DEMOCRACY, FEDERALISM, AND THE GUARANTEE CLAUSE

by Carolyn Shapiro*

The Guarantee Clause of the Constitution promises that "[t]he United States shall guarantee to every State in this Union a Republican form of Government . . . ." The Supreme Court has long held this Clause to be nonjusticiable, and as a result, many see the Clause as purely vestigial. But nonjusticiable does not mean toothless, and this view fails to recognize the Clause's grant of power to Congress. The Guarantee Clause provides Congress with the authority to ensure that each state's internal governance meets a minimum standard of republicanism. The Framers included this promise because they feared that some forms of government, such as monarchy, were incompatible with republicanism, which they understood as representative self-government. Nonrepublican government in one state, they believed, might have deleterious or even dangerous effects on other states, and protection against nonrepublican government was thus essential for long-lasting and healthy interstate and federal–state relationships. Today, the Framers' fears appear prescient as a number of states engage in tactics like extreme partisan gerrymandering, which entrenches one party in power; lame-duck legislation, which reallocates power to undermine an incoming administration; and targeted burdens on voting. These tactics parallel the types of democratic erosion that scholars have observed internationally and historically. Moreover, the potential negative effects of these antidemocratic tactics from one state to another, and from one state to the nation as a whole, are substantial and threaten to undermine many of the benefits of federalism. Fortunately, the Guarantee Clause allows—indeed, requires—Congress to address these antidemocratic state-level practices.

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* Associate Professor of Law and Co-Director, Institute on the Supreme Court of the United States ("ISCOTUS"), IIT Chicago-Kent College of Law. For their invaluable comments and conversation, thanks are due to Katharine Baker, Jessica Bulman-Pozen, Tom Ginsburg, Steven Heyman, Aziz Huq, Joshua Karsh, William Marshall, David Pozen, Richard Primus, Mark Rosen, Christopher Schmidt, and Jed Shugerman, as well as to participants in the National Conference of Constitutional Law Scholars at the Rehnquist Center of the University of Arizona and in workshops at Chicago-Kent and at the Midwest Law and Society Retreat. Excellent research assistance was provided by Patrick Manion and Gabriel Karsh.

TABLE OF CONTENTS

INTRODUCTION

"A republic, if you can keep it." – attributed to Benjamin Franklin, responding to a question about what kind of government the Constitutional Convention had created.

The Guarantee Clause of the Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican form of Government . . . ."[1] For more than a century, the Supreme Court has held that cases arising under the Clause present nonjusticiable political questions.[2] Most scholarship about the Clause likewise focuses on whether individuals' claims brought under the Clause

1. U.S. CONST., art. IV, § 4.

2. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 182 n.17 (1980) (finding Guarantee Clause issue nonjusticiable); Baker v. Carr, 369 U.S. 186, 218–229 (1962) (same); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 140–50 (1912) (same); Luther v. Borden, 48 U.S. 1, 42–43 (1849) (same). *But see* New York v. United States, 505 U.S. 144, 184–85 (1992) (suggesting that some Guarantee Clause issues may be justiciable); Minor v. Happersett, 88 U.S. 162, 175–76 (1875) (reaching merits of Guarantee Clause issue).

should be justiciable.[3] But this court-focused approach is too narrow.[4] The Guarantee Clause is a structural promise between the states and the federal government, not a source of individual rights.[5] And the Clause gives Congress both the power and the obligation to act today to protect against democratic erosion within the states.

The Framers, like many thinkers in the eighteenth century, sought a form of government that would protect the common good by promoting virtue and guarding against corruption.[6] Achieving this elusive goal was the essence of republicanism. And the Framers' experience taught them that monarchy was inherently corrupt and tyrannical.[7] They embraced self-government, in the form of representative democracy, as its antidote.[8] The government should be elected by at least some of the People[9]—although of course, the Framers' definition of republican self-government accommodated both slavery and the exclusion of all women from the electorate. Moreover, the Framers did not always call an elected government "democracy," as we do today, at least when they were comparing their new government to direct participatory democracy, which they rejected as tending towards anarchy, inadequately protective of minority rights, and impractical at the scale of the United States.[10]

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3. *See generally, e.g.*, Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962); Thomas C. Berg, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208 (1987); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994); *Political Rights as Political Questions: The Paradox of* Luther v. Borden, 100 HARV. L. REV. 1125 (1987); Thomas A. Smith, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561 (1984); Note, *A Niche for the Guarantee Clause*, 94 HARV. L. REV. 681 (1981); Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1121 (2005); Patrick A. Withers, Note, *Pouring New Wine Into Old Wineskins: The Guaranty Clause and a Federalist Jurisprudence of Voting Rights*, 10 GEO. J. L. & PUB. POL'Y 185 (2012); Jarrett A. Zafran, Note, *Referees of Republicanism: How the Guarantee Clause Can Address State Political Lockup*, 91 N.Y.U. L. REV. 1418 (2016).

4. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019) (holding that "the fact that [extreme partisan] gerrymandering is incompatible with democratic principles . . . does not mean that the solution lies with the federal judiciary") (internal quotation marks and citations omitted). *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (arguing that courts' willingness to enforce a constitutional provision does not define the scope of that provision).

5. *See A Niche for the Guarantee Clause*, *supra* note 3 at 688 (arguing that Supreme Court precedents construing the Clause demonstrate that "the idea of a republic is an idea more of structure and organization than of any specific individual rights").

6. *See infra* Section I.A.

7. *See infra* Section I.B.

8. *See infra* Section I.B.

9. *See infra* Section I.B.

10. THE FEDERALIST NO. 10 (James Madison); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 14–15 & nn.27–28, 276–80 (2006 paperback ed.) [hereinafter, AMAR, BIOGRAPHY] (arguing that the Framers explicitly considered the republican government they were creating to be democratic); ROBERT A. DAHL, ON DEMOCRACY 16

Because republican government was an attempt to keep both tyranny and anarchy at bay, the Framers were attuned to its fragility. More specifically, they believed that departures from a republican form of government in one state would threaten the continued existence of republican government in other states.[11] They particularly feared monarchy and despotism as inherently corrupt and expansionist.[12] The Guarantee Clause thus arose from a recognition that the form of government in one state could have negative effects on and in other states. The Clause laid down a crucial constitutional marker—one with renewed salience today—that the states owe each other a substantive commitment to compatible forms of government. It also embodied the recognition that states might well be unable to respond effectively if this commitment were breached; federal intervention might be necessary.

The national and constitutional commitment to a popularly elected government, expressed in the Guarantee Clause, has expanded and solidified since the Framing. After the Civil War, Congress relied on the Guarantee Clause to insist on universal male suffrage as a condition for the confederate states' readmission to the Union.[13] And since then, the nation has expanded voting rights through a series of constitutional amendments, as well as through Supreme Court decisions and federal legislation.[14] American identity is intimately connected to a belief in democracy, a word that today unambiguously encompasses representative government. The constitutional amendments and other federal actions to protect and expand voting rights, however, unlike the Guarantee Clause, create individual rights enforceable in federal court.[15] As a result, academics, politicians, courts, and lawyers have not focused on the structural protection of our commitment to popularly elected government provided by the Guarantee Clause.

Today, we again face threats to a republican form of government. We are facing the erosion of fundamental democratic norms and practices. Extreme partisan gerrymandering is one example. In the 2018 midterm elections, for example, Democratic candidates for the Wisconsin State Assembly received 53% of the votes but won only 36 of the 99 Assembly seats.[16] This disparity was not a fluke. It was the consequence of that state's most recent round of redistricting, in 2011, by a

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(1998) (same); WILLIAM WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 18–19, 65 (1972); Larry Lessig, *"The United States is Not a 'Democracy,' it is 'a Republic,'"* MEDIUM (Nov. 26, 2015), https://medium.com/@lessig/the-united-states-is-not-a-democracy-it-is-a-republic-54e8036c781c.

11. *See infra* Section I.B.

12. *See infra* Section I.B.

13. Bonfield, *supra* note 3, at 540–41.

14. *See infra* Section II.C.

15. *See* NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 179–80, 196 (2006).

16. Daniel A. Lieb, *Election Shows How Gerrymandering Is Difficult to Overcome*, AP (Nov. 17, 2018), https://apnews.com/3b4e63717b164dc199d02bd21aa17307.

Republican-controlled legislature. Similar stories can be told about other states, including North Carolina, Texas, and Maryland.[17]

Wisconsin voters in 2018 also unseated the incumbent governor and attorney general, both Republicans. But in the lame-duck session that followed the election, the gerrymandered legislature passed a series of laws removing power from those offices, including a law that prevented the incoming governor and attorney general from keeping a central campaign promise to withdraw from an anti-Affordable Care Act lawsuit.[18] This conduct too is not unique to Wisconsin. In both North Carolina and Michigan, for example, Republican-dominated legislatures recently passed laws to remove power from newly elected Democratic governors and attorneys general.[19]

The effects of these practices are not limited to the particular jurisdictions in which they occur. Gerrymandering, voter suppression, and election maladministration, for example, can all affect the makeup of Congress. But there are other, more subtle—and ultimately more dangerous—effects. In a host of recent publications, democracy scholars, including political scientists, historians, and comparative law experts, explain the importance of recognizing the legitimacy of one's political opponents; declining to take every conceivable partisan advantage when in power; and graciously ceding power after losing an election.[20] Refusal to do these things can manifest in the types of practices described above. These tactics, in turn, can lead to an antidemocratic spiral, where each party and its supporters point to the antidemocratic tactics of the other to justify more of their own. This spiral is not limited to one state; it is contagious.

Moreover, antidemocratic action can undermine some of the most significant benefits of federalism. In recent years, federalism scholars have endorsed

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17. Both parties have engaged in this conduct, but Republicans have been much more effective, in part because of a concerted effort to take control of the post-2010 redistricting cycle. *See* Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, ATLANTIC (Oct. 28, 2017), https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/.

18. Mark Berman & John Wagner, *Wisconsin Gov. Walker Signs Lame-Duck Legislation to Weaken Incoming Democratic Governor, Attorney General*, WASH. POST (Dec. 14, 2018, 12:20 PM), https://www.washingtonpost.com/politics/wisconsin-gov-walker-signs-lame-duck-legislation-to-weaken-incoming-democratic-governor-attorney-general/2018/12/14/7e181990-ffd0-11e8-83c0-b06139e540e5_story.html; D.L. Davis, *Gov. Tony Evers Reverses Position on Pulling Wisconsin from Obamacare Lawsuit*, POLITIFACT (Jan. 25, 2019, 7:31 PM), https://www.politifact.com/wisconsin/statements/2019/jan/25/tony-evers/gov-tony-evers-reverses-position-pulling-wisconsin/.

19. Tara Golshan, *North Carolina Wrote the Playbook Wisconsin and Michigan Are Using to Undermine Democracy*, VOX (Dec. 5, 2018, 1:10 PM), https://www.vox.com/policy-and-politics/2018/12/5/18125544/north-carolina-power-grab-wisconsin-michigan-lame-duck.

20. *See, e.g.*, TOM GINSBURG & AZIZ HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 37–38 (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 8–9 (2018); Christopher R. Browning, *The Suffocation of Democracy*, N.Y. REV. OF BOOKS (Oct. 25, 2018), https://www.nybooks.com/articles/2018/10/25/suffocation-of-democracy/.

the "substantial democratic benefits" that arise when laws or practices in one state have effects in others—often called "spillovers."[21] These spillovers can force an acknowledgement of our interdependence, promote tolerance, and ensure that "even in [today's] highly polarized environment, we still engage in the everyday practice of pluralism."[22] But when a state adopts antidemocratic practices that entrench one party in power or appear to disenfranchise particular voters, the positive, prodemocratic spillover effects of federalism are likely to be replaced by negative ones, including the mistrust and suspicion described by democracy scholars.[23] These and other spillovers, along with Congress's power and obligation to address them under the Guarantee Clause, are the subject of this Article.

This Article makes several contributions to the literature. First, it highlights Congress's role in enforcing the Guarantee Clause, moving the focus away from the courts and questions of justiciability. Second, it shows that congressional action under the Guarantee Clause to address democratic erosion in the states is both necessary and appropriate. Third, it argues that addressing the democratic decay at the state level is urgent, in ways not often enough recognized, because democratic erosion in one state threatens democracy in other states and in the nation as a whole.

In *Rucho v. Common Cause*,[24] the Supreme Court ruled that federal courts cannot hear claims of partisan gerrymandering. In his majority opinion, Chief Justice John Roberts acknowledged that extreme partisan gerrymandering is "incompatible with democratic principles" but he suggested that the solution lies in the political process.[25] The ball is unmistakably in Congress's court.[26]

Part I of this Article describes the historical context and origins of the Guarantee Clause. This Part addresses the relationships between the states themselves and between the states and the federal government at the Founding, and it explains why the Constitution incorporates several interconnected protections, including the Guarantee Clause, for these political entities. Part II describes the Clause's underenforcement during the first 80 years of the Republic, in large part due to the politics of slavery, and Congress's renewed reliance on the Clause as a source of power during Reconstruction.

Part III evaluates significant changes in American politics, demographics, economic development, and law after Reconstruction and throughout the twentieth

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21. Heather K. Gerken & James T. Dawson, *The Virtues of Legislation Without Representation*, ATLANTIC (Mar. 25, 2015), https://www.theatlantic.com/politics/archive/2015/03/why-you-shouldnt-cry-over-spilt-state-regulations/388214/; *see also* Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 78–99 (2014); Heather K. Gerken, *The Taft Lecture: Living Under Someone Else's Law*, 84 U. CIN. L. REV. 377, 389–96 (2016) [hereinafter Gerken, *Taft Lecture*].

22. Gerken & Dawson, *supra* note 21.

23. *See infra* Section IV.A.

24. 139 S. Ct. 2484 (2019).

25. *Id.* at 2570 (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015)).

26. The Article does not claim that congressional power under the Guarantee Clause is unlimited. Congressional action pursuant to the Clause must be in response to meaningful threats to democracy, not a general effort to improve or alter functioning of imperfect systems. *See infra* Part V.

century, all of which are important to understanding the relevance and application of the Guarantee Clause today. The country grew increasingly cohesive, and Americans' commitment to democracy gained strength. The country enacted seven constitutional amendments and a variety of laws to protect and expand the right to vote, all of which provide judicially enforceable individual rights. Those rights parallel and augment the Guarantee Clause, but they do not duplicate the Clause's central structural promise. Part IV demonstrates how, today, new threats to our democratic republic have emerged, making the Guarantee Clause vital once again. Part V explores the implications of and objections to this central argument, including a discussion of the uniquely valuable role Congress can play in enforcing the Clause, the limits of congressional power, and the appropriately deferential standard of judicial review.

I. CREATING AND PRESERVING REPUBLICAN GOVERNMENT

Understanding the Guarantee Clause requires tracking two related but distinct historical narratives. First, throughout the eighteenth century, "republicanism" was a profoundly important, but remarkably malleable, ideal. Section A will address the development of republican thought, particularly at the Founding. Second, and more concretely, Section B will explore the relationship between the intellectual commitments that arose from American republican thought and the role of the Guarantee Clause as a vital structural provision. As this Section will show, the Framers were concerned both with the physical security of the states and with their political compatibility—and the two concerns were intertwined.[27]

A. The Republican Question

During the eighteenth century, political and intellectual elites, including the Framers, were obsessed with republicanism. The term "republicanism" originally referred to the Greek and Roman republics and their putative successes at promoting virtue in service of the common good while keeping corruption at bay, thereby preventing tyranny.[28] But eighteenth century republican thought, on both sides of the Atlantic, did not focus on the specifics of the classical examples. Rather, the

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27. *See* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 11–12 (2010) [hereinafter Balkin, *Commerce*].

28. As historian Gordon Wood explains:

> According to this classical republican tradition, man was by nature a political being, a citizen who achieved his greatest moral fulfillment by participating in a self-governing republic. . . . This virtue could be found only in a republic of equal, active, and independent citizens. To be completely virtuous citizens, men – never women, because it was assumed they were never independent – had to be free from dependence and from the petty interests of the marketplace. Any loss of independence and virtue was corruption.

GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 104 (1992); *see also* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 507 (2003 ed.) ("A neoclassical politics provided both the ethos of the elites and the rhetoric of the upwardly mobile, and accounts for the singular cultural and intellectual homogeneity of the Founding Fathers and their generation.").

problem republican theorists sought to resolve was the perpetual tension between virtue and corruption.[29] As a result, different people saw different, and sometimes incompatible, forms of government as republican.

In England, a "republicanized monarchy" emerged.[30] This version of republicanism emphasized the need for disinterested individuals to make decisions for the common good. The king and the aristocracy had both the necessary financial independence—commerce was deemed inherently corrupting—and the education—only possible for those with significant leisure time—to fulfill this republican ideal.[31] On the other hand, monarchy was at risk of its own form of corruption. If the monarch began to put his own interests ahead of the people, the country could devolve into tyranny.[32] Mixed government, including the popularly elected House of Commons, provided the safeguard.[33]

This particular form of republicanism was rejected in the American colonies. The colonies were at a great distance from the royal court, had no representation in the House of Commons, lacked a landed aristocracy with wealth and leisure time, and had a much flatter class structure.[34] As a result of these and other factors, the revolutionary colonists did not see the British monarchy and oligarchy as disinterested and virtuous stewards of the common good.[35] To the contrary, on this side of the Atlantic, the British monarchy was seen as "inherently corrupt" and tyrannical.[36] American republican thought thus rejected monarchy even as English republican thought embraced it.[37]

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29. WOOD, *supra* note 28, at 104; POCOCK, *supra* note 28, at 486, 507–08.

30. WOOD, *supra* note 28, at 98; *see also id.* at 95–109 (detailing this historical development); POCOCK, *supra* note 28, at 468 (noting English thinkers who described England as "a republic, of that particularly happy kind which has a king as its chief magistrate") (citing II CATO'S LETTERS; OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 28 (3d ed. 1723)).

31. *See* POCOCK, *supra* note 28, at 514–15.

32. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 70 (Harvard Univ. Press 15th Anniversary ed. 2007).

33. POCOCK, *supra* note 28, at 480–81.

34. Pocock explains how the very different social structures of Britain and the colonies led to diametrically opposed views about whether republicanism was compatible with hereditary aristocracy. *Id.*

35. POCOCK, *supra* note 28, at 509, 514; WOOD, *supra* note 28, at 112–13, 168–75.

36. POCOCK, *supra* note 28, at 514.

37. *See, e.g.*, THE FEDERALIST NO. 21 (Alexander Hamilton) (identifying both Caesar and Cromwell as the kinds of rulers to be protected against); WIECEK, *supra* note 10, at 17–18; Bonfield, *supra* note 3, at 518–22 (citing 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 206 (1911) (Statement of Edmund J. Randolph)); Chemerinsky, *supra* note 3, at 867 (citing original sources); Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602, 647–48 (2018); Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1719 & nn.27–28 (2010).

