Invoking the Republican Guarantee: State Attorneys General as Bulwarks of Republicanism

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* Georgetown University Law Center, J.D. expected May 2026; Georgetown University, B.A. 2018. © 2025, Daniel D. Ernst. I would like to extend my sincere gratitude to Professor John Mikhail for his recommendations early on in my research that proved invaluable, to Dean William M. Treanor for his encouragement of my historical inquiry, to my fellow editors on the Georgetown Journal of Legal Ethics for their advice and suggestions in the process of drafting this note, and to my partner in all things, Madison Ferris, for her steadfast support. Any and all errors that remain are mine.

INTRODUCTION

If a state lawfully amended its constitution to establish an elected monarchy, would the United States Constitution prohibit such an action? What if the elected monarch had all governmental powers but could be recalled by the voters? How close to a monarchy could a state get? For example, could a state amend its constitution to vest the governor, elected say for five years at time, with the authority to appoint and dismiss—to thus make answerable to the executive—all members of the legislative or judicial branches? Would such formulations of government violate the Federal Constitution? If so, who would—or could—be responsible for enforcing a constitutional prohibition on such an act?

The United States Constitution establishes, in the Republican Guarantee Clause, that "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."[1] In 1849, the Supreme Court noted in *Luther v. Borden* that the guarantee of republican government had largely been left to the political branches.[2] In 1912, the Court decided it lacked jurisdiction to hear an appeal invoking the Republican Guarantee Clause in *Pacific States Telephone & Telegraph Co. v. Oregon*, holding that the Court in *Luther* had rendered claims brought under the clause nonjusticiable political questions.[3] Decades later, the Court handed down its decision in *Baker v. Carr*, which more thoroughly explained the nature of "political question[s]" and outlined when courts have jurisdiction.[4]

Since the Court's decision in *Baker v. Carr*, the majority of scholarship examining the Republican Guarantee Clause has discussed the provision in light of the Court's decisions in areas such as apportionment[5] and partisan gerrymandering.[6] This scholarship has often focused on whether the Court's cases would be better reasoned by relying on the Clause,[7] whether there are limits to Congressional power under the Clause,[8] or whether the Clause should be justiciable.[9]

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1. U.S. CONST. art. IV, § 4.

2. *See* Luther v. Borden, 48 U.S. (7 How.) 1, 1 (1849).

3. *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149–50 (1912).

4. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

5. *See generally, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Lucas v. Forty-Fourth Gen. Assembly of the State of Colo., 377 U.S. 713 (1964).

6. *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735 (1973); Rucho v. Common Cause, 588 U.S. 684 (2019).

7. *See, e.g.*, J. Andrew Heaton, *The Guarantee Clause: A Role for the Courts*, 16 CUMB. L. REV. 477, 502 (1986); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 116 (2000).

8. *See, e.g.*, Thomas A. Smith, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561, 563 (1984); Catherine Engberg, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 STAN. L. REV. 569, 572 (2001); Gabriel J. Chin, *Justifying a Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule*, 94 B.U. L. REV. 1551, 1552–54 (2014); David S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 VAND. L. REV. 673, 673 (2020).

9. *See, e.g.*, Erwin Chemerinsky, *Cases under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 850–52 (1994); James R. Brakebill, *Gerrymandering, Entrenchment, and "The Right to Alter or*

Recent scholarship has provided a new examination of the Republican Guarantee Clause through the paradigms of treaty and contract law, revisiting the view that the Clause is primarily a promise between the government of the United States and the governments of the several states, as well as emphasizing its role as a commitment between and among the several states to preserve republicanism.[10] Professor Carolyn Shapiro recently shared an insightful analysis on the nature of the Republican Guarantee Clause as a structural guarantee to preserve both the individual parties to the agreement—the United States and the several states—but also the system of federalism generally.[11] Professor Shapiro aptly considers the structural guarantee in light of (antidemocratic) "spillovers," wherein "laws or practices in one state have effects in others."[12]

This Note considers the impact of the structural guarantee paradigm on today's legal landscape, and in particular the effects and opportunities that such a structural guarantee offers to state attorneys general. In Part I, this Note surveys the development of republicanism and the Republican Guarantee, with a particular focus on the Founding era. In Part II, this Note turns to historical and modern examples of spillovers and surveys the special challenges faced today. In Part III, this Note turns to the persons uniquely positioned to make use of the Republican Guarantee Clause in this structural capacity—state attorneys general—and considers the potential ethical challenges these officers may face in trying to invoke the structural guarantee to defend their states. In Part IV, this Note concludes that state attorneys general may ethically and constitutionally make use of the structural guarantee.

I. THE DEVELOPMENT OF THE REPUBLICAN GUARANTEE

A. THE NATURE OF REPUBLICS AT THE FOUNDING

The conception of republicanism that arose in the early United States derived from a diverse confluence of political theories, such as those of John Locke and Montesquieu, and historical republican analogues, such as ancient Greece and Rome.[13] Classical authors generally, and Roman ones in particular, provided the Founding generation insights into republican ideals and a "vivid vocabulary" to communicate those ideals as they quoted popular authors such as Cicero, Sallust,

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Abolish": Defining the Guarantee Clause as a Judicially Manageable Standard, 44 W. NEW ENG. L. REV. 211, 214 (2022).

10. *See, e.g.*, Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602, 603 (2018) (analyzing the Clause in light of contemporaneous international treaties); Alejandro J. García, Note, *The Republican Guaranty Contract*, 109 GEO. L.J. 191, 193–96 (2020).

11. Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 189–96 (2020).

12. *Id.* at 188, 200–03.

