives induces greater sensitivity and checks partiality. Legislative hearings and the testimony of various interest groups widen the legislator's horizon. But hearings are only a part of legislative education. Perhaps a more important factor in generating empathy is the diversity of the legislature's membership itself. . . . Group representation ensures that diverse views are continually expressed, increasing "the likelihood that political outcomes will incorporate some understanding of the perspectives of all those affected."

Eule, *supra* note 13, at 1555 (footnotes omitted) (quoting Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1588 (1989)).

98. For an extensive and nuanced discussion of the difference between raw majority sentiment and true popular will, see Clark, *supra* note 3. *See also* discussion of Eule's position *supra* notes 74–80.

99. "Popular masses too quickly form preferences, fail adequately to consider the interests of others, and are overly susceptible to contagious passions and the deceit of eloquent and ambitious leaders." Eule, *supra* note 13, at 1526–27. Prop C was criticized by its opponents as a manipulation of conservative voter sentiment in anticipation of the upcoming midterm elections. *See* discussion *supra* Part II.

100. Eule, *supra* note 13, at 1551–55; Charlow, *supra* note 13, at 534–38.

101. Eule, *supra* note 13, at 1525.

102. Clark, *supra* note 3, at 439.

103. *Id*. (footnotes omitted). One potential response to concerns about voter turnout and education is that a low voter turnout may actually be desirable if only some voters are going to be educated. Commentators have observed that "[t]here is a relationship . . . between education and turnout. The electoral process is self selecting [sic] [in the context of voter lawmaking]." INITIATIVES: PROGRAM

Clark has suggested that, in addition to making popularly enacted laws constitutionally suspect, these procedural flaws may even undermine the goals of popular lawmaking itself because the voting process fails to account for the intensity and relative priority of voter preferences.[104] Thus, the argument goes, since direct democracy fails to even achieve its ostensible goal of creating legislation that speaks to genuine majority will, its products merit no judicial deference and should be viewed with suspicion.[105]

To sum up, there are a number of worthwhile arguments in support of the proposition that the products of popular lawmaking should merit heightened judicial scrutiny—in the case of federal preemption analysis, a presumption against constitutionality. There is substantial historical and textual evidence that popular lawmaking defies important constitutional principles;[106] plebiscites are not as rigorously produced as traditionally enacted laws;[107] even the apparent statement of majority will contained in a plebiscite may be garbled and distorted due to procedural flaws.[108] Prop C lends credence to all of these arguments. Indeed, the constitutionally problematic nature of popular lawmaking is thrown into relief by the very content of Prop C: it seems dubious, at the very least, that a small group of voters in a state should be entitled to question a law created via constitutionally sanctioned federal processes. Moreover, although there was some input from the state legislature in placing Prop C on the Missouri ballot, it is difficult to characterize what was essentially a flat-out rejection of federal regulation as the kind of measured state regulatory decision that would ordinarily merit deference under the *Sinking-Fund*

PROCEEDINGS, *supra* note 2, at 44. If this is the case, then voter lawmaking is not simply an unfiltered snapshot of broad, visceral majority preference, but is rather a survey of a focus group of informed citizens expressing a legislative preference. This does not seem so drastically attenuated from traditional lawmaking processes.

104. Clark, *supra* note 3, at 448–73. The "messy, real-world practice of direct democracy" tends to "undermine the responsiveness of direct democracy" such that "an initiative or referendum outcome might not reveal what a deliberate, thoughtful majority of the whole voting population would want if they had a full understanding of the issue at hand." *Id.* at 439–40.

105. The most obvious response to this is that low voter turnout, noted above, may actually be an "effective mechanism for reflecting relative intensity of preference," since "those who have little interest in the outcome will simply not vote at all." Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 968 (1998), *quoted in* Clark, *supra* note 3, at 469–70. *See* discussion *supra* Part IV.B. An alternative, more succinct response might be this: "In the end, enumerating the plebiscite's flaws . . . can carry us only so far. Regardless of the many ways in which plebiscites garble the message of majority will, it would be difficult to argue convincingly that legislators convey it more clearly." Eule, *supra* note 13, at 1521.

106. *See* discussion *supra* notes 86–94.