Rejecting monarchy and aristocracy led the Framers to self-government.[38] As one leading scholar of the Guarantee Clause explains, "[a] republic, almost by definition, had to be a government of *more than one or a few*, for the benefit of *more than one or a few*; it had to be a government of and for the many—the people."[39] James Madison, in *Federalist No. 39*, defined a republic as:

> a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it . . . It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people.[40]

But the Framers also feared that democracy itself could lead to corruption and thus to tyranny.[41] They looked for ways to evoke and harness virtue on the one hand, while guarding against corruption and a descent into tyranny on the other, all in service of the common good.[42] One method was separation of powers. The Framers "agreed that the state and federal governments . . . required direct or indirect popular control of the legislative, judicial, and executive branches . . . ."[43] Each of

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38. Of course, the Framers' understanding of a government deriving its power from the people is quite different from our own. States dramatically restricted the franchise: in Rhode Island, for example, only white males owning at least $134 in real property, and their eldest sons, could vote. WIECEK, *supra* note 10, at 86–87. Women could not vote. Bonfield, *supra* note 3, at 529. Enslaved people obviously could not vote, and even free African Americans in free states rarely had the franchise. *Id.* Apportionment, too, was deeply skewed and became more so as waves of immigration increased populations unevenly within states. *See, e.g*, WIECEK, *supra* note 10, at 18–19.

39. WIECEK, *supra* note 10, at 73 (emphasis added); *see also* Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 814 (2002) (concluding that Framers believed "[r]epublican government has three 'core requirements': (i) ultimate control by the citizenry . . . , (ii) absence of a king, and (iii) adherence to the rule of law"); Heller, *supra* note 37, at 1718 (identifying key elements of republican government as: "rule (1) by the majority (and not a monarch), (2) through elected representatives, (3) in separate, coequal branches").

40. THE FEDERALIST NO. 39 (James Madison); *see also* THE FEDERALIST NO. 10, *supra* note 10; WIECEK, *supra* note 10, at 24; *see also id.* at 24 n.21, 65 (discussing Madison's views); Bonfield, *supra* note 3, at 526; Chemerinsky, *supra* note 3, at 867–68 (arguing that the Framers understood the Clause to guarantee a right of political participation).

41. POCOCK, *supra* note 28, at 520.

42. BAILYN, *supra* note 32, at 323.

43. WIECEK, *supra* note 10, at 68; *see also id.* at 72 (explaining in more detail points of agreement on necessity and components of republican government). In fact, during the debates on the Constitution at the Pennsylvania convention James Wilson, an ardent Federalist, emphasized that the Constitution provided that the electors of the most numerous branch of the state legislature be the electors for the House of Representatives. As a result, he said, the national government would be republican because "the same constitution guarantees to every state in the Union a republican form of government. The right of suffrage is fundamental to republics." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE

these branches of government "constituted a separate mode in which the people chose to be represented," and those they chose to represent them might "be looked upon as a natural aristocracy," chosen for their virtue and disinterestedness, while the separation of powers would preclude any branch from obtaining enough power to become corrupt.[44]

Yet even with this general agreement on representative democracy and separation of powers, Founding-era republicanism was not a monolith. Indeed, much of the debate over the Constitution—both within and between the Federalist and the Antifederalist camps—was about different visions of republicanism.[45] For some among the Framers, "[n]o government could be republican that did not respect the natural rights that derived from the law of God, that did not function under a written constitution superior to ordinary laws, and that did not act through valid statutory law."[46] Some Framers who were slave owners acknowledged the grave inconsistencies between their rhetoric and their ownership of human beings, but they resisted ending slavery;[47] others saw no contradiction.[48] Some Antifederalists

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ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 482 (Jonathan Elliot ed., 2d ed. 1836).

44. POCOCK, *supra* note 28, at 521; WIECEK, *supra* note 10, at 20–22; *see also* WIECEK, *supra* note 10, at 74 (explaining how separation of powers counteracted monarchy and tyranny); THE FEDERALIST NOS. 78–79 (Alexander Hamilton). They also believed that "freedom of thought, belief, and expression . . . were inherent in republican citizenship, allowing the people to express their views on public affairs and to guard their liberties against government encroachment." STEVEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY 20 (2008).

45. BAILYN, *supra* note 32, at 321–78.

46. WIECEK, *supra* note 10, at 25; *see also* Bonfield, *supra* note 3, at 521 (quoting a "staunch federalist" as arguing that the guarantee "secures to us the full enjoyment of every thing which freemen hold dear, and provides for protecting us against every thing which they can dread . . . ") (quoting James Sullivan, *Cassius XI*, MASS. GAZETTE, Dec. 25, 1787, *reprinted in* FORD, ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 43, 44 (1892)). For an example of this perspective in action, see Justice Chase's opinion in *Calder v. Bull*, 3 U.S. 386, 388 (1798) (arguing that "[t]here are certain vital principles in our free Republican governments, that which will determine and over-rule an apparent and flagrant abuse of legislative power"). As examples, he listed ex post facto laws, "a law that destroys, or impairs the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A, and gives it to B . . . ." *Id.*; *see also* WIECEK, *supra* note 10, at 25 n.22, 75 (discussing importance of protecting rights of minorities and protecting majorities from tyranny of minority); Bonfield, *supra* note 3, at 527 (discussing *Calder* and arguing that "the Court found the concept of *natural justice* to be an inherent limitation on all *republican* government").

47. BAILYN, *supra* note 32, at 236.

48. *See* AMAR, BIOGRAPHY, *supra* note 10, at 281 ("Slaves were akin to aliens" and so "had no rights to participate in republican governments."); WOOD, *supra* note 28, at 115 (describing southern slaveowners who "had thoroughly absorbed the classical republican ideology of leadership and saw themselves fulfilling it"). By the early- to mid-nineteenth century, some slaveholders went so far as to argue that slavery was not only consistent with but valuable to republicanism because it allowed for a class of men who were neither dependent on the market (and so not corruptible), nor busy with labor (and so able to develop educated and disinterested views on the common good). WIECEK, *supra* note 10, at 152–53.

believed that the United States was too large to survive as a republic.[49] At bottom, however, although Founding-era republican theory was largely a contested and evolving response to an age-old question, the rejection of monarchy in favor of some form of self-government was an accepted baseline.[50]

B. A Nation of (Republican) States

These different views of republicanism were largely elided in the drafting of the Constitution, but the Framers agreed that the nation could not survive without republican safeguards. Although the United States was founded not so much as a single nation, but as a confederation of nations with a mutual defense agreement,[51] that arrangement proved unworkable, leading to the drafting and ratification of the Constitution. The move from a confederation to a nation included promises that the states would be protected. Although the story often told is that the Framers were determined to protect the states from the federal government, or the parts from the whole, in order to protect against tyranny [52] the protections required—and provided—run in several directions.

The Constitution thus contains a series of provisions designed to protect the whole from the parts politically, economically, legally, and militarily. Article I, Section 4, for example, allows Congress to override state-level decisions about the "Times, Places and Manner of holding [congressional] Elections." Article I, Section 10 prohibits states from engaging in their own foreign policy; maintaining their own militaries or entering into interstate compacts without congressional consent; and imposing their own tariffs and duties. The Supremacy Clause of Article VI is yet another example.

Article IV, Section 4, of the Constitution contains more such promises. It reads: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, of the Executive (when the Legislature cannot be convened), against domestic violence." The Constitution thus promised to protect the states from each other as well as, under some circumstances, from their own

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But see WOOD, *supra* note 28, at 282–84 (describing nineteenth century embrace of work over leisure).

49. BAILYN, *supra* note 32, at 344, 347–49.

50. Pocock is charmingly and dryly elliptical and ironic as he describes the contradictions and tensions of American Founding-era republican thought. POCOCK, *supra* note 28, at 506–45.

51. *See, e.g.*, MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 101 (2008); COLIN WOODARD, AMERICAN NATIONS: A HISTORY OF THE ELEVEN RIVAL REGIONAL CULTURES OF NORTH AMERICA 115 (2012) (describing the American Revolution as "a profoundly conservative action fought by a loose military alliance of nations, each of which was most concerned with preserving or reasserting control of its respective culture, character, and power structure"); Williams, *supra* note 37, at 610 (arguing that at the Founding, "relations among the states and between the individual states and the federal government were assimilated to the model of international relations between independent sovereign nations").

52. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 457–59 (1991).

people,[53] and it protected the national government from the states as well.[54] Indeed, such promises were essential if the states were going to open their borders to each other.[55]

The Guarantee Clause is one of these promises, arising from the Framers' fear of monarchy and tyranny. Monarchy was a constant threat. After Shays' Rebellion of 1786 and 1787 threatened the stability of the new country, for example, some people advocated establishing a monarchy or regency, perhaps out of a desire for security and stability.[56]

Obviously, monarchy was rejected at the federal level. But the Guarantee Clause is an acknowledgement that precluding a national monarch would not be sufficient protection. Montesquieu, the nineteenth-century thinker who inspired many of the Framers, and Madison alike "insisted that in a confederation all governments had to be republican because in a mixed confederacy a monarchy would swallow up its republican neighbors."[57] As James Iredell put it at the North Carolina ratifying convention, "If a monarchy was established in one state, it would endeavor to subvert the freedoms of the others, and would, probably, by degrees succeed in it."[58] In other words, if the states were to remain both united and states, they all had to have comparable and compatible, albeit not identical, forms of republican government—with a republican government defined in opposition to monarchy or other despotic "experiments."[59]

The Guarantee Clause was thus a mutual nonaggression pact, beyond the Invasion Clause, through a promise that the states' government would be both worthy of and inclined to mutual respect. This understanding of republicanism in opposition to the existential threat of monarchy explains why the Guarantee Clause appears in the same section as the promises of federal protections against domestic

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53. *See* Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941, 1953–54 (2012) [hereinafter Smith, *Awakening*]) (describing placement of the Guarantee Clause within a set of other promises to protect states from one another).

54. AMAR, BIOGRAPHY, *supra* note 10, at 44; WIECEK, *supra* note 10, at 33, 55.

55. AMAR, BIOGRAPHY, *supra* note 10, at 44–46.

56. WIECEK, *supra* note 10, at 45–49. Hamilton referred directly to "[t]he tempestuous situation from which Massachusetts has scarcely emerged" as support for section 4. THE FEDERALIST NO. 21, *supra* note 37.

57. WIECEK, *supra* note 10, at 26, 73.

58. Bonfield, *supra* note 3, at 520 (citing 4 ELLIOT'S DEBATES 95 (1891)).

59. THE FEDERALIST NO. 43 (James Madison); *see also* WIECEK, *supra* note 10, at 56; Smith, *Awakening*, *supra* note 53, at 1957–60. "The guarantee prohibited monarchical forms of government and assured that the powers of the national government be used to proscribe them." Heller likewise argues for reading the Clause as a "robust protection of republican forms" based on his originalist research. Heller, *supra* note 37, at 1744; *see also* Jonathan Toren, *Protecting Republican Government From Itself: The Guarantee Clause Of Article IV, Section 4*, 2 N.Y.U. J. L. & LIBERTY 371, 377–78, 384–85 (2007) (describing the Framers' fears of monarchy and its incompatibility with republicanism).

violence and foreign invasion.[60] A republican form of government in each state was existentially essential for each state as well as for the entire nation.[61] Madison was explicit in defending section 4 as a whole: "A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to secure each State, not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors."[62] Seen in this light, the federal guarantee is particularly important. States might well be unable to protect themselves from the effects of their neighbors' abandonment of republicanism.

This understanding also offers an explanation for a quirk of wording that is seldom, if ever, remarked on.[63] Article IV, section 4, makes two promises: It promises federal protection from "Invasion" and "domestic violence" to "*each*" state. But the "guarantee of a Republican Form of Government" is made to "*every* State in this Union." One way to understand this difference in language is that while protection against violence might, at any given time, be relevant to only one state, the Guarantee Clause was necessary for the ongoing and interdependent security of all of the states.[64] It is then, not just a promise to (say) Pennsylvania that it is protected from internal and external violence; it is also a promise to (say) Pennsylvania, and Massachusetts, and New Jersey, that (say) New York would not be allowed to adopt a form of government that could, in the long run, threaten them.

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60. This reading also makes sense of the placement of the Clause in Article IV. Williams, *supra* note 37, at 626–28 (noting that all provisions of Article IV address states' relationships with each other); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1471–72, 1477 (2007); Smith, *Awakening*, *supra* note 53, at 1952 (arguing that section 4, including the Guarantee Clause, was intended to protect "state integrity," defined as "states' existence, stability, and parity"); *id.* at 1953–54 (explaining how placement of Guarantee Clause in Article IV, section 4, supports this conclusion and noting that sections 1–3 of Article IV "protect states' integrity, largely by protecting their equality relative to each other"); Toren, *supra* note 59, at 385 (reading Article IV as a whole as addressing "the primacy of national stability" and "the states' relationship with the federal government and with each other").

61. Wiecek explains the "syntactical welding of the guarantee clause to the invasion and domestic violence clauses," *supra* note 10, at 55, as a two-part promise. The promise of protection against violence and insurrection was a promise that the "federal government, acting through the armed forces, would undo something that had been done or begun." *Id.* at 59; *see also* AMAR, BIOGRAPHY, *supra* note 10, at 280 ("[T]he Constitution would offer a kind of democratic insurance policy. If any individual state system of self-government fell sick and needed help, sister republics would come to its aid. In so doing, . . . sister republics would be protecting themselves both individually and collectively. A monarch or tyrant in any one state would pose a geostrategic threat to each and every neighboring state."); Toren, *supra* note 59, at 385 (noting that the Framers' discussions of the Guarantee Clause focused on "the dangers to the union").

62. THE FEDERALIST NO. 43, *supra* note 59.

63. I have found no scholarly discussions of the difference between "every State" and "each State."

64. As Ryan Williams has recently explained, European treaties in the seventeenth and eighteenth centuries sometimes addressed potential "conflicts over internal governance" because such conflicts "could easily spill over into international conflict." Williams, *supra* note 37, at 620; *see also id.* at 629.

Or as Hamilton put it: "Who can predict what effect a despotism, established in Massachusetts, would have upon the liberties of New Hampshire, or Rhode Island, of Connecticut or New York?"[65]

This explanation also suggests a resolution to another puzzle of wording—the use of the word "State" in the Guarantee Clause. The term "State" sometimes referred to its government, sometimes to its people, and sometimes to its physical territory.[66] Guaranteeing a state a particular form of government, however, does not make sense if the guarantee runs *only* to the state government itself, and in part as a result, many people have understood the Clause as primarily, or even exclusively, providing a guarantee to each state's citizens.[67] But in the context of section 4, the Clause is best seen as a protection for states, as states, from each others' politically incompatible governments.[68]

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The Clause incorporates an understanding that the political structures in one state could have significant deleterious, even if not immediate, effects on the others, and that federal intervention might be necessary to prevent the worst of those threats from coming to pass. As Madison explained, "[t]he more intimate the nature of such a [republican] union may be, the greater interest have the members in the political institutions of each other . . . ."[69] In the parlance of modern federalism scholars, political institutions in one state could have deleterious spillover effects in others.[70] And the need for a *federal* guarantee is particularly acute where the potential spillovers might arise from a state's internal structures and political practices, something no other state can adequately protect itself against.[71] At the same time, the Clause embodies a commitment to some form of representative

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65. THE FEDERALIST NO. 21, *supra* note 37. On the other hand, Hamilton also explained that the Clause would not be used to prevent "reforms of the State constitution by a majority of the people in a legal and peaceable mode. . . . The guaranty could only operate against changes to be effected by violence." *Id.* Such changes appeared to include a political leader refusing to leave office when voted out. *Id.*

66. Bonfield, *supra* note 3, at 524.

67. *See, e.g.*, *id.* at 524, 534 (citing Texas v. White, 74 U.S. 700, 720 (1869)).

68. *See* Smith, *Awakening*, *supra* note 53, at 1953–54 (arguing that all of Article IV's promises "protect states' integrity," many "by protecting their equality relative to each other").

69. THE FEDERALIST NO. 43, *supra* note 59.

70. *See, e.g.*, Gerken & Holtzblatt, *supra* note 21, at 69–73.

71. As Jack Balkin argues, the entire structure of the Constitution, including the enumerated powers delegated to Congress provides for federal involvement "where states are separately incompetent or where the interests of the nation might be undermined by unilateral or conflicting state action." Balkin, *Commerce*, *supra* note 27, at 6; *see also id.* at 8 (quoting 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 424 (Jonathan Elliot ed., 2d ed. 1836) (statement of James Wilson)) ("Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.").

government and a rejection of monarchy. The Clause is thus a federal promise to ensure that the states maintain politically compatible forms of self-government. That promise remains relevant today.

II. REPUBLICANISM AND NATIONHOOD BEFORE AND AFTER THE CIVIL WAR

During the nineteenth century, the understanding of the republicanism protected by the Clause continued to be contested, in large part due to its implications for slavery. Relatedly, the question of whether and how to enforce the Clause was a political hot potato in the first half of the nineteenth century, with each federal branch declining active enforcement. But after the Civil War, during Reconstruction, the Clause became a meaningful source of authority for congressional action.

Section A of this Part recounts the history of the underenforcement of the Clause before the Civil War. This underenforcement contributed to what one scholar calls the Clause's "desuetude"[72] and is important to any understanding of its historical meaning and function. Section B connects the Clause's underenforcement to the burgeoning national disagreement over slavery. This Section also shows how the national effects of slavery and the controversies surrounding it vindicated the Framers' insight that forms of government within some states could have deleterious spillover effects on others.

Section C returns to the history of the Clause itself, documenting its role as a source of congressional authority during Reconstruction and as a justification to demand universal male suffrage. This Section ends by suggesting a relationship between the ratification of the Fourteenth and Fifteenth Amendments and the Clause's subsequent return to relative obscurity.

A. The Underenforced Guarantee

During the first half century after the Constitution was ratified, rebellions in different states prompted both congressional and presidential action. In response to the Whiskey Rebellion in western Pennsylvania, Congress passed the Militia Act of 1792, which it then replaced with the Enforcement Act of 1795 and an additional statute in 1807.[73] These statutes provided that the President could call out state militias to quell rebellions in the states, and although they rested primarily on the domestic violence and invasion provisions of Article IV, Section 4, they also were understood by some to implicate the Guarantee Clause.[74] But when Rhode Island became embroiled in an internal but largely nonviolent dispute over the republican legitimacy of two competing governments, the President declined to act, despite invocations of the Clause and requests for his involvement from both sides of the dispute.[75] Congress and the Supreme Court also took no action.

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72. Bonfield, *supra* note 3.
73. WIECEK, *supra* note 10, at 81.
74. *Id.*
75. *Id.* at 101–02.

In the early 1840s, Rhode Island faced a constitutional crisis. It had never enacted its own constitution and still operated under a 1663 English royal charter, adopted as the state constitution in 1776.[76] That charter limited voting rights to men who owned at least $134 of real property, and to their eldest sons.[77] In addition, it apportioned representation in the lower house of the state legislature by town, rather than by population.[78] As Rhode Island's population and economy expanded rapidly in the late-eighteenth and early-nineteenth centuries, its voting and districting rules "created disfranchisement and malapportionment that were severe even by early nineteenth-century standards . . . by 1840 the General Assembly was controlled by a rural minority."[79]

By 1841, there was a strong movement in Rhode Island supporting suffrage for all white men and demanding a new state constitution.[80] Two competing constitutional conventions were called. The first, called by the legislature, was known as the Freeholders' Convention because the legislature "insisted on the restricted freeholders' suffrage for both election and ratification."[81] The second was called by the suffrage activists, led by Thomas Dorr, and was known as the People's Convention.[82] Although the People's Constitution received an overwhelming majority and the Freeholders' Constitution was defeated, the state legislature refused to recognize the People's Constitution.[83] The suffragists formed a shadow government and elected Dorr as "the new People's governor."[84] There were thus two governments claiming legitimacy in Rhode Island.

