Article

Are State Constitutions Constitutional?

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During Reconstruction, Senator Charles Sumner from Massachusetts famously referred to the Guarantee Clause as the "sleeping giant" of the Constitution.[1] Radical Republicans like Sumner believed that the Clause's command that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government"[2] could be used as a tool for reforming the governments of the Confederate states.[3] But nearly 150 years later, the giant has still not awakened. Article IV, Section 4 of the U.S. Constitution has not emerged as a tool to police the structure of state government. Indeed, the Supreme Court has long refused even to adjudicate claims under the Guarantee Clause—they are nonjusticiable.[4]

At first glance, the courts' historical reluctance to adjudicate such claims is striking in light of the Clause's seemingly simple language. It tracks the logical inference that a Union cannot be established if some of its members are monarchies,

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1. WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 2 (1972).

2. U.S. CONST. art. IV, § 4.

3. *See* David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 AM. J. EDUC. 236, 238 (1986).

4. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 182 n.17 (1980) ("We do not reach the merits of the appellants' argument that the Act violates the Guarantee Clause, Art. IV, § 4, since that issue is not justiciable."), *superseded by statute*, 42 U.S.C. § 1973b(a)(1), *as recognized in* Northwest Austin Mun. Utility Dist. No. One v. Holder, 557 U.S. 193, 209–10 (2009); Baker v. Carr, 369 U.S. 186, 224 (1962) ("[T]he Court has consistently held that a challenge to state action based on the Guaranty [sic] Clause presents no justiciable question . . . .").

aristocracies, or dictatorships.[5] But the Clause's text does not indicate how or by whom this clause is to be enforced. No hints suggest the kinds of limits the Clause places on state governments. And despite historical clues gleaned from the Founders' concept of a republican government,[6] the Constitution does not articulate clear standards for determining whether a particular government adheres to a "republican form."[7]

The use of "republican" suggests that the state must have some form of representative government, but the variation could be quite wide. Must state government look like the federal government, with a bicameral legislature that makes all the law? Or can the power rest with the people through various forms of direct democracy? The absence of standards explains much of the judicial reluctance to wade into this definitional thicket.

This Article will examine several legal questions that might arise in disputes involving the Guarantee Clause. First, what is the state of the law over district court jurisdiction to hear the merits of the Guarantee Clause challenge? Second, at what point does the Guarantee Clause become a limit on the state's ability to structure its government in a way that is at odds with the federal model?

Part I will discuss the original meaning of the Guarantee Clause and the line of cases that applied the political question doctrine to claims arising under the Clause. Part II will address the definitional boundaries on what constitutes a republican government in light of state procedures authorizing the referendum and initiative, so-called direct democracy. Part III will consider whether courts are likely to find claims under the Guarantee Clause against voter initiative to be justiciable.

5. MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 1650 (2010).

6. *See, e.g.*, THE FEDERALIST NO. 39, at 193 (James Madison) (Ian Shapiro ed., 2009) (defining 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").

7. *See, e.g.*, Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1716 (2010) ("While scholars have shed light on what the Guarantee Clause covers, how the Clause is implemented has been drastically underevaluated.").

I. DEBATE OVER THE MEANING OF THE GUARANTEE CLAUSE

A. ORIGINAL UNDERSTANDING OF THE CLAUSE

Considerable debate animates the scholarship over the original purposes and understanding of the Clause.[8] Some commentators argue that the Clause's purpose is narrowly limited to preventing states from becoming monarchies, dictatorships, or aristocracies.[9] Others maintain that the Clause was intended to be a broader restriction on state government.[10]

One logical way to begin an analysis of constitutional words, phrases, and clauses is with a presumption that the Framers of the Constitution intended the words they used to have the meaning they understood them to have. Accordingly, the historical context giving rise to the U.S. Constitution provides valuable instruction on how to interpret the text and structure of Constitution, including the Guarantee Clause. How would an objective, well-informed person understand the meaning of the text in question?[11]

A central concept in American constitutionalism is "[t]hat all lawful power derives from the people and must be held in check to preserve their freedom."[12] "A system of government in which the people hold sovereign power and elect representatives who exercise that power" is commonly known as a "republic."[13] A republican government is distinguishable from a "pure democracy," in which the people as a whole hold and exercise the sovereign power of the government, and from a governmental regime ruled by one person or an elite group.[14] In *Federalist No. 39*, James Madison defined a "republic" as "a government which derives all its powers directly or indirectly from the great

8. For list of scholarly authorities discussing appropriate uses of the Guarantee Clause, see *id*. at 1713–16 nn.4–14.

9. *See, e.g.*, Robert G. Natelson, *A Republic, Not a Democracy?—Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 824–25 (2002).

