

# NOTE

## The Republican Guaranty Contract

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*The Guarantee Clause of the U.S. Constitution, located in Section 4 of Article IV, provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.” What reads like a lynchpin of the Founders’ federal experiment has become little more than a quaint footnote of constitutional law. Neither the Supreme Court nor the political branches have made any meaningful use of this rich text. Scholars have long struggled to find its meaning and usefulness and have instead mostly focused on whether it is justiciable.*

*Some recent scholarship has begun to look at what the Clause meant to the Founding Generation. This Note inserts itself in that scholarly debate by arguing that the public of 1787 most likely understood the Guarantee Clause through the lens of contract law. Guarantees, also known as guaranties, were and still are a common contractual device for ensuring the payment of debts by having a third party secure the debt. Under this framework, this Note argues that the Guarantee Clause places the federal government as the guarantor to an obligation of maintaining a “Republican Form of Government,” owed by states to each other. No published article or note has explored such a potential meaning of the Guarantee Clause, and this Note seeks to open an entirely new line of inquiry into the Clause’s meaning.*

*In large part, this Note is a response to Professor Ryan C. Williams’s recent article on the Guarantee Clause. In the article, Professor Williams argues that the Clause should be seen through the lens of eighteenth-century treaty law. This paper works to provide an alternative, and arguably more persuasive, private law lens for understanding the Guarantee Clause. It undertakes detailed etymological and contextual analysis to get at the meaning of the “guarantee.” Moreover, the Note looks at contemporary usage of the term “guarantee” to conclude that the term was more commonly used in both law and business to refer to the eponymous contractual device, rather than treaty mechanisms.*

*In a period characterized by challenges to federal–state and state–state relations, a better-understood Guarantee Clause could serve as a*

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\* Georgetown Law, J.D. 2020; Brown University, A.B. 2015. © 2020, Alejandro J. García. My gratitude goes especially to Dean William M. Treanor and Dean John Mikhail, whose patient guidance and counsel were invaluable to developing the paper that became this Note. Moreover, I am indebted to Maximillian A. Crema, Tyler D. Kuhn, and Justin Rattey for their feedback. The work of Orion de Nevers, Anna Stacey, Maggie O’Leary, and all *The Georgetown Law Journal* editors and staff has been crucial to making this Note what it is today. And, of course, none of this would have been possible without the endless support of my parents, Shadia, and so many others. *Ad majorem Dei gloriam.*

*strong tool to protect the Republic. By placing it within an ancient and well-developed framework of contract law, this Note seeks to advance understanding of the Clause and promote its revival from desuetude.*

## TABLE OF CONTENTS

INTRODUCTION . . . . .	193
I. THE GUARANTEE CLAUSE AS CONTRACT . . . . .	196
A. PROFESSOR WILLIAMS'S TREATY LAW ACCOUNT . . . . .	196
B. THE GUARANTY CONTRACT IN THE EIGHTEENTH CENTURY . . . . .	198
1. Dictionary Definitions . . . . .	198
2. Guaranties in the Eighteenth Century . . . . .	201
<i>a. Legal Treatises and Dictionaries.</i> . . . . .	202
<i>b. Early American Case Law.</i> . . . . .	204
C. STRENGTHS AND DRAWBACKS . . . . .	207
1. Strengths of the Contract Analogy . . . . .	207
2. Drawbacks of the Contract Analogy . . . . .	210
II. THE TERMS OF THE GUARANTY . . . . .	211
A. THE PARTIES . . . . .	213
1. The "United States" . . . . .	214
2. The "States" . . . . .	215
<i>a. In General</i> . . . . .	215
<i>b. Creditors or Debtors?</i> . . . . .	216
<i>i. Substantive Guarantee v. State Autonomy</i> . . . . .	216
<i>ii. The States as Both Debtors and Creditors</i> . . . . .	220
B. THE FORM OF THE OBLIGATION . . . . .	221
C. THE SUBSTANCE OF THE OBLIGATION . . . . .	223
D. CLAIMING ON THE GUARANTY . . . . .	224
CONCLUSION . . . . .	227

## INTRODUCTION

The Guarantee Clause of the U.S. Constitution has historically been described as “a sleeping giant in the Constitution.”<sup>1</sup> The Clause provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”<sup>2</sup> What reads like a lynchpin of the Founders’ federal experiment has become little more than a quaint footnote of constitutional law. A line of Supreme Court precedent finding controversies under the Clause nonjusticiable,<sup>3</sup> coupled with underenforcement by the political branches, has left the Clause derelict.

Faced with the government’s neglect of the Guarantee Clause, scholars over the past few decades have attempted to salvage the Clause from desuetude. Most published work revolves around the nontextual and policy-driven issue of the Clause’s justiciability.<sup>4</sup> Scholars in this area have offered conflicting accounts of whether the Supreme Court should revisit its precedent on the matter.<sup>5</sup> But the literature has paid relatively little attention to the legal framework through which the Founding Generation viewed the obligation created by the Guarantee Clause.

In a recent article, Professor Ryan C. Williams argues that the Clause should be seen through the lens of eighteenth-century treaty law.<sup>6</sup> In this framework, the United States stands “as a kind of neutral, third-party monitor” of states’ compliance with a treaty between the states<sup>7</sup> whereby they pledge to each other to maintain a “Republican Form of Government.”<sup>8</sup> Williams contends that this interpretation “arguably constitutes the most plausible account of the available historical evidence regarding the provision’s original meaning.”<sup>9</sup> To bolster this, he surveys a series of Founding-Era texts and statements that purport to show

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

2. U.S. CONST. art. IV, § 4, cl. 1. The Invasion and Domestic Violence Clauses follow, providing that “[t]he United States . . . shall protect each of [the states] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” *Id.* art. IV, § 4, cls. 2–3.

3. *See infra* Section II.D.

4. *See infra* Section II.D.

5. *Compare, e.g.,* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 851, 863–69 (1994) (proposing that “the Guarantee Clause should be regarded as a protector of basic individual rights,” meaning that “judicial interpretation and enforcement is in accord with the preeminent federal judicial mission of protecting individual rights and liberties”), *with, e.g.,* 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* 66, 71–72 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) (arguing that the Guarantee Clause is wrongly viewed as “an empty vessel” that can “be filled by whatever individual right the particular writer desires the courts to enforce,” thus allowing the judiciary to “ossify” its own vision of republican government through constitutional judgments).

6. Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602, 603 (2018).

7. *Id.* at 618.

8. U.S. CONST. art. IV, § 4, cl. 1.

9. Williams, *supra* note 6, at 673.

how the Framers and ratifiers applied their understanding of treaty guarantees to the Guarantee Clause.<sup>10</sup>

But I believe that the source of the Clause's meaning was closer to early Americans' daily lives. In this Note, I argue that the public of 1787 likely understood the "guarantee" in the eponymous Clause as fitting within the framework of contract law, a field of private—rather than public—law.<sup>11</sup> Specifically, they would have understood the Clause to operate similarly to a guaranty contract. The Framers and ratifiers of the Constitution—mainly landowners, farmers, merchants, and their lawyers—were closely acquainted with at least the mechanics of contracts. Likewise, for the average American of 1787—the “competent and reasonable speaker” of American English<sup>12</sup>—contract law was a much more familiar body of norms than treaty law. While a guaranty contract would have been familiar both to legally knowledgeable and lay Americans in 1787, it is unlikely that treaty guarantees would have been so commonplace. Thus, Williams's treaty law account is less plausible as the *original public meaning* of the Guarantee Clause.

For this analysis, I seek the original public meaning of the word “guarantee,” as attested by sources available to or prepared by members of the Founding Generation. Using this methodology, I contend that the contract law understanding of a *guaranty* is a *more plausible inference* of what the public of 1787 understood when they read the term “guarantee.” To substantiate this, I undertake a survey of dictionaries available at or near the Founding, case law from the early Republic, and the backgrounds and writings of members of the Founding Generation. From this evidence, I conclude that the contract law meaning of *guarantee*—both as a legal and a colloquial term—would have been more familiar to the public of 1787 than its meaning under contemporary international law. With this original public meaning in mind, I apply the contract law framework to

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10. See *id.* at 634–74.

11. Throughout this Note, I use the modern form *guaranty* when referring to the legal device and the modern verb form *guarantee* to refer to the relevant legal action. See *infra* notes 37–40 and accompanying text for a discussion of modern legal definitions of *guaranty*. As I discuss *infra* in notes 88–89 and the accompanying text, eighteenth-century sources used the two forms indiscriminately, though with a tendency to use *guarantee* as the verb form. Moreover, the term *guarantor* was unknown in the Founding Era, but I use it here where appropriate to refer to the party charged with the guaranty obligation. See *Guarantor*, BLACK'S LAW DICTIONARY (11th ed. 2019) (noting that *guarantor* is attested only from the nineteenth century).

By the “public of 1787,” I refer to the paradigmatic “knowledgeable and reasonable interpreter” of the Constitution at the time of its ratification, following the methodology of original public meaning originalism. John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1376–78 (2019). This method of interpretation, nowadays considered the leading theory of originalism, stands in contrast to original intent originalism, which seeks to divine the Framers' intentions in enacting a constitutional provision. See Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 4 (2018).

12. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 761 (2009) (discussing the commonly accepted definition of original public meaning originalism). Although McGinnis and Rappaport offer a competing theory of originalism, which they call “original methods originalism,” their descriptive account of original public meaning originalism is an excellent introduction to the subject. See *id.* at 751–53 for a brief description of original methods originalism.

define the contours of the Guarantee Clause and the means for executing the obligation it creates.

In contract law, a guaranty is a simple device: A guarantor makes a pledge that, if the principal debtor in an underlying contract is unable to discharge his obligation, the guarantor will be answerable for the value or performance of the obligation.<sup>13</sup> The guaranty must be in writing and signed by the guarantor.<sup>14</sup> Under this framework, the Guarantee Clause creates a duty for the United States to guarantee the states' principal obligation to provide a republican form of government as a commitment to other states. This duty is triggered whenever a state fails to provide such a form of government. I call this the Republican Guaranty Contract. Hence, a state harmed by another state's lack of a republican form of government may seek recourse from the United States under the guaranty. Where the United States fails to discharge its duty upon demand, the aggrieved state may file an *assumpsit*-like action to seek satisfaction.<sup>15</sup> Besides offering an analytical framework closer to the original public meaning of the Guarantee Clause, this Note proposes a straightforward theory of justiciability rooted in the common law action for *assumpsit*.

Alternatively, this Note serves to point out that, at the ratification of the Constitution, the word *guarantee* had equally strong connections to two separate bodies of law—contract law and treaty law. This complicates any attempt to apply original methods originalism to the Guarantee Clause, as it would be subject to two bodies of interpretive norms. A court faced with a claim under the Guarantee Clause would therefore be forced to enter the “construction zone” and pick between these two bodies of law to make sense of the obligation.<sup>16</sup>

Before proceeding, a word on what this Note does *not* do. This Note proposes a preliminary vision of the guaranty contract analogy. A full account of the place of guaranties in the eighteenth century and of the Founders' and ratifiers' use of the device would require empirical and archival research that is beyond my means.<sup>17</sup> Moreover, I do not wade into the debates on the substantive meaning of a “Republican Form of Government.”<sup>18</sup> That issue raises questions that require policy judgments on the meaning of republican government, the thickness of this

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13. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 88 (AM. LAW INST. 1981).

14. *Id.* § 88(a). See *infra* Section I.B for a discussion of the form and function of a guaranty contract.

15. An action for *assumpsit* is a “common-law action for breach” of “[a]n express or implied promise, not under seal, by which one person undertakes to do some act or pay something to another,” or for the breach of any contract. *Assumpsit*, BLACK'S LAW DICTIONARY (11th ed. 2019).

16. For a discussion of the construction zone, see generally Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1950–51, 1961–67, 1974–75. Several authors have offered critiques of the construction zone. See, e.g., Barnett & Bernick, *supra* note 11, at 5 (advocating for a theory of good faith originalist construction, which “seeks to implement the Constitution *faithfully* by ascertaining and adhering to the original functions of the constitutional text—its ‘spirit’”); McGinnis & Rappaport, *supra* note 12, at 752 (advancing the “original methods approach,” which requires that “ambiguity and vagueness [be] resolved by considering evidence of history, structure, purpose, and intent”).

17. See *infra* Section I.C.

18. See *infra* Sections II.C–D.

meaning, the three branches' relative institutional capacities to ascertain this meaning, and the desirability of the federal government intervening in states' internal affairs. Instead, I identify two problems that I believe are crucial to answering these questions: (1) the Baseline Problem, or *what* the baseline of republicanism is; and (2) the Congruence Problem, or whether the Guarantee Clause was conceived to ensure congruence in the form of state governments. By identifying these issues, I hope to provide a starting point for additional research on the substance of the obligation to keep a "Republican Form of Government."

Part I of this Note presents a theory of the Guarantee Clause as a guaranty contract, surveys the status of guaranties in eighteenth-century law, and locates the legal device in the context of the Founding Era. This Part concludes by providing arguments for and against using the guaranty contract analogy. Part II analyzes the terms of the Republican Guaranty Contract, determining who the parties are, the form of the obligation, the duties that the guarantor owes, and the means for enforcing the guaranty. I then briefly conclude.

