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PLEBISCITES, THE GUARANTY CLAUSE, AND THE ROLE OF THE JUDICIARY

James M. Fischer*

The people are to be taken in very small doses.

Emerson

Democracy is the worst form of government except all those other forms that have been tried from time to time.

Winston Churchill

Bad laws are the worst sort of Tyranny.

Edmund Burke

Legislation is too serious a matter to be left to the Legislators.

With apologies to General Charles De Gaulle

In 1912 the U.S. Supreme Court refused, in Pacific States Telephone & Telegraph v. Oregon,1 to examine the constitutional validity of an initiative enacted statute imposing an annual license fee on telephone and telegraph companies. The Court found the telephone company's claim, that the plebiscite's2 bypassing of the Oregon legislature violated Article IV, Section 2 of the federal Constitution,3 to

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1. 223 U.S. 118 (1912).

2. I use the term "plebiscite" to reflect the reserved power of the people to enact legislation through the initiative or referendum, or constitutional amendments through the initiative (hereinafter sometimes referred to as "ballot propositions"). The term "direct democracy" is synonymous with the term "plebiscite." The term "direct legislation" is synonymous with the terms "initiative" and "referendum."

3. Article IV, section 4 of the U.S. Constitution provides: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on
be a nonjusticiable political question.⁴ Although the Court's decision saved the plebiscite from federal constitutional challenge,⁵ this was not a ringing endorsement, nor could it be said that the plebiscite was universally popular. Some saw then, as some see now, the plebiscite as a cancer on the body politic: "This country is facing today a crisis as serious as any which has occurred in its history, except that of the Civil War. Popular government is being put to the test, and the outcome will determine whether the people of this country are capable of governing themselves."⁶ This unsympathetic view of the plebiscite has, if anything, intensified over time. Ironically, the plebiscite, once the darling of progressives, is now seen by some modern progressives to be more detriment than benefit, more cause for concern than celebration.⁷

A number of legal scholars have questioned the correctness and limits of the Court's decision not to entertain a Guaranty Clause challenge to the plebiscite. Justice Hans Linde has argued that the Court's jurisdiction-based decision in Pacific States is not binding on the States.⁸ The late Professor Eule, perhaps following in the wake of resurgent scholarly interest in "republican" values,⁹ contended that the basic constitutional theme of republican representative

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Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." The first part of section 4 is commonly referred to as the "Guaranty (or Guarantee) Clause."

4. See Pacific States, 223 U.S. at 151.

5. Plebiscites remain subject to constitutional challenge on the ground they violate specific constitutional provisions. See, e.g., Reitman v. Mulkey, 387 U.S. 369 (1967) (The Court invalidated a state initiative, which prohibited any state interference in deciding ownership of property to sell, lease, or rent realty to whomever the seller wished, as violative of the 14th Amendment Equal Protection Clause).


7. A forceful critique of the plebiscite, particularly with respect to its use in housing and zoning issues, was made in Derrick A. Bell, Jr., The Referendum: Democratic Barrier to Racial Equality, 54 Wash. L. Rev. 1 (1979).


government requires of the judiciary that it give less deference to legislation enacted by the electorate than would be afforded were that very same legislation adopted by the legislature.\textsuperscript{10}

Unlike the issue-specific approach that has been the practice when courts examine the legality of measures adopted through the plebiscite, Justice Linde and Professor Eule would accept broad structural limitations on the plebiscite. These limitations would be beyond immediate popular control since they would be derived from federal constitutional principles. There are many other scholarly contributors to this discussion and I do not mean to slight them by emphasizing the scholarship of Justice Linde and Professor Eule. I believe that the views developed by Justice Linde and Professor Eule provide, however, a coherent, although flawed, argument for judicial enforcement of the federal Guaranty Clause—what I will characterize in this paper as the "guaranty thesis." Understanding this thesis is key to analyzing the role the Guaranty Clause is seen by many legal scholars to play in the debate over the validity and merit of the plebiscite. I wish to develop and critique this "guaranty thesis" first, and then address the arguments Justice Linde has made in his paper for this conference.

The essence of the "guaranty thesis," as I understand it, is that state courts are not precluded by the Supreme Court's decision-making in the Guaranty Clause cases from using the Clause themselves to review the constitutionality of ballot propositions. In exercising this power, state courts could review ballot propositions from either (or both) of two perspectives. First, the state court could adopt what I would characterize as the substantive guaranty clause approach.


the ballot proposition failed to meet that norm, it would be struck down. Second, the state court could use a procedural guarantee clause approach. Under this approach, the state court would subject the ballot proposition to a strict, "hard look" standard of review. The purpose of the "harder look" would be to safeguard minorities and other vulnerable groups from the dangers posed by ballot propositions that are facially neutral yet have discriminatory effects. The presence of discriminatory effects would permit the court to strike down the ballot proposition.\textsuperscript{12}

The thesis's substantive prong rests on a reading of the Guaranty Clause that ultimately must find a mooring in either the original understanding of the provision or contemporary views of what the Clause requires—which largely means what role do we think the Clause should fill. I have problems with either point of the thesis's substantive prong.

The thesis's historical argument runs into the age-old problem of proof. An appeal to history suggests a provable connection in fact that is demonstrably accurate. The difficulty is that in our post-modern age, appeals to history often raise value issues themselves, particularly when the historical record is rich and varied, as it is here. The Constitutional Convention's records, Federalist Papers, and the state ratifying convention debates contain a smorgasbord of comments, insights, views, and arguments regarding the various provisions in the Constitution drafted in Philadelphia in 1787. Like the Bible, these sources can be mined and cherry-picked for propositions that will support almost any position one could wish to take on the relationship between direct democracy and the Guarantee Clause. For example, sometimes the Federalist Papers suggest that the Guaranty Clause permits the states extreme latitude in choosing their form of government.\textsuperscript{13} On other occasions, the Federalist

\textsuperscript{12} This view was developed by Professor Eule. See Julian N. Eule, \textit{Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal}, 65 U. COLO. L. REV. 733 (1994); Eule, \textit{supra} note 10.

Papers suggest that representative decision making is an essential component of republican government. These are significant themes, interesting in their own light, informative of our political, cultural, and moral heritage, but no more reconcilable or subject to ordering principles than the quotations I set forth at the beginning of this paper.

