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# *709 WHO IS RESPONSIBLE FOR REPUBLICAN GOVERNMENT?

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## I.

At a conference on state constitutions five years ago, I raised the question what a republican form of government demands of a state's lawmaking process. Specifically, when does initiative lawmaking, without participation of any representative institution, fail as republican government? [FN1] The questions may have seemed academic to some, but they are not academic today. They are being pressed upon election officers and state courts in response to a recurrence of an old phenomenon, the use of initiatives to force communities to choose sides between dominant majorities and identifiable minorities in a way that elected representatives seek to avoid.

The founding generation committed the states to republican governments and committed the nation to guarantee them. [FN2] The Guarantee Clause sounds all the great themes: federalism, republicanism, the allocation of powers to interpret and to act, the vitality of principles over time. Can an organization of states succeed without a common standard of legitimate government? Is such a standard law for the members if the organization does nothing to give it substance? What is the better way to enforce the standard--expulsion of the errant state, intervention, or judicial review of specific issues? The questions live in twentieth century history from the League of Nations, the United Nations, the organizations of American States and of African Unity, to the most recent applications for membership in the European Community and *710 NATO. Most important for our purposes, what conception of republican government did the Constitution enshrine?

These are tempting themes for theorists. But theory must be turned into operative principles to function as constitutional law. Lawyers must translate the principles into rules for specific applications, and they must prepare to answer questions about the potential scope of their proposed formulas. So should theorists. My focus today is on lawyers' law, and on separating law from assumptions that lawyers, like other people, take as given when a question goes unexamined.

The answers I offer are consistent with a principled theory of republican government, though, as in all law, one may argue about specific instances. In brief, the Guarantee Clause precludes misuse of initiatives for two purposes. One is to force a plebiscite on measures of popular passion or self-interest, the two dangers which were meant to be controlled by the deliberative processes of representative government. The other misuse of initiatives is to enact ordinary laws (as distinct from rules for and limits on government) in the form of constitutional text so as to insulate a law from change by elected lawmakers as well as from review of its constitutionality. But before turning to substance, let us examine who is to make the translation from theory to practice, to turn the guarantee into constitutional law.

We start from two propositions. First, no one questions that the Constitution obligates each state to maintain a republican form of government. The Supreme Court so stated in 1874. [FN3] It was the states' core constitutional obligation, long before the Reconstruction amendments added new duties to respect individual rights. Second, the Supreme Court has declared that it will not decide what republican government demands. [FN4] Within the federal government, the Court said, the guarantee is allocated to Congress. [FN5] This has nothing to do with who is responsible for republicanism within the state. To say that the state has a duty means that it is the duty of the states' officials, through whom the state acts and who swear to uphold the Constitution of the United States. And because the constitutional duty to maintain republican government is the supreme law of the land, the judges in every state are bound to apply ***711** it, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [FN6] State judges are left to decide an issue of federal law (an issue "arising under this Constitution," in the words of the federal judicial article) without the Supreme Court's help, as long as the Court holds to that view. [FN7]

The federal law in question, however--the duty to govern by republican institutions--concerns the political system of which the state's officials themselves are a part. Whatever they personally think of a feature of that system, they may believe that their official role, as well as their perception of political imperatives, obliges them to defend rather than to test its constitutionality. Legal challenges to initiated ballot measures can be made to appear as direct attacks on the people, the same people who elect the officials. When asked about one challenge to the use of initiatives against minority rights, Oregon's chief elections officer, the Secretary of State, is quoted as saying: "I see my job as upholding the law. The law suggests you can subject people's rights to a vote," even, he said, if it were a vote to reinstitute slavery. [FN8] "American history is littered with people going after the rights of others." [FN9]

Such legal judgments ordinarily will be made by an attorney general rather than an elections officer, who may have only the "ministerial" task to verify petition signatures. [FN10] Most attorneys general, however, also are elected. When acting as advocates, they are used to defending the state in constitutional litigation even when they doubt the validity of the state's law. How will they see their role as legal advisers when the Supreme Court has not decided a federal claim and says that it will not decide it? Sad to say, state officials are as unlikely to take responsibility for the federal Guarantee Clause as they would for federal due process, equal protection, or black voting rights, if the Supreme Court had declined to review claims under the Fourteenth or Fifteenth Amendments on grounds that these amendments contemplated congressional enforcement. [FN11] ***712** In private, they might describe the challenge as an invitation to political suicide.

Nonetheless, state courts and officials disqualify proposed initiatives for a variety of legal reasons, such as that the measure is not a "law", [FN12] that it contains more than one subject or revises rather than amends the state constitution, [FN13] that it departs from prescribed procedure, [FN14] and sometimes on grounds that the measure would be unconstitutional if enacted. [FN15] One 1990 case acknowledged that for some measures the initiative process is incompatible with republican government, but courts so far have evaded these new claims. [FN16] One reason doubtless is that the few judicial decisions on the subject are old, sparse, rhetorical, and

often confused. Left unexamined for eighty years, these few decisions have supported a myth that government by plebiscite can never be unrepublican. Yet, then and now, many state cases recognize, at a minimum, that claims under the Guarantee Clause present genuine legal issues for decision. When we treat these issues as questions of law rather than of politics and ideology, we see how little has been decided, what has been confused, and how much demands serious examination and decision. To separate the law from the myth lawyers must do what they do in other fields: look beyond the opinions to what the old cases actually decided, what counsel argued and failed to argue, and what in the opinions was no more than the rhetoric of the day.

***713** II.

That professional task, in fact, is easily managed, once the few cases defending statewide initiatives under the Guarantee Clause are disentangled from cases involving referenda or local initiatives. The story begins in 1904, two years after the Oregon Constitution adopted the populist program of initiatives, referenda, and recall of elected officials. The Oregon Supreme Court seized the first opportunity to declare that direct lawmaking by the voters was consistent with a republican form of government. The case, *Kadderly v. City of Portland,* [FN17] involved no initiative or referendum but a dispute whether the new amendment delayed the effective date of a statutory charter to allow time for a potential referendum. The city won that dispute, but it had made a half-hearted argument that the whole scheme violated the Guarantee Clause, and this allowed the court first to publish a defense of Oregon's innovation before ruling for the city on other grounds.

