



Summer 6-1-2003

Campaign Finance Reform: Central Meaning and a New Approach

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Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 Wash. & Lee L. Rev. 767 (2003).

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Campaign Finance Reform: Central Meaning and a New Approach

Mark C. Alexander*

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I. Introduction

Campaign finance reform protects the integrity of the American political-governmental process. But, campaign finance reform measures have not been analyzed with this understanding. The republican form of government—the heart of American governance—reflects a principle of power derived from the people. In the modern American republic, this power is entrusted to elected representatives in a central government, acting in the best interest of the people. The overwhelming power of money in the political process threatens this unique system of government. The states and federal government have responded to this problem with campaign finance reform, in order to reduce the power of money in politics, and to make candidates and elected officials more directly responsive to the people. Campaign finance reform thus can protect the republican form of government upon which the nation was founded.

The United States Constitution established a republican form of government and put it front and center. In addition to the republican structure of the federal government itself, the Guarantee Clause of the United States Constitution contains an affirmative obligation to ensure this form operates in the states: "The United States shall guarantee to every State in this Union a Republican Form of Government."¹ Particularly since 1849 and *Luther v. Borden*,² when the Supreme Court held Guarantee Clause claims to be nonjusticiable political questions, the Clause has been lost in a judicial vacuum.

1. U.S. CONST. art. IV, § 4.

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

But, the Courts should not treat the Guarantee Clause as a dead letter. While the Court has recused itself from enforcing the Clause, it has never held that the Clause is not a legitimate basis for congressional action. In fact, Congress has both the expertise and experience to enforce the Guarantee Clause and to resolve the political matters it implicates. Accordingly, this Article posits that Congress should enact campaign finance reform under its Guarantee Clause mandate to protect the republican form of government in the states.³ By invoking the Guarantee Clause, this Article proposes a new way to approach the debate over campaign finance reform, based upon Congress's Guarantee Clause obligation. It ultimately proposes that Congress enact a law enabling the states to pass measures to limit the influence of money in politics. The ideal is to adjust the focus of politicians and the balance of power, from the few with access to big money, to the many, the people.

But, there are restrictions on legislating in this area. The First Amendment, as applied by the Supreme Court in *Buckley v. Valeo*,⁴ limits governments' ability to enact campaign finance reform measures, typically requiring such laws to survive strict scrutiny.⁵ While the debates about

3. In a related vein, last year the Congress passed the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 18, 28, 36, 47 U.S.C.) [hereinafter BCRA]. The BCRA is also known as the Shays-Meehan or McCain-Feingold bill. The BCRA eliminates soft money fundraising and spending for candidates by national political parties. BCRA § 101(a). (As compared with "hard money," which is regulated under contribution limits and designated for particular candidate accounts, soft money is unregulated cash that goes to unlimited activities.) The BCRA also increases individual contribution limits, and it increases the allowance of contributions for nonwealthy candidates who are opposed by wealthy candidates who use their private wealth to fund their campaign. *Id.* § 319(a). The BCRA also restricts "electioneering communications," prohibiting all corporations (including those that are tax-exempt) from paying for ads that mention federal candidates within 60 days of a general election (or within 30 days of a primary). *Id.* § 201(a). The law also increases the contribution limits on individual contributions of hard money to campaigns. *Id.* § 307. BCRA includes an expedited judicial review provision, *id.* § 403(a), and it has been challenged in the U.S. District Court for the District of Columbia in *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176 (D.D.C.), *cert. granted*, 123 S. Ct. 2268 (2003). The three-judge panel found some parts of BCRA constitutional and others unconstitutional, but the decision was widely split between the judges, with no clear majority. The Supreme Court heard oral argument on the case on September 8, 2003. *Fed. Election Comm'n v. McConnell*, 123 S. Ct. 2268 (2003).

The law nominally regulates state-level activities, only regulating state and local fundraising directed toward *federal* election activities. BCRA § 101(a). The law amends the prevailing federal statute and regulates exclusively federal election activities—and not the states. Further, in passing this legislation, the Congress did not act explicitly or implicitly under the Guarantee Clause. Accordingly, this Article does not contain any further discussion of this new legislation.

4. *Buckley v. Valeo*, 424 U.S. 1 (1976).

5. *Id.* at 16.

campaign finance reform and *Buckley* have never considered the Guarantee Clause mandate to protect states' republican forms of government, Congress's invocation of the Guarantee Clause in passing campaign finance reform does not make the First Amendment concerns disappear. We need to reconcile the Guarantee Clause's affirmative obligation upon Congress with free speech concerns. This Article will show that when the new balance is struck, the Guarantee Clause mandate to preserve the republican form of government shifts the present balance against restrictions on campaign expenditures and validates reasonable reform efforts. Such analysis concludes that acting to protect the republican form of government, a duty imposed upon Congress by the Constitution itself, can satisfy strict First Amendment scrutiny under *Buckley*.

This Article proceeds in four stages. Part II considers the meaning of the Guarantee Clause itself, identifying popular sovereignty as the core of the republican form of government. This Part further highlights the role of representatives, acting in the best interest of the people, as central in this system. Part III details the interpretation and enforcement of the Guarantee Clause. We first will see that the courts have declined to interpret the political questions raised under the Clause, thus leaving the obligation to the Congress. Beyond that, this Part will show that Congress has both the expertise and the experience to enforce the Guarantee Clause mandate.

With the meaning of the Clause and its method of enforcement elucidated, the Article next presents our specific problem: Big money in the political process results in an elected government primarily responsive to the few and not to the many. Part IV therefore looks at efforts to achieve campaign finance reform and how they have fared in the courts. This discussion naturally starts with *Buckley* and its progeny, followed by a review of state reform efforts. While many states and localities have attempted to preserve the responsiveness of government to the people, many campaign finance reform efforts have run aground on the shoals of *Buckley*. In Part V, the Article presents a plan of action. Pursuant to its Guarantee Clause mandate, Congress should pass a statute enabling the states to engage in meaningful campaign reform to limit the influence of money in politics. Such action would protect the republican form of government in the states. The proposal does not so much challenge *Buckley* as throw additional weight into the balance struck by the Court there, which requires campaign reform to serve a compelling governmental interest for it to survive a constitutional challenge. The constitutional mandate to preserve the republican form of government in the states would shift the conclusion reached in *Buckley* and its progeny: This campaign reform would survive constitutional scrutiny.

These two areas—the Guarantee Clause and campaign finance reform—are fairly static, albeit for different reasons. Approaching campaign finance reform from the Guarantee Clause perspective will animate a debate that has been stultified by using a central constitutional provision that has been unnecessarily moribund.

II. The Guarantee Clause and the Essence of the American Republic

This Part explores the Guarantee Clause itself, revealing that in a republic the power derives from the people.⁶ In the republic created by the Framers, popular sovereignty is effectuated by representatives in government. The voters elect their representative, who is to use his or her best judgment to represent the entire community. Elected community representation thus is central to the Guarantee Clause.

The first three Articles of the Constitution establish and define the Legislative, Executive and Judicial branches—the structure of government itself.⁷ Relatively little attention has been paid to Article IV, Section 4, which contains the key description, "Republican." This provision further offers a command that, coupled with the republic established in the previous three articles, promised that the entire nation—federal and state governments—always would be republican.⁸ Thus, by its own terms the Guarantee Clause promised that the national government would ensure that the states maintain a form of government consistent with that which the Constitution created for the

6. See, e.g., THE RANDOM HOUSE COLLEGE DICTIONARY 1121 (5th rev. ed. 1984) (defining a republic as "a state in which the supreme power rests in the body of citizens entitled to vote and is exercised by representatives chosen directly or indirectly by them").

7. The three branches of government and the resulting checks and balances are also important to republican government, but legislative, executive and judicial powers were not, in and of themselves, new. The Framers went beyond these pre-existing structures to create a new type of government—a republic. Nonetheless, the Guarantee Clause speaks to the structure and form of representative government, as reflected in its textual placement. See also Ann Althouse, *Time for the Federal Courts to Enforce the Guarantee Clause?—A Response to Professor Chemerinsky*, 65 U. COLO. L. REV. 881, 881, 883 (1994) (arguing that "Professor Chemerinsky must work hard to coax the Guarantee Clause out of the category of constitutional provisions relating to the structure of government and into the individual rights category" and that "the Guarantee Clause is what the majority of scholars have taken it to be, a structural safeguard").

8. One practical reason for the Guarantee Clause was far clearer at the time of the Constitutional Convention than it is today. As originally created, the United States Senate was chosen by the legislatures of the respective states. U.S. CONST. art. I, § 3, cl. 1. This structure was altered by a constitutional amendment that furthered the popular sovereignty notion by making Senators subject to popular election. U.S. CONST. amend. XVII, § 1. But the reality of state legislative involvement in the selection of the key chamber in the new national government gave the United States a vested interest in the forms of state government.

national government. No specific requirements were laid out, but the commitment was clear in the words: "The United States shall guarantee to every State in this Union a Republican Form of Government."⁹

Before the United States can fulfill its Guarantee Clause mandate, it must identify what is protected. Although the Guarantee Clause makes a powerful declaration of the United States promise to the states, the term "republican" is not further defined in the text. The Framers discussed the matter but reached no agreement on its meaning at the time¹⁰ or what it might mean in the future.¹¹ In addition to reviewing the Framers' ideas, we will explore constitutional history, executive branch determinations, judicial interpretations, and scholarly opinion in the area. Such a review will show that, while there are many perspectives, the republic serves the people via representatives exercising their best judgment in a central government.¹²

This exploration begins in the founding era. The Framers worked out the new government by reviewing, accepting and rejecting other principles of governance from history and their present-day experience. The new government incorporated ancient historical lessons,¹³ more recent trends in

9. U.S. CONST. art. IV, § 4.

10. WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 13 (1972) ("Thus the word 'republican' may well not have had any single and universal denotation to the men who inserted it into the guarantee clause. It may, in fact, have had no meaning at all."). As discussed in this Part, although the concept of a republic is capacious and hard to define with absolute precision, it is hardly devoid of meaning.

11. In 1807 John Adams wrote: "I confess I never understood it, and I believe no man ever did or ever will." Letter from John Adams to Mercy Warren, July 20, 1807, in 4 *COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY* 332, 353 (Boston, The Society, 5th ser. 1878). See also WIECEK, *supra* note 10, at 72 ("In 1787 no man could predict with certainty how the clause would evolve.").

12. One argument is that the very indeterminate nature of the term and the lack of clarity when the Constitution was written suggest a varying meaning with varying times. See, e.g., G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 803 (1994) (arguing that the varied interpretations of the Guarantee Clause show that "it has been whatever a dominant group of interpreters, at any one point in time, has chosen to make of it"). But, as it tries to assign clearer meaning to the Clause, this Article contrasts with White's position.

13. See, e.g., *THE FEDERALIST* NO. 18, at 122 (James Madison with Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Among the confederacies of antiquity the most considerable was that of the Grecian republics, associated under the Amphictyonic council. From the best accounts transmitted of this celebrated institution it bore a very instructive analogy to the present Confederation of the American States."); JOHN ADAMS, *A Defence of the Constitutions of Government of the United States of America*, in *THE POLITICAL WRITINGS OF JOHN ADAMS* 121 (George A. Peek ed., 1954) [hereinafter ADAMS, *Defence*]. Adams wrote:

Nothing ought to have more weight with America to determine her judgment against mixing the authority of the one, the few, and the many confusedly in one assembly than the widespread miseries and final slavery of almost all mankind in consequence of such an ignorant policy in the ancient Germans.

governance,¹⁴ and a mixed view of the system in England.¹⁵ In designing a new governmental structure, the Framers specifically rejected two forms, monarchy and aristocracy.¹⁶ For example, in the Constitutional Convention, Edmund Randolph expressed the belief that "a republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy."¹⁷ In the ratification debates in Pennsylvania, James Wilson argued that there are but three forms of government: Monarchy, aristocracy and a republic or democracy, but as the only form that left power in the hands of the people, only the last was suitable for the new nation.¹⁸ Thomas Paine pointedly distinguished the new

Id.; THE FEDERALIST NO. 9, at 71 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton argued:

It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy.

Id.

14. See, e.g., THE FEDERALIST NO. 14, at 100 (James Madison) (Clinton Rossiter ed., 1961) ("[E]ven in modern Europe, to which we owe the great principle of representation, no example is seen of a government wholly popular and founded, at the same time, wholly on that principle."); THE FEDERALIST NO. 39, at 240 (James Madison) (Clinton Rossiter ed., 1961). Madison wrote:

What, then, are the distinctive characters of the republican form? . . . Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised in the most absolute manner by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation.

Id.; JOHN ADAMS, *Novanglus; or a History of the Dispute with America, from Its Origin, in 1754, to the Present Time*, in THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 147, 226 (C. Bradley Thompson ed., 2002) [hereinafter ADAMS, *Novanglus*] ("The governments of France, Spain, etc., are not empires but monarchies . . . The British government is still less entitled to the style of an empire. It is a limited monarchy.").

15. See, e.g., THE FEDERALIST NO. 39, at 240–41 (James Madison) (Clinton Rossiter ed., 1961) ("The government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has with equal impropriety been frequently placed on the list of republics.").

16. For example, John Adams compared the new American republic with monarchies and aristocracies, looking to ancient Greek and Roman government, as well as more recent aristocracies in Holland, Venice, and Berne. See ADAMS, *Defence*, *supra* note 13, at 109–12, 119–21; ADAMS, *Novanglus*, *supra* note 14, at 226–27.

17. 1 THE RECORDS OF THE FEDERAL CONVENTIONS OF 1787, at 206 (Yates, 11 June) (Max Farrand rev. ed., 1966) [hereinafter FARRAND'S RECORDS].

18. 2 THE DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 433 (James Wilson) (Philadelphia, J.B. Lippincott & Co., Jonathan

government from a monarchy, even citing a scriptural example in which monarchy was viewed as sinful, because it subordinated God's ultimate rule.¹⁹ While helpful to rule out other forms, the new republic²⁰ could not be adequately defined through such comparisons.

As the new system defied easy labeling, the Framers sought common understandings, consistently emphasizing the power of the people. Perhaps most famously, in *Federalist 39*, Madison wrote:

[W]e may define a republic to be, or at least may bestow that name on, 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 It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people²¹

The Framers believed that in the republic the people are supreme and self-governing.²²

Elliot ed., 2d ed. 1881) [hereinafter ELLIOT'S DEBATES]. Wilson stated:

There are three simple species of government—monarchy, where the supreme power is in a single person; aristocracy, where the supreme power is in a select assembly, the members of which either fill up, by election, the vacancies in their own body, or succeed to their places in it by inheritance, property, or in respect of some *personal* right or qualification; a republic or democracy, where the people at large *retain* the supreme power, and act either collectively or by representation.

Id. Charles Pinckney made the same point and offered the same subsequent arguments, in strikingly similar language, in the South Carolina Convention. 4 ELLIOT'S DEBATES, *supra* at 328 (Charles Pinckney). See also Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 758 (1994) ("In debates over the Constitution, republican government was regularly contradistinguished from monarchy and aristocracy, but rarely from democracy.").

19. THOMAS PAINE, COMMON SENSE (1776), reprinted in 2 THE LIFE AND WORKS OF THOMAS PAINE 93, 110–14 (William M. Van der Weyde ed., Patriots' ed. 1925), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch4s4.html>. Paine also looked at the English system in search of an apt comparison. *Id.* at 102–07.

20. The operational specifics of the new national government were delineated in the rest of the Constitution, particularly Articles I, II, and III. The republican form, however, is capacious and can take various shapes.

21. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

22. As Thomas Jefferson once observed, "we . . . consider the people as our children, and love them with parental affection. But you love them as infants whom you are afraid to trust without nurses; and I as adults whom I freely leave to self-government." Letter from Thomas Jefferson to P.-S. DuPont de Nemours (Apr. 24, 1816), in THOMAS JEFFERSON, POLITICAL WRITINGS 290, 292 (Joyce Appleby & Terence Ball eds., 1999) [hereinafter JEFFERSON, WRITINGS]. See also CHARLES S. HYNEMAN, THE AMERICAN FOUNDING EXPERIENCE, POLITICAL COMMUNITY AND REPUBLICAN GOVERNMENT 146 (Charles E. Gilbert ed., 1994) ("Government

Although the people are the source of power, they need not directly participate in the administration of the republican government.²³ The Framers understood that the Constitution was establishing a system that was to govern the affairs of a large number of people across an expansive geographical area with limited means of communication.²⁴ A central government of elected representatives could conveniently bring the divergent views of the thirteen original states together for the developing national government.²⁵ Accordingly, the national government they designed was a republic that did the people's business via representatives in the central government. Madison discussed this characteristic in *Federalist 14*: "[I]n a democracy the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives."²⁶ Jefferson concurred: "[A] government is republican in proportion as every member composing it has his equal voice in the direction of its concern (not indeed in person, which would be impracticable beyond the limits of a city, or small township, but) by representatives chosen by himself"²⁷

of the people, by the people, and for the people was cited above as the ground-level principle of republican government in the mind of John Adams. Implied in that goal is a supposition that the people will be worthy of self-government."). In addition, Madison wrote: "It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government." *THE FEDERALIST NO. 39*, at 240 (James Madison) (Clinton Rossiter ed., 1961). See also *supra* note 18 (discussing the Framers' view of a republic as the most suitable governing structure).

23. In self-governing, problems arise, primarily in regard to questions of control, authority and ability to function. Madison commented:

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

24. See *THE FEDERALIST NO. 14*, at 100–02 (James Madison) (Clinton Rossiter ed., 1961) (discussing the relative size of the Union). See also *THE FEDERALIST NO. 10*, at 82 (James Madison) (Clinton Rossiter ed., 1961) (observing that one of the two great differences between a democracy and a republic is "the greater number of citizens and greater sphere of country over which the latter may be extended"). Also note that as the nation's population approaches 300 million, and states have many millions of residents themselves, these concerns are all the more present.

25. See *THE FEDERALIST NO. 10*, at 82 (James Madison) (Clinton Rossiter ed., 1961) (discussing the effect of "the delegation of the government . . . to a small number of citizens elected by the rest").

26. *THE FEDERALIST NO. 14*, at 100 (James Madison) (Clinton Rossiter, ed., 1961).

27. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *JEFFERSON*,

The national republic placed the trust of the people in the hands of a federal government that would serve the people. The House was directly elected;²⁸ while both the Senate and the President were indirectly elected (the Senate by state legislatures²⁹ and the President by the Electoral College³⁰), the mechanism was consistent with Madison's notion that it is sufficient that "the persons administering it be appointed, either directly or indirectly, by the people."³¹ The Supreme Court was at the furthest remove, but still was composed of jurists appointed by the President³² (who had been elected by representatives chosen indirectly by the people through the Electoral College), and consented to by the Senate³³ (which had been elected by state legislatures chosen by the people). The people could reign supreme without surrendering their daily lives, and the government could function without the gridlock of every citizen's individual participation. Although the people cede power to their representatives, they retain the leverage of holding their representatives accountable at the ballot box.³⁴ These early voices demonstrate the central

WRITINGS, *supra* note 22, at 210, 211. Thus, the republic was an apt form of government, for reasons of geography, or even practicality as well.

28. See U.S. CONST. art. I, § 2, cl. 1 (providing for popular election of Representatives).

29. U.S. CONST. art. I, § 3, cl. 1. Via constitutional amendment, Senators are now directly chosen. U.S. CONST. amend. XVII.

30. U.S. CONST. art. II, § 1; U.S. CONST. amend. XII.

31. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

32. See U.S. CONST. art. II, § 2, cl. 2 (establishing the President's appointment power, with Senate's "Advice and Consent").

33. *Id.*

34. Plus, a supermajority of the people (no small feat to assemble) has the power to amend the Constitution itself. See U.S. CONST. art. V (providing for proposal of an amendment by two-thirds of both Houses or State legislatures and ratification by three-fourths of the proposing group); see also THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness . . .").

Speaking to this point, Alexander Hamilton believed that "[t]he people remained 'sovereign' only through the carefully guarded and complex machinery of election." GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 53 (1970). Madison added: "The genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people by a short duration of their appointments; and that even during this short period the trust should be placed not in a few, but a number of hands." THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961). See also THE FEDERALIST NO. 49, at 313-14 (James Madison) (Clinton Rossiter ed., 1961). Madison argued:

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their

importance of popular sovereignty³⁵ and the Framers' desire to create a system of government in which the power derived from, and remained in the hands of, the people.³⁶

A few court opinions have addressed this question,³⁷ and they have echoed the importance of the representative serving the best interests of the people. In *In re Duncan*,³⁸ for example, the Supreme Court observed that the republican

power, is derived, it seems strictly consonant to the republican theory to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others.

Id.

35. The North Carolina debates also provide an example of the emphasis placed on the power of the government deriving from the people. 4 ELLIOT'S DEBATES, *supra* note 18, at 9–11. See *id.* at 11 (Iredell) (referring "to a government where the people are avowedly the fountain of all power"); *id.* at 10 (MacLaine) ("The people here are the origin of all power.").