I do not here contest the accuracy of the characterization of the form of the federal government as "republican;" there is, however, no basis for understanding the guarantee of a republican form of government as being designed to place the U.S. Constitution behind a "judicially" enforceable mandate that States adopt institutional arrangements similar to those adopted for the federal government. First of all, the two governments were conceived of as being fundamentally different: the federal government was a government of limited, delegated powers; the state governments were governments of general, reserved powers. Separation of powers/checks and balances as institutional arrangements were designed to keep the federal government true to its nature. There simply was no compelling need, nor reason, to impose like institutional restraints on the States. That does not mean that the Guarantee Clause was intended to be superfluous or hortatory. There was a shared sense at the time that within a federal union of sovereign states it was necessary that the member states be similarly constituted. It was recognized that Union would be impossible were one or

and sometimes arguing that "republican" meant "non-monarchical." See WILLIAM WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 63-64 (1962) (noting the "split personality" of Publius and observing that the differences reflected the differing views of the twin authors, Madison and Hamilton).


15. I raise this point because I believe the comparison is basic to the "guaranty thesis" and because the federal form of government was a central theme to the framers' views as to what constituted a "republican" government. See WIECEK, supra note 13, at 20; THE FEDERALIST NO. 3 (John Jay) (George Carey ed., 1989) (noting that The Federalist Papers begin with a defense of the proposed Constitution as conforming "to the true principles of republican government").
more of the states to assume a monarchical or aristocratic form of government, and more importantly, it would be dangerous to the other states if such events came to pass. Federalist No. 21 repeated this view. Indeed as Professor Bonfield noted, albeit grudgingly, Federalist No. 21 undermines any contention that the Guaranty Clause applies to peaceful changes in government, such as those accomplished through the plebiscite:

Out of convention, The Federalist Papers insisted that without the guarantee, "A successful faction may erect a tyranny on the ruins of order and law, while no succor would constitutionally be afforded by the Union...." After noting the consequences that might ensue from its absence, an answer was provided for the fear that section 4 would permit "officious interference in the domestic concerns of the members." It was that the first clause could be no impediment to reforms of state constitutions by a majority of the people in a legal and peaceful mode, this right could only operate on changes to be effected by violence, but there was an admission that it "would be as much directed against the usurpations of rulers, as against the ferments and outrages of faction and sedition

16. A point recognized and accepted by the Supreme Court in Baker v. Carr, 369 U.S. 186, 222 n.48 (1962) (observing that a justiciable controversy involving the Guaranty Clause may be raised if a state was captured by a permanent military government). See WIECEK, supra note 13.

The guarantee clause was not meant to solidify republican government in the mold of existing political institutions. It obviously could not, if only because the state governmental structures in 1787 were too varied and too changing to share any but the broadest common characteristics. In the clause's negative thrust, it was designed to prohibit monarchical or aristocratic institutions in the states. What began simply as a revulsion, grounded in experience and necessity, against rule by kings became transformed into a pledge of popular government. In its positive aspects the clause assured that innovation would be possible within a republican framework. It was more than the Philadelphia Convention's benediction on the extant state constitutions; it looked to the future, insuring that state governments would remain responsive to popular will.

Id. at 62-63.

17. See 4 ELLIOT DEBATES, supra note 13, at 195 (remarks of James Iredell, later a Justice of the U.S. Supreme Court, at the North Carolina ratifying convention). Wieck also notes the importance the founders attached to the Guaranty Clause as a means of mutual self-protection enforceable through the newly formed central government. WIECEK, supra note 13, at 26.

The historical argument is further weakened and eroded when it is recognized that not even the Framers had a consensus or shared understanding of the form or composition of a republican government. No sooner had the first national government been seated than disputes broke out between those who would come to be called Federalists and those who would come to be called Republicans. Disagreements between the parties as to the proper role of government and the relationship between government and people were profound. We should not ignore the existence of bitter disagreement when we attempt to ascribe an understanding or meaning to text based on our belief that the same understanding or meaning was shared by a distant drafter or drafters.

Even if we grant that state courts are not barred by the Supreme Court’s justiciability political question doctrine from entertaining Guaranty Clause challenges to the plebiscite, a position no court has accepted, we are still left with the profound, unanswered, and probably unanswerable question: what republican model does the Guarantee Clause guarantee? Does it reflect the profoundly undemocratic form of government adopted in 1787, or does it reflect the more democratic model with universal citizen-adult suffrage that has evolved over the last 200 years? Is republicanism viewed as a whole or as a part? In other words, does our view of republicanism accept or reject the Court’s view in *Pacific States* that the proper view is the whole, and the case must be made that the state government as a whole is non-republican

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21. There is little doubt that the founders were profoundly “undemocratic” as that term is understood today. Only one branch of the federal government (House of Representatives) was to be elected by the “people.” The “people” were themselves a discrete minority of the inhabitants of the newly formed United States, excluding not only slaves and women but most adult males. Universal white adult enfranchisement would not occur until the advent of Jacksonian democracy in the 1820s. The Founders saw democracy and despotism as connected; the former necessarily led to the latter. See Wieck, *supra* note 13, at 19. For a criticism of the anti-democratic tone of the “guaranty thesis,” see Akhil Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994).
before the Guaranty Clause would be applied. Requiring that the state as a whole be the proper focus would likely require a court to accept or reject the use of the plebiscite in toto. I do not understand the thesis to make this broad claim, but I do not see how the Guaranty Clause can be used as a scalpel rather than a meat cleaver if guarantee refers to the whole structure of state government, not a discrete part. The problem is that the thesis operates on the assumption that a state government can be republican in the whole, but non-republican as to a discrete part. I believe that such an assumption has no grounding in the historical record. More significantly, its adoption would be cause for mischief. Any law-making procedure outside the scope of republican elected bodies would be subject to challenge under the “guaranty thesis.” For example, state laws providing for the popular election of Presidential Electors raise a claim of non-republican vice. The same could be said for popular election of judges. Use of the Guaranty Clause to challenge these established practices would raise a firestorm of popular protest that would, in my view, do little good and much harm to state courts that would be called upon to apply the “guaranty thesis” to these issues in a principled manner.

