6-1-1998

The Guarantee Clause in California: State Constitutional Limits on Initiatives Changing the California Constitution

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THE GUARANTEE CLAUSE IN CALIFORNIA: STATE CONSTITUTIONAL LIMITS ON INITIATIVES CHANGING THE CALIFORNIA CONSTITUTION

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A growing body of opinion holds that the initiative process in California and other states violates the Guarantee Clause of the United States Constitution. Under that clause "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[1] The theory is that initiatives, which are written and enacted by the voters, thus bypassing the legislature, are a manifestation of "direct democracy." The Framers of our Constitution, the theory goes, rejected direct democracy in favor of a representative—republican—government. A considerable amount of historical literature supports this theory, much of it focusing on the distrust that Madison and others had of factions and popular prejudices.[2]

Unfortunately, it has been nearly impossible to test this general theory in American courts. Shortly after Oregon implemented the nation's first initiative process, the United States Supreme Court held that the Guarantee Clause challenge to the initiative process as adopted in Oregon presented a nonjusticiable political question.[3]

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1. U.S. CONST. art. IV, § 4.

2. *See* THE FEDERALIST NO. 9 (Alexander Hamilton) (Edward Earle ed., 1937) (advocating Hamilton's preferred model of republican government, which included representation of the people by the legislature); THE FEDERALIST NO. 10 (James Madison) (Edward Earle ed., 1937) (noting Madison's blunt distaste for direct democracy); THE FEDERALIST NO. 51 (James Madison) (Edward Earle ed., 1937) (emphasizing the importance in a republic to guard one part of the society against the injustice of the other part).

3. *See* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912). The initiative in *Pacific States* provided that telephone and telegraph companies would be taxed at two percent of their annual gross income derived from intrastate business. *See id.* at 135-36.

Ordinarily, this would be a serious but not fatal impediment to judicial review. State courts are under an equally strong mandate to enforce the Supremacy Clause.[4] If state initiatives violate the Guarantee Clause, a state court should be competent to so hold. Yet some state courts have also rejected such claims on grounds of nonjusticiability. This, despite the fact that the political question doctrine is an outgrowth of separation of powers at the federal level and should have no bearing on the jurisdiction of state courts. State courts recently have held that nonjusticiability is a substantive limitation to the Guarantee Clause itself, rather than a jurisdictional defect.[5] If this theory is true, state courts are as powerless as their federal counterparts to enforce this critical—indeed, foundational—feature of the Constitution.

Accepting, for purposes of this Article, that no court is competent to invalidate a state's adoption of a particular form of the initiative process under the Guarantee Clause directly, they still can—and must—enforce their own state constitutions with their adopted limits and confines on the use of the initiative process. Thus, if a state constitution imposed a restriction on governmental methods analogous to or incorporating the Guarantee Clause, that restriction would be justiciable and enforceable on its own merits.[6]

Of course, state constitutions may impose limits on state functions beyond those found in the federal charter. It is an accepted principle of federalism that while the states may not afford less protection than the federal guarantees under the Supremacy Clause, they are at liberty to afford greater protection to their citizens than the federal minimums.[7]

As it turns out, the protection of a "Republican" form of government may be greater under California law than the minimum protection required by the federal guarantee itself. This Article briefly

4. U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .").

5. *See, e.g.*, *In re* Petition No. 364, 930 P.2d 186 (Okla. 1996); Huddleston v. Sawyer, 324 Ore. 597 (1997). *But see* VanSickle v. Shannahan, 511 P.2d 223 (Kan. 1973) (holding that cases arising under Article IV, Section 4 of the Constitution are not necessarily nonjusticiable).

6. Guarantee Clause claims can also be litigated in disguise, by alleging a violation of some other constitutional provision. *See, e.g.*, Morrissey v. State, 951 P.2d 911 (Colo. 1998)(striking down State constitutional amendment for violating Article V of the United States Constitution, even though the court's discussion focused on the guarantee clause).

7. *See* California v. Ramos, 463 U.S. 992, 1014 (1983); Raven v. Deukmejian, 52 Cal. 3d 336, 353-54, 801 P.2d 1077, 1088, 276 Cal. Rptr. 326, 337 (1990).

explores that possibility under the language of the California Constitution.

Not only does the California Constitution preserve the guarantee of republican government, it also preserves a distinction between constitutional "revision" and "amendment."[8] This distinction is instrumental to California's system of constitutional change. Most reforms can be accomplished through the "amendment" process. Amendments are initiated either by the legislature or by the people directly through the initiative process. However, if the change is significant, either because it changes the structure of government or because it makes wholesale alterations in constitutional text, it will be considered a "revision." Until recently, "revisions" required the calling of a constitutional convention. These may now be commenced by the legislature. But, importantly, revisions may not be made by initiative.

This amendment revision distinction 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.[9] California courts have the power to enforce this constitutional limitation, having done so on several occasions.[10] Unfortunately, they have also devalued the distinction in some cases, most notably in the Proposition 13[11] case, *Amador Valley Joint Union High School District v. State Board of Equalization.*[12] There, the court failed to perceive a threat to republican government by a "revision" of the state constitution through an obvious restructuring of state government.

The question explored in this Article is whether state constitutional provisions and corresponding state supreme court decisions protect a republican government more than the federal guarantee. In particular it will examine whether parts of Proposition 13 violate California's constitutional guarantee of a republican government. It will further explore whether the California Supreme Court erred in

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8. *See* CAL. CONST. art. XVIII, §§ 1-3.

9. *See Raven*, 52 Cal. 3d at 349-50, 801 P.2d at 1085, 276 Cal. Rptr. at 334 ("'comprehensive changes' to the Constitution require more formality, discussion and deliberation than is available through the initiative process").

