

12-1-2014

# California Constitutional Law: The Guarantee Clause and California's Republican Form of Government

David A. Carrillo  
*Berkeley Law*

Stephen M. Duvernay

Follow this and additional works at: <http://scholarship.law.berkeley.edu/facpubs>



Part of the [Law Commons](#)

---

## Recommended Citation

David A. Carrillo and Stephen M. Duvernay, *California Constitutional Law: The Guarantee Clause and California's Republican Form of Government*, 62 *UCLA L. Rev. Discourse* 103 (2014),  
Available at: <http://scholarship.law.berkeley.edu/facpubs/2485>

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).



## California Constitutional Law: The Guarantee Clause and California's Republican Form of Government

David A. Carrillo  
Stephen M. Duvernay

### ABSTRACT

In the two decades since *New York v. United States* was decided, commentators have debated what should give rise to a justiciable Guarantee Clause claim. One common argument is that direct democracy inherently conflicts with the requirement, implicit in the Clause, that states provide a republican (representative) form of government. An offshoot of this argument claims that courts should conjure up substantive Guarantee Clause remedies and strike down specific initiatives that infringe individual rights. It is no surprise that California is a frequent target of this criticism.

This Article argues that California's initiative system, by design and in operation, is aligned with the scope and purpose of the Guarantee Clause, and reinforces rather than undermines the state's republican form of government. While an initiative can be used to amend the state constitution, laws that fundamentally change the basic governmental plan or framework must pass through the republican strictures of the revision process. Furthermore, the California Supreme Court's decision in *Strauss v. Horton* highlights the primary pitfall of stretching the Guarantee Clause beyond its limits to protect individual rights. At its core, the Clause is directed at the structure of state government. Individual rights are better policed and protected by other constitutional guarantees, such as due process and equal protection, that are designed to protect them.

### AUTHORS

David A. Carrillo is a Lecturer in Residence and Executive Director of the California Constitution Center at the University of California, Berkeley School of Law. He received a B.A. from the University of California, Berkeley, and J.D., LL.M., and J.S.D degrees from the University of California, Berkeley School of Law.

Stephen M. Duvernay is an attorney in private practice and a Senior Research Fellow with the California Constitution Center at the University of California, Berkeley School of Law. He received a B.A. from the University of California, Berkeley and a J.D. from the University of Notre Dame Law School.



**TABLE OF CONTENTS**

INTRODUCTION.....106

I. THE GUARANTEE CLAUSE’S STRUCTURAL FRAMEWORK: STATE INTEGRITY,  
REPUBLICAN INSTITUTIONS, AND STATE FLEXIBILITY.....108

II. DIRECT DEMOCRACY AND THE GUARANTEE CLAUSE .....110

III. CALIFORNIA’S STRUCTURAL CONSTITUTIONAL PROTECTIONS ARE ADEQUATE  
SAFEGUARDS FOR THE STATE’S REPUBLICAN GOVERNMENT AGAINST DIRECT  
DEMOCRACY.....113

IV. DIRECT DEMORCACY, THE GUARANTEE CLAUSE, AND INDIVIDUAL RIGHTS ....120

CONCLUSION .....123

## INTRODUCTION

The Guarantee Clause of the U.S. Constitution provides, in relevant part, that “[t]he United States shall guarantee to every State in this Union a Republican<sup>1</sup> Form of Government.”<sup>2</sup> The Supreme Court traditionally treated Guarantee Clause claims as nonjusticiable political questions, starting with the Supreme Court’s refusal to get tangled in a mid-19th century skirmish between two factions claiming to be the one true government of Rhode Island.<sup>3</sup> Consequently, this constitutional provision lay dormant for much of the nation’s history. This changed two decades ago when, in *New York v. United States*,<sup>4</sup> the Supreme Court reexamined the conclusion that cases under the Guarantee Clause are nonjusticiable and cracked the courthouse door to Guarantee Clause claims.<sup>5</sup>

- 
1. “Republican,” in this sense, means “a government by representatives chosen by the people.” BLACK’S LAW DICTIONARY 764 (9th ed. 2009). See Fred O. Smith, Jr., *Awakening the People’s Giant: Sovereign Immunity and the Constitution’s Republican Commitment*, 80 FORDHAM L. REV. 1941, 1954–57 (2012) (discussing the meaning of republicanism); *Id.* at 1955 (“[T]he weight of the evidence suggests that the phrase ‘republican form’ was understood to protect representative government.”).
  2. Article IV, Section 4 of the U.S. Constitution provides, in full: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.” Some courts and scholars call this provision the “Republican Form of Government Clause,” or, less often (and less elegantly), the “Guarantee of Republican Government Clause.” We follow the Supreme Court’s convention and use “Guarantee Clause.”
  3. Several scholars have thoroughly explored the Court’s Guarantee Clause jurisprudence and there is no need to reiterate that analysis here. It is sufficient to quote *New York v. United States*, in which Justice O’Connor briskly traced this history:

[T]he Guarantee Clause has been an infrequent basis for litigation throughout our history. In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the “political question” doctrine . . . .

The view that the Guarantee Clause implicates only nonjusticiable political questions has its origin in *Luther v. Borden* . . . in which the Court was asked to decide, in the wake of Dorr’s Rebellion, which of two rival governments was the legitimate government of Rhode Island. The Court held that ‘it rests with Congress,’ not the judiciary, ‘to decide what government is the established one in a State.’ Over the following century, this limited holding metamorphosed into the sweeping assertion that ‘[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts.’

*New York v. United States*, 505 U.S. 144, 184 (1992) (alteration in original) (citations omitted).