Legally speaking, the defense was dicta. But it deserves careful attention, because the *Kadderly* opinion is the origin of the myth that statewide initiatives are invulnerable to attack under the Guarantee Clause. Courts throughout the West rejected such attacks by citing *Kadderly,* usually in cases from local governments. [FN18] Few decisions actually involved statewide initiatives, and none made an independent analysis of the Clause. Legally, if not politically, the basic issue is open in most states.

When a statewide initiative first reached the Oregon Supreme Court in 1909, that court rejected a challenge under the Guarantee Clause by simply referring to the views it stated in *Kadderly*. The initiative had enacted a gross receipts tax on telephone companies, and a telephone company's unsuccessful attempt to gain Supreme Court review gave us the only case on the Guarantee Clause of which most constitutional lawyers and students have ever heard. The failure reinforced the myth.

***714** What the Supreme Court did in *Pacific Telephone & Telegraph Co. v. Oregon* [FN19] was to dismiss the company's writ of error. The Supreme Court did not hold that Oregon's initiative was compatible with republican government. It denied its own jurisdiction to examine that issue, drawing a faulty analogy to an old and very different precedent, a factional struggle to be the recognized government of Rhode Island after the Dorr Rebellion. [FN20] The Court did not deny the jurisdiction of the Oregon court to decide the telephone company's claim under the Guarantee Clause. Nor did it tell state courts how to decide the merits of such claims. [FN21] It neither vacated nor affirmed the Oregon court's decision. The Supreme Court's dismissal for lack of jurisdiction holds that a contrary decision by a state court would equally be beyond the Court's review.

Chief Justice White's opinion in *Pacific Telephone & Telegraph Co.* and Justice Bean's in *Kadderly* shared the same perspective in framing their respective issues. Both assumed that a state either was republican as a whole, or it would be no proper state at all, and all its acts would be illegal. White, never an elegant writer, filled his opinion with rhetorical hyperbole on his way to denying his Court's jurisdiction. The taxpayer's position, he wrote, must mean that adoption of the initiative and referendum "caus[ed] the state to

cease to be a government republican in form," [FN22] that it "destroyed all government republican in form in Oregon." [FN23] This "would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum." [FN24] Indeed, there would be no valid governmental function in Oregon, because one could not assume "at one and the same time, one and the same government, which is republican in form, and not of that character." [FN25] Of course ***715** the argument was designed to prop up the farfetched analogy to deciding who was right in the Dorr Rebellion, but White's opinion seemed blind to the obvious idea that when a state adopts one nonrepublican feature, this feature alone might be invalid.

The *Kadderly* opinion had taken the same approach: Oregon's legislature, governor, and courts continued to exist, therefore the addition of provisions for direct popular lawmaking left Oregon's form of government as republican as before. This schematic view is understandable in an opinion written immediately upon adoption of the new system, before any initiative or referendum was used, and without any experience with the system's institutional consequences. But the result was a description that overlooked all distinctions between initiating statutes, initiating constitutional amendments, and measures referred by the legislature or by popular petitions. [FN26]

Despite the confusion, the *Kadderly* court left no doubt that the Guarantee Clause required the state to maintain the function of representative lawmaking. Justice Bean recognized that a state would not be republican if it abolished its legislature or required all laws to be made by popular vote. The premises underlying this foundational case contradict much of what has since been done by initiative petitions.

Bean's defense of initiatives has logical gaps. If republican government requires legislatures, how is lawmaking without the participation of legislators nevertheless republican? Bean's answer, that the legislature can repeal an initiated law that the majority of the voters has enacted, is disingenuous even before any actual political experience. Yet the answer stakes out one important limit on permissible initiatives. Statewide lawmaking by initiatives is not republican government if it places legislation beyond change by representative lawmakers.

That, of course, is exactly what the sponsors of many initiatives mean to do. Many proposals for directly operational laws are now drafted as constitutional amendments precisely for that purpose. Petitions for constitutional amendments may require more signatures, but such a requirement does not address the principle of continued legislative authority on which Bean defended direct ***716** lawmaking. Moreover, a second premise of *Kadderly's* defense was that the courts could review initiated laws like other laws. That premise also excludes constitutional amendments. Courts cannot apply state constitutions to invalidate a law if the law itself has validly been made part of the constitution.

III.

I do not mean that a republican form of government must preclude a state's people from changing the state's constitutional structure in the face of opposition from established officials. [FN27] That view would be hard to attribute to the founding generation. Even Alexander Hamilton found "a fundamental principle of republican government" in the "right of the people to alter or abolish the established constitution," [FN28] and maintained that the Guarantee Clause preserved "reform of State constitutions by a majority of the people in a legal and peaceable mode." [FN29] Nor does the *Kadderly* opinion prevent the legislature from submitting directly

operational laws to the voters as constitutional amendments, because these laws will have undergone legislative deliberation. *Kadderly's* entire defense of the untried new system, however, rested on the postulate that legislatures remained the initial lawmakers for laws referred to the voters and also were able to amend or repeal initiated laws. The postulate demands a distinction between measures to structure or limit governmental powers and measures to enshrine laws in the form of constitutional amendments. [FN30]

***717** A few examples illustrate the distinction. An initiative may amend the constitution to permit lotteries, but not to establish a lottery. That may be done by an initiated statute, which the legislature later can change.

An amendment forbidding official invasions of privacy may be initiated. Liability for invasions of privacy can be initiated as a statute, but only the legislature can propose to place tort liability in the constitution.

A limit on particular taxes or borrowing may be initiated as a constitutional amendment, if it does not destroy the state's fiscal capacity to function as a state. A tax or spending measure may be initiated only as a statute, so as to remain within the legislature's lawmaking power. An initiated amendment may dedicate fuel taxes to road construction, but only with prior legislative participation can an amendment fix the amount of the tax in the constitution.

Even structural amendments can be close calls. In an important 1992 decision, the Oklahoma Supreme Court faced a suit to keep off the ballot a proposed amendment that would require all revenue bills to be referred to the voters because the amendment would destroy a republican form of government. [FN31] Like other state courts, the Oklahoma court decided the claim on its merits. Borrowing extensively from *Kadderly,* the opinion acknowledged that "[t]he power of taxation for revenue purposes is an essential attribute of government," [FN32] but it concluded that the proposed requirement would restrict but not destroy government by representation. [FN33] In defending the right of the people to decide how much government may spend, the court could not resist citing the historic contention over "taxation without representation." [FN34] The court apparently overlooked the significance of the final word, representation.