36. The Constitution's commitment to a republican form of government in the states is also manifested in the provisions of Articles I and II regarding elections. Article I, Section 4 provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof. . . ." U.S. CONST. art. I, § 4, cl. 1. Article II, Section 1 similarly states that "Each State shall appoint, in such Manner as the Legislature thereof may direct," the Electors for presidential elections. U.S. CONST. art. II, § 1, cl. 2.

A more recent perspective illustrates popular sovereignty's place at the heart of the republican form of government, and therefore the Guarantee Clause. A Department of Justice memorandum prepared for the Attorney General and President Franklin D. Roosevelt considering the meaning of the Guarantee Clause observed that "[t]he distinguishing feature of a republican form of government is the right of the people to choose their own officers for governmental administration." Memorandum from Alexander Holtzoff, Department of Justice, Washington, D.C., to the Attorney General 2 (Apr. 12, 1935) (on file with the Franklin D. Roosevelt Library). This memo was prepared "in relation to the present situation existing in Louisiana," *id.* at 1, namely, President Roosevelt's conflict with Sen. Huey Long generally, and specifically over Long's desire for full control over the spending of federal dollars in Louisiana. "The President even wondered for a time whether the constitutional guarantee to states of a republican form of government might not serve as a basis for action against Long. A memorandum from Alexander Holtzoff of the Justice Department pointed to the ambiguities of the constitutional provision and killed the idea." ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT, THE POLITICS OF UPHEAVAL* 250 (1960).

The recent disputes in both *Bush v. Gore*, 531 U.S. 98 (2000), and the New Jersey Senate election case, *New Jersey Democratic Party, Inc. v. Samson*, 814 A.2d 1035 (N.J. 2002), have focused attention on the meaning of "Legislature" in these provisions. Although these provisions were not the basis for resolving these matters, they raised strong arguments that the Framers intended to limit the role of the state executive and judicial branches to ensure that the most representative branch of state government controlled the selection of federal officials, whether Electors or Senators.

37. The courts have only infrequently explored the meaning of the Guarantee Clause. For further explication, see *infra* Part III.A.

38. *In re Duncan*, 139 U.S. 449 (1981).

form of government is distinguished by "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves."³⁹ The Court also recounted some of the argument in *Luther v. Borden*,⁴⁰ to the effect that "the people are the source of all political power, but that as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage."⁴¹ A more contemporary perspective from a New York court reflects the same essential understanding: "The republican form of government guaranteed by the Constitution 'contemplates representative government' and . . . the distinguishing feature of a republican form of government is the 'right of the people to choose their own officers for governmental administration . . .'"⁴²

In the last ten years, the Guarantee Clause has received increased scholarly attention⁴³ and calls for its resurrection.⁴⁴ But while scholars offer different perspectives and pursue different agendas, popular sovereignty is consistently believed to be at the core of the republican form of government.⁴⁵ The republic serves the best interest of the people;⁴⁶ by the design of the government itself,

39. *Id.* at 461.

40. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). For a discussion of *Luther*, see *infra* Part III.A.1.

41. *Duncan*, 139 U.S. at 461.

42. *LaValle v. Hayden*, 696 N.Y.S.2d 782, 791 (N.Y. App. Div. 1999) (challenging the constitutionality of a New York law allowing the selection of University Regents by alternative joint ballot in a unicameral legislature) (citations omitted).

43. William Wiecek spurred a renewed interest when he exhaustively examined the Guarantee Clause in 1972, but there was little interest for two decades after that. WIECEK, *supra* note 10. Most recently, the University of Colorado sponsored a symposium on the issue, which generated a spate of articles printed in its law review. 65 U. COLO. L. REV. 708–946 (1994).

44. Erwin Chemerinsky urged: "[I]t is time to resurrect the Guarantee Clause . . . Once awakened, the Guarantee Clause can provide the basis for the Court to address fundamental questions about American government. What is a republican form of government?" Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 879–80 (1994).

45. See Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815, 816 (1994) [hereinafter Merritt, *Republican Governments*] ("Most scholars would agree that a republican government is, at the very least, one in which the people control their rulers.")

46. William Wiecek wrote that popular sovereignty was a reflection of the principle "that government is founded on the consent of the governed and therefore should reflect the will of the people. Frequently this phrase was merely a rhetorical flourish, but even when so used it implied that the people are the source of all power." WIECEK, *supra* note 10, at 22–23. Further: "What began simply as a revulsion, grounded in experience and necessity, against rule by kings

the people rule.⁴⁷ To understand how the people truly remain sovereign, we next must consider the people's voice: the representative.

A republic in the form of a central government—such as the one we see in Washington, D.C.—depends upon the representative to act in the best interest of the people and the nation. Although a republic is "a government in which the scheme of representation takes place,"⁴⁸ that does not mean that the representative will vote the specific will of each constituent in every vote—that is impossible. But it does mean that large numbers of people are to be represented by an individual who will exercise his or her best judgment on their behalf in the daily process of governance.⁴⁹ The representative owes his or her best judgment, on behalf of the community.⁵⁰

became transformed into a pledge of popular government." *Id.* at 62.

47. Akhil Amar has argued forcefully about the importance of popular sovereignty in the American system. "The central pillar of Republican Government, I claim, is popular sovereignty. In a Republican Government, the people rule What it does require is that the structure of day-to-day government—the Constitution—be derived from 'the People'" Amar, *supra* note 18, at 749. Christian Fritz has offered a thorough exploration of popular sovereignty as both "the dynamic concept that underlay[s] the American Revolution" and "the central challenge to Americans in establishing republican governments." Christian G. Fritz, *Alternate Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 288–89 (1997). He also wrote that "Americans were both united in accepting popular sovereignty as the foundational principle of their governments and divided over how to implement the principle." *Id.* at 289. James Gardner has argued that our Constitution is based on a Lockean concept of popular sovereignty, in which individuals band together for mutual security and advantage, surrendering the natural right to self-rule to the collective. The government is an agent of the people, exercising powers delegated to it by them. James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 201–03 (1990). In addition, one group has explained:

"We the People . . . do ordain and establish this Constitution." These words are contained in the Constitution's Preamble and give expression to the doctrine of popular sovereignty, or rule by the people. The Constitution's Framers crafted a governing document, which they submitted for popular ratification, based on the conception that ultimate political authority resides not in the government or in any single government official, but rather, in the people. "We, the People" own our government, but under our representative democracy, we delegate the day-to-day governing powers to a body of elected representatives. However, this delegation of powers in no way impairs or diminishes the people's rights and responsibilities as the supreme sovereign. The government's legitimacy remains dependent on the governed, who retain the inalienable right to alter or abolish their government or amend their Constitution.

NATIONAL CONSTITUTION CENTER, POPULAR SOVEREIGNTY, at <http://www.constitutioncenter.org/explore/OriginsoftheConstitution/ConstitutionBasics/PopularSovereignty.html> (last visited June 21, 2003).

48. THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961).

49. Adams observed that the "Representative Assembly . . . should be in miniature, an

The development of this aspect of the republic is instructive. In early English representative governments, elected representatives were chosen to represent the people of an area, not any particular special interest.⁵¹ Toward that end, the Framers hoped their new system of government would attract individuals of the utmost noble spirit, moved by the good of the country.⁵² "The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse . . ."⁵³ The experiment in the United States of America thus was designed to effect more than local elected representation,⁵⁴ but also to ensure that representatives consider the

exact portrait of the people at large. It should think, feel, reason, and act like them." JOHN ADAMS, THOUGHTS ON GOVERNMENT (Apr. 1776), *reprinted in* 4 PAPERS OF JOHN ADAMS 86, 87 (Robert J. Taylor et al. eds., 1979), *available at* <http://press-pubs.uchicago.edu/founders/documents/v1ch4s5.html>.

50. In a letter to Thomas Jefferson, James Madison wrote: "In the extended Republic of the United States, The General Government would hold a pretty even balance between the parties of particular States, and be at the same time sufficiently restrained by its dependence on the community, from betraying its general interests." Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 THE PAPERS OF JAMES MADISON 206, 214 (Robert A. Rutland et al. eds., 1977), *available at* <http://press-pubs.uchicago.edu/founders/documents/v1ch17s22.html>. At times, the representative will have to exercise best judgment as to a specific issue that has a direct impact on the local community; other times, the representative will vote on the good of the nation-state.

51. See EDMUND S. MORGAN, INVENTING THE PEOPLE, THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 41 (1988) ("[I]n England and America . . . the community was geographically defined. It was the Isle of Kent or the borough of St. Mary's; it was Shropshire or Staffordshire, Norwich or Bristol; it was never the worshipful company of grocers or cordwainers, never the tobacco farmers' union or the association of shipowners."). Morgan further described the landed gentry who served early English Parliament: "Whatever their powers might be, at home or abroad, they sat at Westminster as representatives, not of their class, but of localities." *Id.* at 42.

52. Charles Pinckney also argued that it is important for representatives in the national government to put the common good ahead of provincial concerns. See 4 ELLIOT'S DEBATES, *supra* note 18, at 331–32 (discussing the relative strength of the nation as a whole versus the weaknesses of individual states).

53. THE FEDERALIST NO. 71, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Framers also knew that human nature being as it is, some would act out of self-interest, but such ambition would be held in check by the operation of factions in government. See THE FEDERALIST NO. 10, at 80–81 (James Madison) (Clinton Rossiter ed., 1961) (considering the causes and effects of factions).

54. In the American political system, power was exercised by "representatives chosen by [the people] either mediately or immediately and legally accountable to them." Alexander Hamilton's Notes for his speech of July 12, 1888 at the New York Ratifying Convention, *in* 5 THE PAPERS OF ALEXANDER HAMILTON 149, 150 (Harold C. Syrett & Jacob E. Cooke eds., 1962). See also STOURZH, *supra* note 34, at 49 ("Though the term 'representative democracy' is

broader interests of the collective nation.⁵⁵ For example, Edmund Burke wrote: "Your representative owes you, not his industry only, but his judgment . . ." ⁵⁶ James Wilson opined: "Permit me to proceed to what I deem another excellency of this system: All authority, of every kind, is *derived by REPRESENTATION from the PEOPLE, and the DEMOCRATIC principle is carried into every part of the government.*" ⁵⁷ Representatives were considered central in the form of government that would carry out the will of the people.

In various contexts, the Court has spoken to the importance of representation. *Reynolds v. Sims*⁵⁸ provides a particularly well-known example:

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.⁵⁹

Some of the modern redistricting cases echo the importance of community representation. For example, in *Shaw v. Reno*,⁶⁰ the Court confronted the issue

commonplace in our day, it was novel then, and Hamilton, who as early as 1777 had referred to the government of New York State as a representative democracy, was among the first, if not the first, to use it."). Hamilton also had a simpler conception based on separation of powers. "This plan was in my conception conformable with the strict theory of a Government purely republican; the essential criteria of which are that the principal organs of the Executive and Legislative departments be elected by the people and hold their offices by a *responsible* and temporary or *defeasible* tenure." 3 FARRAND'S RECORDS, *supra* note 17, at 398.

55. To help achieve these goals, and to prevent against aristocratic tendencies, the representatives would be chosen from the many, not the few. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961). As Madison wrote:

[W]e may define a republic to be, or at least may bestow that name on, 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

Id.

56. 2 EDMUND BURKE, WORKS 95 (Cambridge, University Press: Welch, Bigelow, & Co. 1866). Thomas Paine discussed the need to "leave the legislative part to be managed by a select number chosen from the whole body, who are supposed to have the same concerns at stake which those have who appointed them, and who will act in the same manner as the whole body would act were they present." PAINE, *supra* note 19, at 97.

57. 2 ELLIOT'S DEBATES, *supra* note 18, at 482 (James Wilson).

58. *Reynolds v. Sims*, 377 U.S. 533 (1964).

59. *Id.* at 562.

60. *Shaw v. Reno*, 509 U.S. 630 (1993).

of race-conscious redistricting and "majority-minority" congressional districts. In so doing, the Court worried that with race-based districting, "elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy."⁶¹ Similarly, some of the recent federalism cases reflect the principle that the elected representative serves the people and owes them his or her best judgment in service.⁶² In these various ways the importance of representatives is stressed in the case law.

In sum, elected representatives in a republic serve the people by exercising their best judgment on behalf of the people of their community, not the special interests of the few or self-interest.⁶³ The representative is an agent of the

61. *Id.* at 648. Justice O'Connor's concurrence in *Bush v. Vera* reiterated this theme, expressing the need for community members to have equal power and not to be limited in their political participation. *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring). Justice O'Connor wrote of her concern with situations in which "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [e.g., a racial minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* (O'Connor, J., concurring) (alteration in original) (quoting 42 U.S.C. § 1973(b)).

62. In *Printz v. United States*, for example, the Court rejected a federal gun control statute because of a concern that the state chief law enforcement officer (CLEO) would be held accountable for the impact of a federal enactment. *Printz v. United States*, 521 U.S. 898, 920 (1997) ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."). At the same time, the elected representative who made the initial policy decision would be insulated from being directly responsive to the community he or she represents. The Court worried that, funding issues aside, with such laws the states would still be "put in the position of taking the blame for its burdensomeness and for its defects. Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun." *Id.* at 930 (citation omitted). The Court declared that the federal government may not commandeer the state government; such interference with the relationship between the people and the states would prevent the state government from being responsive to its citizens. *Id.* at 932-33.

Further, according to Deborah Jones Merritt: "If Congress tells state legislatures to enact a particular law, and the states must comply, then the state legislatures become slaves of an outside power rather than servants of their electorate." Merritt, *Republican Governments*, *supra* note 45, at 816. While disagreeing with her perspective that the states need greater protection from the federal government and that the Guarantee Clause only serves that limited role, this Article shares Professor Merritt's concern that representatives must be responsive servants of the people.

63. Madison also addressed this problem and factions in FEDERALIST 10: "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote." THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).

people, acting in their best interest, but not as a mindless puppet.⁶⁴ Through the debate among representatives offering their best judgment and the consequent resolution of problems,⁶⁵ the central government serves the people.

This Part has shown that popular sovereignty lies at the heart of the American republic and the Guarantee Clause, and that the republic is predicated on the responsibilities of the representative to the people of the community and the nation as a whole. But, as we will see in Part IV, elected representatives today are often beholden to campaign cash, placing the special interest of the few ahead of the best interests of the many.⁶⁶ In that context, we will see that campaign finance reform thus can ensure the vitality of the

64. In discussing this idea, William Wiecek wrote:

Popular sovereignty . . . led to the "agency" concept of government: the people are the principles, their elected representatives the agents chosen to carry out the popular will This did not mean that representatives were to be merely mouthpieces for whatever a numerical majority believed at any one time, but rather that, in the long run, the elected officials, exercising their independent judgment, would reflect what most enfranchised citizens wanted most of the time.

WIECEK, *supra* note 10, at 23.

65. Republican revival and deliberative democracy theorists also have emphasized the importance of the collective debate by representatives. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1554 (1988) ("The republican commitment to universalism amounts to a belief in the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue."); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 293 (1989) ("Deliberative politics connotes an argumentative interchange among persons who recognize each other as equal in authority and entitlement to respect, jointly directed by them towards arriving at a reasonable answer to some question of public ordering"). Still others focus on the importance of this debate. See Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 461 (1989) ("Constitutional republican politics is, then, a paradigmatic case of the link between psychological and political order: It is a political form in which deliberation can become the basis for effective political choice."); Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2479 (1997) ("Democracy not only vests the choice of government officials in the citizens, it also presupposes that the citizens' choices will be informed. Only then are the people engaged in legitimate self-governance."). In the specific context of the Guarantee Clause, Oregon Supreme Court Justice Hans Linde has suggested that representative government and debate are at the heart of the republic: "The Guarantee Clause did not forbid state laws based on interest or passion or prejudice. It demands deliberation by responsible representatives to contain these motives and to cool what the Supreme Court, explaining the guarantee of republican government in 1891, called 'the impulses of mere majorities.'" Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 725 (1994) (citing *In re Duncan*, 139 U.S. 449, 461 (1891)). See generally Hans A. Linde, *On Reconstituting "Republican Government"*, 19 OKLA. CITY U. L. REV. 193 (1994) (arguing that state judges have a larger role to play in this debate and that initiatives and referenda threaten republican governance).

66. Part IV.B.1-2, *infra*, focuses particularly on this point.

republican form of government. Before making that connection, Part III discusses how the Clause has been enforced and interpreted, examination of which will reveal deference in the courts and a strong role for Congress.

III. Guarantee Clause Interpretation and Enforcement

The courts have left Guarantee Clause enforcement to Congress by holding such cases to be nonjusticiable political questions, better left to the experience and capabilities of Congress. This Part proceeds first by examining the Guarantee Clause in court; next by reviewing congressional action; and finally by concluding that Congress bears the responsibility to enforce the Guarantee. We will then more clearly understand that Congress must assist the states in protecting the republican form of government, a task that can be accomplished through campaign finance reform.

A. The Guarantee Clause—A Closed Door

This exploration of Guarantee Clause interpretation and enforcement begins in the courts, where analysis is sparse and mostly limited to declaring Guarantee Clause matters to be nonjusticiable. In *Luther v. Borden*, decided in 1849, the Supreme Court declared that Guarantee Clause enforcement belonged not to the Court, but to the Congress; for the courts, these matters posed nonjusticiable political questions.⁶⁷ The review that follows details a long period during which courts avoided deciding Guarantee Clause matters, as well as a recent renewed interest in the Court on the Clause.⁶⁸ At the end of this Section, we will see that, 150-plus years after *Luther*, it remains true that Guarantee Clause questions are still not within the courts' competence; Congress must enforce the mandate.

1. First Analysis—Luther v. Borden

In 1849 the Supreme Court stated in *Luther v. Borden* that cases arising under the Guarantee Clause are not justiciable, primarily because they raise political questions that properly belong to the coordinate branches for

67. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (stating that a Congressional decision on a Guarantee Clause issue "could not be questioned in a judicial tribunal").

68. See *New York v. United States*, 505 U.S. 144, 183–86 (1992) (discussing recent shifts in consideration of the Guarantee Clause).

resolution.⁶⁹ The *Luther* Court was asked to resolve a controversy stemming from Dorr's Rebellion, which involved a challenge to the legitimacy of the Rhode Island charter government as it then existed.⁷⁰ The Court declined to answer the central question in the case: Which government was the legitimate government of Rhode Island? The Court viewed the case as proper for resolution by the political branches, but a nonjusticiable political question in court.⁷¹ The Court held:

Under [the Guarantee Clause] of the Constitution it rests with Congress to decide what government is established in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.⁷²

Therefore, only Congress and the President could resolve which government was legitimate; resolution of the issue belonged to the

69. See *Luther*, 48 U.S. (7 How.) at 42 ("It rested with Congress, . . . to determine upon the means proper to be adopted to fulfill this guarantee.").

70. For a very helpful account of the litigation in *Luther*, see WIECEK, *supra* note 10, at 113–29. The facts of *Luther* are, briefly, as follows. Unlike the rest of the states at the time of the American Revolution, Rhode Island did not draft a new constitution; instead it continued the government established by its original royal charter (with modifications to attain statehood), granted by the King of England in 1663. *Luther*, 48 U.S. (7 How.) at 3–4. In 1841, however, a convention assembled to redress malapportionment issues, and to frame a state constitution that was proposed and ratified against the existing government's wishes. *Id.* at 4–7.

In order to maintain its power and resist the new constitution, the existing (charter) government enacted a law, making it illegal to vote in elections held to establish and organize the constitutional government. *Id.* at 6. In violation of the law, however, elections were held, a new government formed, and Thomas Dorr was "elected" governor. See *id.* at 25 (reporting that Governor Dorr was tried for treason). The charter government subsequently declared martial law to prevent it from being overthrown by armed "insurrectionists," including Martin Luther, a citizen of Massachusetts who supported Dorr and his new government. *Id.* at 8–9.

Luther M. Borden and other members of the Rhode Island militia were ordered to arrest Martin Luther for aiding and partaking in the rebellion. *Id.* at 10. After being denied admission, Borden broke into and entered Luther's home. *Id.* When Luther sued for trespass (in the U.S. Circuit Court for Rhode Island), Borden contended that the trespass was a legitimate exercise of his power under martial law, granted by the charter government. *Id.* at 9–10 (setting forth the defendants' arguments). Luther, however, argued that at the time the trespass was committed, the newly ratified constitution was the supreme law of Rhode Island, and the charter government was unconstitutional. *Id.* at 18.

71. *Luther*, 48 U.S. (7 How.) at 42 ("[T]he Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in nature, and placed the power in the hands of that department.").

