CASES UNDER THE GUARANTEE CLAUSE SHOULD BE JUSTICIABLE

ERWIN CHEMERINSKY*

> "The United States shall guarantee to every State in this Union, a Republican Form of Government, and shall protect each of them against Invasion and on Application of the Legislature or of the Executive (when the Legislature cannot be convened) against domestic Violence."
>
> United States Constitution Article IV, Section 4

It is a well-settled principle that cases brought under this provision must be dismissed as posing a nonjusticiable political question. There are countless Supreme Court decisions that have summarily dismissed challenges to various aspects of state governance brought under this clause.[1] The Court frequently has ruled in a single sentence, such as: "As to the guaranty to every state of a republican form of government, it is well settled that the questions arising under [this clause] are political, not judicial, in character, and thus for the consideration of the Congress and not the courts."[2] Likewise, when there have been claims that federal laws are unconstitutional because they deny states a republican form of government, the Court has simply said, "We do not reach the merits of the appellants' argument that the [federal] Act violates the Guarantee Clause, Art. IV, § 4, since that issue is not justiciable."[3]

Surprisingly, in the 1980's, a number of authors challenged this conventional wisdom and urged the Court to adjudicate cases brought

---

* Legion Lex Professor of Law, University of Southern California. I am grateful to participants at the joint USC-UCLA Workshop for their helpful comments on an earlier draft of this article. I also want to thank Ann Althouse, Evan Caminker, and Louise Weinberg for their insightful commentaries. Finally, I am very grateful to Adam Glick for his excellent research assistance.

1. *See, e.g.*, City of Rome v. United States, 446 U.S. 156 (1980); Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1937); Mountain Timber v. Washington, 243 U.S. 219 (1917); Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565 (1916); O'Neill v. Leamer, 239 U.S. 244 (1915); Marshall v. Dye, 231 U.S. 250 (1913); Kiernan v. Portland, 223 U.S. 151 (1912).

2. Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 79-80 (1930) (citations omitted).

3. City of Rome v. United States, 446 U.S. 156, 182 n.17 (1980) (challenging section 5 of the Voting Rights Act of 1965).

under the Guarantee Clause.[4] The heightened attention to the Guarantee Clause probably resulted, in part, from the intense scholarly interest in republicanism during the 1980's.[5] First among historians and then among law professors, there was a flood of literature describing and arguing in the republican tradition in American history.[6] Because the Guarantee Clause expressly assures a "republican form of government," it is understandable that the focus on republicanism would turn attention to this clause.

Also, there is something deeply troubling about a constitutional provision that has been effectively rendered a nullity by judicial interpretation. As has been the case with the "Privileges or Immunities" Clause of the Fourteenth Amendment, scholars have an important role in exhuming such provisions and attempting to restore constitutional meaning to them.[7]

The scholarship urging judicial action under the Guarantee Clause appears to be having an effect. In *New York v. United States*,[8] Justice O'Connor, writing for the Court, questioned the conventional wisdom that cases under the Guarantee Clause are nonjusticiable:

> The view that the Guarantee Clause implicates only nonjusticiable political questions has its origin in *Luther v. Borden* . . . . This view has not always been accepted. In a group of cases decided before the holding of Luther was elevated into a gen-

---

4. *See, e.g.*, Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208 (1987); Note, *Political Rights as Political Questions: The Paradox of* Luther v. Borden, 100 HARV. L. REV. 1125 (1987); Thomas A. Smith, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561 (1984); Note, *A Niche for the Guarantee Clause*, 94 HARV. L. REV. 681 (1981) [hereinafter, *A Niche*]. Prior to the 1980's, the primary article urging use of the Guarantee Clause was Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

5. For the sake of simplicity, throughout this paper I will refer to Article IV, § 4 of the Constitution as the "Guarantee Clause." It is quoted at the beginning of the paper.

6. *See, e.g.*, JOYCE O. APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790'S (1984); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). For earlier writings by historians, see BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

7. *See, e.g.*, Phillip Kurland, *The Privileges or Immunities Clause: Its Hour Come Round At Last?*, 1972 WASH. U. L.Q. 405.

8. New York v. United States, 112 S. Ct. 2408 (1992).

> eral rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were nonjusticiable. . . . More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions . . . . Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances . . . .
>
> We need not resolve the difficult question today. Even if we assume that petitioners' claim is justiciable, neither the monetary incentives provided by the Act nor the possibility that a State's waste producers may find themselves excluded from the disposal sites of another State can reasonably be said to deny any State a republican form of government.[9]

I quote from Justice O'Connor's majority opinion at length because it is striking that the Court both expressly questioned whether cases under the Guarantee Clause should always be deemed nonjusticiable and, in fact, by assuming justiciability, actually decided the merits of the Guarantee Clause claim. As best as I can tell, this is the first instance in the past eighty years in which the Supreme Court has ruled on whether a law violates the Guarantee Clause.

Thus, the time is clearly approaching in which the Court may be quite willing to reject the view that cases under the Guarantee Clause should always be dismissed on political question grounds. In this article, I want to add my voice to the chorus that is urging the Court forward in this regard. Rather than repeat the arguments made elsewhere, I seek to add two additional reasons for judicial adjudication under this constitutional provision.

First, the Guarantee Clause should be regarded as a protector of basic individual rights and should not be treated as being solely about the structure of government. Accordingly, judicial interpretation and enforcement is in accord with the preeminent federal judicial mission of protecting individual rights and liberties.[10]

Second, the Guarantee Clause is unique among instances in which the political question doctrine has been used. It is the only instance in which nonjusticiability has the effect of rendering a constitutional provision a nullity. I contend that the political question doctrine should

---

9. *Id.* at 2433 (citations omitted).

10. For a detailed argument that the preeminent judicial role should be protecting individual rights and liberties, see JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).

be used only in areas where there is reason to believe that the judiciary is substantially less able than other branches of the federal government to interpret and enforce a constitutional provision. This is not true of the Guarantee Clause where judicial abdication has left the provision a constitutional dead letter.