### I. THE GUARANTEE CLAUSE AS CONTRACT

To define "guarantee" for purposes of the eponymous Clause is to draw the outline of the power or duty that the Clause creates. But ironically, the meaning of this crucial operative term has only recently attracted serious scholarly attention.<sup>19</sup> The term appears only once in the Constitution of 1787—in the Guarantee Clause—and is absent from precursor documents, such as "the Articles of Confederation, the Declaration of Independence, early state constitutions, and the Northwest Ordinance of 1787."<sup>20</sup> In this Part, I discuss Professor Williams's treaty analogy for the Guarantee Clause and juxtapose it with the framework of eighteenth-century contract law. I argue that the public of 1787 was likely better acquainted with guaranty contracts than with treaty guaranties. In light of this, I conclude that the original public meaning of "guarantee" was more likely taken from contract law than from treaty law. I therefore propose viewing the Clause as the Republican Guaranty Contract. Finally, I consider arguments for and against the contract analogy.

#### A. PROFESSOR WILLIAMS'S TREATY LAW ACCOUNT

In a pathbreaking recent article, Professor Williams locates the meaning of "guarantee" in the international law of the eighteenth century.<sup>21</sup> To arrive at this conclusion, Professor Williams surveys a set of eighteenth-century international

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19. See Williams, *supra* note 6, at 607–08 (citing Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1737 (2010)). For other discussions of the term *guarantee*, see Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 523 (1961) and Heller, *supra* at 1737–45.

20. Williams, *supra* note 6, at 608.

21. See generally Williams, *supra* note 6.



law sources.<sup>22</sup> From his analysis of the sources, he argues that, when the Constitution was drafted and ratified, “guarantee” had become an established international law term of art.<sup>23</sup> According to sources available at the Founding, this meant “a commitment on the part of a third-party nation to enforce the terms of a treaty, including, if necessary, through the use of force.”<sup>24</sup> The guaranteeing sovereign would thus act “as a kind of neutral, third-party monitor of treaty compliance,” charged with determining whether a treaty violation took place and assisting States Parties in seeking redress for actual violations.<sup>25</sup>

Crucially, the guaranteeing sovereign could act only upon the request of one or more States Parties that claimed a treaty violation.<sup>26</sup> This requirement prevented a guaranteeing sovereign from intervening in the execution of the treaty, even when the guaranteeing sovereign purported to remedy a treaty violation.<sup>27</sup> A contrary rule would have allowed powerful guaranteeing sovereigns to wantonly interfere with the contracting parties’ internal affairs.<sup>28</sup> Such guarantees often applied to securing the territorial integrity of a given state or compliance with specified treaty terms.<sup>29</sup> But they could just as well relate to maintaining particular internal governmental arrangements.<sup>30</sup>

Williams’s argument rests on the Founding Generation’s purported understanding of the states as quasi-sovereign nation-states, which warranted incorporation of international law norms into the Constitution.<sup>31</sup> He declines to wade into the marsh that is the states’ sovereignty vis-à-vis that of the United States.<sup>32</sup> Instead, he presents the international law framework as “a useful structural analogy for managing relationships between the states, as well as relations between the states and the nascent federal government.”<sup>33</sup>

22. *See id.* at 612–20. Most of Williams’s analysis rests on the work of Emer de Vattel, whom Williams describes as “the most widely recognized authority on the law of nations in the early Republic.” *Id.* at 609 (citing *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 462 n.12 (1978) (“The international jurist most widely cited in the first 50 years after the Revolution was [Vattel].”); Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 404 (2012) (“[F]rom the beginning of the United States through well after the founding period, Vattel was the preeminent authority on the law of nations.”)).

23. *Id.*

24. *Id.* at 615.

25. *Id.* at 618.

26. *Id.*

27. *Id.*

28. *See id.* at 618–19.

29. *Id.* at 619.

30. *Id.* Examples of these arrangements include a set of guarantees that Holy Roman Emperor Charles VI negotiated with peer nations to secure his daughter Maria Theresa’s succession to the throne, as well as similar guarantees secured by Great Britain to protect the Protestant succession in the wake of the Glorious Revolution. *See id.* at 619–20, for a more thorough discussion and related sources.

31. *Id.* at 610 (quoting Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1049 (2002)).

32. *See id.* at 624.

33. *Id.* In so doing, Williams observes that courts in the early years of the Republic would consult international law to resolve matters touching on “border disputes, interstate jurisdiction and judgment recognition, extradition, choice of law, and sovereign immunity.” *Id.* at 624–25 (citations omitted)

Moreover, Williams reads the historical record to find two points of agreement between Federalists and Antifederalists: (1) the Guarantee Clause serves to secure the states from involuntary “antirepublican changes to their governments,” and (2) the Clause serves “as a safeguard of state autonomy and independence.”<sup>34</sup> Under this framework, any “invocation of federal power under the” Clause will “almost always depend . . . on the existence of a request for assistance from a guaranteed state whose ‘republican form of government’ is threatened by some outside force.”<sup>35</sup> Thus, absent such a request, the federal government may be powerless to “invoke the Clause as a source of power” against a state.<sup>36</sup>

Williams’s analysis and application of the international law theory of guarantee is nothing short of impressive. But he does not discuss a device that would have been much more familiar to the business-minded Founding Generation: contractual guaranties.

#### B. THE GUARANTY CONTRACT IN THE EIGHTEENTH CENTURY

In this Section, I seek to determine the meaning of the word *guarantee* to eighteenth-century-English speakers and to contemporary law. My primary sources are: (1) eighteenth-century dictionaries, both legal and lay; and (2) legal treatises and case law of the period. From this analysis, I conclude that the term *guarantee*, or the related form *guaranty*,<sup>37</sup> was an established term of art for an agreement whereby a person pledged to satisfy a principal debtor’s obligation when the debtor was unable to discharge it himself. Therefore, I argue that this was an original public meaning of the term “guarantee” as used in the Guarantee Clause.

##### 1. Dictionary Definitions

To modern English speakers, the word *guarantee* is most familiar as a confident assertion, a promise of security, or “an assurance for the fulfillment of a condition.”<sup>38</sup> It is particularly relevant in the context of products, services, or transactions.<sup>39</sup> Phrases such as, “I can guarantee I’ll be there on time,” or

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(collecting cases). As between two sovereigns, these matters are even today governed by norms of public or private international law. But between states, many of these issues are now regulated by the Constitution of 1787 or federal statutory law. *See, e.g.*, U.S. CONST. art. III, § 2, cl. 1 (granting the federal courts jurisdiction over “Controversies between two or more States”); *id.* amend. XI (barring federal courts from hearing cases brought by a citizen of one state against another state, or by foreigners against a state).

34. Williams, *supra* note 6, at 660.

35. *Id.* at 676.

36. *Id.* at 679.

37. *See supra* note 11 for a discussion on the usage of *guarantee* and *guaranty*.

38. *Guarantee*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/guarantee> [https://perma.cc/8LPX-673G] (last visited Aug. 19, 2020); *see also, e.g.*, *Guarantee*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) (defining *guarantee* (verb) as to “promise with certainty” and to “provide a formal assurance . . . regarding (something, esp[ecially] a product)”; *Guarantee*, MERRIAM-WEBSTER, *supra* (defining *guarantee* (verb) as “to assert confidently” and “to engage for the existence, permanence, or nature of: undertake to do or secure”).

39. *See, e.g.*, *Guarantee*, NEW OXFORD AMERICAN DICTIONARY, *supra* note 38 (defining *guarantee* (noun) as “a formal promise or assurance (typically in writing) that certain conditions will be fulfilled, esp[ecially] that a product will be repaired or replaced if not of a specified quality and durability,” and



“money-back guarantee” are part of common American parlance. But to eighteenth-century-English speakers, *guarantee* or *guaranty* likely had a more technical, legal meaning.<sup>40</sup>

When defining the term *guaranty* or *guarantee*, dictionaries available to the Founding Generation almost uniformly spoke of an obligation to secure performance of contracts or stipulations.<sup>41</sup> For instance, the 1785 edition of Samuel Johnson’s celebrated *Dictionary of the English Language* defines the verb *guaranty* as “[t]o undertake to secure the performance of any articles.”<sup>42</sup> Relatedly, the noun form *guarantee* is defined as “[a] power who undertakes to see

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(verb) as to “provide a formal assurance or promise, esp[ecially] that certain conditions shall be fulfilled relating to a product, service, or transaction”).

40. In the eighteenth century, the *guaranty* spelling was most commonly used as a verb to describe the *action* of guaranteeing a principal obligation. See Williams, *supra* note 6, at 612. Modern American law, on the other hand, uses *guaranty* exclusively as a noun to denote the relevant legal device. Compare, e.g., *Guaranty*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969) (defining *guaranty* as “a promise to answer for the debt, default, or miscarriage of another person, provided such person does not respond by payment or performance”), and *Guaranty*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining *guaranty* as “[a] promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another who is liable in the first instance; a collateral undertaking by one person to be answerable for the payment of some debt or performance of some duty or contract for another person who stands first bound to pay or perform”), with *Guarantee*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969) (defining *guarantee* as “[t]he creditor under a contract of guaranty, being the person to whom the principal debtor is primarily liable and to whom the guarantor is secondarily liable”), and *Guarantee*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining *guarantee* in its fourth meaning as “[o]ne to whom a guaranty is made,” also termed “*creditor*”).

It is worth noting that the eighteenth-century verb *guaranty* is closer in meaning to the modern legal verb *guarantee*, whereas the eighteenth-century noun *guarantee* more closely corresponds with the modern noun *guarantor*, which did not exist in the eighteenth century. Compare, e.g., *Guarantee*, BLACK’S LAW DICTIONARY, *supra* (defining the verb *guarantee* as “[t]o assume a suretyship obligation; to agree to answer for a debt or default”), with *Guarantor*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969) (defining *guarantor* as “[t]he person bound, by a contract of guaranty” and “[o]ne who undertakes to answer for the debt, default, or miscarriage of another”), and *Guarantor*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining *guarantor* as “[s]omeone who makes a guaranty or gives security for a debt” and noting that the term dates back to the nineteenth century). *Ballentine’s Law Dictionary* does not include a definition for either *guaranty* or *guarantee* as a verb.

Modern lay dictionaries include definitions of *guarantee* that align both with the eighteenth-century understanding (which was chiefly legal, as I argue in this Note) and the modern legal definition. See, e.g., *Guarantee*, NEW OXFORD AMERICAN DICTIONARY, *supra* note 38 (defining the noun as a legal term meaning “a formal pledge to pay another person’s debt or to perform another person’s obligation in the case of default” and a “less common term for guarantor”); *Guarantee*, MERRIAM-WEBSTER, *supra* note 38 (defining the verb *guarantee* as “to undertake to answer for the debt, default, or miscarriage of,” as in to “*guarantee* a loan” (emphasis added)).

41. Heller, *supra* note 19, at 1737–38. A note on citation: Eighteenth-century dictionaries by and large had no page numbers. The reader would refer to the letter and incipit page headings in searching for a word. Thus, where a citation to a period dictionary lacks a page number, it is not an oversight, but a function of this idiosyncratic paging system.

42. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J. F. & C. Rivington et al. 6th ed. 1785). The publication of Johnson’s dictionary has been called “the most important linguistic event of the eighteenth century,” JOHN ALEGO, THE ORIGINS AND DEVELOPMENT OF THE ENGLISH LANGUAGE 158 (6th ed. 2010), and its definitions have featured heavily in Founding-Era publications and in Supreme Court decisions, see John Mikhail, *The Definition of “Emolument” in English Language and Legal Dictionaries, 1523-1806*, at 14 (July 13, 2017), [https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID3001532\\_code395700.pdf?abstractid=2995693&mirid=1](https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3001532_code395700.pdf?abstractid=2995693&mirid=1) [https://perma.cc/26DV-VM7Y].

stipulations performed.”<sup>43</sup> The same dictionary defines an *article* in the relevant sense as “[t]erms; stipulations.”<sup>44</sup> Likewise, the second edition of Thomas Sheridan’s *A Complete Dictionary of the English Language* defines the verb *guaranty* as “[t]o undertake to secure the performance of a treaty or stipulation between contending parties.”<sup>45</sup> Sheridan defines the noun *guarantee* identically to Johnson.<sup>46</sup> *Entick’s New Spelling Dictionary*, a popular device in the Founding Era for communicating in cipher,<sup>47</sup> similarly defines the noun *guarantee* as “one who sees covenants performed.”<sup>48</sup> All three dictionaries set out *legal* definitions for the term, consistent with a guaranty obligation. Although this does not negate the possibility that eighteenth-century Americans used *guarantee* in the more colloquial sense it has acquired today, these dictionary definitions offer strong evidence that such usage was either nonstandard or deemed incorrect.

Professor Williams makes much of four dictionaries whose definitions of *guaranty* or *guarantee* spoke exclusively of treaty arrangements.<sup>49</sup> But the critical mass of eighteenth-century dictionaries focuses *both* on the contractual meaning of guaranty and on its meaning in international law.<sup>50</sup> Even admitting that there is a “strong possibility” that members of the Founding Generation were well aware

43. 1 JOHNSON, *supra* note 42.

44. *Id.*

45. 1 THOMAS SHERIDAN, *A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (London, Charles Dilly 2d ed. 1789). Sheridan defines the verb *contend* as “[t]o strive, to struggle in opposition; to vie, to act in emulation” and “[t]o dispute any thing, to contest.” *Id.*

46. *See id.* (defining *guarantee* as “[a] power who undertakes to see stipulation performed”).

