REWRITING THE GUARANTEE CLAUSE: JUSTIFYING DIRECT DEMOCRACY IN THE CONSTITUTION

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I. INTRODUCTION

The interpretation of words is a storied and old practice in the United States, where legal construction has become an art.[1] Words have power, and we have made the interpretation of them, sometimes with the most subtle of distinctions, a professional vocation for scholars and attorneys. Resultantly, there are treatises on the methodology of language interpretation and the norms of interpretive behavior.[2] The United States Supreme Court has been interpreting the meaning of the Constitution since *Marbury v. Madison*[3] in 1803, and scholars have been interpreting the meaning of that decision and subsequent cases ever since.[4]

There is a logic to this approach, as we are a nation of written constitutions that set forth federal and state authorities. Many scholars begin with the premise that since the Constitution describes

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1. *See*, Mirjan R. Damaska, *Reflections on American Constitutionalism*, 38 AM. J. COMP. L. (VOL. 2) 421 (1990). Various constitutional scholars, including current members of the U.S. Supreme Court, have written extensively about how to interpret language. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION (2001); STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

2. *See e.g.*, ROBERT W. SHUY, FIGHTING OVER WORDS: LANGUAGE AND CIVIL LAW CASES (2008).

3. 5 U.S. 137 (1803).

4. *See*, *e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962); J. A. Grant, Marbury v. Madison *Today*, 23 AM. POL. SCI. REV. 673, 673–81 (1929). For a more detailed look at the historical practice of judicial interpretation of constitutional interpretation, see LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004). For a more revisionist view of *Marbury*, see SYLVIA SNOWISS, JUDICIAL LAW REVIEW AND THE LAW OF THE CONSTITUTION (1990).

the nature and scope of state power, it is the document that defines the nation and it must be at the center of any attempt to understand the power structure of the American state. This method of studying government, sometimes referred to as "constitutionalism," is largely value-neutral and focuses on the norms as delineated in the constitution and supporting documents.[5] The natural outgrowth of this approach is the focus on issues associated with the formation, creation and exercise of constitutional authority as set forth in the foundational documents and subsequent amendments. Although often omitted from the actual analysis, constitutional analysis is based on the understanding that analysis is adrift when issues or institutions range beyond even the most generously-construed scope of constitutional interpretation. Outside of this core of constitutionalism, decision-makers inform their interpretations with social or other policies, even while maintaining that their decisions are still the most legitimate reading of the text.[6] This is the heart of the difficulty in constitutional systems; words are static while society surely is not.

It is in this more obscure reality that the functions and scope of state authority are defined, redefined and confirmed. The ability of institutions to adapt and change while the construct itself remains facially static is the heart of the American experience. It is proposed herein that the extension and expansion of an institution's authority are products of the interaction of government structures with each other and with society as new stimuli are applied. The scope of an institution's power is defined through a process by which it engages and interacts with society to create and confirm its authority. As a result, the essential element to understanding the evolution of power within American institutions is this interactive relationship between the people and the instruments of the state. In our democracy, institutional authority is defined not only by what a written constitution allows, but also by what consensus the people reach while engaged with the government institutions.

The judiciary presents an illuminating window into this process of change, as the courts act by readily available written decisions. In other words, by exercising its authority through the application of language, courts show the movement of ideas and functions through

5. *See* John Elster, *Introduction, in* CONSTITUTIONALISM AND DEMOCRACY 1, 6 (Jon Elster & Rune Slagstad eds., 1993).

6. *See* Richard F. Fenno, *The House Appropriations Committee as a Political System: The Problem of Integration*, 56 AM. POL. SCI. REV. (VOL. 2) 310 (1965).

the development of case law. Society itself responds to the state action by reflecting the new understanding of institutional power in its interaction with the state.

In this paper, I will explain the analytic framework for this process and illustrate it through the evolution of the Constitution's Guarantee Clause. I will explore how the courts redefined the meaning of the Guarantee Clause from the original understanding of the provision as an attempt to restrict the power of public sovereignty to one that supports popular will. I will do this through an examination of the nature and function of courts in the United States. Initially, I will focus on how courts can change or alter understandings of the constitution and institutional authority. The analysis will begin with a description of the process by which they engage other institutions and the people, and how the courts can translate public stimuli into policy. I will also illustrate how people accept the shifts authored by the courts and confirm and return that understanding to the state by using it to petition the courts themselves. This is a process that can subtly change the meaning of some of the foundational notions in our democratic system through a gradual shift in understanding rather than language. It is a shift that can be so gradual that there is little attention paid to the nature or scope of the change itself.

Finally, I will demonstrate this process by focusing on the interpretation of the Guarantee Clause in the U.S. Constitution. By examining the evolution of this Constitutional provision, the nature and scope of the process by which society and the state influence each other becomes more evident. I will explore the significant economic and social upheavals in the late 19th century which generated new perceptions and understanding of politics and democracy that contrast with the agrarian politics of the founders, resulting in a movement to change the power structures of the government through elections, amendments and referenda. In addition, I will discuss how current litigants reflect this understanding by petitioning the courts with the very language the judiciary used in reshaping the focus and import of the clause.

II. THE MOST USEFUL BRANCH

While the proper scope of judicial authority is the subject of extensive scholarly work, the means by which the judiciary has

expanded the reach and authority of the courts as an institution has received less focus. I propose that the methodology of court-ordered change is one based on shifts in popular understanding and confirmation through judicial institutions. Courts are largely unique as an institution, as they adopt legitimacy through claiming to be the arbiter of the Constitution. The American regard for the rule of law reinforces this position. Law is of fundamental importance to the American consciousness. The American system of government is founded on the notion of "the rule of law," which presumes that power is to be exercised impartially and impersonally in accordance to fixed standards that are applied equitably.[7]

The veracity of these assumptions is regularly challenged, especially by scholars in the field of critical legal studies. Whether the assumptions are accurate or not, American society in general accepts the underlying premise as desirable and achievable. People understand the law as being general standards that *can* be applied equitably. Scholarship suggests that, at least in American society, this belief is pervasive.[8] As long as people believe that judges act impartially, they believe that the legal system is legitimate and equitable, or more generally, that the law is itself impartial and neutral when applied fairly.[9] This belief has allowed the courts, and the Supreme Court specifically, to engender goodwill and commitment from the public.[10]

It is this view of the law that I am going to refer to as the "Myth of Law," with apologies to Stuart Schiengold.[11] Nonetheless, it is not the reality of legal equity that drives judicial power. Rather, it is the belief in the law that has provided an opportunity for the judiciary to expand its reach and influence in the judicial system. The Supreme Court should have been a weak branch in the American

7. The Court's legitimacy can be threatened when it is perceived to be political rather than grounded in law. *See* HOWARD GILLMAN, THE ONLY VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION 172–76 (2001).

8. *See* PATRICIA EWICK, & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE IN CHICAGO 223–44 (1998).

9. ALLAN E. LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 30 (1988).

10. Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36(3) AM. J. OF POL. SCI.. 635, 658 (1992).

11. STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974). However, I will extend this argument beyond the normative issue raised by E. P. Thompson concerning whether law can be impartial or if it is the tool of a particular class or moneyed interest. THOMPSON, *supra* note 8.

system. Arguably, it was intended to be so.[12] The Court has increased its power by claiming that the law and people's belief in the power of the law to be equitable and just as its own. The Court thusly exercises its power in the name of the law, allowing it to engage in policy-making and politics as long as it maintains an image as the spokesman for "the rule of law." In this sense, the judiciary's power is premised on an image based on a myth.

