

# When Is Initiative Lawmaking Not “Republican Government”?

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It is welcome to see scholarly attention turn once again to the constitutional position of direct legislation.<sup>1</sup> Because legislation by a majority of votes cast on an initiative petition bypasses safeguards found in lawmaking by representatives and in the governor's veto, Professor Eule's address in this symposium proposes to confine the anomaly by more rigorous judicial review.<sup>2</sup> The question is, review for what shortcomings?

Two developments may explain the scholars' renewed interest. One is the high national visibility of recent initiative measures, particularly in California, such as tax limitations, bans against nondiscriminatory housing laws, the death penalty, the official entrenchment of the English language, and liability insurance laws. Second, a new academic generation has taken to debating the philosophical theory of legislation: Must lawmakers have broader aims than the self-interest of particular persons or groups? That is a question of political philosophy. The answer becomes a legal test of lawmaking only if it can be translated into a constitutional requirement. If it is a requirement, what are the implications for direct lawmaking by popular initiative?

The philosophical discussion contrasts an interest group model of making public choices<sup>3</sup> with a theory using combinations of the words “civic,” “virtue,” and “republican”—civic republicanism, or simply republicanism for our purposes. This theory postulates that a civil society of equals allows the coercive power of government only for ends that can

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1. See, e.g., W. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* (1972); Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962); Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988); Heaton, *The Guarantee Clause: A Role for the Courts*, 16 CUMB. L. REV. 47 (1985); Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Sirico, *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637 (1980).

2. Eule, *Checking California's Plebiscite*, 17 HASTINGS CONST. L.Q. 151 (1989); see also Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. — (1990).

3. See, e.g., *Symposium on The Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

fairly be said to extend beyond the private interests or passions of those who control that power. Its proponents find sufficient historical support to describe civic republicanism as part of our constitutional tradition, which is only a short step from enforcing the tradition as higher law to set aside legislation—somewhat like the other, more individualistic, tradition of unwritten “natural rights.”<sup>4</sup> Of the two, civic republicanism is the more interesting theory if it can bridge the gap between two visions of judicial review: process-focused review, which its critics find too sterile and too permissive toward political power, and free-wheeling review of the substance of laws independent of any constraints found in the Constitution.

In our recent bicentennial reexamination of the Constitution, some have rediscovered one clause that expressly entrenches the concept of republicanism: the clause of Article IV, section 4, that directs the United States to guarantee to every state a republican form of government. What theory does it enshrine?

### Ruling on Republicanism

The Supreme Court early declined to examine what the Constitution means by a “republican form of government,” holding that a fight between two groups claiming to be the government of Rhode Island had to be settled by the national political branches.<sup>5</sup> In 1912 the Court refused to decide the very different question whether a republican government could bypass representative institutions altogether and make laws without participation of the legislature or the governor, thus turning aside a telephone company’s attack on an Oregon tax placed on the ballot by petition and enacted by a majority of those voting on the measure.<sup>6</sup> The

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4. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) [hereinafter *Beyond the Revival*]; Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter *Interest Groups*]. The growing literature on civic republicanism includes the following: J. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975); Fallon, *What is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989); Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988); Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987); Kramnick, *The “Great National Discussion”: The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3 (1988); Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution* (Book Review), 96 HARV. L. REV. 340 (1982); Simon, *The New Republicanism: Generosity of Spirit in Search of Something To Say*, 29 WM. & MARY L. REV. 83 (1987).

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

6. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

Court stuck with that refusal to interpret the guarantee of republican government in 1962, preferring to review unequal legislative districts as a denial of equal protection of the laws.<sup>7</sup>

There has been academic criticism of the Supreme Court's position,<sup>8</sup> but we need not pursue that here. More importantly, it is a fallacy to assume that because the Supreme Court does not interpret the guarantee, no other courts can or should do so. That is a non sequitur. The Court's doctrine allocates federal responsibility for the guarantee within the branches of the federal government, but it does not relieve the states of the obligation to maintain republican forms of government. A valid act of Congress under the Guarantee Clause would be the supreme law of the land, but so is the clause itself, binding the judges in every state.<sup>9</sup> "The guaranty necessarily implies a duty on the part of the States themselves to provide such a government."<sup>10</sup> A state's attorney general, asked to rule whether a proposal complies with the Guarantee Clause, cannot cite nonjusticiability as an answer. The Supreme Court's stance perhaps frees some state courts to send litigants complaining of unrepresentative state acts to their friendly senators or representatives, but it can not compel them to do so. The state court's response depends on the judicial power within the state, not on the role of the federal judiciary. In many states, for instance, the justices are called upon for advisory opinions, a duty that cannot be avoided whenever a constitutional question has not been answered by the Supreme Court. Even less should it be avoided when present rights depend on the legitimacy of governmental acts.<sup>11</sup>

State courts, in fact, have decided claims of unrepresentative state acts on the merits. The telephone company's challenge to Oregon's tax initiative was one of several in which the Oregon Supreme Court rejected a general attack on the system of direct legislation.<sup>12</sup> But there were few

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7. *Baker v. Carr*, 369 U.S. 186 (1962).