In short, direct lawmaking may not shut out representative lawmakers altogether. This is the minimal implication of *Kadderly* for any court that adopted *Kadderly's* defense of statewide ***718** initiatives. [FN35] Some early opinions, however, reduced republicanism to the radical simplicities of the French Jacobins. In the words of another Oregon judge, republics were invented to escape the rule of monarchs; therefore, "the nearer the power to enact laws and control public servants lies with the great body of the people, the more nearly does a government take unto itself the form of a republic." [FN36]

On this reasoning, who needs legislatures at all, when it is even more republican to make all laws by popular vote? Attorneys general and judges have not asked that hypothetical question, since even the most populist states kept legislatures around, to handle routine or politically unappealing tasks and to be blamed for unsolved social ills. [FN37] But the question is essential to a coherent theory of republican government. What if important areas of policy were removed from legislative control and transferred to an elected leader, with or without submission to a plebiscite? Would the trappings of vestigial legislatures suffice for republican government? Powerless assemblies also exist in authoritarian regimes and in anarchic societies. Outside the context of initiatives, the Kansas Supreme Court gave serious attention to the question whether a regime in which the governor made laws by executive order, subject only to legislative reversal, satisfied the Guarantee Clause. [FN38] When a state's officials lead petition drives to bypass legislative deliberations of their fiscal proposals, or of highly charged emotional social measures, are those measures still republican lawmaking?

***719** IV.

A common fallacy confuses the framers' principle of popular sovereignty, the principle that legitimate power must be derived from the governed, with its exercise through unmediated direct lawmaking. It is ironic that the Oregon opinion praising direct lawmaking as the epitome of republican government invoked James Madison and James Wilson, the Constitution's chief theorists and the main authors of the Guarantee Clause. [FN39] The opinion first misused a passage from Madison's Federalist No. 39, [FN40] defining a republic as a government derived from the people and administered by persons holding office for limited terms or during good behavior--words that clearly describe *representative* government--and it suppressed any mention of Madison's insistence on the principle of representation in Federalist No. 10. [FN41] The opinion quoted James Wilson, when he later served on the Supreme Court, as stating that republican government is "constructed on this principle, that the Supreme Power resides in the body of the people" [FN42]--again a phrase defining the source of legitimate power, not the institutions for its legitimate exercise.

Of course Madison and Wilson were committed to majority rule, but majority rule exercised through representative institutions. In a period of widespread and violent unrest, the designers of the Constitution had fears for republican government besides the phantom that some state might reinstate a monarchy. About direct popular lawmaking, the progressive historian Charles Beard wrote in 1912 that "they would have looked upon such a scheme with horror . . . no one has any warrant for assuming that the founders of our federal system would have shown the slightest countenance to a system of initiative and referendum applied either to state or national affairs." [FN43] Madison told the Philadelphia convention, in ***720** support of a second legislative branch, that its object was to protect the people not only against their rulers but also against their own "fickleness and passion," as well as the risk that "the major interest might under sudden impulses be tempted to commit injustice on the minority." [FN44] For the same reasons, he opposed constitutional provisions for letting citizens "instruct" their representatives and successfully kept such a proposal out of the Bills of Rights. [FN45] James Wilson, though a Pennsylvania democrat, opposed an unstable, short-fused populist legislature at great cost to his own political career. Like Madison, Wilson relied on divided representative institutions to protect minorities against majoritarian passions. [FN46]

It might be said in defense of the flagrant misconceptions in the early opinions that the wide scholarship documenting American republicanism has appeared only during the past thirty years. [FN47] The most recent volume calls these modern studies so important "that they constitute in themselves something of a historical event . . . an extraordinary effort of rescue, a retrieval of something which in the course of time had become all but lost." [FN48] One would like to hope that these efforts also can help rescue the law of republican government from the myths of eighty years ago. But it likely will take more than historical scholarship to withstand the temptations of judicial rhetoric. In modern times, the Colorado Supreme Court went so far as to declare that the "power of initiative ***721** is a fundamental right at the very core of our republican form of government," [FN49] as if to suggest that a government *without* initiatives is not fully republican. More than Madison or Wilson's original logic, however, what may allow courts to rethink initiatives is experience.

The early courts, as I have said, sustained the system of direct legislation as a whole before there was any experience with it, in cases in which no initiative was involved. They pronounced broad endorsements in cases involving local governments--the great majority of cases--often without noticing that only states must maintain republican governments, [FN50] though a few opinions drew the distinction. [FN51] Modern experience shows the system's negative side: the exploitation of emotional social issues, the temptation to political grandstanding, the proliferation of poorly drafted measures that once circulated cannot be corrected or

compromised, the tactics of ***722** "counterinitiatives" that destroy even the fiction of a majority will, [FN52] and the even greater role of money for signature gathering and advertising than in the legislative arena that initiatives were designed to avoid. The effect in some states has been to monopolize the agenda of public discourse and to incapacitate legislatures from confronting serious fiscal and social problems, thereby reinforcing public disdain for representative government. Public opinion as well as judges may be ready to welcome a principled way to separate legitimate uses from abuses without sacrificing the system. Some courts have experimented with such techniques as disqualifying measures for being constitutional revisions or including more than one subject, [FN53] but these are stopgaps that can be met by redrafting the proposal. The vision of republicanism that the framers meant to guarantee imposes more important tests.

A case can be made that statewide republican lawmaking must include deliberation by representatives. [FN54] This would preserve the bulk of direct legislation where it exists: all local initiatives, statewide initiatives to alter governmental structures, initiatives to ***723** mandate legislative attention to a proposed law, and referral of legislative acts upon petitions. A court facing the question of statewide initiatives for the first time would find much support for this reading of the drafters' view of republican government.

A principled distinction, however, need not go that far, as long as a court focuses on the reasons why lawmaking by elected representatives was so important to the theorists of republican government. In brief, they feared that governmental power would be misused from motives of "interest" and "passion," which they meant to contain by designing divided and deliberative institutions of government. The two terms had a long and familiar history in eighteenth century political theory. Interest meant the pursuit of personal self-interest, mainly in the form of wealth. Political "passions" were not selfish personal desires but collective emotions such as love, fear, or hatred. The politics of collective passion appeals to people's identification with one or rejection of another social group for reasons transcending an ordinary political disagreement about policy. In the European and American experience known to the founding generation, the strongest passions divided communities and nations into contending religious factions, or "sects," in Madison's terms, until race and non-European immigration kindled new passions.