4. *Id.*
5. After explaining that the Court’s Guarantee Clause jurisprudence evolved into a rule of per se nonjusticiability, Justice O’Connor continued:

Ultimately, *New York* raised more questions than it answered. The Court did not squarely address the broader issue of justiciability, and the opinion offers only a few limited guideposts for future claims. This much is clear: After *New York*, some questions raised under the Guarantee Clause may be justiciable under some circumstances. Commentators subsequently seized on the uncertainty of the *New York* decision as an opportunity to divine the Guarantee Clause's meaning and suggest what circumstances should give rise to a justiciable claim.<sup>6</sup> But while professors and pundits heavily debated these issues over the last twenty years, lower courts provided little intervening guidance on Guarantee Clause claims, and *New York* remains the Supreme Court's last word on the subject.<sup>7</sup>

Though the full scope and import of the Guarantee Clause remains open for interpretation, this Article takes a modest approach. It evaluates whether California's mechanisms of direct democracy are consistent with the requirement, implicit in the Guarantee Clause, that the state provide a republican form of

---

This view [that Guarantee Clause claims are nonjusticiable] has not always been accepted. In a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable. . . .

More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. . . . Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances. . . . We need not resolve the difficult question today.

*New York*, 505 U.S. at 184–85 (citations omitted). Ultimately, the Court did not resolve that “difficult question” because, even assuming the claim was justiciable, the challenged statute did not violate the Guarantee Clause. *Id.* at 185–86.

6. This Article does not undertake an exhaustive, historical analysis of the Guarantee Clause, nor does it get bogged down in whether certain claims should be justiciable. Many commentators have attempted to do so and have only demonstrated how fertile the ground is for disagreement. For a taste of how much ink has been spilled on the subject, see Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1713–16 & nn.6–14 (2010).
7. For its part, the California Supreme Court has mentioned the Guarantee Clause in three cases since *New York*, and none of those decisions squarely confront the issue considered here. See *People v. Houston*, 281 P.3d 799, 833 (Cal. 2012) (agreeing with the Ninth Circuit that a Guarantee Clause challenge to the initiative enacting the state's death penalty statute was nonjusticiable); *Agua Caliente Band of Cahuilla Indians v. Super. Ct.*, 148 P.3d 1126, 1136–39 (Cal. 2006) (holding that the Guarantee Clause and the Tenth Amendment provided authority to bring suit against an Indian tribe to enforce the state's election laws); *Ventura Grp. Ventures, Inc. v. Ventura Port Dist.*, 16 P.3d 717, 724 (Cal. 2001) (rejecting claim that article XIII A of the California Constitution (Proposition 13) violated the Guarantee Clause, noting that, “[a]t bottom, what [plaintiff] is complaining of is not that [Proposition 13] undermines this state's republican form of government, but that it” operates “in violation of due process of law and the takings clause”).

government. The Article describes how a California court could approach a claim that an initiative violates the Guarantee Clause by viewing the matter from a structural viewpoint. We conclude that, from this structural perspective, a state's use of direct democracy does not necessarily conflict with the Guarantee Clause. Furthermore, California's initiative system is consistent with its obligation to provide a republican form of government. We also consider (and reject) the idea that, in its new formative phase, the Guarantee Clause be adapted to protecting individual rights.

Part I of this Article examines the constraints the Guarantee Clause imposes on the structure of state government. Part II examines whether in general institutions of direct democracy comport with those constraints. Part III argues that popular sovereignty in California is congruent with the purpose of the Guarantee Clause, and its structural limits are adequate to preserve the state's republican form of government against direct democracy's excesses. Finally, Part IV argues that the structural nature of the Guarantee Clause makes it ill-suited to protecting individual rights from particular uses of the initiative process.

## I. THE GUARANTEE CLAUSE'S STRUCTURAL FRAMEWORK: STATE INTEGRITY, REPUBLICAN INSTITUTIONS, AND STATE FLEXIBILITY

Pinning down the scope and substance of the Guarantee Clause in the absence of clear guidance from the Supreme Court poses a significant challenge. We find persuasive Professor Fred Smith's recent analysis of the text and purpose of the Guarantee Clause. Thus, we begin by outlining Professor Smith's work, which provides a useful framework for discussing the provision.<sup>8</sup>

Smith identifies two key concepts that animate the Clause. First, Article IV, Section 4 is directed in significant part to the protection of "state integrity," and specifically, to protecting the "existence, stability, and parity" of the states against internal and external threats.<sup>9</sup> The Guarantee Clause serves this end by way of the "republican principle" that "affirmatively guarantee[s] that the ultimate power in state governments rest[s] in the hands of the people."<sup>10</sup> Second, this "republican principle" has a structural focus that encompasses popular sovereignty and majority rule within a system of representative

---

8. Smith, *supra* note 1, at 1950–60 (applying "text and principle" method of constitutional interpretation, with the goal to "excavate and apply the principles the words command").

9. *Id.* at 1951–54.

10. *Id.* at 1951 (quoting James Madison).

government.<sup>11</sup> Thus, although the Guarantee Clause imposes constraints on the structure of state government—it “necessarily implies a duty on the part of the States themselves to provide” a republican form of government<sup>12</sup>—it does not foreclose a state’s ability to experiment within the broad sphere of republicanism.<sup>13</sup>

The Supreme Court’s decision in *New York* is in accord. Though brief, the analysis in that case is consistent with this dual focus on structural stability and flexibility. There, after assuming the claim was justiciable, the Court held that the challenged statute did not violate the Guarantee Clause because it did not interfere with the states’ political independence or popular electoral accountability<sup>14</sup> and did “not pose any realistic risk of altering the form or the method of functioning of [the state’s] government.”<sup>15</sup>

Similarly, Professor Smith and the *New York* decision are consistent with the original American conception the republican form of government. James Madison explained in the Federalist Papers that the motivating concern behind the guarantee was the specter of nonrepublican political institutions (“aristocratic or monarchical innovations”) that could subvert the stability of a state and weaken the Union.<sup>16</sup> But he acknowledged that the states would

---

11. *Id.* at 1954–60. This is generally consistent with Professor Akhil Amar’s observation that the Guarantee Clause “reaffirms basic principles of popular sovereignty—of the right of the people to ordain and establish government, of their right to alter or abolish it, and of the centrality of popular majority rule, in these exercises of ultimate popular sovereignty.” Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 762 (1994).