8. *See, e.g., Bonfield*, *supra* note 1; *Merritt*, *supra* note 1.

9. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be 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.

U.S. CONST. art. VI, cl. 2.

10. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175 (1874).

11. *See, e.g., Lipscomb v. State Bd. of Higher Educ.*, 305 Or. 472, 753 P.2d 939 (1988).

12. *Kiernan v. Portland*, 57 Or. 454, 112 P. 402 (1910); *Straw v. Harris*, 54 Or. 424, 103 P. 777 (1909); *Oregon v. Pacific States Tel. & Tel. Co.*, 53 Or. 162, 99 P. 427 (1909); *Kadderly v. Portland*, 44 Or. 118, 74 P. 710 (1903).

Long before, the Delaware court had hurled its anathema against a law for local elections on liquor laws as tending "to subvert our representative republican form of government," but its decision was based on Delaware's, not on the federal, constitution. *Rice v. Foster*, 4 Del. (4 Harr.) 479, 499 (1847).

citations to Article IV, section 4, after the United States Supreme Court declined to consider claims under the clause, either because lawyers thought that this also foreclosed such a claim in state courts or because, bereft of case authority, they did not know how to brief it. Courts dismissed the few citations of the clause without any discussion, except for one remarkable modern opinion of the Kansas Supreme Court.<sup>13</sup>

Kansas had amended its constitution to allow the governor to reorganize or abolish state agencies by executive order subject to disapproval by either house of the legislature, and the state treasurer attacked this reversal of functions as contrary to the republican principles required under the Guarantee Clause. Chief Justice Fatzer, after quoting at length from James Madison's notes of the constitutional convention and from his *Federalist* Nos. 10, 39, 43, and 47, eventually sustained the amendment because the legislature retained the power to reorganize the executive branch if it so chose.

Similarly, the Oregon court had turned aside the attack on direct legislation because it left the conventional institutions of government in existence. It was "inconceivable," the court said, that a state "loses caste as a republic" merely because it allows citizens by popular petition and plebiscite to act as a branch of its legislative department.<sup>14</sup> In short, the Oregon court considered the question to be whether Oregon's government, regarded as a static structure, remained republican in form. So did the United States Supreme Court.<sup>15</sup>

This purely static, formal reading of the Guarantee Clause reflected not merely literalism but also a lack of actual experience with the new direct lawmaking. It made the question an abstract all-or-nothing proposition about forms of government. Republics in name that kept impotent assemblies while transferring lawmaking power to an executive sup-

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13. *Van Sickle v. Shanahan*, 212 Kan. 426, 511 P.2d 223 (1973); see also *Frankenstein v. Leonard*, 134 Ohio St. 251, 16 N.E.2d 424 (1938) (per curiam); *Breedlove v. Suttles*, 183 Ga. 189, 188 S.E. 140 (1936); *Riggins v. District Court of Salt Lake County*, 89 Utah 183, 51 P.2d 645 (1935).

14. *Kiernan*, 57 Or. at 474, 112 P. at 405-06; see also *Kadderly*, 44 Or. at 145, 74 P. at 719-20.

15. Plaintiff's assault "is not on the tax as a tax, but on the State as a State . . . to demand of the State that it establish its right to exist as a State, republican in form." *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 150-51 (1912); see also *Sirico*, *supra* note 1, at 652.

Early commentary also was confined to a structural, all-or-nothing approach without considering whether some initiatives might and others might not contravene the purposes of the guarantee of a "republican" form of government. See, e.g., *Sherwood, The Initiative and Referendum Under the United States Constitution*, 56 CENT. L.J. 247 (1903); *Hand, Is the Initiative and Referendum Repugnant to the Constitution of the United States?*, 58 CENT. L.J. 244 (1904); *Coutts, Is a Provision for the Initiative and Referendum Inconsistent With the Constitution of the United States?*, 6 MICH. L. REV. 304 (1908).

ported by popular plebiscites were far in the antique past; others lay in a future unforeseen in 1912. But upon further examination, might it matter how the initiative is used? Might some uses be compatible with republicanism and others not? Or would such a distinction inevitably mean judicial review of substance masquerading as judgments about process? These questions take us back to the theorists of republicanism.

