



PROTECTING REPUBLICAN  
GOVERNMENT FROM ITSELF: THE  
GUARANTEE CLAUSE OF ARTICLE IV,  
SECTION 4

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Section 4. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.<sup>1</sup>

**Introduction**

In an important, relatively recent Supreme Court case, *New York v. United States*,<sup>2</sup> the Court entertained review of legislation under a constitutional clause that had lain mostly dormant since the Founding, Article IV, Section 4. The guarantee of republican government has an incredible allure, potentially conjuring all the

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<sup>1</sup> U.S. CONST. art. IV, §4.

<sup>2</sup> 505 U.S. 144 (1992).

democratic values we hold dear. But no single constitutional provision can be so all-encompassing, or the structure of the document becomes obscured. My purpose in this paper is to ask: what is the specific function of the Guarantee Clause? The Founders clearly intended the federal government to take some action in response to some situation in order to prevent some evil. What problem and what response did they envision?

In order to answer these questions, though, the terms must be defined, and the key term here is *republican government*. What particular quality makes a government republican? Others have found, and I agree, that a republican government at the Founding meant one in which the people are sovereign.<sup>3</sup> The next question is: how perfectly republican must a government be in order to satisfy the requirements of this clause? In order to answer this question—and I think this has not been accomplished effectively—we must determine the specific *function* of the Guarantee Clause. Words can have all kind of meanings and connotations, especially great, hoary words like “republican.” But this constitutional provision dictates action; therefore, we must ask, what must the government do under this provision, and when must it be done?

In reviewing writings by the architect of the clause, James Madison, as well as the debates at the Constitutional Convention, I find that the function of the clause can be described in three ways: (1) Protecting the existing states from upheaval; (2) *Preventing* the states from changing their government to one not republican; and, ultimately, (3) Protecting the union as a whole from disintegration. The Founders, both Montesquieu loyalists and his doubters, agreed that in order for a federation of republican governments to survive, all members of the union must be republican. This element is the one most neglected in past discussion of the clause. The common denominator for all of these aspects is stability: the state governments need to be sufficiently in the control of the people such that the union can remain republican, stable, and at peace.

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<sup>3</sup> See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994).

In Part I of this paper, I will examine in more detail a relatively narrow set of documents from the founding. I do not mean to wade into the debate over the value of original intent; that issue is well covered. But I think looking at the Founders' intent is less problematic when the inquiry is one of function rather than the meaning of an abstract philosophical idea, like "due process" or "equal protection." By examining the evidence, we can determine what part the clause played in the general structure and functioning of the Constitution. This inquiry is more difficult in the context of, for example, the Fourteenth Amendment, where vague, fundamental rights are being enforced directly on behalf of individuals against states.

Also, as Richard Epstein has pointed out, inquiries into original intent become muddled and confused when a wide array of collateral sources are mustered.<sup>4</sup> The wider the net is cast, the greater the variation in meanings, and the result is a loss of focus that obscures the text at the center of the inquiry. In Prof. Epstein's words:

The fatal vice of the historian's favored technique of intensive on the ground investigation is that it supplies too much information that often points in all directions at the same time. The effort to sort through these materials has the unfortunate consequence of leading lawyers and historians to slight the text, particularly the placement and structure of language. Of course, these historical materials are certainly indispensable in understanding the political cross-currents in any major constitutional struggle . . . . But for the legal job of deciding cases no lawyer or judge should be allowed, let alone required, to wander into a vast wilderness from which there is no escape.<sup>5</sup>

Furthermore, many sources, such as the ratification debates, include interpretations and beliefs that are tangential and self-serving. To

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<sup>4</sup> Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 NYU J.L. & Liberty 1096 (2005).

<sup>5</sup> *Id.*

obtain a precise, accurate definition of a given clause, we need to look predominantly at the Constitutional Convention notes and the Federalist Papers. The most helpful and uncontroversial way of understanding the clause, however, is simply reading through the appropriate Article.

In Part II, I will discuss and evaluate the recent proposals made by legal academics for modern use of the clause. Finally, in Part III, I will evaluate recent developments in the case law in light of what I have found to be the clause's intended function.

## I. Origins of the Clause

### A. Madison and the Vices of the Articles

The Guarantee Clause originated as an item in the Virginia Plan, the first set of proposals examined at the Constitutional Convention.<sup>6</sup> James Madison was instrumental in the framing of the Plan, and drew many of its elements, including the guarantee of republican government from his own *Vices of the Political System of the United States*.<sup>7</sup> It is rather convenient for our purposes that the drive behind this constitutional provision came almost entirely from one person, and indeed from one who so thoroughly and intelligently explained the elements of his political theory in writing. Thus, an examination of Madison's motivations is in order.

Jack Rakove illustrates how Madison's disillusionment with state politics under the Articles of Confederation led to the Convention and the Constitution itself.<sup>8</sup> The "Madisonian Moment," as Rakove terms it, involved Madison's realization that the country's problem was not primarily the weakness of the union, but the inherent ineffectiveness of the state governments

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<sup>6</sup> JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 30-33 (Ohio Univ. Press 1984) (1840); WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 28 (Milton R. Konvitz ed., 1972).

<sup>7</sup> James Madison, *Vices of the Political System of the United States*, <http://teachingamericanhistory.org/library/index.asp?document=802> [hereinafter Madison, *Vices*].

<sup>8</sup> See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 35-36 (1997).

themselves.<sup>9</sup> In his first political role as a member of Virginia's delegation to the Continental Congress, Madison had recognized only the more obvious problem with the Articles, that Congress lacked the resources and power to fulfill even its most basic duties under them.<sup>10</sup> His most important contribution as a member of Congress was a plan to increase the central government's revenue, a plan that compromised between national and state interests.<sup>11</sup> Such compromise was, Madison felt at that point, the best way to achieve a more effective union.<sup>12</sup>

In 1780, Madison became a Virginia state legislator. In this capacity, he came to understand that the nation's political problems were deeper and more localized than he had originally thought.<sup>13</sup> He found that Virginia legislators were parochial and incompetent.<sup>14</sup> They tended to be both too self-interested and too responsive to constituent interests.<sup>15</sup> When not simply passing petty legislation benefiting only their own trade (for example), they engaged in unhelpful demagoguery (Madison was thoroughly unimpressed with Patrick Henry as a legislator for this reason).<sup>16</sup>

After only a few frustrating years in the state legislature, Madison began pushing for a constitutional convention. In the words of Rakove, his "central conviction" was that "neither state legislators nor their constituents could be relied upon to support the general interest of the Union, the true public good of their own communities, or the rights of minorities and individuals."<sup>17</sup> The criticism struck at the heart of prevailing "republican theory," influenced particularly by the writings of Montesquieu.<sup>18</sup> Most

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<sup>9</sup> *Id.* at 37.

<sup>10</sup> *Id.* at 38.

<sup>11</sup> *Id.* at 38-39.

<sup>12</sup> *Id.* at 39.

<sup>13</sup> *Id.* at 36-37.

<sup>14</sup> *Id.* at 39-40.

<sup>15</sup> *Id.* at 41 (discussing the "duality of Madison's concern with lawmakers and their constituents").

<sup>16</sup> *Id.* at 40.

<sup>17</sup> *Id.* at 49.

<sup>18</sup> *Id.* at 19 ("The way in which Hamilton and Madison both invoke 'the celebrated Montesquieu to introduce their respective discussions of the extended republic and

importantly, Madison came to question Montesquieu's belief that a small local government, in which the representatives can most closely mirror their constituents, is the best government and the one most likely to preserve liberty.<sup>19</sup> Since the legislature will so mirror the people, the theory posited, the people will truly be governing themselves—only a reduced number of them is doing the governing, due to practical considerations.<sup>20</sup> More particularly, since the laws would affect the legislators to the same extent and in the same way as they would their constituents, legislators would be sure to pass only good laws.

Madison first questioned the assertion that a government of the "people" cannot be oppressive, in arguments made famous by his later essay in Federalist 10. Madison reasoned that within a small area having a small number of interests or "factions," it is that much easier for a particular faction to constitute a majority and succeed in passing laws that oppress the minority. Indeed, in a small republic, the legislators, given this power, will be more likely to use it. A smaller population means a smaller pool from which to draw talented and virtuous leaders; thus, the smaller the state, the more likely it is to be led by incompetents or scoundrels. Tyranny is not merely the result of the distance between an independent, dangerous "government" and an innocent "people," but can arise just as easily, if not more easily, from the latter. The basic need for republican government, of course, remains; a rightful and responsible government requires the consent of the governed. But republicanism, or self-government, can generate its own kind of tyranny. To prevent this tyranny, a vast nation of diverse factions must choose a relatively small number of leaders who can best rule with the public good in mind. A larger, stronger union was thus not

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the separation of powers in *The Federalist* (essays 9 and 47) demonstrates the authoritative status that the French baron's treatise *De l'esprit des lois* commanded.").

