Direct Democracy, Federalism & the Guarantee Clause

William T. Mayton

Among the states, the initiative is an instrument of direct democracy. By the initiative, a percentage of a state's voters place a certain issue on the ballot and that issue is then resolved by popular vote. Nearly a century ago, owing much to the reform group we know as the Progressives, the initiative came into use in a number of states. The Progressive view was that an occasional resort to direct democracy would be a useful antidote to legislatures that had become too clogged by special interests to serve the public. As the initiative was thus introduced it was fiercely attacked by these interests as an unconstitutional departure from more "conservative" notions of representative government. Eighty-eight years ago, in its February 1911 edition, the *Green Bag* included a piece that confidently dismissed these assaults on the initiative. The people in the states, it was noted, might "come to favor" the alternative offered by the "newer direct form of popular control," or they might not: they might instead learn that they altogether favored the "conservative form of representative government." But the choice was theirs; there was nothing in the Constitution that precluded the states from resorting to "the slight tincture of direct democracy" that is the initiative.[1]

That was then. Today, the initiative is again a hot-button issue and again under close attack. It has come under attack as it has been used to enact what a number of modern liberals consider socially regressive laws, such as the "California Civil Rights Initiative" against racial preferences. In this modern controversy, the bottom-line argument against the initiative is much the same as that made so many years ago by ostensibly retrograde industrialists. The argument is along these lines. The Constitution, it is said, has in it a "a

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1 *What is a "Republican Form of Government"?*, 23 Green Bag 80, 81 (1911).

normative preference for representational government."[2] This norm may require that direct democracy, as in the initiative, be avoided in favor of action by legislative bodies. Support for this "constitutional norm" is drawn from certain assumptions about the intent of the Framers. Legislative processes are, as the Framers presumably wished, appropriately "filtered" so as to avoid both the brute force and the weaknesses (ignorance, passion, etc.) of the people. Because the initiative is a species of unwashed democracy, it may rightfully be feared by us as it was by the Framers.

From the Progressive standpoint, though, these accounts of beneficent filters are no more than disingenuous accounts of the dominance of special interests in legislative bodies. These filters operate selectively, to serve the interests of organized groups at the expense of the public interest. For proponents of the initiative, the good, therefore, is in some cases served by avoiding this "filtering." In this respect, in California the Civil Rights Initiative was presented as a bypass – in the direction of the public good – of a legislature immobilized by special interests that had "hijacked the civil rights movement."

Resolution of this great dispute – about whether "the people" may allot to themselves and then decide some of the important social and political issues of the day – comes down to the piece of constitutional text that was featured in the *Green Bag* piece on the initiative – text that since then has come to be regarded as dormant to dead. This text is the "Guarantee Clause" of the Constitution, which provides that "The United States shall guarantee to every State in this Union a Republican Form of Government." Against the initiative, the argument, now as in 1911, is that the initiative, as it bypasses legislative assemblies, is not the "Republican Form of Government" that the Clause requires. Thus, the courts might use the Clause as grounds to strike the initiative.

But as most students of constitutional law will understand, using the courts in this way raises a particular problem. The courts, it is thought, have for several years viewed the Guarantee Clause as "non-justiciable," as a "political question" which might be addressed somewhere in government but not in the courts. But this thought seems to be wrong. As initiative opponents maintain, the Guarantee Clause is or should be justiciable. It has in the past been usefully implemented by the courts, and I will try to show as much.

But what I will also show is that in the courts the Guarantee Clause has had a life much different than initiative opponents would assign to it. In this life, the Clause has been a significant part of federalism. It has been the part of the Constitution that most vividly assures the states of their "right" to choose and to experiment among various forms of government and "to claim the federal guarantee" for those choices and experiments.

The Guarantee Clause is found in Section 4 of Article IV of the Constitution. In full, Section 4 provides that

> 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.