13. *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1998) (describing the ideological theories that Americans were engaging with during the Revolutionary War and Founding periods).

and Tacitus.[14] While references to antiquity served as something of a *lingua franca* for and the soul of the age, the prevailing philosophical drivers—the plethora of European Enlightenment thinkers, whose varied contributions included liberalism, social contract theory, and separation of powers—provided an intellectual buffet on which the Founding generation could feast.[15]

Republicanism in the American experiment was thus, from the outset, a composite. As a result of its diverse influences, and the fact that American leaders could pick which intellectual authorities to prioritize, republicanism was often "vague, ambiguous, multifarious, or conflicting."[16] Republicanism was still novel and evolving; over time it became common—and simpler—to conflate it with the American Revolution, in effect suggesting that republicanism merely meant anything which was not monarchy.[17]

Gradually, three key principles began to imbue Americans' conception of republicanism: balanced constitutionalism or mixed-government combined with a separation of powers; popular sovereignty and majoritarianism; and the rule of law.[18] Under the theory of balanced constitutionalism,[19] republics were expected to compartmentalize the elements of government—the legislative, executive, and judicial powers—in such a way that also balanced the traditional governmental forms, i.e. democracy, monarchy, and aristocracy.[20]

No single governmental form was acceptable on its own: Many Americans saw their revolution as one against monarchy and aristocracy.[21] Likewise, a pure

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14. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 23–26 (1967); *see also* WOOD, *supra* note 13, at 48–65 (providing background on the impact of Classical authors on the Founding generation and how Classical influences merged with eighteenth-century Enlightenment theories and served as the intellectual foundation of the early United States, including in the conception of the "public good").

15. BAILYN, *supra* note 14, at 25–30; *see generally* JEFFREY ROSEN, THE PURSUIT OF HAPPINESS: HOW CLASSICAL WRITERS ON VIRTUE INSPIRED THE LIVES OF THE FOUNDERS AND DEFINED AMERICA (2024) (providing a detailed account of the impact of the Classical and Enlightenment read by several of the leading members of the Founding generation, including Cicero's *Tusculan Disputations*, Locke's *Treatises on Government*, and Montesquieu's *The Spirit of the Laws*).

16. WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 13 (1972).

17. *Id.* at 13–14 (quoting a letter from Jefferson to Samuel Kercheval dated July 12, 1816, stating, "In truth, the abuses of monarchy had so much filled all the space of political contemplation, that we imagined everything republican which was not monarchy. . . . Hence our first constitutions had really no leading principles in them.").

18. *Id.* at 14–26; *see also generally* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994) (holding that the essential quality of republics is that they the people are sovereign, but that such sovereignty is nonetheless constrained by institutional rules).

19. *See generally* THE FEDERALIST NO. 51 (James Madison) (explaining the importance of a balanced constitution); CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Thomas Nugent trans., Univ. Cal. Press 1977) (1750) (articulating the importance of separation of political powers to preserve a state); WOOD, *supra* note 13, at 197–255 (describing the influence of Classical theories of mixed government on the development of the United States government). In short, the theory of balanced constitutionalism, in which various sources of political power within government check and balance one another, developed out of earlier theories dating back to Aristotle.

20. WIECEK, *supra* note 16, at 14–26.

21. *Id.* at 17–18.

democracy was itself unacceptable given the scale of the country and the fear that such a system would inevitably lead to the rise of a dictator.[22] At the same time, the Founding generation emphasized the importance of the separation of powers on the view that if power or authority in government was concentrated in one person or group of persons then such person or persons would be capable of oppressing the other parts of government and thus the people.[23]

While a pure democratic government was not held in high regard, democracy was nonetheless considered an essential building block of republicanism.[24] James Madison articulated this view in *Federalist* No. 39 in which he sought to lay out the characteristics of a republican government.[25] According to Madison:

> [W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is SUFFICIENT for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; . . . .[26]

Such a view echoed earlier pronouncements about the quintessential aspect of democracy in republicanism, including in the 1776 Virginia Declaration of Rights[27] and the United States Declaration of Independence.[28] Hand-in-hand with popular sovereignty was majoritarianism; a republican government was one

22. *Id*. at 18–20; *see also* WOOD, *supra* note 13, at 19–20.

23. WIECEK, *supra* note 16, at 20–21.

24. *Id*. at 22–25; *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 279 (2012) ("When the word 'democracy' appeared in the Founding era, it was as often associated with, rather than defined against, republicanism—even by Madison himself.").

25. THE FEDERALIST NO. 39 (James Madison) (Open Road Integrated Media, Inc., 2022).

26. *Id*. (emphasis in original).

27. WIECEK, *supra* note 16, at 22–23 (quoting from the 1776 Virginia Declaration of Rights, "All power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.").

28. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, *Governments are instituted among Men, deriving their just powers from the consent of the governed*—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.") (emphasis added).

which was largely responsive to the will of the majority of the people[29]—however "the People" were ultimately defined.[30]

The rule of law was the constraining principle on popular sovereignty and the democratic element,[31] which was famously articulated in Article XXX of the 1780 Massachusetts constitution's formulation that a republican government is "a government of laws and not of men."[32] While a variety of sources of law was conceived of—from natural law to constitutions to statutes—and individuals could disagree as to the supremacy of a given source of law, the underlying principle remained that law had to serve as a foundation to any republic.[33]

Although there was not a precise, generally agreed upon definition of what a "republic" was in the early years of the United States, the foregoing constituted several widely agreed upon elements. Degradation of any of these various elements would accordingly entail the weakening, and possibly the destruction of, republicanism.

B. EARLY THREATS TO REPUBLICANISM

During and after the American Revolution, the Founding generation recognized that threats to their continued independence and republicanism could arise from without—namely, enterprising external empires seeking to take advantage of the nascent nation—and from within—such as insurrections and domestic turmoil. In the case of the former, the experience of the late war with Great Britain was a sufficient reminder of the threats from abroad.[34] It is no surprise that a

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29. WIECEK, *supra* note 16, at 24; *see also* Letter from Thomas Jefferson to John Taylor (May 28, 1816), *reprinted in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/03-10-02-0053 [https://perma.cc/NT56-3T5R] ("If then the controul [sic] of the people over the organs of their government be the measure of it's [sic] republicanism, and I confess I know no other measure . . . we may say, with truth and meaning, that governments are more or less republican as they have more or less of the element of popular election and controul [sic] in their composition . . .").