The contested meaning of republicanism was central to this dispute. Freeholders and Dorrites each had a claim to republicanism as understood by different camps of Framers—law and order and regularity, on the one hand, and reflection of the popular will on the other.[85] Moreover, the Freeholders argued that because "Rhode Island's government was considered republican at the time it was admitted to the Union," it necessarily complied with the Guarantee Clause.[86] Both sides appealed to President John Tyler, who declined to intervene directly, in large

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76. *Id.* at 86.
77. *Id.* at 86–87.
78. *Id.* at 87.
79. *Id.* ("The appearance of large urban manufacturing centers in the northeastern corner of the state was accompanied by the grow[th] of a city population that did not own land and was therefore disfranchised. Further, some towns quadrupled their population while others stagnated or lost residents without a change in the allocation of seats in the house."); *id.* ("Malapportionment and disfranchisement were aggravated by ethnic and economic tensions.").
80. *Id.* at 88–91.
81. *Id.* at 91.
82. *Id.*
83. *Id.* at 91, 95.
84. *Id.* at 95. That government quickly dissolved. *Id.* at 96.
85. *Id.* at 93–95.
86. *Id.* at 94, 104; *see also id.* at 94 n.17 ("[W]hat was adequately republican for 1790 remained so in 1842.").

part due to the absence of actual violence that would have triggered the Domestic Violence Clause.[87]

Tyler's neutrality arguably established a precedent that with respect to internal but nonviolent governance disputes, "the guarantee of republican government extended to the recognized government of a state, not to the faction challenging it," and as a result, "the President is not free to choose the group that he will aid on the basis of his own notions of republicanism."[88]

Congress also stayed out of the fray. In response to what became known as the Dorr Rebellion, a group of Democrats in the House succeeded in getting a Select Committee to pass a report asserting congressional authority to determine if state constitutions are sufficiently republican and responsive to the people, but the House itself did not act on it.[89]

And in a case called *Luther v. Borden*, the Supreme Court also declined to identify which government was in compliance with the Guarantee Clause, at least in the circumstances the issue arose.[90] Martin Luther was a Dorrite, and in the aftermath of the People's Convention, Luther Borden and the other defendants, who were "in the military service of the State . . . broke and entered [Luther's] house and searched the rooms for the plaintiff, who was supposed to be there concealed."[91] Luther sued for trespass, and the case, by the time the Supreme Court heard it in 1849, came down to the question of which government was the legitimate one at the time of the alleged trespass, with Luther claiming the Guarantee Clause required the Court to recognize the People's government.[92] By then, however, the state, with the legislature's participation, had enacted a new constitution with virtually universal white male suffrage and representation apportioned "pro rata on the basis of census enumeration."[93] The Dorr Rebellion was over, and the underlying disputes over the republican nature of Rhode Island state government had been resolved internally.

Under those circumstances, in an opinion by Chief Justice Taney, the Court refused to decide the question of whether the original Rhode Island government complied with the Clause.[94] The Court had significant practical reasons. It noted that the Dorrites had never actually held power and that, as a result, were the plaintiff to prevail, all the actions taken by the Rhode Island government beginning in 1842

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87. Tyler did not believe that the Domestic Violence Clause applied because, at the time the Rhode Island governor asked for his help, "there had not yet been armed resistance." WIECEK, *supra* note 10, at 101–02, 104. But he recognized the original governor "as the executive power of the State, and took measures to call out the militia to support his authority if it should be found necessary for the general government to intervene." Luther v. Borden, 48 U.S. 1, 44 (1849). Dorr later mounted a brief and notably unsuccessful military stand, and no federal intervention was necessary. WIECEK, *supra* note 10, at 99.

88. WIECEK, *supra* note 10, at 105.

89. *Id.* at 108–10.

90. 48 U.S. 1.

91. *Id.* at 34.

92. WIECEK, *supra* note 10, at 116–17.

93. *Id.* at 99.

94. *Id.* at 120.

would be "nullities,"[95] even including the new constitution with its expanded rights of suffrage.[96] Such extraordinary consequences had to be avoided.[97]

The Court's opinion also disavowed a judicial role in enforcing the Guarantee Clause, describing the question before it as inherently political.[98] The Guarantee Clause, the Court said, was relevant when Congress decided whether to seat Members elected by a state.[99] By seating them, it necessarily concluded that the state from which those Members came had a suitably republican government.[100] And the Court noted that Congress had, by statute, given the President the primary authority for acting under the Domestic Violence and Invasion Clauses, which required him to first determine whether the government calling on his help was legitimate.[101] Here, the President had declined to act. For the courts to then take up that same question—leading to the possibility of an inconsistent result—would make the Clause "a guarantee of anarchy, and not of order."[102] The legal upshot of the Dorr Rebellion, then, was that no part of the federal government appeared willing to enforce or adjudicate the Guarantee Clause.

B. Slavery, Spillovers, and Republicanism Before the Civil War

This federal passivity in the face of a Guarantee Clause claim must be understood in the context of the debate over slavery. As white southerners, neither President Tyler nor Chief Justice Taney wanted any possibility that the Guarantee Clause could be used to challenge slavery.[103] This concern was not hypothetical. By the 1820s, northern opponents of slavery were using the Clause as part of their arguments against extending slavery into new territories and states, and by the

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95. *Luther*, 48 U.S. at 38.

96. *Id.* at 41.

97. WIECEK, *supra* note 10, at 119–20. Moreover, the Court held that the federal courts "were bound by the decision of the Rhode Island Supreme Court in the Dorr treason trial that the Freeholders' and not the Dorr government was legitimate." *Id.* at 120; *see also Luther*, 48 U.S. at 40.

98. *Luther*, 48 U.S. at 42, 46–47. Although many commentators have argued that this dicta should be read narrowly, see, for example, Bonfield, *supra* note 3, at 535, subsequent courts have not generally done so. Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118, 149–50 (1912) (relying on *Luther* for the proposition that Guarantee Clause issues are nonjusticiable); WIECEK, *supra* note 10, at 123–29. *But see* Minor v. Happersett, 88 U.S. 162 (1875) (rejecting, on the merits, a claim that the Guarantee Clause required women's suffrage).

99. *Luther*, 48 U.S. at 42.

100. *Id.*; *see also* WIECEK, *supra* note 10, at 121–22.

101. *Luther*, 48 U.S. at 43; WIECEK, *supra* note 10, at 122–23.

102. *Luther*, 48 U.S. at 43.

103. Tyler "well knew that, though southerners looked to the federal army for suppression of possible slave insurrections, they resolutely opposed any federal actions that might suggest that the southern state governments were insufficiently republican." WIECEK, *supra* note 10, at 102. He did, however, receive conflicting advice from southern newspapers and officials about whether to intervene. *Id.* at 103.

1840s, "antislavery thinkers had mounted a direct assault on slavery in the states, using the guarantee clause as one of their primary weapons."[104]

The battle was joined during the debate over the slave status of Missouri.[105] Southern slaveholders and politicians insisted that slavery was consistent with republicanism and that the Guarantee Clause did not authorize federal interference with the domestic institutions or internal affairs of the states, although section 4 certainly required federal assistance in quashing slave rebellions.[106] "[O]pponents of slavery, on the other hand, tried to read the principles of the Declaration of Independence into the Constitution via the guarantee clause."[107] Some abolitionists argued that the Clause gave Congress the power to outlaw slavery in all the states, and at least one abolitionist asked a state supreme court to declare that the Clause outlawed slavery.[108]

In response, slaveholding southerners argued that definitions of republicanism were set in 1787, when the Constitution, with its three slave clauses, was drafted and slave states were admitted to the Union,[109] and that the Clause "was an assurance, not of widening democratic participation in government, but of historical restrictions on it."[110] In their view, "[s]lavery had no relation to the form of government; it was a creature of police laws and could not affect the republicanism of the state government."[111] And consistent with a vision of the states as essential units of sovereignty whose internal workings were, for the most part, their own business, they argued that the Clause was actually "a limitation on federal power."[112]

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104. WIECEK, *supra* note 10, at 136; *see also id.* at 142–43. Wiecek also details some remarkable efforts by nineteenth-century proslavery politicians to explain why slavery was not inconsistent with, and might even be helpful or necessary to, republicanism. *Id.* at 152–54 & nn.24–28.

105. Bonfield, *supra* note 3, at 531 (detailing use of this argument during debates over admission of Missouri to the Union).

106. *See* WIECEK, *supra* note 10, at 148–49.

107. *Id.* at 143–45; Bonfield, *supra* note 3, at 531–32. These arguments led some proslavery thinkers to disavow the Declaration of Independence. WIECEK, *supra* note 10, at 152 & n.24.

108. WIECEK, *supra* note 10, at 157–59 & nn.33–37.

109. Bonfield, *supra* note 3, at 531–32.

110. WIECEK, *supra* note 10, at 146. "[T]he antislavery argument carried to its logical end was ridiculous. Children, lunatics, convicts, and women were all deprived of civil and political rights, so why not slaves and Negroes?" *Id.* at 148 (citations omitted). At bottom, the argument of these southerners was remarkably similar to those of the Rhode Island Freeholders: republicanism was self-government by the People, as opposed to a monarchy, but the People could be defined to eliminate more than half the population. *See id.* at 149; Bonfield, *supra* note 3, at 532.

111. WIECEK, *supra* note 10, at 146.

112. *Id.*

Over time, however, the effects of legal chattel slavery in the southern states were increasingly felt in free states, and vice versa.[113] Although at the time of the Founding most northern states permitted slavery, by the 1830s, that had changed.[114] And as the abolitionist movement gained power, tensions between the North and the South grew. Slave states clung to a vision of slaveholding republicanism that the Framers had apparently accepted but that abolitionist resistance made harder to maintain. Free states, on the other hand, found themselves required to enforce the Fugitive Slave Act;[115] unable to protect their residents—even those born within their borders—from abduction under claim of right by slaveholders;[116] and disallowed from recognizing African Americans as U.S. citizens.[117] Preserving slavery in some states therefore directly implicated other states' ability to govern as they saw fit within their own borders.[118] Slavery imposed meaningful spillover effects on the non-slave states. These effects proved the Framers correct in an important way. Although the Framers themselves did not see slavery as the kind of tyranny the Guarantee Clause guarded against, its legal spillover effects were a tragic demonstration that despotism is incompatible with republican self-government.

Moreover, in the North, slavery was seen increasingly as a moral abomination, setting it apart from other sources of conflict between the states. The moral issue of slavery "could not be resolved by decentralization . . . [as] the people in the Northern states were simply unwilling to allow the kind of state-by-state variation on this issue that was accepted and sometimes welcomed on such issues as banking regulation or internal development."[119] This shift had to do with the growing awareness of the moral horror of slavery, but it also reflected an increased sense of nationhood. As Malcolm Feeley and Edward Rubin argue:

> [a]t the time that abolitionist sentiment ran high in the Northern states, Brazil, Russia, the Ottoman Empire, and many other nations practiced human slavery, but Northerners were largely unconcerned about this situation and certainly unwilling to make any significant sacrifices to end it. They cared about slavery in the South – and were ultimately

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113. FEELEY & RUBIN, *supra* note 51, at 108–10 (distinguishing between largely economic disputes, which can be mediated or negotiated, and slavery, which cannot, as a key driver of sectionalism).

114. *Id.* at 108–09.

115. *See* Ableman v. Booth, 62 U.S. 506, 507 (1858).

116. *See* Prigg v. Pennsylvania, 41 U.S. 539 (1842).

117. *See* Dred Scott v. Sanford, 60 U.S. 393 (1857).

118. AMAR, BIOGRAPHY, *supra* note 10, at 372 ("By 1860, the Slave Power exemplified all the evils that the original Article IV guarantee of republican government had aimed to avert. Aggressive slavocrats had flouted basic democratic freedoms within their own states, menaced freedom-lovers in neighboring states, and begun to corrupt the character of federal institutions that rested on state-law foundations.").

119. FEELEY & RUBIN, *supra* note 51, at 109. Feeley and Rubin argue that this shift gave federalism (as they define it) a role it had not had for many years. *Id.* Slave states, whose leadership felt strongly enough about maintaining slavery that "they were willing to die and kill for it" could remain in the Union only by asserting a claim of right against the central government. *Id.*

> prepared to kill and die to end it – because they perceived the South as part of their own polity and regarded the slaves as members of that polity.[120]

Feeley and Rubin's vision is more than a little rosy: African Americans, both before and after the Civil War, have often been excluded from the polity as a practical matter in both the North and the South.[121] But the overall point is important. A growing sense of national unity and national identity, a national economy, and porous state boundaries had significant effects: among them, for some Americans, an increased sense of the moral responsibility they felt towards each other, even if they lived far apart, and a sense that activity in one state could have moral or characterological or cultural effects in another. Slavery thus had unique spillover effects.

The spillover effects worked the other way as well. Slave owners argued, for example, that free states' efforts to protect African Americans had the effect of depriving them of their property without compensation.[122] We recognize this argument today as, to put it mildly, inhumane, deeply offensive, and profoundly antidemocratic. But the fact that it had purchase at the time reinforces—again—the Framers' insight that certain forms of government were simply incompatible with each other. The slaveholding states eventually came to the same realization. Hence, secession and the Civil War.

C. Reconstruction and the Republican Form of Government

Abolitionists may have been unsuccessful in their efforts to use the Guarantee Clause as a sword against slavery before the Civil War, but during Reconstruction, the Clause gained new vitality. Even before the Fourteenth Amendment was ratified, Congress passed a series of laws designed to ensure civil and political rights for African Americans in the South.[123] And the Radical Republicans spearheading these efforts seized upon the Guarantee Clause as one source of constitutional authority for these efforts.[124] They saw it as a way to "clothe federal intervention on behalf of citizens' rights with constitutional legitimacy."[125] That it had been little used until then was not a deterrent: Massachusetts Senator Charles Sumner described it as "a sleeping giant . . . never until this recent war

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120. *Id.* at 110.

121. *See generally* Robert M. Crea, Note, *Racial Discrimination and* Baker v. Carr, 30 J. LEGIS. 289, 292–300 (2004); E. Earl Parson & Monique McLaughlin, *The Persistence of Racial Bias in Voting: Voter ID, The New Battleground for Pretextual Race Neutrality*, 8 J.L. & SOC. 75 (2007).

122. *See, e.g.*, *Dred Scott*, 60 U.S. at 450.

123. Bonfield, *supra* note 3, at 537–41 & nn.102–126.

124. AMAR, BIOGRAPHY, *supra* note 10, at 372–76.

125. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 232 (1988); *see also* Mark D. Rosen, *The Structural Constitutional Principle of Republican Legitimacy*, 54 WM. & MARY L. REV. 371, 398 (2012) [hereinafter Rosen, *Structural*].

awakened, but it now comes forward with a giant's power. . . . There is no other clause which gives to Congress such supreme power over the states . . . ."[126]

Although this view was not unanimous and the path was not smooth, Congress nonetheless relied on the Guarantee Clause, among other sources of authority, to impose previously unheard-of requirements on the defeated confederate states. Congress required the states that had rebelled to adopt universal male suffrage, to convene new constitutional conventions, and to ratify the then-pending Fourteenth Amendment.[127] Congress enforced these requirements by refusing to seat those states' congressional delegations unless and until the states complied—the very type of enforcement of the Clause that the Supreme Court in *Luther* anticipated. And based on the Guarantee Clause, Congress required Nebraska to provide universal male suffrage as a condition of being admitted to the union.[128]

This congressional activity—all of which took place *before* the ratification of the Fourteenth and Fifteenth Amendments—thus relied on the Guarantee Clause to vindicate one of the insights that led to the nationwide abolition of slavery in the first place.[129] "[M]uch happened 'in the nation's first eighty years to give rise to a more robustly egalitarian and nationalist conception of republican government than had prevailed in the 1780s.'"[130] States owed to each other and to the nation a form of government that met certain minimum criteria of democratic republicanism. Put another way, the changed views about the tolerability of slavery within the Union was part of a broader and ongoing shift in an understanding of the "structural

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126. CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (statement of Sen. Sumner), *quoted in* FONER, *supra* note 125, at 232 & Bonfield, *supra* note 3, at 546.

127. Bonfield, *supra* note 3, at 540–41.

128. *Id.* at 541 & n.125 (citing 4 Stat. 391–92 (1867)).

129. The Supreme Court did not have to decide whether to uphold the Reconstruction-era legislation premised on the Guarantee Clause, although it suggested that it would in dicta in *Texas v. White*, 74 U.S. 700, 730–31 (1869).

130. Rosen, *Structural*, *supra* note 125 (quoting AMAR, BIOGRAPHY, *supra* note 10, at 370).

principles" necessary to maintain the nation.[131] The subsequent ratification of the Fourteenth and Fifteenth Amendments reinforced that insight.[132]

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131. Balkin, *Commerce*, *supra* note 27, at 7. The Republicans argued that the meaning of a republican form of government was "dynamic" and was not set at the time of the Founding. Bonfield, *supra* note 3, at 542 & n.133 (citing CONG. GLOBE, 41st Cong., 2d Sess. 1254 (1870) (statement of Sen. Morton)). Morton argued also, similar to Justice Chase in *Calder v. Bull*, 3 U.S. 386, 388 (1798), that there were certain inalienable rights inherent in a republican form of government: "equal civil rights, . . . protection to all, . . . no taking of life, liberty, or property without due process of law." *Id.*; *see also id.* at 542 n.133 (quoting CONG. GLOBE, 39th Cong., 2d Sess. 1290 (1867) (statement of Rep. Mercur)) (arguing that in interpreting the Clause, "'the genius, ruling ideas, progress, and existing sentiments of the great masses of the people' must be accorded great deference"); *id.* at 543 & nn.134–35. *But see* Williams, *supra* note 37, at 678–79 n.472 (suggesting that the public understanding of the Guarantee Clause during Reconstruction was not clearly in support of universal suffrage). Note also Justice Harlan's partial dissent in *Oregon v. Mitchell*, 400 U.S. 112 (1970). There, he argued that the Radical Republicans' enthusiasm for universal Negro suffrage "cooled as it ran into northern racial prejudice. At that time, only six States – Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and New York – permitted Negroes to vote, and New York imposed special property and residency requirements on Negro voters." *Id.* at 156 (Harlan, J., concurring in part and dissenting in part); *see also id.* at 255–56 (opinion of Brennan, J.) (making same points). And in 1865, the white electorate in Connecticut, Wisconsin, Minnesota, Colorado (then a territory), and Washington, D.C. "roundly" defeated "enfranchising proposals" in referenda. *Id.* at 157 (Harlan, J., concurring in part and dissenting in part). And Justice Brennan noted that "Republicans suffered some severe election setbacks in 1867 on account of their support of Negro suffrage." *Id.* at 256 (opinion of Brennan, J.). *But see* AMAR, BIOGRAPHY, *supra* note 10, at 372–76 (discussing republican arguments for full enfranchisement in the South only).

