The Guarantee Clause in the States: Structural Protections for Minority Rights and Necessary Limits on the Initiative Power

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> The United States shall guarantee to every State in this Union, a Republican Form of Government . . .
>
> –United States Constitution Article IV, Section 4

> The republican principle demands, that the deliberate sense of the community should govern the conduct of those to whom they entrust their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive.
>
> –Alexander Hamilton[1]

Introduction

The Guarantee Clause[2] protects the republican form of government and provides essential structural protections for individual rights. It promises to protect not only the political structures of representative government, but also the individual rights of citizens—especially politically unpopular minorities. By participating in those representative structures, citizens are afforded constitutional protection from state initiatives that place their rights on the ballot for a majority plebiscite.

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1. THE FEDERALIST No. 71, at 349 (Alexander Hamilton) (Terrence Ball ed., 2003).
2. U.S. CONST. art. IV, § 4.

The United States Supreme Court has consistently held that the Guarantee Clause is nonjusticiable in the federal courts under the political question doctrine.[3] This position has generated substantial criticism from legal scholars who contend that the Guarantee Clause was designed to protect individual rights.[4] Even if the Court continues to dismiss cases brought under the Guarantee Clause, however, state courts are also constitutionally obligated to adjudicate these challenges.[5] State courts have two affirmative textual grounds for this obligation. First, the Supremacy Clause[6] requires state judges to adjudicate federal constitutional challenges to provisions of their own laws and state constitutions. Second, the United States Supreme Court has interpreted the Guarantee Clause itself to obligate the States to provide their citizens with a republican form of government.[7]

State ballot initiatives are vulnerable to uses that violate the Guarantee Clause's promise to protect the republican form of government. Recently, California's divisive Proposition 8 presented the State's courts with a ballot initiative that placed minority rights on the ballot for a majority vote, and which purported to alter the individual rights of a minority group under the California

3. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 233–34 (1962) (discussing the Court's jurisprudence under the Guarantee Clause and citing many cases holding it nonjusticiable); *see also* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 863–70 (1994) (stating that "countless" Supreme Court decisions have held the principle that the Guarantee Clause presents a nonjusticiable political question, and citing and discussing many of these cases).

4. *See, e.g.*, Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962) (considered a primary pre-1980 article criticizing nonjusticiability of the Guarantee Clause); Chemerinsky, *supra* note 3, at 864–70 (arguing that the United States Supreme Court should adjudicate claims under the Guarantee Clause on the merits primarily because the Guarantee Clause protects individual rights).

5. Former Oregon Supreme Court Senior Judge Hans A. Linde has pioneered this theory of the duty of state courts to adjudicate claims brought under the Guarantee Clause. Linde has written extensively on this subject. *See, e.g.*, Hans A. Linde, *State Courts and Republican Government*, 41 SANTA CLARA L. REV. 951 (2001); Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994).

6. U.S. CONST. art. VI, cl. 2. The Supremacy Clause states that the federal laws and Constitution are "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." *Id.*

7. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1874) (stating that the Guarantee Clause "necessarily implies a duty of the States themselves to provide such a government").

constitution.[8] California courts were obligated to analyze Proposition 8 for its consistency with the protections of the Guarantee Clause. Although the Guarantee Clause's structural protections serve to reinforce substantive rights protected in the Bill of Rights, judicial review under the Guarantee Clause is an independent inquiry from a determination of whether an initiative like Proposition 8 is otherwise constitutional under the Equal Protection Clause.[9]

This Note presents a three-part argument. First, the Guarantee Clause provides critical structural protections for minority rights in the political process. When an initiative places minority rights on the ballot for a majority vote and bypasses the safeguards of deliberation by a representative legislature, that process violates the Guarantee Clause's protection of the republican form of government. This violation is particularly egregious where the initiative removes individual rights protected under a state constitution.

Second, state courts are bound to adjudicate Guarantee Clause challenges and to uphold this federal constitutional protection of both the republican form of government and the individual rights of their citizens. Although Guarantee Clause challenges have avoided adjudication in the federal courts because of the political question doctrine, state courts have a constitutional responsibility to hear Guarantee Clause challenges to state initiatives on the merits.[10]

Third, state courts must adjudicate challenges to such initiatives *before* they are placed on the ballot. The availability of post-enactment judicial review under the Equal Protection Clause is no

8. Proposition 8 is now CAL. CONST. art. I, § 7.5, but will be referred to in this Note as Proposition 8.

9. U.S. CONST. amend. XIV, § 1, cl. 4. The Equal Protection Clause prohibits States to "deny to any person within its jurisdiction the equal protection of the laws." *Id.* Scholars have long argued that the Equal Protection Clause and the Due Process Clause, U.S. CONST. amend. XIV, § 1, cl. 3, have been stretched too thin by judges in decisions defining the scope of individual rights, and that the Privileges or Immunities Clause, U.S. CONST. amend. XIV, § 1, cl. 2, should be revived to protect individual rights. *See, e.g.*, Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 Tex. Rev. L. & Pol. 1 (1998) (arguing that Privileges or Immunities Clause was intended by the Founders to be primary source of individual rights protection and that liberals and originalists alike should support its revival).

10. Federal courts are also constitutionally obligated to enforce the Guarantee Clause, although, as this Note discusses, they have consistently declined to do so under the political question doctrine. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 233 (1962) (discussing the Court's jurisprudence under the Guarantee Clause and citing many cases holding it nonjusticiable); Chemerinsky, *supra* note 3, at 863–70 (listing cases finding Guarantee Clause to be a nonjusticiable political question).

substitute for judicial review at this stage. Pre-election judicial review would prevent this structural constitutional harm to minorities and to the political community at large.

Section I of this Note defines the republican form of government, discusses its virtues, and identifies its critical distinctions from the direct democratic form. Section II addresses the United States Supreme Court's interpretation of the Guarantee Clause. It traces how the Guarantee Clause became nonjusticiable under the political question doctrine and discuss the Guarantee Clause's connection to rights also protected by the Equal Protection Clause. Section III explains why judicial review of initiatives at the pre-election stage is critical for enforcing these rights. Section IV discusses the interpretation of the Guarantee Clause in state courts, and presents the California and Oregon Supreme Courts' responses to challenges to initiative lawmaking. Section V argues that the Guarantee Clause imposes an outer limit on the use of the initiative power to change state constitutions. After discussing two examples of initiatives that reached this limit, Colorado's Amendment 2 and California's Proposition 8, it proposes that these state courts had an alternative federal basis to find these initiatives unconstitutional: initiatives proposing to amend a state constitution to abrogate the individual rights of minorities violate the Guarantee Clause's guarantee to a republican form of government. Finally, Section VI explores the relationship between the Guarantee Clause and the California Constitution's revision/amendment distinction.