The article begins, in Part I, by considering when it is appropriate for matters to be deemed political questions. Obviously, arguing that something should not be a political question requires some criteria for the appropriate content of the political question doctrine. I suggest that the political question doctrine should be used only in areas where there is specific reason to believe that the judiciary is ill-suited to interpreting and enforcing a constitutional provision and that other branches of the federal government are better equipped for the task.

Part II challenges the view that it is not for the courts to enforce the Guarantee Clause. Specifically, I argue that the Guarantee Clause should be regarded as assuring basic political rights, and therefore it is very much the judicial role to interpret and apply this constitutional provision.

Part III challenges the position that it is for the other branches of the federal government to enforce the Guarantee Clause. I contend that the other branches of the federal government are not suited to enforce this constitutional provision.

The conclusion that emerges is that it is time for the Guarantee Clause to be resurrected and given a meaningful role in contemporary constitutional law. I leave for future articles and for others to flesh out the content of the provision. Here, I simply want to argue that cases brought under the Guarantee Clause generally should be adjudicated by the federal courts.[11]

I. THE SCOPE OF THE POLITICAL QUESTION DOCTRINE

The political question doctrine is the principle that certain allegations of constitutional violations are not to be adjudicated by the federal judiciary even though all of the jurisdictional and other justiciability

---

11. It should be noted that there have been a number of state court opinions deciding cases under the Guarantee Clause. *See, e.g.*, City of Thornton v. Horan, 556 P.2d 1217 (Colo. 1976); Heimerl v. Ozaukee County, 40 N.W.2d 564 (Wis. 1949). These cases are more fully discussed at text accompanying notes 101-03. The focus of this paper is on why the Supreme Court and the lower federal courts should not dismiss cases brought under the Guarantee Clause on justiciability grounds.

requirements are met.[12] The Court has said that constitutional interpretation in these areas should be left to the politically accountable branches of government, the President and Congress. Although there is a claim that the Constitution has been violated, the federal courts refuse to rule and instead dismiss the case, leaving the constitutional question to be resolved in the political process.

In other writings, I have questioned whether there should be a political question doctrine and whether the Court should abdicate its role of interpreting and enforcing the Constitution.[13] Professor Martin Redish has written a persuasive article arguing that no part of the Constitution should be immune to judicial enforcement.[14]

Despite these arguments, the political question doctrine is clearly here to stay. Therefore, in this article, my focus is not on whether there should be such a doctrine, but instead, accepting its existence, what should be its content?

Matters should be deemed to be a political question only if there is reason to believe that the judiciary is ill-suited to enforce a particular constitutional provision *and* a likelihood that the other branches of the federal government will do a superior job at interpreting and enforcing the provision. In other words, the political question doctrine should be reserved for instances where there is a special reason for the judiciary not to be involved and a reason for confidence that the provision will be interpreted and enforced by Congress and/or the President. I suggest that this approach to the political question doctrine is descriptively consistent with most of the cases and that it is normatively the best approach to the political question doctrine.

Initially, it should be noted that most of the areas where the Court has used the political question doctrine fit these criteria. In addition to the Guarantee Clause, the Supreme Court has approved the use of the political question doctrine in only five other areas: the process for ratifying constitutional amendments; impeachment and removal of officials from office; foreign policy decision-making; training of state national guards; and decisions by national political parties.

In *Coleman v. Miller*,[15] a plurality of the Court declared that Congress has "sole and complete control over the amending process,

---

12. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 142 (2d ed. 1994).

13. ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 95-105 (1987).

14. Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1985).

15. 307 U.S. 433 (1939).

subject to no judicial review."[16] *Coleman* involved the question of whether a state could approve a proposed constitutional amendment twelve years after having rejected it. The Supreme Court denied review, and Justice Black, writing for a plurality, said that the process of amending the Constitution is a political question: "Article V . . . grants power over the amending of the Constitution to Congress alone . . . . The process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point."[17]

There is a strong reason for the judiciary to refuse to become involved in the amendment process. Constitutional amendments are the only way for the political process to directly overturn a Supreme Court decision interpreting the Constitution. Therefore, courts should not become involved in the primary mechanism for checking the judiciary.[18] The proposed amendment at issue in *Coleman* was intended to overturn an earlier Supreme Court decision denying Congress the power to regulate child labor.[19]

In deciding whether an amendment has been properly ratified, Congress undoubtedly must interpret the meaning of Article V. Certainly, there is reason to question whether it is desirable to leave interpretation to Congress when that body is self-interested in the outcome having proposed the amendment initially.[20] However, there is an argument that since both the judiciary and Congress have an interest in the outcome, it is better for the judiciary to leave the interpretation of Article V to Congress, rather than put the Court in the position of determining the validity of an amendment overturning a Supreme Court decision.

---

16. *Id.* at 459 (Black, J., concurring).

17. *Id.* at 457-459 (citations omitted). *But see* Idaho v. Freeman, 529 F. Supp. 1107, 1135 (D. Idaho 1981), *vacated*, 459 U.S. 809 (1982) (ruling justiciable a challenge to an extension of the time period for ratification of the Equal Rights Amendment.).

18. *See* LAURENCE TRIBE, CONSTITUTIONAL CHOICES 22-23 (1985). *But see* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983).

19. Hammer v. Dagenhart, 247 U.S. 251 (1918). A distinction might be drawn between amendments intended to overrule Supreme Court decisions and those that seek to change the Constitution, but not to overrule a Supreme Court ruling. For example, the proposed Child Labor Amendment was meant to overrule *Hammer*, while the proposed Balanced Budget Amendment would not overrule a specific Supreme Court decision. The argument for application of the political question doctrine to amendments only applies to those amendments that are intended to overrule Supreme Court decisions.

20. *See* CHEMERINSKY, *supra* note 13, at 103-04.

