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STATE COURTS AND REPUBLICAN GOVERNMENT

Hans A. Linde*

I. THE CONSTITUTION'S CHARGE TO STATE JUDGES AND OFFICIALS

Do California judges and officials have any obligation to maintain a republican form of government? And is this obligation relevant to California's initiative system?

The answer is yes to both questions. The legal reasons, as a matter of constitutional text and history, are quite straightforward. Readiness to act on them is another matter.

A. Maintaining Republican Governance as the "Supreme Law of the Land"

The Constitution assumes that each state enters the union with a republican form of government, and it directs the United States to guarantee that state governments remain republican. The 1787 Northwest Ordinance required it for new states, and it was axiomatic for the Philadelphia Convention. Introducing the eleventh resolution of Virginia's plan for the proposed union, Governor Randolph stated that the resolution had "two objects: first, to secure a republican government [and] secondly, to suppress domestic commotions." Later, Randolph proposed, with James Madison's second, to state even more clearly that "no State be at liberty to form any other than a republican government," a principle that James Wilson then rephrased with their

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consent as a guarantee.\(^2\)

The Guarantee Clause imposes a secondary, derivative duty on the United States, but the primary responsibility for republican institutions is on each state. There would be no cause to direct the union to intervene in a state’s government if the states were at liberty to adopt non-republican forms. The U.S. Supreme Court only stated the obvious in 1874 when it wrote that the clause “necessarily implies a duty of the States themselves to provide such a government.”\(^3\) I doubt that anyone has denied this. It is each state’s most fundamental duty to the nation and to its citizens. As the California Constitution itself expressly recognizes, statehood makes the federal Constitution a part of every state’s law.\(^4\)

Compliance with a constitutional duty falls to the officials who act for the state, including its governor, attorney general, secretary of state, and all others who must swear to uphold the constitutions of the United States and of the state.\(^5\) But even more, the federal Supremacy Clause explicitly holds the states’ judges responsible for the officials’ compliance. The Constitution is “the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”\(^6\) The Supremacy Clause does not allow a state’s judges to duck a federal legal challenge even to the very constitution of their state. In principle, then, the judges in every state are bound to consider claims that their state has departed from republican government. Indeed, state judges used to do this often and sometimes still do.

Many such claims are unrelated to initiatives. They may involve an excess of placing the state’s lawmaking power in a single executive—an echo of eighteenth century monarchy.

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2. “That a republican form of government shall be guaranteed to each State, and that each State shall be protected against foreign and domestic violence.” \textit{Id.}


5. \textit{See} U.S. CONST. art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .”).

6. U.S. CONST. art. VI, § 2, cl. 2.
Let me cite a few modern examples. Thirty years ago, Kansas amended its constitution to reorganize executive departments subject only to legislative disapproval rather than prior authorization. The Kansas Supreme Court called squaring this change with the Guarantee Clause "the decisive question in the case," and it sustained the amendment after a lengthy review of James Madison's writings on the tests of republican government.\(^7\)

About the same time, the Wisconsin Supreme Court decided that republican government does not require a strict separation of executive and judicial powers.\(^8\) The same conclusion was announced in Colorado\(^9\) and in Rhode Island.\(^10\) In a 1991 opinion, Oklahoma's justices overcame their concern with republican government and allowed a constitutional proposal to refer all future revenue bills to the voters.\(^11\) These and other modern opinions faced and disposed of the issue on the merits.\(^12\) Other state courts, however, have denied not only their duty but their power to hear claims that a state law or process departs from the republican governance that is "the supreme Law of the Land."

What explains this division among the judges?

B. Trading Analysis for an Adjective: "Non-justiciable"

1. History of Confusion: The Pacific States Telephone Case

The confusion stems directly from the U.S. Supreme Court's 1912 decision in *Pacific States Telephone and Telegraph Co. v. Oregon*.\(^13\) The company challenged a tax enacted by the initiative process and invoked the guarantee of republican forms of government. The Oregon Supreme Court

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13. 223 U.S. 118 (1912).
considered and rejected the argument on the merits, for reasons we will consider later. What did the U.S. Supreme Court do?

The Court dismissed the company's writ of error for lack of jurisdiction—that is, its own jurisdiction to decide this issue. It read the words "The United States" in the Guarantee Clause to place the onus for keeping the state governments republican on the federal political branches rather than the federal courts. This allocation of federal power made the guarantee "not justiciable" in the Supreme Court. The Court did not endorse direct legislation as "republican," having denied its own jurisdiction to consider the question. Logically, that decision would be the same if the Oregon court had invalidated the initiative as non-republican—unless the Supreme Court had then chosen to assert its jurisdiction. Justice White's opinion nonetheless continued with extravagant assertions about the company's claim—that it would invalidate Oregon's entire government and all its acts—assertions that any competent attorney or court can distinguish or dismiss for the dicta they were.