I. Defining the Republican Form of Government

Legal scholars have considerably different theories regarding what defines the republican form from other democratic systems of government. Some scholars argue that all state initiatives are per se violations of republican government.[11] Others argue that the central meaning of republicanism is popular sovereignty, and that direct democracy is therefore perfectly consistent with, although not required by, a republican form of government in which most lawmaking is done by representative decision makers.[12] This Note

11. *See, e.g.*, 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, 1059 (1996) (arguing that the Guarantee Clause establishes a "per se prohibition against state initiatives").

12. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 Colo. L. Rev. 749, 756–59

adopts a definition of a republican form of government under the Guarantee Clause as one that requires, at a minimum, a deliberative lawmaking process by elected representatives.[13]

Alexis de Tocqueville believed that deliberative legislative processes were one of the greatest virtues of the American republic. In *Democracy in America*, Tocqueville emphasized that a republic "is a conciliatory government under which resolutions have time to ripen, being discussed with deliberation and executed only when mature."[14]

James Madison believed that a republican form of government ensured the protection of the public good and private rights from the dangerous passions of a "majority faction."[15] The defining difference between a democracy and a republic, he argued, is that "in a democracy, the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives and agents."[16] Madison understood two critical features to be required in a republican form of government: the delegation of power to elected representatives, and deliberation by those elected representatives before laws were enacted.[17] Madison believed that the delegation of lawmaking authority from the citizens themselves to a smaller number of elected representatives was a structural mechanism that would ensure a better substantive legal outcome. Through the deliberative and reasoned process of lawmaking, he wrote, lawmakers could "refine and enlarge the public views."[18]

Alexander Hamilton argued that deliberative lawmaking by elected representatives was a virtue that distinguished a republic from a democracy because it better ensured laws would be enacted for the

(1994) (rejecting anti-direct democracy thesis as "law office history" and stating its historical and theoretical basis is "not proven").

13. *See, e.g.*, H.M.S. SELLERS, THE SACRED FIRE OF LIBERTY 99 (N.Y.U. Press 1998) (including in list of American republican virtues the pursuit of the common good, popular sovereignty, a deliberative senate, and the rule of law); Ethan J. Leib, *Redeeming the Welshed Guarantee: A Scheme for Achieving Justiciability*, 24 Whittier L. Rev. 143, 149–69 (2002) (discussing theoretical and legal debates as to meaning of republicanism).

14. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 395 (J.P. Mayer ed., George Lawrence trans., Doubleday 1969) (1835).

15. THE FEDERALIST NO. 10, at 43 (James Madison) (Terrence Ball ed., 2003).

16. THE FEDERALIST NO. 14, at 60 (James Madison) (Terrence Ball ed., 2003); *see also* THE FEDERALIST NO. 10, at 44 (James Madison) (Terrence Ball ed., 2003) (setting forth same definitions quoted in No. 14).

17. THE FEDERALIST NO. 10, at 43 (James Madison) (Terrence Ball ed., 2003).

18. *Id.*

common good.[19] Like Madison, Hamilton believed that the procedural mechanism of deliberative lawmaking by elected representatives would ensure more just laws and better public policies. When voters' long-term interests conflict with their immediate desires or impulses, Hamilton argued, it is the duty of elected representatives, whom the voters have appointed to act as guardians of those interests, to "withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection."[20]

The United States Supreme Court's definition of the republican form of government under the Guarantee Clause has been consistent with these defenses of the republican form. In 1891, the Court in *In re Duncan*[21] endorsed a definition of republicanism under the Guarantee Clause which emphasized the delegation of lawmaking power to elected representatives who legislate for the common good and protect against the impulsivity of majority factions. Chief Justice Fuller wrote for the majority:

> By the Constitution, a republican form of government is guarantied [sic] to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.[22]

Because initiatives are enacted by direct majority vote, and bypass these republican processes of formal debate and deliberation by elected representatives, the substantive laws enacted by initiative also suffer. State ballot initiatives do not benefit from the Hamiltonian process of "cool and sedate reflection"[23] and instead risk basing public policy on the "temporary delusion[s]"[24] of a majority

18. THE FEDERALIST No. 71, at 349 (Alexander Hamilton) (Terrence Ball ed., 2003).

20. *Id.*

21. *In re* Duncan, 139 U.S. 449, 461 (1891).

22. *Id.*

23. *Id.*

24. *Id.*

faction at the expense of both the long-term common good of the political community and the individual rights of minority voters.

Although this critique of initiative lawmaking as self-interested and shortsighted may apply to many laws enacted by the initiative process,[25] not all state initiatives amount to federal constitutional violations. When the initiative process is used to place the individual rights of minorities on the ballot for a popular vote, however, this process not only results in bad public policy but also violates the Guarantee Clause.

II. The Guarantee Clause in the United States Supreme Court

A. The Road to Nonjusticiability Under the Political Question Doctrine

In *Luther v. Borden*,[26] the United States Supreme Court was asked to determine which of two rival governments was sovereign in Rhode Island. Rhode Island had recently approved a state constitution, but the officers under the state charter government prohibited the holding of elections under the new constitution, and police officers enforced this ban on elections by force.[27] This incumbent charter government's police officers broke into the plaintiff's house, accusing him of illegal electioneering.[28] The plaintiff sued for trespass, claiming that the government the policemen represented was unconstitutional because it was no longer in a republican form.[29] The Court dismissed the case as nonjusticiable, stating that the Guarantee Clause allocated to Congress the authority to decide between two rival state governments.[30] The Court framed the issue as one of both separation of powers and federalism, stating that the Federal Constitution, "as far as it has provided for an emergency of this kind, and authorized the general government to

25. One contemporary example of a ballot initiative that resulted in shortsighted policymaking but did not rise to the level of a Guarantee Clause violation was California's Proposition 13. Proposition 13 was passed by the state's voters in November 1978 and changed the state's constitution to permanently reduce property taxes and impose limits on the ability of local governments to levy new taxes and fees without voter approval. *See* CAL. CONST. art. XIIIA.

26. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

27. *Id.*

28. *Id.*

29. *Id.* at 35–38.

30. *Id.* at 42 (stating that "[u]nder this article of the Constitution it rests with Congress to decide what government is the established one in a State").

interfere in the domestic concerns of a State, has treated the subject as political in its nature,"[31] and has limited that federal power to Congress.

The Court's discussion was very concerned with protecting the balance of federalism, a jurisdictional concern limited to the federal courts. The *Luther* Court's emphasis on federalism leaves open the state courts as a venue to hear challenges under the Guarantee Clause. Further, the facts that gave rise to the Guarantee Clause question in *Luther* were historically unique and centrally concerned political sovereignty. Thus, *Luther* should not stand for a general nonjusticiability rule where a Guarantee Clause challenge arises from a case in which individual rights are more central to the merits.

