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DEATH BY A THOUSAND CUTS: THE GUARANTEE CLAUSE REGULATION OF STATE CONSTITUTIONS

Jacob M. Heller

NOTE

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INTRODUCTION

California is ungovernable. The state’s annual budget charade might give one the impression that its governor and legislature are to blame. But in truth, it is out of their hands. Decades of “ballot-box budgeting,” where voters pass taxing and spending legislation by citizen initiative, has put more and more of the state’s budget out of the legislature’s control.¹ While estimates vary, somewhere between seventy-seven and ninety percent of California’s general fund² is “set in stone before the Legislature and governor even start

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1. Uniquely, California “is the only state that does not allow its legislature to override successful initiatives . . . and has no sunset clauses that let them expire.” *California: The Ungovernable State*, ECONOMIST, May 16, 2009, at 33, 34; see also Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735, 1756-57 (1998) (“Suffice it to say that voters deciding for or against separate taxing and spending measures cannot balance a state’s budget.”).

2. MARK BALDASSARE & CHERYL KATZ, *THE COMING AGE OF DIRECT DEMOCRACY: CALIFORNIA’S RECALL AND BEYOND* 16 (2008). One commentator estimated in 1990 that “only 8 per cent of the state budget is controlled by the legislature.” Lionel Barber, *U.S. Mid-Term Elections: Californian Legislators Set to Lose a Prop*, FIN. TIMES (London), Nov. 3, 1990, § 1, at 2.

negotiating.”³ With an increasingly small slice of the decision-making authority left to elected representatives, it is difficult to argue that California is still a representative democracy.⁴

This fundamental change in California’s form of government did not happen overnight. Instead, with every election came a new set of initiatives that slowly and gradually set aside pieces of the general fund until there was nothing left. There was no one fatal blow to representative democracy in California; it suffered death by a thousand cuts.

* * *

Article IV, Section 4 of the United States Constitution “guarantee[s] to every State in this Union a Republican Form of Government.”⁵ For over a century, academics, jurists, and politicians have argued that this provision, the “Guarantee Clause,” could be a powerful tool to reform state governments. Myriad uses for the Clause have been suggested, including that it prohibits or regulates direct democracy⁶ and judicial elections,⁷ provides a basis for federal

3. Brian Joseph, *The System Is the Problem with California’s Budget*, ORANGE COUNTY REG., June 5, 2009, available at <http://www.oregister.com/articles/budget-state-governor-2446641-california-lawmakers>.

4. See Peter Schrag, *Take the Initiative, Please: Referendum Madness in California*, AM. PROSPECT, Sept.-Oct. 1996, at 61, 63 (“[T]he initiative, which for a half century was regarded as an extraordinary expedient available in the rare cases of serious legislative failure or abuse, has not just been integrated into the regular governmental-political system, but has begun to replace it. . . . [I]t has by general agreement become the principal driver of policy in California”); see also PETER SCHRAG, CALIFORNIA: AMERICA’S HIGH-STAKES EXPERIMENT 3 (2006) (“Direct democracy, not representative democracy, now lies at the core of California government.”); *id.* at 134; Linde, *supra* note 1, at 1758; Editorial, *Democracy for Sale*, DAILY NEWS OF L.A., Mar. 30, 2005, at N14 (“California is giving up the pretense of a representative democracy.”). As the *Economist* put it recently, “by circumventing legislatures in the minutiae of governance . . . direct democracy overrules, and often undermines, representative democracy.” *Direct Democracy: The Tyranny of the Majority*, ECONOMIST, Dec. 19, 2009, at 47, 47.

I do not mean to imply that *all* of California’s governance woes can be traced back to direct democracy. Other factors, including its size and supermajority requirement for passing tax increases, share the blame. Nonetheless, California is a unique and interesting example of a state’s form of government gradually changing from representative democracy, making it an illuminating example for this Note.

5. U.S. CONST. art. IV, § 4.

6. The literature on this subject is voluminous, but a small sampling of those making this argument recently include Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1539-45 (1990); Linde, *supra* note 1; Hans A. Linde, *When Initiative Lawmaking Is Not “Republican Government”: The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993) [hereinafter Linde, *Homosexuality*]; Hans A. Linde, *When Is Initiative Lawmaking Not “Republican Government”?*, 17 HASTINGS CONST. L.Q. 159 (1989) [hereinafter Linde, *Not “Republican Government”*]; Catherine A. Rogers & David L. Faigman, *And to the Republic for Which It Stands”: Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057 (1996). Some prominent scholars contest the view that direct democracy runs afoul of the Guarantee Clause, however. See AKHIL REED

anti-corruption legislation aimed at state and local officials,⁸ protects individual⁹ and political rights,¹⁰ precludes federal interference with the states’

AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 276-80 (2005); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 756-59 (1994); see also Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807 (2002) (laying out a broad and detailed historical argument that the founders saw direct democracy as part of republican government). Whether initiatives violated the Guarantee Clause was also debated as initiatives and referenda were being introduced into state constitutions at the turn of the century. Compare D.C. Lewis, *Arizona’s Constitution—The Initiative, the Referendum, the Recall—Is the Constitution Republican in Form?*, 72 CENT. L.J. 169, 177 (1911) (concluding that the proposed constitution for Arizona, which included the initiative and referendum, is not republican in form), and T.A. Sherwood, *The Initiative and Referendum Under the United States Constitution*, 56 CENT. L.J. 247, 250 (1903) (“I am unable to reach any other conclusion, but that the amendment cannot withstand the test and the charge that it attempts to substitute for a ‘republican form of government,’ something which does not come up to the standard of such a form of government as understood at the time of the adoption of the federal constitution . . .”), with W.A. Coutts, *Is a Provision for the Initiative and Referendum Inconsistent with the Constitution of the United States?*, 6 MICH. L. REV. 304, 316 (1908) (finding that the initiative and referendum do not conflict with the Guarantee Clause because the framers were only concerned with ensuring governments that resulted in “a correct expression of the will of the people in the laws of the land”), and Comment, *The Constitutionality of the Initiative and Referendum*, 13 YALE L.J. 248, 250 (1904) (concluding that initiatives and referenda are “more in harmony with, than against, the forms of republican government guaranteed to the States by the Federal Constitution”).

7. See Luke Bierman, *Comment on Paper by Cheek and Champagne: The Judiciary as a “Republican” Institution*, 39 WILLAMETTE L. REV. 1385, 1392 (2003).

8. See 134 CONG. REC. S16316 (daily ed. Oct. 14, 1988) (statement of Sen. Biden) (“I believe that the people of this country have a right to honest government. The Constitution guarantees a republican form of government, which means that Congress can enact statutes that make it possible to punish those who violate the public trust at any level of Government.”); Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367 (1989); see also Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 WASH. & LEE L. REV. 767, 835 (2003) (urging Congress to pass campaign finance reform laws under its Guarantee Clause powers).

9. See Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 560, 564, 566 (1962) (suggesting that individual rights including free public education, the right to choose one’s occupation, minority rights, the right to own property, the right to use public facilities, and the right to public benefits, as well as others, are guaranteed by Article IV, Section 4); Mitchell Franklin, *Interposition Interposed: I*, 21 LAW IN TRANSITION 1, 12 (1961) (arguing that the Guarantee Clause gives the federal government “the positive constitutional duty and positive constitutional power to introduce and to maintain republican government, including a system of public education, in states which have wrecked, weakened, terrorized, or abandoned the public school system in order to avoid integration”); see also *Plessy v. Ferguson*, 163 U.S. 537, 564 (1896) (Harlan, J., dissenting) (arguing that segregation is unconstitutional under the Guarantee Clause).

10. See Bonfield, *supra* note 9, at 560 (suggesting effective elections as one of the rights inherent in republican government); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 868-69 (1994) (asserting that the Guarantee Clause protects basic political rights, including the right to vote, choose

ability to maintain their republican forms of government,¹¹ and much more.¹² In the words of Reconstruction Era Senator Charles Sumner, the Clause is a “sleeping giant in the Constitution”; “no clause” gives the federal government “such supreme power over the States.”¹³

The debate over the Guarantee Clause, however, has to date centered exclusively around which forms of government are or are not “Republican.”¹⁴

officeholders, and public deliberation in the political process); Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 204-06 (2007) (discussing the possibility that the Guarantee Clause could justify preclearance under section 5 of the Voting Rights Act); see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 19 (1971); Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1717 (1999); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 105-07 (2000).

11. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) [hereinafter Merritt, *Third Century*]; Deborah Jones Merritt, *Republican Government and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994) [hereinafter Merritt, *Autonomous States*]; see also Dennis Murashko, Comment, *Accountability and Constitutional Federalism: Reconsidering Federal Conditional Spending Programs in Light of Democratic Political Theory*, 101 NW. U. L. REV. 931, 935, 950-54 (2007) (arguing that the Guarantee Clause prohibits some federal conditional spending grants to the states because such grants interfere with representation). For a critique of this view of the Guarantee Clause, see Robert F. Nagel, *Terminator 2*, 65 U. COLO. L. REV. 843, 844-45 (1994).

12. See, e.g., Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77, 95-101 (2004) (separation of powers); Ethan J. Leib, *Redeeming the Welshed Guarantee: A Scheme for Achieving Justiciability*, 24 WHITTIER L. REV. 143 (2002) (federal legislation on religion, violence against women, and antidiscrimination laws); Heidi S. Alexander, Note, *The Theoretic and Democratic Implications of Anti-Abortion Trigger Laws*, 61 RUTGERS L. REV. 381, 403-04 (2009) (“trigger laws” that ban abortion upon *Roe* being overturned); Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208 (1987) (legislative delegations, limitations on direct democracy, and rationality review of administrative determinations); Kristin Feeley, Comment, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427 (2009) (electoral college); Note, *A Niche for the Guarantee Clause*, 94 HARV. L. REV. 681 (1981) (structural defects in state governments); Thomas A. Smith, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561 (1984) (rule of law). See generally WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* (1972) (discussing various uses proposed for the Clause over its history).

13. CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (statement of Sen. Sumner).

14. The Clause has attracted so much scholarly attention around this issue because the word “Republican” is vacuous—“an empty vessel to be filled by whatever individual right the particular writer desires the courts to enforce.” Richard L. Hasen, *Leaving the Empty Vessel of “Republicanism” Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 75, 82 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007); see also Feeley, *supra* note 12, at 1436 (“[I]t could be argued that the Clause is nothing but a Rorschach test.”). As the preceding notes indicate, dozens have taken the invitation to fill the “empty vessel” of “Republican,” hoping to apply the Clause to their favored policy outcome.

I should note that this fact, of course, does not mean that “Republican” is meaningless. Like other vacuous terms in the Constitution (for example, “due process” or “religion”), the

Lost in this discussion is the rest of the Clause's language. While scholars have shed light on *what* the Guarantee Clause covers, *how* the Clause is implemented has been drastically underevaluated. If the Clause guarantees that California will have representative government, for example, the literature has left unanswered whether the Clause was implicated when California amended its constitution to permit initiatives, when a single initiative passed and displaced part of the legislature's power, when a substantial portion of the general fund was irreversibly committed by initiative, or not at all.

Determining how the Guarantee Clause is enforced is central to whether the Clause is a potent tool for governmental reform or a historical artifact. Indeed, due to the lack of attention to this fundamental question, the Clause has lain virtually dormant for over two centuries despite its potential. The vast majority of courts reject Guarantee Clause claims under the perception that the Clause is not violated unless a state completely ceases to be republican in form (i.e., becomes a pure monarchy, aristocracy, or democracy).¹⁵ This I term the "death in one blow" approach to enforcing the Clause: the Clause is not implicated unless a state completely "kills" its republican form of government. Given the extreme unlikelihood that a state will crown a king or descend into anarchy, this interpretation of the Clause ensures its desuetude.

A handful of courts, however, have invalidated specific policies that threatened, but did not completely destroy, a state's republican form of government.¹⁶ This is the "death by a thousand cuts" approach: anything that impedes on the state's republican form is one step closer to an eventual unraveling of the state's republican form of government. Under this view, the Guarantee Clause protects against not only a complete loss of republican government, but also these "cuts" that threaten, encroach upon, or erode a state's republican form. Over the Guarantee Clause's history, this approach has been used to uphold state anti-corruption legislation, strike down ballot initiatives, and was one of the elder Justice Harlan's reasons for why segregation is unconstitutional. This view envisions a robust enforcement of the Clause, and a widespread adoption of this interpretation would make the Clause an effective tool of governmental reform.

This Note sides with the "death by a thousand cuts" view of enforcing the Guarantee Clause. It first argues that, normatively, we should desire that the Constitution guarantee minimum standards of state governance.¹⁷ The requirement that each state maintain a "Republican Form of Government" would ensure that certain principles of good government—majority rule, separation of powers, and representation—would be present in every state. These institutional arrangements were designed specifically to ensure that our

word certainly has *some* meaning that must be given effect.

15. See *infra* Part III.A.

16. See *infra* Part III.B.

17. See *infra* Part I.

governments represent majority will without sacrificing the interests of minorities or overempowering the government. When states deviate from these principles, they risk losing this fundamental virtuous balance.

The Note then advocates that republican government should be guaranteed both top-down and bottom up.¹⁸ Republican government should be guaranteed top-down by the federal government, which would require the states to retain their republican governments. But it should also be guaranteed bottom-up: when the states *are* working to ensure their government is republican, the federal government should be precluded from undermining that effort.

The Note then demonstrates that the Guarantee Clause was in fact intended to serve this role.¹⁹ The text, original understanding, and policy justifications behind the Clause weigh in favor of the “death by a thousand cuts” approach to enforcement. The drafters and supporters of the Constitution argued that the Guarantee Clause would prevent un-republican “encroachments” and “alterations” in state governments. Its detractors interpreted the Clause similarly and worried that the Clause would be so stringently enforced that any “changes” in state constitutions would be unconstitutional. Importantly, however, the Clause was understood to be limited in one important aspect: it only covers states’ forms of government—matters that would at the time of the founding be the sole province of state constitutions—as opposed to state substantive laws.

This view of the enforcement of the Guarantee Clause is not only consistent with its history, it is also necessary to maintain republican government. As is true with California’s use of ballot-box budgeting, the erosion of republican government, as Justice O’Connor noted in regard to state sovereignty, “is likely to occur a step at a time”:²⁰ “If there is any danger, it lies in the tyranny of small decisions—in the prospect that” republican government “will [be] nibble[d] away . . . bit by bit, until someday essentially nothing is left but a gutted shell.”²¹ Death by a thousand cuts is death all the same.

The Note concludes by demonstrating where the Guarantee Clause, if interpreted to protect republican government against death by a thousand cuts, can make substantial change in some areas at the core of state constitutional law, including anti-corruption, voting rights, separation of powers, and the use of direct democracy.²²

18. *See infra* Part II.

19. *See infra* Part IV.

20. *South Carolina v. Baker*, 485 U.S. 505, 533 (1988) (O’Connor, J., dissenting).

21. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 381 (2d ed. 1988), *quoted in Baker*, 485 U.S. at 533 (O’Connor, J., dissenting).

22. *See infra* Part V.