As the Constitution was proffered to the country for its ratification, this section – to the people in the states – was a scary part. To start with, it allowed the national government to

2 *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503 (1994). *See also* Hans A. Linde, *When Is Initiative Lawmaking Not "Republican Government?"*, 17 Hastings Const. L.Q. 159 (1989).

come into the states, forcibly and with troops, in cases of "domestic Violence."

Shays' Rebellion, the armed uprising in Western Massachusetts against the government of that state, was then fresh in everyone's mind. James Madison wrote that a "A recent and well-known event among ourselves has warned us to be prepared for emergencies of a like nature."[3] The "preparation" to which Madison referred was the "Domestic Violence" Clause of Section 4. But to allay the states' fear of a national government empowered to send in its troops, this Clause was subject to the condition that the troops must first be requested by the Governor or legislature of a state.

The Guarantee Clause of Section 4 might also have provided an avenue by which the national government could enter the states, this time to preserve "a Republican form of Government." But given the prevailing regard for the states, any sort of open-ended power by which the federal government might dictate forms of state government was simply out of the question. The Guarantee Clause, therefore, had to be justified and explained as something other than an open-ended power over the states. It was so justified and explained, by Madison in *Federalist No. 43*.

Madison had broadly said what republican government was; it was "a government which derives all its power directly or indirectly from the great body of the people."[4] In *No. 43*, he identified what could not be republican government; it could not be "aristocratic or monarchical" or any "innovation" along those lines. The states, Madison explained, had a collective interest in avoiding these forms because aristocracy or monarchy in any one state would infest and then weaken a "federal coalition" of republican governments. "Greece was undone," Madison noted, "as soon as the king of Macedon obtained a seat among the Amphictyons."

Perhaps more importantly, Madison then explained what the Guarantee Clause could not be. It could not be "a pretext for alterations in the state governments, without the concurrence of the states themselves." In this respect, Madison noted that as the states joined the Union they were republican in form and that "As long as the[se] existing forms [of state government] are continued by the states," the federal government could not presume to modify them. Fine, but what if, as might be expected, the states wished to "experiment" by altering these forms? They could do so, so long as an overall republican form was maintained. As explained by Madison, "Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guarantee for the latter.[5]

By this explanation, the Guarantee Clause is more that just a negative, more than a federal veto respecting "aristocratic or monarchical innovations." As well, the Clause assures a particular flexibility in state government, which is the states' "right" to choose and to experiment with various forms of government and "to claim the federal guarantee" for those choices and experiments: Subject only to the condition that these choices and experiments remain within the zone of popular sovereignty. It is by this assurance of the states' right to

3 The Federalist No. 43 at 246 (Clinton Rossiter ed., 1961).

4 The Federalist No. 39 at 241. For a comprehensive account of the Framers' perception of republican government as popular sovereignty, *see* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 Col. L. Rev. 749 (1994).

5 The Federalist No. 43 at 274. Consistent with this view, Hamilton (in the *Federalist Papers*' only other discussion of the Guarantee Clause) stated that "The Clause could be no impediment to reforms of State constitutions by a majority of the people in a legal and peaceable mode. This right would remain undiminished." The Federalist No. 21 at 140.

chose and to "claim the federal guarantee" for their choices, that the Guarantee Clause stands as a considerable part of federalism.

Also, this state-regarding feature of the Guarantee Clause sheds an altogether different light on the arguments of original intent that underlie present attacks on the initiative. These arguments are largely based on *Federalist No. 10*, which presented the new Congress as a broadly based representative body, composed of a natural elite, in which the force of faction (special interests) will be broken by means of reification by deliberation among this elite. Based on this presentation, opponents of direct democracy argue that the Constitution has in it "a normative preference for representative government."