In *Minor v. Happersett*, the Court considered the argument that the denial of women's right to vote was inconsistent with a republican form of government.[32] The petitioners contended that the state constitution and laws of Missouri, by restricting the franchise to men, were an unconstitutional denial of the republican form of government as guaranteed under the Federal Constitution.[33] Because Missouri and other states had a tradition of restricting the franchise to men that predated the ratification of the Federal Constitution, including the Guarantee Clause, the Court found that in 1874, it was "too late to contend that a government is not republican, within the meaning of this guaranty [sic] in the Constitution, because women are not made voters."[34]

Minor is significant because it reached the merits of the petitioner's Guarantee Clause arguments despite *Luther*'s strong rhetoric of nonjusticiability, even if the Court ultimately relied on history and tradition to reject those arguments. Further, the *Minor* Court discussed the meaning of the Guarantee Clause's protection of the republican form of government at length, and expressly stated that the "guaranty [sic] necessarily implies a duty on the part of the States themselves to provide such a government."[35] The Court has never refuted this statement, and despite its own consistent refusal to adjudicate challenges arising under the Guarantee Clause, it

31. *Id.*
32. Minor v. Happersett, 88 U.S. 162, 165 (1874).
33. *Id.*
34. *Id.* at 176.
35. *Id.* at 175.

emphasizes the Court's recognition of the critical role of state courts in upholding the Guarantee Clause's protections.

Pacific States Telephone & Telegraph Co. v. Oregon[36] is considered the Court's last word regarding the justiciability of Guarantee Clause claims in the federal courts.[37] In *Pacific States*, the Court heard an appeal from the Oregon Supreme Court as to whether a tax on the gross revenue of telephone and telegraph companies, enacted by initiative under the Oregon constitution, violated the Guarantee Clause. Chief Justice White considered the question to be clear: "whether it is the duty of the courts or the province of Congress to determine when a state has ceased to be republican in form, and to enforce the guaranty [sic] of the Constitution on that subject."[38]

The *Pacific States* Court interpreted *Luther v. Borden* to have already established that enforcement of the Guarantee Clause was a political question, and therefore a subject that only the "political department" of the federal government had the power to enforce.[39] Because of this preliminary justiciability determination, the Court dismissed the case without reaching the merits of whether Oregon's initiative process was consistent with a republican form of government, and without discussing how its separation of powers-based ruling affected the state courts.[40] Since *Pacific States*, the Court has consistently held that challenges under the Guarantee Clause are political questions, and as such are nonjusticiable in the federal courts.[41]

36. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912), *aff'g* State v. Pac. States Tel. & Tel. Co., 99 P. 427 (Or. 1909).

37. *See* Chemerinsky, *supra* note 3, at 862 (stating that it was not until *Pacific States* that "the Court truly buried the Guarantee Clause by interpreting *Luther v. Borden* to hold the Guarantee Clause a grant of power only to the political branches").

38. *Pac. States*, 223 U.S. at 133.

39. *Id.* at 149.

40. *Id.* at 151.

41. *See, e.g.*, Mountain Timber Co. v. Washington, 243 U.S. 219 (1916) (rejecting Guarantee Clause challenge to state worker's compensation statute by holding it nonjusticiable political question under both *Luther v. Borden* and *Pacific States*); O'Neill v. Leamer, 239 U.S. 244 (1915) (rejecting Guarantee Clause challenge to Nebraska delegation of power to form municipal drainage district, and stating summarily that the plaintiff's attempt to invoke the Guarantee Clause "is obviously futile"); *see also* Chemerinsky, *supra* note 3, at 863–64 (discussing history of dismissal of claims under Guarantee Clause after *Pacific States* as nonjusticiable political questions).

B. The Guarantee Clause's Connection with Individual Rights and Equal Protection

In *Plessy v. Ferguson*, the majority of the justices rejected constitutional challenges to Louisiana's state-enforced segregation policy on privately run passenger trains.[42] Justice John Harlan wrote a forceful dissent in which he argued that Louisiana's segregation laws were unconstitutional because they violated the guarantee of a republican form of government in the States.[43] He argued that although slavery had been abolished, state-enforced racial segregation remained an unconstitutional scheme because it made a minority group of American citizens legally inferior, and so interfered with the proper functioning of a representative form of government.[44] Justice Harlan contended that:

> Such a system is inconsistent with the guaranty [sic] given by the constitution to each state of a republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.[45]

This statement is significant because of its timing, its interpretation of the Guarantee Clause as providing protection for individual rights, and its call for both Congress and state courts to enforce the Guarantee Clause's guarantee to the republican form of government. *Plessy* was decided in 1896, after *Luther v. Borden* (1849) but before *Pacific States* (1912). This timeline undermines the reasoning of *Pacific States* insofar as its holding relied on interpreting *Luther* to have conclusively settled the issue that challenges under the Guarantee Clause were nonjusticiable political questions. Justice Harlan's *Plessy* dissent indicates that in the last decade of the Nineteenth Century, constitutional challenges to state laws brought under the Guarantee Clause were understood by at least one member of the Court to be justiciable.

Further, Justice Harlan's dissent implied that the Guarantee Clause should be understood to protect both the individual rights of minorities and the integrity of republican political processes. Justice

42. Plessy v. Ferguson, 16 U.S. 537, 549–52 (1896).

43. *Id.* at 563 (Harlan, J., dissenting).

44. *Id.*

45. *Id.* at 564.

Harlan argued that the individual members of a segregated minority are not the only victims of state-enforced segregation. The healthy functioning of a representative, republican government depends on the equal political participation of all citizens. By denying the equality of minority citizens under state law, state-enforced segregation also imposes a structural harm on the American republic.

Finally, Justice Harlan stated that when a state law like Louisiana's violates the federal constitutional guarantee, the Guarantee Clause must be enforced either by "congressional action"[46] or by the courts "in their discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding."[47] Justice Harlan clearly was referring to the obligation of the state courts under the Supremacy Clause,[48] which binds the "[j]udges in every State"[49] to uphold the Federal Constitution where it conflicts with their own state law and state constitution. Because of the Court's position that the Guarantee Clause is nonjusticiable, the first enforcement option of "congressional action"[50] has become the only viable option at the federal level. In contrast, at the state level the courts remain obligated to enforce the protections of the Guarantee Clause against its infringement by their own state's laws or constitution.

Like Justice Harlan's *Plessy* dissent, the majority opinion in *Baker v. Carr*[51] recognized the similar structural protections for individual rights that resonate in both the Equal Protection Clause[52] of the Fourteenth Amendment and the Guarantee Clause. In *Baker*, the Court considered challenges to Tennessee's state apportionment statute based on both the Equal Protection and Guarantee Clauses.