I. THE FEDERAL CONSTITUTION AND STATE GOVERNMENT STRUCTURE

Before describing how the Guarantee Clause should be interpreted, this Part explains its importance. This Part lays out the normative case for requiring the states to have, at a minimum, certain governmental structures, and for enforcing that requirement through a federal guarantee of republican government. It first gives shape to the phrase “Republican Form of Government” in the Guarantee Clause. It then argues that applying principles of republican governance to state constitutions would both ensure minority rights and majority representation. The Part concludes that there is a powerful federal interest in ensuring that state constitutions maintain their republican character and explains how the Guarantee Clause, enforced to achieve that end, fits into American federalism.

A. Defining “Republican Form of Government”

Before exploring whether the states should maintain republican forms of government, we need to pin down what a republican government is. Defining “Republican Form of Government” with precision is difficult, however. Sketching out its exact contours has proven elusive; scholars, jurists, and elected officials jockeyed over its meaning for nearly two centuries.²³

Fortunately, there is widespread agreement about the core definition of a republican government. Because this Note is primarily concerned with the enforcement of the Guarantee Clause rather than exploring all its potential meanings, I only describe here the characteristics of republican government that have garnered near-consensus.

In short, republican governments rule (1) by the majority (and not a monarch), (2) through elected representatives, (3) in separate, coequal branches. If this sounds familiar, it should: the core meaning of republican government defines the broad outlines of our federal government.

23. See *supra* notes 6-12 and accompanying text. Indeed, decades after the Constitution’s ratification, John Adams admitted that he “never understood” the Guarantee Clause and that “no man ever did or ever will.” WIECEK, *supra* note 12, at 72. Somewhat prophetically, Adams also contended that “[t]he word [republic] is so loose and indefinite that successive predominant factions will put glosses and constructions upon it as different as light and darkness.” *Id.* (second alteration in original). The vague, all-encompassing nature of the phrase has even led some to conclude that it is nothing but “an empty vessel to be filled by whatever individual right the particular writer desires the courts to enforce.” Hasen, *supra* note 14, at 82; see Feeley, *supra* note 12, at 1436 (“[I]t could be argued that the Clause is nothing but a Rorschach test.”). Just because it is difficult to define, however, does not mean it has no meaning. Other hard-to-define clauses in the Constitution, for example the Due Process Clause, are at least as vague, but that fact does not prevent us from giving their terms meaning.

1. *Popular sovereignty and anti-monarchy*

A principal tenet of republican government is that “the people rule.”²⁴ Majority rule was seen “as central to republican government.”²⁵ Madison referred to republican government, for example, as “government which derives all its powers directly or indirectly from the great body of the people.”²⁶ As a necessary corollary, a republican form of government cannot be a monarchy or an aristocracy.²⁷ This much is abundantly clear in the discussions surrounding the adoption of the Clause, as the drafters and ratifiers were concerned with ensuring that no states adopted monarchies or aristocracies.²⁸

2. *Representative government*

Government by representation is another core characteristic of republican government. While the founders wanted to prevent government by monarchy and aristocracy, they were just as wary of simple democracy—that is, lawmaking by the people through plebiscite. Simple democracy “suggested a vicious progression from anarchy to the rule of the ignorant, ending in military tyranny—rule by the man on horseback.”²⁹ This view has certainly been

24. Amar, *supra* note 6, at 749; *see* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 196-97 (Jonathan Elliott ed., 2d ed. 1891) (1836) [hereinafter ELLIOT’S DEBATES].

25. Natelson, *supra* note 6, at 823; *see* Chemerinsky, *supra* note 10, at 868; Natelson, *supra* note 6, at 823-24 & n.80.

26. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961); *see also* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 457 (1793) (opinion of Wilson, J.) (describing a “short definition” of a republican form of government as “one constructed on this principle, that the Supreme Power resides in the body of the people”). It is important to note, however, that Madison in THE FEDERALIST NO. 39 was referring to the people ruling through their representatives, and not directly.

27. *See, e.g.*, THE FEDERALIST NO. 39, *supra* note 26, at 241 (James Madison) (“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 . . .”).

28. *See, e.g.*, WIECEK, *supra* note 12, at 14-15, 17, 55-56, 73-74.

29. *Id.* at 19; *see id.* (“In Gordon Wood’s powerful metaphor, power and liberty were ranged on a spectrum, with absolute power concentrated in one man’s hands at one extreme and absolute liberty for the people at the other. ‘The spectrum met in full circle when, it was believed, the disorder of absolute liberty would inevitably lead to the tyranny of the dictator.’” (quoting GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 19 (1969))); *id.* at 65-66 (explaining that Madison believed republican governments were not democracies); *id.* at 72; WOOD, *supra*, at 496-97, 512-14 (demonstrating belief that unbridled democracy would be just as dangerous as tyranny); *see also* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 213-14 (3d ed. 1898) (“By republican government is understood a government by representatives chosen by the people; and it contrasts on one side with a democracy, in which the people or community as an organized whole wield sovereign powers of government, and on the other with the rule of one man, as king, emperor, czar, or sultan, or with that of one class of men, as an aristocracy.”); Charles O. Lerche, Jr., *The Guarantee Clause in Constitutional Law*, 2

questioned, most vigorously by Akhil Amar and Robert Natelson,³⁰ but their views do not seem to constitute the majority on this issue.³¹

3. *Separation of powers*

Another core characteristic of republican governance is a separation of powers among coequal branches of government.³² Separation of powers was seen as a necessary prerequisite for governments to ward off tyranny and was therefore a core component of republican government.³³

W. POL. Q. 358, 358 (1949) (“Republican government, carrying as it did the connotation of non-monarchic institutions which were nonetheless free from the dangers of mob rule, represented a desirable middle ground between licentious democracy and autocratic domination.”). The U.S. Supreme Court has also made similar pronouncements. *See In re Duncan*, 139 U.S. 449, 461 (1891) (“By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.”). This understanding of democracies was put into focus well by James Madison in THE FEDERALIST NO. 10, *supra* note 26, at 81 (James Madison) (critiquing “pure democracy,” and contrasting it with “[a] republic, by which I mean a government in which the scheme of representation takes place”). This view was also expressed by Madison and Hamilton at various times in the debates over the drafting of the Federal Constitution, for example in the debate over how long terms should be for senators. 1 ELLIOT’S DEBATES, *supra* note 24, at 449 (statement of James Madison) (“We are now to determine whether the republican form shall be the basis of our government. . . . [W]e are now forming a body on whose wisdom we mean to rely, and their permanency in office secures a proper field in which they may exert their firmness and knowledge. Democratic communities may be unsteady, and be led to action by the impulse of the moment.”); *id.* at 450 (statement of Alexander Hamilton) (“[I]f we incline too much to democracy, we shall soon shoot into a monarchy.”).

30. Amar, *supra* note 6, at 756-59 (rejecting this understanding of republican, and faulting proponents of this theory for relying on two “scraps” from the THE FEDERALIST NOS. 10, 14). *See generally* Natelson, *supra* note 6 (laying out a broad and persuasive originalist interpretation of republicanism as consistent with direct democracy).

31. *See* sources cited *supra* note 29; *see also* G. Edward White, *Reading the Guarantee Clause*, 65 COLO. L. REV. 787, 795, 797-98 (1994) (critiquing Amar’s view that “Republican Form of Government” is only about popular sovereignty).

32. *See* THE FEDERALIST NO. 47, *supra* note 26, at 301 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”); WIECEK, *supra* note 12, at 21-22, 72; *see also* *Olney v. Arnold*, 3 U.S. (3 Dall.) 308, 314 (1796) (“But if any doubt shall exist upon the subject, the construction should be in favour of that general principle, in the policy of all well regulated, particularly of all republican, governments, which prohibits an heterogeneous union of the legislative and judicial departments.”); *VanSickle v. Shanahan*, 511 P.2d 223, 235-41 (Kan. 1973). *But see In re Interrogatories Propounded by the Senate Concerning House Bill 1078*, 536 P.2d 308, 316-18 (Colo. 1975).

33. *See, e.g.*, THE FEDERALIST NO. 47, *supra* note 26, at 301 (James Madison).

B. *Why Republican Government?*

1. *Republican government as Bill of Rights*³⁴

At the founding, a Bill of Rights was thought by many to be unnecessary. The original, unamended Constitution was considered itself a guarantor of rights.³⁵ The drafters believed that the rights of the people would be protected not by enumerated constitutional “thou shalt nots,” but by the structure of government. Thus, as Hamilton argued in *The Federalist No. 84*, “the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.”³⁶ Of course, the proponents of this view lost that debate. We now have a Bill of Rights, and we are better for it. But the insight and impulse behind their argument—that structure of government is a critical guarantor of rights—is an important lesson too often forgotten.

Our governmental design, including majority rule, representation, and checks and balances, had the specific goal of protecting rights. Majority rule ensures that the will of many is not undone by a minority cabal. Separation of powers prevents one branch from becoming too powerful; if one branch were to accumulate too much power, it could become tyrannical.

Representation, on the other hand, was designed to protect the minority from the whims of the majority. In a legislature, “minorities [can] engage in coalition building through logrolling and thus secure outcomes on particular high-priority issues.”³⁷ That is, while minorities will obviously not get everything they want in majority-rule representative government, through vote-trading and logrolling they will be able to pass (or block) legislation that they most intensely care about.

Compare that to an alternative model of majority-rule policymaking: direct democracy, or rule by plebiscite. In direct democracy, the public votes yes or no on an individual piece of legislation. In this situation, the ability to trade votes is lost: it is impracticable to coordinate logrolling among millions of voters, and in any event vote-trading is unenforceable because of the use of secret ballots. As a result, “a matter extremely harmful to minority interests but only moderately beneficial to non-minority interests may be passed.”³⁸ Direct

34. This heading title is borrowed from Walter Berns, *The Constitution as Bill of Rights*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 50, 50 (Robert A. Goldwin & William A. Schambra eds., 1985).

35. *Id.* at 51 (“[The framers] expected the Constitution, *even without amendments*, to ‘secure the blessings of liberty’ . . .” (emphasis added)).

36. THE FEDERALIST NO. 84, *supra* note 26, at 515 (Alexander Hamilton).

37. Sherman J. Clark, Commentary, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 457 (1998); see also Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don’t Work*, 66 U. COLO. L. REV. 47, 59-60 (1995).

38. Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1, 25 (1978).

democracy effectively “ensur[es] that minorities will be unable to allocate their limited political power toward securing favorable outcomes on those issues that concern them most.”³⁹ This effect, while disputed by some, is now well documented. Those seeking to discriminate have often looked to direct democracy to effectuate their goals.⁴⁰

Of course, it must be admitted that legislatures are far from perfect protectors of minority interests and rights.⁴¹ The task is not, however, determining which form of government is perfect. Instead, the inquiry is comparative: it is important to determine which set of institutions will *best* protect minorities. Theory predicts, and studies are starting to prove, that legislatures will do a better job.⁴² One recent empirical study, for example, found that gay rights fare better in those states without direct democracy than those states with it.⁴³ To borrow Winston Churchill’s famous quip about democracy, republican government is perhaps the worst form of government—except all those other forms that have been tried from time to time.

Importantly, the dynamics set up by the structure of government have persisting effects that reach every area of governance. State legislatures consider hundreds of bills over the course of a year on education, healthcare, welfare, and public safety (to name only a few examples). If much of that decision-making is instead done through direct democracy, the predictable result would be the systematic underrepresentation of minority interests across

39. Clark, *supra* note 37, at 449 n.47.

40. Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997); Donald P. Haider-Markel et al., *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304, 312-13 (2007); *see also* Bruce E. Cain & Kenneth P. Miller, *The Populist Legacy: Initiatives and the Undermining of Representative Government*, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 33, 51-52 (Larry J. Sabato et al. eds., 2001) (discussing the empirical literature on the use of direct democracy to protect minority rights). Thomas Cronin exhaustively catalogued various discriminatory initiatives in 1989. *See* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 92-98 (1989). If anything, the initiative has only become a more brutal tool of discrimination over the last two decades, *see* Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 294, and has become particularly so with respect to gay rights, Haider-Markel et al., *supra*, at 312-13.

41. *See* AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 37 (1998) (“Note, however, that legislatures too have oppressed homosexuals. The legislatures of twenty-five states, not the People, have criminalized gay sex.”).

It is also worth noting that direct democracy has been able to accomplish some very important policies with which I personally agree. “Citizens have used plebiscites to reform the political processes—through restrictions on lobbying, conflict-of-interest statutes, pay cuts for politicians, and campaign reform. These are measures that politicians usually won’t touch, for reasons of crass self-interest.” *Id.* at 36.

42. *See* Gamble, *supra* note 40; Haider-Markel et al., *supra* note 40. *But see* Zoltan L. Hajnal et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. POL. 154 (2002).

43. Haider-Markel et al., *supra* note 40, at 312-13.

the board.

2. *Parchment barriers*

The kneejerk reaction to all this might be that the Constitution, through specifically enumerated rights, provides a backstop to correct persistent failures in government. After all, one may argue that the Bill of Rights and the Fourteenth Amendment protect against abuses of fundamental rights by state governments. Moreover, these protections are broad and surely capture most of the worst abuses.

These arguments are undoubtedly correct, to a point. The Constitution's enumerated rights do go far towards protecting our rights. Indeed, it is difficult to imagine our country without them. But these constitutionally enumerated "parchment barriers"⁴⁴ are also critically deficient. Even though we are blessed with such rights, ensuring republican governance is still absolutely necessary to achieve the vision upon which our country was founded.

First, these clauses protect rights, not interests. While the Fourteenth Amendment outlaws public school segregation, it says nothing about the allocation of funds between poor, inner-city schools and those in the suburbs.⁴⁵ While it provides the indigent due process rights before their welfare benefits are terminated,⁴⁶ it does not require that a state provide benefits to begin with. While it prohibits race-based police abuse, it does nothing if the state decides to place fewer officers in poor black neighborhoods than rich white ones. Many of the most important issues are left untouched through the rubric of rights, and are instead determined in the political process.

Second, these rights are enforced primarily through judicial review. Challenging rights violations in the courts is reactive. It is far better that the political system be constructed to prevent violations in the first place, rather than to resort to after-the-fact reactions to unjust laws.⁴⁷ Furthermore, courts are oftentimes weak institutions, and themselves bend to public opinion and perceived public necessity.⁴⁸ Finally, courts will, at times, interpret the law to exclude protection for certain groups. At the time of this writing, it remains to be seen, for example, whether homosexuals will get robust protection from discrimination under the Equal Protection Clause.

If we are serious about protecting our rights and interests, enumerated constitutional rights will not be enough. Instead, we need strong state government institutions designed to guarantee rights.

44. This was the term Madison used to disparagingly refer to a Bill of Rights. See James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 879 (2004).

45. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28-29 (1973).

46. See *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

47. Liebman & Garrett, *supra* note 44, at 932-33.

48. *Id.* at 933-34.

C. *The Federal Interest in State Government Structure*

Even if republican government is desirable, why should the *federal* government be involved in the regulation of *state* constitutions? This sort of federal control seems, at first blush, to be the antithesis of federalism.

The previous Subpart demonstrates a first response to this concern. For some time now, it has been the business of the federal government to guarantee rights when state governments fail to do so. Because the structure of government is so tied up with individual rights, the federal government may have a strong interest in ensuring that the structure does not degrade.

