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LOUSY LAWMAKING: QUESTIONING THE DESIRABILITY AND CONSTITUTIONALITY OF LEGISLATING BY INITIATIVE

*735 Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative

Many of the fifty states have adopted some form of 'direct democracy,' the process by which state laws and constitutional amendments are adopted directly by the people through ballot measures. There are three types of ballot measures: the initiative, which is either a statute or constitutional amendment proposed by the electorate; the referendum, which is a proposed law that originates from the government or the legislature; and the recall, which is a vote to terminate the mandate of an elected legislature or to remove an elected official from office before the term of office expires.[1] These ballot measures have become increasingly significant in state governments and have been used to address difficult and controversial issues ranging from tax or governmental spending limitations to the death penalty.[2]

Historically, direct democracy dates back to the Middle Ages.[3] The movement toward direct democracy began in the United States during ***736** the late 1800s—a period of massive industrialization, urbanization, and immigration. A deep distrust of the legislatures began to develop as a result of the extensive control that the large corrupt corporations were thought to be gaining. In America, the initiative was supported by the Progressive movement as a tool that could overcome the power of these corporations by allowing the people to directly battle against the corporations' organized interests and influential lobbyists.[4] Proponents of the initiative insisted that it would give voters direct control over their government and thus result in

increased voter interest and understanding of important political issues. Proponents believed that such control and interest would lead to government which reflected the 'free decisions of the popular will.'[5]

The Progressives sought to base their government on the theory of Rousseau, which insists that the people are entitled to absolute control of the state.[6] To further this goal of absolute popular control, the Progressives sought to make government more directly responsible to the will of the majority. Advocates of direct democracy believed that " e very normal citizen who is mentally and morally fit not only has the right, but is also under a duty to participate in the solution of political problems."[7] Individual and corporate contributions to campaigns, "which are made presumably for the purpose of obtaining special favors after election,"[8] should, according to the Progressives, be banned. Further, the Progressives believed that the amounts candidates were allowed to spend on their own campaigns should be limited to ensure equal opportunity for all candidates.[9] The Progressives had a generally optimistic opinion about the collective will of the people, and believed that if given a chance to control government, this collective will would cause evil to perish and good to triumph.

However, this view, reminiscent of Darwinism, has not proved true over time. 'Today, direct democracy is used comparatively infrequently ***737** to curb abuses in government or otherwise to control elected officials.'[10] Rather, the corporations which the Progressives sought to control through direct legislation provisions are now to a great extent controlling the direct democratic process by using their resources to generate intense interest in issues such as alcohol abuse, gun control, pollution, pornography, and racism. For example, interested businesses spent millions of dollars to ensure passage of California's 1986 Proposition 51, which was intended to ease the 'insurance crisis.'[11] The initiative has led to the creation of an entire industry that includes enormously profitable businesses, such as professional signature gathering companies, campaign consultants, and advertising agencies.[12] Thus, lawmaking by initiative has become less an expression of the public will and more a device by which special interest groups manipulate public policy to further their political and financial interests.[13] Moreover, as one commentator has suggested, 'the growing reliance on the referendum and initiative poses a threat to individual rights in general and in particular creates a crisis for the rights of racial and other discrete minorities.'[14]

Part I of this Note analyzes the political issues involved in the process of direct democracy as it exists in America today, maintaining that it is an undesirable form of government for modern American society. This is so because direct democracy is plagued by voter ignorance, voter apathy, and procedural defects, results in laws which impede minority rights, is inefficient, and has a deleterious effect on the branches of government. Thus, Part I finds that representative government is to be preferred.

Not only is there a failure of direct democracy to live up to the Progressives' hopes for a just system of government, but there are also significant questions as to whether government by direct democracy is consistent with the United States Constitution's guarantee to the states of a 'republican' form of government.[15] The United States Supreme Court ***738** has refused to rule on this issue, finding it to be a nonjusticiable 'political question.'[16] Part II of this Note demonstrates, however, that the political question doctrine should not pose a bar to the justiciability of the constitutionality of direct democracy. This Note concludes in Part III that the Constitution's guarantee of a republican government requires that the states maintain representative governments and that direct democracy as a way of enacting laws and amending constitutions is repugnant to the principle of representation and thus violates the Constitution's guarantee and should be declared unconstitutional.

I. POLICY ANALYSIS

The primary goal of this Note is to evaluate the harms that result from direct democracy and to examine the constitutionality of enacting laws and amending state constitutions by initiative.[17] In doing so, this Note posite that foremost among the goals of government is to ensure fair decision making to promote the best interests of society as a whole. Part I demonstrates that this goal is best achieved through representative government.

A. VOTER IGNORANCE

1. *Need for Informed Voting*

A basic requirement for good governing decisions—ones which properly balance the interests of those involved and create desirable results—is an informed electorate.[18] The decision makers need to have a thorough understanding of both sides of an issue in order to make a reasoned, rational decision. Such understanding comes only from complete and accurate information.

When the electorate is not adequately informed, the potential for voter manipulation by political advertisements and the opinions of community leaders is dramatically increased.[19] As James Madison pointed ***739** out in the forty-ninth *Federalist*, ' t he *passions*, . . . not the *reason*, of the public would sit in judgment. But it is the reason, alone, of the public, that ought to control and regulate the government.'[20] The result of uninformed decision making is a choice that reflects the opinions of a few powerful opinion leaders, rather than the reasoned public will as the Progressives had hoped.

Voters in a direct democracy generally do not possess the requisite understanding to make optimal governing decisions for two reasons: the complexity of the ballot issues and the lack of informative communication. Thus, these decisions should instead be made by an elected legislature.

2. *Complexity of Ballot Issues*

The first reason the general public lacks sufficient understanding to make informed governing decisions is that the complexity of many ballot measures prevents many voters from understanding the intricacies of the issues before them. For example, understanding tax reform or environmental measures often requires very specialized knowledge which most voters do not possess.[21] That most voters do not understand the issues about which they are voting is exemplified by a statement made in 1973 by then-Governor of California Ronald Reagan concerning an initiative which limited state government spending. When asked whether he thought the average voter really understood the language of the proposition, Governor Reagan responded: "No, he shouldn't try. I don't ***740** either."[22] If a state's governor does not understand a proposed law, it is unlikely that the general public understands it either.

Similarly, the text of many ballot pamphlets—pieces of descriptive literature which *should* impartially inform the voters about the measures on the ballot—is written at a level of difficulty beyond most voters' level of education. Ballot pamphlets have been described as "50 or 60 pages of absolutely impenetrable prose."[23] One study of California ballot pamphlets between 1974 and 1980 found that the level of education that was required to understand the pamphlets varied from two years of college to two years of graduate school, while the average voter had completed only thirteey years of school.[24]

In addition, the length of ballot measures is often very unwieldly. Two California ballot initiatives provide examples. Proposition 18, the 1972 anti-obscenity initiative, contained a total of 104 sections and subsections. Proposition 9, the Political Reform Act of 1974, contained 11 chapters and 215 sections.

Early proponents of direct democracy envisioned voters pondering measures "the text of which [would be] sent to them three months before election with arguments pro and con."[25] However, most citizens simply do not have the amount of time or interest necessary to study and understand the numerous complex issues with which they are faced.[26] For example, in the average California election, a voter must make over fifty decisions.[27] The number and complexity of proposed measures on the ballot precludes voters from understanding the issues and casting informed votes.

Elected legislators, however, are expected to have the expertise and resources necessary to understand legislative measures and make informed decisions. These legislators often have advanced educations in specialized fields such as law, and thus are better prepared to understand complex bills. Further, legislators can hire a staff with the expertise necessary to understand and explain proposed bills. In addition, legislators, ***741** unlike members of the general public who have other responsibilities, can devote the time necessary to thoroughly read and study lengthy, complex bills; since legislators are 'hired' by the voters to legislate, they are expected to devote considerable time and effort to the task of analyzing legislative measures. Thus, legislators are in a better position to make governing decisions than is the general public.

3. *Lack of Informative Communication*

The second reason why voters under a direct democracy do not sufficiently understand the issues before them is that they are generally not exposed to informative communication.[28] Instead, voters are bombarded with political advertising designed to manipulate opinions by appealing to the voters' emotions rather than to provide useful information on the issues. 'The emotionally charged atmosphere often surrounding referenda and initiatives . . . is not conducive to careful thinking and voting.'[29] One poll shows that sixty-one percent of voters rely on television and newspapers for their information, while only twenty-one percent look to voter information pamphlets to learn about the issues.[30]

Advertisers generally seek to appeal favorably to voters' passions in the most effective and least expensive way possible. They accomplish this goal by appealing to prejudice, oversimplifying the issues, and exploiting the voters' legitimate concerns by promising simplistic solutions to complex problems. Debate on the merits of a particular measure is replaced by short, catchy political slogans which may not accurately reflect the proposed law and endorsements by highly visible celebrities or opinion leaders. The slogans, often used on billboards and in short radio and television spots, are designed to catch the voters' attention, while the celebrities and opinion leaders draw positive media attention and lend legitimacy to the view the advertiser seeks to impart. For example, in the 1986 California general election, many Hollywood celebrities became active in support of a ballot measure—The Safe Drinking Water and Toxics Enforcement Act of 1986 (Proposition 65).[31] These celebrities ***742** received free television and newspaper exposure when they toured California, making public appearances to express their views. The opposition to Proposition 65 sought to counter the celebrity influence by claiming that certain well-known political figures, such as California Govvernor George Deukmejian, opposed the measure.[32] Thus, the campaign became a battle of names and endorsements, rather than a debate on the merits of the issue involved.

Initiative campaigns often mine key arguments from obscure phrases in the proposed laws. 'A proposition about insurance law can be framed as a toxic waste issue, a property tax initiative attacked as an affront to librarians.'[33] A classic example of this problem occurred when California Attorney General John Van de Kamp began a media campaign against California's 1986 Proposition 51. Proposition 51 was designed to ease the 'insurance crisis,' but Van de Kamp alleged that passage of the proposed law would somehow encourage illegal toxic dumping.[34] The uninformed, passionate voting that results from this type of political manipulation is undesirable because it results in decisions that do not accurately reflect the public will, but that instead reflect the public's emotional response to inaccurate representations of the proposed laws.[35]

Since legislators, unlike the general electorate, are better informed and more likely to understand the merits of the issues before them, they are generally not as vulnerable to emotional media diversions when deciding how to vote on a particular bill. Consequently, legislators are more apt to make informed, intelligent decisions. When a legislator behaves irresponsibly and falls prey to political manipulation, the electorate may select a new legislator at the next election. There is, however, no such check on irresponsible behavior of the electorate in a direct democracy.

B. PROCEDURAL DEFECTS

To place an initiative on the ballot, a proponent must draft the measure and collect the requisite number of signatures in support of it. Statutory and constitutional amendment initiatives are then adopted if they ***743** receive a specified majority of the popular vote.[36] However, this process suffers from two major defects.