A second area where the Court has approved the use of the political question doctrine is judicial review of congressional impeachment and removal actions. In *Nixon v. United States*,[21] a federal judge, Walter Nixon, who had been impeached by the House of Representatives, challenged the Senate's creation of a committee to hear the evidence against him. Nixon contended that the entire Senate needed to sit and hear the evidence and that it was unconstitutional for the Senate to rely on the findings and recommendations of a committee.

Chief Justice Rehnquist, writing for the Court, held that such cases pose a nonjusticiable political question.[22] The Court explained that the Framers likely intended that there would be two proceedings against office holders charged with wrongdoing: a judicial trial and legislative impeachment proceedings. Chief Justice Rehnquist noted that "[t]he Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent [judges] . . . . Certainly judicial review of the Senate's 'trial' would introduce the same risk of bias as would participation in the trial itself."[23]

Chief Justice Rehnquist's concern about bias was not the only reason that *Nixon* should have been dismissed on political question grounds. *Nixon* involved the impeachment and removal of a federal judge.[24] The ability of Congress to impeach and remove judges is perhaps the ultimate check on the activities of life-tenured federal judges.[25]

As in the area of constitutional amendments, there is the danger that Congress could flout the requirements of the Constitution in carrying out an impeachment and removal. Yet, in general, the Court indicates that it is better to allow Congress to interpret the Constitution

---

21. 113 S. Ct. 732 (1993).

22. *Id.* at 732.

23. *Id.* at 738.

24. Professor Weinberg makes a persuasive case for judicial review of impeachment proceedings. *See* Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887 (1994) (this issue). However, a distinction should be drawn between impeachments of judges and impeachments of other officeholders. Especially as to impeachment of judges, there is strong reason for judicial noninvolvement because of the obvious self-interest of the judiciary in limiting such impeachments and removals.

25. For a description of the impeachment proceedings early in the nineteenth century against Justice Chase, see BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT (1993).

here than to have the judiciary controlling this powerful check on judicial behavior.[26]

A third area where the Court has approved the use of the political question doctrine involves challenges to the President's conduct of foreign policy. For example, the Court has declared: "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislature--'the political'--departments of the government and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."[27]

Yet, the Court also has emphasized that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[28] For example, the Court has upheld, on the merits, the constitutionality of the President's use of executive agreements, instead of treaties, to implement major foreign policy agreements.[29] Also, the Court has upheld the constitutionality of the use of the treaty power for specific subjects.[30]

The areas where the Court has used the political question doctrine in foreign policy generally involve instances in which there is reason to allow the issue to be resolved between Congress and the President. For example, challenges to the President's use of troops in foreign countries frequently have been dismissed on political question grounds.[31] In this area, the constitutional claim usually is that the President is impermissibly waging war without a declaration from Congress and often is about whether a particular congressional action is sufficient to constitute a declaration of war.

---

26. In an opinion concurring in the judgment, Justice Souter indicated that there might be some instances in which there could be judicial review of the impeachment process. *Nixon*, 113 S. Ct. at 748 (Souter, J., concurring: "If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin-toss, or upon a summary determination that an officer of the United States was simply 'a bad guy,' judicial interference might well be appropriate.").

27. Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

28. Baker v. Carr, 369 U.S. 186, 211 (1962).

29. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

30. Missouri v. Holland, 252 U.S. 416, 433 (1920).

31. *See, e.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (dismissing challenge to American activities in El Salvador); Holtzman v. Schlesinger, 484 F.2d 1307, 1309 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (dismissing challenge to American activities in Viet Nam); *see also* ANTHONY A. D'AMATO & ROBERT M. O'NEILL, THE JUDICIARY AND VIETNAM 51-58 (1972) (describing cases challenging the Viet Nam War).

The Court takes the position that there is every reason to believe that Congress and the President can effectively resolve the issue. Congress has the ability to protect its constitutional prerogatives by prohibiting the use of troops or cutting off funds. The President has the powers of commander-in-chief. Moreover, the Court frequently proclaims its comparative lack of ability to handle foreign policy issues. The Court explained: "[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy . . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility."[32]

In sum, in all three of these areas where the Court has used the political question doctrine--constitutional amendments, the impeachment process, and foreign policy--there is a reason for the judiciary to remove itself and grounds for leaving the issue to the other branches of government. The other two areas where the Court has used the political question doctrine admittedly do not fit this description.

In *Gilligan v. Morgan*,[33] the Court deemed nonjusticiable a lawsuit claiming that the government was negligent in failing to adequately train the Ohio National Guard. The suit was initiated by students at Kent State University after the shooting of four students during an anti-Viet Nam War protest. The plaintiffs contended that grossly inadequate training of the Guard was responsible for the unjustified use of lethal force, and they sought injunctive and declaratory relief. The Supreme Court, in an opinion by Chief Justice Burger, dismissed the case as posing a political question. The Court said that allowing review "would plainly and explicitly require judicial evaluation of a wide range of possibly dissimilar procedures and policies approved by law enforcement agencies or other authorities."[34] The Court emphasized that relief would require ongoing supervision and control of the activities of the Ohio National Guard.

Unlike the other areas where the political question doctrine was used, there was no indication here that either Congress or the President would apply the Constitution and remedy any constitutional violations.

---

32. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). For criticism of this view, see Redish, *supra* note 14, at 1052; Michael E. Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135, 1141-51 (1970).

33. 413 U.S. 1 (1973).

34. *Id.* at 8.

By deeming the case to be a political question, the Court left a constitutional violation would be left entirely ignored and unremedied.