Rejecting Tennessee's argument that a challenge to a state apportionment scheme always presents a nonjusticiable political question, the *Baker* Court instead listed the considerations a court should consider in determining whether such a challenge falls under

46. *Id.*
47. *Id.*
48. U.S. CONST. art. VI, §1, cl. 2.
49. *Id.*
50. *Plessy*, 16 U.S. at 564 (Harlan, J., dissenting).
51. Baker v. Carr, 369 U.S. 186, 237 (1962).
52. U.S. CONST. amend. XIV, § 1, cl. 4.

the political question doctrine.[53] Interestingly, the Court held that a challenge to a state apportionment statute does not present a nonjusticiable political question so long as it is brought under the Equal Protection Clause and not solely under the Guarantee Clause.[54] The Court acknowledged, however, that the case "involve[d] the allocation of political power within a State," which was an issue traditionally challenged under the Guarantee Clause as well as the Bill of Rights,[55] and went to great lengths to distinguish the case from the long line of precedent in which analogous cases had been deemed nonjusticiable because they were brought under the Guarantee Clause.[56]

In his opinion for the *Baker* majority, Justice Brennan clarified that "in the Guaranty [sic] Clause cases and in other 'political question' cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the 'political question.'"[57] Like Justice Harlan's *Plessy* dissent,[58] the *Baker* majority recognized the connection between the individual constitutional rights protected by the Equal Protection Clause and those structural rights theoretically protected but deemed nonjusticiable political questions[59] under the Guarantee Clause.

State courts should interpret United States Supreme Court cases like *Plessy* and *Baker* to stand for the connection between the substantive individual rights protected by the Equal Protection Clause, and the equally important structural rights to a republican form of government protected by the Guarantee Clause. The Guarantee Clause provides independent, judicially enforceable structural protections for individual rights which supplement the

53. *Baker*, 369 U.S. at 209–27 (discussing criteria for determining whether case falls under political question doctrine generally and citing Guarantee Clause cases the Court has held to be political questions).

54. *Id.* at 228.

55. *See, e.g.*, Pac. States Tel. & Tel. Co. v. Or., 223 U.S. 118, 137–38 (1912) (considering petitioner's challenges to a state initiative under both the Equal Protection Clause and Guarantee Clause).

56. *Baker*, 369 U.S. at 227 (discussing and attempting to distinguish *Pacific States*, in which an initiative was challenged substantively under the Equal Protection Clause, and procedurally under the Guarantee Clause).

57. *Baker*, 369 U.S. at 210.

58. Plessy v. Ferguson, 16 U.S. 537, 563 (1896) (Harlan, J., dissenting).

59. *Baker*, 369 U.S. at 210. The Court's discussion of the political question doctrine discusses separation of powers issues extensively, concluding that the "nonjusticiability of a political question is primarily a function of the separation of powers." *Id.*

substantive protections of the Bill of Rights. State courts should not interpret federal political question jurisprudence to relieve them of their own obligation to adjudicate challenges brought under the Guarantee Clause.

III. The Necessity of Pre-Election Judicial Review Under the Guarantee Clause

Pre-election judicial review of initiatives under the Guarantee Clause must be available because of the nature of the constitutional injury majority proponents of initiatives inflict on minority voters, and because of the nature of judicial review appropriate to the Guarantee Clause's structural protections.

First, initiatives involving the individual rights of minorities must be reviewable under the Guarantee Clause before they are placed on an election ballot because this placement alone inflicts a constitutionally cognizable injury. A challenge to an initiative under the Guarantee Clause should be reviewed regardless of whether, if enacted, the minorities oppressed by the law would have a remedy under Bill of Rights provisions such as the Equal Protection Clause. The Guarantee Clause promises citizens a structural political process right to a government where elected representatives enact laws after a deliberative lawmaking process. Although this deliberative process should lead to better laws, as Madison and Hamilton imagined, judicial review of whether a certain use of the initiative power is consistent with the republican form of government is distinct from the review of the enacted law itself.

Second, pre-election judicial review under the Guarantee Clause must be available because post-enactment review is inappropriate to the issues presented in such a challenge. Judicial review of substantive legal outcomes under the Bill of Rights is inappropriate to the review of structural political process rights because it involves balancing the relative strengths of governmental interests and individual rights.[60] Laws enacted by a deliberative process of elected representatives as well as laws enacted by initiative may infringe on individual rights. Judicial review for Bill of Rights violations must always be made available to individuals who are injured by a state law, regardless of the process by which that law is enacted. But this

60. *See* Rogers & Faigman, *supra* note 11, at 1070-71 (arguing that heightened scrutiny of laws enacted by initiative process is inappropriate because of balancing, rather than categorical, inquiry).

substantive judicial review of *outcomes* under the Bill of Rights cannot substitute for judicial review under the Guarantee Clause of whether the *process* by which a law is enacted violates the Constitution because it is inconsistent with the republican form.

It is no fatal impediment to the adjudication of Guarantee Clause challenges that the legal standards of "republicanism" are ambiguous, or that the constitutionality of an initiative would be determined on a case-by-case basis. Despite the difficulty of defining the republican form of government, and despite the reality that each State's initiative process may be unique, the question of whether a particular process is consistent with the republican form is a categorical question[61] squarely within the judicial expertise and duty of state courts charged to uphold the protections of the Federal Constitution.

IV. The Guarantee Clause in the State Supreme Courts

A. The Supreme Court of Oregon: *Kadderly v. City of Portland*

In *Kadderly v. City of Portland*, the Supreme Court of Oregon adjudicated a Guarantee Clause challenge to the 1902 Initiative and Referendum Amendment to the Oregon Constitution (the "1902 Amendment").[62] The 1902 Amendment was passed by the state legislature and ratified by the electorate, and purported to create a reserved initiative and referendum power in the Oregon voters.[63]

The *Kadderly* court first considered the jurisdictional question of whether, as a state court, it had the power to decide if the 1902 Amendment was consistent with a republican form of government under the Guarantee Clause.[64] To this question the court gave an emphatic "yes," stating that it was "clear that [the 1902 Amendment's] validity is a judicial, and not a political, question."[65] Distinguishing the case before it from the facts held to present a nonjusticiable political question in *Luther v. Borden*,[66] the court reasoned that the case before it involved an issue of constitutional interpretation clearly within the expertise of the judicial branch, while *Luther* had presented a question of deciding between a government

61. *Id.* at 1071.
62. Kadderly v. City of Portland, 74 P. 710, 714–15 (Or. 1903).
63. *Id.* at 712.
64. *Id.* at 714–15.
65. *Id.* at 715.
66. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

claiming sovereignty under a constitution and another claiming sovereignty under a charter, which presented a question more appropriate for the political branch.[67]

Turning to the merits, the court discussed the necessary features of the republican form of government under the Guarantee Clause. The court found that the initiative and referendum powers, unlike aristocratic or monarchial forms, seemed consistent with republicanism because they appeared merely to shift additional powers to the people over their legislature, but retained an element of popular sovereignty.[68] Several aspects of the *Kadderly* court's reasoning and conclusion on this issue are significant.