This "normative preference," though, is a huge overgeneralization. A truth that most of the time we conveniently ignore is that the several purposes of *Federalist No. 10* surely included that of assuring the wealthy that the central government would not be so democratic as to allow the masses, acting as a self-interested faction of the whole, to use that government as a means of getting at their property. (Thus, *Federalist No. 10* explains that "such democracies have ever been found incompatible with personal security or the rights of property."[6]) The "filtering processes" of the new national government, it was offered, would defeat that threat to property. In this respect, behind the closed doors of the constitutional convention, the (bad) Madison had noted dismaying signs of a "leveling spirit" among the people and otherwise spoke of a national government designed to balance and check "class" interests, so as to "protect the minority of the opulent against the majority."[7] Here, we should also remember that the "filtering" at the national level was among branches in which "the people" had a limited representation. As originally established, the national government had only one part – the House of Representatives – elected by the people. The rest, the Senate, the President, and the courts, were not.

My whole point here is that as originally established the national government was a rather crabbed model of democratic government. This is, I think, a reason not to derive from this model a "normative preference" that would preclude broader visions of democracy – such as a supplemental use of direct democracy – in the states. Moreover, once the Constitution's necessary regard for federalism is factored in, it is clear the no such preference was established. As expressed in *Federalist No. 43* above, the Guarantee Clause stands in specific opposition to such a preference by reserving to the states the right of choice respecting forms of government, so long as these choices are consistent with popular sovereignty.

While direct democracy has always been some part of American government, witness the New England town meeting, the initial use of it was mostly (but not altogether) confined to local government. The broader use of direct democracy to include initiatives dealing with state-wide concerns was not commenced until the turn of the century. Why then? Partly because a broader use had simply become

6 The Federalist No. 10 at 81.

7 Max Farrand, 1 Records of the Federal Constitution 422-23, 430-431. By the above "wealth-protecting" view of *Federalist No. 10*, I know that I am in part buying into (controversial) views that in this century were first expressed by the Progressive economist Charles Beard and historian Vernon Parrington. This part, though, seems substantiated by the documentary record, which was usefully reviewed in Richard L. Matthews, If Men Were Angels: James Madison and the Heartless Empire of Reason (Univ. Press of Kansas, 1995).

feasible. Direct democracy in the United States initially had been physically limited by problems of distance and communication. However, the early 1900s featured new and improved means of communication and transportation. Thus, owing to the improved logistics in voting, the states could now "proceed from the point" where "they were [previously] forced to stop."[8]

But in greater part, the new state constitutional provisions for the initiative were, as previously noted, enacted because of a perceived defect in legislative assemblies. At the turn of the century, state legislatures were seen as too often unwilling to serve the public interest. This defect was laid to the political domination of machine politics and special interests. Industry and capital were then becoming more concentrated and powerful, and certainly this power had been put to political use in state legislatures. As said by Theodore Roosevelt, "Special interests which would be powerless in a general election may be all powerful in a legislature if they enlist the services of a few skilled tacticians."[9]

The idea of the initiative, then, was that where state legislatures had shown themselves unwilling to serve the public interest, the public might – on occasion – serve itself by its direct vote. This idea was adopted by a number of states, which amended their constitutions to provide that special issues of general concern, as selected by the people, might be submitted directly to the people. As soon as these new instruments of direct democracy were used they were attacked in court, on the grounds that they were contrary to the Constitution's guarantee of a "Republican Form of Government." In the courts, the response to these attacks was consistent with what we have identified as the Guarantee Clause's purpose of assuring state choices in these matter.