The other instance in which the Court has used the political question doctrine is in refusing to hear challenges to decisions of political parties. In *O'Brien v. Brown*,[35] the federal courts were asked to decide what group of delegates should be seated from Illinois at the 1972 Democratic convention. The Supreme Court held that the matter should be dismissed as nonjusticiable:

> in light of the convention as a forum to review the recommendations of the Credentials Committee, in which process the complaining parties might obtain the relief they have sought from the federal courts, the lack of precedent to support the extraordinary relief granted by the Court of Appeals, and the large public interest in allowing the political process to function free from judicial supervision.[36]

This case, too, is not a situation where the judiciary was ill-equipped to decide or where the other branches were superior in interpreting the Constitution. Indeed, if the party hypothetically refused to seat one delegation because it had African-American representatives, it is hard to imagine that the Court would have dismissed the case.[37] Thus, the Court surely is not saying that decisions of political party conventions are not justiciable and instead is saying that particular types of disputes are left to the Credentials Committee. Essentially, the Court is saying that the choice, either way, should not be deemed a constitutional violation. The use of the political question doctrine seems misplaced and unnecessary.

Normatively, I contend that the political question doctrine should be reserved for areas where there is reason to limit judicial involvement and reason to believe that the other branches of government will adequately interpret and enforce the Constitution. Placing a matter in the Constitution should be regarded as removing that matter from the usual political process. The Constitution, as an anti-majoritarian document, exempts the areas covered within it from the usual majoritarian decision-making processes. If cases arising under a constitutional provision are deemed to be a political question, then that provision is

---

35. 409 U.S. 1 (1972).

36. *Id.* at 5.

37. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944) (invalidating discrimination against blacks by political parties).

effectively left to the political branches and majoritarian decision-making. No longer does the provision serve in the same way as a check on the political process. The politically accountable branches could defy the Constitution, and the judiciary would be powerless to halt the infringement.

For this reason, there should be a strong presumption against certain areas being deemed political questions. In general, in the words of *Marbury v. Madison*, it should be "the province and duty of the judicial department to say what the law is."[38] However, there are some instances where the judiciary is substantially less able than other branches to engage in constitutional interpretation. Most notably, in areas where the courts are self-interested--such as the process of adopting amendments to overrule Supreme Court decisions or impeachment of judges--there is reason for the judiciary to remove itself from the process. Likewise, there are instances, such as certain foreign policy decisions, where the Constitution's meaning will best emerge from struggles between Congress and the President.

I want to emphasize that I do not believe that the Court should declare a matter to be a political question simply because it is controversial and the Court wishes to preserve its credibility. This is the position most frequently associated with Alexander Bickel and Felix Frankfurter.[39] Their view rests on a number of highly questionable assumptions. They assume that the judiciary's credibility is fragile; that unpopular, controversial decisions will substantially undermine the Court's legitimacy; that if the Court comes to lack legitimacy it will be disobeyed and rendered much less powerful; and that the risk of this outweighs the costs of not enforcing particular constitutional provisions.

History demonstrates that judicial credibility and legitimacy are not fragile. Some of the Court's most controversial rulings--such as those desegregating schools and reapportioning state legislatures--ultimately enhanced the judiciary's stature. John Hart Ely aptly remarked:

> [T]he possibility of judicial emasculation by way of popular reaction against constitutional review by the courts has not in fact materialized in more than a century and a half of American experience. The warnings probably reached their peak during the Warren years; they were not heeded; yet nothing resembling

38. 5 U.S. (1 Cranch) 137, 177 (1803).

39. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AND AT THE BAR OF POLITICS 184 (1962); Baker v. Carr, 369 U.S. at 267 (Frankfurter, J., dissenting).

> destruction materialized. In fact, the Court's power continued to grow and probably never has been greater than it has been over the past two decades.[40]

There is no reason to believe that a series of controversial decisions under a particular constitutional provision will undermine the Court's credibility, lead to disobedience of judicial orders, and decrease the judiciary's power. Moreover, I believe that, even if there were such a realistic risk, it is worth bearing in order to ensure constitutional enforcement. Ultimately, the Court's institutional capital should be used to enforce the Constitution. As Professor Laurence Tribe eloquently remarked,

> I reject the assumption characteristic of Justices like Felix Frankfurter and scholars like Alexander Bickel; the highest mission of the Supreme Court, in my view, is not to conserve judicial credibility, but in the Constitution's own phrase, "to form a more perfect Union," between right and rights within the charter's necessarily evolutionary design.[41]

In other words, the Court should not deem matters a political question simply because the rulings would be controversial and could cost the Court some political capital. The political question doctrine should be reserved for areas where there is special reason for judicial noninvolvement *and* there is reason to believe that other branches of the federal government will engage in constitutional interpretation. In the remaining two parts of the article, I argue that there is strong reason for the judiciary to decide Guarantee Clause cases and that it is extremely unlikely that the other branches of the federal government will be involved in interpreting and enforcing this provision.

II. THE GUARANTEE CLAUSE AS A PROTECTOR OF INDIVIDUAL RIGHTS

A. *A Brief History of How the Guarantee Clause Came to Be a Political Question*

In his powerful dissent in *Plessy v. Ferguson*,[42] Justice John Harlan argued that state mandated segregation violated the constitutional

---

40. JOHN H. ELY, DEMOCRACY AND DISTRUST 47-48 (1980).
41. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW viii (2d ed. 1988).
42. 163 U.S. 537, 563-64 (1896).

provision requiring that the United States guarantee to each state a republican form of government. Justice Harlan eloquently wrote:

> I am of the opinion that the state of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that state, and hostile to both the spirit and letter of the constitution of the United States. If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country; but there should remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the 'People of the United States,' for whom and by whom through representatives, our government is administered. *Such a system is inconsistent with the guaranty given by the constitution to each state of republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.*[43]

I quote Justice Harlan's words at length, in part, because it is striking that he viewed the Guarantee Clause as a protector of individual rights. Indeed, Justice Harlan relied upon it, as much as the Equal Protection Clause, as the basis for objecting to segregation. Also, it is notable that as late as the end of the nineteenth century, cases under the Guarantee Clause were deemed justiciable.

Throughout this century, a quite different view of the Guarantee Clause has prevailed. The Court has treated it as being exclusively about the structure of state governments and has universally regarded cases brought under it as posing a nonjusticiable political question.