The law then becomes a system of adjudication based on the fixed and predictable notions of fairness, even if developed, as in Thompson's observation, in a system intended to favor one interest group. The law or due process becomes good, even if the people are not.[13] The courts occupy a position of legitimacy in the enforcement of social norms and policy, whether by design[14] or perhaps by circumstance.[15] Courts have legitimated their role and increased their autonomy within the government structure by taking the dominant role as the adjudicator of human rights as well as the enforcer in the federal system of discipline on member states within a constitutional structure.[16] Further, law has become more than operational rules and may represent commonly held values values such as human rights or even capitalism.[17]

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12. *See* ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY 106–108 (1956). Alexander Hamilton had predicted that the Judiciary would always be the weakest of our Constitutional Branches; it controlled neither the sword nor the purse. THE FEDERALIST No. 78 (Jacob E. Cook ed., 1961).

13. As noted above, this argument is founded on an American political culture which views the law as being impartial and equitable and the rule of law desirable. It derives in part from a jurisprudence that attempts to divorce normative value judgments from the law. Whether this is even possible is not clear. Nonetheless, American jurisprudence has traditionally attempted to separate moral correctness from legal right. American courts have historically read the two as separate. Distinguished Justice Oliver Wendell Holmes, Jr. argued that one must carefully distinguish between a legal duty and a moral duty. He noted that the confusion between the two concepts creates perils in a society. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897).

14. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 70–79 (1984).

15. THOMPSON, s*upra* note 8.

16. MARTIN SHAPIRO, COURTS: A COMPARATIVE POLITICAL ANALYSIS 49–64 (1981).

17. Where this approach becomes even more difficult is when the law expands beyond accepted norms of behavior. Government is derived as an embodiment of this collectivity, but has autonomy and can law-make beyond the sentiments of the collective conscience. Biblical texts to classical penal codes illustrate that at least some of the foundation of law arises from collective sentiments and societal perceptions. But law is more than collective norms. Further, the enforcement of law is more significant than enforcing social norms on an individual. It calls for the mediation of an institution to interpret those norms and apply them. The human element cannot be ignored. Concepts of law may be abstract, but institutions are comprised of people with preferences.

In the end, the law becomes the intrinsic good and the Courts become the means to access it. As the Court maintains an image in society as the embodiment of the law, it can expand the scope of its authority based on the legitimacy that the law provides. As the Courts exist within the belief in the law, their scope of action is defined by logical extensions of that image. Hence, the expansion of the Court into a forum for partisan and ideological debates becomes problematic as it draws the Court away from the myth which sustains its authority.[18] The only means to such an extension is, as Howard Gillman suggests, to have courts cloak a partisan preference in the language of the law.[19] In short, the Court must define and redefine its image and operation within the scope of the law to society.

Because of the importance of image and the reliance on law to cloak policy, the courts regularly adapt and move the language of the law to match the desired outcome. This process is not undertaken in a vacuum, and thus courts are consistently engaging with the stimuli provided from society raised through cases and conflicts that force the adaptation of language to new and sometimes unanticipated ends. As a result, the courts become the means by which society attempts to shape and adapt the language of constitutionalism to greater change within society. Sometimes the results are inconsistent with the desires of the original authors of the legal system, as is illustrated by Thompson.[20] At times, the courts may attempt to move the language further than the society itself, at which point a judicial retreat usually follows. But in most cases, the Court trails societal trends and is a reluctant means of change. Courts are composed of the previous political coalition, not the newest. Nonetheless, the courts do ratify and define new understandings of constitutionalism as the stimuli are increasingly applied, and still marry it to the language of the law as if

18. Law cannot be constructed completely by ideological rhetoric or seen as arbitrary and unjust, because it will lose legitimacy within the population. Hence, repeated legal forms, even when initially established to support class divisions, will ultimately limit the rulers' ability to apply force directly and arbitrarily against the population. Laws passed codify inequity, but do so in such a fashion so as to limit the exercise of power by placing it within an institution governed by rules and structure. THOMPSON, *supra* note 8. Ironically, even in this more negative construction of the law and legal institutions, the judiciary supplies the people with the means to enforce equity and human rights.

19. Howard Gillman, *The Court as an Idea, Not a Building or a Game: Interpretive Institutionalism and Analysis of Supreme Court Decision-Making*, *in* SUPREME COURT DECISION MAKING: NEW INSTITUTIONALIST APPROACHES 65 (C. W. Clayton and H. Gillman eds., 1999).

20. THOMPSON, *supra* note 8.

no change has occurred at all. This is a practice that it engages in with some learned institutional skill, and will be explored below.

III. HISTORICAL GUARANTEE CLAUSE

The Guarantee Clause of the U.S. Constitution is a particularly important example of evolving meaning. Facially, the Guarantee Clause simply requires a republican form of government for each of the several states. Yet, the true meaning of the clause is not dependent on the words, but on the date.[21] The understanding of the Guarantee Clause of the American constitution shifted from initially favoring anti-majoritarian approaches to governance, to being discarded by the courts as a nullity, and finally to being championed as the basis for federal intervention into states as the means to enforce basic individual rights and liberties. At no point did the actual words ever change.[22]

To understand the meaning of the Guarantee Clause when it was ratified requires an understanding of the context. The founders of the American republic had clear concerns about the accumulation of power in the hands of public factions, especially popularly elected ones. While the drafters of our constitutional system rejected an authoritarian monarchy, they had little faith in the wisdom of mass public opinion.[23] This is most evident in the means chosen to select government leaders. The presidency was to be filled by electors, who in turn were to be chosen by means determined by state legislators. The upper house of the Congress—the Senate—also was to be selected only indirectly by the people through state legislators.[24] The judiciary was to be appointed by the President, with the nominations subject to the Senate. The only branch directly answerable to the voters was the aptly-named "People's House", or House of Representatives.

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21. *See* Anja J. Stein, *The Guarantee Clause in the States: Structural Protections for Minority Rights and the Necessary Limits on the Initiative Power*, 37 HASTINGS CONST. L.Q. 343 (2010).

22. *See* Erwin Chemerinsky, *Conference of Constitutional Law: Guaranteeing a Republican Form of Government: Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994).

23. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny . . . ." THE FEDERALIST NO. 47, at 49 (Isaac Kramnick ed., 1987)

24. *See also* BARBARA SINCLAIR, THE TRANSFORMATION OF THE U.S. SENATE (1989) (reviewing the structural foundations and limitations of the U.S. Senate).

American democracy was not designed to maximize the input of the people; it was designed to manage and blunt it. James Madison, one of the chief architects of the American Constitution, used a very particular and qualified definition of republic. Madison wrote that a republican government is one which derives its authority from the people, but is administered by officers under public control. Madison distinguished the concept of republic from democracy by assigning to a republic a "scheme of representation."[25] In Madison's view, as expressed in Federalist 10, the representative nature of the republican government was "to refine and enlarge the public views by passing them through the medium of a chosen body of citizens."[26] This rationale was echoed by Alexander Hamilton in Federalist 71. He saw the value of a representative buffer as an "opportunity for cool and sedate reflection."[27] The Constitution is designed with a "normative preference" for representative democracy.[28] Early legislators rejected the very notion that they would, or should, answer to the direct demands of their constituents. Senator Roger Sherman, in rejecting this premise argued:

> I think, when the people have chosen a representative, it is his duty to meet with others from the different parts of the Union, and consult, and agree with them, on such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation.[29]

Though Madison supported popular representation, the institutional structure guaranteed through a series of checks and balances was the defense against authoritarianism, not the wisdom of the populace.[30] This understanding was prevalent in other observations of the system. In his examination of the United States, Alexis De Tocqueville defined the American conception of republic directly:

25. THE FEDERALIST NO. 57 (Isaac Kramnick ed., 1987).

26. *Id.* at 122–27.

27. *Id.* at 409–12.