First, the court reached the merits of the case, although it was brought expressly as a challenge under the Guarantee Clause, and despite the fact that the case was decided well after *Luther v. Borden*, which had seemingly rejected such challenges as nonjusticiable in the federal courts. The Supreme Court of Oregon did not hesitate to find that the case presented a judicial question that it was obligated to adjudicate on the merits.

Second, the court's conclusion that the initiative clause of the 1902 Amendment did not violate the Guarantee Clause relied on its finding that "laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the Legislature at will."[69] This part of the court's reasoning is suspect because the 1902 Amendment clearly permitted the initiative power to be used for constitutional amendments, and not only statutory laws.[70] Changes to the state constitution, enacted by initiative, would of course not be "subject to the same constitutional limitations as other statutes"[71] since they would in fact be changing the constitution itself. Further, the Oregon Court's holding relied on the additional safeguard that a measure passed by

67. *Kadderly*, 74 P. at 716.

68. *Id.* at 720.

69. *Id.*

70. *Id.* at 712. The text of the 1902 Initiative and Referendum Amendment read, in pertinent part, "the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the legislative assembly." *Id.*

71. *Id.* at 720.

initiative could still, under the Oregon Constitution, be "amended or repealed by the Legislature at will."[72]

Third, the Oregon Supreme Court's judgment was rendered completely in the abstract. The *Kadderly* court was called on to determine whether, as a matter of principle, the powers of initiative or referenda could be reconciled with the *idea* of a republican form of government. The 1902 Amendment created an initiative power, but did not present a particular use of that initiative power by which the Court could consider the application of its ruling when used to create a law or to amend the constitution. For that reason, the most the *Kadderly* opinion stands for is that the initiative (and referenda) power, when used to make statutory law rather than amend the state constitution, is not inimical per se to a republican form of government. *Kadderly* does not, however, inform state courts about the substantive contours of the initiative power or about which laws the initiative power may be used to enact if this power is to remain consistent with the republican form of government.

Despite the limits of the *Kadderly* decision, when carefully considered, Oregon[73] and other state courts, including California, have erroneously cited this case to stand for a final determination that the use of the initiative and referenda power to make state laws and, more importantly, to amend state constitutions, is consistent with a republican form of government.

B. The Supreme Court of California: *In re Pfahler*

In re Pfahler[74] presented the Supreme Court of California with a challenge to the validity of the initiative power under the charter of the City of Los Angeles.[75] The challenge arose from the petitioner's arrest and incarceration for violating a municipal ordinance prohibiting the slaughtering of animals within certain geographical limits.[76] The petitioner conceded that if the ordinance had been

72. *Id.* This safeguard does not exist in California. On the contrary, a law or constitutional amendment passed by the initiative in California not only bypasses the deliberative lawmaking process of the state legislature to become law, but can only be repealed or modified by another initiative. *See* CAL. CONST. art. II, § 8.

73. *See, e.g.*, State v. Pac. States Tel. & Tel. Co., 99 P. 427 (Or. 1909) (rejecting challenge to tax enacted by initiative and stating that issue of whether an initiative or referendum violated the Guarantee Clause had been conclusively resolved in *Kadderly*), *aff'd* Pac. States Tel. & Tel. Co., 223 U.S. 118 (1912).

74. *In re Pfahler*, 88 P. 270 (Cal. 1906).

75. *Id.* at 271.

76. *Id.*

enacted by the city council through the ordinary legislative process—by vote of the city council and approval of the mayor—it would be a valid use of the local police power under the California Constitution. Because the ordinance had been enacted through the initiative process, the petitioner claimed it had never actually been legally enacted and therefore he should be released.[77] The Los Angeles charter had been amended in 1903 to allow for local ordinances to be proposed and enacted by initiative, as well as providing for a referenda process, although only the initiative process was challenged in the case.[78]

Unlike in *Kadderly*, where the Supreme Court of Oregon presumed that the elected legislature retained the power to amend or repeal a law enacted by initiative, the Supreme Court of California acknowledged that both the initiative and referenda powers granted by the Los Angeles charter meant that "it is the vote of the electors at the ballot box that finally determines whether or not a proposed measure shall be a law at all."[79] The court recognized the significance of the initiative power in particular, noting that the electors effectively stand in the shoes of the elected city council members and have the power to enact local legislation "as they may deem expedient, where the council declines to enact the same."[80]

The Supreme Court of California, then, was presented squarely with a Guarantee Clause question: Whether an initiative power purporting to grant the voters of a chartered municipality the authority to enact local laws that the local legislature refuses to approve is a "forbidden departure from the republican form of government guaranteed by the Constitution of the United States."[81] The court first assumed that, despite language to the contrary in *Luther v. Borden* and other federal cases, the petitioner's question was judicially cognizable because it was brought in state court.[82]

Next, the court turned to the merits, considering it well within its capabilities to determine whether this use of the initiative process was

77. *Id.*

78. *Id.* at 271–272.

79. *Id.* at 272. Contrast this language with *Kadderly v. City of Portland*, 74 P. 710, 720 (Or. 1903) (presuming that "laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the Legislature at will").

80. *In re Pfahler*, 88 P. at 272.

81. *Id.*

82. *Id.* at 273.

such a "forbidden departure" from the republican form of government so as to violate the Guarantee Clause.[83] The court held that it was not such a departure, but limited its holding to the local context, holding only that the Guarantee Clause "does not prohibit the direct exercise of legislative power by the people of a subdivision of a state in strictly local affairs."[84] Following the historical reasoning used by the United States Supreme Court in *Minor v. Happersett*,[85] the court reasoned that all local government forms which existed at or before ratification were republican. The court concluded that exercises of direct legislation by a municipal electorate were analogous to town meetings in colonial New England, and therefore this use of the initiative power did not violate the Guarantee Clause.[86]

Justice McFarland wrote a strong dissenting opinion lamenting the majority's readiness to "abandon prominent features of our American system of government," namely, the republican lawmaking process.[87] Channeling Madison and Hamilton, Justice McFarland emphasized the republican virtues of deliberative lawmaking by an elected representative body in which laws may be fully considered, and policies are enacted only after their long-term effects are carefully reflected upon and debated.[88] In contrast, the initiative process was vulnerable to abuse by "demagogues, pseudo-reformers, or promoters of discontent"[89] who are able to pass a measure by fooling the voters or appealing to their passions and prejudices and rushing the measure into law before there is time for a "sober second thought."[90] Justice McFarland argued that initiative lawmaking "admits the very evils which the representative form of government was intended to guard against."[91]

The *In re Pfahler* court makes two distinctions in its reasoning that limit the precedential effect of the case. First, the court distinguishes between the uses of the initiative process at the municipal level versus at the state level, and clearly limits its holding

83. *Id.* at 271.

