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## *Articles*

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### What Is a Constitution, What Is Not, and Why Does It Matter?

The occasion for today's conference is the 150th anniversary of Oregon's statehood, not of its constitutional text. These are not the same thing. How and why the two are related has, or should have, important legal consequences.

#### I

##### WHAT DO CONSTITUTIONS CONSTITUTE?

Statehood does not depend on a written "constitution." This is evident from the long history of monarchies, including the United Kingdom, and of an original state like Rhode Island. Authority to govern might rest on unwritten traditions or religious sanctions, on such established customs as lines of succession to hereditary offices,

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or be defined by formal agreements like Magna Carta and later by statutes and by parliamentary rules.<sup>1</sup> Details found in some state constitutions are left to rules in others. Election laws, not constitutional text, specify whose names qualify to appear on official ballots, with or without party designations, and thereby entrench partisan government or leave parties as unofficial organizations. The most primitive state has a political constitution in this sense, or others will not recognize it as a state.

Institutions created by a founding text develop their own myths. Sometimes the political constitution rests on faulty assumptions that familiar practices are legally required, on tradition more than the written text. Oregon legislators may assume that meeting annually needs approval as a constitutional amendment, but the text can be read merely to mandate meeting at least every second year.<sup>2</sup> Oregon judges have imported federal doctrines of nonjusticiability into the state's judicial article, whose text only guarantees that the courts cannot be deprived of the judicial power. The text does not limit what else lawmakers may ask judges to do.<sup>3</sup> For Oregon's centennial, a half-century ago, a commission prepared a modern Oregon constitution, which passed the house of representatives but fell one vote short in the senate.<sup>4</sup> The Oregon court held that voters could not initiate a version of the text because it was a "revision," although the designers of Oregon's initiative system had proceeded to draft many

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<sup>1</sup> Books on the British Constitution, besides those tracing historic developments from before and after Magna Carta, mainly have been commentaries on royal, parliamentary, and electoral institutions rather than on judicial interpretations of "constitutional" text. For several 19th century examples, see, e.g., WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* (2d ed. 1872); A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1885). For a modern collection of essays, see also *THE BRITISH CONSTITUTION IN THE TWENTIETH CENTURY* (Vernon Bogdanor ed., 2003).

<sup>2</sup> OR. CONST. art. IV, § 10.

<sup>3</sup> Article VII, section 1 of the Oregon Constitution, only "vests" (i.e., secures) the "Judicial power of the State" in the courts.

More relevant is article III, section 1, which forbids a person charged with official duties in one of the three departments of government to "exercise any of the functions of another." Is presiding over and attesting to a wedding such a function? Is responding to formal legal questions with a nondecisive opinion of the justices (not of "the Court") such a function? And if so, whose? Similarly, the constitution does not assign to any department an exclusive function of answering formal legal questions with a published opinion.

<sup>4</sup> The commission's report, its draft, and alternative versions appear in a symposium issue in the *Oregon Law Review*. *A Symposium on State Constitutional Revision*, 67 OR. L. REV. 127 (1988).

equally far reaching amendments; the new term was added only in 1960 to permit the legislature to submit “revisions” to the voters.<sup>5</sup>

There are legal limits on governmental design. The early Congress, under the Articles of Confederation, required that future states formed in the Northwest Territory must have republican forms of government.<sup>6</sup> The subsequent admission process, as well as tradition, demanded written constitutions—thereby also turning constitutional disputes into lawyers’ debates over interpreting legal texts. Accordingly, two years before statehood, Oregon’s convention prepared the original constitution, much of it copied from other states.<sup>7</sup> The designers of American constitutions made them harder to amend than ordinary laws, securing their other basic structures and sensitive guarantees of personal liberty against legislative majorities.<sup>8</sup> But this device also encourages sponsors of any desired policy to make whatever extra effort is required to cement their policy into the state’s constitution, beyond the reach of future policy makers. This, in turn, raises a question whether criteria beyond added procedures distinguish constitutions from ordinary laws.