### “Republicanism” and “Democracy”

The theorists' issue is whether the Constitution envisages a political struggle among competing interests or the pursuit of the public interest, a search for some larger vision of the common good.<sup>16</sup> The answer may have consequences for the substantive validity of laws or for the lawmaking process. Republicanism may mean scrutiny of the lawmakers' ends and of the instrumental rationality of laws toward these ends, or it may mean scrutiny of lawmaking institutions and procedures.

My own view has been that although the United States Constitution forbids certain goals, purposes, or effects, it does not affirmatively require state laws to serve worthy substantive ends.<sup>17</sup> I mean no cynicism about legislators; on the contrary, in my experience, most have been far more committed to the idea of serving a public interest than theorists who see politics as a jungle will admit. I do mean that the Constitution prescribes neither a politics of farsighted civic virtue nor a politics of immediate group interests; legislators may follow one model at one place and time and the other model at other places and times. Most will follow both models at the same place and time for different issues, seeking to accommodate long-term public needs as far as the agenda of immediate political demands allows.<sup>18</sup> The paradigm of those concurrent pursuits is not

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16. Some state constitutions in fact address that issue. Georgia's, for instance, asserts that its government "is instituted only for the good of the whole." GA. CONST. art. I, § 2, par. 1. For virtually identical language, see also ALA. CONST. art. I, § 35; ALASKA CONST. art. I, § 2; LA. CONST. art. I, § 1; MD. CONST. art. I; MISS. CONST. art. III, § 5; MO. CONST. art. I, § 1; MONT. CONST. art. I, § 1; N.H. CONST. art. I; N.C. CONST. art. I, § 2; R.I. CONST. art. I, § 2.

17. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). That lecture did not say (1) that legislators only count, or should count, private preferences; (2) that courts should impose "due process" procedures on legislatures beyond enforcing procedures stated in the respective constitutions and laws; or (3) that judicial review of the instrumental "rationality" of laws would be impossible if the law required it. Rather, it said that the United States Constitution does not require instrumental rationality of laws when the goals of such laws are neither prescribed nor forbidden.

18. This is not, of course, a sharp distinction. Congress, over Madison's protests, designed taxes from the beginning with an eye to their microeconomic effects.

In their very first legislative bill, the members of the House of Representatives created an intractable confrontation between North and South. The bill, offered by Virginia's James Madison, was intended to quickly provide the new government with

regulatory lawmaking; the paradigm is taxing and spending. Beyond the unavoidable budget, the lawmaking agenda is the key test of the theory.<sup>19</sup> Not to act at all may sometimes be more irresponsible than whatever action lawmakers might take, yet few theorists suggest that it is unconstitutional not to agree on changing a law.

If the Constitution does not preach that laws must pass a public interest test, republicanism places higher demands on institutional safeguards. The two visions of republicanism struggle over the ghost of James Madison, long acknowledged as the genius of carefully balanced institutions, for channeling the energies of competing geographic and social factions into mutually acceptable public acts. Professor Cass Sunstein questions this view of Madison and claims him, along with the republican label, for a communal as distinct from a pluralist vision of politics.<sup>20</sup> In either view, how does lawmaking by petition and plebiscite fit into republican theory?

The Federalists distinguished republican government both from monarchy and from direct democracy. They stood for government by accountable representatives, government with the consent of the gov-

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needed operating funds. It was a temporary measure, Madison explained; a fuller bill would be offered later. He proposed low tariffs—five percent on most imports. Speed was essential. Spring had come, and merchant ships were already arriving in American ports with the year's shipments. His bill could be enacted within a number of days. This was not to be.

Thomas Fitzsimons of Pennsylvania was on his feet. He had manufacturers among his constituents. "I have in contemplation to encourage domestic manufactures by protecting duties," he said. He offered a substitute bill with high protective tariffs. Madison tried to talk down his parochialism: "We must consider the general interest of the union as much as the local or state interests." His appeal was useless; the damage was already done, and new protectionist demands came in a flood. Northern members wanted high tariffs for their factory owners; Southern members protested that high tariffs would punish their constituents. North and South all had goods to protect: shoes, tobacco, iron, hemp, hats, nails, indigo, table salt, linens, paper, brooms. This became legislative logrolling, a parliamentary art devised long before and perfected over later years in Congress. This was not all.