10. *See, e.g.*, McFadden v. Jordan, 32 Cal. 2d 330, 196 P.2d 787 (1948); *In re* Pfahler, 150 Cal. 71, 88 P. 270 (1906); Livermore v. Waite, 102 Cal. 113, 36 P. 424 (1894).

11. Proposition 13, *in* California Ballot Pamphlet, General Election 56-57 (June 6, 1978).

12. 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

expanding the definitional standard of "amendment" in the *Amador* case.[13]

Apart from the Supremacy Clause in the Federal Constitution, California has expressly adopted and incorporated the Federal Constitution as the supreme law of the State of California in its own constitution. "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land."[14] A similar provision does not appear in many state constitutions, suggesting that the clause may have operational effect.

The state charter further provides: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[15] Reading these two provisions together leads one to the following proposition: California may not afford its citizens less protection than provided in the United States Constitution, but under the state powers reserved to it in the Tenth Amendment, it may accord Californians greater protections.[16] These greater protections include those guarantiees in the Federal Constitution that may not be enforceable on their own. Specifically, while the Guarantee Clause in the Federal Constitution may be unenforceable in federal

13. In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), Justice Scalia was careful to limit the ruling to the "narrower" separation of powers issue and not the Due Process Clause of the Fifth Amendment as it "might dictate a similar result" to state enactments under the Fourteenth Amendment. *Id.* at 217. This is significant because the Kansas Supreme Court has held that the "separation of powers" doctrine is secured to the states as part of the Guarantee Clause of Article IV, Section 4 of the United States Constitution. *See* Van Sickle v. Shanahan, 511 P.2d 223, 241 (Kan. 1973). If the *Van Sickle* view is accepted, then the *Plaut* decision is binding on the states under the Guarantee Clause irrespective of the Fourteenth Amendment, and further raises the issue of whether the Due Process Clause picks up the California form of the federal guarantee of a republican form of government in Article IV, Section 4. *See also* Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966) (en banc), *cert denied*, 386 U.S. 1021 (1967) (using the separation principle under the Guarantee Clause to avoid unconstitutionally constructing the Civil Rights Act of 1871 to abolish judicial immunity); Kohler v. Tugwell, 292 F. Supp. 978 (E.D. La. 1968), *aff'd per curiam*, 393 U.S. 531 (1969) (reviewing a state's plebiscitary action under both the due process and the guarantee clause, finding neither violated).

14. CAL. CONST. art. III, § 1.

15. CAL. CONST. art. I, § 24.

16. *See* American Academy of Pediatrics v. Lungren, 16 Cal. 4th 307, 940 P.2d 797, 66 Cal. Rptr. 2d 210 (1997) (stating "that the California Constitution 'is, and always has been, a document of independent force', and that the rights embodied in and protected by the state Constitution are not invariably identical to rights contained in the federal Constitution") (internal citation omitted).

court due to the political question doctrine, it is arguably enforceable as an incorporated right in the state constitution.

The above proposition is surely true of those rights specified in the state constitution that were copied from the Federal Constitution. After *Barron v. Baltimore*,[17] it was understood that the Bill of Rights did not apply to the states. Accordingly, state constitution drafters in the mid- and late-nineteenth centuries included bills of rights in their own state charters, sometimes copied verbatim from the Federal Constitution.[18] Once the United States Supreme Court began incorporating the Bill of Rights through the Fourteenth Amendment, making them applicable to the states, analogous state constitutional provisions grew dormant.[19] Nonetheless, state rights remain enforceable, independent of federal rights, even when all substance is drained from the federal right.[20] Indeed, an entire doctrine of Supreme Court jurisdiction—"adequate and independent state grounds"—derives from their separate enforceability, and the recognition that state-granted rights are often broader than their federal counterparts.[21]

This Article proposes that the state constitution guarantees California a republican form of government. Moreover, this guarantee is justiciable in state court. Under the general theory stated above, if an initiative or regular legislation violates the guarantee, it must be held invalid. This would be true for initiative constitutional amendments, as it is for initiative statutes. If our right of republican government is to be altered, it can be done only by constitutional revision, not constitutional amendment, and certainly not by the very process—initiative—that undermines the guarantee in the first place.

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17. 32 U.S. (7. Pet.) 243 (1833).

18. *See generally* Rachel A. Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California*, 21 HASTINGS CONST. L.Q. 95, 99-101 (1993).

19. *See generally* Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 WIDENER J. PUB. L. 25 (1993) (illustrating the interaction between state and federal constitutions); Van Cleave, *supra* note 16, at 106 (noting that "most state courts looked to the guarantees pronounced by the United States Supreme Court and simply fell in line with that Court's interpretation, not considering what their own state constitution required").

20. *See* Allen v. Superior Court, 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976). Compare, for example, the United States Supreme Court's interpretation of the Fourth and Fourteenth Amendments with California courts' interpretation of Article I, Sections 7 and 13 of the California Constitution. Divergence in both cases lead to voter-initiated constitutional amendment.

21. *See* Michigan v. Long, 463 U.S. 1032, 1037-44 (1983).

This article further posits that the California power of initiative is limited to enacting amendments and laws. These terms are to be strictly construed, as was done by the state supreme court in Livermore v. Waite,[22] the court's first case dealing with the forms for constitutional change. The limitations on constitutional alteration were enacted (in the constitution of 1849, and confirmed in the constitution of 1879) in light of the then perceived state duty to protect a republican form of government under the Guarantee Clause. Accordingly, violations of these limitations should be justiciable in state court under the Guarantee Clause, as incorporated into the state constitution, as well as under more explicit restrictions on constitutional change.