84. *Id.* at 273.

85. Minor v. Happersett, 88 U.S. 162, 175–76 (1874). *See supra* Section III.A.

86. *In re Pfahler,* 88 P. at 273 (reasoning that "if the people may legislate directly at town meetings, they may do so by vote at the polls").

87. *Id.* at 280 (McFarland, J., dissenting).

88. *Id. See supra* Section I.

89. *Id.*

90. *Id.*

91. *Id.*

on the constitutionality of the initiative power to the local context. Second, the court makes an implicit distinction between the use of the initiative process to enact laws and its use to amend a state constitution.

This second distinction is particularly significant. The majority opinion indicated acceptance of *Kadderly*'s holding insofar as it applied to initiative lawmaking to pass statutes at the state level.[92] In limiting its holding to the local level, the *In re Pfahler* court also stated that this narrow holding should not be understood as a statement that "the people of a state may not reserve the supervisory control as to general state legislation afforded by the initiative and referendum, without violating the federal constitution [sic]."[93] The California Supreme Court in *In re Pfahler* cited *Kadderly* to stand for the proposition that states may permit the use of the initiative power to enact general state legislation without violating the Guarantee Clause, but omitted the fact that the 1902 Initiative and Referendum Amendment challenged in *Kadderly* had also permitted the use of these processes to amend the Oregon Constitution. Further, the *Kadderly* court itself had also declined to analyze the validity of Oregon's constitutional amendment power under the Guarantee Clause.[94]

C. The Issues Left Unresolved by *Kadderly* and *In re Pfahler*

In *Kadderly* and *In re Pfahler*, the Oregon and California Supreme Courts considered challenges to initiative lawmaking under the Guarantee Clause, and in each case upheld the initiative power as consistent with a republican form of government. Properly understood, however, these holdings are narrow and leave room for further Guarantee Clause challenges to initiatives in state courts. Two important issues remain unresolved. First, whether the initiative power may be used to alter a state constitution when the safeguards emphasized in *Kadderly* and cited in *In re Pfahler* are not present. Second, whether a particular initiative that places the individual rights

92. *Id.* at 273.

93. *Id.*

94. Kadderly v. City of Portland, 74 P. 710, 714–15 (Or. 1903). The text of the 1902 Initiative and Referendum Amendment read, in pertinent part, "the people reserve to themselves power to propose laws *and amendments to the Constitution* and to enact or reject the same at the polls, independent of the legislative assembly." *Id.* at 712 (emphasis added).

of minorities on the ballot may violate the Guarantee Clause despite the facial constitutionality of the initiative power.

V. The Necessary Limits Imposed By the Guarantee Clause on State Initiatives: Examples from Colorado and California

Colorado's Amendment 2, ultimately challenged before the United States Supreme Court in *Romer v. Evans*,[95] and California's Proposition 8, recently challenged before the California Supreme Court in *Strauss v. Horton*,[96] present issues unresolved by the early Twentieth Century state court decisions under the Guarantee Clause.

Both initiative measures present precisely the use of the initiative power that the Guarantee Clause is designed to protect against: an amendment to a state constitution that singles out the individual rights of a minority group. In both Colorado and California, these initiatives were placed on the ballot and passed by a bare majority of the state electorate.[97] After its enactment and post-enactment challenge, Colorado's Amendment 2 was ultimately invalidated by the United States Supreme Court under the Equal Protection Clause.[98] On May 26, 2009, the California Supreme Court upheld Proposition 8 against three post-enactment challenges[99] brought primarily under the California Constitution.[100] This Note argues that the availability of post-enactment judicial review of these initiative amendments did not relieve either the California or

95. 517 U.S. 620 (1996).

96. 207 P.3d 48 (Cal. 2009) (consolidated with City & County of San Francisco v. Horton, No. S168078 and Tyler v. State of California, No. S168066, which also involved challenges to the constitutionality of Proposition 8 under the California Constitution).

97. California's Proposition 8 passed with fifty-two percent of the vote. *See* Jesse McKinley, *Top Court in California Will Review Proposition 8*, N.Y. TIMES, Nov. 19, 2008, at A20, *available at* http://www.nytimes.com/2008/11/20/us/20marriage.html?scp=6&sq=California%20Proposition%208&st=cse.

98. *Romer*, 517 U.S. at 635–36.

99. *See* cases cited *supra* note 96.

100. *See* Strauss v. Horton, 207 P.3d 48 (Cal. 2009). Only Justice Carlos R. Moreno dissented, writing that he would have held that Proposition 8 "is not a lawful amendment of the California Constitution." *Id.* at 140. The *Strauss* opinion and additional filings in the Proposition 8 litigation are posted on the website of the California Supreme Court, at http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm (last visited Aug. 17, 2009). On May 22, 2009, a federal post-enactment challenge to Proposition 8 was filed in United States District Court for the Northern District of California. Brought under Title 42, Section 1983 of the United States Code, the complaint alleges that Proposition 8 violates the due process and equal protection rights of gays and lesbians and seeks declaratory and injunctive relief against its enforcement. *See* Perry v. Schwarzenegger, 2009 WL 1490740 (N. D. Cal. May 22, 2009).

Colorado state courts from their constitutional obligation to perform pre-election review under the Guarantee Clause.[101]

A. Amendment 2 in Colorado

Amendment 2 was an amendment to the Colorado Constitution enacted in 1992 by that state's initiative process.[102] The campaign for Amendment 2, and its ultimate adoption by Colorado voters, came in response to ordinances passed in multiple Colorado municipalities[103] banning discrimination on the basis of sexual orientation.[104] The text of Amendment 2 read:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.[105]

Romer v. Evans[106] involved an Equal Protection Clause challenge to the constitutionality of Amendment 2. The United States Supreme Court, hearing the case on appeal from the Supreme Court of Colorado's ruling that Amendment 2 was unconstitutional on equal protection grounds, found that it effected a "sweeping and comprehensive" change in the legal status of gay, lesbian, and bisexual persons under Colorado law.[107] If upheld, the Court

101. The federal courts, of course, are also constitutionally obligated to uphold the Guarantee Clause and the important rights it was designed to protect. The plaintiffs' complaint in *Perry* makes equal protection and due process arguments, but does not include the Guarantee Clause. Perry v. Schwarzenegger, 2009 WL 1490740 (N. D. Cal. May 22, 2009).

102. *Romer*, 517 U.S. at 623.

103. For example, the cities of Boulder and Aspen, and the City and County of Denver passed anti-discrimination ordinances in many contexts, including housing, employment, education, public accommodations, and health and welfare services for their local populations. *See id.* at 623.

104. *Id.* at 623–24.

105. COLO. CONST. art. II, § 30b.

106. *Romer*, 517 U.S. at 620.