1. *Lack of Pre-Enactment Review*

First, the is no provision for systematic fact finding, analysis, amendment, or compromise.[37] Under a modern direct democracy, the general public does not meet together to engage in meaningful discussion about particular ballot measures; the 'town meetings' upon which the theory of direct democracy is based are no longer feasible as a result of the enormous

populations of states. This type of discussion among the voters is, however, necessary to ensure that the best possible solutions are reached. Selecting an optimal solution to a given problem requires more than merely choosing whether or not to implement the proposal which appears on a ballot. Decision makers must have the opportunity to establish and evaluate all potential solutions in order to select the one that will produce the most desirable outcomes. This is possible only through give-and-take discussion among the decision makers. As one commentator has pointed out:

> Discussion is not only like war: it is also like love. It is not only a battle of ideas; it is also a marriage of minds. If a majority engages in discussion with a minority, and if that discussion is conducted in a spirit of giving and taking, the result will be that the ideas of the majority are widened to include some of the ideas of the minority which have established their truth in the give and take of debate. When this happens, the will of the majority will not be the abstract or isolated will of a mere majority, considered in itself and as standing by itself in opposition to the similar will of a mere minority. Some fusion will have taken place: some accommodation will have been attained.[38]

The result of the lack of meaningful discussion among the electorate is that the finalized proposal and its titles, explanations, and summaries suffer from a lack of review.[39] Since informative materials are often distributed without any review, there is no guarantee that the information ***744** will portray the proposal impartially and honestly. The result of the lack of review of titles, explanations, and summaries of proposed ballot measures is that proponents and opponents are able to manipulate the proposed law to create a favorable response at the polls.[40] Thus, decisions are often made on the basis of misleading and inaccurate information and do not reflect the true will of the voters. For example, California's Proposition 8, which was passed into law in 1982, was title 'The Victims' Bill of Rights.'[41] However, it is unclear whether the Bill actually involves victims' rights. The Bill could more accurately be described as pertaining to the prosecution and defense of persons accused of crimes.[42] The misleading title arguably encouraged many voters to favor the law merely because of the emotional appeal of the title, which implied that rights were somehow being bestowed upon the victims of crimes.

Another problem that results from the lack of review and feedback in the drafting stage is that 'there is no way to detect internal inconsistency, conflicts with existing law, inaccurate findings of fact, or questionable policy bases.'[43] Further, there is no critical evaluation, feedback, or input from those who may be affected by the new law. The refining process which occurs in the legislature does not occur among the electorate in a direct democracy. The result is that the proposed measures are often poorly drafted. For example, the voters in a California county enacted an initiative that unconstitutionally purported to supersede all conflicting federal, state, and local laws.[44] This led to lengthy, expensive litigation which could have been avoided if the internal defect had been corrected before the law was enacted. In a representative government, on the other hand, the process of give-and-take discussion which occurs among legislators and the combative refinement process through which legislative bills must pass—committees, hearings, and debates—uncovers many trouble spots and loopholes. Thus, these defects can be corrected before the bill is enacted.

***745** The lack of opportunity for deliberation and compromise inherent in a direct democracy has been called the system's 'great deficiency.'[45] Since discussion among the decision makers is necessary for optimal governing decision making and since the public in unable to engage in such discussion, government decisions should not be made by the public directly. In contrast, elected legislators have an opportunity to meet face to face at regular intervals and discuss the problems and issues facing their constituents. Legislators engage in hearings, floor debates, and other discussions through which they can evaluate alternatives and arrive at optimal solutions, while voters in a direct democracy are limited to a 'yes' or 'no' vote on the particular measure. The Californie Court of Appeals has stated that:

> [T]he election offers the voters but a single choice, to accept or reject the proposal in its entirety. The legislative body, however, is empowered to modify (as well as approve or reject) a recommendation of the planning commission thereby enabling it to consider and take into account in its actions the legitimate claims and suggestions of those who would be affected by the proposal even though they may represent but a small segment of the electorate.[46]

Since representatives, unlike the general public, can engage in the necessary discussion of the issues before them, representative government is more likely to lead to optimal governing decisions than is direct democracy.

Modern American legislatures have been criticized for not engaging in this valuable discussion. Instead, legislatures have been accused of being 'a wasteful labyrinth of overlapping committee and subcommittee fiefdoms,' of having 'a propensity for calling the same witness . . . twelve times in a single month to give the same testimony on the same subjects,' and of having 'an inability to implement even the most elementary principles of planning, programming, and budgeting.'[47] These criticisms, however, do not provide a justification for direct democracy. If these problems do in fact exist in the legislature, then the solution should be to solve these problems in the legislature, rather than to create new problems or avoid the current ones by implementing a system of government that is inherently less desirable because it does not even provide the potential for producing reasoned, informed decisions. Further, these criticisms overlook benefits of the committee system such as the ability to ***746** obtain information and to completely discuss and evaluate various approaches to a problem.

2. *Lack of Signature Gathering Integrity*

The second procedural defect from which direct democracy suffers is the questionable integrity of the signature gathering process. The signature gathering requirement is important because it eliminates the initiation of an expensive campaign process when there is insufficient public support for an initiative. Neither the state nor the opponents of a proposed bill should be required to spend the large sums of money required when a proposed bill is put on the ballot[48] if there is not sufficient public support for the initiative.

However, the need for many signatures can lead to abuses in the signature gathering process by both volunteer and professional signature gatherers. In California, gatherers have employed various 'cover up' devices to obtain the signatures required to place a measure on the ballot. For example, cards have been used to cover up the Attorney General's official summary of the initiative with one more favorable to the proponents;[49] circulars have been illegally distributed in counties where the proponents do not reside;[50] children have been illegally employed as signature gatherers;[51] and forgery has been committed.[52] In addition to these clearly illegal practices, signature gatherers have engaged in other questionable tactics to get signatures. For example, one instructional manual directs gatherers to describe the measure to the potential signer in a short positive phrase, such as 'help get safe nuclear power,' while directing the signer to the petition with pen in hand.[53] While such an approach is not technically illegal, it is of questionable integrity; it results in the collection of signatures from people who may not support the initiative, who may not be aware of what the initiative actually proposes, or who may even be unaware that they are signing a petition to qualify an initiative for the ballot. Thus, the purpose of requiring signatures—to ***747** provide evidence of sufficient support to put an issue before the people—is thwarted.

Representative government is not vulnerable to these abuses. Since signatures are not required to put issues before the legislature, there is no signature gathering process to abuse.

C. MINORITY RIGHTS

1. *Majority Tyranny*

An important goal of a constitutional government is the protection of minority rights. James Madison, in the tenth *Federalist*, describes the 'evil' against which the Constitution seeks to protect as, inter alia, where 'the public good is disregarded in the conflicts of rival parties, and . . . measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.'[54] According to another commentator, ' a n untrammeled majority is indeed a dangerous thing. T he majority can tyrannize the minority.'[55]

Direct democracy allows majority opinion to infringe on minority rights.[56] Madison wrote, 'it may be concluded that a pure democracy, meaning a society consisting of a small number of citizens, who assemble and administer the government in

person, can admit of no cure for the mischiefs of faction. . . . T here is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual.'[57]

For example, 'direct legislation is used effectivey by residents of homogenerous middle-class communities to prevent unwanted development—especially development that portends increased size or heterogeneity of population.'[58] Referendums have increasingly been used to repeal fair housing ordinances, thus thwarting the efforts of city councils and zoning commissions to provide low income housing.[59] This has ***748** become a common means of excluding minorities from suburban residential communities.

California's electoral history provides additional examples of the majority's insensitivity to politically powerless minorities. In 1920, California voters passed the Alien Land Law, an initiative that restricted the rights of aliens who were ineligible for citizenship to acquire real property.[60] Additionally, in 1986, California voters passed a law making illegal the use of any language other than English.[61] These laws demonstrate the majority's tendency to deny rights to minority groups in general, and its insensitivity to the problems facing aliens in particular.

Direct democracy does not give minority groups with limited resources a sufficient opportunity to effectively communicate their position to the general public. As noted previously, give-and-take discussion is required to fuse majority and minority interests,[62] and such discussion does not occur among the general public.[63] Additionally, the campaign that must be waged in support of or in opposition to a ballot measure is often prohibitively expensive for minority groups.[64]

A direct democracy majority can be particularly tyrannical where the public has political control of the courts. In this situation, the courts are not free to interpret the enacted referendum or initiative in a way that will protect minority rights. Instead, politically controlled courts must interpret such measures in accordance with the prevailing majority view. The members of a court who choose not to engage in this 'majoritarian interpretation' may find themselves removed from the bench in the next election.[65]

***749** Representative government is superior to direct democracy in protecting minority rights because the delegation of government responsibilities to a small number of elected representatives allows a more thorough evaluation of the issues and a determination of the entire electorate's best interests.[66] As the legislature engages in give-and-take debate on the merits of both sides of an issue, solutions can be formulated which fuse minority and majority interests.[67] In fact, 'legislatures have tended to adopt laws prohibiting discrimination against . . . minorities , while referendums have tended to overturn them.'[68] For example, the city council of St. Paul, Minnesota, intending to protect gay rights, enacted an ordinance which prohibited 'discrimination in employment, education, housing, public accommodations and public services based on race, creed, religion, sex, color, national origin or ancestry, *affectional or sexual preference*, age or disability.'[69] The voters of St. Paul, however, amended the ordinance by initiative to eliminate the words 'affectional or sexual preference,' thus making discrimination based on that ground permissible.[70] This demonstrates the legislature's tendency to protect minority rights and the electorate's tendency to infringe on them. Given these tendencies and the desirability of providing protection for minority interests, legislatures are preferable to direct democracy.

750 2.** ***Deficiencies of the Equal Protection Clause

There are three reasons why the equal protection clause of the United States Constitution[71] provides insufficient protection for minorities against the majority tyranny that results from direct democracy. First, many individuals whose rights are infringed upon by a particular initiative or referendum may not be able to litigate the issue in federal court; the injured minority individual may not have the resources necessary for expensive, lengthy federal litigation. Without such recourse, the minority member does not receive any fourteenth amendment protection.

Second, it is extremely difficult to successfully challenge a referendum or initiative that is facially neutral, notwithstanding the presence of a substantial discriminatory impact. The Sixth Circuit Court of Appeals has stated that 'neither the Supreme Court nor this Court has ever inquired into the motivation of voters in an equal protection clause challenge to a referendum

election involving a facially neutral referendum unless racial discrimination was the only possible motivation behind the referendum results.'[72] Thus, while a law enacted by a representative body will be held to violate the equal protection clause if racial discrimination was a motivating factor, the 'motivating factor' test will not be applied to equal protection challenges to laws enacted by initiative or referendum.[73] Instead, a facially neutral initiative or referendum will be ***751** held to violate the equal protection clause only if the challenger can prove that racial discrimination was the *only* possible rationale for the law.[74]

The third reason that the equal protection clause does not sufficiently protect individual interests in a direct democracy is that the affected group might be a political minority, rather than a racial or gender group, and therefore is not entitled to any special protection under the equal protection clause.[75] Thus, a distinction may be upheld under a 'rational basis' test notwithstanding an oppressive effect on a particular group.