10. *See, e.g.*, Heller, *supra* note 7, at 1716 (stating that "[g]iven the extreme unlikelihood that a state will crown a king or descend into anarchy," the idea that the Guarantee Clause is not implicated unless a state completely ceases to be republican in form "ensures its desuetude").

11. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78–90 (2012).

12. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 6–7 (3rd ed. 2000).

13. BLACK'S LAW DICTIONARY 1418 (9th ed. 2009).

14. *Id.*

body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior."[15] The Framers of the Constitution provided for the indirect exercise of sovereign power because they believed that human rights were best protected when shielded by "deliberately fragmented centers of countervailing power."[16] To them, centralized accumulation of power in any person or single group of persons meant tyranny, whereas the division and separation of powers meant liberty.[17]

One of the original aims of the Constitution was to address the defects associated with the Articles of Confederation.[18] The idea that a guarantee of republican government was necessary grew from the recognition of one defect in particular—the Articles of Confederation gave the federal government no power to suppress a rebellion in any state.[19] In a letter to Edmund Randolph dated April 8, 1787, James Madison wrote: "An article ought to be inserted expressly guarantying [sic] the tranquility of the States agst. [sic] internal as well as external dangers."[20] Madison later explained that the national government's power to guarantee a republican form of government in the states was necessary "[i]n a confederacy founded on republican principles . . . to defend the system against aristocratic or monarchial innovations."[21] At the Constitutional Convention, proponents of the guarantee explained that the purpose of securing a republican government was to secure the states against dangerous commotions, insurrections, and rebellions.[22]

Indeed, the proximate motivation for the Clause's insertion was likely Shays's Rebellion, an armed movement of aggrieved

15. THE FEDERALIST NO. 39, *supra* note 6, at 193 (James Madison); *see also* PAULSEN ET AL., *supra* note 5, at 1650.

16. TRIBE, *supra* note 12, at 7.

17. *See*, *e.g.*, THE FEDERALIST NO. 28, *supra* note 6, (Alexander Hamilton), NOS. 10, 41, 47, 51 (James Madison).

18. *See* WIECEK, *supra* note 1, at 60 (discussing the development of the Guarantee Clause and the Founders' determination that it be "more effective" than the Articles of Confederation).

19. *See id.* (mentioning how the Articles of Confederation prevented the Confederation Congress from taking action to suppress Shays's Rebellion).

20. Letter from James Madison to Edmund Randolph (Apr. 8, 1787), *available at* http://teachingamericanhistory.org/library/index.asp?document=1584.

21. THE FEDERALIST NO. 43, *supra* note 6, at 222 (James Madison).

22. 5 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 332–33 (1891).

farmers and debtors in Western Massachusetts.[23] The rebels prevented the enforcement of debts and the collection of taxes, which caused great alarm among the governing and merchant classes.[24] The prospect of state government descending into lawlessness convinced many of the delegates to the Constitutional Convention that the new national government needed the authority, if necessary, to send in troops to end mob rule and reestablish representative government.[25] The new Constitution, with the Guarantee Clause in Article IV, would provide that authority.[26]

B. POLITICAL QUESTION DOCTRINE AS A BAR TO JUDICIAL INTERPRETATION

Despite the broad wording of the Guarantee Clause, courts have not ventured to decide whether the Clause extends beyond its apparent historical purpose of authorizing the suppression of insurrections. Courts mostly decline to exercise jurisdiction over Guarantee Clause challenges.[27] In many of the cases in which litigants have asked the Supreme Court to apply the Clause, the Court has found the claims to be nonjusticiable "political questions."[28] State courts have also been reluctant to decide the merits of challenges brought under the Guarantee Clause.[29] As a result, the Clause has been an infrequent basis for litigation. Some scholars and litigants, however, argue that the merits of such claims should be decided by the courts.[30]

23. Jonathon K. Waldrop, Note, *Rousing the Sleeping Giant? Federalism and the Guarantee Clause*, 15 J.L. & POL. 267, 272 (1999).

24. For a discussion and overview of Shays's Rebellion, see WIECEK, *supra* note 1, at 27–42.

25. *See id*. at 27–33. Some have argued, however, that even in the absence of the Rebellion the Constitution would have resembled its current form. *See, e.g.*, Robert A. Feer, *Shays's Rebellion and the Constitution: A Study in Causation*, 42 NEW ENG. Q. 388, 410 (1969).

