1994

Initiative Enigmas

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INITIATIVE ENIGMAS

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To comment on Professor Amar's paper, I wish to return to the subject of the initiative method of amending state constitutions.[1] This is much on the minds of people in this state, as in Oregon and California. We too have ever lengthening ballots and a legislature of shrinking importance.

I.

Professor Amar argued that the initiative does not violate the Guarantee Clause because the essential aspect of republican government is majority rule, and because Madison's most famous text contradicting him can be explained away.[2] Judge Linde vigorously argued the contrary and urged modern courts to invalidate at least some kinds of initiatives under the Guarantee Clause.[3]

First put the question in Borkist form and ask whether the initiative violates framers' intent for the Guarantee Clause. Professor Amar discussed framers' meaning extensively, and both Judge Linde and Professor Eule[4] made opposing arguments. Each of them assumed a unitary meaning of republican in the framers' discourse. I have doubts.

If we ask whether the initiative would be a satisfactory part of the republican government the framers were crafting, the answer is surely no. Professor Amar stressed many framers' references to majority rule. It is beyond argument that there must be ultimate majority rule. But most of the hard problems in creation of the U. S. Constitution lay between the poles of immediate majority rule and

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1. The initiative is used to enact statutes, too, but in most states its use to amend constitutions dwarfs the former in number and importance, and presents harder problems about republican government.

2. *See* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994) (this issue).

3. *See* Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994) (this issue).

4. *See* Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives, and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733 (1994) (this issue).

ultimate majority rule. Federalist Number 10, which Professor Amar attempted to isolate, was Madison's recognition of the tension between majority rule and another fundamental principle of republicanism, consent of the governed.[5] Consent is strained for those who regularly lose majoritarian contests. Madison's solution was complex structure to avoid any group consistently losing out. The centerpiece was separation of powers augmented by interbranch checks. Thus the theme of Number 10 reappears in Numbers 48 and 51, where separation is explained. This is one of many reasons why Number 10 cannot be isolated.[6]

Most of the framers, Madison included, supported a strong and independent role for state governments. Indeed, federalism was viewed as one of the important structural protections for minorities. It is one thing to conclude that the framers would not accept the initiative as republican enough for a government they were creating. And they might have refused to accept the initiative in the proposed constitution of a new state seeking admission to the union, because admission is a discretionary act.

It is quite another matter to say the framers would agree that the federal government had authority to override an existing state government that peacefully added initiative to its institutions. Concepts of federalism and state sovereignty would lead to a different outcome. Furthermore, some historical references to the Guarantee Clause appear to tie it to the clauses that follow it in Article IV, relating to insurrection. Under those readings, one of which is Hamilton's, only violence can justify federal intervention in the affairs of a sovereign state.[7]

In other words, the framers' view of republican government conflicted with their respect for state sovereignty. The folks who adopted the Tenth and Eleventh Amendments would surely have allowed peaceful adoption of the initiative by a state, even if they thought it insufficiently republican for their own creations. To the

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5. *See* THE FEDERALIST NO. 10 (James Madison).

6. *See also* WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 17-20 (1972) (summarizing other framers' distinctions between democracy and republicanism); THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 7, 12-20 (1989) (same).

In several places, Professor Amar's paper did distinguish between ordinary government and ultimate power of the majority. However, the constitutional initiative as used in American states today is very much a device of ordinary government, more so all the time. Thus I may not disagree with him on this point.

7. *See* WIECEK, *supra* note 6, at 64, 67.

framers, most state governments in 1787 were deficient. Two still had royal charters. Yet it is exceedingly unlikely that the framers intended to authorize immediate federal correction of state governments not sufficiently republican.[8]

This reading is supported by subsequent events. During Dorr's Rebellion in Rhode Island, there was an extended debate about the meaning of republican form. Madisonian stability was invoked by the Charterists against the Dorrites' claim based on republican principles. The federal government, including the Court, sided with the existing state government against the Dorrites' very strong Guarantee Clause claim.[9] Professor Amar's explanation for this apparent contradiction is unconvincing.[10] The federal position is more naturally understood as deference to existing state government rather than as a substantive judgment about republicanism.

During the Civil War and Reconstruction, the Guarantee Clause was repeatedly invoked in support of the most intrusive remedies against southern intransigence. Most members of Congress, when they appreciated the limitless power claimed under the clause, retreated into a passive stance.[11]

We see the same division of meaning during the era when the initiative was adopted. In an 1891 decision, the Court expressed Madisonian scorn for "sudden impulses of mere majorities."[12] But that was obiter. When the validity of the initiative was before them in 1912, they ducked.[13]

So I read original intent to reject the claim that the Guarantee Clause invalidates the initiative, not because the initiative satisfies the framers' concept of republicanism. Rather, it does not do enough violence to it to justify federal interference in the affairs of a state.

