

“And to the Republic for Which It Stands”: Guaranteeing a Republican Form of Government

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When the HASTINGS CONSTITUTIONAL LAW QUARTERLY held a symposium to discuss and debate provisions of the California Civil Rights Initiative,¹ it provided what may well have been one of the only public deliberations about the Initiative. Although the symposium was open to the public, most of the California electorate was regrettably unable to attend. And so on election day most California voters, who perhaps will have glimpsed a billboard or bumper sticker urging either a yes or no vote, will go into a polling booth and cast their ballot for or against an initiative about which they know little or nothing. While much can be said about the content of the California Civil Rights Initiative, this Essay is primarily concerned with the pro-

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cess that allows a generally uninformed voting population to determine the fate of such an initiative.

California is by no means unique in its voter initiative procedure,² and this Essay is not unique in its focus on the state initiative process. As the number of constitutionally suspect voter initiatives has increased,³ so too has scholars' attention to the initiative process.⁴ In particular, many scholars have observed that Article IV, Section 4 of the Constitution (commonly known as the "Guarantee Clause")⁵ was meant to protect against the untempered passions of the majority manifested in recent state initiatives.

Most scholars who have addressed this topic suggest only that the Guarantee Clause requires that the Supreme Court take a more active role in reviewing the constitutionality of state initiative measures. In

2. Compare Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1509 n.22 (1990) (twenty-six states have initiative processes that allow voters to enact legislation or state constitutional amendments directly) with Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733, 735 (1988) (twenty-two states).

3. In recent years, state voter initiatives have provided a ready forum for a number of discriminatory attacks against minority groups. See, e.g., *Romer v. Evans*, 116 S. Ct. 1620 (1996) (striking down a Colorado proposition based on animus against homosexuals); *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 951 (9th Cir. 1995) (Brunetti, J., concurring) (concluding that Arizona's English-only initiative is a thinly disguised attempt to disenfranchise non-English-speaking minorities), *cert. granted*, 116 S. Ct. 1316 (1996); Tony Miller, Acting Secretary of State, Proposition 187, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION, NOV. 8, 1994, at 50-55, 91-92 (denying medical, social, and educational services to residents lacking appropriate immigration status); Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 19 (1993) (describing antihomosexual initiatives in Oregon).

4. See Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527 (1994); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994); Eule, *supra* note 2; Fountaine, *supra* note 2; Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994); Linde, *supra* note 3; Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); David Schuman, *Correspondence: A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992); Thomas A. Smith, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 68 N.Y.U. L. REV. 870 (1993); Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208 (1987); Douglas H. Hsiao, Note, *Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic*, 41 DUKE L.J. 1267 (1992); Comment, *Judicial Review of Initiative Constitutional Amendments*, 14 U.C. DAVIS L. REV. 461 (1980); Debra F. Salz, Note, *Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court*, 62 GEO. WASH. L. REV. 100 (1993).

5. The Guarantee Clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, §4.

contrast, we argue in this Essay that the Guarantee Clause establishes a per se prohibition against state initiatives. Part I of this Essay briefly examines the historical origins of the Guarantee Clause and the Founders' apprehensions of direct democracy. Part II observes how modern state initiatives provide contemporary illustrations of the Founders' philosophical concerns about direct democracy. Part III concludes that state initiative measures constitute per se violations of the Guarantee Clause and, accordingly, must be summarily rejected. In so concluding, this Essay rejects proposals that courts review direct legislation or certain genres of direct legislation under heightened scrutiny.

I. Taming the Passions of the Majority: Madison's Foresight

Although absent from most academic scholarship on the Guarantee Clause,⁶ the idea that state initiatives are per se violations of that clause is not original. This thesis finds its origins in James Madison's admonitions about the threat that factions pose to a democracy.

In *The Federalist No. 10*, Madison explained his preference for a republic, "a government in which the scheme of representation takes place[.]"⁷ over a "pure democracy," which he defined as "a society consisting of a small number of citizens, who assemble and administer the government in person."⁸ This was no idle preference, but one derived from Madison's concern about the dangers of factions. In a pure democracy, Madison warned:

[A] common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of the government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual.⁹

6. Only a few authors have suggested that the Guarantee Clause compels the conclusion that state initiatives are per se unconstitutional. See Fountaine, *supra* note 2, at 738; Hsiao, *supra* note 4.

