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Preserving Republican Governance: An Essential Government Functions Exception to Direct Democratic Measures

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NOTE

PRESERVING REPUBLICAN GOVERNANCE: AN ESSENTIAL GOVERNMENT FUNCTIONS EXCEPTION TO DIRECT DEMOCRATIC MEASURES

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INTRODUCTION

James Madison, writing in Federalist No. 10, observed the difference between a republic and a pure democracy.[1] Whereas a republic consists of a scheme of representative governance utilizing a deliberative process to legislate, a pure democracy gives legislative power directly to the public.[2] The Constitution embraces representative governance at the federal level[3] and also guarantees it to the states.[4] Yet with the increased prevalence of direct democratic measures, such as ballot initiatives and referendums, the structural lines between a republican government and a direct democratic government are being blurred, producing both structural and pragmatic consequences for state governments.

The most telling examples of these consequences occur in California. The state has recently endured difficult fiscal times, including a $42 billion budgetary shortfall for the 2009-2010 fiscal year, the worst bond rating of any state in the nation, and an unemployment rate hovering around 11 percent.[5] California voters overwhelmingly rejected ballot measures seeking to ease the budgetary gap between spending and revenue,[6] which forced the legislature to make significant funding cuts for social programs and education.[7] The state even went so far as to enact budgetary cuts to

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1. THE FEDERALIST NO. 10, at 57-60 (James Madison) (E.H. Scott ed., 1898).

2. *Id.* at 57-58; *see also* Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying the Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 402-03 (2003) (noting that the republican system of government that the Framers designed ensures that laws will be enacted through "thoughtful deliberation by elected representatives" and protects the legislative process from the whims of factions by including "a system of separated powers with checks and balances, including bicameralism and presentment").

3. *See, e.g.*, U.S. CONST. art. I, §§ 1-3 (granting all legislative power to a bifurcated legislature composed of elected representatives).

4. *Id.* art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government.").

5. *See, e.g.*, Paul Krugman, *State of Paralysis*, N.Y. TIMES, May 25, 2009, at A19; *The Ungovernable State*, ECONOMIST, May 16, 2009, at 33-36.

6. Jennifer Steinhauer, *California Voters Reject Measures To Keep State Solvent*, N.Y. TIMES, May 20, 2009, at A22.

7. California cut its K-12 education budget by approximately $6.5 billion, its higher education budget by approximately $2 billion, its health budget by approximately $2.3 billion, and its social services budget by approximately $1 billion. Assemb. B. 1D, 2009-10 Assemb., 4th Extraordinary Sess. (Cal. 2009); LEGISLATIVE ANALYST'S OFFICE, JULY 2009 BUDGET

the prison system—a reduction that could provide approximately 16,000 convicted felons with an early release date.[8]

The Chief Justice of the California Supreme Court, Ronald M. George, recently linked California's budgetary and governance problems to its constitutional structure.[9] In particular, Chief Justice George pointed out that "California's lawmakers, and the state itself, have been placed in a fiscal straitjacket"[10] by the state's reliance on the referendum and voter initiative processes.[11] The "fiscal straightjacket" to which the Chief Justice refers[12] is a combination of two state constitutional amendments that restrict the legislature's ability to raise revenue and pass a budget.[13] Although other states have similar budgetary or revenue restrictions, California is the only state to have both.[14] The current state

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PACKAGE 2-3 (2009), *available at* http://www.lao.ca.gov/2009/bud/july_09_budget_package/July_2009_Budget_Package_072909.pdf; *see also* Jennifer Steinhaer, *Governor Signs Budget in California, with Trims*, N.Y. TIMES, July 29, 2009, at A10.

8. California cut its penal budget by approximately $1.2 billion dollars and enacted other changes to reduce the prison population by 37,000 inmates within two years. *See* Assemb. B. 1D, 2009-10 Assemb., 4th Extraordinary Sess. (Cal. 2009); Sen. B. 18C, 2009-10 Assemb., 3d Extraordinary Sess. (Cal. 2009) (enacted); LEGISLATIVE ANALYST'S OFFICE, *supra* note 7, at 2; *see also* Solomon Moore, *California Passes Bill Addressing Prisons*, N.Y. TIMES, Sept. 13, 2009, at A33 (noting a reduction in the prison budget by over $1 billion dollars and the early release of approximately 16,000 inmates); Michael Rothfeld, *Prison Cuts Easier Said Than Done*, L.A. TIMES, Aug. 23, 2009, at A1 (reporting that California's budget crisis could lead to the release of 40,000 inmates).

9. *See generally* Ronald M. George, Chief Justice, Cal. Supreme Court, The Perils of Direct Democracy: The California Experience, Address Before the American Academy of Arts and Sciences (Oct. 10, 2009), *available at* http://jurist.law.pitt.edu/pdf/aaaspeech.pdf [hereinafter Chief Justice George].

10. *Id*. This Note focuses on the impact of ballot initiatives, which circumvent the legislature by relying on plebiscites. It does not focus on referendums, which go through the legislative process and are approved by an electorate vote. For a more thorough description of the various types of direct democratic mechanisms, see Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1510-12 (1990).

11. *See, e.g.*, CAL. CONST. art. II, §§ 8-9 (providing citizens of California with the power to amend the state constitution or propose statutes by way of ballot initiative or voter referendum).

12. Chief Justice George, *supra* note 9.

13. *See* CAL. CONST. art. XIII A, § 3 (requiring a two-thirds supermajority vote of both chambers of the California legislature to increase taxes); *id.* art. IV, § 12(D) (requiring a two-thirds supermajority vote of both chambers of the legislature to pass a budget).

14. *See* Sanford Levinson, *"I Read the News Today, Oh Boy": The Increasing Centrality of Constitutional Design*, 87 TEX. L. REV. 1265, 1265-66 (2009) (noting that thirteen states currently have constitutional provisions requiring a supermajority vote for the passage of a tax increase, and only three states—California, Rhode Island, and Arkansas—have a

of the California budgetary process, which is arguably the result of the institutional framework that ballot initiatives have placed on the legislature, highlights the pragmatic consequences that unrestrained direct democracy can have on the governance of a state.[15] With less prohibitive budgetary and revenue-raising restrictions, other states are able to implement a wider variety of solutions to budgetary shortfalls. California, however, is forced to solve its budgetary problems with its hands tied.

Although the effects of ballot initiatives may be most visible in California, eighteen states—predominantly western states—currently allow citizens to amend their state constitutions with a ballot initiative.[16] This delegation of legislative power from the state legislature to the unelected citizenry reflects the Populist and Progressive movements against party machines and corporate trusts, which were often associated with seemingly corrupt political officials in the West at the turn of the twentieth century.[17]

Despite their legislative function, ballot initiatives are often held to a different standard of judicial review than measures passed by state legislatures.[18] Absent constitutional violations, California and other state courts are typically extremely deferential to the will of the people as reflected in a ballot initiative.[19] Yet the highly

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supermajority requirement for the passage of the budget).