D. EFFICIENCY

Efficiency is an important factor to be considered in establishing a system of government. An 'efficient' government is one that minimizes the costs of achieving societal goals. Direct democracy is a very inefficient form of government. Significant costs result when government is administered by direct democracy rather than a system of representative government.[76]

1. *Campaign Costs*

One way that direct democracy is inefficient is that both proponents and opponents spend exorbitant amounts of money on ballot measure campaigns. Proponents face the initial costs of collecting the number of signatures required to qualify a measure for the ballot.[77] Then, proponents and opponents both face the costs of mounting expensive media campaigns. In many cases, the side with the largest purse is successful at the polls.[78] This provides a powerful incentive to spend liberally throughout the campaign. For example, opponents of California's Safe Drinking Water and Toxics Enforcement Act of 1986 (Proposition 65) hired a political consultant who charged $8500 per month before the measure even qualified for the ballot, and $12,000 per month thereafter.[79] The campaign, which was ultimately unsuccessful, cost a total of over $4 ***752** million.[80]

These campaign costs are reduced in a representative government because the costs of gathering signatures to qualify a measure for the ballot and the costs of mounting a high visibility campaign are eliminated. In a representative government, signatures are not required to get an issue before the legislature. Further, extensive media campaigns designed to reach many people are not required. Proponents and opponents of particular bills can reach the legislators directly at a much lower cost.

2. *Costs to the State*

A second reason that direct democracy is more inefficient than representative government is that the state must spend large sums of money verifying signatures and conducting the election. There are substantial costs associated with verifying signatures to determine whether the measure qualifies to appear on the ballot. For example, in 1971-72, initiative proponents filed 3,024,251 signatures in Los Angeles County.[81] The cost of verifying these signatures was $589,890 (that is, approximately twenty cents per signature) and required around-the-clock work by a total of 600 employees.[82]

Once the signatures have been verified and the measure has qualified for the ballot, the state must bear the cost of conducting the election—which includes preparing and printing the ballot pamphlet describing the issues on the ballot, providing voting booths, and performing the accounting procedures to tabulate the votes. These costs are particularly inefficient in the case of a special election, where but for the process of direct democracy, the costs would not be incurred at all. The costs in a 1973 California special election exceeded $20 million.[83]

In a representative government, the costs borne by the state are less.[84] The costs of verifying signatures are completely eliminated since ***753** signatures are not required to bring an issue before the legislature. Further, the costs of conducting

public elections are less in a purely representative government since, although elections must still be conducted to elect representatives, the election process is much simpler and less expensive. The costs associated with ballot pamphlets are eliminated since it is not necessary to explain individual issues in great detail. Finally, accounting costs are substantially reduced; since there are far fewer items on the ballot, the accounting procedures required to tabulate votes are less elaborate and time consuming.

3. *Voter Time Inefficiency*

A third way in which direct democracy is less efficient than representative government is that direct democracy requires every voter to extensively research and study the issues in order to cast an informed vote. In a representative government, however, the representative does the research for all the voters and an economy of scale is thus created. A voter need only research the candidates to determine which candidate will best represent the voter's interests and opinions; the representative then researches each issue as it arises. This avoids the duplicity of effort that results when every voter researches every issue. Each voter can devote the time saved to activities that will result in greater personal and societal benefit, while the benefits of majority participation will be preserved since all voters are allowed to participate in selecting their respresentatives.

4. *Costs of a Later Declaration of Unconstitutionality*

A fourth inefficiency which results from direct democracy is that time and money are wasted on ballot measures which are subsequently declared unconstitutional. Many initiatives are found unconstitutional by the courts. For example, between 1964 and 1978, eight initiatives were passed in California. Of these, six were attacked on constitutional grounds and four were declared unconstitutional.[85] Two major costs ***754** result when initiatives are found unconstitutional. First, the entire cost of the political campaign waged before the election is wasted when the measure is found unconstitutional since most measures do not provide for legislative amendment, and where they do, amendment is often difficult.[86] Thus, the invalid measure is not replaced with a valid law. Rather, the entire process of writing a new ballot measure, collecting signatures to qualify it for the ballot, campaigning for and against the new measure, and holding an election must be repeated. All the costs—both to the state and to the proponents and opponents of the measure—will be duplicated.

Second, the costs of litigating the constitutionality of the enacted measure are tremendous. These costs include the litigant's cost of bringing the action, the state's cost of providing the court, and the costs of delay to other citizens whose disputes cannot be quickly adjudicated because of crowded court dockets. Further, society suffers the costs of having a 'bad' law in effect for the period of time before the law is declared invalid; the bad law could chill desirable but prohibited behavior or result in punishing behavior that should not be punished.

These costs are substantially reduced in a representative government. First, the costs of enacting a law are reduced since the expense of collecting and verifying signatures, conducting media campaigns, and conducting elaborate elections are eliminated. Thus, a smaller loss is incurred when replacing a law found unconstitutional. Second, the legislature can correct an unconstitutional law by amendment; duplicating the entire process involved in enacting a new law is thus unnecessary. Third, the combative refinement process to which a proposed legislative bill is subjected prior to its being enacted will lower the risk that a legislatively enacted law—as opposed to a law enacted by direct democracy—will contain unconstitutional provisions;[87] the legislature is better qualified to make initial determinations on the constitutionality of a bill since legislators generally have experience in analyzing proposed laws. Thus, the costs that result when a law is declared unconstitutional will occur less frequently.

*755 E. EFFECT ON BRANCHES OF GOVERNMENT

1. *Diminished Legislature Responsibility*

Direct democracy has a negative effect on the legislature; the legislature possesses less power and respect due to the increased power of the electorate. This may dissuade many highly qualified candidates from seeking public office, as the 'prestige' of being a legislator may not be sufficient to lure highly qualified candidates from high paying corporate jobs.[88]

One of the justifications for direct democracy is that it provides a check on the power of the legislature. However, direct democracy goes too far in checking the legislature's power by providing a means for the public to sidestep the legislature and enact its own laws. The knowledge that any decision may be overturned by the voters will not encourage responsible behavior on the part of legislators. They may be discouraged from seeking optimal solutions when they foresee that their efforts will be disregarded. The legislators are not likely to spend the amount of time and effort necessary to full research, discuss, and evaluate issues when they perceive that their efforts will be disregarded and their decisions overturned at the next popular election.[89]

This negative effect on the legislature is exemplified in California, which has been dominated by initiative lawmaking in the last generation. Indeed, one California legislator has stated that 'when [an initiative process] exists, legislators sometimes abdicate their responsibilities by relying on a public vote to do their work. [L]egislative initiatives are sometimes passed as a way to get off the hook and pass the ultimate responsibility on to the greater forum.'[90] The California legislature 'has become a reactor rather than an innovator—dealing with the aftereffects of initiatives already enacted or trying to anticipate those in the pipeline.'[91] As a result of California's increased reliance on the use of the initiative for lawmaking, the California legislature has become increasingly preoccupied with internal politics, and less with its work as a policy making body.[92] Thus, California's legislature has lost credibility ***756** and power as the initiative has made the public the significant policy making force in the state.[93]

It is desirable for a legislature to feel responsible for its decisions. A sense of responsibility encourages thoughtful decision making and tends to lead to better decisions. Proponents of direct democracy suggest that where the public has a check on the legislative power, the legislators tend to act more responsibly. The referendum, however, allows the legislature to escape responsibility for its decisions by enabling it to put issues to the public in order to legitimize the decision. Thus, legislators do not feel directly responsible for their decisions; rather, they can point to the general public as having made the final decision. In a wholly representative government, however, the legislators are directly responsible for the governing decisions; the public may not serve as a 'scapegoat' upon which the legislators can place blame for 'bad' decisions. Therefore, legislators in an exclusively representative government will be inclined to make more careful decisions.

Periodic elections give voters an opportunity to elect representatives who represent their interests and thus provide a check on the legislature's power. As the United States Supreme Court has stated, '[s]low, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.'[94] Thus, 'the proper role of the ordinary citizen is not so much to contribute on a continuing basis to the formulation of public policy as to retain a veto power to be employed when the decisions of officials pass certain bounds.'[95] This 'veto power'—the ability of voters to elect or refuse to elect particular legislators—provides a way in which the public can reserve control over the legislature without greatly usurping the legislature's power.

757 2.** ***Difficulties in Judicial Interpretation

Direct democracy also imposes a heavy burden on courts faced with interpreting the new laws.[96] Poor draftsmanship often creates interpretation difficulties.[97] Additionally, no legislative intent accompanies the new law, and typically there are no statements, reports, or transcripts made during the drafting process. There are, by nature of the direct democracy process, no statements of intent by voters to accompany the new law. The ballot pamphlets which describe the proposed law are insufficient to describe the diverse purposes and intentions of the voters who enact the law; a vote for the law does not necessarily imply a vote for the purposes and intentions of the law as expressed in the ballot pamphlet.[98] Indeed, the California Court of Appeals has pointed out that a court faced with interpreting legislation passed by initiative 'must engage in the often Delphic exercise of divining legislative intent, a process made more difficult by the need to assess the collective

intent of millions of voters rather than a legislative body keeping records of its committee hearings and thought processes.'[99]

Although state legislatures often keep inadequate legislative history records, courts are usually able to find at least some evidence of legislative intent. Thus, the court's interpretation is likely to more accurately reflect the spirit of the new law under a representative government than under a direct democracy.

*758 F. VOTER APATHY

One justification for direct democracy is that promoting public participation in governmental decision making decreases voter apathy. The founders of the Progressive Party believed that voter apathy was a major barrier to the attainment of their goals and perceived the initiative as the solution.[100]

However, as the number of complex issues on the ballot increases, voter apathy does not correspondingly diminish. Direct democracy rarely increases voter turnout.[101] Additionally, a 1982 study of elections in eighteen states and the District of Columbia shows that 'a significant percentage of voters who did go to the polls failed to cast votes on the issue questions.'[102] Unless the voter anticipates significant personal consequences from the outcome of a particular issue, the voter is likely to lack interest in the issue.[103]

Although it is necessary for a voter in a representative government to invest some time and effort in researching candidates, such research is often simpler and a more efficient use of the voter's limited time. The voter does not need to do in-depth research on numerous complex, technical issues. The voter need only investigate the candidate's platform to determine whether it is consistent with the voter's own views on various general issues. The voter should then be able to trust the representative to vote consistently with that platform on the various issues which come before the legislature. Thus, a voter is likely to be less apathetic when faced with only one choice—that of which candidate to elect—than when faced with numerous complex issues, very few of which directly affect the voter.

*759 II. JUSTICIABILITY: THE POLITICAL QUESTION DOCTRINE AND THE GUARANTY CLAUSE

The United States Constitution provides that '[t]he United States shall guarantee to every State in this Union a Republican Form of Government.'[104] The Supreme Court has consistently held that the Guaranty Clause is political in nature and that determining whether direct democracy violates this constitutional guarantee is within the authority of Congress or the Executive rather than the courts.[105] Thus, the Court has refused to interpret the clause to determine whether it is violated by a state adopting provisions for the initiative or referendum.