47. *See* Edmund C. Burnett, *Ciphers of the Revolutionary Period*, 22 AM. HIST. REV. 329, 330 (1917), *cited in* Mikhail, *supra* note 42, at 17 n.97, 18 n.106.

48. JOHN ENTICK, *ENTICK’S NEW SPELLING DICTIONARY* 172 (London, Charles Dilly 1791). Oddly enough, Entick defines the verb *guaranty* as “to defend, provide against, adorn,” *id.*, which places it at odds with other contemporary dictionaries and with the plain text of the Guarantee Clause.

49. *See* Williams, *supra* note 6, at 613 nn.59 & 61, 614 nn.63 & 65–66 (citing NATHAN BAILEY, *AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY* (Edinburgh, Neill & Co. 25th ed. 1783) (defining the noun *guarantee* as “a person agreed on to see articles performed in treaties between Princes”); JAMES BARCLAY, *A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY* (London, J. F. & C. Rivington et al. 1792) (defining the verb *guaranty* as “[t]o undertake to see the articles of any treaty kept”); 1 FREDERICK BARLOW, *THE COMPLETE ENGLISH DICTIONARY* (London, Frederick Barlow 1772) (defining the verb *guaranty* as “to undertake to see the articles of any treaty performed”); THOMAS DYCHE & WILLIAM PARDON, *A NEW GENERAL ENGLISH DICTIONARY* (London, Toplis & Bunney 18th ed. 1781) (defining *guarantee* as “a prince or other person appointed by some other agreeing parties to see justice done between them”). Williams also fails to note the definition in the 1775 edition of John Ash’s *The New and Complete Dictionary*, which defines the noun *guaranty* as “[t]he engagement of mediatorial or neutral states by which they plight their faith, that certain treaties shall be perpetually performed by the contracting parties; a warrant.” 1 JOHN ASH, *THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (London, Edward & Charles Dilly et al. 1775).

50. *See, e.g.*, FRANCIS ALLEN, *A COMPLETE ENGLISH DICTIONARY* (London, J. Wilson & J. Fell 1765) (defining the noun *guarantee* as “a power who undertakes to see the conditions of any league, peace, or bargain performed”); 1 ASH, *supra* note 49 (defining the verb *guaranty* as “[t]o undertake to secure the performance of a stipulation between contracting parties” and the noun *guarantee*, “from the French guarant,” as “[a] state or power which engages for the performance of a treaty or stipulation between contracting parties”).

of the international law definition,<sup>51</sup> the arguably stronger possibility that they were better acquainted with its contract law definition is not canceled out.<sup>52</sup>

In any event, dictionaries are not the be-all and end-all of semantic interpretation.<sup>53</sup> To understand the nature of guaranty obligations and their relationship to the Guarantee Clause, we must find their place within the contract law of the eighteenth century.

## 2. Guaranties in the Eighteenth Century

First, some basics. A guaranty contract creates a triangular relationship: The debtor owes to the creditor a contractual obligation, and if the debtor fails in his obligation, the creditor may obtain satisfaction of the obligation from the guarantor. In its simplest form—a loan contract—the creditor is entitled to the value of the loan by a date certain, plus accumulated interest. If the debtor fails to pay as required by the contract, the creditor may demand payment from the guarantor.

One must note that, in its legal sense, *guaranty* did not come into common use in the United States until the end of the eighteenth century.<sup>54</sup> Prior to this, a guaranty was referred to as a special promise to answer for the debt, default, or miscarriages of another person.<sup>55</sup> The device was significant enough to merit inclusion in the 1677 Statute of Frauds—even though the Statute does not use the word *guaranty*.<sup>56</sup> As Blackstone notes, the guaranty obligation was one of five obligations “deemed of so important a nature, that they ought not to rest in verbal promise only, which cannot be proved but by the memory (which sometimes will induce the perjury) of witnesses.”<sup>57</sup> But available evidence indicates that, by the time of the Founding, this obligation was consistently referred to as a *guaranty* or *guarantee*.

In this Section, I analyze the meaning of *guarantee* or *guaranty* in legal treatises and dictionaries available to the Founding Generation, as well as in the case law of the early Republic. From this survey, I deduce that the term *guarantee*, written thus, was an established term referring to the act of guaranteeing a contractual obligation. Such a contractual device was, therefore, an original public meaning of “guarantee” as used in the eponymous Clause.

51. Williams, *supra* note 6, at 614.

52. See *infra* Section I.C.1 for a discussion of the Framers’ relationship to business and contract-making.

53. See Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 367–81 (2014) (suggesting six grounds for impeaching dictionary-based claims about original constitutional meaning).

54. See Max Radin, *Guaranty and Suretyship*, 17 CALIF. L. REV. 605, 606 (1929).

55. See, e.g., Statute of Frauds 1677, 29 Car. 2 c. 3, § 4 (Eng.) (providing, in full, that “noe Action shall be brought . . . whereby to charge the Defendant upon any speciall promise to answer for the debt default or miscarriages of another person . . . unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized”). *Merriam-Webster* still defines the legal term in identical terms. See *Guarantee*, MERRIAM-WEBSTER, *supra* note 38 (defining the verb *guarantee* as “to undertake to answer for the debt, default, or miscarriage of”).

56. See Statute of Frauds 1677 § 4.

57. 3 WILLIAM BLACKSTONE, COMMENTARIES \*159.

*a. Legal Treatises and Dictionaries*

The form of the guaranty obligation was already well defined by the time of the Founding. But there is some doubt as to whether the terms *guaranty* and *surety* were fully disaggregated in late-eighteenth-century American law.<sup>58</sup> Etymologically, the word *guaranty* is rooted in the Vulgar Latin *garantia*, which until at least the early eighteenth century was understood to mean a warranty of land titles.<sup>59</sup> *Surety*—as a legal term—is of much more ancient mint, dating back to the *securitas* of Roman law, used since at least the second century.<sup>60</sup> In line with these separate etymological lineages, modern American law sees the two terms as discrete, albeit related devices. Thus, a surety in modern American legal English is “[s]omeone who is primarily liable for paying another’s debt or performing another’s obligation,” in the sense of becoming a “joint obligor.”<sup>61</sup> This is distinguished from a “guarantor” in that a guarantor is liable only when the “debtor does not meet the duties owed to the creditor.”<sup>62</sup> And, as I note above, *guaranty* now refers to the contractual obligation, whereas *guarantee* refers to the person charged with the guaranty.<sup>63</sup> But eighteenth-century American law seems to not have drawn such a fine distinction.

Blackstone briefly discusses guaranty obligations without giving them a name. In discussing the promises that the law recognizes as binding, Blackstone comes to the types of agreements covered by the Statute of Frauds.<sup>64</sup> Among them, as provided in Section 4 of the Statute, are agreements “[w]here a man undertakes to answer for the debt, default, or miscarriage of another.”<sup>65</sup> St. George Tucker, in his annotations for this text, further notes that “if two persons go to a shop, and one orders goods, and the other says, ‘if he does not pay I will, or, I will see you paid,’ he is not bound unless his engagement is reduced into writing.”<sup>66</sup> In this context, Tucker uses the term *surety* when stating:

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58. See Radin, *supra* note 54, at 605–11. *But see Guarantee*, BLACK’S LAW DICTIONARY, *supra* note 40 (observing that the verb *guarantee*, defined as “[t]o assume a suretyship obligation; to agree to answer for a debt or default,” dates back to the eighteenth century).

59. See Radin, *supra* note 54, at 605–06 (discussing the origins and early evolution of the term).

60. See *id.* at 606–07.

61. *Surety*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also *Suretyship*, BALENTINE’S LAW DICTIONARY (3d ed. 1969) (defining “suretyship” as “[a] contractual relation, resulting from a primary, original, absolute, and unconditional engagement, whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the principal”).

62. *Surety*, BLACK’S LAW DICTIONARY, *supra* note 61; see also *Guarantor*, BLACK’S LAW DICTIONARY, *supra* note 11 (defining the term as “[s]omeone who makes a guaranty or gives security for a debt” and noting that the term is only attested beginning in the nineteenth century).

63. See *supra* note 40 and accompanying text.

64. Compare 3 BLACKSTONE, *supra* note 57, at \*158–59 (discussing promises “[w]here a man undertakes to answer for the debt, default, or miscarriage of another”), with Statute of Frauds 1677, 29 Car. 2 c. 3, § 4 (Eng.) (discussing agreements that are “speciall promise[s] to answere for the debt default or miscarriages of another person”).

65. 3 BLACKSTONE, *supra* note 57, at \*159.

66. 3 WILLIAM BLACKSTONE, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE

[T]he question is, who is the buyer, or to whom the credit is given, and who is the *surety*; and that question, from all the circumstances, must be ascertained by the jury; for if the person for whose use the goods are furnished be liable at all, any promise by a third person to discharge the debt must be in writing, otherwise it is void.<sup>67</sup>

Further along, Tucker again uses the word *surety* to describe the same obligation. This use comes up under Blackstone's discussion of *assumpsit* for the implied promise of repayment when "a person has laid out, and expended his own money for the use of another, at his request."<sup>68</sup> Tucker observes that:

If a surety in a bond pays the debt of the principal, he may recover it back from the principal in an action of *assumpsit*, for so much money paid and advanced to his use; yet in ancient times this action could not be maintained; and it is said, that the first case of the kind, in which the plaintiff succeeded, was tried before the late Mr. J. Gould at Dorchester. But this is perfectly consistent with the equitable principles of an *assumpsit*.<sup>69</sup>

Once again, Tucker uses the term *surety*. As this shows, the name for the aforementioned obligation was not settled in the foremost American treatise by the turn of the nineteenth century.

Eighteenth-century-English legal dictionaries offer little help. No definition of *guaranty* or *guarantee* appears, and the definitions of *surety* vary.<sup>70</sup> For instance, Richard and John Burn's 1792 *A New Law Dictionary* defines *surety* as, "the bail or pledge for any person, that he shall do or perform such a thing; as surety for the *peace* is the acknowledging a recognizance or bond to the king, taken by a

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COMMONWEALTH OF VIRGINIA 159 n.\* (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter TUCKER]. Tucker's annotated edition of Blackstone's *Commentaries* was one of the most significant works on American law in the early Republic. See David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. 1527, 1527–58 (2009) (discussing the importance of St. George Tucker's writings to understanding the Founding Generation's view of the Bill of Rights). The Supreme Court of the United States has made use of Tucker's tome as a Founding-Era source in a number of its constitutional law opinions. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 769 (2010) (citing Tucker's description of the right to keep and bear arms as "the true palladium of liberty"); *District of Columbia v. Heller*, 554 U.S. 570, 594–95 (2008) (referring to Tucker's tome as "the most important early American edition of Blackstone's *Commentaries*" and employing it to define the "right of self-preservation"); *id.* at 666 & n.32 (Stevens, J., dissenting) (citing Tucker for the contrary proposition); *New York Times Co. v. Sullivan*, 376 U.S. 254, 296–97, 296 n.2, 297 n.5 (1964) (Black, J., concurring) (citing Tucker to divine the Founding Generation's understanding of the First Amendment).

67. TUCKER, *supra* note 66 (emphasis added) (citing cases).

68. 3 BLACKSTONE, *supra* note 57, at \*163.

69. TUCKER, *supra* note 66, at 163 n.\* (citing cases).

70. I am grateful to Dean John Mikhail for his comprehensive list of English-language legal dictionaries published between 1523 and 1792, which made writing this Section immensely easier. See Mikhail, *supra* note 42, at A-91 tbl.2. Dictionaries that Dean Mikhail cites but that I do not mention here contain no definitions for *guaranty*, *guarantee*, or *surety*.

competent judge of record, for keeping the king's peace."<sup>71</sup> In a different vein, Jacob Giles's 1729 *New Law-Dictionary* defines *surety* as "[a] Bail that undertakes for another Man in a criminal Case, or Action of Trespass."<sup>72</sup> Finally, Robert Kelham, in his dictionary of the Norman language (which formed the backbone of English legal parlance), defines the archaic term *garrant* as "protect" and *garrantie* as "a justice's warrant."<sup>73</sup> On the other hand, he defines *surte* (rendered in modern French as *sûreté*)<sup>74</sup> plainly as a "surety."<sup>75</sup> However, this evidence is inconclusive, especially if Radin is correct in saying that "the Common Law knew nothing of" the difference between *surety* and *guaranty* and "the English courts continue to know nothing of it."<sup>76</sup> These dictionaries are, after all, British publications.

Despite the indeterminacy of these sources, there is evidence that American courts during the Founding Era used the word *guarantee* to refer to obligations to answer for the debt or obligation of another.

### b. Early American Case Law

The case law of the early Republic offers clearer evidence on the Founding Generation's understanding of the term *guarantee*. *Eddowes v. Niell* presents a classic dispute over a guaranty.<sup>77</sup> Thomas Niell wrote a letter in 1771 to a British importing firm on behalf of his brother William, saying "that to strengthen his brother's credit, he would *guarantee* all his dealings with their house."<sup>78</sup> Business carried on as usual, until the Revolutionary War caused the suspension of trade between Britain and the Thirteen Colonies. After the dust settled, the British firm sent agents in 1784 to collect on its American clients' prewar debts. As it turns out, William had not yet paid for a series of goods he had purchased before hostilities broke out. He asked for an—entirely reasonable—abatement of the eight years of interest that accumulated during the war. The agent was not impressed. Unfortunately, William died in the midst of negotiations with the firm's agent,

71. 1 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 668 (London, A. Strahan & W. Woodfall 1792).

