

# REFEREES OF REPUBLICANISM: HOW THE GUARANTEE CLAUSE CAN ADDRESS STATE POLITICAL LOCKUP

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*Our Government derives its legitimacy from the consent of the governed, generally measured through our elections. When incumbent powers create structures and rules for our politics that entrench the status quo and limit voter control, however, the legitimacy of that consent is tested. For more than fifty years, and in spite of the “political question doctrine,” the Supreme Court has adjudicated challenges to franchise restrictions, gerrymandering, ballot access provisions, and more. In doing so, the Court utilizes doctrinal frameworks that focus on harms to individual rights and not on structural harms to the competitiveness, accountability, and responsiveness of our politics. This myopic view leaves systemic entrenchment and political lockup largely untouched. Scholars have identified these doctrinal deficiencies, but have not suggested an alternative textual basis for judicial intervention in these cases. This Note offers a potential solution in the Guarantee Clause. It argues that the Clause embodies a promise of popular sovereignty in the states. I contend that the Guarantee Clause can and should be revived to unburden the courts from the deficiencies of existing doctrine and provide a textual basis for addressing the problems of political malfunction.*

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*“But who can say what experiments may be produced . . . by the  
 ambition of enterprising leaders . . . ?”*

—James Madison<sup>1</sup>

INTRODUCTION

The Constitution “guarantee[s] to every state in this Union a Republican form of government.”<sup>2</sup> Consider a state in which voters go to the polls and cast their votes for governor, state legislators, and other local officials to represent their interests. In the abstract, this system meets our colloquial definition of a republic, as the power ultimately resides with the people, but is exercised through representatives accountable to them.<sup>3</sup> Yet surely the mere fact of elections is not sufficient. If voters had the chance to enter a booth and check a box but there were only ever one candidate, if the results of elections were fabricated, or if voters were coerced, then it would be a farce to consider that government a republic.

How, then, should we consider other more subtle or complex limits on popular control over the levers of power? If government officials or party officials rig the structures of politics to entrench the status quo and limit voters’ choices—through laws hindering certain parties’ or candidates’ access to the ballot, through laws that restrict who is eligible to vote, or through district lines drawn to benefit those already in power—what recourse do voters have? When voters cannot meaningfully utilize democratic institutions to change the status quo and assert their power, their only other option is to appeal to the courts.

Unfortunately, doctrines have developed over time that make federal courts unlikely to address practices that are harmful to the

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<sup>1</sup> THE FEDERALIST NO. 43, at 225 (James Madison) (George W. Carey & James McClellan eds., 2001).

<sup>2</sup> U.S. CONST. art. IV, § 4.

<sup>3</sup> The relevant definition of republic is “a government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them and governing according to law.” *Republic*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/republic> (last visited Sept. 12, 2016). In fact, the Latin root for republic is *res publica*, or the “public thing.”

polity as a whole. First, it has been the well-worn cliché of the courts to rule most “political questions” nonjusticiable. This is especially true of claims brought under the Guarantee Clause.<sup>4</sup> Perhaps that is understandable, given worries about an unelected judiciary entering the “political thicket.”<sup>5</sup> That said, for at least fifty years now, the Court *has* reached the merits in countless “political” cases, deciding challenges to gerrymandering and malapportionment, campaign finance restrictions, ballot access provisions, and more.<sup>6</sup> Yet nonjusticiability remains a hurdle for the Guarantee Clause.

Second, when the Court does hear cases about political structure, it considers them on constitutional grounds under the Equal Protection Clause or the First Amendment that focus on the burden to an individual voter or party. The individualist analysis largely ignores how the structures of our politics harm polity-wide values, such as competition, responsiveness to the voters, and majoritarian control.<sup>7</sup> The cumulative burden of multiple interrelated statutes on the polity is particularly overlooked by the existing doctrine’s individualistic focus.<sup>8</sup>

Thus, the Court will entertain challenges to rules and structures, but only under an individual rights framework that does not take structural values into consideration. Meanwhile, the only clause focused on the structures of our politics, the Guarantee Clause, is virtual dead letter. As a result, the Court currently lacks an appropriate

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<sup>4</sup> See *infra* Section II.A (describing the doctrinal abandonment of the Guarantee Clause).

<sup>5</sup> *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J.). Though, as Justice Douglas challenged in *Baker*, “[W]ould this Court hold nonjusticiable or ‘political’ a suit to enjoin a Governor who, like Fidel Castro, takes everything into his own hands and suspends all election laws?” *Baker v. Carr*, 369 U.S. 186, 246 n.3 (1962) (Douglas, J., concurring).

<sup>6</sup> See Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684, 689–90 (2002) (listing many ways in which courts have altered the structure of politics); Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 671–72 (2002) (“Whatever its initial intentions, the Supreme Court is now embroiled in the very heart of the political thicket. A substantial share of the Court’s docket consists of cases involving the regulation of politics—restrictions on campaign spending, redistricting, ballot access, candidates’ speech, and so on.”).

<sup>7</sup> See Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 417 (2015) (“[E]ntrenchment has not typically been the doctrinal focus. Instead, courts have tended to frame their role as enforcing individual rights, leaving systemic concerns like preserving political competition and preventing entrenchment mostly offstage.”); Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 293–94 (2014) (discussing how the Court focuses on individual rights over democratic values).

<sup>8</sup> See *infra* Section I.A (discussing cases in which the Court fails to acknowledge the serious structural harms).

Constitutional framework for considering structural burdens on democratic control of government.

Existing scholarship recognizes this phenomenon. John Hart Ely, Rick Pildes, Sam Issacharoff, Heather Gerken, and Michael Klarman have written extensively on the problems of political entrenchment and on anticompetitive “lockup” of the political markets by incumbent powers. Lockup describes a system where the rules and structures of politics have made changing the status quo more difficult than it should be considering majoritarian preferences.<sup>9</sup> Scholars also ably describe the flaws of the application of individualist equal protection or First Amendment lenses to problems that are structural, interrelated, and implicate more broad-based, polity-wide values such as competition, responsiveness, and popular consent.<sup>10</sup> A separate set of scholars has urged the revival of the Guarantee Clause, arguing that it was both historically incorrect and normatively undesirable for the Court to have labeled claims brought under its aegis “nonjusticiable.”<sup>11</sup>

However, those criticizing the mismatch of the legal doctrine to these problems have neglected to offer an alternative textual and doctrinal framework that unburdens the Court from the problems of its individualistic analysis and allows engagement with structural problems.<sup>12</sup> And those who argue for the revival of the Guarantee Clause, with its focus on the “form of government,” have mostly ignored the structural problems of political entrenchment and lockup.<sup>13</sup>

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<sup>9</sup> See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648–49 (1998) (defining political lockup); Levinson & Sachs, *supra* note 7, at 408 (defining entrenchment). Of course, normative words like “should be” beg the question as to how one defines the “normal,” “appropriate,” or “baseline” condition. Levinson and Sachs describe multiple potential measures of this baseline, but for my purposes, as for theirs, it “is the (more or less hypothetical) alternative of effecting political change through some process that (better) tracks the preferences of democratic majorities or the median voter.” *Id.* at 411. Throughout this piece I use “lockup” and “entrenchment” interchangeably despite slightly different meanings, as both suffice for my purposes.

<sup>10</sup> See *infra* notes 76–81 and accompanying text (discussing the need for better ways to address the mismatch between the individual rights framework and the operation of democratic politics).

<sup>11</sup> See *infra* Part II (discussing judicial and academic arguments for a revival that comports with existing doctrine).

<sup>12</sup> See *infra* Section I.B (showing how scholars fail to provide a constitutional “hook” for intervention on structural problems).

<sup>13</sup> Two pieces come close to advocating for the application of the Guarantee Clause to questions of entrenchment, but both focus exclusively on partisan gerrymandering. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 114–15 (2000) (proposing the Guarantee Clause as a solution to malapportionment); Ari J. Savitzky, Note, *The Law of Democracy*

This Note seeks to bridge the gap between these spheres of scholarship by developing a notion of how the Guarantee Clause both positively could and normatively should serve as a constitutional basis for judicial intervention in cases of state political lockup. I adopt a conception of the Guarantee Clause that focuses on its central promise of “popular sovereignty” and allows for intervention not only in the extreme and unlikely situation where a state ceases to be a republic altogether, but also when a provision is antirepublican.<sup>14</sup> While not a panacea, developing standards based on the Guarantee Clause can free the courts from the burdens and baggage of its existing doctrine and allow courts to address some problems of political malfunction more holistically.

Part I lays out the problem. Section A demonstrates existing doctrinal deficiencies that push the Court toward an unfortunately blinkered view of politics that fails to address the complex and interrelated ways in which popular control is diminished. Section B provides a background on existing scholarship around political “lockup” and entrenchment and shows how scholars neglect to offer an alternative textual solution. Part II presents my proposed solution: the Guarantee Clause. Section A details the history of the Clause’s decline and dormancy. Sections B and C outline why the Clause is both justiciable and manageable, and how it *can* be revived. Finally, Part III makes the normative case that the Clause *should* be revived as a solution for state political lockup and then discusses the details of *when* and *how* this would occur in practice.

## I

### POLITICAL ENTRENCHMENT AND DOCTRINAL DEFICIENCIES

This Part outlines the doctrinal deficiencies that stem from the Court’s focus on individual voters’ rights and burdens, and how the scholarship recognizes these issues but fails to offer a solution based in the text of the Constitution.

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*and the Two Luther v. Borden: A Counterhistory*, 86 N.Y.U. L. REV. 2028, 2057–58 (2011) (describing how the shift away from the Guarantee Clause in apportionment cases has failed in some respects).

<sup>14</sup> See *infra* Section II.B (discussing the role of republicanism in certain interpretations of the Guarantee Clause). Jacob Heller terms this conception the “death by a thousand cuts” approach to the Guarantee Clause. See generally Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711 (2010).

### A. *How Supreme Court Doctrine Enables Entrenchment*

Officials and parties in power utilize the rules and structures of our politics—from franchise restrictions to ballot access requirements to district lines—to entrench themselves. The Constitution generally emphasizes individual harms, such as to a citizen’s freedom of speech or association, or to his or her right to equal protection under the law. Consequently, the Supreme Court analyzes challenges to election laws by balancing the individual burden with the countervailing justification proffered by the state.<sup>15</sup> Under this analysis, the burden of the specific provision is often minimal and generally outweighed by abstract state interests in party stability or avoiding voter confusion.<sup>16</sup>

The harm of these entrenching actions is primarily to structural values like competition, fairness, and the responsiveness of elected officials to the people, and does not accrue to specific individuals. Consequently, under the individualistic legal tests, the Court does not address these harms. The Court currently does not illuminate the contours of how our politics *should* operate—that is, defining what minimum is guaranteed regarding how officials are elected and the people represented.<sup>17</sup> The frequent result is an elevation of the mere possibility that a candidate *can* get on a ballot or voters *can* “throw the bums out” to a sufficient condition for upholding laws. But if these laws were considered in conjunction with other election laws and practical political realities, they would be revealed as illegitimate devices of entrenchment.<sup>18</sup>

*Burdick v. Takushi*<sup>19</sup> presents an example of how the Supreme Court upholds laws that entrench the existing order under its First Amendment analysis. In *Burdick*, a registered voter in Hawaii challenged the State’s prohibition on write-in voting as a violation of his right to free association.<sup>20</sup> Faced with only one candidate on the pri-

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<sup>15</sup> See *infra* note 22 and accompanying text (discussing the balancing test used in election law cases).

<sup>16</sup> See *infra* notes 22–29 and accompanying text (describing, for example, a write-in ballot case in which the Court found that the government’s concerns outweighed the individual’s burden).

<sup>17</sup> See Burt Neuborne, *Felix Frankfurter’s Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. REV. L. & SOC. CHANGE 602, 631 (2011) (“But without a substantive theory of what it means to have fair, as opposed to equal, representation in a democracy, judges can’t confront the problem effectively.”).

<sup>18</sup> See Levinson & Sachs, *supra* note 7, at 406 (“[C]ourts have not yet fashioned doctrinal tools aimed explicitly at preventing or remedying entrenchment.”). Undoubtedly, there are other informal, nonlegal ways to prevent change, from shooting opponents to creating political impediments to change, but these are beyond the scope here. See *id.* at 409 (discussing additional, informal ways political actors can preserve the status quo).

<sup>19</sup> *Burdick v. Takushi*, 504 U.S. 428 (1992).