The answer is yes; but for a century of statehood, Oregon had few occasions to face the question. The constitution required amendments

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<sup>5</sup> OR. CONST. art. IV, § 2; *Holmes v. Appling*, 237 Or. 546, 392 P.2d 636 (1964). The two justices who had served on the commission, K.J. O’Connell and T. Goodwin, JJ., did not participate in this decision; Justice Sloan, dissenting, cited the history of earlier initiatives proposing far-reaching amendments that was collected in plaintiffs’ brief. *Holmes*, 237 Or. at 555–58, 392 P.2d at 640–41.

<sup>6</sup> Act to Provide for the Government of the Territory Northwest of the River Ohio (“Northwest Ordinance of 1787”), ch. 8, art. 5, 1 Stat. 50, 51 n.(a) (1789) (“Provided the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles . . .”).

<sup>7</sup> Oregon and Kansas were the last two states admitted before the Civil War, but the 1857 convention consigned the most highly charged issues—slavery and the status of non-Caucasian people in the state—to a vote separate from the proposed Constitution. The voters decisively rejected slavery but endorsed other racist provisions. See, e.g., OR. CONST. art. I, § 31 (repealed 1970) (entitling only “white” foreign settlers residing in the state to the same property rights as native born citizens); OR. CONST. art. II, § 6 (repealed 1927) (denying right of suffrage to “Negroes, Chinamen and Mulattoes”). The convention discussions are summarized in Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857—Part I (Articles I & II)*, 37 WILLAMETTE L. REV. 469, 549–52, 579–606. At the time, federal law excluded Chinese from U.S. citizenship, and the 14th Amendment’s definition of U.S. citizens lay a decade in the future.

<sup>8</sup> In democracies that rely on parliamentary representation of a diversity of political parties, amendments often require no more than a two-thirds majority of votes. Where power essentially is concentrated in a single leader, elected or otherwise, such a leader often seeks popular endorsement of his program in the form of a plebiscite on a new constitution, regardless whether the existing one provides for this method.

to pass two consecutive legislative sessions and then win adoption by the voters, so the original version remained intact for forty-three years. In 1897, a Republican split over choosing a U.S. Senator allowed Democrats and Populists to prevent a legislative quorum. The price of resuming the state's business was to submit to the voters the means of direct popular intervention in government, by initiating or referring bills and recalling elected officials.<sup>9</sup> After passage in the 1899 and 1901 sessions, these innovations won a large majority of voters in 1902.<sup>10</sup>

Why the city of Portland at once challenged their validity, in a case that involved no direct legislation and that the city won on other grounds, is a political mystery.<sup>11</sup> But the *Kadderly* case gave the Oregon Supreme Court the first opportunity to defend the new system. After reviewing classic passages from the Federalist Papers, Justice Bean's opinion concluded that direct popular lawmaking was compatible with republican government as long as the state's elected representatives retained the power to repeal a law or enact a new one. Other states quickly followed.<sup>12</sup> When Oregon voters first initiated a law—a telephone tax—the U.S. Supreme Court (against a background of the same political split over Eastern financial and Western agrarian interests, as Norman Williams has recounted<sup>13</sup>) disclaimed its own jurisdiction—though not the duty of state officials and judges—to

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<sup>9</sup> David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System,"* 67 TEMPLE L. REV. 947 (1994). Judge Schuman describes U'Ren's role in organizing and leading groups outside the party system to win enactment and later making use of direct legislation.

<sup>10</sup> Could a legislature make some or all laws contingent on prior approval by voters (or other entities) when state constitutions are silent on this question? Judicial opinions have denied it, though Judge Oliver Wendell Holmes, Jr., dissenting, saw nothing in the Massachusetts Constitution to deny legislators this option. See *In re Municipal Suffrage to Women*, 36 N.E. 488 (Mass. 1894); *Hart v. Paulus*, 296 Or. 352, 676 P.2d 1384 (1984); *Opinion of the Justices*, 725 A.2d 1082, 1089 (N.H. 1999).