72. JACOB GILES, A NEW LAW-DICTIONARY (London, E. & R. Nutt et al. 1729). Similarly, the entry for *surety* in T. Cunningham's 1765 dictionary points the reader to "[b]ail," which offers a description of bails in criminal and civil contexts. 2 T. CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (London, S. Crowder & J. Coote 1765). Cunningham provides a lengthy definition and commentary on the unrelated "[s]urety of the [p]eace," which he describes as "an acknowledging of a bond to the prince, taken by a competent judge of record, for the *keeping of the peace*." *Id.* But the term *surety* appears throughout in case summaries, both in its "[s]urety of the [p]eace" and contract law iterations. *Id.*

73. ROBERT KELHAM, A DICTIONARY OF THE NORMAN OR OLD FRENCH LANGUAGE 113 (London, Edward Brooke 1779).

74. See *Sûreté*, THE OXFORD-HACHETTE FRENCH DICTIONARY (Marie-Hélène Corr ard et al. eds., 4th ed. 2007) (translating the term in its first meaning as "safety" of a place, person, or thing; "soundness" of an investment; or "security" of a country; or in its second meaning, as "soundness" of judgment; "steadiness" of gesture; or "confidence" in an actor or musician).

75. KELHAM, *supra* note 73, at 231.

76. Radin, *supra* note 54, at 618.

77. See 4 Dall. 133, 133 (Pa. 1793).

78. *Id.* (emphasis added).



leaving Thomas as his executor. Upon filing suit in assumpsit against the estate for the outstanding debt in 1790, the creditor sought to enforce Thomas's guaranty.

The court ruled for the creditor–plaintiff. It found that plaintiff did not act negligently in seeking to collect the debt.<sup>79</sup> Plaintiff had sought his due as soon as trade relations resumed, and William had acknowledged the debt. The court also rejected Thomas's argument that the nineteen-year span between the 1771 guaranty letter and the 1790 suit somehow extinguished Thomas's obligation. Thus, there was no requirement that plaintiff show itself unable to collect from the principal or that “the principal had become notoriously insolvent” to enforce the guaranty.<sup>80</sup> Interestingly, the reporter uses the terms *guarantee* and *surety* indistinctly to refer to the same obligation.<sup>81</sup>

Similar reported decisions crop up across the young Republic during the Founding Era, many of them using the terms *guarantee* or *guaranty*. Cases dealing with such things as bonds for bricks,<sup>82</sup> bonds for sundries bought for resale,<sup>83</sup> satisfaction of awards obtained against arbitrators,<sup>84</sup> agreements to underwrite losses from consignment sales made on credit,<sup>85</sup> guaranties of payment for stock

79. *Id.* at 135.

80. *Id.*

81. Compare *id.* at 133 (“No demand, however, was made, on the ground of the defendant’s *guarantee*, till about the time of commencing the present action, in *January 1790*.” (first emphasis added)), with *id.* at 135 (“The agent of the plaintiffs then addressed the defendant, not as *surety*, but as executor, of his brother . . .” (emphasis added)).

82. See, e.g., *Parker v. Kennedy*, 2 S.C. Eq. (2 Des. Eq.) 37, 37–39 (1801) (reversing for laches an injunction that ordered one Kennedy to answer for a debt that Singleton owed to Parker for an order of 212,500 bricks, on a 1786 bond that Parker accepted “on the express terms that Kennedy should *guarantee* the payment of the bond” (emphasis added)).

83. See, e.g., *Greene v. Ferrie*, 1 S.C. Eq. (1 Des. Eq.) 164, 164–65 (1790) (ordering one Ferrie to pay a portion of John Banks’s debt to several firms for “goods to a considerable amount,” who “by bonds of [September 1782], *guaranteed* that payment should be made to [the firms]” (emphasis added)). As a historical note, both attorneys in the litigation were noted Founding Fathers. Defendant’s advocate was Brigadier General Charles Coteworth Pinckney, who served as delegate for South Carolina to the Constitutional Convention. See *id.* at 166. And plaintiff retained Edward Rutledge, the youngest signatory of the Declaration of Independence and future Governor of South Carolina (and Pinckney’s former law partner). See *id.* The deceased Greene, whose executrix filed the bill in assumpsit, was none other than Nathanael Greene, distinguished Major General of the Continental Army.

84. See, e.g., *Shermer v. Beale*, 1 Va. (1 Wash.) 11, 11–13 (1791) (reinstating a decree that ordered Beale to satisfy a judgment against three arbitrators in an accounting, pursuant to a May 1788 bond that stipulated that “*Shermer* [was] to receive, in satisfaction of any sum which might be awarded him, bonds or judgments if decided to be good, by the arbitrators, but to be *guaranteed* by *Beale*” (second emphasis added)). The court was perplexed by the arrangement, observing that “[t]his is a strange proceeding, first to choose [arbitrators] to decide a dispute, and then to make them defendants to a suit, in order to demand of them the reasons of their decision.” *Id.* at 14. This strangeness notwithstanding, the court ordered enforcement of the guaranty. *Id.*

85. See, e.g., *M’Dowel v. Teasdale*, 1 S.C. Eq. (1 Des. Eq.) 459, 459–60 (1795) (dismissing for lack of evidence a claim seeking to hold defendant “as a *guarantee* to the complainant for the goods sold [on credit], and therefore . . . liable for any loss sustained by the insolvency of the persons to whom they were sold” (emphasis added)).

in the Bank of the United States,<sup>86</sup> and cosignatories of short-term loans<sup>87</sup> are but a sample.<sup>88</sup> Of course, reported cases constitute only a small subset of cases litigated during the period. Moreover, such cases are a poor barometer of the prevalence of guaranty contracts in a variety of commercial, financial, and mercantile settings.<sup>89</sup> At the least, they stand as evidence that the idea of a guaranty contract, by that or a similar name, was already a part of the Founding Generation's legal vocabulary.

But perhaps most interestingly, these early cases all use the spelling *guarantee*—rather than *guaranty*—when speaking of the legal act of guaranteeing a debt or obligation. This dispels Heller's doubts on the spelling of *guarantee* in the Guarantee Clause,<sup>90</sup> which Williams echoes,<sup>91</sup> and indicates that the spelling *guarantee* for at least the verb form was already commonplace in legal discourse at the time of ratification in 1787 and 1788. It is unclear why these cases deviate from the spelling conventions in contemporary dictionaries. Yet this evinces a strong link between the Framers' final choice of spelling in the Clause—which now looks less idiosyncratic—and the types of documents with which they and their generation would have been familiar.

I make no claim here that the use of *guarantee* in these cases outnumbers the use of the equivalent *surety* in reported cases of the same period. Any such empirical claims are beyond this Note's scope. Nonetheless, I submit that these reported decisions establish a sufficiently strong inference that the word *guarantee* was a common legal idiom for the Founding Generation. This is especially true of the verb form *guarantee*, which is used to refer to both guaranties and

86. See, e.g., *Fowler v. Macomb*, 2 Root 388, 388 (Conn. Super. Ct. 1796) (resolving an issue of demurrer to parol testimony concerning “a certain promissory writing, executed by John Pintard to the plaintiffs, and *guaranteed* by the defendant” in 1792 for twenty shares in the Bank of the United States, which guarantee plaintiffs triggered when Pintard never paid for the shares because “that said Pintard is, and was then, and ever since hath been, a bankrupt” (emphasis added)). The text of the agreement, reprinted in full by the reporter, reads, “I *guarantee* the [amount] within on the part of said John Pintard. Alexander Macomb.” *Id.* (emphasis added).

87. See, e.g., *Bradley v. Phelps*, 2 Root 325, 325–28 (Conn. Super. Ct. 1796) (dismissing a suit against defendant, who guaranteed a three-month loan for one Elijah Austin in July 1793, because plaintiffs did not seek repayment from the then-solvent Austin at the end of the three months and instead waited for him to die bankrupt and then proceed against defendant, who was Austin's “sponsor for the three months only”).

88. Other reported cases from the 1790s that use the term *guarantee* or *guaranty* include *Clarke v. Russel*, 3 U.S. (3 Dall.) 415, 415, 420, 422 (1799) (bills of exchange); *Ridgely v. Carey*, 4 H. & McH. 167, 197 (Md. 1798) (sales underwriting); *Ludlow v. Bingham*, 4 Dall. 47, 60 (Pa. 1799) (“An indorser is *guarantee* for the payment of the note to the holder, if it is not paid by the drawer . . .” (emphasis added)).

89. It would go beyond the scope of this preliminary study to survey contract practice in late-eighteenth-century America and identify the incidence of guaranty contracts in the early Republic's commercial life. This could be the subject of further investigation, which would require extensive archival research that is beyond my means at present. I content myself with leaving this question open for future researchers. See *infra* Section II.C.

90. See Heller, *supra* note 19, at 1737 n.117 (observing that “[t]he spelling in the Clause is peculiar because, based on the dictionaries at the time, a ‘guarantee’ was a noun,” and period dictionaries spelled the verb as “guaranty”).

91. See Williams, *supra* note 6, at 612 & n.55.

sureties. Thus, this is *an* original public meaning of the term *guarantee* in the Guarantee Clause. And, as I show in the following Section, it is more likely that the Framers, ratifiers, and public of 1787 would have been closely acquainted with this meaning through their economic dealings.

### C. STRENGTHS AND DRAWBACKS

In this Section, I consider why the contract law analogy is a more plausible frame through which to view the Guarantee Clause. Principally, this is because there is a clear connection between the public of 1787, and especially the Framers and ratifiers of the Constitution, and guaranty contracts. In my view, this connection is clearer than between that same public and treaty guaranties, which Williams posits. Thus, as an evidentiary matter, the Republican Guaranty Contract requires no logical leaps between the public of 1787 and the proposed original public meaning of “guarantee.” Then, as a counterpoint, I consider certain theoretical and methodological issues that this analogy presents.

#### 1. Strengths of the Contract Analogy

Reading a constitutional provision in light of private law concepts might not seem like the most intuitive project.<sup>92</sup> But the strength of the contemporary evidence for a contract law original public meaning is sufficient to justify it on at least theoretical grounds.

First of all, the guaranty contract analogy is not meant to discredit Professor Williams’s treaty law account of the Guarantee Clause. His study is carefully argued, and his presentation of the evidence is compelling. His article, I think, successfully makes its case that at least some members of the Founding Generation could have read the Clause through the lens of treaty law. But Williams never considers the possibility that contract law guaranties could have informed the Founding Generation’s understanding of the Clause.

As I discuss above, the word *guarantee* had a similar legal meaning then as it does now.<sup>93</sup> Even today, one does not need specialized training to know what a guaranty contract is. One need only apply for a loan or seek a rental home in New York City or Washington, D.C. It is true that Williams presents his interpretation as at least “fall[ing] within the range of plausible interpretations to which the provision would likely have been amenable at the time of enactment.”<sup>94</sup> Originalist analysis will often yield a plausible, rather than a definite, interpretation of a

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92. *But see* Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 373 (1816) (Johnson, J., concurring) (“To me the constitution appears, in every line of it, to be a contract, which, in legal language, may be denominated tripartite. The parties are the people, the states, and the United States. . . . That the states are recognised as parties to it is evident from various passages, and particularly that in which the United States guaranty to each state a republican form of government.”).

93. *See supra* Section I.B.

94. Williams, *supra* note 6, at 673.

constitutional provision.<sup>95</sup> Even so, historical common sense would say that the realm of contracts was much more familiar to members of the Founding Generation than were the intricacies of treaty law. I therefore find it more plausible that they would have read the Clause as they would a contractual guaranty. A quick survey of the Framers' and ratifiers' business involvement serves to make this link.<sup>96</sup>

The members of the Philadelphia Convention and the state ratifying conventions were deeply enmeshed in the economic life of the times. They were merchants, landowners, financiers, lawyers, planters, farmers, career politicians, printers, and inventors. They were almost uniformly wealthy and highly educated. In a word, they were "a continental elite, the nearest thing to an 'establishment' that could have existed in those days of poor communications, limited horizons, and divided loyalties."<sup>97</sup> Even if their main career was not in business, they likely would have undertaken or been entitled to obligations that required guaranties. The lawyers among them would likewise have drafted such guaranties for their clients. All told, contractual guaranties were a commonplace element of the Framers' milieu.

Likewise, the ratifying conventions were populated and steered by members of the continental elite. As Rossiter tactfully notes:

Although a healthy minority of this elite fought doggedly against the Constitution, and although the nationalists depended heavily upon the support of thousands upon thousands of craftsmen and farmers of "the middling sort," the drive for ratification, like the drive to call the Convention in the first instance, was managed by a small group of men who owned a disproportionate amount of power and prestige.<sup>98</sup>

These elites drove the conversation at the ratifying conventions. Their glosses on the text of the proposed national charter swayed their countrymen towards a hard-fought ratification. And courts and academics today read their words closely to determine the meaning of constitutional provisions.

Excerpts from the Framers' and ratifiers' correspondence illustrate their familiarity with guaranties. Captain John Paul Jones, stationed at the shipyards of

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95. Cf. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 690 (1987) (arguing that the historical record will often yield "not a focused, specific answer, but a range of original understandings" of a particular constitutional text).