<sup>20</sup> *Id.* at 430.

mary election ballot, Burdick wanted to write in Donald Duck instead.<sup>21</sup> In rejecting his claim, the Court applied a now-prevalent balancing test weighing “‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule.’”<sup>22</sup> The Court adopted a “narrow, individualistic, nonsystemic conception” of the harm as a burden on Burdick’s expressive right to cast a protest vote for a cartoon duck.<sup>23</sup> Unsurprisingly, the Court found this harm insufficient to overcome the State’s interests in preventing “unrestrained factionalism” and guarding against “party raiding.”<sup>24</sup>

But the Court missed the full scope of the plaintiff’s political reality. One party had continuously controlled the governorship, state senate, and state house for over twenty-five years, making its primary election dispositive.<sup>25</sup> Moreover, state laws made it incredibly difficult for an independent candidate or a third party to secure a place on the general election ballot.<sup>26</sup> Given this context, the write-in ban had the effect of preventing voters like Burdick from meaningful participation.<sup>27</sup> It was because of this broader structural harm—the disappear-

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<sup>21</sup> *Id.* at 438.

<sup>22</sup> *Id.* at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

<sup>23</sup> Issacharoff & Pildes, *supra* note 9, at 672–73.

<sup>24</sup> *Burdick*, 504 U.S. at 439–40.

<sup>25</sup> Anne Feder Lee, *Hawaii*, in *State Party Profiles: A 50-State Guide to Development, Organization, and Resources* 73, 74 (Andrew M. Appleton & Daniel S. Ward, eds., 1997) (“Since 1962 Democrats have retained control over the state’s congressional delegation and its legislative and executive branches.”). Around the time of the case, roughly one-third of Democratic candidates ran unopposed in state legislative races (including Burdick’s own legislative district), and more than one-quarter of voters in uncontested state Senate races would simply cast blank ballots. *Burdick*, 504 U.S. at 442 (Kennedy, J., dissenting). The Party might argue this merely reflects voters’ satisfaction, but that does not justify efforts to block independent candidates.

<sup>26</sup> The law required an independent candidate to obtain ten percent of all votes cast in the primary (or more votes than the worst-performing major party victor). Further, each primary voter had to choose only a single party’s ballot for all offices, meaning the candidate would have to convince potential supporters to forego voting in the dispositive primary elections for other offices. See HAW. REV. STAT. § 12-41 (1993) (articulating the ten percent rule); Brief of Petitioner at 30 n.21, *Burdick v. Takushi*, 504 U.S. 428 (1992) (No. 91-535), 1992 WL 532906, at \*30 n.21 (explaining the mechanism of the single-party ballots). For a third party to be eligible to be on the general election ballot, it must file signed petitions five months prior to the primary election, an exceedingly early filing deadline. *Burdick*, 504 U.S. at 443 (Kennedy, J., dissenting). Consequently, only eight independent candidates had reached general elections in the preceding ten years. *Id.* at 436.

<sup>27</sup> *Burdick*, 504 U.S. at 443 (Kennedy, J., dissenting); see also Issacharoff & Pildes, *supra* note 9, at 671 (“[T]he cumulative structure of Hawaii’s laws eviscerates any nascent resistance to the Democratic monopoly.”).

ance of any mechanism for disrupting the status quo—that Burdick petitioned the Court.<sup>28</sup> Failing to recognize this dynamic, the majority also endorsed Hawaii’s stated interest in political stability, which, considering the context, clearly amounts to an effort by incumbents to maintain power by placing a higher burden on challengers’ entry.<sup>29</sup>

The disappointing outcome of *Burdick*<sup>30</sup> may be partly traced to the deficiencies of the doctrine. The shortsighted balancing of the burdens on individual voters’ First Amendment rights with state interests<sup>31</sup> often leads to a myopic evaluation that discounts the harm to the people as a polity and the integrity of the system by which their representatives’ authority is legitimized.<sup>32</sup>

A similar pattern emerges in the Court’s First Amendment analysis in *New York State Board of Elections v. Lopez Torres*.<sup>33</sup> A group of judicial candidates not favored by party leadership challenged a New York law that required that parties select their candidates for the state trial courts through a convention system in which delegates are elected by party members.<sup>34</sup> The plaintiffs claimed the law violated their rights to ballot access and voters’ rights of association.<sup>35</sup> Both major state parties intervened in the litigation to defend the status quo.

The Supreme Court upheld the law, finding a minimal individual burden on candidates’ and voters’ rights.<sup>36</sup> The Court pointed to other means of securing the party’s nomination, voters’ ability to reject the party leadership’s slate, and candidates’ ability to run as independents.<sup>37</sup> However, the cumulative burden of the state’s election laws

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<sup>28</sup> See Robert Reinhold, *Hawaii Lawsuit May Test Limits of Write-In Votes*, N.Y. TIMES, (Aug. 29, 1991), <http://www.nytimes.com/1991/08/29/us/hawaii-lawsuit-may-test-limits-of-write-in-votes.html> (describing Mr. Burdick’s decision to file suit as a response to Hawaii law which prohibited his protest vote).

<sup>29</sup> See Issacharoff & Pildes, *supra* note 9, at 672–73 (describing how the state’s interest in political stability amounts to an interest in stifling competitive elections).

<sup>30</sup> See *id.* at 670 (“A political process case more wrongly decided than *Burdick* is difficult to imagine.”); Neuborne, *supra* note 17, at 645 (arguing that *Burdick* “may be the Court’s worst democracy decision”).

<sup>31</sup> This balancing test may be the “closest the Supreme Court has come to articulating a general theory of judicial activity in the election law domain,” and is employed in franchise restriction, party regulation, campaign finance, redistricting, and minority representation cases. Stephanopoulos, *supra* note 7, at 292.

<sup>32</sup> In addition to *Burdick* and *Lopez Torres*, see also as examples of this phenomenon *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), and *Clingman v. Beaver*, 544 U.S. 581 (2005).

<sup>33</sup> N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196 (2008).

<sup>34</sup> See *id.* at 200–01 (describing the convention system).

<sup>35</sup> *Id.* at 201.

<sup>36</sup> *Id.* at 204, 209.

<sup>37</sup> *Id.* at 205, 207–08.

rendered it virtually impossible to successfully challenge the preferred choice of the local party boss.<sup>38</sup> The record contained no evidence of a single successful challenge to a party leader-backed candidate in either party.<sup>39</sup> In the rare competitive district, the major parties often divvied up judgeships and cross-endorsed.<sup>40</sup> The result was a state-mandated scheme that invites voter participation, but functionally excludes candidates not hand-picked by party leaders.<sup>41</sup> Thus, though perhaps imposing a minimal individual burden, the scheme placed a significant burden on the polity by frustrating structural values such as competition, responsiveness, and transparency.

Equal protection analysis suffers similar deficiencies in its focus on individual harms. Originally adopted to protect against racial discrimination, the first application of the text to voting rights outside of the race context came in *Baker v. Carr*.<sup>42</sup> Faced with extreme malapportionment, the Court used equal protection to ensure that state legislative districts would be drawn with equal populations.<sup>43</sup> Yet, by definition, the Clause does not protect voters when they are all treated equally poorly—for example when everyone’s vote is ineffective or even nonexistent.<sup>44</sup> Consequently, after the initial wave of mal-

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<sup>38</sup> Party members hoping to nominate a certain supreme court candidate would have to 1) recruit a slate of delegates in each Assembly District within the Judicial District; 2) recruit them four months in advance; 3) have each slate file its own 500-plus signature petition (which totaled over 12,000 signatures in the Judicial District at issue); 4) ensure each signer resides in the Assembly District and has only signed one petition; 5) file this within the 37-day period; and 6) defend the signatures from legal challenge (which often doubles the amount one would need to collect). They would also have to find a way to inform primary voters which candidate those delegates would support at the convention—the delegates’ names are not associated with the candidate on the ballot. Brief for Respondents at 6–9, *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008) (No. 06-766). Moreover, unlike with normal elections, voters do not have an opportunity to subsequently throw the delegates out of office, as their job is completed “two weeks after the election and twenty minutes after they have been sworn in.” *Id.* at 38.

<sup>39</sup> *Id.* at 11. More than ninety-six percent of nominations were also uncontested at the convention. *Id.* at 10.

<sup>40</sup> *Id.* at 12.

<sup>41</sup> Brief of Amici Curiae Law Professors Guy-Uriel E. Charles et al. at 6, *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008) (No. 06-766). Perhaps unsurprisingly, the suit arose largely because the county boss denied López Torres the party backing after she refused to make patronage hires. Tom Robbins, *The Backroom Crowd*, VILLAGE VOICE (Sept. 16, 2003, 4:00 AM), <http://www.villagevoice.com/news/the-backroom-crowd-6409322>. This remains the situation in New York today. See Kat Aaron, ‘Smoke Filled Rooms’ Still Rule New York Judicial Elections, WNYC NEWS (Sept. 8, 2016), <http://www.wnyc.org/story/new-york-judicial-elections-smoke-filled-rooms-still-rule/>.

<sup>42</sup> 369 U.S. 186 (1962).

<sup>43</sup> See *infra* Section II.A.

<sup>44</sup> James A. Gardner, *Forcing States to Be Free: The Emerging Constitutional Guarantee of Radical Democracy*, 35 CONN. L. REV. 1467, 1478 (2003) (“The [Equal Protection] Clause, that is, does not entitle any person, group or polity to a form or degree of democratic popular control beyond whatever the state chooses to provide. . . . Where other

apportionment was corrected, the continued focus on equal protection created an imperfect conceptual fit for second-order cases involving political lockup.<sup>45</sup> The Court's focus on equality, instead of on defining the substantive values of our political structures, led them to uphold practices such as the "bipartisan gerrymander" at issue in *Gaffney v. Cummings*.<sup>46</sup>

In *Gaffney*, Connecticut Democrats and Republicans had forged a compromise that partitioned the State's legislative districts so as to lock in the proportional partisan status quo.<sup>47</sup> Applying equal protection analysis, the Court upheld the plan's constitutionality.<sup>48</sup> In fact, the Court seemingly endorsed the practice of the bipartisan gerrymander, writing that "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength."<sup>49</sup> This makes sense under equal protection's individualist focus, as no individual faces any greater burden or harm than any other individual.

Yet, this doctrinal framework does not consider the substantial structural harms at issue. If all districts are drawn to be "safe" Democratic or "safe" Republican districts, shifts in voter preferences would not be reflected in elections, as virtually every seat would be noncompetitive. Thus, the bipartisan gerrymander entrenches incumbents from both parties, reduces competition, and also likely reduces the responsiveness of the government to voters.<sup>50</sup> As with the First Amendment, equal protection analysis does not contemplate these structural harms to the polity. Criticism of the Court's equal protec-

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qualified voters have no right to participate, even universal exclusion does not offend the Clause.").

<sup>45</sup> See RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* 141–42 (2014) (discussing how the Equal Protection theory behind the *Baker* line of cases precluded challenges to gerrymandering).

<sup>46</sup> *Gaffney v. Cummings*, 412 U.S. 735 (1973).

<sup>47</sup> See *id.* at 738 (describing how the Connecticut state legislature created voting districts "aimed at a rough scheme of proportional representation of the two major political parties").

<sup>48</sup> *Id.* at 752.

<sup>49</sup> *Id.* at 754.

<sup>50</sup> See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 617–20 (2002) (criticizing the *Gaffney* decision on these dimensions).

tion analysis has accompanied *Bush v. Gore*,<sup>51</sup> *Vieth v. Jubelirer*,<sup>52</sup> and *McConnell v. FEC*<sup>53</sup> for similar reasons.

As these First Amendment and equal protection cases demonstrate, political actors will utilize the mechanisms of the state and its laws to entrench themselves, whether to shift control to one political party (*Burdick v. Takushi*),<sup>54</sup> to both political parties at the expense of competitive elections and third-party challenges (*Gaffney v. Cummings*),<sup>55</sup> or to party bosses at the expense of the rank-and-file (*New York State Board of Elections v. Lopez Torres*).<sup>56</sup> Challengers must either argue that 1) the laws impermissibly burden their individual rights, or 2) the laws lend their neighbor more power than they have. The argument they cannot make is that these laws create structures that prevent the people as a whole from having meaningful control. Yet, without free and open political structures we cannot be sure that the status quo government enjoys the consent of the governed,

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<sup>51</sup> *Bush v. Gore*, 531 U.S. 98 (2000). This case actually provides a rare example of a case in which the Court *did* apply equal protection analysis to a structural harm, but the attempt here to shoehorn structural harms into equal protection has been deservedly criticized. See Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 48–50 (2004) (elucidating the incongruity between the Court’s analysis and concerns). Even those sympathetic to the result acknowledge that the argument “deserves much of the scorn that has been heaped upon it.” Richard A. Epstein, “*In Such Manner as the Legislature Thereof May Direct*”: *The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613, 614 (2001). The Florida recount presented no *ex ante* inequality of burden on voters, *id.* at 616–17, and the core of the case was “more consistent with [a] structural concern for partisan capture of election processes.” Pildes, *supra* note 51, at 49. Pam Karlan labels the *Bush* Court’s analysis “structural equal protection.” Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1364 (2001). For a summary of the common attacks on the Court’s analysis in *Bush v. Gore*, see Jonathan L. Entin, *Equal Protection, the Conscientious Judge, and the 2000 Presidential Election*, 61 MD. L. REV. 576, 577–79 (2002).