132. *Cf.* Bonfield, *supra* note 3, at 548; *see also* Smith, *Awakening*, *supra* note 53, at 1988 (discussing Reconstruction era understandings that a republican form of government was inconsistent with a system "'where a large proportion of native-born citizens . . . is left wholly unrepresented . . . '") (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2 (1865) (statement of Sen. Sumner)). The full implications of those amendments, however, were (and remain) contested. In *Oregon v. Mitchell*, for example, Justice Harlan argued that "[i]n the historical context, no one could have understood [the Fourteenth Amendment] . . . as anything other than an abandonment of the principle of Negro suffrage." *Mitchell*, 400 U.S. at 162 (Harlan, J., concurring in part and dissenting in part). As a result, Justice Harlan claimed, the Framers and ratifiers of the Fourteenth Amendment would not have understood that it would disrupt "the States' longstanding plenary control over voter qualifications." *Id.* at 163. In Harlan's view, neither the Guarantee Clause nor the Fourteenth Amendment guaranteed universal suffrage. *Id.* at 201–202. If they did, all the subsequent voting rights amendments would have been unnecessary. *Id.* But Justice Harlan's read of the history was directly contested by Justice Brennan, who concluded that:

> the Amendment was framed by men who possessed differing views on the great question of the suffrage and who, partly in order to formulate some program of government and partly out of political expediency, papered over their differences with the broad, elastic language of s 1 and left to future interpreters of their Amendment the task of resolving in accordance with future vision and future needs the issues that they left unresolved.

III. NATIONHOOD, REPUBLICANISM, AND DEMOCRACY

Since the Civil War, Americans' commitment to voting rights has strengthened, although progress has not always been steady or linear, and our identity as a democracy—and thus as a beacon of light for the world—has solidified. Section A of this Part will address how to understand the Clause's commitment to republicanism today, in light of these developments. Section B will consider the implications of other national changes. In the wake of the Civil War, "these United States" became "the United States." Increased mobility, massive migration, and ease of communication and travel throughout the country have tightened the bonds between citizens and the nation as a whole while diminishing the significance of state-level loyalties. And American politics have nationalized. As a result, our federalism is often tested horizontally, as legal and political developments in one state are increasingly likely to have spillover effects in others.

A. Democratic Republicanism

As Parts I and II explained, from the beginning, republicanism incorporated a commitment to representative government, leading, eventually, to the Fourteenth and Fifteenth Amendments. But even before those amendments, African Americans themselves demanded the vote as their right as citizens of a republic.[133] During 1865, for example, African Americans held statewide conventions throughout the South at which speakers insisted upon "universal manhood suffrage," relying on "America's republican traditions, especially the Declaration of Independence" and echoing the language of the Guarantee Clause.[134] As Eric Foner explains, these claims were not "merely familiar wording. . . . [T]he freedmen and Southern free blacks saw emancipation as enabling the nation to live up to the full implications of its republican creed – a goal that could be achieved only by . . . absorbing blacks fully into the civil and political order."[135] The philosophical and pragmatic connections between universal suffrage and republicanism, while perhaps contestable at the Founding, were widely recognized by the time of the Civil War, including in the South.[136]

In the first years after the Civil War, African-American men registered and voted in impressively large numbers. In 1868, the nationwide percentage of black

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Id. at 274–75 (opinion of Brennan, J.); *see also id.* at 254–74 (setting out historical evidence). As to the subsequent voting amendments, Justice Brennan provided a variety of practical reasons why their proponents might have felt them important. *Id.* at 276–77.

133. FONER, *supra* note 125, at 114.

134. *Id.*

135. *Id.*

136. There is a tendency to refer to "the South" when describing the policies, actions, and beliefs of white southerners who supported the machinery of white supremacy, whether slavery, the Black Codes and Jim Crow, or violent terrorism against African Americans. In fact, "the South" has always also included millions of African Americans who, unsurprisingly, have held very different views. African Americans may not always have been able to act as part of the polity and to express their views at the ballot box, but failing to recognize that they too were part of the South gives us a skewed perspective on the opinions and political beliefs of the people who lived there.

men who had registered to vote was 80.5%, and in some southern states it was over 90%.[137] "In the 1880 presidential election, estimated black turnout was 65 percent or higher in North and South Carolina, Tennessee, Texas, and Virginia."[138] And African Americans successfully elected many of their own to public office.[139]

Not surprisingly, many white southerners resisted, and the federal government eventually abandoned Reconstruction.[140] In the years that followed, two significant developments undermined African Americans' ability to participate in politics in the South—a campaign of terrorism against them and a series of laws, including poll taxes, literacy tests, and grandfather clauses, that prevented them from registering to vote.[141] African-American voter turnout in the South fell to 2% in 1912.[142] Ultimately, African Americans and other civil rights supporters marched and died to make voting possible for black Americans who were long denied their right to do so. In 1965, Congress enacted the Voting Rights Act to enforce the commitments of the Fifteenth Amendment.[143]

Even as white resistance to African-American political participation led to massive denials of the right to vote in the South, however, a new national commitment to universal suffrage was emerging. Americans have increasingly been so unwilling to tolerate exclusions from voting that we have amended our Constitution five times since Reconstruction to expand voting rights. The Seventeenth Amendment eliminated state legislative selection of United States Senators in favor of a popular vote; the Nineteenth Amendment granted women the right to vote; the Twenty-third Amendment gave the District of Columbia electoral votes for President; the Twenty-fourth Amendment eliminated poll taxes for federal elections; and the Twenty-sixth Amendment lowered the national voting age to 18.[144] In addition, the Supreme Court has invoked the Equal Protection Clause to equalize voting rights and voting power, including by requiring legislative districts

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137. LEVITSKY & ZIBLATT, *supra* note 20, at 89.

138. *Id.*

139. HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW 8 (2019).

140. *See* LEMANN, *supra* note 15.

141. *Id.*; Brad Epperly et al., *Rule by Violence, Rule by Law: Lynching, Jim Crow, and the Continuing Evolution of Voter Suppression in the U.S.*, PERSPECTIVES ON POLITICS (Mar. 24, 2019), https://doi.org/10.1017/S1537592718003584; LEVITSKY & ZIBLATT, *supra* note 20, at 90–92.

142. LEVITSKY & ZIBLATT, *supra* note 20, at 92.

143. Unfortunately, African Americans are still disproportionately excluded from the franchise. *See* Epperly et al., *supra* note 141, at 9–10; *infra* Part IV.

144. There have been a total of only 12 amendments since Reconstruction. In addition to those listed in the text, the Sixteenth Amendment authorized a federal income tax; the Eighteenth and Twenty-first Amendments imposed and then repealed Prohibition; the Twentieth Amendment shortened the lame-duck period after federal elections; the Twenty-second imposed the two-term limit on presidents; the Twenty-fifth addressed presidential succession and removal for incapacity; and the Twenty-seventh precludes salary increases for members of Congress from going into effect until after a subsequent federal election.

to be approximately equal in population in decisions that were remarkably popular with the public.[145]

All of these expansions rest on an insistence that voting rights are important enough to justify federal intrusion into state political structures and practices, and they all hearken back to the original American commitment to representative self-government. The voting rights amendments and other federal activity may have had an unintended consequence for the Guarantee Clause, however. As a practical matter, those Amendments have shifted public and academic focus from an emphasis on republican democracy as a necessary condition for states' peaceful and long-term coexistence within one nation, to a focus on the protections the Constitution provides for individuals; and from calls for congressional action to judicial enforcement.[146] That shift has obscured the significance of the Guarantee Clause.

Nonetheless, to say that voting and democracy have dominated the evolution of our constitutional commitments would be an understatement. "[B]y the third quarter of the twentieth century, [Americans] had made democracy a going concern for most, regardless of race or gender."[147] Indeed, over time, American national identity has become intimately connected to a belief in democracy, however imperfect its execution. Presidents, for more than a century, have routinely invoked democracy as America's shining example to the world and our core commitment, or what President Franklin Roosevelt called "our creed of liberty and democracy."[148]

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145. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 269–70 (2009) (describing public reaction to reapportionment cases).

146. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 243–44 (2011) [hereinafter BALKIN, LIVING ORIGINALISM] (arguing for distinctions between individualized or class-based voting claims, to which the Equal Protection Clause easily applies, and claims concerning "structural integrity and fairness of the political system," better viewed through the lens of the Guarantee Clause); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 118–19 n.* (1980) (discussing interaction of the Guarantee Clause and the Fourteenth Amendment); Rosen, *Structural*, *supra* note 125, at 378 (noting that the republicanism "identifies legally significant facts that are overlooked by rights doctrines that focus primarily on individuals"); *id.* at 421–28 (explaining why a structural guarantee of republicanism is meaningfully different from individual rights); *id.* at 429–41 (explaining how the singular focus on individual rights led the Supreme Court to fail to consider relevant information and impact of the voter identification law challenged in *Crawford v. Marion Co. Election Bd.*, 553 U.S. 181 (2008), and the partisan gerrymandering challenged in *Vieth v. Jubelirer*, 541 U.S. 267 (2004)); Smith, *Awakening*, *supra* note 53, at 1988; Williams, *supra* note 37, at 610–11 (arguing that the Clause does not protect individual rights at all); Zafran, *supra* note 3, at 1420 (discussing limitations of courts addressing structural matters through an individual-rights lens).

147. GINSBURG & HUQ, *supra* note 20, at 207.

148. *Praises Army Plan for Japanese Unit*, N.Y. TIMES, Feb. 5, 1943, at 6, *quoted in* Jared A. Goldstein, *Unfit for the Constitution: Nativism and the Constitution, from the Founding Fathers to Donald Trump*, 20 U. PA. J. CONST. L. 489, 491 (2018). The irony of Roosevelt making this claim while issuing internment orders for Japanese Americans is

In his 1905 inaugural address, for example, President Theodore Roosevelt, reflecting on recent massive economic, social, and technological changes, raised both warning and inspiration: "Never before have men tried so vast and formidable an experiment as that of administering the affairs of a continent under the forms of a Democratic republic."[149] He continued:

> Upon the success of our experiment much depends, not only as regards our own welfare, but as regards the welfare of mankind. If we fail, the cause of free self-government throughout the world will rock to its foundations, and therefore our responsibility is heavy, to ourselves, to the world as it is to-day, and to the generations yet unborn.[150]

Presidents have called on the American commitment to democracy in wartime. Asking for congressional authority to send American troops to Europe during World War I, President Woodrow Wilson famously declared that "[t]he world must be made safe for democracy," and trumpeted America's special role in doing so:

> [W]e shall fight for the things which we have always carried nearest our hearts,—for democracy, for the right of those who submit to authority to have a voice in their own Governments, for the fights and liberties of small nations, for a universal dominion of right by such a concert of free peoples as shall bring peace and safety to all nations and make the world itself at last free.[151]

A year before the attack on Pearl Harbor, President Franklin Roosevelt explained the need to support and arm Britain and other Allies "to meet the threat to our democratic faith."[152] President George W. Bush, nine days after 9/11, argued that the United States was a target of terrorists because of our "democratically elected

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emblematic of the reality that our country has frequently failed to live up to our stated ideals. *See generally, e.g.*, Goldstein, *supra*, at 531.

149. Theodore Roosevelt, Inaugural Address of Theodore Roosevelt (Mar. 5, 1905), *in* AVALON PROJECT, http://avalon.law.yale.edu/20th_century/troos.asp.

150. *Id.*

151. Woodrow Wilson, Joint Address to Congress Leading to a Declaration of War Against Germany (Apr. 2, 1917), *in* OUR DOCUMENTS, http://www.ourdocuments.gov/doc.php?doc=61&page=transcript.

152. Franklin Delano Roosevelt, *The Arsenal of Democracy* (Dec. 20, 1940), *in* AMERICAN RHETORIC (updated Aug. 1, 2019), https://americanrhetoric.com/speeches/fdrarsenalofdemocracy.html. This and other invocations of democracy led some on the right to claim that the United States is not a democracy, but a republic, and some have continued to make that claim, although it has been extensively debunked. *See* Steven L. Taylor, *More on "A Republic, Not a Democracy,"* OUTSIDE THE BELTWAY (Aug. 29, 2019), https://www.outsidethebeltway.com/more-on-a-republic-not-a-democracy/ (quoting Jamelle Bouie, *Alexandria Ocasio-Cortez Understands Democracy Better Than Republicans Do*, N.Y. TIMES (Aug. 27, 2019), https://www.nytimes.com/2019/08/27/opinion/aoc-crenshaw-republicans-democracy.html). The Framers' understanding of republicanism required representative democracy. *See supra* Sections I.A, I.B; Lessig, *supra* note 10.

government."[153] And he relied on a promise of bringing democracy to the Middle East to justify the Iraq invasion.[154]

These commitments and beliefs continue. Americans today believe that they have a right to vote and that there is a basic one-person and one-vote principle. According to the Pew Research Center, Americans overwhelmingly (83%) believe that ensuring that no eligible voters are denied the opportunity to vote is "very important" for American elections.[155] In recent years, Americans have made these beliefs clear at the ballot box in states that allow constitutional amendments by initiative. Voters in some states have created independent, nonpartisan or bipartisan redistricting commissions.[156] In 2018, Florida voters, by a supermajority, passed a constitutional amendment to enfranchise ex-felons.[157]

As one scholar explains:

> Ordinary Americans today broadly claim the rights to vote and to vote equally, believe that these rights are theirs, and embody these beliefs in routine practices that are nearly universally celebrated. These rights have thus become. . .elements of proper republican government – even if they were not so when the republican-government clause . . . [was] written.[158]

Making sense of the Guarantee Clause today thus requires recognizing that republicanism means something broader and more democratic than it did at the

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153. George W. Bush, *Address to Joint Session of Congress Following 9/11 Attacks*, AMERICAN RHETORIC (Sept. 20, 2001), https://www.americanrhetoric.com/speeches/gwbush911jointsessionspeech.htm.

154. George W. Bush, *Address on the Future of Iraq*, AMERICAN RHETORIC (Feb. 26, 2003), https://www.americanrhetoric.com/speeches/gwbushfutureofiraq2003.htm.

155. *The Public, the Political System and American Democracy*, PEW RESEARCH CTR. (April 26, 2018), http://www.people-press.org/2018/04/26/3-elections-in-the-u-s-priorities-and-performance/. Americans are somewhat less sanguine about how well we live up to this ideal, however, with only about two-thirds believing that the statement "no eligible voters are denied the vote" describes our system very or somewhat well. *Id.*

156. *See, e.g.*, *Redistricting Proposal Passes in Michigan*, MICH. RADIO (Nov. 6, 2018), http://www.michiganradio.org/post/redistricting-proposal-passes-michigan; Annie Lo, *Citizen and Legislative Efforts to Reform Redistricting in 2018*, BRENNAN CTR. FOR JUSTICE (Nov. 9, 2018), https://www.brennancenter.org/analysis/current-citizen-efforts-reform-redistricting.

157. German Lopez, *Florida Votes to Restore Ex-Felon Voting Rights with Amendment 4*, VOX (Nov. 7, 2018), https://www.vox.com/policy-and-politics/2018/11/6/18052374/florida-amendment-4-felon-voting-rights-results.

158. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 196 (2012). In note 72, Amar goes on to say that "the basic rights of adult American citizens to vote and to have their votes counted equally form part of the actual lived experiences of ordinary persons, who go to the polls year after year expecting these basic principles to be respected by government officials." *Id.* at 551 n.72; *see also* AMAR, BIOGRAPHY, *supra* note 10, at 370–76 (explaining the changing understanding of republicanism during the first 80 years following ratification of the Constitution); BALKIN, LIVING ORIGINALISM, *supra* note 146, at 241 (pointing out that states considered republican at the Founding would not be considered so today).

Founding.[159] The Framers' commitments to preclude despotism and to some form of representative government remain vital. And in today's world, those commitments require universal citizenship suffrage[160] and general one-person, one-vote principles—even as the details are often contested.[161]

B. One Nation, Indivisible

American commitment to national universal suffrage reflects our sense of ourselves as a single *democratic* country. But it also reflects a national identity as a *single* democratic country. In other words, democracy is central, but if we did not have a national identity, there would be no particular need to require every state to extend voting rights as the Constitution now provides. That national identity, in contrast to many Americans' Founding-era identification with their states, was—as described in Part II—an impetus for the strengthened abolitionist movement and eventually for the Civil War. But it developed still further in the post-Reconstruction era with the massive changes that era experienced.

Significant demographic changes, for example, helped to spur a sense of nationhood. The late-nineteenth and early-twentieth centuries saw vast increases in immigration.[162] "For the most part, these immigrants were coming not to New Jersey or Nebraska but to America."[163] In the early twentieth century, the Great Migration of African Americans from the rural South to Northern and Western cities created family and cultural connections across hundreds of miles and between states in very different parts of the country. All of these migrants tended to live in their own close-knit urban neighborhoods—albeit not necessarily by choice—but they were also

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159. *See* Smith, *Awakening*, *supra* note 53, at 1976 & nn.245–48 (citing Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987), and Chisholm v. Georgia, 2 U.S. (4 Dall.) 419, 457 (1793) (Wilson, J., dissenting)); *see also* BALKIN, LIVING ORIGINALISM, *supra* note 146, at 241 ("We must ask what the guarantees of representative government and popular sovereignty mean today in our world."); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. Rev. 26, 51 (2000) [hereinafter Amar, *Foreword*] ("We the People today must be expansive even if We the People at one time were less so."). As Rosen explains, "exclusions from the franchise that were acceptable during the Founding Era would not be constitutional today." Rosen, *Structural*, *supra* note 125, at 404. He argues that the Guarantee Clause, coupled with constitutional voting provisions and amendments and years of custom, form "a structural principle of republican legitimacy" and "together establish that the federal and state governments . . . . are ultimately answerable to citizens." *Id.* at 381; *see also id.* at 401–03 (explaining why Framers' expectations about the scope of the Guarantee Clause should not be binding on the country today).

160. Interestingly, at the Founding, many states allowed noncitizens to vote. *See* Virginia Harper-Ho, *Non-Citizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 L. & INEQ. 271, 273–75 (2000).

161. *See, e.g.*, Evenwel v. Abbott, 136 S. Ct. 1120, 1132–33 (2016) (concluding that states are not required to rely on voting-eligible population in redistricting and declining to decide whether they are allowed to do so). *But see id.* at 1133–42 (Thomas, J., concurring in judgment) (arguing that the Constitution does not require one-person one-vote).

162. FEELEY & RUBIN, *supra* note 51, at 112.

163. *Id.*

"distributed among different states" and so did not "dominate any particular state and give it a distinctly different character."[164] Both the internal migration of African Americans and the vast immigration from abroad thus contributed heavily to a citizenry that identified primarily as American and that had meaningful cross-state connections.

Technology—notably the railroad, the steamboat, and the telegraph—likewise facilitated an increased sense of national identity and increased assimilation between Americans in different parts of the country, expanding technological trends that had begun even before the Civil War.[165] And along with both the country's geographic spread and the technology to communicate and travel more efficiently came increased national regulation, deemed necessary as commercial enterprises spanned more than one state and so could not be effectively regulated at the state level.[166] The 1913 ratification of the Sixteenth Amendment, allowing for a federal income tax imposed "without apportionment among the several States," added to the federal government's national reach and effectiveness.[167]

The New Deal itself was both cause and consequence of the increasingly nationalized economy. The increased regulatory authority of the federal government has "made control of the federal government the central prize of US politics."[168] The New Deal's public works projects, like electrification, helped bring "far-flung communities, down to the littlest town or the remotest farm, into a national culture . . . ."[169] Radio, historian Jill Lepore argues "more than with any other technology of communication, before or since, [gave] Americans . . . a sense of their shared suffering, and shared ideals . . . ."[170] The World Wars and the Cold War solidified national pride, cohesion, and patriotism.[171]

Today, and contrary to the Framers' expectations, even as there are deep divisions within American political culture, we have a much stronger sense of national identity than Americans did at the time of the Founding.[172] Federalism works differently today than at the Founding. Political divides tend to be more rural/urban-suburban than state-to-state.[173] This is not to say that Americans have no reason or desire to identify with their states, but that they "identify far more

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164. *Id.*

165. *Id.* at 112–13 (citing H.G. WELLS, THE OUTLINE OF HISTORY 1006 (1949)).