96. For a more general discussion of the business environment in the early United States, and of the degree of citizens' participation in the economy, see generally JEREMY ATACK & PETER PASSELL, *A NEW ECONOMIC VIEW OF AMERICAN HISTORY: FROM COLONIAL TIMES TO 1940*, at 26–142 (2d ed. 1994); SHARON ANN MURPHY, *OTHER PEOPLE'S MONEY: HOW BANKING WORKED IN THE EARLY AMERICAN REPUBLIC 8–70* (2017); CURTIS P. NETTELS, *THE EMERGENCE OF A NATIONAL ECONOMY 1775–1815*, at 23–64, 89–155 (1962); GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 315–33 (2009).

97. CLINTON ROSSITER, *1787: THE GRAND CONVENTION 153* (2d ed. 1987). For a general discussion of the Convention delegates and their careers, see *id.* at 79–158.

98. *Id.* at 277.

Lorient in Brittany, complained to Benjamin Franklin in 1780 that a band of ragged seamen who had survived a tour of service on his ship “[c]onsider me as the Guarantee for . . . payment” of their wages.<sup>99</sup> When the Continental Army’s financial situation seemed bleakest in the winter of 1781, Lieutenant Colonel John Laurens wrote to General Washington that the King of France was willing “to *guarantee a loan* of ten millions of livres to be opened in Holland in favour of the United States” for military supplies.<sup>100</sup> In 1782, Jean de Neufville & Fils, an Amsterdam banking house, wrote to Benjamin Franklin in Paris about certain “[c]ontinental bills.”<sup>101</sup> In the letter, it assured Franklin that one William Foster of Boston was “[w]illing to give his guarantee” that payment would be made on them, and that Neufville & Fils was willing to put up its “own guarantee as an additionl. Security otherway that for our part we shall act therein as may be deem’d Necessary.”<sup>102</sup> In 1788, the perennially indebted Thomas Jefferson received a note from his Amsterdam bankers that mentions Jefferson’s guarantee of a loan of 100 guineas made to Captain Jones.<sup>103</sup> In the depths of the young Republic’s financial troubles, a crestfallen William Short reported to Treasury Secretary Hamilton that their London banker “found that no house of solidity would undertake to *guarantee a loan* [to the United States] for any commission and that no loan could be opened *publicly* for a foreign power.”<sup>104</sup> The famed Major General Nathanael Greene entered into a series of ruinous guarantees to secure clothing for his soldiers, as reported by Alexander Hamilton in commenting on an indemnification petition sent to Congress by Greene’s destitute widow.<sup>105</sup> These are but a handful of examples. In every instance, the term *guarantee*—whether used as a noun or verb—is used in the ordinary course of things, requiring no explanation. What shines through is the normalcy of the legal device, as well as its simplicity.

At least one reported case speaks of a guaranty drawn up by none other than James Wilson, delegate to the Constitutional Convention and Associate Justice of the Supreme Court. The case involved a guaranty for a bond that Wilson executed

99. Letter from J.P. Jones to B. Franklin, Esquire (Feb. 23, 1780), in 31 THE PAPERS OF BENJAMIN FRANKLIN 515, 515–16 (Ellen R. Cohn et al. eds., 2006).

100. Letter from John Laurens to George Washington (Apr. 11, 1781) (emphasis added), <https://founders.archives.gov/documents/Washington/99-01-02-05365> [<https://perma.cc/6LFS-YMV9>].

101. Letter from Jean de Neufville & Fils to Benjamin Franklin (Oct. 24, 1782), in 31 THE PAPERS OF BENJAMIN FRANKLIN, *supra* note 99, at 246, 246.

102. *Id.* I have retained the abbreviations and punctuation in the original.

103. Letter from Nicolas & Jacob van Staphorst to Thomas Jefferson (June 30, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON 301, 301 (Julian P. Boyd et al. eds., 1956).

104. Letter from William Short to Alexander Hamilton (Oct. 10, 1791), in 9 THE PAPERS OF ALEXANDER HAMILTON 311, 313 (Harold C. Syrett et al. eds., 1965) (first emphasis added).

105. Alexander Hamilton, Report on the Petition of Catharine Greene, in 10 THE PAPERS OF ALEXANDER HAMILTON 406, 410–11 (Harold C. Syrett et al. eds., 1966) (noting that Greene ordered a financial firm to pay certain obligations to people “whose debts he had guaranteed” in connection with the purchase of uniforms for his soldiers); *see also* Greene v. Ferrie, 1 S.C. Eq. (1 Des. Eq.) 164, 165 (1790) (noting a series of guarantees that Greene had made in a case dealing with settlement of his estate).

in 1796 for William Nicholls.<sup>106</sup> The latter assigned the guaranty to Tench Coxe,<sup>107</sup> a delegate to the Continental Congress and Federalist pamphleteer.<sup>108</sup> Although the case as reported turned on an evidentiary question,<sup>109</sup> it offers proof that these Framers knew the guaranty device and made use of it in their economic dealings.

These examples are but snapshots of the complex social networks and market economy that bound the people of the thirteen states together in the 1780s and '90s. My sample size is admittedly limited. As I remark above, any further study of this topic would have to engage with documents that often fall outside the public documentary record. Unpublished letters, contracts, memoranda, journals, ledgers, notes, and court records are likely to contain vast amounts of evidence about the use of guaranties in the Founding Era. Ironically, evidence and discussion of treaty guaranties is likelier to appear in publicly accessible databases and collected documents simply because of the public nature of international agreements. Williams's international law reading of the Guarantee Clause benefits from this wealth of documents. But guaranties, as simple, run-of-the-mill agreements, would most probably have been written out on scraps of paper that were discarded once the principal obligation was satisfied, or confined to private files later abandoned. There was simply less of an incentive to preserve records of guaranties than of treaties or matters of state. Even the most thorough exploration of the existing documentary record would miss many such ephemeral records. Otherwise stated, the Republican Guaranty Contract is, by its nature, at an evidentiary deficit. Until enterprising minds undertake a thorough investigation of the prevalence of guaranty contracts in eighteenth-century America, the deficit will persist.

Even with this evidentiary deficit, however, I contend that the Republican Guaranty Contract framework is closer to the daily reality of the public of 1787 than an international law framework. A Founding Generation schooled in the ways of business and in its legal devices would have encountered guaranties with some regularity. Meanwhile, the concept of a treaty guaranty would have been known chiefly to statesmen and lawyers knowledgeable about public law. The contract law reading therefore seems like the more plausible original *public* meaning of the term "guarantee."

## 2. Drawbacks of the Contract Analogy

The contract analogy is by no means perfect. In this Section, I identify some flaws of the analogy.

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106. See *Coxe v. Nicholls*, 2 Yeates 546, 546 (Pa. 1800).

107. *Id.* at 547.

108. *The Idea of the Senate*, U.S. SENATE, [https://www.senate.gov/about/origins-foundations/idea-of-the-senate/1787DemFederalist\\_Coxe.htm](https://www.senate.gov/about/origins-foundations/idea-of-the-senate/1787DemFederalist_Coxe.htm) [<https://perma.cc/3VBP-USCG>] (last visited Aug. 20, 2020).

109. See *Coxe*, 2 Yeates at 547.



The Constitution is a public law document, subject to its own set of interpretive rules and orienting concepts. It is, after all “a Constitution we are expounding.”<sup>110</sup> In the realm of contracts, a suit to recover on a guaranty usually depends on little more than ascertaining the existence of a contract, the terms of the agreement, the nature and extent of the breach, and the creditor’s capacity to satisfy a judgment.<sup>111</sup> Public policy considerations usually take a back seat.<sup>112</sup> Conversely, any claim under the Guarantee Clause as a contract would necessarily require the court to weigh issues of policy expediency, separation of powers, and federalism, among others. Thus, although the contract framework provides a theoretical scaffolding with which to build a theory of enforceability, it runs into problems common to more traditional ways of interpreting the Guarantee Clause.

In this sense, Professor Williams’s treaty analogy fits snugly within the scheme of the federal project. If one buys the claim that the states stand as individual sovereigns, and that there is an agreement among them that they shall retain a republican form of government, Williams’s theory is sound. Admittedly, in my own survey of available documentary evidence, treaty guarantees are mentioned and discussed abundantly. Williams rightfully relies on the high incidence of the term in drawing his own conclusions.<sup>113</sup> But even if the reader were to agree with Williams that his theory is the *most* plausible reading of the historical record, this Note still makes a valuable contribution. The Note points out the Guarantee Clause’s connection to a separate but equally significant body of eighteenth-century law. It therefore challenges the notion that a constitutional provision—even one as obscure as the Guarantee Clause—is subject to interpretation according to a single body of law. A court or other constitutional decisionmaker interpreting the Clause would have to pick between competing interpretations by entering the construction zone. In effect, this Note identifies an ambiguity in the text of the Clause that has not previously been discussed. This probably makes the interpreting court’s task harder, but it allows us to pay closer attention to the Founding Generation’s understanding of the “guarantee” that the Clause promises.

Crucial to this endeavor, however, is finding what the contract analogy actually tells us about the Guarantee Clause. I make an attempt at this in the following Part.

## II. THE TERMS OF THE GUARANTY

As with any contractual provision, the core of my analysis of the Republican Guaranty Contract focuses on the relevant text.

The Guarantee Clause provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”<sup>114</sup> Guaranty contracts

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110. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis omitted).

111. *See, e.g., supra* Section I.B.2.b (citing cases).

112. *See supra* Section I.B.2.b (citing cases).

113. *See Williams, supra* note 6, at 612–20 & nn.52–103.

114. U.S. CONST. art. IV, § 4, cl. 1. The Invasion and Domestic Violence Clauses follow, providing that “[t]he United States . . . shall protect each of [the states] against Invasion; and on Application of the

in the eighteenth century often paralleled the Clause's minimalistic drafting and required nothing other than a valid signature. Written formulations such as "I guarantee the [contract] within on the part of said John Pintard. [Signed,] Alexander Maccomb,"<sup>115</sup> or "to strengthen my brother's credit, I will guarantee all his dealings with the House of N. & N. *Signed*, Thomas Niell,"<sup>116</sup> were deemed sufficient and enforceable by Founding-Era courts. All the Statute of Frauds required was that "some Memorandum or Note [of the agreement] shall be in Writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized."<sup>117</sup> In that vein, the Guarantee Clause is, like the rest of the Constitution, a written document made with all the requisite solemnities.<sup>118</sup> The document bears the signatures of the delegates lawfully authorized to represent the states' interests at the Philadelphia Convention.<sup>119</sup> Moreover, the document was ratified—dare I say endorsed—by the people of the several states' duly appointed delegates gathered in conventions. The question remains whether the Constitution can be considered to be signed by the party to be charged in the guaranty—the United States—but this inquiry would be sophistry. Let us assume that the constituent states' duly authorized representatives could and did sign on the United States' behalf.

This preliminary inquiry might seem disingenuous, but these are necessary steps. Again, we have the text: "The United States shall guarantee to every State in this Union a Republican Form of Government."<sup>120</sup> That is the whole agreement. Thus, to determine the nature of the Republican Guaranty Contract, I will analyze: (1) the parties to the contract—the United States and the several States; (2) the form of the obligation—a guaranty; and (3) the substance of the obligation—a "Republican Form of Government."

But before this analysis, a note on placement. The Guarantee Clause's location within the Constitution is crucial to the nature of the obligation it creates. Some scholars have argued that Article IV is little more than an amalgam of unrelated provisions hastily cobbled together at the last minute.<sup>121</sup> Nevertheless, Article

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Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." *Id.* art. IV, § 4, cls. 2–3. I do not analyze these subsequent provisions because their phrasing and content are rooted in eighteenth-century public law.

115. *Fowler v. Maccomb*, 2 Root 388, 388 (Conn. Super. Ct. 1796).

116. This is paraphrased from *Eddowes v. Niell*, 4 Dall. 133, 133 (Pa. 1793) ("[William Niell's] brother, the defendant, wrote a letter to [British merchants], in which he said, 'that to strengthen his brother's credit, he would guarantee all his dealings with their house.'").

117. Statute of Frauds 1677, 29 Car. 2 c. 3, § 4 (Eng.).

118. See generally Jane Pek, Note, *Things Better Left Unwritten?: Constitutional Text and the Rule of Law*, 83 N.Y.U. L. REV. 1979 (2008) (analyzing the implications of the Constitution's "writtenness" and its connection "to rule-of-law values").

119. See U.S. CONST. art. VII, § 1; see also ROSSITER, *supra* note 97, at 80 (noting that the Philadelphia Convention "was first and foremost a gathering of states").

120. U.S. CONST. art. IV, § 4, cl. 1.

121. See, e.g., GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 28 (2004) (arguing that Article IV is a "grab bag of miscellaneous provisions"); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1477 (2007) ("Article IV is not often considered as a single entity . . .

IV's thematic unity runs counter to this reading.<sup>122</sup> Structurally, Article IV of the Constitution regulates the relationship of the United States with the several states, and of the states among themselves.<sup>123</sup> Thus, the Guarantee Clause necessarily impacts the balance of power between the federal government and the states, or between the states.