12. *Minor v. Happersett*, 88 U.S. 162, 175 (1874).

13. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

14. Specifically, the Court noted that “[u]nder [either the Spending or Commerce Clause], Congress offers the States a legitimate choice rather than issuing an unavoidable command. The States thereby retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate.” *New York*, 505 U.S. at 185.

15. *Id.* at 185–86.

16. In Federalist No. 43, James Madison explains how maintaining similar, republican governments increases cohesion between the states and promotes the stability of the nation:

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained.

THE FEDERALIST NO. 43, at 245 (James Madison) (A.B.A. ed., 2009).



retain authority to define and experiment with the structure of their government so long as they remain republican.<sup>17</sup> As Professor Mayton put it,

[T]he Guarantee Clause is more than just a negative, more than a federal veto respecting “aristocratic or monarchical innovations.” As well, the Clause assures a particular flexibility in state government, which is the states’ “right” to choose and to experiment with various forms of government and “to claim the federal guarantee” for those choices and experiments: Subject only to the condition that these choices and experiments remain within the zone of popular sovereignty. It is by this assurance of the states’ right to choose and to “claim the federal guarantee” for their choices, that the Guarantee Clause stands as a considerable part of federalism.<sup>18</sup>

California took advantage of the opportunity to experiment with its own unique version of a republican state government, in which the electorate exercises significant power through institutions of direct democracy. Part II examines how California’s institutions of direct democracy square with the Guarantee Clause.

## II. DIRECT DEMOCRACY AND THE GUARANTEE CLAUSE

The Supreme Court has not addressed the merits of whether direct democracy institutions are within the flexibility furnished to the states under the Guarantee Clause. When the question reached the Court, predictably it held the case was nonjusticiable.<sup>19</sup> But the Court has recognized that “a State is afforded

---

17. Indeed, Madison makes clear that the states retain significant autonomy to modify their form of government:

But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To [this] question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be, of course, bound to pursue the authority. But the authority extends no further than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for antirepublican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.

THE FEDERALIST NO. 43, at 246.

18. William T. Mayton, *Direct Democracy, Federalism & the Guarantee Clause*, 2 GREEN BAG 2d 269, 271–72 (1999).

19. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 140–51 (1912).

wide leeway when experimenting with the appropriate allocation of state legislative power.”<sup>20</sup> And California cases dating back over a century confirm that direct democracy is complementary to the state’s republican form of government.<sup>21</sup> Indeed, the California Supreme Court has emphasized that “notwithstanding our continuing representative and republican form of government, the initiative process itself adds an important element of direct, active, democratic contribution by the people.”<sup>22</sup>

This is consistent with the experience of other states evaluating their own institutions of direct democracy. For example, the Washington Supreme Court observed that “[n]o court in this or any other jurisdiction has invalidated any law on the ground that its passage by initiative violated the Guarantee Clause.”<sup>23</sup> After noting that the weight of authority supported the conclusion that Guarantee Clause challenges to initiatives were not justiciable, the court rejected such a challenge as frivolous because even “[t]hose courts which have treated the issue as justiciable have uniformly rejected the contention that use of the initiative process is inconsistent with the ‘republican form of government’ guaranteed by U.S. Const. art. IV, § 4.”<sup>24</sup> Those decisions are effectively the last word on the subject, as we have found no subsequent serious

---

20. *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978).

21. *See In re Pfahler*, 88 P. 270, 272–73 (Cal. 1906) (holding that a local initiative process did not violate the Guarantee Clause). *Pfahler* was decided before the 1911 amendment of the California Constitution that provided for initiative and referendum statewide. Although the decision was limited to a local initiative, the court suggested that statewide use of the initiative and referendum would not violate the Guarantee Clause. *Id.* at 273. In reaching that conclusion, the Court relied on the Oregon Supreme Court’s then-recent decision in *Kaddery v. City of Portland*, 74 P. 710 (Or. 1903), upholding that state’s referendum and initiative process.

22. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1289 (Cal. 1978) (citing *Pfahler*); *see also* Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807, 810–13 (2002) (surveying case law and explaining that “the courts . . . defending citizen lawmaking as consistent with, but not necessary to, republicanism are closest to the correct position”) (punctuation altered for clarity).

23. *State v. Davis*, 943 P.2d 283, 285–86 (Wash. 1997) (rejecting challenge to “Three Strikes” law passed by initiative). There is one exception. In *Morrissey v. State*, 951 P.2d 911 (Colo. 1998), the Colorado Supreme Court struck an initiative on Guarantee Clause grounds. But *Morrissey* is a unique case. The initiative directed the Colorado state legislature to propose a federal constitutional amendment prescribing congressional term limits. *Id.* at 913. As the Colorado Supreme Court explained, the initiative “usurps the exercise of representative legislative power by dictating to elected representatives the precise manner in which they are to attempt to amend the United States Constitution. . . . This coercion of legislators is itself inconsistent with Article IV, Section 4 (the Guarantee Clause).” *Id.* at 916.

24. *Davis*, 943 P.2d at 286 (citing *State v. Montez*, 789 P.2d 1352 (Or. 1990); *In re Initiative Petition No. 348*, 820 P.2d 772 (Okla. 1991); *McKee v. Louisville*, 616 P.2d 969, 972 (Colo. 1980)).

challenge to direct democracy institutions in federal courts or state courts of last resort.<sup>25</sup>

Despite the ready acceptance of direct democracy by those courts, scholars continue to squabble over whether direct democracy is antirepublican.<sup>26</sup> In light of the apparent lack of interest in this issue by the Supreme Court, and the absence of any real judicial support for ending direct democracy institutions, for practical purposes, this remains a schoolyard debate. And so it is unrealistic to forecast that either the United States or California Supreme Court would rely on the Guarantee Clause to dismantle the state's initiative system, particularly given both courts' reticence to rely on that clause for far more modest purposes.<sup>27</sup> Therefore, it is unlikely that the near future will see a high court decision (state or federal) holding that the mere inclusion of direct democracy features in a state constitution violates the Guarantee Clause. But acknowledging the practical reality does not end the discussion. We still must consider, from a doctrinal standpoint, why this is the right answer. In other words, it is well enough that courts are unwilling to dismantle direct democracy institutions on Guarantee Clause grounds—in the next part we will explore a supporting rationale.