A. CASELAW DEVELOPMENT

The Supreme Court first applied the political question doctrine[106] as a bar to the justiciability of Guaranty Clause claims in *Luther v. Borden.*[107] *Luther* held that an inquiry to determine the legitimacy of two opposing governments[108] 'belonged to the political power and not to the judicial branch . . . and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State.'[109] The Court based its decision on several factors: the decision as to which state government was lawful was committed to other branches of the federal government; the President had recognized one government as legitimate; there was a need for finality in the Executive's decisions; and there existed an apparent lack of criteria by which courts could determine whether a government was republican in form.[110]

Later, in *Pacific States Telephone & Telegraph v. Oregon*,[111] the Supreme Court applied the principles set forth in *Luther* to the question of whether government by direct democracy violates the Constitution's guarantee of a republican form of government. *Pacific States* involved a ***760** challenge to a law, passed by initiative, which taxed certain corporations. The defendant was a corporation that was being sued by the State of Oregon for taxes due pursuant to the initiative. The

corporation defended its failure to pay the tax by challenging the constitutionality of the state's power to legislate by initiative and referendum. Specifically, the corporation claimed that the initiative and referendum were repugnant to the Constitution's guarantee of a republican form of government.

The Court held that this issue was 'political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power.'[112] Thus, the Court refused to rule on the merits of the corporation's claim. The Court reasoned that if it found this issue justiciable, two 'anomalous and destructive effects'[113] would result. First, any citizen of a state would be able to challenge the existence of the state in order to avoid all duties and taxes.[114] Second, if a state's government was found to violate the Constitution, the federal government would have to disregard the state's existence.[115]

The Court overstated the effects of declaring this issue justiciable, however. While citizens would be able to turn to the federal courts to enforce their right to a republican form of government, the resulting suits need not be characterized as attacks on the very existence of the state. Rather, these suits could be characterized as challenges to an allegedly unconstitutional practice by an existing state government. The citizen would not be seeking to have the state's existence nullified, but merely to enforce a constitutional right to have a state govern in the constitutionally prescribed way. This type of constitutional challenge is analogous to a challenge to a state constitutional provision or statute which provides for racial segregation on the grounds that the provision is inconsistent with the fourteenth amendment of the United States Constitution. The citizen who makes a fourteenth amendment challenge to a state law is not challenging the existence of the state, but rather its allegedly unconstitutional practice. Likewise, the Guaranty Clause claimant is challenging an allegedly unconstitutional practice by a state, rather than the state's existence.

Further, the potential effects of a decision on the merits of an issue do not justify the Court's refusal to rule on the issue. For example, in ***761** rendering its decision that state enforced racial segregation violated the fourteenth amendment,[116] the Court surely foresaw the unrest that the decision might create. Nevertheless, the Court ruled on the merits of the segregation issue in order to uphold the constitution. Likewise, the existence of potential problems that may result from a decision that direct democracy violates the Constitution should not justify the Court's refusal to rule on the merits of the issue.

In *Baker v. Carr*,[117] the Court affirmed *Luther* and *Pacific States*, holding that 'Guaranty Clause claims involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable.'[118] These 'elements' are 'primarily a function of the separation of powers'[119] and include:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[120]

Baker involved a claim that legislative apportionment violated voters' fourteenth amendment rights. The Court distinguished this claim from those made under the Guaranty Clause and held the fourteenth amendment claim justiciable.[121] The basis of the Court's distinction was that ' t he question in *Baker* was the consistency of state action with the federal Constitution,'[122] whereas Guaranty Clause claims involve separation of powers issues. The Court stated in *Baker* that 'it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"[123]

***762** Like fourteenth amendment claims, however, many Guaranty Clause claims relate to the application of the United States Constitution to state governments, rather than the relationship among the branches of the federal government. For example, *Pacific States* involved a conflict as to whether the structure of a state's government was consistent with the United States Constitution and did not involve issues of separation of powers within the federal government. The coordinate federal branches were brought into the controversy when the Court decided to leave the decision to another branch. The Court could

similarly bring the other branches into any case. This action by the Court, however, should not render the case nonjusticiable.

The *Baker* Court correctly pointed out that some issues which the Court has held to be political questions *do* involve separation of powers and therefore are properly left to the other branches. For example, foreign policy issues involve claims that presidential or congressional action with regard to a foreign government is inconsistent with the constitutionally granted powers of those branches. This issue clearly involves the separation of federal powers. No state is involved; the sole issue is the extent of the power of a branch of the federal government. This issue is distinguishable from the issue of whether direct democracy violates the Guaranty Clause; the foreign policy issue involves a question as to *which branch of the federal government* is responsible for making foreign relations decisions, whereas the direct democracy issue involves a question as to *whether a state's actions are consistent with the Constitution*.

Notwithstanding the demonstrated shortcomings of the caselaw that addresses the justiciability of the Guaranty Clause, courts have continued to hold issues that arise under this Clause nonjusticiable. The remainder of Part II argues, however, that per se nonjusticiability of Guaranty Clause claims is undesirable and that justiciability should depend on the *particular issue* involved, rather than on the constitutional provision under which a claim is brought. Under this analysis, Part II shows that the issue of direct democracy should be found justiciable.

B. PLEA FOR JUDICIAL ENFORCEMENT OF THE GUARANTY CLAUSE

The Court's decision not to resolve issues that arise under the Guaranty Clause of the Constitution renders that clause unenforceable. Neither Congress nor the Executive will enforce the guarantee of a republican form of government because the direct political control of Congress and the Executive by the states which are allegedly violating the Guaranty Clause makes the political process inherently ineffective to ***763** enforce the Constitution's guarantee. Once Congress has admitted a state, it is unlikely to impose sanctions upon or exclude that state when it changes from a republican to a nonrepublican form of government.

The framers of the Constitution, however, intended that this guarantee apply to and be enforced against the states. In defense of the republican government guarantee, James Madison wrote that the members of a society have the

> right to insist that the forms of government under which the compact was entered into should be *substantially* maintained. But a right implies a remedy; and where else could the remedy be deposited than where it is deposited by the Constitution? . . . The only restriction imposed on [the states] is that they shall not exchange republican for anti-republican Constitutions . . .."[124]

The Supreme Court has recognized that '[t]he guaranty necessarily implies a duty on the part of the States themselves to provide such a government.'[125] The failure to enforce this duty, however, renders the Guaranty Clause 'form without substance,'[126] and is contrary to the framers' intent.

The framers were concerned that without such a restriction on the states, majority rule would infringe upon property rights and destroy the system of enlightened leadership which the framers had established.[127] The guarantee was intended to 'protect the minority of the opulent against the majority.'[128] To effectuate the framers' intent[129] to establish a compromise between majority rule and minority rights, the guarantee of a republican form of government must be enforceable.

Of the three branches of government, the judiciary is best suited to enforce the Guaranty Clause so as to protect minority rights. The federal judiciary is insulated from the majoritarian pressures that make the other branches inappropriate for protecting minority rights. For example, since the Constitution provides that federal judges have life tenure on ***764** good behavior and guaranteed salaries,[130] federal judges, unlike the President and members of Congress, do not face reelection. This insulation from the political process, which is unique to the federal judiciary, permits the kind of independence essential for the protection of minority interests. In contrast, the Congress and Executive cannot be trusted completely with the enforcement of the guaranty; these branches are controlled by the very majority at which the Guaranty Clause is aimed. Thus,

this issue should be within the jurisdiction of the federal judiciary.

The framers were convinced that without substantially similar state governmental structures, the Union would be unsuccessful. This view reveals the influence of Montesquieu, who believed that two dissimilar governments could not coexist in one union.[131] The framers, adopting this view and agreeing further with Montesquieu that a republican form of government was to be preferred, included the guarantee of this form of government in the Constitution to ensure the uniformity of state governments. Failure to enforce the guarantee effectively disregards this crucial aspect of the framers' constitutional plan of government.

Additionally, enforcement of the Guaranty Clause is needed to provide protection of political and civil rights.[132] The fourteenth amendment is insufficient as the sole protector of these rights for two reasons.[133] First, the fourteenth amendment provides only a negative limitation on state action. Alternatively, the Guaranty Clause provides an opportunity to affirmatively require state governments to establish republican forms of government to help ensure the protection of individual rights. Second, the fourteenth amendment does not protect against restrictive ballot requirements and oppressive state governmental structures. This is precisely the danger the Guaranty Clause addresses. For example, while the fourteenth amendment is unlikely to apply where a state government has provided that a legislature be hereditary, appointed, or life tenured, the guarantee of a republican form of government would render this type of action unconstitutional. Thus, any injury to the citizens of a state resulting from the establishment of an unconstitutional form of government ***765** will go unredressed if their only protection is the fourteenth amendment. As one commentator has pointed out, 'only the guarantee clause can compensate for the deficiencies of the fourteenth amendment. As such, it has a tremendous potential to assure the fuller realization of our societal goals, chief among which is the protection and advancement of all citizens' political and civil rights.'[134] Thus, in order to protect valuable constitutional rights not protected by the fourteenth amendment, the federal courts should enforce the republican government guarantee.

C. PROPOSED METHOD FOR DETERMINING JUSTICIABILITY

To determine whether a case is justiciable the courts should examine the issues themselves rather than the constitutional clause under which they arise.[135] A court could address the Guaranty Clause issues that are appropriate for judicial determination and avoid those that are not. This approach requires that courts apply the criteria provided in *Baker*[136] to determine which Guaranty Clause issues are appropriate for judicial determination.

Baker supports this approach by stating that the issue in *Pacific States* was not justiciable despite the fourteenth amendment claims because 'the Court believed that [the fourteenth amendment claims] were invoked merely in verbal aid of the resolution of *issues* which, in its view, entailed political questions.'[137] This statement is evidence that the *Baker* Court was looking at the justiciability of the issues raised, rather than the justiciability of the Guaranty Clause itself.[138] However, *Baker* concludes that an issue brought under the fourteenth amendment may be justiciable while the same issue brought under the Guaranty Clause is nonjusticiable.[139] Thus, the Court's conclusion is that it is the constitutional provision under which an issue arises, rather than the issue itself, ***766** that renders Guaranty Clause cases nonjusticiable. This conclusion, however, does not necessarily follow from the Court's analysis.

The *Baker* Court listed several factors which determine a political question.[140] Two of these factors relate to the determination that a *constitutional provision* is per se nonjusticiable; the others go to the determination of whether *a particular issue* brought under a constitutional provision is justiciable. The two factors relevant to determining whether a constitutional provision is per se nonjusticiable are a textual commitment of the issue to another branch of government and a lack of criteria for judicial resolution of the issue. If the Guaranty Clause is per se nonjusticiable, then it must be on the basis of one of these factors. However, as the following two subsections point out, these factors do not apply so as to render the Guaranty Clause per se nonjusticiable. Thus, if an issue brought under the Guaranty Clause is nonjusticiable, it must be because *the particular issue* is rendered nonjusticiable by the remaining *Baker* factors. Later subsections show, however, that the remaining *Baker* criteria do not render nonjusticiable the issue of whether direct democracy violates the Guaranty Clause.