72. *Id.*

decisionmaking of the coordinate political branches, and it was nonjusticiable. *Luther v. Borden* thus is well known for its negative holding: Courts cannot enforce the Guarantee Clause because it raises nonjusticiable issues.⁷³ The positive corollary of *Luther v. Borden* may be more important: The Guarantee Clause is nonjusticiable because the power to enforce its command rests with the political branches, particularly the Congress.⁷⁴

2. Long Time, Little Change

The Court's opinion in *Luther* shut the door on judicial resolution of matters involving the Guarantee Clause. Subsequent efforts typically have been turned back by simultaneously denying judicial power with respect to the Clause and asserting Congress's authority to act pursuant to Guarantee Clause authority. One wave came in several post-Civil War cases, in which southern states challenged their status as states, particularly in the context of the Reconstruction Acts.⁷⁵ The first invocation of the Guarantee Clause after *Luther* was in the aftermath of the Civil War in *Texas v. White*.⁷⁶ The state of Texas was the plaintiff, and the issue was the proper ownership of certain U.S. government-issued bonds.⁷⁷ The threshold question was whether the plaintiff was, in the eyes of the law, the state of Texas.⁷⁸ While the Court had original jurisdiction of suits by states,⁷⁹ the rebellion had thrown into doubt who, or what, could properly be considered the state in those states that had attempted to secede.⁸⁰ The Court had no difficulty in deciding that the acts of secession were invalid: A state had no right, under the Constitution, to secede from the union,⁸¹ and therefore all acts of secession were invalid, and Texas had remained a state within the United States.⁸² But although the *state* of Texas did

73. For a further discussion of this proposition, see *infra* Part III.A.

74. For an affirmative discussion of Congress's powers, see *infra* Part III.B.

75. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428; Act of Mar. 23, 1867, ch. 6, 15 Stat. 2; Act of July 19, 1867, ch. 30, 15 Stat. 14 (collectively, "Reconstruction Acts").

76. *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868).

77. *Id.* at 702-03.

78. *Id.* at 718-19.

79. *Id.* at 702; U.S. CONST. art. III, § 2, cl. 2.

80. See *Texas*, 74 U.S. (7 Wall.) at 724 (asking, "Did Texas . . . cease to be a State?").

81. See *id.* at 726 (declaring acts of secession invalid).

82. *Id.* at 726. The Court wrote:

Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance,

not secede,⁸³ the *government* of Texas essentially ceased to function.⁸⁴ After the War, a new government had to be established:

There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.⁸⁵

This new government, first established by the President, was "provisional,"⁸⁶ thereby giving Congress the opportunity to confirm the legitimacy of the new government in the exercise of its power under the Guarantee Clause.⁸⁷ Citing *Luther*, the Court observed that "the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in

were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union.

Id.

83. *Id.* The Court had previously considered the meaning of "state":

In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. . . . But [the word "state"] is also used in its geographical sense, as in the clauses which require that a representative in Congress shall be an inhabitant of the State in which he shall be chosen, and that the trial of crimes shall be held within the State where committed.

And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government.

In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.

Id. at 721. In this clause a plain distinction is made between a state and the government of a state.

84. The Court found the Confederate government to be illegitimate. *See id.* at 726–27 (discussing the consequences of attempted secession).

85. *Id.* at 729.

86. *Id.* at 729–31.

87. *See id.* (discussing the Guarantee Clause and Congress's role after the Civil War).

Congress."⁸⁸ The Court thus affirmed two key points: (1) that Guarantee Clause issues are nonjusticiable political questions; and (2) that Congress has a right to act under the Guarantee Clause.⁸⁹

Another set of instructive judicial decisions involved initiatives and referenda.⁹⁰ In 1912, the Court reiterated its position that Guarantee Clause interpretation was a nonjusticiable political question in *Pacific States Telephone & Telegraph Co. v. Oregon*.⁹¹ In this case, a corporation challenged

88. *Id.* at 730 (citing *Luther*). The Court also observed:

In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

Id. at 729. Note how this language echoes the Necessary and Proper clause, U.S. CONST. art. I, § 8, cl. 18, as well as the Court's broad language in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

The quotation in this sentence is from *Luther v. Borden*, but *Texas v. White* could not be farther removed. In the former case, the reference to legislative power was to justify the Court's refusal to decide the issue, *Luther*, 48 U.S. (7 How.) at 42, but in *Texas v. White*, the sentence validated Congress's action in passing the laws that confirmed the President's provisional establishment of a new government in Texas. *Texas v. White*, 74 U.S. (7 Wall.) at 700, 729 (1868). The Court stated that the case did not require it to "pronounce judgment upon the constitutionality of any particular provision of [the Restoration Acts]." *Id.* at 731. Nevertheless, in holding that it did have original jurisdiction over the case before it, the Court necessarily validated the Reconstruction Acts in their establishment or recognition of a new government of Texas. This new government, and those in other secessionist states, "which had been established and had been in actual operation under executive direction, were recognized by Congress as provisional, as existing, and as capable of continuance." *Id.*

89. See also *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1867) (finding the determination of the legitimate state government of Georgia to be a political question for Congress or the President to determine, not the courts, and that such matters of political rights are nonjusticiable); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500–01 (1866) (holding the President's implementation of a congressional enactment, the Reconstruction Acts, to be a nonjusticiable political question).

90. For an illuminating discussion of this specific area, see Amar, *supra* note 18, at 756–59 (arguing that the Guarantee Clause does not prohibit direct democracy). There may be an interest in challenging direct democracy in light of gay rights and other laws that are viewed as not being progressive. See, e.g., Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 809 (2002) (reporting both a conservative and a liberal distaste for "citizen lawmaking"); Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 19 (1993) (discussing an Oregon antihomosexuality initiative).

91. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

an Oregon corporate tax that had been adopted by the initiative process,⁹² arguing that the manner of adoption contravened the Guarantee Clause.⁹³ The corporation argued that such initiatives and referenda would destroy republican government in the state.⁹⁴ In holding the case nonjusticiable,⁹⁵ the Court observed that the legislative branch should decide the political question of whether a state government is republican, but the judicial branch should interpret the Constitution, in the context of specific governmental actions.⁹⁶ This attack on the state, *qua* state (not *qua* actor), was a nonjusticiable Guarantee Clause issue, properly reserved to the Congress, the political branch.⁹⁷ The following year, in *Marshall v. Dye*,⁹⁸ the Court again made clear its path in these cases, in declining to rule on the Guarantee Clause aspects of a challenge to a referendum to change the Indiana State Constitution.⁹⁹ The Court held that the Guarantee Clause enforcement power was "conferred upon the Congress of the United States."¹⁰⁰ As courts followed the *Luther* lead for

92. *Id.* at 135.

93. *Id.* at 137.

94. The corporation proceeded "upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon." *Id.* at 141.

95. The Court first considered justiciability, before addressing the substantive meaning of the Clause itself. According to the Court, "the case [came] to the single issue whether the enforcement of that provision, because of its political character, is exclusively committed to Congress or is judicial in its character." *Id.* at 137. Note also that the Court refers to "exclusive" congressional enforcement powers. *Id.*

96. *See id.* at 150 ("[T]he legislative duty [is] to determine the political questions involved in deciding whether a state government republican in form exists, and the judicial power . . . in a controversy properly submitted [is] to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power.").

97. *Id.* at 150–51. The court proceeded to note:

It is the government, the political entity, which . . . is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form.

Id.

98. *Marshall v. Dye*, 231 U.S. 250 (1913).

99. *See id.* at 255–57 (setting forth the background of the case and finding no justiciable controversy).

100. *Id.* at 256. The court found:

[*Pacific States*] held that [the Guarantee Clause] depended for enforcement upon political and governmental action through powers conferred upon the Congress of the United States. The full treatment of the subject in that case renders further consideration of that question unnecessary, and the contention in this behalf presents no justiciable controversy

Id.

decades,¹⁰¹ the Guarantee Clause door was not open in court.¹⁰² Instead, the mandate is to be implemented by Congress.

3. Slight Opening

Toward the end of the 20th century, after almost 150 years, the United States Supreme Court opened the door slightly—and only slightly—in *New York v. United States*.¹⁰³ In this case, the Court held that the Tenth Amendment prohibited the Congress from commandeering state governments, thus striking a federal regulation that required states to "take title" to radioactive waste.¹⁰⁴ Writing for the majority,¹⁰⁵ Justice O'Connor also briefly addressed the

101. For example, in 1930, the U.S. Supreme Court held: "As to the guaranty to every State of a republican form of government (Sec. 4, Art. IV), it is well settled that the questions arising under it are political, not judicial, in character and thus are for the consideration of the Congress and not the courts." *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 79–80 (1930); *see also Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916) (noting "the settled rule that the question of whether that guarantee of the Constitution has been disregarded presents no justiciable controversy").

102. *See also Colegrove v. Green*, 328 U.S. 549, 556 (1946) ("Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts."). One author has reported:

These attempted applications of the clause were regularly rejected by the state courts, usually on the grounds that the challenged innovation did not so far blur the lines between the departments of government as to negate the republican character of the state. Thus in the two generations between 1871 and 1937 state courts permitted legislatures [a wide array of activities].

WIECEK, *supra* note 10, at 256–57. While for the most part, the Court said almost nothing of substance during this period, two cases offered minimal insights, as they did not defer the Guarantee Clause issue. *See Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175–76, 178 (1874) (observing that "[n]o particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated," but finding that Missouri did not violate the Guarantee Clause in denying women suffrage); *In re Duncan*, 139 U.S. 449, 461 (1891) ("[T]he distinguishing feature of that [republican] form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves . . .").

103. *New York v. United States*, 505 U.S. 144 (1992).

104. *See id.* at 177 (finding that "the provision is inconsistent with the federal structure of our Government established by the Constitution").

105. The Court held that such actions would undermine the state governments' accountability to the people, as the federal government could otherwise make decisions, but the state governments would be held accountable for those same decisions. *Id.* at 168–69. This challenge by the State of New York to a federal provision regulating the handling of low level radioactive waste is generally seen as an important declaration of Tenth Amendment limitations on the federal government, in line with the current Court's growing protection of states' rights. *See, e.g., Fed. Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 756–60 (2002)

applicability of the Guarantee Clause.¹⁰⁶ She observed its rare application in court and confirmed that such issues are typically viewed as nonjusticiable political questions.¹⁰⁷ Even though she cracked the door for the future,¹⁰⁸ Justice O'Connor closed the door for Guarantee Clause application in that particular case.¹⁰⁹

(applying the bar of state sovereign immunity to halt a federal administrative proceeding); *United States v. Morrison*, 529 U.S. 598, 619 (2000) (finding that Congress exceeded its Commerce Clause authority when it created a federal remedy for intrastate violence against women); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress may not require state officials to "administer or enforce a federal regulatory program"); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (finding that the Gun-Free School Zones Act of 1990 exceeded Congress's Commerce Clause authority because it impinged on local matters). See generally Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) [hereinafter Merritt, *State Autonomy*].

106. The issue of Guarantee Clause applicability had been raised in some briefs: amicus curiae State of Michigan contended that it was "appropriate to rely upon the protections afforded by the Guarantee Clause as a restraint on Congress in the exercise of its delegated authority under the Commerce Clause." Brief of Amicus Curiae State of Michigan in Support of Petitioners at 4, *New York v. United States*, 505 U.S. 144 (1992) (Nos. 91-543, 91-558, 91-563). Further, the brief argued that when a "statute in question significantly shifts the balance of power from the States to Congress," the conclusion should be that "it infringes upon the rights guaranteed to States under the Guarantee Clause." *Id.* at 13. Another brief argued:

In a republican government, all power derives from the voters. The citizens of a republican state decide when to exercise their legislative or executive power and how to wield that authority. If the federal government forces the states to adopt a statute, it destroys this relationship between state voters and their representatives; state legislators become accountable to Congress, rather than to their constituents. Similarly, if the national government compels the states to enforce federal regulatory programs, state budgets and executive resources reflect federal priorities rather than the wishes of local citizens. These results are antithetical to the popular control exerted in a republican form of government.

Brief for Petitioner the County of Allegheny at 13, *New York v. United States*, 505 U.S. 144 (1992) (Nos. 91-543, 91-558, 91-563) (citing Merritt, *State Autonomy*, *supra* note 105, at 61-62).

107. See *New York*, 505 U.S. at 184 (addressing the Guarantee Clause). Justice O'Connor wrote:

We approach the issue with some trepidation, because the Guarantee Clause has been an infrequent basis for litigation throughout our history. In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine.

Id.

108. On a related note, Justice O'Connor had mused about the subject in her dissent in *South Carolina v. Baker*, 485 U.S. 505, 531 (1988) (O'Connor, J., dissenting), suggesting that it was arguable the Guarantee Clause may protect a "[s]tate's autonomy . . . from substantial federal incursions," citing Merritt, *State Autonomy*, *supra* note 105, at 70-78.

109. *New York*, 505 U.S. at 186 ("Thus even indulging the assumption that the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute, petitioners have not made out such a claim in these cases.").

Several other prominent cases involving state-federal relations also raised the issue of Guarantee Clause applicability around the same time as *New York v. United States*.¹¹⁰ In several cases, amici argued that the Guarantee Clause serves as a restraint on the federal government, notwithstanding the language of the Clause, which affirmatively commands the federal government to act to protect the republican form of government in each state.¹¹¹ As this argument ignores the Guarantee Clause's affirmative command, it has not succeeded.¹¹²

110. In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), the Court considered whether a state could deny ballot access to multiterm Congressional incumbents. In an amicus brief, several states argued that the "right of States to control selection of their representatives goes to the heart of the Guarantee Clause." Brief of the States of Nebraska et al. as Amici Curiae in Support of the Petitioners at 26, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (Nos. 93-1456, 93-1828). In justifying this assertion, the amici noted that in *In re Duncan*, the Court stated that a republican form of government granted the people the right to "choose their own officers for governmental administration, and pass their own laws . . ." Brief of the States of Nebraska et al. at 27 (quoting *In re Duncan*, 139 U.S. 449, 461 (1891)). Therefore, the amici contended, the guarantee of a republican form of government implicitly promises to the states the autonomy to respond to the will of the people. Brief of the States of Nebraska et al. at 29 (quoting Merritt, *State Autonomy*, *supra* note 105, at 25). Unless the form chosen was not republican, amici argued, the United States had no constitutional mandate or ability to intervene with the state's choice. Brief of the States of Nebraska et al. at 26-29. Further, in *United States v. Morrison*, 529 U.S. 598 (2000), one amicus brief argued that the "Guarantee Clause 'implies a modest restraint on federal power to interfere with state autonomy,'" because states must be allowed to "establish and maintain their own forms of government." Brief of Rita Gluzman as Amica Curiae in Support of Respondents at 10-11, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29) (quoting Merritt, *State Autonomy*, *supra* note 105, at 2). This brief also cited Laurence Tribe's work in which he stated that the text of the Guarantee Clause "provides a compelling justification for the Court to use Article IV as a basis for marking the outer limits and inviolate spheres of state autonomy." *Id.* at 11 (quoting 2 LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 910 (3d ed. 2000)).

111. A further irony is that the Guarantee Clause grants apparent authority, or even a mandate, for the federal legislature to provide a mechanism to foster the ideal of the republican form of government in the states. But the same clause provides no parallel command for the federal government, a republic, to protect itself as it protects the states. The Clause thus requires the federal government to act to protect the states, but is silent about protecting itself. Further, the Constitution specifically charges the states with the responsibility of prescribing the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. I, § 4, cl. 1. For an example of where the states unsuccessfully attempted to exercise this power to limit the number of terms a federal elected officeholder could serve, see *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

112. The states' rights approach to these cases builds upon the work of Deborah Jones Merritt, who has argued that the Guarantee Clause protects state sovereignty. See, e.g., Merritt, *Republican Governments*, *supra* note 45, at 816 ("In a federal system, however, some exercises of national power also shatter the republican bond between state voters and their state representatives."); see generally Merritt, *State Autonomy*, *supra* note 105. The argument continues that the Guarantee Clause should not necessarily be seen as a sword of federal affirmative power, but instead as a shield to protect the states:

The text of the Guarantee Clause can be read, not only as a grant of congressional

While there has been no new *resolution* on justiciability¹¹³ or Congress's ultimate enforcement responsibility since 1992,¹¹⁴ there has been a renewed *interest* in judicial review of Guarantee Clause matters.¹¹⁵ In sum, the courts

power, but as a limit on that power. The national government may intervene to restore republican government in states that have deviated from that principle, but it also promises in the Guarantee Clause to avoid any actions that would destroy republican government.

Merritt, *Republican Governments*, *supra* note 45, at 820. This argument also has roots in southerners in the pre-Civil War era, in the debate over the Guarantee Clause and slavery. See WIECEK, *supra* note 10, at 146 ("The southerners [in 1820] argued that the clause was not an innovative device, but rather a limitation on federal power."). Furthermore, "[t]his insistence on republicanism as self-government for the states, free of federal interference, characterized the position of the South through the end of Reconstruction." *Id.* at 147. Again, Merritt's position is ironic in its insistence that the affirmative mandate in the Guarantee Clause that the federal government assist the states be instead interpreted as a bar on federal government intrusion into the sphere of states' rights. Although influential with some, its fundamental misunderstanding of the nature of the Guarantee Clause limits the power of the argument. For an insightful critique of Merritt's position, see Kathryn Abrams, *No "There" There: State Autonomy and Voting Rights Regulation*, 65 U. COLO. L. REV. 835 (1994).

113. See, e.g., *United States v. Vazquez*, 145 F.3d 74, 83 (2d Cir. 1998) ("[T]he Court has yet to identify any such [justiciable] claims."); *Schultz v. Pataki*, 960 F. Supp. 568, 575 (N.D.N.Y. 1997) ("[T]his Court is left with scant guidance in determining when the general rule of nonjusticiability should be abrogated.").

114. This basic argument has not succeeded elsewhere. See *Kelley v. United States*, 69 F.3d 1503, 1510–11 (10th Cir. 1995) (rejecting as without merit a state claim that the Federal Aviation Administration Authorization Act of 1994 violated the Guarantee Clause by infringing upon states' rights).

115. Justice O'Connor's long-term vision of the Court and legal doctrine may give reason to believe that the Guarantee Clause has prospects for future adjudication. Two authors have offered a marketplace analogy to the development of legal doctrine in this context:

Whether ultimately successful or not, . . . O'Connor has engaged in a very clever entrepreneurial strategy, one that combines deference to the long tradition of the market *and* the intrepid, even unexpected introduction of the new product [the Guarantee Clause perspective]. Using the conventional Tenth Amendment and fiscal burden arguments, she very quickly established herself as one of the Court's federalism experts Thus, she built important credentials in the congested intergovernmental market.

Her certification well established, she was then in a position to inaugurate the novel idea in her *South Carolina v. Baker* dissent Since then, she has moved quite cautiously, but deliberately, apparently attempting to build slow consensus for the Guarantee Clause product which she hopes will at least join the Tenth Amendment on the market shelves.

WAYNE V. MCINTOSH & CYNTHIA L. CATES, *JUDICIAL ENTREPRENEURSHIP: THE ROLE OF THE JUDGE IN THE MARKETPLACE OF IDEAS* 98 (1997). Perhaps like the "undue burden" standard she introduced in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting), and which the Court adopted in *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992), Justice O'Connor's Guarantee Clause perspective will gain enough adherents so that the Guarantee Clause will become the basis for resolution of a

have rarely given much content to the Guarantee Clause; instead they find such matters to be nonjusticiable.¹¹⁶ The Court's approach to the Guarantee Clause provides Congress with the ability to define the term republican and enforce the mandate on its terms.¹¹⁷

B. Congressional Power, Expertise and Ability

Beyond the judicial deference we have just examined, Congress has particular expertise and ability, as will be seen in this subpart, to enforce the

different case in the future. While some may be persuaded, it bears emphasis that this Article suggests a vision completely different from Justice O'Connor's. This Article suggests a more proactive role for the federal government pursuant to the Guarantee Clause, while she has suggested a restraint on the federal government.

116. Of the few recent cases to come to the lower federal courts, the vast majority have not joined the issue. A typical example is *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996), a case challenging federal immigration policy and its impact on the states. While noting the opening from *New York v. United States*, the court held that "there is no basis for us to say that the plaintiffs here have presented a justiciable claim. Furthermore, nothing in their complaint indicates in any way that federal immigration policies are depriving New York State of a republican form of government." *Padavan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996). See also *California v. United States*, 104 F.3d 1086, 1091 (9th Cir. 1997) (reaching the same result regarding justiciability); *New Jersey v. United States*, 91 F.3d 463, 468-69 (3d Cir. 1996) (same); *Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995) (same). A few cases also come to the state courts. See, e.g., *Lowe v. Keisling*, 882 P.2d 91, 100-01 (Or. Ct. App. 1994) ("[T]he United States Supreme Court's interpretation of the Guaranty Clause as presenting a purely political question that is exclusively for Congress and not the courts to decide, precludes the courts of this state from entering any declaration about compliance with the Guaranty Clause."). Other challenges typically have been swept aside with a few strokes of the pen, as the courts recognize the role of Congress in Guarantee Clause enforcement. A typical example of the courts' hands-off approach comes in a cursory analysis that disposes of both the justiciability argument and the applicability argument in a few brief sentences. The "analysis" reads, in full:

Likewise, the Court does not find that the Guarantee Clause bars this action. The Supreme Court has questioned whether the Guarantee Clause was meant to be used as a source for litigation. Regardless, the Court finds that the Act does not violate the Guarantee Clause; the Act does not "deny [the] State a republican form of government."

MCI Telecomm. Corp. v. BellSouth Telecomm., Inc., 9 F. Supp. 2d 766, 772 (E.D. Ky. 1998) (alteration in original) (citations omitted) (rejecting a challenge to federal regulation of the telephone industry). The modern courts have left the enforcement of the Clause to Congress.