<sup>19</sup> *Id.* at 49. See THE FEDERALIST NO. 10 (James Madison).

<sup>20</sup> MONTESQUIEU, THE SPIRIT OF THE LAWS 159 (Anne M. Cohler et al. eds., Cambridge University Press 1989) (1748) ("As, in a free state, every man, considered to have a free soul, should be governed by himself, the people as a body should have legislative power; but, as this is impossible in large states and is subject to many

only called for by practical necessity; it would fundamentally improve the quality of government.

Another problem, more directly relevant to the Guarantee Clause, grew out of this basic argument of “factions” and the proper size of government. Conventional “republican theory” supposed that since, in a republic, the might lies in the hands of the right—that is, the majority—a republic is perfectly self-sustaining and stable.<sup>21</sup> In other words, the majority is both rightfully in power and, being the majority, more powerful than any individual tyrant or small group of aspiring aristocrats. Skeptical of such view, Madison first questioned the assertion that majority rule is at all times synonymous with righteous rule.<sup>22</sup> But even assuming the goal of keeping the majority in power, Madison feared that republics, and small republics in particular, were not as perfectly stable as convention held. A small number of people could possess a disproportionately large amount of power, military or otherwise.<sup>23</sup> Furthermore, a minority of the republic’s electorate, in its effort to overthrow the republican government, could get help from outside, either from foreigners or people inside the geographical area of the state but—for reasons proper or not—outside the electorate.<sup>24</sup>

In a union, the consequences of this instability are much more devastating. One of Montesquieu’s ideas with which Madison

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drawbacks in small ones, the people must have their representatives do all that they themselves cannot do.”).

<sup>21</sup> Madison, *Vices*, *supra* note 7 (“According to Republican Theory, Right and power being both vested in the majority, are held to be synonymous.”); THE FEDERALIST NO. 43 (James Madison) (“At first it might seem not to square with the republican theory, to suppose, either that a majority have not the right, or that a minority will have the force to subvert a government; and consequently that the federal interposition can never be required but when it would be improper.”).

<sup>22</sup> Madison, *Vices*, *supra* note 7 (“According to fact and experience a minority may in an appeal to force, be an overmatch for the majority.”).

<sup>23</sup> *Id.* (“If the minority happen to include all such as possess the skill and habits of military life, & such as possess the great pecuniary resources, one third only may conquer the remaining two thirds.”).

<sup>24</sup> *Id.* (“One third of those who participate in the choice of the rulers, may be rendered a majority by the accession of those whose poverty excludes them from a right of suffrage, and who for obvious reasons will be more likely to join the standard of sedition than that of the established Government.”).

wholeheartedly concurred was that a union of governments can only survive so long as the member governments are uniformly republican in form.<sup>25</sup> Monarchies, Montesquieu believed, are by nature more likely to be aggressive and malevolent, as they can drive their people into self-serving wars without any electoral check.<sup>26</sup> If even one member state of a union is monarchical, it will inevitably turn on its neighbors to expand its power.<sup>27</sup> As the saying goes, one rotten republic spoils the bunch. Having already established both the ineffectiveness and potential instability of local governments, Madison viewed the risk as exponentially greater once multiplied over the entire union. All it would take is one ineffective state government to dissolve into a monarchy, and the other states – the entire union, in fact – could soon follow.

In preparation for the Constitutional Convention, Madison drafted his famous guiding memorandum, the *Vices of the Political System of the United States*,<sup>28</sup> in which he put forth his radical ideas on the inherent flaws of small republican governments. His *Vices* begins with the most obvious and superficial problems of the weak union, failure of states to support the union financially, and moves toward the more fundamental problems afflicting the state governments, saving the most devastating – injustice of the laws – until the end.<sup>29</sup> Right in the middle of his enumeration of the vices, serving almost as a bridge between the enforcement problems and states' injustice, Madison included the "want of a guaranty to the States of their Constitutions & laws against internal violence."<sup>30</sup>

The placement of the guarantee among the vices is not, in my belief, a random occurrence. In a sense, this vice is a conceptual link between the flaws of local, parochial government on the one hand, and the need for a stronger union to protect those same

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<sup>25</sup> MONTESQUIEU, *supra* note 20, at 132; THE FEDERALIST NO. 43 (James Madison).

<sup>26</sup> MONTESQUIEU, *supra* note 20, at 132 ("The spirit of monarchy is war and expansion; the spirit of republics is peace and moderation.").

<sup>27</sup> THE FEDERALIST NO. 43 (James Madison) ("But who can say what experiments may be produced by the caprice of particular states, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers?").

<sup>28</sup> RAKOVE, *supra* note 8, at 46.

<sup>29</sup> Madison, *Vices*, *supra* note 7.

governments on the other. Madison's explanation of the "want of a guaranty" discusses the flaws, outlined above, of the "might equals right" theory, adding that "where slavery exists the republican Theory becomes still more fallacious."<sup>31</sup> Madison's point here is that republican government, with all its flaws and indeed *because* of its flaws, requires protections. A republic would, of course, be less flawed, and indeed more republican, if it did not enslave some of its people. But the focus of this vice, and ultimately the Guarantee Clause, is not creating the most republican government possible, but protecting the republican governments' continued existence, flawed or not.

It is also important to note that, at this point, the provision did not include a general guarantee of "republican government," but only one against *domestic violence*. Madison primarily feared instability and violent upheaval. Of course, as noted above, Madison believed that even a peacefully instituted monarchy was ultimately a threat to the union and to peace, and this fear was reflected in the Clause. But section 4, taken as a whole, gives primacy to the peaceful stability of a union of republican governments, not the republican nature *per se* of those governments.

As a solution to all the problems of state governments, Madison wrote Washington that he desired no less than an absolute federal veto, "*in all cases whatsoever*," of all state legislation.<sup>32</sup> Not only was this a drastic subversion of the existing state governments, but Madison went so far as to borrow, explicitly and directly, from the language of the hated British monarch's royal prerogative.<sup>33</sup> Thus, when arriving at the Constitutional Convention, Madison sought to establish not only a stronger union, but a greater national republic to replace—effectively, if not directly—the parochial state governments. Although this ambitious goal was ultimately doomed, it is important to keep in mind when examining the function of Madison's own Guarantee Clause. Madison had no

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> RAKOVE, *supra* note 8, at 51.

<sup>33</sup> *See id.*

great love for the state governments, however republican “in form” they may have been; their protection as such was required only for the greater good of the Union as a greater, more effective republic.

## **B. At the Convention**

As noted in the introduction, the mechanism of the Guarantee Clause could be construed in three different ways: 1) Protecting the states’ existing governments, constitutions and laws; 2) Preventing the states from becoming un-republican; and 3) Protecting the health, stability and republican nature of the union as a whole. All three of these themes were reflected in some way in the debates at the Constitutional Convention, and I will discuss each in turn.

### **1. Enshrining the Existing State Constitutions**

At the outset of the Constitutional Convention, Edmund Randolph introduced the Virginia Plan, which the delegation from that state had drawn up before most of the other delegates had arrived. The eleventh resolution of the Plan read as follows:

Resd. that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State.<sup>34</sup>

The first change, on June 11, 1787, was elimination of the territorial aspect of the guarantee, which bothered the delegates from the smaller states, who were at the same time jockeying for position in the debate over representation. According to Madison’s notes, George Read of Delaware went so far as to argue, surprisingly, that the ultimate goal should be “doing away [with] states altogether and uniting them all into one great Society.”<sup>35</sup> This suggestion,

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<sup>34</sup> MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 32 (Ohio Univ. Press 1984) (1840).

<sup>35</sup> Records of the Federal Convention, The Founders’ Constitution, Volume 4, Article 4, Section 4, Document 3, [http://press-pubs.uchicago.edu/founders/documents/a4\\_4s3.html](http://press-pubs.uchicago.edu/founders/documents/a4_4s3.html) [hereinafter Records].

which ironically must have pleased Madison most of all, had no chance for success, but it accomplished the more immediate task of eliminating the territorial guarantee.

