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Direct Democracy, the Guaranty Clause, and the Politics of the "Political Question" Doctrine: Revisiting *Pacific Telephone*

On this, the 150th anniversary of statehood, it is appropriate to examine one of Oregon's most conspicuous contributions to the American system of governance: direct democracy. In 1902, the voters of Oregon amended the state constitution—the first time that they had done so—and adopted the initiative and referendum. The initiative empowers citizens to petition to have statutory or constitutional measures put on the ballot for adoption. The referendum, in turn, authorizes citizens by petition or the legislature by law to refer a legislatively enacted measure to the voters for approval. Six years after the adoption of the initiative and referendum, Oregon voters completed their embrace of direct democracy, adopting (by constitutional initiative) the recall, in which citizens may petition to hold a special election to remove public officials from office.[1]

Oregon's role in the nationwide movement toward direct democracy was an important one. Oregon was among the first states

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[1] THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 125–26 (1989).

to adopt the initiative and referendum,[2] and it was the first state to adopt the recall. Its status as an early adopter and the extensive debates within Oregon regarding the need for more popular involvement in lawmaking led early proponents (and opponents) of direct democracy to refer to it as the "Oregon system" or "Oregon plan."[3] Moreover, it was Oregon's use of direct democracy—specifically, the initiative—that was first challenged in the U.S. Supreme Court as violating the Guaranty Clause of the U.S. Constitution, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[4] Opponents assailed the initiative and referendum for bypassing the representative institutions that, according to them, served the constitutionally essential function of filtering and tempering the more volatile popular political will.[5] In *Pacific States Telephone & Telegraph Co. v. Oregon*,[6] however, the U.S. Supreme Court refused to decide the matter, holding instead that Guaranty Clause challenges to direct democracy posed a nonjusticiable political question.

As a practical matter, the U.S. Supreme Court's refusal to adjudicate the constitutionality of direct democracy opened the door to the adoption and use of direct democracy throughout the nation. Today, twenty-seven states provide for the initiative, referendum, or both.[7] Election ballots in these states often contain numerous initiatives and referenda.[8] In Oregon in particular, between 1902 and 2007, Oregonians put 340 initiatives and 62 referenda on the ballot.

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[2] *Id.* at 26. South Dakota was the first to adopt the initiative and referendum in 1898, followed by Utah in 1900. David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System,"* 67 TEMP. L. REV. 947, 948 n.7 (1994).

[3] *See, e.g.*, 47 CONG. REC. 1332 (1911) (statement of Rep. Anderson); 47 CONG. REC. 1445 (statement of Rep. Crumpacker); Otto Praeger, *Direct Legislation Within the States*, DALLAS NEWS, Apr. 7, 1911; *see also* Schuman, *supra* note 2, at 948 n.7 (citing ALLEN H. EATON, THE OREGON SYSTEM: THE STORY OF DIRECT LEGISLATION IN OREGON (1912)).

[4] U.S. CONST. art. IV, § 4.

[5] *See generally* Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

[6] 223 U.S. 118, 149–51 (1912).

[7] M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 12 (2003).

[8] In the 2000 general election in Oregon, for example, there were eighteen constitutional and statutory initiatives, one statutory provision referred by petition, and two statutory provisions referred by the legislature on the ballot. SECRETARY OF STATE, OREGON BLUE BOOK 2001, at 316–17, *available at* http://bluebook.state.or.us/state/elections/elections22a.htm.

Of those, 118 of the initiatives and 21 of the referenda passed.[9] During the same period, the Oregon Legislature referred 407 measures to the people, of which 233 passed.[10] In the most recent election in 2008, there were twelve statewide measures on the ballot, and the state voter guide explaining the measures, along with pro and con statements from interested citizens, totaled 150 pages.

In light of the widespread use of direct democracy in Oregon and elsewhere, this anniversary provides a good occasion to examine how direct democracy at the state and local levels became an accepted part of the American constitutional order. In this Article, I argue that the constitutionality of direct democracy has never received the thorough judicial consideration that the issue deserves. The Oregon Supreme Court, which validated the initiative and referendum, did so in a case that, significantly, did not involve an initiated or referred measure; it was decided on other, nonconstitutional grounds that obviated the need for the U.S Supreme Court to opine on the constitutionality of direct democracy. By the time that the validity of direct democracy reached the U.S. Supreme Court several years later, the heated political controversy surrounding the adoption of direct democracy in several western states induced the Court in *Pacific Telephone* to avoid reaching the merits of the question. The net result was to close the federal courts to constitutional challenges to direct democracy under the Guaranty Clause, a doctrine that has—erroneously in my view—remained in place ever since.

In Part I, I briefly recount the history of the adoption of direct democracy in Oregon. In Part II, I turn to the Oregon Supreme Court's validation of direct democracy in *Kadderly v. City of Portland*,[11] showing how the unusual procedural posture in which the Guaranty Clause claim arose muddled the Oregon Supreme Court's

[9] SECRETARY OF STATE, OREGON BLUE BOOK 2009, *available at* http://bluebook.state.or.us/state/elections/elections09.htm.

[10] *Id.* The greater success of legislatively referred measures no doubt reflects the impact of the low threshold for popularly sponsored initiatives and referenda. In contrast to a legislatively sponsored referendum, which must garner the support of a majority of both houses, an initiative or popularly sponsored referendum can be put on the ballot by a petition signed by only a small percentage (the exact requirement of which has varied over time) of the state's citizens. Currently, popularly sponsored referenda require four percent, initiatives for statutory measures require six percent, and initiatives for constitutional amendments require eight percent of the number of votes cast for governor in the preceding election to be put on the ballot. BILL BRADBURY, SECRETARY OF STATE, OREGON BLUE BOOK 2003–04, at 296–313, *available at* http://bluebook.state.or.us/state/elections/elections06.htm

[11] 44 Or. 118, 74 P. 710 (Or. 1903).

consideration of the issue and produced an incomplete and ultimately unsatisfying theoretical reconciliation of direct democracy with republican government. In Part III, I describe the U.S. Supreme Court's opinion in *Pacific Telephone*, with particular emphasis on the Court's reliance on *Luther v. Borden*.[12] In Part IV, I then assess the Court's reasoning in *Pacific Telephone*, illustrating the flaws in the Court's analysis. Finally, in Part V, I offer a tentative explanation for why, in light of those analytical flaws, the U.S. Supreme Court ruled the way it did. Interestingly, this story has less to do with Oregon, the state in which the case arose, and much more to do with Arizona, the state whose belabored efforts to become part of the Union helped split a party and end a presidency.

I
DIRECT DEMOCRACY IN OREGON

The origins of Oregon's adoption of the initiative and referendum lie in the Populist and Grange movements of the late nineteenth century. That political history has been ably and comprehensively recounted by then-Professor, now-Judge David Schuman.[13] In brief, in the late nineteenth century, many viewed the Oregon legislature as corrupt and beholden to moneyed interests. As a way to bypass the legislature, the Oregon Populist Party proposed the adoption of the initiative and referendum.[14] Although only four Populists were elected to the Oregon Legislature in 1895, a bill to convene a constitutional convention to adopt the initiative and referendum nearly passed.[15]

Both disappointed and emboldened by their near success, Populists, such as William U'Ren, decided to push for a constitutional amendment adopting the initiative and referendum at the next session of the legislature two years later. The switch in mechanism carried one significant drawback: unlike a constitutional convention, which at the time could be called by the legislature alone, a constitutional amendment had to be enacted by two, successive legislatures before

12 Luther v. Borden, 48 U.S. 1 (1849).

13 *See generally* Schuman, *supra* note 2.

14 *Id.* at 953. In so doing, the state party was merely following the lead of the national Populist Party, which had formally embraced the initiative and referendum in its 1892 party platform. CRONIN, *supra* note 1, at 45.

15 Schuman, *supra* note 2, at 953. The Senate was evenly divided, and the House defeated the bill by only one vote. *Id.*

then being put to the people for ratification.[16] The legislature, however, failed to convene in 1897 due to a split in the state Republican Party.[17] A special session that met in 1898 then handily defeated the Populists' resolution.

Dismayed, the Populist proponents of direct democracy regrouped and focused their energy on grass-root efforts to educate and mobilize popular support for the adoption of the initiative and referendum. In 1899, a new resolution calling for the adoption of a constitutional amendment was offered. The proposed amendment provided in pertinent part that:

> [T]he people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly.[18]

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[16] OR. CONST. art. XVII, § 1 (1857). In 1906, the voters approved a constitutional amendment that required voter approval of any bill calling a constitutional convention.

[17] Schuman, *supra* note 2, at 954–55. Republicans had a clear majority in the legislature but were split between traditional Republicans and so-called "Silver Republicans" who wished to dispense with the gold standard and who supported the adoption of the initiative and referendum. After traditional Republicans secured the re-election of their leader as U.S. Senator, Populist and Democratic lawmakers joined the Silver Republicans in refusing to attend the House's sessions, depriving the House of the necessary quorum to convene. After two months, legislators gave up on convening the legislature and returned home, earning the 1897 legislature the derogatory title as the "Hold-Up Legislature." *Id.* at 954.

[18] OR. CONST. art. IV, § 1 (1902). The amendment in full amended article IV, section 1 to read:

> The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety) either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections,

As a result of the Populists' campaign, which generated substantial popular support for the amendment, virtually all political opposition to the measure vanished. Every political party in Oregon, except the Prohibitionists, endorsed the amendment. The 1899 legislature passed the resolution easily. The 1901 legislature, in turn, adopted the resolution with only one dissenting vote and ordered the amendment to be put to the people at an election the following year. On June 2, 1902, Oregon voters overwhelmingly approved the amendment by a vote of 62,024 in favor to 5668 opposed.[19]

All subsequent efforts to roll back the initiative and referendum failed. In 1905, conservative legislators introduced a bill calling a constitutional convention to revise the entire constitution, but the bill, which was viewed as a thinly disguised mechanism to repeal the initiative and referendum, was defeated.[20] Moreover, the following year, to prevent similar efforts, Populists initiated and the voters approved a constitutional amendment requiring a referendum on any bill calling a constitutional convention.[21] Even then, opponents of direct democracy persuaded the legislature to refer a measure calling a constitutional convention to the people, but voters overwhelmingly

> except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: "Be it enacted by the people of the state of Oregon." This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for justice of the supreme court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the secretary of state, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor.

[19] Schuman, *supra* note 2, at 956.

[20] *Id.* at 957. Given the overwhelming popularity of direct democracy in Oregon at the time, a constitutional convention was the only plausible mechanism for conservatives to repeal the new amendment. A convention might produce a new constitution that, while lacking provisions for direct democracy, was nevertheless so appealing to voters in other respects as to command popular assent. In contrast, a constitutional amendment to repeal the 1902 amendment, which would necessarily be limited to that one subject, would have been easily defeated by voters.

[21] OR. CONST. art. XVII, § 1 ("No convention shall be called to amend or propose amendments to this Constitution, or to propose a new Constitution, unless the law providing for such convention shall first be approved by the people on a referendum vote at a regular general election."). The measure passed with 47,661 in favor to 18,751 opposed. SECRETARY OF STATE, OREGON BLUE BOOK 2003–2004, at 296, *available at* http://bluebook.state.or.us/state/elections/elections10.htm.

defeated the measure.[22] For better or worse,[23] the initiative and referendum were a settled part of the Oregon political landscape.

The impact on Oregon lawmaking was immediate. In 1906, Oregon voters used the initiative to amend the state constitution to grant "home rule" authority to local governments and to extend the initiative and referendum to local voters.[24] In 1908, Oregon voters used the initiative to further expand direct democracy in Oregon, adopting the power of recall and, prior to the adoption of the Seventeenth Amendment to the U.S. Constitution, instructing the state legislature to elect as U.S. Senators those individuals selected by the people.[25] And, in 1912, eight years prior to the adoption of the Nineteenth Amendment to the U.S. Constitution, Oregon voters extended the right to vote to women.[26] All told, between 1902 and 1912, there were 102 initiated or referred measures put to Oregon voters. The 1908 voter pamphlet describing the various measures on the ballot and including arguments pro and con totaled 126 pages; the 1910 voter pamphlet ran over 200 pages.[27] As one commentator at the time observed, Oregon voters had to be "not only exceedingly intelligent, but exceedingly well informed."[28] One might add exceedingly dedicated and patient, too.