28. Julian E Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1533 (1994).

29. Cass R. Sunstein, REPUBLIC.COM 41 (2001).

30. Kramnick, *supra* note 27 at XX.

> What is meant by 'republic' in the United States is the slow and quiet action of society upon itself. It is an orderly state really founded on the enlightened will of the people. It is a conciliatory government under which resolutions have time to ripen, being discussed with deliberation and executed only when mature.[31]

This deliberation prevents policy by brute force or by unbridled passions which were understandably feared by the drafters of the Constitution.[32]

Hence, the challenge for the constitutional drafters was how to design a government that represented the people, yet would not be subject to the untrustworthy whims of popular opinion. This was a particularly difficult task in light of the implementation of a new expansive role for the federal government beyond the scope of the failing Articles of Confederation. This centralized authority challenged some of the bedrock principles justifying the revolution itself, which was predicated on a distrust of centralized political power that purported to govern faraway places.[33] The result—like much of the American government—was a compromise. While democratic, the underlying design of the U.S. system is one that insulates the major decision-making apparatus from the passions of the people. The federal government was to have powers that would permit it to coerce obedience over a vast area, and the mechanism of the purportedly democratic system would temper and limit popular will.

During the debates preceding the creation of the Constitution, the issues strayed beyond the nature and formation of the national government into the requirements for state governments. The chief proponent of the large state-supported Virginia plan, Governor Randolph, asserted that his proposal had the aim to secure a republican government.[34] This was a proposition that gained little initial traction.[35] With James Madison's support, this matter was

31. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 395 (2000).

32. William T. Mayton, *Direct Democracy, Federalism & The Guarantee Clause*, 2 GREEN BAG 269, 270-77 (1999).

33. *See* JOSEPH ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION (2000).

34. *See* WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION ch. 2 (1972).

35. *Id.*

later revived by Randolph with the provision that the states would be restricted to the formation of a "republican" form of government.[36] The proposal was essentially enshrined in the Constitution, though the wording itself was changed by James Wilson to the current Guarantee Clause of the U.S. Constitution:[37] "The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."[38]

While the meaning of this clause seems facially obvious, it meant something far different to the proponents of the clause than it does today. It is important to note that the Constitution does not "guarantee" democratic state governments, but rather a republican form of state government. This is a distinction of merit for the authors of our Constitution, who were concerned with protecting the mechanisms of government from the whims of the public at large, as well as protecting land-holders from violence. Ironically, the drafters instituted the clause as an anti-majoritarian provision. This understanding presents a new way to think about the democratic deficit debate. The drafters of the Constitution were clearly not concerned about seeing that all of the branches were legitimized through elections, nor were they focused on the need for such a design in the creation of the federal government. Instead, the drafters were more concerned with limiting the role of popular will and buffering the institutions of government from it, rather than increasing it. This alone stands in contrast to notions of popular sovereignty and the efforts of many to re-link institutions with perceived democratic deficits, such as the courts.[39]

The drafters were concerned with violence against state governments and landed persons in general. More particularly, the drafters were wary that the violence from Shays' Rebellion—the

36. Madison wrote to Randolph in 1787 suggesting that the union be organized on republican principles and a clause should be inserted that guarantees protection for states against, "internal as well as external danger." Letter from James Madison to Peyton Randolph (1787) *in* THE WRITINGS OF JAMES MADISON, at 336 (G. Hunt ed., New York 1900).

37. While Governor Randolph spoke of the need for the clause to reject monarchy, others at the Constitutional Convention including James Madison, Colonel Mason and James Wilson spoke of the clause in terms of preventing violence not just from foreign sources, but from domestic ones as well. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, Vol. 2. (Max Fharrand ed., Yale University Press 1911).

38. U.S. CONST. art. IV, § 4.

39. *See* Caldiera, *supra* note 11, at 658 (analysis of democratic deficits).

armed revolt in Massachusetts against the state government—would be the first of many armed assaults against men of property.[40] With the implications of the revolt clear, Madison observed that a "recent and well-known event among ourselves has warned us to be prepared for emergencies of a like nature."[41] As a result, the "Domestic Violence Clause," (as Madison referred to it) was added, but tempered the condition that any federal troops used to quell violence must first be requested by the governor or legislature of a state.[42] Understood in its entirety, the Guarantee Clause was simply part of a larger effort to de-legitimize violence as an extra-legal means to defend community interest by mandating their form of anti-majoritarian government with a linkage to popular election for legitimization purposes.

The framework for the design of a republican government was derived from Virginia. With its tranquil politics and aristocratic leadership, the state was considered a model for a future government.[43] Leadership of learned men was favored over factionalism and the corrupting influence of political parties.[44] Instead of popular ideologies being translated into parties who would counterbalance each other—the basic pluralist vision of democracy[45]—the founders envisioned an institutional solution with each branch of government checking and watching the other branches. The design was intended to preclude the concentration of power in one segment of the government.[46] Though Madison sought popular elections to protect the rights of minorities, the safeguarding mechanism was structural and would not depend on the grace of public opinion or the benevolence of politicians.[47] The institutional structure, not the politicians, was to mute the dangers of populism, democracy and factions.[48]

The same problems were foisted on the states through the

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40. WIECEK, *supra* note 36; Mayton, *supra* note 34.

41. Kramnick, *supra* note 27, at 279–86.

42. *Id.*

43. RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 46 (1969).

44. *Id.*; THE ESSENTIAL ANTIFEDERALIST—FEDERAL FARMER LETTERS VII, VIII, AND IX, AND BRUTUS ESSAY II (W.B Allen & Lloyd Gordon eds., 1985); THE FEDERALIST NO. 10 (Jacob E. Cook ed., 1961).

45. DAVID TRUMAN, THE GOVERNMENTAL PROCESS (1971).

46. Kramnick, *supra* note 27, at 51.

47. *Id.* at 122–28.

48. *See*, *e.g.*, Walter Dean Burnham, *Realignment Lives*, *in* THE CLINTON PRESIDENCY: FIRST APPRAISALS 363, 373 (C. Campbell & B. Rockman eds., 1996).

Guarantee Clause's requirement of a "republican" government which sought in part to impose Madison's solution for populism and factions on the states by creating their own layer of institutional safeguards between the people and the government. States are required to form and maintain a government based on notions of institutional barriers between popular opinion and rising factionalism. This Madisonian notion of deliberative and buffered government has slowly been eroded over time. People's growing belief in the wisdom of voters in a democratic system has transferred significant authority to the people through popular referenda and initiatives. By 2009, 26 states had adopted either the referendum or the initiative process allowing voters to directly intervene in the governance of their state.[49] This allows voters to bypass the often ineffectual state government and implement popular policy directly. The result is a modern conflict between the new understanding of democracy and republic, which respects public deliberation, versus the conservative and restrictive structure of the government as memorialized in the Guarantee Clause. This historical and primarily structural clause is at the heart of a more modern conflict.

IV. COURT-ORDERED DEMOCRACY

The transformation of the Guarantee Clause has been a slow and deliberative process. The government, and thus the interpretation of the language structuring the government in the Constitution, has been altered by an American society which has come to value popular will with greater acceptance.[50] Initially, the interpretation of the clause was consistent with the anti-majoritarian intention of the provision. In the 1847 case of *Rice v. Foster*[51] a Delaware court struck down an attempt to give citizens legislative authority. The case arose from a provision of Delaware law which allowed voters in each county to decide whether alcohol sales should be permitted. The court adopted the same rationale as the framers, arguing that, "[t]he

49. National Conference of State Legislatures, *Initiative and Referenda States*, 2009, available at http://www.ncsl.org/Default.aspx?TabId=16589.

50. Scholars of political behavior have increasingly studied the importance of public opinion in multiple areas, including elections and the implementation of policy. While it is largely impossible to measure the impact of public opinion during the infancy of the republic, the effects and implications in the modern era are significant. *See*, *e.g.*, BENJAMIN I. PAGE & ROBERT SHAPIRO, THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICAN' POLICY PREFERENCES (1992).