A second response comes from a theory developed by Tom Ginsburg and Eric Posner, who note that when a political system has multiple levels of government (as is the case in the United States and the European Union, for example), the substates' constitutions will likely have "weaker government structures and rights" than the superstate's.⁴⁹ Their observations of the American states and the European Union bear their theory out.⁵⁰ This is to be expected: the substate, unlike the superstate, has a superintending government that can and will step in if it does too little to protect rights, or if its structure of government goes off the rails. Because constitutions impose constraints that can get in the way of passing popular policies, substates have incentives to loosen those constraints if the superstate is expected to step in when things go wrong. If this dynamic is correct, and if state constitutions therefore tend to have looser governmental structures, the federal government may be playing a critical role when it periodically superintends the structure of state governments.

The structure of state governments is also a federal interest because the performance of one state can affect the rest. The country is more interconnected and interdependent now than ever before. If one large state or a few small states falter, the nation stumbles. Consider the example of California that began this Note. California constitutes a substantial percent of the country's gross domestic product. Its persistent state of budgetary gridlock is not just the state's problem; it's the country's.

II. REPUBLICANISM TOP-DOWN AND BOTTOM-UP

The previous Part demonstrates that the Guarantee Clause can fill a much

49. Tom Ginsburg & Eric Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1601 (2010). It should be noted that, to Ginsburg and Posner, this situation is not necessarily undesirable: states are closer to the people they govern, and are therefore able to make tradeoffs between rights and efficiency better than a one-size-fits-all federal government standard. I use Ginsburg and Posner's theory not because they would necessarily agree with the policy conclusions of this Note, but because their positive observations are consistent with a justification for federal superimposition on structural issues.

50. *Id.* at 1602-20.

needed gap by ensuring that states adhere to some principles of republican government. In so doing the Clause can act as a powerful protector of rights. The next question is how the Guarantee Clause should serve that role.

The immediate impulse is to assume that the Guarantee Clause should be enforced top-down—that is, by federal imposition. The top-down view of the Guarantee Clause tracks the model set by the Fourteenth Amendment. The Fourteenth Amendment gives both Congress the power to prophylactically provide for due process and equal protection, and the courts the power to invalidate laws that contravene those principles. Similarly, the Guarantee Clause could give Congress the power to act prophylactically to ensure states maintain republican governments,⁵¹ and the courts the ability to invalidate laws that contravene republican principles.⁵²

This is only one side of the coin, however. As Deborah Jones Merritt discussed in her seminal work on the Guarantee Clause,⁵³ there is also the possibility for republicanism to be engendered from the bottom-up. States do many things to strengthen their republican form of government. For example, states may protect the integrity of their representative governance by enacting anti-corruption measures. When they do, the Guarantee Clause can protect those efforts from federal interference. As Merritt explains:

The text of the Guarantee Clause can be read, not only as a grant of congressional power, but as a limit on that power. The national government may intervene to restore republican government in states that have deviated from that principle, but it also promises in the Guarantee Clause to avoid any actions that would destroy republican government.⁵⁴

Thus the Guarantee Clause can ensure that states maintain republican forms of government best by being enforced *by* the federal government at some times, but *against* the federal government at others. It can and should be enforced both top-down and bottom-up.⁵⁵

51. See, e.g., Alexander, *supra* note 8, at 835 (urging Congress to pass campaign finance laws under Guarantee Clause powers); Kurland, *supra* note 8 (recommending that new anti-corruption legislation could be justified under Guarantee Clause powers); Catherine Engberg, Note, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 STAN. L. REV. 569, 572 (2001) (arguing that “Congress’ duty to guarantee a republican form of government includes the power to restrict state lawmaking by initiative”).

52. For example, former Oregon Supreme Court Justice Hans Linde has argued that the Guarantee Clause should be used by courts to invalidate certain voter initiatives. See, e.g., Linde, *Homosexuality*, *supra* note 6; Linde, *Not “Republican Government,”* *supra* note 6.

53. Merritt, *Third Century*, *supra* note 11.

54. Merritt, *Autonomous States*, *supra* note 11, at 820; see *id.* at 819 (describing the Guarantee Clause as both a “powerful sword in the hands of the national government” and a “shield” that protects “the states from certain types of national intrusion”).

55. One example to illustrate this point is anti-corruption legislation. As is explained in more detail in Part V.A *infra*, the Guarantee Clause can both empower the federal government to prosecute state-level corruption, and also prevent federal policies from undermining states’ efforts at combating corruption themselves.

III. CURRENT APPROACHES TO PROTECTING REPUBLICAN GOVERNMENT

Despite the importance of republican institutions and the possibility of the Guarantee Clause providing both top-down and bottom-up protection, the Clause has “been an infrequent basis for litigation throughout our history,”⁵⁶ and with the exception of a few moments in history, an even more infrequent basis for legislation.⁵⁷ This is so for essentially one reason: a majority of courts have assumed that the Clause is not implicated unless a state has completely abandoned its republican form—i.e., become a monarchy, aristocracy, dictatorship, pure democracy, or descended into anarchy. In federal courts, this understanding of the Clause is the basis for finding that it is a nonjusticiable political question. Many state courts, some of which have different justiciability requirements than federal courts⁵⁸ and allow Guarantee Clause claims to be heard,⁵⁹ have adopted this same interpretation to deny virtually all Guarantee Clause claims. For these courts, the Clause is essentially dead letter law: unless a state crowns a king or is overtaken by a dictator, it has no use. Given the extreme unlikelihood of such occurrences in modern America, this interpretation ensures the Clause’s desuetude.

Nothing in the Clause’s text or history indicates that this is the correct interpretation of the Clause; to the contrary, this Note will argue that these cases are wrongly decided.⁶⁰ Some courts have rejected this interpretation and have used the Guarantee Clause to invalidate policies that are detrimental, though not entirely destructive, to a state’s republican form of government. This interpretation of the Clause would suggest that it could be used as a robust tool of governmental reform.

Surprisingly, while these approaches are near-opposites and imply extremely different uses for the Clause, this difference has not yet been noted or commented upon by any court or scholarly work on the Clause. This Part details and analyzes these divergent approaches to enforcing the Guarantee Clause.

56. *New York v. United States*, 505 U.S. 144, 184 (1992).

57. An interesting near-use of the Guarantee Clause as a basis for legislation was Congress’s considered use of the Clause to declare Huey Long’s Louisiana as no longer a republican government. See Gerard N. Magliocca, *Huey P. Long and the Guarantee Clause*, 83 TUL. L. REV. 1 (2008).

58. See *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

59. See, e.g., *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126, 1137-38 (Cal. 2006) (deciding Guarantee Clause issue); *VanSickle v. Shanahan*, 511 P.2d 223, 231-32 (Kan. 1973); *In re Initiative Petition No. 348*, State Question No. 640, 820 P.2d 772, 779-80 & n.21 (Okla. 1991). But see *Huddleston v. Sawyer*, 932 P.2d 1145, 1157-62 (Or. 1997).

60. See *infra* Part IV.

A. *Death in One Blow*

The rule followed by the majority of courts is also the most restrictive on the use of the Guarantee Clause. These courts hold that anything short of a state's complete abandonment of republican government is constitutional under the Clause. I term this the "death in one blow" approach: a state must completely kill its republican government for it to run afoul of the Guarantee Clause. For state courts, this has meant that Guarantee Clause claims have been rejected on the merits. For federal courts, this logic has been used to justify a policy of nonjusticiability.

1. *Merits*

Many state supreme courts, when faced with Guarantee Clause claims, have held that the Clause is not violated unless the particular policy under review causes the state to "cease to have a republican form of government,"⁶¹ or "abolish or destroy the republican form of government [of the State], or substitute another in its place."⁶² These courts will often rule that even if a challenged action "impose[s] severe limitations," "restricts," or otherwise substantially impairs republican government, as long as it does not "result in [its] destruction," it "does not breach the federal guaranty."⁶³

The "death in one blow" approach on the merits has also been endorsed by the U.S. Supreme Court. In *New York v. United States*, the Court assumed that the Clause was nonjusticiable, but in the alternative upheld a federal statute against a bottom-up Guarantee Clause challenge, holding that the statute could not "reasonably be said to *deny* any State a republican form of government."⁶⁴

61. *Hammond v. Clark*, 71 S.E. 479, 489 (Ga. 1911); *see also* Opinion to the Governor, 185 A.2d 111, 116 (R.I. 1962) (holding that there is no Guarantee Clause violation unless malapportionment of legislative districts "deprives the people completely of representative government and therefore of a republican form of government").

62. *VanSickle*, 511 P.2d at 243; *see also* *Deer Park Indep. Sch. Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095, 1099-1100 (5th Cir. 1998); *Kaddery v. City of Portland*, 74 P. 710, 719 (Or. 1903).

63. *In re Initiative Petition No. 348*, 820 P.2d at 774, 780-81.

64. *New York v. United States*, 505 U.S. 144, 185 (1992) (emphasis added); *id.* at 186 (finding federal policy "do[es] not pose any realistic risk of altering the form or the method of functioning of New York's government"). It is important to note that, although the Court did address the merits of the Guarantee Clause claim, it was only doing so "assum[ing] that [the Guarantee Clause] claim is justiciable." *Id.* at 185. The same can be said for basically every federal court that has addressed the merits of a Guarantee Clause claim since *New York*, with the exception perhaps of *Largess v. Supreme Judicial Court*, 373 F.3d 219 (1st Cir. 2004) (per curiam). The Fifth Circuit, for example, assumed that a Guarantee Clause claim was nonjusticiable, but held in the alternative that a federal immigration policy that allegedly infringed on Texas's voters' ability to determine spending priorities "fails to allege a realistic risk of denying to Texas its guaranteed republican form of government":

Any inaction by the federal government with respect to immigration enforcement or payment of state expenditures cannot realistically be said to pose a meaningful risk of altering the

2. *Justiciability*

The logic of the “death in one blow” approach has led the federal courts to hold the Clause nonjusticiable. The first case to hold the Clause nonjusticiable was *Luther v. Borden* in 1849.⁶⁵ In that case, the Court was faced with deciding which of two rival governments during Dorr’s Rebellion was the legitimate government of Rhode Island.⁶⁶ The *Luther* Court held that “it rests with Congress” to decide which government was lawfully established in the state.⁶⁷

That limited holding has, in the words of Court, “metamorphosed” into the general rule that Guarantee Clause claims are *always* nonjusticiable, an interpretation the Court has since recognized was probably unwarranted.⁶⁸ The original case that expanded *Luther*’s reach was *Pacific States Telephone & Telegraph Co. v. Oregon*.⁶⁹ The question before the Court was whether Oregon’s then-recently adopted constitutional amendment permitting legislation by initiative was constitutional under the Guarantee Clause. Citing *Luther*, the Court held that Guarantee Clause claims were always nonjusticiable.⁷⁰ Chief Justice White followed the logic of the *Luther* opinion, and explained that if the Clause were justiciable, courts would have the authority to declare the *entire government* of a state “illegal,” and therefore “practically award a decree absolving from all obligation to . . . obey the laws of” the state.⁷¹ After dissolving the state, the reviewing court would then have to undertake to rebuild it, lest “anarchy is to ensue.”⁷² This all would imply that the judiciary would have the authority to conduct what is traditionally the province of the legislative and executive branches. Since *Pacific States*, the Court has consistently held the Guarantee Clause nonjusticiable, never questioning (or quoting) this logic.⁷³

This argument for nonjusticiability assumes that the Clause operates solely

Texas government’s form or method of functioning. The Texas electorate is not being deprived of the opportunity to hold state and federal officials accountable at the polls for their respective policy choices. We must conclude that the complaint fails to state a violation of the guaranty clause

Texas v. United States, 106 F.3d 661, 667 (5th Cir. 1997); *see also, e.g., Kelley v. United States*, 69 F.3d 1503, 1511 (10th Cir. 1995) (refusing to find Guarantee Clause violation where the law in question could not “be construed in any way as affecting the states’ ability to structure their own governments as they see fit”).

65. 48 U.S. (7 How.) 1 (1849).

66. *Id.*

67. *Id.* at 42.

68. *New York*, 505 U.S. at 184; *see also, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST* 118 n.* (1980) (criticizing the doctrine expanding *Luther* to find *all* Guarantee Clause claims nonjusticiable).

69. 223 U.S. 118 (1912).

70. *See id.* at 141-43.

71. *Id.* at 142.

72. *Id.*

73. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 182 n.17 (1980); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937).

as a mechanism to declare an entire state's government illegal. This is the flipside of the "death in one blow" approach: if the guarantee can *only* be enforced when a state has completely ceased to be republican in form, then the *only* remedy must be declaring the entire government invalid, an act that is beyond the powers of the judicial branch. The case for nonjusticiability in federal courts, then, rests on the assumption that the only approach under the Clause is death in one blow.⁷⁴

B. *Death by a Thousand Cuts*

Some courts have adopted a starkly different approach to enforcing the Guarantee Clause. Under the "death by a thousand cuts" approach, courts find that the Guarantee Clause has been implicated when the challenged policy is inconsistent with, but does not completely destroy, a state's republican government. It does not matter that the state retains a republican form of government in its totality or all of its essential elements; instead, any action that subverts republican government, even if minimally so, violates the guarantee.

Death by a thousand cuts is by far the minority approach, and has only been adopted in a handful of cases. Nevertheless, it is the approach that, as I will demonstrate, better represents the original understanding of the Clause, as well as the most logical interpretation for how the guarantee can and should be enforced.

The "death by a thousand cuts" approach was most recently adopted by the California Supreme Court in *Agua Caliente Band of Cahuilla Indians v. Superior Court*.⁷⁵ California's Fair Political Practices Commission (FPPC) sued the Agua Caliente Band of Cahuilla Indians, a federally recognized Indian tribe, for the tribe's failure to comply with state reporting requirements for campaign contributions and other violations of California's Political Reform

74. A unique twist on the "death in one blow" approach was taken by the First Circuit in *Largess v. Supreme Judicial Court*. 373 F.3d 219 (1st Cir. 2004) (per curiam). In that case, Massachusetts legislators and other individuals sued to strike down the Massachusetts Supreme Judicial Court's ruling that same-sex marriage is legal, see *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), arguing that the deciding of that issue by the judicial branch undermined Massachusetts's separation of powers, impairing its republican form of government. While such claims are normally considered nonjusticiable under *Luther* and *Pacific States*, the First Circuit determined instead that the case before it could be justiciable depending "on the resolution of the merits of the underlying claim"—that is, if there was enough of a deprivation of republican government, the case would be justiciable. *Largess*, 373 F.3d at 225. The bar for justiciability, however, was the familiar "death in one blow": only in "unusual and extreme cases, such as the establishment of a monarchy" in a state, can "individuals . . . utilize the federal courts to enforce the Guarantee Clause." *Id.* at 229. Oddly enough, then, the First Circuit has therefore held that a "death in one blow" claim makes the Guarantee Clause justiciable in federal courts, seemingly at odds with the reasoning of *Pacific States*.

75. 148 P.3d 1126 (Cal. 2006).

Act (PRA).⁷⁶ The tribe asserted that it was immune from suit under the doctrine of tribal sovereign immunity. Because tribal immunity is a federal immunity, no state commission should be able to overcome it, the FPPC included.