In any event, *Pacific States* held nothing to cast doubt on Oregon's own responsibility for its republican institutions. The Supreme Court did not cast doubt on that responsibility. It did not hold that the Oregon courts lacked jurisdiction to decide how the initiative squared with republican lawmaking. The Court did not hold (and, having denied its own jurisdiction, it could not hold) that the Oregon court should have dismissed the company's claim rather than decided it. *Pacific States* did not touch the state judges' responsibility for testing their states' adherence to republican governance.

The opinion's rhetoric, however, created confusion in the state courts. Some early state cases after *Pacific States* continued to decide Guarantee Clause claims. Other state courts, including one California intermediate court, began to dismiss such claims as "non-justiciable" with simple citations to *Pacific States*, without analyzing whether that opinion decided anything about the authority of state courts. Some

14. *Id.* at 151.
courts have chosen to note the question of justiciability and still deal with the claim of non-republican government action.\textsuperscript{17} The Oregon court, whose decision on the merits the Supreme Court had left standing, later seesawed between reading \textit{Pacific States} to foreclose review in 1954,\textsuperscript{18} to stating the correct analysis in 1990,\textsuperscript{19} and back again in 1997.\textsuperscript{20}

"Non-justiciable," of course, is a conclusion, not a premise for a conclusion. To say that a court may not decide a legal issue because it is "non-justiciable" is no explanation at all. The Supreme Court's premise for the dismissal in \textit{Pacific States} concerned political responsibility within the national government, not the state's obligation. Moreover, justiciability is not a factor in attorneys general opinions, nor in state court advisory opinions, which are not binding adjudications. Could there be other reasons for dismissing such claims in state courts? None that, in my view, survive examination.

First, it is not a tenable theory that Article IV, Section 4, of the U.S. Constitution is not law, or that it does not bind state officials. Second, if the guarantee is called a "political question" because the Constitution "textually commits" national enforcement "to the United States," then the Supremacy Clause even more clearly commits compliance with the Constitution to the care of the states' judges.

Nor does the clause fail as law, in or out of courts, for lack of discernible standards. The nature of republican government long was central to American political theory. State courts have not found themselves without persuasive sources to decide claims that some governmental acts departed from republican governance. The task for judges is

\textsuperscript{aff'd} 281 U.S. 370 (1930). The significance of the affirmances is discussed below at n. 23. \textit{See also} Williams v. City of San Carlos, 43 Cal. Rptr. 486, 489 (Cal. Ct. App. 1965).


\textsuperscript{18} \textit{See} Baum v. Newbry, 267 P.2d 220 (Or. 1954) (secretary of state's power to redistrict if court invalidates legislature's plan).

\textsuperscript{19} \textit{See} State v. Montez, 789 P.2d 1352 (Or. 1990) (initiative placing death penalty in the constitution, beyond legislative change).

\textsuperscript{20} \textit{See} State \textit{ex rel.} Huddleston v. Sawyer, 932 P.2d 1145 (Or. 1997) (requiring legislative supermajority to change sentencing laws approved by voters).
not to define "republican government" as a Platonic form but
to recognize when a particular feature is not republican.
State courts, one hopes, would have no trouble—at least, no
intellectual trouble—in concluding that the decrees of a
governor who declared martial law and canceled elections to
remain in power would not be republican lawmaking, even if
the state retained the form of a legislature in a powerless
assembly. They also might recognize a failure of republican
government if the governor or legislature could reverse any
judgment of a court or remove any judge as they pleased—not
unprecedented elsewhere.

2. Developing State Jurisprudence on Republican
Government

State judges may feel at a loss how to decide, and lawyers
how to brief, a federal text in the absence of Supreme Court
cases and opinions. But if the state's own constitution
guaranteed that it would forever maintain a republican form
of government, I doubt that the state's courts would profess
themselves unable to analyze and apply that provision. Yet
California's situation is the same. As I have said, the
national requirement that all states maintain republican
governments legally makes this duty a part of every state's
constitution, and courts should apply it as such.

Suppose that a state changed its constitution and
empowered its governor to impose criminal punishment on
violations of executive orders, or to determine the
government's financial needs and to levy taxes on such
income or property and at such rates as the governor deemed
necessary to meet those needs. Would a court be unable to
discern that this is not republican government—even if the
governor acted in full compliance with due process, equality,
and other individual rights? If a state court did hold such a
gubernatorial power 'nonrepublican,' would anyone expect the
U.S. Supreme Court to hold that the court exceeded its
jurisdiction? The Kansas court in Van Sickle v. Shanahan 21
readily tackled and disposed of a somewhat different claim
against a governor's power to change existing law.