107. *See* discussion *supra* notes 97–101.

108. *See* discussion *supra* notes 102–105.

Cases.[109] Prop C was also the product of a highly targeted campaign that resulted in a primarily Republican voter turnout.[110] As Prop C illustrates, popular lawmaking is flawed in a number of ways that may yield laws of questionable validity—laws suggesting a need for, or perhaps even demanding, increased judicial scrutiny when examined for constitutionality.

V. APPLICATION OF JUDICIAL DEFERENCE OR A PRESUMPTION AGAINST PREEMPTION

A. The Presumption Against Preemption

By contrast, Professor K.K. DuVivier has suggested that differential judicial review of popularly enacted laws should take the form of a "presumption against preemption," or "an enhanced review that requires a greater effort to reconcile the ballot initiative with the federal regulatory scheme."[111] DuVivier identifies three factors inherent to the type of plebiscite that she believes should be entitled to a judicial presumption against preemption: "(a) topic areas that have traditionally been regulated by the states, such as health and safety; (b) good candidates for experimentation at the state level when there is no need for national uniformity; and (c) matters that expand the rights of individuals without infringing on the rights of others."[112] Where a plebiscite exhibits all three of these factors, DuVivier believes, it should receive "greater deference in preemption analysis."[113] Thus, DuVivier's proposed differential standard of judicial review for the products of popular lawmaking is a two-step process: (1) categorization as either exhibiting or not exhibiting the

109. *See supra* note 73.

110. *See* discussion *supra* notes 46–47.

111. DuVivier, *supra* note 15, at 224–25. DuVivier discusses "ballot initiatives," rather than plebiscites in general, but her argument is applicable to all forms of popular lawmaking. The presumption against preemption, like the presumption against constitutionality, operates as a form of differential judicial review in the context of federal preemption analysis, where scrutiny cannot be heightened or relaxed in as linear a fashion as it can in the context of, for example, rights-protective analysis. *See* discussion *supra* note 69.

112. DuVivier, *supra* note 15, at 248. The "alignment" of all three factors in a single ballot initiative is both necessary and sufficient to entitle the law to a presumption against preemption in DuVivier's scheme.

113. *Id.* at 254. DuVivier identifies these categories as representative of "social issues," and argues that a presumption against preemption "encourages experimentation and seeks to limit the use of preemption to arrest the process." *Id.* Thus, her proposed factors may be seen as reflective of a normative judgment that social experimentation is valuable to society as a whole rather than a procedural or structural preference for specific types of lawmaking.

desired factors, and (2) application of a presumption against preemption to laws that fall within the specific preferred category.[114]

The presumption against preemption has traditionally been applied by the Supreme Court in the context of laws representing areas of "intimate concern" to the states.[115] As Justice Frankfurter wrote:

> [D]ue regard for our federalism, in its practical operation, favors survival of the reserved authority of a State over matters that are the intimate concern of the State unless Congress has clearly swept the boards of all State authority, or the State's claim is in unmistakable conflict with what Congress has ordered.[116]

An example of the Court applying the presumption against preemption can be found in *Medtronic, Inc. v. Lohr*.[117] In *Medtronic*, the Court asserted

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114. Tushnet has criticized the use of categorization of popularly enacted laws on three grounds:

> (a) Differential standards of judicial review matter, not in connection with *all* public policies, but in connection only with those that the polity actually pursues through direct or representative legislation. With respect to this subset of public policy, differential standards of judicial review matter only when the laws raise nontrivial, federal constitutional questions. Therefore, the categories we develop must subdivide an already restricted set of public policies.
>
> (b) Any categories that emerge are likely to be ill-defined. This would allow judges to place cases into categories of more or less aggressive review depending on their personal views of which standard is justified.
>
> (c) By their nature, such categories of legislation would be both over- and under-inclusive. Even with well-defined categories, we will always be able to find a case placed in the category of aggressive judicial review where, upon full consideration, only ordinary judicial review was justified.

Tushnet, *supra* note 13, at 376. While it seems undesirable to reject an otherwise appropriate standard of judicial review simply because it poses administrative difficulties, Tushnet's argument does have some bite in the context of DuVivier's proposed factors. Indeed, it seems as though any direct legislation that runs counter to prevailing legislative norms (which, presumably, would be the most constitutionally suspect direct legislation) could easily be classified as "social experimentation" and thus become entitled to judicial deference.