117. In the context of the Reconstruction-era cases, Wiecek has written:

The net immediate effect of these cases was to leave the clause what it had been since *Luther v. Borden*, an open-ended authorization to Congress to work out its own conception of what was required in a republican form of government and to implement this conception as it saw fit.

WIECEK, *supra* note 10, at 211.

Guarantee Clause mandate. The text of the Constitution itself and the history of its enforcement affirm this position.

The Framers did not provide an unambiguous definition of the term republican form of government.¹¹⁸ By not doing so, they remitted the question of what is republican to the body most competent to decide that question—the Congress—precisely because the Congress was the most republican branch¹¹⁹ of the newly established government, which was itself republican.¹²⁰ Read as it is written, the Clause thus suggests commitment of the question to the political branches, primarily the Congress. Accordingly, it can be argued that a republican form of government is whatever Congress decides a republican form of government is.¹²¹ Beyond this quick text-based argument, this subpart will show that both through congressional action and judicial inaction, the Congress

118. In practical terms, the failure to further define the term "republic" might be said to reflect the inability of the Framers to reach a consensus on what they meant. *See supra* notes 10–11 (discussing the historically abstract nature of the term "republican").

119. One might, of course, defend the Court in Madisonian terms as republican because it derived its legitimacy from the people through the nomination and confirmation process; one might also defend the Presidency as republican as elected by the people, albeit indirectly through the Electoral College. But the most republican of the three branches, at least in the sense that it contained the only component directly chosen by the people, was the House of Representatives. *See also supra* notes 28–33 and accompanying text (describing the manner in which each branch was chosen).

120. The Constitution established the House as popularly elected, U.S. CONST. art. I, § 2, cl. 1, and the Senate as chosen by state legislatures, U.S. CONST. art. I, § 3, cl. 1. (The selection method was amended by the Seventeenth Amendment of the Constitution to allow for popular election of Senators). Both houses were therefore elected—directly or indirectly, in Madison's words—by the people. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961). Who better, then, to decide whether a particular state's government was republican (or at least republican in form) than the legislative branch, with the concurrence, if two-thirds in both Houses cannot be achieved, of the president. Perhaps "it takes one to know one" was not the phrase in vogue at the time, but the Framers committed the definition and determination of that question to the body that ought to be most responsive to the people—the branch whose interests were to be served by the form of government being created.

121. *See WIECEK, supra* note 10, at 205 ("The guarantee clause . . . is whatever a majority of Congress wants to make of it."). In this view, the Framers did not avoid the definition of a republic; rather, they left the task of defining the parameters of the capacious term republican to be determined for each age by the most republican body extant. In this light we more clearly see that Guarantee Clause claims are nonjusticiable because, in the absence of judicially manageable standards, the "political" questions belong to the "political" branch. This conclusion does not suggest that all questions political in nature are nonjusticiable political questions. The political question doctrine is discussed *infra*, in notes 260–65 and accompanying text. Even though courts are charged with interpreting the laws, those matters that lack judicially manageable standards, because they are political in nature, should be left to the political branch. *Baker v. Carr*, 369 U.S. 186, 217 (1962). In this rather common sense way, we can see that the Framers left Guarantee Clause enforcement to the Congress.

typically is the branch responsible for Guarantee Clause interpretation and enforcement.

Judicial review of specific Congressional enforcement action helps us to understand why Congress bears the primary enforcement responsibility.¹²² The Court first approached the question in *Texas v. White*. In that case, as discussed earlier,¹²³ the Court avoided any decision on the specifics of the various Reconstruction Acts, and therefore the Court did not determine the extent to which they were permissible exercises of federal power under the Guarantee Clause.¹²⁴ Nevertheless, the Court clearly stated that federal statutes implementing this power were subject to normal review for conformity to constitutional limitations:

In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.¹²⁵

Accordingly, Congress has the enforcement power and may renew a statute passed for the purpose of "guaranteeing" a republican form of government for any or all states to determine whether it employs a means "necessary and proper" for that end.¹²⁶

Most importantly, Congress has a particular expertise and ability to step in to resolve problems of the political system¹²⁷—something that is not the proper

122. At the time of the drafting of the Constitution, judicial review had not been created. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (establishing judicial review). Therefore, the question of whether the Court could second-guess Congress's determination of what it meant to be republican did not arise. Nor did *Luther v. Borden* address that question because that case addressed only the issue of whether the Court would apply the Clause when Congress had not acted. Similarly, later challenges to initiatives and referenda as being antirepublican did not involve any act of Congress, and may be seen as the Court refusing to embroil itself in a dispute that was the responsibility of another branch. See, e.g., *Marshall v. Dye*, 231 U.S. 250, 258-59 (1913) (declining to rule on the Guarantee Clause aspects of a challenge to a referendum to change Indiana's state constitution); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 135-36 (1912) (challenging a corporate tax that had been adopted through an initiative).

123. See *supra* notes 76-89 and accompanying text.

124. *Texas v. White*, 74 U.S. (7 Wall.) 700, 731 (1868).

125. *Id.* at 729.

126. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (providing a well-known explanation of the meaning of necessary and proper).

127. Given the recent passage of the BCRA, Congress has particular experience at the moment. See *supra* note 3 (discussing the passage and the future of the BCRA).

province of the courts. Not only does Congress have the right or duty to act under the Court's blessings, the Court has stated that Congress is the proper branch for resolving Guarantee Clause matters,¹²⁸ in part because it has the experience.¹²⁹

Turning to specific enforcement actions, throughout the first half of the 19th century, Congress considered and exercised its powers under the Clause, in the context of the admission of states and seating members of Congress. The admission of Illinois, Missouri, and Nebraska bears out this point. In 1818, as Illinois sought admission, Congress acted: The House delayed the seating of the representative-elect until a determination could be made that the Illinois constitution was republican.¹³⁰ Soon thereafter, in debating the Missouri Compromise, Senators weighed congressional power to give meaning to the Guarantee Clause, arguing whether slavery was consistent with the republican form.¹³¹ In the context of admitting Nebraska, Congress conditioned admission on the provision of political rights to blacks. In so doing, it expressly invoked and acted on Guarantee Clause authority.¹³²

128. Recall the Court's statement in *Luther*: "[I]t rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not." *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).

129. *Luther* sheds some light, as it held that Congress retains the Guarantee Clause power: "And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority." *Id.* Thus we see that Congress has a particular authority to act, as established by cases from *Luther v. Borden* going forward. But, if a court were to check or review (in whole or in part) that authority, the original understanding of Congress's powers helps demonstrate the proper scope of congressional action.

130. See 15 ANNALS OF CONG. 296 (1818) ("Mr. Poindexter of Mississippi, said he thought it incumbent on the House, before admitting the Representative to a seat, to examine the constitution just laid before it, to see . . . whether the form of government established was republican, which the United States were bound to guaranty."). See also WIECEK, *supra* note 10, at 142 (recounting the same).

131. 16 ANNALS OF CONG. 338–39 (1820); *id.* at 993–94. Justice Harlan had also raised this point in his *Plessy* dissent. See *Plessy v. Ferguson*, 163 U.S. 537, 563–64 (1896) (Harlan, J., dissenting) (arguing that racial segregation is "inconsistent with the guarantee given by the Constitution to each State of a republican form of government").

132. For example, Senator Cresswell of Maryland argued that Congress has a right to interpose conditions on a state when "necessary to secure the people of [the] State a republican form of government." CONG. GLOBE, 39th Cong., 2d Sess. 57 app. (1866). See also *id.* at 189–90 (remarks of Sen. Johnson) (urging a more narrow construction); *id.* at 474–80 (detailing extensive debate in the House of Representatives on same subject). In the context of the Nebraska admission, William Wiecek has written: "The guarantee clause, after all, can be enforced by statute, which is to say that it is whatever a majority of Congress wants to make it."

After the Civil War, Congress again acted under its Guarantee Clause authority. The members explicitly invoked the Clause and its interpretation in *Luther* in the debate on the Reconstruction Acts.¹³³ Congress acted under its Guarantee Clause power, reflecting an affirmative belief that it held the ultimate enforcement power.¹³⁴ Representative Winter Davis argued that the Guarantee Clause "places in the hands of Congress the right to say what is and what is not, with all the light of experience and all the lessons of the past, inconsistent, in its judgment, with the permanent continuance of republican government."¹³⁵

WIECEK, *supra* note 10, at 205.

133. CONG. GLOBE, 38th Cong., 1st Sess. 82–85 app. (1864) (remarks of Rep. Winter Davis); CONG. GLOBE, 39th Cong., 1st Sess. 2 (1865) (resolution of Sen. Charles Sumner); CONG. GLOBE, 39th Cong., 1st Sess. 72–75 (1865) (remarks of Rep. Thaddeus Stevens). Thaddeus Stevens argued that the Guarantee Clause provided authority to authorize temporary, and ultimately permanent, governments in the former Confederacy: "It is obvious . . . that the first duty of Congress is to pass a law declaring the condition of these outside or defunct States, and providing proper civil governments for them." CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865). The Fourteenth and Fifteenth Amendments, ratified in 1868 and 1870 respectively, could not provide the authority for the Reconstruction Acts, enacted in 1867.

134. Congress enacted these laws over the President's veto. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865) (noting the President's opposition to Congress on this issue). For an interesting analysis, see Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 908–09 (1994). May wrote:

Of the fifteen statutes enacted by Congress over his objection, fourteen were opposed by [President Andrew] Johnson on constitutional grounds. Most of these laws dealt with Reconstruction, a process which Johnson believed fell within the executive province rather than that of Congress. According to Johnson, the eleven rebellious states had never left the Union and were entitled to immediate representation in the House and Senate. The Republican Congress thought otherwise. Through a series of statutes adopted over Johnson's veto, the former Confederacy was placed under military rule. Many of Johnson's vetoes rested on the premise that Congress could not constitutionally legislate for the southern states at a time when their representatives were excluded from the House and the Senate. Though Johnson's constitutional opposition to these measures was deeply felt, he more than once acknowledged that if a veto is overridden by Congress, the President is bound to enforce the statute despite his constitutional misgivings.

Id.

135. CONG. GLOBE, 38th Cong., 1st Sess. 83 app. (1864). Davis articulated an aggressive and broad vision of Congress's power in 1864:

The duty of guarantying means the duty to accomplish the result. It means that the republican government shall exist. It means that every opposition to republican government shall be put down. It means that everything inconsistent with the permanent continuance of republican government shall be weeded out . . . [A]nd if, in its judgment, any form of policy is radically and inherently inconsistent with the permanent and enduring peace of the country, with the permanent supremacy of republican government, and it have the manliness to say so, there is no power, judicial or executive, in the United States that can even question this judgment but

Several southern states, attacking the laws in the Court, challenged Congress's approach to the political matters involved in reuniting the government. For example, the Reconstruction Acts authorized the national government to intercede militarily in southern states "until loyal and republican State governments could be legally established . . ."¹³⁶ Mississippi challenged this congressional enforcement of the guarantee in court, claiming that the implementation of the federal statutes would destroy the state government.¹³⁷ The Supreme Court decided that the courts could not enjoin the President from implementing an act of Congress on the ground that the act was itself alleged to be unconstitutional.¹³⁸ Mississippi's challenge failed; Congress had taken charge of Guarantee Clause enforcement, and the Court affirmed Congress's position as enforcer.¹³⁹

Further, during this same period, some states objected to blacks being given the franchise,¹⁴⁰ a question political in nature.¹⁴¹ Specifically, Georgia feared that under the Reconstruction Acts, it would be "Africanized" by the inclusion of blacks in the body politic.¹⁴² In other words, Georgia disagreed with the political solution rendered by Congress in regard to reestablishing a republican form of government.¹⁴³ The state called for judicial intervention in a

the PEOPLE; and they can do it only by sending other Representatives here to undo our work.

Id.

136. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 475 (1867). *See also* Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 (first Reconstruction Act) (creating military districts and establishing military authority in the rebel states).

137. *Johnson*, 71 U.S. at 476.

138. *Id.* at 500–01. The Court, noting the broad discretion the President had to enforce the acts, invoked "general principles which forbid judicial interference with the exercise of Executive discretion." *Id.* at 499.

139. *Id.* at 500–01.

140. Herman Belz has provided interesting commentary on the subject. HERMAN BELZ, *A NEW BIRTH OF FREEDOM* 175 (1976) (writing about the Reconstruction acts and suggesting that "the way to protect blacks . . . was to give every citizen the ballot"). *See also* FRANK J. SCATURRO, *THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION: A DISTORTION OF CONSTITUTIONAL JURISPRUDENCE* 10, 19 (2000) (describing a Congressional plan to require southern states to enfranchise blacks and noting the Court's deferral to Congress on such Reconstruction issues). Without the Fifteenth Amendment, ratified after the Reconstruction Acts were enacted, Congress had to find some authority for acting.

141. This position was not new; it had been articulated in debates in the early 1800s. *See* WIECEK, *supra* note 10, at 148 ("[Sen. James] Barbour and [William] Pinkney insisted that republicanism did not imply civil and political equality, nor did it exclude caste."). While this question is political in nature, it does not necessarily mean that it is a political question, judicially speaking.

142. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 66 (1867).

143. *Id.* at 63–64.

political question,¹⁴⁴ "[f]or the rights for the protection of which [the court's] authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges."¹⁴⁵ Precisely because the Court refused to decide this dispute where a congressional enactment was at issue, *Georgia v. Stanton*¹⁴⁶ provides a strong case for congressional enforcement of the Guarantee Clause. The Court supported Congress's ability to determine the political form of governments by declining to sit in judgment of an act of Congress intruding into state government because a "political" question was involved.¹⁴⁷

Texas also objected to the federal government actions to enforce the guarantee. The federal government acted in two ways in Texas, first by the President during the Civil War, in his constitutionally-defined role of commander-in-chief.¹⁴⁸ Congress then passed the Reconstruction Acts¹⁴⁹ to reestablish republican forms of government in all former Confederate states. In *Texas v. White*, the Court affirmed that the Guarantee Clause power was held by the Congress, and that the Reconstruction Acts were a proper exercise of such power.¹⁵⁰

Congress is the primary enforcer¹⁵¹ of the Guarantee Clause, and, by acquiescing in Congress's political and legislative solutions, the Court has affirmed¹⁵² Congress's role.¹⁵³

144. The Court described the bill as an effort "to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul, and totally abolish the existing State government of Georgia, and establish another and different one in its place." *Id.* at 76.

145. *Id.* at 77.

146. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867).

147. However, the Court went on to indicate a limitation of its hands-off attitude: "No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented . . ." *Id.* at 77. This statement indicates that judicial refusal to review federal enactments under the Guarantee Clause may be limited to instances in which private interests are not involved.

148. See U.S. CONST. art. II, § 2, cl. 1 ("The president shall be Commander in Chief of the Army and Navy of the United States.").

149. Reconstruction Acts, *supra* note 75.

150. See *Texas v. White*, 74 U.S. (7 Wall.) 700, 730 (1868) ("[T]he power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress."). See also *id.* at 729 (deferring to Congress to do that which is necessary and proper to enforce the guarantee).

151. See *id.* at 730 (quoting *Luther*, 48 U.S. (7 How.) at 42) ("For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not."). See also *Kohler v. Tugwell*, 292 F. Supp. 978, 982 (E.D. La. 1968) ("It is the duty of the Congress and the President to uphold and defend portions of the Constitution that, for one

C. Proactive Enforcement

Congress may act proactively to enforce the Guarantee Clause on behalf of the United States. One way in which Congress has discharged its responsibility is by refusing to seat representatives from states that do not have the requisite republican government.¹⁵⁴ At the same time, however, the Guarantee Clause is not specifically linked to the provisions of Article I, section 5, governing that power. Indeed, the mandate of the Clause is not reactive, in that its purpose is

reason or another, have not been considered appropriate areas for judicial action.").

152. Moreover, *Texas v. White* strongly suggests that the Court will review congressional action under the Guarantee Clause deferentially, and subject to the question of whether the means chosen are "necessary and proper" to the ends to be obtained. This conclusion of course reflects on the broad interpretation of federal powers as declared in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and the spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). See also U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States").

153. While this Article proposes a significant role for the Congress, the President is not without Guarantee Clause power. See, e.g., WIECEK, *supra* note 10, at 301 ("The Supreme Court in *Luther v. Borden* established beyond question that the guarantee power was invested primarily in Congress and was delegable in some ways to the President."). The text speaks of the "United States," thus allowing the President to act, even when the federal courts consider Guarantee Clause matters nonjusticiable. In the example of Dorr's Rebellion, President Tyler had prepared troops for action, in the event they were needed. See *id.* at 104–10 (describing events before and after the rebellion). See also *id.* at 107 ("[President Tyler] confirmed the widely held assumption that responsibility for execution of the dual promise of guarantee and protection might sometimes fall on the President, as commander in chief of the armed forces, rather than Congress."). But also in that context the President can be said to be acting under his authority under the domestic violence clause, the back half of the Guarantee Clause that we do not explore in these pages. "The United States shall . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), [protect the States] against domestic Violence." U.S. CONST. art. IV, § 4. Although the President may act, his actions may be limited. When Lincoln appointed government officials in defeated rebel states after the Civil War, he was clearly acting in pursuit of the Guarantee Clause mandate. Further, *Mississippi v. Johnson* was actually an action against Andrew Johnson, who was enforcing the Reconstruction Acts. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 475 (1867). But despite some action by the President, the Congress has typically taken the lead, and the President, if anything, has followed and the courts have deferred. Congress remains the primary enforcer.

154. The Constitution accords the power to each House of determining its membership and expelling those who are not qualified. U.S. CONST. art. I, § 5, cl. 1–2. This action occurred in the examples of Illinois, Missouri, and Nebraska, discussed earlier. See *supra* notes 130–32, and accompanying text (recounting arguments over those states' admission into the Union). The sanction of depriving a state of its representation in the national government is a serious act, likely to have enormous political and economic consequences.

not to withhold recognition of a state that lacks the requisite government, but rather it is proactive, to *guarantee* that government.

First, we explore the language and command of the Guarantee Clause and ask: What does it mean to "guarantee?" A guarantee envisions a proactive approach. The Oxford English Dictionary (OED) defines "guarantee" as:

To be a guarantee, warrant, or surety for; *spec.* to undertake with respect to (a contract, the performance of a legal act, etc.) that it shall be duly carried out; to make oneself responsible for the genuineness of (an article); *hence*, to assure the existence or persistence of; to set on a secure basis.¹⁵⁵

These meanings import the responsibility of the United States (acting, as we have seen, through the Congress) to ensure the genuineness of state republican governments. The OED includes two basically contemporaneous usage examples that confirm this view: "1791 BURKE . . . Publick treaties made under the sanction, and some of them guaranteed by the Sovereign Powers of other nations. 18 LD. BROUGHAM (Ogilvie), By the treaty of alliance she guaranteed the Polish constitution in a secret article."¹⁵⁶ In our specific context, this reading is consistent with the language of *Texas v. White*, in which the Court strongly implied that Congress could do whatever is necessary and proper to implement its power (and duty) under the Guarantee Clause.¹⁵⁷ The Guarantee power, thus conceived, is prophylactic.

Defining the proper exercise of that power with precision also will depend upon the perceived threat to the republican form of government. In *Luther v. Borden*, for example, it might have been sufficient had Congress simply recognized one or the other of the competing governments.¹⁵⁸ In the direct

155. OXFORD ENGLISH DICTIONARY (2d ed. 1989), available at http://dictionary.oed.com/cgi/entry/009815?query_type=word&queryword=guarantee&edition=2e&first=1&max_to_show=10&sort_type=alpha&search_id=COC5-1XguFn-135&hilite=00099815. Had the Framers desired a reactive role for Congress, words like "repair" or "restore" might have been more appropriate.

156. *Id.*

157. See *Texas v. White*, 74 U.S. (7 Wall.) 700, 729 (1868) (discussing Congress's duty under the Guarantee Clause). As the Court stated:

In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the state to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

Id.

158. Recall that in *Luther*, the debate was over whether the original charter government or the Dorrite government was properly the government of Rhode Island. The courts could then

democracy cases,¹⁵⁹ Congress (had it concluded that the republican form of government was threatened) could have invalidated the referendum or the initiative, leaving the courts to refuse to enforce "laws" which were passed by such means.¹⁶⁰ Thus, we will also see that in some contexts, Congress may be more or less proactive in its enforcement of the Clause.

Further, in *Coyle v. Smith*¹⁶¹ the Supreme Court held that the Guarantee Clause requires that Congress has a duty of "seeing that [a republican state government] is not changed to one anti-republican."¹⁶² More creative uses of the Guarantee Clause have also been argued. For example, one commentator has contended that the enforcement of federal corruption laws against state and local government officials could be justified under the Guarantee Clause, even if other sources of federal power were insufficient.¹⁶³ Finally, in his definitive work, Wiecek wrote: "The power to 'guarantee' is prophylactic as well as reactive. The national government need not sit by an idle spectator to the loss of republicanism . . ."¹⁶⁴ Congress may act affirmatively and need not limit itself to reacting to state governments that have lost their republican form.¹⁶⁵

have applied normal common law principles to determine whether Luther or Borden was acting lawfully.

159. See *supra* notes 91–100 and accompanying text (discussing *Pacific States and Marshall*).

160. See Catherine Engberg, Note, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 STAN. L. REV. 569, 591 (2001) (concluding that "Congress could enact a nationwide ban on state initiative lawmaking").