I. DIRECT VERSUS REPRESENTATIVE GOVERNMENT: THE GUARANTEE CLAUSE.

James Madison's *Notes of Debates in the Federal Convention of 1787*[23] show that the Framers of the Constitution were quite certain that the republican—representative—form of government they were creating protected against the evils of direct democracy.[24] The guarantee of "Republican government" to every state in the Union was proposed to the Convention as Resolution 11 by Governor Randolph of Virginia.[25] As Madison recorded in his *Notes*, on May 31, 1787, Randolph observed that the general object of the Constitution was to provide a "cure" for the "evils" under which the United States labored.[26] "[I]n tracing these evils to their origin every man had found it in the turbulence and follies of democracy. . . ."[27] Randolph also stated that the purpose of the Resolution was two-fold. First, to secure a republican government and second, to suppress domestic commotions.[28]

Before direct democracy—through voter approval of private initiatives—was adopted in California in 1911, the reach and scope of the guarantee of republican government had been construed and

22. 102 Cal. 113, 26 P. 424 (1894).

23. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Ohio Univ. Press 1966) (1787) [hereinafter NOTES OF DEBATES].

24. *See* THE FEDERALIST No. 51 at 323 (James Madison)(Clinton Rossiter ed., 1961).

25. NOTES OF DEBATES, supra note 22, at 32; *see also* THE FEDERALIST NO. 10 at 81-84 (James Madison).

26. NOTES OF DEBATES, *supra* note 22, at 42.

27. *Id.*

28. *See id.* at 321.

applied by both the United States and California Supreme Courts. On the federal side, the Supreme Court in *Luther v. Borden*[29] announced the political question doctrine, holding that courts would not use the Guarantee Clause to decide between competing groups on the admission of a state to the Union, as that was a nonjusticiable political question.[30]

The Court next considered the meaning of "Republican" in *Minor v. Happersett*,[31] twenty-five years after *Luther*. After reviewing the forms of state government existing at the time of the Constitution, the Court concluded that the term "Republican" in Article IV, Section 4, meant representative government.[32] It further noted that "[t]he guarant[ee] necessarily implies a duty on the part of the States themselves to provide such a government."[33]

In 1906, in *In re Pfahler*,[34] the California Supreme Court upheld a Los Angeles municipal ordinance enacted by a local initiative against a challenge that it violated the Guarantee Clause.[35] Assuming the issue presented a judicial question,[36] the court adjudicated that issue. The majority opinion, citing *Minor*, traced the history of direct democracy in local and municipal affairs since the adoption of the Constitution. The court concluded that the Guarantee Clause did not prohibit the direct exercise of legislative power by the people of a "subdivision of a state in strictly *local* affairs."[37] That the *Pfahler* court felt subject to the duty to provide a republican form of government as stated in *Minor*, is evident because both the majority and

29. 48 U.S. (7 How.) 1 (1849).

30. The political question/nonjusticiability rule of *Luther* was reformulated in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 177 U.S. 533, 583 (1964), opening the door for the justiciability of some Guarantee Clause claims even where a political question is involved, provided it is not the only issue and there is no absence of judicially measurable standards.
Even application of the *Luther* standard has been questioned. As Justice Douglas observed, "[t]he statements in *Luther v. Borden* . . . that this guaranty is enforceable only by Congress or the Chief Executive is not maintainable." *Id.* at 242 n.2 (Douglas, J., concurring) (citation omitted). Also see Justice O'Connor's critique of it, citing various decisions and legal scholars, in her extended comments on the Guarantee Clause in *New York v. United States*, 505 U.S. 144, 183-86 (1992).

31. 88 U.S. (21 Wall.) 162, 175-76 (1874).

32. *Id.*

33. *Id.* at 175.

34. 150 Cal. 71, 88 P. 270 (1906).

35. *See id.* at 92, 88 P. at 279.

36. The court noted, in passing, the *Luther v. Borden* decision. *See id.* at 77, 88 P. at 273.

37. *Id.* (emphasis added).

dissenting opinions mentioned *Minor*.[38] The dissent observed, "every act done by a state which is inconsistent with and violative of the theory of a republican form of government is invalid."[39]

Thus, the California Supreme Court in *Pfahler,* using the same historical analysis employed by the Court in *Minor,* distinguished, under the Guarantee Clause, between allowable direct democracy at the local or municipal level of government and the representative democracy required at the state level. The two decisions are not inconsistent with each other as they relate to the different forms of state governance that existed when the Constitution was adopted.

What is of particular significance in the *Pfahler* decision is an additional distinction the court made—or at least pointedly implied—between enacting laws and changing the state constitution by initiative.[40] In a precisely limited proviso, the court indicated that state constitutional enactments might not be similarly treated.[41] The court cited a leading Oregon case, *Kadderly v. Portland*,[42] stating that the people of a state may "reserve the supervisory control as to general state legislation afforded by the initiative and referendum."[43]

Kadderly upheld the 1902 Initiative and Referendum Amendment to the Oregon Constitution.[44] It was the only case found by the California Supreme Court that directly discussed the permissibility of state initiatives under the Guarantee Clause. The Oregon amendment reserved to the people the power to propose and enact *laws and amendments* to the Constitution at the polls, independent of the Legislature.[45] It anticipated and informed the language of the 1911 amendment to the California Constitution installing the initiative process in this state. Yet, the *Pfahler* court pointedly omitted any reference to that part of the Oregon Constitution authorizing the use of initiatives to enact amendments to the state constitution from the court's limited approval of enacting statutes by initiative.[46]

Thus, the *Pfahler* court drew two distinctions under the Guarantee Clause in the use of direct democracy by initiative. First, between local and state government and second, between the use of initiatives