107. *Id.* at 627.

recognized, Amendment 2 would have had the effect of placing gay, lesbian, and bisexual persons "in a solitary class with respect to transactions and relations in both the private and governmental spheres . . . [by] withdraw[ing] from homosexuals, but no others, specific legal protections . . . and forbid[ing] reinstatement of these laws and policies."[108]

The harm done by Amendment 2, the Court reasoned, was particularly egregious because of the initiative process by which it amended the Colorado Constitution. In order to reverse the harm done by Amendment 2, gays, lesbians, and bisexuals and their supporters could not simply appeal to their elected state representatives in the Colorado legislature, but would have had to convince a majority of Colorado voters to amend the state constitution again to provide for specific protections for them as a class.[109]

The Court recited the rational basis standard of review and analyzed the constitutionality of Amendment 2 under the Equal Protection Clause.[110] The Court's reasoning, however, focused on the rights of minority groups to effectively use the lawmaking process without first having to overcome additional barriers—an argument made more soundly under the Guarantee Clause than the Equal Protection Clause.[111] The Court stated that the right to equal protection was denied by an initiative like Amendment 2, which made it more difficult for one class of citizens apart from others to "seek aid

108. *Id.*

109. *Id.* at 631.

110. *Id.* at 635–36.

111. *Id.* at 633. Scholars have spilled a lot of ink attempting to make sense of *Romer* as an Equal Protection Clause case. *See, e.g.*, Akhil Reed Amar, *Attainder and Amendment 2:* Romer's *Rightness*, 95 MICH. L. REV. 203, 222 (1996). Generally, commentators have noted the *Romer* Court's lack of a sound Equal Protection Clause basis for striking down Amendment 2 while declining to hold that gays and lesbians were a constitutionally protected class, and have attempted to present alternative justifications for the outcome. *See, e.g.*, Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 923 (1999) (noting this "paradox" and presenting an alternative "interpretation based on jurisdictional design" and arguing that *Romer* could illustrate the rule that a state may not attempt to selectively disempower localities, in which homosexuals or any other statewide minority may enjoy a majority of political support, through an initiative passed at the state level"); David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 587-590 (1999) (noting that the *Romer* opinion is "notably obscure," suggesting *Romer* instead stands at least in part for the "deep connection between localism and positive constitutional enforcement" against private parties, and arguing that the municipalities were perhaps the proper plaintiffs in the case).

from the government,"[112] and which had the statewide effect of making that minority group "a stranger to its laws."[113] The Court found that Amendment 2, by denying gay, lesbian, and bisexual citizens the ability to protect their interests through meaningful access to the political process at both the state and municipal levels, violated the Equal Protection Clause.[114] The tone of Justice Kennedy's opinion for the Court indicates discomfort with the fact that, through the use of direct democracy, a majority of Colorado voters had amended their state constitution by an initiative "born of animosity toward the class of persons affected."[115] At a minimum, the Court reasoned, the United States Constitution required the Court to strike down a law enacted out of "a 'bare . . . desire to harm a politically unpopular group.'"[116]

The United States Supreme Court never should have needed to hear the post-enactment challenge to Amendment 2 under the Equal Protection Clause. The reasons that led the Court to find that Amendment 2 violated the Equal Protection Clause apply more forcefully to why the Colorado Supreme Court, conducting pre-election review under the Guarantee Clause, should have found that the measure could not be printed on a ballot in the first place.[117] Amendment 2 singled out a minority group and asked the majority of voters in the state to vote on the rights of that minority group alone. The Amendment purported to change the state constitution so that if enacted, it could only be reversed by a subsequent majority vote. It bypassed the deliberative lawmaking process of the elected representatives in the state legislature which, in a republican form of government, protect against laws being enacted as a result of majoritarian passions and prejudices against a "politically unpopular group."[118] For these reasons, Amendment 2 was a use of the initiative process inconsistent with a republican form of government, and the

112. *Id.*

113. *Id.*

114. *Id.* at 635–36.

115. *Id.* at 634.

116. *Id.* (quoting Dep't. of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

117. *See* Hans A. Linde, *When Initiative Lawmaking Is Not 'Republican Government': The Campaign Against Homosexuality*, 71 OR. L. REV. 19 (1993) (arguing that anti-homosexual constitutional amendment proposed by initiative as Measure 9 in Oregon in 1992 should be struck down under the Guarantee Clause).

118. *Id.*

Colorado courts had an obligation to strike it down on that basis alone, regardless of whether it was ultimately enacted.

B. Proposition 8 in California

Like Colorado's Amendment 2, Proposition 8 was a state constitutional amendment enacted by initiative that abrogated the previously protected individual rights of a minority group. Like Colorado's, California's courts were constitutionally obligated to review Proposition 8 under the Guarantee Clause before it was placed on the ballot.[119] Because it failed to uphold this constitutional obligation to grant pre-election judicial review under the Guarantee Clause, the California Supreme Court was presented with a state constitutional challenge[120] to a measure enacted by a bare majority of California voters after a heated and contentious statewide election.

On May 15, 2008, in *In re Marriage Cases,*[121] the California Supreme Court ruled that California Family Code provisions defining marriage as between a man and a woman violated the rights of gay and lesbian couples to equal protection under the California Constitution.[122] On June 2, 2008, California's Secretary of State declared that Proposition 8 could be placed on the ballot, and on November 4, 2008, after a contentious statewide campaign in which a combined total of eighty-five million dollars was spent, Proposition 8

119. Pre-election judicial review of voter initiatives for compliance with the single subject rule is generally not available in California absent a "clear showing of invalidity," and the California Supreme Court has stated in dicta in at least one case that pre-election review of compliance with the "nonrevision" requirement is also precluded. Brosnahan v. Eu, 641 P.2d 200, 201 (Cal. 1982) (declining on pre-election review to reach issue of whether proposed initiative complied with single subject requirement). However, the Court has been willing to provide pre-election review for compliance with the nonrevision requirement in at least one case. *See* McFadden v. Jordan 196 P.2d 787 (Cal. 1948) (reviewing proposed voter initiative for compliance with nonrevision requirement), *cert. denied,* 336 U.S. 918 (1949). *See generally*, Douglas C. Michael, *Comment: Preelection Judicial Review: Taking the Initiative in Voter Protection*, 71 CAL. L. REV. 1216 (1983) (arguing that pre-election judicial review for compliance with substantive single subject and nonrevision requirements should be available in California where there is substantial doubt regarding a proposed initiative's constitutionality). This Note contends that pre-election review of voter initiatives for compliance with the Guarantee Clause should be available.

120. Strauss v. Horton, 207 P.3d 48 (Cal. 2009). *See also* cases cited *supra* note 96.

121. *In re* Marriage Cases, 183 P.3d 384, 453 (Cal. 2008).