30. It should be noted the Founding generation had a severely limited view as to who "the People" were—white majority-age freeholders—and saw all other persons "represented" by this incredibly small class of persons, and only through the process of amendment has the United States, slowly and often painfully, but eventually expanded the franchise to more completely realize the principle that all are created equal. *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (providing a detailed history of the initial contraction of the right to vote following the Founding era and the slow, incremental process of enfranchisement over the course of American history).

31. WIECEK, *supra* note 16, at 25–26.

32. MASS. CONST. art. XXX.

33. WIECEK, *supra* note 16, at 25; *see also* Amar, *supra* note 18, at 769 ("A majority must act through the proper, peaceful legal channels—such as conventions—rather than appeals to brute force, or (as Hamilton will remind his readers in [Federalist] Number 78) unprincipled pressure on officials to ignore extant, unrepealed constitutional provisions.").

34. *See Milestones: 1784–1800, John Jay's Treaty, 1794–95*, U.S. DEP'T. OF STATE OFFICE OF HISTORIAN, https://history.state.gov/milestones/1784-1800/jay-treaty [https://perma.cc/7PS3-ZMMH] (last visited Jan. 10, 2025) (describing causes of continuing tensions with Great Britain following the Treaty of Paris in 1783 that ended the Revolutionary War and the resulting efforts, culminating in John Jay's Treaty, to avoid another war with the British).

nation that so recently had thrown off the colonial shackles of a far flung "mother country" would be wary of external invasion by a foreign power.[35]

At the same time, recent developments in a few states demonstrated a cause for concern about broadly destabilizing domestic conflicts. Notable among such conflicts, and one which influenced the drafting of the Constitution generally and Article IV specifically, was Shays's Rebellion.[36] Shays's Rebellion laid bare the impotence of Congress under the Articles of Confederation. Under the Articles of Confederation, Congress could not act unless pursuant to an express, enumerated power,[37] and because Congress then lacked such a grant of authority to raise an army in response to rebellion, it was powerless to intervene.[38] Likewise, the Articles prevented Massachusetts from defending itself from the rebellious veterans, because the sixth Article forbade any state from maintaining forces during times of peace without sanction from the Confederation Congress;[39] Massachusetts's sister states were themselves either unable or unwilling to offer aid.[40] The rebellion was eventually suppressed through a procedural ruse, but the events left a mark on many Founders, notably Madison, who recognized that the structural defects of the Articles were potentially lethal to republicanism.[41]

In addition to armed uprisings, Madison and other Founders were concerned about rumored designs to institute a monarchy in the United States due to growing misgivings with republicanism generally.[42] These rumors were widespread—and concerningly supported by rich and poor alike (including members of Shays's Rebellion)—and they persisted through the duration of the Constitutional Convention of 1787.[43] Indeed, during the Convention, rumors swirled that the attendees were intending to establish a monarchy, including a rumor that the attendees planned to send for the Bishop of Osnaburgh,[44] a fact which makes

35. *See* U.S. CONST. art. IV, § 4 ("[A]nd shall protect each of them [the States] against Invasion . . .").

36. WIECEK, *supra* note 16, at 27–42.

37. *See* ARTICLES OF CONFEDERATION OF 1781, art. II ("Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation *expressly delegated* to the United States, in Congress assembled.") (emphasis added).

38. WIECEK, *supra* note 16, at 34–35.

39. ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 4.

40. WIECEK, *supra* note 16, at 34-35.

41. *Id.* at 40–42.

42. *Id.* at 42–47; *see also* GEORGE RICHARDS MINOT, THE HISTORY OF THE INSURRECTIONS IN MASSACHUSETTS IN THE YEAR SEVENTEEN HUNDRED AND EIGHTY SIX AND THE REBELLION CONSEQUENT THEREON 61–62 (James W. Burditt & Co., 2d ed. 1810) (1788) ("There began also to arise another class of men in the community, who gave very serious apprehensions to the advocates for a republican form of government. These, though few in number, and but the seeds of a party, consisted of persons respectable for their literature and their wealth.").

43. WIECEK, *supra* note 16, at 44–50.

44. *Id.* at 49; *see also* Letter from Alexander Hamilton to Jeremiah Wadsworth (Aug. 20, 1787), *reprinted in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-04-02-0121 [https://perma.cc/83FU-664S] ("I am at a loss clearly to understand its object—and have some suspicion that it has been fabricated to excite jealousy against the Convention with a view to an opposition to their recommendations. At all events I wish if possible to trace its source and send it to you for that purpose."); *id.* at

clear that the famous (though possibly apocryphal) inquiry asked of Benjamin Franklin was a genuine question at the time.[45]

In response to these concerns, which heightened the recognition of the fragility of republicanism, the Framers at the Constitutional Convention considered various formulations of what eventually became the Republican Guarantee Clause.[46]

C. THE FRAMER'S VISION OF THE REPUBLICAN GUARANTEE

The Constitutional Convention of 1787 was a meeting of most of the preeminent figures of the United States, and perhaps the most common trait among those in attendance was the belief that a stronger national government was necessary.[47] Those who attended were, on the whole, nationalist, in no small part because several leading opponents to a stronger national government—including leaders like Samuel Adams and Patrick Henry—refused outright to attend the Convention.[48] The attendees not only agreed that the national government needed to be stronger, but that this required taking power from the states[49] and making the national government supreme over the states.[50] Indeed, recent scholarship demonstrates that the Committee of Style, tasked with crafting the final draft of what became the Constitution, comprised the leaders of the "nationalist wing of delegates" at the Convention, and that the Constitution's ultimate draftsman—Gouverneur Morris—was an ardent nationalist.[51]

Although nationalistic, everyone at the Convention—with the exception of Alexander Hamilton—anticipated the states existing and exercising some sovereignty in the new constitutional order.[52] This framework ultimately spawned the

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n.1 (providing a background on a letter circuiting that purported to discuss a scheme to "invite the second son of George III, Frederick, Duke of York, who was the secular Bishop of Osnaburgh, part of the Bishopric of Münster, to become king of the United States").