115. DuVivier, *supra* note 15, at 258 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 241 (Frankfurter, J., dissenting)).

116. *Rice*, 331 U.S. at 241 (Frankfurter, J., dissenting), *quoted in* DuVivier, *supra* note 15, at 258 n.202.

117. Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996). In *Medtronic*, the Court held that state common-law claims against the manufacturer of a pacemaker were not preempted by a federal statute providing that:

> Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—
>
> (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
>
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

that only the clear intent of Congress to preempt state law should be used to strike down an otherwise valid exercise of state police power.[118] Additionally, the Court emphasized that any clear congressional intent to preempt should be construed as narrowly as possible.[119] In *Hillsborough County v. Automated Medical Laboratories, Inc.*,[120] the Court also invoked "the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation."[121] The *Hillsborough* decision observed that the presumption against preemption could be rebutted by more than just clear federal intent to preempt, holding: "Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility.'"[122]

Medtronic and *Hillsborough* demonstrate that limited forms of express and conflict preemption both still operate to overcome the presumption against preemption.[123] However, more expansive forms of preemption, including field preemption, will not invalidate an exercise of state police power that is protected by the presumption against preemption.[124]

Id. at 481–82 (quoting 21 U.S.C. § 360k (YEAR)). *Medtronic* demonstrates the lengths to which the Court has gone to reconcile state law with federal law under the presumption against preemption. The Court allowed state damages claims despite strict statutory language regarding the circumstances under which a state requirement could be exempted, *id.* at 482 n.5, and existing precedent regarding the preemption of common-law claims by federal statutory regimes, *id.* at 487–88 (citing Cipollone v. Liggett Group, 505 U.S. 504 (1992)). *Medtronic* and *Hillsborough County*, discussed further *infra* Part V.A, were both cited extensively by DuVivier, *supra* note 15, at 13–14.

118. "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (internal quotation marks omitted).

119. *Id.*

120. Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707 (1985).

121. *Id.* at 716. The *Hillsborough* court upheld a local regulation imposing more stringent testing and record-keeping requirements on plasma collection centers than did a relevant portion of the Federal Public Health Service Act. *Id.* at 709–10, 712.

122. *Id.* at 713 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).

123. *See* discussion *supra* Part III.A. This also provides some support for my distinction between the presumption against constitutionality as applied in situations of express and type-1 conflict preemption on the one hand, and field and type-2 conflict preemption on the other. *See supra* notes 72–73.

124. In *Hillsborough*, the Court stated:

> We reject the argument that an intent to pre-empt [sic] may be inferred from the comprehensiveness of the FDA's regulations at issue here. . . . Indeed, even in the absence of the 1973 statement [made by the FDA indicating that the regulations in question were not intended to usurp state authority], the comprehensiveness of the FDA's regulations would not justify pre-emption [sic]. . . . [M]erely because the federal provisions were sufficiently

It seems there are two theories under which one could extend the presumption against preemption, traditionally granted to exercises of state police power, to products of direct legislation: (1) the police power belonging to the electorate of a state is coextensive with that of traditional state lawmaking bodies,[125] and (2) the right of citizens to express their preferences through voting is as fundamental as the right of state governments to regulate for the health, safety, morals, and general welfare of its citizens, and is therefore entitled to the same judicial deference.[126]

> comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field. . . . Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt [sic] in its entirety a field related to health and safety.

Hillsborough, 471 U.S. at 716–18. Similarly, in *Medtronic*, despite the existence of explicit preemption language as well as a clearly defined procedure for obtaining an exemption to preemption, the Court still opted to construe the preemption language as narrowly as possible and declined to find that "a state law of general applicability" not included among the twenty-two specifically enumerated exemptions was preempted. *See Medtronic*, 518 U.S. at 499–500. The Court characterized its narrow reading of express preemption language as "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Id.* at 485.