The fact assumed in my question—that the challenged
act complies with all other constitutional guarantees—
suggests why lawyers and courts neglect the guarantee of

republican government. Petitioners for relief from some state law generally can and do choose from a panoply of other federal claims, most often under the Equal Protection Clause, Due Process, or the First Amendment. With few conventional sources for briefing a charge of non-republican action and little encouragement to expect success, this claim appears when the other claims seem slim. Judges, who are more inclined to protect individual rights than to sit in judgment on their states' governments, are likely to ignore such republicanism claims when the law is vulnerable to a conventional Fourteenth Amendment attack, and to dismiss them without much analysis when the law otherwise passes muster.

In two early state cases following the dismissal in *Pacific States*, appellants nonetheless added Guarantee Clause arguments to their clearly appealable Fourteenth Amendment claims. The Supreme Court could not dismiss these judgments, and it affirmed them. The Oregon court has mistaken these results to imply that it lacked power to review charges of non-republican actions as it had done three generations earlier. The best illustrations, however, are found in Colorado.

In *Evans v. Romer*, challenging Colorado's amendment against anti-discrimination laws for homosexuals, plaintiffs argued that republican government, as understood in Madison's time, precluded putting the rights of a distinctive minority to the vote of a popular majority. Logically, a claim that a law was not validly enacted needs to be answered before reaching the substantive validity of the measure. But this argument was not discussed in the Colorado court's

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23. See *Huddleston*, 932 P.2d. 1145. The majority opinion may have overlooked that the 14th Amendment claims in these cases precluded dismissals of the appeals in the U.S. Supreme Court, unlike the dismissal of the writ in *Pacific States*. Two dissenters correctly read *Pacific States* to deal only with federal jurisdiction. The modern Washington Supreme Court was more careful, declining to decide its own authority because the issue had not been satisfactorily briefed. See *State v. Manussier*, 921 P.2d 473 (Wash. 1996).

24. 854 P.2d 1270 (Colo. 1993). This historic theory of republican lawmaking institutions also should have been raised against the 1964 California initiative barring anti-discrimination "open housing" laws, which similarly was pushed to a five to four Supreme Court decision on equal protection grounds. See *Reitman v. Mulkey*, 387 U.S. 369 (1967).
opinion, which preferred to debate the more familiar equal protection issue on which a five to four majority in the U.S. Supreme Court ultimately invalidated the amendment. Later, however, the Colorado court found a violation of republicanism in a law that it struck down on another independent ground.

In sum, the U.S. Constitution requires states to maintain republican governments, and it directs state judges to ensure compliance with the Constitution. State courts understood this until the Supreme Court used the word "non-justiciable" to deny its own responsibility within the U.S. Government for enforcing the guarantee. In modern times, some state courts have applied this denial to themselves, some have continued to consider issues of republican government, and some have admitted their uncertainty and wavered back and forth on the issue. But it is wholly illogical to suggest that the U.S. Constitution, which requires states to maintain republican governments and swears state officials and judges to abide by its terms, prevents state courts from reviewing their states' adherence to republican processes. That view stands the Constitution on its head.

Meanwhile, the present Supreme Court is looking at ways to use the Guarantee Clause against federal laws. Surely a disabled and dysfunctional government is not the kind of republican state government that this novel perspective seeks to preserve. But the Supreme Court is unlikely to clarify the standards for state governments until a state court actually finds some state action or process incompatible with republican government. If state courts, for insurance, couple such findings with some more familiar basis for the same result, Supreme Court review may wait a long time.

26. See Morrissey v. State, 91 P.2d 911 (Colo. 1998). In view of the second basis for decision, the court thought it unnecessary to decide its authority to enforce the Guarantee Clause.
27. In New York v. United States, 505 U.S. 144 (1992) (invalidating federal requirement that states "take title" to certain radioactive wastes as "commandeering" state processes), the Court suggested that the justiciability of Guarantee Clause claims was a complex issue that it did not need to decide in that case.
II. RELEVANCE FOR GOVERNMENT BY PLEBISCITE

So far we have focused on the state courts' duty to test their state's adherence to republican means of governing. That duty seems to have met with little objection when courts have reviewed such challenges to executive power. How does it relate to lawmaking by initiatives?

A. The Original Defense

It was by no means taken for granted a century ago that initiatives were a republican form of lawmaking. It was an obvious issue in the political as well as academic debates. When Oklahoma's constitutional convention proposed to copy Oregon's newly adopted model of direct legislation, the delegates were so concerned that the president and attorney general would block Oklahoma's statehood that they left the system optional until the state was safely admitted. The issue was litigated at once after Oregon in 1902 adopted the populist program of direct democracy.

In 1903, before any initiative had yet been circulated, the Oregon Supreme Court stated its defense of the new system, in Kadderly v. City of Portland. Other courts quickly cited Kadderly as the answer to attacks on direct legislation in their states. The California Supreme Court cited it in 1906 to observe that the federal Guarantee Clause did not necessarily confine initiatives to local uses. The Oklahoma and Kansas courts relied on Kadderly's holding that the initiative and referendum do not conflict with the Guarantee Clause.