<sup>11</sup> *Kadderly v. City of Portland*, 44 Or. 118, 74 P. 710 (1903). I am indebted to Judge Henry Breithaupt for pointing out that Portland's then-mayor was former Senator George Williams, who also was president of the Direct Legislation League. See DAVID ALLEN JOHNSON, *FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840–1890*, at 299. Perhaps, given the small circle of 19th-century Oregon's political class, Williams had reason for confidence in the outcome.

<sup>12</sup> *Kadderly* and later cases were reviewed more fully in Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993).

<sup>13</sup> Norman R. Williams, *Direct Democracy, the Guaranty Clause, and the Politics of the "Political Question" Doctrine: Revisiting Pacific Telephone*, 87 OR. L. REV. 979 (2008).

decide the constitutional issue. After 1903, Oregon, in effect, had its second constitution.

The constitutional challenge to Oregon's newly adopted system was that direct lawmaking departed from a republican form of government, not in its details, but in principle. In turn, *Kadderly's* response was not a blueprint but an intelligible principle for their coexistence. A republican government must be responsible to its citizens, hence periodically chosen by them—unlike the individual citizens, often a small fraction, who choose to vote on some measure or to ignore it without pretending to represent anyone else. This shortcoming does not prevent voter plebiscites on referred or initiated measures, as long as lawmaking by representatives remains the indispensable ongoing institution. Moreover, a republican government must be a *government* as well as *republican*. It must be able to govern; anarchy, however appealing to libertarians, does not qualify.

*Kadderly's* defense of popular lawmaking neglected to mention initiatives to enact “amendments to the Constitution”<sup>14</sup> by the same simple majority vote as “laws” but beyond change by elected representatives. The new system's triumphant sponsors quickly initiated major changes in the government, including equal suffrage and municipal home rule, and others that were rejected.<sup>15</sup>

A century ago, after fifty years of statehood, these developments occupied two conventions of the Oregon State Bar Association, with formal addresses by lawyers who were brought up with classic histories of Greece, Rome, and England, the Federalist Papers, and the writings of Macauley, de Toqueville, and Bryce.<sup>16</sup> The Speaker of Oregon's House of Representatives, C.N. McArthur, in explaining why the legislature proposed a new constitutional convention, deplored placing statutory matter into state constitutions, including matters of private law, which was exacerbated by allowing easy amendments upon initiative petitions. “On the whole,” he observed,

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<sup>14</sup> OR. CONST. art. IV, § 1(2)(a).

<sup>15</sup> See OREGON SECRETARY OF STATE, OREGON BLUE BOOK, 2007–08, at 296–99 (2007) (tables of initiative measures adopted between 1902 and 1914 in Oregon Bluebook (2008)). Among the rejects was one described as “U'ren's Constitution,” a radical restructuring to abolish the state senate and introduce proportional representation in the single assembly, which shows that the original understanding of “amendment” did not distinguish it from “revision.”

<sup>16</sup> PROCEEDINGS OF THE OREGON STATE BAR ASSOCIATION, 1908–1909, 1909–1910, at 18, 84, 139, 148 (addresses of Charles H. Carey, F.T. Post, Walter P. La Roche, and C.N. McArthur).

“the adoption of the Initiative and Referendum is breaking down distinctions heretofore made between the processes of legislation and constitutional amendments,” so that the constitution could not reliably serve “to protect minorities, to guarantee certain rights, and to insure a republican form of government.”<sup>17</sup> In practice, however, the original sponsors of the Oregon system did respect that distinction, before later generations ignored it.

But their generation understood and respected the distinction between *laws* governing individuals and the *constitution* of government. That respect was swept aside by two later developments: the advent of paid signature gatherers, and the discovery by well-heeled movements that Oregon’s small electorate offered a low cost way to raise a cause *du jour* to constitutional stature. The results can be described as Oregon’s third constitution, including a detailed program for prison work,<sup>18</sup> a wholesale easing of constraints on criminal prosecutions (relabelled as “victim’s rights”)<sup>19</sup> and a detailed section on property taxes that fills 120 column inches.<sup>20</sup> Some of these measures, and others that failed, would not meet the test laid down in *Kadderly* for republican government: that laws could be made by direct legislation as long as elected representatives remain able to amend or repeal these laws and courts can test them against the constitution. Legislators and courts lose these powers when a law is locked into the constitution, which, of course, is the purpose of initiating a law as an amendment.<sup>21</sup>