The California Supreme Court, however, used the Guarantee Clause to pierce the tribe's federal common law immunity. Tribal immunity here, to the court, would permit "tribal members to participate in elections and make campaign contributions . . . unfettered by regulations designed to ensure the system's integrity," weakening the state's enforcement of the PRA.⁷⁷ Enforcing the PRA, though, "is vitally important to [California's] republican form of government."⁷⁸ Hence, the court held that the Guarantee Clause⁷⁹ affords the state bottom-up protection to defend its republican form of government, enabling it to overcome federal tribal immunity to enforce its laws to prevent a weakening of the PRA.

Note that the injury to California's republican form of government from tribal immunity—the inability to enforce one campaign finance act in one unique situation—neither demonstrates that California has been deprived completely of its republican form of government, nor that it has lost a vital element of its republicanism. The injury is instead one of a thousand cuts that weakens California's republican form. To the California Supreme Court, that was enough to constitute a violation of the Guarantee Clause.

Agua Caliente was based in large part on the Supreme Court's 1991 opinion in *Gregory v. Ashcroft*.⁸⁰ There, the Court considered whether a provision in the Missouri Constitution that required judges to retire at seventy

76. *Id.* at 1128-29. The tribe's failure to report its contributions was apparently no small omission—it allegedly contributed great deals of money, totaling over \$7.5 million in 1998, \$175,000 in the first half of 2001, and \$426,000 in the first half of 2002. *Id.* California also argued that the tribe failed to report lobbying interests, late contributions, and did not file required semi-annual campaign statements. *Id.* at 1229. Interestingly,

[o]ne of the unreported contributions alleged to have been made by the Tribe in March 2002 went to a committee supporting Proposition 51, a statewide ballot initiative. Although Proposition 51 failed, it would have authorized \$15 million per fiscal year for eight years to fund several projects, including a passenger rail line from Los Angeles to Palm Springs, where the Tribe operates a casino.

Id.

77. *Id.* at 1138-39.

78. *Id.* at 1139.

79. It is worth noting that the court used the Guarantee Clause "together with the rights reserved under the Tenth Amendment" to reach its holding. *Id.* While the court never spells out how the two function together, the likely meaning is that the administration of republican government, not being a power "delegated to the United States by the Constitution," is therefore "reserved to the States" under the Tenth Amendment. U.S. CONST. amend. X. One may even go so far as to argue that the Guarantee Clause specifically commits this power to the states exclusively, and that the Clause carves out areas of authority in the federal government's enumerated powers. The state does not *need* the Tenth Amendment in order to assert its Guarantee Clause argument; however, in the Guarantee Clause itself "the United States promises to secure each of the states the autonomy necessary to maintain a republican form of government." Merritt, *Third Century*, *supra* note 11, at 22-23.

80. 501 U.S. 452 (1991).

violated the federal Age Discrimination in Employment Act (ADEA).⁸¹ This would normally be a straightforward application of the Supremacy Clause, under which the federal ADEA is “the supreme Law of the Land,” Missouri’s Constitution notwithstanding.⁸² But Missouri’s power to determine the qualifications of its judicial officers, the Court explained, is unlike other areas of state regulation: “it is a decision of the most fundamental sort for a sovereign entity” through which Missouri “defines itself as a sovereign.”⁸³ This authority is “reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States ‘guarantee[s] to every State in this Union a Republican Form of Government.’”⁸⁴ Because the right of the state to choose its own officers is guaranteed to the state through the Constitution’s guarantee of a republican government, Congress cannot override that guarantee by meddling in that process.⁸⁵ Here, as in *Agua Caliente*, the Court was concerned with a policy that only minimally interfered with the state’s republican form of government. Only a tiny sliver of the state’s ability to administer its government was at risk (and only for septuagenarian judges at that). Yet this one hindrance of republican government was enough to invoke the Clause’s bottom-up protections.

A smattering of courts over the Clause’s history similarly adopted the “death by a thousand cuts” approach. The Colorado Supreme Court held in 1998 that an initiative that directed its legislature to vote a certain way on a federal constitutional amendment was unconstitutional because the law is “inconsistent with Article IV, Section 4”: the Clause “assures the role of elected representatives in our system,” and so the initiative impermissibly “ties the hands of the individuals who are chosen to represent this state.”⁸⁶ In 1966, the Third Circuit held that a federal statute that abrogated state judges’ judicial immunity violates the Guarantee Clause because it would “destroy the independence of the judiciary in the various States,” impinging on their republican forms.⁸⁷ Delaware’s Court of Errors and Appeals held in 1847 that

81. *Id.* at 455.

82. U.S. CONST. art. VI, cl. 2.

83. *Gregory*, 501 U.S. at 460.

84. *Id.* at 463 (alteration in original) (quoting U.S. CONST. art. IV, § 4). For an argument as to why the Tenth Amendment’s presence in this decision may be superfluous, see *supra* note 79.

85. The story is a bit more complicated than this: The outcome of *Gregory* was not to permit Congress to usurp the guarantee to the states through the ADEA. But the rule in *Gregory* was not an outright prohibition of such acts. Instead, Congress might still be able to interfere with a state’s authority to choose its own officers under its Supremacy Clause powers if it clearly announces its intent to do so. *Id.* at 460.

86. *Morrisey v. State*, 951 P.2d 911, 916-17 (Colo. 1998). This language, however, is likely dictum, as the *Morrisey* court also held the act under consideration violated Article V as well. See *id.* at 914-16 & n.9. Also, it is worth noting that, although this was a Colorado state court opinion enforced against the state of Colorado, this was a top-down, not a bottom-up, invocation of the Guarantee Clause’s protections.

87. *Bauers v. Heisel*, 361 F.2d 581, 588-89 (3d Cir. 1966).

the state's General Assembly "infringe[d]" upon republican government when it submitted prohibition laws to popular referendum.⁸⁸ An Indiana appellate court noted that granting a board the authority to audit all three branches of Indiana's government would breach the separation of powers in the state and therefore violate the Guarantee Clause.⁸⁹ Some courts saw the guarantee as a prohibition on the legislature for conducting certain activity, for example using taxes for private gain, and in these cases a single usurpation of that power would violate the Clause.⁹⁰

Perhaps most interestingly, Justice Harlan argued that the Guarantee Clause prohibits racial segregation in his powerful dissent in *Plessy v. Ferguson*.⁹¹ Harlan found the "system [of racial segregation] inconsistent with the guarantee given by the Constitution to each State of a republican form of government, and may be stricken down . . . by the courts in the discharge of their solemn duty to maintain the supreme law of the land."⁹² To Justice Harlan, the Guarantee Clause was implicated not because segregated states were no longer republican in form, but rather because segregation was "inconsistent" with republican government, and it was the Court's duty to "maintain" that guarantee through top-down imposition.

These opinions all stand for the proposition that it only takes one infringement or impingement of republican government—one tax for private gain, abdicating the legislature's power to legislate on a single subject, an advisory board's supervisory powers in a limited area of policy, or racial segregation—to constitute a violation of the Clause.

C. Legislative and Executive Guarantee Clause Powers

An interesting question these cases leave unanswered is how courts would review federal legislative or executive acts justified under the Guarantee Clause. To my knowledge, no court has ever confronted this issue, nor has the judiciary been given the opportunity: neither Congress nor the Executive has acted pursuant only to their Guarantee Clause powers.⁹³ Presumably, if the

88. *Rice v. Foster*, 4 Del. (4 Harr.) 479, 497-99 (1847).

89. *State v. Clamme*, 134 N.E. 676, 683 (Ind. App. 1922).

90. See, e.g., *Beach v. Bradstreet*, 82 A. 1030, 1032 (Conn. 1912); *Heimerl v. Ozaukee County*, 40 N.W.2d 564, 567 (Wis. 1949) ("Taxation for a private purpose is prohibited by the clause of the federal constitution that guarantees to every state a Republican form of government (sec. 4, art. IV), as such a form of government forbids the raising of taxes for anything but a public purpose."); see also *Appeal of Allyn*, 71 A. 794, 795 (Conn. 1909) (implying Guarantee Clause is a limitation on Connecticut's legislature to not deviate from a republican form of government).

91. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

92. *Id.* at 564 (Harlan, J., dissenting).

93. Although the Guarantee Clause was used to justify a host of Reconstruction Era Republican policies, "[a]t no point did congressional Republicans rest their Reconstruction

political branches were to act pursuant to their Guarantee Clause powers, federal courts would not refuse jurisdiction to determine whether such action was consistent with the Clause;⁹⁴ and even if they did, state courts with different jurisdictional rules would certainly be free to consider such cases.

If courts were ever presented with this situation, “death in one blow” courts would likely invalidate most exercises of federal powers under the Guarantee Clause, while “thousand cuts” courts would likely uphold them. Federal powers are limited to the express powers allotted to the government in the Constitution. Proposals to use the Guarantee Clause to justify, for example, federal anti-corruption⁹⁵ or voting rights legislation⁹⁶ must presumably be congruent and proportional to the harm that the Clause protects against.⁹⁷ If the Guarantee Clause only protects states from descending into monarchy or anarchy, congressional power under the Clause will be limited to those extreme situations alone, and anti-corruption or voting rights legislation would be outside of the powers allotted to the federal government by the Guarantee Clause. The existence of a few corrupt officials or discriminatory elections does not signal that the state government has completely ceased to be republican in form, even though its republican institutions are undoubtedly weaker.

If, on the other hand, the Clause enables the federal government to protect against cuts to states’ republican forms, these proposals for federal legislation might be constitutional. State-level corruption and discriminatory voting practices harm states’ republican forms, although they do not destroy them. Under a “thousand cuts” approach to enforcing the Guarantee Clause, that injury would be enough to make a federal response congruent and proportional.

Whether courts use a “one blow” or “thousand cuts” approach is therefore determinative not only in litigation, but also for defining the scope of congressional and executive powers under the Guarantee Clause.

IV. PROTECTING REPUBLICAN GOVERNMENT AGAINST DEATH BY A THOUSAND CUTS

While the courts are irreconcilably divided over how the Guarantee Clause

policy exclusively on the guarantee clause[,] . . . the clause was one constitutional text among several that authorized their policies.” WIECEK, *supra* note 12, at 167. The Guarantee Clause was also nearly used to declare Huey Long’s Louisiana no longer a republican form of government. Magliocca, *supra* note 57.

94. See Engberg, *supra* note 51, at 582.

95. See, e.g., Kurland, *supra* note 8.

96. See, e.g., Hasen, *supra* note 10, at 204-06.

97. Cf. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (holding that legislation passed under section 5 of the Fourteenth Amendment must have a “congruence and proportionality” between the harms identified in the Fourteenth Amendment and the means Congress uses to remedy them); Engberg, *supra* note 51, at 587-89 (arguing that *Boerne*’s congruence and proportionality test would likely apply to Congress’s use of the Guarantee Clause).

should be implemented, no court or scholar has seriously investigated the Clause's text or history to determine how it should be enforced.⁹⁸ This Part investigates the Clause's text and history, and finds substantial evidence in favor of the "death by a thousand cuts" approach. It also argues that this approach is both necessary for the important policy purposes behind the guarantee to be fulfilled, and is a justifiable exercise of federal power. The evidence presented here seriously undercuts the rationale used by state courts to routinely deny Guarantee Clause claims, and that which underlies the federal courts' continuing policy of nonjusticiability.

A. *The Text*

The Clause reads in full: "The United States shall guarantee to every State in this Union a Republican Form of Government."⁹⁹ This text favors neither the "one blow" nor the "thousand cuts" approach.

No "death in one blow" court has explicitly spelled out a text-based rationale to support its approach to enforcement. One can infer, however, that these courts believe that the United States is dutifully upholding its guarantee to the states as long as no state adopts an unrepblican form of government. The assumption here is that the Clause guarantees a *result only*: that each state has a republican form of government. As long as that result is upheld, there is no violation.

"Death by a thousand cuts" courts have similarly not articulated a reading of the text that justifies their approach to enforcing the Guarantee Clause. The assumption behind these cases must be that the Clause guarantees *both a result* (republican government) *and an obligation to maintain that result* (by invalidating encroachments on the republican form); as Justice Harlan put it in his *Plessy* dissent, courts may enforce the Clause to invalidate segregation "in the discharge of their solemn duty to *maintain* the supreme law of the land."¹⁰⁰

These interpretations, in turn, depend on what it means to "guarantee" a republican form to the states. The term on its face does not speak to either interpretation of the Clause; it is ambiguous without further definition. After all, we use "guarantee" today to refer to "engag[ing] for the existence, permanence, or nature of,"¹⁰¹ as well as to "assume responsibility for . . . the performance of" something for another.¹⁰² These conceptions of "guarantee"

98. The closest one has come is Arthur Bonfield, who briefly discusses the word "guarantee" in the Clause in the context of the protection of an individual's political and civil rights. Bonfield, *supra* note 9, at 523-24.

99. U.S. CONST. art. IV, § 4.

100. *Plessy v. Ferguson*, 163 U.S. 537, 564 (1896), *overruled by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (Harlan, J., dissenting) (emphasis added).

101. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 554 (11th ed. 2004).

102. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 778 (4th ed. 2006).

could easily support either the “one blow” or “thousand cuts” views.

It is worth noting, however, that although the text is arguably ambiguous, there would be no question as to what “guarantee” means had the same wording been used in other clauses of the Constitution. Imagine, for example, if the First Amendment “guaranteed” the freedom of speech, or if the Fourteenth Amendment “guaranteed” due process and equal protection of the laws; we would almost certainly have the same “death by a thousand cuts” approach with respect to those amendments today.

B. *Original Meaning*

As the previous Subpart demonstrates, the Guarantee Clause’s wording does not lend itself to an easy interpretation of how it was meant to be enforced. We must therefore look for evidence of its meaning elsewhere.

We begin this investigation by examining the understanding that the drafters and ratifiers had of the Guarantee Clause. Evaluating two words in the Clause in particular provides much insight into how it was intended to be implemented: “guarantee” and “Form.” Through an analysis of the original understanding of these words as they were used in the Guarantee Clause, we can draw two conclusions. First, the Clause was meant to operate as a robust and enforceable protection of the states’ republican forms of government. There is strong support that *any* deviation, encroachment, or threat to the republican form, however small, would implicate the Clause. Second, while imposing a robust limitation, the Clause was only meant to limit the states’ constitutions, which were understood at the time to delineate the structure of government, as opposed to the states’ substantive laws.

The original understanding, therefore, best supports the “death by a thousand cuts” approach, with the (rather substantial) caveat that it was only meant to limit the structure of state governments—that is, their constitutions—and not ordinary legislation.

1. *Context and origination*

The Clause began as a limitation on the forms of government that new states admitted into the union were permitted to take. The origin of the Guarantee Clause was likely in Thomas Jefferson’s drafts for the constitution of Virginia in 1776.¹⁰³ Perceiving that Virginia had laid claim to parts of the territory that would become “new colonies,” Jefferson’s constitution required that the “colonies shall be established on the same fundamental laws contained in this instrument.”¹⁰⁴

103. See WIECEK, *supra* note 12, at 15.

104. 2 THE WRITINGS OF THOMAS JEFFERSON 26 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1893).