161. *Coyle v. Smith*, 221 U.S. 559 (1911).

162. *Id.* at 567–68 (quoting *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 174 (1874)). The Court considered the enforcement of the Guarantee in the context of a challenge to a move of the capital of Oklahoma.

163. Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 415–16 (1989).

164. WIECEK, *supra* note 10, at 302.

165. The congressional responsibility thus echoes themes of the imminence and clear and present danger tests from First Amendment jurisprudence. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (noting the limits on the states' prohibition of speech). The Court in *Brandenburg* noted:

These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id.; *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

In sum, Congress bears the responsibility to enforce the Guarantee Clause mandate—it has the experience and the expertise, and the courts have acquiesced—and it may act prophylactically in so doing. In the next Part, the Article will examine the specific issue of, and the Guarantee Clause connection with, campaign finance reform.

IV. Campaign Reform Past, Present, and Future

The power of money in politics presents an unchecked threat to the republican form of government. At present, the few with money maintain disproportionate control at the expense of the many, and the elected official betrays the responsibility of representation.¹⁶⁶ There has been a significant movement toward enacting campaign finance reform measures in recent years, in response to the growing recognition that such efforts are necessary to protect against the corrosive influence of money in politics and government.¹⁶⁷ Properly understood against this backdrop, campaign reform is about systemic efforts to ensure a republican government that is responsive to the people.

While this Article asserts a new approach to campaign finance reform, first we must consider the prevailing orthodoxy—*Buckley v. Valeo*.¹⁶⁸ As will be discussed in this Part, that decision set the standard in campaign finance reform analysis by equating money and speech.¹⁶⁹ As a result, most subsequent campaign finance reform legislation has had to satisfy strict scrutiny in order to be held constitutional.¹⁷⁰ Accordingly, *Buckley* would pose a significant

166. See *infra* Part IV.B.1 (discussing effect of money on the political process).

167. See *infra* notes 236–47 (citing studies that show money's effect).

168. *Buckley v. Valeo*, 424 U.S. 1 (1976).

169. See *id.* at 19 (contending that mass media exposure, which is expensive, is now an "indispensable instrument[] of effective political speech"); Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235, 1247 n.61 (2000) [hereinafter Overton, *Mistaken Identity*] (observing that "[a] number of commentators have interpreted *Buckley* as equating money with speech"). But, Overton argues:

Contrary to popular opinion, *Buckley*'s initial application of speech doctrine to regulations of political money is not based on the logic that "money is speech" (spending is *the same thing* as speaking). Rather, *Buckley*'s application of speech doctrine was premised on the rationale that money is so strictly necessary to "effective political speech" that a restriction on money effectively constitutes a restriction on speech. By analogy, although consuming gas is a different activity than driving a car, a restriction on gas consumption necessarily limits how far one can drive.

Id. at 1246–47 (citations omitted).

170. See *Buckley*, 424 U.S. at 14 (describing "broadest protection" of the First Amendment).

challenge to any congressional attempt to pass campaign finance reform under the Guarantee Clause, as proposed in this Article. This Part will explore *Buckley* and its progeny at the Supreme Court, followed by an examination of state and local reform efforts and their reception in court. This exploration at the end reveals a significant—but not impossible—First Amendment hurdle that any campaign finance reform proposal will have to clear.

A. *Buckley and Subsequent Supreme Court Interpretations*

1. *Buckley v. Valeo*

In 1974, Congress amended the Federal Election Campaign Act of 1971, so that it had four major components, two of which merit exploration in this context. First, the law set contribution limits, imposing \$1,000 caps on campaign contributions from individuals to candidates for federal office, and a \$5,000 limit on contributions by political committees to candidates.¹⁷¹ In addition, the law placed a \$25,000 cap on total annual contributions for each contributor.¹⁷² Second, the law set expenditure limits, (1) restricting the amount an individual could spend "relative to a clearly identified candidate" to \$1,000; and (2) curbing the amounts that candidates or their families could spend on their own election efforts: \$50,000 for presidential and vice-presidential candidates, \$35,000 for Senate candidates, and \$25,000 for House candidates.¹⁷³

Early in its per curiam opinion, the *Buckley* Court declared the principle that would guide its analysis, and that has become its signature:

The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."¹⁷⁴

171. *Id.* at 7, 13 n.12.

172. *Id.* at 7, 13.

173. *Id.* at 13, 187–88. The law also created disclosure requirements and public funding for presidential elections. *Id.* at 7.

174. *Id.* at 14 (alteration in original) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

The Court not only reinforced the preeminence of political *speaking* as fundamental First Amendment activity, it elevated political *spending* as well to such higher status.¹⁷⁵ As with other laws that restrict core First Amendment activity, these regulations would have to meet "exacting" or strict scrutiny, requiring narrow tailoring to meet a compelling governmental interest.¹⁷⁶

Two principal analyses followed from there, one as to expenditure limits and the other regarding contribution limits. Campaign expenditures were seen as central to the communication of political ideas.¹⁷⁷ Consequently, the Court observed that limitations would likely offend the First Amendment, because restricting the amount of money spent on political communication reduces core First Amendment political speech.¹⁷⁸ The Court thus inexorably connected political expenditures and protected First Amendment activities, invalidating this attempt to limit such expenditures.¹⁷⁹

While acknowledging that contributions also could be seen as speech, the Court distinguished them from expenditures, by arguing that "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."¹⁸⁰ This conclusion effectively reduced the core speech value of contributions as compared to expenditures and set the stage for the Court to uphold the federal statute's specific contribution limits, but the Court had another step to make first. Even if it was not core First Amendment activity, the government still must justify burdening speech activity.¹⁸¹ Here, the Court found that the corrupting

175. Campaign contributions and expenditures, thus described as political speech, hit at "the central meaning of the First Amendment." *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964). See also *Eu v. S. F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) ("[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))).

176. *Buckley*, 424 U.S. at 16.

177. *Id.* at 16–17, 19.

178. *Id.* at 19. The court considered the current nature of political spending:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Id.

179. See *id.* at 23 (finding that the Act's "expenditure ceilings impose . . . severe restrictions on protected freedoms of political expression and association").

180. *Id.* at 21.

181. Content-based laws that affect speech will be subject to strict scrutiny and content-neutral ones will be analyzed under intermediate scrutiny. See, e.g., *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (describing the standards for such laws).

influence of money in politics¹⁸² could provide a sufficiently powerful justification for government regulation of speech. "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."¹⁸³ Such *quid pro quo* corruption was not the only way to justify contribution limits. "Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."¹⁸⁴ Either actual corruption or the appearance thereof was deemed a sufficient governmental interest to justify the government curbing this political speech. In sum, the *Buckley* Court set a strict scrutiny standard and struck down expenditure limits but upheld contribution limits.¹⁸⁵

2. Subsequent Supreme Court Decisions

The Supreme Court has extended the *Buckley* framework over the last several decades to apply to a wide array of campaign finance regulation. For example, in *Federal Election Commission v. National Conservative Political Action Committee*,¹⁸⁶ the Court applied strict scrutiny to invalidate a federal statutory provision restricting spending by political action committees in support of a presidential candidate.¹⁸⁷ Because the expenditures were

182. This concern was particularly sensitive in the post-Watergate era.

183. *Buckley*, 424 U.S. at 26–27. Note also that in its concern for "our system of representative democracy," the Court (presumably unintentionally) signals our Guarantee Clause concern. Although this idea was not derived from an Article IV analysis, it does echo Guarantee Clause themes.

184. *Id.* at 27.

185. *See id.* at 23 ("[A]lthough the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions."). The Court also upheld public financing of presidential elections and disclosure requirements. *Id.* at 58 n.66, 66–68.

186. *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985).

187. *Id.* at 493–94. The Court found such independent expenditures to constitute core First Amendment speech and any regulations had to be justified by a compelling state interest. *Id.* at 493; *cf.* *Cal. Med. Assoc. v. Fed. Election Comm'n*, 453 U.S. 182, 195–97 (1981) (upholding a Federal Election Campaign Act [hereinafter FECA] provision limiting the dollar amount of contributions to a political action committee, reasoning that such contributions facilitated third-party speech and were not speech in and of themselves, and finding that the contributions therefore had limited First Amendment protection and could be regulated).

independent of and not coordinated with any candidate,¹⁸⁸ the Court found that there was no danger of corruption and invalidated the restriction—it was not justified by a compelling governmental interest.¹⁸⁹ In *Citizens Against Rent Control v. City of Berkeley*,¹⁹⁰ the Court focused on the *Buckley* corruption rationale, holding that absent an individual candidate, there was no risk of quid pro quo corruption, and therefore there was insufficient constitutional justification to restrict contributions to issues-related committees.¹⁹¹ These are but two examples of Supreme Court cases in which *Buckley* has been applied, with regulations failing strict scrutiny. *Buckley* strict scrutiny has also been applied in many other contexts, including both independent¹⁹² and coordinated¹⁹³ political expenditures, corporate political contributions,¹⁹⁴ and

188. The FECA defines coordinated expenditures as "expenditures made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. § 441a(a)(7)(B)(i) (2000).

189. *Fed. Election Comm'n*, 470 U.S. at 497–98, 501.

190. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

191. *Id.* at 299–300. The facts of the case presented a ballot referendum, as opposed to the election of a candidate. *Id.* at 292. The Court invalidated a \$250 limitation on contributions to a committee formed to oppose a ballot measure. *Id.* at 300. The Court held that the committee was simply expressing political ideas and the contribution limit would directly affect expenditures, thereby limiting the expression of such ideas. *Id.* at 299. Because such limits cannot be placed on individuals' expenditures, the Court reasoned that they should not be placed on those expenditures of individuals choosing to band together to express a common viewpoint. *Id.* at 296.

192. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, the Court extended the right of unlimited independent expenditures to political parties. *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 618 (1996) [hereinafter *Colorado I*].

193. When *Colorado I* came back before the Court five years later, the Court clarified that any *coordinated* expenditures by a political party are functionally contributions and may be limited consistent with the First Amendment. *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001) [hereinafter *Colorado II*].

194. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978) (invalidating a Massachusetts statute prohibiting all corporate contributions or expenditures used to influence the outcome of such referenda). The Court concluded that the statute restricted core First Amendment speech, *id.* at 776, regardless of whether the source was an individual or a corporation. *Id.* at 784. Corporate contributions and expenditures could only be limited to serve a compelling state interest, which the Court found lacking. See *id.* at 788–95 (countering the arguments that found such an interest). The Court did leave open the possibility that with a different record, a different result might follow:

According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations has been overwhelming or even

contributions to Political Action Committees (PACs).¹⁹⁵ The result, more often than not, strikes down a law. Above all, the lesson is that the *Buckley* First Amendment strict scrutiny framework, including the expenditure-contribution dichotomy, has controlled subsequent Supreme Court campaign finance reform decisions.

While *Buckley* has controlled the Court's analysis since 1976, there has been increasing discontent on the Court about the case.¹⁹⁶ Justice Thomas has viewed *Buckley* as too permissive of campaign reform; he has argued that contribution limits suppress speech and should be subject to strict scrutiny the way expenditure limits are, and both are unconstitutional.¹⁹⁷ Justice Kennedy has expressed dissatisfaction with the impact of *Buckley*'s split decision, as it bans expenditure limits but allows contribution limits.¹⁹⁸ Taking the view that

significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.

Id. at 789–90 (citations omitted). In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), using *Buckley*'s corruption rationale, the Court found a FECA provision prohibiting corporations from using general treasury funds for expenditures to be unconstitutional as applied to a nonprofit corporation. *Id.* at 263. Because the corporate defendant was formed to disseminate political ideas, not amass capital, as such, it was not the type of organization that had been the focus of regulation of corporate political activity. *Id.* at 259. However, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court upheld a Michigan statute prohibiting corporations from using general treasury funds for political expenditures. *Id.* at 666. The Court found that the statute was sufficiently narrowly tailored to maintain the integrity of the electoral process because the statute prevented only expenditures from a corporation's general treasury, but allowed for expenditures from a segregated political fund. *Id.* at 660.

195. *Cal. Med. Assoc. v. Fed. Election Comm'n*, 453 U.S. 182, 193–99 (1981) (considering the constitutionality of a FECA provision limiting contributions to PACS).

196. There have been mixed signals. For example, even while individual Justices expressed discontent in their opinions, the Court affirmed *Buckley*'s vitality and applied it in *Nixon v. Shrink Missouri Government Political Action Committee*, 528 U.S. 377, 397–98 (2000). But unlike many other cases applying *Buckley* strict scrutiny, the Court upheld state contribution limits. See *id.* (finding that *Buckley* supports Missouri's limitations on contributions).

197. See *Colorado II*, 533 U.S. at 465–66 (Thomas, J., dissenting) (calling for an overruling of *Buckley*). Justice Thomas stated:

As an initial matter, I continue to believe that [*Buckley*] should be overruled. Political speech is the primary object of First Amendment protection, and it is the lifeblood of a self-governing people. I remain baffled that this Court has extended the most generous First Amendment safeguards to filing lawsuits, wearing profane jackets, and exhibiting drive-in movies with nudity, but has offered only tepid protection to the core speech and associational rights that our Founders sought to defend.

Id. (Thomas, J., dissenting) (citations omitted). The phrase "lifeblood of a self-governing people" quite clearly echoes Guarantee Clause principles.

Buckley is too restrictive of legislative attempts at campaign reform, Justice Stevens has found fault with the entire *Buckley* analysis because "[m]oney is property; it is not speech."¹⁹⁹ Similarly, Justice Breyer has challenged the money-as-speech premise, suggesting a need to reconsider *Buckley* based on the proposition that money is not speech, but rather enables it.²⁰⁰ With such divergent opinions, there is no consensus that *Buckley* should be overruled, and even if so, what standard should supplant the *Buckley* framework.²⁰¹ In any case, *Buckley* remains a formidable barrier to campaign reform advocates, even though not all campaign finance reform efforts have been found unconstitutional.²⁰²

B. State and Local Campaign Finance Reform Attempts & Court Reactions

States and localities have tried to reform their campaign machineries, attempting to return the process to their citizens and to ensure the election of

198. See *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting) ("[T]he compromise the Court invented in *Buckley* set the stage for a new kind of speech to enter the political system. It is covert speech. The Court has forced a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits . . ."). Justice Kennedy specifically has called for overruling *Buckley*, thereby "free[ing] Congress or state legislatures to attempt some new reform, if, based upon their own considered view of the First Amendment, it is possible to do so." *Id.* at 409–10 (Kennedy, J., dissenting).

199. *Id.* at 398 (Stevens, J., concurring). Therefore, unlike Justice Thomas, Justice Stevens would be more likely to find limits constitutional. See generally *Overton, Mistaken Identity*, *supra* note 169, at 1241 (building on Stevens's dissent and "contend[ing] that courts should consider both speech doctrine and property doctrine in developing a new way to look at campaign finance").

200. See *Shrink Mo.*, 528 U.S. at 400 (Breyer, J., concurring). Justice Ginsburg joined this opinion.

201. In other words, the irony is that there have been six votes to overturn *Buckley*, although in fractured directions. Further, it is also possible that the Court may uphold a campaign finance measure without overruling *Buckley*. Although *Buckley* rejected specific limits, it did not close the door to upholding some limits, if supported by new facts and interests. For example, in *Landell v. Vermont Public Interest Research Group*, 300 F.3d 129 (2d Cir. 2002), the Second Circuit recently upheld Vermont's campaign finance reform statute, based in large part upon the extensive factual record developed in the legislature and in the trial court. That opinion, however, has since been withdrawn for possible amendment. Justices Stevens, Kennedy, Breyer, and Ginsburg may provide four votes to hear a case like *Landell* (which, combined with *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998), may provide at least the seeds of a circuit split). Justice Thomas is far less predisposed to uphold any regulation of campaign financing, but he still has an interest in hearing such a case.

202. For the most recent example, see *Shrink Mo.*, 528 U.S. 377, which upheld Missouri's contribution limits.

officials who are responsive to their communities.²⁰³ When such campaign finance reform measures have been challenged in court, *Buckley* has controlled.²⁰⁴ This subpart discusses how campaign reform can protect the republican form of government, then surveys specific efforts at the state and local level, and ultimately reviews the courts' reactions to such legislation.

1. *The American Republic and Campaign Reform*

This Article posits that campaign reform can protect the republican form of government from the subversive effects of big money. As we consider that hypothesis, we must examine the underlying proposition that at present, the few maintain a disproportionate sway over elected representatives and the representative is more likely to exercise judgment on behalf of the few than on behalf of the many.²⁰⁵ The influence of the few deprives the people of their representation and diminishes the republic.²⁰⁶ In order for the republic to be truly representative, the people must have control of their choices—not simply

203. See *infra* Part IV.B.2 (cataloging state and local efforts at reform).

204. See *infra* Part IV.B.3 (reporting the courts' adherence to *Buckley*).

205. Bill Bradley offered the following assessment:

[N]othing breaks down trust in democracy as powerfully and surely as money. The truest model of how our republic is supposed to work is citizens speaking to their representatives and representatives responding to their constituents' voices and concerns. Big money gets in the way of that. It's like a great stone wall separating us from our representatives in Congress and making it almost impossible for them to respond to our commonsense request that they address the profound issues that affect all of us

BILL BRADLEY, *THE JOURNEY FROM HERE* 85–86 (2000).

206. In addition, the money race in campaigns narrows the ultimate choices the people have in whom they elect. The need for large sums of money to mount a viable campaign reduces and eliminates competition. Uncertain of their ability to raise the necessary amount of money, many potential candidates forego politics. Further, massive "war chests" that incumbents (and others) often amass have had the impact of scaring away would-be opponents. This equality concern also skews the republican form of government. See Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1170–74 (1994) (arguing that the current system of elections and politics creates wealth disparity and inequalities); THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMISSION ON CAMPAIGN FINANCE REFORM, *DOLLARS AND DEMOCRACY* 3 (2000) ("The enormous burdens of fundraising on elected officials and candidates discourage many potentially serious candidates from participating in elections."); see generally Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987 (2002) (arguing that the current political system has a disproportionately negative impact on participation and representation of people of color).

by voting, but through having their representatives reflect their interests, not those whose financial support enabled their election.²⁰⁷

In *Reynolds v. Sims*,²⁰⁸ the Court observed that the individual right to vote was at the "heart of representative government."²⁰⁹ Dilution of that right directly threatens representative government.²¹⁰ Today, there is another type of dilution of political power: The will of the people is not done because of the influence of lobbyists, PACs, and others who control large sums of campaign cash. Efforts at gun control,²¹¹ prescription drug benefit reform,²¹² corporate

207. This conclusion also suggests that we should be concerned with the power and wealth of lobbyists, arguably more than with campaign contributions that, whatever their size, are dwarfed by the amounts spent to secure favors from the representatives once in office. Without denying the importance of that perspective, the focus of this Article is on campaign finance reform, and the lobbyist issue must be reserved for another day.

208. *Reynolds v. Sims*, 377 U.S. 533 (1964).

209. *Id.* at 555.

210. *See id.* ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

211. *See BRADLEY, supra* note 205, at 86–87 (explaining the effect of money). Bradley argued:

At times, money does more than shape the agenda. It has specific consequences that run counter to the public good. Take handguns: Every day they kill twelve children in America. Seventy-two percent of Americans favor mandatory licensing of handguns, but Congress seems to find any excuse not to do something about it On the face of it, this doesn't make sense—until you notice the fact that in 1998, the National Rifle Association gave nearly \$2 million to various members of Congress

Id.

212. The AARP (arguably one of the most successful "special interest" lobbies) has argued:

As consumers press lawmakers to reduce prescription drug costs and make medications affordable for more people, drugmakers are fighting many such efforts every inch of the way. The brand-name drug industry is waging this battle with one thing it has plenty of—money. For years it has been by far the richest [industry] in America

Patricia Barry, *Drug Industry Spends Huge Sums Guarding Prices*, AARP BULLETIN ONLINE, at http://www.aarp.org/bulletin/departments/2002/medicare/0510_medicare_1.html (May 2002).

Another advocacy group has argued:

The prescription drug industry is spending approximately \$230 million this election cycle on lobbying, campaign contributions and issue ads as it tries to shape public policy in the face of increasing public hostility to its price-gouging and profiteering.

It's clear why the drug industry has gone on such a political spending spree. Prescription drug coverage and costs, particularly for the elderly, have become a leading if not the leading issue in election campaigns this year Consumers are demanding that Congress provide Medicare drug coverage and drug price relief for the elderly and the drug industry is resisting, with all its might.

reform,²¹³ tobacco regulation,²¹⁴ environmental and energy regulation,²¹⁵ and campaign reform²¹⁶ all are being or have been stalled, despite popular sentiment in favor of reform.²¹⁷ As a result, according to one poll, "two-thirds (67%) of U.S. adults believe that the political influence of giant corporations, such as tobacco companies, weakens our democracy."²¹⁸ This perception is a sure sign of a republican government in crisis.

The drug industry's investment has paid off handsomely as the industry's special-interest clout has kept the Republican-controlled Congress from providing prescription drug coverage through Medicare.