Nevertheless, the implicit preservation of the states as they existed at the time was a recurring theme in the debate over the clause. The replacement formulation, “that a republican constitution, and its existing laws, ought to be guaranteed to each State by the United-States,” was debated more thoroughly on July 18.<sup>36</sup> The first objection in Madison’s notes came from Gouverneur Morris of Pennsylvania, who presciently argued against guaranteeing “such laws as exist in R. Island.”<sup>37</sup> This theme was echoed later by William Houstoun of Georgia, who “was afraid of perpetuating the existing Constitutions of the States,” Georgia’s in particular being “a very bad one.”<sup>38</sup> Houstoun anticipated the Dorr Rebellion problem as well, asserting that “[i]t may also be difficult for the Genl. Govt. to decide between contending parties each of which claim the sanction of the Constitution.”<sup>39</sup>

Thus, in discussing the content of the republican government guarantee itself, the delegates seem to have been interpreting the provision to *protect* the existing states, not interfere with their political structures or electoral systems. The assumption would be that states admitted into the union are republican and entitled to the guarantee, barring any drastic change in government. The only difficulty in judging whether a particular state government qualified arose when two different institutions claimed to be the proper government.<sup>40</sup> Madison’s notes contain no objection that the guarantee would result in federal meddling in the states’ electoral politics.

To allay Morris’ fears of endorsing the inevitable constitutional disaster that was Rhode Island, his colleague, James Wilson, replied that “[t]he object is merely to secure the States

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See *supra* notes 121-126 and accompanying text.

[against] dangerous commotions, insurrections and rebellions.”<sup>41</sup> In response, Madison made this explicit by proposing additional language to deal with “domestic as well as foreign violence.”<sup>42</sup> In support of the provision, Maryland’s Daniel Carroll noted:

Some such provision is essential. Every State ought to wish for it. It has been doubted whether it is a casus federis at present. And no room ought to be left for such a doubt hereafter.<sup>43</sup>

Thus, the delegates saw the clause as both presumptively guaranteeing the existing state constitutions and securing the states from any physical attack, a security the states might not have possessed under the Articles, even in theory.

## 2. Interfering with the States

Some delegates, however, saw the domestic violence section of what was to become section 4 as tipping the balance of power in favor of the federal government. When the Committee of Detail reported back to the Convention with their new draft, the clause had changed slightly. It included a proviso in front of the domestic violence section, so that it read as follows:

The United States shall guaranty to each State a Republican form of Government; and shall protect each State against foreign invasions, and, on the application of its Legislature, against domestic violence.<sup>44</sup>

Charles Pinckney moved to strike the qualifying phrase, “on the application of its Legislature.”<sup>45</sup> The motion provoked objections from delegates opposed to a strong central government. One of Madison’s chief small-state opponents, Luther Martin, complained that the clause gave the federal government “dangerous and

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

unnecessary power.”<sup>46</sup> Elbridge Gerry used stronger language, fearing that the clause would “let[] loose the myrmidons of the U. States on a State without its own consent. The States will be the best Judges in such cases. More blood would have been spilt in Masss in the late insurrection, if the Genl. authority had intermeddled.”<sup>47</sup>

New Hampshire’s John Langdon argued that the threat of a great force had the opposite effect, that of deterring domestic violence from the outset.<sup>48</sup> Gouverneur Morris also supported Pinckney, pointing out how “strange” it is that they should “form a strong man to protect us, and at the same time wish to tie his hands behind him.”<sup>49</sup> But his argument in favor of trusting the national legislature with discretion could not sway those who were disinclined throughout the Convention to so trust a distant, central government. Later, John Dickinson tried again to strike the proviso, taking a more practical tack in his reasoning than Morris. He pointed out, perhaps strangely, that the state legislature itself could be behind the rebellion. The delegates did not buy his argument, and his motion failed resoundingly.<sup>50</sup> The application requirement remained in the final version.

Note that the delegates feared the specter of a government intermeddling in an intrastate dispute by unjustifiably deeming it “domestic violence,” but did not raise similar objections to the potentially broader guarantee of “republican government.” The only objection raised by the delegates to the latter, more fundamental guarantee, was that it was *too protective* of existing states. But there were some indications that at least a few of the Founders intended a *restriction* on the states’ form of government as well. According to Yates’ notes, on the first day the clause was debated Randolph argued that “republican government must be the basis of our national union; and no state in it ought to have it *in their power* to change its government into a monarchy.”<sup>51</sup> Similarly, even

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (emphasis added).

after the provision was construed by Wilson as dealing primarily with situations of violence, Randolph maintained that an independent purpose of the clause, in addition to halting insurrections, must be to “secure Republican Government.”<sup>52</sup> He even attempted, with a second from Madison, to add language making explicit this restrictive aspect: “and that no State be at liberty to form any other than a Republican Govt.”<sup>53</sup> Perhaps the southern states could not then foresee a time when the federal government could use the idea of republicanism as a sword against slavery. And perhaps Rhode Island’s government, with its limitation of suffrage to landholders and severe malapportionment,<sup>54</sup> would have been more defensive in response to this threatened interference had it been represented at the Convention.

### 3. Protecting the Union

Returning to Randolph’s explication of the provision as quoted in Yates’ notes, he stated, as the ultimate reason for precluding a state from establishing a republican government, that such government “must be the basis of our national union.”<sup>55</sup> George Mason explained further that without the right to suppress insurrections, even entirely within one state, the *general government* “must remain a passive Spectator of its own subversion.”<sup>56</sup> Nathaniel Gorham expounded most thoroughly Montesquieu’s theory of why a republican union must be uniformly republican:

At this rate an enterprising Citizen might erect the standard of Monarchy in a particular State, might gather together partizans from all quarters, might extend his views from State to State, and threaten to establish a

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (internal quotation marks omitted).

<sup>54</sup> See *infra* text accompanying note 118.

<sup>55</sup> Records, *supra* note 35.

<sup>56</sup> *Id.*

tyranny over the whole & the Genl. Govt. be compelled to remain an inactive witness of its own destruction.<sup>57</sup>

Thus, the delegates were aware of the danger of even one state becoming totalitarian, even peacefully. In fact, when two parties within a state *are* in conflict, Gorham goes on to say that the central government should only get involved once the dispute turns violent.<sup>58</sup> The implication is that an upstart monarch commanding the will of an entire state is yet more dangerous than a state with two competing governments.

Even so, the emphasis in these passages is the danger *to the union*, not to the liberties of individual citizens. Of course, the Founders sought to create a republican union because they believed that republican government best ensured individual liberty. But the particular function of this provision is neither the protection of liberty itself nor the particular virtues of republicanism, but the protection of a republican union from violence, upheaval, and ultimately, tyranny.

If the primacy of national stability is not so obvious from the debates, it becomes clearer once we do what is all too seldom done: simply read through the section in question and examine the context of the clause, as it was adopted and ratified in the final version. Article IV as a whole deals with the states' relationship with the federal government and with each other. Section 1 demands that each state give "full faith and credit" to the laws of other states.<sup>59</sup> Section 2 continues that theme, instructing that each state protect the citizens' "privileges and immunities," as defined by the several states (however this clause ended up being construed).<sup>60</sup> Section 3 outlines the procedure for allowing new states into the union.<sup>61</sup> Finally, Section 4 reads: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* ("With regard to different parties in a State; as long as they confine their disputes to words they will be harmless to the Genl. Govt. & to each other.").

<sup>59</sup> U.S. CONST. art. IV, § 1.

<sup>60</sup> U.S. CONST. art. IV, § 2, cl. 1.

on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”<sup>62</sup>

Although one objective of section 4 was, in Randolph’s words, to “secure republican government,” it is tied together with the provision protecting the states against violent upheaval. Section 4, taken as a whole, seeks to ensure a safe, peaceful republican union. Thus, the emphasis in Randolph’s formulation belongs on *secure* rather than *republican*. Of course, it is impossible to know whether a government deserves this security if we do not know whether it is republican; but that question becomes easier to answer once we understand the primary function of the clause, which seems to be ensuring stability. The rights of individual citizens, to the extent that the main body of the Constitution deals with them directly at all, were protected against the states in Section 2 of the same article. Section 4 protects the state *governments*, once they are accepted as and remain fundamentally republican in form.