166. *Id.* at 112.

167. U.S. CONST. amend. XVI.

168. DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED 131 (2018).

169. Jill Lepore, *The Last Time Democracy Almost Died*, NEW YORKER (Jan. 27, 2020), https://www.newyorker.com/magazine/2020/02/03/the-last-time-democracy-almost-died.

170. *Id.*

171. HOPKINS, *supra* note 168, at 22.

172. *Id.* at 4, 170–93.

173. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1110-11 (2014).

strongly with their country . . . than with subnational units . . . something that wasn't always true."[174]

And such nationalization has significant political content. Between the internet and national news networks, Americans can and do easily keep up with national political news from around the country,[175] while finding news about state and local politics has become relatively increasingly difficult.[176] Americans are increasingly likely to donate to campaigns across state lines, with only one-third of itemized political contributions in 2012 going to candidates in the same state as the donor.[177] Americans travel to other states to volunteer for campaigns or to act as nonpartisan poll watchers. And state and local races can become crucial events in national movements. The recent election of several reformist prosecutors, such as Larry Krasner of Philadelphia and Craig Watkins of Dallas, drew upon and in turn will affect national criminal justice reform efforts.[178] Organizations across the political spectrum develop and promote their policies in state legislatures around the country.[179]

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In this contemporary nationalized America, making sense of the Guarantee Clause requires evaluating when and whether antidemocratic spillovers threaten our national cohesion, our ability to draw on federalism as a strength, and our republican democracy. A particular practice at a particular time and place might be undemocratic or unfair to constituents, but its effects might be highly localized. The same practice, under different circumstances, might not be. Part IV explores these questions.

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174. HOPKINS, *supra* note 168, at 170.

175. *Id.* at 127 (noting that contemporary news media provide much more information to Americans about national politics than about state or local politics).

176. *Id.* at 198; *see also* Charles Bethea, *What Happens When the News Is Gone?*, NEW YORKER (Jan. 27, 2020), https://www.newyorker.com/news/the-future-of-democracy/what-happens-when-the-news-is-gone.

177. HOPKINS, *supra* note 168, at 61, 76–77. In 1990, the proportion of out-of-state donations was only one-third. *Id.; see also* Bulman-Pozen, *supra* note 173, at 1035–36 & nn.256–60 (documenting this trend). Bulman-Pozen also discusses whether states could exclude residents of other states from participating in their elections, whether by prohibiting out-of-state contributions and expenditures or imposing a residency requirement for petition circulators. *Id.* at 1137–42. The courts have generally struck down such restrictions, with the exception of an Alaska law imposing limits on nonresidents' campaign contributions. *See* State v. Alaska Civil Liberties Union, 978 P.2d 597, 617 (Alaska 1999). But as she documents, it is not entirely clear how such issues would be decided in the Supreme Court.

178. Maya Wiley, *Power of the Prosecutor: Reformer District Attorneys are Changing Criminal Justice in Ways Legislatures Can't*, NEW REPUBLIC (May 24, 2018), https://newrepublic.com/article/148305/reformer-district-attorneys.

179. One of the best known is the American Legislative Exchange Council. *See* ALEC, www.alec.org/ (last visited Feb. 21, 2019).

IV. TODAY'S THREATS TO REPUBLICANISM

As a practical matter, even after the enactment of all the voting amendments, American democracy has often been, at best, aspirational and, at worst, illusory, especially for African Americans. And in addition to racial exclusion, we can point to a rich history of incumbent and partisan entrenchment, maintained through often unsavory and sometimes illegal means, including patronage, malapportionment, extreme gerrymandering, exploitation of racial and ethnic divisions, voter intimidation, and election fraud. [180] But although entrenchment is part of our history, when taken to extremes, it challenges the very foundation of a liberal constitutional democracy: "free and fair elections characterized by the potential transfer of power." [181] Alexander Hamilton would agree. Explaining the Clause, he said: "The natural cure for an ill-administration, in a popular or representative constitution, is a change of men. A guaranty by the national authority would be as much levelled against the usurpations of rulers as against the ferments and outrages of faction and sedition in the community." [182] What the framers might have called "rotation" [183]—or the meaningful possibility of it—was essential to protecting against the despotic entrenchment they feared.

When and whether such entrenchment gives rise to Guarantee Clause concerns, however, is a highly contextual, historically contingent question. [184]

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180. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 274–75 (2004) (plurality opinion); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1302-03 (1982); Crea, *supra* note 121; Heller, *supra* note 37; Parson & McLaughlin, *supra* note 121; Zafran, *supra* note 3.

181. GINSBURG & HUQ, *supra* note 20, at 10. Ginsburg and Huq argue that a serious danger of democratic erosion arises when there is "decay in the three basic predicates of democracy—competitive elections, liberal rights to speech and association, and the rule of law." *Id.* at 43. The rule of law includes the neutral, expert, and nonpartisan administration of elections and redistricting. *Id.* at 13. And they explain that a party seeking to entrench itself may well:

> politicize the selection of judicial, bureaucratic, and prosecutorial offices that are supposed to be insulated from partisan conflict. It might do so with an eye to using those elements of the state to entrench itself even further against political competition, as well as more simply to further favored policy ends. For example, in the vast majority of democracies, appointments to the judiciary involve some insulation from direct control of the executive branch. . . . But these formal, arms-length structures can themselves be manipulated, and a party that seeks to extend its control over all branches of government will be motivated to do so.

Id. at 85. While they do not appear to believe that the United States is on the verge of losing our commitment to "liberal rights to speech and association," they do worry about decay in the other two axes and they appear to believe that such decay is cause for significant concern about the health of our democracy. *Id.* at 44.

182. THE FEDERALIST NO. 21, *supra* note 37.

183. JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), https://wisc.pb.unizin.org/adef20172018/chapter/1-2-john-adams-thoughts-on-government/.

184. *See* BALKIN, LIVING ORIGINALISM, *supra* note 146, at 243–44 (discussing entrenchment as a natural danger of democratic government and identifying the Guarantee

Section A reviews current scholarship about the norms, practices, and structures needed to preserve meaningful democracy and about the threats to democracy that we see today. Section B explains why such threats have negative spillover effects from one state to another, effects that states cannot protect themselves against. Effective protection can only come from the federal government, as promised by the Guarantee Clause.

A. Democratic Erosion in Theory and Practice

With the election of President Donald Trump and challenges to democracy observed worldwide, there has been a not-so-small explosion of books and articles diagnosing and decrying the possible demise of democracy.[185] This work provides a valuable frame for evaluating when a particular practice or, more accurately, a constellation of practices gives rise to broader concerns for the health of republican self-government. One of the key insights of this work is that preventing what Tom Ginsburg and Aziz Huq call "democratic erosion" requires both gracious losing and gracious winning. Steven Levitsky and Daniel Ziblatt identify two key related norms essential to a healthy democracy: "mutual toleration, or the understanding that competing parties see each other as legitimate rivals, and forbearance, or the idea that politicians should exercise restraint in deploying their institutional prerogatives."[186] Ginsburg and Huq operationalize these norms' role in the central characteristic of a functioning democracy: "the possibility of one coalition turning power over to another."[187] Both sets of authors explain that without mutual toleration and forbearance, the winning party will have both ideological and electoral incentives to play "constitutional hardball" by putting in place policies that will make it that much harder for their opponents to retake power in the future. And knowing that might happen, any party in power has an incentive to do the same, leading to a spiral of antidemocratic actions.[188] Put another way, "orderly exit [from power] rests upon the belief that one will have voice in the new arrangements and hence can live to fight another day,"[189] but "constitutional hardball lends itself to retaliation and escalation."[190]

Such escalation is particularly likely when extreme partisan polarization erodes the vital norms of forbearance and mutual legitimacy. "[W]hen societies grow so deeply divided that parties become wedded to incompatible worldviews,

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Clause as protection against it); Zafran, *supra* note 3, at 1445–55 (arguing that courts should adjudicate Guarantee Clause challenges to entrenchment and partisan lock-up).

185. *See generally, e.g*, LEVITSKY & ZIBLATT, *supra* note 20; GINSBURG & HUQ, *supra* note 20; Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018) [hereinafter Fishkin & Pozen, *Asymmetric Hardball*]; Browning, *supra* note 20.

186. LEVITSKY & ZIBLATT, *supra* note 20, at 8–9; *see also id.* at 102–17 (explaining these concepts in more detail); Fishkin & Pozen, *Asymmetric Hardball*, *supra* note 185, at 922–27.

187. GINSBURG & HUQ, *supra* note 20, at 11.

188. LEVITSKY & ZIBLATT, *supra* note 20, at 112.

189. GINSBURG & HUQ, *supra* note 20, at 11.

190. Fishkin & Pozen, *Asymmetric Hardball*, *supra* note 185, at 927.

and especially when their members are so socially segregated that they rarely interact, stable partisan rivalries eventually give way to perceptions of mutual threat."[191] Such perceptions lead "parties [to] view one another as mortal enemies," which means that "the stakes of political competition heighten dramatically," undermining the normal operation of democratic give-and-take:

> Losing ceases to be a routine and accepted part of the political process and instead becomes a full-blown catastrophe. When the perceived cost of losing is sufficiently high, politicians will be tempted to abandon forbearance. Acts of constitutional hardball may then in turn further undermine mutual toleration, reinforcing beliefs that our rivals pose a dangerous threat.[192]

And as democracy scholars warn, along with such polarization comes an increasing unwillingness to compromise—a straightforward application of the notion that when parties become "wedded to incompatible world views," ordinary democratic methods of resolving disputes become much more fraught.[193]

It is no secret that we are in an era of such extreme polarization.[194] Political scientists have documented that while at one time there were Democratic members of Congress who were more conservative than some Republicans, that is no longer

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191. LEVITSKY & ZIBLATT, *supra* note 20, at 116; *see also id.* at 9 (arguing that "extreme polarization can kill democracies"); *id.* at 112 (explaining vicious cycle of mistrust and constitutional hardball); GINSBURG & HUQ, *supra* note 20, at 209 (making same point); Jed Handelsman Shugerman, *Constitutional Hardball vs. Beanball: Identifying Fundamentally Antidemocratic Tactics,* 119 COLUM. L. REV. FORUM (2019), https://columbialawreview.org/content/hardball-vs-beanball-identifying-fundamentally-antidemocratic-tactics/ (arguing that some forms of hardball are so fundamentally antidemocratic that "it breaks [the] basic rules[—]to eliminate the other players from the game," and labelling this antidemocratic hardball as beanball); Joseph Fishkin & David E. Pozen, *Evaluating Constitutional Hardball: Two Fallacies and a Research Agenda,* 119 COLUM. L. REV. FORUM No. 5 (2019), https://columbialawreview.org/content/evaluating-constitutional-hardball-two-fallacies-and-a-research-agenda/ (agreeing with conceptual distinction between hardball and beanball).

192. LEVITSKY & ZIBLATT, *supra* note 20, at 112; *see also* GINSBURG & HUQ, *supra* note 20, at 90 ("When each side of a bilaterally divided nation perceives the other side as extreme and imperiling its very existence, politics can assume a zero-sum character.").

193. LEVITSKY & ZIBLATT, *supra* note 20, at 116. There is evidence that our current polarization is asymmetric in that Republicans have moved further to the right than Democrats have moved to the left and that, along with that shift, Republicans are less willing to compromise than are Democrats. Fishkin & Pozen, *Asymmetric Hardball*, *supra* note 185, at 940 & n.103; GINSBURG & HUQ, *supra* note 20, at 126–27. If so, that difference between the parties may explain why we may currently see more examples of Republicans engaging in the norm-breaking behaviors that endanger democracy than of Democrats. *See* Shugerman, *supra* note 191 (arguing that Republicans are significantly more aggressive in their use of constitutional hardball and beanball than are Democrats). But neither party is pure, and the danger of escalation is ever-present.

194. THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 56–57 (paperback ed. 2016), *cited in* Fishkin & Pozen, *Asymmetric Hardball*, *supra* note 185, at 940 & n.102.

true.[195] And the polarization is not limited to professional politicians. The Pew Research Center reports that since 1994, "the gaps [between Republicans and Democrats] on several sets of political values in particular – including measures of attitudes about the social safety net, race and immigration – have increased dramatically."[196] Fewer than half of Americans appear to favor political compromise.[197] Nearly half of Democrats and Republicans alike view the opposing party as "a threat to the nation."[198] Such rhetoric is ubiquitous, especially by President Trump. In but one of many examples, President Trump's speech formally announcing his reelection campaign, he excoriated Democrats as "look[ing] down with hatred on our values and with utter disdain for the people whose lives they want to run" and calling "the Democratic position on immigration . . . 'the greatest betrayal of the American middle class and, frankly, American life.'"[199]

Republicans and Democrats increasingly live in different places, with Republicans in more rural areas and Democrats in cities and suburbs,[200] and increasingly large numbers of survey respondents indicate that they would not want their children to marry across party lines.[201] More broadly, those who identify with the different parties appear to have "competing narratives about triumphs and challenges in all realms of public life – the economic, the social, the moral."[202]

As democracy scholars would predict, this kind of polarization appears to be creating an unwillingness to accept the possibility of electoral loss. This unwillingness translates into concrete actions designed to diminish the electoral

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195. HOPKINS, *supra* note 168, at 133 (summarizing research); The Polarization of the Congressional Parties, VOTEVIEW (Jan. 30, 2016), https://legacy.voteview.com/political_polarization_2015.htm.

196. HOPKINS, *supra* note 168, at 134 (describing scholarly disagreement over the extent to which polarization is primarily an elite phenomenon but noting "widespread agreement that voters are more sorted by ideology than in prior decades, with conservatives overwhelmingly defining themselves as Republicans and liberals as Democrats"); *The Partisan Divide on Political Values Grows Even Wider*, PEW RESEARCH CTR. (Oct. 7, 2017), http://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/.

197. *The Public, the Political System and American Democracy*, PEW RESEARCH CTR. (April 26, 2018), http://www.people-press.org/2018/04/26/8-the-tone-of-political-debate-compromise-with-political-opponents/.

198. Emily Badger & Niraj Chokshi, *How We Became Bitter Political Enemies*, N.Y. TIMES: THE UPSHOT (June 15, 2017), https://www.nytimes.com/2017/06/15/upshot/how-we-became-bitter-political-enemies.html.

199. Maggie Haberman, Annie Karni & Michael D. Shear, *Trump, at Rally in Florida, Kicks Off His 2020 Re-election Bid*, N.Y. TIMES (June 18, 2019), https://www.nytimes.com/2019/06/18/us/politics/donald-trump-rally-orlando.html.

200. *See* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2009).

201. Lynn Vavreck, *A Measure of Identity: Are You Wedded to Your Party?*, N.Y. TIMES: THE UPSHOT (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/upshot/are-you-married-to-your-party.html.

202. Bulman-Pozen, *supra* note 173, at 1114.

strength of the opposing party. Many of these actions have been extensively discussed and analyzed elsewhere; what follows is only a summary.

1. Extreme Partisan Gerrymandering

Extreme partisan gerrymandering can allow one party to maintain control over a legislature (or a congressional delegation) even if it receives significantly less than a majority of votes cast. In Wisconsin, for example, in the 2018 midterm election, Democratic candidates for the State Assembly received 53% of the votes.[203] Republicans, however, won 63 of the 99 Assembly seats.[204] Other states, and both parties, are responsible for similar stories, including Republicans in North Carolina, and Democrats in Maryland.[205]

Of course, parties and politicians have long used redistricting as a political tool designed to entrench power. The word "gerrymander" itself dates back to 1812 when Massachusetts Governor Eldridge Gerry approved a redistricting map that favored his party—and that included a district that was shaped like a salamander.[206] What sets apart today's gerrymandering, however, is its effectiveness. Technology—in particular, high-powered analysis of detailed data about voters and highly sophisticated mapping software—allows a party in control of districting to guarantee itself a legislative majority not just in the next one or two elections but well beyond that[207]—possibly even as long as until the next redistricting cycle. In some states, parties in control of redistricting can also redistrict their state legislatures repeatedly during the course of a decade.[208] Thus, a party can perpetuate its legislative control long after it has lost popular support.[209] And the Supreme

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203. Lieb, *supra* note 16.

204. *Id.*

205. *See* Newkirk, *supra* note 17; Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

206. Greg Miller, *The Map That Popularized the Word 'Gerrymander,'* NAT'L GEO. (Nov. 6, 2018), https://news.nationalgeographic.com/2017/06/map-gerrymander-redistricting-history-newspaper/.

207. *See, e.g.*, Jacob Eisler, *Partisan Gerrymandering and the Constitutionalization of Statistics*, 68 EMORY L.J. 979, 992 (2019) (discussing techniques to make partisan gerrymandering much more durable).

208. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 412–13 (2006) (plurality opinion) (describing off-cycle redistricting in Texas); Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2051 n.158 (2018) (describing "jurisdictions without temporal limits on redistricting, in which a legislative majority may redraw lines to fine-tune partisan advantage as often as they have the intestinal fortitude to do so") (citing Justin Levitt & Michael P. McDonald, *Taking the "Re" out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247, 1258–60, 1262–64, 1266 (2007)).

209. Jordan Ellenberg, *How Computers Turned Gerrymandering into a Science*, N.Y. TIMES (Oct. 6, 2017), https://www.nytimes.com/2017/10/06/opinion/sunday/computers-gerrymandering-wisconsin.html; Newkirk, *supra* note 17; *see also* BALKIN, LIVING ORIGINALISM, *supra* note 146, at 243–44 (arguing that the Guarantee Clause is designed to ensure majority rule).

Court has decided that the federal judiciary has no role to play in addressing these activities.[210]

2. Lame-Duck Lawmaking

The antidemocratic consequences of extreme partisan gerrymandering—and its contributions to an antidemocratic spiral—have been particularly evident in the recent post-election conduct of legislators in heavily gerrymandered states. In the 2018 general election in Wisconsin, for example, the Democratic candidates for governor and attorney general won and a majority of voters chose Democratic state legislators, but, as already noted, the gerrymandered legislature remained in Republican control.[211] During the lame-duck session, while the defeated Republican governor remained in office, the legislature passed a series of laws removing power from the governor and attorney general, including preventing the incoming officials from keeping their campaign promises to withdraw from a lawsuit challenging the Affordable Care Act, and scaling back the governor's appointment power.[212] And Republican legislative leaders expressed the kind of contempt for voters of the other party that democracy scholars warn about.[213] Similar disempowering laws were passed by North Carolina's Republican-controlled legislature in 2016, after Democratic candidates were elected as governor and attorney general.[214]

3. Voter Suppression

Voter suppression, like gerrymandering, has a long and even less illustrious history. Long a technique to prevent African Americans from voting or even registering to vote in the South, it has become more sophisticated.[215] Some states have imposed voter identification requirements that disproportionately affect voters

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210. *Rucho*, 139 S. Ct. at 2498–2508.

