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OBSERVATIONS ON THE GUARANTEE CLAUSE--AS THOUGHTFULLY ADDRESSED BY JUSTICE LINDE AND PROFESSOR EULE

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I.

Although the subject of the opening session of this conference is not so limited, the analyses of Justice Linde and Professor Eule both deal exclusively with the applicability of the Guarantee Clause to various forms of initiatives and referenda.¹ Later, Professor Amar will make a strong argument that an "anti-direct democracy" goal was not the point of the Guarantee Clause at all.² If Professor Amar is correct, then what has been discussed at this session may well be seen as idle chatter. But let us assume that the appropriate tools of constitutional interpretation need not take us that far.

Nonetheless, I wish to express my agreement with Professor Amar, and my strong concurrence with Professor Chemerinsky, that it would be highly desirable if the Guarantee Clause could validly be enforced by the federal courts to secure certain basic political rights of individuals--largely to protect the essence of majority rule in our representative system of government.³ Indeed, under these circumstances, I believe the Guarantee Clause probably would have been, and perhaps may still be, the constitutional provision of choice with respect to many of the issues concerning legislative malapportionment and other denials of voting rights,⁴ especially regarding the method of selection (e.g., appointment versus election) of certain

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Instead, all these problems have been shoehorned into the Equal Protection Clause, beginning with the Supreme Court’s landmark decision in Baker v. Carr over thirty years ago.  

II.

Nothing I have said to this point is meant to suggest that I disagree with Justice Linde’s plea that the Guarantee Clause might properly be employed by the courts for another purpose: to protect against the misuses and abuses of direct democracy. Let me now turn to that matter, i.e., whether the Guarantee Clause should be judicially invoked not just to secure the essence of majority rule, but also to require that at least some forms of lawmaking are the product of deliberation by elected representatives.

First, to make full disclosure of my personal views, I must admit to great ambivalence toward the desirability of initiatives and referenda. I remember receiving a letter in the late 1960’s or early 1970’s from a Senate committee requesting an appraisal of a proposed amendment to the United States Constitution to provide for a national initiative and referendum process. I responded that my experience as a voter in California had made me so strongly opposed to that system that I could not consider it dispassionately. My thinking, similar to that of Justice Linde, was that these forms of direct democracy epitomized the worst features of lawmaking: reflexive responses to passions and prejudices, as compared to products of reason and deliberation, often involving very confused


7. I also subscribe to Professor Merritt’s position that the governing decisions of the United States Supreme Court do not unequivocally demand the often-stated rule that a contention under the Guarantee Clause presents a nonjusticiable political question. I hasten to add, however, that I do not agree with her proposed use of the Guarantee Clause to protect states’ rights from actions of the national government. Compare Deborah J. Merritt, Republican Governments & Autonomous States: A New Role for the Guarantee Clause, 65 U. COLO. L. REV. 815 (1994) (this issue) with JESSE H. CHOPER, JUDICIAL REVIEW & THE NATIONAL POLITICAL PROCESS CH. 4 (1980).

8. Linde, supra note 1, at 710.
and unchangeably drafted measures by groups having enormous influence and money that affect highly complex issues.

On the other hand, by the 1980's, my disaffection with the state legislature, which I perceived as often ignoring, if not flouting, the public interest, led me to favor some form of popular check, especially with regard to matters of government structure such as term limits for officeholders and regulations of campaign finances and practices. These sentiments have caused me to rethink my opposition to initiatives and referenda.

Second, even if, for reasons to be discussed below, the federal courts determine that a challenge to "excessive" direct democracy--as compared to a claimed abridgment of individual political rights--presents Article III judges with a nonjusticiable question under the Guarantee Clause, Justice Linde is surely right that it does not automatically follow that state courts are precluded from adjudicating the issue. As he demonstrates, the Supreme Court has never told the state courts that they are disabled from resolving such matters, and the state courts in fact have addressed these arguments on the merits.

State courts may persuasively be seen as playing a significantly different role in the state government system when they engage in constitutional interpretation than do the federal courts in our national political process. Professor Eule makes a forceful contention that the widely-used system of electing state judges, or of holding them politically accountable in some other way, makes state courts vulnerable to the electorate when rendering highly visible and controversial decisions on initiatives or referenda. Consequently, he argues, state courts are not going to be terribly effective in policing invalid measures. This may be true. It may also be true, however, that the fact that state judges are somewhat politically responsible--whether or not reflecting a desirable policy--authorizes them to engage in a more activist, policymaking role than their federal counterparts. The greater exercise of discretion in constitutional adjudication by state courts may be seen as presenting a lesser conflict with majoritarian democracy than when unelected national judges with lifetime tenure employ the power of judicial review.

9. Id. at 710-11.
10. Id. at 717.
11. Eule, supra note 1, at 736.
12. Id.
It should be noted, though, that there is a serious question, that has not been addressed, presented by state court consideration of constitutional issues under the Guarantee Clause. If the Supreme Court does hold that Guarantee Clause claims—at least in some form—present nonjusticiable political questions, will the Court permit state judges to render nonreviewable decisions invalidating state laws under that provision of the federal Constitution? Will it allow state courts to have the final judicial word on the meaning of the United States Constitution, without any opportunity for United States Supreme Court input? This not only produces a situation in which there may be nonuniform interpretation of the federal Constitution in different parts of the country, it also places an especially powerful authority in the hands of state judges, because there would be no way for the people subject to their state court’s interpretation of the federal Constitution to change it through ordinary processes. That is, even if the people of Colorado strongly disagree with an interpretation of the Guarantee Clause made by the Colorado Supreme Court, they cannot seek review in the United States Supreme Court because (we are assuming) the Justices have held the question to be nonjusticiable. Moreover, because the decision of the Colorado Supreme Court only applies in Colorado, the state’s citizenry cannot, as a practical matter, join with voters in other states to changes this interpretation of the United States Constitution, either by formal constitutional amendment or by petition to Congress (which would possess ultimate power, under our assumption of nonjusticiability, to reverse the state judiciary). Their only recourse would be to influence the Colorado Supreme Court to overturn its judgment.