---

25. In one case pending in Colorado (*Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014)), the Tenth Circuit allowed a Guarantee Clause challenge to the adoption by initiative of the state's "Taxpayer Bill of Rights" to survive a motion to dismiss. The Court of Appeals denied rehearing en banc over the dissent of four judges who each raised concerns about the justiciability of Guarantee Clause claims. *Kerr v. Hickenlooper*, No. 12-1445, 2014 WL 3586582 (10th Cir. July 22, 2014).

26. See Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185, 187 (2002) ("Opponents of direct democracy argue that a republican form of government means representative government, and conclude that the Framers envisioned representative democracy, as opposed to direct democracy, at the state as well as federal level."). On the side opposing direct democracy, see Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993) [hereinafter Linde, *The Campaign Against Homosexuality*]; Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994); Catherine A. Rogers & David L. Faigman, *And to the Republic for Which It Stands: Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057, 1066-71 (1996). On the side supporting direct democracy, see Hirsch, *supra*, at 190-93; Mayton, *supra* note 188; Natelson, *supra* note 212; see also Amar, *supra* note 111, at 756-59 (discussing the "Anti-Direct Democracy Thesis").

27. Conceivably, a state's direct democracy institutions could vest so much power in its electorate that the representative functions of government are overwhelmed, and the state becomes a true democracy rather than a representative republic. California is not such a state, so we do not attempt to resolve that hypothetical Guarantee Clause scenario.

### III. CALIFORNIA'S STRUCTURAL CONSTITUTIONAL PROTECTIONS ARE ADEQUATE SAFEGUARDS FOR THE STATE'S REPUBLICAN GOVERNMENT AGAINST DIRECT DEMOCRACY

We rejected in the previous Part the concept that all direct democracy features in a state constitution necessarily violate the Guarantee Clause. The question remains, however, whether particular initiatives can violate the Guarantee Clause. Certainly, a law that fundamentally alters “the form or the method of functioning”<sup>28</sup> of a state’s republican institutions may run afoul of the Clause. But California’s initiative process cannot achieve that degree of change. As discussed below, the California Constitution contains structural safeguards that ensure the initiative process cannot fundamentally change the structure or framework of the state government. California’s primary safeguard<sup>29</sup> is the restriction on the ability to revise the California Constitution. The California Constitution provides that “[t]he legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum.”<sup>30</sup> It further explains that “[t]he initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.”<sup>31</sup> The initiative power can be used to amend, but not revise, the California Constitution.<sup>32</sup> This binary scheme

---

28. *New York v. United States*, 505 U.S. 144, 186 (1992); *cf.* *Strauss v. Horton*, 207 P.3d 48, 99 (Cal. 2009) (revisions are laws that “fundamental[ly] change . . . the basic governmental plan or framework”).

29. There are other, less controversial constitutional provisions that insulate the state’s governmental framework from direct democracy. For example, Article II, Section 12 provides:

No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect.

Cal. Const. art. I, § 12. This provision, which was “enacted to prevent the initiative from being used to confer special privilege or advantage on specific persons or organizations,” *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1263 (Cal. 1989), is an infrequent subject of litigation. *See* Cal. Const., art. IV, § 16(a) (stating that enactments must have uniform operation).

30. Cal. Const., art. IV, § 1.

31. Cal. Const., art. II, § 8(a).

32. A brief overview of California’s direct democracy provisions:

“[T]he California Constitution provides that an amendment to that Constitution may be proposed either by two-thirds of the membership of each house of the Legislature (Cal. Const., Art. XVIII, § 1) or by an initiative petition signed by voters numbering at least 8 percent of the total votes cast for all candidates for Governor in the last gubernatorial election (Cal. Const., Art. II, § 8, subd. (b); *id.*, Art. XVIII, § 3), and further specifies that, once an amendment is proposed by either means, the amendment becomes part of the state Constitution if it is

categorizes an initiative measure as either a revision or an amendment. Revisions are laws that “fundamental[ly] change . . . the basic governmental plan or framework” set forth in the California Constitution.<sup>33</sup> An amendment is any law that effects a more modest addition or change to the state’s constitution.<sup>34</sup> The state constitution imposes a much higher procedural barrier to enacting revisions than it does for amendments,<sup>35</sup> while judicial doctrine prevents accomplishing structural changes through the procedurally more expedient amendment route. These procedural and substantive limitations impose a critical check on the initiative power—one that to an extent parallels the Guarantee Clause’s focus on governmental structure.

The California Supreme Court’s decisions reinforce the view that the state’s initiative process is consistent with the Guarantee Clause. For example, in *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, the Court rejected a challenge that an initiative (Proposition 13, Cal. Const., art. XIII A) was invalid because it constituted a revision rather than an

approved by a simple majority of the voters who cast votes on the measure at a statewide election. *Id.*, Art. XVIII, § 4.

*Strauss*, 207 P.3d at 60 (emphasis omitted).

33. *Id.* at 99.

34. See *infra* notes 36–38, and accompanying text. Article XVIII of the California Constitution governs constitutional amendments and revisions. It provides in full:

Sec. 1. *Amendments or revisions; legislative proposals.* The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may propose an amendment or revision of the Constitution and in the same manner may amend or withdraw its proposal. Each amendment shall be so prepared and submitted that it can be voted on separately.

Sec. 2. *Convention to revise Constitution.* The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may submit at a general election the question whether to call a convention to revise the Constitution. If the majority vote yes on that question, within 6 months the Legislature shall provide for the convention. Delegates to a constitutional convention shall be voters elected from districts as nearly as equal in population as may be practicable.

Sec. 3. *Initiative.* The electors may amend the Constitution by initiative.

Sec. 4. *Submission to electors; effective date; conflicting provisions.* A proposed amendment or revision shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.