7. THE FEDERALIST NO. 10, at 133 (James Madison) (Benjamin F. Wright ed., 1961) [hereinafter Madison, THE FEDERALIST NO. 10].

8. *Id.* Madison explained:

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

Id. at 133-34.

9. *Id.* at 133.

Madison thus believed that the “factious spirit [that] has tainted our public administrations”¹⁰ was most dangerous when there was nothing to check its excesses.¹¹

Madison proposed the republican form as a check on the passions of a potentially factious majority.¹² Representative decisionmaking offered a mechanism by which public views could be refined and enlarged. In a republic, Madison believed, “the superior force of an interested and overbearing majority”¹³ could be tempered by the reasoned judgment of representatives acting for the common good.

Although Madison’s eloquent defense of the republican form is the one most often quoted, Madison was not alone among the Constitution’s Framers in his apprehension of direct democracy and his preference for representative government. Alexander Hamilton preferred the republican form because, as he put it, when “the interests of the people are at variance with their inclinations,”¹⁴ elected representatives are duty bound to withstand people’s temporary delusions. Indeed, some historians contend that the delegates at the Constitutional Convention were more concerned about an excess of populism in the state governments than they were about the weakness of the Articles of Confederation.¹⁵

The historical record indicates a consensus among the Framers: A republican form of government was the best “safeguard against the

10. *Id.* at 130.

11. Fisher Ames offered the following observations on popular passions in the context of congressional elections:

I would not have the first wish, the momentary impulse of the publick mind, become law. For it is not always the sense of the people, with whom, I admit, that all power resides. On great questions, we first hear the loud clamours of passion, artifice, and faction. I consider biennial elections as a security, that the sober, second thought of the people shall be law.

Fisher Ames, Speech in the Convention of Massachusetts, on Biennial Elections (Jan. 1788), in *WORKS OF FISHER AMES* 24 (John T. Kirkland ed., 1809).

12. Of course, the United States Constitution is replete with institutional checks and balances designed to frustrate the temporal passions and prejudices of the governors. The mandate of a republican form of government in the states is just one check, a check aimed at the people when they become the lawmakers *en masse*.

13. Madison, *THE FEDERALIST* No. 10, *supra* note 7, at 130.

14. *THE FEDERALIST* No. 71, at 459 (Alexander Hamilton) (Benjamin F. Wright ed., 1961). Hamilton added as follows:

The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of 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.

Id.

15. Eule, *supra* note 2, at 1523 & n.80.

tyranny of [majoritarian] passions."¹⁶ Representative decisionmaking was considered so critical that it was not only instituted at the federal level but guaranteed at the state level.

Despite this guarantee, lawmaking by initiative is now a popular practice in many states. The question, therefore, is whether and how the Framers' fears of direct democracy are pertinent to the current practice of state initiative decisionmaking.

II. Modern State Initiatives: The Incarnation of Madison's Fears

Although modern initiative practices were virtually unknown to the constitutional delegates,¹⁷ "everything about the tone of the Convention suggests that they would have looked upon such a scheme 'with a feeling akin to horror.'"¹⁸ Assumptions about the Framers' beliefs alone may not be sufficient justification to condemn what has become a very popular practice. However, original intent and original constitutional structure are not the only justifications for finding that state initiative processes are per se unconstitutional. The great strength of our Constitution has been its capacity to evolve and thus respond to new circumstances. Good principles and reasons sometimes support changing interpretations over time.¹⁹ But in the case of the Guarantee Clause and its preference for the republican form, time has only demonstrated the Founders' wisdom.

Although we believe the initiative process, especially in California, exemplifies the dangers the Founders associated with pure democracy, counterexamples are always available. Government is an

16. THE FEDERALIST NO. 63, at 415 (James Madison) (Benjamin F. Wright ed., 1961).

17. Eule, *supra* note 2, at n.82.

18. *Id.* at 1523 n.83 (quoting Charles Beard, *Introduction to DOCUMENTS ON THE STATE-WIDE INITIATIVE, REFERENDUM AND RECALL* 29 (Charles Beard & Birl Shultz eds., 1912)).