125. DuVivier's proposed model of judicial deference is a limited version of this theory, as one of her proposed factors that would entitle a ballot initiative to the presumption against preemption is "topic areas that have traditionally been regulated by the states, such as health and safety." DuVivier, *supra* note 13, at 248. One could choose to adopt either the limited DuVivier model of police powers belonging to the electorate, or adopt the view that the electorate's police powers are fully coextensive with those of state lawmaking bodies. Either way, the argument would be that the electorate of a state is qualified to exercise the state's police power in the same way as the legislature of that state. Thus, any exercise of state police power by means of popular vote (or, under DuVivier's model, exercises of state police power by popular vote that have added normative value to society) is entitled to the presumption against preemption just as a product of the legislature would be. This correlates the idea, expressed in *Citizens Against Rent Control*, that electorates and legislatures are equally constitutionally bounded when making laws. Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 295 (1981); *see supra* note 60. Most popular lawmaking is authorized by an amendment to a state constitution. *See* JOSEPH F. ZIMMERMAN, THE INITIATIVE: CITIZEN LAW-MAKING 23 (1999). Since popular lawmaking is thus textually incorporated into the structure of state government, it makes sense to assume that popular lawmaking is intended to have coextensive power with that government. However, many states do expressly limit what can be legislated by plebiscite. *Id.* at 29. This tends to weaken this argument, although at least twelve state high courts have held that popularly enacted laws should be liberally construed, and South Dakota actually requires such liberal construal by statute. *Id.* at 30. In the context of federal preemption, "traditional police powers of the State survive unless Congress has made a purpose to pre-empt [sic] them clear." Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 121–22 (1992) (Souter, J., dissenting).

126. Under this theory, the right of citizens to vote is treated as qualitatively different from the right of state lawmakers to exercise police power, but is nonetheless granted special status in the context of judicial review due to its fundamental nature. I base this potential theory primarily on *The Federalist No. 78* thesis that the Constitution emanates from the people and that the people thus occupy a unique position of sovereignty within the constitutional scheme. *See* discussion *supra* note 95. Thus, in response to the earlier-described arguments that the plebiscite is unconstitutional or, at the

Undoubtedly, the former of these theories is a preferable option for extending the presumption against preemption to the products of popular legislation, since it appears to have at least some grounding in constitutional text.[127] The Tenth Amendment is regrettably silent on whether the "States" to whom power is reserved may exercise that power by means of popularly enacted legislation.[128] For purposes of this discussion, the remaining relevant inquiry is *why* it might be desirable to extend the presumption against preemption to plebiscites.

B. Why the Presumption Against Preemption Is Desirable

On a purely visceral level, the idea that the voice of the people should occupy a special position within political processes seems democratically appealing. Justice Hugo Black once characterized voter-enacted regulation as "moving in the direction of letting the people of the State—the voters of the State—establish their policy, which is as near to a democracy as you can get."[129] Other commentators have noted the instinctive appeal of allowing the voice of the people special deference.[130] The European Union has endorsed the use of plebiscites along similar lines: "The right of citizens to have their say in major decisions on long-term or virtually irreversible commitments involving a majority of citizens is one of the democratic principles common to all member States of the Council of Europe."[131] Another reason to defer to the voice of the people for purposes of judicial review is Alexander Hamilton's venerable observation that "the power of the people" is both prior and superior to constitutionally established government structures.[132]

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very least, non-constitutional, *see supra* Part IV, the argument could be made that the popular vote, instead, enjoys a sort of meta- or ur-constitutional status. *See also* discussion *infra* Part V.B.

127. U.S. CONST. amend. X.

128. *Id.*

129. 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 668 (Phillip B. Kurland & Gerhard Casper eds., 1975), *quoted in* Eule, *supra* note 13, at 1506.

130. *See, e.g.*, Clark, *supra* note 3. "The assumption is this: whatever one thinks about the propriety or wisdom of plebiscites, they at least do one thing—they let the people speak. In the words of the Supreme Court, direct democracy is designed to 'give citizens a voice on questions of public policy.'" *Id.* at 435 (quoting City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 673 (1976)).

131. Council of Europe, Recommendation of the Comm. of Ministers to Member States on Referendums and Popular Initiatives at Local Level, Recommendation No. R (96) 2, at 19 (1996), *quoted in* DuVivier, *supra* note 15, at 238.