211. Lieb, *supra* note 16.

212. Mitch Smith & Monica Davey, *Wisconsin Republicans Defiantly Move to Limit the Power of Incoming Democrats*, N.Y. TIMES (Dec. 5, 2018), https://www.nytimes.com/2018/12/05/us/wisconsin-power-republicans.html.

213. Speaker of the Wisconsin Statehouse Robin Vos explained that "[i]f you took Madison and Milwaukee out of the state election formula, we would have a clear majority." Emily Badger, *Are Rural Voters the 'Real' Voters? Wisconsin Republicans Seem to Think So*, N.Y. TIMES: THE UPSHOT (Dec. 6, 2018), https://www.nytimes.com/2018/12/06/upshot/wisconsin-republicans-rural-urban-voters.html. Senate Majority Leader Scott Fitzgerald similarly claimed that the Republican-led legislature is "closest to those we represent," unlike the "incoming administration that is based almost solely in Madison." *Id.*; *see also* GINSBURG & HUQ, *supra* note 20, at 72–73 (describing antidemocratic mechanism of dismissing some voters as not fully part of the polity).

214. GINSBURG & HUQ, *supra* note 20, at 161, 241; LEVITSKY & ZIBLATT, *supra* note 20, at 208–12 (documenting events in North Carolina); Maggie Astor, *Wisconsin, Limiting Governor, Borrows a Page From North Carolina's Book*, N.Y. TIMES (Dec. 5, 2018), https://www.nytimes.com/2018/12/05/us/politics/wisconsin-governor-legal-challenge.html.

215. *See* Dana Milbank, *The Election Really Was Rigged*, WASH. POST (Nov. 29, 2016), https://www.washingtonpost.com/opinions/the-election-really-was-rigged/2016/11/29/c2ed58d8-b666-11e6-a677-b608fbb3aaf6_story.html (describing extensive voter suppression efforts).

who are more likely to vote for Democrats than Republicans.[216] There is ample evidence that that disproportionate effect is, for many of the legislators supporting these requirements, a primary reason to enact them. When the Wisconsin legislature enacted new voter identification laws ("voter ID laws") in 2011, for example, one Republican legislative aide reported that "'GOP Senators were giddy' about the way a proposed voter ID bill 'literally singled out the prospects of suppressing minority and college voters.'"[217] In North Carolina, the legislature cut back on early voting, targeting "with almost surgical precision" the times and places most likely to be used by African American voters.[218]

4. Election Maladministration

There are increasing complaints that polling places in Democratic neighborhoods are disproportionately closed, that voting machines are unfairly distributed making very long wait times in some places but not in others, that voting machines are sometimes inoperable or delivered without essential ancillary equipment, and that early voting is restricted in targeted ways.[219] Moreover, some of the decisions about how to conduct elections—like how to distribute voting machines, for example—and the nuts and bolts of doing so—like actually getting the machines to the right places and in working order—are overseen by partisan officials, sometimes engaged in their own campaigns, raising the suspicion that they use their offices for partisan advantage rather than to ensure free and fair elections.[220]

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216. Michael Wines, *Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain*, N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/us/some-republicans-acknowledge-leveraging-voter-id-laws-for-political-gain.html.

217. CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 64 & n.77 (2018) [hereinafter ANDERSON, ONE PERSON] (quoting Wines, *supra* note 216).

218. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

219. Amy Gardner and Beth Reinhard, *Broken Machines, Rejected Ballots and Long Lines: Voting Problems Emerge as Americans Go to the Polls*, WASH. POST (Nov. 6, 2018 5:42 PM), https://www.washingtonpost.com/politics/broken-machines-rejected-ballots-and-long-lines-voting-problems-emerge-as-americans-go-to-the-polls/2018/11/06/ffd11e52-dfa8-11e8-b3f0-62607289efee_story.html?utm_term=.042fd32cc226. One reason these complaints are increasing is the Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013). In *Shelby County*, the Court effectively struck down the requirement of Section Five of the Voting Rights Act ("VRA") that some jurisdictions preclear any voting or election-related changes with the Federal Department of Justice or the D.C. District Court. (Technically, the Court struck down the "coverage formula" set out in a different section of the VRA, leaving section five intact but inapplicable to any jurisdictions.) Many of the practices described in the text would have been prohibited under the preclearance regime because they have a disproportionate impact on racial minorities.

220. In Georgia's most recent gubernatorial election, for example, Secretary of State Brian Kemp was also the Republican candidate for governor. Kemp was accused of engaging in a host of antidemocratic practices, including holding up the processing of new citizens' voter registrations and misallocating voting machines. Carol Anderson, *Brian Kemp's Lead in Georgia Needs an Asterisk*, ATLANTIC (Nov. 7, 2018), https://www.theatlantic.com/ideas/archive/2018/11/georgia-governor-kemp-abrams/

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To the extent that these laws and actions are designed to entrench one party or certain politicians in power, some of their contributions to the antidemocratic spiral are obvious. As the same Republican aide quoted above explained, "Think about that for a minute. Elected officials planning and happy to help deny a fellow American's constitutional right to vote in order to increase their own chances to hang onto power."[221] This attitude is the kind of unwillingness to accept or allow electoral loss, and failure to engage in forbearance, that democracy scholars warn about.

The tactics may have additional antidemocratic effects. Supporters of voter ID laws, for example, often rely on claims of widespread in-person voter fraud—claims that have repeatedly been debunked—to generate public, and judicial, support for them.[222] Ordinary people who hear the claims of voter fraud, especially when they hear those claims from politicians and commentators who share their world view, are likely to distrust the integrity of election results they don't like.[223] In other words, the claims add to the likelihood that Republican voters will view Democrats as lacking a legitimate claim to power.[224] It works the other way as well. For those unable to vote due to voter ID laws, or for those whose side loses voters—generally Democrats—those laws also have the potential to delegitimize election results by creating a belief that Republicans win only by preventing people from voting.[225] It is hard to imagine a better way to undermine mutual tolerance.

575095/. Kemp prevailed in a very tight election. His opponent, Stacie Abrams, and her allies have filed a lawsuit challenging numerous aspects of Georgia's voting and election practices as violating the Voting Rights Act and the Equal Protection Clause. Vanessa Williams, *Lawsuit by Abrams PAC Continues Debate over Voter Suppression in Bitter Georgia Governor's Race*, WASH. POST (Nov. 29, 2018, 9:29 AM), https://www.washingtonpost.com/politics/lawsuit-alleges-voter-suppression-in-bitter-georgia-governors-race-and-seeks-protections-for-future-races/2018/11/29/750afc20-f353-11e8-aeea-b85fd44449f5_story.html.

221. Wines, *supra* note 216. This aide left his job due to this experience. *Id.*

222. Crawford v. Marion County Election Bd., 553 U.S. 181, 191–96 (2008) (upholding Indiana's voter identification law in part due to state's asserted interest in preventing voter fraud and safeguarding public confidence despite lack of any evidence of such fraud in Indiana); ANDERSON, ONE PERSON, *supra* note 217, at 55, 63–66.

223. *See* Bulman-Pozen, *supra* note 173, at 1113 (explaining that partisanship effects how people process information); Ross Ramsey, *Analysis: What do Texas Voters Want? Meat and Potatoes, Apparently. And Cleaner Elections*, TEXAS TRIB. (June 21, 2019), https://www.texastribune.org/2019/06/21/texas-voters-split-trump-fear-elections-are-rigged-poll-says/ (contrasting concerns about elections amongst Texas Democrats and Republicans).

224. *See* Ariel Malka & Yphtach Lelkes, *In a New Poll, Half of Republicans Say They Would Support Postponing the 2020 Election if Trump Proposed It*, WASH. POST (Aug. 10, 2017, 2:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/10/in-a-new-poll-half-of-republicans-say-they-would-support-postponing-the-2020-election-if-trump-proposed-it/ (noting, among other alarming findings, that nearly half of Republicans believed that Trump won the popular vote in 2016).

225. *See, e.g.*, Parson & McLaughlin, *supra* note 121, at 100–03; Leonard Pitts, Jr., *Republicans Cheated to Win, and We All Lost*, MIAMI HERALD (Nov. 20, 2018, 4:46 PM),

Likewise, if allegations of biased election administration are true, such manipulation is an example of attempts to undermine free and fair elections. If they are not, the mere appearance of this kind of antidemocratic conduct with no meaningful way to check it might itself undermine many people's faith in elections and in the democratic process more generally, possibly making them less likely to participate and less likely to acknowledge the winners as legitimate.

Many, possibly most, of these entrenchment efforts are currently legal or constitutional.[226] Many, like gerrymandering and voter suppression, have a long history, although they are intimately connected to our history of racist exclusion from the franchise.[227] But the insights of comparative law, history, and political-science scholars warn us not to look at these practices—and others not cataloged here—in isolation or out of their larger political context, or to rely on formal legality, when evaluating threats to democracy. "Because erosion occurs piecemeal, it necessarily involves many incremental changes to legal regimes and institutions. Each of these changes may be innocuous or defensible in isolation. It is only by their cumulative effect that erosion occurs."[228]

B. Evaluating Spillovers

To the extent that partisan gerrymandering, voter suppression, and other antidemocratic tactics lock into power a particular party or faction, they arguably create the kind of pseudo-monarchy or aristocracy that the Framers worried about.[229] But antidemocratic practices in some states need not rise to the level of despotism to cause serious negative spillover effects in others, and in fact, they work to undermine some of federalism's greatest strengths.

The simplest such spillovers arise from the contagious nature of antidemocratic tactics. As Ginsburg and Huq explain: "We live in an era of easy and

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https://www.miamiherald.com/opinion/opn-columns-blogs/leonard-pitts-jr/article221971770.html.

226. *See, e.g.*, *Crawford*, 553 U.S. at 181 (upholding Indiana's voter identification law).

227. *See generally* Crea, *supra* note 121.

228. GINSBURG & HUQ, *supra* note 20, at 45; *see also id.* at 80, 91; LEVITSKY & ZIBLATT, *supra* note 20, at 8, 77–96 (exploring specific examples of this phenomenon); Fishkin & Pozen, *Asymmetric Hardball*, *supra* note 185, at 922 (quoting Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 266 (2017)) (describing "constitutional hardball" in part as aggressive and disruptive tactics that may be technically permissible but that "put pressure on the 'norms of good institutional citizenship' that help to structure and 'sustain the constitutional system'").

229. *Cf.* BALKIN, LIVING ORIGINALISM, *supra* note 146, at 243 (arguing that "[t]he goal of the guarantee clause is to protect popular sovereignty; . . . to ensure that majorities rule and present aristocracy or oligarchy, whether the aristocracy or oligarchy is due to birth, concentration of economic power, or the result of political machination"); LEVITSKY & ZIBLATT, *supra* note 20, at 108 (explaining why the longstanding norm of president serving no more than two terms was critical to "our republican system") (quoting House Resolution *in* Bruce Peabody, *George Washington, Presidential Term Limits, and the Problem of Reluctant Political Leadership*, 31 PRESIDENTIAL STUD. Q. 402 (2001)).

rapid legal borrowing and transplantation across jurisdictions. . . . Bad ideas can spread as quickly as good ones . . . Democratic erosion is one example of this."[230] They elaborate: "Patterns of diffusion, whereby policies and institutions adopted in one state can spread to others, need not differentiate between pro- and antidemocratic content. One can imagine, for example, institutional innovations, such as restrictions on the ballot or hardwired partisan gerrymanders, spreading around the country . . . ."[231]

Such anti-democratic spillovers present a different kind of threat to federalism than do spillovers that arise from policy differences, like disagreements over whether to legalize marijuana or different levels of environmental regulation.[232] Such policy spillovers of course generate friction, which many federalism scholars see as inherently problematic.[233] Others, including leading scholar Heather Gerken, argue that such policy-based spillover effects often create a positive friction that moves debates into the political sphere and forces political discussion and compromise.[234] For one thing, spillovers force an "everyday practice of pluralism," where citizens of different states have to tolerate their neighbors' different views and different laws.[235] But spillovers are less likely to lead to such positive developments where those already messy political processes are distorted by antidemocratic tactics. Citizens of one state are much less likely to tolerate policy spillovers if they believe that the neighboring states are distorting the democratic processes that produce those policies.

Indeed, Gerken argues that the focus of federalism scholars should largely be on whether "the right conditions of federal-state bargaining obtain."[236] The point here is not that citizens of one state have any right to interfere with the politics and policy preferences of another state under normal circumstances.[237] Rather, because federalism is messy, as is politics, we have an interest in having what Gerken calls the "right conditions for federal-state bargaining" present in *all* states.[238] For those conditions to obtain nationally, however, states should not be able to distort their relative power nationally by means of state-level entrenchment. Indeed, consistent with my reading of the Guarantee Clause, Fred Smith argues that the Clause is a

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230. GINSBURG & HUQ, *supra* note 20, at 73.

231. *Id.* at 149. As Ginsburg and Huq explain, federalism "cannot supply a reliable safeguard against erosion, and it is a deep mistake to celebrate or condemn it in an unthinking or categorical fashion." *Id.* at 150.

232. *See generally, e.g.*, Kristen H. Engel, *State Environmental Standard Setting: Is There a "Race" and Is it "To the Bottom"?*, 48 HASTINGS L.J. 271 (1997) (discussing ways that states' environmental regulation impacts other states).

233. *See* Gerken & Holtzblatt, *supra* note 21, at 61–62 (discussing such concerns).

234. *See id.* at 78–97.

235. Gerken & Dawson, *supra* note 21; *see also* Gerken & Holtzblatt, *supra* note 21, at 88; Gerken, *Taft Lecture*, supra note 21, at 395.

236. Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 1030 (2015) [hereinafter Gerken, *Détente*].

237. *See* Heller, *supra* note 37, at 1760 (distinguishing between constitutional matters and ordinary substantive law).

238. Gerken, *Détente*, *supra* note 236, at 1030.

bulwark against precisely such power distortion. He argues that the Clause protects what he calls "state integrity," which includes "existence, stability, and *parity*," providing a "method to protect states from becoming significantly weaker or stronger than their neighbors."[239]

Yet an entrenched but unrepresentative government can lead to precisely such distortions. There can be a gerrymandering cascade effect, for example, when a gerrymandered state legislature draws gerrymandered congressional districts. Voter suppression can likewise affect the make-up of the House of Representatives, as well as the outcome of Senate and Presidential elections. And since members of Congress in heavily gerrymandered "safe" seats are less likely to be willing to compromise or work across the aisle, this gerrymandering cascade not only feeds into the antidemocratic spiral described by scholars, but it affects the entire functioning of the national government—by definition a spillover effect.[240]

Other concrete effects on national governance are plausible if still unrealized. Extreme partisan gerrymandering of state legislatures could lead to a call for a national constitutional convention—and ratification of amendments or even an entirely new constitution—on terms dictated by only one party and without the widespread democratic support that any such changes should enjoy.[241] Or consider what would happen if a presidential race were thrown to the House. The Twelfth Amendment provides that where no candidate receives a majority of the presidential electors' votes, the House decides the election—with each state entitled to a single vote. Extreme partisan gerrymandering might well control partisan control of the different state delegations, as it does with North Carolina and Wisconsin, which would then determine the outcome of the election.[242] These outcomes may not be likely, but they are certainly plausible, and those who study democracy warn against ignoring the unlikely but plausible.

Dysfunctional state-level democracies can also impede another central value of federalism—the development and implementation of alternative policies and practices. One view of federalism is that states "check the federal government"

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239. Smith, *Awakening*, *supra* note 53, at 1951 (emphasis added).

240. *See* Fishkin & Pozen, *Asymmetric Hardball*, *supra* note 185, at 945–51 (explaining that Republican members of Congress in overwhelmingly Republican districts have increasingly been threatened by primary challenges from the right, making moderation and compromise politically hazardous).

241. *See* Carolyn Shapiro, *Gerrymandering the Constitution: More than Statehouse Politics at Risk*, HILL (Oct. 1, 2017, 12:20 PM), https://thehill.com/opinion/judiciary/353283-gerrymandering-the-constitution-theres-more-than-just-statehouses-at-risk. Indeed, such a convention is the explicit goal of many on the political right. *See, e.g.*, Joan Walsh, *The 7.383-Seat Strategy*, NATION (Mar. 22, 2018), https://www.thenation.com/article/the-7383-seat-strategy/; *see also* GINSBURG & HUQ, *supra* note 20, at 139–40 (playing out a version of this scenario with a special emphasis on how the resulting constitutional amendments might be antidemocratic); *id.* at 206 (explaining that there is "no way to insulate against the risk that a convention would be captured by antidemocratic forces").

242. *Cf.* Norm Ornstein, *What Happens If the 2020 Election Is a Tie?*, ATLANTIC (July 11, 2019), https://www.theatlantic.com/ideas/archive/2019/07/what-happens-if-2020-election-tie/593608/.

in part "by formulating opposing policies and putting them into practice."[243] On this view, the states are a kind of proving ground not only for the purpose of experimenting to identify potentially superior policies, but also for the purpose of developing platforms on which the parties can run.[244] If the states' democratic processes are undermined, however, that policy development may well be stymied.

And dysfunctional democracies can also distort the role that states play in implementing, challenging, and developing *national* policy. Governors and state legislatures, together or separately, may have extraordinary power to embrace, implement, resist, seek waivers from, or otherwise interact with federal law that requires or allows state implementation—which is a significant amount of federal law.[245] Consider how different the ongoing debate about the Affordable Care Act would be if no states had rejected the law's Medicaid expansion. Or consider the role marijuana legalization is having on national drug policy.[246] And state attorneys general can have even more immediate effects on nationwide policy than can governors and state legislatures. In recent years, state attorneys general have been challenging federal policy in court with increasing frequency, sometimes obtaining nationwide injunctions.[247] When an attorney general obtains a nationwide injunction against a federal regulation, that certainly affects the interests of citizens in other states.

On the other side, functioning democratic practices and institutions in different states can have positive and prodemocratic spillover effects. More robust political responsiveness at the state level may well foster stronger state governments, increased political involvement, and more faith in the democratic process.[248] That in turn can have positive effects on citizens' general willingness to see their political opponents as legitimate and to engage in forbearance when they have governmental control. Put another way, robust democracy at the state and local level can give people the practice and experience necessary to accept that they will sometimes be on the losing side of elections. And increased state and local government

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243. Bulman-Pozen, *supra* note 173, at 1089.

244. *Id.* at 1089–90.

245. *See, e.g.*, Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 485–86 (2017); Gerken, *Détente*, *supra* note 236, at 1010–11.

246. Gerken, *Détente*, *supra* note 236, at 1014.

247. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018); Texas v. United States, 945 F.3d 355 (5th Cir. 2019). *See also* PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 168–95 (2015). State attorneys general also influence national policy by suing nongovernment actors. *See, e.g.*, *id.* at 22–30 (discussing growth of state litigation against private corporations to promote policy goals).