#### A. THE PARTIES

To discern the Republican Guaranty Contract's import and effect, we must first determine who the contracting parties are.<sup>124</sup>

The Republican Guaranty is evidently an obligation of the United States. But two plausible theories appear as to identities of the creditor and debtor. The first is that the Republican Guaranty Contract secures an obligation of the states *to other states* to retain a "Republican Form of Government." This is Professor Williams's reading.<sup>125</sup> The states therefore stand as creditors and debtors to each other. The second is that the United States is bound to guarantee an obligation of the states to provide a "Republican Form of Government" *to the people*. This accords more with the substantive guarantee theories of Bonfield,<sup>126</sup> Wiecek,<sup>127</sup> and Chemerinsky.<sup>128</sup> Of course, this latter theory also raises the question of whether "the people" refers to the final Preamble's "We the People of the United States"<sup>129</sup> or to "We the People of the States of New Hampshire, Massachusetts," etc.<sup>130</sup> These distinctions are significant in that they dictate who can claim on the guaranty obligation. Moreover, the identity of the parties will define the

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[because] its four sections were cobbled together during the last hours of the Constitutional Convention.").

122. See Williams, *supra* note 6, at 626–27 (remarking on Article IV's "overarching concern with mediating and mitigating potential sources of tension between state governments"). To this list, I would add sources of tension between the state and federal governments.

123. See U.S. CONST. art. IV. Article IV stands in contrast to the subject matter of the other six articles. See *id.* art. I (Congress); *id.* art. II (the President); *id.* art. III (the judiciary); *id.* art. V (amendment process); *id.* art. VI (supremacy of Federal Constitution and law); *id.* art. VII (ratification process). See generally Matthew Spalding, *Introduction to the Constitution*, in THE HERITAGE FOUND., THE HERITAGE GUIDE TO THE CONSTITUTION 7, 11 (David F. Forte & Matthew Spalding eds., 2d ed. 2014) ("The Constitution is divided into seven parts, or articles, each dealing with a general subject.").

124. Cf. Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1212–14 (2010) ("[A]ctions require actors, just as verbs require subjects. Thus, a constitutional claim is necessarily a claim that some *actor* has acted inconsistently with the Constitution. And so, every constitutional claim should begin by pointing a finger. Every exercise of judicial review should begin by identifying a governmental actor, a constitutional *subject*. And every constitutional holding should start by saying *who* has violated the Constitution." (footnote omitted)).

125. See Williams, *supra* note 6, at 630–34 (arguing that the Guarantee Clause operates only to the benefit of the states).

126. See Bonfield, *supra* note 19, at 524 (arguing that only "the *people* of every state" would benefit from the guarantee).

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

128. See Chemerinsky, *supra* note 5, at 851.

129. U.S. CONST. pmb1.

130. *The Constitution as Reported by the Committee of Detail, August 6, 1787*, reprinted in ROSSITER, *supra* note 97, at 374, 374 [hereinafter *Committee of Detail Draft*].

substance of the obligation—what the debtor owes—and how the creditor may seek to collect on a default.

I consider these questions in turn and conclude that the parties to the Republican Guaranty Contract are the United States and the several states. This conclusion is rooted in the text and in the Founding Generation’s understanding of the Clause’s operation.

### 1. The “United States”

One thing about the Republican Guaranty Contract is clear: The United States is the proverbial “party to be charged.” As used in the Constitution *qua* governmental charter, “the United States” refers to the sovereign state and the governmental superstructure that the Constitution frames.<sup>131</sup> Indeed, the Guarantee Clause is the only constitutional provision that identified a specific power or duty of the federal government “by its corporate name.”<sup>132</sup> The text makes no distinction between the three coordinate branches of the federal government. As a result, the Republican Guarantee Contract binds all three branches equally.

To Professor Williams, this phrasing comports with the treaty analogy. Where a nation is assigned a power or duty in a treaty, such a provision binds “the nation as a whole, irrespective of the internal governmental processes that might be necessary to comply with that treaty.”<sup>133</sup> Thus, regardless of which federal actor enforces the guarantee, the nature of the obligation remains the same.<sup>134</sup>

131. Unlike the Articles of Confederation, which provided in Article I that “[t]he Stile of this Confederacy shall be ‘The United States of America,’” ARTICLES OF CONFEDERATION of 1781, art. I, *reprinted in Articles of Confederation: March 1, 1781*, YALE L. SCH.: THE AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/artconf.asp](http://avalon.law.yale.edu/18th_century/artconf.asp) [https://perma.cc/AV8P-9S3T] (last visited Aug. 21, 2020), the Constitution of 1787 includes no provision establishing what the “United States” is, *see* U.S. CONST. A similar provision appeared also in the Committee of Detail’s August 6th draft of the Constitution. *See Committee of Detail Draft*, *supra* note 130, at art. I (“The stile of this government shall be, ‘The United States of America.’”). The final Preamble, by referring to “the People of the United States . . . ordain[ing] and establish[ing] this Constitution for the United States of America,” U.S. CONST. pmbl., seems to provide an equivalent textual basis, but the entire Constitution of 1787 can be read to presuppose the existence of a sovereign “United States.” For a discussion of the Preamble’s drafting history and its significance to the Federalist cause, *see* William M. Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 119 MICH. L. REV. (forthcoming 2020) (manuscript at 38–40, 60, 61, 78–87) (available at [https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID3625910\\_code238438.pdf?abstractid=3383183&mirid=1](https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3625910_code238438.pdf?abstractid=3383183&mirid=1) [https://perma.cc/Y983-S3W5]).

132. Bonfield, *supra* note 19; *see* Williams, *supra* note 6, at 632 (observing that in all “other instances where the Constitution confers powers or imposes duties on different branches of the federal government with respect to the same subject matter, the text clearly and carefully specifies which branch possesses which powers or responsibilities with respect to that subject”). Relatedly, Dean Mikhail has identified the “All Other Powers” Clause (which he calls the “sweeping clause”) of Article I’s Necessary and Proper Clause as a recognition of unenumerated powers that the United States possesses as a sovereign entity. *See* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1050 (2014).

133. Williams, *supra* note 6, at 632–33 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 207 cmt. a (AM. LAW INST. 1987)); *accord* Bonfield, *supra* note 19 (noting that the lack of reference to a specific department means “that the obligation rests on all the departments of the government, in their appropriate spheres”).

134. *See* Williams, *supra* note 6, at 633.

The treaty argument is helpful in visualizing the unitary obligation that the Republican Guarantee Contract imposes on the federal government. As in international law, where a contract names a party in its corporate capacity, it binds the entity as a whole, not merely its operative components. Where the Constitution wishes to oblige a particular governmental actor, it does so directly or through implication. Such is the case here: By identifying the “United States” as the relevant governmental actor, the Guarantee Clause binds all of its component parts. But although the Guarantee Clause makes no distinction between the three branches, each branch has a unique role in discharging the guaranty, as I discuss below.

## 2. The “States”

### *a. In General*

Mention of the “United States” in the Guarantee Clause stands in contrast to the mentions of “every State in this Union” four words later<sup>135</sup> and “each of them” (referring to the states) in the Invasion and Domestic Violence Clauses.<sup>136</sup> These latter clauses sought to reverse the states’ inability under the Articles of Confederation to require federal assistance in fighting off invasion and domestic insurrections.<sup>137</sup> Indeed, these clauses give the states a clear prerogative *against* the United States to demand assistance on such occasions.

Hence, as a textual matter, the states are not charged with the Republican Guaranty. Rather, they are parties to the underlying obligation that the Republican Guaranty secures. I discuss the structure of the underlying obligation in the following Section.

On the other hand, the states’ obligation—and concomitant powers—to guarantee to their citizens a republican form of government arise from sources exterior to the Federal Constitution. Indeed, this obligation arises from a state’s own charter of government, which sets out the terms of the compact between the state and its people.<sup>138</sup> The national Constitution merely ensures that the states do not

135. U.S. CONST. art. IV, § 4, cl. 1.

136. *Id.* art. IV, § 4, cls. 2–3 (“The United States shall . . . protect each of [the states] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

137. *See, e.g.*, THE FEDERALIST NO. 21, at 103 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“The want of a mutual guaranty of the State governments is another capital imperfection in the federal plan.”). *See generally* WIECEK, *supra* note 127, at 27–42 (discussing how Shays’s Rebellion and Massachusetts’s difficulties in securing federal aid in suppressing the uprising were prime motivations for enacting Article IV, Section 4).

138. *See, e.g.*, VT. CONST. of 1777, ch. 1, arts. 4–7 (“[A]ll power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.”); *Minor v. Happersett*, 88 U.S. 162, 175 (1874) (“The guaranty necessarily implies a duty on the part of the States themselves to provide such a [republican form of] government.”); *see also* Hans A. Linde, *State Courts and Republican Government*, 41 SANTA CLARA L. REV. 951, 952 (2001) (“The Guarantee Clause imposes a secondary, derivative duty on the United States, but the primary responsibility for republican institutions is on each state.”).

lack the powers they need to comply with this obligation. It does so through the Tenth Amendment's reservation to the states of powers not delegated to the United States.<sup>139</sup> But it would be to disregard the text to read the Guarantee Clause as endowing any part of state governments, and much less the state judiciaries, with any sort of enforcement authority.<sup>140</sup>

*b. Creditors or Debtors?*

This is where we reach a fork in the road. Identifying the states as a party to the Republican Guaranty Contract raises the question of whether the guaranty is owed to the states *qua* sovereign entities, or to the people of the states. Otherwise put, we must determine whether the states stand as *creditors* or *debtors* of the principal obligation. This raises the questions: Do the states *owe* a “Republican Form of Government,” and if so, to whom? Or are the states *owed* a “Republican Form of Government” and if so, by whom? This is the thorniest question we face. The literature features two main positions: (1) the *substantive guarantee theories*, espoused by Bonfield, Wiecek, and Chemerinsky; and (2) the *state autonomy theories*, represented by Williams, Merritt, and Tribe.<sup>141</sup> From a reading of the Guarantee Clause as the Republican Guaranty Contract, I conclude both that the states *owe each other* a “Republican Form of Government” (the principal obligation) and that the United States guarantees *to the states* that it will answer for any state's failure to provide a “Republican Form of Government” (the guaranty obligation). Thus, the states stand as both creditors and debtors of the principal obligation and as beneficiaries of the Republican Guaranty Contract.

*i. Substantive Guarantee v. State Autonomy*

In this Section, I survey the substantive guarantee and state autonomy theories of the Guarantee Clause that scholars have developed.

The substantive guarantee theories see the Guarantee Clause as a safeguard for certain individual rights to self-government. Thus, the obligation is owed by states to citizens *in their individual capacities*, who can then seek vindication of their right to a “Republican Form of Government.”

Professor Bonfield has stringently argued that the guaranty is owed “to the *people* of every state, for only they would benefit by such a provision.”<sup>142</sup> The Clause

139. See U.S. CONST. amend. X.

140. *But see* Edward A. Stelzer, Note, *Bearing the Judicial Mantle: State Court Enforcement of the Guarantee Clause*, 68 N.Y.U. L. Rev. 870, 871 (1993) (arguing that “the Constitution empowers state courts to hear [Guarantee Clause] claims, but also . . . imposes an *affirmative obligation* on them to do so”).

141. See *infra* Section II.A.2.b.i.

142. Bonfield, *supra* note 19, at 524. In his article, Bonfield engages in a form of proto-originalism, asking what the Supreme Court of the 1790s would have read the Guarantee Clause to mean. See *id.* at 522 (“[A] more detailed analysis of the contemporary meaning and construction of the guarantee clause will be attempted. What, in precise terms, did the provision mean? How would the Supreme Court have construed the clause in the decade after its adoption?”). This approach has since become disfavored. See Barnett & Bernick, *supra* note 11, at 9–10 (discussing the shift from



would benefit citizens in their individual capacities, entitling each of them “to its fulfilment, even against the will of a majority of his fellow citizens.”<sup>143</sup> In other words, it would create an individual cause of action for breach of the Guarantee Clause. For Bonfield, if the United States owed a duty to the states as governmental entities, a state government turned nonrepublican would have no cause to invoke the duty.<sup>144</sup> This would render the Clause a pretty but ineffectual bauble. Thus, for Bonfield, the Guarantee Clause would “have sanctioned affirmative national action to organize and preserve republican government.”<sup>145</sup> He argues that this is a “common sense approach,” commanded by the definition of *guarantee* in Johnson’s dictionary.<sup>146</sup> Moreover, he submits that in the 1790s, the word *state* could refer to the governmental entity, the territory, or its people.<sup>147</sup> As support, he cites to William Winslow Crosskey’s treatise on the Constitution<sup>148</sup> and Justice Iredell’s 1795 opinion in *Penhallow v. Doane’s Administrators*.<sup>149</sup> In the latter, a decision on captures by the federal government, Justice Iredell waxes poetic on the nature of republics:

A distinction was taken at the bar between a *State* and *the people of the State*. *It is a distinction I am not capable of comprehending*. By a *State* forming a Republic (speaking of it as a *moral person*) I do not mean the Legislature of the State, the Executive of the State, or the Judiciary, but *all the citizens which compose that State, and are, if I may so express myself, integral parts of it; all together forming a body politic*.<sup>150</sup>

This passage may stand for the broader trend of identifying the states by their people, as Crosskey and Bonfield argue. But the Constitution’s consistent disaggregation of the term “State” from “People” or “Citizens” controverts this understanding.<sup>151</sup>

Other commentators have taken similar stances. Dean Chemerinsky argues that the Guarantee Clause is not “about guaranteeing a particular structure of government in states or even about protecting state governments from federal

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ascertaining the “collective intentions of [Founding-Era] decisionmaking bodies” to the “original public meaning of the text”).

143. Bonfield, *supra* note 19, at 525.

144. *See id.* at 524 (“[W]hat protection would the state government need against its own action?”).

145. *Id.*

146. *Id.* at 523–24.