When Virginia ceded territory to the Confederation Congress, it included the proviso “that the States so formed shall be distinct republican States . . . having the same rights of sovereignty, freedom, and independence as the other States.”¹⁰⁵ Upon accepting the cession, Congress required that the constitutions of new states formed “not be incompatible with the republican principles, which are the basis of the constitutions of the respective states in the Union.”¹⁰⁶ The 1784 Northwest Territories Ordinance required “[t]hat their respective governments shall be republican,”¹⁰⁷ and when it was replaced in 1787, the Ordinance required that “[t]he constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles.”¹⁰⁸ Its stated purpose was to “fix and establish . . . forever” the “fundamental principles of civil and religious liberty, which form the basis whereon these republics [(the already extant states)], their laws and constitutions, are erected.”¹⁰⁹

The concept that new states should be “fixed . . . forever” as republican in form combined with two other major influences that compelled the introduction of the Clause. First, Shay’s Rebellion in Massachusetts and the perceived need for the national government to put down future insurrections was clearly on the minds of those who introduced the Clause.¹¹⁰ This explains the need for the remainder of the section, that the “United States . . . shall protect each [State] against Invasion; and . . . against domestic Violence.”¹¹¹ Second, at the time, there was a widespread rumor and fear that there might be a monarchy established in one of the states, and that if a state became a monarchy, it would threaten the vitality of the union.¹¹² This second concern explains why the drafters believed the federal government had an interest in ensuring that the states maintained republican forms of government.

105. 1 BEN PERLEY POORE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES* 427 (Washington, Gov’t Printing Office 2d ed. 1878).

106. 25 *JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789*, at 694 (Gaillard Hunt ed., 1922).

107. 26 *id.* at 277.

108. 2 FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES* 962 (1909). Interestingly, the “principles contained in these articles” included civil and religious liberties, habeas corpus, jury trials, due process, inviolability of contracts, federal supremacy, and public education. *Id.* at 960-62.

109. *Id.* at 960.

110. See WIECEK, *supra* note 12, at 27-33, 55. Indeed, Madison listed as one of the “vices” of the confederation that it did not give the federal government authority to protect the states “against internal violence.” 1 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 322 (New York, R. Worthington 1884). This, Madison referred to as a “Want of Guaranty to the States of their Constitutions and laws,” *id.*, foreshadowing the initial wording of the Clause during drafting.

111. U.S. CONST. art. IV, § 4.

112. See WIECEK, *supra* note 12, at 42-43.

2. “*Guarantee*”: *empowering the federal government to regulate state constitutions*

Against this backdrop, the drafters and ratifiers sought to “guarantee” to the states a republican form of government. Understanding what it means for the United States to “guarantee” a republican form is central to understanding how the Clause was meant to be enforced.¹¹³ Unfortunately, besides a few cursory pages in the occasional law review article on the Clause,¹¹⁴ no court or scholar has seriously considered the word’s meaning or its implications for how the Clause should be implemented. The investigation of the word’s original meaning reveals that the Clause was understood to stringently protect the states’ republican forms of government from any alterations, encroachments, or threats.

It is important to emphasize that this was not the *only* understanding of the Clause at the time. The Clause was understood to have a variety of meanings and uses, including permitting the federal government to defend states against invasions and insurrections. These understandings have been covered well by other scholars, and I will not recapitulate their arguments here.¹¹⁵ More importantly, this understanding is not exclusive of the “guarantee” understood as protecting states’ republican forms from more than just military threats. The rest of the text of Article IV, Section 4 amply supports the Clause as authorizing the federal government to use its military power to defend the states.¹¹⁶

a. *Definition*

Most dictionaries at the time of the founding defined “guaranty”¹¹⁷ as to

113. *See id.* at 3.

114. *See, e.g.,* Bonfield, *supra* note 9, at 523-24.

115. *See* WIECEK, *supra* note 12 (explaining the Clause’s interpretation as allowing federal intervention to suppress insurrections and establish order at various points in the Clause’s history).

116. U.S. CONST. art. IV, § 4 (“The United States . . . shall protect each [State] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

117. The spelling in the Clause is peculiar because, based on the dictionaries at the time, a “guarantee” was a noun, from the French *garant*: “A power who undertakes to see stipulations performed.” 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan et al., 5th ed. 1773); *see also* FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY (London, J. Wilson & J. Fell 1765) (“[A] power who undertakes to see the conditions of any league, peace, or bargain performed.”); N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (Edinburgh, Neill & Co., 25th ed. 1783) (“[A] person agreed on to see articles performed in treaties between Princes.”). Regardless, given its use in the Clause as a verb, it is reasonable to conclude that “guarantee” meant what most dictionaries instead spelled “guaranty.”

“secure the performance” of a stipulation, contract, or treaty between parties.¹¹⁸ Samuel Johnson’s 1773 dictionary, however, contained different definitions of “guaranty,” the first four of which could be pertinent here:

1. To watch by way of defence [sic] and security.
2. To protect; to defend.
3. To preserve by caution.
4. To provide against objections.¹¹⁹

These dictionaries present essentially three distinct though related definitions. First, with Samuel Johnson’s first, second, and fourth definitions, “guarantee” could mean *to protect* or *to defend*. “Guarantee” could also mean *to undertake to ensure* specific stipulations are carried out, consistent with the majority of dictionaries (and interestingly, with later editions of Johnson’s dictionary).¹²⁰ Finally, “guarantee” could mean *to preserve*.

All three definitions lend support to the “death by a thousand cuts” approach. That the United States must “watch by way of defense,” “protect,” or “provide against objections” to the states’ republican forms of government, implies it must do more than merely see to it that they exist; it must also take care to see they are maintained against debasement.¹²¹ This implication is even stronger with the other definitions—both “undertak[ing] to ensure” and “preserv[ing]” imply that the United States must be actively involved in maintaining republican forms of government in the states.

118. THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Charles Dilly, 2d ed. 1789) (“To undertake to secure the performance of a treaty or stipulation between contracting parties.”); *see also* ALLEN, *supra* note 117 (“[T]o undertake to see the articles of any treaty kept.”); 1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Vernor & Hood et al., 2d ed. 1795) (“To undertake to secure the performance of a stipulation between contracting parties.”); FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY (London, Frederick Barlow 1772) (“[T]o undertake to see the articles of any treaty performed.”).

119. JOHNSON, *supra* note 117.

120. *See* 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al., 6th ed. 1785) (defining guaranty as “[t]o undertake to secure the performance of any articles”).

121. Note also that these definitions support the bottom-up protections of the Clause: the federal government would fail at its duty to “protect” or to “defend” republican governments if it impeded on those forms. *See supra* Part II.

These definitions of “guarantee” could also be used to support the contention that the Guarantee Clause *only* provides for the physical security of the states’ republican forms of government, as against attack or insurrection. It is indisputable that Article IV, Section 4 does empower the federal government to physically protect the states, the Guarantee Clause included; this was seen as one of its many virtues. As the history surrounding the drafting and ratification debates reveals, however, it would be wrong to assume that this is the *only* function of the Clause. It is clear that if the founders thought of “guarantee” as “to protect,” they thought of it both in the physical security sense and in the broader sense of “provid[ing]” these forms of government “against objections,” including nonviolent changes to state constitutions.

b. *Drafting history*

This understanding is buttressed by the Clause's history during the drafting and ratification of the Constitution. It is clear, based on this history, that the United States's role in guaranteeing a republican form of government to the states was understood as preventing them from altering their own forms of government away from a republican form. The word "guarantee" in the Clause was taken to mean that the federal government could enforce a limitation on the forms that state governments may take. That limitation could be strictly enforced and adhered to; "guaranteeing" something, to the founders, did not allow for much flexibility.

When originally introduced on May 29, 1787 by Virginia Governor Edmund Randolph, the Clause read: "*Resolved*, That a republican government, and the territory of each state, (except in the instance of a voluntary junction of government and territory,) ought to be guaranteed by the United States to each state."¹²² What is perhaps most interesting about this initial wording is that it uses the same verb, "guarantied," to apply to both "republican government" and "the territory of each state." Using "guarantee" to cover territorial integrity shows that the word was no empty promise. Just as the Clause would certainly be implicated if Vermont annexed a small New Hampshire town, the "guarantee" would also be implicated if a state ceded one inch of its republicanism.

By June 11, 1787, the debate on the Clause began. Madison moved to alter the Clause so it would read: "The republican constitutions, and the existing laws of each state, to be guaranteed by the United States."¹²³ Randolph was in favor of the revision "because a 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."¹²⁴

Three things are of note here. First and foremost, Randolph perceived the Clause as a *limitation* on state governments: "no state *ought to have it in their power*." Second, Randolph portrayed the Clause as limiting states from "chang[ing]" their governments to monarchies. This choice of wording does not fall clearly on either side of the "death by a thousand blows" debate; a "change" could occur either one step at a time, or in one violent overthrow—it does not rule out either interpretation. Third, "republican government" in the first drafting was replaced with "republican constitutions, and the existing laws of each state." This implies that the terms were understood to be to some degree interchangeable: by "republican governments," the founders were concerned with protecting or preserving the states' government structures and

122. 1 ELLIOT'S DEBATES, *supra* note 24, at 145.

123. *Id.* at 406.

124. *Id.*

laws, as opposed to, for example, their officers or territory.¹²⁵

When the debate on the Clause was again taken up on July 18, the original resolution (though amended a few times) looked substantially as it did five weeks earlier: “That a Republican Constitution & its existing laws ought to be guaranteid [sic] to each State by the U. States.”¹²⁶ The first objections from Gouverneur Morris and William Houston reveal further that the word “guarantee” was understood in the Clause as empowering the federal government to assiduously protect republican forms in state constitutions. Morris was concerned with ensuring “that such laws as exist in R. Island should [not] be guaranteid [sic].”¹²⁷ More to the point, Houston feared the provision would “perpetuat[e] the existing Constitutions of the States,” citing Georgia’s constitution as a “very bad one” that he “hoped would be revised & amended.”¹²⁸ The worry, then, was that the Clause as phrased would not allow for any flexibility in the constitutions of the states as they then existed—states would not even be allowed to “revise[] & amend[]” them.

This provides support for the “death by a thousand cuts” approach. That the states’ constitutions and laws were “guarantied” to them by the United States at this stage of drafting was understood to mean that the states could not even *amend* their constitutions or laws. There is certainly no suggestion that the Guarantee Clause was only implicated if their constitutions were entirely abolished or replaced. Now that the language guarantees a republican form rather than the states’ constitutions, we can infer that a deviation from a republican form in part, even if not in totality, likewise implicates the Clause.

In response to these concerns over the Clause’s inflexibility, James Wilson explained that “[t]he object is merely to secure the States agst. dangerous commotions, insurrections and rebellions.”¹²⁹ Randolph swiftly responded that this was but one aim of the Clause, urging that it had “2 Objects[:]. 1. to secure Republican Government. 2. to suppress domestic commotions. He urged the necessity of both these provisions.”¹³⁰ At this point, Madison suggested rephrasing the resolution so that it read: “that the Constitutional authority of the States shall be guarantied to them respectively agst. domestic as well as foreign violence.”¹³¹

125. This topic will be taken up in more detail in the following Subpart. *See also* WIECEK, *supra* note 12, at 59 (“A simple territorial guarantee had been rejected in favor of a broad guarantee of republican government that would, first, secure . . . internal order; second, prevent the establishment of autocratic governments in the states; and third, give broad powers to the federal government over the states to achieve the first two objects.”).

126. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 47 (Max Farrand ed. 1911) [hereinafter FARRAND’S RECORDS].

127. *Id.*

128. *Id.* at 48.

129. *Id.* at 47.

130. *Id.*

131. *Id.* at 47-48.

The discussion drifted briefly into whether the federal government needed express authorization to suppress rebellions, but Randolph was persistent in ensuring the Guarantee Clause protected state forms of government. He moved to amend Madison's proposal to add to it: "and that no State be at liberty to form any other than a Republican Govt."¹³² His proposal was seconded by Madison.¹³³ "[A]s a better expression of the idea," Wilson suggested rephrasing the entire resolution to: "that a Republican (form of Governmt. shall) be guarantied to each State & that each State shall be protected agst. foreign & domestic violence."¹³⁴ This resolution was agreed to, and would later serve as the format and basis for the wording of the Clause as ratified. Importantly, Randolph's conception of the Clause as a restriction on the states appears to have persisted through the drafting, as did the restrictive word "guarantee."

c. *Ratification*

The debates surrounding ratification provide further support for a "death by a thousand cuts" approach to interpreting the Guarantee Clause. This is most apparent in the discussion and debates that took place in the widely influential editorials and pamphlets. One editorial by Tench Coxe, who "has been credited as the single individual most responsible for shaping public understanding of the Constitution,"¹³⁵ explained the Clause as preventing "any man or body of men, however rich or powerful" from "mak[ing] an *alteration* in the form of government of any state."¹³⁶ In another commentary that he penned in the *Pennsylvania Gazette*, he similarly argued that "the f[e]deral constitution *restrains* [the states] from *any alterations* that are not *really republican*."¹³⁷ An

132. *Id.* at 48.

133. *Id.*

134. *Id.* at 48-49. Given the order in which the speakers are recorded as speaking in Madison's notes on the debates, it is perhaps important to note that there is some ambiguity as to whether Wilson was responding to Randolph's amendment or to a comment from Rutledge about whether it was necessary to have the guarantee to begin with. Given the context, however, Wilson's suggestion that his wording would be "a better expression of the idea" presumably refers to the proposed resolution, and not to Rutledge's comment.

135. Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 44 (2003) (citing JACOB E. COOKE, TENCH COXE AND THE EARLY REPUBLIC 111 (1978)).

136. An American Citizen IV: On the Federal Government, Oct. 21, 1787, *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 431, 431 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter DOCUMENTARY HISTORY] (emphasis added). Coxe even felt that those that tried to introduce such alterations "will stand guilty of high treason." *Id.* at 432 (emphasis omitted). For whatever it is worth, Coxe adopted the interpretation of "Republican" that centered on popular sovereignty—he was most concerned with "alteration[s] . . . whereby the powers thereof shall be attempted to be taken out of the hands of the people at large." *Id.* at 431-32 (emphasis omitted).

137. A Freeman II, PA. GAZETTE, Jan. 30, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 136, at 508, 509 (first and second emphases added).

editorial by the staunch federalist James Sullivan, writing under the pseudonym “Cassius,” saw the Clause as “sufficient to convince [his countrymen] of the excellency” of the constitution being debated.¹³⁸ To Sullivan, a Bill of Rights would be redundant:

Does not the [Guarantee Clause] provide for the establishment of a free government in all the states? and if that freedom is *encroached* upon, will not *the constitution be violated*? It certainly will; and its violators be hurled from the seat of power, and arraigned before a tribunal where impartial justice will no doubt preside, to answer for their high-handed crime.¹³⁹

Other supporters of the proposed constitution similarly saw the Guarantee Clause as ensuring that the federal government would protect citizens against the states’ encroachment upon specific fundamental freedoms. Writing under the pseudonym “Curtius,” a commentator argued that “should ever the liberties of the people be violated,” they have a “peculiar advantage” “from this constitution.”¹⁴⁰ While under other governments “the people are obliged, in order to obtain redress, to resolve themselves into a state of anarchy and tumult,” here they are protected in the first instance by the “combination, system, and arrangement under their state legislatures”; and should that fail, they are protected in the second instance because “the union is bound to guard the rights of the injured, and to guarantee to each state a republican form of government.”¹⁴¹ Another pamphleteer argued in the *Massachusetts Centinel* that the “FREEDOM of *speech, writing, publishing and printing*” is protected “throughout the States” because “a Republican Constitution is sacredly guaranteed to them all.”¹⁴² The writer went on to argue that all “*courts, laws, judges, juries, customs, &c.*” were also “confirmed” by the Clause.¹⁴³ Similarly, another editorialist writing in the *Centinel* four days later echoed this argument: “if . . . the republican forms of government are guaranteed to the several states, then surely the liberty of the press is most amply provided for.”¹⁴⁴

These supporters of the Constitution saw the Guarantee Clause as preventing unrepresentative “alterations” in or “encroach[ments]” upon the states’

138. Cassius, XI, THE MASS. GAZETTE, No. 394, Dec. 25, 1787, *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 43, 44 (Paul Leicester Ford ed., Brooklyn, Historical Printing Club 1892). Sullivan later explains the clause as holding the country’s rulers “bound . . . to guarantee to us a republican form of government in its fullest extent.” *Id.* at 46.