38. *See id.* at 76-77, 93, 88 P. at 272-73, 279.
39. *Id.* at 93, 88 P. at 279 (McFarland, J., dissenting).
40. *See id.* at 77, 88 P. at 273.
41. *See id.* at 77-78, 88 P. at 273-74.
42. 74 P. 710 (Or. 1903).
43. *Pfahler*, 150 Cal. at 77, 88 P. at 273.
44. *See Kadderly*, 74 P. at 721-22.
45. *See id.* at 712.
46. *See Pfahler*, 150 Cal. at 79, 88 P. at 273-74.

to enact statutes and their use to amend state constitutions. *Pfahler* approved the use of initiatives in local and municipal governance and accepted, as decided by *Kadderly*, that initiatives could enact laws at the state level without violating the Guarantee Clause.[47]

What makes *Pfahler's* omission even more noteworthy is that *Kadderly* twice cited the California decision of *Livermore v. Waite*,[48] a leading California case setting forth a carefully restricted view of the amendment process under the California Constitution.[49] *Livermore* invalidated a constitutional amendment on the ground that it did not satisfy the requirements for an amendment, even though it had been put before the voters by the legislature, and had received majority approval.[50]

Chief Justice Beatty presided over both the *Livermore* and *Pfahler* courts, joining the majority in each case. Justice McFarland also participated in both cases, joining a concurring opinion in *Livermore* and authoring the lone dissent in *Pfahler*. In the *Pfahler* dissent, after stating that the Guarantee Clause "declare[d] a great constitutional principle,"[51] Justice McFarland expressed his "regret at the apparent readiness of many of the people to abandon prominent features of our American system of government—the wisest and best system ever yet devised and put into successful operation."[52]

The California Supreme Court is presumed to be aware of its own decisions. It can hardly be said that Justices Beatty and McFarland, who had agreed on a restrictive definition of "amendment" in the *Livermore* decision, but disagreed in *Pfahler* whether initiatives at the municipal level violated the Guarantee Clause, were unaware of the distinction in the cases. Their opinions are reconciled by the view that initiatives may adopt laws at the municipal level, but may not lawfully enact amendments to the constitution. There are four levels of direct governance by initiatives involved: (1) the municipal level; (2) the level of laws or statutes of the state; (3) the level of

47. *See id.* at 77, 88 P. at 273.
48. 102 Cal. 113, 36 P. 424 (1894).
49. *See Kadderly*, 74 P. at 716.
50. *See Livermore*, 102 Cal. at 123-24, 36 P. at 428. *Livermore* was decided 17 years before the initiative process was adopted. But the limitations noted in that case on amending the constitution were preserved by the initiative process. *See* McFadden v. Jordan, 32 Cal. 2d 330, 196 P. 787 (1948).
51. *Pfahler*, 150 Cal. at 93, 88 P. at 279 (McFarland, J., dissenting).
52. *Id.* at 95, 88 P. at 280 (Beatty, J., dissenting).

amendments to the constitution as limited by the *Livermore* definition; and (4) the level of alterations to the constitution that exceed the *Livermore* definitional standard of "amendment."

The *Kadderly* court never discussed the constitutional amendment language in the Initiative and Referendum Amendment when sustaining it under the Guarantee Clause. Instead, the court limited its discussion to the enactment of laws, the sole issue before the court.[53] *Kadderly* involved a law incorporating the city of Portland that was passed by the legislature under an exception in the Initiative and Referendum Amendment for laws passed for the immediate preservation of the public peace, health, and safety.[54] A landowner challenged the legality of a street and sewer assessment by the city, the legality of the law making Portland a charter city, and the legality of the Initiative and Referendum Amendment.[55] The court rejected all claims.[56] In doing so, the court was not called upon to discuss or consider any distinction between the enactment of laws by initiative and amendment to the constitution by the same means.

A. Changing the Constitution: Revision and Amendment

Statutes are not constitutions, and the enactment of a law is not equivalent to changing a constitution. Constitutions set forth the powers and organization of government, the principles under which it operates, and the protected rights of the people. The only method of changing the federal Constitution, as provided in Article V, is by an amendment approved by a two-thirds vote of both houses and ratified by the legislatures of three-fourths of the states, or by a convention proposing amendments called for by three-fourths of the states.[57] The Constitution does not permit ratification of a proposed amendment through direct democracy.[58] As Madison noted in *The Federalist No. 43*,[59] the reason for the considerable difficulties in altering the Constitution was to preserve and protect a stable and permanent Constitution from a facility of change that would make it too "mutable."[60]

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53. *See Kadderly*, 74 P. at 716.
54. *Id.* at 712.
55. *Id.* at 714-15.
56. *Id.* at 721-24.
57. *See* U.S. CONST. art. V.
58. *See* Hawkes v. Smith, 253 U.S. 221, 226-27 (1920); AFL-CIO v. Eu, 36 Cal. 3d 687, 701, 686 P.2d 609, 618-19, 206 Cal. Rptr. 89, 98 (1984).
59. THE FEDERALIST NO. 43 (James Madison) (Benjamin Wright ed., 1966).
60. *Id.* at 315 (James Madison).

California also recognizes that altering the constitution is more significant than enacting a statute. Statutes may be passed by a majority of both legislative houses and signed by the governor, while any change to the constitution through the legislature always requires a two-thirds vote of both legislative branches and approval by the voters.[61] California also recognizes a difference between greater and lesser changes to its constitution by providing for two types of changes: revision for the more significant reforms,[62] and amendment for less significant changes.[63]

The California purpose, like the federal purpose, of interposing a difficult procedure for constitutional change by revision, is to protect and preserve the permanence of the state document. As stated by the California Supreme Court in *Livermore*, "the underlying principles upon which [the constitution] rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature."[64] In distinguishing between the degree of change requiring the use of the revision procedure and the degree of change permissible under the amendment procedure through the legislature, *Livermore* concluded that only "an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purposes for which it was framed" are amendments under Article XVIII of the constitution.[65]

B. The 1911 Amendment of Article IV, Section 1

In 1911, as part of the popular protest against Southern Pacific Railroad's domination of the California legislature, the legislature proposed and the people adopted an amendment to Article IV, Section 1 of the California Constitution.[66] This authorized the people to propose and enact laws and amendments to the constitution, and

61. *See* Cal. Const. art XVIII, §§ 1, 2, 4.