19. Examples abound of constitutional interpretations that have evolved to accommodate more modern contexts than the Founders were capable of imagining. For example, "interstate commerce" as the Founders understood it, obviously did not anticipate that electronic transfers on an "information superhighway" would be one of the modes of transportation that phrase would come to govern. *See, e.g., Pic-a-State Pa., Inc., v. Reno*, 76 F.3d 1294, 1303 (3d Cir. 1996); *United States v. Kimbrough*, 69 F.3d 723, 726 (5th Cir. 1995). Similarly, "equal protection" means something very different today than it did in the post-Civil War era in which it was drafted. "Equal protection" has expanded as our Nation has expanded its understanding and appreciation of the meaning of equality. *See Owen Fiss, The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After Brown v. Board of Education*, 41 U. CHI. L. REV. 742 (1974); J. Harvie Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

imperfect business, and we do not mean to suggest that the republican form invariably produces wise and prudent outcomes.²⁰ Our thesis rests on more modest and realistic premises. We analyze the modern context merely to determine whether the original premises and logic that informed the construction of the constitutional structure remain in force. What follows is an analysis of the Founders' still accurate premises, as found in the context of state initiatives, and anecdotal explanations of additional problems presented by modern initiative processes that could not have been anticipated by the Founders.

A. Absence of Deliberation

The starting point for any evaluation of the relative merits of direct democracy is the observation that legislative decisionmaking typically involves complex questions of public policy. In part, Madison's preference for representative democracy was based on his belief that such complex questions are refined and enlarged when they are subjected to discussion and debate by a representative body. Deliberation expands the diversity of views heard and affords a more rounded and fuller response to complex and difficult policy matters.

Some commentators argue that legislation enacted by representative bodies is just as unsound as that enacted by initiative, or that the criticisms of direct legislation cannot be supported with sufficient empirical data.²¹ Madison did not express such a categorical condemnation of pure democracy or naive endorsement of representative democracy.²² Indeed, while empirical conclusions regarding the relative merits of each method in practice would undoubtedly be interest-

20. Rather, we tend to agree with P.J. O'Rourke's admonition: "Feeling good about government is like looking on the bright side of any catastrophe. When you quit looking on the bright side, the catastrophe is still there." P.J. O'ROURKE, *National Busybodies*, in *PARLIAMENT OF WHORES* 49, 49 (1991).

21. See, e.g., Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 *CHI.-KENT L. REV.* 707, 709-10 (1991) ("[I]t is not at all clear that the median plebiscite voter is systematically inferior to the median representative."); Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 *CORNELL L. REV.* 527, 626 (1994) (arguing that "one could pick and choose among [the thousands of plebiscites] to illustrate an argument either way").

22. Madison described a constitutional preference for a process that was the lesser of two evils, not an ultimate panacea. In fact, Madison recognized that the effect of representative government may be inverted: "Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people." Madison, *THE FEDERALIST* NO. 10, *supra* note 7, at 134. Madison suggested that the solution to the problem of factious representatives is the preference for an extensive republic over a small one. *Id.* The possibility that representatives could also be influenced by factions did not affect Madison's preference for representative government.

ing, they are unnecessary: No one could seriously contend that complex problems are better solved in the absence of discussion and debate. And no matter how creative the suggestions from defenders of pure democracy, the simple truth is that representative lawmaking includes, as part of its process, formal deliberation and debate. The state initiative process does not.

B. Absence of Opportunity to Compromise

Closely related to the problem of lack of opportunity for deliberation and time for refinement of ideas is the fact that initiatives “offer only binary choices, but the set of solutions to a given problem is seldom so limited. The fact that we restrict ourselves to two alternatives should not obscure the fact that we start off with many more.”²³ Initiative lawmaking leaves no room for compromise or amendment. Consequently, the initiative process “merely aggregate[s] individual opinion, without any particular structural provision for dialogue or dialectic.”²⁴ Perhaps the greatest strength of democracy is lost when it is exercised in its pure form. The democratic principle presumes that a government “of the people and by the people” will craft laws with the subtlety to be a benefit “for the people.”²⁵ The initiative process results in polarization of views. The subtlety and nuance that typically results from compromise is annulled by this process.