26. Authority to end internal violence is authorized by the Domestic Violence Clause, also contained within Section 4 of Article IV. U.S. CONST. art. IV, § 4.

27. *See* Heller, *supra* note 7, at 1727.

28. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 182 n.17 (1980), *superseded by statute*, 42 U.S.C. 1973b(a)(1), *as recognized in* Northwest Austin Mun. Utility Dist. No. One v. Holder, 557 U.S. 193, 209–10 (2009); Baker v. Carr, 369 U.S. 186, 218–29 (1962); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 140–51 (1912).

29. *See, e.g.*, Hammond v. Clark, 71 S.E. 479, 489 (Ga. 1911); Kadderly v. City of Portland, 74 P. 710, 719 (Or. 1903).

30. *See, e.g.*, Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 868–69 (1994); Heller, *supra*

In *Marbury v. Madison*, Justice Marshall anticipated the political question doctrine when he stated: "Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[31] The modern prudentially based political question doctrine instructs Article III courts to avoid deciding questions that the Supreme Court deems more suitable for other branches of government, even if all the other jurisdictional and justiciability requirements for adjudication are met.[32] The Court has stated that the political question doctrine "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government."[33]

To understand the doctrine, one must examine the specific areas in which the Supreme Court has applied it. One way to organize these cases is by the type of legal issue in dispute. The Supreme Court has deemed the following challenges to be political questions: claims arising under the Guarantee Clause,[34] challenges to constitutional amendments,[35] suits involving the validity of foreign or military affairs,[36] disputes over the propriety of congressional self-governance,[37] and controversies regarding impeachment.[38]

Another way to address political question precedent is by focusing on the *Baker* factors. In *Baker v. Carr*,[39] the Supreme Court identified six criteria that a court should consider when deciding whether a particular case presents a political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment

note 7, at 1749–52.

31. 5 U.S. (1 Cranch) 137, 170 (1803).

32. *See, e.g.*, Nixon v. United States, 506 U.S. 224 (1993).

33. United States v. Munoz-Flores, 495 U.S. 385, 394 (1990).

34. Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (stating that under the Guarantee Clause, "it rests with Congress to decide what government is the established one in a State").

35. Coleman v. Miller, 307 U.S. 433, 457–59 (1939) (plurality opinion).

36. Oetjen v. Cent. Leather Co., 246 U.S. 297, 303 (1918) (holding that an action in Mexico "of the legitimate Mexican government . . . is not subject to reexamination and modification by the courts of this country").

37. Field v. Clark, 143 U.S. 649 (1892). *But see* Powell v. McCormack, 395 U.S. 486 (1969) (holding justiciable the question of the substance of congressional qualifications but not the decision of whether a member satisfied those qualifications).

38. Nixon v. United States, 506 U.S. 224 (1993).

39. 369 U.S. 186 (1962).

> of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[40]

The six "*Baker* factors," however, have confused courts because the factors are subject to varied interpretations and do not amount to a clear rule. For example, *Nixon v. United States*[41] involved a dispute under the Impeachment Clause, which provides, in part: "The Senate shall have the sole Power to try all Impeachments. . . ."[42] Walter L. Nixon, a former federal judge, was impeached by the Senate. Nixon sought review of the Senate's impeachment procedure (which involved the use of a committee to take testimony and gather evidence), claiming that the Senate failed to give him a full evidentiary hearing before the entire Senate. The Supreme Court decided that the Senate had sole discretion to establish impeachment procedures and thus the issue presented a political question.

Applying the *Baker* factors, the Court found that impeachment procedure was a textually demonstrated commitment to another branch—the Court stated that "the word 'sole' indicates that this authority is reposed in the Senate and nowhere else."[43] The Court also determined that there were no judicially manageable standards for resolving the issue—the Impeachment Clause's use of the word "try" lacked "sufficient precision" to allow for judicial interpretation.[44]

The Supreme Court has repeatedly held that cases alleging a violation of the Guarantee Clause present nonjusticiable political questions.[45] *Luther v. Borden*[46] is generally regarded as the seminal case.[47] The dispute in *Luther* involved two rival governments that were each vying to be the legal government of Rhode Island.[48] In the 1840s, Rhode Island was governed by