## II

### WHO SECURES “REPUBLICAN” GOVERNMENT?

What is the responsibility of a state’s lawyers and judges for preserving republican governance? The textual answer is unequivocal. Under the supremacy clause, the U.S. Constitution is

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<sup>17</sup> C.N. McArthur, *The Need for a Constitutional Convention*, in PROCEEDINGS OF THE OREGON BAR ASSOCIATION 153–54 (1913). At a later time, McArthur might have added Florida’s experience with a system that allows initiatives only for constitutional amendments, without specifying what qualifies as an amendment.

<sup>18</sup> OR. CONST. art. I, § 41.

<sup>19</sup> OR. CONST. art. I, § 42.

<sup>20</sup> OR. CONST. art. XI, § 11.

<sup>21</sup> Because the guarantee clause challenge was to initiative lawmaking, I do not here deal with constitutional amendments submitted by the legislature itself, i.e., by the responsible elected representatives that this challenge demands. The text of article IV, section 1 of the Oregon Constitution leaves the issue open.

“the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>22</sup> The founders entrusted the Constitution to *state* judges. Federal judges were not even given general jurisdiction over federal questions until 1875.<sup>23</sup>

Some state courts, including Oregon’s, have been confused by—or have seized upon—Chief Justice White’s “political question” label in the *Pacific Telephone* case to evade that responsibility.<sup>24</sup> But this has not deterred judges from issuing numerous advisory opinions of the Justices, where these are used, on diverse issues of republican government.

Lawyers distrust law in the absence of judicial decisions: what is the use of knowing the right answer if there is no institution to validate and apply it? But often that authority—and responsibility—exists outside courts. In 1998, Attorney General Hardy Myers, then recently elected, said that before he advised officials about an issue of republican government, he wanted to know whether courts would review it,<sup>25</sup> though justice department litigators continued to resist such review with the routine invocation that it was “nonjusticiable.”<sup>26</sup>

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<sup>22</sup> U.S. CONST. art. VI, cl. 2.

<sup>23</sup> The Judiciary Act of 1875, 18 Stat. 470, § 1.

<sup>24</sup> See Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 COLO. L. REV. 709 (1994). The issue later was raised in two Colorado cases. In *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *aff’d*, *Romer v. Evans*, 517 U.S. 620 (1996), the Colorado court chose familiar equal protection formulas to invalidate an amendment barring legislation to protect minority sexual orientation, passing over a claim that the initiative process was a nonrepublican means to such an amendment. In *Morrissey v. State*, 951 P.2d 911 (Colo. 1998), the same court held that a term limits initiative governing congressional elections violated Article V of the U.S. Constitution and ran contrary to the principle of representative government established in the Guarantee Clause of Article IV. Because the court rested its opinion on a violation of Article V, however, it saw no need to decide whether the latter basis was justiciable. *Morrissey*, 951 P.2d at 916 n.9; see also David B. Frohnmayer & Hans A. Linde, *State Court Responsibility for Maintaining “Republican Government”*: An Amicus Curiae Brief, 39 WILLAMETTE L. REV. 1487 (2003) (Brief of Hans A. Linde and David B. Frohnmayer as Amici Curiae in Support of the Petition for Certiorari, *cert. denied*, *Sawyer v. Or. ex rel. Huddleston*, 118 S. Ct. 557 (1997)).

<sup>25</sup> Hardy Myers, *The Guarantee Clause and Direct Democracy*, 34 WILLAMETTE L. REV. 659, 660 (1998).