Additionally, the reduction of an infinite number of alternatives to a finite number of choices on an initiative ballot also results in a phenomenon dubbed “voter overload.”²⁶ When voters are required to choose the “least bad” alternative, the true preferences of the majority are distorted and irrational decisionmaking often results.²⁷ Examples of voter overload demonstrate the Founders’ intuitive observation that it is better to make decisions with a full appreciation of all various alternatives.

23. Eule, *supra* note 2, at 1520-21.

24. Charlow, *supra* note 4, at 535-36 & n.31.

25. Pure democracy too closely illustrates Oscar Wilde’s caustic observation: “Democracy means simply the bludgeoning of the people, by the people, for the people.” CHARLES HENNING, *THE WIT & WISDOM OF POLITICS* 59 (1989) (quoting OSCAR WILDE, *THE SOUL OF MAN UNDER SOCIALISM* (1895)).

26. See Hsiao, *supra* note 4, at 1284-85 & n.105 (citing BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 203 (1984)).

27. *Id.*

C. Voter Confusion

One factor that Madison could not anticipate in forming his preference for republican over nonrepublican forms of government is the modern initiative process's potential to confuse the voting population. In the initiative process, formal deliberation and debate is in effect replaced by bumper-sticker logic and thirty-second television sound-bites. These media do not provide meaningful information. Instead, they furnish a perfect opportunity for "manipulative campaigns designed to oversimplify the issues and appeal to the electorate's worst instincts."²⁸ It is doubtful whether even the more balanced and comprehensive ballot pamphlets can do much to correct the problems of voter ignorance and deception. Educating the typical voter about the complexities of issues involved in a particular initiative requires more time and commitment than most voters can muster.²⁹

Without considering the specific provision of the measure, voters in search of decisionmaking shortcuts may attempt to align their vote with a particular sponsor or opponent to a ballot measure, or to vote for or against an issue based on the initiative's title, without considering the specific provisions of the measure. These voter shortcuts, however, are not well designed to lead to salutary outcomes. Names of initiatives and names of groups supporting and opposing such initiatives are often unreliable guides. Examples of deceptive advertising abound in the most recent California election and other recent state elections. A provision concerning the hunting of mountain lions was on the California ballot.³⁰ The two groups supporting and opposing the measure were "Californians for Balanced Wildlife Management" and "California Wildlife Protection Coalition."³¹ What these names cleverly concealed from even the most conscientious voter was which group supported the killing of mountain lions and which group wanted to save them.

Lest the reader think that only mountain lions have generated such deceptive sponsor titles, "Northwesterners for More Fish" is a

28. Eule, *supra* note 2, at 1556.

29. *Id.* at 1508-09 (describing a phone-book sized "pamphlet" full of microscopic, convoluted descriptions of various initiatives, bonds, and proposed constitutional amendments that were beyond his comprehension). Eule also observed, "[A] 1976 Massachusetts survey revealed that persons in the lowest income category were the most likely to state that they could not vote on a proposition because it was too long and they were unable to assess what a yes or no vote would mean." *Id.* at 1515 n.45 (citing D. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 116 (1984)).

30. Bill Jones, Secretary of State, Proposition 197, in CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION, MARCH 26, 1996, at 28-31, 59-61.

31. *Id.*

group of utilities and companies interested in clear cutting and lower water quality control standards.³² “Friends of Eagle Mountain,” a group formed to further the interests of a mining company, “wants to create the world’s largest landfill in an abandoned iron ore pit.”³³ The “National Wilderness Institute” wants to roll back wetlands regulation in the Endangered Species Act.³⁴ And, of course, it cannot be overlooked that the “California Civil Rights Initiative,” whose purpose is to curtail policies and programs designed to benefit underprivileged minorities, borrowed its name from a movement designed to implement some of those very same policies and programs.³⁵