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8. *See* THE FEDERALIST NO. 43, at 292 (James Madison) (Jacob Cooke ed., 1961) (Madison's direct answer to the Antifederalist claim that the Guarantee Clause would justify federal interference with peaceful change to state constitutions).

9. *See* WIECEK, *supra* note 6, at 111-29.

10. *See* Amar, *supra* note 2, at 774-77.

11. *See* WIECEK, *supra* note 6, at 166-243. Federalism aside, even the activists favored inclusion of blacks within traditionally representative government rather than any sort of direct democracy or other end run around separation of powers.

12. *In re* Duncan, 139 U.S. 449, 461 (1891).

13. Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (Guarantee Clause challenge to initiative nonjusticiable).

II.

For argument's sake, assume my previous point is wrong, and original intent would view the initiative as contrary to the Guarantee Clause. The wording of the Clause is mandatory, and some of its history supports a more vigorous federal role. Or note Judge Linde's view that state courts, less encumbered by concepts of federalism, can enforce the Clause against their own governments. If original intent supports Judge Linde and the initiative is unrepublican, should modern courts therefore invalidate some or all initiatives, as he urges?[14]

No. The initiative is an excellent illustration of what is fundamentally wrong with Borkism. The device has been with us since 1898, and its constitutional validity was thoroughly discussed and tested during its first twenty years.[15] It was consistently sustained and has been assumed to be valid by almost all Americans ever since.

We lawyers have all kinds of reasons why the constitutional validity was not properly tested. Most importantly, the Supreme Court dodged the merits under the political question doctrine.[16] And its weak opinions on the point were written by one of our more forgettable jurists, Chief Justice White. Legal academics can flay his work without breathing hard. As Judge Linde has shown, the leading case in the Oregon Supreme Court is even easier to put down.[17]

However flawed in theory, these decisions are both legal and practical precedents, now over seventy-five years old. Precedents are

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14. In the text, I accept Judge Linde's claim for state courts arguendo, but I am troubled by it on several grounds. First, the terms of the Guarantee Clause authorize federal intervention; the Clause is arguably not a self-executing law to be enforced by any court with jurisdiction. Second, the Supreme Court's holdings that the Clause is nonjusticiable can be read to say that only Congress can define republican government, and the courts can enforce only what Congress has enacted, so state courts, like federal, cannot act absent a federal statute. Third, what if a state initiative attempted to deprive the state's courts of authority over the question?

15. *See* WIECEK, *supra* note 6, at 259-69.

16. *See Pacific States*, 223 U.S. 118; *see also* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565 (1916).

17. *See* Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 24-27 (1993) (criticizing Kadderly v. City of Portland, 74 P. 710 (1903)). Chief Justice White's opinions were joined by Holmes and Hughes; had they written for the Court, we would have a tougher time of it.

law, too, the fatal flaw of Borkism. Precedents as well-established as these are what the public think the law is. They, as much as original meaning, are the bedrock of the rule of law, the image that a court finds but does not create law. They are separation of powers at its most fundamental, between the lawmaker and the law-applier.

We realist lawyers know all the shortcomings of those images of precedent and the rule of law. But the public do not. Nor do they care much whether the Supreme Court reached the merits in *Pacific States*, or about any other technical question we might raise. To them, the initiative is valid. For a court, particularly the Supreme Court, now to say that it is not would encounter enormous costs in public respect for the courts. The legal establishment can pull this off occasionally, as in *Brown*.[18] But there must be very strong reasons, again as in *Brown*. If we do it all the time, the image of the courts shifts too much to law creators. We have just gone through a cycle of political reaction. Overturn the initiative and we shall have another. I don't think the reasons are strong enough. *Pacific States* is not *Plessy*.[19]

If we take the anti-Borkist view that the Guarantee Clause is for each generation to reinterpret according to its own circumstances, the case encounters other obstacles. No generation since has been so strongly attached to the Constitution's structural protections as the founders. We have almost entirely substituted judicial review. For us now to pretend that we are devoted to Madisonian structuralism is, as Professor Ely would say, a fake. This much is given away by the assertion in law reviews that because of the political question doctrine, the Guarantee Clause is a dead letter. Only a modern American, assuming a huge role for courts, can say that.