The first of the cases were more-or-less local government cases. They established that (1) under the Clause a republican form of government is one that remains centered in and responsive to the people, and that (2) within this confine the Clause leaves the states free to choose among forms of government.[10] The constitutionality of the state-wide initiative most prominently arose in Oregon, where in 1902 provision for a state-wide initiative had been added to the state constitution. This amendment was immediately tested in *Kadderly v. City of Portland*.[11] The Oregon Supreme

8 The National Economic League, The Initiative and the Referendum: Arguments Pro and Con (1912).

9 Quoted in Thomas E. Cronin, Direct Democracy: The Politics of Initiative, Referendum, and Recall 54 (Harvard Univ. Press, 1989). That era's overall perception of political corruption, and the Progressives' "general theme," has been described as "the effort to restore a … political democracy that was widely believed to have existed earlier in America and to have been destroyed by the great corporation and the corrupt political machine" and to "bring back a kind of morality and civic purity that was also believed to have been lost." Richard Hofstadter, The Age of Reform 5-6 (Random House, 1955).

10 *7 Bonnery v. Belsterling*, 104 Tex. 432, 138 S.E. 571 (1911); *Hopkins v. Duluth*, 81 Minn. 189, 192, 83 N.W. 536 (1900).

11 *Kadderly v. City of Portland*, 44 Or. 118, 74 P. 710 (1903). In this case, the question of whether Oregon's new direct-democracy amendment violated the Guarantee Clause came on indirectly. Under this amendment, a state legislative enactment might be repealed by Oregon voters within ninety days after a legislative session had ended. In its 1902 session, the legislature had provided for a new charter for the city of Portland. The Charter became immediately effective, without waiting out the ninety day period in which it might be challenged by an initiative. Hence, the charter was said to be void. In defense of its new charter, Portland argued that the ninety-day period need not be met because the initiative on which it was based was unconstitutional.

Court found that the initiative did not violate the Guarantee Clause. As the court noted, the initiative passed the basic test of being solidly grounded in popular sovereignty. Beyond that, the initiative was in fact compatible with a general scheme of representative government, separated powers, and personal rights. As said by the court, "the people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substituted another in its place."

Nor had the personal rights of Oregon's citizens been altered, because laws enacted by direct democracy were subject to these rights same as any other law. As stated by the court, "Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes … ." (This important point was confirmed in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

Finally the Oregon court noted the Guarantee Clause's positive protection of a state's power to use various forms of democracy, quoting *Federalist No. 43* for the proposition that "Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guarantee for the latter."

Thereafter, the reasoning in *Kadderly* was followed and applied by the Oregon Supreme Court in *Pacific States Telephone & Telegraph v. Oregon*.[12] By the initiative, Oregon voters had imposed a tax of two per cent of gross revenues on certain utilities. Pacific States Telephone & Telegraph argued against the tax, on grounds that the initiative by which it was adopted was unconstitutional under the Guarantee Clause. The Oregon court summarily rejected that argument, saying the Guarantee Clause and the initiative "had been thoroughly argued to and considered by this court in *Kadderly v. Portland*, and the views of this court as then and now entertained are indicated in the opinion filed in that case."

The telephone company then appealed from this decision to the U.S. Supreme Court.[13] That Court, though, refused to take the appeal, on the grounds that the case presented a political question outside the power of a federal court. This assessment of a political question was based on an odd if not distorted view of the facts, which I will explain shortly. The effect of the Supreme Court's inaction in *Pacific States*, though, was to leave in place the state court decision approving the initiative.[14]

The Supreme Court's decision in *Pacific States* has been widely understood as establishing that the Guarantee Clause presents a political question beyond the power of Article III courts. But a close examination of that case shows that this assessment of non-justiciablity has an infirm basis. As Justice O'Connor has said, an initially "limited holding" by the Court has "metamorphosed into the sweeping assertion" of non-justiciability.[15] Understanding just how Justice O'Connor is right is important to understanding that the Guarantee Clause is indeed justiciable, and that it does protect states' use of the initiative.

The "limited holding" to which Justice O'Connor referred was *Luther v. Borden*, where

12 53 Or. 163, 99 P. 427 (1909).

13 223 U.S. 118 (1912).