<sup>26</sup> See *Or. ex rel. Huddleston v. Sawyer*, 324 Or. 597, 932 P.2d 1145 (1997). After the defendant in that case petitioned for certiorari, an inquiry from the U.S. Supreme Court gave the department the opportunity to agree to the writ; instead it filed a response arguing against it. See Frohnmayer & Linde, *supra* note 24, at 1488 (Editor’s Historical Note) (“It is possible that Attorney General Hardy Myers, who took office while staff counsel were litigating the appeal, later wished that the Department instead had responded that it had no objection to the requested Supreme Court review, in the hope of clarifying the question of

A decade later, however, senate president Peter Courtney requested an opinion of the attorney general (Hardy Myers) on the subject. These were the stated questions and the short answers:

*First Question:* Does the United States Constitution obligate the State of Oregon to maintain a republican form of government?  
*Short Answer:* Yes.

*Second Question:* If so, is this legal obligation binding on all state public officials, irrespective of whether or how the obligation is judicially enforced? *Short Answer:* Yes.

*Third Question:* If so, may state officials obtain the legal opinion or advice of the Oregon Attorney General on questions of compliance with the obligation? *Short Answer:* Appropriate state officials may present questions about compliance with the Guarantee Clause to the Attorney General.

*Fourth Question:* In the absence of modern substantive decisions by the United States Supreme Court, may answers to such questions be derived from historic sources and opinions of courts in Oregon and in other states? *Short Answer:* The listed sources may provide useful guidance in answering this type of question.

*Fifth Question:* May the Legislature by statute set impartial standards and procedures for assuring adherence to a republican form of government, so long as the statute does not contravene the United States Constitution? *Short Answer:* The Oregon legislature may establish impartial standards and procedures intended to assure a republican form of government, so long as the legislation does not contravene the Oregon Constitution, the United States Constitution, or governing federal law.<sup>27</sup>

The question, then, is whether Oregon's elected leaders, in any of the three branches, care to defend their institutional authority and responsibility. A policy once endorsed by a majority of votes (even if not of voters) may gain a mythic quality in the political constitution even when a state, like Washington, allows only statutory initiatives but not constitutional amendments.

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whether the Department's advice on questions of republican government would or would not be reviewable in the state's courts.").

<sup>27</sup> Or. Atty. Gen. Op. No. 8286 (2008), available at <http://www.doj.state.or.us/agoffice/agopinions/op8286.pdf>. The full opinion footnoted that it remains an open question whether the Oregon court's *Huddleston* decision "is a correct extension" of *Pacific Telephone's* denial of federal jurisdiction. *Id.* at 6 n.1. Cf. Frohnmayer & Linde, *supra* note 24, at 1488 (Editor's Historical Note).

## III

## “MAY NOTS” OR “SHALLS”

Sometimes the difference between a “law” and an “amendment to the constitution” depends on the chosen wording, so that the proponents may, consistent with *Kadderly*, phrase a proposed amendment as a negation rather than an affirmative command. Other measures may be nonrepublican in substance.<sup>28</sup> But how does a restraint on government, which may be initiated as a constitutional amendment, differ from a mandate, which may be initiated only as a law? What some may criticize as empty formalism often has practical importance. An amendment barring government pensions without specified contributions from public employees leaves lawmakers a choice whether to provide pensions at all or, if an amendment bars pensions altogether, some other benefit. A command addressed to employees to contribute to a pension leaves lawmakers no such choice. It can properly be initiated as a law but not as a constitutional amendment.<sup>29</sup> The telephone tax at issue in *Pacific Telephone* was initiated as a law; to cast it as an amendment might well have struck this early initiative’s sponsors as bizarre.

Important as constitutional structures and processes are, Americans early and always coupled “republican” government with the assertion of personal rights. But they understood constitutional rights as restrictions of official power, many of them reflecting the grievances charged against King George III in the Declaration of Independence, limits on authority that could be respected by officials or enforced by judges, or should be so understood even when stated as rights. Here, too, later case law sometimes reflects familiar but inappropriate formulas as much as a constitutional text. The Oregon court for a time misread a guarantee of a remedy for tortious injuries, somewhat as the U.S. Supreme Court has simply omitted the word “process” from the due process clause to review the substance of state

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<sup>28</sup> Constitutional limits on taxing, borrowing, or spending, for instance, formally are restrictions on legislators; they are problematic when voters are invited to enact tax cuts as separately attractive initiative amendments without specifying a corresponding cut in spending or a source of compensating revenue.