Perhaps one might try to distinguish *Pacific States* by reliance on our changed view of federalism. As I have said, federalism was an important reason for cautious use of the Guarantee Clause in Rhode Island and in sustaining the initiative, even during Reconstruction, all before 1937. But distinguishing *Pacific States* this way would add still another burden to the changes wrought in that year, changes so basic that Bruce Ackerman labels 1937 a constitutional moment.[20] Yet our weakened view of federalism was accomplished without constitutional amendment, mostly by the judges. It is hard to believe

18. Brown v. Board of Education, 347 U.S. 483 (1965).
19. Plessy v. Ferguson, 163 U.S. 537 (1896).
20. BRUCE ACKERMAN, WE THE PEOPLE 113-14 (Harv. U. Press Paperback 1993).

that the public would accept an earlier change in judicial interpretation as sufficient basis to scuttle the initiative any more than a new one.

III.

The Court has always said that Guarantee Clause questions are nonjusticiable. Or at least they are so until Congress has enforced the clause; the essential point is probably who can define republican, Congress or the Court. All four of today's principal papers advocate overturning that rule.[21] I want to speculate about public attitudes to raise a question about that position. My point has several premises, which I must now assemble.

First, discussions of the initiative in writings by Judge Linde, Professor Eule, Derrick Bell, and others compare it with the work of legislatures, and the comparison is entirely favorable to legislatures.[22] Legislatures hold public hearings, they hear expert evidence, they must listen to the views of Madisonian minorities, legislation can be redrafted to accommodate minorities' strongest objections, compromises can be struck, and minorities are protected by bicameralism and executive veto. There is deliberation before the final form of an enactment. Some further points can be added, such as the geographic system of representation, which also blunts majoritarianism. All of these are bypassed by initiatives, which enact majority preferences that do not accommodate dissenting views in any way. Judicial review under the state's constitution is bypassed when the initiative amends that constitution. Problems of consent of the governed for Madisonian minorities are acute.

I am sympathetic with these accounts. Many initiative measures enacted in this country have been quite ugly.[23] Had we not federal judicial review, the record would be foul indeed.

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21. *See* Linde, *supra* note 3; Amar, *supra* note 2; Deborah J. Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994) (this issue).

22. *See* Linde, *supra* note 17; Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990); Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); *see also* DAVID MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 184-85 (1984).

23. *See* Eule, *supra* note 22, at 1505 n.5, 1551-52.

On to my second premise. Recall the popularity of the initiative despite its shortcomings. Its popularity is rising. Polls tell us that most Americans would like to have a national initiative.[24] Why is this happening? The standard account is that citizens are fed up with their representatives and want to bring them to heel.

I am sure this account is part of the picture, but I want to suggest another factor that may be afoot. Make another comparison, between the ordinary legislative process and the judicial process. Again, the legislative process shows compromise, accommodation, amendment, and the need for three sources of legislative power to agree. Many clashing interests are accommodated. By contrast, the judicial process declares winners and losers by a preponderance of the evidence, or five-four, or a jury's thunderous award of punitive damages. In this important way, the judicial process resembles the initiative.

End of premises. My speculation is this. The increasing attractiveness of the initiative may in part be a reaction to the greatly expanded role of the judiciary. A feature of the modern judicial role is to heap scorn on the ordinary legislative process. Legislatures are branded as discriminatory or as procedural klutzes, as having no respect for individual rights and liberties. For a prominent example, recall the Supreme Court's gratuitous bashing of Congress in its *Chadha* opinion.[25] So when citizens turn to the initiative, they are imitating aspects of judicial review. They are learning from their betters in the legal profession. The judicial process has trained them to want to be winners, not compromisers, and it has trained them to sneer at legislatures. They have followed our lead in deciding that legislatures are unsatisfactory.

If my speculation is correct, we should question whether the better response to problems posed by initiatives is more law. Perhaps it is the opposite. Perhaps if courts showed more respect for the legislative process and its accommodations and compromises, citizens would regain some respect for it as well. So I come to a position akin to Professor Eule's but with a different emphasis. Like him I think initiatives deserve a closer judicial look than ordinary legislation.[26] However, I arrive at that view by emphasizing the need for greater judicial respect for legislatures, rather than by turning up the heat

24. *See* Eule, *supra* note 22, at 1507, 1553.
25. INS v. Chadha, 462 U.S. 919, 926-28 (1983).
26. *See* Eule, *supra* note 22 at 1584-86.

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