When the Pacific States Telephone Company later challenged an initiated law, the Oregon court sustained the


29. See Ex parte Wagner, 95 P. 435 (Okla. 1908) (referendum on a city ordinance).

30. 74 P. 710 (Or. 1903), reh'g denied, 75 P. 222 (Or. 1904) (challenge to a statute delaying the effective date of an ordinance so as to allow petitions for a referendum).

31. See In re Pfahler, 150 Cal. 71 (1906).

32. See Wagner, 95 P. 435; State v. Board of Comm'rs, 144 P. 241 (Kan. 1914) (requiring city commissioners to enact a proposed ordinance or put it on the ballot).
initiative by simply referring to the views it stated five years earlier in its *Kadderly* opinion. 33 So we must review how that opinion squared the initiative and referendum with a republican form of government.

Recall that the court faced the question abstractly, before either device had been used. Furthermore, the court rejected an argument that the question was not justiciable. 34 The issue was cast as one of the state's architecture—either it was republican or it was not. The court considered the effect of plebiscites on the formal structure of government, not yet on its functioning. The opinion acknowledged that one object of the Guarantee Clause was to "prevent [the people] from abolishing a republican form of government," 35 and that this meant "a government administered by representatives chosen or appointed by the people or their representatives." 36 But, the court found, Oregon's representative government continued to exist. A referendum only gave voters the power to withhold their assent to laws passed by those representatives. "[T]he legislative and executive departments are not destroyed" 37 and initiated laws "may be amended or repealed by the Legislature at will." 38 Moreover, initiated laws remained subject to the same constitutional limitations as other statutes.

In short, *Kadderly* postulated that republican government meant government by elected representatives. It defended lawmaking by plebiscite only to the extent that it did not interfere with the continued authority of elected representatives. This was the defense later cited by the California, Oklahoma, and Kansas courts. 39

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34. See id. See also City of McMinniville v. Howenstine, 109 P. 81 (1910) (challenging power delegated to cities). "The federal constitution is a sufficient guard against any legislative system that might become subversive of a republican form of government, such as, for example, a perpetual surrender of State sovereignty to the municipalities, etc." *Id.*
36. *Id.*
37. *Id.* at 720.
38. *Id.*
B. The Implications of the Kadderly Defense: Preserving Representative Government

The Kadderly opinion did not fully explore all the implications of Oregon’s new system. It did not consider initiated constitutional amendments or anticipate their use to disarm the legislature’s power to amend or repeal laws. In 1903, the debate was conducted in all-or-nothing terms, was direct participation of voters in statewide lawmaking contrary to a republican form of government or was it not?

Then and now, critics have been impatient with distinctions, while supporters are satisfied with waving the banner of democracy without considering the implications of government without representation, or the record of other regimes based on plebiscites. In its most simplistic form, what can be un-American about putting any decision to a vote of the people? Actually, American courts have not, and would not, allow a popular vote on overriding their own constitutional holdings, granting or denying a tavern license, or on admitting some identified residents to citizenship while excluding others, as in Switzerland. Judges now can rely on expansive notions of due process or equal protection for such decisions, but before 1868 they might well have invoked principles of “republican government.” Constitutional scholars and theorists also question the claim of lawmaking by initiative to higher

41. See People v. Max, 198 P. 150 (Colo. 1921) (referendum on decisions invalidating laws).
42. See Club Misty, Inc. v. Laski 208 F.3d 615 (7th Cir. 2000).
43. Under Swiss law, “regular naturalization falls exclusively under the jurisdiction of the cantons and communes which may make further stipulations and decide freely whether or not they wish to grant the alien cantonal and communal citizenship and thus, Swiss citizenship.” Embassy of Switzerland, Washington D.C., Fact Sheet: The Swiss Citizenship Law (last modified Jan. 4, 2001) <http://www.swissemb.org/legal/html/swiss_citizenship_law.html>. In 2000, one community by referendum excluded Swiss residents of Balkan origin from citizenship while admitting residents of Italian and other origins. See Elizabeth Olson, Swiss Refusal of Citizenship to Immigrants Raises Debates, N.Y. TIMES, May 21, 2000, at A9.
44. See Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (principle that legislative power is limited “flows from the very nature of our free Republican governments” (emphasis added)); Rice v. Foster, 4 Del. (4 Harr.) 479 (Del. 1847).
democratic credentials than lawmaking by representatives. By stating the test to be the preservation of a state's representative government, Kadderly put the issue of its displacement by initiatives—lawmaking without government—on the right track. The opinion remains the best foundation for further analysis by attorneys general as well as by the courts.