1. *Commitment to Another Branch of Government*

Pacific States held that all issues under the Guaranty Clause are for Congress or the Executive to resolve.[141] The Court reasoned that when Congress admits representatives and senators from a state, it confirms that the state's government conforms with the Constitution and that the judiciary is therefore bound to accept that government as legitimate.[142]

This argument is not persuasive, however, as a justification for the Court's refusal to rule on the Guaranty Clause. Congress' potential for enforcing the Constitution against a state does not excuse the federal courts from enforcing the constitutional rights of the citizens of the United States. As Chief Justice Marshall stated in *Marbury v. Madison*,[143] ' t he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'[144] This implies that it is the judiciary's responsibility to enforce the Constitution where the other branches fail to do so.

***767** There is no textual commitment of Guaranty Clause interpretation and enforcement to a particular branch of government other than the judiciary. By stating that '[t]he United States shall guarantee,' the text of article IV, section 4 suggests that it is not necessarily for Congress or for the Executive to enforce the guarantee. Although the words '[t]he United States shall guarantee' can plausibly be interpreted to mean 'Congress or the President shall guarantee,' this interpretation is by no means inevitable or even more credible than that allowing the judiciary to interpret the clause. In fact, the use of the words 'United States' suggests that all three branches which comprise the government are responsible for enforcing the guarantee.

This conclusion—that all three branches are responsible for enforcing the Guaranty Clause—finds additional support in the placement of the Clause in article IV, rather than in articles I, II, or III, the sections which designate the specific and exclusive powers and duties of each branch of the federal government. Further, while article IV specifically allocates certain duties to Congress or the Executive, it is silent as to whether a particular branch is responsible for enforcing the guarantee of a republican form of government.[145] For example, section three of article IV specifically gives Congress the authority to admit new states into the Union.[146] Similarly, the second clause of section four of article IV gives Congress and the Executive authority to protect the states against domestic violence.[147] However, no specific branch of the federal government is designated in the first clause of article IV, section 4 as the branch responsible for interpreting the republican government guarantee. Clearly, had the framers intended to allocate enforcement of the Guaranty Clause exclusively to the legislative or executive power, they could have specifically done so, as they did in other parts of the Constitution. Thus, based on the text of the Constitution, the judiciary is at least equally entitled to interpret the guarantee.

In his concurring opinion in *Baker*, Justice Douglas recognized the lack of textual support in the Constitution for the proposition that the interpretation and enforcement of the Guaranty Clause is exclusively for Congress or the Executive rather than for the judiciary. He noted:

> ***768** The statements in *Luther v. Borden* . . . that this guaranty is enforceable only by Congress or the Chief Executive is [sic] not maintainable. Of course the Chief Executive, not the Court, determines how a State will be protected against invasion. Of course each House of Congress, not the Court, is 'the Judge of the Elections, Returns, and Qualifications of its own Members.' . . . But the abdication of all judicial functions respecting [any issue arising under the guarantee] . . . is indefensible.[148]

Further, Justice Frankfurter dissented in *Baker*, saying that the Guaranty Clause 'is not committed by express constitutional terms to Congress. It is the nature of the controversies arising under it, nothing else, which has made it judicially unenforceable.'[149] Thus, the Court's designation of the Guaranty Clause as per se nonjusticiable cannot be maintained on the basis of a commitment to another branch of government. If the Guaranty Clause is per se nonjusticiable, it must be due to a lack of criteria for resolving issues raised under the provision.

2. *Lack of Decision Making Criteria*

The *Baker* Court found there to be a lack of criteria for deciding Guaranty Clause claims, stating that 'the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government.'[150] The Court went on to distinguish Guaranty Clause claims from fourteenth amendment claims, pointing out that ' j udicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment.'[151]

The Court failed, however, to recognize the fallacy of such reasoning: had the courts chosen to interpret the Guaranty Clause, sufficient judicial standards would develop under it. The fourteenth amendment is no more an inherent repository of judicial standards than is the Guaranty Clause; the words 'equal protection of the laws' are no more meaningful without interpretation than are the words 'republican form of government.' It is the line of decided cases interpreting the fourteenth amendment that provides standards for deciding claims brought thereunder. Likewise, a line of cases interpreting the Guaranty Clause would provide criteria for deciding Guaranty Clause claims.

***769** There are sufficient criteria for deciding at least some claims under the Guaranty Clause. The *Luther* Court suggested that the political question doctrine should not pose an absolute bar to the justiciability of all Guaranty Clause claims by stating that '[u]nquestionably a military government, established as the permanent government of the State, would not be a republican government.'[152] Since the Court can clearly distinguish a military government from a republican government, there is not a complete lack of criteria for determining what constitutes a republican form of government.[153] The *Baker* Court acknowledged this by stating that 'the judiciary might be able to decide the limits of the meaning of 'republican form,' and thus the factor of lack of criteria might fall away.'[154] This factor, therefore, does not support per se nonjusticiability of the Guaranty Clause. Rather, the particular issues arising thereunder must be analyzed under the remaining *Baker* criteria to determine whether a judicial ruling is appropriate. The remainder of this section applies those criteria to the issue of whether direct democracy violates the Guaranty Clause and concludes that this issue should be held justiciable.

3. *The Impossibility of Deciding Without an Inappropriate Judicial Policy Determination*

A court need not make an inappropriate policy determination to rule on the direct democracy issue. Ample evidence is available on both sides of this issue to provide sufficient grounds for analyzing direct democracy and for determining whether it is a constitutionally permissible form of government. The court is being asked merely to apply the Constitution to a particular state practice and determine whether that practice is within the constitutional framework established for the states.

The only policy determination required is a determination of the meaning of the Guaranty Clause and its application to the states. The federal courts are best suited for this type of constitutional interpretation. As Chief Justice Marshall stated in *Marbury v. Madison*,[155] ' i t is emphatically the province and duty of the judicial department to say ***770** what the law is.'[156] Thus, it is the federal courts' duty to make the policy determinations that are necessary and apply the Guaranty Clause to the direct democracy issue.

4. *Judicial Respect for Decisions of the Other Branches*

Three of the criteria set forth in *Baker* for determining whether an issue is a nonjusticiable political question were concerned specifically with ensuring that the judiciary not interfere with the decisions of another branch of government: '[T]he impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; . . . an unusual need for unquestioning adherence to a political decision already made; [and] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.'[157] This subsection will address each of these factors to determine whether any apply so as to render the claim that direct democracy violates the Guaranty Clause nonjusticiable.

A judicial decision on the issue of direct democracy would not express a lack of respect for the other branches of government since neither Congress nor the Executive have expressed an opinion on this issue. The direct democracy issue is

distinguishable on this point from the issue involved in *Luther*.[158] In *Luther*, the President had already recognized one of two competing Rhode Island governments as legitimate and had prepared to send military aid to that faction.[159] The *Luther* Court held that in view of this action by the President, a court would not have been justified in recognizing the opposing government because the result would have been a direct conflict between the President and the judiciary.[160] Such conflict between the branches of the federal government is undesirable and presents an unusual need for unquestioning adherence to a political decision already made. Thus, the Court could not have resolved the issue it faced in *Luther* without expressing a lack of respect for the coordinate branches of government. However, since no branch of the federal government has made a determination on the direct democracy issue, a court could rule on this issue without showing disrespect.

***771** There is no need for unquestioning adherence to a political decision already made since no decision has been made on the direct democracy issue. Even if Congress or the President had made a decision regarding an issue, this does not necessarily excuse the judiciary from its duty to uphold the Constitution and apply it to issues arising thereunder. In *United States v. Nixon*,[161] the Court did not hesitate to resolve a constitutional issue notwithstanding a contrary resolution by the executive branch. The Court, in rejecting the Executive's claim that it was for the President to determine the scope of executive privilege, stated:

> The President's counsel . . . reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison* that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'[162]

The Court's willingness in *Nixon* to resolve an issue as to which the Executive had already expressed an opinion suggests that this factor should not be determinative. Thus, even if a coordinate branch has expressed an opinion as to whether direct democracy violates the Constitution's guarantee of a republican form of government, it is the judiciary's duty, absent special circumstances such as those in *Luther*, to formulate its own independent opinion as to the issue.

In addition, the potential embarrassment from multifarious pronouncements by various branches does not justify the judiciary's refusal to resolve the direct democracy issue. It is the judiciary's duty to determine what the law is regardless of the potential that other branches might come to different conclusions.[163] In *Powell v. McCormack*,[164] Chief Justice Warren stated that ' o ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.'[165] The potential for embarrassment to the courts, then, is not determinative in assessing justiciability. If this factor has any weight in the Court's decision, it ***772** must be only a consideration to be weighed with the other factors mentioned. Thus, the courts should not refuse to resolve the direct democracy issue based on this factor.

Since none of the factors annunciated by the *Baker* Court provide adequate justification for the federal judiciary's refusal to resolve the issue of whether direct democracy violates the Constitution's guarantee of a republican form of government, this issue should be held justiciable. The remainder of this Note assumes justiciability and discusses the constitutionality of legislating by initiative or referendum.

III. THE UNCONSTITUTIONALITY OF DIRECT DEMOCRACY

Direct democracy violates the United States Constitution's guarantee to the states of a republican form of government and thus should be declared an unconstitutional method of lawmaking. When interpreting the Constitution, weight should be given to the meaning of the words[166] as well as to the policies underlying the various clauses. Thus, in interpreting the Guaranty Clause, a court should look not only to the meaning that the framers attached to the word 'republican,' but also to the contemporary understanding of the word. In addition, a court should examine the policies underlying the guarantee of this form of government to the states. By applying these policies to modern state governments, the best interpretation of the Guaranty Clause can be developed—one which adapts the framers' intent to contemporary governmental structures.

A. DEFINITION OF 'REPUBLICAN' GOVERNMENT

During the Constitutional Convention and the debate that followed several definitions were provided for the term 'republican.' Patrick Henry believed that the essence of a republican government was the delegation of power to a number of representatives, who would be held accountable via periodic elections.[167] In the tenth *Federalist*, Madison asserted that a republic is a government where the powers are delegated 'to a small number of citizens elected by the rest.'[168] Madison more ***773** specifically described his view of a republican form of government in the thirty-ninth *Federalist* as:

> a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it . . .. It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments [during pleasure for a limited period or during good behavior].[169]

Thomas Jefferson viewed a republic as a government ruled by the majority of its citizens en masse. Recognizing, however, that this ideal government could not be achieved in a country as large as the United States, Jefferson conceded that the best alternative was the delegation of governmental power to representatives appointed by popular election. Jefferson believed that to the extent that this representative character existed, a government was republican.[170]

The Supreme Court has indicated that the state governments, as they existed in 1787, provide examples of what is republican:

> All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.[171]

In 1787, all the state governments were based on popular sovereignty; the governments were ruled by representatives, who were elected by the consent of the people, and in whom the source of all power was vested.[172] The state governments were organized into three branches, with elected bicameral legislatures.[173] All the states had wholly representative ***774** governments.[174]

The Supreme Court has stated that:

> By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.[175]

Likewise, *Webster's Dictionary* defines 'republic' as 'a government in which supreme power resides in a body of citizens entitled to vote and is exercised by *elected officers and representatives* responsible to them and governing according to law.'[176] The distinguishing characteristic of a republican form of government is, then, a representative nature. It is this characteristic of government that the framers sought to preserve by including the guarantee of a republican form of government in the Constitution.