15. Voters in California have amended the California Constitution on numerous other occasions to restrict the amount of revenue that may be accumulated from various sources. Article XIII, section 3, for example, which is a result of voter amendments on two separate occasions, provides over eighteen different property tax exemptions. CAL. CONST. art. XIII, § 22 (limiting the amount of property taxes the state may raise per year; adopted by voter approval in 1974); *id.* art. XIII A, § 1 (capping property taxes at one percent of the value of the property; approved by Proposition 13, a ballot initiative).

16. William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMP. L. (SUPPLEMENT) 485, 496 (2006).

17. *See* Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 21-30 (1997); *see also* Dennis Polhill, *Democracy's Journey*, *in* THE BATTLE OVER CITIZEN LAWMAKING 5, 8-10 (M. Dane Waters ed., 2001) (providing an overview and timeline of the development of direct democracy).

18. *See, e.g.*, Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 192-93 (Alaska 2007) (describing the different standards used to interpret legislatively enacted statutes and voter-enacted statutes).

19. *See, e.g.*, Swetzof v. Philemonoff, 203 P.3d 471, 474-75 (Alaska 2009) (noting that the court "construe[s] voter initiatives broadly so as to preserve them whenever possible" (quoting City of Fairbanks v. Fairbanks Convention & Visitors Bureau, 818 P.2d 1153, 1155 (Alaska

deferential method of reviewing initiative activities seems to run contrary to the Framers' vision of the courts as a check on the legislature.[20] Indeed, given the increased use of ballot initiatives by well-financed special interests,[21] Madison's warning of the dangers that factions pose to effective governance becomes increasingly pertinent.[22]

Additionally, the substituted use of the ballot initiative process for legislative purposes presents fundamental structural problems with the republican form of government envisioned by the Framers and reflected in the Guarantee Clause of the U.S. Constitution.[23] Although it is settled law that the Guarantee Clause itself poses a nonjusticiable political question,[24] its inclusion in the Constitution

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1991))); Citizens for Planning Responsibility v. County of San Louis Obispo, 97 Cal. Rptr. 3d 636, 642 (Ct. App. 2009) (noting that direct democratic measures must be given "extraordinarily broad deference" because "[t]he state constitutional right of initiative or referendum is one of the most precious rights of our democratic process"); Zingale v. Powell, 885 So. 2d 277, 282 (Fla. 2004) (stating that a referendum or initiative "provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it" (emphasis omitted) (quoting Gray v. Bryant, 125 So. 2d 846, 852 (Fla. 1960))).

20. *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 424-31 (addressing the concept of judicial review, Hamilton stated that "[a] Constitution is, in fact, and must be, regarded by the Judges as a fundamental law. It must therefore belong to them to ascertain its meaning as well as the meaning of *any particular act proceeding from the Legislative body*.") (emphasis added); *see also* James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1059-60 (noting that the structural purpose of "independent Courts" in the constitutional scheme was partially to "protect the Constitution from temporary majorities reflecting prevailing public opinion").

21. *See, e.g.*, Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES, Nov. 15, 2008, at A1 (describing the influence and effect of special interest money on the 2008 same-sex marriage ballot initiative in California). *See generally* Elizabeth Garrett & Elisabeth R. Gerber, *Money in the Initiative and Referendum Process: Evidence of Its Effects and Prospects for Reform*, *in* THE BATTLE OVER CITIZEN LAWMAKING, *supra* note 17, at 73-96.

22. *Accord* Staszewski, *supra* note 2, at 401-03 (describing the "[t]ension" between direct democratic measures and the representative constitutional structure set forth by the Framers); *see* THE FEDERALIST NO. 10 (James Madison), *supra* note 1, at 53-60.

23. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government.").

24. This Note is not advocating that courts should overturn ballot initiatives on a Guarantee Clause rationale. *See* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (holding that Guarantee Clause claims are nonjusticiable political questions). *But see* New York v. United States, 505 U.S. 144, 185 (1992) (suggesting "that perhaps not all claims under the Guarantee Clause present nonjusticiable questions").

was the result of a much-debated and deliberate decision on the structure of government at both the federal and state levels.[25]

This Note argues that the scope of ballot initiatives should be limited in substance to matters that are not essential government functions. California's Constitution imposes similar restrictions on referendums, forbidding their use for "urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State."[26] These restrictions on referendums provide a framework by which restrictions on ballot initiatives could be framed.

First, courts could institute a heightened standard of review for ballot initiatives that deal with essential matters of governance. Such a review should be one in which the courts are cognizant of the Framers' intent to preserve a republican form of government. Although this heightened review is not a call for litigants to challenge ballot initiatives on a Guarantee Clause rationale, it is a call for courts to look for guidance from the principles of republican governance that the Framers embraced. In order to prevent direct democratic measures from usurping the republican form of government, courts should employ an "essential government functions" exception to their typically deferential standard of review of ballot initiatives.[27]

The second—and perhaps more easily implemented—way that states could limit ballot initiatives is to adopt constitutional provisions that restrict ballot initiatives in the same way that California currently restricts referendums.[28] These constitutional provisions would place important limits on the scope of ballot initiatives by restricting them to matters that are not of essential importance to the governance of the state. This type of restriction,

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25. *See, e.g.*, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 320-22 (Adrienne Koch ed., 1966) [hereinafter MADISON, NOTES OF DEBATES] (reporting a debate about the Guarantee Clause at the Constitutional Convention involving, among others, Edmund Randolph, James Wilson, Gouverneur Morris, and James Madison).

26. *See* CAL. CONST. art. II, § 9(a).

27. *See* Stanley H. Friedelbaum, *Initiative and Referendum: The Trials of Direct Democracy*, 70 ALB. L. REV. 1003, 1023 (2007) ("Judges have been compelled to weigh the permissible scope of an intrusive direct democracy against prohibitions intended to protect essential government functions from excessive interference detrimental to the public welfare.").

28. *See supra* note 26 and accompanying text.

while still allowing ballot initiatives that address social issues of concern to citizens,[29] is most consistent with the Framers' vision of a republican form of government for the states. Furthermore, it aims to prevent many of the pragmatic consequences resulting from state legislatures' inability to yield a full range of governance tools as a result of direct democratic measures.[30]

Part I of this Note traces the Framers' deliberations regarding the necessity of a republican scheme of government. By examining both the deliberations that occurred during the Constitutional Convention and the post-Convention debates between the Federalists and Antifederalists, it becomes clear that the Framers expressly rejected direct democratic measures at both the state and federal levels in favor of a representative republican government. Part II describes the current treatment of ballot initiatives in California. Because of the state's widespread use of ballot initiatives, California presents the best example of the dysfunction that these initiatives cause in government. Lastly, Part III describes a way to remedy this dysfunction: excepting essential government functions from the reach of ballot initiatives. This exception addresses both the structural and pragmatic problems that unfettered use of ballot initiatives create and provides states with a greater ability to address legislative problems through the legislative process, as the Framers intended.