<sup>52</sup> *Vieth v. Jubelirer*, 541 U.S. 267 (2004); see Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 505–06 (2004) (discussing *Vieth* and concluding: “An individual-rights framework is suitable for addressing a concrete and personal harm, like the disenfranchisement of a voter. In a partisan gerrymander case, however, no individual has been denied the right to vote; the claim is about who wins, not who votes.”).

<sup>53</sup> *McConnell v. FEC*, 540 U.S. 93 (2003); see Gerken, *supra* note 52, at 515–17 (“The language of individual rights—the right to free speech and the state interest in preventing corruption—seems too abstract or too narrow to capture what is at stake here.”).

<sup>54</sup> 504 U.S. 428, 442–44 (1992) (Kennedy, J. dissenting) (describing Hawaii’s voting system and prohibition of write-in voting, which posed barriers to third-party and independent candidates in favor of the Democratic Party).

<sup>55</sup> 412 U.S. 735, 738 (1973) (describing a challenged reapportionment plan in Connecticut that was based upon Democratic and Republican voting results in preceding elections).

<sup>56</sup> 552 U.S. 196, 200–01 (2008) (describing New York’s Supreme Court election system requiring parties to select candidates).

which is the fundamental Lockean basis for its legitimacy.<sup>57</sup> Instead of confronting important questions about our political structures head on, the Court applies a formula imported from other areas of constitutional law and engages in an “unsatisfying discourse about individual entitlements and the quality of counterpoised state interests.”<sup>58</sup>

*B. Scholars Identify the Doctrinal Problem, but Do Not Offer a Textual Solution*

Many in the academic community have recognized the doctrinal problems described above. This Section starts with an overview of theories of constitutional law that justify judicial intervention in politics altogether, and then reviews scholarship that focuses on doctrinal deficiencies when courts do intervene to address the problems of political entrenchment or lockup. I conclude that these scholars stop short of providing a needed textual hook in the Constitution that justifies intervention.

Judicial decisions that would overturn the actions of the democratic branches of government face an issue of legitimacy—what Alexander Bickel famously termed the “counter-majoritarian difficulty.”<sup>59</sup> So why is judicial intervention in cases of political lockup justified at all?

The answer begins with footnote four of *Carolene Products* and process theory.<sup>60</sup> Footnote four discusses the potential for heightened judicial scrutiny when legislation “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”<sup>61</sup> Political process theory, as the elaboration of this command has come to be known, avoids the countermajoritarian dilemma by arguing that the political process has systemic flaws and that judicial review should remedy those malfunctions, not superintend out-

<sup>57</sup> See *infra* notes 69–71.

<sup>58</sup> Issacharoff & Pildes, *supra* note 9, at 645. And that is when the Court is actually being consistent in how it analyzes cases; Pam Karlan has found the jurisprudence to reflect more ad hoc determinations. Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 313 (1997). However, to be sure, certain Justices have written disapprovingly of electoral entrenchment at times. See Levinson & Sachs, *supra* note 7, at 417–18 (detailing the history of the Court’s treatment of entrenchment).

<sup>59</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962); see Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 117–20 (summarizing the debate over how best to define countermajoritarian).

<sup>60</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

<sup>61</sup> *Id.* at 152 n.4.

comes.<sup>62</sup> In *Democracy and Distrust*, John Hart Ely builds upon process theory and defines the state of systemically malfunctioning politics as when “(1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority.”<sup>63</sup> Consequently, courts should not intervene when the system merely generates undesirable outcomes; rather, the court acts as a referee who intervenes “only when one team is gaining unfair advantage, not because the ‘wrong’ team has scored.”<sup>64</sup> This formulation, then, puts the courts on the side of a group—which may be a numerical minority or majority—that is nonetheless shut out.<sup>65</sup>

The analogy to antitrust employed by Issacharoff and Pildes is the dominant modern formulation of this case for intervention in situations of entrenchment. They write of how parties manipulate the rules of political competition to block challengers and fault the Supreme Court—“the institution best positioned to destabilize these lockups”—for its failure to develop a framework for achieving this task.<sup>66</sup> Issacharoff and Pildes promote the value of competition as a way to ensure outcomes remain responsive to popular will.<sup>67</sup> As with Ely’s referee, they call for judicial intervention that focuses on the background electoral structures and does not attempt to control politics directly through enforcement of individual rights.<sup>68</sup>

The justifications for judicial intervention in political entrenchment provided by these conceptions of process theory support interventions on behalf of electoral majorities as well. Traditionally, and paradoxically, there has been less justification for intervening in politics for majoritarian ends,<sup>69</sup> as courts should begin with the presumption that electoral majorities can find vindication through politics.<sup>70</sup> Yet the situations in *Baker v. Carr* and *Reynolds v. Sims* demonstrate the rationale behind judicial intervention on behalf of a numerical majority, as voters were unable to dislodge minority rural

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<sup>62</sup> Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 772 (1991).

<sup>63</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980).

<sup>64</sup> *Id.* The title of this Note is inspired by Ely’s command.

<sup>65</sup> For instances of electoral entrenchment through history, see Levinson & Sachs, *supra* note 7, at 414–17.

<sup>66</sup> Issacharoff & Pildes, *supra* note 9, at 644.

<sup>67</sup> *Id.* at 646.

<sup>68</sup> *Id.* at 648.

<sup>69</sup> Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 655 (2001).

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

control of the state legislature.<sup>71</sup> As Justice Clark argued in *Baker*, if there is no political institution open to remedying the group's exclusion, the courts are the only remaining bulwark.<sup>72</sup> Moreover, the distinction between intervening for a majority versus a minority may lack a clear dividing line in this context.<sup>73</sup> It is difficult to know whether the same electoral majority would exist if the political structures and rules were different. While our intuition might suggest that having the option to write in a candidate in Burdick's district would make little practical difference, or that the state legislature would still look and act similarly in *Gaffney* had redistricting not eliminated competitive seats, one never truly knows until voters and candidates are given an open and fair chance to compete.

Regardless of outcome, the mere presence of structures and rules that "rig the game" undermines the legitimacy of the results and representation in *Burdick*, *Lopez Torres*, and *Gaffney*. If our republic is built upon the notion that our government derives its legitimacy from consent of the governed, then preferences must be accurately registered in our elections and structures that artificially entrench must fall.<sup>74</sup> Outcomes may not necessarily change, but the status quo lacks legitimacy if voters have little control, votes have little meaning, and the system is unresponsive to majority preferences.<sup>75</sup> This Note accepts the rationale for judicial intervention in cases of entrenchment and lockup described by this scholarship.<sup>76</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> *Baker v. Carr*, 369 U.S. 186, 259 (1962) (Clark, J., concurring) (noting how the people of Tennessee had no other avenues for relief, and concluding that only judicial intervention would bring recourse to a "stymied" people "caught up in a legislative strait jacket").

<sup>73</sup> See Pildes, *supra* note 59.

<sup>74</sup> See Klarman, *supra* note 62, at 781 ("Every political (or judicial review) theory requires a starting premise, and ours is popular consent.").

<sup>75</sup> See *id.* at 782; JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 140 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1690) ("'Tis fit that everyone who enjoys his share of the protection, should pay out of his estate his proportion for the maintenance of it. But still it must be with his own consent, i.e. the consent of the majority, giving it by themselves or their representatives chosen by them."). The choice of "responsiveness" is not without critics. Nicholas Stephanopoulos has written about how, though competition and responsiveness have dominated the literature (and, to a lesser extent, participation), "alignment" is a distinct and undervalued political value. Stephanopoulos, *supra* note 7, at 295–303. When I write of competition, responsiveness, or alignment, I am largely using the words interchangeably, as I embrace *any* metric that drives towards the overarching values of accountability and legitimacy of government. Similarly, I elide the very real differences between voters and the general population here, often using the words "people" and "voters" or "electorate" interchangeably, as the debate over the nature of representation is orthogonal to my task.

<sup>76</sup> The structural focus of these scholars is now the "prevailing position in the legal literature" and one which I adopt as a baseline for my analysis here, though Richard

Many of these same scholars also help explain much of the insufficiency of the First Amendment and equal protection analysis described above. When harms accrue to the polity, an individual rights framework does not match the problem. At one time, the individualist framework overlapped with the questions the Court was adjudicating, but today's complex cases require a sharper textual tool.<sup>77</sup> Judges have created law around voting rights, gerrymandering, ballot access, campaign finance, and other related law of democracy areas,<sup>78</sup> but they have done so without developing any larger conception of *how* our politics should operate—without elevating any structural values that protect the polity.<sup>79</sup>

Scholars recognize this mismatch. Issacharoff and Pildes write of the “awkward attempts to fold difficult questions of democratic politics and judicial review into the conventional regime of rights-based constitutional and statutory law.”<sup>80</sup> Heather Gerken concludes that the individual rights framework “does not provide adequate analytic tools for resolving [structural] challenges.”<sup>81</sup> In fact, this lack of fit—that “the Court’s discourse of rights and interests fails to capture what is truly at stake in election law cases”—is the prevailing academic position.<sup>82</sup>

Yet, if courts should intervene to ensure political processes remain sufficiently open to challenge and change, on what constitutional grounds would they base their intervention? Existing scholarship on entrenchment fails to offer a textual solution.<sup>83</sup> Klarman says his antientrenchment proposal is not grounded in the Constitution at

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Hasen, Nathaniel Persily, and others lodge serious and valuable criticisms of this position. See Stephanopoulos, *supra* note 7, at 295–99 (outlining the competing positions in the scholarship).

<sup>77</sup> See Gerken, *supra* note 52, at 512–13.

<sup>78</sup> Issacharoff, *supra* note 6, at 690 (“[T]he idea that American politics, or even just redistricting, exists independently of deep judicial involvement describes a country not readily recognizable.”).

<sup>79</sup> Stephanopoulos, *supra* note 7, at 293–94. Stephanopoulos quotes Judge Posner’s harsh conclusion that the Court has “failed to articulate a coherent conception of democracy even though the relation between law and democracy is fundamental to the proper role of judges in a democratic society.” *Id.* at 294.

<sup>80</sup> Issacharoff & Pildes, *supra* note 9, at 645. Additionally, these situations represent nonoriginalist applications of the Equal Protection Clause, which was written to focus on problems of race. Note, *A Niche for the Guarantee Clause*, 94 HARV. L. REV. 681, 687 (1981) (arguing that because of the historical focus of the Equal Protection Clause on race, it is problematic to push the clause beyond its original application).

<sup>81</sup> Gerken, *supra* note 52, at 504.

<sup>82</sup> Stephanopoulos, *supra* note 7, at 295.

<sup>83</sup> Others have lodged this same criticism before. See Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 673–74 (2002) (criticizing Issacharoff for, among other things, the lack of textual basis for his proposed rule).

all, but rather in democratic theory more broadly.<sup>84</sup> Despite concluding that the Court must either “retrace [its] steps,” “find a better map,” or “rely on a guide” to fix its doctrine, Gerken neglects to offer a specific textual alternative.<sup>85</sup> Issacharoff and Pildes write of how the Constitution “offers little textual or historical guidance” for their anti-trust framework,<sup>86</sup> and so Issacharoff sees “no gain in pretending that the answers to the questions of how to make democracy work are compelled by vague terms [in the Constitution].”<sup>87</sup>

It may be tempting to criticize existing doctrine and leave it at that. But in the absence of any constitutional text guiding their intervention, courts have been hesitant to recognize whether political structures are locked up or sufficiently open and responsive.<sup>88</sup> Both Supreme Court and lower court judges are unlikely to turn away from the individualist frameworks they are accustomed to, even if deeply flawed, in the absence of constitutional text as the basis for justification and guidance on cases’ resolutions. Yet, despite the apparent logic of applying a clause focused on the “form of government” to cases of entrenchment, scholars, with a few narrow exceptions, have largely overlooked the application of the Guarantee Clause to state political lockup.<sup>89</sup>

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<sup>84</sup> Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 499 (1997).

<sup>85</sup> Gerken, *supra* note 52, at 517–18. Perhaps for this reason she readily admits her failure “to offer a full articulation of what a structural approach would look like.” *Id.* at 520.

<sup>86</sup> Issacharoff & Pildes, *supra* note 9, at 713.

<sup>87</sup> Issacharoff, *supra* note 6, at 688. He continues, colorfully, to say, “Sometimes it is simply best to tell poor Virginia the sad truth: sorry, there really is no Santa Claus.” *Id.*

<sup>88</sup> Issacharoff & Pildes, *supra* note 9, at 652.