The merchants of New York, Philadelphia, Baltimore, and other cities had anticipated this tariff bill and had ordered abroad unusually large quantities of goods. They rallied now to stall the bill's passage until those goods were safely in warehouses duty-free. This might reek of scandal, but the merchants had friends in Congress. After being passed by the house in early May and by the Senate on June 12, the bill did not reach President Washington until early July. Even then, it did not take effect until August 1. The government, starved for funds, lost more than \$1 million by the delay.

MacNeil, *The First Congress*, 1 CONSTITUTION 52, 55 (Summer 1989).

19. Any knowledgeable observer is familiar with the central importance of choosing which long or short term, general or special concerns win a place on the agenda, and how this often causes bills to be shaped to fit the jurisdiction of a friendly committee. See, e.g., Riker & Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 386 (1988).

20. Sunstein, *Interest Groups*, *supra* note 4, at 30 n.4.

erned, not by the governed. "Republican" and "democratic" were not synonyms. "Popular" government could be either a republic or a pure democracy; the difference, to Madison, was that "in a democracy, the people must meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents."<sup>21</sup> Democracy was the antifederalists' program, reflected, for instance, in demands that citizens be empowered not only to petition but to instruct their representatives.<sup>22</sup> But even radicals like Thomas Paine and the most democratic state constitution, Pennsylvania's in 1777, relied on representative rather than plebiscitary democracy.<sup>23</sup> Nor were the wishes of the majority synonymous with the public good. As Sunstein notes, Madison thought the problem of faction especially acute in a direct democracy, because "[a] common passion or interest will, in almost every case, be felt by a majority of the whole" without much regard for the minority.<sup>24</sup> The common good would emerge from the deliberations of properly chosen representatives.<sup>25</sup>

The initiative and referral of laws to popular vote were adopted by western states a century later in the opposite spirit. In Oregon, the change followed a breakdown of representative government, after the legislature, which was elected in 1896, divided three ways over its chief political job of electing a United States Senator, and actually failed to organize at all. This allowed populists to extract promises of radical changes from the older parties.<sup>26</sup> These changes included women's suffrage, direct election of senators, local home rule, and recall of officials along with the initiative and referendum, all of which eventually were adopted. This was radicalism directed at institutions and processes, not at substantive outcomes, but of course it was motivated by substantive

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21. THE FEDERALIST NO. 14, at 132 (J. Madison) (J. Hamilton ed. 1904).

22. See G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 189-94, 372-83 (1969); MASS. CONST. pt. 1 art. 19 (1780). A proposal to add the right "to instruct their Representatives" to what became the First Amendment failed in the House of Representatives. See 1 ANNALS OF CONG. 731-45 (J. Gales ed. 1789), reprinted in 5 THE FOUNDERS' CONSTITUTION 199-206 (P. Kurland & R. Lerner eds. 1987); see also OR. CONST. art. I, § 26.

23. See Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? 102 (R. Goldwin & W. Schambra eds. 1980); see also Berns, *Does the Constitution "Secure These Rights"?*, in *id.* at 59, 66 (the antifederalists had to concede that even the states were too large for direct democracy).

24. Sunstein, *Interest Groups*, *supra* note 4, at 40-41 (quoting THE FEDERALIST NO. 10, at 59-60 (J. Madison) (P. Ford ed. 1898)).

25. *Id.*

26. See J. LA PALOMBARA, THE INITIATIVE AND REFERENDUM IN OREGON: 1938-1948, at 4-11 (1950); McClintock, *Seth Lewelling, William S. U'Ren and the Birth of the Oregon Progressive Movement*, 68 OR. HIST. Q. 197, 210-16 (1967); West, *Reminiscences and Anecdotes: Mostly About Politics*, 51 OR. HIST. Q. 95, 95-107 (1950).

concerns. The proponents of direct legislation were farmers, debtors, silver Republicans, single taxers, and egalitarian populists, as much as progressive reformers; they demanded these majoritarian structures, not for abstract reasons, but to gain majoritarian economic goals. Thus, William Jennings Bryan tried to get the initiative and referendum into the 1896 Democratic platform, where they appeared in 1900. Theodore Roosevelt, on the other hand, saw direct legislation as a revolt against corruption of existing institutions.<sup>27</sup> To the Populists,<sup>28</sup> of course, these were the same reasons: those institutions' resistance to majority goals and their protection of the wealthy minority proved the need for radical change even apart from outright bribery. The obvious reform was simply to let the people decide for themselves by majority vote.