40. *Id.* at 217 (numbering added).
41. *Nixon*, 506 U.S. 224.
42. U.S. CONST. art. I, § 3.
43. *Nixon*, 506 U.S. at 229.
44. *Id*. at 230.
45. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 154 (5th ed. 2007).
46. 48 U.S. (7 How.) 1 (1849).
47. *See* CHEMERINSKY, *supra* note 45, at 154.
48. *Luther*, 48 U.S. (7 How.) at 35–37.

an old royal charter that had been established in the seventeenth century. When a new state constitution was proposed and ratified in 1841, the incumbent government enacted a law prohibiting elections under the new constitution and imposed martial law.[49] Martin Luther was an election commissioner under the new government. In 1842, Sheriff Luther Borden broke into Luther's home to search for evidence of illegal electioneering activity, and Luther sued for trespass. Borden asserted that the search was a lawful exercise of his governmental power but Luther argued that Rhode Island's charter was not "republican" in character and that Borden acted pursuant to an unconstitutional government's orders.

The Supreme Court declined to address the merits of the case because it posed a nonjusticiable political question. The Court held that the question presented was for congressional, not judicial, resolution: "For as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not."[50] The Court thus let stand the new state constitution and left Luther to his fate.

Since deciding *Luther*, the Supreme Court has never expressly found that a state government or state action violates the Guarantee Clause.[51] But the Court has held that such claims are nonjusticiable.[52] In *Pacific States Telephone & Telegraph Co. v. Oregon*,[53] for example, the Court addressed allegations that a republican form of government is one in which the people of a state must elect representatives to govern; direct democracy was claimed to be antithetical to a republican government.[54] The case concerned an amendment to Oregon's constitution adopting voter initiative and referendum. A law taxing certain classes of corporations was then passed pursuant to the amendment, and an Oregon corporation neglected to pay the tax. When the State sued to collect the tax, the corporation defended on the theory that the adoption of the initiative and

49. *See* WIECEK, *supra* note 1, at 113.

50. *Luther*, 48 U.S. (7 How.) at 42. The Court also noted that allowing judicial challenges to the lawful authority of state governments would create practical difficulties. *Id.* at 44.

51. *See* CHEMERINSKY, *supra* note 45, at 154.

52. *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 133 (1912); Taylor v. Beckham, 178 U.S. 548, 578–79 (1900).

53. *Pac. States Tel. & Tel. Co.*, 223 U.S. at 118.

54. *Id.* at 136–38.

referendum destroyed all government republican in form in Oregon. The Court found that the claim at issue was a political question because the assault was "not on the tax as a tax, but on the State as a State."[55] The Court highlighted the difference between "the legislative duty to determine the political questions involved in deciding whether a state government republican in form exists, and "the judicial power and ever-present duty . . . to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power."[56] Despite not reaching the merits of the Guarantee Clause claim, *Pacific States* ensured that the initiative process would remain free from Guarantee Clause challenges in the years that followed.

Today, however, the justiciability barrier may not be as formidable as it once was. In *New York v. United States*,[57] the Court signaled a possible shift in the justiciability of Guarantee Clause claims. The case involved a challenge by the state of New York against federal legislation that, among other things, forced the states to "take title" to low-level radioactive waste. While the central holding of *New York* was that this "take title" provision violated the Tenth Amendment, the Court also addressed New York's Guarantee Clause claim and whether it was justiciable. The Court noted that *Luther*'s "limited holding" about who could decide the legitimacy of the Rhode Island government had "metamorphosed into the sweeping assertion that '[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts.'"[58] Prior to the elevation of *Luther* "into a general rule of nonjusticiability," the Court noted that it had "addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable."[59] Though the Court intimated that courts could reach the merits of Guarantee Clause claims, "at least in some circumstances," it opted not to lay down a general rule because New York's claims would have failed on the merits anyways.[60] The Supreme Court's suggestion that the justiciability barrier is not absolute may have

55. *Id.* at 150.
56. *Id.*
57. 505 U.S. 144 (1992).
58. *Id.* at 184 (quoting Colegrove v. Green, 328 U.S. 549, 556 (1946)).
59. *Id.*
60. *Id.* at 185–86.

implications for the judiciary's role in considering popularly enacted state provisions.