### C. The Federalist Papers

The Federalist Papers were composed after the Convention to convince New Yorkers of the new Constitution’s merits. They famously provide the best glimpse into Madison’s political philosophy and the theories that guided the creation of the Constitution. Here we can best examine the question we have heretofore left relatively unexamined: what does “republican government” *mean*? After analyzing Madison’s understanding of republicanism, we can return to the intended function of the Guarantee Clause and perhaps answer the question, *how* republican must the states be?

#### 1. The Meaning of Republicanism

It is notoriously difficult to locate any precise definition in grand words of principle, such as “due process” or “republicanism.” Even if the meaning of these terms had not been

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<sup>61</sup> U.S. CONST. art. IV, § 3, cl. 1.

<sup>62</sup> U.S. CONST. art. IV, § 4.

obscured by the passage of time, the people of the Founding Era themselves often did not agree on an exact definition. But even if scientific exactitude is impossible, it is possible and productive to discover what broad principle, among the several that formed the Founders' political thought, the Founders had in mind when they called a government "republican." Certainly they considered a republican government best, but which of its virtues gave it the "republican" title in the first place? The answer, as Akhil Amar has argued, is self-government or popular sovereignty.<sup>63</sup> As Madison saw, the people could govern badly or violate principles important to the Founders, such as minority rights; but as long as they are, in fact, governing—be it directly or indirectly—their government is republican.

For whatever reason, it is fashionable when gleaning the meaning of republicanism or indeed any concept from the Federalist Papers to resort solely to the famous Number 10. But for our purposes this is a rather roundabout approach, as Madison *directly* addresses the nature of republican government in Number 39 in his explication of federalism. According to Madison, a republic is

a government which derives all its powers directly or indirectly from the great body of the people; . . . . It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; . . . . It is *sufficient* for such a government, that the persons administering it be appointed, either directly or indirectly, by the people; . . . otherwise every government in the United States, as well as every other popular government that has been or can well be organized or well executed, would be degraded from the republican character.<sup>64</sup>

Thus, republican government is government by the people or, as Madison implicitly labels it, "popular government." The emphases in the quote above are Madison's: the *essential* nature of republican

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<sup>63</sup> Amar, *supra* note 3.

<sup>64</sup> THE FEDERALIST NO. 39 (James Madison).

government is that the people control their government, and it is merely *sufficient* that this control be executed indirectly; i.e., by the election of a relatively small number of representatives. This assertion is not radical; he is essentially recapitulating Montesquieu.<sup>65</sup> In this essay, Madison is defending the Constitution *within* conventional republican theory, assuming its correctness. With the notable exception of Federalist No. 10, Madison and Hamilton tried their best to convince New Yorkers that the Constitution was not a drastic innovation, but a perfectly acceptable manifestation of sound, established theory. Rakove explains how “co-opting” Montesquieu was strategically advantageous in the ratification debates, even as refuting him was “more satisfying intellectually.”<sup>66</sup> Number 10 is so notable and so famous precisely because it is one of the few instances where Madison, still treading lightly, explains how, to the extent the Constitution differs from conventional theory, it is actually an *improvement* on that theory. Thus, his opposition, in that essay, of republican government to pure democracy is a temporary rhetorical device used in explaining his novel, indeed un-republican, theory of factions.

Returning to number 39, Madison goes on to defend various electoral rules in the federal Constitution as either reasonably consistent with or actually more people-friendly (and hence, *republican*) than various state provisions then in existence. As final proof of the national government’s republican nature, Madison points to the prohibition of the intensely hated titles of nobility and to the guarantee to the states of a republican form of government.<sup>67</sup> If you still feel that your state governments are more republican, or otherwise better than our new national government, says Madison, you will be happy to know that the new Constitution leaves the state republics intact. After setting forth evidence of how the states retain their sovereign power, he summarizes the ways in

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<sup>65</sup> MONTESQUIEU, *supra* note 20.

<sup>66</sup> RAKOVE, *supra* note 8, at 154.

<sup>67</sup> THE FEDERALIST NO. 39 (James Madison).

which the new government is national and, conversely, the ways in which it is “federal” (i.e., leaves power to the states).<sup>68</sup>

Finally, in number 51, Madison puts this all together. He reconciles the novel theory of factions in number 10 with the claim of adherence to republicanism in number 39. He appeals to every advocate of republicanism by citing republicanism’s ultimate goal of guarding against oppression. The reason we advocate republican government—that is, self government—must be to prevent the oppression of our citizens. “Justice” (and, implicitly, not republicanism itself) “is the end of government,” says Madison. “It is the end of civil society.”<sup>69</sup> As in Federalist 10, Madison points out that oppression comes not only from rulers, but from an overbearing majority. Therefore, “all the sincere and considerate friends of republican government” should agree, Madison says, that removal of at least some powers to a national government will best further the “republican cause.”<sup>70</sup>

In our explication of the phrase “republican government,” we are not seeking to discover what early Americans, the Founders, or even Madison thought of good government in general; we are seeking the definition of republicanism. At first glance, Federalist 51 might seem to equate representative government or federalism with republicanism; in fact, it is doing just the opposite. Madison is appealing to broader principles, justice and liberty, which should and must be the greater ends of republican government. They are not synonymous with republican government. Madison, through a brilliant sleight of hand, is showing how placing a government farther away from its constituents—in effect, making it less republican—can actually further the goals republicanism enthusiasts must admit are the *real* ends of good government.

But the Guarantee Clause does not protect ideal governments or federal governments; it protects *republican* governments. The essential quality of state governments that section 4 seeks to preserve is popular sovereignty. Ironically, the

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<sup>68</sup> *Id.*

<sup>69</sup> THE FEDERALIST NO. 51 (James Madison).

<sup>70</sup> *Id.*

very need for and inclusion of a national guarantee of local republican government constituted an innovation above and beyond traditional notions of republicanism. The presence of the clause as a whole is where Madison's theory comes in. But the subject of Madison's guarantee is republican government, which to Madison and everyone else meant government by the people.

## 2. The Function of the Clause: *How Republican?*

Madison himself points out that the phrase "republican government" can describe a broad array of systems. How much control must the people have over their government in order for the state to satisfy the guarantee? We can answer this question by examining the function and practical operation that Madison attributed to the Guarantee Clause in the Federalist Papers. Although Hamilton also discusses the Guarantee Clause in Federalist 21, he focuses on the "Domestic Violence" provision and seems to claim that the rest of section 4 does not exist.<sup>71</sup> Albeit consistent with Section 4's primary theme of ensuring peace and stability, this recasting ignores the plain denial of the states' freedom to adopt, even peacefully, an un-republican government. In any case, Hamilton's essay must be relegated to a discussion of the "domestic violence" clause; for a thorough analysis of the "republican government" clause itself, we must turn to its architect, Madison.

In Federalist 43, Madison lists the various powers transferred to the new national Congress, discussing each one in turn. The sixth power on this list is the "guarantee to every state in the Union a Republican form of Government."<sup>72</sup> He explains the basic need for a guarantee as follows:

In a confederacy founded on republican principles, and composed of republican members, the superintending

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<sup>71</sup> THE FEDERALIST NO. 21 (Alexander Hamilton) ("[The guarantee] could be no impediment to reforms of the State Constitutions by a majority of the people in a legal and peaceable mode. This right would remain undiminished. The guarantee could only operate against changes to be effected by violence.").

<sup>72</sup> THE FEDERALIST NO. 43 (James Madison).

government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a Union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into, should be *substantially* maintained.<sup>73</sup>

Again, the emphasis is Madison's. Madison goes on to cite Montesquieu's historical evidence for the need of a uniformly republican union, including Greece's undoing as a result of the King of Macedonia's inclusion. Madison's fear is of "aristocratic or monarchical innovations," not just any un-republican characteristic. For the purposes of protecting against the collapse of the union, it is sufficient that the state governments remain "*substantially*" republican. In fact, the guarantee "supposes a pre-existing government of the form which is to be guaranteed."<sup>74</sup> Madison clearly intends the clause to govern situations of peaceful as well as violent change, but he maintains a strong presumption that a government admitted to the union is republican.