Lawyers express concern about defining the contours of "interest" and "passion." Some fear that "passion" could be charged against any strongly held policy preference. But "passion" described a kind of motive for a measure, not the intensity of one's support. "Interest" likewise does not disqualify every proposal that addresses economic or fiscal policies. Both words should be familiar to lawyers and judges from codes for the conduct of lawyers themselves. The same lawyers who doubt the courts' ability to apply "interest" and "passion" in the sense meant by eighteenth century statesmen think nothing of debating in court whether a law reflects motives of economic protectionism, or to aid religion, or whether it makes a "suspect" distinction, or is "arbitrary" or "capricious." Madison's two reasons for requiring legislative deliberation can hardly be called unmanageable by judges who do not shy from deciding whether an expenditure has a "public purpose," [FN55] or whether a statute so ***724** urgently serves a "compelling interest" as to override a constitutional right. I have previously stated a set of tests derived from Madison's two reasons in greater detail. [FN56] They could be phrased differently. If a fresh look at the history, the political theory, and the functional experience of "republican government" persuades a court that all statewide substantive lawmaking upon initiative petitions (as distinct from referenda and local initiatives) fails guaranteed standards of representative deliberation, resort to the framers' reasons for insisting on such deliberations is unnecessary. Tests become essential when courts will not go so far. The question is whether anyone will take responsibility for these or other standards of republican lawmaking when the Supreme Court will not.

## V.

There is a different reason why no one has done so. The reason is that in courts as well as in what now is called constitutional theory, substantive review under timeworn judicial formulas has displaced issues of legitimate policymaking. But that does not make these issues redundant. Neglect of institutional safeguards is not the price of a rights-centered jurisprudence.

***725** The states' duty to maintain republican government preceded the Fourteenth Amendment by eighty years. The states, of course, had long had their own declarations of rights, but national legal standards of liberty, equality, or due process did not bind the states. The national constitution relied on representative state institutions to balance competing interests and to protect minority rights. [FN57] The Guarantee Clause did not forbid state laws based on interest or passion or prejudice. It demands deliberation by responsible representatives to contain these motives and to cool what the Supreme Court, explaining the guarantee of republican government in 1891, called "the impulses of mere majorities." [FN58]

Process and validity are distinct issues. The guarantee precludes initiatives to enact laws that would be valid if enacted by a legislature. Let me mention only two examples. When the Supreme Court barely sustained Minnesota's depression-era moratorium on mortgage payments, the majority credited Minnesota's legislators and governor with finding this step necessary to "protect the vital interests of the community," and "not for the mere advantage of individuals" but for the protection of society. [FN59] That could not be asserted of the same law enacted as an initiative, a process that invites voters to legislate for their own financial self-interest at will. Idaho's voters in 1942 and California's in 1948 used the initiative to vote themselves pensions from the state treasury, a measure of financial self-interest that might validly be enacted upon legislative deliberation but not as an initiative. [FN60] The private interests of ***726** legislators also may color their views of public policy, but they do not regard appeals to their personal financial interest as legitimate arguments in legislative deliberations.

A second California example appears in *Reitman v. Mulkey,* [FN61] in which another five-four majority held that an initiative banning open housing laws denied racial minorities equal protection of the law. The Supreme Court did not suggest that open housing laws are required or, once enacted, cannot be repealed. But on a showing of racist motivation, California officials should disqualify an initiative to repeal such laws as an exercise of unmediated majoritarian passion, even if the legislature could validly repeal them.

The Guarantee Clause has not changed, but some impulses of passion or prejudice of "mere majorities" now fail substantive judicial review under the Fourteenth Amendment. Lawyers opposing an initiative measure are irresistibly drawn to attack its validity under the familiar rubrics of the Supreme Court's Fourteenth Amendment formulas, even where there is no provision for preelection substantive review. They find it difficult to separate arguments that a measure is an improper initiative from arguments that the measure is constitutionally "bad" however it is enacted. Lacking case law, a claim under the Guarantee Clause seems a long shot, and perhaps a risky provocation. The attempt to persuade judges that an initiative is impermissible even if the measure would not be unconstitutional seems hardly worth making. A court rejecting an initiative under the Fourteenth Amendment can blame the Supreme Court.

The Fourteenth Amendment, however, did not make the Guarantee Clause redundant. The clause does not merely add another wild card to post-election judicial review. "Wait to see if it ***727** passes" is an understandable attitude toward substantive claims against an initiative, but it is no response to a claim that a measure requires legislative deliberation. Statements like the Washington court's, that it could not pass on the constitutionality of proposed initiatives any more than of legislative bills, [FN62] are common for substantive challenges, but they are easily distinguished from claims under the Guarantee Clause. The clause is not an additional test of substantive validity. Hard as it seems, lawyers and courts need to apply the guarantee without regard to the validity of the proposed

measure if enacted by a legislature. The Colorado Supreme Court preferred to decide that an initiated amendment barring civil rights laws for homosexuals violated equal protection rather than that it was an improper initiative measure, though the reverse is the proper sequence. [FN63]

Logically--if logic matters--issues of process always precede issues of substance. Courts decide whether an agency rule was properly adopted before reaching an attack on its validity. Courts disqualify initiative petitions that propose something other than legislation or cover more than one subject without evaluating their content. The Kansas court, as I have mentioned, examined whether the Guarantee Clause lets a state give its governor power to change statutory law though the changes themselves were beyond challenge. [FN64] Colorado's Justices followed the Kansas court to decide whether a new process for legislative districting violated the Guarantee Clause, without regard to the validity of any districting plan. [FN65] Similarly, Guarantee Clause challenges to an initiative are logically addressed prior to reaching other challenges under the Fourteenth Amendment.

Limits on preelection review of initiatives do not prevent disqualification of impermissible ballot measures. Scaling back its more exuberant rhetoric, the Colorado court wrote in 1987 that the "powers of initiative and referendum, although broadly construed, are not unlimited;" a proposal can be disqualified for exceeding their ***728** proper sphere. [FN66] An objection under the Guarantee Clause is a claim against the process, like other grounds that are routinely dealt with at the stage of filing the proposed measure, but this point is obscured when challengers fail to separate the objection from attacks on the substance of the proposed law. There is no law to invalidate if a measure fails. Yet the guarantee of republican lawmaking has special force when a statewide initiative stirs appeals to passion or to prejudice against an identifiable social group. A campaign and a public referendum on issues such as open housing, parochial schools, or homosexuality injures the targeted minority whether or not the measure passes. If a proposed measure fails the test, republican government requires the state's officials to reserve it for legislative deliberation.