14 After the Supreme Court's decision in *Pacific States*, the use of the initiative by the states has remained protected, by one means or the other, in state court decisions. In some cases, state courts (following *Pacific States*) have found that the Clause was not justiciable. *E.g.*, *State v. Manussier*, 129 Wash.2d 652, 921 P.2d 473 (1996). Other state courts have found the Clause to be justiciable, but not to forbid the initiative. *See* note 19.

15 *New York v. United States*, 505 U.S. 144, 184 (1992).

the tumultuous politics of early Rhode Island had presented the Court with an uncommonly touchy case.[16] The Rhode Island Constitution had consisted of the charter, granted by King Charles II in 1663, establishing the colony. Over the years, this charter had become unacceptable to a number of Rhode Islanders, especially its limitation of the franchise to property owners. The charter, though, had no provisions whereby these citizens (or any other citizens) might amend it. The charter did provide for amendment by legislative action, but the General Assembly would not amend the charter as the suffragists wished. The General Assembly did, however, authorize a constitutional convention known as the "Freeholder's Convention." At the same time, the suffragists held their own convention, "The People's Convention." Each convention produced a constitution and both were submitted to the voters, the result (without accounting for inaccuracies or fraud) was that The People's Constitution was ratified and the Freeholder's Constitution was rejected.

The General Assembly then passed a law that precluded the establishment of a government under The People's Constitution. But under that "constitution" elections were held all the same and Thomas Dorr was elected governor. This "Dorrite" government was for a brief period a rival to the existing, "Charter" government. The Charter government asked President Tyler to intervene, under Section 4, Article IV of the U.S. Constitution, to prevent domestic violence. Tyler refused. In 1842, Dorr was arrested by the Charter government for treason. Shortly thereafter, the movement that he led collapsed. About seven years later, though, that movement got its case before the U.S. Supreme Court. *Luther v. Borden* was a trespass action against the state, on the grounds that its arrest of Dorr had been unlawful because the Dorrite government rather than the Charter government had been the legitimate government of the state. The Court was thus called on to decide whether back in 1842 the Dorrites had established themselves as the rightful government of the state.

For reasons of prudence and practicality, that decision was one that the Court would not make. Firstly, the Dorrite government had collapsed in 1842 and the Charter government had continued. Were the Court to declare that the Charter government had been unseated in 1842, that declaration would, as the Court noted, call into question all the acts and laws of Rhode Island since 1842 and beget the huge problem of reconstituting an alternative government. Secondly, the Court was unsure of whether, as an evidentiary matter, it could reconstruct the years-old electoral contest between the competing governments. Thirdly, President Tyler's refusal to intervene in Rhode Island seemed to the Court to be a recognition, by the presidency, of the legitimacy of the Charter government. For these pragmatic reasons, the Court declined the invitation to rule that the existing Rhode Island government was the wrong government. It is in light of this common sense that we should read the occasional statement such as: "Much of the argument on the part of [Dorr] has turned upon political rights and political questions, upon which the Court has been urged to express an opinion. This we decline to do."

As *Luther v. Borden* was the limited holding, the Court's opinion in *Pacific States* was the "sweeping metamorphosis" to which Justice O'Connor referred. At the start of its opinion in *Pacific States*, the Court stated the facts and issue clearly enough, saying that the question before it was whether "The initiative amendment and the tax in question … violates the right to a republican form of government which is guaranteed by sec. 4, article 4 of the

16 7 How. 1 (1849).

Federal Constitution." But from then on the Court inflated the issue, so that the complaint about the initiative became an attack not on the initiative but on the whole state government. In this respect, the Court referred to the "propositions" raised by the case, and then miscast them as follows:

> [T]he propositions each and all proceed alone upon the theory that [Oregon's] adoption of the initiative and referendum destroyed all government republican in form in Oregon. This contention … would necessarily affect the validity … of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed, the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon.