51. 4 Del. (4 Harr.) 479 (1847); Damaska, *supra* note 1.

people, although intending to do right, are the subject of impulse and passion; and have been betrayed into acts of folly, rashness and enormity, by the flattery, deception, and influence of demagogues."[52] Using the Guarantee Clause, the court wrote, "Although the people have the power in conformity with its provisions, to alter the Constitution, under no circumstances can they, so long as the Constitution of the United States remains the paramount law of the land, establish a democracy or any other than a republican form of government."[53] The court notably contrasted democracy with republic, asserting that the republican form of government is the protection from the evils and vices associated with democracy.

While *Rice v. Foster* has little relevance today as precedent, it is a significant and largely undisputed reflection of the base understanding of the Guarantee Clause. The decision was consistent with the original purpose and understanding of the Guarantee Clause.[54] The judiciary maintained this approach to the clause, refusing to allow it to be used beyond its limiting influence on majoritarian democracy. In *Luther v. Borden,*[55] the Supreme Court was asked to choose between two rival governments that had arisen in Rhode Island. In 1841, Rhode Island was still operating under an older system of government established by a royal charter of 1663. The charter strictly limited suffrage, allowing only landed persons (freeholders) to vote. Many citizens—mostly poorer people—petitioned the legislature for reform, but these complaints were ignored, and the charter offered no means for amendment.[56] Dissident groups protesting the charter held a popular convention to draft a new constitution and elect a governor. The old charter government declared martial law and put down the rebellion, although no federal troops were sent. One of the insurgents, Martin Luther, brought suit claiming the old government was not "a republican form of government" and all its acts were thereby invalid.[57]

As noted above, to use the clause against a government of and

52. *Rice v. Foster*, 4 Del. (4 Harr.) at 486.

53. *Id.* at 488.

54. Similarly decided cases in that era include: Meshmeier v. State, 11 Ind. 482 (1858); *Ex parte* Wall, 48 Cal. 279, 17 Am. Rep. 425 (1874); and Thornton v. Territory, 3 Wash. T. 482, 17 Pac. 896 (1888). By the early 20th century, this line of cases was largely dismissed. *See, e.g.*, State v. Briggs, 46 Utah 288 (1915).

55. 48 U.S. 1 (1849).

56. Mayton, *supra* note 34, at 275–77.

57. *Luther,* 48 U.S. at 15.

by freeholders would have been a reversal of the drafters' intent. As might have been expected by the drafters of the Guarantee, the Court refused to apply the clause to the case. Ultimately, the Supreme Court dismissed the suit without ever reaching the issue of what constitutes a republican form of government. Writing for the majority, Chief Justice Taney concluded, "Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so."[58] This interpretation of the Guarantee Clause (or lack of one) was later repeated by the Court, rendering the Guarantee nothing more than an unenforceable truism.[59] Since issues under the Guarantee Clause are political by definition, the Court essentially reduced the Guarantee to a statement with no enforceable meaning.

In the United States, no greater stimuli has been applied to the workings of our state institutions than the shift away from a slave-based agrarian nation. One of the first significant stimuli applied to the application of the Guarantee Clause was the equality of the races. An early attempt to reconstruct the meaning of the Guarantee Clause beyond its anti-majoritarian roots came from the judiciary. In *Plessy v. Ferguson*,[60] Justice Harlan tried to reinterpret the Guarantee Clause to enforce basic individual rights within the states and reject segregation. Writing in dissent of an opinion that legalized the doctrine of separate but equal, Harlan argued:

> I am of opinion that the state of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that state, and hostile to both the spirit and letter of the constitution of the United States. If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country; but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now

58. *Id.* at 46–47.

59. For an extensive discussion, *see* Chemerinsky, *supra* note 24.

60. Plessy v. Ferguson, 163 U.S. 537 (1896).

> constituting a part of the political community, called the 'People of the United States,' for whom, and by whom through representatives, our government is administered. *Such a system is inconsistent with the guaranty given by the constitution to each state of a republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.*[61]

Harlan's interpretation of the Guarantee Clause, stimulated by the increasingly bitter race division in the United States, was ahead of its time. Harlan essentially argued that the Guarantee Clause did far more than the drafters intended. In Justice Harlan's view, the Guarantee Clause required that the United States enforce basic civil or human rights among all of its citizens. Not only was this meaning of "republican" inconsistent with the drafters' intent, Harlan's opinion countenanced federal intervention in a state's internal management of its citizens. This is surely not what was envisioned by the drafters of the Constitution, who sought federal protection to maintain affluent property owners, not to create equity among citizens of competing or different classes. Nonetheless, the analysis presented in Harlan's opinion would prove useful later.

Justice Harlan's interpretation of the Guarantee Clause gained no traction at the time. In fact, the judicial interpretations of the Guarantee Clause were already evolving away from any substantive meaning that could be applied to state governments. Prior to Justice Harlan's now famous dissent in *Plessy*, the Court already had refused to find any substantive meaning in the requirement of a republican form of government.

The judiciary proceeded to largely vitiate the importance of the clause for any purpose and rejected any attempt to use the clause to make any judgment as to the republican character of a state government. Even when the court did not reject the usage of the clause outright, any meaningful interpretation of it was quickly dismissed. In *Minor v. Happersett*, the clause was used to challenge the denial of the franchise to women.[62] The Supreme Court ruled that

61. *Id.* at 563 (emphasis added).
62. Minor v. Happersett, 88 U.S. 162, 175 (1874).

as both state and federal governments had a history of limiting the vote to men that predated the ratification of the constitution, it was "too late to contend that the government is not a republican . . ."[63] Though *Minor* was significant for the Court's willingness to address the Guarantee Clause, as a practical matter, the result was the same: permitting unchallenged state governments that may not qualify as either a republic or a democracy. In doing this, the courts maintained state governments favorable to the existing power of landed persons.

This state of affairs remained unchanged until new stimuli were applied by the popular movement towards institutions of popular or direct democracy. The stimuli for change came from two places. First, was a larger societal change: after years of democratic government, there was a newfound respect for popular will, one that was not shared in drafting the governing institutions.

Second, significant demographic changes brought on by immigration and the Industrial Revolution forced a change in the understanding of democracy and the Republican Guarantee. The changes in this period were significant in many areas, but especially in the domain of labor.[64] These conditions gave rise to the Progressive movement in the early 20th century as, in part, an extension of the tradition of the agrarian protest against the dominance of large corporations at the expense of the farmer.[65] The 1890's brought several important stimuli for change. Due to growing industrialization, there was an increasing disparity between the rich and poor, best exemplified by tycoons such as Andrew Carnegie, who made fortunes while workers, including young children, toiled for meager wages in difficult conditions.[66] Large business entities, known then as trusts, controlled access to jobs and business in many parts of the economy, especially agriculture and industry, depressing

63. *Id.* at 176.

64. For a discussion of this era and the changes in the view of popular participation, see, e.g., VICTORIA CHARLOTTE HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES, PRINCETON STUDIES IN AMERICAN POLITICS (1993).

65. The implications of this era are significant, though largely beyond the scope of this paper. Nonetheless, much scholarship has been done in social science, history and law. For a focused view on the era, see JOHN DONALD HICKS, THE POPULIST REVOLT: A HISTORY OF THE FARMERS' ALLIANCE AND THE PEOPLE'S PARTY (1961); RUSSEL BLAINE NYE, MIDWESTERN PROGRESSIVE POLITICS: A HISTORICAL STUDY OF ITS ORIGINS AND DEVELOPMENT1870–1958 (1959); and C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877–1913 (1951).

66. ARTHUR S. LINK & RICHARD L. MCCORMICK, PROGRESSIVISM 9 (1983).

wages and monopolizing distribution.[67]

There also was a change in the middle class. The 20th century brought a new emphasis on the power of science, efficiency and rationality.[68] This new middle class sought to change the nature of the power structure to represent them and their interests. These progressives represented a middle class that changed the dynamics of society from one based on the division between landed and non-landed to one in which education and knowledge would be significant sources of social and political power.