248. Bonfield, *supra* note 3, at 570–71. Indeed, in states that have nonpartisan districting commissions, "the political systems . . . are more politically responsive than those in states where districts are drawn by partisan legislatures." GINSBURG & HUQ, *supra* note 20, at 200 (citing Nicholas Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769 (2013)).

responsiveness can also strengthen states relative to the federal government, enhancing federalism's benefits still further.[249]

In addition, many Americans, even if they are in the electoral minority where they live, may benefit from knowing that there are elected officials elsewhere—whose campaigns they may have supported—promoting the issues and positions they believe in. Some scholars label this "surrogate representation,"[250] and they explain that it can ensure that even voters who are constituents of officials they voted against can have representation through "the systemwide composition of the legislature."[251] Indeed, this reality too can make losing more acceptable.

This surrogate representation can have particularly important *national* effects in our time of partisan polarization. When one party controls the presidency, for example, people who might otherwise feel alienated from their own country can maintain "a sense of national community" by being part of "the out-group" together.[252] Put another way, federalism helps to mediate people's disappointment when their party is out of power at the national level. It "means that partisans on the losing side of a national election need not see their 'minority status as irreversible,' in part because they are not a minority everywhere."[253] But if some states are dominated by a single party through entrenchment, whether through gerrymandering, voter suppression, or other means, that can undermine the effectiveness of surrogate representation, undermining people's national *and* more

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249. As Bonfield puts it:

> The net result of a constitutional exercise of [Article IV,] section 4 power would be more vibrant and effective state government, with an intensifying of the values to be derived therefrom. This, because the more responsible and representative a state government becomes, the more it fulfills the expectations of the federal system. National intervention to secure these objectives would bolster the ability of local government to ascertain, and thereby insure, the advancement and protection of permissible local values. It would also assure better handling and resolution of state problems through a more adequate expression of local opinion and feeling. And it might conduce to a greater feeling of unity and contentment with state government, thereby strengthening it as a bulwark against federal usurpation and the dangers of autocracy. Further, national intervention could secure broader popular consent, or at least acceptance of social experimentation undertaken by the state, as well as provide more of the people with a first hand opportunity to gain a meaningful participation in government. Such broad based local control as would result from an enforcement of the guarantee might also foster a desire in the mass of the people to have local problems administered locally, instead of giving them up to the national government where their control would be more remote.

Bonfield, *supra* note 3, at 570–71.

250. Bulman-Pozen, *supra* note 173, at 1132 (citing Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 522 (2003) (defining surrogate representation)).

251. Mansbridge, *supra* note 250, at 524–25, *quoted in* Bulman-Pozen, *supra* note 173, at 1133.

252. Bulman-Pozen, *supra* note 173, at 1115; *see also id.* at 1115–22.

253. *Id.* at 1124.

local political allegiances. In other words, antidemocratic entrenchment can have spillover effects on the nation as a whole.

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The specifics may be different from the Founding, but the insights that led to the Guarantee Clause remain powerful. We have a national constitutional commitment to democratic republicanism that began with the Framers' nascent belief in a government of elected representatives and has grown deeper and broader with time. Certain forms of government are incompatible in a single nation; antidemocratic beliefs and actions can have significant spillover effects; and there are times when only the federal government can effectively protect our longstanding national commitments.

V. CONGRESSIONAL ACTION TO ENFORCE THE GUARANTEE

The Guarantee Clause obligates "the United States" itself to enforce the Guarantee, without limiting the grant of power to any particular branch.[254] It thus provides independent authority for congressional action to regulate state elections, voting, and government operations when necessary to protect the republican democracies of the different states.[255] In fact, the Clause may *require* a federal legislative response to state level actions when they threaten antidemocratic spillovers.[256] Section A of this Part develops the congressional role in enforcing the Clause under such circumstances, describing the types of permissible regulation and the advantages Congress has over other branches in enforcing the Clause. Section A also briefly discusses the level of certainty and evidence of an antidemocratic spillover threat needed to justify or require congressional action. My intent here, however, is not to set forth a fully developed legal doctrine but rather to lay out its

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254. *See* Bonfield, *supra* note 3, at 523; Chemerinsky, *supra* note 3, at 871.

255. *See* Heller, *supra* note 37, at 1753–59 (arguing that the Clause could support a variety of congressional actions as long as they are limited to addressing state government structure and not substantive law); *id.* (arguing for federal anti-corruption laws, laws governing voting rights and malapportionment, "legislative power grabs" and some forms of popular initiatives); Rosen, *Structural*, *supra* note 125, at 453 (arguing that the political branches, more than courts, should be responsible for protecting "Republican Legitimacy"); Mark D. Rosen, *Can Congress Play a Role in Remedying Dysfunctional Political Partisanship?*, 50 IND. L. REV. 265, 271–72 (2016) [hereinafter Rosen, *Can Congress*] (arguing that Congress has power under the Guarantee Clause to enact "rules-of-the-road regulations" for states when Congress reasonably deems them necessary to protect "the legitimacy of representative government"); 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 (2005) (suggesting that the Guarantee Clause would support renewal of section 5 of the Voting Rights Act). *But see* Oregon v. Mitchell, 400 U.S. 112 (1970) (holding, with no majority opinion, that Congress can set the qualifications of voters in congressional and presidential elections but not in state and local elections); *id.* at 120–29 (opinion of Black, J.) (explaining this position).

256. *Cf.* Greene, *supra* note 3, at 1054 ("Congress has a constitutional duty under the Guarantee Clause to remedy state capture by undemocratic factions . . . . ").

conceptual framework. Section B considers and responds to a variety of objections to the argument.

A. Congressional Power to Act

The Guarantee Clause is one of several provisions that allows Congress to regulate democratic processes within states. Article I, section 4 provides: "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such regulations except as to the places of chusing Senators." Such time-place-manner regulations, the Supreme Court has held, whether issued by the state legislature or by Congress, are extremely broad. The "comprehensive words" of this section "embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making public election returns."[257] And Congress likewise has some power to regulate the conduct of presidential elections.[258]

Congress has exercised these powers, including when it enacted the National Voter Registration Act of 1993,[259] also known as the Motor Voter Act, and the Help America Vote Act of 2002.[260] These laws required easier access to voter registration and restricted the circumstances under which states could remove voters from the rolls.[261] These laws, however, did not require, or were not interpreted to

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257. Smiley v. Holm, 285 U.S. 355, 366 (1932); *see also* Arizona v. Ariz. Inter Tribal Council, Inc., 570 U.S. 1, 8 (2013) (noting that "[t]he Clause's substantive scope is broad" and citing *Smiley*); *Mitchell*, 400 U.S at 121–24 (opinion of Black, J.) (Congress has control over suffrage requirements for congressional elections under *Smiley* and Article I, §§ 2, 4); Ass'n of Cmty. Org. for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 793–95 (7th Cir. 1995) (upholding provisions of the National Voter Registration Act because it requires voters to be able to register for federal elections only when obtaining drivers licenses, in reliance on *Smiley* and its progeny).

258. Burroughs v. United States, 290 U.S. 534, 544–47 (1934) (quoting *Ex parte* Yarbrough, 110 U.S. 651, 657–58, 663, 666–67 (1884)); *see also* U.S. CONST. art. I, § 4; *ACORN*, 56 F.3d at 793 (describing *Burroughs* as holding that congressional power over presidential elections is "coextensive with" its power over congressional elections). Rosen argues that this doctrine and the "Chusing of Electors" Clause "likely give Congress all the power it needs to regulate rules-of-the-road of federal elections," with "any gaps . . . [to be] filled in by the Necessary and Proper Clause." Rosen, *Can Congress*, *supra* note 255, at 270.

259. 52 U.S.C. § 20501 (1993).

260. 52 U.S.C. § 20901 (2002).

261. In the current Congress, the House of Representatives has passed H.R.1, also known as the For the People Act, which would, among other things, require states to set up independent commissions for congressional redistricting and would ban partisan gerrymandering. H.R.1, 116th Cong., 1st Sess., §§ 2401, 2411 (1st Sess. 2019). Senate Majority Leader Mitch McConnell has refused to bring H.R.1 to the Senate floor, so it has no chance of passage in this Congress. Chris Marquette, *HR1 Provides Freshman House Democrats a McConnell 101 Lesson*, ROLL CALL (June 5, 2019, 2:24 PM), https://www.rollcall.com/news/congress/freshmen-house-dems-urge-action-from-mcconnell-on-hr1.

require, states to adopt the same practices with respect to state and local elections as they did for federal elections.[262] Certainly many, if not most, states chose to do so if for no other reason than administrative convenience, but the Article I, section 4 power, which speaks only to congressional elections, does not itself empower Congress to impose such requirements.

Congress can, of course, regulate state elections and voting practices to vindicate individual rights under the Fourteenth, Fifteenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments. It can enforce "by reasonable legislation" the rights set forth in each of those provisions. And Congress has indeed at times acted to enforce them,[263] although the precise scope of its power under these Amendments remains contested.[264]

The Guarantee Clause, however, gives Congress broad powers to determine what the republican form of government means and what means are necessary to guarantee it, and the Necessary and Proper Clause applies to the exercise of those powers as well.[265] Congress is the entity best situated to know what, given "the flux of contemporary values," the people understand a republican form of government to be.[266] Indeed, pursuant to the Guarantee Clause, not only did Congress impose requirements on the confederate states that would have been anathema at the Founding,[267] but it loosened other requirements. For example, at least some during the Founding believed that a bicameral legislature was an essential attribute of the republican form of government.[268] Yet in 1867, Congress admitted Nebraska, with its unicameral legislature, to the Union, while at the same time requiring it to provide for universal male suffrage, which certainly had not existed at the Founding.[269]

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262. *See, e.g.*, *ACORN*, 56 F.3d at 792–93 (describing scope of the National Voter Registration Act).

263. *See, e.g.*, Voting Rights Act, 52 U.S.C. § 10301 (1982); *Ex parte* Yarbrough, 110 U.S. at 660–67 (upholding criminal convictions under a federal statute outlawing interference with voting in federal elections).

264. *See* Shelby County v. Holder, 570 U.S. 529, 550–56 (2013) (in 5–4 decision, striking down part of the Voting Rights Act as outside the scope of Congress's power under the Fourteenth and Fifteenth Amendments); *id.* at 559–94 (Ginsburg, J., dissenting).

265. U.S. CONST., art. I, § 8, cl. 18 (granting Congress the power to "make all laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States").

266. *A Niche for the Guarantee Clause*, *supra* note 3, at 691 (arguing that this is one reason the Guarantee Clause is generally appropriately considered a political question); *see also* Bonfield, *supra* note 3, at 542–43 (citing various Reconstruction-era members of Congress who argued that the meaning of republican form of government was subject to change over time). Ginsburg and Huq argue that the Framers themselves likely would have wanted modern-day Americans to use new information about what works to maintain our democratic republic. GINSBURG & HUQ, *supra* note 20, at 168.

267. *See supra* Section II.C.

268. WIECEK, *supra* note 10, at 27.

269. *Id.*

Indeed, to the limited extent that the Supreme Court has considered the definition of "a republican form of government," it has deferred to Congress, and has said that the Clause is for Congress to enforce.[270] In *Minor v. Happersett*, a pre-Nineteenth Amendment case, for example, the Court rejected a claim that the Guarantee Clause required women's suffrage.[271] Instead, the Court deferred to Congress's apparent conclusion, as manifest in its decisions to admit and readmit states that denied women the right to vote, that such disenfranchisement did not violate the Clause.[272] In *Texas v. White*, the Court commented (in dicta) that in enforcing the Clause when readmitting confederate states to the Union, "a discretion in the choice of means is necessarily allowed."[273]

Congress also has much more flexibility in enforcing the Clause than do courts. While courts can act only when an injury has occurred or is imminent, Congress can take proactive and prophylactic measures when necessary. Indeed, the Founding-era definition of "guaranty" included taking preventive efforts.[274] Particular prodemocratic measures may cease to be effective over time. New challenges could arise.[275] Comparative law scholars, historians, and political

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270. Baker v. Carr, 369 U.S. 186, 220, 242 (1962) (quoting Luther v. Borden, 48 U.S. 1, 36 (1849)).

271. 88 U.S. 162 (1874).

272. *See id.* at 177.

273. 74 U.S. 700, 728–29 (1868). *See* Bonfield, *supra* note 3, at 544 n.141 (interpreting the passage to mean that the Clause gives "the United States . . . power to act affirmatively" and that "[t]he word 'guarantee' conferred broad powers to effectuate the provision's purposes"); *see also id.* (noting disagreement); Rosen, *Structural*, *supra* note 125, at 398 (citing AMAR, BIOGRAPHY, *supra* note 10, at 370–76). The Court similarly explained that Congress had the power to implement the domestic violence clause:

> It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal government to interfere.

Luther, 48 U.S. at 43. Instead, Congress gave the power to the President. *Id.*

274. *See* WIECEK, *supra* note 10, at 59 (arguing that the Clause incorporates a "positive, prophylactic guarantee, to be secured by the civil branches of the federal government"); Bonfield, *supra* note 3, at 523 (arguing that the use of the word "guarantee" at the time of the Founding "would have empowered the United States to take measures that would *protect*, as well as restore, republican government"); *id.* at 524 (arguing that the Framers could not have intended to give the central government "power limited so that it could intervene only when it was too late? And in any obligation to restore, must there not be implied a power to preserve?"); Rosen, *Can Congress*, *supra* note 255, at 271–72; Heller, *supra* note 37, at 1738 (discussing Founding-era dictionary definition of "guaranty" as including "[t]o protect; to defend" and "[t]o preserve by caution") (quoting 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan et al., 5th ed., 1773)). *But see* Williams, *supra* note 37, at 624–25, 675 (arguing that eighteenth-century use of "guarantee" implied a treaty-like obligation that could be invoked only at the request of the state facing a threat to its form of government).

275. Imagine, for example, if states began providing for extraordinarily long, even lifetime, terms of office for executive officials or legislators. One could easily imagine such

scientists teach us that democracy requires upkeep and maintenance and that waiting for demonstrable harm may mean waiting too long, especially in the face of the kind of antidemocratic spirals that we may currently be facing.[276] Congress, more than the courts, is likely to have the flexibility necessary to respond appropriately to such events.

The Supreme Court in *Luther* acknowledged that one way Congress can enforce the clause is to refuse to seat a state's congressional delegation.[277] But congressional action under the Clause cannot be limited to an action so extreme that it amounts to a representational death penalty.[278] Scholars make pains to tell us that there are no magic bullets and indeed in the current environment, such an action would likely inflame antidemocratic fervor rather than counter it.

There are unquestionably limits on congressional power under the Guarantee Clause, although the details require additional development, and (as suggested above), may change with circumstances, but the basic outlines of those limits are clear from the argument already set forth.[279] Congressional action is appropriate if it is aimed at state voting, election, and governance practices that have or threaten antidemocratic spillovers. Today, this power might justify federal laws that prohibit or limit state-level, lame-duck legislation that redistributes authority in state government.[280] It might include federal laws that require election officials for both federal and state elections to be nonpartisan and appointed instead of elected, or that prohibit election officials from presiding over elections in which they are on the ballot.[281] Other federal laws could prohibit extreme partisan gerrymandering of state legislatures.[282] They could mandate criteria for distribution, maintenance, and

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a move, designed to entrench power, being part of an antidemocratic spiral. Because there are no such provisions currently in the offing, there currently is no basis for Congress to legislate against them. But if they became a meaningful possibility, that could well change. *See* Bonfield, *supra* note 3, at 515 n.8 (pointing to extremely long terms of office in state government, or making offices hereditary, as potentially violating the Clause).

276. *See supra* Part IV.

277. *Luther*, 48 U.S. at 35.

278. Of course, Congress might refuse to seat a state's congressional delegation in the face of such extreme circumstances as a coup or announcement of a monarchy, but that would be such an extreme action that it could be counterproductive at best and it is easy to imagine how it could lead to a crisis-level breakdown in national cohesion.

279. *See supra* Section V.A.

280. *Cf.* Heller, *supra* note 37, at 1757–58 (arguing that the Clause could protect against "legislative power grabs," by which he appears to mean legislatures encroaching on executive power and thus undermining separation of powers).

281. Ginsburg and Huq endorse nonpartisan election administration. GINSBURG & HUQ, *supra* note 20, at 208–10.

282. Bonfield, *supra* note 3, at 567 (arguing that the Clause allows Congress to address "malapportionment and gerrymandering" and that "Congress can use the guarantee clause to liberalize state voting requirements and thereby ensure a broader based electorate" and specifically noting the elimination of the poll tax in state elections as within congressional power); *see also* Heller, *supra* note 37, at 1755 nn.214–17, 1756 (citing Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 114–15 (2000)) (arguing for anti-malapportionment laws).

security of voting machines; opening and closing polling places; and voter identification requirements.[283]

But note what would not be covered. Absent a meaningful threat of antidemocratic spillovers, Congress does not ordinarily have power to legislate anything about the internal structure of state government. No one imagines that Nebraska's unicameral legislature causes antidemocratic spillover effects, and it is hard to concoct a justification for congressional regulation or invalidation of that structure. Likewise, many states provide for direct democracy to varying degrees, and although the Framers actively feared direct democracy and saw it as contrary to the republican form of government, it does not today appear to be leading to antidemocratic spillovers, even when it leads to significant state-level dysfunction —as when, for example, voter initiatives in California hobble legislators' budgeting authority by limiting taxing authority and restricting spending choices.[284] It seems similarly unlikely that Congress could interfere with new state and local experiments in ranked-choice voting [285] or prevent a state from experimenting with a parliamentary system instead of the three branches that the Framers envisioned as part of republican government, although no state has yet tried to do so.[286]

Such limits on congressional power are consistent with *Coyle v. Smith*, the rare case in which the Supreme Court held that congressional action pursuant to the Guarantee Clause went too far.[287] In *Coyle*, Congress admitted Oklahoma to the Union on the condition that it not move its state capital, then in Guthrie, until at least 1913.[288] This law was defended in part as an exercise of congressional power to

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283. Ginsburg and Huq make similar arguments, although they stop short of the kind of regulation I am proposing:

> Congress might create a nonpartisan center for excellence in poll management, capable of identifying and disseminating best practices; providing careful empirical studies of barriers to voting (and discrediting fallacious claims of voter fraud aimed at suppressing voter turnout for political opponents and, in some instances, racial and ethnic minorities); and developing regulation in response to systemic threats to election administration on the national level – say, of the kind posed by Russian interference in the 2016 national polls.

GINSBURG & HUQ, *supra* note 20, at 210.

284. This phenomenon is sometimes called "ballot-box budgeting." *See* Heller, *supra* note 37, at 1758–59.

285. *See* Lee Drutman, *Laboratories of Democracy: San Francisco Voters Rank Their Candidates. It's Made Politics a Little Less Nasty.*, VOX (July 31, 2019, 9:24 AM), https://www.vox.com/the-highlight/2019/7/24/20700007/maine-san-francisco-ranked-choice-voting.

286. *See A Niche for the Guarantee Clause*, *supra* note 3, at 692 (arguing that "[i]f state self-government means anything, it means the right to be different, innovative, even deviant in the search for new ways to institutionalize popular control over public decisionmaking"); *see also* THE FEDERALIST NO. 21, *supra* note 37 (explaining that the Clause "could be no impediment to reforms of the State constitution by a majority of the people in a legal and peaceable mode").

287. 221 U.S. 559 (1911).