Also, Justice Harlan's use of the Guarantee Clause challenges a common myth about the constitutional provision: that it was deemed to be nonjusticiable in 1849 in *Luther v. Borden*[44] and has been irrevocably buried ever since. In *Luther*, the Supreme Court was asked to decide, in the wake of the Mischievous rebellion, which of two rival governments

---

43. *Id.* (emphasis added).
44. 48 U.S. 1 (1849).

was the legitimate government of Rhode Island.[45] After the approval of a state constitution for Rhode Island, the incumbent office-holders enacted a law prohibiting elections under the new constitution. Police officers who were agents of the existing government broke into a home seeking evidence of illegal electioneering activity. The homeowner brought a trespass action against the police officers and contended that they lacked legal authority because the state government that employed them was unconstitutional in that it was not a republican form of government. The Court dismissed the suit and declared that "it rests with Congress to decide what government is the established one in a State."[46]

Despite this language, it was not until the twentieth century that the Court clearly buried the Guarantee Clause. In several cases after *Luther*, the Court adjudicated the merits of Guarantee Clause cases and did not dismiss them on political question grounds.[47] For instance, in *Minor v. Happersett*,[48] the Supreme Court adjudicated the claim that denying women the right to vote violated the Guarantee Clause. Although the Court ruled against the challengers, finding that the tradition of denying women the franchise made it acceptable in a republican form of government, what is notable is that the Court ruled on the merits of the issue.[49]

It was not until *Pacific States Telephone & Telegraph Co. v. Oregon*,[50] in 1912, that the Court truly buried the Guarantee Clause by interpreting *Luther v. Borden* to hold the Guarantee Clause a grant of power only to the political branches. In *Pacific States*, an Oregon law,

---

45. For a history of this colorful and tragic episode in American history, see MARRIN E. GETTLEMAN, THE MISCHIEVOUS REBELLION (1973); WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION 86-110 (1972).

46. 48 U.S. at 42.

47. *See, e.g., In re* Duncan, 139 U.S. 449 (1891) (rejecting a challenge to a state's death penalty statute because it was adopted in a manner consistent with a republican form of government); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (rejecting an argument that denying women the right to vote violated the Guarantee Clause).

48. 88 U.S. (21 Wal.) 162 (1875).

49. The Court declared:

> As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances, it is certainly now too late to contend that a government is not republican, with the meaning of this guaranty in the Constitution, because women are not made voters.

Id. at 175-76.

50. 223 U.S. 118, 143-48 (1912).

adopted by popular initiative, was challenged as violating the Guarantee Clause. The initiative provided that telephone and telegraph companies would be taxed at two percent of their annual gross income derived from intra-state business. The companies argued that "the creation by a state of the power to legislate by the initiative and referendum causes the prior lawful government to be bereft of its lawful character as the result of the provisions of article 4, § 4 of the Constitution."[51] The Court, however, dismissed the challenge and concluded that whether a state has ceased to be republican in form is not a judicial question, but a political one, which is solely for Congress to determine.[52]

In countless cases since, the Supreme Court has relied on *Luther* and *Pacific States* to reject challenges based on the Guarantee Clause. Indeed, soon after *Pacific States*, the Supreme Court began summarily dismissing Guarantee Clause arguments. In 1915, in *O'Neill v. Leamer*,[53] a challenge was brought to the actions of a municipal drainage district, and the Court, citing *Pacific States*, simply declared: "The attempt to invoke section 4 of Article IV of the Federal Constitution is obviously futile."[54] In 1916, in *Mountain Timber Co. v. Washington*,[55] the Court rejected a challenge to a state's workers' compensation law and flatly held:

> It is urged that the law violates § 4 of article IV of the Constitution of the United States, guaranteeing [sic] to every state in the Union a republican form of government. As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress, and not to the courts.[56]

Ever since *Pacific States*, the Supreme Court consistently has rejected claims brought under the Guarantee Clause, always holding that "the enforcement of that guarantee, according to settled doctrine, is for Congress, not the courts."[57] In the remainder of this Part, I argue that it is for the courts to enforce the Guarantee Clause. The next subsection contends that it is within the judiciary's role because the

---

51. *Id.* at 137.
52. *Id.*
53. 239 U.S. 244 (1915).
54. *Id.* at 248.
55. 243 U.S. 219 (1916).
56. *Id.* at 234.
57. Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937).

Guarantee Clause should be regarded as protecting basic individual rights. The final sub-section argues that there is no reason why the judiciary is ill-suited to the task of enforcing this constitutional provision. The following section then argues that there is no affirmative reason to leave the matter to Congress.

B. *The Guarantee Clause As a Safeguard of Individual Rights*

The application of the political question doctrine is least appropriate in cases where individual rights are at stake. Ever since *Marbury v. Madison*,[58] it has been recognized that the judiciary has a special and important role in protecting individual liberties. Indeed, the very phrase "political question" comes from *Marbury*. In explaining the authority of the judiciary to review presidential actions, Chief Justice John Marshall wrote:

> By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . The subjects are political. . . . [B]eing entrusted to the executive, the decision of the executive is conclusive. . . . Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[59]

Chief Justice Marshall contrasted political questions with instances where individual rights are at stake; the latter, according to the Court, never could be political questions. The Court declared, "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."[60]

There are many reasons why there should be an especially strong presumption against applying the political question doctrine in matters involving individual rights. The Constitution's anti-majoritarian character is most important when protecting the rights of political or social minorities from the majority. Political or social minorities should

---

58. 5 U.S. (1 Cranch) 137 (1803).
59. *Id.* at 165-66.
60. *Id.*

not have to rely on the majority to safeguard their liberties. Certainly, it is not original nor profound to observe that the judiciary's political insulation makes it well-suited to uphold the Constitution. If anything is clear from the structure of the Constitution and the language of Article III, it is that the federal judiciary was given life tenure and salary protection precisely to ensure its independence.