II. THE CONTRADICTORY NATURE OF REPRESENTATIVE GOVERNMENT

A. STATE VOTER INITIATIVE AND REFERENDUM

The initiative and referendum are forms of direct democracy that arose in the late nineteenth and early twentieth centuries.[61] Since then, direct-legislation devices have been used by many states to guide and formulate state policy.[62] The citizens of several states have embraced the concept of popular participation in the legislative process and some have amended their state constitutions to guarantee direct democracy.[63]

The initiative allows the people to propose state or local legislation through petitions, for enactment or rejection at the polls.[64] Voter initiatives can either enact or repeal laws, but the proposals must not exceed the scope of the government's power. For example, the proposed law must not violate the Contracts Clause; it cannot be discriminatory, arbitrary, or unreasonable; and it cannot contravene state limits, statutes, or policy. The initiative process itself is considered political speech and is protected under the First and Fourteenth Amendments of the U.S. Constitution.[65]

Voter referendums also enable direct participation in the legislative process. When electorates are given the power to vote by referendum, they can require a legislative body to submit legislation to reexamination by the people. Many state constitutions, charters, and statutes provide that a governing body must submit proposed action to referendum, reconsider legisla-

61. *See generally* RICHARD HOFSTADTER, THE AGE OF REFORM, 255, 265–66 (1959) (discussing the restoration of popular government).

62. Timothy M. Tymkovich, *Colorado Survey: Recent Legislation and Colorado Supreme Court Decisions Referendum and Rezoning*, 53 U. COLO. L. REV. 745, 749 (1982).

63. *Id.*

64. *See* Natelson, *supra* note 9, at 808 n.2.

65. *See* Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 192 (1999) (finding that the First Amendment requires vigilance in judging the validity of restrictions on the initiative process); Yes on Term Limits, Inc. v. Savage, 550 F.3d 1023, 1030–31 (10th Cir. 2008) (finding that Oklahoma's ban on non-resident petition circulators violated the First and Fourteenth Amendments of the U. S. Constitution).

tion upon a petition signed by a certain percent of voters, or subject enacted legislation to a popular referendum.[66]

Challenges to voter proposals through initiative and referendum can be either procedural or substantive, and the adequacy of a petition can be challenged in court.[67] Sometimes proposals are disqualified because they contain more than one subject or do not comport with other procedural requirements. A voter proposal will be disqualified when, if enacted, the measure would be unconstitutional on some other ground.

Critics of participatory democracy assert that it has the potential to destroy representative government as required by the U.S. Constitution.[68] Voter initiative and referendum procedures have also been criticized for allowing the exploitation of emotional social issues, creating poorly drafted laws that are difficult to amend or repeal, incapacitating legislatures, and monopolizing the agenda of public discourse.[69] Other problems arise when money is used for signature gathering and advertising.

Despite such criticisms, many states have a strong tradition of supporting direct legislation. For example, in 1910, Colorado voters overwhelmingly adopted a constitutional amendment guaranteeing the initiative and referendum.[70] The amendment was codified in article V of the Colorado Constitution. When faced with challenges to the scope of the initiative and referendum, Colorado courts have generally deferred to the amendment, citing the enabling language of the state constitution, which states, "[a]ll political power is vested in and derived from the people."[71]

B. DIRECT DEMOCRACY AND THE GUARANTEE CLAUSE

Although the language of the Guarantee Clause seems to require each state in the Union to maintain a representative democracy, courts have generally allowed states to legislate

66. *See, e.g.*, COLO. CONST. art V, § 1.

67. *See* Craig B. Holman, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239, 1242–44 (1998) (discussing ways to challenge voter initiatives).

68. Tymkovich, *supra* note 62, at 749.

69. *See, e.g.*, Daniel M. Warner, *Direct Democracy: The Right of People to Make Fools of Themselves; The Use and Abuse of Initiative and Referendum, A Local Government Perspective*, 19 SEATTLE U. L. REV. 47, 77–84 (1995) (discussing problems in drafting, voter approval, and execution stages).

70. *Id.*

71. COLO. CONST. art. II, § 1.

through voter initiative and referendum.[72] A distinction, however, can be drawn that could result in a challenge to a voter initiative or referendum: an attack on the *process* of initiative and referendum may be different than an attack on the legislation that *results* from such process.

For example, critics who oppose voter initiative and referendum argue that the results of voter-controlled legislation can have a cumulative effect that undermines the republican nature of state governments.[73] In *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, Jacob Heller argues that the Guarantee Clause should be used to invalidate specific policies that threaten, but do not necessarily destroy, a state's republican form of government.[74] This reasoning is based on the premise that the question of when the outer limits imposed by the Guarantee Clause are triggered is one of degree. Thus, the initiative and referendum process itself may not be enough to implicate the Clause, but when the results of the process reach a certain degree of deviation from republican norms, they may become subject to the limits of the Clause.