62. Until 1962, a "revision" could only be proposed by a constitutional convention. Now it may be accomplished through the Legislature and the voters. *Id.* § 1.

63. *See* Livermore v. Waite, 102 Cal. 113, 118-19, 36 P. 424, 426 (1894).

64. *Id.* at 118, 36 P. at 426.

65. *Id.* at 118-19, 36 P. at 426.

66. The language was virtually identical to the 1902 Oregon Initiative and Referendum Amendment which was codified in the state constitution. *See* OR. CONST. art. IV, § 1, cl. (2)(a) (authorizing people "to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly").

adopt and reject the same at the polls, independent of the legislature.[67]

Several observations can be made regarding the 1911 Amendment which bear on the types of constitutional change that can be made by initiative. These follow from the drafters' deliberate use of the term "amendment" to describe the scope of constitutional change permitted. This is a restrictive term which provides the only safeguard against the relatively easy process of constitutional change created by the Amendment.

First, although the constitution continued to require different processes for altering the constitution and enacting laws when accomplished by the legislature, no such procedural distinction was made when it came to private persons—the people—acting through the initiative process. At the time of the 1911 Amendment, the procedural requirements for proposing and enacting laws and amendments to the constitution by initiative were the same; they required the same number of petition signatures to put an initiative on the ballot.[68] Thus, the 1911 Amendment eliminated the requirement of super-majority approval (two-thirds vote of the legislature), making it easier for private parties to propose constitutional change than for the legislature to do so itself.

Second, although statutes are constrained by various substantive limitations in the constitution, these limitations do not apply to changing the constitution itself, by either representative or direct democracy. The only substantive limitation imposed on constitutional reform by initiative under the 1911 Amendment, is the limiting word "amendment."

Third, when the initiative was proposed in 1911, it was presented against a backdrop of Supreme Court decisions on the mechanisms for constitutional change. In *Livermore*, the Court had announced a strict construction of the term "amendment." In *In re Pfahler*, it had approved initiative lawmaking at the local level, while omitting any language approving amending the constitution by initiative even

67. *See* CAL. CONST. art. IV, § 1 (emphasis added). The language of the 1911 Amendment to Article IV, Section 1 authorizing the enactment of amendments to the constitution has since been split off and placed in Article XVIII, Section 3. It now reads as follows, "The electors may amend the Constitution by initiative." CAL. CONST. art. XVIII, § 3.

68. Petition signatures by electors equal to eight percent of the votes cast for Governor at the last gubernatorial election. The number was reduced to five percent in 1966 for the enactment of laws but remained at eight percent for initiative constitutional amendments. *See* CAL. CONST. art. II, § 8.

under the restrictive *Livermore* standard. It is doubtful that members of both legislative houses and the drafters of the amendment were unaware of these cases, or the limitations they had imposed on constitutional "amendment."

Finally, it is inconceivable that members of the legislature were oblivious of the fact that by the enactment of the 1911 amendment, the terms "revision" and "amendment" no longer just separated the two types and procedures of changing the constitution under representative government. Instead, they became terms for separating changes to the constitution that require approval by representative democracy from those changes that may be proposed by private individuals and enacted by plebiscite under direct democracy.[69]

The legislature went a good deal further than the *Pfahler* decision by proposing the use of initiatives to enact amendments to the California Constitution. Presumably, the legislature understood that the term "amendment" would be confined within the narrow *Livermore* standard, a definition which *Pfahler* had preserved by

69. While any constitutional change proposed through the legislature may be debated and amended before it is put on the ballot, an initiative amendment proposed by a private person must be accepted or rejected as given. *See* CAL. CONST. art. XVIII, § 2. In 1912, the year after the acceptance of the California initiative amendment, the United States Supreme Court considered a Guarantee Clause challenge to a tax statute enacted by initiative under the 1902 Oregon Initiative and Referendum Amendment. *See* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912). The Court rejected the challenge, holding that the state's use of direct democracy by initiative presented a political, not a judicial question. *See id.* at 149 (citing Luther v. Borden, 48 U.S. (7 How.) 1 (1849)). Because the *Pacific States* case is still cited as authority for the proposition that a state use of direct democracy by initiative is not reviewable under the Guarantee Clause, a few observations are appropriate. First, the *Pacific States* decision did not adjudicate the constitutionality of the initiative process, but declined to review it on the basis of the political question doctrine of the *Luther* case. *See id.* at 151. This doctrine has since been generally relaxed by *Baker v. Carr*, 369 U.S. 186 (1962) and seriously questioned in reference to the Guarantee Clause. *See* New York v. United States, 565 U.S. 144 (1992). Second, the Court only had a statute enacted by initiative before it, not a constitutional amendment enacted by initiative. *See Pacific States*, 223 U.S. at 135. Third, the case involved the Oregon constitutional initiative amendment and not the 1911 initiative amendment to the California Constitution that was enacted after the California Supreme Court decisions in *Livermore* and *Pfahler*. *See id.* at 133-34. It is the position here that the decision in *Pacific States* is no longer controlling authority for the the nonjusticiability of state initiative action under the Guarantee Clause of the Federal Constitution, nor, under *Pfahler*, is it authority for precluding a challenge to amendments to the constitution by initiative beyond the *Livermore* definitional standard of "amendment" either directly under the Guarantee Clause or under due process and the Tenth Amendment.