Because my primary topic today is the judicial authority to continue that analysis, I only suggest its general direction, without going into detail. An incursion on representative government can be invalid for distinct reasons. One is simply logical; the Kadderly rationale does not allow lawmaking by elected representatives to be placed below lawmaking by plebiscites as if it were an inferior but regrettably necessary substitute. Republican government does not demand simple majority votes. The designers of the U.S. Constitution, themselves, required supermajority votes on a few important issues. Elected representatives may propose such a requirement for their own institution to the voters. But without their participation, it is inconsistent with Kadderly's premises to impose a higher barrier on elected lawmakers, while allowing initiatives to be adopted by simple majorities of whoever chooses to vote on them. The other, less simple, test is substantive. Initiatives may not incapacitate the state government from performing legally essential functions of a state.


46. This principle extends beyond initiating laws as constitutional amendments, to provisions making it harder to change or repeal laws that have been enacted by popular vote than laws enacted by the legislature and governor. See CAL. CONST. art. II, § 10(c); OR. CONST. art. IV, § 33; cf. Luker v. Curtis, 136 P.2d 978 (Ida. 1943) (citing Kadderly); State ex rel. Huddleston v. Sawyer, 932 P.2d 1145, 1172 (Or. 1997) (Durham, J., dissenting).

The designers of "republican government" rejected the view (embodied in some post-Revolutionary state constitutions) that elected officials only act as agents when voters cannot act directly. See Marci A. Hamilton, Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation, 69 N.Y.U. L. REV. 477 (1994).
1. Preserving Representative Lawmaking

The *Kadderly* opinion allowed voters to share in the state's legislative power, by initiatives as well as by referenda, only as long as the representative legislature retains the power to change, repeal, or reenact laws. This means that ordinary laws may not be put beyond legislative reach, by placing them in the state's constitution or by other special obstacles to later legislative action.

By “ordinary laws” I mean laws that govern private relationships or conduct or impose burdens or penalties on private persons, as distinct from directing how government should be organized and conducted or limiting its powers. *Kadderly*’s test does not prevent initiating amendments that change governmental structures, or elections, or define private rights, for instance, the procedural rights of crime victims against government acts. It does not prevent initiating measures to enact criminal penalties or taxes. But the test does prevent initiatives to put taxes or sentencing laws beyond legislative change, even if the drafters phrased a punishment as a “victim’s right.”

This distinction is not new. The drafters of early state constitutions, including Oregon’s in 1857, basically understood and followed it, with some exceptions. After Oregon allowed initiatives to propose “laws” and “amendments to the Constitution,” the new system’s populist sponsors long adhered to the distinction, proposing ordinary laws for private conduct and addressing constitutional initiatives only to government. The telephone tax at issue in *Pacific States* was initiated as a law; had it been initiated as a

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First, in the view of nearly all critics, the 1879 document was too much a collection of detailed and highly specified codes that would better have been left to ordinary legislation. . . . Ironically, any gains made in 1970 by purging the document of excessive detail and of provisions more properly “legislative” have been more than overbalanced since then by the profligate use and often devastating effects of the modern direct ballot for constitutional revision.

*Id.* at 48.

constitutional amendment it could not have been sustained by the Oregon court's simple citation to Kadderly. 49

2. Preserving the State's Ability to Function as a State

Recent initiatives, starting with California's 1978 Proposition 13, have sought amendments to restrict particular taxes or overall levels of public spending. 50 Other initiatives impose obligatory expenditures without providing a new source of revenue. Because government operates by spending money, this use of initiated amendments poses a distinctive threat to representative government. Standing alone, a limitation on taxing property may merely compel a state to turn to some other tax, on incomes, sales, or gross receipts, until precluded by new amendments, and forced spending on prisons or pensions may only compel a state to reduce or abandon other programs. But if initiatives may entrench tax limitations and spending programs in the constitution, they could potentially reduce the elected government to allocating the small change left to its legislature. 51

This troubling implication led the Oklahoma Supreme Court in 1991 to question whether an initiative to require referenda on most revenue bills departed from representative government. 52 A legislature without the means to govern and reduced to debating the choice of the state song or flower would not qualify. The Oklahoma court allowed the amendment, declining to assume that the voters would defeat

49. See supra text accompanying note 31. The distinction applies to initiated amendments, not to amendments referred to the voters by the legislature. Fiscal, bonding, and other constraints in state constitutions often require legislatures to refer an amendment in order to enact and dedicate a revenue source to specific purposes in a form beyond legislative change. That decision, however, is proposed by the representative lawmakers themselves, not imposed upon them.

50. See, e.g., OR. CONST. art. XI, § 11 (replacing a flawed initiative), and § 11(b)-(e) (1997) (totaling 132 column-inches of details in the constitution).

51. The Idaho Supreme Court rejected a claim that the legislature could not repeal an initiated statute in this grant of state pensions to senior citizens because initiatives "come[ directly from the people." Luker v. Curtis, 136 P.2d 978, 979 (Idaho 1943). If a series of initiatives can place such mandated expenditures directly in the constitution or otherwise beyond legislative control, along with initiated tax limitations, as can happen in California, the implications for the state government's ability to function are obvious.