## VI.

To recapitulate: State officials have a constitutional duty to govern by republican means. State judges are specifically bound to apply the Constitution as the supreme law of the land. Unlike the federal courts, state courts are not free to shift claims under the Guarantee Clause to the state's political branches. Debate about "justiciability" needs to distinguish the issue of whether a feature of government is nonrepublican, which is a matter for legal analysis, from the issue of federal enforcement of the guarantee. State courts in fact have not refused to decide such legal claims.

The sweeping rhetoric in judicial opinions on direct lawmaking has usually exceeded the precise issue presented, seemingly making no distinctions between state and local governments and between statutory and constitutional initiative and referenda. [FN67] Lawyers need to separate the actual legal holdings from the political myths. Important questions of state-wide governance prove to be both open and manageable, once one discards the notion that the Guarantee ***729** Clause has no content beyond banning monarchy and decision by plebiscite can never fall short of republican government. That is historically mistaken, for those of us who care about the ideas embedded in constitutional texts. It goes too far even if one does not care what the authors meant. State courts would become concerned if an amendment were to extend the initiative from general laws to particular acts. [FN68] The most populist court would doubt that republican government permits a plebiscite to decide whether a legal death sentence should be commuted or executed. [FN69]

Reciting that there is no agreed definition of republican government misses the point. The issue is not to define what is republican but to recognize what is not. Republicanism imposes some systemic limits on statewide initiatives, regardless of content. A state may allow its voters to initiate structural changes and restrict the powers of the state's government without having to persuade the state's officials. [FN70] But the proposed change, as well as ***730** provisions for referenda, must retain a functioning state government, as the Oklahoma court recognized. [FN71]

Second, representative institutions may not be excluded from substantive lawmaking for the state's citizens. A court reasonably could sustain statewide referenda but find that lawmaking without any representative deliberations is not the republican government meant by the authors of the Guarantee Clause. Since the system has become entrenched, judges are likely to prefer the *Kadderly* court's defense of statutory initiatives as long as legislatures are free to amend or repeal these statutes. That defense precludes initiatives to place laws beyond representative lawmaking by enacting them in the form of constitutional amendments.

Other limits follow from the reasons why the founding generation insisted on the deliberations of representative legislatures as the hallmark of republican lawmaking. Madison and Wilson relied on elected representatives to defuse, to compromise, and, at best, to prevent the abuse of government power from motives of personal self-interest or majoritarian passion. This reliance should preclude direct plebiscites on initiatives that fail either of those tests, whether or not the same measures could validly be enacted upon legislative debate. The tests can be phrased differently, once lawyers give them serious attention at all. The important point is that the demands of republican lawmaking are constitutional law, they concern issues of process distinct from and prior to judicial review of substance, and they have not been decided in most courts.

Who will take responsibility for those requirements? Some of the enthusiasm for popular lawmaking now is tempered by experience with initiatives that exploit social divisions, demand up-or-down votes on simplistic formulas and on complex economic or legal policies, and lead voters to destroy revenues for programs that they have no wish to give up. Yet distrust of representative government is as high as it was a century ago. Popular control by the referendum and recall--the power to withdraw consent--is very different from by-passing representative bodies entirely to enact statewide laws directly upon petitions, but lawyers and courts from *Kadderly* on have failed to draw the distinction for the public. Many citizens who are tired of the worst initiatives might be relieved to learn that the Constitution provides a principled answer that saves most direct voter participation in lawmaking. Disqualifying an ***731** initiative before signatures are gathered should be politically easier than after it wins at the polls. But governors, attorneys general, and other officials who deplore abuses of the initiative process [FN72] also deny their duty to determine when those abuses cease to be republican government. Even when they consider a measure an abuse, officials impose the burden of litigation on citizens who oppose that abuse rather than those who commit it. Questions of political courage aside, their constitutional principles depend on precedents. If one state made a breakthrough, others would likely follow.

Who is left? We are used to thinking that politics is for politicians but constitutional law is for lawyers and courts. [FN73] State courts have shown that they know the guarantee of republican government is law, but courts rarely volunteer their advice without sound arguments. [FN74] Yet some advocates hesitate to make sound arguments for which they cannot cite prior case law, relying instead on less cogent but familiar formulas. If lawyers and judges--or constitutional law professors--look to see who is responsible for the guarantee, we can always turn to the mirror.

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Government," on March 18, 1994.

[FN1]. Hans A. Linde, *When Is Initiative Lawmaking Not 'Republican Government'?*, 17 HASTINGS CONST. L.Q. 159 (1989).

[FN2]. "The United States shall guarantee to every State in this Union a Republican Form of Government . . . . " U.S. CONST. art. IV, § 4.

[FN3]. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1874).

[FN4]. Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).

[FN5]. *Id.* at 147.

[FN6]. U.S. CONST. art. VI, cl. 2.

[FN7]. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . . " *Id.* art. III, § 2, cl. 1.

[FN8]. Steve Duin, *Why, Oh Why, Won't Keisling Take a Dive?*, OREGONIAN, Feb. 20, 1994, at D1.

[FN9]. *Id.*

[FN10]. *See, e.g.*, Farley v. Healy, 431 P.2d 650 (Cal. 1967).

[FN11]. Each of the Reconstruction amendments expressly provided Congress with power to enforce it "by appropriate legislation." U.S. CONST., amend. XIII, § 2, amend. XIV, § 5, amend. XV, § 2. One argument made against invalidating unequal legislative districts was that section 2 of the Fourteenth Amendment provided another remedy. *See* Reynolds v. Sims, 377 U.S. 533, 593 (1964) (Harlan, J., dissenting).

Compare also the situation in the years between Wolf v. Colorado, 338 U.S. 25 (1949), and Mapp v. Ohio, 367 U.S. 643 (1960), when the Supreme Court held that the Fourth Amendment bound the states but did not prevent prosecutors from using unlawfully seized evidence.

[FN12]. AFL-CIO v. March Fong Eu, 686 P.2d 609 (Cal. 1984) (initiative to force legislature to call for a federal constitutional convention); Paisner v. Attorney Gen., 458 N.E.2d 734 (Mass. 1983) (internal procedures of legislative houses); Foster v. Clark, 790 P.2d 1 (Or. 1990) (administrative acts); City of Eugene v. Roberts, 756 P.2d 630 (Or. 1988) (advisory vote).