<sup>89</sup> For example, the Clause is never mentioned by Klarman, *supra* note 84, nor Levinson & Sachs, *supra* note 7, nor Gerken, *supra* note 52. Issacharoff and Pildes only mention it once in *Politics as Markets*, merely to analogize to a provision of the German Constitution. Issacharoff & Pildes, *supra* note 9, at 695 & n.217. By contrast, Rick Hasen directly argues against reviving the Guarantee Clause. See Richard L. Hasen, *Leaving the Empty Vessel of “Republicanism” Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 85 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) [hereinafter Hasen, *Empty Vessel*] (detailing history of Court’s interventions, concluding that it has attempted to “entrench in constitutional law their view of the best political arrangements,” and cautioning against using the Guarantee Clause to continue this project). Yet elsewhere even Hasen rejects the idea that the doctrinal category matters. See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM Baker v. Carr to Bush v. Gore* 17 (2003) (arguing that since the doctrine is mostly judge-made, results of voting cases should “turn on consistent principles of equality rather than doctrine.” For other exceptions to this general oversight, see *supra* note 13.

The next Part suggests that the Guarantee Clause might serve as a textual tool applicable to structural problems and able to provide sufficient guidance for judicial intervention.<sup>90</sup>

## II

### THE FALL AND POTENTIAL RISE OF THE GUARANTEE CLAUSE

This Part provides a brief history of how the Guarantee Clause fell into disuse and why the Court came to embrace its individual rights approach in the first instance. It then continues by discussing why the Clause can be revived.

#### A. *The Unfortunate Abandonment of the Guarantee Clause and the Switch in Baker*

Generally, authority for the proposition that the Guarantee Clause is nonjusticiable is traced back to *Luther v. Borden*.<sup>91</sup> In *Luther*, the Court was asked to decide between two political groups, each claiming legitimate right to govern the State of Rhode Island in the wake of Dorr's Rebellion in 1842.<sup>92</sup> The plaintiff argued that state troops who entered his home had unlawfully trespassed because the

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<sup>90</sup> Other scholars have urged the Clause's revival for a wide gamut of reasons. See, e.g., Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 WASH. & LEE L. REV. 767 (2003) (to support legislation reforming campaign finance); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 867–69 (1994) (to protect the individual right of political participation); Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 375 (1989) (to provide basis for legislating against and prosecuting state and local corruption); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988) (to reinvigorate federalism and ensure state autonomy); Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807 (2002) (to argue for and against direct democracy); Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941 (2012) [hereinafter Smith, *Awakening*] (to reform our state sovereign immunity jurisprudence); *A Niche for the Guarantee Clause*, *supra* note 80, at 682 (to authorize judicial action only where structural defects in state and local governments threaten those individual rights defined elsewhere in the Constitution); Thomas A. Smith, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561 (1984) (to secure the "rule of law" in states); Bradley T. Turflinger, Note, *Fifty Republics and the National Popular Vote: How the Guarantee Clause Should Protect States Striving for Equal Protection in Presidential Elections*, 45 VAL. U. L. REV. 793, 795 (2011) (to support the election of the president by popular vote); Jonathon K. Waldrop, Note, *Rousing the Sleeping Giant? Federalism and the Guarantee Clause*, 15 J.L. & POL. 267, 268–69 (1999) (to reinvigorate federalism and ensure state autonomy).

<sup>91</sup> 48 U.S. (7 How.) 1 (1849).

<sup>92</sup> *Id.* at 37–39.

government under whose authority they acted was not republican.<sup>93</sup> Chief Justice Taney worried that a ruling on that issue could throw Rhode Island into legal chaos,<sup>94</sup> and so the Court held that it was the task of Congress to “decide what government is established in [a] State before it can determine whether it is republican or not.”<sup>95</sup>

Though scholars debate exactly how narrowly to construe the holding of *Luther*,<sup>96</sup> it is clear that for many years afterwards, the Court adopted a fairly narrow interpretation of *Luther* focusing on the extreme facts of the rebellion.<sup>97</sup> After *Luther*, the Court continued to decide Guarantee Clause claims on the merits,<sup>98</sup> and continued the project of defining “republican.”<sup>99</sup>

The virtual death knell for the Guarantee Clause came in 1912. In *Pacific States Telephone and Telegraph Co. v. Oregon*,<sup>100</sup> the case cited for the proposition that guarantee questions are nonjusticiable, the Court faced a challenge to Oregon’s initiative system after voters

<sup>93</sup> *Id.* at 19–21. Even those unsympathetic to Dorr’s cause believed the courts were the proper institution for deciding the issue, and the Guarantee Clause the proper basis for challenge. WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 112–13 (1972).

<sup>94</sup> It may have been these practical considerations that were dispositive. WIECEK, *supra* note 93, at 119–20.

<sup>95</sup> *Luther*, 48 U.S. (7 How.) at 42. Had the Court actually decided the merits of Luther’s claims, it would have been deciding a question practically settled seven years earlier, and in direct contravention of the President *and* Congress, both of whom had recognized the government of the royal charter. WIECEK, *supra* note 93, at 125–26.

<sup>96</sup> Compare WIECEK, *supra* note 93, at 119–20 (arguing that the holding was concerned with practical problems and characterizing broader language as dicta), and Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 776 (1994) (characterizing the holding as one of governmental recognition, not of republicanism), with Jonathan Toren, Note, *Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4*, 2 N.Y.U. J.L. & LIBERTY 371, 404 (2007) (disputing these narrow readings).

<sup>97</sup> For example, *In re Duncan* cited *Luther* as holding that the choice between two opposing governments should be left for the political branches. 139 U.S. 449, 461 (1891); see also *Baker v. Carr*, 369 U.S. 186, 242 n.2 (1962) (Douglas, J., concurring) (“[T]he abdication of all judicial functions respecting voting rights, however justified by the peculiarities of the charter form of government in Rhode Island at the time of Dorr’s Rebellion, states no general principle.” (citations omitted)).

<sup>98</sup> See, e.g., *Forsyth v. Hammond*, 166 U.S. 506, 519 (1897) (holding that the preservation of legislative control over municipal boundaries is not part of the guarantee); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175–76 (1874) (holding that Massachusetts was still “republican” despite the exclusion of women from voting).

<sup>99</sup> See, e.g., *In re Duncan*, 139 U.S. at 461 (1891) (writing that the “distinguishing feature” of the republican guarantee is “the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies”); *Chisholm v. Georgia*, 2 U.S. 419, 457 (1793) (advocating for a “short definition” of a republican form of government as “one constructed on [the] principle, that the Supreme Power resides in the body of the people”).

<sup>100</sup> *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

imposed a corporate tax hike.<sup>101</sup> The *Lochner* Era Court, though not eager to validate a corporate tax, was unwilling to accept the company's arguments that direct democracy was antirepublican, as such a ruling would have likely invalidated legislation in eleven states with initiatives or referenda.<sup>102</sup> Chief Justice White's sweeping language claimed *Luther* was "absolutely controlling" and that addressing the merits of whether initiatives are republican would have "destructive effects" on Oregon, on the nation, and reflect an "inconceivable expansion" of judicial power.<sup>103</sup> Yet given what was previously recognized as a fairly narrow holding in *Luther*, Chief Justice White was actually ducking the merits by creating a straw man based on this broader reading.<sup>104</sup>

As with the expansion of *Luther's* holding, courts also broadly construed the holding of *Pacific States* to be that the Guarantee Clause is nonjusticiable. The case could easily have been confined to the facts presented by rejecting claims that direct democracy was antirepublican,<sup>105</sup> but the "loose and extravagant language" of the opinion "promoted a constitutional doctrine of judicial abstention that went considerably beyond *Pacific States* and even further beyond any modern rationale upholding that decision."<sup>106</sup> Consequently, for the last century, with few exceptions, the Guarantee Clause has been considered nearly *per se* nonjusticiable.

Famously, in *Colegrove v. Green*,<sup>107</sup> the Court dismissed a challenge to malapportionment brought under the Guarantee Clause,

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<sup>101</sup> *Id.* at 119.

<sup>102</sup> WIECEK, *supra* note 93, at 265, 267.

<sup>103</sup> *Pac. States*, 223 U.S. at 141–43. Rachel Barkow has explained this language as signifying that, compared to *Luther*, the Court "relied on prudential factors to a much greater extent," essentially "reasoning backward from [the potential] consequences without regard for the language or structure of the Constitution . . ." Rachel E. Barkow, *The Rise and Fall of the Political Question Doctrine*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 23, 29–30 (Nada Mourtaba-Sabbah & Bruce E. Cain eds., 2007).

<sup>104</sup> See Savitzky, *supra* note 13, at 2045 & n.104 (2011) (collecting other sources of criticism).

<sup>105</sup> See WIECEK, *supra* note 93, at 268 (stating that the Court's holding would have been most defensible if confined to the unique factual situation presented); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 554–56 (1962) (arguing that the holding in the case is most defensible when construed narrowly); Hasen, *Empty Vessel*, *supra* note 89, at 81 (arguing that the Court's reasoning was flawed).

<sup>106</sup> WIECEK, *supra* note 93, at 268; accord Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208, 220 (1987) ("Current academic treatment of the reasoning in *Pacific Telephone* is almost unanimously scornful, finding no basis for the Court's assertion that the challenge must have been to the entire government.").

<sup>107</sup> *Colegrove v. Green*, 328 U.S. 549 (1946) (3-1-3 decision).

writing that the case presented a nonjusticiable political question and citing *Pacific States*.<sup>108</sup> Justice Frankfurter warned that courts “ought not to enter this political thicket” and told petitioners to elect a fairer state legislature or invoke the powers of Congress.<sup>109</sup>

However, in 1962, the Court’s relationship to the Guarantee Clause changed dramatically. Only fourteen years after *Colegrove* and facing a nearly identical case of legislative malapportionment, the Warren Court chose to intervene in *Baker v. Carr*.<sup>110</sup> In *Baker*, the malapportionment of state legislative districts in Tennessee was systematic, giving minority rural interests a lock on power and leaving the locked-out majority with no other means for redress.<sup>111</sup> The Guarantee Clause provides a guarantee that state political structures will not frustrate popular sovereignty or the will of the people.<sup>112</sup> Extreme malapportionment would seem to be the exact type of antirepublican scenario that justifies intervention,<sup>113</sup> but the consensus view at the time was that Guarantee Clause claims were nonjusticiable political questions.

Facing this history,<sup>114</sup> but wanting to address the egregious legislative entrenchment in Tennessee, Justice Brennan attempted to split the difference. His opinion for the Court reviewed the political question doctrine’s history and set out six “elements thought to define ‘political questions.’”<sup>115</sup> He concluded that the political question doc-

<sup>108</sup> *Id.* at 556 (Frankfurter, J.) (plurality opinion).

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

<sup>110</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>111</sup> The Tennessee Supreme Court held that it had no power to order reapportionment, the State had no mechanism for amending the Constitution outside of the legislature, and the rural legislators had no incentive to give up power to the urban and suburban bloc. McConnell, *supra* note 13, at 105.

<sup>112</sup> See *infra* notes 152–61 and accompanying text.

<sup>113</sup> EPSTEIN, *supra* note 45, at 139 (“It is hard to imagine *any* republican theory of government . . . that could mount even a feeble defense of so outrageous a system.”).

<sup>114</sup> Technically, *Colegrove* was not really precedent, as it was decided by seven justices and the judgment only carried four votes between two opinions. See *Colegrove*, 328 U.S. at 550, 564, 566, 574 (illustrating vote breakdown). Nonetheless, it had been treated as a “mountainous barrier.” Roy A. Schotland, Commentary, *The Limits of Being “Present at the Creation,”* 80 N.C. L. REV. 1505, 1506 n.6 (2002).

<sup>115</sup> *Baker*, 369 U.S. at 229. Political questions are those with “one or more elements” suggesting a separation of powers issue, namely: 1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department”; 2) “a lack of judicially discoverable and manageable standards for resolving it”; 3) “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion”; 4) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government”; 5) “an unusual need for unquestioning adherence to a political decision already made”; 6) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.* at 217. Ironically, a number of these factors “appear to be judicially unmanageable” themselves. Barkow, *supra* note 103, at 44.

trine was inapplicable to questions of “the consistency of state action with the Federal Constitution,”<sup>116</sup> thus paving the way for the Court’s use of the Guarantee Clause.<sup>117</sup> Nonetheless, the Court found that even Guarantee Clause claims related to matters of state government are nonjusticiable,<sup>118</sup> as they violate one of the six elements: “a lack of judicially discoverable and manageable standards for resolving it.”<sup>119</sup> So while Guarantee Clause claims were no longer *per se* nonjusticiable, the Court still could not imagine how courts might practically adjudicate them.