The changes heralded problems for older groups.[69] The progressives were faced with significant institutional barriers to change. Efforts were made to change policy through elections, and a newly formed Populist Party was successful in winning nine-percent of the popular vote in the presidential election of 1892.[70] Efforts were also made to circumvent the state-supported system that favored industry with citizen-made law through a newly revived and constitutionally justified initiative system. While the American government may have been designed to limit popular movements and even to make legislation difficult through divided powers, Americans began, with increasing frequency, side-stepping the structural restraints by using alternatives to traditional legislation to reverse or even reject unpopular policies. This gave rise to the increasing popularity of the referendum, an electoral device that allows voters to reverse or reject the decisions of state or local legislative bodies. While subject to criticism, referendums are, in the most direct sense, the truest form of democracy as they are a potent form of popular sovereignty.

67. This also was a time when thousands of immigrants were flooding into the country from Europe. Many of these immigrants remained in the eastern industrial cities working for low wages in dirty and dangerous jobs. Both the government and the political parties were unable to address the significant changes in the society from the industrial and demographic growth. *See*, *e.g.*, J.J. Huthmacher, *Urban Liberalism and the Age of Reform*. 49 MISS. VAL. HIS. R. 231 (1962).

68. *See* ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877–1920 (1967).

69. The progressive movement drew significantly from an older middle class of ministers, professors and lawyers who were being overshadowed by powerful industries, especially the railroads. *See* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955). Huge demographic, economic and technological stimuli brought together diverse groups into shifting coalitions during the progressive period. Progressivism was a significant movement for a generation of Americans that sought to address the ills of a modern urban society, a society very different than the agrarian nation that the Founders sought to govern. *See* JOHN D BUENKER ET AL., PROGRESSIVISM (1977).

70. *See* LINK, *supra* note 74, at 18.

New interest groups used aggressive means to bypass the buffering effect of the legislative bodies in the states in order to defeat the dominance of traditional interests in the law-making bodies.[71] This was, in a larger sense, a shifting of ideas. The new groups, such as the progressives who were often blocked in the existing state institutions, proposed that the wisdom of the population as indicated through the initiative process was better-suited to enact policy than representatives acting within a republican structure of institutions. This is nothing short of a rejection of the deliberative premise that Madison and Hamilton advocated during the drafting of the Constitution. Yet, the rationale is based, at least facially, on democratic principles that were rapidly beginning to rise to prominence over the republican restraints written into the constitution.[72] The courts were the venue that would ultimately provide the means to confirm a more modern understanding of the Constitution.

Beyond the desire of a growing and increasingly powerful middle class, the move to accept and ultimately endorse this movement toward direct democracy was aided by advances in technology. The basic structure of direct democracy did exist at the infancy of the American republic. In New England, town hall meetings were used as a form of popular legislature.[73] However, the ability of people to act directly was limited by the technologies of the time, especially the restrictions of poor communication over vast distances. Nonetheless, by the 20th century, technology had improved to such an extent that contemporaries of the period were openly discussing and publishing ideas about the use of the referendum and the initiative. As noted in a published debate in 1912, voting technology for use in a referendum or initiative had improved so that the states could now proceed from the point where they were previously forced to stop.[74]

The change away from the older jurisprudence of the Guarantee Clause occurred quietly as a result of a Supreme Court

71. Scholars have studied the growing influence of interest groups on the legislative process using both lobbying and campaign donations. See JOHN BERRY, INTEREST GROUP SOCIETY (5th ed. 2008); J.E. Owens, *The Impact of Campaign Contributions on Legislative Outcomes in Congress: Evidence from a House Committee*. 34 POL. STUD. 285–95 (1986).

72. For a discussion of the era, see Mayton, *supra* note 34.

73. *Id.*

74. J.W. BEATSON, THE NATIONAL ECONOMIC LEAGUE, THE INITIATIVE AND REFERENDUM: ARGUMENTS PRO AND CON 29–30 (1912).

decision. One of the earliest challenges to direct democracy was rejected, but with no overt statement redefining democracy or republic in America. The Guarantee Clause had been presented as a rationale to reject these extra-legislative processes, but the U.S. Supreme Court's 1912 decision in *Pacific States Telephone and Telegraph Co. v. Oregon,*[75] rejected the rationale on its face and largely ended the efforts to use the clause to restrict direct democracy.[76] In *Pacific States*, an Oregon law adopted by popular initiative was challenged as being invalid, or more directly, inconsistent with republicanism as set forth in the Guarantee Clause.[77] The challenged law was a tax on telegraph and telephone companies of two percent of their annual gross income derived from intra-state business in Oregon. The companies, in challenging the law, summarized their arguments before the United States Supreme Court as follows: "the creation by a state of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of § 4 of article 4 of the Constitution[.]"[78] The companies were simply asserting a fairly basic understanding of the Constitution by arguing that an initiative was incompatible with the republican design of our government.[79]

The Court in *Pacific States* did not make a grand pronouncement of the role of people in government, or the wisdom of the people. That language comes from later courts after the law became more settled.[80] The Court in *Pacific States* took a simple

75. 223 U.S. 118 (1912). Prior to *Pacific States,* states had begun to grapple to some degree with questions of direct democracy and the Guarantee Clause. *See* Kadderly v. Portland, 74 P. 710, 719 (Or. 1903) (deciding that initiatives were not *per se* incompatible with the Guarantee Clause); *In re* Pfahler, 88 P. 270, 273 (Cal. 1906) (holding direct legislation in municipalities was akin to town meetings and therefore permissible under the Guarantee Clause). Both decisions were fairly limited, but suggest a trend toward greater recognition of direct democracy in states.

76. *See, e.g.*, Mountain Timber Co. v. Washington, 243 U.S. 219 (1916) (issues under the Guarantee Clause are nonjusticiable political questions); O'Neill v. Leamer, 239 U.S. 244 (1915) (rejecting use of Guarantee Clause challenge to the formation of a drainage district); *see also* Chemerinsky, *supra* note 7, and Stein, *supra* note 7, at 350–52 (discussions of the Guarantee Clause cases rejected after *Pacific States*).

77. *Pac. States*, 223 U.S. at 133.

78. *Id.* at 137.

79. *Id.* at 137–39.

80. See, *Baker v. Carr* 369 U.S. 186, 218-232 (1962), and Hunter v. Erickson 393 US 385, 391–93 (1969).. The Court avoids fully reviving the Guarantee Clause, though it does indicate a willingness to do so. See, *New York v. United States*, 505 U.S. 144, 183-85 (1992);

small step and refused to use the Guarantee Clause to restrict extra-legislative processes. This resulted in similar movements in the lower courts. Many courts simply avoided issues concerning the conflict between direct democracy and the purported republican form of government by claiming the issues were outside the jurisdiction of the judicial branch. In the tradition of *Marbury v. Madison*, the courts made a policy statement by rejecting their own jurisdiction. Courts had adjudicated the Guarantee Clause prior to *Pacific States*, but the Supreme Court implicitly accepted the challenged processes of direct democracy. On the state level, where the issues have been decided, courts repeatedly declined to declare referenda or initiatives as inconsistent with the Guarantee Clause.[81]

Scholars have written of the Court's decision in *Pacific States* as a conservative decision.[82] Yet, this conclusion is in error. The importance of the decision was not in defending state's rights, but in finishing a legal trend of nullifying the original meaning of the Guarantee Clause as a defender of representative government and deliberation. The refusal to enforce the provision made it a larger nullity in efforts to buffer or limit popular control over the policy, at least at the state level. Ironically, the Court's earlier unwillingness to use the Guarantee Clause to expand individual rights provided an easily adaptable framework to apply to the more contemporary issue of referenda. While facially this appears consistent and perhaps even conservative, it is not. Previously, the Court refused to create an enforceable provision for individual rights, which would plainly have been beyond the original meaning of the clause. Now, the Court was using the same language of restraint to nullify its use for its more traditional purpose—the defense of existing deliberative and buffered state institutions.