[FN13]. Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990) (finding one section of initiative amendment to be a "revision," rejecting single-subject challenge) (Mosk, J., dissenting on that issue); Holmes v. Appling, 392 P.2d 636 (Or. 1964).

[FN14]. Hart v. Paulus, 676 P.2d 1384 (Or. 1984) (legislature may not require that local governments endorse statewide tax measure before referral to voters).

[FN15]. Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 652 (Cal. Ct. App. 1991).

[FN16]. *See* State v. Montez, 789 P.2d 1352, 1377 (Or. 1990).

[FN17]. 74 P. 710 (Or. 1903).

[FN18]. *See, e.g., In re* Pfahler, 88 P. 270 (Cal. 1906) (sustaining municipal initiative procedure); State *ex rel.* Foote v. Board of Comm'rs, 144 P. 241 (Kan. 1914) (same); *Ex parte* Wagner, 95 P. 435 (Okla. 1908) (sustaining municipal referendum). Earlier, the Minnesota Supreme Court rejected a Guarantee Clause attack on submitting city charters to the voters. Hopkins v. City of Duluth, 83 N.W. 536 (Minn. 1900). None of these decisions is precedent for statewide initiatives.

[FN19]. 223 U.S. 118 (1912).

[FN20]. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

[FN21]. A few state court opinions immediately following *Pacific Telephone & Telegraph Co.* misunderstood this point. *See, e.g.*, People *ex rel.* Tate v. Prevost, 134 P. 129 (Colo. 1913) (rejecting Guarantee Clause challenge to local home rule); State *ex rel.* Wagner v. Summers, 144 N.W. 730 (S.D. 1913) (rejecting Guarantee Clause challenge to local initiative and referendum); *see also* Iman v. Southern Pac. Co., 435 P.2d 851 (Ariz. Ct. App. 1968) (republican government is a question solely for the legislature and then sustaining initiative as consistent with the Guarantee Clause).

[FN22]. *Pacific Tel. & Tel. Co.*, 223 U.S. at 140.

[FN23]. *Id.* at 141.

[FN24]. *Id.*

[FN25]. *Id.*

[FN26]. For instance, Justice Bean wrote that the governor's veto power was not abridged except when the legislature referred a bill to the voters, a proposition that simply omitted initiatives, which exclude the governor as well as the legislature. Kadderly, 74 P. at 720.

[FN27]. *See, e.g.*, Wilson v. Koontz, 348 P.2d 231 (Nev. 1960) (validating an initiative to require biennial instead of annual sessions of the legislature). The substance of the amendment would raise a Guarantee Clause issue if it proposed only decennial sessions, or no sessions, as was suggested during the 1879 California constitutional convention. *See infra* note 35 and accompanying text; *see also* State *ex rel*. Miller v. Hinkle, 286 P. 839 (Wash. 1930) (reapportionment law).

[FN28]. THE FEDERALIST NO. 78, at 527 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[FN29]. THE FEDERALIST NO. 21, at 131 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). *See* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994) (this issue).

[FN30]. By "directly operational" (or "substantive") laws, I mean laws that impose obligations on private persons or appropriate specific sums for particular expenditures without any need or opportunity for legislative action. I do not mean provisions that bar the legislature from imposing certain obligations or making certain expenditures. Such provisions may, however, fail other tests of republican government discussed below, or may violate the Fourteenth Amendment.

If a properly conducted convention includes directly operational, substantive laws in a constitution, these ordinarily will have undergone the required deliberation.

[FN31]. *In re* Initiative Petition No. 348, 820 P.2d 772 (Okla. 1992).

[FN32]. *Id*. at 780 (quoting Watchtower Bible & Tract Soc'y v. Los Angeles County, 182 P.2d 178, 180 (Cal. 1947)).

[FN33]. *Id*.

[FN34]. *Id*. at 781.

[FN35]. *Kadderly's* theory of republican lawmaking can be read more broadly. It should, for instance, foreclose a provision like California's, where the legislature cannot amend or repeal even statutory initiatives without resubmission to the voters. CAL. CONST. art. II, § 10(c).

[FN36]. Kiernan v. Portland, 112 P. 402, 405 (Or. 1910), *writ of error dismissed*, 223 U.S. 151 (1912). This highly ideological opinion, too, was written in a case that involved neither an initiative nor a referendum, but a provision allowing municipal home rule.

[FN37]. Populist resentment of legislatures could go further, as in the 1879 California constitutional convention:

> So strong was the sentiment against legislative activism that a Workingman's party delegate proposed an article declaring: "There shall be no legislature convened from and after the adoption of this Constitution, . . . and any person who shall be guilty of suggesting that a Legislature be held, shall be punished as a felon without the benefit of clergy."

MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 113 (1977).
[FN38]. Van Sickle v. Shanahan, 511 P.2d 223 (Kan. 1973).

[FN39]. *Id*.

[FN40]. *Id*. at 243.

[FN41]. THE FEDERALIST NO. 10 (James Madison).

[FN42]. Kiernan v. Portland, 112 P. 402, 405 (Or. 1910), *writ of error dismissed,* 223 U.S. 151 (1912) (quoting Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 457 (1793)). How citations fasten myths into case law is shown in State *ex rel*. Foote v. Board of Comm'rs, 144 P. 241 (Kan. 1914), in which the Kansas court attached the quotation from *Chisholm* to a citation of *Kadderly* in order to defend a provision for local initiatives that did not need this defense at all.

[FN43]. CHARLES A. BEARD & BIRL E. SHULTZ, DOCUMENTS ON THE STATE-WIDE INITIATIVE, REFERENDUM, AND RECALL 28-29 (1912). The fact that Beard disliked the economic policies behind the Federalists' constitutional design reinforces rather than detracts from his judgment of their view of republican government.

[FN44]. 4 THE FOUNDERS' CONSTITUTION 123 (Philip B. Kurland & Ralph Lerner eds., 1987) (quoting Records of the Federal Convention, June 26, 1787).

[FN45]. THOMAS E. CRONIN, DIRECT DEMOCRACY 25 (1989).