II

THE MISSTEP OF *KADDERLY*

Soon after their adoption, the constitutionality of the initiative and referendum was challenged in the Oregon courts, though in an unusual setting. In January 1903, prior to the advent of home rule authority, the Oregon legislature approved a new charter for the City of Portland. Among other provisions, the charter authorized the city to assess real property to pay for public improvements, such as roads and bridges. Moreover, the legislature expressly provided that the charter was to go into effect immediately upon its approval by the

22 Schuman, *supra* note 2, at 958.

23 *See id.* at 958–60 (discussing uses and abuses of direct democracy in Oregon).

24 *Id.* at 958.

25 CRONIN, *supra* note 1, at 126.

26 SECRETARY OF STATE, OREGON BLUE BOOK 2003–2004, at 298, *available at* http://bluebook.state.or.us/state/elections/elections12.htm.

27 Henry M. Campbell, *The Initiative and Referendum*, 10 MICH. L. REV. 427, 431 (1912).

28 Robert Treat Platt, *Some Experiments in Direct Legislation*, 18 YALE L.J. 40, 47 (1908).

governor "to insure the health, peace, and safety of the people of Portland." The governor approved the charter, and, less than a month later, the Portland City Council adopted a resolution instructing the city auditor to prepare an assessment of certain parcels of property to pay for street improvements that had been completed.

Seeking to avoid the assessment, a group of property owners filed suit challenging the city's authority to undertake the assessment. Among other claims, the property owners alleged that the Portland Charter could not have gone into effect immediately because the 1902 amendment required that the effective date of all legislative acts be delayed until ninety days after the adjournment of the legislature so as to allow the people the opportunity to exercise their referendum power. As such, according to the property owners, the assessment ordinance, which had been passed within that ninety-day window, was invalid. Defending the city's authority to enact the ordinance, the city and its codefendants responded that the legislature had expressly exempted the Charter from the mandated ninety-day delay by invoking the need to act immediately to protect the "health, peace and safety" of the Portland residents. The city argued further that, if the exception did not apply, the ninety-day delay was unconstitutional because the entire 1902 Amendment violated the Guaranty Clause of the U.S. Constitution.

Several features of this litigation are striking. First, the constitutionality of the initiative and referendum amendment did not arise in the context of a challenge to an initiated or referred measure. The Portland City Charter had been adopted by the legislature and approved by the governor. Rather, the constitutionality of direct democracy was put before the court in a backdoor fashion via the challenge to the ninety-day delay for legislative measures. Second, it was unclear that the 1902 amendment was responsible for this delay, and, even if it was, the challenge to the ninety-day delay hardly provided a proper case in which to analyze the constitutionality of the referendum power itself, let alone the constitutionality of the initiative power, which did not entail the ninety-day delay.[29] Third, the

[29] The original 1857 Constitution specified the ninety-day delay for all legislative bills, except those in which the legislature inserted an emergency clause. OR. CONST. art. IV, § 28 (1857). As a consequence, it could have been argued that the initiative and referendum amendment was not responsible for the ninety-day delay. The Oregon Supreme Court in *Kadderly*, however, conclusively declared that the initiative and referendum amendment modified and limited the legislature's power to exempt measures from the ninety-day delay. *See* Kadderly v. City of Portland, 44 Or. 118, 147, 74 P. 710, 720 (1903) (declaring that article IV, section 28 "has been modified by the amendment of 1902, so as to exclude

constitutional challenge to direct democracy was not made by the property owners but rather by the city and its codefendants.

The trial court dismissed the property owners' complaint, and the case was appealed to the Oregon Supreme Court, which held that the city charter had validly gone into effect immediately upon its approval by the governor. The court's opinion in *Kadderly v. City of Portland* is a striking example of judicial overreach. The court ultimately concluded that the legislature had properly invoked the exception to the ninety-day delay requirement by expressly referencing the need to act immediately to ensure the health and safety of the people of Portland. That holding was sufficient to decide the case, obviating the need for the court to address the Guaranty Clause claim.[30] Nevertheless, rather than rest solely on that determination, which was exclusively an issue of state law, the court chose to decide the federal constitutional issue as well.[31]

The court began its federal constitutional analysis by acknowledging that the U.S. Constitution did not define or prescribe

from the power to declare an emergency all laws except those necessary for the immediate preservation of the public peace, health, or safety"). As the court would later explain in *Sears v. Multnomah County*, 49 Or. 42, 45, 88 P. 522, 523 (1907), without that limitation, the legislature could evade the referendum power by putting emergency clauses into laws not dealing with urgent threats to the public health or safety.

Even so, the amendment's limitation on the legislature's power to put laws into effect immediately was formally distinct from—and most likely severable from—the amendment's conferral of the power of initiative and referendum on the people. As such, the latter was not put before the court by the former, and, on the merits, there was no reasonable basis to believe the former violated the Guaranty Clause. Surely, the people can mandate a ninety-day delay in the effectiveness of any or all legislative measures without implicating the Guaranty Clause—there is nothing in a republican form of government that would seemingly require that laws go into effect immediately. Any limitation on the legislature's power to exempt measures from such delay would therefore not implicate that clause.

30 Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 25 (1993); Schuman, *supra* note 2, at 956.

31 Hans Linde compares the Oregon Supreme Court's action in *Kadderly* to the U.S. Supreme Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which Chief Justice John Marshall resolved several other, nonconstitutional issues before turning to the constitutional question of the existence of the power of judicial review. *See* Hans Linde, *Kadderly at 100*, 64 OR. ST. B. BULL. 17, 18 (2003). In my view, that is an inapt comparison. Marshall had to resolve those underlying nonconstitutional questions before turning to the constitutional one so as to make clear that the Court had no choice but to resolve the constitutional question. To this day, the U.S. Supreme Court follows that rule of judicial decision making. In contrast, the Oregon Supreme Court had resolved the case on a nonconstitutional ground that obviated the need for its exploration of the federal constitutional claim.

the form of a "republican" government. Nevertheless, such a government, the court continued, must necessarily be one "administered by representatives chosen or appointed by the people or by their authority."[32] Of course, embracing that understanding of republican government placed direct democracy (or at least certain versions of it) in a constitutionally dubious position. After all, the gravamen of the Guaranty Clause challenge was that initiated and referred measures were unrepublican precisely because they circumvented or subordinated, respectively, the representative process.

The court's response was to finesse the issue. As the court declared, "the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place."[33] Rather, "[t]he government is still divided into the legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people." The amendment did reserve some legislative power to the people directly, but "the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed." Elaborating, the court noted that initiated measures, although they bypassed both the legislature and executive, "are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the Legislature at will." Though not mentioned expressly, referred measures were presumably valid for the same reason. In short, in the court's view, the Guaranty Clause only forbade governmental processes that abolished the representative branches of government or that "materially curtailed" the representative process by placing legislative measures beyond judicial review or legislative correction.

The Oregon Supreme Court's resolution of the Guaranty Clause issue was hardly conclusive as to all forms of direct democracy. As Hans Linde has pointed out, the court's interpretation avoided entirely the constitutionality of initiated constitutional amendments, which are manifestly beyond the legislature's ability to amend or repeal.[34] Likewise, its interpretation of the Guaranty Clause offered no clear guidance as to the validity of local direct democracy, particularly where, as in Oregon, the state constitution grants "home rule"

[32] *Kadderly*, 44 Or. at 146, 74 P. at 719.

[33] *Kadderly*, 44 Or. at 147, 74 P. at 720.

[34] Linde, *supra* note 30, at 26–27.

authority to local governments.[35] To say that direct democracy does not "materially curtail" the power of the state legislature does not address the propriety of popularly enacted measures at the local level, which measures often are constitutionally immune from correction by the state legislature.

Even as to those types of popularly enacted measures within its purview, the court's reasoning was far from satisfactory. In a sense, statewide initiatives and referenda did "materially curtail" the representative process; indeed, that was the whole point of such measures. The proponents of direct democracy had sold it to the people precisely as a mechanism to avoid the legislature, which was viewed as venal and corrupt. Perhaps the court could find refuge in the formalist distinction, which it evidently sought to make, that direct democracy "curtails" the representative process but not "materially" so. Yet, that analytical move requires a far more robust description of what it means to "materially curtail" the representative process. None was forthcoming. Moreover, the court's reliance on the fact that popularly enacted measures in Oregon would be subject to judicial review and subsequent legislative amendment or repeal hardly sufficed. The former was beside the point—the availability of judicial review of the merits of popularly enacted measures was surely not a sufficient substitute for legislative approval. Republican government must necessarily involve more than judicial review. And the latter rested on a curiously simplistic understanding of the legislative process. The court seemed to assume that any popularly enacted measure could become or remain law only with the legislature's approval (either expressly because it enacted the measure or tacitly because it refused to amend or repeal it). Yet, as students of the legislative process understand, the legislature's failure—or, even more obviously, its inability[36]—to amend or repeal a law hardly denotes its approval of the measure.

[35] In fairness, the validity of such local direct democracy could not be foreseen at the time of the *Kadderly* decision. It was only after *Kadderly*, in 1906, that the people of Oregon by constitutional initiative adopted a state constitutional amendment adopting home rule authority for cities. OR. CONST. art. XI, § 2; *see also* Cynthia Cumfer, *Original Intent v. Modern Judicial Philosophy: Oregon's Home Rule Case Frames the Dilemma for State Constitutionalism*, 76 OR. L. REV. 909 (1997) (discussing history of measure). That same year, the Oregon legislature referred a constitutional amendment authorizing local initiatives and referenda, which was approved by the people.

[36] Any subsequent legislative effort to modify or repeal a popularly enacted measure is subject to the governor's veto, which can only be overridden by a two-thirds vote of each house. OR. CONST. art. V, § 15b.

Likewise, the Oregon Supreme Court failed to appreciate the impact of direct democracy on the executive's authority. Both initiated and referred laws circumvent the governor's veto by allowing for the enactment of measures without her assent. Moreover, in the context of measures referred to the people by the legislature itself, the referendum process could be strategically deployed by the legislature precisely to avoid a gubernatorial veto. In short, direct democracy could be said not only to weaken the representative process as a whole, but also to tilt it in favor of the legislature at the expense of the executive by giving the former the choice as to whether to seek gubernatorial or popular assent to its measures.

One plausible answer to this concern was that the Guaranty Clause did not require states to vest the executive branch with a legislative veto—that an executive veto was not a necessary component of a "republican form of government." Under this view, limiting the veto power did not violate the clause because the greater power to dispense with the veto entirely included the lesser power to limit its applicability exclusively to certain types of measures, such as legislative bills. Such a view has strong historical and theoretical support. Strikingly, however, the Oregon Supreme Court implicitly rejected it, offering instead a paean to the executive veto as "one of the safeguards against hasty or ill-advised legislation which is everywhere regarded as essential."[37]

Rather, the court dismissed this aspect of the constitutional challenge on the ground that "[t]he veto power of the Governor is not abridged in any way, except as to such laws as the Legislature may refer to the people." That, of course, was factually untrue: initiated measures also avoid the executive veto. More importantly, acknowledging that the executive veto power is abridged with respect to legislatively referred measures hardly addressed the constitutional concern regarding such abridgment. If one believes (as the court did) that the gubernatorial veto is an "essential" check on the legislature, it is not clear how the legislature's power to refer measures directly to the people for approval can be tolerated. A legislature wishing to enact a measure that it knows the governor will veto may act strategically and refer the measure to the people directly, thereby bypassing the gubernatorial veto.

[37] *Kadderly*, 44 Or. at 147, 74 P. at 720.

In short, the *Kadderly* court was able to endorse direct democracy only by erroneously minimizing just how much the initiative and referendum transformed the structure of Oregon lawmaking. To be sure, the power of initiative and referendum had only been adopted by the people of Oregon the year before, so perhaps the court could be excused for its inability to perceive just how transformative the new powers of popular lawmaking would prove to be. Yet, given that the measure before it was not an initiated or referred one, and given that the court did not need to reach the constitutional issue in light of its holding regarding the inapplicability of the ninety-day waiting period, it is hard not to condemn the court for its rush to opine on the constitutionality of the initiative and referendum. The relationship between republican government and direct democracy was, and is, a fraught one, deserving a more thorough and nuanced analysis than *Kadderly* offered.