Direct democracy, however, subverts the principle of representation. Government by the people directly—by initiative or referendum—is inconsistent with representative government. Madison distinguished these two forms of government in the tenth *Federalist*:

> The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.[177]

***775** Thus, since direct democracy is not consistent with the representative nature of a republican form of government, it should be declared an unconstitutional form of state government insofar as it is inconsistent with the policies of the Guaranty Clause.

B. POLICIES OF THE GUARANTY CLAUSE

The framers were trying to accomplish two goals by including the republican government guarantee in the Constitution. First, the framers intended to protect the people from abusive state governments.[178] This suggests that the definition of 'republican' is not fixed, but rather is dynamic and should be interpreted so as to maximize the protection against abusive state governments. This dynamic character of a republican government is supported by the framers' belief that a republic was limited by 'natural justice'[179]—that is, the belief that justice was founded on laws that were natural in origin, rather than man made. Since natural justice is an evolving concept that expands and contracts throughout history, republican government should therefore be defined in light of contemporary values as well as historical meaning.

A dynamic interpretation of 'republican' is also consistent with judicial and congressional notions of statutory and constitutional construction. The Supreme Court has stated that, '[w]hile the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning.'[180] Thus, a court interpreting the Guaranty Clause may look at current views of government and interpret the Clause so as to further the framers' goal to protect against oppressive state governmental practices.

Direct democracy is an oppressive practice against which the Guaranty Clause should protect. As Part I points out, substantial harms result from voter ignorance, procedural defects, and voter apathy that is present in a direct democracy. Foremost among these harms are laws that infringe on individual rights. Additionally, direct democracy results in a loss of economic efficiency in lawmaking and negative effects on existing branches of government. In order to further the policy of the Guaranty Clause and eliminate these harms, direct democracy should be declared nonrepublican.

***776** A second purpose of the Guaranty Clause is to ensure that states maintain uniform governmental structures.[181] This suggests that the definition of 'republican' is flexible as long as it serves this goal. A definition that includes direct democracy as an optional form of state government, however, would not guarantee uniformity. Rather, some states would maintain representative governments, while others would engage in direct democracy. This diversity of state governmental structures is repugnant to the constitutional plan of the United States.

In sum, a court faced with interpreting the republican government guarantee should consider two factors: the definition of 'republican' and the policies underlying the Guaranty Clause. Applying these factors to the question of whether direct democracy violates the guarantee, it is clear that direct democracy does not possess the characteristics which republican government requires. Direct democracy lacks the representative character that is crucial to the definition of 'republican,' and it undermines the policies of the guarantee to provide for the uniformity of state governments and to protect against those that are oppressive. Thus, direct democracy as a way of adopting laws and constitutional amendments should be declared unconstitutional.

Footnotes

[1] The arguments developed in this Note apply equally to the initiative, the referendum, and, to a lesser extent, the recall.
States with the initiative, referendum, or recall include:
Initiative: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming;
Referendum: Alaska, Arizona, Arkansas, California, Colorado, Idaho Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming;
Recall: Alaska, Arizona, California, Colorado, Idaho, Kansas, Louisiana, Michigan, Nevada, North Dakota, Oregon, Washington, and Wisconsin.
L. TALLIAN, DIRECT DEMOCRACY: AN HISTORICAL ANALYSIS OF THE INITIATIVE, REFERENDUM AND RECALL PROCESS 45 (1977).
An amendment to the United States Constitution has been proposed which would provide for a federal initiative and recall. *See id.* at 120-21; *see also* Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 2 (1978) (In July 1977, Senators James Abourezk (D., S.D.) and Mark Hatfield (R., Or.) co-sponsored a joint resolution proposing a constitutional amendment through which federal laws could be enacted by national initiative.).

[2] *See* D. MAGLEBY, DIRECT LEGISLATION 5 (1984).

[3] *See generally* D. BUTLER & A.RANNEY, REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 39-66 (1978) (discussion of historical development of direct democracy in Switzerland); LEAGUE OF WOMEN VOTERS OF CALIFORNIA, INITIATIVE AND REFERENDUM IN CALIFORNIA: A LEGACY LOST? 1-11 (1984) [hereinafter LEAGE] (historical background of direct democracy).

[4] Note, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922, 922 (1975).

[5] Note, *The Direct Initiative Process: Have Unconstitutional Methods of Presenting the Issues Prejudiced its Future?*, 27 UCLA L. REV. 433, 437 (1979).

[6] *See generally* Cole, *Introduction* to J. ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES (Am. ed. 1950).

[7] LEAGUE, *supra* note 3, at 4 (quoting Benjamin DeWitt). This right, the Progressives believed, extended even to women. However, women in the United States did not receive the right to vote until 1920, when the nineteenth amendment to the United States Constitution was ratified. *See* U.S. CONST. amend. XIX.

[8] LEGAGUE, *supra* note 3, at 5 (quoting Benjamin DeWitt).

[9] *Id.* ('So long as a candidate himself was allowed to spend as much money as he chose in his own campaign, wealthy candidates had a decided advantage over their poorer competitors.').

[10] Bell, *supra* note 1, at 18.

[11] King, *At the End, Winners Talk Smart and Losers Explain*, L.A. Times, Nov. 15, 1986, pt. 1, at 1, col. 1.

[12] *See generally* King, *Consultants Are King in a Media Age*, L.A. Times, Nov. 9, 1986, pt. 1, at 1, col. 1.

[13] *See generally* Walters, *Public Policy Gridlock: The Initiative as Decidedly Bad Lawmaking*, L.A. Daily J., July 14, 1986, at 4, col. 2 (analyzing the effect of initiative measures on California politics).

[14] Bell, *supra* note 1, at 2.

[15] *See* U.S. CONST. art. IV, § 4. Challenges to direct democracy have also been made on due process grounds. *See, e.g.*, City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976) (provision requiring land use changes to be ratified by 55% of voters held not to violate due process rights of landowners who apply for zoning changes); Note, *supra* note 5. This Note will limit the constitutional analysis of direct democracy to a Guaranty Clause challenge.

[16] *See* Pacific States Tel. & Tel. v. Oregon, 223 U.S. 118 (1912) (issue whether a state provision for enacting laws by initiative violates the Guaranty Clause held to be a political question).

[17] Specific reforms of direct democracy have been suggested previously and are beyond the scope of this Note. *See, e.g.*, D. MAGLEBY, *supra* note 2, at 194-96; Note, *supra* note 4.

[18] L. TALLIAN, *supra* note 1, at 9.

[19] St. Paul Citizens for Human Rights v. City Council, 289 N.W.2d 402, 407 (Minn. 1979) (Wahl, J., dissenting) ('An election campaign does not lend itself to [adequate] explanations but to simple fact statements or slogans. As a result voters may be confused and make decisions, not on a factual or philosophical basis, but for emotional or political reasons.'); THE FEDERALIST NO. 49, at 317 (J. Madison) (C. Rossiter ed. 1961) (pointing out that without adequate, accurate information, voters vote pursuant to the opinions of 'persons of distinguished character and extensive influence in the community').

[20] THE FEDERALIST NO. 49, *supra* note 19, at 317 (J. Madison) (emphasis in original).

[21] *See* C. ADRIAN & C. PRESS, GOVERNING URBAN AMERICA 109 (5th ed. 1977). An example of the difficult language found in ballot measures is provided by California's Safe Drinking Water and Toxic Enforcement Act of 1986, which provides in part:
Section 25249.6 shall not apply to any of the following:
. . .
(c) An exposure for which the person responsible can show that the exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer, and that the exposure will have no observable effect assuming exposure at one thousand (1,000) times the level in question for substances known to the state to cause reproductive toxicity, based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for the listing of such chemical pursuant to subdivision (a) of Section 25249.8.
CAL. HEALTH & SAFETY CODE § 25249.10(c) (West Supp. 1988) (1986 Ballot Proposition 65). Most voters would probably have difficulty understanding this language. Further, even if the voter is able to understand the language, most would be unable to determine the scope of the exception and whether such an exception is desirable.

[22] LEAGUE, *supra* note 3, at 54 (quoting Ronald Reagan). The measure to which Reagan was referring was defeated in a special election. *Id.*

[23] LEAGUE, *supra* note 3, at 54 (quoting Professor Raymond Wolfinger, University of California, Berkeley); *see also* D. MAGLEBY, *supra* note 2, at 118-19 (discussing the readability of ballot titles and descriptions).

[24] LEAGUE, *supra* note 3, at 55; D. MAGLEBY, *supra* note 2, at 120 (only 17% of voters had earned a B.A. degree).

[25] LEAGUE, *supra* note 3, at 54 (quoting John Randolph Haynes).

[26] *See* D. BUTLER & A. RANNEY, *supra* note 3, at 34.

[27] *Id.* at 90; *see also* Note, *supra* note 4, at 935.

[28] When voters *are* exposed to such informative communication, they often disregard it. *See infra* text accompanying notes 100-03 (discussion of voter apathy in a direct democracy).

[29] Bell, *supra* note 1, at 18.

[30] LEAGUE, *supra* note 3, at 54; *see, e.g.*, King, *Commercial Litmus Test: Will TV Viewers Buy It?*, L.A. Times, Nov. 14, 1986, pt. 1, at 28, col. 1 (One voter, when asked how she decided how to vote on an initiative or referendum, expressed an enlightening and possibly prevalent description of her decision making process: '[W]e vote—my husband and I—according to the quality of the [advertisement's] skit.').

[31] King, *supra* note 30, at 29, col. 1.

[32] *Id.*

[33] King, *supra* note 12, at 28, col. 2. This is possible because ballot propositions, not having gone through the combative refinement process which is applied to legislative bills, are often poorly drafted by sympathetic collaborators. Thus, holes can be punched in the proposed laws. *Id.*

[34] King, *supra* note 11, at 38, col. 4.

[35] *See supra* text accompanying notes 19-20.

[36] In California, only a majority is needed. *See* CAL. CONST. art. II, § 10. Some states, however, require more than a simple majority. *See, e.g.*, D. BUTLER & A. RANNEY, *supra* note 3, at 69.