The second method of advancing the “guaranty thesis’s” substantive prong is to argue that the Guaranty Clause reflects evolving ideals of republican government that reflect contemporary needs and values. To suggest this approach is, of course, to identify its prime difficulty. Legal Realism is

22. The point is developed in greater detail by Sirico, supra note 13, at 651-52.


24. The claim that the practice violates the norm of “republicanism” as announced by the “guaranty thesis” is enhanced by the fact that the Founders specifically rejected proposals to elect the President by popular vote.

25. I say this notwithstanding my own view that contested judicial elections are a pernicious intrusion on the independence of the judiciary from popular influence. It is enough that judges read about election results; judicial decisions should not be secured directly by election results. Yet, I am constrained to add that my dislike of the practice does not persuade me that popular election of judges is non-republican, much less that it warrants redress through Article IV, section 4. As Daniel Webster once noted: “A strong conviction that something must be done is the parent of many bad measures.”
more attractive to legal commentators than judges. Rare is the judge who acknowledges that his or her construction of constitutional text is controlled by values alien to those who drafted and ratified the text.

Constitutions must, of course, be dynamic and have the capacity to respond to new situations not seen, or even foreseeable, by the drafters and ratifiers. This delicate balance is maintained by extending the core meaning of the original text, as understood and defined by the courts, to the new situation presented. How fast and how honestly this process is conducted cannot be defined. The Constitution, as interpreted by the Court, means many things today that one suspects would surprise those who were there at the beginning. Some find this dismaying, others exhilarating. Yet, even the latter will acknowledge the need to maintain a bridge to the past if we are to maintain a meaningful distinction between legislative and judicial power.

A bold claim that the Guaranty Clause encompasses modern views of civic republicanism—itself a debated concept—is unlikely to be accepted by modern courts. One can argue that a particular model of modern civic republicanism more closely coheres with the republican model held by the drafters and should be adopted for that reason. That argument brings us back, however, to the historical argument, which, I have argued, does not support the view that the Constitution entrenched a particular model or standard of republican government on the states.

We should not forget that the Constitution was meant primarily for those who lived in the newly independent States in 1787. Their situation was not that of inhabitants of a dominant superpower. The States were divided by regional differences, subject to substantial debt to British and Dutch bankers, confronted by Spanish forces in the South and West, British forces in the North, hostile Native Americans everywhere, rebellions at home, and indifference abroad. That argument brings us back, however, to the historical argument, which, I have argued, does not support the view that the Constitution entrenched a particular model or standard of republican government on the states.

Article IV, Section 4, which includes the Guaranty Clause, was a natural expression of a concern that a State may need assistance, due to external or internal pressures that would

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26. See WIECEK, supra note 13, at 22 (prevent tyranny), 39-40 (concern over Shay's Rebellion and fear of internal commotions), 38 (concern over British agents in Canada fomenting insurrection), 42-46 (concern over creation of a monarchy).
threaten its very ability to function as a State in the form and manner those alive at the time experienced and expected. It is a misapplication of constitutional text to take terms and provisions that had a historical relevance and apply them to a different situation that does not meaningfully share that historical context. The mistake made in arguing for a grandiose view of the Guaranty Clause is no different from those who have a grandiose vision of the Second Amendment. The procedural prong of the “guaranty thesis” makes the claim that plebiscites raise severe risks to vulnerable groups that are different in kind from the risks deliberative bodies pose to these vulnerable groups. Deliberative bodies contain safeguards against majoritarian excess. These safeguards include consensus building, reliance on the quality and quantity of constituent pressure, and an awareness of constitutional guarantees which in the aggregate point, direct, and encourage elected representatives to govern for the public good.

27. Like the aggressive proponents of the Second Amendment, the proponents of the Guaranty Clause read that clause in isolation from the rest of the text. Article IV, section 4 of the Constitution provides: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion, and on the Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” The first clause is commonly referred to as the Guarantee Clause. The second clause, however, suggests the context in which the guaranty was made that provides little support for reading the first clause broadly.

28. See Eule, supra note 10, at 1526 (discussing the “representative filter”); cf. Bell, supra note 7, at 19-20:

Appeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns. Of course, politicians, too, may offer quick cure-alls to gin electoral support and may spend millions on election campaigns that are as likely to obfuscate as to elucidate the issues. But we vote politicians into office, not into law. Once in office, they may become well-informed, responsible representatives; at the least, their excesses may be
presume that the legislation has been adjusted internally to address the issue of disparate effects as part of the "give and take" of the legislative process. Consequently, courts need only police those instances where the normal "give and take" does not operate—as, for example, when the court discerns a discriminatory intent on the part of the majority against the minority. Judicial review of legislation coming from deliberative bodies is consistent with this view.  

From the viewpoint of the "guaranty thesis," however, the normal checks and balances inherent in deliberative, representative bodies are missing when direct democracy is used to enact law. Voting is a singular, isolating experience. A voter can privately and deliberately seek to advance his own self-interest, his neighbor's adverse interest, or both. Unlike deliberative, representative bodies, there is no accountability for one's vote; indeed, a voter can publicly state that he or she will vote one way, but vote the other way in the voting booth and no one will know. According to the thesis, voter autonomy and ballot secrecy raise the likelihood that ballot propositions will operate, in fact, to burden vulnerable minorities. For this reason, the thesis would subject legislation enacted by plebiscites that disparately affect vulnerable minorities to a stricter standard of review than would be applied were legislation, identical to the ballot proposition, enacted by a deliberative, representative body.

The fundamental question is whether we should allow our concerns for the integrity of the law making process to influence the decision whether law, independent of its content, should be respected. The "guaranty thesis" suggests that concerns over the integrity of plebiscites justify that laws thereby enacted be subjected to harsher scrutiny than laws enacted by representative institutions. The thesis does not operate under the illusion that the legislative process of deliberative, representative bodies is immune from majoritarian excess; representative bodies have at times exhibited a discomforting refusal to act with integrity. The

curtailed by the checks and balances of the political process.

*Id.* (citation omitted).