139. *Id.* at 44 (emphasis added).

140. Curtius III, N.Y. DAILY ADVERTISER, Nov. 3, 1787, *reprinted in* 19 DOCUMENTARY HISTORY, *supra* note 136, at 174, 179.

141. *Id.* at 179.

142. Truth, MASS. CENTINEL, Nov. 24, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 136, at 234, 235.

143. *Id.*

144. One of the Middling-Interest, MASS. CENTINEL, Nov. 28, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 136, at 328, 331.

republican forms of governments, or as a guarantor of certain fundamental rights. This language is unmistakably supportive of the “death by a thousand cuts” approach.

The Guarantee Clause’s detractors similarly saw the Clause as disallowing state governments from introducing unrepublican alterations or amendments to their constitutions. William Symmes, Jr. wrote in a letter to Captain Peter Osgood, Jr., for example, that the Clause would make it “difficult to *effect any important change* in State-government,” and concluded that the “clause meddles to much with ye. independence of ye. several States.”¹⁴⁵ To Symmes, although it was “improbable that any State will choose to *alter* ye. form of its govt.,” it still “ought to be ye. privelege of every State to do as it will in this affair.”¹⁴⁶ His worry was that the Clause could be interpreted subjectively, and if the federal government saw something “*in* our present constitutions, or *any future amendments*, not strictly republican,” it would give it the right to intermeddle.¹⁴⁷ Similarly, the Albany Anti-Federalist Committee issued a circular attacking the proposed constitution because it leaves states to “the mercy of the General Government, to allow them such a *form* as they shall deem proper.”¹⁴⁸

The concept of the Guarantee Clause as robustly protecting states’ republican forms of government is also represented in the *Federalist Papers*.¹⁴⁹ Madison focused explicitly on the guarantee of a republican form in *The Federalist No. 43*. There, Madison described the Clause as a defense “against aristocratic or monarchical *innovations*” in the states.¹⁵⁰ The Clause was necessary, he explained, because “[t]he 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

145. Letter from William Symmes, Jr. to Peter Osgood, Jr., Andover, Nov. 15, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 136, at 107, 115 (emphasis added).

146. *Id.* (emphasis added).

147. *Id.* (emphasis added).

148. Albany Anti-Federal Committee Circular, Apr. 10, 1788, *reprinted in* 21 DOCUMENTARY HISTORY, *supra* note 136, at 1379, 1382.

149. Publius did seem to have somewhat of a split personality on this issue, though. Hamilton “stressed the repressive and combative character” of the Clause, and represented the Clause as concerning itself *solely* with “changes to be effected by violence.” WIECEK, *supra* note 12, at 67; *see* THE FEDERALIST NO. 21, *supra* note 26, at 140 (Alexander Hamilton) (“[The Clause] 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 guaranty could *only* operate against changes to be effected by violence.” (emphasis added)). *But see* Bonfield, *supra* note 9, at 520 n.40 (discussing Hamilton’s THE FEDERALIST NO. 21 and concluding that his claim that the Clause is only effectuated by violence “would seem a bit exaggerated especially in light of his contention that it would operate against the usurpation of rulers”).

150. THE FEDERALIST NO. 43, *supra* note 26, at 274 (James Madison) (emphasis added).

which the compact was entered into should be *substantially* maintained.”¹⁵¹ Citing Montesquieu, Madison explained the rationale behind the Clause: “Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort than those of a kindred nature.”¹⁵² In response to whether the Clause will be a “pretext for *alterations* in the State governments, without the concurrence of the States themselves,” “who can say,” asked Madison, “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?”¹⁵³

Madison therefore portrayed the Guarantee Clause as a robust protection of republican forms. The Clause prevented “innovations” and “experiments,” implying single changes instead of complete abandonment of the states constitutions. Madison envisioned the Clause as giving the federal government “the right to insist” that state constitutions be “substantially maintained,” indicating that large alterations might be prevented by the Clause. He argued that the Clause was justified in making “alterations” in state governments, implying smaller changes than complete invalidation of an unrepresentative constitution. Finally, the prohibited changes in the forms of government would come not only from violent overthrow of states’ governments, but also peaceably through “the ambition of enterprising leaders.” This all strongly supports the “death by a thousand cuts” approach.

One sentence in *The Federalist No. 43* might give one pause, however: “The *only* restriction imposed on [the states] is that they shall not *exchange* republican for anti-republican Constitutions.”¹⁵⁴ It is tempting to draw from this statement that the “death in one blow” approach should be preferred: if the prohibited action is “exchang[ing]” one constitution for another, perhaps that is the only time when the Guarantee Clause is implicated. This is not the only way to read the statement, though; a change in the state’s constitution that starts the state down a long march toward tyranny might well be contemplated by the Clause in Madison’s mind. The federal government’s republican form was meant not only to avoid tyranny in the present, but also to prevent a slow slide in that direction in the future.¹⁵⁵ And that states cannot “exchange” constitutions could be read to mean that they cannot exchange their current

151. *Id.* (first emphasis added).

152. *Id.* at 275.

153. *Id.* (emphasis added).

154. *Id.* (emphasis added).

155. *See, e.g.*, THE FEDERALIST NO. 47, *supra* note 26, at 301 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous *tendency* to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.” (emphasis added)); THE FEDERALIST NO. 48, *supra* note 26, at 308 (James Madison) (“[P]ower is of an encroaching nature and . . . it ought to be effectually restrained from passing the limits assigned to it.”).

constitutions for those that *contain* antirepublican elements.

By the time the Clause was being debated in the state ratifying conventions, the delegates appeared to express views on the Guarantee Clause indicating it was a limitation on states' ability to *alter* their constitutions. In North Carolina, for example, when James Iredell was asked the purpose of including the Guarantee Clause without including a similar guarantee of religious liberty,¹⁵⁶ he contrasted the republican guarantee with a (then-hypothetical) religious one, and explained that, “[h]ad Congress undertaken to guaranty religious freedom . . . they would then have had a pretence to interfere in a subject they have nothing to do with. Each state, so far as the [Guarantee Clause] does not interfere, must be left to the operation of its own principles.”¹⁵⁷ Iredell therefore saw and explained the Clause as a right to “interfere”; to deny to the states “the operation of [their] own principles.” Indeed, he saw the Guarantee Clause as the *only* legitimate restriction on state governments—even more so than a guarantee of religious liberty.

3. “Form of Government”: confining the Guarantee Clause to matters of state constitutional law

The Guarantee Clause was understood to protect states' republican forms against alterations, encroachments, or threats. The next question then, is what precisely is it that the states are limited from changing? What did the drafters and ratifiers understand a “Republican Form of Government” to mean?¹⁵⁸

The term “Form of Government” was chosen specifically to mean three things: First, a “form of government” was synonymous with state constitutions, as distinct from state substantive laws or officers. Constitutions were understood at the time to primarily define the structure of government and its absolute limits—the branches and their defined functions, how often elections happen, and who qualifies for office, for example.¹⁵⁹ Second, the Clause is not explicit about limiting state constitutions only because there was a fear that using that language would restrict states to their then-existent constitutions, and not allow for constitutional amendments. The purpose of the wording, especially the use of “form,” was to allow the states flexibility to amend their constitutions, as long as they did not introduce unrepblican elements. Finally, while “form” allows the states flexibility to change their constitutions, the use of the word also connotes that whatever was meant by “Republican,” it was meant to be adhered to with some specificity.

156. Recall that the First Amendment's religion clauses were not included in the original Constitution.

157. 4 ELLIOT'S DEBATES, *supra* note 24, at 194-95.

158. U.S. CONST. art. IV, § 4.

159. This, of course, is in contradistinction to some state constitutions today that include substantive law, California's constitution being the most striking example.

a. *Definition*

Dictionaries at the time of the founding carried two near-opposite definitions of “form” as it might apply to the Clause.¹⁶⁰ One definition for “form” found in many dictionaries was “[e]xternal appearance without the essential qualities; empty show.”¹⁶¹ Conversely, the word was also defined as “the essential, specifical [sic] or distinguishing modification of the matter of any natural body.”¹⁶² While both definitions were employed throughout the debates on the Clause, it is apparent that the second definition is the only likely use of the word in the Clause; the other would convert the guarantee into a superfluity. That “form” was defined then as the “specific[] or distinguishing modification” perhaps implies that the republican form was meant to be adhered to with some specificity.

b. *Drafting history and ratification*

As discussed in Part IV.B.2 above, a recurring criticism of the Clause during drafting was that it would afford no flexibility for states that wished to alter their constitutions.¹⁶³ This was especially a concern when the Clause was phrased to guarantee to the states “a republican constitution”¹⁶⁴ or “[t]he republican constitutions, and the existing laws of each state.”¹⁶⁵ The remedy, proposed by Wilson, was that the wording be changed from guaranteeing the state constitutions to “Republican Form[s] of Government” instead.

“Form of Government” made sense as a replacement for guaranteeing the state constitutions. At the time, constitutions *were* forms of government. As Justice William Patterson explained in 1795: “What is a Constitution? It is the form of government . . . in which certain first principles of fundamental laws

160. One definition sometimes used, though not discussed here, is “a stated method, an established practice.” ASH, *supra* note 118; *see also, e.g.*, ALLEN, *supra* note 117; JOHNSON, *supra* note 117. This definition does not seem to fit well with the Clause; a “republican *practice* or *method* of government” does have some coherence to it, but it seems unlikely that this was the intended meaning. Besides, the essence of the definition is perhaps best captured in the definition in *infra* note 162 and the accompanying text.

161. JOHNSON, *supra* note 117; *see* SHERIDAN, *supra* note 118 (“[E]xternal appearance without the essential qualities, empty show.”); *see also* ALLEN, *supra* note 117 (“[T]he external appearance, shape, or particular model of any thing.”); ASH, *supra* note 118 (“The shape, the external appearance of any thing.”); BARLOW, *supra* note 118 (“[T]he external appearance, shape, or model. . . . External appearance, or meer [sic] show.”).

162. BAILEY, *supra* note 117; *see* JOHNSON, *supra* note 117 (“*Form* is the essential, specifical [sic], modification of the matter, so as to give it such a peculiar manner of existence.”); *see also* ASH, *supra* note 118 (“[A] particular modification, a model.”); BARLOW, *supra* note 118 (“That which gives essence to a thing.”).

163. *See* 2 FARRAND’S RECORDS, *supra* note 126, at 47-48.

164. 1 ELLIOT’S DEBATES, *supra* note 24, at 169.

165. *Id.* at 406.

are established.”¹⁶⁶ The wording was a way for the drafters to avoid holding the states to their current constitutions while still implying that the guarantee limited their “first principles of fundamental laws” to remain republican in form. It allowed the guarantee to “ensure[] dynamic, not static government.”¹⁶⁷ In the words of Madison, “[w]henver the States may choose to substitute other republican forms, they have a right to do so” under the Guarantee Clause.¹⁶⁸

That same fear—that the Clause would make state governments static—played out in state-ratifying conventions along similar lines as it did during drafting. In Massachusetts, for example, Amos Singletary wondered why Congress would not “guaranty our state constitution?”¹⁶⁹ General Samuel Thompson stressed that Congress “only meant to guaranty a *form* of government,” seemingly anticipating the attack from Rufus King that the Clause would “preclude[] the state from making any alteration” in its constitution.¹⁷⁰

Detractors from the Constitution, on the other hand, seemed to seize on the form’s first definition, “[e]xternal appearance without the essential qualities; empty show,”¹⁷¹ to attack the Clause. In the New York ratifying convention, for example, Thomas Tredwell quipped that “at least that clause in which Congress guaranties to the several states a republican *form* of government, speaks honestly . . . whilst the mere form is secured, the substance . . . is swallowed up by the general government.”¹⁷² William Lenoir in North Carolina echoed these concerns: “[The Clause] guaranties a republican form of government to the states; when all these powers are in Congress, it will only be a form.”¹⁷³ These sentiments were also expressed by commentators. “A Federal Republican,” for example, wondered “how far the proposed constitution will tend to reduce the dignity and importance of the states.”¹⁷⁴ The author concluded that although the Constitution guaranteed a republican form of government, it “will indeed be only *form*” because Congress’s powers could trammel the states.¹⁷⁵

166. Vanhorne’s Lessee v. Dorrance, 2 Dall. 304, 308 (C.C.D. Pa. 1795); *see also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (equating “forms of government” with “Constitutions”).

167. WIECEK, *supra* note 12, at 76.

168. THE FEDERALIST NO. 43, *supra* note 26, at 275 (James Madison).

169. 2 ELLIOT’S DEBATES, *supra* note 24, at 101.

170. *Id.* Note here that, although Rufus King was incorrect about the Clause preventing the state from making “any alteration[s]” in its constitution, he still read the “guarantee” language to restrict the state from making alterations, as opposed to more drastic changes, an interpretation consistent with the “thousand cuts” approach.

171. JOHNSON, *supra* note 117.

172. 2 ELLIOT’S DEBATES, *supra* note 24, at 403.

173. 4 *id.* at 202.

174. A Federal Republican, A View of the Constitution, Nov. 28, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 136, at 255, 267.

175. *Id.*

These attacks should not be taken seriously in the consideration of how to interpret the word “form” as it is used in the Clause, however. At most, these statements were meant to use the double-meaning of “form” with some license.

c. *Application of the “Form of Government” limitation today*

Translating this limitation of the Guarantee Clause’s enforcement to the present is difficult. While the founders clearly understood that the Clause should only apply to state constitutions, the line between state constitutional and substantive law has been blurred substantially since the founding. While state constitutions used to be where “certain first principles of fundamental laws are established,”¹⁷⁶ many now contain provisions that are best described as substantive.¹⁷⁷ Perhaps the most workable distinction today is that “*constitutions* define structures, processes, and restraints of government, while rules direct at the governed are *laws*.”¹⁷⁸ Thus, certain state policies that deal with the structure, process, and restraints of government, even if not formally in the state’s constitution, may count as “constitutional”—that is, touching on a state’s “Form of Government”—for the purposes of the Guarantee Clause. These might include state campaign finance and voting rights laws, which have major implications on the structure of government. Other policies within state constitutions, like affirmative rights to education for example, should be treated as substantive “laws,” not subject to Guarantee Clause restrictions and protections. Admittedly, the line between the two concepts is far from clear and may be difficult to implement in practice. This line, however, best approximates what the drafters and ratifiers intended for the province of the Guarantee Clause.