132.

> [W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. . . . [I]n regard to the interfering acts of a superior and

Another argument in favor of judicial deference to plebiscites is that such laws may have greater practical value to society than traditional legislation because they offer an expedited legislative process and allow state policy to more clearly reflect community norms.[133] DuVivier argues that "[a]lthough criticism of initiatives is valid in many contexts, the benefits of some initiatives, at least some of those allowing social experimentation in health and safety, sufficiently outweigh the drawbacks such that they deserve greater deference when threatened by preemption."[134] Otherwise, "[p]reemption can curtail valuable social experiments initiated by the people."[135] Other commentators have remarked that plebiscites provide citizens with the opportunity "to directly affect public policy at the ballot box without having to rely on the whims of an elected representative," thus enabling the law to be more responsive to shifts in prevailing societal norms.[136]

> subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior [the people] ought to be preferred to the subsequent act of an inferior and subordinate authority [their elected representatives].

Hamilton, *supra* note 95. A strong reading of this principle might, in fact, suggest that the mere fact of Prop C's enactment should render the federal health care bill constitutionally repugnant, since a subset of the people have rejected this act of the "subordinate" legislature. Given that the Federalist Papers are not actually part of the text of the Constitution, however, I am reluctant to give this reading much weight. I acknowledge that the voters of Missouri might disagree with me.

133. Both reasons to prefer popular lawmaking to acts of the legislature were cited by proponents of Prop C. Senator Cunningham praised the fact that Prop C allowed Missouri voters to make their voices heard without the need for approval from Governor Jay Nixon, a Democrat. Video: January 13, 2010 - Senator Jane Cunningham Speaks at Patriotic Rally at State Capitol, *supra* note 23. Senator Lembke was eager to bypass not only the executive branch, but the judicial branch as well:

> [W]e have a few liberals in this state that want to settle things the way they always settle things: in the courts, instead of allowing the people of Missouri to vote on this issue . . . . I can't tell you how disappointed I am that people on the other side of this issue would not want to allow Missourians to have a vote.

Video: June 29, 2010 - Senator Jim Lembke Discusses Health Care Freedom Act (Mo. Senate 2010), *available at* http://www.senate.mo.gov/media/10info/Lembke/LembkeSJR25Streaming062910.wmv. After Prop C was passed, Senator Cunningham proclaimed, "The citizens of the Show-Me State don't want Washington involved in their health care decisions." Messenger, *supra* note 7.

134. DuVivier, *supra* note 15, at 235.

135. *Id.* at 240. Senator Lembke also invoked the idea of the states as "laboratories of democracy." Audio: Week of 1.11.10 - Senator Jim Lembke Discusses State Sovereignty, *supra* note 35. This could also be interpreted as a kind of marketplace theory: the notion that greater freedom to experiment with social policy will ultimately produce better policies is an important assumption underlying this argument.

136. Nate Hendley, *Could Ballot Initiatives Work in Canada?*, PUNDIT MAG., Nov. 7, 2000, *quoted in* DuVivier, *supra* note 15, at 238. The obvious objection to this argument is that "social experimentation" that reflects prevailing norms may well be rights-trampling for members of various minorities. *See, e.g.*, Eule, *supra* note 13, at 1525–27; *see also* discussion *supra* Part IV.B. DuVivier arguably corrects for this by including "matters that expand the rights of individuals without infringing on the rights of others" among her criteria for plebiscites that should be entitled to the presumption

A final, structuralist argument for judicial deference in reviewing popular legislation is that the Seventeenth Amendment strengthens the constitutional status of the popular vote.[137] Eule has characterized the various government structures set in place by the Constitution as a "complex filtering mechanism" designed to alleviate "the threat of majority faction."[138] Thus, according to Eule, the legislative products of majority preferences are constitutionally suspect due to the normative preference for laws that represent heavily filtered majority preferences expressed in the Constitution.[139] One response to this is that the Seventeenth Amendment switch to popular election of U.S. Senators represents the removal of at least one "filter" on majority preferences.[140] At the very least, the presence of the Seventeenth Amendment operates to weaken the assumption that unfiltered majority preferences create unconstitutional outcomes. A stronger reading of the Seventeenth Amendment might suggest that the amendment displays a normative preference for greater reflection of majority preferences in government.[141]