<sup>29</sup> Cf. *Atiyeh v. State*, 323 Or. 413, 918 P.2d 795 (1996), discussed in David B. Frohnmayer & Hans A. Linde, *Initiating “Laws” in the Form of “Constitutional Amendments”*: An Amicus Curiae Brief, 34 WILLAMETTE L. REV. 749 (1998) (Editor’s Historical Note).

policies.<sup>30</sup> The process of case-by-case adjudication inexorably produces decision by adjectives, such as labeling some constitutional rights but not others as “fundamental”—without, however, explaining how these may equally be repealed by a simple majority of self-selected voters.<sup>31</sup>

A right that is stated as a denial of official power leaves open many other choices of action, or inaction. When judges enforce such a denial, they invade no legal authority. In contrast, a bare declaration of an affirmative right only creates a legal conundrum. When a California ballot measure added the word “privacy” to the opening phrase of the state’s constitution,<sup>32</sup> the California Supreme Court rejected the traditional understanding of rights as negating government power, citing explanatory statements that the ballot measure protected privacy also against nongovernmental actors.<sup>33</sup> What options did this leave open? One answer might be that such a declaration directs lawmakers to provide a legal remedy against private invasions of the stated right. Instead, the court undertook to define both the scope of the term “privacy” and of compensation for an invasion, with predictably divided opinions. Are these then frozen into constitutional law? Another option might have been to make clear that the court’s initial answers were only provisional and left room for legislative change, like most common law torts.<sup>34</sup> But when an initiative unambiguously places legal rules governing private persons into the constitution, it fails *Kadderly*’s test for republican governance.

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<sup>30</sup> OR. CONST. art. I, § 10; *see also* Hans A. Linde, *Without “Due Process”:* *Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970). Discovery of the misconception led Justice O’Connell to persuade a majority of the 1961–62 Commission on Constitutional Revision to propose an independent Oregon “due process” text, which however was rejected in the legislative version. *See* THE COMMISSION FOR CONSTITUTIONAL REVISION, *A NEW CONSTITUTION FOR OREGON: A REPORT TO THE GOVERNOR AND THE 52ND LEGISLATIVE ASSEMBLY*, reprinted in 67 OR. L. REV. 127, 198, 224–31 (1988).

<sup>31</sup> *See, e.g., In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by* CAL. CONST. art. I, § 7.5 (2008). The same question applies to other rights enhanced by adjectives like “inalienable” or “natural.” *See Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 23 P.3d 333 (2001).

<sup>32</sup> CAL. CONST. art I, § 1 (amended 1972). At the time, the word referred to increasing concerns with the privacy of communications, records, and other information, not personal autonomy in matters of sex, reproduction, or mortality.

<sup>33</sup> *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994) (urine testing of athletes).

<sup>34</sup> Similar questions arise under guarantees of a remedy for traditional torts. Article I, section 10 of the Oregon Constitution, for instance, did not prevent the replacement of tort damages for negligently inflicted injury by workers’ compensation laws.

A constitutional amendment ordering specific government action<sup>35</sup> leaves lawmakers no choice, as *Kadderly* demands. Instead, it irrevocably shifts lawmaking to the courts. When such an initiated amendment also requires new appropriations from tax receipts, a judicial order addressed to the legislature invades a core function that for centuries drove demands for representative government, familiarly known as “the power of the purse.”<sup>36</sup>

#### IV

#### WHAT NEEDS TO BE DONE?

The constitution’s historic function and text, not only a different process of adoption, distinguish laws from constitutional amendments. A principle that *constitutions* define structures, processes, and restraints of government, while rules direct at the governed are *laws* and cannot properly be initiated as amendments to the constitution, is clear enough as far as it goes; but it is not all, if a republican government must be a government as well as republican. Sometimes this may call for a more detailed, differentiated assessment than mere form. It may be one of degree, based on historical and functional rather than categorical reasons.