Instead, the Court both justified intervention *and* avoided overturning *Colegrove* by holding the same claim justiciable on equal protection grounds,<sup>120</sup> because of the Equal Protection Clause’s “well developed and familiar” judicial standards.<sup>121</sup> Of course this was pure “sleight-of-hand,”<sup>122</sup> as standards under the Equal Protection Clause had not been developed at the time,<sup>123</sup> but nonetheless the switch was made.<sup>124</sup> Justice Frankfurter, who cautioned the Court in *Colegrove*, furiously dissented that this was just a “Guarantee Clause claim masquerading under a different label.”<sup>125</sup> He argued that as equal protection “can only mean an equality of persons standing in the same relation to whatever governmental action is challenged,” an apportionment inquiry necessarily requires a theoretical baseline of what

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<sup>116</sup> *Baker*, 369 U.S. at 226.

<sup>117</sup> WIECEK, *supra* note 93, at 285; Thomas I. Emerson, *Malapportionment and Judicial Power*, 72 *YALE L.J.* 64, 67 (1962) (stating that Brennan “repudiates the notion that ‘political questions’ are to be determined by blanket categories” and therefore justiciability under the Clause would seem to turn on whether the essential elements of a political question are present in any particular case).

<sup>118</sup> *Baker*, 369 U.S. at 218.

<sup>119</sup> *Id.* at 217. Paradoxically, this standard seems to relate back to the prudential political question doctrine.

<sup>120</sup> *Id.* at 207–08. The theory here is that the strength of the individual voter’s vote is not equal between two legislative districts of astoundingly disparate populations.

<sup>121</sup> *Id.* at 226.

<sup>122</sup> Richard L. Hasen, *The Benefits of “Judicially Unmanageable” Standards in Election Cases Under the Equal Protection Clause*, 80 *N.C. L. REV.* 1469, 1476 (2002); *see also* Gerken, *supra* note 52, at 512 (“Justice Brennan’s message to his brethren was clear: we are just adjudicating an individual right, the kind of claim we routinely resolve. *We know how to do this.*”).

<sup>123</sup> *See* Chemerinsky, *supra* note 90, at 871 (“This is an obviously fatuous distinction because both clauses are equally vague and the principle of one-person one-vote could have been articulated and enforced under either constitutional provision.”); McConnell, *supra* note 13, at 106 (arguing that judicial standards under the Equal Protection Clause were no more developed at the time of *Baker* than those of the Guarantee Clause).

<sup>124</sup> Perhaps not coincidentally, *Baker* is said by some to signal “the beginning of the end of the prudential political question doctrine.” Barkow, *supra* note 103, at 36.

<sup>125</sup> *Baker*, 369 U.S. at 297 (Frankfurter, J., dissenting).

constitutes adequate representation in a republican state.<sup>126</sup> Consequently, “[t]o divorce ‘equal protection’ from ‘Republican Form’ is to talk about half a question.”<sup>127</sup>

In many ways, Frankfurter’s opinion was prescient.<sup>128</sup> Courts have entered the political thicket repeatedly since *Baker*, and did so, at first, without any clear standards or criteria for dealing with the puzzles of apportionment.<sup>129</sup> The problem, however, is not in entering the thicket, but in the choice to abandon the Guarantee Clause. The Guarantee Clause was abandoned because the Court never developed a meaningful conception or concrete standards for republicanism.<sup>130</sup> Nonetheless, it is still possible to envision judicially manageable standards and effect a switch back to the Guarantee Clause.

### B. Why the Guarantee Clause Can Be Revived

Given the judicial history outlined above, the Guarantee Clause can be revived without overruling any precedent. *Luther* did not classify the Clause as *per se* nonjusticiable,<sup>131</sup> and *Baker* makes clear that, to the extent *Pacific States* had broadened that conception, the Guarantee Clause should no longer be equated with nonjusticiable political questions.<sup>132</sup> After *Baker*, as long as a claim brought under the Guarantee Clause survives the six elements of a political question, including “judicially discoverable and manageable standards,” it is justiciable.<sup>133</sup> Despite this, courts will often still dismiss guarantee claims as nonjusticiable without elaborating.<sup>134</sup>

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<sup>126</sup> *Id.* at 301. Frankfurter also discussed how a vote cannot be diluted without a standard of reference for what it should be worth, which requires a choice between competing theories of political philosophy. *Id.* at 300.

<sup>127</sup> *Id.* at 301.

<sup>128</sup> See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 19 (1971) (“Of course, his characterization was accurate, but the same could be said of many voting rights cases he was willing to decide.”); Gerken, *supra* note 52, at 512 (“In deciding election law cases, the Court generally adheres to a traditional individual-rights structure. It follows Brennan, not Frankfurter. The problem is that Justice Frankfurter was right.”).

<sup>129</sup> See McConnell, *supra* note 13, at 106 (noting the lack of a judicially manageable standard at the time of *Baker*).

<sup>130</sup> Berg, *supra* note 106, at 221.

<sup>131</sup> See WIECEK, *supra* note 93, at 127 (“Taney himself did not equate political questions with guarantee clause cases; he merely stated that *Luther v. Borden* was both. . . . [Later judges’] misreading of *Luther* [lead to] an unthinking, automatic application of Taney’s rationale to cases that did not warrant it.”).

<sup>132</sup> *Baker*, 369 U.S. at 228–29.

<sup>133</sup> See *supra* notes 117–21 and accompanying text (describing the *Baker* standard).

<sup>134</sup> See, e.g., *Barber v. Hawaii*, 42 F.3d 1185, 1198–99 (9th Cir. 1994); *New Progressive Party (Partido Nuevo Progresista) v. Hernandez Colon*, 779 F. Supp. 646, 654 (D.P.R. 1991); *Kirk v. Boehm*, 216 F. Supp. 952, 953–54 (E.D. Pa. 1963).

However, there is evidence of judicial interest in reengaging with the Guarantee Clause.<sup>135</sup> Most prominently, Justice O'Connor, in *New York v. United States*,<sup>136</sup> suggested the Clause's justiciability. After detailing the Clause's history before the Court, she cited *Reynolds v. Sims* and numerous scholars for the proposition that perhaps not all Guarantee Clause claims are nonjusticiable.<sup>137</sup> Though not defining republicanism, she stressed the central importance of accountability of government officials to the local electorate.<sup>138</sup> She reached the merits of this claim, even if only "indulging" the assumption that the Clause provides a basis for suit.<sup>139</sup>

Just a few years ago, the Tenth Circuit considered a challenge to a voter initiative in Colorado on Guarantee Clause grounds in *Kerr v. Hickenlooper*.<sup>140</sup> The court never reached the merits because it only dealt with an interlocutory appeal, but it ruled the Guarantee Clause claim justiciable.<sup>141</sup> Though later vacated and remanded by the Supreme Court in light of *Arizona State Legislature v. Arizona*

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<sup>135</sup> In addition to the cases that follow, soon after *Baker*, a three-judge panel in the Eastern District of Louisiana heard a challenge to the state's procedure for adopting a constitutional amendment. In a concurring opinion joined by a second judge, Judge Wisdom argued that the Guarantee Clause claim should be justiciable, and could be decided on its merits using the same standards they used to decide the case on due process grounds. *Kohler v. Tugwell*, 292 F. Supp. 978, 985 (E.D. La. 1968) (Wisdom, J., concurring), *aff'd* 393 U.S. 531 (1969). Though rejecting the challenge on the merits, Wisdom wrote that "the republican guarantee, bent and broken since *Luther v. Borden*, is not beyond repair," admonishing that "[f]ederal courts should be loath to read out of the Constitution as *judicially* nonenforceable a provision that the Founding Fathers considered essential to formulation of a workable federalism." *Id.* Philip Frickey, a former Wisdom clerk, suggests that the judge was especially attuned to the potential issues of state governance because he "gained his political consciousness during the period in which Huey Long ran Louisiana as his own monarchy." Philip P. Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 TUL. L. REV. 276, 301 (1985). Moreover, individual justices, from Justice O'Connor in *Georgia v. Ashcroft*, to Justice Breyer in *Vieth* and *Nixon v. Shrink PAC*, have also dropped hints that they are attuned to structural harms. See Gerken, *supra* note 52, at 513–14, 517–21.

<sup>136</sup> 505 U.S. 144 (1992).

<sup>137</sup> *Id.* at 185. The *Reynolds* Court said that only "some" Guarantee Clause claims were nonjusticiable. *Reynolds v. Sims*, 377 U.S. 533, 582 (1964).

<sup>138</sup> Edward A. Stelzer, Note, *Bearing the Judicial Mantle: State Court Enforcement of the Guarantee Clause*, 68 N.Y.U. L. REV. 870, 883 (1993) (noting that although Justice O'Connor did not formally define republicanism, accountability of government officials would appear to be an integral component). *But see infra* notes 169–70 and accompanying text (suggesting that Justice O'Connor views the Guarantee Clause as protecting state autonomy, not as vindicating political rights).

<sup>139</sup> *New York*, 505 U.S. at 186.

<sup>140</sup> 744 F.3d 1156 (2014).

<sup>141</sup> *Id.* at 1161.

*Independent Redistricting Commission*,<sup>142</sup> the court concluded that their “review of the record and briefing in this case satisfies us that judicially discoverable and manageable standards for Guarantee Clause litigation exist” and they were unwilling to allow dicta suggesting the Clause’s nonjusticiability “to become a self-fulfilling prophecy.”<sup>143</sup> While these isolated examples do not suggest any great likelihood that the Guarantee Clause *will* be revived in the near future, they do show that its revival is not foreclosed by precedent and has been championed by some judges and courts.

Assuming the will to revive the Clause,<sup>144</sup> the next hurdle is for courts to define “republican” and create manageable standards. While courts have only sporadically touched on this question, scholars have extensively explored the history of the Guarantee Clause,<sup>145</sup> its abandonment,<sup>146</sup> and the case for its revival.<sup>147</sup> Were courts to embrace its full revival, academic analysis may be helpful in elucidating the Clause’s meaning and in delineating which claims may be brought under its aegis. The Clause’s sparse, broad language surely lends it to many interpretations,<sup>148</sup> but those who have done a close study of the text and its origins find certain discernible clues.

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<sup>142</sup> *Hickenlooper v. Kerr*, 135 S. Ct. 2927 (2015). *Arizona State Legislature* dealt with similar issues of standing and the propriety of lawmaking by initiative. 135 S. Ct. 2652 (2015).

<sup>143</sup> *Kerr*, 744 F.3d at 1179. The court analogized the Clause’s sparse history to that of the Second Amendment and noted that the Court in *District of Columbia v. Heller* never “even considered the possibility that the sources available to it could be insufficient for developing judicially discoverable and manageable standards.” *Id.* at 1178. Judge Posner, in *Risser v. Thompson*, recognized the powerful criticism of the nonjusticiability of the Guarantee Clause, but wrote that it was “too well entrenched to be overturned at our level of the judiciary.” 930 F.2d 549, 552 (7th Cir. 1991).

<sup>144</sup> This Note addresses how courts *could* and why they *should* revive the Guarantee Clause, but, aside from mention of *New York* and *Kerr*, leaves the question of whether they *would* for later debate and discussion.

<sup>145</sup> See *supra* Section II.A (exploring the history of the Guarantee Clause).

<sup>146</sup> See *id.* (discussing cases holding Guarantee Clause issues nonjusticiable).

<sup>147</sup> See *supra* note 90 (citing scholarly support for the revival of the Guarantee Clause).

<sup>148</sup> WIECEK, *supra* note 93, at 2 (“The clause is enigmatic, almost Delphic in its quality. Every important word or phrase in it is ambiguous and susceptible of widely varying definition.”).

### C. *The Meaning of “Republican Form”*

Critics ranging from President John Adams in 1807<sup>149</sup> to G. Edward White in 1994<sup>150</sup> have often commented on the open-ended or indeterminate nature of “republican form.” Rick Hasen calls it an “empty vessel to be filled by whatever individual right the particular writer desires the courts to enforce.”<sup>151</sup> But just as broad language like “due process” can have real meaning, what constitutes a “republican government” is, at the very least, partially knowable. By studying the debates around the time of drafting and ratification, scholars have reached a near consensus regarding the core of what the Clause “guarantees,” even if some of the outer bounds of the Clause’s reach remain contentious.

Scholars and jurists mostly agree that the core meaning of republican government is popular control of government, and that this control is largely exerted through majoritarian processes.<sup>152</sup> This conception is shared by founders like James Madison,<sup>153</sup> Alexander Hamilton,<sup>154</sup> and James Wilson,<sup>155</sup> and endorsed by varied scholars,

<sup>149</sup> *Id.* at 72 n.27 (“The word [republic] is so loose and indefinite that successive predominant factions will put glosses and constructions upon it as different as light and darkness.” (alteration in original) (quoting Letter from John Adams to Mrs. Mercy Warren (July 20, 1807), in 4 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY NO. 5 332, 353 (1878))).

<sup>150</sup> G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 803 (1994) (stating that the Clause is “indeterminate” at its core and “has been whatever a dominant group of interpreters, at any one point in time, has chosen to make of it”).