Cal. Const. art. XVIII, §§ 1–4.

35. Under Cal. Const. Article II, Section 8(b) an initiative constitutional amendment may be placed on the ballot after collecting a number of elector signatures equal to 8 percent of the votes for all candidates for Governor in the last gubernatorial election. By contrast, only the state legislature is empowered to propose revisions. Cal. Const. art. XVIII, § 1.

amendment.<sup>36</sup> In rejecting the challenge, the Court cited the initiative system itself as evidence that reliance on direct democratic processes does not render the state's government antirepublican:

[W]e are convinced that article XIII A . . . does not change our basic governmental plan. Following the adoption of article XIII A both local and state government will continue to function through the traditional system of elected representation. . . . It should be borne in mind that notwithstanding our continuing representative and republican form of government, the initiative process itself adds an important element of direct, active, democratic contribution by the people.<sup>37</sup>

Since *New York*, commentators have also suggested that California's structural limitation on the state's initiative process and the Guarantee Clause have similar effects:

[The] amendment revision distinction [*sic*] may be analogous to the Guarantee Clause. Initiatives which restructure California government in an anti-republican manner may constitute revisions of the constitution, hence beyond the initiative power. California courts have the power to enforce this constitutional limitation, having done so on several occasions.<sup>38</sup>

---

36. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281 (Cal. 1978). "Proposition 13 made major changes to the system of real property taxation and taxing powers throughout California, imposing important limitations upon the assessment and taxing powers of state and local governments." *Strauss*, 207 P.3d at 88 (citation omitted). Petitioners claimed, inter alia, that the initiative would "result in a change from a 'republican' form of government (*i.e.*, lawmaking by elected representatives) to a 'democratic' governmental plan (*i.e.*, lawmaking directly by the people)."<sup>36</sup> Specifically, petitioners argued that a provision requiring that particular types of taxes imposed by local governments be approved by a supermajority vote of the electorate restricted the authority of the local representative government. *Amador Valley*, 583 P.2d at 1288–89.

37. *Id.*

38. Ernest L. Graves, *The Guarantee Clause In California: State Constitutional Limits on Initiatives Changing the California Constitution*, 31 LOY. L.A. L. REV. 1305, 1307 (1998) (footnotes omitted). Professor Manheim makes a similar point:

[T]he guarantee of republican government has a close analog within the California Constitution itself. It is the exclusion from the initiative power of the ability to fundamentally change the form of state government. These changes, such as altering the distribution of powers, can be accomplished only where 'the entire sovereignty of the people is represented in the [constitutional] convention.'

Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1219 (1998) (quoting *Livermore v. Waite*, 36 P. 424, 426 (Cal. 1894)) (alteration in original); see also *id.* at 1218–29 (discussing the revision/amendment dichotomy).

The comparison between the Guarantee Clause and the California Constitution, however, has limits. Being consistent with the Guarantee Clause is different from being its analogue. While the Guarantee Clause is directed at securing and preserving a republican form of government, the California Constitution does not place any substantive limits on the revision power, which could, in theory, be used to accomplish antirepublican ends. Preservation of republican virtue is not the object of California's restrictions on initiative amendments, nor is it a necessary result of enforcing the restriction. The virtue protected is preserving the integrity of the state government from a certain degree of change without a duly deliberative process.

Consequently, it is important to emphasize a key distinction between the Guarantee Clause and the amendment/revision dichotomy under California law. While the Guarantee Clause is directed at securing and preserving a republican form of government, the California Constitution does not proscribe the ability to revise the constitution in an antirepublican manner. This means a revision establishing a California monarchy could be procedurally proper under the state constitution but unconstitutional under Article IV.

Those theoretical distinctions aside, one practical point is quite clear: Key to the effectiveness of California's structural constitutional protections for the state's republican form of government is the willingness of the California Supreme Court to enforce the constitutional requirements for revisions against creative direct democracy efforts. The California Supreme Court most recently and comprehensively addressed the revision/amendment issue in *Strauss v. Horton*.<sup>39</sup> That decision demonstrates the state high court's commitment to the view that the revision/amendment distinction exists to police attempts at restructuring the state government rather than efforts to redefine individual rights.

In *Strauss*, opponents of Proposition 8 challenged the validity of that initiative, arguing that it constituted a revision that could not be adopted through the initiative process. After extensive analysis of the relevant precedent, the Court summed up what makes a constitutional revision:

[T]he numerous past decisions of this court that have addressed this issue all have indicated that the type of measure that may constitute a revision of the California Constitution is one that makes "far reaching changes in the nature of our basic governmental plan" or, stated in

---

39. 207 P.3d 48.

slightly different terms, that “substantially alter[s] *the basic governmental framework* set forth in our Constitution.”<sup>40</sup>

From there, the Court concluded that the measure was a constitutional amendment that could properly be adopted by initiative because “Proposition 8 works no such fundamental change in the *basic governmental plan or framework* established by the preexisting provisions of the California Constitution—that is, ‘in [the government's] fundamental structure or the foundational powers of its branches.’”<sup>41</sup>

A few points from *Strauss* underscore how the Court's interpretation and enforcement of the amendment/revision distinction closely track the purpose of the federal Guarantee Clause.

1. *State Integrity*. The analysis in *Strauss* demonstrates how the design of the California Constitution promotes state integrity, just as the Guarantee Clause does: California already has a republican form of government, and the restrictions on revisions act to preserve that status quo. The California Supreme Court's treatment of the amendment/revision issue in that case is an application of the overarching principle that the procedural and substantive constraints preserve the state's fundamental governmental framework by requiring significantly more process to revise the constitution than is needed to amend it by initiative. The Court's fidelity to the strictures imposed on the initiative process and its defense of the constitutional structure writ large are consistent with the concept of state integrity that animates the Guarantee Clause.<sup>42</sup>

---

40. *Id.* at 98 (quoting *Amador Valley*, 583 P.2d at 1286; *Legislature v. Eu*, 816 P.2d 1309, 1319 (Cal. 1991)) (emphasis and alteration in *Strauss*).