There are more subtle reasons why the judiciary has a special role in deciding matters of individual rights. The judiciary is the only institution obligated to hear the complaints of a single person. For the most part, the federal judiciary's jurisdiction is mandatory.[61] In contrast, the legislature and executive are under no duty to hear the complaints of a single person. An individual or small group complaining of an injustice to a legislator or the President could be, and often is, easily ignored. The courts, however, are obligated to rule on each person's properly filed complaint. It does not matter whether the litigant is rich or poor, powerful or powerless, or among few or many.

Moreover, the judiciary is the branch most likely to decide issues based on an interpretation of the Constitution. The judiciary is supposed to decide each case on its own merits, based on the issues presented. Therefore, in every case where there is an allegation that the Constitution is being violated, the judiciary is obligated, if it has jurisdiction and if there is no way to decide the case on nonconstitutional grounds, to issue a constitutional ruling.[62] Congress and the President, in contrast, are not obligated to decide each matter on its own merits or even make decisions based on constitutional interpretations. Logrolling and voting trade-offs are accepted parts of the legislative process. Although legislators and the President are forbidden by their oath of office to enact laws that they believe to be unconstitutional, they are not required to provide a remedy every time someone proves that the government is doing something unconstitutional.

All of this is simply to say what is now almost universally accepted by liberals and conservatives alike: the federal judiciary has a special role in protecting individual rights. My claim is that the Guarantee Clause is best understood as being fundamentally about individual rights and thus very much an area where judicial review is appropriate.

---

61. For a discussion of exceptions to this, such as abstention doctrines, see CHEMERINSKY, *supra* note 13, at 685-778.

62. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should.").

Interestingly, most of the writings about the Guarantee Clause treat it as fundamentally being about the structure of government. For example, the most prominent recent article about the Guarantee Clause, by Professor Deborah Merritt, argues that it should be used to protect state autonomy from federal encroachment.[63] In other words, she views the Guarantee Clause as being the basis for challenging federal laws that impermissibly intrude on state prerogatives.

Obviously, any separation of structure of government from individual liberties is questionable because structural features such as separation of powers and federalism are designed to prevent tyranny and safeguard individual rights. Nonetheless, such a distinction is often drawn, especially in the area of justiciability. For example, cases concerning the standing doctrine barring judicial review of generalized grievances implicitly rely on this distinction.[64] A generalized grievance is made when a plaintiff claims a violation of a structural provision of the Constitution. For example, if a plaintiff claims that Congress failed to provide a statement and account of all expenditures or that members of Congress hold positions in the executive branch, then the plaintiff is deemed to present a generalized grievance.[65] As I have argued elsewhere, "[t]he generalized grievance standing . . . barrier reflects a belief that the judicial role is solely to prevent and remedy specific injuries suffered by individuals. The Court has no authority to halt government violations of the Constitution except in circumstances in which plaintiffs claim that their personal rights . . . are infringed."[66]

More specifically, the Supreme Court almost always has used the political question doctrine in areas that pertain to the structure of government and not individual rights.[67] Professor Tribe explains that "[t]he theme of these central cases [is] that the political question doctrine

63. Merritt, *supra* note 4.

64. For a discussion of the generalized grievance standing cases, see CHEMERINSKY, *supra* note 13, at 88-97.

65. *See, e.g.*, United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).

66. CHEMERINSKY, *supra* note 13, at 95.

67. The notable exception to this would be challenges by prospective delegates at political party conventions who claim that their constitutional rights are violated if they are not seated. *See, e.g.*, O'Brien v. Brown, 409 U.S. 1 (1972). Also, the distinction between individual rights and the structure of government seems questionable in the area of impeachment, because a particular person is being impeached, characterizing the area as entirely about the structure of government seems inaccurate. Similarly, in the area of foreign policy, if a soldier challenges the constitutionality of a war before being sent overseas, the case really is about the rights of that individual to be sent to war only if constitutional requirements are fulfilled.

involves an inquiry into the ability of courts to derive enforceable rights from the constitutional provisions which the litigants invoke."[68]

The Guarantee Clause is best understood as protecting basic rights of political participation within state governments. The discussion at the Constitutional Convention certainly supports the view that the Guarantee Clause should be regarded as originally being about political rights.[69] The original drafting of the Clause was done by James Madison and Edmund Randolph.[70] In part, the provision was meant to give the federal government the authority to suppress insurrections. However, it also was clearly meant as a prohibition of monarchies within states. For example, New York delegate Robert Yates spoke in favor of the provision and declared, "[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."[71]

In *The Federalist*, Alexander Hamilton and James Madison frequently discussed the Guarantee Clause. For example, in *The Federalist Number 43*, Madison emphasized that the Guarantee Clause assured that states would not become monarchies.[72] In the final *Federalist* paper, number 85, Hamilton argued that the assurance of a republican government, in contrast with a monarchy, was one of the primary advantages of ratifying the new Constitution.[73] Professor Wiecek noted:

> The guarantee clause emerged from the pages of *The Federalist* with its assurance of popular control of government, rule by majorities in the states with safeguards for the rights of minorities, and emphasis on the substance as well as the form of republican government enhanced and more explicit than in the Philadelphia debates.[74]

At a minimum, the guarantee of a republican form of government was meant to protect against a monarchy. What was so objectionable

---

68. TRIBE, *supra* note 41, §§ 3-13

69. I am not making an originalist argument that the Guarantee Clause should be given this meaning because the framers intended it. I am simply pointing out that the interpretation I suggest is consistent with what is known of the framers' intent.

70. WIECEK, *supra* note 45, at 51-52.

71. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 206 (Max Farrand ed., 1911).

72. THE FEDERALIST NO. 43 (Alexander Hamilton) (C. Rossiter ed., 1967).

73. THE FEDERALIST NO. 85 (Alexander Hamilton).

74. WIECEK, *supra* note 45, at 67-68.

about a monarchy? In a monarchy, citizens do not get to choose their rulers, power is fixed and inherited; in a republican form of government, the people ultimately retain sovereignty and choose their officeholders.[75] In other words, the key features of a republican form of government are a right to vote and a right to political participation.