<sup>151</sup> Hasen, *Empty Vessel*, *supra* note 89, at 82.

<sup>152</sup> Merritt, *supra* note 90, at 23; Smith, *Awakening*, *supra* note 90, at 1954; *see also* Stelzer, *supra* note 138, at 904–06 (collecting similar judicial definitions of “republican”). Michael Klarman dissents from this view, even as he makes a similar argument about entrenchment. Klarman does not look for a constitutional basis for his theory because he believes the text and founders were fundamentally countermajoritarian. Klarman, *supra* note 84, at 499 n.45.

<sup>153</sup> THE FEDERALIST NO. 39, at 188 (James Madison) (Lawrence Goldman ed., 2008) (defining “republican” by stressing how essential it is that a government “be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it”). Madison played a central role in the Clause’s creation. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 206 (Max Farrand ed., 1911) (describing Madison’s proposed revisions to the Guarantee Clause); *cf.* Larry D. Kramer, “*The Interest of the Man*”: James Madison, *Popular Constitutionalism*, and the *Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 706 (2006) (“Madison was, above all, a committed republican who believed in popular government and believed that the people must control the government and laws at all times. . .”).

<sup>154</sup> *See* THE FEDERALIST NO. 22, at 108 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (noting that a “fundamental maxim of republican government” is that “the sense of the majority should prevail”).

<sup>155</sup> WIECEK, *supra* note 93, at 69 (citing Wilson as linking elections to the Clause and saying “[t]he right of suffrage is fundamental to republics”).

such as Akhil Amar,<sup>156</sup> William Wiecek,<sup>157</sup> Deborah Merritt,<sup>158</sup> Robert Natelson,<sup>159</sup> and Michael McConnell.<sup>160</sup> The Supreme Court embraced this same definition in *Chisholm v. Georgia* and *In re Duncan*.<sup>161</sup>

Beyond this central notion of popular sovereignty, however, the consensus begins to break down. Some claim that the Clause merely protects against states becoming monarchies or aristocracies and that, short of the wholesale abandonment of republicanism, the Clause furnishes no grounds for federal intervention.<sup>162</sup> Madison's *Federalist No. 43* contains a sentence on how the only restriction on states is that "they shall not exchange republican for antirepublican Constitutions."<sup>163</sup> While the historical record is not perfectly clear,<sup>164</sup> I adopt a more expansive conception of the Clause as guaranteeing against small antirepublican decisions, not only the wholesale abandonment of a republican state constitution.<sup>165</sup> Given the unlikelihood that a

<sup>156</sup> See Amar, *supra* note 96, at 749 (claiming the "central pillar" of republican government is "popular sovereignty").

<sup>157</sup> See WIECEK, *supra* note 93, at 62–63 (explaining how the Clause began as a revulsion against rule by kings but was "transformed into a pledge of popular government," and ensured "that state governments would remain responsive to popular will").

<sup>158</sup> See Merritt, *supra* note 90, at 23–25 ("The guarantee clause . . . promises each state a government based on popular control.").

<sup>159</sup> See Natelson, *supra* note 90, at 823–24 (2002) ("Republicanism requires that the majority, (or plurality) rule.").

<sup>160</sup> See McConnell, *supra* note 13, at 107 (arguing that the Clause "emphasiz[es] the right of 'the People'—the majority—to ultimate political authority").

<sup>161</sup> *In re Duncan*, 139 U.S. 449, 461 (1891) (writing that the "distinguishing feature" of the republican guarantee is "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies"); *Chisholm v. Georgia*, 2 U.S. 419, 457 (1793) (advocating for a "short definition" of a republican form of government as "one constructed on [the] principle, that the Supreme Power resides in the body of the people").

<sup>162</sup> See, e.g., Toren, *supra* note 96, at 392 ("The primary concern is that one of the United States will become a monarchy or aristocracy, be it through rebellion, invasion, or the charismatic ascension of a few leaders, and thereby destabilize the entire union."); see also Heller, *supra* note 14, at 1726 (noting that "a majority of courts have assumed that the Clause is not implicated unless a state has completely abandoned its republican form").

<sup>163</sup> THE FEDERALIST NO. 43 (James Madison) (Jacob E. Cooke ed., 1961); see also JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 35–49 (1996) (discussing Madison's view of republicanism).

<sup>164</sup> WIECEK, *supra* note 93, at 63–64 (noting the "split personality" of Publius); *Risser v. Thompson*, 930 F.2d 549, 552–53 (7th Cir. 1991) ("Maybe, though, 'republican form of government' signifies more than the absence of a monarch or an aristocracy vested with powers of government. On this the historical record is unclear.").

<sup>165</sup> Emerson, *supra* note 117, at 68 (suggesting, when *Baker* was decided, that while the antimonarchical view was the original purpose, a broader interpretation is appropriate given "the Court's current role as an institution for supporting and vitalizing the mechanisms of the democratic process without undertaking to supervise the results reached by that process"); Heller, *supra* note 14, at 1727–48 (outlining this debate and

state would return to monarchy, it is the small seemingly benign decisions that cumulatively restrict and undermine states' republican forms that must be guarded against.<sup>166</sup>

Other scholars, led by Deborah Merritt, argue that the Clause is chiefly a tool of federalism, guaranteeing each state "the autonomy necessary to maintain a republican form of government."<sup>167</sup> Merritt suggests that as long as a state remains "republican," the Clause shields against federal intrusion,<sup>168</sup> and this may be the conception Justice O'Connor adopts in *New York v. United States*.<sup>169</sup> This reading is buttressed by the full text of Article IV, Section 4, which continues on after the Guarantee Clause to vow that the United States will protect the states from invasion and domestic violence.<sup>170</sup> Of course, this shield also implies a sword, justifying federal intervention when a state fails to uphold its republican form.<sup>171</sup> In many respects, then, this dispute over the Clause and federalism is a variation on the same debate described above.

Finally, there is also heated debate as to the necessity of representation and deliberation. A robust set of scholars argues over whether the Clause requires representation or whether forms of direct democracy are allowable.<sup>172</sup> Corollary to this argument is the addi-

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making the textual and historical case for the broader conception). This conception also meshes with Justice Douglas's challenge in *Baker*. See *supra* note 5 and accompanying text.

<sup>166</sup> Heller, *supra* note 14, at 1748–49.

<sup>167</sup> Merritt, *supra* note 90, at 22.

<sup>168</sup> *Id.* at 25.

<sup>169</sup> See *New York v. United States*, 505 U.S. 144, 185–86 (1992) (rejecting a Guarantee Clause claim against legislation on the premise that the challenged provisions "do not pose any realistic risk of altering the form or the method of functioning of New York's government").

<sup>170</sup> U.S. CONST. art. IV, § 4.

<sup>171</sup> Moreover, even though the text of the Guarantee Clause presents the guarantee "to every State," both the Court and scholars have suggested that it still creates rights enforceable by individuals. See *Plessy v. Ferguson*, 163 U.S. 537, 563–64 (1896) (Harlan, J., dissenting) (relying on the Guarantee Clause as a protector of individual rights); *Texas v. White*, 74 U.S. 700, 700 (1868) (interpreting "State" to "express the idea of a people or political community, as distinguished from the government"); *Bonfield*, *supra* note 105, at 524 (noting the absurdity of suggesting the beneficiary of the guarantee is only the state government itself, "[f]or what protection would the state government need against its own action?"). As such, potential plaintiffs bringing a claim on Guarantee Clause grounds would still achieve standing. See Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887, 897–98 (1994) (discussing how plaintiffs generally must assert a claim of individual right to have standing).

<sup>172</sup> Compare David A. Carrillo & Stephen M. Duvernay, *California Constitutional Law: The Guarantee Clause and California's Republican Form of Government*, 62 UCLA L. REV. DISCOURSE 104, 110–12 (2014) (arguing that the Clause supports direct democracy), and Natelson, *supra* note 90, at 814–15 (same), with Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994) (arguing the Clause mandates representation and not direct democracy), and Catherine A. Rogers & David L.

tional contention that the Clause guarantees deliberative governance.<sup>173</sup> In my view, the historical record is not clear enough to justify the level of federal intrusion required to eliminate direct democracy or to ensure some platonic ideal of deliberation in all state legislatures.

For all the different conceptions of the Clause's text, origins, and contemporary meaning, virtually all agree that popular control remains central to its guarantee.<sup>174</sup> The core meaning of the Clause is known, and not so indeterminate as to justify relegation to the dustbin.

It is this narrow conception of the Guarantee Clause, centered on popular sovereignty and adopted by diverse courts and scholars alike, that provides the basis for its proposed use here as a safeguard against antirepublican rules or structures of government.<sup>175</sup> In the interest of limiting the scope of judicial intervention,<sup>176</sup> I propose only that "republican form" be defined to require that state politics be structured in a manner that ensures that the people retain ultimate control over the government, that majoritarian will cannot be continuously frustrated, and that those in power are not there by way of artificial advantages baked in the system.<sup>177</sup> This does not imply that the

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Faigman, "And to the Republic for Which It Stands": *Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057 (1996) (same), and EPSTEIN, *supra* note 45, at 24–25 (same). Moreover, the Supreme Court has repeatedly held that certain elements of direct democracy will be tolerated within a republican system. *See, e.g.,* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (allowing a ballot initiative that created a redistricting commission); *Ohio ex rel. Davis v. Hildebrand*, 241 U.S. 565, 570 (1916) (upholding a referendum against a challenge brought on Guarantee Clause grounds); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 149–51 (1912) (upholding a ballot initiative against a challenge brought on Guarantee Clause grounds).

<sup>173</sup> Compare Stelzer, *supra* note 138, at 873–74 (discussing a case in which internal legislative rules allowed the votes of senators not in attendance to be recorded in the affirmative—leading to the improper passage of a tax bill—and concluding that a court could find a violation of the Clause's guarantee of deliberation), and Berg, *supra* note 106, at 231 (arguing for a deliberative conception of the Clause), and Rogers & Faigman, *supra* note 172, at 1071 (same), with Stephanopoulos, *supra* note 7, at 314–16 (discussing the "delegate" and "trustee" models of representation, which do not require deliberation).

<sup>174</sup> Merritt, *supra* note 90, at 76.

<sup>175</sup> This would also extend to the rules and structures of political parties to the extent that they are considered state actors, but that debate is beyond the scope here.

<sup>176</sup> This is especially important in light of history suggesting that over time the Court will expand the scope of its judicial review. *See* Klarman, *supra* note 84, at 544.

<sup>177</sup> *Cf.* Levinson & Sachs, *supra* note 7, at 409 ("Whatever form impediments to political change might take, to qualify as 'impediments' they must be distinguishable from the expected workings of the political process. . . . Entrenchment implies. . . [unresponsiveness] to changes in voters' preferences; a system that is perfectly responsive to unchanging preferences would be viewed as a well-functioning democracy."). While I take a conservative and more limited approach here, the Court might fairly review the Clause's

minority should always lose, especially as I emphasize fair inputs (elections) over outcomes, and do not account for the effects of deliberation, logrolling, and other distorting effects of representation. It also does not foreclose experimentation within republicanism.<sup>178</sup> It only ensures mechanisms by which voters can disrupt the state status quo if needed—in practice, not just in theory.

### 1. *The Clause Has Manageable Standards and Meets the Baker Criteria*

The Clause *is* justiciable per the *Baker* criteria for two main reasons: it is enforceable by courts and implies manageable standards. First, by placing the guarantee on the “United States,” and not on “Congress,” the Constitution does not close the door to judicial enforcement of this mandate.<sup>179</sup> This reading is corroborated by the Clause’s location in Article IV, which outlines the relationship between the states and federal government, rather than Article I, which focuses on the legislative branch.<sup>180</sup> Scholars who have analyzed contemporary constitutional debates concur.<sup>181</sup> Consequently, claims brought under the Clause do not contain a “textually demonstrable constitutional commitment of the issue to a coordinate political department,” and thus satisfy both the classical strain of political question doctrine and the first *Baker* criterion.<sup>182</sup>

Second, judicially manageable standards can be derived from the conception of the Clause focused on popular sovereignty, meaning that guarantee claims are justiciable per the *Baker* criteria. Though “popular sovereignty” remains a broad principle, consensus articulations of the Clause’s meaning demonstrate that discernable standards exist.<sup>183</sup> Starting with this broad agreement that the Clause protects

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history and determine that representation or deliberation *is* inherent to its guarantee; doctrine can change and courts can act accordingly.

<sup>178</sup> Carrillo & Duvernay, *supra* note 172, at 108–09.

<sup>179</sup> Chemerinsky, *supra* note 90, at 871 (“The clause does not say ‘Congress shall guarantee;’ it unambiguously says ‘the United States’ and includes all of the branches of the federal government.”); see also Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 255 (2002) (noting the Court’s shift towards interpreting “United States” to mean “Congress”); Bonfield, *supra* note 105, at 523 (concluding that the Court was “fully empowered” to enforce the provision).