Confusion caused by deceptive rhetoric has been exacerbated by another “recent innovation in obfuscation.”³⁶ Competing interest groups, no longer satisfied in manipulating voters on their way to the polling booth, have turned to manipulation of voters through the ballot itself. Now competing propositions are placed on the same ballot.³⁷

To be sure, efforts at voter manipulation are not always successful,³⁸ and legislators are certainly capable of being duped. These examples demonstrate the risks of manipulation and confusion when the

32. Jane Fritsch, *Name-Calling Environmental Groups Say Foes Try to Sound Friendly*, N.Y. TIMES, March 25, 1996, at A1.

33. *Id.*

34. *Id.* at A8.

35. Bill Jones, Secretary of State, Proposition 209, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION, NOV. 5, 1996 (forthcoming Sept. 1996).

36. Eule, *supra* note 2, at 1517.

37. *See id.* Professor Eule described how this tactic was used effectively by Occidental Petroleum:

The Los Angeles City Council had entered into a contract with Occidental giving the company the right to drill for oil beneath one of the city’s coastal communities. Some concerned citizens collected signatures for an initiative (Proposition O) designed to bar the drilling. Occidental qualified a competing initiative (Proposition P) which incredibly appeared to oppose offshore drilling. Only the most perceptive of readers could grasp the hidden intent of Occidental’s effort—to mandate onshore drilling. Occidental then compounded its deception by advertising Proposition P as environmental legislation and entitling it “The Los Angeles Public Protection, Coastal Protection, and Energy Resources Initiative.” It enlisted a former Governor, Edmund “Pat” Brown, to write a letter to the voters. Brown urged the defeat of Proposition O because, unlike Proposition P, it “contains not a single word in opposition to offshore oil drilling.” A legal effort to strike Occidental’s measure from the ballot as fraudulent was denied by a state court judge, who unwittingly damned the entire California process of direct democracy by concluding that Proposition P was “probably no more misleading than any other initiative.”

Id. at 1517-18 (citations omitted).

38. Charlow, *supra* note 4, at 628-29 (noting that in Professor Eule’s example of the California smoking referendum, the powerful smoking lobby lost, despite the excesses of its campaign).

decisions are made without proper information and the process lacks formal procedures for deliberation and debate.

D. Measuring “Legislative” Intent

Another problem with lawmaking direct from the people concerns how the courts are to discern the underlying intent or purpose of the law. When courts are presented with cases in which claimants challenge laws as violations of their individual rights, courts must weigh the depth of the rights claimed against government’s interest in enacting the law. The government’s interest is usually inferred from the legislative intent of the statute together with contextual clues on which courts might depend. Similarly, when courts struggle with construing ambiguous provisions of laws, legislative intent is paramount. But how is the collective intent of a voting populace to be measured? The difficulties in gauging voter intent are exacerbated when whatever “voter intent” exists is hidden by a subterfuge of voter manipulation and deceptive advertising.³⁹

III. Unconditional Enforcement of Structural Constitutional Provisions: No Room for Balancing

If direct democracy is an ill against which the Constitution sought to protect, the question remains how that protection is to be effected. By letting the political process take care of itself?⁴⁰ By intervention of the courts? If so, which courts, state or federal?⁴¹ Should courts merely engage in a more exacting review of direct legislation, or hold that all direct legislation is invalid as a per se violation of the Guarantee Clause? The proposed solutions are as bountiful as the law review articles on this subject. This Essay proposes a simple solution based on the purpose and structural function of the Guarantee Clause.

39. Referring to Professor Eule’s example, a court evaluating voter intent of Proposition P sponsored by Occidental Petroleum might conclude, based on a review of the advertising literature, that voters intended to enact environmentally protective legislation. The court might then have a difficult time, in light of this perceived purpose, if asked to interpret the provisions mandating onshore oil drilling. See Eule, *supra* note 2, at 1517-18.

40. See Charlow, *supra* note 4, at 626-29 (doubting that opponents of direct democracy have made a convincing case about the dangers of the initiative process and arguing that the solution to existing problems is to “[l]et the political process take care of itself”).