There is no doubt that a "republican government"--both from the perspective of the framers and its contemporary desirable content--includes more than just protection from monarchical governments.[76] Madison, for example, believed that a republican government provided the solution to reconciling majority rule with protecting minority rights.[77] Madison was particularly concerned that states might be controlled by stable majority coalitions that would systematically impede minority rights.[78] He saw that an integral part of solving the dangers of democracy is having a republican government where people elect representatives and representatives make laws that must comply with state and federal constitutional provisions.[79]

The recent republican revival among scholars further fleshes out the possible content of a "republican form of government." Briefly stated, historians such as Bernard Bailyn and Gordon Wood, and law professors such as Cass Sunstein and Frank Michelman have argued that the core of a republican government is citizen participation in important public deliberations.[80]

Perspectives from both the republican revival and the founders' debates indicate that the Guarantee Clause is not primarily about guaranteeing a particular structure of government in states or even about protecting state governments from federal encroachments. Instead, it is meant to protect the basic individual right of political participation, most notably the right to vote and the right to choose public officeholders. Because it was adopted prior to the drafting and ratification of the First Amendment, and long before the First

---

75. SAMUEL BEER, TO MAKE A NATION: THE REDISCOVERING OF AMERICAN FEDERALISM 139-41 (1993).

76. Smith, *supra* note 4, at 568 n.43 ("The core meaning of the guarantee clause is therefore not merely the proscription of aristocratic and monarchical government. . . . There is, however, a long tradition of equating republican government with government by the people.").

77. THE FEDERALIST NO. 10 (James Madison).

78. *Id.*

79. *Id.*

80. *See, e.g.*, Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Michelman, *supra* note 6. *But see* Richard Fallon, *What is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989).

Amendment was applied to the states, the assurance of republican governments also can be seen as independently protecting public deliberations in the law-making process.

Thus, it is not surprising that the Guarantee Clause was the first choice for litigants challenging malapportioned state legislatures.[81] Nor is it surprising that almost 100 years ago, Justice Harlan turned to the Guarantee Clause as the basis for his dissent in *Plessy v. Ferguson*. He viewed a republican form of government as one where all people have a right to equal participation and all people have a right to be treated equally by the government.

My goal here is not to define in detail what is a republican form of government. Rather, I simply contend that the Clause should be understood as protecting basic individual rights.[82] In this way, deciding cases under the Guarantee Clause should be regarded as at the very core of the traditional judicial role. The Court is defining and safeguarding fundamental rights--rights that are truly at the heart of a republican government.[83]

---

81. *See, e.g.*, Colgrove v. Green, 328 U.S. 549 (1946) (dismissing challenge to malapportionment brought under the Guarantee Clause on political question grounds).

82. Professor Althouse expresses doubt as to whether the current Court would use the Guarantee Clause to protect individual rights. Ann Althouse, *Time for Federal Courts to Enforce the Guarantee Clause? A Response to Professor Chemerinsky*, 65 U. COLO. L. REV. 881, 882-83 (1994) (this issue). I share her skepticism and generally have concern over the willingness of the current Court to safeguard individual liberties. *See* Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 47 (1989). However, my contention is that the Clause should be understood, at least in substantial part, as protecting individual rights. Hopefully, at some point, the Supreme Court--either the current Court or more likely one in the future--will accept this position and use the Clause to safeguard individual rights.

83. Professor Althouse questions this position by arguing that there is no demonstrated need for judicial review of cases under the Guarantee Clause. Althouse, *supra* note 82, at 884. I question the assumption of Professor Althouse's position that judicial enforcement of a constitutional provision is justified only if there is a pressing social need. I believe that judicial enforcement should be the norm unless there is a compelling reason for judicial noninvolvement.

There are many constitutional issues that potentially can arise under the Guarantee Clause. Do initiatives as a form of law-making violate the Guarantee Clause? *See* Hans Linde, *Who's Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994) (this issue). Do particular types of voting arrangements violate the Guarantee Clause? *See* Kathryn Abrams, *No "There" There: State Autonomy and Voting Rights Regulation*, 65 U. COLO. L. REV. 835 (1994) (this issue). Do federal laws that infringe state sovereignty violate the Guarantee Clause? *See* Deborah J. Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994) (this issue). These issues should be decided on the merits.

C. *The Absence of Reasons for Judicial Noninvolvement*

Viewing the Guarantee Clause as being primarily about individual rights creates a strong presumption in favor of judicial interpretation and enforcement. Furthermore, there is no special reason for judicial noninvolvement with cases arising under this provision. Unlike the processes for ratifying constitutional amendments and impeachment, the Guarantee Clause is not in any way connected with political oversight of the federal judiciary. Unlike foreign policy, there is no reason why the judiciary is uniquely less qualified to be involved than the other branches of the federal government.

The traditional criteria for applying the political question doctrine were articulated by Justice Brennan in *Baker v. Carr*.[84] This classic, oft-quoted statement declares:

> 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.[85]

I seriously doubt whether these criteria are ever useful in deciding what is a political question. For example, there is no place in the Constitution where the text states that the legislature or executive should decide whether a particular action constitutes a constitutional violation. The Constitution does not mention judicial review, much less limit it by creating "textually demonstrable commitments" to other branches of government. Similarly, many important constitutional provisions are written in broad, open-textured language and certainly do not contain "judicially discoverable and manageable standards."

Nonetheless, the *Baker* criteria are generally invoked as describing the instances in which there is a basis for the judiciary to remove itself

---

84. 396 U.S. 186, 217 (1962).

85. *Id.*

from deciding a dispute and to declare that a matter is a political question. None of the *Baker* criteria is met with regard to the Guarantee Clause.