Madison then explains the flaws in Montesquieu's theory of a perfectly stable republic, as outlined above, for further illustration of the need for the guarantee. Again, significantly, Madison refers to "an unhappy species of population abounding in some of the States, who during the calm of regular governments are sunk below the level of men" and the possibility of their giving "a superiority of strength to any party" – implicitly, a minority – "with which they may associate themselves."<sup>75</sup> He is speaking, presumably, of slaves. He had already acknowledged the allowance of slavery as a fault under the Articles (the 20-year limitation on importation being an improvement thereof), describing the slave trade as no less than "a traffic which has so long and so loudly upbraided the barbarism of

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

modern policy.”<sup>76</sup> Of course, the Virginian Madison was speaking anonymously to a New York audience, and determining his “true” feelings about slavery is beyond the scope of this paper.<sup>77</sup> Either Madison viewed slavery itself as proof that the voting majority is not necessarily mean the majority of right, or he believed that the slaves could overthrow the legal voting majority as it exists. But the broader point here is, again, that a substantially, if flawed, republican state is worthy of protection under the Guarantee Clause.

The Federalist Papers thus provide further support for what we have already seen. The primary concern is that one of the United States will become a monarchy or aristocracy, be it through rebellion, invasion, or the charismatic ascension of a few leaders, and thereby destabilize the entire union. For this to happen, a state need be so rotten as to threaten the health of other states; so long as the state is *substantially* republican, the Guarantee Clause (at least) is satisfied. The protection of particular natural rights of citizens was best left, Madison and the federalists believed, to the structure of the federal government, with its enumerated powers, and to the state constitutions. Why define the powers of the great American republic, with all its structural safeguards and protections, if this structure and its attendant rights are all easily enforced by a brief guarantee?

## II. Interpretation of the Clause

The upshot of what I have described as the function of the Guarantee Clause is that the clause has essentially been rendered moot by history. Thankfully, we have for ourselves a rather stable, and at the very least “substantially” republican government. Therefore, even if the Guarantee Clause is made formally or theoretically justiciable, it almost surely will never again be applied

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<sup>76</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>77</sup> See RAKOVE, *supra* note 8, at 337 (quoting Madison as saying at the Convention that slavery is “the most oppressive dominion ever exercised by man over man” and as an example of “the danger of oppression to the minority from unjust combinations of the majority,” a sort of flipside of the argument in Federalist 43).

in practice under my understanding of the clause. This effect is the converse of what has been argued about the Commerce Clause: what has grown since the founding is not the meaning of the Commerce Clause, but interstate commerce itself.<sup>78</sup> When it comes to the Guarantee Clause, the field has not grown, but rather, thankfully, shrunk.

I don't see this as a problem, but many do. Lawyers feel an understandable need to put every word in our great formative document to work, to have every phrase make the world a better place. There have been several scholarly attempts in recent years to put the Guarantee Clause to use. I will address each basic approach in turn.

#### **A. Whatever Republican Government is, It Forbids Ballot Initiatives**

One approach feeds into the perhaps justifiable aversion to the results of the ballot initiative explosion of the last several decades.<sup>79</sup> Unfortunately, the argument has little behind it besides that aversion.<sup>80</sup> The argument seizes on Madison's opposition in Federalist No. 10 between republican government and pure democracy, arguing that if republican government means representative government to the exclusion of direct democracy, then the guarantee must prohibit ballot initiatives.

First, the argument, wanting only to invalidate initiatives (or at least the bad ones), skips right to what the clause must say about initiatives. Oregon Supreme Court Judge Hans Linde, for example, never tells us what "republican government" *does* mean or

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<sup>78</sup> See, e.g., Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1171 (1998) ("Increases in the incidence of [interstate] commerce necessarily present Congress with greater opportunities to exercise regulatory authority.").

<sup>79</sup> See e.g., Hans A. Linde, *Who is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994); Hans A. Linde, *When Initiative Lawmaking is not "Republican Government:" The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993).

<sup>80</sup> See Amar, *supra* note 3, at 756 ("The foundation of this claim is remarkably slender, consisting of 'law office history' based on a brief passage in Madison's Federalist Number 10 and a cross reference back to this passage in his Number 14, which served as a sequel.").

what it was meant to accomplish.<sup>81</sup> Could it be that the Founders inserted it solely to thwart ballot initiatives? Even so, Linde engages in some hair-splitting that would disqualify only certain types of initiatives.<sup>82</sup>

Second, as explained above, “republican government” at the time of the founding meant government by the people. Madison, by creating a national government and moving governmental power farther away from the people, was put on the defensive by proponents of conventional, Montesquieu-inspired republican theory.<sup>83</sup> Thus, ballot initiatives are, if anything, *too* republican. Again, our purpose should be determining what the intended function of this specific clause is, not what the Founders generally thought about the related issues. Madison would probably disapprove of direct democracy and worry about tyranny of the majority, but the Guarantee Clause is completely inapposite. Proponents of the anti-initiative view seize on the opposition in Federalist 10 between a republic and a “pure democracy,” but as explained above, a republic is in fact only representative by practical necessity. A republic is allowed to be representative; it does not need to be so. Madison only constructs this opposition, using Montesquieu’s allowance that necessity does indeed require that a republic resort to representatives, in order to make his point about factions and take Montesquieu’s allowance several steps further.

One thing the anti-initiative argument has going for it is that a case involving this argument went all the way to the Supreme

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<sup>81</sup> Linde, *Who is Responsible for Republican Government?*, *supra* note 79.

<sup>82</sup> Linde, *When Initiative Lawmaking is Not Republican Government*, *supra* note 79, at 31 (“A process might be legitimate for one purpose but not for another. . . . A statewide initiative process may be a legitimate process for enacting a gross receipts tax and not for raising social barriers between groups of citizens.”); *see* Amar, *supra* note 3, at 756 n.26 (“Judge Linde ultimately suggests that only certain forms of direct democracy offend Republican Government—for him, initiatives are more problematic than referenda, constitutional initiatives more problematic than statutory initiatives, affirmative-lawmaking initiatives more problematic than structural initiatives, and emotional, ideological initiatives more problematic than other initiatives.”).

<sup>83</sup> Rakove, *supra* note 8.

Court in the early 20<sup>th</sup> Century.<sup>84</sup> The anti-initiative side lost, but the court simply labeled all cases under the clause as nonjusticiable per *Luther* (more on that below). The fact remains that the approach has little to do with the intended meaning and function of the clause.

### B. The Clause Guarantees State Sovereignty

In an article that has the distinction of being cited by Justice O'Connor,<sup>85</sup> Deborah Jones Merritt argues that the Guarantee Clause ensures independent state sovereignty.<sup>86</sup> Like the Court in *New York v. United States*,<sup>87</sup> Merritt proposed resurrecting the principle underlying *National League of Cities*.<sup>88</sup> However, she hinges her version of the anti-commandeering principle on the Guarantee Clause rather than the Tenth Amendment. She argues that the clause requires the federal government to allow the states to retain their own republican rule. If the federal government usurps too much state authority, the states can no longer be described as “republics.”<sup>89</sup>

Unfortunately, Merritt’s argument has several problems. First, although she mentions that the Guarantee Clause originated as part of the Virginia Plan, she fails to acknowledge that the very same Plan proposed a national veto on *all state legislation*, which surely violates the state sovereignty principle she advocates.<sup>90</sup> As shown above, the authors of the Guarantee Clause had every intention of undermining state sovereignty, even though this goal became politically untenable.

Second, Merritt bases her position primarily on arguments made in the ratification debates, where the loss of state sovereignty

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<sup>84</sup> *Pacific Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912). *See infra*.

<sup>85</sup> *New York v. United States*, 505 U.S. 144, 157 (1992).

<sup>86</sup> Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

<sup>87</sup> 505 U.S. at 166 (“[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”).

<sup>88</sup> *National League of Cities v. Usery*, 426 U.S. 833 (1976).

<sup>89</sup> Merritt, *supra* note 86, at 2.

<sup>90</sup> Madison, *supra* note 34 (“Resolved . . . that the National Legislature ought to be impowered. . . to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union . . .”).

was the primary point of contention. The mere fact that federalists cited the Guarantee Clause as *evidence* that state sovereignty remained intact does not mean that the *function* of the clause was specifically to maintain sovereignty. This problem occurs when one resorts to ratification debates for a straightforward reading of clauses in the Constitution. These debates were skewed toward issues of federalism, because the novel and, in some minds, dangerous feature of the new Constitution was that it displaced, at least partially, the power of the state governments. If you base your understanding of the Constitution on the ratification debates, *every* clause will end up being all about federalism.<sup>91</sup>

Third, it is true, of course, that to guarantee a republican government there must be a government in the first place, but this is a mere inference from the Guarantee Clause, not an explication of it. The republican government may already be in place when the United States government “guarantees” (for example, in cases of invasion) or, in cases involving the “republican government” guarantee itself, the state may only become republican once the national government does its proper guaranteeing. It is backward to argue, as Merritt does,<sup>92</sup> that the Guarantee Clause *forbids* the federal government from governing the state’s franchise. Either the franchise is so deficient as to render the state un-republican, in which case the national government has a *responsibility* to intervene under the clause, or the franchise is sufficiently republican, in which case the clause does nothing.