41. See Linde, *supra* note 4, at 728 (arguing that despite the Supreme Court’s holdings that it is nonjusticiable, state courts are still free to consider Guarantee Clause challenges and state judges “are specifically bound to apply the Constitution as the supreme law of the land”).

Federal courts are the traditional forum in which constitutional wrongs are set right.⁴² In the context of the Guarantee Clause, however, the Supreme Court has presented a formidable obstacle to federal court review of any Guarantee Clause challenge by continually holding that “questions arising under [the Guarantee Clause] are political, not judicial, in character, and thus for the consideration of Congress, and not the courts.”⁴³ The specific rationales supporting the Court’s unwillingness to decide Guarantee Clause challenges have been criticized by many commentators.⁴⁴ More recently, the Court’s obstinance appears to be softening.⁴⁵ This Essay does not directly address the justiciability questions. Instead, in anticipation that the Court will ultimately assume its responsibility in reviewing Guarantee Clause challenges, this Essay addresses the substantive issues the Court will face at that time.

As envisioned by Madison and the other constitutional Framers, the guarantee of a republican form of government is a structural provision designed to prevent the instability and oppression of voting minorities associated with direct democracy. The language of the Guarantee Clause indicates its structural purpose. The Clause requires a state process of decisionmaking that checks factious majorities. It also describes a relationship between the federal government and the states in which the federal government acts as guarantor to ensure that the states adhere to their republican obligations. Any lingering ambiguities about the structural purpose of the Guarantee

42. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 15 (1962) (arguing that “the Framers . . . expected that the federal courts would assume a power—of whatever exact dimensions—to pass on the constitutionality of actions of the Congress and the President, as well as of the several states”).

43. *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 79-80 (1930); see also *Pacific States Tel. & Tel. v. Oregon*, 223 U.S. 118 (1912) (refusing to adjudicate a claim that a law enacted through the Oregon initiative process was unconstitutional under the Guarantee Clause).

44. See, e.g., Fountaine, *supra* note 2, at 766-68 (arguing that commitment to another branch of government is not a tenable basis for maintaining clause as nonjusticiable); Berg, *supra* note 4, at 217 (concluding that “textual commitment” to another branch is weak support for nonjusticiability and has been abandoned by the Court).

45. Although the Court ultimately declined to reach the merits of the Guarantee Clause challenge in *New York v. United States*, 505 U.S. 144 (1992), it indicated that it may be rethinking its traditional approach to the Guarantee Clause as nonjusticiable. Writing for the Majority, Justice O’Connor noted that “[m]ore recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances.” *Id.* at 2433 (citations omitted).

Clause are dispelled by even the most cursory reference to the Framers' defenses of the republican form.⁴⁶

Few dispute that "republican form" as described in the Guarantee Clause means representative, not direct, democracy.⁴⁷ Why then have so many scholars concluded that the most blatant example of direct democracy, direct vote by initiative, is not a per se violation of the Clause?

The conclusion that the Guarantee Clause is not violated by state initiatives has its roots in two faulty premises. The first errant premise begins with the observation that other representative elements of state governments continue to exist. Because direct legislation merely supplements those representative elements—in other words, because initiative lawmaking is only ancillary to those institutions—these scholars argue, it is not a per se violation of the Guarantee Clause.⁴⁸

This cramped interpretation ignores the purpose and nature of the Clause. As a structural provision, the Guarantee Clause prescribes a process of lawmaking. It does not guarantee against a specific result, and it is not a general rule of thumb that can be deviated from as long as the primary structure of state governments remains representative. When only some of a state's laws are directly enacted, the threats of factional passions may be less pervasive, but they are no less dangerous. Nor are they less violative of the Guarantee Clause. The importance of this conclusion is nowhere more apparent than in those instances in which the initiative process enacts laws that are immune from legislative renunciation, as is the case with popular amendments to the California Constitution.⁴⁹

46. See generally THE FEDERALIST NOS. 10, 43 (James Madison), No. 79 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

47. For a dissenting, though widely respected, opinion, see Akhil R. Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 756-59 (1994) (concluding "that the Anti-direct democracy reading of the Republican Government Clause of Article IV is 'not proven'").