C. *“The Tyranny of Small Decisions”*

The Guarantee Clause’s history shows that it was meant to protect against even minor unrepublican encroachments and alterations. As developments since its adoption demonstrate, we must adopt the “death by a thousand cuts” approach if the Constitution’s guarantee of republican governments to the states is to have any meaning today.

States’ republican governments are not presently in danger of being supplanted by the installation of a king after a violent coup. Instead, the danger is a death by a thousand cuts: discrete decisions that individually appear

176. *Vanhorne’s Lessee v. Dorrance*, 2 Dall. 304, 308 (C.C.D. Pa. 1795).

177. See, e.g., Hans A. Linde, *What Is a Constitution, What Is Not, and Why Does It Matter?*, 87 OR. L. REV. 717, 722 (2008) (describing various provisions of the Oregon constitution that are more substantive than constitutional—a “way to raise a cause *du jour* to constitutional stature”).

178. *Id.* at 727 (discussing this distinction in the context of which propositions should and should not be allowed to be amended into Oregon’s constitution).

innocuous but cumulatively restrict, restrain, and eventually undermine states' republican forms. California's use of ballot-box-budgeting that began this Note is a good illustration. Each taxing and spending initiative ate up a relatively small slice of the budget, but as their effects accumulated over time, the legislature was eventually squeezed out. With as much as ninety percent of the state's budget off-limits to legislators, the California legislature has effectively been nullified.¹⁷⁹

Another example is the slow legislative takeover and control of executive administrative agencies.¹⁸⁰ Some state legislatures are supervising increasingly more executive regulatory agencies,¹⁸¹ with "pernicious results":

[T]he more legislatures acquire control over regulatory agencies, the more they weaken executive power and inflate their own. When legislative oversight of agencies drifts into supervision, legislative control becomes dominant, for the agency must look to the legislature not only for funding but also for continuing and specific approval of its work product. In practice, this means the legislature will dictate the agencies' work product.¹⁸²

As Laurence Tribe eloquently put it in the context of state sovereignty and federalism: "If there is any danger, it lies in the tyranny of small decisions—in the prospect that" republican government "will [be] nibble[d] away . . . bit by bit, until someday essentially nothing is left but a gutted shell."¹⁸³ Enforcing the guarantee of a republican form of government to the states in the modern world necessitates its use against the tyranny of decisions both large and small.

D. *Justiciability Reconsidered*

All federal courts and some state courts refuse to adjudicate Guarantee Clause claims. Recall that these courts refuse jurisdiction because they have implicitly adopted the "death in one blow" approach: to these courts, the Clause only comes into operation when a state crowns a king or descends into anarchy, and so the only remedy is declaring the entire state government void. That remedy is beyond the court's authority, and so courts cannot evaluate such claims at all.¹⁸⁴ With the above reevaluation of the "death in one blow" approach, we now also reevaluate whether this argument for nonjusticiability is still sustainable.

1. *Others' arguments for justiciability*

Others have argued strenuously that the Clause should be enforced in the

179. See *supra* notes 1-4 and accompanying text.

180. See Bogus, *supra* note 12, at 81-82.

181. *Id.* at 81.

182. *Id.* at 82.

183. TRIBE, *supra* note 21.

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

courts.¹⁸⁵ First, the text of the Clause indicates that the “United States” is to carry out the guarantee, a term that is normally understood to encompass all three branches.¹⁸⁶ Moreover, the text commands the United States to implement the guarantee: “The United States *shall* guarantee”¹⁸⁷ The political branches have all but abdicated their responsibility to enforce the Clause,¹⁸⁸ leaving only the judiciary to carry out the federal government’s obligation.¹⁸⁹ Its placement in Article IV, alongside other judicially enforceable clauses such as the Full Faith and Credit Clause,¹⁹⁰ Privileges and Immunities Clause,¹⁹¹ and the Fugitive Extraditions Clause,¹⁹² further weighs in favor of the Clause’s justiciability.¹⁹³ Finally, for a Clause that is meant to limit the states’ forms of government, it seems that the federal forum is the only one likely to hear such claims without prejudice. Indeed, under this sustained attack from the academy, the Court has signaled its retreat from the position that all claims are nonjusticiable under the Clause.¹⁹⁴

2. *Justiciability and death by a thousand cuts*

The distinction between the “death in one blow” and “death by a thousand cuts” provides the final nail in the coffin of non-justiciability. The “death in one blow” approach is inconsistent with the history and purposes of the Guarantee

185. See, e.g., ELY, *supra* note 68; TRIBE, *supra* note 21, at 398; Bonfield, *supra* note 9, at 560-65; Chemerinsky, *supra* note 10; Merritt, *Third Century*, *supra* note 11, at 70-78.

186. See Chemerinsky, *supra* note 10, at 871; see, e.g., Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429, 606 (1895) (construing “the United States” in U.S. CONST. art. II, § 4, as including “the judges of the United States” as well as executive officers), *overruled on other grounds* by South Carolina v. Baker, 485 U.S. 505 (1988); cf. Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010) (urging a literal reading of the subjects in constitutional clauses).

187. U.S. CONST. art. IV, § 4 (emphasis added).

188. See Chemerinsky, *supra* note 10, at 865.

189. *Id.* But see WIECEK, *supra* note 12, at 133-243 (discussing the proposed use of the Guarantee Clause during the Civil War); Magliocca, *supra* note 57 (discussing Franklin Delano Roosevelt and Congress’s deliberations over using the Clause in Huey P. Long’s Louisiana).

190. U.S. CONST. art. IV, § 1; see, e.g., Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 494-99 (2003) (evaluating Full Faith and Credit Clause issue).

191. U.S. CONST. art. IV, § 2, cl. 1; see, e.g., Supreme Court of Va. v. Friedman, 487 U.S. 59, 64-70 (1988) (evaluating Privileges and Immunities Clause violation).

192. U.S. CONST. art. IV, § 2, cl. 2; see Puerto Rico v. Branstad, 483 U.S. 219, 226-30 (1987) (overruling *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860), and allowing Fugitive Extraditions Clause to be justiciable in federal courts).

193. Chemerinsky, *supra* note 10, at 871; Merritt, *Third Century*, *supra* note 11, at 75. Indeed, during drafting the Clause was moved *out* of Article I and into Article IV. JOHN R. VILE, *THE CONSTITUTIONAL CONVENTION OF 1787*, at 337 (2005).

194. See *New York v. United States*, 505 U.S. 144, 185 (1992); *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) (explaining that “*some* questions raised under the Guaranty Clause are nonjusticiable” (emphasis added)).

Clause. The Clause was not meant to invalidate entire governments.¹⁹⁵ Rather, its intended use was to empower the federal government to protect republican government from single, minor threats and encroachments, while limiting the federal government from undermining it.

This is precisely the type of claim courts can and should hear. Constitutional guarantees are always enforced on a case-by-case basis in the courts; that is the judicial role. When federal courts evaluate separation of powers challenges, for example, the question is never whether the federal government's entire system of checks and balances is off-kilter. Instead, the question is whether one branch usurped its authority or encroached on another's *in the specific instance* before the court.¹⁹⁶ The former question is not one that the courts are equipped to decide. Courts have parties before them, and those parties have an interest only in the outcome of the case. Courts will therefore not hear all the evidence required to make an appropriate determination on the state of separation of powers in the federal government. The latter question, however, is precisely what courts are meant to handle. Courts can develop facts about the specific situation before them, and reach a determination on whether the situation is inconsistent with the principles of separation of powers.

The same should be true of the Guarantee Clause. There will be instances when parties before courts will allege facts that show that a particular policy is detrimental to a state's republican form of government. The Supreme Court of Oklahoma, for example, considered an initiative that would amend its constitution in a way that "would impose severe limitations upon the Legislature's ability to raise new revenue"¹⁹⁷ and "undoubtedly restrict[.] . . . government by representation."¹⁹⁸ Following the "death in one blow" approach, the court held that because the amendment would not "abolish government by representation," the Guarantee Clause was not implicated.¹⁹⁹ This gets the issue backwards: if the court waits until the claim arises that "there is no representative government in Oklahoma," it will have waited until events played out in such a way that it is presented with a claim it cannot adjudicate. Instead, because courts should enforce the Guarantee Clause to protect against encroachments and threats, they should approach it as they

195. See Hasen, *supra* note 14, at 81 ("[The parade of horrors in *Pacific States*] is surely makeweight. Nothing in the Constitution requires the Supreme Court, in holding that an aspect of state law is nonrepublican, to find all actions of that state to be nonrepublican as well. The Court could have simply declared the particular feature of state law—in *Pacific States*, the initiative power—to be nonrepublican, leaving the rest of state law intact.")

196. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 468-76 (1998) (evaluating single statute that permits line-item veto); *INS v. Chadha*, 462 U.S. 919, 946-47 (1983) (evaluating single statutory provision that allowed for legislative veto).

197. *In re Initiative Petition No. 348, State Question No. 640*, 820 P.2d 772, 774 (Okla. 1991).

198. *Id.* at 780.

199. *Id.*

approach all other claims: one case at a time. The “death by a thousand cuts” approach is the only appropriate method for adjudicating cases and controversies.

3. *Justiciability in the state courts*

A more difficult question is whether *state* courts should hear Guarantee Clause claims. Textually, the Clause commits the “United States” to carry out the guarantee, a term that likely cannot be construed to include state courts. State court judges are, however, “bound by Oath or Affirmation, to support [the] Constitution,” and the Constitution is the “supreme Law of the Land” by which “the Judges in every State shall be bound.”²⁰⁰ As the Court held in *Minor v. Happersett*, “[t]he guaranty necessarily implies a duty on the part of the States themselves to provide [a republican form of] government.”²⁰¹ One text-based reading could be that, in upholding the Constitution, state judges must partake in ensuring that the United States does not fail to guarantee a republican form of government to the states.²⁰²

V. APPLICATIONS TO ISSUES IN STATE CONSTITUTIONAL LAW

The previous Part argued that the Guarantee Clause should protect republican governments against death by a thousand cuts. This Part considers what that would look like in practice.

A. *Anti-Corruption*

The Guarantee Clause could serve as the basis both for top-down federal anti-corruption legislation and bottom-up protection for similar state legislation. This is only possible, however, if the Guarantee Clause protects republican government from death by a thousand cuts.

1. *Anti-corruption top-down*

Adam Kurland argues that current federal anti-corruption prosecution legislation is critically insufficient because it depends upon and is limited to

200. U.S. CONST. art. VI.

201. 88 U.S. (21 Wall.) 162, 175 (1874).

202. This line of reasoning has been forwarded most prominently by former Oregon Supreme Court Justice Hans A. Linde. *See* Linde, *supra* note 177, at 723; *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 in *Sawyer v. Oregon ex. rel. Huddleston*, 522 U.S. 994 (1997)); Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994).

Congress's commerce and postal powers.²⁰³ Those powers, Kurland contends, construe the national interest too narrowly. The federal interest in anti-corruption does not stem from mere regulation of commerce or the mail. Rather, there is a "paramount federal interest in assuring the nation's citizens honesty at all levels of government."²⁰⁴ That interest, when applied to the states, is an interest in republican government and is enshrined in the Guarantee Clause. "After all," Kurland asks, "what erodes a republican form of government more than corrupt officials?"²⁰⁵ Although he never quite articulates the issue in this way, he has a point: corruption breaks the link between the people and their representatives, threatening both representation and majority rule.²⁰⁶

While corruption may *threaten* or *erode* these core republican principles, one could hardly say that the existence of a few corrupt officials in a state completely undermines its republican form of government. Consider this response to Kurland's proposed use of the Guarantee Clause:

I find the Guarantee Clause a problematic source of national power to deal with state and local corruption. The Clause seems designed for in extremis situations where the basic form of state government has been altered. Extending it to the control of everyday operations of state and local governments is a considerable textual leap.²⁰⁷

Thus the question is not whether corruption erodes republican government. It certainly does. Rather, the question is whether the Guarantee Clause is enforced to prevent a death by a thousand cuts or a death in one blow.

203. Kurland, *supra* note 8, at 376-409.

204. *Id.* at 415.

205. *Id.* at 417; *see also id.* at 429 (arguing that corrupt officials "substantially erode the foundation of republican government"); *id.* at 431 ("[O]fficial corruption directly threatens the essential features and the true 'republican' nature of the American governmental system."); *id.* at 377 ("The faith that the citizenry places in all levels of government is the foundation of the republic. Thus, anything that erodes that foundation is of substantial federal interest.").

206. Indeed, the founders shared this concern. *See* James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 175 (1994) ("Corruption, therefore, referred to the subversion of the institutions, customs, and social relations that preserved republican government."); *id.* at 181.

207. George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law, and Post-Lopez Analysis*, 82 CORNELL L. REV. 225, 258 (1997) (footnote omitted). Others have made similar arguments. *See* Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 92 n.66 (2003) ("The national government has a very restricted authority to interfere in the administration of the state governments, triggered only by systemic misuse of state authority that undermines the legitimacy of the exercise of official power. The federal concern is that abuse of authority should not reach a level that would result in the destruction of the state government by a tyrannical leader. The Constitution recognizes the national government as the ultimate protector of the citizenry from widespread misuse of authority in the states, perhaps the ultimate form of corruption.").

2. *Anti-corruption bottom-up*

A bottom-up approach presents the interesting possibility of using the Clause to protect state anti-corruption policies from federal interference. But, again, this is only possible under the “death by a thousand cuts” approach to enforcing the Clause.

Recall *Agua Caliente*,²⁰⁸ discussed in Part III, in which a Native American tribe asserted federal tribal sovereign immunity to prevent it from being sued under California’s Fair Political Practices Act. Under the Supremacy Clause, federal sovereign immunity should supersede the enforcement of a state act. The California Supreme Court disagreed. The state’s interest in protecting its political process, it found, is protected by the Guarantee Clause. Because the Constitution trumps federal common law immunities, the court permitted California to enforce its anti-corruption policies against the tribe. Interestingly, similar positions have been taken before by jurists,²⁰⁹ litigants,²¹⁰ and scholars.²¹¹

One interesting application of the bottom-up protection of state anti-corruption policies is the use of the First Amendment to invalidate campaign finance restrictions.²¹² One could argue that while the First Amendment might invalidate federal campaign-finance statutes, the analysis should be different when applied to the states. In invalidating a federal campaign finance statute, the Court normally balances the *constitutional* First Amendment interest in free speech against the *nonconstitutional* governmental interest in the actuality or appearance of corruption.²¹³ The balancing is different, however, when the First Amendment is applied to state governments. There, a court would need to

208. *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126 (Cal. 2006).

209. *See, e.g., Geary v. Renne*, 911 F.2d 280, 296-98, 302 & nn.8, 32 (9th Cir. 1990) (en banc) (Rymer, J., dissenting), *vacated*, 501 U.S. 312 (1991).

210. *See, e.g.,* Brief for Therestofus.org et al. as Amici Curiae Supporting Respondents-Cross-Petitioners at 7-19, *Randall v. Sorrell*, 548 U.S. 230 (2006) (Nos. 04-1528, 04-1530, 04-1697).