To sum up once more, there are a number of compelling arguments for affording the products of popular lawmaking greater judicial deference—via a presumption against preemption in the context of federal preemption analysis—than their traditionally enacted counterparts. The "will of the people" as sacrosanct within a free, democratic society has instinctive normative appeal;[142] the government should be held accountable to the citizens from whom its power derives;[143] and the law is more responsive to popular will when the people play a role in creating it.[144] Prop C, as a straightforward expression of majoritarian disapproval of government, appears to amply exhibit all of these desirable features of popular lawmaking. The ballot proposition itself was a clear act of seeking to hold the federal government accountable to the constitutional standards of its constituents, and tedious political processes were unable to thwart or mute its message.[145] Thus, despite the flaws in the process that led to its

against preemption. DuVivier, *supra* note 15, at 248.

137. "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote." U.S. CONST. amend. XVII.

138. Eule, *supra* note 13, at 1525–26.

139. *Id.* at 1533*; see* discussion *supra* Part IV.A.

140. U.S. CONST. amend. XVII.

141. I am grateful to Professor David Law for an in-class discussion that inspired this argument.

142. *See* discussion *supra* notes 129–132.

143. *See* discussion *supra* notes 133–136.

144. *See* discussion *supra* notes 138–141.

145. *See* discussion *supra* Part V.B; discussion *supra* Part II; *supra* note 133. Note also the contrast between Prop C's turnaround time, *see* discussion *supra* Part II, and the lengthy litigation

passage, Prop C appears to have a strong claim to enhanced deference upon review by a court.

VI. WHY DIFFERENTIAL REVIEW OF POPULAR LAWMAKING IS UNDESIRABLE

As noted earlier, Prop C appears likely to be preempted by the federal health care law if its constitutional validity is challenged.[146] The one case in which this would not be true, however, is if the federal health care bill addressed by Prop C were found to be itself unconstitutional, since there would be no conflict with the federal law if the federal law itself does not stand. Presumably, and as may be inferred from the earlier discussion of the rhetoric surrounding Prop C, a bill that would "[d]eny the government authority" to do something[147] hinges on the assumption that the exercise of government power in question is somehow not authorized—in the case of the federal government, not authorized by the Constitution.[148] One may also assume that the Supremacy Clause only grants "supreme" status to laws that are valid, i.e. constitutional exercises of federal authority. Indeed, the answer to this question of the health care bill's constitutionality appears to be precisely what Missouri voters who voted for Prop C were seeking.[149] Here, then, is the primary issue with differential judicial review of plebiscites: it may stand as an impediment to getting the *right* answer to this highly important question.[150]

As Professor Robin Charlow has observed, "[D]ifferent standards of review involve more than different deference. They also invoke different substantive rules for establishing violations of the equal protection guarantee [on which Charlow's analysis focuses], which often leads to different substantive conclusions."[151] Since Prop C's validity may hinge on an analysis of the constitutionality of its federal target, a variation in judicial scrutiny, as compared to the same law if it had been passed by the Missouri legislature, might very well also mean an undesirable variation in the analysis of the health care law's constitutionality.[152]

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process many other states are pursuing instead, *see supra* note 51.

146. *See* discussion *supra* Part III.A.

147. H.B. 1764, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010).

148. *See* discussion *supra* notes 35–40.

149. *See* discussion *supra* notes 35–40.

150. *See* discussion *infra* Part VI.

151. Charlow, *supra* note 13, at 594.

152. For an example of how varying levels of scrutiny may actually result in the application of different substantial norms, see *id.* at 599–600. In the context of equal protection review, Charlow argues that the operative inquiries for standard and heightened judicial scrutiny, which seek a nexus