This notion, that the attack on the initiative was actually an attack on the state as a state, iterates throughout the opinion, to the penultimate paragraph where the Court warns that "the assault which the contention here … makes is … on the state as a state."[17] We can, though, be reasonably sure that the telephone company, as it had set out to avoid the initiative-imposed tax on its revenues, never thought to destroy the state of Oregon. Moreover, the initiative was simply a supplementary form of legislation. As the Oregon Supreme Court had said, "the people" had "simply reserved to themselves a larger share of legislative power" and the state government was "still divided into the legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people."[18]

The Court, of course, refused to engage in such wholesale destruction. It reached that result, though, by concluding that "the issues presented, in their very essence, are … political and governmental, and embraced within the scope of the powers conferred upon Congress, and not, therefore, within the reach of the judicial power." From that statement forward the Guarantee Clause has often been spoken of as dead at the hands of the political question doctrine. But as it is supposed to have died, the Clause did so in service of federalism, because as it fell the Clause left standing the state court decision holding that the Clause guaranteed the states' right to choose their own forms of popular sovereignty, and to choose the initiative in particular.

But then the Clause was not actually put to death. Accepting *Pacific States* on its own strange terms, the most that that case established is that the Clause presents too big a question to federal courts when they are asked to destroy a state as a state. Outside that implausible context (as several state courts have held and as the modern Supreme Court has indicated), the Clause had not been established as categorically non-justiciable.[19] Thus, for political question purposes Guarantee Clause issues should be treated like any other constitutional issue, with a court applying ordinary *Baker v. Carr* standards (commitment of an issue to a coordinate branch of government, whether the issue lends itself to "manageable judicial standards," whether there is a danger of conflicting pronouncements by different government branches, and so on) to determine justiciability.[20] By these standards,

17 223 U.S. at 141, 151.

18 *Kadderly*, 44 Or. at 145.

19 E.g. *In re Petition*, 820 P.2d 772, 779-81(1992); *Vansickle v. Shanahan*, 212 Kan. 426, 435-39, 511 P.2d 223 (1973). For a discussion of U.S. Supreme Court opinions that indicate that the clause is justiciable, *see New York v. United States*, *supra*.

20 See Arthur E. Bonfield, *Baker v. Carr: New Light on the Federal Guarantee of Republican Government*, 50 Calif. L. Rev. 245 (1962); *Vansickle v. Shanahan, supra*. *See also Reynolds v. Sims*, 377 U.S. 533, 582 (1964) ("some questions raised under the Guarantee Clause are non-justiciable" but only where "political in nature and where there is a clear absence of judicially manageable standards").

the Guarantee Clause generally should be justiciable, as it was in *Hoxie v. Brewer* in 1956, when a federal district court found that an attempt at mob rule by white supremacists over a school board intent on desegregation was not a part of republican government (which elevates the rule of law over anarchy).[21]

Open and in view, the Clause provides a "federal guarantee" of a state's "right" to choose among various forms of government – including the initiative – so long as it acts peaceably and without lawless confusion.

Against whom does this right stand? In its history, the Guarantee Clause and the right thereunder have generally stood against judges as they might seek to impose their own political views on the states. In California, the Clause should have reminded the federal district court that inasmuch as it overturned that state's duly enacted Civil Rights Initiative because of the direct democracy form of it, the court was pretty close to a particular despotism – "the aristocracy of the long robe" – that in matters of federalism the Clause opposes. Indeed, the Ninth Circuit Court of Appeals, as it reversed the district court's injunction against the initiative, noted that "A system that permits one judge to block with the stroke of a pen what 4,736,180 residents voted to enact as law tests the integrity of constitutional democracy."[22]

A postscript: That there is no "normative preference" in the Constitution against the initiative does not at all entail the further conclusion that the content of an initiative should similarly not be questioned in court. As the courts have said, this content may be questioned if it violates constitutionally protected personal rights.

21 This mob action was enjoined. 137 F. Supp. 364, 366-67 (E.D. Ark. 1956). See also Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 Yale L.J. 561 (1984).

22 *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).