45. Terence Ball, *"A Republic—If You Can Keep It", in* CONCEPTUAL CHANGE AND THE CONSTITUTION 137 (Terence Ball & J.G.A. Pocock eds., 1988) ("Legend has it that as Benjamin Franklin left the Constitutional Convention, a woman asked, 'What have you given us, Dr. Franklin?' 'A republic,' he replied, 'if you can keep it.'").

46. WIECEK, *supra* note 16, at 51–63.

47. WOOD, *supra* note 13, at 464–67; *see also* DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 6–8, 17–24 (2008) (providing background on the motivations of leaders, especially Washington and Madison, who pushed for and attended the Convention, which included the weakness of the Articles of Confederation which were often ineffective and frequently ignored).

48. STEWART, *supra* note 47, at 25–26.

49. *Id.* at 25.

50. *Id.* at 171–173 (describing the process of drafting the Supremacy Clause of the United States Constitution).

51. William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 8–15 (2021); *see also generally id.* at 27–117 (providing a detailed account of how the nationalist influence of Gouverneur Morris—and his cunning and subtle stylistic tweaks to the draft of the Constitution—allowed him to win the ideological war in areas he had lost on the floor of the Convention); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1078–1128 (2014) (making the case for how the nationalist leaders at the Convention drafted and intended the Necessary and Proper Clauses to vest general legislative authority in the United States Congress).

52. DENNIS C. RASMUSSEN, FEARS OF A SETTING SUN: THE DISILLUSIONMENT OF AMERICA'S FOUNDERS 61–

federalist system, a schema of the dual sovereignty vested in both the national and state governments with the former supreme over the latter, and with a system of mutual obligations between and among the several sovereigns.[53]

The Framers were heavily influenced by Montesquieu, who had "taught . . . that in a confederation, which the new nation plainly had to be, all component governments should be republican"[54]—lest a monarchical or aristocratic state would swallow up a republican sister state.[55] In *Federalist* No. 43, Madison quoted Montesquieu in defending the Republican Guarantee Clause, saying:

> Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort, than those of a kindred nature. "As the confederate republic of Germany . . . consists of free cities and petty states, subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland." "Greece was undone . . . as soon as the king of Macedon obtained a seat among the Amphictyons."[56]

This sentiment was echoed by James Iredell later at the North Carolina ratifying convention.[57]

Thus, the Framers established the Republican Guarantee Clause with "[t]hree complementary visions."[58] In the first, the Clause served as "a kind of democratic insurance policy" by guaranteeing against structural changes to the states made from within, such as through internal coups.[59] In the second, the Clause served as a guarantee of "sister republics . . . protecting themselves, both individually and collectively" against external threats from any non-republican sister states, such as spillover effects or direct invasions. In the third, through that collective action, the Clause served to protect against the corruption of the national republic as a

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70 (2021) (providing background on Hamilton's proposal for the new constitution, which did not include the states and which was unceremoniously ignored by the rest of the Framers).

53. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 85–91 (2004).

54. WIECEK, *supra* note 16, at 73.

55. *Id.* at 26; *see also* The Federalist No. 43 (James Madison) (Open Road Integrated Media, Inc., 2022) ("In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations. . . . the forms of government under which the compact was entered into should be SUBSTANTIALLY maintained.") (emphasis in original).

56. The Federalist No. 43 (James Madison) (Open Road Integrated Media, Inc., 2022).

57. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 195 (Jonathan Elliot, ed. 1st ed., 1836) ("If a monarchy was established in any one state, it would endeavor to subvert the freedom of the others, and would, probably, by degrees succeed in it. This must strike the mind of every person here, who recollects the history of Greece, when she had confederated governments. The king of Macedon, by his arts and intrigues, got himself admitted a member of the Amphictyonic council, which was the superintending government of the Grecian republics; and in a short time he became master of them all. It is, then, necessary that the members of a confederacy should have similar governments.").

58. AMAR, *supra* note 24, at 280.

59. *Id.*; *see generally* Williams, *supra* note 10 (describing the view of the Republican Guarantee Clause as a treaty among states and its natural fit in Article IV Section 4 as a result).

whole.[60] These latter two points are the same that Professor Shapiro has recently raised in her account of the Republican Guarantee Clause as providing a structural guarantee against antidemocratic forces.[61]

The Republican Guarantee Clause provides both a vertical and a horizontal guarantee, i.e., both a guarantee between the states and the national government, and between and among the several states individually and as a whole. The Clause provides a structural promise to safeguard republicanism in the United States and the several states, and the multifaceted nature of "republicanism" means that the guarantee contemplates protections for any number of essential features of a republic, such as the democratic element of popular sovereignty and the rule of law generally. Accordingly, it is the duty of each state individually, and for all states collectively, to safeguard republicanism as much as it is the duty of the national government, in order to preserve a structure wherein republicanism can survive.

II. SPILLOVER EFFECTS

In light of the structural guarantee of the Republican Guarantee Clause, spillover effects that can cause a breakdown of republicanism in sister states—e.g., spillovers that prompt states to entrench incumbent or partisan advantage—take on a constitutional valence. To illustrate the impact of spillover effects, this Part details some historical examples of spillovers before turning to the potentially destabilizing spillovers states face today. These examples are not meant to be exhaustive, but to illustrate the point that states are influenced by one another and to warn that anti-republican efforts can erode republicanism throughout the nation.

A. SPILLOVERS IN VOTING RIGHTS IN THE EARLY REPUBLIC

The United States Constitution lacks an express, affirmative right to vote.[62] In the earliest years of the nation, the question of who could vote was left entirely up to the states.[63] The only textual, constitutional requirement for voting was that electors for the House of Representatives had to be those persons who satisfied the qualifications of the "most numerous Branch of the State Legislature" of each state.[64]

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60. AMAR, *supra* note 24, at 280.

61. *See generally* Shapiro, *supra* note 11.