omission.[70] Whether the legislature, in proposing the use of initiatives to "amend" the constitution, also rejected the use of initiatives to accomplish reforms going beyond the *Livermore* standard, was an issue to come before the Supreme Court and be resolved in *McFadden v. Jordan.*[71]

C. *The 1948 Decision of* McFadden v. Jordan

The California Supreme Court decided the scope of constitutional change permissible by initiative in *McFadden v. Jordan.* The court resolved what the legislature proposed and the people accepted under the term "amendment" by enacting Article IV, Section 1, and the role of the *Livermore* restrictive definitional standards.[72] The court decided whether a proposed initiative amendment to the constitution was indeed an amendment or was a revision that could not be enacted by a majority vote at the polls.[73] The court, in preventing the proposed initiative amendment to the constitution from being put on the ballot, concluded that use of initiative amendments to change the constitution only extended to, and was limited by, the *Livermore* definition of the word "amendment" in Article XVIII.[74]

The *McFadden* court did not consider the validity of an enacted amendment per se, but the permissibility of an amendment by a particular procedure and process. The court determined the extent and scope of constitutional change permissible through the initiative process under the California Constitution.[75]

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70. The 1911 voter information sheet (now a pamphlet) to approve Senate proposal 22 to amend Article IV, Section 1 clearly demonstrates that the Legislature was acutely aware of both the Guarantee Clause and the *Pfahler* decision. Senator Gates and Asemblyman Clark, who wrote in support of the amendment, argued that initiatives were not new, referring to their use in the State of Oregon and the City of Los Angeles (*cf. Pfahler*), as well as their earlier use in New England, the latter being the historical basis used in *Pfahler* to uphold the use of initiatives at the local or municipal level against a Guarantee Clause challenge. Senator Wright, in authoring the opposition to the amendment in the voter information sheet, called it "so radical as to be almost revolutionary" in its tendency to change "the republican form of our government." He wrote, "[t]he Supreme Court of the United States may yet hold that this amendment is in conflict with that provision of the federal constitution which guarantees to each state a republican form government." *See* Official Ballot Pamphlet (Oct. 10, 1911).

71. 32 Cal. 2d 330, 196 P.2d 787 (1948).

72. *See id.*

73. *See id.* at 331-32, 196 P.2d at 788.

74. *See id.* at 349-50, 196 P.2d at 799.

75. *See id.* at 345-51, 196 P.2d at 796-800.

The court noted that the words "revision" and "amendment" had "heretofore in controlling aspects been the subject of scrutiny and exposition by this court."[76] The court then quoted the *Livermore* definitional standards of those terms.[77] Immediately thereafter, the court stated that "[t]he initiative power reserved by the people by amendment to the Constitution in 1911 (art. IV, § 1) applies only to the proposing and the adopting or rejecting of 'laws and amendments [as defined in *Livermore*] to the Constitution' and does not purport to extend to a constitutional revision."[78] The 1911 amendment was passed long after the *Livermore* decision and "is to be understood to have been drafted in the light of the *Livermore* decision."[79] This corresponds to the well established rule that "a legislative statute is . . . presumed to have been enacted in the light of such existing judicial decisions[80] as have a direct bearing upon it."[81]

Having established the standard for determining the scope of constitutional change permissible by initiative under Article IV, Section 1, the *McFadden* Court reviewed the proposed amendment before it, finding that it failed to meet the standard.[82] The court further explicated the applicable standard in rejecting an attempt to expand the definition of amendment under that article. The court stated:

> The people of this state have spoken; they made it clear when they adopted article XVIII and made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood that there was a real difference between amendment and revision. *We find nothing whatsoever in the language of the initiative amendment . . . to effect a breaking down of that difference.* On the contrary, the distinction appears to be scrupulously preserved by the express declaration in the amendment (particularly in the light of the *Livermore* case . . .) that the power to propose and vote on 'amendments to the Constitution' is reserved directly to

76. *Id.* at 332, 196 P.2d at 789.
77. *See id.* at 332-33, 196 P.2d at 789.
78. *Id.* at 333, 196 P.2d at 789.
79. *Id.* at 334, 196 P.2d at 789.
80. This includes both *Livermore* and *Pfahler.*
81. *McFadden*, 32 Cal. 2d at 334, 196 P.2d at 790. It also corresponds to the comments of Senators Gage and Wright and Assemblyman Clark in the 1911 voter informatin sheet. *See supra* note 69.
82. *See McFadden*, 32 Cal. 2d at 346, 196 P.2d at 796-97.

> the people in initiative proceedings, while leaving unmentioned the power and the procedure relative to constitutional revision, which revisional power and procedure, it will be remembered, had already been specifically treated in section 2 of article XVIII.[83]

The court observed that the construction of "amendment" proposed by intervenors "would reduce to the rubble of absurdity the bulwark so carefully erected and preserved."[84]

The court also rejected the contention that Article IV, Section 1 should be construed to "'give the people' the power to initiate directly a revision [a change beyond the *Livermore* amendment standard] as well as amendments" to prevent a possible "frustration of the will of the people," the court stated that the method of revision in Article XVIII "does not purport to be dispensed with, alternatively or otherwise, by section 1 of article IV, reserving the power to propose, and prescribing generally the procedure for bringing to a vote, 'laws and amendments to the Constitution.'"[85]

The *McFadden* decision determined that the extent of direct democracy to alter the primary document of the state by initiative only extends to, and is limited by, the *Livermore* definitional standards of amendment and revision. Any proposal to change the California Constitution which exceeds the *Livermore* limits constitutes a revision that may not be enacted by the initiative method under the 1911 amendment to Article IV. Rather, it must be enacted through the republican procedure provided by Article XVIII.