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29. *See, e.g.*, CAL. CONST. art. I, § 7.5 (demonstrating a social issue ballot initiative, Proposition 8, which amended the California Constitution to recognize those marriages consisting of only one man and one woman). *But see* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (holding Proposition 8 and the subsequent constitutional amendment unconstitutional in violation of both the Equal Protection and Due Process Clauses of the U.S. Constitution).

30. *See* Chief Justice George, *supra* note 9. Because such effects—both structural and pragmatic—are most visible in California, this Note will focus primarily on that state.

I. THE FRAMERS' REJECTION OF DIRECT DEMOCRACY FOR THE FEDERAL AND STATE GOVERNMENTS

A. The Constitutional Convention of 1787 and the Importance of the Guarantee Clause

The members of the 1787 Constitutional Convention were articulate and adamant in their intent to create a republican form of government at both the federal and state levels.[31] This intention is reflected in the transcripts of the debates surrounding the merits of the Guarantee Clause.[32] For instance, Daniel Carroll, a delegate from Maryland,[33] argued that a guarantee to the states of a republican government was an "essential" component of the new Constitution: "[e]very State ought to wish for it."[34] His colleague Edmund Randolph, a delegate from Virginia,[35] moved the Convention to include language stating that "no State be at liberty to form any other than a Republican Gov[ernment]."[36] James Madison seconded this motion.[37]

The Convention's debates further make clear the Framers' fear that, without a republican guarantee to the states, citizens could institute a form of government that was repugnant to the republican values the Framers hoped to institute.[38] This fear reflected their knowledge of the government of Georgia, which, in 1777, was the first state to include a constitutional provision providing citizens

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31. U.S. CONST. art. IV, § 4; *see* Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208, 226-30 (1987) (describing the Framers' intent for states to possess republican styles of government).

32. *See* MADISON, NOTES OF DEBATES, *supra* note 25, at 320-22; Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735, 1747 (1998) (arguing that the Guarantee Clause "was designed as a legal requirement for statehood in the Union").

33. MADISON, NOTES OF DEBATES, *supra* note 25, at 256.

34. *Id.* at 321.

35. *Id.* at 323.

36. *Id.* at 322.

37. *Id.*

38. *Id.* at 321. Nathaniel Gorham, a delegate from Massachusetts, warned that, absent the Guarantee Clause, "an enterprising Citizen might erect the standard of Monarchy in a particular State, might gather together partizans [sic] from all quarters, might extend his views." *Id.*

with the ability to modify the state constitution through the citizen initiative process.[39] The delegates at the Constitutional Convention expressly discussed this fact, and William Houston of Georgia was "afraid of perpetuating the existing Constitutions of the States" without the guarantee of a republican government.[40]

The delegates' debate about the meaning and necessity of the second half of the Guarantee Clause[41] also reflected their fears. During this discussion, some delegates argued that "the object is merely to secure the States [against] dangerous commotions, insurrections and rebellions."[42] Edmund Randolph objected to this interpretation, and pointedly noted that the Guarantee Clause has "[two] objects. [First,] to secure Republican Government. [Secondly,] to suppress domestic commotions."[43] He "urged the necessity of both of these provisions."[44] Randolph's broader definition—incorporating the necessity of a republican government in the states—has been a focus of the Supreme Court's Guarantee Clause jurisprudence, particularly within the context of challenges to direct democratic institutions.[45]

B. The Federalist v. Antifederalist Debates

The debates among the Framers regarding the validity and necessity of guaranteeing a republican form of government to the states did not stop at the Convention's conclusion; the Guarantee Clause was a visible topic of both the Federalist Papers and the Antifederalists Papers. The Antifederalists were vocal in their

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39. *See* Fisch, *supra* note 16, at 488, 494. When Georgia modified its constitution in 1789, however, the provision was removed. *Id.* at 494. Massachusetts was the first state to utilize a direct democratic process when adopting its constitution. *Id.* at 488.

40. MADISON, NOTES OF DEBATES, *supra* note 25, at 321.

41. The second clause of the Guarantee Clause states: "and [the United States] shall protect each of them [the states] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4.

42. MADISON, NOTES OF DEBATES, *supra* note 25, at 321 (noting the opinion of James Wilson, delegate from Pennsylvania).

43. *Id.*

44. *Id.*

45. *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1, 42-43 (1849) (discussing the importance of the Guarantee Clause).

opposition to a republican form of government in the states.[46] For example, John DeWitt called the republican theory of government a "faithful [m]irror" that will result in an entrenched aristocracy taxing the people at will.[47] James Winthrop echoed this sentiment when he argued that republics naturally evolve into "aristocraticks,"[48] the formation of which permitted the nobles in the country to consolidate power and take it away from the people.[49]

Indeed, the sentiment that a republican government would result in a legislature too far removed from the people was one of the Antifederalists' central concerns.[50] Arguing that republican governments naturally transcend into "democraticks," the Antifederalists were weary of the republican form of representative democracy.[51] In particular, a republican government could work only on a theoretical level when "the body of the people are virtuous, and where property is ... equally divided."[52] Without these ideals present in the public, the republican government transforms into monarchy or aristocracy.[53] The Antifederalists' solution was one of simplicity: a more direct democracy. A simpler form of government—such as one in which the people are less removed from the legislative activities of the government—offered the best protection against the dangers of consolidated power.[54]

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46. *See* Gordon S. Wood, *Introduction* to THE ANTIFEDERALISTS xvi, cvi-cvii (Cecelia M. Kenyon ed., 1966); *see also* James Winthrop, *Agrippa, XV*, MASS. GAZETTE, Jan. 2, 1788, *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 108 (Paul Leicester Ford ed., 1892) (discussing concerns about state legislatures abusing their powers).

47. John DeWitt, *Essay III* (Nov. 5, 1787), *reprinted in* THE ANTIFEDERALISTS, *supra* note 46, at 102, 108-09. It is unclear who wrote under the pseudonym John DeWitt. THE ANTIFEDERALISTS, *supra* note 46, at 89.

48. Winthrop, *supra* note 46, at 105. James Winthrop was an Antifederalist from Massachusetts. Wood, *supra* note 46, at xxi, xxxix.

49. *See* Wood, *supra* note 46, at xxi, xxxix.

50. James Winthrop, *Agrippa, IV*, MASS. GAZETTE, Dec. 3, 1787, *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 46, at 63-64 (noting that a republic would yield "laws not being made by the people, who felt the inconveniences, [and] did not suit their circumstances").

51. *See* Winthrop, *supra* note 46, at 546.

52. Bryan, *Centinel No. 1*, INDEP. GAZETTEER, Oct. 5, 1787, *reprinted in* THE ANTIFEDERALISTS, *supra* note 46, at 1.

53. *Id.* at 6-7.