This started in earnest an effort to redefine the clause and the very nature of our understanding of the American democracy. The stimuli for change out of society came from significant legal and historical scholarship on the role of the Guarantee Clause in American jurisprudence. Some of the leading law journals began serious advocacy of a shift in the judicial view of the Guarantee Clause in the 20th century with the most influential articles published in the latter

Gregory v. Ashcroft, 501 U.S. 452, 463 (1991).

81. Mayton, *supra* note 34.

82. *See* Chemerinsky, *supra* note 24 at 862–63.

half of the 20th century.[83] The gravamen of the argument was a claim that the Guarantee Clause should be understood as a protector of basic human or individual rights.[84] This claim transforms the clause from one that is concerned only with government structure to a larger, more significant statement of federal oversight of state management of individual liberties, civil rights or even malapportionment.[85] Ironically, all of this scholarship appears to avoid referencing James Madison's own interpretation of the Guarantee Clause in which he expressly stated that it should not be, "a pretext for alterations in the state governments."[86]

V. ELEVATION OF POPULAR WILL OVER DELIBERATION

The *Pacific States* decision was not the end of the Guarantee Clause; rather, it was the end of the clause as it was drafted. Modern courts, no longer grappling with the traditional meaning, have given the Guarantee Clause a new significance. The Guarantee Clause is not being interpreted to reassert the Madisonian fear of factions, but rather to actually guarantee a broad set of democratic principles. Not only had the idea of republicanism reversed itself to favor a more majoritarian democracy, but there was also a serious effort to use the Guarantee Clause as the means to force compliance with an increasingly populist understanding of the concept of republicanism. Some scholars even reached to ancient Greek ideas of "republic" as the definitive embodiment of the term's meaning.[87]

This reversal of the Court on the traditional meaning of republicanism translated to the states as well. Within local

83. Thomas C. Berg, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208 (1987); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*. 46 MINN. L. REV. 513 (1962); Charles O. Lerche, Jr., *The Guarantee Clause in Constitutional Law,* 2 THE W. POL. Q. 358, 374 (1949); Deborah J. Merritt, *The Guarantee Clause and State Autonomy*: *Federalism for a Third Century*, 88 U. COLO. L. REV. 11 (1988); Thomas A. Smith, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*. 93 YALE L.J. 561 (1984).

84. *See*, Chemerinski, *supra* note 24 at 851; Jesse H. Choper, *Ira C. Rothgerber, Jr, Conference on Constitutional Law: Guaranteeing a Republican Form of Government: Cases Under the Guarantee Clause Should be Justiciabl*e. 65 U. COLO. L. REV. 741, 741 (1994) (arguing for an expanded use of the Guarantee Clause).

85. Choper, *supra* note 90 at 741–42.

86. THE FEDERALIST NO. 43, at 274 (James Madison) (1987).

87. Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 856–57 (2002) (argues against scholars advocating the Madisonian traditional definition of republic).

governments the referendum can be a particularly effective political tool to bypass intransigent government policy, especially in the areas of land use and development. As an alternate means to shift government policy, the referendum has changed from a symbol of popular sovereignty to a potent political tool for those persons with means to rally public support. It allows newly-formed neighborhood groups to challenge community lawmakers over pivotal local decisions. The result has been more attempts to reverse local ordinances through the referendum and an increasing likelihood that the government and opposition will seek judicial protection of local ordinances from the referendum process. While Madison might have supported the quashing of factions attempting to circumvent the deliberative lawmaking bodies, this is a process that has had little success in the courts.

Not only has the judiciary rejected, and ultimately stopped even acknowledging the anti-majoritarian design of the Constitution, it began consistently making the opposite interpretation. The subsequent case law repeats and expands on this shift toward direct democracy, putting aside claims about the founder's concerns about the possible implications of popular policy-making consistently. Even attempts to use alternative elements of the Constitution to present the argument have largely failed. In *James v. Valtierra*, [88] the U.S. Supreme Court noted that the submission of an ordinance to voters for its approval or rejection, by a referendum, does not operate to deprive the opponents or proponents their due process or equal protection rights. The justifications for direct democracy are increasingly tied to this new understanding of democracy, and popular opinion, as being self-correcting, open and ultimately right in both the moral and legal sense. Referenda were defended by contending that far from denying rights to any persons, the referendum invites all citizens to participate in the activities of government in a direct and active manner.

Even with a shift in popular understanding, some shifts require substantial legal gymnastics to accomplish. The Guarantee Clause was well-buried by the Supreme Court in *Pacific States*; any revival would alter settled law. Yet, this was done to some degree by linking the notion of a republican form of government with individual rights. In *Baker v. Carr*, [89] the Supreme Court allowed a challenge to

88. 402 U.S. 137, 140 (1971)..
89. 369 U.S. 186, 228 (1962).

Tennessee's apportionment scheme brought under the Guarantee Clause as long as it was also brought under the Equal Protection Clause. Tennessee argued that a state's apportionment scheme always falls under the political questions doctrine making the issue non-justiciable.[90] Writing for the majority, Justice Brennan ably reincorporated the notions underlying the Guarantee Clause back into an actionable provision though the 14th Amendment and the Bill of Rights.[91] While at least facially affirming the notion that structural questions regarding political power allocation in the state remain nonjusticiable,[92] the Court ruled on an allocation scheme.[93]

Interestingly, this circumvention of the older precedent presented an intellectual puzzle. As in *Baker*, the challenge to the initiative in *Pacific States* was brought under both the Guarantee Clause and the Equal Protection Clause.[94] The Court was not dissuaded and distinguished the older case, noting that in *Baker*, and unlike in *Pacific States*, "[t]he Fourteenth Amendment claim is not so enmeshed with those political question elements which render Guarantee Clause claims nonjusticiable[.]"[95] While *Baker* did not by itself resurrect the Guarantee Clause, it did suggest that issues concerning elections, representation and republican forms of government were justiciable, if framed correctly.

This shift in Constitutional law is largely a product of modern values concerning individual rights and a reconstruction of our notion of democratic process. The elevation of the popular election over deliberation or institutional buffers assumes a referendum is not a delegation of a governmental power to the people; it is a power that the people reserved to themselves. As the U.S. Supreme Court observed in *Hunter v. Erickson*, [96] in establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature. With such a premise, the only possible conclusion is that no instrument of government (be it state, local or federal) may interfere with this power that began with the people and was retained by them during the creation of government. Direct democracy existed prior to

90. *Id.*
91. *Id.* at 199–200.
92. *Id.* at 210.
93. *Id.* at 226.
94. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 137–39 (1912).
95. *Baker*, 369 U.S. at 227.
96. 393 US 385, 391–93 (1969).

government institutions and remains a check on the exercise of state authority. While this might have been evident to the modern Court and perhaps even a plausible interpretation of the formation of states, this understanding did not inform the construction of the Constitution or the nation's founding.

Because the federal courts had already marginalized the Guarantee Clause, as discussed above, state courts have addressed issues of direct democracy from these more new, yet seemingly traditional, notions of democracy, rather than from the more restrictive interpretation of republican government favored in the Federalist Papers. The legal construct begins with an assertion concerning an inherent trust for the judgment of the people. This position is not an isolated conception, but rather a trend in judicial thinking evidenced by decisions of the U. S. Supreme Court, which has become zealous in its defense of the referendum. In *City of Eastlake v. Forest City Enterprises, Inc.*, the U.S. Supreme Court, speaking through Chief Justice Burger, noted, "The referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies."[97]

Without any effort to clarify how this interpretation of the meaning of the U.S. Constitution is consistent with the meaning as stated by the drafters, Chief Justice Burger actually made a citation to the Federalist Papers in setting forth his expansive understanding of the rights to direct democracy as set forth in the Constitution itself. Burger declared, "Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature"[98] The *Eastlake* decision is notable not just for the absence of any reference to the traditional anti-majoritarian view of the Constitution, but also for its effort to suggest that the foundations and authority for direct democracy is grounded in the very documents that had been understood to reject it. The Court's primary authority for this movement was its own precedent which had continued to move toward the very conclusion that was reached in *Eastlake*. Once this

97. 426 U.S. 668, 673 (1976).