Despite the weaknesses in its analysis, *Kadderly* was not reviewed by the U.S. Supreme Court. The city and its codefendants that had raised the Guaranty Clause claim had prevailed and therefore had no reason to seek review by the U.S. Supreme Court. Conversely, the property owners who lost had no reason to challenge the court's Guaranty Clause analysis. Because the ninety-day delay requirement predated the initiative and referendum amendment, which, according to the Oregon Supreme Court, only narrowed the legislature's discretion to exempt measures from that delay, the invalidation of that amendment on Guaranty Clause grounds would not have invalidated the legislature's decision to put the Portland City Charter into immediate effect. Moreover, even if the owners had sought review, the fact that the decision rested on an issue of state law negated the existence of jurisdiction in the U.S. Supreme Court. Not only were the Oregon Supreme Court's ruminations about direct democracy and the Guaranty Clause pure dicta, it was precisely because they were dicta that rendered federal review impossible. Until the U.S. Supreme Court was confronted with a case presenting the Guaranty Clause issue in a federally cognizable fashion, *Kadderly*'s questionable validation of direct democracy would remain on the books.

With U.S. Supreme Court review unavailable for the time being, *Kadderly* set the stage for the judicial embrace of direct democracy, both in Oregon and elsewhere. In 1906, the voters of Oregon amended the constitution again to provide for initiative and referenda

at the local level,[38] and, when the measure was challenged on Guaranty Clause grounds, the Oregon Supreme Court invoked *Kadderly* to uphold the measure.[39] Meanwhile, outside Oregon, several other state supreme courts, including those in California and Oklahoma relied upon *Kadderly* in upholding their systems of direct democracy.[40] As one commentator put it, "[b]y 1912 the initiative and referendum seemed secure from judicial attack."[41]

III

THE U.S. SUPREME COURT AND *PACIFIC TELEPHONE*

The constitutionality of the direct democracy finally made it to the U.S. Supreme Court in 1912 in *Pacific States Telephone and Telegraph Co. v. Oregon*.[42] In 1903, the Oregon legislature enacted an annual license fee, which ranged in amount from $10 to $200, on all corporations doing business in the state.[43] In 1906, at the same time that they were extending the initiative and referendum power to local voters, Oregon voters initiated and approved a two percent tax on the gross receipts of telephone and telegraph companies as a license fee for doing business within the state.[44] Pacific States Telephone, an Oregon corporation, refused to pay the newly initiated tax, and the state filed suit to collect the delinquent, unpaid taxes. The company defended its refusal to pay on, among other grounds, the basis that the initiative process violated the Guaranty Clause and therefore the initiated tax was unconstitutional.[45]

In several respects, *Pacific States* was a good vehicle for the Oregon courts to assess the validity of direct democracy. Unlike *Kadderly*, *Pacific States* involved a constitutional challenge to an initiated measure. Moreover, the challenge was presented after the

[38] The measure passed 47,678 in favor to 16,735 opposed. SECRETARY OF STATE, OREGON BLUE BOOK 2007, *available at* http://bluebook.state.or.us/state/elections/elections10.htm.

[39] Kiernan v. City of Portland, 57 Or. 454, 469, 112 P. 402, 404 (1910).

[40] *In re* Pfahler, 88 P. 270 (Cal. 1906); *Ex parte* Wagner, 95 P. 435 (Okla. 1908).

[41] WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 264 (Cornell Univ. Press 1972).

[42] 223 U.S. 118 (1912).

[43] H.B. 2, 1903 Leg., 22nd Sess. (Or. 1903).

[44] The measure passed 70,872 in favor to 6360 opposed. SECRETARY OF STATE, OREGON BLUE BOOK 2007, *available at* http://bluebook.state.or.us/state/elections/elections10.htm.

[45] State v. Pac. Sts. Tel. & Tel. Co., 53 Or. 162, 163, 99 P. 427, 427 (1909).

passage of the measure, allowing the court to see more fully how direct democracy played out in this particular circumstance. Had they wanted to, the Oregon courts could have looked into both the origin of the measure (e.g., had the Legislature considered such a measure? If so, on what basis was it defeated?) and the nature of the popular campaign for it (e.g., who had sponsored the initiative? How had the campaign for it been waged?). The answer to those questions would have yielded substantial insight into the need for and potential dangers of direct democracy, thereby providing much needed context for assessing the relationship of direct democracy to republican government. Unfortunately, no such inquiry was undertaken. The Oregon Supreme Court summarily rejected the company's constitutional claim on the basis of *Kadderly*,[46] and the company filed a writ of error in the U.S. Supreme Court.

The U.S. Supreme Court, in turn, dismissed the writ of error for lack of jurisdiction, holding unanimously that a constitutional challenge to the initiative and referendum power under the Guaranty Clause presented a nonjusticiable "political question."[47] The Court began its analysis by characterizing the Guaranty Clause claim as necessarily focusing on the state governmental process as a whole. Either a state's government viewed in its entirety was republican in form or it was not; particular lawmaking processes in the state would not be analyzed separately to determine whether they were republican in character.[48] Viewing the Guaranty Clause challenge in this broad sense raised the stakes for the litigation, as the Court itself realized. If the company's challenge were upheld, the Court warned, it would

> necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in

[46] *Pacific Telephone*, 53 Or. at 165, 99 P. at 428 ("Whether the initiative and referendum amendment to the Constitution is invalid, because repugnant to the provisions of the Constitution of the United States, was thoroughly argued to and considered by this court in Kadderly v. Portland, and the views of the court as then and now entertained are indicated in the opinion filed in that case, and it is needless to restate them at this time.").

[47] *Pacific Telephone*, 223 U.S. at 150. At the time, there were only eight justices on the Court. Justice John Marshall Harlan died on October 14, 1911, while *Pacific Telephone* was pending, and his replacement, Justice Mahlon Pitney, was not sworn in until March 18, 1912, after the case had been decided. *See* U.S. Supreme Court, Members of the Supreme Court of the United States, *available at* http://www.supremecourtus.gov/about/members.pdf.

[48] Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 141 (1912).

> Oregon, because it cannot be assumed, if the proposition be well founded, that there is at one and the same time one and the same government which is republican in form, and not of that character.[49]

So viewed, the company's Guaranty Clause challenge threatened to wreak "anomalous and destructive effects upon both the state and national governments."[50]

This premise regarding the nature and broad scope of a Guaranty Clause challenge formed the linchpin of the Court's ensuing analysis. First, as a policy matter, the Court worried that enforcing the Guaranty Clause would entail a ruinous expansion of the judicial power. In the Court's view, to allow the company's challenge to go forward would invite every citizen wishing to be free of some state tax or regulation "to assail in a court of justice the rightful existence of the state." Moreover, were any such challenge upheld, not only would the federal court necessarily have to decree the invalidity of the existing state government, it would also have the duty and power "to build by judicial action upon the ruins of the previously established government" and reconstitute a new state government lest "anarchy is to ensue."[51] The Court's view of such consequences was clear:

> Do the provisions of § 4, Art. IV, bring about these strange, far-reaching and injurious results? That is to say, do the provisions of that Article obliterate the division between judicial authority and legislative power upon which the Constitution rests? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it and thus overthrow the Constitution upon the ground that thereby the guarantee to the States of a government republican in form may be secured, a conception which after all rests upon the assumption that the States are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the Nation.[52]

For the Court, to state these questions was to answer them.

Second, construing the Guaranty Clause challenge in this global, all-or-nothing approach brought into play the Court's decision a half-century earlier in *Luther v. Borden*.[53] To fully understand and evaluate the Court's invocation of *Luther*, it is important to delve into the facts of that case in some detail. *Luther* arose out of a truly

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[49] *Id.*

[50] *Id.*

[51] *Id.* at 141–42.

[52] *Id.* at 142.

[53] 48 U.S. 1 (1849).

remarkable event in antebellum American history: the "Dorr Rebellion." In the 1840s, Rhode Island, alone among the states, still operated under its royal charter, which had been issued by Charles II in 1663.[54] Among other defects, the charter provided for an apportionment of the legislature that, almost two centuries out of date, grossly underrepresented the political influence of the newly urbanizing cities.[55] Even more problematically, only men owning $134 of real property and their eldest sons were entitled to vote.[56] As a consequence, by 1841, there were less than 10,000 freemen entitled to vote out of an adult male population of approximately 25,000 and a total state population of more than 108,000.[57]

After several attempts to persuade the Rhode Island General Assembly to reform the charter failed, proponents of constitutional reform called their own constitutional convention, which proposed a new constitution known as the "People's Constitution."[58] Bypassing the charter government, supporters of the People's Constitution put their proposed constitution directly to the people for ratification at town meetings at which all adult, white, male residents could vote. The People's Constitution was overwhelmingly ratified (13,947 in favor to fifty-two opposed).[59] At the same time, the assembly called a constitutional convention, which also proposed a new constitution known as the "Freeholders' Constitution." The Freeholders' Constitution resembled the People's Constitution in large part.[60] Moreover, attempting to co-opt the reformist opposition, the charter

[54] WIECEK, *supra* note 41, at 86.

[55] MARVIN E. GETTLEMAN, THE DORR REBELLION: A STUDY IN AMERICAN RADICALISM: 1833–1849, at 6 (1980).

[56] *Id.*

[57] *Id.* app. B, at 234.

[58] THE PEOPLE'S CONVENTION, THE PEOPLE'S CONSTITUTION (1841), *reprinted in* GETTLEMAN, *supra* note 55, app. A, at 205–31.

[59] WIECEK, *supra* note 41, at 91. Not only did the nearly 14,000 votes in favor of ratification of the People's Constitution constitute a majority of the adult male population, a majority of freemen (4925 out of approximately 9500 in the state) participated in the election and voted in favor of ratification. GETTLEMAN, *supra* note 55, at 54. The U.S. Supreme Court subsequently dismissed the significance of the popular ratification of the People's Constitution, noting that, not only had the charter government refused to authorize its submission to the people for ratification, the informal, "voluntary" process used by its proponents was biased in favor of ratification. Luther v. Borden, 48 U.S. 1, 36 (1849).

[60] WIECEK, *supra* note 41, at 91 n.14. Both proposed constitutions, for example, excluded African-Americans but otherwise empowered most adult, white males to vote. GETTLEMAN, *supra* note 55, at 61, 209.

government provided that all native born, white, adult citizens were entitled to vote in the election to ratify the Freeholders' Constitution.[61] The Freeholders' Constitution, however, was narrowly defeated (8013 in favor to 8689 opposed).[62]

The adoption of the People's Constitution and ensuing rejection of the Freeholders' Constitution produced a political crisis in Rhode Island. The charter government Assembly passed a law banning the formation of any government under the People's Constitution and ultimately declared martial law.[63] Undeterred, the reformists held elections for state offices under the People's Constitution and elected Thomas Dorr as the People's Governor. The People's Legislature convened for two days in early May 1842 but hastily adjourned.[64] Dorr and other reformists first sought assistance from President Tyler and then attempted to seize the Providence arsenal, but both efforts were unsuccessful.[65] Dorr attempted to regroup and rally his supporters in Chepachet, Rhode Island.[66] In response, Governor Samuel King called out the state militia to suppress what he and other supporters of the charter government saw as an illegitimate, armed insurrection. Before the militia reached Chepachet, however, Dorr fled to New Hampshire. In his absence, the People's Government collapsed.[67]

Although the People's Government was a failure, the reformists succeeded in producing constitutional reform. In November 1842, just a few months after the collapse of the People's Government, the voters approved a new constitution that expanded suffrage to almost all adult men, including (unlike the People's Constitution) African-Americans, and that partially redressed the malapportionment of the Assembly.[68] The new Constitution took effect in May 1843. Dorr himself, however, could not take much solace from this victory: when Dorr subsequently returned to Rhode Island, he was arrested, tried and convicted of treason, and sentenced to life imprisonment.[69]

61 GETTLEMAN, *supra* note 55, at 61.

62 *Id.* at 79 n.97.

63 *Id.* at 90; *Luther*, 48 U.S. at 37.

64 GETTLEMAN, *supra* note 55, at 101–03.

65 *Id.* at 108–12, 120–22.

66 WIECEK, *supra* note 41, at 98.

67 *Id.* at 98–99.

68 GETTLEMAN, *supra* note 55, at 144–47.

69 WIECEK, *supra* note 41, at 99. Governor Jackson subsequently released Dorr, and, in 1854, the Rhode Island legislature formally reversed his conviction. *Id.* at 100.