31. Ironically, not cravenly following public opinion polls does not necessarily generate either popular or academic kudos, as demonstrated by the substantial disapproval visited on congressional republicans for their
thesis operates on the assumption that this tendency infects to a greater extent the plebiscite. Dissimilar treatment is not urged because of differences in the actuality of abuse; we are provided no empirical data by which we can measure the degree of deviation from the desired norm or the extent to which, in fact, one method of decision making is more principled than another. Rather, the gradations of evil are based on the potential for abuse. The thesis sees in the representative institutions and their internal processes the safeguards mentioned earlier that caution against majoritarian excesses. These safeguards are found to be altogether absent in the context of plebiscites, and correspondingly, the thesis would subject plebiscites to the equivalent of a judicial "hard look."

I do not believe it is surprising that certain qualities present in connection with one form of decision making might not be present in an altogether different form of decision making. The question is whether these identified differences are really significant; do they really affect the integrity of the process; and if so, can they be redressed through the remedy of a judicial "hard look?" The problem would be difficult enough if we were addressing a case in which one form of decision making was identified as generating more instances of abuse. In such a case, one would question whether the factors identified as critical to the process were merely correlative or causal. In the context presented by the "guaranty thesis," the problem is abstracted. Anecdotal information and case studies are legion, but good empirical data comparing the "quality" of decision making accomplished by the plebiscite with that of representative institutions is lacking. This is not surprising. Few controversial political disputes are resolvable by facts rather than values. This unrelenting attacks on former President Clinton—attacks that persisted in the face of acknowledgment that the attacks were unpopular and politically counterproductive.

32. See Phillip P. Frickey, Interpretation on the Borderline: Constitution, Canons, Direct Democracy, 1996 ANN. SURV. AM. L. 477, 486 (suggesting that the presumptions are descriptive in nature and thus, subject to criticism as lacking empirical support).

points out, however, the care we should exercise before we render constitutional decisions on fluid fact patterns and selective collection of facts. We must, in the absence of any sound data, forecast the possible incidence of abuse. On that basis alone we must then find that a form of decision making that possesses those certain identified factors is less likely to be abusive or abused (i.e., improperly subject to majoritarian excesses) than is a system of decision making that does not possess those factors. I find the proof necessary to sustain the thesis unavailing and, I suspect, unavailable except as a reflection of one's already formed views of the superiority of certain forms of decision making over others. Ultimately the thesis fails, for its assumption of the superiority of representative decision making over the plebiscite can neither be proven nor disproven. Hence, it can provide no real support for a principled decision to subject one form of decision making to a different level of scrutiny than is rendered to the other, at least to the extent the different treatment is predicated on perceived characteristics of each form.

The "guaranty thesis" invokes the spectre of "majoritarian excesses" as a justification for a judicial "hard look" at plebiscite legislation. I will concede that "majoritarian excess" is not only possible, but, on occasion, a reality. But all forms of decision making possess the potential for abuse and, on occasion, that potential is realized. The difficulty is in defining what we mean by "excess." If the thesis is suggesting that certain types of legislation (i.e., that within the four corners of the Carolene Products footnote relating to the relative fitness of the judicial and legislative branches to address certain types of problems) are to receive a judicial "hard look," that point is unremarkable. Constitutional guarantees can be no more abrogated by the

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34. See BRODER, supra note 33. An esteemed reporter, the bulk of Broder's book reflects a balanced account of recent usage of ballot propositions, emphasizing experiences in California and Oregon in the 1990s. Yet, in the final chapter of the book, when the reporter becomes an editorial writer, his criticism of ballot propositions becomes divorced from his conclusions. The nuance and subtlety of the earlier chapters is replaced by unsubstantiated conclusion. Having examined the pros and the cons of ballot propositions with exemplary fairness and an eye for detail, Broder concludes that the con position prevails, but then fails to tell us why.

people directly than through their representatives. Yet, I
understand the “guaranty thesis” to be making a far broader
statement. “Majoritarian excess” lies in the very fact that the
plebiscite exists and serves as a mechanism to bypass
representative institutions. This fact alone, in my estimation,
serves as the driving force behind the judicial “hard look” at
ballot propositions that proponents of the thesis demand.

The “hard look” gloss bears some resemblance to the
“hard look” doctrine that emerged in the 1970s as a
methodology for judicial review of agency decision making.
The doctrine was expressive of a review function that was
artfully described as both “narrow” on the one hand, and
“probing,” “searching,” and “careful” on the other.\(^6\) The
difficulty with applying a “hard look” doctrine in the context
of plebiscites is that any “hard look” doctrine presupposes
that one knows what one is looking for. In the administrative
law context, the search was for evidence of reasoned “on the
record” decision making by the agency.\(^7\) If the agency failed,
in the court’s estimation, to have exercised a sound discretion,
the agency’s decision was set aside. Of course, in the context
of agency decision making the “hard look” doctrine can be
justified as a means of assuring that the decision maker has
acted consistent with the law that authorizes the decision
maker to decide in the first instance. But what law
authorizes the application of the “hard look” doctrine to
plebiscites? On what basis do courts assume the role of
determining whether the voters exercised a “sound”
judgment? By what right do courts assume the right to
declare properly enacted legislation invalid because in the
mind or opinion of the judge, the enactment is ill advised,
wrongheaded, or just plain stupid. I do not doubt for a
moment that many of us would like the ability to exercise
such a power. I state with great confidence that few, if any, of
us would want to confer such power in someone other than
ourselves.

Before we embark on a crusade to rein in the plebiscite
by the use of judicial “hard looks,” we should ask ourselves
why is a “hard look” needed. Why are the existing controls on
the plebiscite inadequate? Limitations on plebiscites already


\(^7\) See, e.g., Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850-53
(D.C. Cir. 1970), cert. denied, 403 U.S. 923.
exist and it is unclear what additional, needed protections would be provided by recourse to the Guaranty Clause. Plebiscites must deal with appropriate legislative matters. Plebiscites cannot address matters that affect only a few or a distinct group to the extent that we would characterize the process as "adjudicative" or "quasi-adjudicative." Likewise, the plebiscite, if it is too directly focused at a particular evil, may be struck down as a Bill of Attainder. Just as we cannot have "trial by legislature" we should not use plebiscites to have "trial by the electorate."