The Livermore definitional standards of revision and amendment that were made a part of the 1911 enactment of the initiative amendment to Article IV, Section 1 are not just any judicial constructions of these terms in the constitution. Rather, they serve as the specific judicial limitation mandated for determining the scope of the initiative power reserved to the people by that Article. Since the Livermore definitions of these words is a mandated part of a constitutional provision, they may not be altered except through a revision or an amendment. Accordingly, the alteration of the standard in Amador Valley, being neither a revision or amendment proposed through the legislature nor an initiative accepted by the people,

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83. *Id.* at 347-48, 196 P.2d at 798 (emphasis added).

84. *Id.* at 348, 196 P.2d at 798. The construction proposed by the intervenors is similar to the standard later created by Justice Richardson in the *Amador Valley* decision.

85. *Id.* at 350, 169 P.2d at 799.

violates due process—the requirements of Articles IV, XVIII, and VI—and the separation of powers doctrine of Article III, Section 3.

Construction of the limited scope of constitutional change permissible by initiative under the 1911 amendment represented, in "the fullest tenable measure" the "intention" of the legislature—exercising the state power reserved in the Tenth Amendment—to adopt direct democracy in California by proposing the amendment to Article IV, Section 1.[86] This construction also represents the fullest interpretation of the legislature's intent to exempt constitutional change by amendment in Article IV from the republican form then required by Article XVIII and secured by the Guarantee Clause in California. Thus, any constitutional change exceeding the *Livermore* standards enacted by initiative not only violates Article IV, but also violates Article XVIII and the California form of the Guarantee Clause.

D. The California Constitutional Structure

The California Constitution, before and after 1911, recognizes revision and amendment as the only two types of permissible changes to the document.[87] Together, these two types of constitutional alteration constitute the whole of constitutional change under the California Constitution. They are complements of each other. If a given change is not an amendment, it is necessarily a revision. These forms of change are also inversely related, such that any increase in the extent of change permitted by amendment automatically results in a corresponding decrease in the extent of changes requiring the revision procedure. Before the 1911 initiative amendment, there were different procedures for effecting a revision and an amendment. Both of these procedures were republican in form, requiring that all changes to the constitution be made with the approval and participation of the legislature, as well as acceptance by the voters. The reciprocal structure of the procedure was only between two republican enactment forms. Each of these republican forms of constitutional change was secured by the Guarantee Clause.

The above summary of the structure of constitutional change existing under the California Constitution when Senate Proposal 22 was accepted by the voters helps define California's Guarantee Clause in the area of constitutional change by initiative. First, since

86. *McFadden*, 32 Cal. 2d at 332, 196 P.2d at 788.
87. *See* CAL. CONST. art. XVIII, § 1.

the proposed amendment of the legislature only reserved amendment and not revision from the existing republican structure, making it subject to initiative, while leaving the existing structure untouched, any revision by initiative beyond the *Livermore* standard violates the California form of the guarantee of a republican form of government. Second, since the extent of change permissible by the amendment to Article IV proposed by the legislature constituted "the fullest tenable measure" of the scope of permissible change intended by initiative, any change beyond the fullest extent violates the required republican form of Article XVIII and the Guarantee Clause in California.

By reserving the initiative power to change the constitution by amendment, the 1911 amendment of Article IV necessarily made the republican requirements of Article XVIII for enacting a revision and the mandate of the Guarantee Clause subject to the same *Livermore* standards. In other words, a proposed constitutional change by initiative beyond the *Livermore* standards violates Article IV; any such constitutional change enacted by initiative is void as not having been enacted by the republican procedure required by Article XVIII. Such a constitutional change violates the Guarantee Clause by not having been enacted under the republican form of government required by the State and Federal Constitutions.

E. The Intention of the Legislature

As *McFadden* determined, the scope of constitutional change permitted initiatives by the amendment to Article IV—direct democracy under the Tenth Amendment—is "to be understood to have been drafted in the light of the *Livermore* decision" defining "amendment" as "the fullest tenable measure" of the intention of the legislature.[88] So too is it to be understood to have been drafted as the fullest tenable measure of the intent of the legislature to remove constitutional change from the republican forms of Article XVIII in light of the clear implication of the 1906 *Pfahler* decision. Not only had the legislature adopted the *Livermore* definition of the permissible extent of the amendment power in Article IV, it also adopted the clear implication of *Pfahler* on the permissible extent of the initiative process in California. This was necessary to preserve republican government as required by Article XVIII, incorporating the Guarantee Clause. Thus, the legislature, in proposing the 1911 initiative process, accepted limitation on direct democracy contained in Article IV—per

88. *McFadden*, 32 Cal. 3d at 334, 196 P. 2d at 789-90.

the *Livermore* decision—and the California limitation on the extent of that power to erode the federal requirement of a republican form of government in the Guarantee Clause—per the *Pfahler* decision.

The legislature intended to remove a certain quantum of constitutional change from the republican forms of enactment required by Article XVIII and make it available to direct democracy. The initiative amendments itself manifested this intention as it adopted a new plebiscitory procedure to alter the constitution to the limited extent of enacting amendments, while leaving untouched the existing revision procedure of Article XVIII.