### C. The Clause Encapsulates Any and All Individual Rights

Another analytical approach is to hang onto the Guarantee Clause any and all individual rights that could properly be associated with a good republican government. One extreme example of this approach is represented in an article by Arthur

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<sup>91</sup> Of course, Akhil Amar essentially makes this argument regarding the Bill of Rights, which he does believe to be all about federalism, i.e., preserving states. See *generally* AKHIL REED AMAR, *THE BILL OF RIGHTS* (1998).

<sup>92</sup> Merritt, *supra* note 86, at 43-45.

Bonfield.<sup>93</sup> Bonfield meticulously goes through the history of the clause during the convention and ratification, and accurately portrays its meaning as popular sovereignty, if not in those precise terms.<sup>94</sup> But then he cites one Supreme Court case from the early 19th Century, which says that an essential feature of Republican governments is that they ensure basic rights, and a concurring opinion that mentions “natural justice” in this regard.<sup>95</sup> He uses this obscure quote to springboard the focus onto “natural justice.” And since the concept of “natural justice” evolves, so does the clause.<sup>96</sup> In the end, the clause enables federal courts to impose on the states whatever the justices deem to be “contemporary values” associated with natural justice.<sup>97</sup>

A more notable proponent of the individual rights thesis, in more moderate form, is famed hornbook author Erwin Chemerinsky.<sup>98</sup> Chemerinsky first dispenses with the notion courts have imputed to *Luther v. Borden*<sup>99</sup> that the clause is categorically nonjusticiable. First, in his most convincing argument, Chemerinsky points out that the Guarantee Clause is the only instance where courts are deferring to the “political” decision made not by another branch of the federal government, but by a state government. The problem, he argues, is not that another branch of the government has already made a decision, but that they are failing to decide the issue at all.<sup>100</sup>

As for “judicially manageable standards,” Chemerinsky argues that the guarantee of republican government is no vaguer than Due Process or Equal Protection.<sup>101</sup> But considering

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<sup>93</sup> Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

<sup>94</sup> *Id.* at 527 (“Jefferson’s conclusion was that governments were republican to the extent that they had this element of popular election and control.”).

<sup>95</sup> *Id.* at 527-28.

<sup>96</sup> *Id.* at 528.

<sup>97</sup> *Id.* at 560.

<sup>98</sup> Erwin Chemerinsky, *Cases under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994).

<sup>99</sup> 48 U.S. (7 How.) 1 (1849).

<sup>100</sup> See Chemerinsky, *supra* note 98, at 873.

<sup>101</sup> *Id.* at 871.

Chemerinsky's rather expansive and indeterminate definition of the Guarantee as encapsulating a "right to political participation,"<sup>102</sup> which becomes protection against majority rule<sup>103</sup> and of "basic individual rights,"<sup>104</sup> those other clauses, which are at least focused on certain categories of rights, seem like better candidates.

He then objects to the nonjusticiability of the clause on the grounds that if courts do not step in and start enforcing individual rights under the Guarantee, it will only be enforced by Congress once a state establishes a monarchy or scraps its legislature.<sup>105</sup> But if that is exactly when the clause is *supposed* to be used, what is wrong with that result? Chemerinsky is assuming his conclusion.

His next argument is also somewhat circular. He points out that if Congress (as opposed to the federal courts) were to interfere with the states' form of government, the interference would be unconstitutional as "commandeering" under *New York v. United States*.<sup>106</sup> But the Tenth Amendment reserves to the states all powers not given the federal government; if the Guarantee Clause gives Congress the power and responsibility to interfere with state governments in a certain situation, then *New York* would not apply. It only applies once Chemerinsky assumes what he seeks to prove: that the power lies not with Congress, but with the courts.

As for the content of the Guarantee, Chemerinsky would have it swallow the rest of the Constitution whole. He claims that evidence from the founding indicates that the clause was not merely intended to prevent the establishment of monarchy, without

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<sup>102</sup> *Id.* at 868-69 ("[The Guarantee Clause] is meant to protect the basic individual right of political participation, most notably the right to vote and the right to choose public officeholders. . . . [and] also can be seen as independently protecting public deliberations in the law-making process.").

<sup>103</sup> *See id.* at 868 ("There is no doubt that a "republican government" – both from the perspective of the framers and its contemporary desirable content – includes more than just protection from monarchical governments. Madison, for example, believed that a republican government provided the solution to reconciling majority rule with protecting minority rights.").

<sup>104</sup> *Id.* at 869 ("I simply contend that the Clause should be understood as protecting basic individual rights.").

<sup>105</sup> *Id.* at 876.

<sup>106</sup> *See id.* at 877.

furnishing any of this evidence.<sup>107</sup> The clause, he argues, protects minority rights because the Constitution as a whole is an “anti-majoritarian document” (a surprising claim he does not really explain).<sup>108</sup> His argument is essentially a syllogism: The reason we have republics is that republics best protect individual rights, therefore any violations of individual rights are violations of republican government. By that logic, since the entire Constitution could be seen as geared towards protecting rights, *every* clause would be similarly violated. He fails to define what is a “republican form” or give any specific content to his notion of “individual rights,” saying that this is outside the scope of his paper.<sup>109</sup> But shouldn’t the specific meaning of the clause be the *starting point* of the discussion?

#### D. Amar and the Majoritarian Principle

Akhil Amar, unlike the authors above, makes an attempt to discover the “central meaning” of republican government, an attempt that is characteristically brilliant and convincing.<sup>110</sup> Amar concludes, using a wide array of quotes from various figures of the Founding (in contrast to the more selective and, hopefully, focused approach I adopt here), that this central meaning is popular sovereignty.<sup>111</sup> Popular sovereignty, he then posits, is synonymous with majority rule.<sup>112</sup> Amar goes on to discuss the role of the Guarantee Clause in various disputes, each of which entailed the question of who belonged in the “denominator” of the majority/minority calculation.<sup>113</sup>

Amar’s “denominator” approach is certainly an interesting and illuminating way of tying together the various historical

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<sup>107</sup> Chemerinsky writes: “The discussion at the Constitutional Convention certainly supports the view that the Guarantee Clause should be regarded as originally being about political rights.” *Id.* at 867. He provides no quotes or citations to support this claim, which I have found to be false in my own investigation of the the debates.

<sup>108</sup> See *id.* at 864, 868.

<sup>109</sup> *Id.* at 869.

<sup>110</sup> Amar, *supra* note 3.

<sup>111</sup> *Id.* at 762-766.

<sup>112</sup> *Id.* at 763.

episodes he describes. But I think his emphasis is conceptually misplaced when it comes to determining the core principle behind the Guarantee Clause. Republican government is government by the people; majority rule is just the mechanism (“decisional rule” in social science parlance) by which the people settle on a particular outcome. The simple concept of “republican government” does not go that far; it describes government by the people, however that should work. Of course, if enough people are excluded from the electorate, the government can hardly be said to constitute popular rule (and therefore perhaps mine is merely a conceptual quibble). But I think this vague, basic notion of republicanism fits with the purpose and function of the clause: to maintain a stable, broadly republican union.<sup>114</sup>

Finally, Amar’s conclusions undermine all his laudable efforts to discover the “central meaning” of the Guarantee Clause. He cites a litany of complaints about modern American government, even modern American society in general, which only tangentially (at best) relate to popular sovereignty. For example, Amar asks: “Are the extremes of wealth and poverty today – among equal citizens, equal voters – truly compatible with the spirit of Republican Government?”<sup>115</sup> The obvious “equality of opportunity” and “size of the pot” responses aside, note the mere “compatibility” with the “spirit” of republican government. We are already well astray of Amar’s “central meaning.” Furthermore, can one imagine unelected courts deciding, under the authority of the Guarantee Clause, that the current distribution of wealth in the United States is unconstitutional and directing a redistribution accordingly? What could be more incompatible with popular sovereignty than this scenario?

### III. Application of the Clause

#### A. *Luther, Pacific States Telephone, and Nonjusticiability*

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<sup>113</sup> *Id.* at 766.

<sup>114</sup> See *supra* text accompanying notes 73-74.

<sup>115</sup> *Id.* at 773.