Why might this be inconsistent with a "republican form of government," or, if not always so, when might it be inconsistent? We need not debate the imaginary extreme case; a state that abolished its legislature or left it with no lawmaking function would not have a "republican form of government." If populist reformers had adopted a constitution in which all laws, or all taxes and appropriations, could be proposed only by the governor or by initiative petition and enacted by plebiscite, they would have exceeded the limits of Article IV, section 4, as understood in early Oregon cases. It would not save such a scheme, I think, to leave the legislature only the power to *repeal* an initiated law. Treat my hypothetical example as one extreme on a spectrum that permits enactment of some or even most measures by plebiscites bypassing the legislature: If so, how does republicanism provide criteria for distinguishing permissible from impermissible initiative measures?

### "Interest" and "Passion"

The Federalists rejected pure democracy for indirect democracy, or "republicanism," not only to overcome the problem of geographic scale, but because they feared public acts derived from motives of "interest" or "passion." "Interest," of course, meant self-interest, essentially the pursuit of wealth. Non-economic "passions" might be religious or patriotic, collective emotions of love, fear, or hate toward some group or object—that is to say, communal rather than atomistic.<sup>29</sup> May some measures be

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27. T. Roosevelt, *Rationalism and Popular Rule*, in *THE INITIATIVE, REFERENDUM AND RECALL* 52 (W. Munro ed. 1912).

28. "Populists" is capitalized here when it means the party by that name. William Schneider sees a parallel difference among contemporary Democrats. See Schneider, *JFK's Children: The Class of '74*, *THE ATLANTIC*, Mar. 1989, at 35.

29. See Diamond, *Decent, Even Though Democratic*, in *HOW DEMOCRATIC IS THE CONSTITUTION?*, *supra* note 23, at 28-29.



invalid if taken by direct plebiscites that would be valid if enacted by representative bodies?

Consider some examples, stated here as variations on actual experience. An initiative measure proposes to remove all family farms and residential property from taxation. Another proposes to appropriate half the state's existing budget to pay persons past the age of 60 a public pension of \$200 a week. A third measure requires all children to attend public schools only. A fourth declares English to be the state's official language, to be used in all public transactions. A fifth repeals laws against racial, religious, or sex discrimination in the sale or rental of housing. A sixth enacts the death penalty over the protests of religious and other groups conscientiously opposed to taking life in the people's name. A seventh prohibits abortions, or it appropriates public funds for abortions over similar conscientious objections.

The first two, special tax exemptions and appropriations for pensions, are openly designed to redistribute wealth among classes of citizens, the classic battle of contending interests. The third, the attack on private schools that was invalidated in *Pierce v. Society of Sisters*,<sup>30</sup> is what Oregon in fact did with the initiative in 1922, during a brief affair with the Ku Klux Klan. It plainly was motivated not by majoritarian self-interest but by anti-Catholic passion. Is the fourth, the English language measure, similarly an expression of a majority's ethnic prejudices, or is it a public-spirited concern about the society's future cohesion expressed by a group losing its majority status? In the fifth example, the self-interest of real estate developers trades on the passion of prejudice to reverse the elected legislature's deliberate view of the public interest. The sixth and seventh are philosophical as well as emotional battles in which economic interests play little role.

Does enactment by plebiscite rather than by a legislature satisfy republican principles in all these examples, in some, or in none? Regrettably, the contemporary theorists of republicanism do not discuss initiated popular legislation, perhaps because it is uncommon in the older states, or perhaps because the question seems uninteresting as long as courts apply the same substantive limitations to initiated laws as to all laws.<sup>31</sup> Thus, *Pierce* struck down Oregon's public school monopoly as a denial of

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30. 268 U.S. 510 (1925).

31. In a recent symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988), neither the main authors, Professors Michelman and Sunstein, nor any of ten expert commentators, referred to the phenomenon of direct popular legislation. Nor was it discussed by the commentators in the *Symposium on the Theory of Public Choice*, *supra* note 3.

“substantive due process” to private schools. *Reitman v. Mulkey*<sup>32</sup> voided California’s open housing initiative upon the California court’s finding that it encouraged racially motivated conduct, and *Hunter v. Erickson*<sup>33</sup> on similar grounds invalidated a selective referral requirement limited to open housing ordinances.