The adoption of a new, reformed constitution would seem to have been the end of the story, but the validity of the Dorr Rebellion was presented to the federal courts in a run-of-the-mill tort suit. After the collapse of the People's Government, the charter government engaged in a systematic campaign to roundup and punish supporters of the Dorr government.[70] In late June 1842, a posse of Rhode Island militia forcibly entered and searched the house of Martin Luther, a supporter of the People's Government.[71] Luther subsequently sued the members of the posse, including Luther Borden, for trespass in federal court.[72] The members of the posse defended their action on the ground that they were members of the Rhode Island militia and were discharging their legal duties under the law of the legitimate government of Rhode Island. In response, Luther sought to prove that the Charter Government was unrepublican, that the People's Government was in fact the legitimate government of the state of Rhode Island, and that therefore Borden and the posse were not acting under legitimate authority.[73] The jury found in favor of Borden and the defendants, and Luther appealed to the U.S. Supreme Court.

Writing for the Court, Chief Justice Roger Taney ruled that the federal courts were bound to accept the Rhode Island courts' determination that the Charter Government was the legitimate government of the state. According to Taney, this rule sprang in part from the general rule of comity—that federal courts are bound by state court determinations on points of state law.[74] It also rested on pragmatic grounds—that there were no principled, apolitical grounds upon which a federal court could evaluate and determine which of two competing governments was the legitimate one.[75] Indeed, Taney was fearful of the consequences of allowing federal courts to undertake the inquiry that Luther proposed. Expressing concerns that would be reprised a half-century later in *Pacific Telephone*, Taney declared:

> For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter

[70] *See* GETTLEMAN, *supra* note 55, at 141.

[71] *Id.* at 142.

[72] *Id.* at 178. Luther was able to invoke the jurisdiction of the federal circuit court based on diversity of citizenship; before the posse arrived, Luther fled to Massachusetts. *Id.*

[73] *See* Luther v. Borden, 48 U.S. 1, 32–35 (1849).

[74] *Id.* at 40.

[75] *Id.* at 41–42.

> government had no legal existence during the period of time above mentioned,—if it had been annulled by the adoption of the opposing government,—then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.[76]

In light of those consequences, the U.S. Supreme Court was unwilling to enter such an inquiry unless the Constitution clearly demanded it, which, in the Court's view, it did not.

Taney then turned to the Guaranty Clause. His analysis was brief and conclusory: "Under this article of the Constitution," Taney wrote, "it rests with Congress to decide what government is the established one in a State."[77] Congress does so, Taney continued, by seating the representatives and senators from the state, and, when it does so "its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."[78] The determination as to which government was legitimate, like the determination as to which government was republican in character, was a political, not judicial question.

Taney's analysis of the Guaranty Clause leaves much to be desired. The Court's declaration that Congress's determination is binding on the federal courts conflicted with its ruling just a few moments earlier that the state court's determination on this point was authoritative and binding. Whose decision bound the federal courts if Congress seated senators selected by a government that the state courts had rejected? Moreover, as even Taney realized,[79] Congress's "decision" to seat the representatives and senators from Rhode Island hardly denoted its approval of the Charter Government. The representatives and senators had been seated without debate in May 1841—over a year before the People's Government had been formed.[80] Once it did assemble in early May 1842, the People's Government did not send

[76] *Id.* at 38–39.

[77] *Id.* at 42.

[78] *Id.*

[79] *Id.* ("It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy.").

[80] 10 CONG. GLOBE, 27th Cong., 1st Sess. 1 (1841).

senators to Congress, let alone set a date for the election of a new slate of representatives, to contest the seats occupied by the senators and representatives selected by and under the auspices of, respectively, the Charter Government.[81] In the absence of express congressional debate and resolution regarding which government was the legitimate, republican one, it was beside the point whether the Court was bound by Congress's authoritative determination. The question before the Court was not its authority to act when Congress had resolved the matter, but rather its power when Congress had not. Taney's conclusory response that, nevertheless, "the right to decide is placed there [in Congress], and not in the courts" begged the question.[82]

In any event, it was this dramatic episode in American history and the Court's refusal to step into the middle of it that the *Pacific Telephone* Court found dispositive of the company's Guaranty Clause challenge to Oregon's initiated license tax. The Court recounted at length the Rhode Island events and quoted extensively from the Court's decision in *Luther*, which the Court lauded as having "never been doubted or questioned since." The Court did not explain *Luther*'s relevance, but the evident proposition of law that the Court drew from that decision was that, as a categorical matter, all Guaranty Clause challenges were nonjusticiable because such challenges invariably put the Court in the position of evaluating and potentially negating the existence of an entire state government.

Having raised the stakes in this fashion and thereby called into play its decision in *Luther*, the Court quickly proceeded to its ultimate conclusion that the determination whether the adoption of the initiative and referendum was consistent with a republican form of government was a political question to be resolved by Congress, not by the federal courts. As the Court saw it, the company's challenge was not to "the tax as a tax, but on the State as a State," requiring that Oregon "establish its right to exist as a State, republican in form."[83] Such an attack was, the Court concluded, "political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power."[84]

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[81] GETTLEMAN, *supra* note 55, at 102–03.

[82] *Luther*, 48 U.S. at 42.

[83] Pac. Sts. Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 150–51 (1912).

[84] *Id.* at 151.

The same day as it handed down its decision in *Pacific Telephone*, the Court also issued its decision in *Kiernan v. City of Portland*.[85] That case involved a Guaranty Clause challenge to direct democracy at the local level, and, just as the Oregon Supreme Court had cursorily upheld Oregon's adoption of the municipal initiative and referendum on the basis of *Kadderly*, the U.S. Supreme Court blithely dismissed the Guaranty Clause challenge as nonjusticiable on the basis of *Pacific Telephone*.[86] In short, regardless of the differences among the various forms of direct democracy, the Court had made clear that the federal courts were closed to Guaranty Clause challenges to direct democracy. The implications for direct democracy were not lost on contemporary observers. As one progressive journal reported with glee just weeks after *Pacific Telephone* was decided, the Supreme Court's decision meant that "there is no obstacle to the adoption of the initiative and referendum by any State in the Union."[87]

IV
THE POLITICAL QUESTION DOCTRINE, REPUBLICAN GOVERNMENT, AND DIRECT DEMOCRACY

Pacific Telephone was a deeply flawed decision. As noted above, the linchpin in the Court's conclusion that *Pacific Telephone* presented a nonjusticiable political question was its assumption that Guaranty Clause challenges necessarily focused on the republican character of the state government viewed as a whole. Yet, the Court never explained why that was so—why it could not evaluate particular lawmaking processes within the state government as republican or not. Surely the Guaranty Clause itself did not compel the Court to take the state government as an undifferentiated whole. Congress, for example, could presumably refuse to admit proposed states or seat representatives and senators from already admitted states that had adopted particular forms of lawmaking that, in its view, were unrepublican. Indeed, just a few months before *Pacific Telephone* was decided, Congress had engaged in precisely that type of focused inquiry.[88] Moreover, were the rule any other, states could

[85] 223 U.S. 151 (1912).

[86] *Id.* at 163–64.

[87] *Direct Legislation Not Unconstitutional*, OUTLOOK, Mar. 9, 1912, at 516.

[88] *See infra* text accompanying notes 130–39 (discussing congressional debates over initiative, referendum, and recall provisions in proposed Arizona constitution). In fact, during the congressional debate, Senator George Sutherland, the future U.S. Supreme Court Justice, expressly endorsed Congress's authority to engage in such piecemeal

easily evade the requirements of the Guaranty Clause by embedding unrepublican lawmaking processes within a larger framework of republican processes.[89] And, if Congress can engage in such individualized review, surely the courts can too.

Perhaps the Court meant only to suggest that the sole judicial remedy for a violation of the Guaranty Clause was the wholesale invalidation of the state government. There is no support, however, for such a necessarily thermonuclear reading of the Guaranty Clause. The constitutional guarantee may run to the state as a whole, but, as Larry Tribe has observed, when the whole foundation of the constitutional challenge is that a state government has been rendered unrepublican by the adoption of a particular lawmaking process, the remedy would properly be to invalidate the problem-causing process, not dispatch the entire state government.[90] Likewise, invalidating laws produced via an unrepublican process does not necessarily require the invalidation of laws produced via republican processes. To be sure, there are conceivable, though implausible, scenarios in which the constitutional violation is so great and pervasive as to call into question the entire state government. For example, suppose that a state were to dispense entirely with its legislature and vest all power in a hereditary governor (i.e., a monarch). Even if the remedy there would be to invalidate the entire state government and all its actions, that would not compel the same broad remedy when the violation is not so extensive. More modestly, there may be occasions in which an unrepublican process is so intertwined with a republican process that the invalidity of the former calls into question the validity of the latter, but traditional principles of severability would identify those situations and provide for an appropriate but still limited remedy. In short, there is nothing in the Guaranty Clause that would require the Court to invalidate an entire state government and all its actions

analysis of individual state lawmaking processes under the Guaranty Clause. *See, e.g.*, 47 CONG. REC. 2794 (1911) (statement of Sen. Sutherland); *see also* 47 CONG. REC. 3712 (statement of Sen. Crawford) (noting that "provision" in proposed Arizona constitution was "unrepublican").

89 Suppose, for example, a hypothetical state decided to vest the power over some area of public policy, say the disposal of solid waste, exclusively in an unreviewable, hereditary monarch. Lawmaking with regard to all other matters remained vested in the popularly elected legislature, subject to a qualified veto by the popularly elected governor. The hereditary monarchy is clearly unrepublican, yet the state government as a whole still appears more republican than not.

90 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-13, at 369 (3d ed. 2000).

merely because one distinct aspect of the government is unrepublican in character.

Focusing (as the Court should have) on the individual lawmaking process challenged by the telephone company would have had two dramatic consequences for the Court's analysis in *Pacific Telephone*. First, such a piecemeal approach would have laid to rest the Court's professed consequentialist fear that upholding the telephone company's challenge would necessarily require negating the existence of the entire Oregon state government, invalidating all the laws enacted in Oregon in the ten years since direct democracy had been adopted, and thereby requiring the federal courts to fashion by judicial edict a new government from the ruins of the old. The gravamen of the company's constitutional challenge was that the initiative and referendum process itself was unrepublican, not that all lawmaking processes in Oregon were. Because the Oregon system of direct democracy was adopted in a constitutional amendment, traditional principles of severability clearly pointed toward treating the initiative and referendum as distinct and severable from the preexisting system of legislative lawmaking under the original, unamended state constitution. Moreover, the invalidation of such process would only have called into question those measures adopted pursuant to it, not all acts of the state government since 1902.[91]

Second, the piecemeal approach would have eliminated the relevance of *Luther v. Borden* to this and other Guaranty Clause challenges to individual lawmaking processes. *Luther* was applicable only because, in the Court's view, both cases asked the judiciary to invalidate an entire state government and all the acts undertaken by it. The piecemeal approach, of course, avoids this eventuality. Unlike *Luther*, in which a decision on the merits would have negated the existence of either the Charter or People's Government, *Pacific Telephone* involved a Guaranty Clause claim that could be upheld without imperiling the validity of state government in Oregon. In short, *Luther* was inapposite.

Recasting the Guaranty Clause analysis in this less revolutionary and disruptive fashion does not mean by itself that the Court was wrong to hold that *Pacific Telephone* presented a nonjusticiable political question. Without the specter of governmental Armageddon

[91] In the elections between 1902 and 1912, when *Pacific Telephone* was decided, there were thirty-three initiatives adopted by Oregon voters. SECRETARY OF STATE, OREGON BLUE BOOK 2009, *available at* http://bluebook.state.or.us/state/elections/elections09.htm.

or the seemingly dispositive precedent of *Luther* to undergird it, though, the argument for treating the Guaranty Clause as nonjusticiable evaporates. As the Court subsequently elucidated in *Baker v. Carr*,[92] the political question doctrine turns upon whether there is a "textually demonstrable constitutional commitment" of the resolution of the constitutional issue to a coordinate branch or whether there is a "lack of judicially discoverable and manageable standards" to guide the courts' resolution of the matter.[93] Neither of those circumstances existed with respect to the Guaranty Clause challenge to Oregon's system of direct democracy.