 Courts have historically policed the plebiscite to insure that certain information, e.g., title, description, voter pamphlet, is accurate. Courts have also controlled the ballot proposition itself insuring that it adheres to limits that apply to its use, such as single subject requirements and prohibitions on wholesale revision of law through plebiscites.

38. See Bi-Metalic Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).


40. See Oregonians for Nuclear Safeguards v. Myers, 554 P.2d 172 (Or. 1976) (ordering certain misleading and unfair passages deleted from the voters' pamphlet). See generally Comment, Avoidance of an Election or Referendum When the Electorate Has Been Misled, 70 HARV. L. REV. 1077 (1957).

41. Many proponents of the "guaranty thesis," including Justice Linde, bemoan the use of the plebiscite to erect barriers to state funding of "needed" services. See Linde, supra note 23 (criticizing initiatives, such as California's Proposition 13, which amend a state's constitution to restrict taxes and levels of spending). Yet, the problem is more self-inflicted than externally compelled. The California Supreme Court chose to apply an extremely liberal single subject test. See James M. Fischer, Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence, 11 HASTINGS CONST. L.Q. 43, 51-54 (1983) (critiquing loose and liberal California interpretation of the single subject requirement). When state courts take a sensible approach towards the single subject requirement, the type of initiative adherents to the "guaranty thesis" fear are avoided. See Amalgamated Transit Union, Local 587 v. State, 11 P.3d 762 (Wash. 2000) (holding that the initiative, which sought to limit license fee tabs and require voter approval of future state and local tax increases, violated single subject requirement).

42. See Fischer, supra note 41, at 50-51 (discussing the approaches of several jurisdictions to distinguish between the proper use of the initiative to amend the state constitution versus its improper use to revise the state constitution).
It may be argued that these controls are inadequate, that they fail to prevent pernicious ballot propositions from being placed before the electorate. If the problem is under enforcement of existing rules, what leads proponents of strict scrutiny through judicial "hard looks" to believe that judicial tolerance will suddenly be replaced with judicial rigor? If the problem is that the constraints, even when properly enforced, are themselves inadequate, then the issue becomes whether another barrier or control should be placed on plebiscites in addition to the specific barriers and controls found in the Bill of Rights and Fourteenth Amendment?

This last point becomes, for me, the heart of the debate. If we put all the historical arguments aside, if we accept that a judicial "hard look" doctrine can exist and be implemented, we might still ask whether the "guaranty thesis's" suggestion of judicial safeguarding of a state's republican institutions is a good idea, independent of whether it is constitutionally defensible. Law, like nature, abhors a vacuum. The Guaranty Clause is, after all, a broad statement and much can, no doubt, be justified by its invocation once it is perceived that the desired result is in furtherance of a "good public policy." Modern advocates of the "guaranty thesis" are not the first to see in the Guaranty Clause a great power that could be harnessed to achieve the drivers' view of the public good. Senator Charles Sumner had a similar dream in 1867: "It is a clause which is like a sleeping giant in the Constitution, never until this recent war awakened, but now it comes forward with a giant's power . . . . There is no clause which gives to Congress such supreme power over the States as that clause." Senator Sumner was, of course, incorrect. The Guaranty Clause did not assume any positive role in defining state-federal relations, at that time or later. A

43. This is the "crocodile in the bathtub" fear made famous by the late, and much missed, Justice Otto Kaus. See Paul Reidinger, The Politics of Judging, A.B.A. J., Apr. 1, 1987, at 52, 58 (reporting Justice Kaus's comments, in the aftermath of a successful political effort to deny reelection to three targeted Justices of the California Supreme Court, that ignoring the political consequences of prominent decisions was akin to ignoring crocodiles in your bathtub); see also Gerald Uelmen, Otto Kaus and the Crocodile, 30 LOY. L.A. L. REV. 971, 973-74 (1997). The "underenforcement" problem also raises a question of state court power which I address infra notes 72-76 and accompanying text.


45. See WIECEK, supra note 13, at 232-36.
more "romantic" characterization would be that the Clause is a sleeping beauty who only awaits the kiss of her Prince (Justice Linde seems to have volunteered for the role) to awaken her from a long slumber (perhaps "coma" is a more apt characterization).

Involving courts in the supervision of state institutional arrangements would, in my estimation, be unwise. If such involvement can be justified based on the potential for abuse, must not such interference be demanded when actual abuse is shown? The judiciary has consistently resisted such claims. Would courts be able to do so if the "guaranty thesis" were accepted? I do not demean the importance of judicial review to suggest that there may be limits to its capacity to do good if it is to do well. At some point the popularly elected branches and the people must be left to enjoy the benefits or suffer the consequences of their actions.

In his paper prepared for this Conference, Justice Linde has refined and expanded his central argument that state courts are not barred by the Court's decision in *Pacific States* from enforcing the Guaranty Clause against direct legislation. Justice Linde's paper addresses the problem

46. See Townsend v. Yeomans, 301 U.S. 441 (1937) (refusing to inquire whether the legislature made any effort to obtain facts supporting the legislation adopted: "[T]he legislature . . . is presumed to know the needs of the people of the State. Whether or not special inquiries should be made is a matter left to legislative discretion."); United States v. Balin, 144 U.S. 1 (1892) (refusing to question the accuracy of the speaker's count of the quorum); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (refusing to set aside statute tainted with bribery).

47. Unfortunately, I believe that much of the concern voiced by the proponents of the "guaranty thesis" is based on a profound lack of trust in the abilities and competence of voters. See BRODER, supra note 33, at 230 (noting the attitude of some of the governing elite who believe that most Americans are too ill-informed to make wise decisions on important issues). This attitude was captured in the majority panel opinion in *Jones v. Bates*, 127 F.3d 839, 956-63 (9th Cir. 1997), which held that Proposition 140 (which imposed lifetime term limits on legislators) had not been fully comprehended by California voters. The panel decision was subsequently reversed by the Ninth Circuit in an en banc decision. Bates v. Jones, 131 F.3d 843, 846 (9th Cir. 1997) (holding that voters were given sufficient notice of the effect of the initiative to make an effective choice), cert. denied, 523 U.S. 1021 (1998).