My primary purpose in this paper is to discuss the intended function and meaning of the Guarantee Clause, not who should exercise that function. Nevertheless, we must at least summarize the justiciability issues that have plagued the clause before we can arrive at a discussion of its current state. In 1849, the Supreme Court decided the famous case of *Luther v. Borden*,<sup>116</sup> which not only became the authoritative decision on the Guarantee Clause, but an important case for the general doctrine of political question.

In 1842, Rhode Island was the only state in the union in which the people had not drafted or ratified their own constitution. The government in place was essentially the colonial charter government.<sup>117</sup> Despite the growth of Rhode Island's towns, the legislature had not re-apportioned the state since independence. Exacerbating this inequality between urban wage earners and rural landowners was the restriction of suffrage to "freeholders," owners of at least \$134 worth of real property, together with their eldest sons.<sup>118</sup> This situation prompted a reformist movement, the Rhode Island Suffrage Association, to draft a rival constitution and hold its own elections.<sup>119</sup> The established government of Rhode Island, meanwhile, made a token effort to solve its ratification deficiency and held its own convention at the same time; this convention, however, still restricted the franchise to freeholders.<sup>120</sup>

After the election and inauguration of the new freeholder governor, Samuel King, Suffrage Association leader Thomas Wilson Dorr attempted to rally support for a forceful rebellion.<sup>121</sup> Both leaders pled their case to President John Tyler, who wrote a letter to King saying that until his government was lawfully and peaceably replaced, Tyler would recognize it as the lawful government of Rhode Island. But Tyler refused to muster troops, as King had requested, or get involved in any way until an actual rebellion was

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<sup>116</sup> 48 U.S. (7 How.) 1 (1849).

<sup>117</sup> WIECEK, *supra* note 6, at 86.

<sup>118</sup> *Id.* at 86-87.

<sup>119</sup> *Id.* at 91.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 97-98.

underway.<sup>122</sup> In June, the situation came to its climax, as Dorr had mustered some support from Massachusetts and Connecticut. Tyler wrote a proclamation ordering the rebellion to disperse and authorized his Secretary of War to issue it, but by the time the Secretary arrived, Dorr's meager force had already disbanded.<sup>123</sup> Later that year, a new constitution was ratified, granting suffrage to all taxpayers and members of the militia.<sup>124</sup>

At the high point of tensions in Rhode Island in June, a police officer named Luther Borden had burst into the home of suspected Dorr sympathizer Martin Luther and ransacked it.<sup>125</sup> Even as the state's problems were basically settled, as a sort of political payback against President Tyler, Luther sued in federal court. By the time the case was actually decided, in 1849, Tyler was no longer in office.<sup>126</sup>

Chief Justice Taney's discussion of the issues begins, not with the political question problem that became inexorably attached to the clause, but with practical considerations of granting Luther's claim.<sup>127</sup> If the Court were to declare the charter government as illegitimate, all laws passed and all taxes collected thereafter (at least until the new constitution was ratified in November) would also be invalidated, and enforcement would be a nightmare.<sup>128</sup> Taney was unwilling to declare that these considerations disposed of the case, only that they required the Court to "examine very carefully its own powers before it undertakes to exercise jurisdiction."<sup>129</sup>

Taney then proclaims that the decision of whether to recognize a constitution, claimed to be ratified by the people, has always rested in the hands of the "political department," and the

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<sup>122</sup> *Id.* at 101-04.

<sup>123</sup> *Id.* at 106-07.

<sup>124</sup> *Id.* at 99.

<sup>125</sup> *Id.* at 113-14.

<sup>126</sup> *Id.* at 115.

<sup>127</sup> *Luther v. Borden*, 48 U.S. (7 How.) 1, 38-39 (1849).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 39.

“judicial power has followed its decision.”<sup>130</sup> The state supreme court of Rhode Island had similarly deferred to the political outcome in the case involving the prosecution of Dorr for treason.<sup>131</sup> In the only point of law that seems to contradict the rest of the opinion, Taney also says the Court must defer to the state courts in this matter.<sup>132</sup> After this puzzling point—after all, if any judicial authority is fundamentally unequipped to decide the issue, as Taney says it is, why does *any* court deserve deference here?—Taney returns to separation of powers, deciding that the Constitution has placed responsibility for the Guarantee squarely in the hands of Congress, who in turn delegated enforcement to the President by way of the Militia Act of 1795.<sup>133</sup>

The Guarantee Clause began coming up again in the courts during the Progressive Era, during which many innovations in government were challenged by people who were hurt by them. Although a few state decisions entertained such claims, the Supreme Court put this to an end in the case of *Pacific States Telephone & Telegraph Company v. Oregon*.<sup>134</sup> The plaintiffs in that case challenged initiatives that had been passed by the voters under a new provision in the Oregon constitution. They argued that republican government necessarily entails representative government and that this principle was violated by direct democracy.<sup>135</sup> The Court determined that *Luther* is “absolutely controlling,”<sup>136</sup> but also gave its own reason for rendering all claims under the Guarantee Clause nonjusticiable political questions. A claim under this Clause is not justiciable because it is one “not on the tax as a tax, but on the state as a state.”<sup>137</sup> *Pacific States* left the

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 40.

<sup>133</sup> *Id.* at 42-43.

<sup>134</sup> 223 U.S. 118 (1912).

<sup>135</sup> *Id.* at 140-41.

<sup>136</sup> *Id.* at 143.

<sup>137</sup> *Id.* at 150.

Guarantee Clause dead (at least in the courts) until *Baker v. Carr* reopened the door in 1962.<sup>138</sup>

Commentators have almost universally condemned this decision, even more strongly than they have criticized the political question doctrine generally. They claim both that *Pacific States Telephone* misconstrued *Luther* in determining that it bestowed categorical nonjusticiability on the Guarantee Clause<sup>139</sup> and that *Luther* should never in the first place have abstained as strongly as it did.<sup>140</sup> As for the first claim, some argue unconvincingly that *Luther's* decisional holding involved the practical problems with enforcement and that the other rationales were mere dicta.<sup>141</sup> A simple reading of the case belies this argument. As discussed above, the consequences of invalidating the existing government were only factors that compelled the Court to “examine very carefully its own powers.”<sup>142</sup> A more convincing argument points out that *Luther* can be confined to cases where the central government is deciding between two governments.<sup>143</sup> This decision in particular is what Taney proclaims to be irretrievably political. If one body is indisputably the government of a state, then that decision need not be made, and that government’s constitution can, perhaps, be evaluated against a judicial standard of republicanism.

Commentators, and perhaps now the Supreme Court (see below), also argue that cases falling under the Guarantee Clause should be nonjusticiable only insofar as they also constitute a political question under that general doctrine (with all its problems). If the problem is vagueness, the clause is no vaguer—once its specific meaning is nailed down—than the broad clauses of

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<sup>138</sup> See *infra*.

<sup>139</sup> See, e.g., Amar, *supra* note 3, at 776 (“[*Luther*] has today come to stand for the broad proposition that the Republican Government Clause of Article IV is not justiciable. But a narrower reading of *Luther's* holding makes much more sense. The key issue in the case was not whether the charter regime was Republican, but whether it was a Government.”).

<sup>140</sup> See, e.g., Chemerinsky, *supra* note 98, at 872 (discussing the “many obvious flaws” in *Luther's* reasoning).

<sup>141</sup> WIECEK, *supra* note 6, at 119-120.

<sup>142</sup> *Luther v. Borden*, 48 U.S. (7 How.) 1, 39 (1849).

<sup>143</sup> See *supra* note 127.

section 1 of the Fourteenth Amendment.<sup>144</sup> As for the structural, federalist nature of the clause, the Court has not shied away from construing other structural clauses, such as the Commerce Clause. As I mentioned earlier, the thesis of this paper does not really address the justiciability issue. I am generally convinced by these arguments, but as I pointed out earlier, I think the intended function of the clause—even if theoretically enforceable by the courts—has been rendered moot by history, such that the justiciability question is essentially irrelevant.