III.

The most difficult problem, in my opinion, for review of initiatives and referenda under the Guarantee Clause is whether there are “judicially discoverable and manageable standards,” 13 principled ways to determine when direct democracy violates the constitutional requirement of a republican form of government. I would like to briefly consider several possible approaches.

13. This is a term of art under the political question doctrine. Baker, 369 U.S. at 217.
First, Justice Linde suggests that any statewide initiative (whether or not amendable by the legislature) that "stirs appeals to [majoritarian] passion or to prejudice against an identifiable social group"\textsuperscript{14} or that "invites voters to legislate for their own financial self-interest"\textsuperscript{15} should be held to violate the Guarantee Clause: "republican government requires the state's officials to reserve [such measures] for legislative deliberation."\textsuperscript{16} I am less confident than Justice Linde that there is a principled way for the judiciary to administer this approach without expanding its coverage to much, if not most, of traditional lawmaking. Ballot measures that disadvantage homosexuals, or deny welfare to unwed mothers, or provide special remedies against "dead-beat dads," or establish "three-strikes-and-you're-out" prison sentences, each seem to me to involve passion and prejudice against an identifiable group in our society. Indeed, would not heavy penalties against "manufacturers engaged in persistent environmental pollution" appear to qualify under Justice Linde's approach? I feel it is probably better to rely on provisions of the Constitution other than the Guarantee Clause to determine whether government actions of this kind amount to majoritarian abuses, no matter by whom enacted.

Second, Justice Linde also suggests a different criterion. He would distinguish between, on the one hand, referenda (proposed statutes that are referred to the people by the legislature, having gone through the lawmaking process) and initiatives that can be amended by the legislature, and, on the other hand, attempts "to place laws beyond representative lawmaking by enacting them in the form of constitutional amendments."\textsuperscript{17} If ballot measures in the latter category amount to "statewide substantive lawmaking"\textsuperscript{18} rather than "measures to structure or limit governmental powers,"\textsuperscript{19} Justice Linde would have the courts hold that they violate the Guarantee Clause. This would still permit some constitutional changes (i.e., "structural amendments")\textsuperscript{20} to be voted upon in statewide elections.

\textsuperscript{14} Linde, supra note 1, at 728.
\textsuperscript{15} Id. at 725.
\textsuperscript{16} Id. at 728.
\textsuperscript{17} Id. at 730.
\textsuperscript{18} Id. at 724.
\textsuperscript{19} Id. at 716.
\textsuperscript{20} Id. at 717.
Once again, I am not as sanguine as Justice Linde that this standard is capable of principled judicial application (although I find it more promising than the first approach discussed above). For example, Justice Linde would rule that "an initiated [constitutional] amendment may dedicate fuel taxes to road construction." It would seem to follow that an initiated constitutional amendment could also mandate that a certain percentage of all state revenue be dedicated to specified purposes, such as elementary and secondary education, or that real property taxes may not increase more than a specified amount each year. Realistically, wouldn't these be just as much "substantive lawmaking" as an initiative that "fix[es] the amount of the [fuel] tax in the [state] constitution," one that Justice Linde would invalidate if it precluded legislative participation? Similarly, would a balanced budget provision or a campaign practice/finance reform measure--matters that legislatures are more or less incapable of dealing with effectively, for perfectly human but nonetheless highly undesirable reasons--be "structural amendments" or "substantive lawmaking"? These are "close calls" and pose difficult questions in any effort to articulate a manageable standard for courts to employ under the Guarantee Clause to address the possible abuses and misuses of direct democracy.

Perhaps the cleaner approach for state courts to take under the Guarantee Clause would be to invalidate all efforts that totally eliminate representative lawmaking by enacting constitutional amendments through statewide initiatives. I do not find that to be unacceptable, and a number of states have adopted that rule. The "people" could still have the opportunity to amend their constitution through procedures with appropriate safeguards (e.g., state constitutional conventions), which is not the same as allowing constitutional amendment by plebiscite.

21. Id.
22. This would be similar to California's Proposition 98, which has become an extremely effective impediment to many proposed solutions to the state's economic problems.
23. That, of course, is the essence of California's famous Proposition 13.
24. Linde, supra note 1, at 717.
25. Id. at 730, n.70.
IV.

I conclude by restating an earlier point. It may well be that electorally responsible state courts have a greater claim of legitimacy when they wrestle with these difficult issues of government policy than do life-tenured federal judges. As a consequence, I am inclined to agree with Justice Linde that there is value in exploring ways that might aid the state judiciary's efforts to assure that "republican lawmaking," in contrast to "direct plebiscite on initiatives," will "prevent the abuse of government power from motives of personal self-interest or majoritarian passion."26

26. Id. at 730.