Take the argument that the Guaranty Clause commits its enforcement to Congress and the President, not to the courts. This is what Taney seemed to imply in *Luther*, but, on examination, there is no support for the view that the Constitution entrusts the enforcement of the Guaranty Clause *exclusively* to the political branches. Certainly the text of the Guaranty Clause, which should be the foundation of any "textually demonstrable" commitment of the issue, does not expressly mandate its resolution by the political branches and them alone.[94] The Guaranty Clause refers to the "United States," not "Congress" or "the President," as the guarantor of republican government, and there is nothing in the term "United States" that necessarily excludes the federal judiciary.[95] Indeed, as Arthur Bonfield first observed, the fact that the Guaranty Clause was placed by the framers in Article IV, not Article I or II, suggests that the guarantee was one for the entire federal government to ensure, not just the political branches.[96]

Moreover, as a functional matter, there is little to commend congressional enforcement as the exclusive remedial mechanism. As others have argued, Congress is in an exceptionally poor position to guarantee republican government in the states. Congress's authority to refuse to seat representatives and senators from an unrepublican state—the mechanism envisioned by Taney in *Luther*—is more formal than real. The perfunctory ceremony held at the beginning of each biennial Congress is hardly the forum for a comprehensive and probing assessment of the republican bona fides of each state's

92 369 U.S. 186 (1962).

93 *Id.* at 217.

94 *See* WIECEK, *supra* note 41, at 287.

95 *See id.* at 301.

96 Bonfield, *supra* note 5, at 523.

government.[97] And, as *Luther* illustrated, developments in the state may unfold in ways that significantly delay or even preclude congressional review.[98] Furthermore, even if Congress were to consider the republican bona fides of individual states, the draconian nature of the sanction—depriving a state of its congressional representation—would surely make Congress reluctant to act except in the most extreme circumstances.[99] For that reason, some congressmen have contradicted Taney's prescription in *Luther* and disputed Congress's authority to refuse to seat congressional delegations.[100]

Alternatively, one could argue that the Guaranty Clause lacks the judicially manageable standards necessary for judicial enforcement, but that is an even more dubious route to take. To be sure, the meaning of a "republican form of government" is far from clear, but, the interpretive ambiguity present in that phrase is surely no greater than that in "freedom of speech," the "equal protection of the laws," or "commerce . . . among the several states."[101] And, as *Kadderly* indicated, courts can construe the phrase "republican form of government" without engaging in nonjudicial activity. A given court's interpretation of the Guaranty Clause might be wrong, but there is nothing about the Guaranty Clause that defies illumination by traditional interpretive tools that are used with respect to other abstractly worded but judicially enforced provisions. Indeed, the U.S.

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[97] *See* WIECEK, *supra* note 41, at 127–28; *see also* Linde, *supra* note 30, at 29–30 (paraphrasing WIECEK, *supra* note 41, at 127–28, to assert that seating a congressional delegation does not establish that a government is republican because Congress cannot be expected to consider the issue during an opening-day formality when no prior objection has been made).

[98] This is particularly true with respect to unrepublican developments at the local level. Surely the Guaranty Clause applies to municipal governments, but it is inconceivable that Congress could review the lawmaking processes of the 89,000 local governments in the United States as part of its proceedings to seat congressional delegations from the states. *See* U.S. CENSUS BUREAU, LOCAL GOVERNMENTS AND PUBLIC SCHOOL SYSTEMS BY TYPE AND STATE: 2007, *available at* http://www.census.gov/govs/cog/GovOrgTab03ss.html.

[99] As one commentator observed in the wake of *Pacific Telephone*, it would be "unthinkable" that Congress would deprive a state of its congressional representation. *Direct Legislation Not Unconstitutional*, OUTLOOK, Mar. 9, 1912, at 516.

[100] *See, e.g.*, 47 CONG. REC. 1401 (1911) (statement of Rep. Mann). More recently, the U.S. Supreme Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969), casts doubt on Congress's power to refuse to seat qualified, duly elected members from a state.

[101] *Cf.* WIECEK, *supra* note 41, at 287, 303.

Supreme Court in *Baker* noted that the Guaranty Clause is not beyond judicial construction.[102]

There is perhaps more force to the prudential concerns that sometimes are raised with respect to judicial enforcement of the Guaranty Clause. The specter of disagreement or, worse, confrontation between the Court and the political branches with respect to the republican character of a given state troubles some. Of course, there is the same possibility of disagreement and confrontation with respect to other constitutional provisions that are judicially enforced.

Moreover, to the extent that prudential concerns should influence the assertion of jurisdiction, there is one powerful, pragmatic reason for the U.S. Supreme Court to treat Guaranty Clause claims as justiciable in the ordinary case: the need for a uniform, federally provided interpretation. As Hans Linde correctly observed, *Pacific Telephone* does not foreclose judicial enforcement of the Guaranty Clause; it only forecloses *federal* judicial enforcement.[103] State courts remain free, even after *Pacific Telephone*, to enforce the Guaranty Clause. Indeed, the result of *Pacific Telephone* was not to displace *Kadderly*; to the contrary, it left *Kadderly* as the law of the land in Oregon. Not only may state courts adopt ill-formed or dubious interpretations of the clause—as the Oregon Supreme Court did in *Kadderly*—courts in different states may reach different interpretations of the clause. The meaning of a "republican form of government" may be open to reasonable debate, but surely our constitutional order would be better off with a definitive answer provided by the U.S. Supreme Court, rather than a crazy quilt of divergent interpretations reached by state courts.[104]

In short, once the analytical focus is limited to the question whether a given lawmaking process is republican in form, there is no good reason for federal courts to refuse the exercise of congressionally granted jurisdiction to enforce the requirements of the Constitution. In the absence of extraordinary circumstances that make the general rule inapplicable, Guaranty Clause challenges to particular lawmaking processes do not present nonjusticiable "political questions."

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[102] Baker v. Carr, 369 U.S. 186, 222 n.48 (1962).

[103] Linde, *supra* note 31, at 20.

[104] *Cf.* Cohens v. Virginia, 19 U.S. 264, 416 (1821) (noting that need for interpretive uniformity supported existence of jurisdiction by U.S. Supreme Court over state court decisions).

V
UNDERSTANDING *PACIFIC TELEPHONE*

The Court's curious refusal to entertain federal jurisdiction raises the question why the Court would remove the federal judiciary from the controversy surrounding the adoption of direct democracy. That it wanted to do so is clear not only from the result of *Pacific Telephone* but also the weak reasoning embraced by the Court to justify its decision. Neither *Luther* nor the illusory fears of political anarchy compelled the Court to stay its hand. Rather, those considerations were makeweights called into service by a Court that wished to have nothing of this fight for other, unstated reasons. But what could they be?

At a certain level, inquiries into the underlying motivations of the Court must necessarily be conjecture. We cannot know with certainty what forces—intellectual, political, or otherwise—animated the justices. Nevertheless, courts, like any institution, take action for a reason, and we can try to make sense of the Court's action, particularly when, as here, its own explanation is so transparently incomplete (at best) or disingenuous (at worst).

A. Conventional Explanations

The most obvious candidate for the Court's decision to treat the Guaranty Clause challenge to direct democracy as nonjusticiable is that the Court wished to refrain from intruding on matters of state sovereignty by reviewing state political processes, particularly when the constitutional basis for doing so—the Guaranty Clause—is so ambiguous. Alexander Bickel, for example, praised *Pacific Telephone* as an "exercise of self-restraint" by the Court.[105] Perhaps the Court felt the need to eschew what it saw as an invitation for judicial activism, but that seems highly doubtful. *Pacific Telephone* was decided only seven years after *Lochner v. New York*, in which the Court impressed the Due Process Clause into service as a vehicle for the judicial review of the substantive merits of state and local legislation. The Guaranty Clause, even at it broadest reading, would not license the wide-ranging judicial review and concomitant intrusion into state sovereignty that the comparatively vacuous

[105] 9 ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910–21, at 311 (1984).

doctrine of economic substantive due process at the time entailed. Moreover, even the most avid commitment to judicial restraint does not justify the wholesale abandonment of an express constitutional guarantee as *Pacific Telephone* accomplished. Whatever the doubts regarding the exact meaning of "republican form of government," those doubts did not justify leaving that Guaranty entirely to the political process.

Alternatively, perhaps the Court did not want to place itself in a position in which its decisions would conflict with those made by the federal political branches. A judicial determination that a particular state lacked a republican government might contradict a contrary assessment by Congress, which, so the argument goes, would embarrass the U.S. Supreme Court and perhaps lead to retaliatory measures by Congress.

At least in this general formulation, the "political confrontation" rationale seems implausible because the possibility of conflict is so remote (and is certainly not so inevitable to justify the wholesale abdication of judicial enforcement of the Guaranty Clause). As discussed above, the Court envisioned that Congress would consider the republican character of each state government in deciding whether to seat that state's congressional delegation. Given the reality that Congress does not use that ceremonial occasion to do so, however, the Court was mistaken. Certainly in the absence of a specific congressional floor debate regarding the republican character of a given state's government, the Court had no basis to assume that Congress had considered the bona fides of the state government. And, not to gild the lily: there was certainly no evidence that Congress, in seating the Oregon congressional delegations since 1902, had formed a definitive view of the republican nature of the Oregon state government.

Likewise, while a judicial decision might contradict any determination Congress may have made in admitting a state into the Union, that conflict would be more formal than real. To be sure, when admitting a state into the Union, Congress typically recites that the proposed state constitution is "republican" in character; however, a judicial determination that a particular state's government is not republican would only contradict that congressional determination with respect to state lawmaking processes as they existed at the time

of the state's admission into the Union.[106] *Pacific Telephone*, of course, involved a challenge to a state constitutional amendment that altered the very form of state government that Congress had endorsed as republican in 1859 when it admitted Oregon.[107] Hence, at least with respect to subsequent alterations to the state constitution, judicial review under the Guaranty Clause could potentially reaffirm, not undermine, the admitting Congress's will. Moreover, because the current Congress need not necessarily share the same view of republican government as the prior Congress that admitted the challenged state into the Union, it is unclear that judicial invalidation of state lawmaking processes that existed at the time of admission would offend the current Congress. And, at least for a Court fearful of political confrontation and congressional retaliation, it would be the current Congress, not a Congress of a half-century earlier, whose views would matter.

This last insight may point to the real reason why the U.S. Supreme Court so desperately wanted to avoid a decision on the merits in *Pacific Telephone*. It was not so much that the Court felt the need to honor the 35th Congress's decision in 1859 to admit Oregon as a state or the 58th and ensuing Congress' decisions to seat representatives and senators from Oregon after the adoption of the initiative and referendum amendment in 1902. Rather, it was because the Court feared inserting itself into the constitutional debate regarding direct democracy that was raging in 1911, both within the 62nd Congress and between Congress and President William Taft. At the time, like other items on the Progressive agenda, direct democracy generated substantial partisan debate with Democrats and progressive Republicans generally supporting it and traditional Republicans typically opposing it.[108] Moreover, this partisan debate had erupted with particular severity in the months leading up to the U.S. Supreme Court's decision in *Pacific Telephone*, during the battle over the admission of Arizona to the Union. *Pacific Telephone* may be best understood as the product of a desire by the Court to avoid inserting itself into the heated, partisan, interbranch debate over direct

[106] Even then, the admission may not be conclusive as to Congress's will at the time if Congress did not separately consider the republican character of a given lawmaking process later challenged in court. Linde, *supra* note 30, at 30 (citing *Ex Parte* Wagner, 95 P. 435, 436 (Okla. 1908)).

[107] Pac. Sts. Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912); An Act for the Admission of Oregon into the Union, ch. XXXIII, 11 Stat. 383 (Feb. 14, 1859).

[108] CRONIN, *supra* note 1, at 52.

democracy that the recent admission of Arizona both revealed and aggravated.

B. Arizona and the Progressive Agenda

The fault lines in the congressional battle over Arizona statehood began to take shape in 1907, five years before *Pacific Telephone*. That year, Congress admitted Oklahoma as a state. Notably, Oklahoma's Constitution contained the initiative and referendum, making it the first state to be admitted with such provisions in its original constitution.[109] That victory for progressive proponents of direct democracy, however, was short-lived. The progressive Republican President Theodore Roosevelt was succeeded in 1909 by the more traditional, conservative Republican President William Taft. Taft disliked the initiative and referendum, which he viewed as signs of a "rising tide of radicalism in the West."[110] In fact, in October 1909, Taft visited the Arizona territory and expressly warned its citizens not to copy the Oklahoma Constitution, which he derided as the product of a "zoological garden of cranks."[111] Two years after Taft's election, however, dissatisfaction with the Taft administration produced an upheaval in the 1910 congressional mid-term elections. Democrats regained control of the House of Representatives for the first time since 1842, and while Republicans nominally retained control of the Senate, the Senate Republicans were split between the conservatives, led by Senator Nelson Aldrich, and the progressives, led by Senator Robert LaFollette. With the Senate almost evenly split, the eight progressive Republican Senators effectively controlled the balance of power.[112] The stage was set for a showdown between the President and Congress and between progressives and conservatives over the progressive agenda, which included the promotion of direct democracy.