54. *See id.* This argument for greater direct participation by the general public in the legislative activities of the state was embraced during the Progressive Era by the early

In contrast, the Federalists pointed to several ways that the proposed republican constitution protected the people from the dangers inherent in a direct democracy.[55] Madison, for example, articulated his warnings of the dangers of factions during the Convention debate,[56] and famously reiterated them in Federalist No. 10.[57] This danger of "pure democracy," he wrote, was that a "common passion or interest will, in almost every case, be felt by a majority of the whole ... and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual."[58] To Madison, the republican form of government best protected the rights of the minority from abuses of the majority, such as the "artful misrepresentations of interested men" or the "irregular passion[s]" of a majority.[59] The republican government was fashioned, he argued, to protect the citizenry against the "shortcomings of human nature" that would dominate in simple majority rule.[60]

C. The Final Rejection of Direct Democracy

The decision to utilize a republican form of government, at both the federal and state levels, reflected the Framers' intent to limit

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proponents of the ballot initiative and adopted by many western states. *See* Persily, *supra* note 17, at 21 (describing the progressive movement towards greater use of direct democratic measures as representing a "[p]ower to the people" ideology). The central goal of instituting direct democratic measures was to remove the influence of powerful "party machines and corporate trusts" that dominated the political process. *Id*. at 22. *But see* Fisch, *supra* note 16, at 497 (noting that the high cost of placing an initiative on the ballot suggests that the ballot initiative system is available to only well-funded special interest groups).

55. THE FEDERALIST No. 10 (James Madison), *supra* note 1, at 57.

56. *See* MADISON, NOTES OF DEBATES, *supra* note 25, at 76 (issuing a warning during the Convention that "[a]ll civilized Societies would be divided into different Sects, Factions & interests ... of rich & poor, debtors & creditors ... the disciples of this religious Sect or that religious Sect ... [indicating that] the rights of the minority are in danger").

57. *See* THE FEDERALIST NO. 10 (James Madison), *supra* note 1, at 57 ("When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens.").

58. *Id.*

59. THE FEDERALIST NO. 63 (James Madison), *supra* note 1, at 347 (noting that the "interference of some temperate and respectable body of citizens" would "check the misguided career, and ... suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind").

60. Dan T. Cohen, *A Rhetoric for Ratification: The Argument of* The Federalist *and Its Impact on Constitutional Interpretation*, 56 DUKE L.J. 469, 492-93 (2006).

the dangers of factionalism or unrestrained populism that may occur in more direct democratic institutions.[61] It also ensured the "enlarge[ment] [of] the public views, by passing them through the medium of a chosen body of citizens,"[62] and guaranteed that representatives would best be able to discern what was truly of the public good, as opposed to simply a majority rule where minority interests would be at risk to oppression by prevailing public opinion.[63] As evidenced by the inclusion of the Guarantee Clause in the proposed constitution, the Framers believed that republicanism, as a structure of government, was important at both the federal and state levels.[64] Addressing arguments alleging that the Guarantee Clause presented fundamental federalism problems—notably that the federal government was free to force the states into a particular structure of government[65]—Madison noted that "[t]he only restriction imposed on [the states], is that they shall not exchange republican for anti-republican Constitutions; a restriction which ... will hardly be considered as a grievance."[66] This argument suggests that there is latitude for states to choose their own form of government, so long as the chosen form comports to republican principles.[67]

Further, because all the states had republican governments before the ratification of the Constitution, the Guarantee Clause

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61. *See* THE FEDERALIST NO. 10 (James Madison), *supra* note 1, at 57 (noting that societies that employed a more direct democratic organization were often plagued with "spectacles of turbulence and contention ... incompatible with personal security, or the rights of property").

62. *Id.* at 58.

63. *Id.*; *cf.* Wilson, *supra* note 20, at 1059-60 (describing the countermajoritarian structural role the courts play on the majority's prevailing public opinion).

64. *But see* Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 856 (2002) (describing the basic elements of republicanism as "control by the citizenry, the absence of a monarch, and the rule of law," and arguing that a "government is republican for constitutional purposes, whether the legislative power is vested in representatives exclusively, in the people exclusively, or, as is the case in most states today, in some combination thereof").

65. *See A Manifesto of a Number of Gentlemen from Albany County*, N.Y. J. & WKLY. REG., Apr. 26, 1788, *reprinted in* THE ANTIFEDERALISTS, *supra* note 46, at 359, 363 (arguing that the Guarantee Clause "left [the states] at the mercy of the general government, to allow them such a form as they shall deem proper").

66. THE FEDERALIST NO. 43 (James Madison), *supra* note 1, at 242.

67. *See* William T. Mayton, *Direct Democracy, Federalism & the Guarantee Clause*, 2 GREEN BAG 2d 269, 271-72 (1999) (discussing the notion that the Guarantee Clause gives states wide latitude to experiment in systems of governance within the republican framework).

represented a mutual agreement between the federal and state governments: "the states have an a priori duty to furnish a republican form of government to their citizenries while the federal government has a responsibility to safeguard the existence of republican governments across the Union."[68] The Supreme Court embraced this interpretation when it wrote in 1874 that the Guarantee Clause "implies a duty on the part of the States themselves to provide such a government."[69]

II. CURRENT STANDARDS OF JUDICIAL REVIEW: A PERSPECTIVE FROM CALIFORNIA

An analysis of the current standards by which courts review direct democratic measures—ballot initiatives in particular—reveals a highly deferential treatment.[70] Much of the deference accorded to ballot initiatives is based in the deep-seated belief that the electorate holds a reserved legislative power that is equal to or greater than that of the legislature.[71] A review of the treatment of direct democratic measures by California courts demonstrates this highly deferential treatment.

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68. Edward A. Stelzer, *Bearing the Judicial Mantle: State Court Enforcement of the Guarantee Clause*, 68 N.Y.U. L. REV. 870, 889 (1993) (emphasis omitted).

69. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1874).

70. *See, e.g.*, Citizens for Planning Responsibly v. County of San Luis Obispo, 97 Cal. Rptr. 3d 636, 642 (Ct. App. 2009) (noting a "long-established rule of according extraordinarily broad deference to the electorate's power to enact laws by initiative"). This deference is particularly prevalent in state court settings; a federal court is more likely to invalidate a direct democratic measure than a state court. *See* Mads Qvortrup, *The Courts v. The People: An Essay on Judicial Review of Initiatives*, *in* THE BATTLE OVER CITIZEN LAWMAKING, *supra* note 17, at 197, 200; *see also* Jones v. Bates, 127 F.3d 839, 857 (9th Cir. 1997) (describing federal rules interpreting ballot initiatives as "a different and more stringent inquiry").

71. *See, e.g.*, Rossi v. Brown, 889 P.2d 557, 560 (Cal. 1995) ("The initiative and referendum are not rights granted the people, but ... power[s] reserved by them. Declaring it the duty of the courts to jealously guard this right of the people, the courts have described the initiative and referendum as articulating one of the most precious rights of our democratic process." (quoting Associated Home Builders of the Greater East Bay, Inc. v. City of Livermore, 557 P.2d 473, 477 (Cal. 1976))).