48. See, e.g., Eule, *supra* note 2, at 1544 (rejecting the notion that initiatives are per se unconstitutional because they serve only an ancillary role); Linde, *supra* note 3, at 26 (criticizing early judicial opinions for concluding that a state government's entire form was either republican or not, "and if not, then the validity of all acts of the entire government were [sic] threatened"). Although Professor Linde criticizes the flawed reasoning that led the Oregon Supreme Court to conclude that the general practice of lawmaking by initiative is not a nonrepublican form, he nevertheless stops short of concluding that initiative processes are unconstitutional in principle. See *id.* at 41-45. Instead, he concludes that, while constitutional in principle, initiative lawmaking nevertheless violates the Guarantee Clause when it in fact demonstrates prejudicial animus. *Id.*

49. We do not mean to imply that the Guarantee Clause prescribes state citizens' right to amend state constitutions by a supermajority.

A second error that has led scholars astray is a tendency to misconstrue the Clause's structural protection for voting minorities as solely a substantive protection for discreet and insular minorities and for individual liberties.⁵⁰ Undeniably, representative lawmaking reduces the likelihood that unpopular minorities and individual liberty interests will suffer oppression from a wanton, unchecked majority. However, the dangers of popular government, and the Founders' concern with it, extend beyond possible infringements on individual rights. As Madison commented, "the form of popular government . . . enables [a majority faction] to sacrifice to its ruling passion or interest *both the public good and the rights of other citizens.*"⁵¹ Put another way, the Founders preferred the republican form because popular democracy put not only individual liberties but also "the public good" at risk.⁵²

Madison recognized the threat posed by majority factions' propensity to sacrifice the public good for self-interest:

Complaints are everywhere heard . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.⁵³

While the threat a majority faction poses to individual rights may be more odious, its threat to the public good is probably more prevalent. Many, if not most, legislative decisions involve mundane quandaries that, while bound up with the public good, are devoid of questions that impinge upon the balance between government interests (expressed as majority will) and individual liberties. Governments must decide how much tax to levy, the proper days for collection of garbage, the allocation of funding for schools and social programs, infrastructure planning, environmental policies, and the like. In each of these contexts, there will be a majority and a minority. Most often the minority involved will be a simple voting minority, not one of the dis-

50. See, e.g., Chemerinsky, *supra* note 4, at 851 ("[T]he Guarantee Clause should be regarded as a protector of basic individual rights. . . ."); Linde, *supra* note 3, at 41-43 (proposing five tests for courts to use to determine when initiative measures carry indicia of prejudicial animus and thus run afoul of the Guarantee Clause); Salz, *supra* note 4, at 117 ("A Guarantee Clause challenge to a discrimination-prone initiative can provide a substantive safeguard for the rights threatened by this type of legislation.").

51. Madison, THE FEDERALIST NO. 10, *supra* note 7, at 132 (emphasis added).

52. *Id.*

53. *Id.* at 129-130.

creet and insular variety.⁵⁴ By protecting these voting minorities, the Guarantee Clause ensures a political process that will be more responsive to the public good. Indeed, Madison hypothesized that in a republic, "it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves."⁵⁵

In his survey of American society and politics, Alexis de Tocqueville provides a good, if somewhat antiquated, illustration of Madison's concern about majority factions displacing the public good:

In America there is no law against fraudulent bankruptcies, not because they are few, but because they are many. The dread of being prosecuted as a bankrupt is greater in the minds of the majority than the fear of being ruined by the bankruptcy of others; and a sort of guilty tolerance is extended by the public conscience to an offense which everyone condemns in his individual capacity.⁵⁶

Although this example of majoritarian self-interest has since been defeated by more principled bankruptcy laws, other examples of majority self-interested legislation are plentiful.⁵⁷

While individual liberties and unpopular minorities enjoy the benefits of the Guarantee Clause, those benefits are only part of the overall purpose of the Clause. One of the most notable accomplishments of the Constitution is its solutions to the threats that majoritarian tyranny poses to individual liberty. The Constitution had other purposes too, including the establishment of a stable federation, composed of states that rule themselves with a common standard of legitimate government.⁵⁸ Commentators who conclude that initiatives

54. See Charlow, *supra* note 4, at 534 n.27 (using the phrase "'electoral minorities' . . . to emphasize that it is not minorities in the modern colloquial sense that were to be the particular beneficiaries of the Framers' scheme, but rather the structural safeguards instituted by the Framers were to benefit any group that would not get the result it desired if a simple popular majority vote were taken").