98. *Id.* at 672 (citing THE FEDERALIST NO. 39 (James Madison); Hunter v. Erikson, 393 U.S. 385 (1969); James v. Valtiera, 402 U.S. 137 (1971)).

premise was declared by the United States Supreme Court, the legal meaning of the Constitution changed with only sporadic attempts to bring the original understanding of the constitutional construct back outside of scholarly work. After *Eastlake*, the power of popular sovereignty had largely become a truism, in spite of history.

The power of this shift would trickle down to state jurisprudence with the result going even further in defense of direct democracy than the U.S. Supreme Court. The Florida Supreme Court has echoed the U. S. Supreme Court in recognizing the fundamental importance of the referendum as a means of direct democracy for the citizens of the state. In *Florida Land Co. v. City of Winter Springs* the court stated, "[t]he concept of referendum is thought by many to be a keystone of self-government, and its increasing use is indicative of a desire on the part of the electorate to exercise greater control over the laws which directly affect them."[99] Because the referendum is a reserved power, even normally legitimate questions of due process are inapplicable. In holding the power of referendum above such concerns, the Florida Supreme Court in *Florida Land Co.* quoted the rationale and analysis of the California Supreme Court in *Dwyer v. City Council of Berkeley*:[100]

> By the petition for a referendum the matter has been removed from the forum of the council to the forum of the electorate. The proponents and opponents are given all the privileges and rights to express themselves in an open election that *a democracy or republican form* of government can afford to its citizens upon any municipal or public affair.[101]

The *Dwyer* decision and its progeny are noteworthy, not just for the reverence the Court gives popular sovereignty, but for the blending of the notions of the republicanism with democracy and the shedding of any pretense to reassert the Madisonian view that representative government was a necessary component for the avoidance of tyranny and the fallacy of faction-driven popular will. The meaning of the Constitution changed, because the greater society changed and the institutions followed the public stimuli without

99. 427 So.2d 170, 172 (Fla. 1983).
100. 253 P. 932 (Cal. 1927).
101. *Florida Land Co.*, 427 So. 2d at 172.

significant opposition.

The courts did not arrive at this reconstruction of the Constitution in a vacuum; the ideas were vetted and deliberated in scholarship. There was a significant movement for this change in legal historical work. This advocacy could be seen in the leading works on the Guarantee Clause by historians.[102] The translation of the momentum from the greater society to the policy-making institutions occurred slowly, but the shift became apparent. By the 1990s, the court was ready to return to the Guarantee Clause, but nevertheless adrift from the original intent. Buoyed by the decades of case law supporting popular sovereignty and supportive legal scholarship, the Guarantee Clause was once again in play. The evidence of the impact of the scholarship as well as the shifting understanding of republicanism is evidenced in the writings of the Supreme Court in 1992. In *New York v. United States,*[103] Justice Sandra Day O'Connor, writing for the Court, created a new avenue for the enforcement of the new democratic norms through the use of the Guarantee Clause. Justice O'Connor wrote in relevant part:

> The view that the Guarantee Clause implicates only nonjusticiable political questions has its origin in *Luther v. Borden*. . . . This view has not always been accepted. In a group of cases decided before the holding of Luther was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were nonjusticiable. . . . More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. . . . *Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances. . . .*[104]

O'Connor's willingness to consider the influence of scholarship on the import of the Guarantee Clause is not significant as a policy

102. *See*, *e.g.*, JOYCE O. APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790'S (1984); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); Frank I. Michelman, *Traces of Self Government*, 100 HARV. L. REV. 4 (1984); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969).

103. 488 U.S. 1041 (1992).

104. *Id.*

change, but rather a more open admission of an often well-known, if understated, role of pressures from the greater society on the implementation of constitutional principles. This is increasingly apparent in the efforts of scholars to encourage the Court to revive the provision into a meaningful statement of federal or state authority, even if the scholars themselves cannot agree on what that authority should be. O'Connor's acknowledgment of this influence is not a great surprise, but unusual for its candor.[105]

While at the federal level the implications of this legal evolution are still being written, at the state level the courts have moved quickly to turn notions of direct democracy into constitutionally-protected principles. Any interpretation that relies upon the Constitutional design attempting to structurally constrain democratic whim, as was the clear intent of the drafters, has rapidly faded in state courts. For instance, in *Brooks v. Watchtower,*[106] a case before Florida's 4th District Court of Appeal, two parties vied over whether the sale of a city-owned auditorium could be the subject of a public vote. In attempting to convince the court that a disputed municipal ordinance authorizing the sale should be allowed to go to the people in a special election, Brooks claimed in part that "an attempt to halt a referendum strikes at the heart of the American democracy"[107] Elections are democratic; opposition to them is obviously counter to democracy and therefore un-American. This premise later was validated by the court, which ordered that a referendum be held. It noted that under U.S. and Florida Law, a referendum is so central to the American democracy that it should be permitted, except in exceptional circumstances such as clear fraud.[108]

Initially, it is noteworthy that the claim that referenda are central to American democracy goes unchallenged in the case. In fact, it is the appellant Brooks that makes reference to the Federalist Papers for support of the referendum.[109] What is apparent in the state of the case law is the utter negation of that former construct envisioned in the U.S. Constitution. The nation has gone from distrust to trust of popular decision-making without changing the

105. Alternatively, some have argued against this approach to constitutional interpretation. *See* ROBERT BORK, SLOUCHING TOWARDS GOMORRAH (1996).

106. 706 So.2d 85 (Fla. 4th DCA 1998) [hereinafter *Brooks*].

107. Appellant's Opening Brief at 4, *Brooks, supra* note 105.

108. *Brooks*, *supra* note 105.

109. Appellant's Opening Brief, *Brooks*, *supra* note 105.

form or structure of the Constitution itself. American democracy is about the input of the citizens; it no longer is about containing them. Further, this understanding is no longer confined to judicial fiat. It is an understanding that is now returned to the courts for adjudication under the guise of constitutional infringement.

Interestingly, courts continue to push this understanding through interpretation, even when the legislators or drafters are not willing to go as far. In Florida, courts have ruled that even written limitations on referenda are to be narrowly construed and largely are procedural guidelines that merely delegate to the legislative bodies the duty to determine the method by which a referendum can be submitted to the people.[110] A Florida appellate court in *Ennis v. Town of Lady Lake*[111] found such limitations do not permit the government to deny the people the right to have a referendum placed on the ballot.[112] In *Diaz v. Board of County Commissioners of Dade County*[113] (1980), the United States District Court for the Southern District of Florida denied a petition for a preliminary injunction to prevent a referendum vote on a proposed ordinance. The District Court explained its reasoning as follows:

> The judicial branch of government properly hesitates to prevent citizens from voting on matters raised by an exercise of the constitutional right to petition the government. To do otherwise would be to enter a political thicket studded with constitutional thorns. *The right to vote is the very essence of democracy*. A candidate or issue on the ballot should almost always stay there. Thus, an election may only be enjoined when an immediate and irreparable violation of constitutional rights could not otherwise be prevented.[114]

In the end, the Constitution, the populace and the elected branches of government, and the courts have reached a consensus.

110. Florida courts rarely enjoin elections, and when such an injunction is granted it is based upon very limited exceptions and on only the narrowest constitutional grounds, such as a conflict with a statute, invalid signatures, or language so confusing that a voter is deprived of notice as to his vote. *See*, *e.g.*, Rivergate Rest. Corp. v. Metro Dade City, 369 So.2d 679 (Fla. 3d DCA 1979).