52. See In re Initiative Petition No. 348, 820 P.2d 772, (Okla. 1991). Quoting Kadderly, the court stated the "dispositive question" to be whether the amendment would cause "a loss of representative government." Id. at 780.
the revenue bills referred to them. In fact, the federal Constitution does not mandate many state-funded functions beyond conducting elections, not even for roads, schools, or police. The Constitution does, however, presuppose that states have functioning legislatures and courts. Perhaps judges might find that an initiative amendment that cut funding for courts by ninety percent, or destroyed judicial independence by allowing the governor or legislature to replace judges at will, or subjected judges to annual political elections, went too far to be a republican government.

3. Distinguishing Non-Republican Substance from Non-Republican Process

It remains to be distinguished whether or not the substance of a measure or the use of an initiative to enact it is non-republican. If a measure would destroy an aspect of republican government in the state, it does not matter whether the measure is adopted by the legislature, by a referral to the voters, or upon initiative petitions. State laws differ on whether the apparent invalidity of a measure should

53. U.S. CONST. art. I, § 2; art. IV, § 3; and art. VI, cls. 2-3.

54. The essence of political decision is whether and how to levy taxes, allocate funds, and make new laws. If one postulates that courts are a necessary element of a republican government, the issue is how a state distinguishes judges who apply law in adjudications from those political officers who exist to make such political decisions, and who periodically compete for elective office with promises to "represent" and to advocate the interests of their constituents, in campaigns marked by the political methods of partisan nomination, funding by competing interests, and competing promises of favorable actions in office. To the extent that a state's laws allow for little or no distinction between elected political officials and independent courts in these respects, courts might question such laws as potentially inconsistent with republican government. See Hans A. Linde, The Judge as Political Candidate, 40 CLEV. ST. L. REV. 1, 17 (1992).

keep it off the ballot. There are good arguments both for and against an early determination. But it is not unusual for election officers or courts to decide that a proposed initiative or referral does not qualify as a proper ballot measure because it concerns an administrative act, does not propose a law, contains unrelated subjects, or is a revision rather than an amendment.

The Kadderly test of preserving representative government would allow some measures to be referred by a legislature that could not be imposed by an initiative. Elsewhere I have set out another reason why an initiative may not be a legitimate process for a measure although it might be valid if enacted by elected representatives. The drafters of the Guarantee Clause feared lawmaking upon popular "passions" and "interest" in the states as much as any improbable revival of monarchy, and they designed "republican" institutions to forestall this. Understanding those terms should preclude initiatives aimed at identifiable minorities, ad hominem, regardless whether the measure would be invalid if passed by those institutions.

55. Compare Stan P. Geurin, Comment, Pre-Election Judicial Review: The Right Choice, 17 OKLA. CITY U. L. REV. 221, 221 n.6 (1992), with William Lewton Teague, Jr., Pre-Election Constitutional Review of Initiative Petitions: A Pox on Vox Populi?, 17 OKLA. CITY U. L. REV. 201 (1992). The choice concerns only whether the apparent substantive invalidity of a measure should disqualify it; nothing speaks for putting measures that do not qualify as proper initiatives or referrals on the ballot. The Oklahoma Supreme Court split on the issue of whether a non-enforceable policy statement demanding congressional term limits could be either a law or initiated as a constitutional amendment. See In re Initiative Petition No. 364, 930 P.2d 186 (Okla. 1996) (holding measure ineligible).

56. See Linde, supra note 39.

57. See id. at 32-38 (setting out the 18th century significance of these terms). A strongly held conviction about a public policy, whether in favor of the death penalty or against a sales tax, is not a "passion": 

"Passion" describes, not how strongly one supports a measure but why one supports it. The most obvious (though not all) collective passions appeal to a communal judgment of inclusion and exclusion based on nationality, race, or religious convictions—to ad hominem preconceptions like those condemned as "invidious" in equal protection doctrine.

Linde, supra note 54, at 35. "Interest" referred to personal, mainly financial, self-interest. In a financial depression this should, for instance, prevent debtors from initiating a debt relief law for themselves of the kind that the Supreme Court allowed representative government to adopt in the overall public interest. See Home Bldg. and Loan Ass'n. v. Blaisdell, 290 U.S. 398 (1934); see also Linde, supra note 39.
C. Resolving the "Justiciability" Muddle

We return to the issue of responsibility for the lawmaking process. All public officials are responsible for governing by republican means, with or without direction by the courts. But some elected officials see career opportunities in sponsoring initiative campaigns, leading "the people" against their fellow representatives. Others share the ambivalence of their constituents toward lawmaking without government. They decry the destructive force of measures they oppose, while turning to initiatives when their representative institutions block their own policies. In politics, shifting goals often have priority over systemic principles. This persistent ambivalence underscores the importance of recognizing the constitutional line between initiating easy-to-change laws and placing laws beyond legislative change.