But invalidation of some initiatives on substantive grounds says nothing about legitimate enactment of laws that can survive judicial review of their substance. The Constitution’s concern about republican principles of lawmaking preceded the substantive guarantees of the Bill of Rights and the Fourteenth Amendment. Nor does judicial review of substance make it irrelevant how laws are made. In other places and times, regimes that were anything but republican sometimes imposed far-reaching national reforms that could not have been achieved by existing consensual institutions, but the quality of the reforms would not make their imposition legitimate in an American state.<sup>34</sup>

In republican theory, “deliberation” was central to representative government.<sup>35</sup> The word invokes distinct ideas. One is that the mass of citizens, unlike a representative assembly, would lack the knowledge to make responsible decisions. Lack of knowledge, however, can be overcome for any one measure in isolation. In Oregon, the supreme court reviews challenges to the attorney general’s phrasing of the captions and questions that are printed on the ballot, and the state distributes voter pamphlets, which set out each measure accompanied by statements of proponents and opponents. Legislators often have no greater knowledge

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32. *Reitman v. Mulkey*, 387 U.S. 369 (1967); cf. *James v. Valtierra*, 402 U.S. 137 (1971) (sustaining state constitutional amendment extending referendum provisions to public housing decisions).

33. 393 U.S. 385 (1969).

34. A recent article notes that Atatürk (Mustafa Kemal), who in the 1920s and 1930s undertook to turn the remnants of Ottoman Turkey into a modern European state, replaced the Islamic Sharia with a version of the Swiss Civil Code and the Arabic with the Roman alphabet, secularized the schools, adopted the Western calendar, and extended political rights to women.

Far more radical than the French or Russian Revolutions, the revolution he achieved transformed an entire culture, leaving scarcely a single old tenet in place; it is probably accurate to say that no social metamorphosis in history is so much the product of the vision of one man. . . .

Scholars generally agree that had Atatürk shown a fastidious regard for democracy as the term is understood in the West his revolution would have been stillborn. Viorst, *A Reporter At Large (Turkey)*, THE NEW YORKER, June 5, 1989, at 43, 56. See also Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 16-20, 34-39 (1972).

35. For a contemporary view stressing republican deliberation, see Sunstein, *Beyond the Revival*, *supra* note 4. The function of mediating conflicting interests was largely assumed by political parties. For a recent discussion, see Fitts, *supra* note 4.

and less time to study many bills on which they vote. But more than personal knowledge distinguishes deliberative action.

### **Deliberation, Self-Interest, and Collective Passion**

Deliberation in representative bodies does not often achieve its ideal of dispassionate debate and logical persuasion, but it does institutionalize deliberative processes of choice. Representatives do not react to each bill in isolation. They see many bills, some repeatedly over a period of several sessions. They relate the effect of a bill or its alternative to other laws and programs. In or out of committees, they can press proponents and opponents for answers to questions. They can request legal or fiscal analyses. They can amend a bill to clarify, to improve, or to compromise. An initiative petition allows none of this.<sup>36</sup>

There is a deeper difference. Legislators must deal with priorities other than their own or those of their narrow constituencies. They must make deliberate choices in allocating scarce resources. There is no give and take between the sponsors of an initiative measure and those who must accept it or reject it in toto. Often a representative body chooses not to override the strongly felt objections of minority opinion or interests in order to effect the wishes of the popular majority. The very unresponsiveness that outraged the majoritarian populists can be the essence of deliberate decision.

Unlike the voter who is given a menu of measures on the ballot, a legislator (at least in states like Oregon) cannot vote anonymously for or against a few bills and skip the rest; the legislator must take a stand on each bill that reaches the floor. Even under the interest group model of public policy, representatives are expected to rationalize their acts as serving some interest beyond their private self-interests. Citizens voting on an initiative measure need not do so. Representatives as lawmakers can have a conflict of interest; citizens as lawmakers cannot. To the contrary, the plebiscite is defended as the truest measure of aggregate self-interest; neither theory nor practice expects voters to subordinate their perceived self-interest in voting on ballot measures. The anonymous plebiscite may be the ultimate in democracy, as the 19th century populists saw it, but even with the best access to information, it remains the antithesis of deliberative, "republican" lawmaking.

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36. Until 1966, the California Constitution allowed initiative petitions to propose draft legislation to the legislature before it was referred to the voters. If the legislature adopted an alternative version, both versions would be referred. CAL. CONST. art. IV, § 1, cl. 3 (1849) (repealed 1966).