147. *Id.* at 524.

148. *Id.* at 524 n.48 (citing 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 55–69 (1953)). Crosskey taught law at the University of Chicago and was an early “originalist in the modern Bork/Meese sense,” whose three-volume treatise proved controversial but quickly fell into obscurity. Much of his treatise is now considered idiosyncratic and to have aged poorly. *See* Ken Kersch, *The Curious Case of William Winslow Crosskey, Part I*, LEGAL HIST. BLOG (July 14, 2011, 7:20 AM), <http://legalhistoryblog.blogspot.com/2011/07/curious-case-of-william-winslow.html> [<https://perma.cc/RQ6V-UZWX>].

149. Bonfield, *supra* note 19, at 524 n.49 (citing *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54, 93 (1795) (opinion of Iredell, J.)).

150. *Penhallow*, 3 U.S. (3 Dall.) at 93 (third emphasis added).

151. *See* Williams, *supra* note 6, at 631 (discussing this trend in the Constitution’s text).

encroachments. Instead, it is meant to protect the *basic individual right of political participation*, most notably the right to vote and the right to choose public officeholders.”<sup>152</sup> In a similar vein, Professor Wiecek posits that the Clause empowers mostly Congress to “superintend the acts and the structure of the state governments and to inhibit any tendencies in a state that might deprive its people of republican government.”<sup>153</sup> To him, the terms “guarantee” and “Republican Form of Government” are so vague that “they, like the clause itself, were blank checks to posterity.”<sup>154</sup>

By contrast, the state autonomy theories propose that the Guaranty Clause’s underlying obligation to maintain a “Republican Form of Government” is between the several states as sovereigns.

Williams argues that the international law understanding of the Guarantee Clause “casts considerable doubt” on Bonfield and Chemerinsky’s individual-rights vision.<sup>155</sup> Instead, he contends that the Clause was meant “to protect the rights of states in their sovereign governmental capacities.”<sup>156</sup> In his view, the states *qua* sovereigns are the object—the creditor for our purposes—of the Guarantee Clause, which “was intended to benefit, rather than to burden, the several states.”<sup>157</sup> This reading stems from the mechanics of treaty guarantees, where the guaranteed state could “call upon the assistance of a foreign power while preserving its own sovereignty and autonomy.”<sup>158</sup> By this reading, the states would be *both* the principal creditors and debtors of the guaranty, depending on the facts. In other words, the United States is guaranteeing the obligation that each state owes to *all other states* to have a “Republican Form of Government.” Likewise, each state is a creditor to the same obligation from every other state. This does not tamper, however, with each state’s own duty to provide its people with a republican form of government. What it means is that the Guarantee Clause secures *only* the state–state obligation and *not* the separate state–people obligation.

Professor Merritt’s argument accords with Williams’s. In her view, the Guarantee Clause was “an attempt to mark the boundary between federal power and state sovereignty.”<sup>159</sup> The resulting broad language extended the protection to “secure[] the states against any threat to ‘republican government,’” both from “marauding mobs and would-be monarchs” and the federal government.<sup>160</sup> Under this theory, the Guarantee Clause prevents Congress from acting to modify the

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152. Chemerinsky, *supra* note 5, at 868 (emphasis added).

153. WIECEK, *supra* note 127.

154. *Id.* at 75.

155. Williams, *supra* note 6, at 610–11.

156. *Id.* at 611.

157. *Id.* at 630.

158. *Id.* at 660–61.

159. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 35 (1988).

160. *Id.*

states' form of government in the absence of a separate grant of power.<sup>161</sup> The federal government is therefore restrained from interfering with a state's government "in a way that would destroy [its] republican character."<sup>162</sup> But the Clause also forbids a state from establishing a nonrepublican form of government, namely "a monarchy, a dictatorship, or any other form of government inconsistent with popular representation."<sup>163</sup> Merritt therefore sees the Guarantee Clause as a bulwark of federalism, actionable in court whenever there is a claim that Congress has "invad[ed] state autonomy."<sup>164</sup> But, as a double-edged sword, Congress may also invoke the Clause to proceed against states that erect anti-republican governments within their borders.<sup>165</sup> Although Merritt does not consider who the parties to the obligation are, her framing suggests that the people have no participation in it.<sup>166</sup>

Finally, Professor Tribe has stated that the Clause recognizes a duty of the federal government *to the states* "to respect the state's most fundamental structural choices as to how its people are to participate in and shape processes of their own governance."<sup>167</sup> Therefore, the Clause has a dual nature as: (1) "a *restraint* on the range of permissible state government forms," and (2) "a *protection* from exercises of federal power that would either eliminate the 'republican' nature of any particular state government or render 'non-republican' a state's choice of a particular structure for governance."<sup>168</sup> This restriction may prevent the federal government from acting in ways that would inhibit states from maintaining a republican form of their choosing.<sup>169</sup>

Which side has the correct vision? The text of the Clause and Founding-Era sources support the state autonomy theory and, thus, that the Clause secures a state-state obligation. And yet the substantive guarantee theories rely on an assumption that, if the Clause is meant only to protect from aristocratic or monarchical overthrow of republican government, then the Clause is obsolete.<sup>170</sup> Those dangers are long behind us, they say, and therefore the Clause must have teeth to prevent subtler intrusions on republican government. Ultimately, the conflict is between two broad visions of the Constitution: It is either a government charter

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161. Merritt identifies certain, specific areas where states should be shielded from federal interference: decisions "to define their own franchises; to choose their own governmental structures; to set qualifications and salaries for officials performing legislative, executive, or judicial tasks; and to operate their governments as autonomous units rather than as branch offices of the federal government." *Id.* at 78.

162. *Id.* at 25.

163. *Id.*

164. *Id.* at 78.

165. *Id.* at 26.

166. *See id.*

167. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 908 (3d ed. 2000).

168. *Id.* at 909.

169. *See id.* at 908–09.

170. *See* WIECEK, *supra* note 127, at 4 (arguing that the Clause was crafted to suppress state insurrections and prevent "relapse to monarchic or aristocratic forms of government," but that "[t]hese dangers are obsolete today").

reflecting the concerns of the time when it was written or a self-actualizing document. This is not a conflict I intend to resolve here.

*ii. The States as Both Debtors and Creditors*

Following the Republican Guaranty Contract framework, I proceed to apply traditional tools of contract interpretation to the agreement as written.<sup>171</sup> From this analysis, I conclude that the Guarantee Clause places the states as both creditors *and* debtors to the obligation to maintain a “Republican Form of Government.”

The text of the Guarantee Clause supports the state autonomy reading. In this sense, the only parties to the Republican Guaranty Contract are the United States and the several states, and not the people. When the Clause commands that “[t]he United States shall guarantee *to every State in this Union* a Republican Form of Government,”<sup>172</sup> it identifies the states as the object of the obligation.<sup>173</sup> Moreover, the rest of Section 4 deals with protections that the United States owes to the states in their sovereign capacities.<sup>174</sup> The Domestic Violence Clause even disaggregates the component parts of a “State” by distinguishing the “Legislature” from the “Executive” for purposes of requesting federal assistance.<sup>175</sup> Yet the clear beneficiary of the Domestic Violence Clause is the “State” as a whole. Under *noscitur a sociis*, the word “State[s]” in the Guarantee Clause must necessarily refer to the states *in the same capacity* as the rest of the Section. Moreover, where Article IV speaks to the rights of citizens or individuals, it does so through clear textual commands.<sup>176</sup> Unless one is willing, as Crosskey and Bonfield are, to read “the people” into the mention of a “State” by implication, there is no textual basis for concluding that anybody other than the states *qua* states are parties to the principal obligation. This would be to introduce ambiguity

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171. For a good, recent discussion of contract interpretation, see generally Gregory Klass, *Interpretation and Construction in Contract Law* (Jan. 2018) (unpublished manuscript) (available at <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2971&context=facpub> [<https://perma.cc/CMZ7-SRWP>]).

172. U.S. CONST. art. IV, § 4, cl. 1 (emphasis added).

173. See Williams, *supra* note 6, at 630–31 (discussing the states’ place as the object of the Guarantee Clause).

174. See U.S. CONST. art. IV, § 4, cls. 2–3 (“The United States . . . shall protect each of [the states] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

175. See *id.* art. IV, § 4, cl. 3.

176. See *id.* art. IV, § 2 (“The *Citizens* of each State shall be entitled to all Privileges and Immunities of *Citizens* in the several States. A *Person* charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime. No *person* held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.” (emphasis added)).

for policy purposes, which is far distant from the method of contract interpretation.<sup>177</sup>

Interestingly, there is little question about meeting of the minds in this instance. The nature of the Republican Guaranty is such that the persons who signed the contract were acting both on behalf of the United States *and* the states. There is, of course, the matter of their distinct personhood, but this was no arm's-length transaction: The constituent states' representatives acted on behalf of both the United States and their respective states.

Where the terms of a contract are clear and the parties are named, as is the case here, the inquiry need go no further. Only the United States and the several states are the parties to the Republican Guaranty. That this aligns with Williams's own reading of the historical record and his treaty law analogy again points towards a closeness to the spirit of the provision.

#### B. THE FORM OF THE OBLIGATION

As I discuss above, the core of the Republican Guaranty Contract is the guaranty itself.<sup>178</sup> Even that is relatively simple: The United States pledges to provide the states a "Republican Form of Government" whenever they fail to provide it themselves. This is no different from the guaranty contracts I discuss above.<sup>179</sup> The failure to provide a "Republican Form of Government" constitutes a breach of the states' principal obligation to the other states. Determining what constitutes a breach is no simple task, as I discuss below,<sup>180</sup> but a breach by one state hands a right of action to all other states. In a typical guaranty contract, such a breach may be due to circumstances within the debtor's control—such as financial mismanagement—or due to extraneous circumstances—such as an economic collapse. Under this theory, the states as debtors of the Republican Guaranty could fail their obligation both through deliberate usurpation of republican government or through external pressures like insurrection or invasion. Usurpation could even be incremental. But what is the form of the United States' obligation?

The nature of the guaranty is such that the United States would be obliged to act only where a state breaches. Where there is no breach, the United States cannot act *motu proprio* to make up for a perceived deficiency. At the least, it cannot do so by invoking the Guarantee Clause.<sup>181</sup> In this regard, I disagree with Merritt's reading of the Clause as a "sword" in Congress's hands, albeit a "quite limited" one.<sup>182</sup> Under the Republican Guaranty Contract, gone would be the

177. See generally Klass, *supra* note 171.

178. See *supra* Section I.B.

179. See *supra* Section I.B.2.b.

180. See *supra* Section II.A; *infra* Section II.C.

181. The United States may—and often does—act *motu proprio* to correct perceived failures by the states to provide an acceptably republican form of government. But these have historically been rooted in different constitutional provisions that concede narrower subject-matter powers. See, e.g., Merritt, *supra* note 159, at 38–40 (discussing other constitutional provisions that could be and have been used by Congress to legislate against the states in the voting rights sphere).

182. See *id.* at 26.

Antifederalists' concern that the philosopher-kings of the federal government could infringe on state prerogatives unprompted.<sup>183</sup> In the same vein, placing the federal government as the arbiter of republicanism could reduce the likelihood that a jealous state could use a baseless allegation that a sister state has become nonrepublican for some political or material gain. By moving such disputes from a direct state-to-state battleground to the national stage, states would be discouraged from making such frivolous claims.

But placing the United States as arbiter would not altogether eliminate the risk of partisan action. Assume that the federal government is controlled by party *A*, which has taken a strong stance against requiring voter IDs in national, state, and local elections. Indeed, party *A* has gone as far as calling such requirements “anti-republican” and “un-American.” But state *X*, whose government is controlled by party *B*, enacts a statute that imposes strict voter ID controls. In this scenario, state *Y*, a party *A* stronghold, could claim that state *X*'s voter ID law renders its government nonrepublican in form. State *X* will likely be unmoved by the claim and take no action. State *Y* could then petition its allies in the federal government to take action. This petition would give the party *A* administration a basis under the Guarantee Clause to take direct action against state *X*. The open-endedness of the text could allow the United States to take any action it deems necessary and proper to restore a “Republican Form of Government.” Indeed, party *A* could use the Guarantee Clause as a cudgel to beat its party *B* opponents into submission, using the full force of the national government. And all this over a policy disagreement over which reasonable minds may differ, rather than a wholesale usurpation of a state's form of government.

What then? Perhaps, to diminish the corrupting effect of partisanship, a claim under the Guarantee Clause could be litigated in the federal courts. Such litigation could arise from an alleged deficiency or taint in the political branches' enforcement of the Guarantee Clause or could substitute political enforcement altogether. Litigation of such claims naturally raises justiciability issues, particularly of relative institutional competence and political questions. But, assuming a federal court could hear and adjudicate the claim that a state has abandoned a “Republican Form of Government,” the aforementioned partisan use of the Guarantee Clause could be curtailed. I discuss a potential theory of justiciability below.<sup>184</sup>

Despite these potential problems in its application, the text of the Guarantee Clause, when read as the Republican Guaranty Contract, makes clear the following: The United States' obligation is to react when prompted by a demand from a state that another state has breached the underlying obligation, not *motu proprio*. I discuss the mechanics of this device in greater detail below.<sup>185</sup>

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183. See, e.g., Letter from William Symmes to Captain Peter Osgood, Jr. (Nov. 15, 1787), in 4 THE FOUNDERS' CONSTITUTION 562, 562 (Philip B. Kurland & Ralph Lerner eds., 1987) (protesting that the United States has no business telling the states how to govern themselves).