Rx Industry Goes for KO: Drug Companies Spend Record Amount This Election Cycle, PUBLIC CITIZEN, at http://www.citizen.org/congress/reform/drug_industry/articles.cfm?ID=799 (Nov. 2000) (citations omitted).

213. Major corporate reform became reality apparently only because of the unstoppable tide in the aftermath of scandals at Enron, Arthur Andersen, WorldCom, and more. See Elisabeth Bumiller, *Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. TIMES, July 31, 2002, at A1 (reporting the passage of the Sarbanes-Oxley Act in response to various corporate frauds). A Gallup poll showed the people's concerns about whose interest was being represented in Washington. A large majority of Americans believe that politically powerful members of Congress who set the legislative agenda "are more interested in protecting the interests of large corporations." *Little Political Fallout From Business Scandals*, GALLUP ORGANIZATION, July 8, 2002, at <http://www.gallup.com/poll/releases/pr020708.asp>.

214. For a description of the ways in which the tobacco industry has lobbied for its positions, see *The CALA Files: The Secret Campaign by Big Tobacco and Other Major Industries to Take Away Your Rights*, PUBLIC CITIZEN, at <http://www.citizen.org/congress/civjus/tort/industry/articles.cfm?ID=800> (last visited July 8, 2003).

215. An article published by the United Auto Workers (a union with considerable political influence in its own right) has argued that "judging by public opinion polls, if Congress really delivered what voters say they want . . . [f]unding for the environment and clean energy would go up." Robert Kuttner, *What Voters Really Want*, UAW ONLINE, at <http://www.uaw.org/atissue/02/022102kuttner.html> (Feb. 21, 2002).

216. The proponents of major reform fought for change for well over a decade. One writer commented: "[P]owerful economic forces in this country have mobilized to make sure that neither party seriously offers voters what they say they want. The immense difficulty Congress has had in enacting even a tepid form of campaign finance reform to limit big money in politics underscores this reality." *Id.*

217. Although the representative must act in the best interest of the constituency, that does not necessarily mean that the representative should only act according to popular sentiment. But when the popular sentiment is consistently thwarted, we must ask why.

218. *Columbia/HCA Committing to Limit Its Political Influence: Seeks Way Out Of Hall Of Shame*, INFACT, at <http://www.infact.org/52500hca.html> (May 25, 2000). See also BROOKS JACKSON, HONEST GRAFT, BIG MONEY AND THE AMERICAN POLITICAL PROCESS 320 (rev. ed. 1990) ("Voters seem to sense their diminished influence."); DOLLARS AND DEMOCRACY, *supra* note 206, at 3 ("The widespread and highly publicized evasions of the campaign finance laws insult the integrity of our legal system and contribute to the public's deep and growing cynicism about the campaign finance process, and about the very legitimacy of our democracy itself."); LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS, THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS 3 (1996) ("Americans have lost faith in the system that sustains their democracy, believing that it serves special interests more than the general

Further, monied individuals, corporations, and special interests wield power proportionate to their access to money but disproportionate to their numbers.²¹⁹ The unequal influence imperils the republic because the people cannot match resources with monied interests who have their will done in Congress.²²⁰ The impact of big money threatens the republic.

While far more people can vote today than when the Constitution was ratified,²²¹ popular sovereignty, if safe at the ballot box, is thus frustrated in

citizenry.”).

219. Senator John McCain put the issue into relief against the backdrop of both the 2000 presidential elections and the legislation he was sponsoring to change the campaign finance system:

After one of the closest elections in our nation’s history, there’s one thing the American people are unanimous about—they want their government back. We can do that by ridding politics of large, unregulated contributions that give special interests a seat at the table while average Americans are stuck in the back of the room.

McCain, Feingold, Cochran Introduce Bipartisan Campaign Reform Act Of 2001, at <http://www.senate.gov/~feingold/releases/01/01/200112345.html> (Jan. 22, 2001).

220. One commentator wrote:

Ordinary citizens are unable to match this influence which is all too frequently directed to frustrate legislation which protects their rights, which gives them legal remedies, or which holds corporations accountable. Citizens [sic] groups believe that this factor more than any other is responsible for politician’s [sic] failure to address critical issues and for the impotence of state regulators who serve these politicians. Available data suggests that voting in congress closely follows the money donated to political coffers.

J. Michael Wynne, *Integrated Health Services and Political Influence*, at http://www.uow.edu.au/arts/sts/bmartin/dissent/documents/health/ihs_political.html (Jan. 2001).

221. The founding-era idea of a white male freeholder as voter does not comport with the modern day notion. See U.S. CONST. amend. XV, § 1 (prohibiting the denial of suffrage based on race or a previous condition of servitude); U.S. CONST. amend. XIX, § 1 (extending voting rights to women); U.S. CONST. amend. XXIV, § 1 (prohibiting poll taxes); U.S. CONST. amend. XXVI, § 1 (granting eighteen-year-olds the right to vote); *City of Phoenix v. Kolodziejcki*, 399 U.S. 204, 213 (1970) (concluding that a property requirement for voters in a limited purpose election violated Equal Protection Clause); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (same); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 622 (1969) (holding unconstitutional a statute that restricted a school district election to property owners and parents); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (finding a poll tax violated the Equal Protection Clause of Fourteenth Amendment). As one writer noted:

If one were to equate “the People” in the newly-created American republic with those persons who actually voted for their representatives in state legislatures and Congress, the source of sovereign power in the new nation was not widely dispersed. Women did not vote. Most blacks did not vote. In most states eligibility for suffrage was conditioned on the possession of freehold land . . . or the possession of other property valued over a designated amount. Although these suffrage conditions broke down over time, for a good portion of the nineteenth century they had the effect of limiting the suffrage to freehold-owning white males.

terms of the role of the people's representatives. The focus of campaign reform, in terms of guaranteeing a republican form of government, is on the systemic dilution of the people's ability to choose their representatives who will, in turn, be responsive to them. Although individuals still enjoy the vote, the republican form of government is threatened.²²² If the unelected few—primarily wealthy individuals, corporations, and special interests—continue to tighten their grasp on the process,²²³ government becomes less and less responsive to the people; the elected officials must be responsive to the best interests of the people.²²⁴ Meaningful campaign reform can help us on the path to a system where elected officials act in the best interest of the community that they represent, not special interests.²²⁵ The Article will next show how the states have tried to correct these problems through campaign reform.

White, *supra* note 12, at 796.

The individual right to vote has changed dramatically over time and such shifting sands cannot form the foundation for building a solid sense of popular sovereignty. Further, if we focus too myopically on the individual right to vote, we lose sight of the representational aspect of popular sovereignty. See also Edward A. Hartnett, *A "Uniform and Entire" Constitution; Or, What if Madison Had Won?*, 15 CONST. COMMENT. 251, 276 (1998) (detailing a uniform and entire Constitution and positing that the vote-related Amendments belong together and could be incorporated into the text of Constitution alongside the Guarantee Clause). Hartnett continues: "[B]y setting limits on exclusion from political participation, [these Amendments] help to define what a truly representative government entails. Thus all four should be placed at the end of Article IV, section 4 . . ." *Id.*

222. Senator Russell Feingold said: "The extraordinary spending in the 2000 election gives monied interests more influence on the Congress and the President than ever before. The voices of average Americans have been drowned out by the deafening racket of campaign cash." *McCain, Feingold, Cochran Introduce Bipartisan Campaign Reform Act of 2001*, at <http://www.senate.gov/~feingold/releases/01/01/200112345.html> (Jan. 22, 2001).

223. As a point of historical comparison, Thomas Paine complained as follows about the government of England: "Sir William Meredith calls it a republic; but in its present state it is unworthy of the name, because the corrupt influence of the crown, by having all the places in its disposal, hath so effectually swallowed up the power . . ." PAINE, *supra* note 19, at 121. Also, recall the discussion earlier that initial English understandings of representative government eschewed special interest representation. *Supra* note 51 and accompanying text.

224. Alexander Hamilton's comments on slavery shed some light: "The only distinction between freedom and slavery consists in this: In the former state, a man is governed by the laws to which he has given his consent, either in person, or by his representative: In the latter, he is governed by the will of another." ALEXANDER HAMILTON, *A Full Vindication of the Measures of Congress*, in 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 54, at 45, 47.

225. Bill Bradley aptly described the situation:

In a curious way, money in politics turns everyone into an interest group. You're a gun owner or a trial lawyer or a tobacco company, each with your own fund-raising machine, or you're in the great ranks of the nongivers, with no voice at all. One of the consequences of this dichotomy is that when voters don't get the results they want, they feel cheated and ignored. When you believe that influence drives the process, and you don't win, you believe that someone else's influence has trumped

2. State and Local Reform Efforts

Importantly, scores of legislative bodies have made the determination that reform is needed, and the courts should accord some deference to those findings. A review of the legislative efforts reveals that dozens of states and well over 100 localities have made significant changes in their campaign finance laws.²²⁶ A brief survey uncovers several common statutory goals that echo themes of preserving the republican form of government.²²⁷

yours, and your trust in your government diminishes. It's at this point that many Americans lose interest and become cynical about politics in general. Politicians are increasingly viewed as controlled by special-interest money that endangers their integrity

BRADLEY, *supra* note 205, at 87–88.

226. In March 2000, one organization reported:

- Since 1990, 30 states have radically changed their campaign finance laws, 17 of them between 1995 and 1998.
- From 1972 until the 1996 elections, at least 45 initiatives and/or referenda, as well as constitutional and charter amendments on election reform, were placed on the ballot. In 36 of these cases, a majority of voters supported enactment.
- With voters approving ballot initiatives in Massachusetts and Arizona in the 1998 elections, these two states will join the 22 that already have statutes on the books providing some sort of public financing for election campaigns. Some 12 states and New York City now have some form of expenditure limitations.

Campaign Finance: State and Local Overview, at <http://www.campaignfinancesite.org/structure.states1.html> (last visited July 1, 2003); see also NATIONAL CIVIC LEAGUE, LOCAL CAMPAIGN FINANCE REFORM, at <http://www.ncl.org/npp/lcfr/inventory.html> (last updated Feb. 2002) (indexing reforms). *But see Massachusetts Legislature Repeals Clean Elections Law*, N.Y. TIMES, June 21, 2003, at A16 (discussing the repeal of the Massachusetts law). The repeal measure became an amendment to the state's compromise budget by voice vote. *Id.*; H.B. 1457, 183rd Gen. Ct. (Mass. 2003), available at <http://www.state.ma.us/legis/history/h01457.htm> (last visited Aug. 26, 2003).

227. In so doing, the legislative body often makes declarations of findings to support the ultimate restriction on campaign financing. As one example, Arizona's statute reads as follows: 16–940. Findings and declarations.

A. The people of Arizona declare our intent to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions. Campaigns will become more issue-oriented and less negative because there will be no need to challenge the sources of campaign money.

B. The people of Arizona find that our current election-financing system:

1. Allows Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction;
2. Gives incumbents an unhealthy advantage over challengers;
3. Hinders communication to voters by many qualified candidates;
4. Effectively suppresses the voices and influence of the vast majority of

First and foremost, in their reform efforts the states seek to reduce the disproportionate influence of special interest wealth. To illustrate, in its campaign finance reform statute, the Colorado legislature declared: "[L]arge campaign contributions to political candidates allow wealthy contributors and special interest groups to exercise a disproportionate level of influence over the political process."²²⁸ Next, states enact reform measures in order to reduce the costs of campaigning that deter qualified candidates from running for office. Again using Colorado as an example, the legislative declaration of its campaign reform statute states that "the rising costs of campaigning for political office prevent qualified citizens from running for political office; and that the interests

Arizona citizens in favor of a small number of wealthy special interests;

5. Undermines public confidence in the integrity of public officials;
6. Costs average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors;
7. Drives up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding; and
8. Requires that elected officials spend too much of their time raising funds rather than representing the public.

ARIZ. REV. STAT. ANN. § 16-940 (West Supp. 2002). *See also* COLO. REV. STAT. ANN. § 1-45-102 (West 2002) (noting the problems money injects into elections); MASSACHUSETTS CLEAN ELECTIONS LAW, St. 1998, c. 395 § 1(a)(7) (same) (repealed 2003); 1997 Vt. Acts & Resolves 64, § 1 (listing legislative findings) (codified as amended at VT. STAT. ANN. tit. 17 §§ 2801-83) (2002).

228. COLO. REV. STAT. ANN. § 1-45-102 (West 2002). *See also* Massachusetts Clean Elections Law, St. 1998, c. 395 § 1(a)(5) (finding a diminished accountability to the people) (codified as amended at MASS. GEN. LAWS ANN. ch. 55A, §§ 1-18 (West 1999) (repealed 2003)); SEATTLE, WASH., MUNICIPAL CODE § 2.04.450(A) (1978), <http://www.clerk.ci.seattle.wa.us/~public/code1.htm>. Vermont's General Assembly found that "[s]ome candidates and elected officials respond to contributors who make large contributions in preference to those who make small ones." 1997 Vt. Acts & Resolves 64, § 1(a)(2). In interpreting the Seattle statute, the Washington Supreme Court found that it was "clearly intended to express in general terms . . . that in the electoral process the public interest as expressed through the ballot box should prevail over special and private interests." *City of Seattle v. State*, 668 P.2d 1266, 1274 (Wash. 1983) (citing SEATTLE, WASH., MUNICIPAL CODE art. 18, § 4). *See also* *Homans v. City of Albuquerque*, 160 F. Supp. 2d 1266, 1273 (D.N.M. 2001) (noting that the city sought to ensure that "ordinary citizens, not just the very wealthy, can run for office in Albuquerque without having to receive large sums of money from special interest groups"); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 608 (Alaska 1999) (considering the State's argument that the statute was enacted in an effort to ensure that the "corporate voice" is prevented "from overwhelming individuals' voices . . . in leveling the playing field" (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658-61 (1990))); Daniel Ortiz, *Introduction to THE FIRST AMENDMENT AT WORK: CONSTITUTIONAL RESTRICTIONS ON CAMPAIGN FINANCE REGULATION, in CAMPAIGN FINANCE REFORM: A SOURCEBOOK* 63-66 (1997) (exploring recent Supreme Court campaign finance jurisprudence).

of the public are best served by limiting campaign contributions."²²⁹ Further, state reforms often are designed to restore waning public confidence in the electoral process,²³⁰ as in Vermont, where enactment of campaign reform was designed to combat "the appearance that candidates and elected officials will not act in the best interests of Vermont citizens."²³¹ These reform efforts also invoke concepts like enhancing and ensuring representative democracy.²³² In sum, the states clamor for reform because they see the system—the republican form of government—being corrupted. The states connect the demise of the system with campaign finance reform and attempt to break out of the cycles of politics that exist today.²³³

229. COLO. REV. STAT. ANN. § 1-45-102 (West 2002). Like Colorado, one purpose of Massachusetts's campaign finance reform law is to "creat[e] genuine opportunities for qualified residents of the Commonwealth to run for State office, and [to] encourage more competitive elections." *Bates v. Dir. of the Office of Campaign & Political Fin.*, 763 N.E.2d 6, 22 (Mass. 2002) (citing Massachusetts Clean Elections Law, St. 1998, c. 395 § 1(b)(1) (repealed 2003)). Note also that in *Bellotti*, the Supreme Court wrote that "confidence of the citizenry in government" would be a compelling governmental interest that could justify campaign finance reform. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789–90 (1978).

230. For example, the Vermont legislature declared, "Robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased." 1997 Vt. Acts & Resolves 64, § 1(a)(4) (codified as amended at VT. STAT. ANN. tit. 17 §§ 2801–83 (West 2001)).

231. *Id.* § 1(a)(9). In a similar vein, in *Homans* the U.S. District Court found that "[t]he record [was] clear that the vast majority of residents of Albuquerque, indeed seventy-one percent, feel that spending limits improve the fairness of elections." *Homans v. City of Albuquerque*, 160 F. Supp. 2d 1260, 1273 (D.N.M. 2001).

232. The Massachusetts campaign finance reform statute stated an intention to "enhance democracy" by "restoring the rights of citizens of all backgrounds to equal and meaningful participation in the democratic process." *Bates v. Dir. of the Office of Campaign Political Fin.*, 763 N.E.2d 6, 22 (Mass. 2002) (citing Massachusetts Clean Elections Law, St. 1998, c. 395 § 1(b)(1) (repealed 2003)). The city of Seattle adopted a campaign finance reform initiative in an "attempt[] to ensure a representative democracy." *City of Seattle v. State*, 668 P.2d 1266, 1271 (Wash. 1983) (citing SEATTLE, WASH., MUNICIPAL CODE art. 18, § 4 (effective Nov. 2, 1976)). Further, as the Supreme Judicial Court of Massachusetts explained in *Bates*, "[t]he fundamental premise of the clean elections law is that government is more responsive to the people to the extent that its chosen representatives are free from the influence of those providing financial largesse." *Bates*, 763 N.E.2d at 22. As one commentator noted, the Massachusetts Clean Elections Law seeks to "affirm the principle of 'one person, one vote' and give all citizens meaningful participation in the democratic process." MASS. VOTERS FOR CLEAN ELECTIONS, THE CLEAN ELECTIONS LAW, at http://www.massvoters.org/The_Clean_Elections_Law.html (last visited July 1, 2003).

233. Massachusetts provides an interesting tale, in that its Clean Elections Law was passed by voter referendum but repealed by the legislature with the governor's acquiescence. See *Massachusetts Legislature Repeals Clean Elections Law*, *supra* note 226, at A16 (discussing the repeal of the Massachusetts law).

The legislative findings and judicial interpretations, as just discussed, reflect a belief that money has a corrosive effect on republican politics and governance.²³⁴ Social science research verifies that the states have good reason to act, demonstrating a link between campaign contributions and influence in government.²³⁵ For example, the most recent such study examined voting patterns on financial services legislation²³⁶ as compared to contributions to members of Congress.²³⁷ The study looked at legislation with banking,

234. While the evidence, both statistical and anecdotal, is very persuasive, admittedly the connection between contributions and the political position can never be proven beyond all possible doubt. There is a sort of chicken and egg problem that asks "whether contributions follow positions or positions follow contributions." Thomas Stratmann, *Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation*, 45 J.L. & ECON. 345, 349 (2002) [hereinafter Stratmann, *Financial Services*]. In other words, does a contributor contribute because the candidate has taken (or has promised to take) a position on a particular issue, or does the candidate take (or promise to take) the position because the contributor has made the contribution to the candidate? Such a proposition can never be proved absolutely, but as we now see, there is very strong evidence, both from social science and from less formal observations of the process, that supports the basic proposition that money influences candidates and elected officials. See, e.g., Jonathan J. Silberman & Gary C. Durden, *Determining Legislative Preferences on the Minimum Wage: An Economic Approach*, 84 J. POL. ECON. 317 (1976) (suggesting a strong correlation between contributions and voting patterns). *But cf.* Henry W. Chappell, Jr., *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model*, 64 REV. ECON. & STAT. 77 (taking the opposite position and specifically refuting Durden and Silberman); *cf.* Jeffrey Milyo et al., *Corporate PAC Campaign Contributions in Perspective*, 2(1) BUS. AND POL. 75 (2000) (acknowledging the wide literature establishing money-votes correlation and equating it with bribery, but nonetheless challenging the true effectiveness of corporate political contributions). The Supreme Court in *Shrink Mo.* observed that while there are differing perspectives, "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377, 395 (2000).

235. In addition to the econometric analyses to be discussed, there has been a significant amount of anecdotal study reflecting the principle that money has a significant impact on the process. For example, one book describes the rise and fall of Tony Coelho from politics, offering the following assessment: "The system of money-based elections and lobbying rewards those who cater to well-funded interests, both by keeping them in office and allowing [legislators] to enrich themselves while they serve." JACKSON, *supra* note 218, at 320. In commenting on the ignominious end of Coelho's House career, Jackson writes, "Coelho's departure, of course, changed nothing. He left intact a deeply rooted system of money-based politics. It had molded his career and it brought him down, and it continued to flourish after he was gone." *Id.* at 318. "More than ever, members of Congress are political freebooters, financially beholden not to their party but to scores of favor-seeking groups." *Id.* at 321. Larry Sabato and Glenn Simpson have also written persuasively about the "Keating Five" savings and loan scandal as an example of the types of problems which abound. SABATO & SIMPSON, *supra* note 218, at 5-9.

236. Stratmann, *Financial Services*, *supra* note 234.

237. The researchers examined a legislative area where candidates had not necessarily previously articulated positions. The absence of a prior position statement can help create a

insurance, and investment components at three different points in time in the 1990s.²³⁸ Having so many different votes on different but related subjects at various points of time allowed researchers to more readily analyze any patterns and correlations between political contributions and votes.²³⁹ Further, the study controlled for party affiliation.²⁴⁰ The study concluded unambiguously: "[I]nterest groups 'buy' legislators' votes with PAC contributions."²⁴¹ A similar study analyzed campaign contributions and subsequent voting patterns for ten different congressional votes on agricultural price supports and quotas.²⁴² The study found that politicians were particularly responsive to the dictates of contributors²⁴³ and that contributions more recent in time had the greatest effect.²⁴⁴ And most starkly, the study revealed that the power of money could be equated with the ultimate success of specific legislative measures: "[W]ithout campaign contributions farm interest would have lost in five of the seven votes that were won."²⁴⁵ In addition to the vote-specific analyses, other

clean canvas, so to speak, in that it may be less likely that the contributor donated money because of previous knowledge as to a certain position and can thus enable researchers to more readily determine whether the candidate takes a position that follows the money. *Id.* at 349–50.