<sup>180</sup> Bonfield, *supra* note 105, at 523; Chemerinsky, *supra* note 90, at 871; Merritt, *supra* note 90, at 75–76.

<sup>181</sup> WIECEK, *supra* note 93, at 76–77; Amar, *supra* note 96, at 754.

<sup>182</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>183</sup> Stelzer, *supra* note 138, at 905–06 (“While . . . various articulations only scratch the surface of the guarantee clause, they do show that standards of republicanism are discernible.”).

popular sovereignty, and given that political power resides in the people only to the extent that they control that power directly or control the choice of those representatives who exercise their power by proxy, it does not require a great leap to find an implied guarantee of fair and open elections and a prohibition on structures that entrench the status quo and limit popular control. The Clause empowers federal oversight of the organization and functioning of state governments to ensure that, over the long run, elected officials reflect what most people want most of the time.<sup>184</sup> Certainly differences between states in the structures of their state politics have always existed and will continue to exist, but this fact does not preclude our ability to discern the limits and contours of the guarantee of popular government.

There is no reason that standards could not be developed under the Guarantee Clause as they have been under countless other provisions of the Constitution.<sup>185</sup> Even skeptics recognize that similarly broad provisions have previously been given texture by the Court's refinement over time.<sup>186</sup> While it seems a stretch to suggest judges can define the contours of a republican form of government "without much difficulty,"<sup>187</sup> there is nothing special about the Clause that suggests its growth and development over time would be inappropriate.<sup>188</sup> In the same way that "equal protection" came to imply a

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<sup>184</sup> WIECEK, *supra* note 93, at 23 (arguing that the principles embodied in the Guarantee Clause "did not mean that representatives were to be merely mouthpieces for whatever a numerical majority believed at any one time, but rather that, in the long run, the elected officials, exercising their independent judgment, would reflect what most enfranchised citizens wanted most of the time").

<sup>185</sup> See EPSTEIN, *supra* note 45, at 141 ("Any claim that the principles of republican government are unintelligible makes the Constitution itself largely unintelligible and weakens the protections otherwise offered against the dangers of faction and self-interest . . .").

<sup>186</sup> See, e.g., White, *supra* note 150, at 804–05 ("Thus the Equal Protection Clause and ultimately the Due Process Clause came to be read substantively, even though their indeterminacy was conceded."); Hasen, *Empty Vessel*, *supra* note 89, at 80–81 (noting how the Court used equal protection in a wide range of other election law contexts not initially considered).

<sup>187</sup> Stelzer, *supra* note 138, at 906. Chemerinsky relies on the conclusory statement that "if the Court decided cases under the Guarantee Clause, judicial standards would emerge." Chemerinsky, *supra* note 90, at 871. But even if it would not be "easy," it would also not be any more onerous than developing other similarly broad provisions. See Neuborne, *supra* note 17, at 628 (comparing the development of standards under the Guarantee Clause to creating those for "the freedom of speech," "Our Federalism," equality, or the separation of powers in grey areas like Youngstown Steel"); see also Amar, *supra* note 96, at 753 (making the same argument).

<sup>188</sup> ELY, *supra* note 63, at 123. Similarly, Wiecek concludes that the Clause "merely passes on to succeeding generations the responsibility of constantly redefining the republican ideal, of determining what parts are enforceable by federal action, and of deciding how they are to be enforced." WIECEK, *supra* note 93, at 27.

requirement that voters not be placed in districts of widely disparate populations,<sup>189</sup> guaranteeing a republican form of government can and should imply that candidates have a reasonable chance to appear on the ballot, that voters not be artificially sorted to benefit a certain party, or that citizens not be arbitrarily disenfranchised. The broader critique of unmanageable standards within prudential political question doctrine, exemplified by Justice Scalia's position in *Vieth v. Jubelirer*, suffers similar defects.<sup>190</sup> As Richard Fallon argues, judicially manageable standards are generally products of adjudication, not inherent to the Constitution's meaning.<sup>191</sup>

The history of the Guarantee Clause is not conclusive. Debates over its original meaning, and the definition of "republican form," will likely continue. Yet, disagreements should not necessitate the Clause's dormancy. After all, with the exception of the Privileges and Immunities Clause, it is virtually unheard of for an entire clause of the Constitution to be interpreted in a way that removes all practical significance.<sup>192</sup> In truth, the Clause offers more guidance than it gets credit for, as the consensus understanding of its guarantee of popular sovereignty naturally leads to the development of standards around election law.

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<sup>189</sup> See, e.g., Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899, 1926–27 (2006) (comparing the development of standards under the Equal Protection Clause to the potential development of the Guarantee Clause); McConnell, *supra* note 13, at 106–07 (same).

<sup>190</sup> Scalia focuses on how potential standards are unmanageable in justifying the Court's decision to leave a partisan gerrymander intact. *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) ("As the following discussion reveals, no judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable . . ."). Yet, the same attack could be lodged against the obscenity standard, various "totality of the circumstances" tests, and the "shocks the conscience" standard for whether executive action violates substantive due process. Joshua S. Stillman, Note, *The Costs of "Discernible and Manageable Standards" in Vieth and Beyond*, 84 N.Y.U. L. REV. 1292, 1310–11 (2009). Even the linguistically vague rational basis and strict scrutiny tests are subject to similar criticism; they have just benefitted from the refinement of decades of precedent. *Id.* at 1312.

<sup>191</sup> Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1277 (2006) (labeling the decision in *Vieth* "anomalous"). *But see* Hasen, *supra* note 122 (extolling the virtues of unmanageable standards in this area of the law).

<sup>192</sup> Smith, *Awakening*, *supra* note 90, at 1947. Smith goes on to compare it to the Privileges and Immunities Clause, but notes that even that has been given some meaning. *Id.* at 1947–48.

### III

#### THE GUARANTEE CLAUSE CAN FREE COURTS TO REDUCE ENTRENCHMENT

Over fifty years ago, after *Baker*, the Court began to intervene more regularly in the internal workings of our political system. As the initial interventions demonstrated mixed results, John Hart Ely and others began to identify the problem of applying an individual-focused legal doctrine imported from other areas of constitutional law to a problem that implicated structural notions of fairness.<sup>193</sup> Yet, in the absence of any alternative affirmative textual hook, courts would be, and have been, unlikely to enter the political thicket to remedy structural problems.<sup>194</sup>

Part II argued that neither the text nor early dominant precedents compels a view of the Guarantee Clause as being essentially superfluous to the constitutional structure, or, at best, merely aspirational but unenforceable. The inquiry now turns to the links between the problems of electoral manipulation identified in the first section of the paper, and the potential use of the Guarantee Clause as an appropriate, or perhaps the most appropriate, constitutional vehicle for redress.

In this Part, I argue that the Guarantee Clause provides a potential way forward that would allow courts to unshackle themselves from the baggage of the individualist doctrines of the past and focus on structural concerns in our politics.

Before I define why, when, and how the courts should intervene on Guarantee Clause grounds, I should briefly explain why this should be the task of the federal judiciary in particular. The political question doctrine suggests that these issues are best left to political branches,<sup>195</sup> but there are a number of reasons why Congress is unlikely to act. First, Congress may not pay attention to the political situation within a particular state because the political benefits of acting would be minimal at best and members would generally feel pressure to remain

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<sup>193</sup> ELY, *supra* note 61, at 100–03, 118–19; Levinson & Sachs, *supra* note 7, at 417. To be sure, the categories of individual rights and structural rights are not so analytically neat. See Gerken, *supra* note 52, at 529 (discussing how some individual rights and structural rights claims are difficult for courts to analyze).

<sup>194</sup> See *supra* note 88 and accompanying text (stating that courts have been hesitant to recognize when political structures have been captured in the absence of any textual guide).

<sup>195</sup> Though, given the decline of the prudential political question doctrine since *Baker v. Carr* and *Bush v. Gore*, there is greater “acceptance in our political and legal culture of a strong form of judicial supremacy.” Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1230 (2002).

neutral.<sup>196</sup> Radically malapportioned state legislatures existed for decades without congressional solution.<sup>197</sup> Second, elected members of Congress have a direct personal interest in the election practices of their home states, and, having succeeded under the status quo previously, would likely ensure that provisions that entrench and lock up the state's politics remain intact.<sup>198</sup> Third, Congressional remedies targeting a specific state's practices might conflict with the Tenth Amendment.<sup>199</sup>

In cases where there is reason to believe that a legislative or state body is both able and willing to intervene, there is no need for federal

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<sup>196</sup> See ELY, *supra* note 63, at 117 (writing that the voting cases involve rights “whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo”); Chemerinsky, *supra* note 90, at 876 (“The challenges that will arise . . . are the ones that Congress is virtually certain not to address.”). Similarly, while some call for leaving enforcement to state courts, *see, e.g.*, Stelzer, *supra* note 138, at 895–96, 900–01, this Note focuses on federal courts because the system of appointment and life tenure helps ensure federal judges are insulated from political pressures in a way that state judges—many of whom are elected and/or subject to reelection or recall—are not. ELECTED JUDGES, LAST WEEK TONIGHT WITH JOHN OLIVER (HBO Feb. 23, 2015) (full segment), <https://www.youtube.com/watch?v=poL71-Uk3I8>; Scott Greytak et al., *Bankrolling the Bench: The New Politics of Judicial Elections 2013-2014* (2015), <http://newpoliticsreport.org/app/uploads/JAS-NPJE-2013-14.pdf>. Federal judges are comparative outsiders, better able to objectively assess claims, and largely unaffected by their outcomes. Chemerinsky, *supra* note 90, at 865.

<sup>197</sup> *Baker v. Carr*, 369 U.S. 186, 259 (1962) (Clark, J., concurring) (“It is said there is recourse in Congress and perhaps that may be, but from a practical standpoint this is without substance. To date Congress has never undertaken such a task in any state.”). In fact, after the Court ordered reapportionment, “bills were introduced into Congress to strip federal court jurisdiction over such cases.” Chemerinsky, *supra* note 90, at 876. The one clear exception to this historical pattern regards race. As the problems of minority disenfranchisement became more complex, as with at-large districts that entrenched white control over areas with significant black or Hispanic populations, Congress passed the 1982 amendments to Section 2 of the Voting Rights Act to overturn a formalistic test the Court had established. *See* Hasen, *supra* note 122, at 1500–01 (2002) (presenting this history). Congress is unlikely to intervene outside this racialized context.

<sup>198</sup> Chemerinsky, *supra* note 90, at 876. This logic has also been used to explain Chief Justice Warren’s vote in *Baker*. *See* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1669 & n.130 (1993). The one historical exception to Congress’s passivity (and to the Court’s unwillingness to address structural issues) has been in the context of race. The Court will intervene to prevent minority vote dilution—whereby political structures are arrayed to prevent a minority group from electing a candidate of its choice—even though individuals can only demonstrate harm as part of an aggregate entity. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1668 (2001) (noting the Court’s special treatment of vote dilution claims). Congress created this exception when, after the Court failed to think holistically about systems used to disenfranchise minority voters, it intervened to pass the Voting Rights Act. *See* Hasen, *supra* note 122, at 1500–01 (2002) (presenting this history). Outside of this specific context of the Civil Rights movement, Congress is much less likely to intervene.

<sup>199</sup> Chemerinsky, *supra* note 90, at 877.

judicial involvement.<sup>200</sup> Similarly, if there is a particular reason to believe a coordinate branch would do a superior job, the prudential political question doctrine may suggest the propriety of abstention.<sup>201</sup> But the structure of state governments *is* a federal interest, as the federal government helps ensure rights when state governments fail to do so, and the performance of one state can affect the rest.<sup>202</sup>

### A. *Why the Guarantee Clause Should Be Revived*

The Guarantee Clause should be revived, first, because it can provide a flexible standard that functions better than the current standards in various law of democracy realms. For example, in the gerrymandering context, the shift to Equal Protection led to a rigid equipopulation standard that only exacerbated structural problems. Ignoring Justice Holmes's reminder "that the machinery of government would not work if it were not allowed a little play in its joints,"<sup>203</sup> and Chief Justice Warren's prescient worries in *Reynolds*,<sup>204</sup> subsequent Supreme Court decisions endorsed mathematical equality.<sup>205</sup> This rigid equipopulation mandate obscured the larger distortions and inequalities of gerrymandering.<sup>206</sup>

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<sup>200</sup> This echoes Justice Clark in *Baker v. Carr*, stating that he "would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee." 369 U.S. 186, 258 (1962).

<sup>201</sup> WIECEK, *supra* note 93, at 126.