62. *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE AND THE POLITICAL PROCESS 47–49 (rev. 6th ed. 2022) (providing background on the suffrage in the constitutional framework); *see also* Minor v. Happersett, 88 U.S. 162, 170–80 (1874) (finding that suffrage was not among the privileges and immunities of citizens and therefore not a right protected by the Constitution).

63. *See generally* KEYSSAR, *supra* note 30, at 7–21 (providing a background on suffrage in the early United States and on the debate over constitutionalizing the right to vote at the Convention, which ultimately failed and left states to decide); *see also id.* at 4–7 (offering background on the disparate suffrage requirements in the colonial period, wherein "Catholics and Jews, but also Native Americans, free blacks, and non-naturalized aliens" were able to vote in some states but not in others, and in certain areas women were able to vote, and in others only members of specific religious sects could).

64. U.S. CONST. art. I, § 2.

The earliest barrier to suffrage that eroded in the United States was the requirement that voters be freeholders—i.e., those who owned the requisite amount of land.[65] Throughout the decades following ratification, piecemeal efforts across several states began which eventually removed the freeholder requirement, ranging from Delaware in 1792 to Maryland a decade later, to Massachusetts and New York another decade after that.[66] This expansion of the franchise was largely a response to social pressures, including pressures for increased wages and from immigration, and thus an example of spillover effects. As it became clear that ever fewer otherwise economically active citizens—those with wealth but not land—were ineligible to vote because of the property requirement, states acted to remove the prerequisite.[67]

In large part, the framing of the argument against the freehold requirement was based on the idea that voting was viewed as a right that a state could not suspend but for exceptional circumstances.[68] Linked to this argument were Revolutionary ideas including "no taxation without representation" and the idea implicitly underpinning republicanism's elemental principles of popular sovereignty and the rule of law: "that law to bind all must be assented to by all."[69] These various ideas directly confronted—and indeed seemingly defeated—the classical Blackstonian idea that only individuals who had a certain degree of independence, e.g., the landed few, could be trusted to make laws for themselves and others.[70]

While the right to vote was expanding for some individuals, it was contracting for others. Soon after ratification, women were barred from voting everywhere in the United States.[71] Free Black Americans were soon targeted in many places where they previously could vote; every state that joined the union after 1819 prohibited Blacks Americans from voting outright, and the federal government prohibited the same in territories.[72] The efforts to deny Black Americans the ability to vote were steeped in racism, and they often increased as property requirements decreased to counter the possibility of free Black Americans traveling to locations where they could vote.[73]

65. KEYSSAR, *supra* note 30, at 22–25.
66. *Id*. at 24.
67. *Id*. at 24–26.
68. *Id*. at 10.
69. *Id*. at 11.
70. *Id*. at 8–9, 38–42.
71. *Id*. at 43–44.
72. *Id*. at 44–45.
73. *Id*. at 44–46.

B. SPILLOVERS FROM ABOLITIONISM AND EFFORTS TO PROTECT SLAVERY

Besides the expansion of the franchise, both abolitionist and anti-abolitionist state efforts offer examples of spillover effects in the early United States, which shaped opinions of the Republican Guarantee Clause. When the United States declared independence in 1776, slavery was legal throughout the states, but as republican ideals took root in the new nation, state-by-state abolition slowly began to take form.[74] Recent scholarship has recentered the study of abolitionism in the early United States on enslaved people and free Black Americans, making clear the extent to which the grassroots movement to abolish slavery grew directly from those most directly impacted by slavery and was later adopted more broadly adopted by abolitionist allies.[75]

Influenced by the growing abolitionist sentiment in their sister states, through new constitutions, statutes, and court cases, most northern states put slavery on the road to gradual abolition by the convening of the Constitutional Convention.[76] As the disparity between Free and Slave states grew between the northern and the southern states, the South began to react fiercely against northern efforts to constrain the ability to own slaves and sought to enlist the national government to protect the institution, further exacerbating tensions.[77]

Enslavers in the South further perceived their interests to be threatened by spillover effects—and even some direct appeals to citizens—when abolitionists began the "great postal campaign," an effort to circulate antislavery publications by mail throughout the United States.[78] These efforts were met with extreme opposition by Southerners who feared that such efforts, even in Free states but especially in their own, threatened the stability of slavery as an institution and could incite uprisings by enslaved people, leading Southern leaders to try to seek legal and constitutional means to prohibit such activity.[79]

As slavery became increasingly viewed as a "moral abomination" by the North, the conflict reached a point where Northerners appealed to the Republican Guarantee Clause as a basis to outlaw slavery, arguing that the institution contravened republicanism as articulated by the Declaration of Independence.[80] At the same time, these spillover effects in the northern states hardened attitudes in the

74. WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, 40–54 (1977).

75. *See generally* MANISHA SINHA, THE SLAVE'S CAUSE: A HISTORY OF ABOLITION (2016) (offering a comprehensive account of the abolition movement); GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC (2011) (describing the political evolution of abolition in the early United States and its impact on constitutional development).

76. WIECEK, *supra* note 74, at 40–54.

77. Shapiro, *supra* note 11, at 202.

78. WIECEK, *supra* note 74, at 172–73.

79. *Id*. at 173–76.

80. Shapiro, *supra* note 11, at 201–02.

southern states, which created their own spillover effects that sought to strengthen sentiments in favor of slavery—the spillovers became a cycle that further entrenched each side's prior stance.[81] Both Free and Slave states seized on the Republican Guarantee Clause to support their arguments, and so the understanding of the Clause became muddied and politicized to the point that it was, for a time, without utility.[82] As the spillover effects in both North and South bolstered each region's hostility toward the other over mutually incompatible conceptions of republicanism—one which could allow for slavery and one which could not—the country eventually resolved these differences through the Civil War.

C. MODERN DAY SPILLOVERS

Today, republicanism in the United States faces many difficulties, which has caused publications, such as the Economist, to label the country as a "flawed democracy."[83] Surveys show trust in the country's system of government has hit an all-time low, and fewer and fewer Americans believe that the government is functioning, with polarization and mistrust skyrocketing.[84] The Pew Research Center has found that only 28% of Americans are satisfied with democracy's functioning in the United States, an even lower percentage than the 35% that was measured soon after the January 6, 2021 attack on the Capitol.[85] A different study found that 72% of Americans believe that the United States was formerly a good example of democracy but do not believe it to be one any longer.[86]

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81. *Id*. at 202–03.