A. Statutory Controls and Court Restrictions on Ballot Initiatives

Before examining how California courts treat ballot initiatives, it must be noted that California currently imposes several restrictions on ballot initiatives during judicial review. First, several state constitutional provisions limit the validity of ballot initiatives. A ballot initiative may neither name an individual or corporation to office nor address more than one singular subject per initiative.[72] Additionally, a petition must be presented to the California Attorney General prior to being placed on the ballot as an initiative.[73] These statutory restrictions, although relatively minimalist and predominantly procedural, are common among states that incorporate ballot initiatives into their systems of governance.[74]

Second, California courts have limited the scope of ballot initiatives to *legislative acts*: "those which declare a public purpose."[75] Administrative and executive acts, therefore, are outside the reach of ballot initiatives.[76] The initiative must also be a constitutional legislative exercise, particularly when fundamental rights are the subject matter of the initiative.[77] Lastly, California courts impose a de minimis requirement of comprehensibility on the legislative measures.[78] Interpreting California initiative law, the Ninth Circuit wrote that "it is enough for purposes of interpreting the meaning of the measure that the 'average' voter 'likely' understood the measure."[79]

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72. CAL. CONST. art. II, §§ 8(d), 12.

73. *Id.* § 10(d).

74. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 19-101 to -143 (2010) (describing the procedural, form, and substance requirements for direct democratic measures).

75. *See Citizens for Planning Responsibly*, 97 Cal. Rptr. 3d at 642 (differentiating legislative acts, defined above, from administrative acts, which are "sometimes called adjudicative or quasi-adjudicative" and which "implement the steps necessary to carry out that legislative purpose").

76. *Id.*

77. *See* Jones v. Bates, 127 F.3d 839, 857 (9th Cir. 1997) (discussing California initiative law).

78. *Id.*

79. *Id.*

B. Deferential Treatment of Direct Democratic Measures by the California Courts and Beyond

In light of these restrictions, state courts in California begin with the premise that the reserved powers of initiative and referendum are either "greater than the power of the legislative body"[80] or "generally coextensive with the power of the [l]egislature to enact statutes."[81] Thus, the judiciary promotes the inherent power of ballot initiatives by providing them with a presumption of validity.[82] This presumption gives courts the justification to "liberally construe[]" the people's initiative powers to best promote the initiative system.[83] Indeed, a recent California appellate court reaffirmed this principle when it wrote that it had a "duty to ... construe the relevant constitutional provisions liberally in favor of the people's right to exercise the powers of initiative and referendum."[84]

Perhaps the most glaring instance of court deference regarding ballot initiatives arises when the courts construe initiatives that contain ambiguous language. One recent California appellate court case discussed this deference at length, comparing the standards of judicial interpretation for ambiguous legislative enactments with those for ballot initiatives.[85] Describing the means by which the court will interpret ambiguous statutes enacted by the legislature, the court declared:

> An interpreting court must go behind a statute's language when it is susceptible of more than one reasonable interpretation. To decipher the purpose of an ambiguous statute, a court may consider the ostensible objects to be achieved by the statute, the statutory scheme of which the statute is a part, the evils to be

80. *Citizens for Planning Responsibly*, 97 Cal. Rptr. 3d at 651.

81. Prof'l Eng'rs in Cal. Gov't v. Kempton, 155 P.3d 226, 243 (Cal. 2007) (quoting Santa Clara County Local Transp. Auth. v. Guardino, 902 P.2d 225 (Cal. 1995)).

82. *See Jones*, 127 F.3d at 857 (construing California initiative law).

83. Legislature v. Eu, 816 P.2d 1309, 1313 (Cal. 1991) (emphasis omitted); *see also Citizens for Planning Responsibly*, 97 Cal. Rptr. 3d at 642.

84. *Citizens for Planning Responsibly*, 97 Cal. Rptr. 3d at 642.

85. AB Cellular LA, L.L.C. v. City of Los Angeles, 59 Cal. Rptr. 3d 295, 301 (Ct. App. 2007).

> remedied, public policy, the legislative history, and the wider historical circumstances of the enactment.[86]

In the next paragraph, however, the court pointed to a different standard of review that it utilizes when interpreting ballot initiatives. Contending that the review is "fairly proximate to statutory construction," the court noted that the interpretation "must be delivered in a liberal and practical manner so it will meet changed conditions and the growing needs of the people."[87] On the one hand, this standard allows a court to interpret a ballot initiative broadly, giving effect to the will of the electorate. On the other hand, the court may interpret the initiative so as to remedy its deficiencies, eschewing the spoken will of the people in order to meet the court's perceived notion of the changing and growing intentions of the people.[88]

This method of interpretation reaches beyond merely going behind a statute's language as required in the case of an ambiguous legislative statute, and leaves the court open to the accusation that it is legislating from the bench.[89] The court attempted to guard against the dangers of its own interpretation by noting that the "literal language of enactments may be disregarded to avoid absurd results."[90] Moreover, the courts may examine "contemporaneous construction of the [l]egislature or the administrative agencies that are responsible" for interpreting the statutes.[91] Even with these additional interpretative restrictions, however, regulations set forth by initiative enjoy a less rigorous gauntlet of judicial review.

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86. *Id.*

87. *Id.* at 302 (citation omitted) (internal quotation marks omitted).

88. *Id.*

89. *See* Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929, 940 (2007) ("[I]t remains the role of the legislature to legislate, and the Judiciary to interpret. An activist court legislates from the bench, and thus, encroaches on the legislature's constitutional turf. Legislating from the bench destroys the proper end of judging.") (quotations and citations omitted). Charges of judicial activism have been leveled against the California court system in the past. *See, e.g.*, Chantale Fiebig, Note, *Legislating from the Bench: Judicial Activism in California and Its Increasing Impact on Adult Prison Reform,* 3 STAN. J. C.R. & C.L. 131, 133 (2007).

90. *AB Cellular*, 59 Cal. Rptr. 3d at 302 (internal quotation marks omitted) (quoting Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1300 (1978)).

91. *Id.*

A different standard of review for direct democratic measures and legislatively passed measures is not unique to California. The Alaska Supreme Court, for example, explicitly stated that "we take a slightly different approach when interpreting initiatives enacted by the voters" than with legislatively passed enactments.[92] This inconsistent treatment of legislative measures—based solely on the *source* of the measure—once again appears to be the result of courts holding that the "people's reserved power of initiative [is] greater than the power of the state's legislative body."[93]

III. AN ESSENTIAL GOVERNMENT FUNCTIONS EXCEPTION TO BALLOT INITIATIVES EMBRACES THE FRAMERS' REPUBLICAN IDEALS

The debate surrounding the proper standard of judicial review of ballot initiatives and direct democratic measures spans the spectrum from strict scrutiny,[94] to a standard of review based on the haste by which the measure was proposed and passed,[95] to a more lenient standard of review that presumes the validity of ballot initiatives.[96] Part III.A enters this debate by proposing a new alternative: a standard of review—or statutory equivalent—that exempts essential government functions from the reach of ballot initiatives. Not only does this exemption further the Framers' intent to establish a republican form of government, it also avoids many of the pragmatic and structural deficiencies that accompany more permissive standards of review.

92. Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 192 (Alaska 2007).

93. Rossi v. Brown, 889 P.2d 557, 574 (Cal. 1995).

94. *See, e.g.*, Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237, 273 (1999) (advocating for a strict scrutiny standard of judicial review for ballot initiatives because empirical evidence suggests that "people do not vote, are uninformed, and miscast their votes, [so] judges seem better situated and more knowledgeable in evaluating the law").

95. *See, e.g.*, John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1 N.Y.U. J. LEGIS. & PUB. POL'Y 163, 179-81 (1997).

96. *See, e.g.*, Jones v. Bates, 127 F.3d 839, 857 (9th Cir. 1997).

A. Pragmatic Consequences of Unrestricted Ballot Initiatives

1. Limiting Legislatures' Ability To Solve Fiscal Crises

To illustrate the necessity of an essential government functions exception to ballot initiatives as a protection against unintended consequences, consider California's law regarding the use of direct democratic measures to affect tax regulations and the pragmatic consequences of the court's treatment of these initiatives. The California Constitution bars the usage of referendums for "urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the state," yet places no such restrictions on the use of ballot initiatives.[97] Because voters may still use their referendum power for social issues or other legislative issues not related to the taxation of the state, the ballot initiative provides the general public with the means by which it may tie the legislature's revenue-raising hands. This unrestricted use of ballot initiatives on the finances of the state is problematic given the complexity and multitude of economic issues that may be decided on a single vote by a potentially uninformed electorate.[98]

In 1995, the California Supreme Court upheld the distinction between the seemingly absolute power of ballot initiatives and the restrained power of referendums.[99] In *Rossi v. Brown*, the court embraced the plenary power of ballot initiatives and warned that any restrictions on the initiative power to restrain taxation—such as the way in which referendums are restrained—"strikes at the very root of popular self-government."[100] In addition to the historical justification for this unrestrained citizen initiative power, the court offered a pragmatic justification for the differentiation between initiatives and referendums concerning tax measures: whereas it is necessary to exempt tax measures from the referendum power in

97. *Compare* CAL. CONST. art. II, § 9(a) (restricting the referendum power), *with* CAL. CONST. art. II, § 8(a) (setting forth no equivalent restrictions on the state initiative power).

98. K.K. DuVivier, *Fast-Food Government and Physician-Assisted Death: The Role of Direct Democracy in Federalism*, 86 OR. L. REV. 895, 908-09 (2007).

99. *See* Rossi v. Brown, 889 P.2d 557, 588 (Cal. 1995).

100. *Id.* at 564. The court also noted that "[p]ractically all historic struggles for liberty, including ... our own American revolution, have centered about the question of *the people's control over taxation*." *Id.* (citation omitted).

order to "prevent the disruption of [the state's] operations by interferences with the administration of its fiscal powers and policies," citizen initiatives that affect the tax structure of the state "will rarely affect the current budgetary process."[101] The short-sightedness of this analysis is obvious, and a simple hypothetical that takes the court's logic to its natural end can illustrate its folly: Imagine a ballot initiative that seeks to forbid any state income tax, state sales tax, or property tax in all fiscal years following the current one. Under the court's analysis in *Rossi*, the court would not take issue with such a restriction despite the fact that it may significantly disrupt the state's fiscal operation; as long as the initiative does not affect the "*current* budgetary process,"[102] an initiative is a proper vehicle to bring such a sweeping governmental change.

2. The Increased Influence of Special Interest Groups

Another pragmatic consequence of a deferential standard of review of direct democratic measures is that what Madison referred to as "factions" can essentially control the ballot initiative process.[103] The use of ballot initiatives, and their success, depends largely upon the amount of private money spent promoting the initiative.[104] Again, examining California's initiative system, data reflecting the

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101. *Id.* at 566.

102. *Id.* (emphasis added).

103. *See supra* notes 55-60 and accompanying text.

104. *See* Staszewski, *supra* note 2, at 420-32 (discussing the role that private interest groups play in the ballot initiative process and concluding that "the role of 'the people'" is secondary to the role of initiative experts in the formulation and passage of initiatives). *See generally* CTR. FOR GOVERNMENTAL STUDIES, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 281-316 (2d ed. 2008) (examining the effect of private money on the successfulness of ballot initiatives in California). In addition to utilizing a spending campaign, proponents of ballot initiatives also work within the existing normative framework to achieve their desired governance or policy goals. *See* MATTHEW MANWELLER, THE PEOPLE VS. THE COURTS: INITIATIVE ELITES, JUDICIAL REVIEW, AND DIRECT DEMOCRACY IN THE AMERICAN LEGAL SYSTEM 75-80 (2005) (discussing how professional initiative drafters are using judicial strategies and creating institutional support to advance their positions). Utilizing mechanisms such as "grass-roots organization[ ], altering the language of measures to meet current legal requirements, incrementalism, using previously upheld legal language, keeping initiatives very short, drafting constitutional amendments rather than statutory initiatives, ... judicial forum shopping, ... and drafting multiple versions of the same initiative," proponents wield a diverse range of political tools to achieve their legislative goals. *Id.* at 65.

separate costs associated with qualifying a measure to be placed on the ballot as an initiative and lobbying for its passage suggest that the system is susceptible to factioned interests dominating the process.[105] For instance, the median cost of qualifying a measure to be placed on the ballot in 2006 was close to three million dollars, or sixty-three times greater than comparable costs in 1976.[106] The numbers become even larger when examining the costs associated with the special interest lobbying that accompanies these initiatives: in 2006, eight ballot initiatives garnished over three hundred million dollars in support and opposition spending.[107] Among the largest contributors to these efforts—which amounted to almost two-thirds of total spending in the ballot initiative process—were energy companies, a Hollywood producer opposing the energy companies, and tobacco companies.[108]

The trend of special interests representing the predominant financing source of ballot initiatives continued in 2009. Voters were asked to vote on Proposition 16, an energy proposal, and Proposition 17, an insurance proposal. Each ballot initiative campaign was almost entirely financed and sponsored by corporations looking to close certain consumer-friendly loopholes in the law.[109] The large amount of money spent by special interests demonstrates the inherent risk of factioned interests in a process that functions as a substitute for legislative activities.[110] Given Madison's strong objections to

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105. *See* Garrett & Gerber, *supra* note 21, at 74-75; *cf.* Citizens United v. FEC, 130 S. Ct. 876 (2010) (striking down, on First Amendment grounds, a provision of the Bipartisan Campaign Reform Act of 2002, which prohibited labor unions and corporations from advertising for the election or defeat of a candidate within a certain number of days before an election).

106. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 104, at 11 tbl.4 (noting that the median cost of qualifying a ballot initiative in California increased from $44,861 in 1976 to $2,848,259 in 2006).

107. *Id.* at 283 tbl.8.1.

108. *Id.* at 288-89 tbl.8.4.