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109 OKLA. CONST. art. V, § 1 (1907).

110 JOHN BRAEMAN, ALBERT J. BEVERIDGE: AMERICAN NATIONALIST 172 (1971) (citing Letter from Taft to Joseph Cannon (June 17, 1909)).

111 John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 31 (1988) (citing Arizona Gazette, Oct. 13, 1909, at 1, cols. 1–2).

112 GEORGE E. MOWRY, THE ERA OF THEODORE ROOSEVELT AND THE BIRTH OF MODERN AMERICA: 1900–1912, at 273 (1958). Republicans held sixty of the ninety-two seats in 1910. *See* U.S. Senate, Party Division in the Senate 1789–Present, *available at* http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited June 1, 2009).

In 1910, Congress had passed an enabling act authorizing both New Mexico and Arizona to convene constitutional conventions to draft state constitutions as a prelude to admission.[113] In New Mexico, Republicans secured the most seats at the New Mexico convention, and the resulting constitution omitted the initiative entirely and contained a watered down version of the referendum that made popular referenda highly difficult to undertake.[114] New Mexico's decision to eschew direct democracy pleased conservatives, including President Taft, who formally approved the proposed constitution.[115]

The admission of Arizona, however, was fraught with difficulty. Both the national Democratic and Republican parties backed statehood for Arizona in principle.[116] When the time came to elect delegates to the constitutional convention, however, the territorial Democratic and Republican parties took opposing sides with regard to the initiative and referendum, which became the predominant issue in the election.[117] In contrast to New Mexico, Democrats won a sizeable majority in the Arizona convention, securing forty-one of the fifty-two seats. Moreover, thirty-nine of the delegates pledged during the campaign to support the initiative and referendum.[118]

When the convention convened in October 1910, the adoption of direct democracy was one of the first measures considered, with support for it understandably strong. Democratic delegates favorably examined the Oklahoma and Oregon constitutional provisions

113 Act of June 20, 1910, ch. 310, 36 Stat. 557 (1910).

114 A petition to refer a legislative measure to the people had to be signed by not less than ten percent of the qualified electors in each of three-fourths of the counties and, in aggregate, by not less than ten percent of the entire state electorate. N.M. Const. art. IV, § 1 (1911); *see also* Jerry W. Calvert, *A Popular Referendum Device and Equality of Voting Rights—How Minority Suspension of the Laws Subverts "One Person-One Vote" in the States*, 6 CORNELL L.J. & PUB. POL'Y 383, 388 (1997).

115 *See* 47 CONG. REC. 1234 (1911) (statement of the clerk reading letter from President Taft to the U.S. Senate and House of Representatives dated Feb. 24, 1911).

116 Democratic Party Platform of 1908, *reprinted in* 1 NATIONAL PARTY PLATFORMS 144, 149 (Donald Bruce Johnson ed., rev. ed. 1978); Republican Party Platform of 1908, *reprinted in* 1 NATIONAL PARTY PLATFORMS 157, 162 (Donald Bruce Johnson ed., rev. ed. 1978). Even before he left office, President Roosevelt had endorsed the admission of Arizona as a state—a position that President Taft likewise embraced. *See* Theodore Roosevelt, Eighth Annual Message (Dec. 8, 1908), *reprinted in* III THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790–1966, at 2327 (Fred L. Israel ed. 1966); William Taft, First Annual Message (Dec. 7, 1909), *reprinted in* STATE OF THE UNION MESSAGES, *supra*, at 2364.

117 Charles Foster Todd, The Initiative and Referendum in Arizona 18 (1931) (unpublished masters thesis, University of Arizona).

118 Leshy, *supra* note 111, at 32.

regarding direct democracy and extolled the virtues of popular participation in government.[119] Republican opponents responded that the inclusion of the initiative, referendum, and recall might cost Arizona its bid for statehood.[120] One delegate in particular attacked the initiative as inconsistent with the Guaranty Clause, expressly pointing to the *Pacific Telephone* litigation then pending before the U.S. Supreme Court.[121] Adding credibility to the Republicans' prediction, President Taft visited Arizona while the convention was in session and, reprising statements made a year earlier, criticized the Oklahoma Constitution in a transparent attempt to dissuade the Arizona delegates from embracing direct democracy.[122]

Neither the Republicans' resistance nor Taft's opposition to direct democracy deterred the delegates, who overwhelmingly approved the initiative, referendum, and, perhaps most importantly, a recall for all public officials, including judges.[123] The recall of judges was particularly important to the Democratic Party's labor supporters, who viewed the recall power as a way to restrain pro-business judges from interfering in labor disputes by issuing labor injunctions.[124] Taft's repeated admonitions to Arizonans to eschew direct democracy did have one tangible effect on the convention proceedings, however. Near the end of the convention, after the provisions adopting direct democracy had been approved, the convention chaplain opened the proceedings with the prayer that President Taft not veto Arizona's admission "for a little thing like the initiative and referendum; Lord, don't let him be so narrow and partisan as to refuse us self-government."[125] On December 9, 1910, the delegates approved the proposed constitution by a wide margin,[126] and, on February 9, 1911, the voters of Arizona overwhelmingly ratified the constitution,

119 DAVID R. BERMAN, ARIZONA POLITICS & GOVERNMENT: THE QUEST FOR AUTONOMY, DEMOCRACY, AND DEVELOPMENT 33 (1998); Leshy, *supra* note 111, at 99.

120 Leshy, *supra* note 111, at 102, 105 & n.667.

121 *Id.* at 105.

122 Russell Roush, The Initiative and Referendum in Arizona: 1912–1978, at 115 (1979) (unpublished Ph.D dissertation, Arizona State University) (citing George S. Hunter, "The Bull Moose Movement in Arizona," 10 ARIZONA AND THE WEST 343–62 (1968)).

123 Roush, *supra* note 124, at 124; STEVEN L. PIOTT, GIVING VOTERS A CHOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA 144 (2003).

124 H.A. Hubbard, *The Arizona Enabling Act and President Taft's Veto*, 3 PAC. HIST. REV. 307, 322 (1934).

125 BERMAN, *supra* note 119, at 35; Leshy, *supra* note 111, at 105.

126 PIOTT, *supra* note 123, at 144. The ultimate vote was 41–11 in favor. BERMAN, *supra* note 119, at 33.

sending it to Congress and President Taft for their approval as required by the Enabling Act.[127]

Back in Washington, conservative Republicans seized upon the provisions in the proposed Arizona Constitution regarding direct democracy as an attack on representative government and the rule of law. In the summer of 1911, in an address to the Yale Law School, Taft's Attorney General, George Wickersham, lambasted the "new scheme of government by initiative, referendum and recall embodied in the constitutions of Oklahoma and Arizona" as fundamentally unrepublican.[128] After praising New Mexico for largely eschewing direct democracy, Wickersham attacked the proposed Arizona Constitution as a vehicle for the suppression of the majority by a small handful of motivated voters. Wickersham's language and tone were trenchant. Noting that revolutionary France and Switzerland had adopted similar systems, Wickersham caustically warned that to adopt a system of direct democracy "would be to substitute for the institutions which are the growth and evolution of centuries of American experience, the devices of French revolution and Swiss socialism."[129]

The constitutionality of direct democracy likewise divided Congress, which debated the admission of Arizona and New Mexico in the spring and summer of 1911. Opponents of Arizona's admission seized upon its embrace of direct democracy. Although the recall of judges drew some of the most caustic attacks,[130] opponents also rejected the initiative and referendum as both dangerous and unconstitutional.[131] Viewing "republican" government as

[127] BERMAN, *supra* note 119, at 35; Leshy, *supra* note 111, at 56–57. The vote was 12,187 in favor to 3302 opposed.

[128] George W. Wickersham, *New States and Constitutions*, 21 YALE L.J. 1, 29 (1911).

[129] *Id.* at 31.

[130] *See, e.g.*, 47 CONG. REC. 3691 (1911) (statement of Sen. Root) (decrying judicial recall as "degeneracy"); 47 CONG. REC. 3723 (statement of Sen. O'Gorman) (declaring judicial recall "to be the most destructive and the most revolutionary assault ever made upon the stability of our Government"); *see also* 47 CONG. REC. 1327 (statement of Rep. Willis) (acknowledging that referendum is "probably" republican but opposing judicial recall); 47 CONG. REC. 1402 (statement of Rep. Mann); 47 CONG. REC. 1448–49 (statement of Rep. Crumpacker); 47 CONG. REC. 3695 (statement of Sen. Nelson) (opposing judicial recall as unrepublican); 47 CONG. REC. 3697, 3712 (statement of Sen. Crawford); 47 CONG. REC. 3733 (statement of Sen. Bradley) (opposing judicial recall as unrepublican); 47 CONG. REC. 4222 (statement of Rep. Howland); 47 CONG. REC. 4231 (statement of Rep. Cannon) (opposing judicial recall as unrepublican).

[131] *See, e.g.*, 47 CONG. REC. 1251 (statement of Rep. Legare); 47 CONG. REC. 1444 (statement of Rep. Crumpacker); 47 CONG. REC. 1504 (statement of Rep. Littleton); 47

synonymous with "representative" government,[132] they attacked the initiative for allowing the people to bypass the representative institutions of government.[133] Even the referendum, which does not entirely displace the role of the legislature, was challenged by some as unrepublican.[134] In fact, implying that direct democracy would ultimately lead to despotism, Representative Julius Kahn (R-CA) hyperbolically attributed the fall of the French Republic and the establishment of Napoleon's dictatorship to the referendum.[135] More disparagingly, Senator Weldon Heyburn (R-ID) asserted of Arizona's proposed admission with provisions for direct democracy, "[w]e want no freaks in this household of States."[136]

In response, supporters of Arizona's admission urged a more limited understanding of the Guaranty Clause as forbidding only monarchial or aristocratic forms of government and endorsed the constitutionality of direct democracy as consistent with republican government by empowering the people to rule themselves.[137]

CONG. REC. 2795 (statement of Sen. Sutherland); 47 CONG. REC. 3735 (statement of Sen. Bailey); 47 CONG. REC. 4125 (statement of Sen. Heyburn).

132 47 CONG. REC. 1523, 4231 (statement of Rep. Cannon); 47 CONG. REC. 3712 (statement of Sen. Crawford); 47 CONG. REC. 3735 (statement of Sen. Heyburn).

133 *See, e.g.*, 47 CONG. REC. 1341, 1346 (statement of Rep. Kahn); 47 CONG. REC. 1445 (statement of Rep. Crumpacker); 47 CONG. REC. 1504 (statement of Rep. Littleton); 47 CONG. REC. 2795 (statement of Sen. Sutherland); 47 CONG. REC. 3735–36, 4120–21 (statement of Sen. Bailey); *see also* 47 CONG. REC. 1348 (statement of Rep. Hamilton) (noting that initiative's constitutionality was a close one).

134 47 CONG. REC. 3735 (statement of Sen. Heyburn); 47 CONG. REC. 4121 (statement of Sen. Bailey).

135 47 CONG. REC. 1340. Representative Kahn's hyperbolic attack was not finished. Referring to the judicial recall, Kahn declared that, if judges can be recalled, there would be no rule of law and, therefore, "the law colleges of that State should all be entirely abolished." *Id.* at 1342. And, as for the initiative, it "would ultimately lead to the destruction of all government" and to "anarchy." *Id.* at 1346.

136 47 CONG. REC. 3735 (statement of Sen. Heyburn). Not content just to malign Arizona, Senator Heyburn also launched into an ad hominem attack on the voters in Arizona and other states that had adopted direct democracy. 47 CONG. REC. 4124 (asking "are men going mad"); 47 CONG. REC. 4126 ("That is where the initiative comes from—it comes from the cranks.").