41. *Id.* at 99 (quoting *Eu*, 816 P.2d at 1318) (emphasis and alteration in *Strauss*). In addition, the California Supreme Court rejected the argument that Proposition 8 constituted a revision because it abrogated equal protection principles. *Id.* at 99–114; *see also infra* notes 50–**Error! Bookmark not defined.**, and accompanying text. As we later learned, Proposition 8 was invalid as a violation of the equal protection provision in the federal constitution. *Perry v. Brown*, 671 F.3d 1052, 1095 (9th Cir. 2012) (holding that Proposition 8 violated the Equal Protection Clause), vacated and remanded on other grounds by *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). But that holding has no impact on the California Supreme Court's analysis of the revision/amendment issue under the state constitution.

42. As the Court explained:

As a qualitative matter, the act of limiting access to the designation of marriage to opposite-sex couples does not have a substantial or, indeed, even a minimal effect on *the governmental plan or framework of California* that existed prior to the amendment. . . . [T]he measure does not transform or undermine the judicial function; this court will continue to exercise its traditional responsibility to faithfully enforce *all* of the provisions of the California Constitution, which now include the new section added through the voters' approval of Proposition 8. Furthermore, the judiciary's authority in applying the state Constitution always has



2. *Popular Sovereignty and the Principle of Majority Rule.* Another prevailing theme in *Strauss* is reliance on the popular sovereignty principle encoded in the state constitution that “[a]ll political power is inherent in the people” and that the people may “alter or reform their government.”<sup>43</sup> This is the essence of popular sovereignty. To that end, Californians have devised a system in which the constitution may be amended by initiative on a majority vote. In the words of Justice Kennard, “[w]hen the voters have validly exercised this power, as they did here, a judge must enforce the Constitution as amended.”<sup>44</sup>

This may seem, at first, to be counterintuitive: How is popular sovereignty, as expressed through the initiative, consistent with *republican* government? After all, doctrinaire republican government theory holds that although the people have a right to form and to participate in government (which they exercise by choosing their representatives), once that choice is made the previously diffuse participatory right of the people is vested in the representative alone and nothing remains of the people’s right.<sup>45</sup>

But the right to ordain, alter, and abolish a constitution is central to republican government.<sup>46</sup> If that is true to some degree for a limited government of enumerated powers like the federal government, then it must be even more so for a plenary state government. While the delegation and social contract theories of the federal constitution, and its lack of direct democracy tools, suggest that going forward the people have delegated all their power to the

---

been limited by the content of the provisions set forth in our Constitution, and that limitation remains unchanged.

*Strauss*, 207 P.3d at 62 (emphasis in original).

43. *Id.* at 78–79, 117; *see id.* at 131 (Moreno, J., concurring and dissenting) (“There is no doubt that the ultimate authority over the content of the California Constitution lies with the people.”); *see also* Cal. Const., art. II, § 1 (“All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.”). Although that provision uses the term “right,” it would be a mistake to read this as creating an individual constitutional right. We think that this provision of the state constitution should be read as a power held by the people collectively.
44. *Strauss*, 207 P.3d at 123 (Kennard, J., concurring). The converse of Justice Kennard’s statement must also be true: When the voters have *invalidly* exercised (or exceeded) their power, the courts must enforce these constitutional limits against the people.
45. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 315 (1998).
46. *See Amar, supra* note 11, at 764 (“But how, exactly, would the federal Constitution establish a truly republican government ‘derive[ing] all its powers’ from the people? In part through the practice of elections for officers, but even more fundamentally, through the act of popular ordainment and establishment of the Constitution itself.”).

representative government so created,<sup>47</sup> California better embodies the “consent of the governed” theory, as the people and the electorate exercise powers on an ongoing basis.<sup>48</sup> If popular sovereignty, majority rule, and reformative powers are all supports for a republican government, then the fact that those powers exist in greater measure in California’s government (compared with the federal government) should provide greater security for a republican form of state government.

3. *The Revision Process is an Overriding, Fundamentally Republican Check.* The revision process provides an independent level of republican protection. A measure that alters California’s “basic governmental plan or framework” cannot be passed by initiative. Therefore, such a law would be subject to the republican restriction of the revision process, namely, proposal by a two-thirds majority of the Legislature or through constitutional convention, followed by popular ratification in a statewide election.<sup>49</sup> This ensures that any law that could implicate the Guarantee Clause necessarily would be channeled through the revision process, where it would be vetted either by the Legislature or in convention, and then approved by the people, before it takes effect. These more-burdensome procedural requirements ensure that potential revisions benefit from greater involvement from the elected representatives or the electorate (or both), and the higher bar imposed by the deliberative process makes revisions simultaneously less likely to occur and more likely to be well-considered when they do.<sup>50</sup> This system strongly favors the status quo, viz., a representative

---

47. See WOOD, *supra* note 44, at 315 (discussing delegation theory of the federal constitution); DENNIS C. MUELLER, *CONSTITUTIONAL DEMOCRACY* 61 (1996) (discussing social contract theory of the federal constitution).

48. Even James Madison, the great federalist himself, acknowledged that if a government’s power derives from the consent of the governed, they must retain the power to reform that government:

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others.

THE FEDERALIST NO. 49 (James Madison), at 285 (A.B.A. ed., 2009).

49. Cal. Const., art. XVIII, §§ 1–2, 4.

50. See MUELLER, *supra* note 46, at 158 (discussing the Condorcet Theorem, which posits that citizens on average correctly decide issues, and a sufficiently large sample of the population will nearly always choose the correct answer); ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY* 170 (2007) (“Condorcet Jury Theorem says that where right answers exist, and where the average competence of the voting group exceeds .5, then the probability that majority voting will hit the right answer increases as the group’s size increases and as its average competence increases.”); see also MARQUIS DE CONDORCET, *ESSAI SUR L’APPLICATION DE*

republic with significant direct democracy institutions, over truly radical changes.<sup>51</sup> From any of those perspectives, then, the revision's procedural requirements operate to preserve a republican form of government in California.