82. WIECEK, *supra* note 74, at 119–22.

83. *Why America is a "Flawed Democracy": EIU's Index Plots the Country's Democratic Decline Since 2006*, THE ECONOMIST (Mar. 21, 2024), https://www.economist.com/graphic-detail/2024/03/21/why-america-is-a-flawed-democracy [https://perma.cc/KY5V-PUMY]*; see also* Vanessa Williamson, *Understanding Democratic Decline in the United States*, BROOKINGS INSTITUTE (Oct. 17, 2023) https://www.brookings.edu/articles/understanding-democratic-decline-in-the-united-states/ [https://perma.cc/ZY37-KLWK] (describing how "election manipulation" and "executive overreach" are eroding democratic governing institutions in the United States) (emphasis removed); PolicyCast, *Fung and Keyssar: America's Flawed Democracy is in Deep—Possibly Fatal—Trouble*, HARV. KENNEDY SCHOOL (Feb. 17, 2022), https://www.hks.harvard.edu/faculty-research/policycast/americas-flawed-democracy-deep-possibly-fatal-trouble [https://perma.cc/QPQ2-JMT4] (providing a historical account democratic governance in the United States and examining why it is in a particularly precarious position today); Ed Pilkington, *America's Flawed Democracy: The Five Key Areas Where it is Failing*, THE GUARDIAN (Nov. 16, 2020, 3:00 PM), https://www.theguardian.com/us-news/2020/nov/16/america-flawed-democracy-five-key-areas [https://perma.cc/QB8X-J5DZ] (detailing five key areas of democratic governance in which the United States is particularly vulnerable).

84. *Why America is a "Flawed Democracy": EIU's Index Plots the Country's Democratic Decline Since 2006*, *supra* note 83.

85. Jeffrey M. Jones, *Record Low in U.S. Satisfied with Way Democracy is Working*, GALLUP (Jan. 5, 2024), https://news.gallup.com/poll/548120/record-low-satisfied-democracy-working.aspx [https://perma.cc/7NKW-Q34W].

86. Janell Fetterolf & Sofia Hernandez Ramones, *72% of Americans Say the U.S. Used to be a Good Example of Democracy, But Isn't Anymore*, PEW RESEARCH CTR. (July 10, 2024), https://www.pewresearch.org/short-reads/2024/07/10/72-of-americans-say-the-us-used-to-be-a-good-example-of-democracy-but-isnt-anymore/ [https://perma.cc/6LLX-N5NZ].

These concerning trends unfortunately comport well with the active threats to republicanism that Professor Shapiro identifies. Among these are racial exclusion and incumbent and partisan entrenchment, which often materializes through methods such as "patronage, malapportionment, extreme gerrymandering, exploitation of racial and ethnic divisions, voter intimidation, and election fraud."[87] Professor Shapiro notes many recent and concerning examples of these negative trends, such as lame-duck lawmaking in Wisconsin in 2018, which removed power from the offices of governor and attorney general to limit the ability of incoming officials to enact their agendas.[88] A recent situation that reflects eroding republicanism includes the efforts by the Republican-controlled North Carolina Supreme Court to thwart an incumbent Democrat from having her election certified and taking her seat as a member of the court.[89]

There is a plethora of ills that ail the many varied republics in the United States, and this fact is leading many Americans—especially younger Americans—to increasingly turn their backs on democracy and republicanism.[90] While past reactions against democratic governance are not determinative, they reflect a frustration with our democratic institutions which we must correct. History has shown that reinforcing spillovers can lead to incompatible republics, as in the case of the antebellum resentment between the North and South. It is incumbent on those officials who are able not only to push back against this tide of resentment, but to cure the underlying ills that cause anti-republicanism.

III. STATE ATTORNEYS GENERAL AS BULWARKS OF REPUBLICANISM

A. THE ROLE OF THE STATE ATTORNEY GENERAL

The role and status of state attorneys general varies by state. In some states, the office is defined by the state constitution; in others, it is defined by statute.[91] Broadly speaking, a state attorney general is expected to "provid[e] informal legal advice and formal legal opinions to the governor and other state officials and agencies and sometimes the legislature; represent[] the state, state agencies, and

87. Shapiro, *supra* note 11, at 214; *See also id.* at 214 n.181 (noting the bases for serious fear for democratic erosion, including "decay in the three basic predicates of democracy—competitive elections, liberal rights to speech and association, and the rule of law" (quoting TOM GINSBURG & AZIZ HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 43 (2018))).

88. Shapiro, *supra* note 11, at 219.

89. Eduardo Medina & Michael Wines, *In North Carolina, Republicans Try to Reverse a Supreme Court Election Loss*, N.Y. TIMES (Jan. 10, 2025) https://www.nytimes.com/2025/01/10/us/north-carolina-supreme-court.html [https://perma.cc/AU26-GCTP].

90. *See* Roberto Stefan Foa & Yascha Mounk, *The Signs of Deconsolidation*, 28 J. OF DEMOCRACY 5, 5–8 (Jan. 2017); *Youth and Satisfaction with Democracy*, CTR. FUTURE DEMOCRACY, 11–13, 30–31 (2020). *But see Open Society Barometer: Can Democracy Deliver?*, OPEN SOC'Y FOUNDS. (2023) (finding that in general a sizable majority of people still prefer democracies to the alternative).

91. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 521 (Emily Myers ed., 2018) [hereinafter NAAG] (Appendix A lists from where the office of state attorney general derives its authority throughout the country).

state officers in litigation; enforce[e] state civil and criminal law; and supervis[e] local prosecutors . . . ." [92] The office of state attorney general been shaped most of all by the fact that the overarching responsibility of the office shifted from its ancient roots serving the English monarch to serving the People as sovereign.[93]

The overarching duty of state attorneys general, and the one to which courts look when assessing common law claims from them, is to serve and protect the public interest.[94] As each state is protected and bound by the United States Constitution, republicanism is among the varied public interests that each state attorney general is duty-bound to preserve. State attorneys general thus sit at an interesting intersection—while they are creatures of their individual state and must advocate for their own state's interest, that interest may at times require them to keenly observe the happenings of both their sister states and the national government in order to assess any threats to republicanism at home. If such a threat should manifest, a state attorney general is in the unique position of being able to invoke the Republican Guarantee Clause on behalf of their state—and so must consider how to do so without violating their ethical obligations, among them Model Rule 3.1.

B. THE DUTY TO—AND CHALLENGES OF—BRINGING A MERITORIOUS CLAIM

Model Rule 3.1 requires that a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[95] The American Bar Association has made clear that actions are frivolous when a "lawyer is unable either to make a good faith argument on the merits . . . or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law."[96] Rule 3.1 is forceful, emphasizing that lawyers "shall" ensure that they bring meritorious claims, and those who violate Rule 3.1 may be subject to disciplinary proceedings.

Any lawsuit by a state attorney general invoking the Republican Guarantee Clause would implicate Rule 3.1 given the Supreme Court's precedent on the Clause—namely, that the Court has generally found the Clause to be nonjusticiable.[97] While such a lawsuit poses the risk of potentially being deemed non-meritorious, state attorneys general who take seriously the purpose of the Republican

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92. Scott M. Matheson Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 3 (1993).

93. NAAG, *supra* note 90, at 1–2.

94. *Id.*; *see also id.* at 39–45 (describing the common law authority of state attorneys general).

95. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2021) [hereinafter MODEL RULES].

96. MODEL RULES R. 3.1 Commentary.

97. *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1, 2 (1849); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149 (1912).

Guarantee Clause, understand its history, and recognize their duty to their state and to the Constitution to preserve republicanism, are duty-bound to proceed—cautiously—regardless. Indeed, upon close examination of the Supreme Court's precedents, including the frequently overread decision in *Luther v. Borden* and the Court's later decisions clarifying the nature of "political questions," it would be reasonable to assert—as some commentators, like Professor Richard Hasen,[98] have—that the Court holding the Republican Guarantee Clause is justiciable is likely a question not of "if," but rather "when."

C. THE DORR REBELLION AND SUBSEQUENT PRECEDENT

One of the major episodes in the history of the Republican Guarantee Clause, which prompted the first and most significant Supreme Court case interpreting the Clause, stemmed from Rhode Island's failure to expand the franchise.[99] Rhode Island was, in large part, resisting the spillover effects of the expanding franchise discussed in Part II.A. In 1842, over fifty years after the United States Constitution was ratified, the state of Rhode Island was the only state which had refused to draft or ratify their own state constitution.[100] Instead, Rhode Island had continued to operate under the royal charter granted by King Charles II in 1663.[101]

The royal charter had restricted suffrage to "freemen," which Rhode Island defined by statute as the owners of at least $134 of real property, as well as their eldest sons.[102] At the same time, the charter provided that the lower house of the General Assembly would be composed of two representatives from each town, except for certain cities granted extra representatives.[103] As a result of the explosion of Rhode Island's population—disproportionately based in northeastern urban manufacturing centers—in the fifty years following ratification, the charter restricted the franchise from massive swaths of the population of the state and caused malapportionment that was "severe even by early nineteenth-century standards."[104] Nearly three-quarters of all adult males had met the voting prerequisites in the eighteenth century, but by the 1830s "substantially less than half of the adult white males in the state could vote, and many of those who lacked the franchise were immigrant workers."[105]

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98. 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 75, 76 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) ("[T]here is good reason to believe that the Court will soon consider claims arising under the Guarantee Clause.").

99. *See* WIECEK, *supra* note 16, at 86–110.

100. *Id.* at 86.

101. *Id.*

102. *Id.* at 86–87.

103. *Id.* at 87 (Providence, Portsmouth, and Warwick were entitled to four representatives, and Newport was entitled to six representatives.).

104. *Id.*

105. KEYSSAR, *supra* note 30, at 57.

After a few decades of attempts to rectify the flaws of the charter—ones which were fairly easily dispatched by the coalition of conservatives and landowners dominating the legislature—frustration in the state began to come to a head.[106] An activist named Seth Luther, a "gifted orator" who had served time in debtors' prison, began a campaign to provide representation for the disenfranchised white working men in the state.[107] The movement was coopted by a group of middle-class reformers led by Thomas Dorr, a well-pedigreed attorney from Providence who launched an effort to write a constitution for the state.[108]

In 1841, after many years and successive failures appealing to the state government for reform, Dorr's movement convened a "People's Convention" that drafted a constitution that granted the franchise to all adult white men who satisfied a year-long residency requirement, and reapportioned the legislature.[109] The state government, succumbing to pressure, likewise called a convention that allowed for limited reapportionment of delegations but which retained the freeholder requirement, causing the convention to be known as the "Freeholders' Convention."[110] Two constitutions came from the dueling efforts and two conventions thereafter submitted constitutions for ratification; the People's Constitution was ratified 14,000 to 52, while the Freeholders' Constitution was rejected 8,689 to 8,013.[111]

The General Assembly thereafter implemented a series of laws meant to stop the new constitution from going into effect and to prevent the election of any candidates under the new constitution.[112] These laws largely failed in halting the advancement of Dorr's movement, though they did splinter his following as some supporters feared risking jail time for their efforts.[113] Dorr later marched into Providence surrounded by thousands of supporters and was inaugurated as governor, and he opened a new session of the legislature that governed under the authority of the People's Constitution.[114]

Accordingly, two different governments in Rhode Island claimed to be the legitimate government of the state, and a standoff lasted for weeks.[115] Following an attempt by Dorr and some armed followers to take the state arsenal by force after being denied entry, the Dorrites were beaten back, and Dorr fled into a quasi-exile.[116] In response to these events, the Freeholders' government soon thereafter