Professor Eule proposes to tame that antithesis within the larger system of checks and balances, that is to say, by the courts, because enactment by direct legislation has excluded the legislature and the governor. He proposes tighter judicial scrutiny of initiated measures, rather than giving them intuitively greater deference as the authentic expression of majority will.<sup>37</sup> But scrutiny for what flaws? The prescription for tighter scrutiny must relate to the diagnosis. Professor Eule, like others, believes that initiative measures are especially vulnerable to unequally financed, one-sided, and misleading propaganda. Perhaps so, but I do not understand him to invite courts to invalidate a successful initiative on a finding that this has occurred. Yet there is little logic in proposing a "harder look" at initiated laws for violations of the same substantive constraints that, if found to exist, also would invalidate conventional legislation. The suggestion of heightened judicial scrutiny of initiated laws for invasions of liberty, equality, or property rights carries the unfortunate implication of relatively lower scrutiny of otherwise identical conventional laws. That cannot be defended if violation of a guaranteed right is the flaw in issue.

Whether an initiative measure squares with republicanism cannot hinge on whether the measure invades constitutional rights. The question, to repeat, is whether some measures may be invalid if taken by direct plebiscites that would be valid if enacted by a representative legislature. If the answer is yes, the difference must lie in the process of enactment. The measure must be impeached on grounds on which the drafters in 1787 chose a republican over a purely majoritarian form of government: *deliberation, interest, and passion*. These are not easy tests to apply. But they are not more obscure than what the Supreme Court has made of equality, "privacy," and "substantive due process."

Deliberation in the initiative process would be enhanced if a proposed measure, after receiving the necessary signatures, were required to be laid before one regular session of the legislature before being placed on the ballot only if the legislature did not act; or if an initiative measure had to receive majorities in two successive elections.<sup>38</sup> Lacking these safeguards against hasty, slipshod, and ill-considered action, courts can recognize the different roles of the common requirements governing the title and "single subject" of proposals in legislative bills and in initiative measures. Legislators may show a weakness for logrolling and a huck-

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37. Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157 (1989).

38. See the pre-1966 provision of the California Constitution, art. IV, § 1, cl. 3 (1848) (repealed 1966).

ster's puffery in labeling their products, but legislators are less likely than voters to be misled when, for instance, "victims' rights" becomes a wrapper for a package of pro-prosecution changes in trial procedure.<sup>39</sup>

Beyond testing for procedural failure of information on which to deliberate, testing whether a measure short-circuited the role of deliberation in mediating private "interests" is not categorically impossible. Some initiative measures are evident appeals to the voters' self-interest, sometimes against an opposing private interest, sometimes against a more diffused target like the tax system. A classic example of the former would be an initiative for the kind of debt moratorium that (when enacted by the Minnesota Legislature) was sustained against a contract clause challenge in *Home Building & Loan Association v. Blaisdell*.<sup>40</sup> Many other initiatives pursue non-economic goals that may be the special interest of their sponsors but are not the collisions of economic class interests that republicanism was designed to mediate. The distinction is not beyond judicial capacity. When an environmental or penal initiative disregards countervailing costs that a legislature would refuse to impose, the defect is not that the initiative appeals directly to a majoritarian "interest." A nonself-serving initiative's defect, however, may be not majoritarian "interest" but majoritarian "passion."

"Passion," to Enlightenment theorists like David Hume and "Publius," meant the wellsprings of individual action, such as pride and ambition for honor and fame, as well as of collective action.<sup>41</sup> But only collective, not individual, passion could create a majoritarian "faction," in Madison's term. Collective passion would differ from cumulated self-interest; it might be ethnic or religious (sectarian, Madison might say),<sup>42</sup> or it might be a patriotic fervor against outsiders, "enemies." Even rep-

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39. See *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982); cf. *State ex rel Fidanque v. Paulus*, 297 Or. 711, 719, 688 P.2d 1303, 1308 (1984) (Linde, J., dissenting) (initiative measures violative of the single subject requirement should be subject to attack at various stages of the approval process).

40. 290 U.S. 398 (1934). I doubt that the majority, in this 5-4 decision, would have been as ready to find that the Minnesota moratorium law's declaration of an "emergency" gave "occasion for the exercise of the reserved power of the State to protect the vital interests of the community," and that the "legislation was not for the mere advantage of individuals but for the protection of a basic interest of society," if the law had been enacted by initiative petition and popular plebiscite rather than by the Minnesota legislature and governor.

41. G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 83-86, 190-92 (1981). The Federalist's dichotomy is said to be one of "passion" and "reason." Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 *YALE L.J.* 449, 459 (1989).