211. Paul E. McGreal & James J. Alfini, Debate, *First Amendment Limits on the Regulation of Judicial Campaign Speech: Defining the Government’s Interest*, 157 U. PA. L. REV. PENNUMBRA 76, 96 (2008), <http://www.pennumbra.com/debates/pdfs/JudicialCampaignSpeech.pdf>. (“[F]ar from using campaign-speech restrictions as a subterfuge to defeat elections, these restrictions have been used in Texas to enhance judicial elections by establishing a level of discourse that not only provides voters with the necessary information to make meaningful decisions, but also has the added benefit of educating the electorate about the Texas judiciary. . . . [T]he U.S. Constitution guarantees a republican form of government to each state. The ‘guarantee clause’ does not prescribe the form of republican government but leaves that decision to each state. If a state decides on an elected judiciary and imposes prejudgment restrictions on that judiciary to maintain its impartiality, those policy choices should be respected.”)

212. The most recent example of this is the Court’s ruling in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), to allow corporations to spend on campaigns from their treasuries.

213. *Id.* at 909-11.

weigh the *constitutional* First Amendment interest in free speech against the *constitutional* interest in state republican governance. The balance there might come out differently. There is also some rationale for treating the states and the federal government differently in this regard. The Constitution grants the federal government strong, enduring republican institutions (for example, separation and balance of powers between the branches) that help prevent corruption from interfering with representation or majority will. We cannot make that same presumption, however, about state constitutions.

Regardless of how it can be used bottom-up, just as with the top-down potentials for the Guarantee Clause to protect anti-corruption efforts, it only works if the Clause protects against republicanism's death by a thousand cuts. A "death by one blow" court would view the application of federal tribal sovereignty or the First Amendment not to completely deprive a state of its republican form, and therefore find the Guarantee Clause inapplicable.

B. *Voting Rights*

Another potential top-down application of the Guarantee Clause is to ensure political rights, like the right to vote. Examples of this use of the Guarantee Clause, however, raise interesting questions about whether the "death by a thousand cuts" approach is even necessary for the Clause to be enforced in these circumstances.

1. *Malapportionment and majority rule*

Michael McConnell proposed that the redistricting cases did not have to depend on the one-person, one-vote Equal Protection Clause rationale, but instead could have been based on the Guarantee Clause.²¹⁴ McConnell starts from the rather unobjectionable proposition that, "at a minimum, the [Guarantee] Clause must mean that a majority of the whole body of the people ultimately governs."²¹⁵ In some states, however, the legislative districts were drawn based on census data that was over half-a-century old.²¹⁶ Population patterns changed over time, resulting in some legislative districts where a state representative could represent as few as a hundred thousand people, while others legislators represent nearly a million. This presents the mathematical possibility that a minority of the people in the state hold a majority share of the decisionmaking powers through their representatives. McConnell argues that, because this violates the majority rule principle, it is a clear violation of the Guarantee Clause.²¹⁷

214. See McConnell, *supra* note 10.

215. *Id.* at 114.

216. See, e.g., Baker v. Carr, 369 U.S. 186, 191 (1962).

217. McConnell, *supra* note 10, at 114-15.

What is interesting about this example is that even a “death by one blow” court would presumably find such a state not to be republican in form: its legislature is not representing the majority will. Thus either a “death by a thousand cuts” or “death by one blow” approach would likely remedy this problem.

2. *Section Five of the Voting Rights Act*

If one focuses on the *individual right* to vote, however, the analysis changes. Consider the Voting Rights Act of 1965 (VRA),²¹⁸ passed pursuant to Congress’s Fifteenth Amendment powers.²¹⁹ VRA’s section 5 “preclearance requirements,” for example, suspend all changes in state election procedures unless a three-judge panel or the Attorney General approves that they have neither “the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.”²²⁰ Section 5 has been challenged on federalism grounds, and although the Court recently decided not to invalidate it,²²¹ the law is likely to be challenged again without congressional overhaul.²²² This is in part due to the fact that the Fifteenth Amendment concerns the denial of the right to vote based on race, but those problems “have unquestionably improved,” weakening Congress’s justification for reauthorizing the Act’s intrusive measures.²²³

Rick Hasen has suggested that Congress may be able to justify the VRA instead on the Guarantee Clause.²²⁴ This alternative basis can bolster Congress’s position because it detaches the justification for the Act from

218. Pub. L. No. 89-110, 79 Stat. 437 (1965).

219. U.S. CONST. amend. XV, § 2.

220. 42 U.S.C. § 1973c(a) (2006).

221. *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504, 2513 (2009) (sidestepping constitutional issue).

222. See Posting of Lyle Denniston to SCOTUSblog, Section 5 Survives for Now, <http://www.scotusblog.com/wp/section-5-survives-for-now/> (Oct. 25, 2009, 20:35 EST).

223. *NAMUDNO*, 129 S. Ct. at 2511; see Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148 (2007), <http://thepocketpart.org/2007/12/10/pildes.html>.

224. Hasen, *supra* note 10, at 204-06. Congress would have some historical justification for believing suffrage is a critical component of republican government. See 2 ELLIOT’S DEBATES, *supra* note 24, at 482 (statement of Wilson) (expressing view that “[t]he right of suffrage is fundamental to republics,” and it is “secured” because the “Constitution guaranties to every state in the Union a republican form of government”); see also 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 522-24 (1953). Some pronouncements from the Court also echo this argument. See, e.g., *Baker v. Carr*, 369 U.S. 186, 242 (1962) (Douglas, J., concurring) (“[T]he right to vote is inherent in the republican form of government envisaged by Article IV, Section 4 of the Constitution.”). The problem with this line of argument, however, is that the franchise was extended to only white, landed men at the time of the founding, and this was apparently not at odds with republicanism. See, e.g., *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175-76 (1874).

strictly race-based concerns, and attaches it instead to the guarantee of republican government. Congress's oversight role under section 5 could be an exercise of its guarantee of a republican form.

Unlike the malapportionment example, however, Congress's ability to pass the VRA under its Guarantee Clause powers depends on the Clause being enforced through the "death by a thousand cuts" approach. It is difficult to argue that the exclusion of a few (or even many) people from the ballot box negates the entire republican nature of a state's form of government, and so a "death by one blow" court would likely be unpersuaded by this assertion of congressional power. A "death by a thousand cuts" court, on the other hand, could view the exclusion of certain groups from voting as something that damages the state's republican form and uphold section 5 under that reasoning.

C. Legislative Power Grabs

A recent trend in some states, including Pennsylvania, Ohio, North Carolina, and Wisconsin, is that legislatures are taking increasing control of executive agencies.²²⁵ These states "have committee veto provisions that allow committees to effectively hold captive administrative rules without full legislative and gubernatorial consideration."²²⁶ This "rules review" process has political advantages for legislators: it allows them to "weaken[] regulations to curry favor with constituents and contributors,"²²⁷ and so there are natural impetuses for the trend to continue. While each individual exercise of rules review does not completely change a state's form of government, the combined effect of these legislative power grabs undermines these states' executives.²²⁸ With each legislative trespass into the realm of the executive, the state gets closer to a unitary legislature; each instance of legislative veto and rules review is a cut, even if one of thousands, that may lead to the death of separation of powers in the state.

In many states, those worried about this subversion of the separation of powers could appeal to state constitutions' separation of powers provisions, many of which explicitly mandate that the branches be kept separate.²²⁹ In these states, however, either the constitutions lack such provisions or they are not enforced seriously.²³⁰ And in some of these states, the only way to change

225. See Bogus, *supra* note 12, at 81-82.

226. See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1214 (1999).

227. Bogus, *supra* note 12, at 82.

228. *Id.*

229. See Rossi, *supra* note 226, at 1191 n.105 (citing thirty-five states with strongly-worded provisions providing for a strict separation of powers).

230. See *id.* at 1204-08. Some states have express constitutional provisions allowing their legislatures to review agency rulemaking, and the Supreme Court of Idaho has even found the practice valid under Idaho's constitution. *Id.* at 1202-03 & nn.187-89.

the constitution is through the legislature.²³¹ Given that legislators have an interest in expanding their power, such constitutional change seems unlikely.²³²

The Guarantee Clause may be used here to supplement deficiencies in state constitutional design. While it may be allowable under state constitutions for legislatures to practice stringent rules review, the concept strikes at the heart of a government of separated powers. Someone injured by a legislative veto could ask a court to review whether the practice is a “cut” against separation of powers in the state.²³³ Guarantee Clause claims, enforced under the “death by a thousand cuts” approach, may be used to bring these state legislatures in line with republican principles.

D. *Ballot-Box Budgeting*

We now return to the situation in California that began this Note. Whether ballot-box budgeting can be challenged depends entirely on whether the Guarantee Clause protects against death by a thousand cuts or death in one blow.

California’s unique system of initiatives allows bare majorities to irreversibly commit state finances. It is the only state where such spending initiatives cannot be overridden by the legislature and are not required to sunset after a period of time.²³⁴ Budgeting initiatives have slowly committed increasing portions of the general fund, leaving the legislature with as little as ten percent of the state’s budget to spend at its discretion.

This presents two problems. First, it makes the state nearly impossible to govern. With the vast majority of finances already committed, the legislature cannot react appropriately to situations requiring budgetary discretion—most importantly, contractions and expansions in the state’s economy and tax base. These problems are compounded by an initiative-imposed requirement that all tax increases be passed by a supermajority, making already-constrained budget negotiations even more difficult. Second, as we saw in Part I.B.1, the funding allocations likely do not account well for minority interests because they were passed through plebiscite instead of the legislature.

Under a “death by a thousand cuts” approach, the Guarantee Clause could be used to challenge this practice.²³⁵ Such initiatives restrict representative

231. See, e.g., PA. CONST. art. XI, § 1.

232. But see Bogus, *supra* note 12, at 126-34 (describing how extreme political pressure in Rhode Island led its legislature to amend its constitution to provide real separation of powers).

233. Cf. *INS v. Chadha*, 462 U.S. 919, 926 (1983) (holding that the legislative veto—a single “cut” against the executive’s power—violated bicameralism and presentment, and was therefore an unconstitutional transgression on the separation of powers).

234. See *The Ungovernable State*, *supra* note 1.

235. The focus here on the Guarantee Clause is not only because it is explicitly concerned with the structure of state governments, but also because it is the only plausible

government in the state. Each spending initiative takes away some quantum of legislative control. While popular sovereignty is also a core component of republican government, the founders made clear that it is only the will of majorities *as expressed through representatives*, as opposed to legislating directly, that constitutes a republican government. Under the “death by a thousand cuts” approach, a court could enjoin the enforcement of such initiatives.

Under a “death by one blow” approach, on the other hand, a court would uphold spending and taxing by initiatives. Indeed, many courts have already done so under this rationale. In *In re Initiative Petition No. 348*²³⁶ (discussed above in Part III.A.1), for example, the Oklahoma Supreme Court upheld an initiative that would “impose severe limitations” and “restrict[]” representative government, reasoning that because the initiative did not “result in [republican government’s] destruction” it therefore “does not breach the federal guaranty.”²³⁷

It is worth considering whether all direct lawmaking is unconstitutional under the “death by a thousand cuts” approach. The answer is most likely not. Referenda, which allow the people to veto legislation passed by the legislature, are a good example. The right to *make* legislation is distinct from the right to see it *go into effect*; while representative lawmaking is a core republican concept, having legislation *enforced* after a legislature passes it is not. Executive vetoes are a component of nearly all our state and federal republican forms of government.²³⁸

The situation may also be different if the legislature had the ability to amend or repeal statutes enacted by initiative. In *Kadderly v. City of*

option remaining. Those looking to challenge the practice of ballot-box budgeting would find no recourse in the California constitution—more often than not, spending initiatives are placed *in it*. Proposing an initiative to overturn ballot-box budgeting would almost surely fail; despite their deleterious consequences, initiatives still garner widespread support among Californians. See Joe Mathews, *The George Retention*, FOX & HOUNDS DAILY, Oct. 12, 2009, <http://www.foxandhoundsdaily.com/blog/joe-mathews/the-george-retention> (describing the California Supreme Court Justice George’s recent critique of initiatives as touching the “third rail” of California politics because “[f]or all the criticism . . . three in four voters want to preserve the process”). The rights-protecting provisions of the Constitution would also be of little use: unless the particular initiative violates a specifically enumerated right, they are inapplicable. See, e.g., *James v. Valtierra*, 402 U.S. 137, 139-40 (1971) (upholding decision rule that would almost surely hurt minorities). Though spending legislation might distribute resources inequitably or make legislating difficult, those are normally not cognizable constitutional harms. Those looking to challenge ballot-box budgeting would likely turn to the Guarantee Clause.

236. 820 P.2d 772 (Okla. 1991).

237. *Id.* at 774, 780-81.

238. The same can be said about a number of other forms of direct democracy, including indirect constitutional initiatives. See Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL’Y 295, 302-04 (2007) (explaining different types of direct democracy).

Portland,²³⁹ the Supreme Court of Oregon faced one of the earliest challenges to the constitutionality of initiatives and referenda under the Guarantee Clause. The court followed “death in one blow” reasoning to reject the Guarantee Clause claim:

[T]he initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substituted another in its place.²⁴⁰

The court made a point of noting, however, that “[l]aws proposed and enacted by the people . . . may be amended or repealed by the Legislature at will.”²⁴¹ This important fact distinguishes Oregon’s system of direct democracy (as well as every other state with direct legislation) from California’s, and changes the analysis substantially. If the legislature retains the power to repeal or amend, its power is not at all constrained—not any more, anyway, than its power is constrained by legislation passed by earlier legislatures.²⁴²

E. *State Substantive Law*

The four examples discussed here are issues that likely implicate the Guarantee Clause. They deal with a state’s form of government, including the nature of representation, separation of powers, and the composition of the polity. Although these issues are now regulated by a mix of statutes and constitutional provisions, they are what the founders would have considered constitutive of government—inherently constitutional issues.

It is important to note, however, that this is where the reach of the Guarantee Clause ends. It does not apply to those matters not touching on a state’s form of government. The phrase “Form of Government” was not meant to include the sorts of federal regulation now proposed for the Clause in, for example, public education,²⁴³ desegregation,²⁴⁴ and individual rights.²⁴⁵

239. 74 P. 710 (Or. 1903).

240. *Id.* at 720.

241. *Id.*; see also *id.* (“[B]ut the legislative and executive departments are not destroyed, *nor are their powers or authority materially curtailed.*” (emphasis added)).

242. Other forms of direct legislation may be protected under similar analysis, including direct and indirect statutory initiatives. See Krislov & Katz, *supra* note 238, at 302-04.

243. See, e.g., Franklin, *supra* note 9, at 12.

244. *Plessy v. Ferguson*, 163 U.S. 537, 563-64 (1896), *overruled by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (Harlan, J., dissenting); *Hoxie Sch. Dist. v. Brewer*, 137 F. Supp. 367, 374-75 (E.D. Ark.), *aff’d*, 238 F.2d 91 (8th Cir. 1956).

245. *Bonfield*, *supra* note 9, at 528; Chemerinsky, *supra* note 10, at 868-69.

CONCLUSION

Today, the threat to states' republican forms of government is a death by a thousand cuts. Corruption erodes the link between voters and representatives necessary in representative democracy. Branches of state government slowly grow to the point that their coordinate branches are effectively undermined. Ballot-box budgeting sets aside portions of the state's general fund and slowly squeezes out legislatures. If the guarantee of a republican form of government is to have any meaning today—and if it is to have the force the drafters and ratifiers of the Constitution intended for it—the Clause must protect against these incursions that slowly undermine our republican institutions. Death by a thousand cuts is death all the same.