\* \* \*

In sum, the California Supreme Court's interpretation and enforcement of the distinction between amendments to, and revisions of, the state constitution are aligned with the scope and purpose of the Guarantee Clause and are consistent with maintaining California's extant republican form of government. Next, we consider the idea that, despite its structural nature, the Guarantee Clause can be pressed into service as a protector of individual rights.

#### IV. DIRECT DEMOCRACY, THE GUARANTEE CLAUSE, AND INDIVIDUAL RIGHTS

As discussed above,<sup>52</sup> revision issues under the California Constitution, like the Guarantee Clause, concern the form of government. Thus, revision issues under the California Constitution are analytically and doctrinally distinct from equal protection issues under the U.S. Constitution. The *Strauss* decision therefore correctly focused on whether the structure of California's government was affected by Proposition 8 and not "whether the provision at issue is wise or sound as a matter of policy or whether we, as individuals, believe it *should* be a part of the California Constitution."<sup>53</sup> Nevertheless, the *Strauss* court considered arguments about the initiative's effect on individual rights and the decision invites discussion of a common claim made by opponents of direct democracy: The Guarantee Clause should be used to police against majoritarian excesses and strike down exercises of direct democracy that infringe individual constitutional rights, particularly rights that protect minority groups.<sup>54</sup>

---

L'ANALYSE À LA PROBABILITÉ DES DÉCISIONS RENDUES À LA PLURALITÉ DES VOIX [Essay on the Application of Analysis to the Probability of Majority Decisions] (1785).

51. One example is the proposal, currently gathering signatures to qualify for the November 2014 ballot, to divide California into six new states. See David A. Carrillo & Stephen M. Duvernay, *Six Problems With 'Six Californias' Initiative*, SAN FRANCISCO DAILY JOURNAL (Mar. 11, 2014), at 6.
52. See *supra* Part III.A.
53. *Strauss*, 207 P.3d at 59 (emphasis in original); see also *Marriage Cases*, 183 P.3d 384, 398–99 (Cal. 2008).
54. See, e.g., Linde, *The Campaign Against Homosexuality*, *supra* note 26; Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 301–04 (2007); Debra F. Salz, Note, *Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court*, 62 GEO. WASH. L. REV. 100 (1993); Anya J. Stein, Note, *The Guarantee Clause in the States: Structural Protections for Minority Rights & Necessary Limits on the Initiative Power*, 37 HASTINGS CONST. L.Q. 343 (2010); Accord Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be*

It is not difficult to read *Strauss* and be sympathetic to this line of thinking. The Court's treatment of the issue of individual rights in *Strauss* is instructive. In response to the argument that Proposition 8 constituted a revision because it "eliminat[ed] or 'stripp[ed]' same-sex couples of a fundamental constitutional right," the Court found that Proposition 8 had only a "limited effect" on the privacy, due process, and equal protection rights of same-sex couples, and that it left the core substantive constitutional rights recognized in the *Marriage Cases* intact.<sup>55</sup> In reaching this conclusion, the Court reiterated that measures that discriminate on the basis of sexual orientation generally are subject to strict scrutiny under the state's equal protection guarantee.<sup>56</sup> Importantly, the Court left open the question of "whether a measure that actually deprives a minority group of the *entire* protection of a fundamental constitutional right or, even more sweepingly, leaves such a group vulnerable to public or private discrimination in *all* areas without legal recourse, would constitute a constitutional revision under the provisions of the California Constitution."<sup>57</sup>

---

*Justiciable*, 65 U. COLO. L. REV. 849, 860–70 (1994) (arguing that the Guarantee Clause should be understood to protect individual rights).

55. *Strauss*, 207 P.3d at 102. Proposition 8 had only a "limited effect" because it "exclusively affects access to the designation of 'marriage.'" *Id.* Justices Werdegar and Moreno each wrote separately to criticize the majority for understating the effect of the initiative. Though Justice Werdegar concurred in the judgment, she sharply disagreed with the majority's failure to adequately account for the protection of individual rights when considering Proposition 8's "scope." *Id.* at 124 (Werdegar, J., concurring) ("The drafters of our Constitution never imagined, nor would they have approved, a rule that gives the foundational principles of social organization in free societies, such as equal protection, less protection from hasty, unconsidered change than principles of governmental organization."); *id.* at 126 ("The history of our California Constitution belies any suggestion that the drafters envisioned or would have approved a rule... that affords governmental structure and organization more protection from casual amendment than civil liberties.").

Justice Moreno was more direct:

[R]equiring discrimination against a minority group on the basis of a suspect classification strikes at the core of the promise of equality that underlies our California Constitution and thus 'represents such a drastic and far-reaching change in the nature and operation of our governmental structure that it must be considered a 'revision' of the state Constitution rather than a mere 'amendment' thereof.' . . . The rule the majority crafts today not only allows same-sex couples to be stripped of the right to marry that this court recognized in the *Marriage Cases*, . . . it places at risk the state constitutional rights of all disfavored minorities. It weakens the status of our state Constitution as a bulwark of fundamental rights for minorities protected from the will of the majority.

*Id.* at 129 (Moreno, J., concurring and dissenting) (citations omitted). *But see Strauss*, *id.* at 61–63, 78, 102–07 (majority opinion) (addressing various points regarding the equal protection argument).

56. *Id.* at 102.

57. *Id.* (internal citation omitted) (emphasis in *Strauss*). There is a potential problem with this part of *Strauss*. What is the doctrinal basis for saying that a partial denial of a right does not qualify as a

Even assuming one agrees with this description of equal protection, it remains an equal protection issue—one not capable of resolution under the Guarantee Clause. Even if an initiative threatening widespread and substantial infringement of minority rights could constitute a revision, it almost certainly would violate other fundamental constitutional rights. Under either approach, the structural issue would be secondary to the discriminatory abridgment of individual rights. Accordingly, it would be unnecessary in such a case to reach the difficult questions of whether the measure is a revision or whether the Guarantee Clause is violated, because the case would be more amenable to resolution on other grounds.