Requirements of super-majority votes, for instance, clearly deal with the law-making process. It is common to make some legislative acts contingent on wider support than a bare majority of votes.<sup>37</sup> How much wider may this be? A system rigidly demanding unanimity for all legislation would deny that elected assemblies represent people with divergent interests; it typifies one-party dictatorships. If every member complies and always votes as

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<sup>35</sup> The amendments authorizing Oregon’s lottery, as well as many bond measures, were not mandates but exceptions from general constitutional bans on lotteries and on public debts. A severe restriction of legislative taxing and spending authority, the essential instrument of governance, also rings alarm bells if imposed by an initiated amendment. *See, e.g., In re Initiative Petition No. 348*, 820 P.2d 772 (Okla. 1992) (expressing misgivings about mandatory referrals but choosing to await what voters would do).

<sup>36</sup> Article IX, section 4 of the Oregon Constitution, like Article I, Section 9 of the U.S. Constitution, prescribes: “No money shall be drawn from the treasury, but in pursuance of appropriations made by law.”

<sup>37</sup> As a practical matter, many Acts of Congress that deserve enactment but not the time for floor debates and votes can pass only by unanimous consent and can be derailed by a single member. The rules of the Senate require a three-fifths majority to end debate, effectively setting this hurdle for any controversial bill. Standing Rules of the Senate, S. Doc. No. 110-9, R. XXII (2007). But both rest on rules adopted by the members and can be changed by them.

directed, the system fails as republican; when one member does not, it fails as government.<sup>38</sup> But the judgment involves more than drawing a different numerical line. Taxation offers contemporary illustrations. A prohibition on all state taxes in any form would prevent “constituting” a government. A rule that an elected assembly could enact taxes only by unanimous votes would contradict republicanism. Should lowering the bar to ninety percent save it? Or to eighty percent? Yet history precludes ruling out super-majorities altogether; the U.S. Constitution’s drafters themselves required two-thirds votes for amendment and for treaties.<sup>39</sup> A republic may demand a higher consensus for some decisions than for others.

The problem comes to a head if the state constitution (or federal law) also mandates spending programs. Nevada faced this dilemma when its legislature had a majority to raise taxes for mandated public schools, but could not muster the required two-thirds. After unsuccessful special sessions, Nevada’s Governor obtained a decision of the Nevada Supreme Court that this super-majority requirement had to yield to the substantive obligation to fund schools.<sup>40</sup> Three years later, in an unrelated context, the same court disavowed giving priority to substantive directives over constitutional procedures of lawmaking.<sup>41</sup> But Nevada’s experience shows how a system that invites a majority vote to entrench a popular spending program beyond legislative reach and also lets a separate majority vote to entrench a tax limitation cannot function as a republican government.

What institution will analyze and apply the distinction—and apply it systematically—regardless of the policy that the particular measure serves or of its popularity at the time? The responsibility falls first on the state’s public lawyers, as the attorney general’s opinion recognizes. But theirs should not be the last word. If they are career civil servants, they will hesitate to advance any proposition for which they can cite no precedent; without it, critics of an opinion that casts doubt on a controversial measure, or sometimes that defends one, will

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<sup>38</sup> Precedents of requiring unanimity for joint action by holders of autonomous powers, as in Poland’s Sejm in the 17th century (and later in the 1919 League of Nations) demonstrate their shortcomings as models of republicanism, as even John Calhoun, the proponent of “concurrent majorities,” recognized. See *Kronika Sejmowa, 500 Years of Poland’s Sejm*, <http://kronika.sejm.gov.pl/kronika.97/text/spec/spec0.htm> (last visited May 15, 2009); JOHN C. CALHOUN, *DISQUISITION ON GOVERNMENT* 71 (1851).

<sup>39</sup> U.S. CONST. art. V, art. II, § 2.

<sup>40</sup> See *Guinn v. Legislature of Nev.*, 71 P.3d 1269 (Nev. 2003).

<sup>41</sup> *Nevadans for Nev. v. Beers*, 142 P.3d 339 (Nev. 2006).

call the opinion political. The state's lawyers also may later have the task of defending a challenged law in court. Moreover, government counsel are not expected to invite outside briefs or arguments before writing a legal opinion, though nothing precludes this step.