106. *Id.*
107. *Id.*
108. *Id.* at 57–58.
109. *Id.* at 58.
110. WIECEK, *supra* note 16, at 90–91.
111. *Id.* at 91.
112. KEYSSAR, *supra* note 30, at 58–59.
113. *Id.* at 59.
114. *Id.*
115. *Id.*
116. *Id.* (Dorr would later return to Rhode Island after more than a year away. He was sentenced to life in prison for treason but was later released less 2 years later due to deteriorating health).

drafted and ratified a new constitution that expanded the franchise generally, with certain limitations that were likely a reaction meant to punish those who supported Dorr.[117]

Following the events of the rebellion, a Dorr supporter named Martin Luther sued a Freeholder military officer, Luther Borden, who had been sent to arrest him, for trespassing on his property.[118] Borden responded to the suit by arguing that the General Assembly had declared martial law at the time and that, under lawful orders, he had been empowered to break and enter Luther's home to arrest him.[119] Questions about the lawfulness of Borden's orders thus arose. Luther argued that the Freeholders' government had been supplanted by the People's Constitution and that the Freeholders' Constitution was not republican and therefore violated the Republican Guarantee Clause; Borden countered that the actions of the People's government had never been lawful.[120]

When the case came before the Supreme Court, years after the troubles in Rhode Island had subsided, the Court dismissed the action, reasoning that it lacked jurisdiction because the case before it involved a political question.[121] The Court discussed both Congress and the President's ability to recognize states—and thereby confer recognition of the state as "republican" or not—and the potential mischief of courts later intervening in such determinations.[122] However, this discussion was *dictum*, and the question properly before the Court was not whether Rhode Island had had a republican government, but which of the alleged governments was validly in place at the time of the events in question.[123]

As Professor Akhil Amar puts it, the "key issue in the case was not whether the charter regime was Republican, but whether it was a *Government*."[124] Thus, if the Court had instead intervened, it would have had the effect of invalidating not only the lawfulness of the Borden's trespass, but also "all governmental action—marriages, land transfers, criminal convictions and the like—that had taken place in the interim."[125] Given that both Congress and the President had previously engaged with the Rhode Island charter government prior to the Dorr Rebellion in a way that amounted to recognizing its authority, it is unsurprising that the Court decided to resolve the case on the simpler grounds of deferring to the political branches as having determined the continued *existence* of the charter government, rather than launch into a challenging examination as to the quality and constitutionality of its republicanism.[126]

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117. *Id*. at 60.
118. WIECEK, *supra* note 16, at 113–15.
119. Luther v. Borden, 48 U.S. (7 How.) 1, 1–2 (1849).
120. *Id*.
121. *Id*.
122. *Id*.
123. *Id*.
124. Amar, *supra* note 18, at 776.
125. *Id*.
126. 48 U.S. (7 How.) 1, 1–2 (1849).

The Court later held in *Pacific States Telephone & Telegraph Co. v. Oregon*, based on its decision in *Luther*, that the Republican Guarantee Clause presented a nonjusticiable political question.[127] Even assuming that the Court was not overly incorporating the lesson from *Luther*, there is reason to question the strength of this precedent, reason enough at least that bringing a lawsuit that conflicts with the traditional view of *Luther* would be a meritorious claim based on a good faith argument for a modification of the doctrine in light of a more historically grounded approach to the Guarantee Clause—one which would reasonably satisfy Model Rule 3.1.

First, since the Court's decision in *Baker v. Carr* outlining necessary standards that would render a political question judicially manageable, there has been a wealth of scholarship analyzing how to apply the Republican Guarantee Clause in a judicially manageable way.[128] Second, some members of the court have begun to open the door to questioning the continued absolute nonjusticiability of claims arising under the Clause.[129] In *New York v. United States*, Justice O'Connor expressly raised the question when she stated, "[P]erhaps not all claims under the Guarantee Clause present nonjusticiable political questions."[130]

IV. CONCLUSION

When Benjamin Franklin was leaving the Constitutional Convention, legend has it that a woman asked him what the product of the convention was—to which Franklin said, "A republic, if you can keep it."[131] This was only partially true as the United States Constitution established federalism, providing that many republics could coexist with one another. Today, these various republics are not quite in harmony, and antidemocratic spillover effects threaten the very structural foundation of republicanism in the United States and among the several states. The United States Constitution provides a structural guarantee to protect against the erosion of republicanism by guaranteeing to every state a republican form of government.

Sitting at a crossroads, dispersed throughout these republics, are state attorneys general who are in most instances uniquely empowered to invoke the Constitution's guarantee of a republican form of government. As states erode the foundations of republicanism, such as through efforts to establish partisan entrenchment and safeguard incumbents against the will of the majority, state attorneys general have a compelling basis on which to invoke the republican guarantee in courts. Beyond directly challenging the Court's precedent on the Republican Guarantee Clause, state attorneys general could even make use of the procedural-substantive prong

127. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149 (1912).
128. *See, e.g.*, Chemerinsky, *supra* note 9; Brakebill, *supra* note 9.
129. New York v. United States, 505 U.S. 144, 184–85 (1992).
130. *Id.*
131. Ball, *supra* note 45.

distinction[132] identified in other areas of its jurisprudence, leaning into the structural guarantee as outlined by Professor Shapiro.[133]

Such a step cannot be taken lightly, as any such lawsuit will directly challenge existing precedent from the Supreme Court and may open the door to subsequent claims made in bad faith as an exercise of interstate lawfare. It is also no small thing to assert that a state is undermining republicanism, and doing so has its own political risks. Despite the risks, preserving our republics—each and all of them—is an essential, never-ending duty, and those who can serve as a bulwark for republicanism must do so. As the Guarantee Clause reminds us, we only have a republic if we can keep it.

132. *See generally* Jonathan K. Waldrop, Note, *Rousing the Sleeping Giant? Federalism and the Guarantee Clause*, 15 J.L. & POL. 267 (Spring 1999) (providing an analysis of the Guarantee Clause with a procedural-substantive distinction).

133. Shapiro, *supra* note 11.