The three legislators in the voter information sheet of 1911 clearly demonstrated that the extent of the initiative power to enact amendments to the constitution under Article IV was also the intended limit of permissible initiative action to alter the constitution under the Guarantee Clause in California. Senator Wright observed that the extent of the initiative power in the amendment—as drafted and limited in light of the *Livermore* definitional standard and the *Pfahler* Guarantee discussion—might conflict with the guarantee of a republican government.[89]

While it is not for a state to decide with finality what degree of direct democracy is acceptable under the Guarantee Clause in the federal Constitution, it is up to a state under the Tenth Amendment to decide what degree of direct democracy it accepts in state governance and the reciprocal level of the protection of a republican form of government that it requires under the Guarantee Clause. The state is at liberty in its constitution to accord its citizens a greater protection of republican government than is federally required under the Guarantee Clause. These state-declared limits on the use of direct democracy are then enforcable either under the Federal Guarantee Clause or the greater state view of it.[90]

One can assume that the Article IV power to change the constitution by initiative amendment, as defined in *Livermore*, satisfies the federal minimum requirement of a republican form of state government. Nonetheless, the state was at liberty to decide the extent of direct democracy to alter the constitution by initiatives it accepted as a part of the California Constitution. It need not equate state constitutional limits on the permissible extent of the initiative power with

89. *See* Official Ballot Pamphlet (Oct. 10, 1911).

90. *See* California v. Ramos, 463 U.S. 1014 (1983); Raven v. Deukmejian, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990).

the Guarantee Clause in the federal Constitution. However, the arguments in the voter information sheet demonstrate that the legislature proposed and the people approved such limits on altering the Constitution by initiative.

The court in *McFadden* could have rested its decision solely on construction of the state constitution. However, the *McFadden* court looked to the limits of the initiative power to change the basic state document, not only on the construction of Articles IV and XVIII in the state constitution, but also on the requirements of the guarantee of a republican form of government in both the California Constitution and the United States Constitution.

While the *McFadden* opinion never mentions the Guarantee Clause or the *Pfahler* decision, the court opened its discussion of the extent of constitutional change permissible by initiative under the 1911 amendment to Article IV, and the acceptablity of the proposed amendment before it under that standard, by stating that the proposal at bench was "barred from the initiative upon *any legally permissible construction of the pertinent constitutional provisions.*"[91] This language clearly refers to the "construction" of Articles IV and XVIII and not the measurement of the proposed amendment against that construction. The construction of Article IV involved the scope of constitutional change permissible by initiative under the term "amendment." The two key terms—amendment and initiative—in the provision that the court was considering had been scrutinized and interpreted in earlier supreme court decisions. The *McFadden* opinion is presumed to have been drafted in light of the *Livermore* and *Pfahler* decisions. The court's extended discussion of one—*Livermore*—and failure to mention the other—*Pfahler*—is significant.

The most immediate significance is that the court accepted that the initiative power to change the constitution by amendment in Article IV, as limited by the *Livermore* standards of amendment and revision, was a "legally permissible construction" of Article IV under the Tenth Amendment that does not contravene the Guarantee Clause. Since the *McFadden* Court determined that the initiative power to change the constitution, when limited to the *Livermore* standards did not, per se, violate the Guarantee Clause, there was no need for the court to discuss *Pfahler*, as this view conformed to the clear implication of the *Pfahler* decision. The issue would be

91. *See McFadden*, 32 Cal. 2d at 332, 196 P.2d at 788 (emphasis added).

concluded: the initiative power to change the constitution, when confined to the standards incorporated within Article IV, is permissible under the powers of the state reserved to it by the Tenth Amendment, and there is no necessity or reason to discuss *Pfahler.*

The conclusion of the *McFadden* Court that the proposed amendment before it was barred upon "any legally permissible construction" of the state constitution obviously was referring to the demands of the United States Constitution, including the Guarantee Clause in Article IV, Section 4, as well as the *Pfahler* construction and application of that provision. The highest state court was construing the state constitution. That court's construction was, of course, limited by the requirement that it be a "legally permissible construction" under the United States Constitution. The Guarantee Clause is the provision of the Federal Constitution in which the phrase "legally permissible construction" is most pertinent. In other words, the court drew the line between the extent of permitted direct democracy by initiatives under Article IV and the existing requirement of Article XVIII that changes in that document include the participation and approval of the representative—republican—form of democracy as required by the Guarantee Clause. The point at issue in the case was the standard to be applied before determining the validity of a proposed enactment under Article IV, Section 1. The standard to be used in distinguishing between direct and representative democracy when changing the state constitution is that of the Guarantee Clause.

In short, the *McFadden* decision determined that the permissible scope of constitutional change by initiative intended by the legislature and accepted by the people by enacting the 1911 amendment to Article IV, Section 1 was limited by the *Livermore* standards of amendment and revision. This conclusion was not only required by Articles IV and XVIII of the California Constitution, but this construction of the provisions was the limit of "any legally permissible construction" of those sections under the guarantee of a republican form of government in both the the United States and California Constitutions.

II. CONCLUSION

The State of California accepted the *Livermore* definitional standards of "amendment" and "revision" as the limit of permissible alteration of the California Constitution by initiative action under the 1911 amendment to Article IV, Section 1. Any constitutional change

enacted by initiative in excess of that standard is void as beyond the power of initiative. It is a violation of the republican requirements for enactment in Article XVIII, and a violation of the Guarantee Clause, as embodied in the California Constitution.

Since the *Livermore* definitional standards of "amendment" and "revision" are to be read into the initiative process as the constitutional criteria for determining if a given initiative amendment is permissible, those standards may only be changed by constitutional revision. Any attempted reformulation of the permissible limits of constitutional change by initiative violates due process and the Guarantee Clause, both in the form of enactment and in its failure to adequately protect a republican form of government for the State Constitution. Moreover, any constitutional changes enacted by initiative that exceed the *Livermore* definitional standards are void ab initio, even though approved by a state court under a different standard, if their original enactment would have violated the Guarantee Clauses of the California and United States Constitutions.