[37] At least one court has held that this procedural defect does not constitute a constitutional violation of due process of lawmaking. *See* Felix v. Milliken, 463 F. Supp. 1360 (E.D. Mich. 1978) (provision allowing a percentage of the electorate to place constitutional amendments on the ballot held not to violate due process).

[38] E. BARKER, REFLECTIONS ON GOVERNMENT 67 (1942) (footnote omitted).

[39] Only about half the states which have direct democracy have a provision for judicial or administrative review of materials before they are distributed. *See* Note, *supra* note 5 app. at 467-70, col. 5.

[40] *See supra* note 33 and accompanying text.

[41] *See* CAL. CONST. art. I, § 28.

[42] *See* Note, *Proposition 8 and the California Supreme Court: Interpretation Run Riot?*, 60 S. CAL. L. REV. 540, 540 n.1 (1987); *see also* People v. Castro, 38 Cal. 3d 301, 306, 696 P.2d 111, 113, 211 Cal. Rptr. 719, 721 (1985) (Proposition 8 applies equally to the prosecution, the defense, and the courts); *In re* Lance W., 37 Cal. 3d 873, 908-09, 694 P.2d 744, 768-69, 210 Cal. Rptr. 631, 655-56 (1985) (Mosk, J., dissenting) (Proposition 8 allows defense counsel to attack the credibility of police officers and the prosecution's witnesses).

[43] Note, *supra* note 4, at 930-31 (footnote omitted). For a discussion of the difficulties facing a court interpreting legislation passed by initiative, see *infra* notes 96-99 and accompanying text.

[44] *See generally* Patterson v. County of Tehama, 184 Cal. App. 3d 1546, 229 Cal. Rptr. 696 (1986) (literal language of initiative disregarded to avoid absurd results).

[45] D. BUTLER & A. RANNEY, *supra* note 3, at 196.

[46] Taschner v. City Council, 31 Cal. App. 3d 48, 64, 107 Cal. Rptr. 214, 227 (1973).

[47] L. TALLIAN, *supra* note 1, at 5.

[48] *See infra* text accompanying notes 77-84; *see also* D. MAGLEBY, *supra* note 2, at 194 ('One of the areas of initiative politics most in need of reform is the petition-circulation process.').

[49] In the 1972 California general election, cards used to help qualify for the ballot California's Proposition 22, which regulated farmworker labor relations, made the misleading claim that the proposal would result in lower food prices. CALIFORNIA ASSEMBLY ELECTIONS AND REAPPORTIONMENT COMM., PUBLIC HEARING ON THE INITIATIVE PROCESS 48 (Oct. 10, 1972).

[50] *Id.* at 2.

[51] *Id.* at 32, 55-56.

[52] For example, in one case signature gatherers copied portions of the telephone book into petitions. *Id.* at 2; *11 Charged with Fraud on Prop. 22*, L.A. Times, Oct. 27, 1972, pt. 1, at 9, col. 8.

[53] L. TALLIAN, *supra* note 1, at 139.

[54] THE FEDERALIST NO. 10, *supra* note 19, at 77 (J. Madison).

[55] J. ELY, DEMOCRACY AND DISTRUST 8 (1980).

[56] *See* THE FEDERALIST NO. 10, *supra* note 19, at 77-84 (J. Madison) (discussing the tendency for an overbearing majority to sacrifice the interests of the minority under a system of direct democracy); *see generally* Bell, *supra* note 1 (noting the use of referendum to thwart civil rights reforms).

[57] THE FEDERALIST NO. 10, *supra* note 19, at 81 (J. Madison).

[58] Bell, *supra* note 1, at 18 (footnote omitted).

[59] *See, e.g.*, James v. Valtierra, 402 U.S. 137 (1971) (upholding article XXXIV of the California Constitution, which required that the construction, development, or acquisition of any low rent housing project be approved by a majority of the voters at a community election); Arthur v. City of Toledo, 782 F.2d 565 (6th Cir. 1986) (court rules that referendums which overturned ordinances authorizing the construction of sewer extensions to public housing sites did not breach cooperation agreement between the city and housing authority); Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291 (9th Cir. 1970) (city-wide vote nullified city council's approval of a low income housing project); *see also* Note, *Instant Planning—Land Use Regulation by Initiative in California*, 61 S. CAL. L. REV. 497, 516-18 (1988) (discussion of the impact of zoning by initiative on minorities).

[60] LEAGUE, *supra* note 3, at 24.

[61] CAL. CONST. art. III, § 6.

[62] *See supra* text accompanying notes 37-38.

[63] *Id.*

[64] *See infra* text accompanying notes 77-80.

[65] For example, in the 1986 California general election, California Supreme Court Chief Justice Rose Bird and two associate justices were not reelected presumably because of a belief by the California electorate that by failing to uphold death penalty sentences pursuant to the 1972 California death penalty initiative, the justices were imposing their own views rather than following the views of the electorate. The voters were arguably uninterested in the constitutional rights of the defendants who faced death penalty sentences, but were merely anxious to have the death penalties upheld.
The California courts arguably have failed to follow laws enacted by initiative in several instances. For example, in People v. Castro, the court held that an initiative which provided that '[a]ny prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used *without limitation* for purposes of impeachment (applied *only* to felonies involving a) 'readiness to do evil'—moral turpitude, if you will.' 38 Cal. 3d 301, 305 n.1-314, 696 P.2d 111, 112 n.1-119, 211 Cal. Rptr. 719, 720 n.1-727 (1985); *see also* Patterson v. County of Tehama, 184 Cal. App. 3d 1546, 229 Cal. Rptr. 696 (1986) (county ordinance which purported to limit authority of all 'public entities' held not to apply to the state notwithstanding a clear intent for the law to so apply).

[66] THE FEDERALIST NO. 10, *supra* note 19, at 82 (J. Madison). Madison suggests another way in which legislatures are better protectors of minority rights: representatives, who come from various districts throughout the state, theoretically protect against local factions which would otherwise have sufficient power to impose their view on the entire state. *Id.* According to this view, representative government diffuses decision making power among the representatives. In practice, however, representative government has resulted in largely partisan decision making rather than in a diffusion of decision making power.

67 *See supra* text accompanying note 38.

68 D. BUTLER & A. RANNEY, *supra* note 3, at 36; *see also supra* text accompanying notes 60-61.

69 ST. PAUL, MINN. LEGIS. CODE ch. 74 (1977) (emphasis added); *see* St. Paul Citizens for Human Rights v. City Council, 289 N.W.2d 402 (Minn. 1979).

70 *St. Paul Citizens for Human Rights*, 289 N.W.2d at 404.

71 U.S. CONST. amend. XIV; *see also infra* notes 132-34 and accompanying text (discussion of the need for enforcement of the Guaranty Clause in order to provide protection of political and civil rights).

72 Arthur v. City of Toledo, 782 F.2d 565, 573 (6th Cir. 1986) (referendum which repealed ordinances authorizing the local metropolitan housing authority to construct sewer extensions to two proposed public housing sites held not to violate the equal protection clause); *see also* Kirksey v. City of Jackson, 663 F.2d 659 (5th Cir. 1981) (ballot measure upheld notwithstanding substantial discriminatory impact and evidence of discriminatory intent on the part of a majority of those voting); Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291 (9th Cir. 1970) (declining to consider the issue of racial motivation in a city-wide vote that nullified city council approval of a low income housing project). *But cf.* Hunter v. Erickson, 393 U.S. 385 (1969) (Akron, Ohio charter amendment which required approval of any fair housing legislation by a majority of the electors held to be an unconstitutional violation of the equal protection clause); Reitman v. Mulkey, 387 U.S. 369, 375-76 (1967) (California constitutional amendment that barred any restriction on a property owner's discretion to sell or lease to any person in the owner's absolute discretion held unconstitutional because it involved the state authorizing and encouraging illegal racial discrimination in violation of the equal protection clause). The *Kirksey* court, in defending the district court's decision to exclude evidence of discriminatory intent with regard to a ballot measure, stated that '[s]tigmatized racial attitudes, neither socially admirable nor civically attuned, are not constitutionally proscribed.' *Kirksey*, 663 F.2d at 662. Courts are not as strict when laws enacted by representative bodies are involved. The *Arthur* court pointed out that 'although courts *have* inquired into the votes of city council members, the policies underlying the 'secret ballot' prevent courts from inquiring into the votes of the electorate.' *Arthur*, 782 F.2d at 574 (emphasis added).

73 *Arthur*, 782 F.2d at 574.

74 *Id.*

75 *See, e.g., supra* text accompanying notes 69-70.

76 *See generally* Note, *supra* note 4, at 939-42.

77 *See* LEAGUE, *supra* note 3, at 18-20 (examples of signature requirements of various states).

78 J. HARRIS, CALIFORNIA POLITICS 116 (1967); *see also* D. MAGLEBY, *supra* note 2, at app. E (table of total expenditures for California ballot propositions between 1954 and 1982).

79 King, *supra* note 12, at 28, col. 2.

80 King, *supra* note 11, at 38, col. 3. Eighty-two percent of that $4 million was spent on television advertisements. In the final week before the election, the campaign against Proposition 65 spent over $600,000 on television and radio time. *Id.*

81 Note, *supra* note 4, at 941 n.90.

82 *Id.*

83 *Id.* at 941 n.91.

84 However, one cost associated with a representative government does not face the state governed by 'pure' direct democracy—the cost of legislators' salaries. In a pure direct democracy, there is no legislature, and thus no need for salaries for legislators; all decisions are made by the general public directly. States of the United States which put certain issues to a vote by the general public, however, do not use a pure form of direct democracy; these states have legislatures also. The savings of salaries which a pure direct democracy realizes is, therefore, not realized by the states. Thus, the cost of legislators' salaries does not offset the high costs of administering a direct democracy in the states. With partial direct democracy, all the costs of electing representatives *plus* the costs of direct democracy exist.

85 *See* Reitman v. Mulkey, 387 U.S. 369 (1967) (held unconstitutional California's 1964 Proposition 14 which would have permitted restrictions on sales and rentals of residential real property); Rockwell v. Superior Court, 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976) (held unconstitutional California's 1972 Proposition 17 which provided for a mandatory death penalty, because United States Supreme Court guidelines were not met); Santa Barbara School Dist. v. Superior Court, 13 Cal. 3d 315, 530 P.2d 605, 118 Cal. Rptr. 637 (1975) (held unconstitutional California's 1972 Proposition 21, which dealt with anti-busing, if previous segregation was either de jure or de facto); Weaver v. Jordan, 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537 (1966) (held unconstitutional California's 1964 Proposition 15 which restricted pay television); *see also* D. MAGLEBY, *supra* note 2, at app. A (table showing the judicial determinations of the constitutionality of successful California initiatives between 1964 and 1979).

86 Where the initiative allows for legislative amendment, more than a simple majority in both houses of the legislature is often required. Thus, it is very difficult to amend laws enacted by direct democracy. *See generally* Note, *supra* note 4, at 942.

87 *See* Note, *supra* note 5, at 439.

88 *See* D. BUTLER & A. RANNEY, *supra* note 3, at 36-37.