137 *See, e.g.*, 47 CONG. REC. 311 (statement of Sen. Chamberlain); 47 Cong. Rec. 443 (statement of Sen. Works); 47 CONG. REC. 1245 (statement of Rep. Martin); 47 CONG. REC. 1331–32 (statement of Rep. Anderson); 47 CONG. REC. 1334 (statement of Rep. Stedman); 47 CONG. REC. 1411–12 (statement of Rep. Dupre); 47 CONG. REC. 1462 (statement of Rep. Ferris); 47 CONG. REC. 1472 (statement of Rep. Norris); 47 CONG. REC. 1499 (statement of Rep. McGuire); 47 CONG. REC. 1515–17 (statement of Rep. Flood); 47 CONG. REC. 1521 (statement of Rep. Sherley); 47 CONG. REC. 4229 (statement of Rep. Davenport). While they endorsed its constitutionality and supported the right of each state to select its own form of government within constitutional limitations, not all of

Rejecting the notion that republican government meant only representative government, one representative invoked Abraham Lincoln, declaring that a republican government is one "of the people, by the people, and for the people."[138] Indeed, flipping the opponents' attack on itself, Senator George Chamberlain (D-OR) extolled direct democracy as "essential to the perpetuation of our institutions and the preservation of a republican form of government."[139]

In August 1911, after several months of debate, Congress adopted a resolution admitting Arizona as a state.[140] In an effort to mollify conservative opposition, the resolution required Arizona to hold an election at which voters could approve a constitutional amendment limiting the recall to executive and legislative officials, but admission was not contingent on the voters actually adopting the amendment.[141] That was insufficient for President Taft, who, on August 15, 1911, vetoed Arizona's admission.[142] Equating the judicial recall with "legalized terrorism," Taft railed against the recall as "destructive of independence in the judiciary" and "injurious to the cause of free government."[143] Moreover, responding to proponents of direct democracy who defended it as a way to empower popular majorities, Taft offered a lengthy and sharp critique of unfettered majoritarian government, declaring:

the supporters of Arizona's admission thought that direct democracy was desirable. *See* 47 CONG. REC. 1411–12 (statement of Rep. Dupre) (opposing initiative, referendum, and recall); 47 CONG. REC. 1472 (statement of Rep. Norris) (opposing recall of judges).

138 47 CONG. REC. 4241 (statement of Rep. Hardy).

139 47 CONG. REC. 319.

140 The House of Representatives initially approved the resolution admitting New Mexico and Arizona on May 23, 1911. The exact number of representatives supporting the resolution is unknown because no roll call was taken. 47 CONG. REC. 1528 (recording that resolution passed on voice vote). A fairly clear view of the size of support for the resolution, however, can be gleaned from two other votes taken that same day within moments of the main vote. On a Republican-sponsored amendment to make Arizona's admission conditioned on the repeal of the judicial recall, the House voted 142–50 against the amendment. 47 CONG. REC. 1525. After the House approved the main resolution, a motion to recommit the resolution to the Committee on Territories was rejected by a vote of 215-58. 47 CONG. REC. 1528. In turn, the Senate approved the House resolution on August 8, 1911, by a vote of 53-18. 47 CONG. REC. 3742. The House then concurred in the Senate amendments, which were minor and related to New Mexico's admission, 47 CONG. REC. 3814, and the joint resolution was presented to the President on August 11, 1911. 47 CONG. REC. 3829.

141 *See* H.J. Res. 14, § 7, 62d. Cong., 1st. Sess. (1911).

142 47 CONG. REC. 3964–66 (veto message).

143 *Id.* at 3964, 3965; *see also* Campbell, *supra* note 27, at 432–33 (contending that judicial recall "means the destruction of the independence of the judiciary" and "the complete overthrow of all government by law").

> A popular government is not a government of a majority, by a majority, for a majority of the people. It is a government of the whole people by a majority of the whole people under such rules and checks as will secure a wise, just, and beneficent government for all the people.[144]

Taft's veto of Arizona's admission because of the judicial recall was puzzling on several levels. As several congressmen noted at the time, the recall, even as applied to judges, paled in comparison to the sweeping changes in governance wrought by the adoption of the initiative and referendum.[145] Applied to elected officials (which in Arizona included judges),[146] the recall would add marginally little popular control beyond that already provided by regular, periodic elections and, correspondingly, threaten marginally little decrease in judicial independence for the same reason. As a consequence, Taft's focus on the judicial recall while ignoring the initiative and referendum was, in the words of Representative John Martin (D-CO), akin to "straining at a gnat and swallowing a camel."[147] Moreover, as almost everyone including President Taft understood even at the time,[148] once Arizona was admitted, its citizens could amend their constitution to reinsert the judicial recall without any interference from Congress or the President—as Arizonans in fact did. In short, Taft's veto not only focused on the least troublesome mechanism of direct democracy, it would not even forestall its ultimate adoption.[149]

Following Taft's veto, Congress immediately enacted a new resolution admitting Arizona as a state but this time expressly on the condition that Arizona amend its constitution to remove the judicial

144 47 CONG. REC. 3964.

145 47 CONG. REC. 4220 (statement of Rep. Martin).

146 Under the Arizona Constitution, state supreme court justices were elected to six-year terms, and state superior court judges were elected for four-year terms. ARIZ. CONST. art. IV, §§ 3, 5 (1910).

147 47 CONG. REC. 4220.

148 *See, e.g.*, 47 CONG. REC. 3966 (veto message) (acknowledging that Arizona, once admitted, could adopt judicial recall); 47 CONG. REC. 4230 (statement of Rep. Davenport).

149 In light of these incongruities, one cannot help but think that Taft, acting in the fall of 1911 and fully cognizant of the then-pending *Pacific Telephone* litigation, hoped that the Supreme Court would resolve the constitutionality of the initiative and referendum. Indeed, Taft's lengthy and tangential tirade against popular majoritarianism in his veto message seemed calculated more to impress a judicial audience than sway popular or congressional opinion. Of course, if Taft hoped that the Court would do the dirty work for him and invalidate the initiative, he was to be sorely disappointed.

recall.[150] President Taft signed the new resolution without comment[151] and on December 12, 1911, Arizona voters duly amended their constitution, limiting the recall to legislative and executive officials.[152] Taft subsequently acknowledged Arizona's compliance with the congressional resolution and on February 14, 1912, Arizona was admitted to the Union.[153] Ironically, Taft's and the conservative Republican's efforts to force the repeal of the judicial recall were largely for naught: nine months later, as many had predicted, Arizona voters amended their constitution to reinsert the judicial recall.[154]

The fight in Congress over Arizona's admission both revealed and fueled a more fundamental split within the Republican Party that had been brewing for years. Progressive Republicans, such as La Follette, had become increasingly disenchanted with President Taft and the conservative Republicans.[155] In January 1911, La Follette and other progressives formed the National Progressive Republican League ("NPRL") with the avowed hope of promoting the progressive Republican agenda, including direct democracy.[156] By the summer of 1911, the NPRL decided to field a candidate to challenge Taft for the Republican nomination, and, after former President Theodore Roosevelt demurred, La Follette announced his campaign for the Republican nomination.[157] La Follette stumbled early on,[158] and, in February 1912, Roosevelt changed his mind and announced his

150 47 CONG. REC. 4141 (Senate approval of S.J. Res. 57 by vote of 53-9); 47 CONG. REC. (House approval of S.J. Res. 57).

151 47 CONG. REC. 4381. Given his dismal view of the Oklahoma Constitution with its embrace of direct democracy, Taft's approval of the revised resolution admitting Arizona with the initiative, referendum, and recall of legislative and executive officials is curious.

152 BERMAN, *supra* note 119, at 35; Leshy, *supra* note 111, at 58.

153 Leshy, *supra* note 111, at 58. Carl Hayden, Arizona's only representative, was sworn in to the House on February 19, 1912, while Marcus Smith and Henry Ashurst were sworn in to the Senate on April 2, 1912. 47 CONG. REC. 2198, 4146. Confirming that Congress does not use such occasions to assess the republicanness of state governments, all three were sworn in without any debate about the character of Arizona's government, even though that very subject had convulsed the Congress just months before.

154 Leshy, *supra* note 111, at 58 n.320.

155 FRANCIS L. BRODERICK, PROGRESSIVISM AT RISK: ELECTING A PRESIDENT IN 1912 32–33 (1989) (discussing progressive anger at administration's handling of congressional leadership, tariff reform, and conservation of public lands).

156 *Id.* at 40; JAMES HOLT, CONGRESSIONAL INSURGENTS AND THE PARTY SYSTEM, 1909–1916, at 49–50 (1967); MOWRY, *supra* note 112, at 291.

157 BRODERICK, *supra* note 155, at 40; HOLT, *supra* note 156, at 50.

158 BRODERICK, *supra* note 155, at 43.

intention to run for the Republican nomination as a progressive Republican. Meanwhile, conservative Republicans rallied around the incumbent, President Taft. Roosevelt won significant victories in the Republican Midwest heartland, including Taft's own home state of Ohio,[159] but Taft's forces secured a majority of the delegates to the national convention. Fearing progressivism more than defeat in November, Taft's supporters ramrodded his renomination through the national convention.[160] In response, the Progressives bolted from the party and formed their own, the Progressive or "Bull Moose" party, with Roosevelt as its presidential nominee.[161]

Although the split in the Republican Party was driven by differences between progressives and conservatives on a number of issues, direct democracy was one of the more salient and important issues dividing the two sides. Roosevelt and the Progressives explicitly advocated the adoption of the initiative, referendum, and recall.[162] In fact, Roosevelt had opened his campaign with the express declaration of his support for the right of the people to be able to recall individual judicial decisions that they thought erroneous.[163] Roosevelt's and the Progressives' embrace of direct democracy, especially the judicial recall, horrified conservative Republicans, who rallied around President Taft.[164] Taft, of course, had already made his hostility to direct democracy clear. His veto of Arizona's admission had cemented the impression that he was an implacable foe

159 HOLT, *supra* note 156, at 56.

160 BRODERICK, *supra* note 155, at 46–56.

161 *Id.* at 107–11.

162 Progressive Party Platform of 1912, *in* 1 NATIONAL PARTY PLATFORMS, *supra* note 116, at 176. Even before the formal creation of the Progressive party, Roosevelt had endorsed the initiative and referendum, Theodore Roosevelt, *Nationalism and Popular Rule*, OUTLOOK, Jan. 21, 1911, at 97, and praised Oregon's experience with direct democracy as having "produced good results." *Id.* With the formal split from the Republican party, however, Roosevelt's commitment to direct democracy became even more strident. In his acceptance speech at the Progressive party convention—which he entitled "A Confession of Faith"—Roosevelt again endorsed and called for the adoption of the initiative, referendum, and recall. Theodore Roosevelt, *A Confession of Faith* (Aug. 6, 1912), *in* SPEECHES OF THE AMERICAN PRESIDENTS 340, 341–42 (Steven Anzovin & Janet Podell eds. 1988). With the same vehemence that Taft condemned popular rule, Roosevelt praised direct democracy as necessary "for giving the people in every state the real right to rule themselves." *Id.*

163 BRODERICK, *supra* note 155, at 43. Ironically, like Taft, Roosevelt opposed the recall of judges. Leshy, *supra* note 111, at 101 n.644.

164 HOLT, *supra* note 156, at 59.

of direct democracy.[165] Moreover, while the Republican party platform ultimately adopted by Taft's supporters did not expressly repudiate the initiative or referendum, its hostility to direct democracy was apparent to all: Republicans, the platform intoned, "believe in our self-controlled representative democracy, which is a government of laws, not of men, and in which order is the prerequisite of progress."[166] The judicial recall, the platform continued, was "unnecessary and unwise."[167]

The presidential election in November 1912 ultimately revealed sizeable support for a progressive platform. The Democratic nominee Woodrow Wilson, who had endorsed direct democracy during the campaign,[168] won a commanding majority of the electoral vote, though only a plurality of the popular vote.[169] The Progressives under Roosevelt, in turn, came in second place.[170] Together, the Democrats and Progressives took more than sixty-nine percent of the popular vote. Meanwhile, the incumbent President Taft placed a poor third, winning only two states (Utah and Vermont).[171] In fact, in Arizona, which was still smarting from his initial veto of statehood just a year earlier, Taft placed fourth behind the Socialist Party candidate Eugene Debs.[172] Moreover, in the congressional elections, Democrats expanded their control of the House, securing over two-

165 MOWRY, *supra* note 112, at 265; 47 CONG. REC. 1469 (1911) (recounting letter from Sen. Bailey advising that Taft "does not favor a general initiative and referendum as found in Oregon").

166 Republican Party Platform of 1912, *in* 1 NATIONAL PARTY PLATFORMS, *supra* note 116, at 183.

167 *Id.* at 184.