48. See Linde, supra note 23. I believe the problem with the "guaranty thesis" has earlier antecedents in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), in which rival factions competed for control of the government of Rhode Island. See WIECEK, supra note 13, at 86-129 (discussing the decision in its political and historical contexts). If the Court would not intervene when the entirety of a state's government was under attack and resisting removal, it is questionable
somewhat differently from what I have characterized as the "guaranty thesis." As noted earlier, that thesis, owing here primarily to the writings of Professor Eule, emphasized the potential that plebiscites could be used to disadvantage insular and vulnerable minorities. That potential could be exploited because of the deference and limited review courts afford legislation that does not demonstrate a discriminatory purpose or intent. Professor Eule and others feared that many voters, and sponsors of ballot propositions, would have that intent, but the secretive, isolating nature of voting would mask that reality from the judicial view. Ballot propositions could thus, disparately effect minorities, but would, under existing law, escape serious judicial review.

Justice Linde's paper expresses a different concern: direct legislation threatens the structural integrity of state republican institutions when direct legislation is placed beyond the legislature's power to repeal, amend, or correct laws enacted through the plebiscite. Legislators are not, in Justice Linde's view, mere "potted plants" condemned to sit idly by while critical governmental decisions are made by non-republican actors. The use of direct democracy to place voter enacted legislation beyond the reach of elected representatives constitutes, in Justice Linde's view, an impermissible nullification of the republican guarantee contained in Article IV, Section 4.

I believe that the criticisms many commentators have directed at direct democracy through the plebiscite are well directed and well documented. There is little doubt that the plebiscite has traveled far from its Progressive roots. Plebiscites were once envisioned as allowing the great mass of

49. See Eule, supra note 10.
50. See supra notes 28-39 and accompanying text.
51. See Linde, supra note 23. I would assume that Justice Linde would treat a proposal that the people be allowed to "instruct" their representatives as being non-republican. Such a proposal was rejected by the First Congress, largely on the basis that it was inconsistent with the republican model adopted by the Constitution. See Cook v. Gralike, 529 U.S. 1065 (2001) (discussing the reasoning for rejecting a proposed amendment that citizens have a right to instruct members of Congress).
52. See Linde, supra note 23.
53. See supra note 33.
citizens to bypass corrupt legislatures controlled by bosses and parties beholden to their own or narrow "special interests."\textsuperscript{54} Modern plebiscites appear with distressing frequency to reflect the interests of groups with intense rather than broad-based preferences.\textsuperscript{55} Nor do I find the remedies suggested by Justice Linde to restrict the non-republican aspects of direct legislation—permitting legislatures to treat voter enacted legislation the same as legislature enacted legislation\textsuperscript{56}—to be unattractive. Yet, while I see the benefits of restricting direct statutory legislation, I am unpersuaded that the benefit can be achieved through judicial application of the Guaranty Clause because the restraints imposed by \textit{Pacific States} are not as facile to slip as Justice Linde contends.

Justice Linde, reading \textit{Pacific States} narrowly, argues that the decision did not purport to reject state court decisions that had considered and applied the Guaranty Clause to the plebiscite. I am less sanguine than Justice Linde that his view is correct. As noted previously, I read \textit{Pacific States} as a commitment of Guaranty Clause questions to the federal representative body. At the root, Justice Linde and I disagree over the meaning of the Court's treatment of the Guaranty Clause question as "nonjusticiable" in \textit{Pacific States}. While I agree with Justice Linde that \textit{Pacific States} does not read the Guaranty Clause out of the Constitution; I do believe, however, that \textit{Pacific States} reads the judicial power out of the Guaranty Clause.

\begin{itemize}
\item \textsuperscript{54} I use "special interests" in the pejorative sense intended by the Progressives. "Special interests" are generally seen as being opposed to the "public interest," although what is "special" and what is "public" tends to vary based on the viewpoint and values of the person doing the classifying.
\item \textsuperscript{55} See Elizabeth Garrett, \textit{The Law and Economics of "Informed Voter" Ballot Notations}, 85 VA. L. REV. 1533, 1562 (1999).
\item \textsuperscript{56} I hope I am not mischaracterizing or unduly limiting Justice Linde's objections. He emphasizes these objections to current usages of direct legislation (See Linde, \textit{supra} note 23) and I infer that were the objections removed, direct legislation would not violate republican norms as guaranteed by Article IV, section 4.
\end{itemize}
Pacific States is simply unsupportive of Justice Linde’s gloss. The opinion repeatedly states that the power to enforce the Guaranty Clause is entrusted to Congress, not the courts. Justice Linde necessarily relies on the fact that the Court did not reverse or vacate the Oregon Supreme Court decision that the plebiscite did not violate the Guaranty Clause; rather, the Court dismissed the matter “for want of jurisdiction.” This disposition is read as being susceptible to the reading that the Court was speaking solely to the power of federal courts, and not to the power of state courts, to enforce Article IV, Section 4.

It must be observed that it is a strange federal right—for Justice Linde does not argue that the Guaranty Clause has a non-federal basis—that finds exclusive judicial enforcement in state courts, and not federal courts. Congress, exercising its jurisdiction under Article 1, Section 8, Clause 9 and Article III, Section 1 over inferior courts, could prescribe that in certain cases federal rights must be enforced only in state courts, but as far as I can discern it has not done so. There is, however, no constitutionally mandated corollary—aside from the one Justice Linde reads into Article IV, Section 4 and finds in Pacific States.

It is not correct, however, to read the Court’s disposition of Pacific States so broadly. There is no consistent method used by the Court to resolve justiciability dispositions. In part this is a consequence of the long-standing concern by the Justices over the obligatory jurisdiction of the Court. In other part, this is a consequence of the fact that justiciability

57. For example, after stating the argument that the non-republican nature of the plebiscite states a justiciable claim, the Court replied:

We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the repugnancy of those contentions to the letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed.

Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 142-43. The entirety of the unanimous opinion is of this tenor.

58. See id. at 151.


concerns arise in many different ways. While vacation of the state court decision may be the usual disposition in cases of mootness, there is no pattern identifiable for cases raising the political question doctrine.