238. *Id.* at 357–65.

239. *Id.* at 367.

240. *See id.* at 360–61 (explaining the format of the study). Stratmann states:

The fact that the basic results hold up when the regressions are run separately for each party suggests that the findings in our other tables are not caused by parties forcing their members to switch their voting behavior but by individual legislators changing their votes in response to changes in contributions.

Id.

241. *Id.* at 368.

242. Thomas Stratmann, *Campaign Contributions and Congressional Voting: Does the Timing of Contributions Matter?*, 77 REV. ECON & STAT. 127, 129 (1995) [hereinafter Stratmann, *Timing*].

243. *See id.* at 135 ("The results confirm the qualitative and quantitative importance of campaign contributions.").

244. *See id.* (reporting findings). Stratmann noted:

[T]he findings suggest that campaign contributions from not only one period, but from at least two periods, are important for legislative voting. Contributions that are given at approximately the same time as the vote have a larger impact on the congressional voting behavior than contributions that the legislator received to win the last popular election.

Id.

245. *Id.* at 127. *See also* Christopher Magee, *Campaign Contributions, Policy Decisions, and Election Outcomes, A Study of the Effects of Campaign Finance Reform*, 64 THE JEROME LEVY ECONOMICS INSTITUTE OF BARD COLLEGE PUBLIC POLICY BRIEF 7, 37 (2001) (making the similar finding that in terms of "House support for NAFTA, cuts in defense spending, and gun control . . . PAC money appeared to be decisive on these issues"). This conclusion does not suggest that in all cases all votes of Congress are up for grabs, depending on the marginal and

studies have shown that contributions have a large impact on policy outcomes by virtue of the access that money can buy. One study concluded that PACs give money to incumbents in large part to gain access and the influence that comes with it.²⁴⁶ "Evidence consistent with that hypothesis is that business groups gave more money to members of the Ways and Means and Commerce Committees, labor groups targeted contributions to members of the Education and Labor Committee, and defense PACs heavily supported members of the National Security Committee."²⁴⁷ These econometric studies thus confirm what so many states and localities have known and addressed: Money can buy votes, shape legislative outcomes, and buy access.

3. Buckley Adherence

As state and local governments have responded to the threat to the republican form of government with campaign finance reform measures, those efforts have been challenged in court. Not surprisingly, the reaction in court is clear: As the Sixth Circuit observed, "Any judicial consideration of the constitutionality of campaign finance reform legislation must begin and usually ends with the comprehensive decision in *Buckley*."²⁴⁸ *Buckley* is the controlling Supreme Court precedent; accordingly, courts consistently employ the *Buckley* First Amendment strict scrutiny framework. But there is not much case-by-case exploration outside the *Buckley* box. A typical campaign reform analysis in the *Buckley* mold begins with the court exalting campaign spending as political

most recent contribution; correlation and causation are always difficult to distinguish. But the study does provide stark evidence of the power of campaign contributions in specific situations.

246. See Magee, *supra* note 245, at 36–37 (positing that PACs give money "to buy unobservable services that benefit the interest group").

247. *Id.* at 36. See also Stratmann, *Timing, supra* note 242, at 132 (finding that farm interest "campaign contributions are positively related to . . . membership in the House Agriculture Committee"); JACKSON, *supra* note 218, at 323. Author Brooks Jackson noted some of the results of this system:

The pernicious effect of narrow factions can be seen clearly in the ways Congress set up housing-subsidy programs that aid wealthy developers more than they help poor families. It showed itself in a tax code that allowed 'investors' to profit from coal-mining ventures that mined no coal. It was at work as tax shelter syndicators grew rich through deals that drained the Treasury without producing any tangible product.

Id.

248. *Kruse v. City of Cincinnati*, 142 F.3d 907, 911 (6th Cir. 1998). See also *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1186–87 (10th Cir. 2000) (quoting *Kruse*); *Right to Life of Mich., Inc. v. Miller*, 23 F. Supp. 2d 766, 767 (W.D. Mich. 1998) (same).

speech, thereby subjecting it to the highest level of First Amendment protection.²⁴⁹ The courts typically reject limits on expenditures,²⁵⁰ based on the *Buckley* principle equating money and speech.²⁵¹ But also under *Buckley*, some contribution limits have survived and some have fallen.²⁵² Whether striking or upholding a law, the adherence to *Buckley* is strong. Although the corruption rationale does not completely foreclose the opportunity for any meaningful campaign reform,²⁵³ *Buckley* casts a long shadow.

As explored in this Part, campaign finance reform laws must survive First Amendment strict scrutiny, and that is very difficult, except when attacking corruption can be convincingly argued as the legislative goal. But we have also seen that the states' and localities' efforts to regulate campaigns grow out of a well-founded desire to protect the republican form of government. While *Buckley* dictates a First Amendment analysis, the Guarantee Clause offers an additional perspective. As will be discussed in Part V, a Guarantee Clause approach can survive *Buckley*'s strict

249. See *Suster v. Marshall*, 149 F.3d 523, 529 (6th Cir. 1998) (stating that contribution and expenditure limitations "operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976))); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 18 (1st Cir. 1996) (same).

250. See, e.g., *Suster*, 149 F.3d at 530; *Kruse* 142 F.3d at 912 (6th Cir. 1998); *Gardner*, 99 F.3d at 18; *Frank v. City of Akron*, 95 F. Supp. 2d 706, 710 (N.D. Ohio 1999). All of these cases quote, with alterations, the same language from *Buckley*:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Buckley, 424 U.S. at 19. But see *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 661 (1990) (upholding a prohibition on certain corporate political expenditures).

251. See *supra* note 169 and accompanying text (noting that *Buckley* has been so interpreted).

252. See *Frank*, 95 F. Supp. 2d at 710 ("A limitation on the amount that a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication." (quoting *Buckley v. Valeo*, 424 U.S. 1, 20–21 (1976))).

253. This corruption rationale applies only to contributions, not independent expenditures:

Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Buckley, 424 U.S. at 47. See also *Colorado II*, 533 U.S. 431, 441, 464 (2000) (quoting from same); *Colorado I*, 518 U.S. 604, 615 (1996) (same); *Austin*, 494 U.S. at 683–84 (1990) (Scalia, J., dissenting) (same); *Fed. Elec. Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (same).

scrutiny. It is time to introduce a new factor, it is time to challenge the conventional wisdom.

V. Old Problem, Old Clause, New Approach

The Guarantee Clause speaks to the republican form of government, and so does campaign finance reform. Current analysis fails to consider that connection. How does the Guarantee Clause help us? This analysis forces a re-examination of the debate over campaign finance reform that has been dominated by the *Buckley* framework for so long. Regardless of one's position on the correctness of the approach taken in *Buckley*, it is hard to argue against its impact and dominance. The problem is that campaign finance reform laws are myopically measured against *Buckley*.²⁵⁴ As a result, we have lost sight of why campaign finance reform is important.

The Guarantee Clause approach reminds us that campaign finance reform is not important as a partisan question of Democrats versus Republicans, but it is fundamentally important as a matter of the health of the system of government that we hold so dear in this country. The Guarantee Clause specifically protects that unique structure—the republic—that is in jeopardy. Thus, employing a Guarantee Clause framework helps by reorienting the debate to its "true north" position. Although more recent cases have started to recognize that corruption of the system extends beyond the quid pro quo of *Buckley*,²⁵⁵ neither courts nor commentators have ever specifically addressed this specific, central issue in the debate. Thus, this Article proposes, in effect, a recentering, so that the core value of the health of the republic is explicitly considered in any ongoing discussions of campaign finance reform.

This last Part of the Article outlines a role for Congress to animate the debate over campaign reform by turning to the Guarantee Clause. The federal government must fulfill the Article IV mandate to guarantee the states a republican form of government via campaign reform. Congress should pass a law to provide a safe harbor where a state's action would be analyzed under a Guarantee Clause analysis, rather than only the First Amendment standards.²⁵⁶ But, we cannot ignore the

254. See *supra* note 248 and accompanying text (listing cases that have adhered to *Buckley*).

255. See *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377, 390–95 (2000) (considering evidence of corruption).

256. This proposal specifically applies so as to have the Congress provide a safe harbor for campaign reform efforts to the states. It does not apply to the federal government. Still, that question merits momentary attention. In creating the republic for the United States, the Framers saw a particular value in protecting the same form of government for the states. They promised the states that the national government would ensure that the states could enjoy the same

previous quarter-century of judicial opinions, so we now consider how to clear the *Buckley* hurdle.

A. Resolving the Apparent First Amendment Conflict

At this point in this Article, the reader might respond, "So what?" Although Congress has the power under the Guarantee Clause to enact legislation dealing with state elections, the First Amendment can be said to trump the Guarantee Clause, just as it could trump the exercise of any of Congress's enumerated Article I powers. This response has an intuitive appeal. After all, in constitutional adjudication the Bill of Rights operates as a limitation on the powers that were entrusted to the national government by the original Constitution. So long as *Buckley* is not reconsidered, the argument concludes, a Guarantee Clause enactment is as subject to invalidation as any other.²⁵⁷ Several responses suggest that such a conclusion is too facile. We first must consider that such matters are nonjusticiable, but then assuming justiciability, we will see that the Guarantee Clause provides a compelling justification for campaign finance reform that would satisfy constitutional scrutiny. Finally, we will reconsider whether the Guarantee Clause in a structural way recasts this entire issue so as to justify congressional action.

1. Procedure: Courts Should Not Hear Guarantee Clause Cases

The first reply invokes the justiciability doctrine.²⁵⁸ Starting with *Luther*, a long line of cases hold Guarantee Clause matters nonjusticiable.²⁵⁹ As Guarantee Clause

governmental structure as had been created for the nation. But no such guarantee was created for the federal government, most logically speaking, because there was no need for such; the Framers had drafted a document that created a republic, so there was no need to guarantee that there would be a republican form of the national government—it existed by virtue of the Constitution. But now that we see the ways in which the republican form of government is suffering, perhaps there is a need to visit the question in the federal context as well. While it would be tempting to read a federal Guarantee Clause into the text, by natural implication of the Framers' original acts, no such text exists. Instead, amending the Constitution so as to add a federal Guarantee Clause could be one way to achieve this goal. This Article does not propose such action, but instead raises these ideas for further discussion at another point in time.

257. For recent examples of the application of this principle, see *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (remanding the Children's Online Protection Act, which regulated online obscenity, to a lower court for further analysis of whether the statute survives strict scrutiny) and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (overturning federal regulation of "virtual" child pornography, the Child Pornography Prevention Act).

258. As a procedural question of the courts' ability to even hear a matter, justiciability should be considered first.

259. See *supra* Part III.A (documenting the lack of advancement in this area of the law

matters are political questions, the argument goes, the courts cannot review such congressional action. If Congress were to act pursuant to Guarantee Clause authority, courts simply might not hear a challenge to the resulting law. The nonjusticiability point is also important because it speaks to the structural role of the various branches in interpreting and enforcing the Guarantee Clause. In short, Guarantee Clause matters are inherently political by nature—they involve a definition of what a republican form of government is—and more specifically, campaign finance reform is a question distinctly political in nature. The political question doctrine allows for the courts to stay out of areas in which they do not belong and properly leaves some matters for the expertise of other branches.

Just as we look back over 150 years to *Luther* for our Guarantee Clause foundation, we can also look back even farther, for example, to *Marbury v. Madison*,²⁶⁰ for the early development of the political question doctrine. "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political . . . can never be made in this court."²⁶¹ As we move forward in time, the political question doctrine has been most famously stated in *Baker v. Carr*,²⁶² in which the Court set forth six factors as touchstones in the decision as to whether a matter is a political question and therefore nonjusticiable,²⁶³ four of which particularly speak to our situation. The courts would be well-advised against ruling on a Guarantee Clause campaign finance reform challenge, which would (a) involve a non-judicial policy determination; (b) disrespect Congress's act; (c) unnecessarily

since *Luther's* rationale was created).

260. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

261. *Id.* at 170.

262. *Baker v. Carr*, 369 U.S. 186 (1962).

263. The *Baker* court listed the factors:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

cleave from a political decision already made by the Congress; and (d) risk conflicting pronouncements from the two branches.²⁶⁴ Thus, if Congress acts as proposed in this Article, the matter properly may be seen, judicially speaking, as a political question that is unreviewable in court.²⁶⁵

But dicta from *Texas v. White* cuts against this position: "In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed [But] no acts [may] be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution."²⁶⁶ Although it is dicta, this passage implies that there are limits to the power that the Court can enforce, and in fact, Congress may not ignore First Amendment limitations solely because it is acting pursuant to another power. Thus, even adhering to the established principle that Guarantee Clause matters are nonjusticiable does not mean that courts will adhere to this judicially-created doctrine.²⁶⁷ Thus, moving beyond justiciability, a First Amendment challenge may still be available.²⁶⁸

A second reply to the First Amendment challenge builds on the justiciability argument, but from a perspective of textual context, emphasizing commands and grants of power. Put most simply, the Guarantee Clause mandates action, unlike almost any other part of the Constitution: The structure may be seen as superseding other permissive language. The Guarantee Clause contains an affirmative mandate to the federal government: "The United States shall guarantee . . . a Republican Form of Government."²⁶⁹ This constitutional provision both grants a power and creates a duty. By contrast, the enumerated powers in Article I are largely discretionary—Congress is granted various

264. *Id.*

265. This conclusion suggests what might be called a republican form doctrine that inveighs for congressional control and against court review of Guarantee Clause matters.

266. *Texas v. White*, 74 U.S. (7 Wall.) 700, 729 (1868). Other Supreme Court precedent sheds additional light. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 582 (1964) ("[C]ongressional approval, however well-considered, could hardly validate an unconstitutional state legislative apportionment. Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights."). Further, in *Baker v. Carr*, the Court addressed what could have been seen as Guarantee Clause claims as Equal Protection claims, thus avoiding the political question doctrine. *Baker v. Carr*, 369 U.S. 186, 208–09 (1962).

267. Seen in the light of *Bush v. Gore*, 531 U.S. 98 (2000), it could be argued that the current Court might be willing to push aside the political question doctrine as it sees a duty to intercede.

268. Further, one may argue that the later date of adoption of the First Amendment necessarily serves as a limitation on whatever came before (i.e., the Guarantee Clause).

269. U.S. CONST. art. IV, § 4 (emphasis added).

powers but not commanded to exercise any of them.²⁷⁰ By determining that such questions are nonjusticiable,²⁷¹ the Court has not only taken itself out of Guarantee Clause enforcement, it also has reinforced the constitutional command that Congress must act. On this score, *Texas v. White* is again instructive. While it upheld action by the President toward the end of re-establishing a loyal government in Texas after the Civil War, it expressly described such actions as "provisional," waiting upon congressional power to validate them by passing laws.²⁷² The argument, then, is that exercises of the Guarantee Clause power are nonjusticiable precisely because the judiciary cannot interfere with the Congress's discharge of its constitutionally imposed duty.

The Guarantee Clause commands action by Congress. Simultaneously, it also requires judicial deference (whether in traditional justiciability terms or not) to such congressional action. The courts thus have yet another reason, in addition to the long history of nonjusticiability holdings, to decline to hear Guarantee Clause matters.

2. Substance: There is a Compelling Justification

The first two approaches to the possible First Amendment conflict are procedural in the sense that they would be raised preliminarily in an attempt to limit judicial review of the substance of the matter. As judicially created doctrines, the courts may still ignore them and proceed to the First Amendment issue itself. Accordingly, the next lines of attack confront the First Amendment conflict head-on; they are related but different approaches. The next path to surviving current First Amendment jurisprudence is to find that the Guarantee Clause, when invoked by Congress to ensure republican government in the

270. In a related vein, the First Amendment contains not a command but a prohibition: "Congress shall make no law . . ." U.S. CONST. amend. I. In contrast, again we see that the Guarantee Clause provides a rare affirmative *obligation* for federal action. Cf. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U.L. REV. 899, 956 (1997) ("The constitutional context supplies further evidence that the Petition Clause uses the word 'Government' to carry a three-branch meaning. The Constitution speaks frequently of the United States; but rarely of the 'government.' The latter term appears but thrice in the whole instrument as originally framed . . .").

271. See *supra* Part III.A (documenting the history of court opinions finding nonjusticiability on Guarantee Clause cases).

272. See *Texas v. White*, 74 U.S. (7 Wall.) 700, 730 (1868) ("The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress.").

states, provides a compelling interest to justify an infringement on freedom of speech. In other words, playing by *Buckley*'s rules, congressional action is constitutional, because (1) it provides a new compelling interest analysis or (2) it satisfies the current compelling interest corruption test.

Buckley controls,²⁷³ and First Amendment scrutiny looms large.²⁷⁴ But strict scrutiny, in theory, need not be fatal in fact.²⁷⁵ First, we must identify a compelling governmental interest. There can be no doubt that acting to protect the republican form of government is a compelling governmental interest. As we have seen, the American republic is the Framers' unique contribution to the world.²⁷⁶ Not only did the Framers build a republic in Articles I, II, and III, but they also saw it necessary to ensure compatible forms of government in all the states, even going so far as to mandate federal protection of this form of government in the Guarantee Clause. In so doing, the Framers were acting out their belief that the republic would best serve the people, through elected representatives in the central government.²⁷⁷

Further, moving beyond the Guarantee Clause, other constitutional provisions embody the textual and structural commitment to the republican form of government. For example, the text dictates the methods of election of members of Congress²⁷⁸ and Senators,²⁷⁹ plus subsequent amendments revised the provisions for electing Senators.²⁸⁰ The text and amendments further delineate the method of selection of the President and the Vice President.²⁸¹ In terms of the exercise of the franchise—the working mechanism of the republic—the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments all protect and extend the right to vote to certain individuals.²⁸²

273. Most courts begin and end their analyses with *Buckley*. See *supra* note 248 and accompanying text (citing cases that have adhered to *Buckley*). See also *supra* Parts IV.A.2 and IV.B.3 (discussing further Supreme Court cases relying on *Buckley* and cases evaluating state and local reform efforts within a *Buckley* standard).

274. *Buckley v. Valeo*, 424 U.S. 1, 44 (1976). See also *Colorado II*, 533 U.S. 431, 440 (2001) (recounting the history of strict scrutiny on campaign spending).

275. *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring); Gerald Gunther, *The Supreme Court, 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

276. See generally *supra* Part II.

277. See generally *supra* Part II.

278. U.S. CONST. art. I, § 2, cl. 1.

279. U.S. CONST. art. I, § 3, cl. 1.

280. Now Senators are directly chosen. U.S. CONST. amend. XVII, § 1.

281. U.S. CONST. art. II, § 1, cl. 2–3; U.S. CONST. amend. XII.

282. See *supra* note 221 (describing the amendments); see also Hartnett, *supra* note 221, at 258–81 (analyzing each amendment).

In these various ways, the Constitution itself thus speaks to the compelling need to preserve and protect the republican form.²⁸³ Protecting the integrity of the Framers' creation and the concomitant textual mandate surely is a compelling governmental interest.

Bringing the matter to the level of specific case law, the Court *has* identified other matters that could serve as a compelling interest to justify campaign reform measures.²⁸⁴ First, *Buckley* itself identified broad process concerns as justifying campaign restrictions.²⁸⁵ Other cases also shed light. For example, in *Burson v. Freeman*²⁸⁶ the Court upheld Tennessee statutes prohibiting vote solicitation and limiting the display of campaign materials within 100 feet of a polling place on Election Day.²⁸⁷ As they were specifically designed to restrict election day political speech, the statutes had to survive

283. Cf. Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 958-59 (1988) (discussing other national interests given in Constitution).

284. See *id.* at 955 ("In order to fully protect this interest in democracy, the Court has frequently accepted the government's asserted compelling interests in preventing election fraud and corruption as justifying various restraints on individual rights.").

285. That Court considered the nature of those interests:

The governmental interests sought to be vindicated by the disclosure requirements . . . fall into three categories. First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return. And, as we recognized in *Burroughs v. United States*, 290 U.S., at 548, Congress could reasonably conclude that full disclosure during an election campaign tends "to prevent the corrupt use of money to affect elections"

Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

The disclosure requirements, as a general matter, directly serve substantial governmental interests.

Buckley v. Valeo, 424 U.S. 1, 66-68 (1976) (citation omitted).

286. *Burson v. Freeman*, 504 U.S. 191 (1992).

287. *Id.* at 211.

strict scrutiny;²⁸⁸ preventing voter intimidation and election fraud were held to be compelling governmental interests.²⁸⁹ *Bellotti* provides another example, as the Court identified several other interests that lead to the conclusion that enforcing the Guarantee Clause mandate is compelling. "Preserving the integrity of the electoral process . . . and 'sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance."²⁹⁰ Not only do the post-*Buckley* cases offer this support, pre-*Buckley* case law also had identified the stability of the system and integrity of the electoral process as compelling governmental interests.²⁹¹ Guaranteeing the states a republican form of government serves these same goals.²⁹² Thus, case law supports finding that campaign regulations preserving the republican form of government can survive *Buckley*'s scrutiny as serving a compelling governmental interest.