Whether the scrutiny given to Prop C is heightened or relaxed, a judicial holding based on such differential scrutiny is inevitably saying that when it comes to plebiscites, the Supremacy Clause means something different—either that even potentially unconstitutional federal laws trump popularly enacted state laws, or that otherwise constitutional federal laws may be unconstitutional when they conflict with popularly enacted state laws. Because Prop C touches (by design) upon the constitutionality of a federal law, to expand or contract the validity of Prop C based on its procedural origins is necessarily to expand or contract the constitutionality of the federal health care law. To find, for example, that a federal law is "supreme" against a popularly enacted state law when it might not be "supreme" against the same law if it were enacted by a state legislature is to endow the federal law with a sort of substantive "superconstitutionality" stemming from what are really procedural concerns about how the state law was enacted. Substantive law is thus made or undone based on procedural concerns.[153]

This conflation of substance with procedure may be observed in both of the proposed approaches to differential review discussed in this Note.[154] Eule proposes a substantive review to address the motives of voters because he has procedural concerns about the initiative and referendum processes. DuVivier would give procedural preference to popularly enacted laws she sees as having particular substantive value. As with Prop C, both of the standards presented here for differential judicial review of plebiscites—ostensibly just a higher or lower procedural bar—would result in substantive alterations to related law. Eule's corrective measures to catch discriminatory intent of voters would essentially expand the reach of equal protection doctrine with regards to popularly enacted laws.[155]

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between the legislative act and legislative purpose, are qualitatively different from the truly relevant equal protection question—whether or not the affected minority group was given unbiased consideration during the lawmaking process. *Id.* at 599. Charlow ultimately concludes that there is no compelling reason to evaluate the products of popular lawmaking differently from their traditionally enacted counterparts. *Id.* at 601.

153. Charlow has observed this conflation of procedural concerns with substantive solutions:

> To put it another way, proponents of the special review thesis [an aggregation of a number of different arguments in favor of differential judicial review for plebiscites, including Eule's, discussed *infra* Part IV.A] 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).

Id. at 560*; see also id.* at 599–601.

154. *See* discussion *supra* Parts IV.A and V.A.

155. *See* Charlow, *supra* note 13, at 599.

DuVivier's presumption against preemption would contract the force of the Supremacy Clause as applied to plebiscites.

To expand or contract whole areas of substantive federal law to account for variables in the state legislative process is an undesirable outcome. Ad hoc modifications to constitutional doctrine are not a tenable form of jurisprudence. It makes little sense to sacrifice legislative cohesion to account for the procedural differences of a form of lawmaking that is at most merely a complementary tool alongside the vast cogs of legislative machinery.[156] In the case of Prop C, the electorate of a state has called for the evaluation of the constitutionality of a contentious new federal law. Why run the risk of answering that question incorrectly simply for the sake of correcting constitutionally authorized (by the state constitution) lawmaking processes at the state level? Additionally, given all of the compelling arguments in favor of both heightened judicial scrutiny and judicial deference, adhering to the Court's established precedent of disregarding the popular origins of the law seems less like simply overlooking a law's plebiscite status, and more like an appropriate means of balancing out these many competing concerns.[157]

VII. CONCLUSION

Judicial review has been criticized as "the invocation of power by an unelected and largely unaccountable governmental body."[158] There is a sense in which this exercise of power could be seen as complementing the sort of raw, majoritarian democracy embodied in popular lawmaking. The standard framework for federal preemption analysis, absent any corrective considerations for plebiscite origin, might actually accomplish more in the context of popularly enacted laws than is immediately obvious—not simply because it is a convenient default, but because of the need to balance the complex set of priorities and considerations detailed above. Courts may thus pursue the correct answer to complex constitutional problems rather than struggling to adopt a differential judicial review that alters substantive law to account for various procedural strengths and

156. Harel Arnon has observed that this complementary role was all that was envisioned by the early champions of popular lawmaking: "It should be noted . . . [that] most political activists and later progressives[] did not view initiatives and referendums as a replacement for the contemporary representative system. Instead, they viewed them as a supplement that would be needed in order to overcome some of the flaws within the system of representative government." ARNON, *supra* note 2, at 11.

157. *See* discussion *supra* Parts IV.B and V.B.; *see also supra* Part III.B.

158. Eule, *supra* note 13, at 1531.

weaknesses in the lawmaking process. As Prop C demonstrates, popular legislation may serve to enforce a kind of constitutional accountability of the federal government to the people it is constitutionally obligated to serve—and that may be the most vital role that direct democracy can play in American government.

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