[FN46]. For a more detailed discussion, see Hans A. Linde, *When Initiative Lawmaking Is Not Republican Government: The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 27-28 (1993). The question does not hinge on terminological distinctions between "republican" and "democratic" government; in the political rhetoric of the day, the terms were treated as identical, or as opposites, or were combined, to fit the occasion and the intended audience. *See id*. at 22; *see also* Amar, *supra* note 29, at 749-50. Republics could be more or less democratic, depending on the extent of the franchise, but Beard's comment applies also to the most democratic leaders, like Patrick Henry, Thomas Jefferson, and Thomas Paine, who postulated government by elected representatives. *See* CRONIN, *supra* note 45, at 19.

[FN47]. BERNARD BAYLIN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967), J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT (1975), and GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969) are three landmarks among numerous recent studies, many of them focused directly on uses of the term "republic" and theories of representation, and including the views of the anti-federalists.

[FN48]. STANLEY ELKINS & ERIC MCKITTRICK, THE AGE OF FEDERALISM 4-5 (1993).

[FN49]. McKee v. City of Louisville, 616 P.2d 969 (Colo. 1980). Characteristically, the actual point dividing the court was whether an annexation ordinance was an exercise of state or local lawmaking. In a previous Colorado case, the quoted rhetoric included the power to recall officials. Bernzen v. City of Boulder, 525 P.2d 416, 419 (Colo. 1974).

The Delaware court, to the contrary, earlier held that local votes on liquor laws tended "to subvert our representative republican form of government." Rice v. Foster, 4 Del. (4 Harr.) 479, 499 (1847).

[FN50]. *See, e.g.*, State *ex rel.* Foote v. Board of Comm'rs, 144 P. 241 (Kan. 1914). There is a subsidiary issue whether states may irrevocably delegate lawmaking to cities, an issue argued in Kiernan v. Portland, 112 P. 402 (Or. 1910), *writ of error dismissed*, 223 U.S. 151 (1912), but legislatures generally can override local substantive law. *See* Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4*, 46 MINN. L. REV. 513, 525 (1962).

[FN51]. In 1908 the Iowa Supreme Court rejected the "hypothesis" of a Guarantee Clause attack on municipal government as "wholly wrong":

> The purpose of the federal Constitution was to provide a form of government, republican in character, for the states as a united whole. This is manifest from the history of the times, the contemporaneous writings and public addresses, the constitutional debates, and the provisions of the instrument itself as adopted.
>
> . . . .
>
> Eckerson v. City of Des Moines, 115 N.W. 177, 181 (Iowa 1908). The Washington Supreme Court followed *Eckerson* in Walker v. City of Spokane, 113 P. 775 (Wash. 1911).

[FN52]. *See* Elizabeth M. Stein, *The California Constitution and the Counter-Initiative Quagmire*, 21 HASTINGS CONST. L.Q. 143 (1993).

[FN53]. *See, e.g.*, Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990); Brosnahan v. Brown, 651 P.2d 274 (Cal. 1982) (4-3 decision that "victim's rights" initiative did not include more than one "subject"); *cf.* Chemical Specialties Mfrs. Ass'n v. Deukmejian, 278 Cal. Rptr. 128 (Cal. Ct. App. 1991) (initiative invalid for multiple subjects); California Trial Lawyers Ass'n v. March Fong Eu, 245 Cal. Rptr. 916 (Cal. Ct. App. 1988) (same). *See* Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983).

[FN54]. Commonly discussed differences between the deliberative process in legislatures and in initiative campaigns focus on the legislature's access to sources of factual information, legal analysis, and professional drafting, as well as its opportunity to compromise opposing views by amending the initial drafts. For republican theory, more important features are that legislative representatives are elected to cast votes on all measures, and to defend their votes as serving some collective interest other than their private self-interest. Unlike a voter facing a menu of initiatives, a legislator is not elected to vote on some bills and to skip others on grounds that the legislator has no opinion or is indifferent as to whether the bill passes or not.

A voter has no similar public responsibilities. Commonly a majority of votes cast on an initiative measure suffices to enact the measure. Starting from a low voter turnout in most non-presidential elections and a significant drop-off in votes cast on all but the

most emotional or publicized ballot measures, initiatives often are enacted by a small, personally concerned fraction of voters. This makes the claim that "the People" enacted such an initiative an ideological exaggeration. Political scientists concentrate on a somewhat different comparison, that between votes on ballot measures and on candidates. *See* DAVID B. MAGLEBY, DIRECT LEGISLATION 78-90 (1984); CRONIN, *supra* note 45, at 68-70.

[FN55]. *Compare In re* Interrogatory Propounded by Governor, 814 P.2d 875 (Colo. 1991) (private employment is a public purpose) *with* Colorado Cent. R.R. v. Lea, 5 Colo. 192, 196 (1879) (if "public benefit" allows funding private railroad construction, constitutional prohibition is "utterly nugatory"); City of Aurora v. Public Utils. Comm'n, 785 P.2d 1280, 1289 (Colo. 1990) ("public purpose" is not susceptible of precise definition, but rather, depends on facts and circumstances). One recent opinion states the test to be whether public financing for private development is "animated by" a public purpose, that is to say, a test for a legitimate motive, rather than for the likelihood of achieving that purpose. City of Charlottesville v. Dehaan, 323 S.E.2d 131 (Va. 1984). *See* Dale F. Rubin, *Constitutional Aid Limit Provisions and the Public Purposes Doctrine*, 12 ST. LOUIS U. PUB. L. REV. 143 (1993) (reviewing many cases).

[FN56]. *See* Linde, *supra* note 1. Disqualified initiatives should include those that (1) stigmatize a social group or exalt one group over others, (2) without using stigmatizing language are by their terms directed against identifiable racial, ethnic, linguistic, religious, or other social groups, (3) are proposed in a historical and political context that leaves no doubt that the initiative asks voters to choose sides for or against such an identifiable group, or (4) make emotional appeals to impose majoritarian values that offend the conscience of other groups in the community, without being directed against those groups. These types are further explained and illustrated in Linde, *supra* note 46.

The motives for an initiative measure often are apparent on the face of the measure or from the context in which it is proposed, for instance the anti-Catholic bias of the Ku Klux Klan's 1922 Oregon initiative banning private schools. The racist context of repealing open housing laws was apparent to the California Supreme Court in Mulkey v. Reitman, 413 P.2d 825 (Cal. 1966). If the issue needs evidence, an appeal to the voters' emotional, ideological, or religious passions (as that word was used by the Federalists' generation) necessarily is more publicly visible than in the legislative process. *See* Linde, *supra* note 46, at 42.