But no court has examined specific provisions as testing those outer limits, nor has the Supreme Court suggested in any case that particular provisions resulting from the initiative process call into question the essential republicanism of state constitutions.

III. THE CHALLENGE TO STATE-INITIATED MEASURES AND THE MEANING OF THE GUARANTEE CLAUSE

If plaintiffs can clear the justiciability hurdle, the disposition of their claims will hinge on the proper interpretation of the Guarantee Clause. This depends in part on the how the Clause was intended to restrict state government. If the Clause was intended to prohibit only blatant state violations of fundamental republican concepts, then a state can argue that the Clause does not apply to run-of-the-mill constitutional provi-

72. *See*, *e.g.*, Rossi v. Brown, 889 P.2d 557, 560 (Cal. 1995) (construing state constitutional provisions liberally in favor of the people's right to exercise the powers of initiative and referendum); Margolis v. Dist. Court, 638 P.2d 297, 304–05 (Colo. 1981) (upholding the power of Colorado's citizens to review rezoning decisions of municipal governments through referendum elections); Okla. Tax Comm'n v. Smith, 610 P.2d 794, 806 (Okla. 1980) (holding that the state legislature could not change a question pending before the people by initiative or referendum).

73. *See* Heller, *supra* note 7, at 1713.

74. *Id.* at 1716.

sions—they do not turn state government into a monarchy or unauthorized outlier form of government. But if the purpose of the Clause is to require states to maintain substantially representative democracies through the use of traditional separation-of-powers techniques, some measures may raise sufficient concerns to interest courts in the line-drawing process such an inquiry would seem to require.

Even if a court concludes that the Guarantee Clause imposes more-than-minimal requirements on state government, establishing where the floor for republican government lies will be an interesting task. Originalist interpretations of this question tend to yield a more limited set of requirements, given the Founders' toleration of diverse forms of state governments.[75] An interpretation done through the lens of political theory—with less fluid definitions of "republic" and "democracy"—will probably yield a more robust set of requirements.

In *New York*, the Supreme Court hinted at a possible approach to adjudicating Guarantee Clause claims based on federal legislation aimed at state governments. Without deciding the justiciability question, the Court found that neither federal monetary incentives for the state to dispose of radioactive waste nor the exclusion of waste producers from disposal sites in other states denied "any State a republican form of government."[76] The Court reasoned that, because the States had a "legitimate choice" whether to accept the federal incentives, they retained "the ability to set their legislative agendas" and "state government officials remain accountable to the local electorate."[77]

While some of *New York*'s criteria—state control over legislative agendas and state official accountability—may shed light on what constitutes "republican" government, they shed little light on how the Court would come out on other challenges, such as limits on a state's taxing and spending powers that are not imposed by federal legislation but adopted by the states themselves. In *New York*, the claim was that federal legislation was denying the states the ability to maintain an autonomous government. The focus was on the distribution of power between the *states* and the federal government, not on the distribution of power within a state. The latter scenario raises a

75. *See, e.g.*, Natelson, *supra* note 9, at 814–15 (arguing that the Founders accepted a wide range of citizen lawmaking).

76. New York v. United States, 505 U.S. 144, 185 (1992).

77. *Id.*

much harder question: whether legislative control and electoral accountability can even be threatened when both voting and lawmaking remain exclusively within a state. A court's review of a particular piece of legislation passed under a state initiative or voter referendum will highlight the difficulty of judicial line drawing in this situation.

CONCLUSION

The point of this Article has not been to consider the legal merits of a challenge to the state initiative power or particular measures resulting from that process, but to outline some of the concerns and questions in any Guarantee Clause challenge. It seems inevitable we are likely to see more Guarantee Clause claims directed at products of direct democracy. The political climate is polarized and factions on each side of the aisle are resorting to various initiatives and referendums to bypass stalemated or reluctant state legislatures. Meanwhile, their respective opponents will continue to use the courts to stop them.

But the introduction of the *Baker* factors in future cases and *New York*'s statement that the justiciability bar may not be absolute has given courts an opening to consider the justiciability of Guarantee Clause challenges. Unless the Supreme Court speaks otherwise, lower courts might take up the challenge. Yet it is still uncertain whether courts will know where to go with Guarantee Clause claims once they have crossed the justiciability barrier.