184. See *infra* Section II.D.

185. See *infra* Section II.D.



## C. THE SUBSTANCE OF THE OBLIGATION

Now for substance. If the meaning of “guarantee” is the *how* of the Republican Guaranty Contract, the meaning of a “Republican Form of Government” is the *what*. A substantial tranche of scholarship on the Clause has focused on the meaning of this phrase. For instance, Professor Amar makes a broad formulation of republicanism, arguing that it consists of “popular sovereignty, majority rule, and the people’s right to alter or abolish.”<sup>186</sup> On the other hand, Bonfield includes a host of welfare-like rights—such as public education, equal access to housing and transportation, and abolition of gerrymandering—that Congress could regulate by invoking the Guarantee Clause.<sup>187</sup> I do not attempt to settle this centuries-long question within the confines of this Note. Instead, I raise two issues that should orient any attempt to solve the question. Of course, in the contract context, this question would be answered either through a term sheet (especially in modern sophisticated transactions) or evidence of what the parties understood the terms to be. In a way, Founding-Era evidence is a form of parol evidence as to the meaning of a “Republican Form of Government.”

The first issue, which I call the Baseline Problem, asks *where* the baseline lies for a “Republican Form of Government.” The definition of republican government has been historically elusive and often reduced to a broad principle of majority popular rule and representative democracy. But a more specific, distinctly American definition of republicanism could feasibly be articulated. This form may require separation of powers, bicameralism, fair apportionment of electoral districts, and universal franchise, among other features. Such a definition would give the federal government a clearer mandate for constraining the states as they shape and maintain their governments. It would also give the states a more definite manner of articulating a demand or suit under the Guarantee Clause. Crucially, this requires determining whether the letter and the spirit of the Clause place the baseline at the time of ratification or whether the baseline must shift according to our evolving understanding of republican government. The effect of the Reconstruction Amendments and universal suffrage must also be factored in. For better or worse, the answer to this question may depend on the school of thought to which the decisionmaker adheres—the originalist philosophies or the living constitutionalist philosophies.<sup>188</sup> Moreover—and perhaps most controversially—we must answer *who* determines the baseline. Is it Congress? Is it the courts, when presented with a claim under the Guarantee Clause? Is it “We the People” as a body? Must it be determined *de jure* or can a *de facto* baseline be determined?

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186. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 786 (1994).

187. See Bonfield, *supra* note 19, at 565–69.

188. On the distinction between originalism and living constitutionalism, see Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 6–15 (Mar. 7, 2019) (unpublished manuscript) (on file with author).

The second issue, which I call the Congruence Problem, asks whether the Guarantee Clause was conceived to ensure congruence in the form of state governments.<sup>189</sup> By “congruence” I mean that the Guarantee Clause was meant to create uniformity in the states’ forms of government. If the Clause were designed to ensure such congruence, a state could articulate a breach of the Clause by another state or by the federal government where such congruence is found lacking. In this connection, one could envision two types of congruence: (1) *vertical congruence*, namely, congruence of the form of state government with that of the federal government; and (2) *horizontal congruence*, namely, congruence of the form of state governments with those of other states. The Congruence Problem is closely related to the Baseline Problem but requires a different analysis. Under the vertical congruence theory, the form of the *federal* government serves as the basic blueprint for the form of state governments. This would *ipso facto* foster horizontal congruence, as states fall into line behind the United States—or are forced to. A horizontal congruence theory poses greater practical hurdles, as it would require a delicate balance between competing state models. But a strongly articulated baseline of republicanism could lessen this tension. And if the baseline is weak, then what are the limits of heterogeneity before the guarantee obligation is triggered? And, to further complicate matters, was the standard for heterogeneity fixed in 1787 or has it evolved as the U.S. Constitution itself has evolved?

I believe that any attempt to enforce a “Republican Form of Government” will be meaningless absent an answer to the Baseline and Congruence Problems. Because this is a separate set of questions, I leave them open for future study.

#### D. CLAIMING ON THE GUARANTY

Discerning the parties, form, and substance of the Republican Guaranty raises the question of how a state may make a claim based on the guaranty. In this Section, I do not purport to solve the long-running debate on the Clause’s justiciability. Much of that debate turns on issues, such as the political question doctrine and the relative institutional competence of the federal judiciary, that exceed the scope of this Note.<sup>190</sup> For what it is worth, prevailing Supreme Court doctrine states that controversies arising under the Guarantee Clause are nonjusticiable because they present a political question.<sup>191</sup> Instead, I will sketch out a broad

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189. Bonfield, for instance, makes much of the Guarantee Clause’s homogenizing mission. He states baldly that the Clause “was intended to insure substantial uniformity among all the state governments *inter se*, and between the states and the federal government.” Bonfield, *supra* note 19, at 522, 524, 563.

190. For discussions of this contested topic, see, for example, AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 276–80 (2005) (arguing that the popular sovereigntist reading of the Guarantee Clause precludes judicial line drawing); JACK M. BALKIN, *LIVING ORIGINALISM* 241–43 (2011) (proposing that federal courts should act to enforce the Guarantee Clause where institutionally appropriate); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 118 n.\* (1980) (arguing in favor of judicial review of the Clause); and Chemerinsky, *supra* note 5, at 870–74 (arguing for a broad theory of justiciability and diminishing the possibility of Congress’s role in enforcing the Clause).

191. See *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 149–51 (1912); *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).

theory of the means of recovery under the Guarantee Clause, rooted in the common law mechanisms available at the Founding.

As I establish above, for a guaranty to be triggered, the principal debtor must have breached his obligation. Such a breach may be due to circumstances within the debtor's control—such as financial mismanagement—or due to extraneous circumstances—such as an economic collapse. Under this theory, the states as debtors of the Republican Guaranty could fail their obligation both through deliberate usurpation of republican government or through external pressures like insurrection or invasion.

The guaranty obligation requires the creditor to make a demand of the guarantor once the default occurs.<sup>192</sup> The demand would have to be made of the political branches, and particularly of Congress. After all, any corrections of nonrepublican government, short of suppressing a rebellion through military force, would require legislation to be effective. But even rarer than litigation under the Guarantee Clause is legislation predicated on it.<sup>193</sup> A quintessential application of the Guarantee Clause would be determining whether a proposed new state has a republican form of government.<sup>194</sup> In making such an evaluation, Congress evaluates whether the new state can ensure it will maintain a republican form of government and thus whether the United States can constitutionally guarantee that fact to the other states. Of course, this is not a determination of breach, but rather a determination of whether the United States can enter into the obligation to begin with. If the early constitutional exegetes are to be trusted, a nonrepublican state has no place in the Union.<sup>195</sup> On the other hand, a determination of breach would have to follow more traditional petition-and-legislate channels. Therefore, contrary to the substantive guarantee theories, Congress's role would be reactive rather than proactive.

Assuming that Congress fails to act on the demand—as political gridlock would have it—then the aggrieved state could seek recourse in the federal courts. Article III assigns original jurisdiction to the Supreme Court over “all Cases . . . in which a State shall be Party.”<sup>196</sup> The traditional means of recovering on a guaranty where the guarantor does not make satisfaction is an action for assumpsit. Blackstone summarizes the action thus:

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192. Cf. 3 BLACKSTONE, *supra* note 57, at \*155–56 (noting that damages in an action to collect on debt “will . . . adapt and proportion themselves, to the truth of the case which shall be proved without being confined to the precise *demand* stated in the declaration. For if *any* debt be proved, however less than *the sum demanded*, the law will raise a promise *pro tanto*, and the damages will, of course, be proportioned to the actual debt” (first and third emphasis added)).

193. See Heller, *supra* note 19, at 1726.

194. Williams, *supra* note 6, at 677 (citing Charles O. Lerche, Jr., *The Guarantee of a Republican Form of Government and the Admission of New States*, 11 J. POL. 578, 578 (1949)).

195. THE FEDERALIST No. 43, at 222–23 (James Madison) (Ian Shapiro ed., 2009); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 295–302 (William S. Hein & Co. 2d ed. 2003) (1829).

196. U.S. CONST. art III, § 2, cl. 2; cf. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431 (1793) (opinion of Iredell, J.) (holding that this grant of original jurisdiction is self-executing).

If [a promise] be to *do any explicit act*, it is an express contract, as much as any covenant; and the breach of it is an equal injury. . . . [T]here only lies an action upon the case for what is called the *assumpsit* or undertaking of the defendant; the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. As if a builder promises, undertakes, or assumes to Caius, that he will build and cover his house within a time limited, and fails to do it: Caius has an action on the case against the builder, for this breach of his express promise, undertaking or *assumpsit*; and shall recover a pecuniary satisfaction for the injury sustained by such delay.<sup>197</sup>

Blackstone makes clear that the “failure of performing,” by itself, is a sufficient “wrong or injury done to the plaintiff” for an action of *assumpsit* to lie.<sup>198</sup> Under the Republican Guaranty, *any state* has a right of action against the United States whenever *any other state* fails to have a “Republican Form of Government.” Naturally, a state articulating a claim under the Guarantee Clause would seek not a remedy at law (that is, cash) but rather equitable relief against the United States. A bill for specific performance of a guaranty or surety was available to aggrieved contract parties in the early Republic, much as it is today.<sup>199</sup> This would be the only manner for the aggrieved state to obtain meaningful relief, by obtaining an order for the United States to correct the offending state’s lack of a “Republican Form of Government.” Whereas the courts of the eighteenth century abhorred the commingling of law and equity, our current system of procedure has no such qualms.<sup>200</sup> Therefore, the modern equivalent of a writ of *assumpsit*—a suit for breach of the Republican Guaranty—would properly bring the issue before a court.<sup>201</sup> Whether a court would be correct in declining to resolve the issue for prudential reasons is beyond the present inquiry. But what the contract analogy

197. 3 BLACKSTONE, *supra* note 57, at \*158 (first emphasis added).

198. *Id.*

199. *See, e.g.,* *Ludlow v. Simond*, 2 Cai. Cas. 1, 39 (N.Y. Sup. Ct. 1805) (opinion of Thompson, J.) (observing that, had the principal debtor of an obligation to sell certain goods “refused to give his note for the *deficiency* . . . it may be *doubtful*, whether a specific performance in this respect was not necessary for the purpose of charging” the person acting as surety (first emphasis added)); *Ward v. Webber*, 1 Va. (1 Wash.) 274, 279 (1794) (noting in dictum that, in a case where a bond against sureties is lost, the sureties are still legally bound, but “the Court will not on account of the sureties, withhold the usual relief in giving [the bond] the same validity as if it were produced”).

200. *See* FED. R. CIV. P. 2 (“There is one form of action—the civil action.”). A federal district court may order specific performance of a contractual obligation “where no adequate monetary remedy is available and that relief is favored by the balance of equities, which may include the public interest.” *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 261 (2d Cir. 2012) (noting further that, once the district court determined that the defendant breached the agreement and that injunctive relief was warranted, “the court had considerable latitude in fashioning the relief,” including requiring performance that is not “identical with that promised in the contract”).

201. Interestingly, a subsidiary common law rule allowed a guarantor who spent money on the principal creditor’s behalf to seek satisfaction from said creditor. *See* 3 BLACKSTONE, *supra* note 57, at \*163 (“Where a person has laid out, and expended his own money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on his *assumpsit*.”); *accord* TUCKER, *supra* note 66, at 163 n.\*. Would this allow the United States to assess the costs of performing under the guaranty on the offending states?

does for the Guarantee Clause is to open up a simpler form of claim—state *X* claims that the United States failed to correct state *Y*'s nonrepublican form of government—than is currently available. The existence of a contract with definite parties and clear parameters of what is a breach could ward off complex standing inquiries that often serve to nip cases at the bud.<sup>202</sup>

#### CONCLUSION

The Republican Guaranty Contract is ultimately little more than a framework—it requires action by the named parties or further scholarly analysis to find its content. What I hope to have achieved in this Note is to lay out a plausible and heretofore unexplored original public meaning of the Guarantee Clause. The formula of a “guarantee” was already established as a contract law term of art by the time of the Founding. A wealth of Founding-Era sources confirm that the public of 1787 would have been acquainted with guaranty contracts under that name. And these sources serve as evidence that the public of 1787 would plausibly have read the term “guarantee” through a contract law lens. This new framework offers a variety of advantages, including interpretive flexibility, conceptual simplicity, and a clearer path to justiciability. Perhaps most importantly, the Republican Guaranty Contract provides a more definite sense of whose duty it is to provide a “Republican Form of Government”—the several states’—and whose duty it is to make up for any deficiencies—the United States’. Therefore, through this understanding of the *form* of the obligation, constitutional theorists and practitioners may begin to conceptualize its *substance* and the practical uses that the device could have. As federal–state and state–state tensions continue to rise and the Republic’s essence becomes more hotly contested, the Guarantee Clause could play a major role in resolving such disputes. For this reason, I hope to advance scholarship on the long-neglected Guarantee Clause, ultimately to bring it out of its slumber and place it at the core of our constitutional exertions.

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202. It is an uncontroversial proposition that a party to a contract has standing to sue for a breach of said contract. *See, e.g.,* *Dill v. Am. Home Mortg. Servicing, Inc.*, 935 F. Supp. 2d 299, 302 (D. Mass. 2013) (“To bring a claim for breach of contract, a litigant must be a party to or intended beneficiary of the contract.”).