89 B. DE WITT, THE PROGRESSIVE MOVEMENT 223 (1915).

90 LEAGUE, *supra* note 3, app. M, at 119-20 (quoting Senator Bill Lockyer (D. Hayward)); *see also id.* app. M, at 119 (comments of California Assemblyperson Robert J. Campbell (D. Richmond): 'Unfortunately the legislature has not acted and in some instances were [sic] not willing to take the heat on controversial issues. It was easier for the legislature to let the voters do it rather than take the heat.').

91 Walters, *supra* note 13, at 4, col. 2.

92 *Id.*

93 *See generally id.* ('the political atmosphere of the last generation in California has been dominated by the initiative').

94 United States v. Richardson, 418 U.S. 166, 179 (1973).

95 Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523, 542 (1977) (arguing that a basic value supporing the protection of free speech, press, and assembly is the ability through the exercise of those freedoms for checking the abuse of power by public officials); *see generally* J. LOCKE, AN ESSAY CONCERNING THE TRUE, ORIGINAL, EXTENT AND END OF GOVERNMENT (Peardon ed. 1952); J. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269-83 (1942).

96 For a discussion of the California Supreme Court's approach to interpreting referendums, see Note, *supra* note 42 (analysis of various interpretive techniques and justifications for applying a realist theory of interpretation to California's Proposition 8—The Victims' Bill of Rights).

97 *See id.* at 558-59 (discussion of interpretive difficulties posed by poor draftsmanship); LEAGUE, *supra* note 3, at 40-41 (discussion of interpretive difficulties faced by courts). An example of the problems of poor draftsmanship is California's 1978 Proposition 13—the controversial tax initiative that became article XIII of the California Constitution—which was described as containing 40 linguistic ambiguities. *Id.* at 40. This initiative led to extensive litigation interpreting Proposition 13's anomolies. *See id.* at 40, app. F at 96-97 (summarizing judicial decisions regarding Proposition 13).

98 *See, e.g.*, Russell v. Superior Court, 185 Cal. App. 3d 810, 819, 230 Cal. Rptr. 102, 108 (1986) ('A passing reference in one ballot argument is not sufficient to demonstrate a clear intent . . ..').
This lack of discernable legislative intent is coupled with the fact that voters often do not fully understand either the complex measures or the ballot pamphlets that describe them. *See supra* text accompanying notes 21-24, 28-35 (discussion of voters' lack of understanding of ballot measures).

99 *Russell*, 185 Cal. App. 3d at 817-18, 230 Cal. Rptr. at 107 (court unable to find a clear intent for the retroactive application of California's 1986 Proposition 51, which was designed to eliminate joint and several liability for noneconomic damages); *see also* Consumers Union v. California Milk Producers Advisory Bd., 82 Cal. App.3d 433, 439, 147 Cal. Rptr. 265, 268-69 (1978) (discussing difficulties of determining intent and purpose of a law enacted by initiative).

100 *See* Munro, *Introduction to* THE INITIATIVE, REFERENDUM, AND RECALL 22 (W. Munro ed. 1916):
The way to get voters interested in measures is to ask for their opinion upon measures, not for their opinion upon men. The way to educate the voter upon matters of public policy is to submit measures to him in person and not to some one who holds his proxy.

101 D. MAGLEBY, *supra* note 2, at 180.

102 LEAGUE, *supra* note 3, at 56; *see also* D. MAGLEBY, *supra* note 2, at 106-18 (discussion of voter drop-off in initiative elections).

103 Additional considerations that affect the voter's interest in the issue include the voter's perception of the importance of the issue and the closeness of the vote, and intellectual considerations such as the value of being well informed. *See* Note, *supra* note 4, at 935. For a discussion regarding the public's lack of interest in the merits of issues involved in ballot initiatives, see King, *supra* note 11, at 38, col. 6 ('It is just darn discouraging to set up an informational banquet and have people go out for hot dogs.').

104 U.S. CONST. art. IV, § 4. Section 4 goes on to provide that the United States 'shall protect each of [the states] against Invasion;

and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.' *Id.*

105 *See* Pacific States Tel. & Tel. v. Oregon, 223 U.S. 118, 151 (1912).

106 The political question doctrine requires a court to find a matter nonjusticiable because it is to be resolved by the political branches of government and not by the courts. *See generally* D. CURRIE, FEDERAL COURTS 91-110 (1982).

107 48 U.S. (7 How.) 1 (1849).

108 This conflict grew out of Rhode Island's Dorr Rebellion in which a group established a new government and was attempting to overthrow the previously existing government. *See id.* at 4-6.

109 *Id.* at 7.

110 *See generally id.; see also* Baker v. Carr, 369 U.S. 186, 222 (1962).

111 223 U.S. 118 (1912).

112 *Id.* at 151.

113 *Id.* at 141.

114 *See id.*

115 *See id.* at 142.

116 *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (equal protection clause held to prohibit state enforced segregation).

117 369 U.S. 186 (1962).

118 *Id.* at 218.

119 *Id.* at 210.

120 *Id.* at 217.

121 *Id.* at 228.

122 *Id.* at 226.

123 *Id.* at 210.

124 THE FEDERALIST NO. 43, *supra* note 19, at 274-75 (J. Madison) (emphasis in original).

125 Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1875).

126 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

127 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 51 (M. Farrand ed. 1966); *see also* Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 517 (1962).

128 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 127, at 431.

129 Some constitutional scholars argue that the framers' intent is not relevant in modern constitutional decision making. This Note, however, adopts the view that the framers' intent is important in constitutional decision making and thus should be respected at least to some degree.

130 *See* U.S. CONST. art. III.

131 *See* 9 C. MONTESQUIEU, THE SPIRIT OF LAWS 127 (Colonial Press ed. 1899).

132 *See generally* Bonfield, *supra* note 127, at 514 (noting that the Guaranty Clause represents an 'untapped source of federal power, by which the central government can assure the fuller realization of our society's democratic goals').

133 For an argument that the initiative and referendum are deserving of heightened due process and equal protection scrutiny, see Note, *Constitutional Constraints on Initiative and Referendum*, 32 VAND. L. REV. 1143, 1148-65; *see also supra* notes 71-75 and accompanying text (discussion of the failure of the equal protection clause to adequately protect minority rights in a direct democracy).

134 Bonfield, *supra* note 127, at 516.

135 *See generally* Bonfield, Baker v. Carr: *New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245 (1962) (analyzing Baker v. Carr, 369 U.S. 186 (1962), as it relates to the justiciability of questions raised under the Guaranty Clause and arguing that it should be the particular issue raised, rather than the mere invocation of the Guaranty Clause, that renders a case nonjusticiable).

136 *Baker*, 369 U.S. 186.

137 *Id.* at 228 (emphasis added).

138 The Court has, in some cases, resolved claims which were brought under the Guaranty Clause without even questioning their

justiciability. *See, e.g., In re* Duncan, 139 U.S. 449 (1891); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (republican government, as guaranteed in the Constitution, held not to require that the right of suffrage be extended to women); *see also* Bonfield, *supra* note 127, at 548-51 (discussing various cases entertained under the Guaranty Clause).

139 *See Baker*, 369 U.S. at 227.

140 *See id.* at 217.

141 *See* Pacific States Tel. & Tel. v. Oregon, 223 U.S. 118, 146 (1912); *supra* text accompanying notes 111-15.

142 *Pacific States*, 223 U.S. at 147.

143 5 U.S. (1 Cranch) 137 (1803).

144 *Id.* at 163.

145 For a discussion which concludes that the three clauses of article IV, § 4 should be considered as three separate and independent propositions, see Bonfield, *supra* note 127, at 516-22.

146 U.S. CONST. art. IV, § 3 ('New States may be admitted by the Congress into this Union . . ..').

147 U.S. CONST. art. IV, § 4 ('and on Application of the Legislature, or of the Executive . . . against domestic Violence').

148 Baker v. Carr, 369 U.S. 186, 242 n.2 (1962) (Douglas, J., concurring) (citation omitted) (quoting U.S. CONST. art. I, § 5).

149 *Id.* at 297 (Frankfurter, J., dissenting).

150 *Baker*, 369 U.S. at 223.

151 *Id.* at 226.

152 Luther v. Borden, 48 U.S. (7 How.) 1, 45 (1849).

153 The Court has, on occasion, provided further definitions of what constitutes a republican government. *See infra* text accompanying notes 171, 175.

154 *Baker*, 369 U.S. at 222 n.48.

155 5 U.S. (1 Cranch) 137 (1803).

156 *Id.* at 177.

157 *Baker*, 369 U.S. at 217.

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

159 *See* Bonfield, *supra* note 135, at 249.

160 *See Luther*, 48 U.S. at 44.

161 418 U.S. 683 (1974).

162 *Id.* at 703 (citation omitted) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

163 *See id.* at 703-05; Marbury v. Madison, 5 U.S. (1 Cranch) at 177.

164 395 U.S. 486 (1969) (claim for declaratory relief regarding Congress's ability to exclude members held justiciable).

165 *Id.* at 549.

166 Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 542 (1869); Locke v. New Orleans, 71 U.S. (4 Wall.) 172 (1866).

167 Bonfield, *supra* note 127, at 526.

168 *See* THE FEDERALIST NO. 10, *supra* note 19, at 82 (J. Madison) (distinguishing a republic from a direct democracy).

169 THE FEDERALIST NO. 39, *supra* note 19, at 241 (J. Madison) (emphasis in original).

170 Bonfield, *supra* note 127, at 527.

171 Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175-76 (1874).

172 *See* THE FEDERALIST NO. 39, *supra* note 19, at 241-42.

173 *See* Bonfield, *supra* note 127, at 529 (describing the states' governments as they existed in 1787).

174 THE FEDERALIST NO. 63, *supra* note 19, at 386-87 (J. Madison); *see also* Note, *The Referendum as a 'Republican Form of Government*,' 24 HARV. L. REV. 141, 142 (1910) (Alexander Hamilton, among others, believed that the state governments were wholly representative.).

[175] *In re* Duncan, 139 U.S. 449, 461 (1891) (murder conviction upheld notwithstanding claim that the relevant codes had been invalidly enacted).

[176] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1928 (unabridged ed. 1981) (emphasis added); WEBSTER'S NEW COLLEGIATE DICTIONARY 983 (1977) (same); *see also* THE RANDOM HOUSE THESAURUS 601 (College ed. 1984) (listing 'representative government' as synonymous with 'republic'); WEBSTER'S NEW WORLD DICTIONARY 508 (paperback ed. 1984) (defining 'republic' as 'a state or government . . . in which the power is exercised by officials elected by the voters').

[177] THE FEDERALIST NO. 10, *supra* note 19, at 82 (J. Madison).

[178] Bonfield, *supra* note 127, at 559.

[179] *Id.* at 527-28, 559.

[180] Sweezy v. New Hampshire, 354 U.S. 234, 266 (1957) (Frankfurter, J., concurring).

[181] This uniformity of state governments was of critical importance to the framer's constitutional plan of government. *See supra* text accompanying note 131.

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