111. 660 So.2d 1174 (Fla. 5th DCA 1995).

112. *Id.* at 1176.

113. 502 F. Supp. 190 (S.D. Fla. 1980).

114. *Id.* at 195 (emphasis added).

The Constitution defends the notion of popular sovereignty, direct democracy and mass public participation. This agreement was reached gradually as a result of changing society, the penetration of education and shifting understandings about the value of public discourse. It was accomplished through the judicial recognition and confirmation of the change with no effort made to rewrite a word of the Constitution itself.

VI. CONCLUSION

All state institutions engage with society and are affected by the perceptions that people have of their authority. The courts are perhaps the most transparent of institutions, as all of their actions occur in writing with some form of written justification. Whether interpreting intent or using analogy, the courts can find the meaning of a law or constitutional provision far from the original meaning of the provision, as is evidenced by the case law history of the Guarantee Clause. While courts do not stand alone in altering the meaning of the Constitution, they are an important element by which ideas can be brought and understandings slowly changed over larger time periods. This is part of the nature and function of courts in the United States.

The process itself may not produce immediate results,[115] but its power to conform public stimuli and modern public perceptions into the framework of a static and otherwise frozen construct is significant. Further, the case law demonstrates how people will use the language and understandings created by the judiciary to seek government redress. As the case of the Guarantee Clause demonstrates, people will regularly accept the shift authored by the courts and confirm and return that understanding to the state by using the very interpretations authored by the courts to petition those same courts. The altered understanding can become so settled that even the foundational documents such as the Federalist Papers can be read with this new focus,[116] and modern jurists have no understanding that anything has actually changed.

Using the example of the Guarantee Clause, the process by

115. For a discussion of the role of courts in enacting policy change, see Robert Dahl, *Decision-Making in a Democracy*: *The Supreme Court As a National Policy Maker*, 62 J. OF PUB. L. 1–33 (1957); GERALD ROSENBERG, HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1980); Michael W. McCann, *Reform Litigation on Trial*, 17 L. & SOC. INQUIRY 715 (1992).

116. *Eastlake,* 426 U.S. 672 (using Federalist No. 10 in defense of direct democracy).

which society and the state influence each other becomes clearer. The shift in the economic and cultural foundations of American society, which generated the progressive movement, was stimulus which caused a foundational change in how people perceived and understood the role of popular will in the constitutional structure. This in turn produced a movement of people to change the power structures of the government through elections, amendments and referenda. Litigants opposed to the new movement attempted to reject the changes by relying on the judiciary to restate the meaning of the Guarantee Clause as representing a restraining force on the power of public sovereignty. Courts not only rejected what was a fair interpretation of the Founder's meaning, but ultimately redefined the Constitution to support popular will and the role of the referendum in the U.S. system. The new understanding has penetrated so significantly into the modern perception of American democracy that litigants today petition the courts with the very language the judiciary originated in reshaping the focus and import of the Constitution itself. Society changed and this forced an institutional change which ultimately was adopted, digested and confirmed by the greater society in the use of the new understanding.

The process continues today, and will continue. Our readings and understandings of the various provisions of the Constitution will no doubt be different than subsequent generations. Evolution is never complete, and even the understanding of the role of popular will and referenda, which appear so well-settled today in our political system, will continue to evolve even as this is being written. Some scholars are calling for a revival of the limiting effect of the Guarantee Clause as a way to challenge initiatives which are popular, but may be seen to infringe on individual rights.[117] Ultimately, the courts will be forced to address such questions, and the Guarantee Clause may well mean something different in the future. As illustrated above, the judiciary does not work above the political discourse. Courts respond to the pressures of other government institutions. Even studies that are short in duration demonstrate that the courts are influenced by the popular issues and concerns of the people.[118]

117. Stein, *supra* note 23 (arguing for the use of the Guarantee Clause for pre-ballot review of initiatives that effect individual rights under the state constitution).

118. Political scientists have studied the influence of public opinion on the courts with mixed results, though it is clear that courts are at times influenced by popular ideas and movements. *See*, *e.g.*, Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209-–6 (1986); Charles H.

What has changed more recently is the willingness of leading judicial figures to concede that this is true. Modern courts openly admit being influenced by the scholarship of the time, even in the text of a decision. In her review of the Guarantee Clause, Justice O'Connor justifies shifting to a more active use of the provisions in part because of the "*contemporary commentators*" who have urged such a course of action.[119] Similarly, in *Roper v. Simmons,*[120] Justice Anthony Kennedy reversed himself and the U.S. Supreme Court on the death penalty for juveniles, noting that the nation had reached a consensus against the juvenile death penalty since the number of states that either have no capital punishment or do not allow it for offenders under 18 had risen to 30.[121] In this case, society itself has started to create meaning within the Constitution; one the Court openly felt compelled to follow, and by doing so, wrote a new meaning to what constitutes cruel and unusual punishment in the United States Constitution.

Where the meaning of the Guarantee Clause will go is unclear, with its meaning very much open to varying interpretations.[122] As noted above, there is a significant attempt to understand it as a means to allow the federal government to enforce basic norms of human or civil rights.[123] If this course is followed, the Guarantee Clause could become a powerful avenue for the growth of federal power, or even judicial power, to mandate to state governments their own rules of operation.[124] Yet, there are other possible avenues. Some proponents

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Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751–771 (1989); Richard Funston, *The Supreme Court and Realignment,* 69 AM. POL. SCI. REV. 795–811 (1975); HOWARD GILLMAN, THE ONLY VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION (2001); James H. Kuklinski & John E. Stanga, *Political Participation and Government Responsiveness: The Behavior of California Superior Courts*, 73 AM. POL. SCI. REV. 1090–1099 (1979); H.W. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

119. New York v. U.S., 505 U.S. 144, 185 (1992)

120. 543 U.S. 551, 112 S. W. 3d 397 (2005).

121. *Id.* at 555.

122. Legal scholars have suggested multiple avenues for Guarantee Clause jurisprudence. *See* G. Edward White, *Ira C. Rothberger, Jr. Conference on Constitutional Law: Guaranteeing a Republican Form of Government: Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. LAW REV. 787–806 (1994).

123. Chemerinsky, *supra* note 24.

124. Implications of a more vibrant Guarantee Clause are the subject of scholarly work. *See* Hardy Myers, *The Guarantee Clause and Direct Democracy*, 34 WILLAMETTE L. REV. 659–662 (1998); Jonathon K. Waldrop, *Rousing the Sleeping Giant? Federalism and the Guarantee Clause*, 15 J. L. & POL. 267–307 (1999); Louise Weinberg, *Ira C. Rothberger, Jr.,*

of the Guarantee Clause argue for its use as a means to protect a state's autonomy from federal encroachment.[125] The rationale for this assertion is that any republican government—as the states are guaranteed to have—cannot exist if the federal government is dictating policy to the states.[126]

As illustrated through the case law concerning the shifting meaning of the Guarantee Clause and the role of popular decision-making in our constitutional structure, society itself is constantly shifting and changing, and by doing so, it is forcing a similar, if delayed, change in the nature and function of the institutions that exist within the greater society. The ability of the courts to regularly reconcile this change with the language of the Constitution allows for the shifts to occur gradually without forcing huge and perhaps violent power shifts in the construct. The fact that the drafters of the Constitution itself were seeking a static structure allows for an image of stability amidst a sea of change. The U.S. Constitution's survival has depended on these informal amendments since our government and politics would not work as originally designed.

Conference on Constitutional Law: Guaranteeing a Republican Form of Government: Cases Under the Guarantee Clause Should be Justiciable, 65 U. COLO. L. REV. 887, 946 (1994).

125. Merritt, *supra* note 89.

126. *Id.* at 15–18.