We should also be careful before we build a doctrine on a point never expressly considered by the Court. *Pacific States* does not affirmatively support the proposition that state courts possess the power to enforce the Guaranty Clause. Language used in any opinion must be understood in light of the facts and issues before the court; and the opinion is not authority for a proposition not considered. Of course, Justice Linde may respond that the opposite is also true; issues not expressly considered are not foreclosed. I believe, however, that Justice Linde's case must rely on more than negative inference. It requires an affirmative showing that the concerns, which caused the Court in *Pacific States* and in practically all other Guaranty Clause cases to find the issue inappropriate for federal court resolution, are not present or abated when state courts are involved. Justice Linde has not made that case. Moreover, even if the case for state enforcement could be sustained, it would then raise the anomalous problem that state courts would be the final arbiters of federal law—a view rejected by the Court in *Martin v. Hunter's Lessee*. State court decisions applying the Guaranty Clause to state political arrangements would also be immune from political correction, other than by federal constitutional amendment—a dubious position.

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62. *See Stern et al., supra* note 60, § 18.5.

63. *See Webster v. Fall, 266 U.S. 507, 511 (1925)* (arguing “[q]uestions which merely lurk in the record are not resolved, and no resolution of them may be inferred”).

64. 14 U.S. (1 Wheat.) 304 (1816). *See generally Charles Warren, Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act of 1789, 47 Am. L. Rev. 1, 161 (1963).*

65. Judge (now Justice) Ginsburg expressed a similar concern with state court efforts to find broader federal rights than the Court was willing to recognize. *See Ruth Bader Ginsburg, Book Review, 92 Harv. L. Rev. 92, 340, 343-44 (1978)* (reviewing Laurence Tribe, *American Constitutional Law* (1st ed. 1978)). In the second edition, Professor Tribe more closely aligned himself with Justice Ginsburg's views. *See Laurence Tribe, American Constitutional Law 40-41 & n.55 (2d ed. 1988); see also Donald Beschle, Uniformity in Constitutional Interpretation and the Background Right to
believe these considerations strongly caution against adoption of Justice Linde's embellishment of the "guaranty thesis" that vests state courts with the power to enforce a federal "claim" the Court has found to be outside the power of federal courts to enforce.

Pacific States holds that the Constitution commits the republican guarantee to Congress, not the courts. After Pacific States, the Guaranty Clause must be read as if the words "United States" means "Congress." If I am correct, and I know Justice Linde and others will argue that I am not, their efforts to expand the decision making bodies that can consider Guaranty Clause questions beyond Congress must


The right of the citizen to effective implementation of democratic outcomes is, of course, properly subordinated to the individual rights created by the Constitution, which may be asserted against majorities. The scope of those rights will undoubtedly continue to be the source of sharp controversy. Expansion of individual rights may well reflect the evolving understanding of those rights not only by courts, but by the people as a whole. Such outcomes are clearly consistent with the overall constitutional scheme. However, expansive readings of individual rights provisions which are idiosyncratic, and which depart from contemporary views of what the provision means nationwide, not only interfere with the utilitarian benefits derived from the invalidated government practice, but on a deeper level deprive the citizens of the state involved of their right to effectively govern themselves within constitutional limits. It is this background right to an effective democracy within constitutional limits, the explicit recognition of which would have a significant effect on constitutional interpretation as a whole, which provides the foundation for the value of uniformity in constitutional interpretation.

Id. at 541-42.

66. Justice Linde's argument finds some support in Wiecek's review of the events leading to the adoption of the Guaranty Clause. See WIECEK, *supra* note 13, at 59 (arguing that the "guarantee of a republican form of government . . . was a positive, prophylactic guarantee, to be secured by the civil branches of the federal government"); id. (arguing that "the more generalized guarantee clause could be read as an authorization for Congress, the President, or the courts to act"). The fact is that the Guaranty Clause has not been so read by the Court. The only decision by the Court which even intimates a judicial role for the Guaranty Clause is Coyle v. Smith, 221 U.S. 559 (1910), which addressed a provision in the Act admitting Oklahoma as a State that required that the State Capitol remain at Guthrie until 1913. The requirement was struck down and the objection that the issue presented a political question under the republican guaranty was, as Wiecek noted, "brushed aside." WIECEK, *supra* note 13, at 239. Yet, the decision in Coyle is somewhat enigmatic and reflects more on equal treatment of the States and the ability of Congress to prescribe conditions for admission that could not be imposed on the States qua States. Coyle is hardly a ringing endorsement of a vibrant judicial role in enforcing the republican guaranty.
necessarily fail. When the Constitution, as written or as interpreted, vests decision making in a particular body, that vesting is exclusive. This point was illustrated in *Hawke v. Smith.* In *Hawke* the Court held that the Constitution’s commitment of amendment to the state legislature in Article V did not permit intrusion by citizen referendum. Concededly, the term “Legislature” expressly appears in Article V and this fact was relied on by the Court in *Hawke,* and more recently in *U. S. Term Limits, Inc. v. Thornton,* as concentrating the power to the designated body exclusively. Yet, the force of the argument is strictly literal and ignores the fact that the Court in *Pacific States* rendered a definition declaration of what the text meant. That meaning necessarily becomes part of the text itself.

If my reading of *Pacific States* is correct and the decision represents a commitment of the power to enforce the Guaranty Clause exclusively to Congress, then there is necessarily no power possessed by the States (or state courts) of Guaranty Clause enforcement. Congress could perhaps delegate the power to the courts, but I do not understand Justice Linde to be making that argument, so I will not. The effect, however, of *Pacific States*’s commitment of Guaranty Clause enforcement to the Congress is that it strips the judiciary of any equivalent power.

Justice Linde’s assertion that state courts have the power to enforce the Guaranty Clause has no constitutional mooring. It is not a power reserved by the States. The

67. 253 U.S. 221 (1920).
69. It strikes me as unusual that the Supremacy Clause that Justice Linde would invoke to give state court judges the power and right to apply the Guaranty Clause to state ballot propositions can be selectively invoked to call upon the text of the Constitution but not the law of the text as developed by the Court. The distinction may be justified if the Court’s decision making in the Guaranty Clause area was centrally based on the view that the disputes were prudentially non-justiciable. *Pacific States* holds that the Constitution commits whatever power the Guaranty Clause confers to Congress. That form of decision making, whether it is labeled “political question” or “justiciable,” is itself a Constitution-interpreting decision which precludes state court usurpation of federal power. *See* Louis Henkin, *Is There a Political Question Doctrine?,* 85 YALE L.J. 597 (1976). Professor Henkin noted that the political question doctrine, properly applied, represents a judicial decision that a matter has been committed to one of the political branches for decision making. *See id.* at 599 (arguing that “a political question is one in which the courts forego their unique and paramount function of judicial review of constitutionality”).
Guaranty Clause is a federal power created by the Constitution.\textsuperscript{70} As noted in Thornton, "As we have frequently noted, 't]he States unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.'"