109. Pacific Gas & Electric supplied "98% of the $46 million in campaign financing" in support of Proposition 16. Marc Lifsher, *Props. 16 and 17 May Set Trend: If They Succeed, More Firms Could Turn to the Ballot Box as an Easier Way To Change the Laws,* L.A. TIMES, June 5, 2010, at B1. Similarly, Mercury General Corporation supplied over 99 percent of the $16 million Proposition 17 spending. *Id.*

110. *See* Garrett & Gerber, *supra* note 21, at 75 (suggesting that well-funded special interest groups may be able to "buy" an initiative based on the expensive process by which an initiative is passed). This Note examines the reality of influence in the ballot initiative process but does not argue against the inherent free speech or related First Amendment rights

this type of influence in the legislative process, such lawmaking and constitutional reformation driven by special interests raises concerns regarding the viability of a republican government.

B. Structural Consequences of Unrestricted Ballot Initiatives

In addition to these pragmatic consequences, allowing ballot initiatives to usurp the legislative function of a state also raises structural governmental issues. Most notably, unfettered ballot initiatives undermine the deliberative nature of a republican government. By emphasizing the value that deliberation brings to the legislative process, the Framers thought a republican form of governance would best serve the public good.[111] Madison left no question regarding the importance of permitting a deliberative body—as opposed to direct citizen action—to govern when he wrote: "it may well happen, that the public voice, pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves."[112] Ballot initiatives by their nature, however, do not allow for this deliberative process to occur:

> The voters do not write the language of ballot measures; nor do they typically engage in meaningful public debate about the advisability of a proposed policy. With the possible exception of unusually high-profile initiative elections, some voters may not know anything about a measure prior to entering the voting booth.... Even when the language of a ballot measure is presented to the electorate, many voters are unable to understand the meaning of the legalese that is often used in the text. Nor are they aware of the existing legal landscape or the likely application of a measure to some later, unforeseen interpretive controversy. Indeed, the most that can realistically be expected

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associated with political speech in the process. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (holding that the First Amendment forbids restrictions on corporate contributions to direct democratic measures such as ballot referendums).

111. *See* Victor Goldfeld, Note, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367, 376-79 (2004) (noting that "well-informed deliberation is the method likely to further the public interest," and that the role of special interests, or factions as Madison called them, can be minimized best by legislative deliberation).

112. THE FEDERALIST NO. 10 (James Madison), *supra* note 1, at 58.

> of voters is that they will grasp the broad purpose of an initiative measure and vote either to approve or reject a general policy based on their understanding of information gleaned from media accounts, advertising, and ballot pamphlets.[113]

The treatment of direct democratic measures by courts such as *Rossi* undermines this deliberative ideal.[114] Referendums, which are deliberated legislative measures put to the voters for mere approval, are constitutionally prohibited from fundamental government activities such as implementing tax measures for ordinary state operations, calling elections, and passing "urgency statutes" in California.[115] Voter initiatives, however, have court approval to address the essential government function of revenue-raising legislation.[116] The California court broadened, rather than limited, the power of a nondeliberative legislative function, and in turn provided a means by which "a party [may] do indirectly what the Constitution prohibits doing directly."[117] Other courts have also recognized the nondeliberative nature of ballot initiatives.[118] In these situations, when faced with a particular disposition that would run contrary to the Framers' ideals of government, courts should embrace the essential government functions exception to the application of direct democratic measures. In particular, when a state decides to embrace a legislative function that governs without deliberation in matters related to the fundamental governance of the state, such as a direct ballot measure used to limit a legislature's ability to raise revenue, courts must protect the value of representation and the necessity of deliberation.[119]

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113. Staszewski, *supra* note 2, at 431-32 (citations omitted).

114. *Compare* Rossi v. Brown, 889 P.2d 557, 560 (Cal. 1995) (noting that the initiative power is a plenary legislative power reserved by the people), *with* Staszewski, *supra* note 2, at 401-03 (discussing the importance of bicameral deliberation in the Framers' governmental design).

115. CAL. CONST. art. II, § 9(a).

116. *See Rossi*, 889 P.2d at 560-61.

117. *Id.* at 578 (Mosk, J., dissenting).

118. *See, e.g.*, Duran v. Castro, 227 F. Supp. 2d 1121, 1126 n.6 (E.D. Cal. 2002) ("[T]he law considered here is the result of the initiative process—a process not noted for careful and deliberate consideration.").

119. *See* Eule, *supra* note 10, at 1558-59 (arguing for courts to relax the presumption of constitutionality for direct democratic measures, and stating that "when the people eschew representation, courts need to protect the Constitution's representational values").

Looking to California again, history demonstrates that ballot initiatives have been overwhelmingly used to circumvent the legislature on matters of essential government importance. Since California's use of ballot initiatives became constitutional in 1911,[120] 40 percent of ballot initiatives approved by the voters have affected revenue, taxation, bonds, or governmental/political processes.[121] The effects of these initiatives have significantly impacted the ability of the legislature to govern the state. One commentator, for example, estimated that one-third of California's annual budget is tied to mandatory appropriations as a direct result of ballot initiatives.[122] Coupled with several constitutional provisions that restrain the legislature's ability to raise revenue, which were also passed by ballot initiatives, it is clear that many of the fundamental functions of California's legislature have been either usurped or limited by direct democratic mechanisms.[123]

C. The Essential Government Functions Exception

As discussed, the use of direct democratic measures in a legislative capacity produces fundamental *structural* consequences that undermine the Framers' clear intent to establish a republican government.[124] Ballot initiatives, being legislative measures passed through a nonlegislative process, may also produce unintended *pragmatic* consequences that hinder the governance of a state.[125] Given the broad reach of these measures, a check on ballot initiatives is essential in preventing unintended consequences from impeding the successful governance of a state. Indeed, even though California has certain statutory constraints that limit the reach of ballot initiatives, these restrictions are largely provisions address-

120. *See* Fisch, *supra* note 16, at 500.

121. *See* CTR. FOR GOVERNMENTAL STUDIES, *supra* note 104, at 7 tbl.3.

122. John G. Matsusaka, *Have Voter Initiatives Paralyzed the California Budget?* 1 (Univ. of S. Cal. Law and Pub. Policy, Research Paper No. 03-24, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=476443.

123. *See supra* note 15 and accompanying text.

124. *See supra* Part I.C.

125. *See* Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1051-52 (2001) (describing the legislative process as a "slow, careful, iterative, ... compromise-oriented" process that results in informed and deliberate law making, and the initiative process, in comparison, as a "battering ram" that "shortchange[s] deliberation and refinement").

ing the form—not the substance—of ballot initiatives and offer few safeguards against the dangers that ballot initiatives pose to effective government.[126]

These structural problems can be remedied in two ways. First, courts, representing a check on the legislature,[127] could limit the scope of ballot initiatives by striking down initiatives that interfere with certain essential government functions.[128] Although such action would protect the structural model of the Framers' chosen government while at the same time limiting the negative pragmatic consequences to state governance, it faces considerable obstacles. The normative framework of state judicial institutions causes state judges to hesitate before invalidating successful ballot initiatives out of a fear that the people will unseat an unpopular judge in an upcoming judicial election.[129] Judges may also fear being labeled as an activist.[130] Moreover, without any justification beyond the Framers' vision of the structural separation of powers inherent in republicanism, judges may confront precedent that prevents them from striking down ballot initiatives that affect essential government functions.[131]

The second, more realistic way to guard against the dangers of ballot initiatives is for state legislatures to utilize existing governmental procedures to amend state constitutions to limit the scope of ballot initiatives. For example, California could amend the ballot initiative provisions of its constitution to be in accord with its

126. *See supra* Part II.B.