[FN57]. There are a few exceptions. Article 1, Section 10 of the Constitution prohibits bills of attainder, ex post facto laws, and laws "impairing the obligation of contracts." Article IV, section 2 entitles the citizens of each state to all privileges and immunities of citizens in the several states.

[FN58]. *In re* Duncan, 139 U.S. 449, 461 (1891):

> By the constitution, a republican form of government is guaranteed 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 impulses of mere majorities.

[FN59]. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 444-45 (1934).

[FN60]. The Idaho legislature's repeal of this initiative was sustained in Luker v. Curtis, 136 P.2d 978 (Idaho 1943), in an opinion

that explains the need to permit legislation after an initiated statute:

> In the legislature, a Bill must be introduced, printed, read on three several days; and the members thereby have an opportunity of debating the act and offering and making amendments, so that the law, if on a controversial subject, is ordinarily much discussed and analyzed. On the other hand, an initiative measure is drafted by a single person, or group of persons and after it is circulated and filed, there is no opportunity for amendment or change until after it is voted upon.

*Id.* at 979-80 (citation omitted); *see also* Fine v. Firestone, 448 So. 2d 984, 988 (Fla. 1984); Oregon Educ. Ass'n v. Phillips, 727 P.2d 602 (Or. 1986) (Linde, J., concurring). The California initiative amendment, Article XXV of the California Constitution, was later repealed by another popular vote. *See generally* Note, *California's Constitutional Amendomania*, 1 STAN. L. REV. 279 (1949).

[FN61]. 387 U.S. 369 (1967).

[FN62]. State *ex rel.* O'Connell v. Kramer, 436 P.2d 786, 787 (Wash. 1968).

[FN63]. Evans v. Romer, 854 P.2d 1270 (Colo. 1993).

[FN64]. Van Sickle v. Shanahan, 511 P.2d 223 (Kan. 1973).

[FN65]. *In re* Interrogatories Propounded By Senate Concerning House Bill 1078, 536 P.2d 308 (Colo. 1975) (Guarantee Clause does not preclude judicial participation in redistricting).

[FN66]. City of Idaho Springs v. Blackwell, 731 P.2d 1250, 1253 (Colo. 1987); *cf.* City of Rocky Ford v. Brown, 293 P.2d 974, 976 (Colo. 1956) (court cannot pass on the validity of a measure before it is adopted, except in answer to formal interrogatories from the legislature).

[FN67]. States have or have had many distinct provisions for initiative lawmaking, including forms that require or permit legislative action on the proposed measure. *See* MAGLEBY, *supra* note 54; JOSEPH F. ZIMMERMAN, PARTICIPATORY DEMOCRACY 76-78 (1986); Gilbert Hahn, III & Stephen C. Morton, Note, *Initiative and Referendum--Do They Encourage or Impair Better State Government?*, 5 FLA. ST. U. L. REV. 925 (1977).

[FN68]. If such an act decided some person's individual right, courts might seek an escape from the Guarantee Clause by way of due process or equal protection doctrines, but this is not always easier. Could an initiative, for instance, declare specified private property to be a historic landmark, even if a legislative body can do so?

[FN69]. Madison used this example of the difference between republican deliberation and the susceptibility to passion of Athenian democracy:

> What bitter anguish would not the people of Athens have often escaped, if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens, the hemlock on one day, and statues on the next.

THE FEDERALIST NO. 63, at 425 (James Madison) (Jacob E. Cooke ed., 1961). The Colorado Supreme Court, at the height of its populist enthusiasm, invalidated a provision allowing a majority of voters to overturn its own judgments that a law was unconstitutional. People v. Max, 198 P. 150 (Colo. 1921). The court finessed explaining this conclusion by declining to sever referrals of judgments under the state constitution from those under federal law, which the Supremacy Clause puts beyond a referendum. The Guarantee Clause would be an obvious explanation, if the court of that time (in another of the cases on local home rule) did not label this a "political question." People *ex rel.* Tate v. Prevost, 134 P. 129, 134 (Colo. 1913). On Theodore Roosevelt's sponsorship of the recall of judicial decisions, see William D. Lewis, *A New Method of Constitutional Amendment By Popular Vote,* 43 ANNALS 311 (1912).

The guarantee of republican government also is the proper judicial defense if a state's court system becomes excessively politicized by partisan judicial elections or campaign attacks by partisan officials, short terms of office, or election campaigns organized and predominantly financed by groups with special litigation interests. *See* Hans A. Linde, *The Judge as Political Candidate*, 40 CLEV. ST. L. REV. 1, 17 (1992).

[FN70]. States have chosen opposing rules; Illinois, for instance, allows only structural initiatives while a number of states do not allow initiatives to amend their constitutions. *See* MAGLEBY, *supra* note 54, at 38-40.

[FN71]. *In re* Initiative Petition No. 348, 820 P.2d 772 (Okla. 1992).

[FN72]. *See Nevada Governor: Anti-Gays Keep Out--Oregon Initiative Drive Spreads Southeast,* SACRAMENTO BEE, Jan. 20, 1994, at B2:

> Nevada Gov. Bob Miller Wednesday criticized proponents of anti-gay initiatives in the Pacific Northwest for planning a similar petition of "intolerance and discrimination" in his state.
>
> . . . .
>
> The governor said he'll write the Oregon Citizens Alliance, which plans to file its petition here by early next week, stating, "In Nevada, we do not tolerate discrimination based on age, race, gender, religion, physical condition, sexuality, or any other factor."

[FN73]. Most people still mean the United States Supreme Court. The Court, of course, someday might realize that it is one thing to let Congress decide whether a state is eligible for statehood or which of two factions are entitled to represent it in Congress, and quite another thing to wait for Congress to pass laws concerning particular departures from republican institutions in a state's government. But that is no excuse for state officials and courts. If a state court, exercising its own constitutional responsibility, invalidates a state act under the Guarantee Clause, an appeal by the losing side would open the way to reconsideration of Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912); a dismissal of the appeal would reaffirm the finality of the state court's judgment on the issue. *See also* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994) (this issue).

[FN74]. In State v. Montez, 789 P.2d 1352 (Or. 1990), the Oregon Supreme Court recognized that an initiated constitutional

amendment could violate the Guarantee Clause but declined to decide the question on inadequate briefs.

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