Further, as the republic depends upon the faith of the governed, a congressional determination that the influence of money on state legislatures is so severe (whether actual or the appearance thereof)²⁹³ as to undercut the republican nature of those governments should be determinative of the question. Congressional amelioration of this problem is a compelling interest. On top of that, the Constitution, in the Guarantee Clause, places a responsibility in the hands of the Congress to act to protect the republican form of

288. *Id.* at 198.

289. *Id.* at 206.

290. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (1978) (citations omitted). Also recall that *Bellotti* left open the door for factual scenarios that could satisfy *Buckley* scrutiny. See *supra* note 194 (discussing *Belotti*). See also *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983) (considering other election-related interests); *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (expressing concern about protecting "the integrity of our system of representative democracy"). Cf. *Tashjian v. Republican Party*, 479 U.S. 208, 220–222 (1986) (rejecting the state's desire to prevent voter confusion as a sufficient interest); *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 124–26 (1981) (striking down laws that altered the primary process in the interest of assisting voters).

291. See *Am. Party of Tex. v. White*, 415 U.S. 767, 782 n.14 (1974) ("Appellants concede, as we think they must, that the objectives ostensibly sought by the State, viz., preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion, are compelling."); *Storer v. Brown*, 415 U.S. 724, 736 (1974) ("It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling . . ."); *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973) ("It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal.").

292. See, e.g., *supra* notes 227–33 (articulating the states' reasons for enacting campaign finance reform measures).

293. This language deliberately tracks the *Buckley* analysis of actual or apparent corruption. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

government. As members of the most republican branch, Senators and Representatives best can identify threats to the republican form—they are experts.²⁹⁴ Thus, like the political question doctrine suggests, the courts should particularly respect a congressional determination that the republican form needs protection, and that determination should form the foundation for deciding that there is a compelling governmental interest.²⁹⁵ In these various ways, congressional action to protect a republican form of government should be held a compelling governmental interest to satisfy *Buckley*.²⁹⁶

Even taking this issue more narrowly on *Buckley*'s terms, a Guarantee Clause-based campaign reform proposal would survive *Buckley*, in that it would be designed to prevent corruption.²⁹⁷ While the *Buckley* Court found corruption to be a compelling justification for enacting campaign finance reform legislation,²⁹⁸ it considered corruption in a narrow quid pro quo sense.²⁹⁹ It did not fully articulate the vision of corruption of the political process described in these pages.³⁰⁰ This Article is concerned broadly with the corruption of the American system of politics and governance, as compared with the corruption of specific individuals, which can also be addressed directly through public corruption statutes.³⁰¹ Protecting the republican form of

294. And, ironically, they are often the culprits.

295. In a sense, this builds on Justice O'Connor's opinion in *Shaw v. Reno* that compliance with the Voting Rights Act is a "very strong" governmental interest. *Shaw v. Reno*, 509 U.S. 630, 653–54 (1993).

296. Still, any legislation would have to be narrowly tailored, a concern that policy makers would have to keep in mind while crafting any legislation.

297. While this is a limited form of the Article's main proposition that Congress has a constitutionally designated power to police the health of the system, suggesting that Congress is best situated to determine when there is a threat of corruption, the purpose at this point is to show another way this proposal would fit within the existing legal framework.

298. *Buckley*, 424 U.S. at 26–27. For further discussion of this point, see *supra* Part IV.A.1.

299. *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976). The Court cited to several examples of situations in the Nixon Administration where money was raised specifically to obtain favorable treatment on specific matters, and to the apparent buying of Ambassadorships through campaign finances. See also *Buckley v. Valeo*, 519 F.2d 821, 839–40 (D.C. Cir. 1975) (discussing the relationship of corruption, campaign finance, and public confidence in government), *aff'd*, 424 U.S. 1 (1976).

300. Another way to put this point is that a congressional campaign finance reform enactment under Guarantee Clause authority—this Article's proposal—would not pose a direct conflict with *Buckley*. This Article thus offers an alternative analysis for those who want to respect the precedential value of *Buckley*. Recall Justice O'Connor's famous line in *Casey*: "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992).

301. See 18 U.S.C. § 201 (2000) (providing penalties for those who give or offer, solicit or receive anything of value in return for influence in official acts).

government may be directly equated with preventing corruption, not on the micro level, but rather on the macro level. The Court has indicated a willingness at least to consider this perspective in some more recent cases. In *Shrink Mo.*, for example, the Court held that corruption "extend[s] to the broader threat from politicians too compliant with the wishes of large contributors."³⁰² Thus, either by analyzing the compelling interest of guaranteeing a republican form of government, or by looking at the corruption rationale itself, a Guarantee Clause approach to campaign finance reform would withstand a *Buckley* challenge.³⁰³

3. Structure: Alternative Approach

A final, more radical approach to the *Buckley* dilemma is to reframe the First Amendment issue and consider the structural importance of the Guarantee Clause. Consider the one person, one vote principle,³⁰⁴ which, like our situation, involves political and governmental structures, state-federal relations, and seminal constitutional principles. As the Court made clear in *Reynolds*, "Malapportionment can, and has historically, run in various directions. However and whenever it does, it is constitutionally impermissible under the Equal Protection Clause."³⁰⁵ But, it would be ludicrous to bring suit to restructure the United States Senate³⁰⁶ in conformity with the one person, one

302. *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377, 389 (2000). The *Austin* Court interpreted corruption as including "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support." *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). See also Overton, *Mistaken Identity*, *supra* note 169, at 1267 n.139 (considering the interpretations of "corruption or the appearance thereof").

303. One might respond that the case law in this field has always considered the type of broad systemic corruption that this Article addresses, thus nothing new emerges with the Guarantee Clause analysis. No doubt, the subtext of a corrupt political system runs under both the "traditional" campaign finance reform case law and this new analysis. But the important difference in this context is that the Guarantee Clause analysis has never been considered before, and in doing so, we explicitly confront the deterioration of the republican form of government in a way that has never explicitly been considered in case law or scholarship.

304. See, e.g., *Lucas v. Gen. Assembly of Colo.*, 377 U.S. 713, 737 (1964) (holding a Colorado apportionment unconstitutional even though the voters had approved it); *Reynolds v. Sims*, 377 U.S. 533, 545-46 (1964) (finding unconstitutional an Alabama election system which overweighted rural voters); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (finding that Federalist 57 mandated "one person, one vote"); *Gray v. Sanders*, 372 U.S. 368, 379 (1963) (same as *Reynolds*, for Georgia system).

305. *Reynolds*, 377 U.S. at 567 n.43.

306. See U.S. CONST. art. I, § 3, cl. 1 (stating that each state shall have two Senators, each with one vote, regardless of population variations from state to state).

vote principle. The Electoral College is similarly implicated in this analysis.³⁰⁷ These two structural creations of the Constitution run afoul of the one person, one vote principle,³⁰⁸ but they have survived. Structural provisions that might otherwise be seen to contravene the Bill of Rights can, and do, withstand strict scrutiny.³⁰⁹ Why? Because, viewed as structural components of government, they are unlike exercises of power. The structure created by the Constitution thus arguably supersedes the individual rights delegated in the Bill of Rights.

From this perspective, the Guarantee Clause is simply not subject to the same First Amendment restrictions as other government action. While not "structural" in the same sense as Articles I, II, and III in establishing basic governmental institutions, the Guarantee Clause protects the underlying republican structure of the *entire* enterprise. The republican form of government is the heart and soul of the Constitution; the Guarantee Clause requires the United States to protect this structure. Perhaps it is even more important as the guarantor and guardian of the entire structure. While the First Amendment certainly applies to political speech, it does not apply so as to

307. See U.S. CONST. art. II, § 1 (providing for the appointment of Electors); U.S. CONST. amend. XII (creating and detailing function of Electoral College, which utilizes malapportioned voting scheme based on House and Senate representation).

308. Many people have challenged the Electoral College for just such a reason. See generally Victor Williams & Alison M. Macdonald, *Rethinking Article II, Section 1 and its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201 (1994); Roberta A. Yard, *American Democracy and Minority Rule: How the United States Can Reform Its Electoral Process to Ensure "One Person, One Vote"*, 42 SANTA CLARA L. REV. 185 (2001); Ky Fullerton, Comment, *Bush, Gore, and the 2000 Presidential Election: Time for the Electoral College to Go?*, 80 OR. L. REV. 717 (2001).

309. In *Reynolds*, the Court justified these two institutions:

The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government In rejecting an asserted analogy to the federal electoral college in *Gray v. Sanders* . . . we stated: We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election.

Reynolds v. Sims, 377 U.S. 533, 574-75 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368 (1962)).

thwart this Guarantee Clause approach to campaign finance reform.³¹⁰ To elevate the values of unlimited campaign expenditures as expressive activity while the republican form of government disintegrates is akin to fiddling while Rome burns. The structure of government must be protected, or the protection of the individual from the excesses of government becomes rather meaningless form over substance. Thus, we see yet another way to resolve the apparent *Buckley* conflict.³¹¹

As we approach the end of the Article, a brief review is in order. We have seen that popular sovereignty is at the heart of the republican form of government; the people reign supreme, and representatives in the central government act in the best interest of all the people—the many, not the few.³¹² The Guarantee Clause provides an affirmative obligation for the United States, acting through the political branches, to protect the republican form in the states.³¹³ Congress bears the responsibility—and has exercised it—to enforce the Clause, and the courts defer to the legislative branch.³¹⁴ We have also seen that the republican form of government is in danger, threatened by the corrosive influence of money in politics.³¹⁵ As attempts have been made to remedy this problem, the courts have employed the *Buckley* First Amendment strict scrutiny framework.³¹⁶ Now is the time for Congress to act pursuant to Guarantee Clause authority; the last subpart showed that congressional action in this area pursuant to the Guarantee Clause could withstand strict scrutiny.³¹⁷ Thus, the key point of this Article has been established: Congress must act—and may do so within constitutional boundaries—to help the states with campaign finance reform, as an exercise of Guarantee Clause power. Now, we consider how that can happen.

310. The value of political speech is being diminished more surely by the destruction of the republican form of government than by any single restriction on the mechanics of campaigns and elections. As the process is distorted by the ability of the few to disproportionately influence the elected representative, the republic is in danger.

311. In this context—an argument in the alternative—core First Amendment values ultimately would be strengthened by this approach to campaign reform rather than weakened. See also Chemerinsky, *supra* note 44 (arguing that the Guarantee Clause protects individual rights).

312. See *supra* Part II (considering the essence of the America republic).

313. U.S. CONST. art. IV, § 4.

314. See *supra* Part III (discussing judicial deference on Guarantee Clause issues).

315. See *supra* Part IV.B.1–2 (reporting the measurable effect of money in politics and the failed efforts to lessen this problem).

316. See *supra* Parts IV.A.1–2 and IV.B.3 (discussing *Buckley*'s continued application).

317. See *supra* Part V.A (considering how a reform measure passed under the Guarantee Clause would stand up to strict scrutiny).

B. A Proposal for Congressional Action

The states have attempted to guarantee the integrity of their republican governments, but the courts have struck down these efforts under a First Amendment analysis.³¹⁸ In order to fulfill its constitutional obligation to guarantee the states a republican form of government, Congress should pass a law empowering the states to enact meaningful campaign reform. Although courts should have input into this matter, the Guarantee Clause envisions deference to the legislative branch—courts should defer to Congress as to the meaning of a republic and what it takes to have a republican form of government.

To illustrate, here are the outlines of a campaign reform law for the United States Congress to offer the states a safe harbor and congressional assistance in regulating their own campaigns. It would proceed in two major sections. The first part of the legislation would contain three congressional declarations. First, Congress would simply and succinctly state that it is acting pursuant to its Guarantee Clause obligation. Second, the law would spell out the central features of a republican form of government³¹⁹ and indicate how this ideal is being subverted by the reality of today's system.³²⁰ Third, the law would explain the connection between the republican form of government and campaign reform.³²¹ With these three steps, Congress effectively would declare why this is a matter for its attention pursuant to the Guarantee Clause. The law would then turn to the mechanics of how to restore and/or preserve the republican form of government at the state level.

The specifics of a law are to be left to the Congress, which the Constitution most trusts to enforce the Guarantee Clause. Congress should decide the best way to guarantee the states a republican form of government, and the courts should defer to that decision. But, Congress is not entirely unfettered in its discretion. Primarily, to the extent that the influence of large money contributions has the effect of diminishing the government's responsiveness to the majority of the people, any Guarantee Clause-sponsored legislation would at least have to have a firm foundation in that reality in order to fall within the Guarantee Clause's grant of power. As members of Congress

318. See *supra* Part IV.B.3 (reporting the failure of new reform efforts to pass the *Buckley* test).

319. See *supra* Part II (considering nature of a republic).

320. See, e.g., *supra* Part IV.B.1–2 (discussing corrosive effect of money on political system).

321. See, e.g., *supra* Part IV.B.1–2 (discussing corrosive effect of money on political system).

carry out their duty in this area, they must be guided by the principles embodied in the Guarantee Clause, such as those delineated in this Article. In other words, as we move forward, we must remain mindful of how we got here. The means chosen by Congress to assist states with campaign finance reform in order to preserve their republican governments must be consonant with the principles of republican governance. Further, the means chosen must meet the *McCulloch*-like standard, which again is appropriately deferential to Congressional decisions.³²²

There are two guiding principles by which we³²³ can judge Congress's choice of means to protect the states. The broad principle driving this discussion is that the power of money has had a corrupting effect on the political-governmental system. Two intertwined ideas should inform any Congressional response: expenditures and contributions.³²⁴ First, campaigns cost enormous sums of money, and the dollar amount is increasing rapidly. So, Congress would act appropriately in furtherance of its Guarantee Clause mandate by assisting the states to reduce the costs of campaigning. Measures like providing free airtime for candidates' advertisements and debates,³²⁵ or offering a franking privilege for candidate mailings would be examples of measures that might help achieve such a goal.³²⁶

Second, the other side of the coin is raising the money to spend—because candidates will need to raise money. The problem we have identified in large part results from the fact that some well-financed groups and individuals gain

322. See, e.g., *supra* notes 88, 126, 152 and accompanying text (discussing *McCulloch* and its ramifications).

323. We the people can keep a check, and the President and members of the judiciary branch can also do so.

324. Note also that, contrary to *Buckley*, expenditures and contributions cannot be looked at separately as though unrelated one to the other.

325. The federal government could leverage its FCC licensing power to require broadcasters and cable operators to condition licenses on the provision of a certain amount of airtime for participating candidates' advertisements. *But see* Kathleen Q. Abernathy, *My View From the Doorstep of FCC Change*, 54 FED. COMM. L.J. 199, 203 (2002) ("I consider proposals like the push for free political ads ill-conceived . . ."); Rebecca R. Reed, *Free Air Time: Campaign Finance Reform or Constitutional Violation?*, 18(2) COMM. LAW. 21, 25–26 (2000) (arguing that such a proposal would be unconstitutional).

At present, candidates are protected from price gouging by the stations. See 47 U.S.C. § 315(b) (2000) (disallowing higher-than-normal rates for campaign advertisements). For a discussion of the role of debates in the presidential selection process, see generally Mark C. Alexander, *Don't Blame the Butterfly Ballot: Voter Confusion in Presidential Politics*, 13 STAN. L. & POL'Y REV. 121 (2002). The same provisions could be made applicable to radio as well. The federal government also could subsidize mailings for candidates via the United States Postal Service, at no cost to the campaign.

326. These are merely illustrative, not exhaustive, policy suggestions.

access because of their financial capabilities, while the average citizen is not heard. Toward that end, Congress would be acting to further its Guarantee Clause mandate by helping reduce that gap. Related measures could include contribution limits, matching funds, and public financing.³²⁷ This Article does not propose a detailed legislative proposal—Congress is constitutionally entrusted with that task. But the details must be judged against the driving principles laid out in these pages to reduce the corrosive impact that money has on the political-governmental process.³²⁸ If Congress acts pursuant to its Guarantee Clause mandate, then the means chosen must be measured against the specific ends of the Clause itself as explored earlier.

At this point, the states would take the lead within parameters set by Congress. They would design their campaign reform measures and turn to the Congress for help, which the federal government would provide.³²⁹ States desiring assistance would benefit in several ways. First, Congress would provide federal funds for state campaign activities. Second, while money helps, the federal government could help drive down the overall cost of campaigns. Third, states would then have a greater ability to attempt bolder reforms like contribution ceilings, expenditure limits and soft money bans. Above all, the mechanics are left up to the federal elected officials, for they are entrusted with preserving the republican form. Based on this basic outline, the states would design plans as they see fit, and Congress would support their actions, pursuant to the Guarantee Clause mandate.

If Congress acts along these lines, then the states would be able to opt in to meaningful campaign reform.³³⁰ There are no penalties for not doing so, but

327. There could be straight funding or matching funding. For example, for every dollar the candidate raises from individuals, the federal government would provide one to four dollars in matching funds. Cf. NEW YORK CITY, N.Y., ADMINISTRATIVE CODE tit. 3, § 3-705(2) (2001) (creating a quadrupling matching fund system), http://www.nycfb.info/program_law/cflaw/cfact/cfactchap7.htm#705. In addition, federal funding could be made available to the states to pay for certain political activities, including conventions, get-out-the-vote drives and other broad appeal activities. In this way, candidates could spend less time raising money as there would be funding provided to the political parties and candidates.

328. On the other side, any limits will be judged by the same basic criterion of whether they appropriately further (and not whether they are the best or most narrowly tailored means) the goals of guaranteeing a republican form of government.

329. In a sense, this would be akin to the state government making application to the United States for help, pursuant to part of Article IV that we have not discussed in these pages: "The United States shall . . . on Application of the Legislature, or of the Executive, [protect the States] against domestic Violence." U.S. CONST. art. IV, § 4.

330. This voluntary structure avoids problems of state autonomy and commandeering that were rejected in the Tenth Amendment context in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). See also Merritt, *Republican Governments*, *supra* note 45, at 816 ("If Congress tells state legislatures to enact a particular

there are great rewards. Beyond the financial and more tangible federal assistance, the states would benefit because once Congress declares its actions to fall under the Guarantee Clause mandate, the resulting laws would arguably be insulated from attack, or more to the point, the analysis would change. Although *Buckley* would still provide the key analytical reference point, any court challenge also would have to confront the Guarantee Clause issue.

This proposed law would represent Congress's efforts at enforcing the Guarantee Clause, with the federal and state governments working together. The key point is that without campaign reform, the republican form of government is in jeopardy. The states have sponsored their own laws,³³¹ which are often stricken under *Buckley* analysis.³³² The United States has an obligation to the states, under Article IV, Section 4, to help them preserve their republican form of government. Campaign reform can do the job, and Congress must provide a safe harbor for the states to act.

VI. Conclusion

The heart of the American republic is popular sovereignty—the people are supreme, and their political will is done in the central government by duly elected representatives. In the republic, the people must have control of their choices—not simply by being able to vote, but by having the government act in their best interest. Toward that end, the representatives owe their best judgment to all members of the community. Today, the increased influence of the few is diminishing the responsiveness of the representative to the many. The republican form of government is in jeopardy. The Guarantee Clause mandates federal government action to protect the republican form of government.³³³

law, and the states must comply, then the state legislatures become slaves of an outside power rather than servants of their electorate."'). This Article's proposal does not run up against Merritt's state autonomy concern, in that Congress would allow states to enact their statute at their will without federal interference, and then the states' actions would be immune from challenge.

331. See *supra* Part IV.B.2 (documenting various state and local reform efforts).

332. See *supra* Part IV.B.3 (reporting that those efforts usually fail to meet *Buckley*'s standard).

333. This Article has proposed a new approach to campaign reform, with particular inspiration and support from the Guarantee Clause. The specific proposal just set forth likely would achieve results and would certainly challenge the established thinking in the area. But beyond that, simply accepting the basic role of the Guarantee Clause in this area could have other ramifications. In particular, there is a question of federal court enforcement to consider briefly.

The states have experimented with campaign finance reform in order to place power back in the hands of the people. But, the field of campaign finance reform has proceeded under limited *Buckley* analysis that does not address a central moving force behind campaign finance reform. The Guarantee Clause, which has rested in relative obscurity for nearly two centuries, is directly relevant to this discussion, and it should be used to revive the debate over campaign finance reform. Such congressional action would fulfill the Constitution's mandate and would survive a *Buckley* challenge. While offering a basic plan of action for the Congress, I hope even more broadly to animate a debate that yearns for creative attention. We should reconsider campaign reform as something central to the American republic; future analysis should take the Guarantee Clause perspective into account. It is time for the United States to fulfill its obligation to the states.

The language of the Guarantee Clause places a specific obligation on the federal government and unless and until Congress acts, the courts might play a role to fulfill that obligation. Thus, when a federal court next faces a challenge to campaign finance legislation, it might weigh the Guarantee Clause in determining whether to uphold the challenged law. Thus, one final implication of this Article is that perhaps the courts should analyze state campaign finance reform laws under the Guarantee Clause. Further development of the merits or shortcomings of this idea is best left for a later time.