The state's institution that ordinarily is expected (as well as directed by the U.S. Constitution) to assure adherence to the Constitution is the judicial department. The nation has had recent and sobering experience with how passive virtues like denials of jurisdiction, standing, or the nonjusticiability of so-called political questions affect the conduct of government.<sup>42</sup> The Oregon Supreme Court, in a proper case, should be asked to reconsider the "open question" whether *Huddleston's* reading of the precedents was wrong, and to return to the opposite position that the court took a few years earlier.<sup>43</sup> Judges should not be deterred from following the supremacy clause's directive by an institutional reluctance to open the door to baseless new claims. While awaiting such a case, however, the legislature should do the next best thing: it should, by statute, enact a procedure for obtaining advisory opinions of the justices (which are not binding adjudications), a device that states have found helpful guidance to predict and avoid fiscal and other legal disputes more common than rare issues of republicanism.<sup>44</sup> As an alternative, should the court find an excuse to reject the task, a statute could direct the chief justice to designate up to seven senior judges from whom a

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<sup>42</sup> ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); see also Hans A. Linde, *The State and the Federal Courts in Governance: Vive la Différence!*, 46 WM. & MARY L. REV. 1273 (2005); Hans A. Linde, "A Republic . . . If You Can Keep It," 16 HASTINGS CONST. L.Q. 295, 319–27 (1989).

<sup>43</sup> *Supra* note 26. *Huddleston* relied on two old post-*Pacific Telephone* U.S. Supreme Court decisions that affirmed rather than dismissed appeals from state courts, without observing that these appeals relied more on substantive due process than on the already rejected guarantee clause claims and therefore could not be dismissed. See Frohnmayer & Linde, *supra* note 24.

In 1990, the Oregon Supreme Court, after noting that such claims could not be decided in federal courts, wrote: "That does not mean that the states may not adjudicate the compatibility of state law with the guarantee clause," citing its own opinions in *Kadderly* as well as *Pacific Telephone*. *State v. Montez*, 309 Or. 564, 603–04, 789 P.2d 1352, 1377 (1990). State courts have reviewed laws for not being "republican," both before and after *Pacific Telephone*. See, e.g., *Rice v. Foster*, 4 Harr. 479 (Del. 1847), *VanSickle v. Shanahan*, 511 P.2d 223 (Kan. 1973).

<sup>44</sup> Purely advisory opinions are not permissible in the form of adjudications between nonadversary parties, see *Or. Med. Ass'n v. Rawls*, 276 Or. 1101, 557 P.2d 664 (1976), but a few states authorize advisory opinions by statute, see Linde, *supra* note 42, at 1283 (citing Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1845–46 (2001)).

panel could be selected to give advisory opinions, after briefing in argument, on a constitutional issue, including issues of republican governance. Under either version, such an opinion might properly be sought by legislative leaders, by the governor, or by another independently elected state official, after consultation with the attorney general, on a matter directly within that official's independent authority—for instance, by the secretary of state, as chief elections officer, on whether a proposed measure is properly initiated as an amendment.

#### CONCLUSION

To sum up: Some 150 years ago, Oregon adopted a conventional constitution of its time. Forty years later, in reaction to domination by entrenched political parties and interests, the “Oregon System”—in effect, Oregon's second constitution—was designed to make government more responsive to the popular demands of the Progressive era. It succeeded as long as its original designers initiated *laws* to enact specific policies and initiated *amendments to the constitution* only to reform the institutions and electoral politics of government. The system went astray when later generations of activists began collecting extra signatures on petitions in order to erect constitutional monuments to some cause of the moment and place them beyond the reach of lawmakers elected to represent all the state's people, both voters and nonvoters, and to take responsibility for balancing the state's books.

Oregon's current text can fairly be described as a constitutional mess. But if those responsible for the state's institutions find it dysfunctional, the original conceptions of “laws” and “amendments” leaves restoration of the distinction in their hands. The harder question is whether this also is within the capacity of the political constitution.