### **B. *Baker, Reynolds, and Reapportionment***

In *Baker v. Carr*,<sup>145</sup> the plaintiffs challenged a state apportionment statute that created districts of varying sizes. Before remanding the case for consideration under the Equal Protection Clause, the Court evaluated the Guarantee Clause and its justiciability. Brennan's decision is somewhat confusing on this point. At first, Brennan proclaims that Guarantee Clause cases "involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable."<sup>146</sup> He goes on to cite *Luther* for the proposition that the Guarantee Clause necessarily gives us "no judicially manageable standards"<sup>147</sup> and says that any claim under the Guarantee Clause is necessarily "futile."<sup>148</sup> Next, however, he determines that the claim in *Baker* did *not* constitute a "political question" under the new criteria he lays out, and remands for consideration under the Equal Protection Clause.<sup>149</sup>

Justice Harlan, in his dissent in *Reynolds v. Sims*,<sup>150</sup> put it best:

Stripped of aphorisms, the Court's argument boils down to the assertion that appellees' right to vote has been invidiously 'debased' or 'diluted' by systems of

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<sup>144</sup> See *supra* notes 92-95.

<sup>145</sup> 369 U.S. 186 (1962).

<sup>146</sup> *Id.* at 218.

<sup>147</sup> *Id.* at 223.

<sup>148</sup> *Id.* at 227.

<sup>149</sup> *Id.* at 237.

apportionment which entitle them to vote for fewer legislators than other voters, an assertion which is tied to the Equal Protection Clause only by the constitutionally frail tautology that 'equal' means 'equal'.<sup>151</sup>

Robert Bork, in an article advocating neutral, principled judicial decision-making, argues that the Guarantee Clause actually provides a more principled basis for the decision than the Equal Protection Clause.<sup>152</sup> Clearly, equality is not an absolute value; some factors justify discrimination and differentiation. For equality to be constitutionally mandated for a given subject, that subject must consist of a primary right of the individual, such that it can be applied honestly and legitimately across all factual scenarios.<sup>153</sup> How do the primary rights of the individual include an absolute equality of weight given to votes? And how does the Court recognize the principle in *Baker*, but still allow other mechanisms that weigh votes unequally, including the committee system, the filibuster, and even the practice of districting? The Guarantee Clause, on the other hand, does not require finding such a deep, primary principle, because the idea of one-person-one-vote could reasonably be construed as an essential element of a republican form of government; i.e., a mechanism essential to ensuring that the people are governing. Ultimately, as Bork himself acknowledges, a reading of Madison and the convention debates indicates that such a detail could not have been thought so essential;<sup>154</sup> but at least it would be *conceptually consistent* with the clause, more so than with Equal Protection.

In *Reynolds v. Sims*,<sup>155</sup> the Court, in a brief reference to the Guarantee Clause, confirmed that the door had been opened by stating that "*some* questions raised under the Guarantee Clause are nonjusticiable, where 'political' in nature and where there is a clear

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<sup>150</sup> 377 U.S. 533 (1964).

<sup>151</sup> *Id.* at 590.

<sup>152</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 19 (1971).

<sup>153</sup> *Id.* at 18.

<sup>154</sup> *Id.* at 19.

<sup>155</sup> 377 U.S. 533 (1964).

absence of judicially manageable standards” [emphasis added]. *Reynolds* was again an apportionment case, and was decided on Equal Protection grounds. It was also a bit clearer on why the political question outcome was different for the Guarantee Clause analysis than for the Equal Protection Clause. The Court indicated that since Congress accepted the state into the union in substantially the same form as it exists now, the Guarantee Clause has essentially been satisfied. This view comports with the Founders’ assumptions at the debates, as discussed above.<sup>156</sup> The Guarantee Clause might not be categorically out of the Court’s purview, but it is rather easy to satisfy.

### C. *New York and Federalism*

The landmark federalism case, *New York v. United States*,<sup>157</sup> pushed open the door to justiciability more widely, but in a strange context. That case decided, under the Tenth Amendment, that the Federal Government may not direct the machinery of State Governments to do its bidding—a prohibition that has come to be known as the “anti-commandeering” rule.<sup>158</sup> After striking down only part of the federal statute under the Tenth Amendment, Justice O’Connor tentatively evaluates the other parts under the Guarantee Clause. Plaintiffs had argued—as Merritt does in her article—that a federal statute making demands on a state government deprives the state of its sovereign power and, therefore, of its republican form of government. Without officially resolving the “difficult question” of whether the clause is justiciable generally, O’Connor favorably cites several cases predating *Pacific States Telephone* that presumed the clause to be, at least theoretically, justiciable, as well as several legal scholars who have argued for its justiciability (including Merritt).<sup>159</sup> O’Connor goes on to determine that, just as the incentive provisions involved were not severe enough to violate the Tenth Amendment,

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<sup>156</sup> See *supra* text accompanying notes 36-40.

<sup>157</sup> 505 U.S. 144 (1992).

<sup>158</sup> 505 U.S. at 182-83.

<sup>159</sup> *Id.* at 184-85.

they cannot “reasonably be said to deny any State a republican form of government.”<sup>160</sup>

Whereas the apportionment cases, had they applied the Guarantee Clause, would have merely stretched the clause by making it far more stringent than its intended function required, *New York* detaches the clause from its context and meaning. As I argued in my discussion of Merritt’s article, the idea that the Guarantee Clause serves to protect state sovereignty is not only inconsistent with the intended function of the clause, it is precisely contrary to it, at least in some instances. Of course, if the federal government actually rendered a state government un-republican—say, installed a monarch or deprived all blondes of the franchise—then this would surely constitute a violation of the clause. But this is a far cry from saying that the *act of meddling itself* is the target of the clause. As I illustrated in my survey of the constitutional convention, the clause operates in both directions in the State-National power struggle; it is thus improper to describe the primary purpose clause as strengthening one or the other (although this certainly could be the *effect* in a given case). Furthermore, taking some power away from the states was the chief purpose of the United States Constitution. Only the power not given the federal government was left to the states, as the Tenth Amendment makes clear.

Reviewing what I have found to be the meaning and function of the Guarantee Clause, “republican government” is a government substantially by the people. The purpose of the clause is to make the national government responsible for ensuring that no single state becomes un-republican—i.e., divorced from popular control—enough that the stability and freedom of union as a whole is threatened. Thus, although it is justifiable for the Courts to have construed the clause as *theoretically* justiciable, the matter should really end there if we are to keep the clause in its proper place in the Constitution’s broader structure. However, if the Court absolutely must have the clause do something, it should restrict its use to cases

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<sup>160</sup> *Id.* at 185.

that are consistent in principle with its meaning: i.e., cases involving a lack of self-government in the states.

### **Conclusion**

When Madison included the lack of a guarantee of republican government among his Vices, he sought not only to protect that form of government, but also to compensate for its flaws and, to some extent, correct it. Conventional theory—Montesquieu's thought being the chief source—held that the more local government was, the closer it was to the people, the more effective it would be and the better it would protect individual liberties. Madison saw from experience, and figured out in theory, that a government controlled closely by the people could be both ineffective and oppressive. And because it stood on shakier ground than the conventional wisdom imagined, it was also less perfectly self-sustaining than he thought. All this necessitated not just the Guarantee Clause, but the Constitution in general; in other words, a move partly away from republicanism.

Thus, although the Founders understood a republican government as one that is controlled by the people, they necessarily believed in a looser version of it, because their entire purpose at the convention was loosening it—loosening, but not breaking it. Government must always remain under the ultimate control of the people, or liberty will be threatened; and, in a union, if any single member is tyrannical, the other states and the entire union are in jeopardy. Article IV, Section 4 as a whole sought to preserve the stability of the United States as a republican union of republican states, by holding up the great threat of a national army against anything that threatened this stability. Ultimately, the reason for having a republican government is to promote justice and freedom, but these values were best promoted, the Founders felt, by the structural innovations they conceived.

In recent years, commentators and one Supreme Court case have sought to use this clause for purposes different from those the Founders anticipated. The Founders were not perfect, and the purposes are not bad. But as with any constitutional provision,

particularly with provisions such as this that fit delicately into the greater structure of our federal system, removing the provision from its meaning and context jeopardizes the cohesiveness and effectiveness of the Constitution as a whole. Just as the field of the Commerce Clause has expanded, at least partly due to expansion of the economy, far beyond the Founders' wildest imaginations, the field for the Guarantee Clause—the threat of monarchy and aristocracy arising in the states—has, thankfully, shrunk to nothing. It is difficult for us today to appreciate how serious the Founders' felt the risk was of destruction of their republican governments, relatively novel experiments still in their infancy. Republican government is, of course, as valuable and crucial today as it was at the Founding, and there are certainly many laudable ways in which our government could be brought closer to the people. But it is just as important that each piece of our great constitutional machinery is reserved for its proper function, so that our government remains a constitutional one.