288. *Id.*

guarantee a republican form of government in making its admission decision and, as such, was a political question.[289] The Court rejected this contention, relying on the equal-footing doctrine, which provides that newly admitted states are "entitled to and possess[] . . . all the rights of dominion and sovereignty which belonged to the original states."[290] And it held that determining the location of the state capital is part of such sovereignty.[291] Seen through the lens of spillovers, this holding is clearly correct. It is hard to imagine how moving the state capital away from Guthrie before 1913 could possibly cause any antidemocratic spillovers, and the invocation of the Clause seems entirely pretextual.

And as *Coyle* suggests, some judicial review of congressional action under the Clause is appropriate. But because the Supreme Court has held most claims brought under the Clause to be nonjusticiable, any review should be highly deferential. Having provided virtually no guidance on the scope and meaning of the Clause, the Court should not now require Congress to play guessing games about what it can do to enforce the Clause. By deeming the Clause a political question in almost every situation, the Court has chosen not to explicate it, [292] and so it should give Congress some meaningful space to reinvigorate it. For that reason, as well as because, as described above, Congress is the branch best-suited to identify what a republican form of government is and to identify appropriate preventive and remedial measures, the Court's deference to Congress in interpreting and enforcing the Clause should be broad. In particular, Congress is due more here than the limited deference the Court gives congressional efforts to enforce individual rights pursuant to the Fourteenth and Fifteenth Amendments.[293] Unlike those amendments, the Clause does not provide an individual right that must be balanced against state sovereignty.[294] Rather, it is a structural principle arising from the recognition both that certain forms of government would be incompatible and that states cannot themselves prevent their neighbors from adopting those forms of government. The Clause requires balancing different states' governance and sovereignty interests, as well as the states' and the federal government's interests in national cohesion. When

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289. *Id.* at 564–66.

290. *Id.* at 577 (quoting Bollin v. Nebraska, 176 U.S. 83, 87 (1900)).

291. *Id.* at 579.

292. *See* cases cited *supra* note 2.

293. *Cf.* Metzger, *supra* note 60, at 1514 (arguing that congressional power under Article IV generally is more expansive than under the Fourteenth Amendment). Some might argue that if the Court can't adjudicate claims brought directly under the Clause, it should not adjudicate challenges to Guarantee Clause-enforcing legislation. Such extreme judicial passivity would be, in my view, inappropriate, however. As Bonfield says "judicial abstinence would give Congress unlimited power to impose on the states whatever government it deemed republican." Bonfield, *supra* note 3, at 564.

294. *See* Zafran, *supra* note 3, at 1449–55 (arguing that the Clause should be understood to guarantee popular sovereignty and to combat "lockup" or entrenchment, allowing courts to shift their attention to structural problems and the cumulative effects of different laws and away from claims of individual First Amendment and Equal Protection claims); *see also* Bonfield, *supra* note 3, at 563 (noting that Framers wanted "the guarantee to be mandatory and to serve as protection against both majority and minority abuse").

Congress acts reasonably to protect each state's government from deleterious antidemocratic spillovers, the Court should defer.

B. Objections and Answers

The primary objections to my arguments arise from concerns for federalism and state sovereignty. Some of these objections sound in originalism. Certainly, the Framers did not understand the Clause to empower Congress to pass the kinds of laws I suggest above. To the contrary, "the regime of electoral authoritarianism that characterized the American South for much of its history was perceived as (and probably was in fact) faithful to the founding promise in ways that multiracial, pluralist democracy was not."[295] And the politics of the Founding Era were full of constitutional hardball and mistrust that democracy scholars might wince at today.[296] "It took several decades for this hard-edged quest for permanent victory to subside,"[297] and for the nation to develop constitutional and democratic norms and commitments.

But the Framers did believe that there had to be some uniformity in the types of government among the states and that there was at least one type of government—monarchy—that would pose an actual threat to other states and to the country as a whole.[298] And realistically, a federal guarantee was necessary to protect against that threat. Enforcing the Guarantee Clause is well beyond any one state's abilities.[299]

Reading today's democracy scholars, it is striking how close their contemporary nightmare scenario is to the Framers' fears of entrenched, factionalized power.[300] These scholars describe a Republican Party, many of whose members are set on entrenching power in a white minority, which as Levitsky and Ziblatt point out, would be "profoundly antidemocratic."[301] They continue:

> Such measures would trigger resistance from a broad range of forces, including progressives, minority groups, and much of the private sector. This resistance could lead to escalating confrontation and even violent conflict, which, in turn, could bring heightened police repression and private vigilantism – in the name of "law and order."[302]

The Framers might have taken white supremacy as a given, but they certainly wanted to build a political structure that would avoid that kind of strife and potential for violence. The Guarantee Clause's core commitments and insights remain vital today.

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295. GINSBURG & HUQ, *supra* note 20, at 207.
296. *See, e.g.*, LEVITSKY & ZIBLATT, *supra* note 20, at 102–03, 119–20.
297. *Id.* at 120.
298. *See supra* Section I.B.
299. Balkin, *Commerce*, *supra* note 27, at 11–12.
300. *See supra* Section I.B.
301. LEVITSKY & ZIBLATT, *supra* note 20, at 207.
302. *Id.* at 207–08.

Ryan Williams' new textualist and originalist reading of the Clause offers a different perspective on its original meaning. He argues that the word "guarantee" had a particular meaning under international law in the seventeenth and eighteenth centuries, and among other things, only the party protected by the guarantee, and not the guarantor, could invoke it.[303] He suggests therefore that the guarantee should be something that can be invoked only by each state individually with respect to threats to its own government.[304] But this limitation is inconsistent with the fact, acknowledged by Williams, that the Clause was designed in part to protect states *from each other*,[305] and it does not explain the guarantee being extended to "*every* State," as discussed *supra*, instead of to "each State," like other promises in the same part of the Constitution. Additionally, the guarantee cannot be understood to apply only in the face of violence, which would make it duplicative of the protection against invasion and domestic insurrection also found in section 4.[306] Nor does Williams' view that the guarantee should be seen as actionable only at the request of a state[307] make sense in light of its pairing with the promise of protection against invasion, which incorporates no such requirement, and seems at odds with the limitation of protection against "domestic violence" to occasions when such protection is explicitly sought—a limitation that does not apply to the Guarantee Clause.[308]

Other scholars, largely led by Deborah Merritt, have argued that the Guarantee Clause should be seen as a promise that states' internal political workings will almost always be off-limits to the federal government. "If the national government pledges to maintain a republican form of government in each state, then *a fortiori*, the national government promises to maintain some government in each state."[309] And interfering with the mechanics of state government would undermine the "autonomous nature of the relationship between state governments and their voters," thus undermining the republican nature of those governments.[310] In other

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303. Williams, *supra* note 37, at 672, 675–76.

304. *Id.* at 675–76.

305. *Id.* at 629.

306. *Id.* at 648–55 (citing some Framers who read it that way and some who disagreed); *id.* at 650 (arguing that the Clause is best read not to "inhibit states from making voluntary changes to their existing governments [but] rather [as] merely a protection against violent usurpations of political authority").

307. *Id.* at 676.

308. U.S. CONST. art. IV, § 4.

309. Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815, 819 (1994) [hereinafter Merritt, *New Role*]; *see also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

310. Merritt, *New Role*, *supra* note 309, at 820. She argues that the Motor Voter law might run afoul of her principle—although it would be entirely consistent with mine. *Id.* at 825. The Motor Voter law is problematic because she thinks unfunded mandates imposed on the states by the federal government "infringe state autonomy by shifting politically unpalatable tasks to the states. When governmental action engenders strong opposition, or when the costs of a regulatory program are high, members of Congress have a substantial motive to shift the political onus or economic costs . . . ." *Id.* at 824. That undermines the state

words, she sees the Clause as a kind of guarantee of federalism. This approach to the Clause lacks textual support.[311] Its underlying insight, however, is consistent with my argument. Both of us see the Clause as part of a commitment to an overall federal structure. But unlike Merritt, who is worried primarily about federal overreach and vertical federalism, my approach focuses on horizontal federalism, national cohesion, and the threats that states can pose to both.

Erwin Chemerinsky has suggested that there may be other limitations on congressional power under the Guarantee Clause. In particular, he suggests that the anti-commandeering principle of the Tenth Amendment, as articulated in *New York v. United States*, might preclude Congress from "declar[ing a] particular state practice illegal and commanding the state to adopt a new law changing its ways."[312] But as Chemerinsky himself notes:

> *New York* might be read narrowly to involve only instances in which Congress compels states to adopt and administer federal regulatory programs. Also, an exception . . . could be recognized for instances in which Congress acts to guarantee that states have a republican form of government. Article IV's authorization could be viewed as trumping the Tenth Amendment concerns because of the former's specific grant of power to the federal government over state government structure and processes.[313]

Given the significant structural safeguards the Guarantee Clause provides, this reading is more consistent with a healthy respect for federalism than is an absolutist reading of the Tenth Amendment.

Understanding the relationship between federalism and the Guarantee Clause reconciles the proper reading of the Clause with sweeping generalizations about state power in a variety of Supreme Court opinions. Particularly in the last two or three decades, the Court has frequently relied on the principle that "federalism secures to citizens the liberties that derive from the diffusion of sovereign power."[314] The Court has noted that "the Framers . . . intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections,"[315] "to determine the conditions under which the right of suffrage may be exercised,"[316] and "to prescribe the qualifications of its officers and the manner in

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legislature's accountability to its own citizens, thus undermining its republican form of government.

311. *See* Williams, *supra* note 37, at 656.

312. Chemerinsky, *supra* note 3, at 877 (citing New York v. United States, 505 U.S. 144 (1994)). Chemerinsky also suggests that such laws might run afoul of *Coyle v. Smith*, 221 U.S. 559 (1911). *Id.*

313. *Id.* at 877–78.

314. Shelby County v. Holder, 570 U.S. 529, 543 (2013) (quoting Bond v. United States, 564 U.S. 211, 221 (2011)) (internal quotation marks and citations omitted).

315. *Id.* (quoting Gregory v. Ashcroft, 501 U.S. 452, 461–62 (1991) (quoting Sugarman v. Dougall, 413. U.S. 634, 647 (1973))).

316. *Id.* (quoting Carrington v. Rush, 380 U.S. 89, 91 (1965)).

which they shall be chosen."[317] All of this is so in the context of internal state governance that does not implicate the Guarantee Clause.[318]

The distinction between justified and unjustified federal regulation is evident in the cases from which the above quotes are taken. *Gregory v. Ashcroft*, for example, is frequently cited for the principle that states have the basic power to set the qualifications of their elected officials due to each state's "obligation . . . 'to preserve the basic conception of a political community.'"[319] But *Gregory* was not about congressional power to prevent antidemocratic spillovers from different states' self-governance decisions. Instead, it considered, although it did not ultimately decide, whether Congress has the power to apply a general age-discrimination policy to state judges.[320] Against the general background principles relating to state-level self-government, and with no reason to believe that Congress had been acting to protect the republican form of government (or even any discussion of that possibility), the Court held that, as a matter of statutory interpretation, the Age Discrimination in Employment Act did not reach state judges.[321]

Other cases in which the Court has described state self-governance as a central constitutional principle involve Equal Protection challenges to a variety of state laws—from durational residency requirements for voters, which it has struck down,[322] to limitations on public employment for noncitizens, which it has upheld

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317. *Id.* (quoting Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 161 (1892)).

318. As Justice Harlan explained, at the Founding, the states retained "the power to set state voting qualifications . . . except to the extent that the guarantee of a republican form of government may be thought to require a certain minimum distribution of political power." Oregon v. Mitchell, 400 U.S. 112, 201 (1970) (Harlan, J., concurring in part and dissenting in part). In *Mitchell*, the Court evaluated the constitutionality of a series of amendments to the Voting Rights Act. In a series of fractured opinions, with an opinion by Justice Black announcing the judgment, the Court upheld provisions lowering the voting age to 18 for federal elections, abolishing literacy tests and durational residency requirements for voting in presidential elections. It struck down the provision lowering the voting age to 18 in state and local elections, precipitating the enactment of the Twenty-sixth Amendment. Four justices (Douglas, Brennan, White, and Marshall) would have upheld all of the challenged provisions, including lowering the voting age for state and local elections. Four Justices (Harlan, Stewart, Burger, and Blackmun) would have struck down the voting age provisions for both state and federal elections, and Justice Harlan also would have struck down the durational residency requirements. All justices agreed that the ban on literacy tests was constitutional as consistent with Congress's power to enforce the Fourteenth and Fifteenth Amendments. Congress did not claim to be relying on the Guarantee Clause for any of the provisions. *See also* Bonfield, *supra* note 3, at 567 (arguing that giving states the power to decide who national electors are by means of deciding who state electors are, Art. I, § 2; Am. 17, § 1, "in no way conflicts with Congress's power to regulate those requirements in the interest of preserving republican government. The states were given a free hand so long as the United States found it unnecessary to intervene pursuant to its duty under Article IV.").

319. *Gregory*, 501 U.S. at 461 (quoting Dunn v. Blumbstein, 405 U.S. 330, 344 (1972)).

320. *Id.* at 457–64.

321. *Id.* at 470.

322. *Dunn*, 405 U.S. at 330.

for jobs deemed essential to self-government but not when states enact blanket restrictions.[323] These cases involve the relationship between state-level regulation and individual rights—and in many of them, despite the soaring language about state control of its own governance, the Court in fact struck down restrictions on who states count as members of their political communities.[324] But most importantly for understanding their implications here, they simply do not address congressional power at all, much less its power under the Guarantee Clause.

Many of these cases are cited in *Shelby County v. Holder*, in which the Supreme Court struck down the part of the Voting Rights Act that imposed special obligations on certain states before they could make any changes related to voting or elections.[325] The Court rested its holding in large part on a principle of "equal sovereignty" that it said made it improper for Congress to impose regulations related to elections on only some states without highly specific justifications, even when acting under its Fourteenth and Fifteenth Amendment enforcement powers.[326] *Shelby County* is deeply problematic and has justly been extensively criticized,[327] but it does not bar congressional action under my reading of the Guarantee Clause. For one thing, much of the legislation I envision would be national in scope. In fact, aside from the equal sovereignty holding of *Shelby County*, there is a powerful substantive reason to make most if not all the reforms discussed above universal. Across-the-board regulation—that is regulation that members of the congressional majority are willing to impose on their own states—is likely to appear less punitive and less partisan than more targeted legislation and is thus more likely to help de-escalate our current antidemocratic trends.[328]

This is not to say, however, that congressional regulation pursuant to the Guarantee Clause is limited to across-the-board legislation. The Guarantee Clause protects against despots out of fear for their destabilizing effect on other states.[329] Imagine if a state's governor simply refused to leave office at the end of his term, refused to obey the orders of state or federal courts, and ordered the state police to enforce his edicts. Such circumstances, however unlikely, would be the extreme circumstance in which congressional action might be warranted before any evidence of antidemocratic spillovers arise. Indeed, Huey Long's campaign of terror and undermining of democratic processes in 1930s Louisiana prompted many citizens of Louisiana to beg the federal government for help, explicitly invoking the Clause, and led President Franklin Roosevelt to seriously contemplate federal intervention

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323. Sugarman v. Dougall, 413 U.S. 634 (1973).

324. *See, e.g.*, *Dunn*, 405 U.S. at 330 (striking down durational residency requirements for voting); Carrington v. Rash, 380 U.S. 89 (1965) (striking down Texas law prohibiting members of the military who move to Texas as part of their service from voting).

325. 570 U.S. 529 (2013).

326. *Id.* at 544–46.

327. *See, e.g.*, Linda Greenhouse, *Current Conditions*, N.Y. TIMES (June 26, 2013 6:57 PM), https://opinionator.blogs.nytimes.com/2013/06/26/current-conditions/?_r=0.

328. *See* LEVITSKY & ZIBLATT, *supra* note 20, at 215–18 (arguing against Democrats adopting tactics of Republicans because such escalation is likely to continue the death spiral).

329. *See* Section I.B.

pursuant to the Guarantee Clause.[330] (Long was assassinated before the federal government made any decisions or committed to any action.)[331] But this hypothetical use of the Clause is not the focus of this Article.

The final objections to my arguments are less about my general reading of the Clause than about my specific concerns and proposals for legislation. Indeed, one could agree with my reading of the Clause but disagree that congressional action is currently called for. These objections sound in politics. Some may see my arguments as a partisan attempt to advance the goals and electoral fortunes of the Democratic Party. And certainly my arguments here are largely consistent with the positions and interests of those who have my political sympathies. But as democracy scholars have demonstrated, the current threats to our democratic republic are disproportionately emerging from the political right.[332] In fact, that reality is the very reason my argument may be seen as a form of partisan constitutional hardball. "Unfortunately and paradoxically, the 'voting wars' have reached such a high temperature that even effectuating . . . temperature-lowering, anti-hardball solutions might in some cases require constitutional hardball."[333] My argument is thus best seen as what Fishkin and Pozen call "anti-hardball"—an opportunity to force de-escalation and "tak[e] certain types of constitutional hardball off the table" for the future.[334]

And then there is the Cassandra problem. The 2018 midterm elections turned out to be highly competitive—despite significant gerrymandering and allegations of voter suppression and irregularities. The Democratic party not only took control of the House of Representatives, but also a number of state legislatures, governorships, and other statewide offices that it had not previously held.[335] Voters in a number of states passed anti-gerrymandering or franchise-expanding initiatives.[336] But our highly polarized politics and well-documented antidemocratic trends require vigilance. As Levitsky and Ziblatt put it, "[t]he tragic paradox of the electoral route to authoritarianism is that democracy's assassins use the very institutions of democracy – gradually, subtly, and even legally – to kill it."[337] Democracy scholars' warnings of a piecemeal and gradual descent make clear that

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330. *See generally* Gerard N. Magliocca, *Huey P. Long and the Guarantee Clause*, 83 TUL. L. REV. 1 (2008).

331. *Id.* at 36.

332. *See* GINSBURG & HUQ, *supra* note 20, at 241 (pointing to Republican Party as more open to embracing democratic erosion); LEVITSKY & ZIBLATT, *supra* note 20, at 145–67, 172–75 (tracing current circumstances back to Newt Gingrich and putting most of the onus on the Republican party); *id.* at 170–71 (explaining how racial and religious polarization now maps onto partisanship); Shugerman, *supra* note 191, at 122 (arguing that Republicans are significantly more aggressive in their use of constitutional hardball and beanball than are Democrats).

333. Fishkin & Pozen, *Asymmetric Hardball*, *supra* note 185, at 981.

334. *Id.*

335. *US Mid-Term Election Results 2018: Maps, Charts and Analysis*, BBC NEWS (Nov. 28, 2018), https://www.bbc.com/news/world-us-canada-46076389.

336. *See supra* Section III.A.

337. LEVISTKY & ZIBLATT, *supra* note 20, at 8.

waiting until antidemocratic harms reach a certain level may well mean waiting too long.[338]

CONCLUSION

American democracy today is threatened and strained. There are no panaceas, but strengthening our democratic institutions and operations is essential. The Guarantee Clause offers one avenue. The Clause arose from a recognition that the states' governments do not operate in political vacuums. Although there is substantial room for diversity of and experimentation with state government structure, without core commitments to participatory democracy and representative governments, the states could not remain united. As we face threats today to those commitments, it is time to turn again to the Guarantee.

338. *See, e.g.*, GINSBURG & HUQ, *supra* note 20, at 242–43.