This highlights the primary pitfall of adapting the Guarantee Clause to protect individual rights. At its core, the Guarantee Clause is directed at the structure of state government and is not a backstop to secure individual rights. There is no need to stretch the Guarantee Clause beyond its limits to protect individual rights that are specifically protected by other constitutional provisions.<sup>58</sup> A litigant claiming that an initiative destroys or infringes her rights already has several tools at her disposal: she could bring a due process or equal protection challenge, assert a takings claim, or even rely on the Privileges or Immunities Clause<sup>59</sup>—to say nothing of California’s independent constitutional guarantees.<sup>60</sup> Those protections are directed at precisely the sort of evils that proponents of the individual rights theory fear will result if the initiative process runs amok.<sup>61</sup>

---

revision, but a complete denial would? This reservation potentially sets up a difficult future dispute over just how much a right needs to be restricted to constitute a revision, or which rights would trigger this sort of scrutiny. Once one accepts the initial proposition that revisions are defined as structural changes, it is difficult to justify including individual rights in that analysis. Some rights, like speech and voting, are so essential to republican government that the form of government necessarily changes in their absence. But there are other rights that the electorate could restrict or abolish without changing the form of our state government or reducing its republican character.

58. *Strauss* is a prime example. Proposition 8 is better framed as a violation of equal protection—a view ultimately adopted by the Ninth Circuit. “It is enough to say that Proposition 8 operates with no apparent purpose but to impose on gays and lesbians, through the public law, a majority’s private disapproval of them and their relationships, by taking away from them the official designation of ‘marriage,’ with its societally recognized status. Proposition 8 therefore violates the Equal Protection Clause.” *Perry*, 671 F.3d at 1095.

59. For readers wishing to go down this rabbit hole, see *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3058 (2010) (Thomas, J., concurring in part and concurring in the judgment); Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

60. But note that those rights are subject to change. See *Strauss*, 207 P.3d at 103–07.

61. We are not alone in arriving at this conclusion. See Richard L. Hasen, *Leaving the Empty Vessel of “Republicanism” Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 75, 88 (Nada Mourtada-Sabbah & Bruce E. Cain eds.,

Finally, not only is the Guarantee Clause unnecessary to enforce individual rights, but conjuring up substantive Guarantee Clause rights to strike down an initiative is inapt—it would be akin to raising a Third Amendment challenge to a warrantless search of your house.<sup>62</sup>

There is little doctrinal basis, and little practical reason, to shoehorn an individual rights defense theory into the Guarantee Clause. That clause serves its intended purpose as a structural provision, and the many provisions expressly aimed at protecting individual liberty already serve their purpose. True, for every wrong there is a remedy.<sup>63</sup> But use the right tool for the job.

### CONCLUSION

The Guarantee Clause secures to each state a republican governmental structure. Within those bounds the people retain the ultimate authority to define the framework and substance of their state government. California's system of direct democracy is both the product and embodiment of the people's power. And yet the state's direct democracy institutions are designed to insulate California's form of government from fundamental change by popular whim and to ensure that such a change is vetted through republican processes. Although it may sound like a difficult balance to strike, the decision in *Strauss* confirms that the existing structural constitutional protections serve that end.

Furthermore, simply because the Guarantee Clause remains largely undefined does not transform the provision into a constitutional safeguard-of-last-resort for enforcing individual rights, and the U.S. Supreme Court's silence cannot support expanding the provision so far beyond its core protection of

---

2007) (“We already have a wide and deep equal protection jurisprudence to protect minorities from laws that trample on their rights. . . . The Guarantee Clause is simply unnecessary to protect minority rights.”); Ann Althouse, *Time for the Federal Courts to Enforce the Guarantee Clause? A Response to Professor Chemerinsky*, 65 U. COLO. L. REV. 881, 884 (1994) (“To the extent that a particular referendum produces a law that injures a politically powerless or unpopular minority, the easier path to remedy, if the Court seeks one, remains the same as the remedy for the same law passed through representative channels: it can simply find that the law violates equal protection or some other individual right.”); see also Jesse H. Choper, *Observations on the Guarantee Clause—As Thoughtfully Addressed by Justice Linde and Professor Eule*, 65 U. COLO. L. REV. 741, 744–47 (1993) (responding to Justice Hans Linde’s argument that direct democracy violates the Guarantee Clause).

62. The Third Amendment provides: “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” U.S. CONST. amend. III. The Fourth Amendment, of course, provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .” U.S. CONST. amend. IV.

63. Cal. Civ. Code § 3523.

governmental structure. The courts remain free to enforce fundamental individual rights under the constitutional provisions designed to secure them. After all, we have made it this far without using the Guarantee Clause for such an expansive purpose, and the Republic still stands.

Overlooked in this debate are the roles of the people, the political process, and the operation of the very republican government secured by the Constitution. California's voters elect their representatives. The state's citizens are at liberty to petition, lobby, cajole, and protest to effectuate change. Voters can recall politicians, run for office, invalidate legislative statutes, and enact their own initiative statutes and constitutional amendments. These ordinary acts of participatory democracy are the keystone of our political system, the expression of the republican principle that animates the Guarantee Clause. It is the people who bear ultimate responsibility for their government, good, bad, or ugly.<sup>64</sup>

---

64. As Justice Jackson trenchantly explained, "It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error." *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 442–43 (1950) (Jackson, J., concurring in part and dissenting in part). *Cf.* Joseph de Maistre, *Lettres et Opuscules Inédits* vol. 1, no. 53 letter of 15 Aug. 1811 (1851) ("Toute nation a le gouvernement qu'elle mérite."), reprinted in *THE YALE BOOK OF QUOTATIONS* 485 (Fred R. Shapiro ed., 2006). Or, depending on your perspective, "People should not be afraid of their governments. Governments should be afraid of their people." *V FOR VENDETTA* (Warner Bros. 2005).