168 CRONIN, *supra* note 1, at 50; 47 CONG. REC. 1469 (recounting statement made by then-Governor Wilson approving Oregon system of direct democracy); *U'Ren First Gains Gov. Wilsons's Ear*, MORNING OREGONIAN, May 18, 1911, at 6 (quoting Wilson as endorsing referendum but reserving judgment on judicial recall). Likewise, the Democratic Party platform expressed the party's belief that only the "larger exercise of the reserved power of the people can they protect themselves from the misuse of delegated power and the usurpation of government instrumentalities by special interests." Democratic Party Platform of 1912, *in* 1 NATIONAL PARTY PLATFORMS, *supra* note 116, at 175.

169 BRODERICK, *supra* note 155, at 207. In the Electoral College, Wilson won forty states with 435 electoral votes; in the popular vote, however, he secured less than forty-two percent of the votes. *Id.* at 207–08.

170 *Id.* at 208.

171 *Id.*

172 BERMAN, *supra* note 119, at 35.

thirds of the seats, and seized control of the Senate for the first time in twenty years.[173]

C. Pacific Telephone *in Context*

It was in the midst of this political tumult that *Pacific Telephone* was argued and decided. The Oregon Supreme Court handed down its decision in February 1909, and the telephone company's petition for writ of error was filed in April 1909. Strikingly, it took three years for the U.S. Supreme Court to take up the case—three years in which the constitutionality of direct democracy became the subject of increasingly bitter cross partisan and intra-partisan battles. Briefing was belatedly completed only in the fall of 1911, after the protracted, raucous debate in Congress over Arizona's admission, and the Court heard oral arguments on November 3, 1911. Significantly, both the telephone company and the state of Oregon drew the Court's attention to the debate over Arizona's admission. The telephone company quoted President Taft's August veto message regarding Arizona's admission, while Oregon repeatedly pointed to Congress's approval of Arizona's constitution in other respects, particularly the initiative and referendum.[174] The Court was undoubtedly flummoxed by what to make of this situation. When it issued its decision on February 19, 1912—just five days after Arizona had been admitted into the Union—the Court made no mention of the congressional and presidential actions just a few months previous, a curious omission for a court that had just ruled that the whole matter was appropriately left to the political branches to resolve.

Moreover, for the Republican appointees to the Court, who comprised five of the eight sitting justices at the time,[175] the emerging

[173] BRODERICK, *supra* note 155, at 207. Interestingly, during the debate over Arizona's admission, progressive Republicans had warned their more conservative colleagues that opposition to direct democracy would cost the party. *See, e.g.*, 47 CONG. REC. 447 (statement of Sen. Works) ("I want to say to Senators on this side of the Chamber, representing the great Republican Party, that unless the party heeds this demand and responds to it by enacting and enforcing these reform measures, it will go down to defeat and final destruction and oblivion.").

[174] *Compare* Brief for Plaintiff in Error at 48, Pac. Sts. Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (No. 822), *with* Brief for Defendant in Error at 39, 73–74, Pac. Sts. Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912). *See also* Brief for the State of Washington as Amici Curiae Supporting Defendant in Error at 27–28, Brief for Defendant in Error at 39, 73–74, Pac. Sts. Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (emphasizing Congress's vote to admit Arizona with initiative in its constitution).

[175] As noted above, one seat was vacant due to the death of Justice Harlan. Of the remaining eight justices, five were Republicans (Justices McKenna, Holmes, Day, Hughes,

split in the Republican Party must have given each pause. To choose sides in the battle over direct democracy was to choose sides in the intra-partisan political battle between conservatives and progressives engulfing the party. On the one hand, the judicial endorsement of direct democracy would have been viewed as a rebuff to Taft, Wickersham, and the other conservatives. On the other hand, the judicial invalidation of direct democracy would have sent howls of protest among progressives, stoking their already substantial distrust of the judiciary and adding further fuel to the intra-partisan fire sweeping the Republican Party.[176]

Ironically, the Democratic justices also faced a quandary. The Democratic Party endorsed direct democracy, making the invalidation of it an act of partisan betrayal.[177] Yet, all three of the Democratic justices owed their positions on the Court to President Taft.[178] In fact, Justices Lurton and Lamar were close friends of President Taft, who had appointed both of them primarily, if not exclusively, because of those friendships.[179] As a consequence, their friendship with the President and a felt sense of loyalty as recent appointees must have made them reluctant to rebuke the President by expressly endorsing direct democracy as constitutional. Holding that the case was nonjusticiable was a nifty way to have their cake and eat it too: the practical result of that holding was to clear the way for Oregon and other states to adopt direct democracy, but it did so in a way that did not embarrass the President. Thus, for both the Republican and

and Van Devanter) and three were Democrats (Chief Justice White and Justices Lurton and Lamar). It is unclear whether Justice Day participated in the case; due to his wife's critical illness and ensuing death, he was absent from the Court until January 18, 1912, while the case was under advisement. WALTER F. PRATT, JR., THE SUPREME COURT UNDER EDWARD DOUGLASS WHITE, 1910–1921, at 54 (1999).

176 *Cf. id.* at 70–71 (noting that *Pacific Telephone* and its political question holding "could not have come at a more opportune time to blunt the attacks on the courts").

177 Interestingly, just a year before *Pacific Telephone*, Justice Lurton had expressed his doubts about the constitutionality of "direct popular legislation." Horace H. Lurton, *A Government of Law or a Government of Men?*, 193 N. AM. REV. 9, 12 (1911). Referring to the Guaranty Clause, Lurton wrote that "the guarantee to each State of a republican form of government found in the Federal Constitution refers obviously to the character of republican governments which then existed [in 1789], a form inconsistent with a pure or absolute democracy." *Id.* The qualifiers "pure" and "absolute," however, left Lurton wriggle room to embrace a mixed system of direct and representative democracy, such as that before the Court in *Pacific Telephone*.

178 President Taft appointed Justices Horace Lurton and Joseph Lamar to the Court and elevated Chief Justice Edward White, who was originally appointed by President Grover Cleveland, to the chief justiceship just a year earlier.

179 PRATT, *supra* note 175, at 11, 22.

Democratic justices, to decide that the issue was nonjusticiable was a clean, if unprincipled way to extract the Court from an interbranch, intra-partisan debate that none of them were eager to enter.

Placing *Pacific Telephone* in this historical context yields several important insights. First, it reaffirms that the U.S. Supreme Court is a political institution that is sensitive to the political milieu in which it operates.[180] Constitutional interpretation at the Court is not some arid intellectual exercise divorced from the political realities of the day. Rather, the Court is keenly aware of constitutional debates taking place outside the Court, and, in general, it is reluctant to unnecessarily insert itself into such debates, particularly when doing so would place it at the forefront of interbranch, partisan political battles.[181] To be sure, there are occasions in which the Court makes a stand of constitutional principle in a matter convulsing the nation regardless of the ramifications for the Court. *Brown v. Board of Education* may be one such example, even though the Court suffered no significant loss of institutional status or authority and ultimately gained much because of the decision. As *Pacific Telephone* indicates, though, such stands of principle are the exception rather than the rule.

Second, this history underscores the need for a more limited, nuanced understanding of *Pacific Telephone*. The Court and commentators have subsequently read that case as categorically consigning the Guaranty Clause to judicial oblivion. Indeed, it was precisely because of that broad reading of the case that the Court, when it confronted the constitutionality of the malapportionment in the 1960s, was forced to invoke the Equal Protection Clause as the foundation for its decision.[182] Placed in context, however, *Pacific Telephone* deserves no such categorical reading. To the contrary, it

[180] Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398, 1460–76 (2004) (arguing that the Court refused to expressly endorse the dormant Commerce Clause in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), because of a fear that expansion of its power of judicial review at that time would provoke congressional retaliation).

[181] Of course, there are always exceptions. *Bush v. Gore*, 531 U.S. 98 (2000), for example, may have been one recent occasion in which the Court failed to appreciate the dangers of unnecessary involvement. As Christopher Eisgruber has observed, the rushed consideration given to that case may have obscured the Court's perception of the need for judicial involvement and the dangers of it. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 62–63 (2001). Even here, however, aside from much critical commentary, the Court has not suffered any tangible loss of authority or congressional rebuke.

[182] Baker v. Carr, 369 U.S. 186 (1962).

should be read only as refusing *at that time* the judicial review of the initiative and referendum.

Third and relatedly, the unique historical circumstances that induced the Court to stay its hand in 1912 no longer exist. Recent Congresses have not given sustained attention to the demands of republican government in general or the constitutionality of direct democracy in particular. As such, the Court need no longer fear being caught in the crossfire of a Congress and President struggling with the constitutionality of direct democracy. Moreover, because those institutions have not undertaken the constitutional responsibility that the U.S. Supreme Court yielded exclusively to them, it is time for the Court to proclaim its willingness and readiness to enforce the Guaranty Clause. As noted above, the Constitution does not require the Court to entrust its enforcement exclusively to the political branches, and, in light of those branches' conspicuous nonfeasance, judicial enforcement is the only mechanism available at the federal level to make the promise of the Guaranty Clause real.

To be sure, the proponents of direct democracy won a resounding victory in the 1912 elections, and, today, direct democracy has been embraced in some form by a majority of the states. That, however, does not mean that there is an overwhelming societal consensus in favor of direct democracy that should induce the Court to continue to avoid the issue. While direct democracy retains a good deal of popularity in principle, few believe as the Progressives did that direct democracy enables a virtuous, cohesive, public-spirited majority to circumvent a venal, corrupt, self-serving legislature. The obvious use of direct democracy by special interest groups pushing hard edged ideological agendas for their narrow benefit has left Americans with a more nuanced understanding of both the benefits and disadvantages of direct democracy.[183] Indeed, in Oregon at least, voters have more recently sought to limit, not expand, the scope of direct democracy.[184] Oregonians, like Americans generally, may not subscribe to Wickersham's Panglossian view of representative democracy, but

[183] CRONIN, *supra* note 1, at 5–6; Schuman, *supra* note 2, at 962; *see also* Linde, *supra* note 30, at 36–38 (discussing attempts by special interest groups to use initiative in Oregon to repress particular minority groups).

[184] Measure 26 (adopted Nov. 5, 2002) (banning payment based on number of signatures on initiative and referendum petitions). In fact, in 2000, not only did Oregon voters overwhelmingly approve a constitutional amendment lengthening the time allowed for verifying the signatures on petitions, Measure 78 (adopted May 16, 2000), they overwhelmingly rejected a measure that would have prohibited making the initiative process harder to satisfy, Measure 96 (rejected Nov. 7, 2000).

they increasingly see representative and direct democracy as imperfect alternatives, each with their own benefits and disadvantages.[185] Moreover, not all forms of direct democracy present the same constitutional considerations. Constitutional initiatives, for example, pose much more of a challenge to representative democracy than do legislatively sponsored referenda, which differ little, if at all, from the plebiscites used throughout early American history.[186] To lump all forms of direct democracy together and declare them all off limits from federal judicial review elides the potentially significant and constitutionally dispositive differences among them.

None of this bears upon how the Court should interpret the Guaranty Clause or, more specifically, resolve the constitutionality of the various forms of direct democracy. Those are difficult questions upon which reasonable people disagree.[187] It is to say, however, that the Court should no longer refuse to pass on these matters. *Pacific Telephone* was a product of its time, and times have changed.

CONCLUSION

Pacific Telephone cleared the way for the widespread adoption of direct democracy throughout the nation. In Oregon, *Pacific Telephone* effectively ended the judicial attack on direct democracy. Together with *Kadderly*, which foreclosed any constitutional attack in state court on direct democracy, *Pacific Telephone* ensured that opponents of direct democracy in Oregon would be forced to fight within the political arena, attempting to persuade Oregon voters at the polls to limit or jettison direct democracy.

More fundamentally, *Pacific Telephone* effectively read the Guaranty Clause out of the Constitution. As a legal matter, the Court was wrong to do so. Even if the Court's reluctance to insert itself into the political tumult surrounding the rise of progressivism and direct democracy in the early twentieth century made sense at the time, it no

185 CRONIN, *supra* note 1, at 2, 9.

186 Interestingly, even at the time of *Pacific Telephone*, this difference among forms of direct democracy was not lost upon the protagonists. The telephone company expressly disclaimed any attack on referenda, which it acknowledged as posing a different constitutional question.

187 The meaning of a "republican form of government" is far from clear. Some Framers believed that it forbade only monarchal or aristocratic government, while others suggested that it encompassed a more robust commitment to representative democracy. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 122–23 (1980).

longer does so now. The Guaranty Clause is part of the Constitution, and, like the First Amendment and Equal Protection Clause, it is capable of and entitled to judicial enforcement by the federal courts.