<sup>202</sup> Heller, *supra* note 14, at 1724; see also James M. Fischer, *Plebiscites, the Guaranty Clause, and the Role of the Judiciary*, 41 SANTA CLARA L. REV. 973, 977–80 (2001) (explaining that member states in a federal union be similarly constituted and that it would be dangerous to some states if others assumed a different form of government); Stelzer, *supra* note 138, at 890 (quoting James Iredell as noting that republican government "was essential to the existence and harmony of the confederacy").

<sup>203</sup> *Reynolds v. Sims*, 377 U.S. 533, 577 n.57 (1964).

<sup>204</sup> *Id.* at 579 (noting that redistricting could be an "open invitation to partisan gerrymandering"); Harold Leventhal, *Courts and Political Thicketts*, 77 COLUM. L. REV. 345, 348–49 (1977) ("In . . . *Reynolds v. Sims*, Chief Justice Warren recognized that mathematical exactness was neither wise nor feasible.").

<sup>205</sup> Leventhal, *supra* note 204, at 349–50 (describing the Court's movement towards mathematical equality culminating in two 1969 decisions). Professor Neuborne suggests the formal equality test was adopted under pressure from Justice Frankfurter, "who insisted that judges lack the capacity to develop a constitutionally enforceable substantive right of fair representation." Neuborne, *supra* note 17, at 628.

<sup>206</sup> See Neuborne, *supra* note 17, at 631 (noting how incumbent powers used the safe harbor of mathematical equality to entrench minority rule). Equipopulation also led to absurd results; in *Karcher v. Daggett*, the Court invalidated a New Jersey apportionment plan for U.S. House districts for its deviation of 0.7% instead of simply being honest about the offensive nature of the partisan gerrymander at issue. 462 U.S. 725, 744 (1983). Adding to the folly is the fact that, given statistical variations in census sampling, varying birth/death rates, immigration, and many other factors, absolute population equality is impossible to achieve. McConnell, *supra* note 13, at 110–11 (arguing that a variety of

What if *Baker* had proceeded under the Guarantee Clause? Certainly, the same constrained formulations of constitutional concern could have emerged. But *Baker*, like many cases that open a line of constitutional concern, had reached for the path of apparent least resistance without anticipating that the next layer of electoral distortion would require a more robust set of tools. Perhaps a *Baker* decision grounded in a structural concern for the meaning of republicanism could have required reapportionment because the status quo “systematically prevent[ed] effective majority rule” without endorsing a strict equipopulation standard.<sup>207</sup> Judge McConnell notes that this would have assisted the Court’s project of sanctioning some racial gerrymanders for bringing minority strength closer to its proportional weight, without sanctioning partisan gerrymanders, which are designed to entrench a political faction against effective challenge.<sup>208</sup>

Second, in some ways, the Guarantee Clause actually furnishes more guidance for courts than do the rights of association, equal protection, and due process when dealing with modern issues of governmental structures and election law.<sup>209</sup> Its abandonment left the Court without a coherent way to strike down self-dealing.<sup>210</sup> The Guarantee Clause would provide a textual basis to guide the Court’s work of defining what is essential to free and fair elections, and what makes a vote meaningful. As Frankfurter noted in *Baker*, saying that malapportionment in Tennessee violates equal protection requires a conception of what makes a vote meaningful, or how much power voters

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factors including birth and death rates and immigration create different levels of influence for voters in different places).

<sup>207</sup> McConnell, *supra* note 13, at 114. This was Justice Stewart’s proposed standard in *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 753–54 (1964) (demanding that a plan must not “permit the systematic frustration of the will of a majority”). See ELY, *supra* note 63, at 122–24 (noting the weak rationale for favoring equipopulation over Stewart’s formulation); see also Hasen, *supra* note 122, at 1485–86 (praising Stewart’s proposal for its unmanageability, as it would have allowed for experimentation in the area).

<sup>208</sup> McConnell, *supra* note 13, at 116. Nonetheless, the overlapping nature of partisan and racial voting patterns would still create difficulties for judicial analysis. See, e.g., *Exit Polls*, CNN: ELECTION CENTER 2008, <http://edition.cnn.com/ELECTION/2008/results/polls/#USP00p1> (last visited Sept. 12, 2016) (showing that ninety-five percent of black voters supported the Democratic nominee in the 2008 presidential election).

<sup>209</sup> Bork, *supra* note 128, at 19 (arguing the Clause “provides some guidance for a Court”, whereas “[t]he concept of the primary right of the individual in this area provides none”).

<sup>210</sup> Neuborne, *supra* note 17, at 633–34 (explaining why the Equal Protection Clause cannot reach political gerrymandering). *Contra* Pildes, *supra* note 51, at 45 (arguing that other clauses might reach self-dealing).

*should* have.<sup>211</sup> Some might argue that this invites result-oriented judging, but once the court intervenes, there are arguably no truly objective standards.<sup>212</sup>

Third, the more flexible standards of the Guarantee Clause would be better suited to the interrelated nature of entrenchment, as presented in Part I. The focus on individual burdens and state justifications often leads courts to conclude, falsely, that there is another way for a candidate to get on the ballot, for a voter to exercise his or her choice, or for incumbents to be dislodged.<sup>213</sup> By contrast, even if one provision is not significantly burdensome on any one individual, courts acting under the umbrella of the Guarantee Clause might conclude that the provision, within the larger system, functions in a way that harms an important structural polity-wide value and makes the state marginally less republican.

### *B. How the Clause Would Practically Address Lockup*

If the Supreme Court were to recognize the wisdom of this proposal tomorrow, what would be the practical result? Under a conception of the Guarantee Clause that protects popular sovereignty, judicial intervention would *not* be justified in many scenarios. For example, term limits, though often fashioned as a response to entrenchment and blocked by self-interested incumbents, simply work to limit voters' choices by removing the incumbent legislator from consideration.<sup>214</sup> Consequently, courts applying a Guarantee Clause framework to electoral entrenchment in this situation would not typically intervene. Similarly, under the narrow consensus-driven conception I offer, courts should not dismantle direct democracy measures but rather leave that decision to the political system.<sup>215</sup> Moreover, without reading a guarantee of deliberation into the Clause, chal-

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<sup>211</sup> See *supra* notes 125–27 and accompanying text (stating that the determination of whether apportionment violates equal protection requires answering what constitutes adequate representation in a republican state); see also ELY, *supra* note 63, at 118 (arguing that voting cases styled as Equal Protection decisions cannot be understood “without a strong injection of the view that the right to vote in state elections is a rather special constitutional prerogative, a view . . . most naturally assignable to the Republican Form Clause”).

<sup>212</sup> Hasen, *supra* note 122, at 1487–88 (noting that the choice is merely between dictating results “at the front end through the one-person, one-vote rule,” or allowing “variation on the back-end through Justice Stewart’s flexible standard”).

<sup>213</sup> See *infra* Part I.

<sup>214</sup> But see Klarman, *supra* note 84, at 510 (arguing that legislative rejection of term limits is “entrenchment at its worst”).

<sup>215</sup> See *supra* note 172 and accompanying text (discussing the debate over whether the Guarantee Clause allows for forms of direct democracy).

lenges to internal legislative procedure are similarly improbable targets for justifying judicial intervention.<sup>216</sup>

However, in cases in which the challenged provisions directly relate to popular sovereignty, courts may utilize the Guarantee Clause as a textual roadmap to ensure that the structures of our politics enable responsiveness to the popular will. The Clause *would* reach the “paradigmatic case of electoral entrenchment” in which officials manipulate the rules once in office to thwart subsequent majorities from replacing them.<sup>217</sup> Judicial enforcement would also reach other exclusionary or discriminatory devices that weaken the “republican” nature of the state government,<sup>218</sup> as the Clause guarantees “both a result (republican government) and an obligation to maintain that result (by invalidating encroachments on the republican form).”<sup>219</sup> For example, the Clause could apply to franchise restrictions, as they can improperly skew the scope of the political community in a way that undermines popular sovereignty and unfairly entrenches the status quo. It might also justify judicial intervention in cases of partisan and bipartisan gerrymandering in which officeholders draw lines to entrench themselves or their party, and in cases of stringent ballot access provisions that raise the costs of entry and unduly burden challengers, leaving the system less responsive.

Returning to the examples provided at the outset, analysis of the situations in *Burdick*, *Clingman*, *Gaffney*, and *Lopez Torres* might progress quite differently under the Guarantee Clause. In *Burdick*, the prohibition on write-in voting would not be analyzed for its burden on voters’ rights of free expression and protest. Rather, a court might view the prohibition as yet another way the party in power makes it nearly impossible to mount a challenge against the leadership-backed candidate, thus constraining popular will and artificially entrenching the status quo. In *Clingman*, instead of focusing on voters’ right to associate with the Libertarian Party, courts would analyze how the election rules insulate the major parties from competi-

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<sup>216</sup> See *supra* note 173 and accompanying text (discussing the debate over whether to read deliberation into the Clause).

<sup>217</sup> Levinson & Sachs, *supra* note 7, at 412 (describing this paradigmatic case).

<sup>218</sup> See *supra* note 165 and accompanying text (arguing that the Guarantee Clause protects against small antirepublican decisions, not only the wholesale abandonment of republicanism at the state level). Even some critics of reviving the Guarantee Clause concede this point. See Hasen, *Empty Vessel*, *supra* note 89, at 81 (“Nothing in the Constitution requires the Supreme Court . . . to find all actions of that state to be nonrepublican as well. The Court could have simply declared the particular feature of state law—in *Pacific States*, the initiative power—to be nonrepublican, leaving the rest of state law intact.”).

<sup>219</sup> *Heller*, *supra* note 14, at 1734.

tion by placing burdens on third parties and their supporters that prevent them from growing in strength. And in *Gaffney*, rather than endorsing the bipartisan gerrymander as a positive exercise in political fairness, a court effectuating the Guarantee Clause's protection of popular sovereignty would recognize that carving up the state to entrench the proportional status quo renders elections less meaningful and representatives less accountable.

After reaching these conclusions, courts can also craft sufficient remedies under the Guarantee Clause. Judge Gleeson's opinion in *López Torres* embodies a perfect example of how this might look. Gleeson understood that the cumulative effect of the state election laws undermined the legitimacy of the judicial elections and was "designed to freeze the political status quo" and prevent competition.<sup>220</sup> Though his analysis utilized the ill-fitting *Burdick-Anderson* balancing test described in Part I, he wrote of how "[a]n election must always retain the essential qualities of an election,"<sup>221</sup> and fashioned an appropriate remedy. Gleeson ultimately left the decision of a permanent remedy to the state legislature, while ordering a temporary solution—direct judicial primary elections—that he believed was the "least intrusive course" and that preserved the roles of both the parties and the voters.<sup>222</sup> Similar remedies could be fashioned in most Guarantee Clause cases, and in many, merely enjoining the antirepublican practice would suffice.

In the absence of political solutions to the problems of entrenchment and political lockup in the states, the federal judiciary is the backstop for ensuring that our government truly reflects the will of the people. The Guarantee Clause provides a textual basis for courts to unburden themselves of the flaws of individualist doctrines and instead focus on opening up the structures of our politics.

## CONCLUSION

In *Colegrove v. Green*, Justice Frankfurter wrote that it is "hostile to a democratic system to involve the judiciary in the politics of the people."<sup>223</sup> Frankfurter's beliefs have not carried the day; the Court has adjudicated countless "political" questions over the past fifty-five

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<sup>220</sup> *López Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212, 255 (E.D.N.Y.), *aff'd*, 462 F.3d 161 (2d Cir. 2006), *rev'd*, 552 U.S. 196 (2008).

<sup>221</sup> *Id.* at 247.

<sup>222</sup> *Id.* at 255–56. The idea of a temporary solution was also endorsed by Justice Clark in *Baker* when he suggested consolidating some existing assembly districts and awarding "the seats thus released to those counties suffering the most egregious discrimination." *Baker v. Carr*, 369 U.S. 186, 260 (1962) (Clark, J., concurring).

<sup>223</sup> *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946).

years. But the fall of the Guarantee Clause, which hit its nadir in *Baker* in an attempt to placate Frankfurter's concerns, has paradoxically brought his worst nightmares to fruition. The Supreme Court intervenes in political cases and then proceeds to uphold provisions that entrench the status quo, that diminish the control of voters, and that undermine the legitimacy of the republican form of government guaranteed to the States.

Many have identified the problems in our state politics *and* the flaws of the extant individualist doctrinal framework. But now is *not* the time for the Court to embrace Frankfurter in an attempt to wash its hands of a problem it helped create. Rather, it is time for the Court to reengage, and to get a "fresh start,"<sup>224</sup> by reviving the Guarantee Clause. Courts should develop what it means for a vote to be effective, for elections to be open and fair, and for the structures of government to be sufficiently competitive and responsive. We can and should apply the one phrase of the Constitution devoted to the *form* of state governments to the problems of the *forms* of our state governments.

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<sup>224</sup> Vieth v. Jubelirer, 541 U.S. 267, 345 (2004) (Souter, J., dissenting).