That line brings the responsibility back to the state courts. An act taken by non-republican means is unconstitutional in the most profound sense, with or without judicial review, but reliance on courts to decide legal issues has become so deeply ingrained that anything that courts will not review is thought not to be law at all. And surely review by appellate courts, with their wider and longer perspective, is preferable to leaving legal issues to the unreviewable decisions of short-term political officials.

Oregon's attorney general has stated that he would not approve ballot measures that failed the test of republican lawmaking, though he would first seek clarification whether courts would review such decisions if appealed. Clarification may be a long time coming, if it must wait for a case in which

58. A telling example is found in the recurring debates over requiring a prescribed level of participation to pass a measure (e.g. "double-majority" requirements), which are attacked as thwarting democracy by majority rule or defended as securing a truly representative majority, depending on the speaker's attitude toward the measure at issue. See Hans A. Linde, Taking Oregon's Initiative Toward a New Century, 34 WILLAMETTE L. REV. 391, 403 (1998).

59. See Hardy Myers, The Guarantee Clause and Direct Democracy, 34 WILLAMETTE L. REV. 659 (1998). Myers used the example of the 1922 Oregon measure allowing only public schools, which was initiated under the leadership of the Ku Klux Klan in order to destroy Catholic schools. It was invalidated in Pierce v. Society of Sisters, 268 U.S. 510 (1925). Other examples would be various initiatives in California, Colorado, Washington, and elsewhere to overturn rights that lawmakers had extended to racial minorities, homosexuals, or non-citizen immigrants.
a court faces a plausible claim to void a successful initiative measure on grounds that it fails the test for republican lawmaking that the court cannot void on other grounds. Until recently, state courts have found ways to evade that confrontation.\(^6\) Is another approach available?

In the few states that provide for advisory opinions, the justices have proceeded to analyze questions of republican government on the merits.\(^6^1\) Other states generally allow legislators and other officials to obtain a formal opinion from their attorney general. If an attorney general is formally asked whether a state is or is not bound to maintain republican government the answer cannot be in doubt. Nor can one doubt the answer to a second question, whether this duty in principle binds officials who act for the state, including legislators, governors, and election officers.\(^6^2\) The state's chief election officer may not put a measure on the ballot if doing so would be incompatible with republican government. When would it be incompatible? In the absence of judicial or congressional guidance, that legal advice would have to come from the attorney general.\(^6^3\) A legislature itself could resolve by law that republican government depends on preserving the lawmaking capacity of elected representatives—the Kadderly premise—and direct state officials to judge measures accordingly, although they could not resolve the opposite.

Also, state laws provide for petitions for adoption of administrative rules.\(^6^4\) Once it is understood that in principle initiatives must meet standards of republican lawmaking, there is a good case for seeking to formulate those standards

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\(^6^0\) See Evans v. Romer, 854 P.2d 1270 (Colo. 1993); Atiyeh v. State of Oregon, 918 P.2d 795 (1996) (calling plaintiffs' claim "moot" because unrelated parties succeeded in voiding the measure on other grounds, though plaintiffs had asked for future relief and had no interest in the measure's merits). The recent exception was Morrissey v. State, 91 P.2d 911 (Colo. 1998).

\(^6^1\) See, e.g., State v. Lehtola, 198 N.W.2d 354 (Wis. 1972) (powers of district attorneys); In re Interrogatories Propounded by the Senate Concerning House Bill 1078, 536 P.2d 308 (Colo. 1975) (validity of judicial role in redistricting).

\(^6^2\) See U.S. CONST. art. VI, cl. 3.

\(^6^3\) One could imagine an assertion, on a false analogy to the Supreme Court's deferring to the federal political branches, that the state legislature decides what is or is not republican government. See Iman v. Southern Pac. Co., 435 P.2d 851 (Ariz. Ct. App. 1968). But the state legislature cannot have the last word on compliance with a legal requirement of the U.S. Constitution.

in advance by means of a rule-making proceeding. Election
officers might prefer to be thrown into a hornets' nest, but
may a few published standards not serve them better than
facing continual battles with the proponents or opponents of
specific measures? Moreover, once adopted, courts in turn
could review the standards like other rules, divorced from the
political struggle over a specific ballot measure.

Would it be wise to try such an approach to defining the
constitutional boundaries of lawmaking without government?
The legal means exist; readiness to act is another matter, as I
said at the outset. My role here is to offer a legal analysis,
not political advice.