127. *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 424-31.

128. *See* Friedelbaum, *supra* note 27, at 1023.

129. Bea Ann Smith, *Alarming Attacks on Judges: Time To Defend Our Constitutional Trustees*, 80 OR. L. REV. 587, 606 (2001) ("[T]he judge who strikes down an initiative faces a highly and well-funded group ready to unseat him at the next opportunity.... The populist movement that bred initiatives threatens to impose even more direct pressure on judges who reject their proposals.").

130. *See* Fiebig, *supra* note 89, at 133 (discussing criticisms of California judges for perceived judicial activism).

131. *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (holding that the ballot initiative process in Oregon was a nonjusticiable political question when litigants raised a Guarantee Clause challenge); Luther v. Borden, 48 U.S. (7 How.) 1, 56 (1849) (holding that Guarantee Clause claims are nonjusticiable political questions). *But see* New York v. United States, 505 U.S. 144, 185 (1992) (suggesting "that perhaps not all claims under the Guarantee Clause present nonjusticiable questions"); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 851-52 (1994); Berg, *supra* note 31, at 209.

provisions limiting referendums.[132] This change would exempt subject matter relating to urgency matters, tax matters, or "usual current expenses of the State" from being implemented by way of a ballot initiative.[133] In this sense, California could be a model for other states to emulate in limiting ballot initiatives and ensuring that the governance of the state remains consistent with the republican framework set forth by the Framers.

D. The Importance of the Guarantee Clause in Judicial Review of Ballot Initiatives

When addressing ballot initiatives from a structural perspective, courts play an important role in ensuring that the Framers' republican spirit is preserved.[134] This Note is not arguing that courts should hold certain ballot initiatives unconstitutional as a violation of the Guarantee Clause, although some commentators have advocated making the Guarantee Clause a justiciable question.[135] Instead, this Note follows the logic of Hans Linde, former Justice of the Oregon Supreme Court, who argued that the Constitution, as the supreme law of the land, imposes a duty on the states to "maintain republican forms of government."[136] This duty, which he characterized as the "most fundamental duty in American public law," belongs to both state officials and judges.[137]

In order to preserve the Framers' republican ideals, courts need not rely upon a violation of the Guarantee Clause. A judicial standard that honors the intent of the Framers, particularly their intent that both federal and state governments adhere to a republican form of government,[138] is attainable through an essential government functions exception. A central danger that direct democratic

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132. *See supra* note 97 and accompanying text. Ironically, amending the California Constitution to limit the substantive reach of ballot initiatives could be accomplished by using a ballot initiative.

133. *See* CAL. CONST. art. II, § 9(a) (restricting the subject matter of the state referendum power).

134. *See* Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 39-40 (1993).

135. *See* Berg, *supra* note 31; Chemerinsky, *supra* note 131.

136. Linde, *supra* note 134, at 39-40.

137. *Id.*

138. *See supra* Part I.

measures pose to the republican form of government is the danger presented by factions and simple majority rule. As Madison famously warned, "[w]hen a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens."[139] A ballot initiative, as a legislative instrument, presents the same danger: a system of pure majoritariansim.[140] One of the most famous instances of a court's check on the majoritarianism of a ballot initiative was *Romer v. Evans*.[141] Although the Court overturned the law at issue on equal protection grounds,[142] it also demonstrated the ability of courts to honor the Framers' desire for a republican style of legislating in order to protect the rights of minorities at the hands of majoritarian and factioned powers.

Although courts need not rely on the Guarantee Clause to invalidate a ballot initiative that interferes with essential government functions, the Guarantee Clause can provide courts with guidance. Courts readily acknowledge that the process of interpreting ballot initiatives requires the initiative to be within constitutional constraints and consistent with the intent of the Framers.[143] Of central concern to the necessity of a republican government is the protection against the dangers that factions pose to legislative activities.[144] The essential government functions exemption to direct democratic subject matter is necessary in order to prevent such factioned interests from abusing their majority position at the expense of minority interests.[145]

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139. THE FEDERALIST NO. 10 (James Madison), *supra* note 1, at 57.

140. *See* MANWELLER, *supra* note 104, at 192.

141. 517 U.S. 620 (1996) (striking down an amendment to the Colorado Constitution, passed by voter initiative, that forbade localities from including homosexuals in any protected class).

142. *Id.*

143. *See, e.g.*, Zingale v. Powell, 885 So. 2d 277, 282 (Fla. 2004).

144. *See supra* notes 58-63 and accompanying text.

145. *See* Eule, *supra* note 10, at 1558-59 ("[C]ourts must pick up the slack and ensure that the majority governs in the interests of the *whole* people.").

CONCLUSION

As the current California Chief Justice recently noted, continued reliance on ballot initiatives for matters that are paramount to the successful governance of a state "shall continue [the state] on a course of dysfunctional state government, characterized by a lack of accountability on the part of our officeholders as well as the voting public."[146] This cautionary statement regarding the dangers of governance by ballot initiative reiterates the message of this Note: the Framers chose a republican system of government and rejected a direct democratic system.[147] Continued reliance on unfettered ballot initiatives could, as John Adams foretold, subject the voter initiative mechanism to the common fate of most pure democracies —one in which direct governance subjects the government to an inability to govern properly.[148]

The essential government functions exception to ballot initiatives preserves the Framers' intent to implement a republican style of government in the states—best reflected in the Guarantee Clause[149] —by preserving the governance attributes that are most threatened by widespread use of ballot initiatives. Not only do ballot initiatives discourage the legislative deliberation that the Framers valued, they also subject the governance of a state to the dangers of factionalism.[150] By excluding essential government functions from the reach of direct democracy, as the California Constitution does in the case of state referendums on taxation,[151] the structural and philosophical framework of a republican state government is strengthened by the forced reliance on the ideals of deliberation, representative governance, and governance from the greatest diversity of interests.[152] Apart from the structural governance advantages of exempting certain types of subject matter from ballot initiatives, the exception prevents the pragmatic consequences that result when

146. Chief Justice George, *supra* note 9.

147. *Id.*

148. *Id.* (analogizing California's current reliance on ballot initiatives for governance to John Adams's warning that "democracy never lasts long" and that "[t]here is never a democracy that did not commit suicide").

149. *See supra* Part I.

150. *See supra* Part III.A.2.

151. *See* CAL. CONST. art. II, § 9(a).

152. *See supra* Part I.

a legislature's hands are symbolically tied during times of state fiscal crisis.

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