55. Madison, THE FEDERALIST No. 10, *supra* note 7, at 134.

56. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 239 (Phillips Bradley, ed. & Francis Bowen, trans., Vintage Books 1945) (1862).

57. Perhaps the most blatant and regrettable example of popular democracy's self-interest is California's Proposition 13. Proposition 13 enacted an acquisition-value taxation system that benefitted longer-term property owners over those purchasing later. By 1992, when the United States Supreme Court rejected an Equal Protection challenge to the law, some home owners were paying five times the amount in property taxes as their neighbors whose property was of equivalent value. See Nordlinger v. Hahn, 112 S. Ct. 2326 (1992). Space prohibits an extended diatribe on the effect Proposition 13 has had on California's educational system. Suffice it to say that this initiative illustrates well the danger in direct democracy that the people, if it were within their means, would vote themselves a raise.

58. In describing the purpose of the Guarantee Clause, Madison noted that "[g]overnments of dissimilar principles and forms have been found less adapted to a fed-

violate the Guarantee Clause only when they implicate individual liberties fail to recognize the Clause's broader purpose, which is to ensure stable, legitimate governments in the individual states.

Understanding why these commentators' premises are faulty also helps explain why their proposed solution, heightened scrutiny of direct legislation, is inappropriate. Heightened scrutiny is a form of balancing. With individual rights challenges to legislative pronouncements, the Court balances the depth of the right at stake with the strength of the government interest.⁵⁹ But in the case of the Guarantee Clause, there is nothing to balance. Structural provisions do not have competing interests that can be balanced. The question of whether a state government that allows an initiative process is republican in form must be decided categorically. To be sure, some governmental forms will reside closer to the line than others, for the boundaries of the republican form itself are ambiguous. Hence, a process whereby voters send proposed legislation to the state legislature for action presents very different concerns than does the California initiative process, which permits amendment of the state constitution by direct vote of the majority. Any ambiguity, however, must be resolved definitionally and systemically. Unlike laws that infringe individual liberty, the guarantee of a republican form of government is a guarantee of a mode of decisionmaking intended to produce both satisfactory process and salutary results. The protection afforded by the Guarantee Clause, however, does not diminish the need for substantive review when representational democracy infringes individual liberty. We pray for enlightened governors, but prepare for despots. The republican form encourages enlightenment through deliberation; the Bill of Rights provides the last defense for liberty.

IV. Conclusion

The Guarantee Clause mandates that the states govern themselves in a manner that reduces the risk that individual rights or the public good will be subverted, and it ensures a federal remedy should the states stray from that mandate. It guarantees a process of deci-

eral coalition of any sort, than those of a kindred nature." *THE FEDERALIST* No. 43, at 312 (James Madison) (Benjamin F. Wright ed., 1961).

59. For example, in *Roe v. Wade*, 410 U.S. 113 (1973), the Court balanced the woman's right to reproductive choice against the strength of the state's interest in protecting the woman's health and the life of the fetus. Similarly, in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court balanced the right of the press to print freely, even if that freedom included the possibility of printing false or defamatory statements, against the government's interest in protecting the reputations of public officials.

sionmaking better tailored to avoid the passions and prejudices of the day. If the Supreme Court decides to consider Guarantee Clause challenges, it will have many delicate decisions to make. For example, are local initiatives and referenda violative of the Guarantee Clause? What about voter recalls of elected representatives? Apportionment schemes for voting districts? But the one issue that should not cause much consternation for the Court is the unconstitutionality of state initiative processes. The Founders were clear in their preference for representative democracy over direct democracy, and they clearly expressed their preference in a structural provision in the Constitution. If there is any doubt left regarding the Founders' wisdom in this regard, the Court need only observe the results of modern state initiative processes.