Scholarship on direct legislation must move beyond
asking whether "the initiative" is consistent with republican
government, and beyond disposing of the question with a
citation to Pacific States without reading the analysis in
Kadderly that Pacific States left undisturbed. Under
Kadderly, the primary target is not initiatives as such but the
entrenchment of laws beyond the reach of regular lawmaking.
A modern court's answer may depend on the degree to which
the court has become concerned with the impact of such
entrenched initiatives on the ongoing conduct and the long-
run capacity of representative government. Maybe such a
concern lies behind the recent turn to invalidating initiative
amendments for formal defects, as "revisions," or as
containing multiple subjects or multiple amendments.65

65. See, e.g., Armatta v. Kitzhaber, 959 P.2d 49 (Or. 1998) (invalidating
measure amending multiple constitutional guarantees in criminal cases);
Kurrus v. Priest, 29 S.W.3d 669 (Ark. 2000). While this article was in
preparation, the Washington courts invalidated an initiated measure reducing
automobile license fees and another initiative rolling back taxes and fees
adopted without voter approval. See Oliver Staley, Judge strikes down
Initiative 722: Tax-limit measure addressed more than one issue (Feb. 24, 2001)
Also, an Oregon court invalidated an initiated amendment requiring
compensation when a regulation reduces value of real property. See McCall v.
Kitzhaber, No. 00C-19871 (Marion County Cir. Ct. Feb. 2001). The reason
given in every case was one or more formal flaws that sponsors with time can
learn to avoid. "Since the 1970s... half the [legal] challenges have resulted in
the initiative being invalidated in part or in whole." RICHARD J. ELLIS,
DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA (forthcoming
2002). In a 1999 review of prior cases, Kenneth P. Miller discerned a shift from
an "accommodationist" to a "watchdog" judicial stance in California, Colorado,
and Oregon, especially after Colorado adopted a "single subject" requirement for
initiatives in 1994. See Kenneth P. Miller, The Role of Courts in the Initiative
Process: A Search for Standards (paper delivered at the 1999 annual meeting of
These formal tests are no easier to clarify, are often less pertinent to the real problem, and are less useful in the long run than the test of preserving representative government. Yet, the recent decisions suggest that courts no longer believe that overturning an initiated law outrages most voters. Maybe the answer depends on who else in the state shares the concern with the larger systemic issue and is prepared to present the arguments for its judicial resolution. So far, negation or avoidance may have seemed the courts' most convenient and politically safe course.

If an attorney general or a court really wants to learn whether the federal Constitution precludes state court review for republican means of governance, it is unlikely either will find out by declining to enforce that constitutional duty and leaving it to the challenger to gain certiorari from the Supreme Court on the jurisdictional issue. More promising, as well as more principled, is to act on a well-founded claim that some proposed action or measure would be incompatible

the American Political Science Association).

Miller notes that the state's lawyers are expected to defend ballot measures even if attorneys general believe them to be invalid (though the opposite can be argued, in my view), and he states that "courts stand virtually alone in filtering the initiative process" and recommends some form of non-judicial procedure for pre-election disqualification of invalid initiatives so as to reduce the political burden on courts. But who will voluntarily assume that burden, unless a court finds that it is required by law? Perhaps sponsors of questionable initiatives should have to defend the validity of an initiative for themselves, if an attorney general formally explains the basis for declining to do so. See Senate v. Jones, 21 Cal. 4th 1142 (1999) (pre-election disqualification of initiative under California Constitution's single subject rule); Gerald F. Uelmen, Handling Hot Potatoes: Judicial Review of California Initiatives after Senate v. Jones, 41 SANTA CLARA L. REV. 999 (2001).

66. In Atiyeh v. State of Oregon, 918 P.2d 795 (1996), the case against initiating an ordinary law as a constitutional amendment was presented by a group including two former Oregon governors, the Mayor of Portland (a former Speaker of the House), two former judges of the Oregon Supreme Court, and other past and present officials, who disclaimed any personal interest in the substance of the disputed measure. The case was dismissed as moot when the measure was invalidated on debatable federal grounds in a related suit. See Frohmayer & Linde, supra note 48, at 750-51.

More often, given the modern use of initiatives, claims of non-republican lawmaking have been raised, not by telephone companies or the Society of Sisters, but by public defenders against the death penalty and other sentencing laws constitutionalized upon populist initiatives. See, e.g., State v. Wagner, 752 P.2d 1136, 1197 n.8 (Or. 1988) (Linde, J., dissenting); State v. Montez, 789 P.2d 1352 (Or. 1990); State v. Manussier, 951 P.2d 473 (Wash. 1996). Also, groups defending the political rights of homosexuals seeking legislative protection have raised the claim. See Evans v. Romer, 854 P.2d 1270 (Colo. 1993).
with republican government, leaving it to the proponents to persuade the Supreme Court that the state may not secure republicanism by its own courts. No matter how the question is presented, Californians should know that their own supreme court, without overruling itself, can follow the implications of the Kadderly analysis that it cited in its first defense of the popular initiative,67 if the court is called upon to do so.

67. See In re Pfahler, 150 Cal. 71 (1906).