122. *Id.*

was put before the voters at the general election.[123] Proposition 8 proposed that a single line be added to Article I of the California Constitution: "Only marriage between a man and a woman is valid or recognized in California."[124] Proposition 8 passed with fifty-two percent of the vote.[125]

On November 13, 2008, the City and County of San Francisco and other petitioners filed a petition for a writ of mandate asking the California Supreme Court to compel several named state officers to uphold the court's prior ruling on the constitutionality of same-sex marriage in California,[126] and to prevent these officers from giving legal effect to Proposition 8.[127] The petitioners argued that Proposition 8 exceeded the voter's initiative power of constitutional amendment because it denied a minority group a right that was granted to them under the state constitution, as that constitution was recently interpreted by the California Supreme Court.[128] This fundamental change to individual rights, argued the petitioners, may only be enacted by a constitutional *revision*, and may not be accomplished by a majority of the voters by *amendment*.[129]

VI. The Guarantee Clause and the California Constitution's Revision/Amendment Distinction[130]

The Proposition 8 petitioners' arguments were raised pursuant to the revision/amendment distinction under the California

123. Bob Egelko, *State High Court to Hear Prop. 8 Case March 5*, S.F. CHRONICLE, Feb. 4, 2009, at B-5, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/02/03/BAMB15MMOH.DTL.

124. Amended Petition for Writ of Mandate and Memorandum of Points and Authorities at 3, City & County of San Francisco v. Horton, No. S168078 (Cal. Nov. 13, 2008) [hereinafter Amended Petition].

125. Jesse McKinley, *Top Court in California Will Review Proposition 8*, N.Y. TIMES, Nov. 19, 2008, at A20, *available at* http://www.nytimes.com/2008/11/20/us/20marriage.html?scp=6&sq=California%20Proposition%208&st=cse (stating that measure passed with fifty-two percent of the vote and discussing California Supreme Court's decision to hear challenges to its constitutionality).

126. *In re* Marriage Cases, 183 P.3d at 453.

127. Amended Petition, *supra* note 124. *See also* Bob Egelko, *supra* note 123.

128. Amended Petition, *supra* note 124, at 10.

129. Amended Petition, *supra* note 124, at 9. *See generally* CAL. CONST. art. XVIII, §§ 1–4.

130. This Note does not purport to provide a complete analysis of California's revision/amendment, but only to briefly illustrate the thematic connection between the rights protected by this state constitutional theory and those protected by the Guarantee Clause.

Constitution, but the principles behind this distinction are equally relevant to a challenge brought under the Guarantee Clause. Although the California Supreme Court ultimately rejected the petitioners' arguments for a structural interpretation of the revision/amendment distinction and upheld Proposition 8, the Guarantee Clause presented the court with an alternative basis in the Federal Constitution for finding Proposition 8 unconstitutional before it was placed on the ballot.

In California, a revision requires a two-step process: (1) a constitutional convention, or a two-thirds vote by both houses of the legislature; and (2) ratification of the changes by a majority vote of the electorate.[131] An amendment, on the other hand, effects a less fundamental change to the constitution, and may be accomplished by a simple majority vote of the electorate through the initiative process.[132]

The California Constitution's distinction between constitutional changes that may be accomplished by amendment and changes that may only be accomplished by revision was explained by the California Supreme Court in 1894:

> The very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.[133]

Constitutional changes that would fundamentally alter "permanent and abiding" constitutional principles or fundamental individual rights, such as the interpretation of what equal protection requires, are revisions. Significantly, a revision requires additional procedures, including the republican structural safeguards of deliberative lawmaking in the state legislature, and even the

131. CAL. CONST. art. XVIII, §§ 1–4.

132. CAL. CONST. art. XVIII, § 3.

133. Livermore v. Waite, 36 P. 424, 424,(Cal. 1894) (discussing the difference between revision and amendment and finding that changing the seat of state government could not be accomplished by amendment).

prolonged debates incident to a constitutional convention. These additional structural protections demonstrate the California Constitution's recognition of the connection between the process by which laws are enacted and their substance. The Proposition 8 petitioners recognized, as has the United States Supreme Court, that the structural protections of the process by which laws are enacted are most significant when the individual rights of minorities are at stake.[134]

The initiative process may be fully consistent with a republican form of government where it is used to pass an amendment which affects all citizens in the state equally. An initiative proposing to amend the state constitution to provide a legal right to physician-assisted suicide, for example, would be consistent with the Guarantee Clause because all state citizens would have to live with the consequences of the policy they chose to enact, and because the majoritarian process could be used to reverse the amendment in the same way that it was enacted. Likewise, under the California Constitution's revision/amendment distinction, such an initiative should constitute "an addition or change within the lines of the original instrument,"[135] should be classified as an amendment, and could be enacted by a majority vote through the initiative process.

On the other hand, an initiative that amends a state constitution to uniquely effect the individual rights of a politically unpopular minority group is inconsistent with a republican form of government. Proposition 8, for example, proposed to amend the California Constitution to deny gay and lesbian couples alone the right to marry while preserving this right for all other couples. In this situation, the use of the initiative process is inconsistent with the structural protections inherent in a republican form of government because it bypasses the deliberative lawmaking process and the structural protections that process provides for the individual rights of minorities. Here, the minority group that is uniquely harmed by the initiative also lacks the ability to use the majoritarian process to reverse the initiative measure. As the petitioners argued under the revision/amendment distinction, this type of initiative should be classified as a revision, because it changes the "underlying principles"[136] of the constitution's protections of individual rights, and

134. *See* Plessy v. Ferguson, 16 U.S. 537, 563 (1896) (Harlan, J., dissenting).

135. *Livermore*, 36 P. at 424.

136. *Id.*

may not be enacted by a bare majority of the electorate through the initiative process.

In the Federal Constitution, the connection between minority individual rights and republican political processes is precisely what the Guarantee Clause is designed to protect. In their post-enactment challenge to Proposition 8, the petitioners contested that the revision/amendment distinction was also intended to protect that important connection. The California courts not only failed to uphold their obligation to review Proposition 8 under the Guarantee Clause before it was placed on the November 2008 general election ballot, but also failed to adopt a structural interpretation of the revision/amendment distinction that would have resulted in declaring Proposition 8 invalid because it was a revision to the California Constitution unconstitutionally enacted by the initiative process.

Conclusion

The Guarantee Clause provides critical structural protections for the individual rights of minority voters by ensuring the process of deliberative decision-making by a representative legislature necessary to the republican form of government. Under both the Guarantee Clause itself and the Supremacy Clause, state courts are constitutionally required to adjudicate challenges brought to state ballot initiatives like Colorado's Amendment 2 and California's Proposition 8 that violate this structural protection. Finally, because the constitutional injury to minority voters is inflicted by the placement of their rights on the ballot for a majority plebiscite, and because the balancing test inherent in judicial review for Bill of Rights violations is inappropriate for the Guarantee Clause's structural protections, pre-election judicial review under the Guarantee Clause must be available in the state courts.