Contrary to petitioners' assertions, the power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States. Petitioners' Tenth Amendment argument misconceives the nature of the right at issue because that Amendment could only "reserve" that which existed before. "As Justice Story recognized, 'the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them . . . . No state can say, that it has reserved, what it never possessed.'\textsuperscript{71}

While Thornton obviously addresses the question of powers reserved by the States under the Tenth Amendment, the principle articulated is applicable here. The Constitution does not confer on state courts a power the Court has held is constitutionally committed to a political branch to the exclusion of the judiciary.

The fact that the Guaranty Clause may be under-enforced is not a legitimate basis for encouraging state court enforcement of a broader right than federal law recognizes. When the right is of federal origin—as is the case with the

\textsuperscript{70} See WIECEK, supra note 13, at 15 (referring to the Virginia Plan and noting that "the guarantee prohibited monarchical forms of government and assured that the powers of the national government would be used to proscribe them"); id. (noting that "Madison insisted that the federal government needed some coercive authority over the states"); id. at 60-62 (discussing changes in the guarantee provision accomplished by the Committee of Detail that rejected an effort to restrict the guarantee to the mutual support approach of the Articles of Confederation). Wiecek observes:

The Workings of the Committee and the intentions of its members can be inferred to a great extent from the Randolph-Rutledge working outline that guided the Committee in preparing its drafts for submission to the Convention. From this document it appears that the Committee intended the guarantee clause to be a grant of power to the federal government, not dependent on the will of the state governments . . . .

\textit{Id.} at 60.

\textsuperscript{71} Thornton, 514 U.S. at 801-02 (citation omitted).
Guaranty Clause—the entire range of the right is determined by federal law. The point was adopted in Oregon v. Hass\textsuperscript{72} when Oregon sought to provide a broader constitutional guarantee than that recognized by the Court.\textsuperscript{73} The Court rejected Oregon's efforts and stated, "[A] state may not impose such greater restrictions \textit{as a matter of federal constitutional law} when this Court specifically refrains from imposing them."\textsuperscript{74} The States were not barred from recognizing a broader right under their own constitutions.\textsuperscript{75} They were, however, constrained from adding to federal rights in a manner inconsistent with the Court's treatment of the scope of the federal right. If there is error in the definition of the right, it is for the Court to correct, not the States.

I am not prepared to state that the plebiscite is socially good or bad, the Emerson and Burke quotes at the beginning of this paper notwithstanding. I doubt that the people of a jurisdiction that has not adopted the plebiscite are necessarily any better or worse off than the people of a jurisdiction that has. At least I see nothing in the use of the plebiscite in the last ten to twenty years that suggests it poses a danger to the Republic or that it is a pernicious, as opposed to unwise, method of effecting a change in law. The case has not been made that there is a demonstrated need, here or elsewhere, that all political questions that can also be framed as legal disputes by reference to cap-aciously construed language in the Constitution must be decided on the merits by courts. Let us consider that committing the preservation of republican institutions may be better and more sensibly served by locating that power in a representative institution—the Congress—rather than the most non representative and non republican branch—the Judiciary.

I can think of no better end to my ruminations on this

\textsuperscript{72} 420 U.S. 714 (1975).

\textsuperscript{73} The issue involved Oregon's efforts to prohibit use for impeachment purposes of statements taken in violation of the defendant's Miranda rights. The use for impeachment purposes had been authorized in Harris v. New York, 401 U.S. 222 (1971).

\textsuperscript{74} Hass, 420 U.S. at 719 (emphasis added).

\textsuperscript{75} This point served as the basis for an influential article by Justice Brennan. William Brennan, \textit{State Constitutions and the Protection of Individual Rights}, 90 HARV. L. REV. 489 (1977).
topic than to quote from the preeminent legal scholar on the Guaranty Clause—Professor Wiecek:

It might have been argued—and it was by a few Anti-federalists in the ratification debates of 1788-1789—that the word "republican" in the guarantee clause was a sonorous but meaningless adjective. Possibly, the word was not meant to have any strictly definable significance. Few of the delegates in Philadelphia tried to explain precisely the concept of republican government; the document they drafted abounds in vague words and phrases. The Convention was not a "seminar in analytic philosophy or linguistic analysis." Because the Constitution is so much the product of compromise, we run a danger of reading history backward when we construe it, seeing meanings in words and phrases that would surprise the men who used them. An attempt to find conceptual precision in a document whose most important immediate virtue had to be its acceptability may be misleading.

Thus the word "republican" may well not have had any single and universal denotation to the men who inserted it into the guarantee clause. It may, in fact, have had no meaning at all. John Adams complained late in life that "the word republic as it is used, may signify anything, everything, or nothing." He insisted that he "never understood" what the guarantee of republican government meant; "and I believe no man ever did or ever will."

76. WIECEK, supra note 13, at 12-13 (citations omitted). I realize some have challenged Adams's lucidity at the point in his life when the comments were made. See Amar, supra note 21, at 752-53:

The Indeterminacy Thesis might deny that any such central meaning exists. The concept of Republican Government, Indeterminists would argue, is utterly vacuous. In 1807, John Adams complained to Mercy Otis Warren that he had "never understood" what a republican was and "no other man ever did or ever will." But as the great historian Gordon Wood has observed, Adams' "memory was playing him badly" representing "the bewilderment of a man whom ideas had passed by."

Yet, other eminent historians find that Adams remained vigorous and alert through this period. See ELLIS, supra note 14. Again, we are confronted with the reality that the past is often no more distinct than the future. Here, I will side with what Adams said and leave the interpretations to others.