42. "A religious sect may degenerate into a political faction in a part of the confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source . . ." *THE FEDERALIST* NO. 10, at 61-62 (J. Madison) (P. Ford ed. 1898).

representative institutions are feeble dikes when such passions are fanned—for instance, by a William Randolph Hearst, as Speaker Thomas Reed learned.<sup>43</sup> But would the nation's government be "republican," as the Constitution uses the term, if war on Spain (or on Iran, in 1979) could be declared by a popular majority voting on an initiative petition? If this would not be "republican," then what of a state's initiative to ban the German language as unpatriotic,<sup>44</sup> or perhaps a measure to intern Japanese-Americans?

If direct popular enactment of such passions into law should be questionable under the Guarantee Clause, that issue was not made irrelevant when the Fourteenth Amendment later offered the courts other rubrics to review measures for substance rather than for process. Testing an initiative measure for "passion," as well as for "interest," implies deeper inquiry into the measure's origins, background, and contemporaneous expressions of public opinion than merely substituting the text of voters' pamphlets and explanatory ballot statements for conventional legislative history.

### Conclusion

To summarize: Any theory of "republicanism" is incomplete that does not consider the Guarantee Clause or does not account for the anomalous position of state lawmaking by plebiscites without participation by the state's representative institutions, specifically its legislature. The United States Constitution requires each state to maintain a republican form of government. The Constitution also obliges each state's governmental institutions, particularly under Article VI its judges, to honor that requirement, which means that they must interpret it when necessary. Because the Supreme Court has held that within the federal government the determination is allocated to the political branches, such a determination (for instance in approving a state's constitution at the time of admission) would bind a state court; but without it, the court must interpret the guarantee of a "republican form of government" as best it can.<sup>45</sup> State courts in Kansas and Oregon have done so.

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43. See B. TUCHMAN, *THE PROUD TOWER* 145-62 (1966).

44. The legislation invalidated in *Meyer v. Nebraska*, 262 U.S. 390 (1923) on substantive due process grounds was not an initiative measure.

45. For instance, in 1907, Congress admitted Oklahoma's senators and representatives although Oklahoma's constitution provided for the initiative and referendum lawmaking system. See *Kiernan v. Portland*, 57 Or. 454, 470, 111 P. 379, 404 (1910). Is the decision of one Congress to admit a state legally binding authority on the constitutional question for another state, beyond showing that the admitted state's structure is not per se nonrepublican?

Whether lawmaking by statewide plebiscite upon an initiative petition, bypassing the legislature and governor, is "republican" remains an open question. One possible answer is that this method of state legislation may or may not be republican, depending on the characteristics of the measure or the processes of enactment. When the experiment with initiative legislation was newly adopted at the turn of the century, the Oregon Supreme Court held that its existence did not contravene the Guarantee Clause. The state's other governmental institutions remained as republican as before. That was before the state had experience with the effects of the system on those other institutions.

Although the question was and is open to debate, a state court may now find it too difficult to hold that a system of statewide plebiscitary lawmaking without participation by any representative officials is nonrepublican in whatever form and for whatever purpose.<sup>46</sup> It is easier to proceed as if the United States Supreme Court's stance meant the contrary, that the Guarantee Clause imposes no constraints on initiative legislation in any form or for any purpose, or that a state court may not consider a challenge under the Guarantee Clause. But the Supreme Court has not said that. Once it is recognized that a state's compliance with its obligation to maintain a republican form of government is justiciable in the state's courts, regardless of who deals with that question in Washington, D.C., a state court might consider whether a particular initiative process or a particular measure is compatible with republican lawmaking, if the issue were presented. I am not aware of a case where such an argument was made.

It is not an argument to be made lightly. If thrown in desperation into a losing brief, it is likely to result only in an adverse precedent for later cases. In the foregoing comments, I have tried only to suggest possible lines of inquiry into the background of the republicanism that the drafters of the Constitution, particularly the successful Federalists, intended to preserve. A differentiated approach to testing statewide direct lawmaking requires examination of their ideas of deliberation and their fear of unmediated short-run majoritarian passions and self-interest. It requires litigants to demonstrate that a particular measure was enacted from such motives. The question deserves whatever help scholarly amici curiae like Professor Eule and the theorists of republicanism can give us.

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46. In fact, disputes over whether a measure is "legislative" or "administrative" are frequently litigated. See *State ex rel Allen v. Martin*, 255 Or. 401, 405-07, 465 P.2d 228, 230-31 (1970); *Tillamook P.U.D. v. Coates*, 174 Or. 476, 149 P.2d 558 (1944).