First, *Baker* speaks of a "textually demonstrable commitment" of a matter to another branch of government. The text of the Guarantee Clause has no such commitment to Congress or the President. Quite the contrary, the Clause states that "[t]he *United States* shall guarantee to every State . . . a Republican form of government."[86] The clause does not say "Congress shall guarantee;" it unambiguously says "the United States" and includes all of the branches of the federal government.

Moreover, as Professor Merritt noted, the location of the Clause in Article IV supports the view that the text does not commit enforcement of the provision solely to the President or Congress.[87] If the Guarantee Clause was meant to be enforced solely by Congress, it likely would have been placed in Article I which defines congressional powers. The text of the Constitution simply does not support excluding judicial enforcement.

Second, *Baker* speaks of instances where there is a lack of judicially discoverable or manageable standards. Yet, there is no reason why "republican form of government" is more lacking in standards than "due process" or "equal protection." For example, the Court could just as easily have found the rule of "one-person one-vote" under the Guarantee Clause as under equal protection.[88] Indeed, if the Court decided cases under the Guarantee Clause, judicial standards would emerge.

In *Baker*, Justice Brennan, writing for the Court, said that challenges to malapportionment were justiciable if brought under the Equal Protection Clause, but nonjusticiable if brought under the Guarantee Clause.[89] Justice Brennan wrote that whereas "the Guaranty Clause is not a repository of judicially manageable standards, . . . [j]udicial standards under the Equal Protection Clause are well developed and familiar."[90] This is an obviously fatuous distinction because both clauses are equally vague and the principle of one-person one-vote could have been articulated and enforced under either constitutional provision.[91]

---

86. U.S. CONST. art. IV, § 2 (emphasis added).

87. Merritt, *supra* note 4, at 75.

88. *But see* Reynolds v. Sims, 377 U.S. 533 (1963) (articulating the rule of one person-one vote under the equal protection clause).

89. 369 U.S. at 227.

90. *Id.* at 223-26.

91. *See* Arthur E. Bonfield, Baker v. Carr: *New Light on the Constitutional Guarantee of Republican Government*, 50 CAL. L. REV. 245, 251 (1962) ("[T]he same

Most likely, the distinction was invoked so that the Court could distinguish, rather than overrule, *Colgrove v. Green*.[92] Just fourteen years before *Baker*, the Court in *Colgrove* dismissed a challenge to malapportionment brought under the Guarantee Clause as posing a nonjusticiable political question. The Court in *Baker* either could have overruled or distinguished *Colgrove*. The Court chose the latter course and did so by declaring that apportionment challenges under equal protection are justiciable while those brought under the Guarantee Clause are not.

Third, *Baker* speaks of the Court avoiding review when it would be making a policy determination "of a kind clearly for nonjudicial discretion." As discussed above, protecting individual rights--and especially safeguarding rights of political participation--is a core judicial role.

However, in *Luther v. Borden*,[93] the Supreme Court offered a different version of this argument as to why the Court should not decide cases under the Guarantee Clause. The Court said that one reason why the matter was a political question was that if it decided that Rhode Island violated the Guarantee Clause, then the Court would be required to declare the entire government unconstitutional and to invalidate all of its actions.[94] The Court said that such a ruling would cause chaos.

There are many obvious flaws with this argument. First, even if the Court were to declare that an entire state government violated the Guarantee Clause, it could impose the remedy prospectively. There would be no need to invalidate prior state government actions or to leave the state without a government until the flaws were remedied. For example, when the Supreme Court held that the federal bankruptcy courts were unconstitutional, the Court did not invalidate all of the decisions previously made or immediately banish the courts from existence.[95] The Supreme Court delayed the remedy to provide Congress time to recreate the courts in a manner consistent with the Constitution. In fact, the Court even extended the time period when Congress did not act in a timely fashion.[96]

---

issue may be justiciable if raised under the equal protection clause, and nonjusticiable if raised under the guarantee. This seems a rather peculiar doctrine, since it is difficult to understand how an issue contains any more of the elements of nonjusticiability when pleaded under the latter provision.").

92. 328 U.S. 549 (1946).

93. 48 U.S. (1 How.) 1 (1849).

94. 48 U.S. at 13-14.

95. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

96. CHEMERINSKY, *supra* note 13, at 237-38.

Additionally, most Guarantee Clause cases will not require finding that an entire state government violates the Guarantee Clause. The reapportionment cases, for example, required that new legislatures be adopted under the one-person one-vote rule. A court deciding a Guarantee Clause case usually can impose a specific remedy and avoid the *Luther* Court's fear that an entire government would be invalidated.

Furthermore, at most this argument calls for courts to avoid a particular type of remedy in Guarantee Clause cases. It does not negate the existence of rights under the provision nor provide a basis for a complete judicial refusal to hear such cases.[97]

The fourth criterion articulated in *Baker* for considering when matters are a political question is whether court decisions would indicate a lack of respect for other branches of the federal government. In Guarantee Clause cases, however, the Court generally will be asked to review actions and policies of state governments, not those of Congress or the President.[98] Therefore, unlike judicial review in separation of powers cases or in Tenth Amendment decisions, the Court is not indicating any lack of respect for other branches of the federal government.[99] In fact, in *Baker* the Court noted that the political question doctrine is a function of separation of powers and is applied in instances where deference to the other branches of the federal government is desirable.[100]

The Guarantee Clause is thus different from most other areas where the political question doctrine is invoked because it generally involves judicial deference to state governments. This in itself is troubling as a matter of constitutional law. State courts are not bound by federal justiciability rules and thus can--and do--decide cases brought under the Guarantee Clause.[101] Thus, without the possibility of Supreme Court review, state courts have the final say as to a question of federal

97. *See* ELY, *supra* note 40, at 118 (describing how the Court confused the right with the remedy asked for in *Luther*).

98. *But see* Merritt, *supra* note 4 (arguing that the Guarantee Clause should be used to invalidate federal legislation interfering with state autonomy).

99. This criterion can be seriously questioned because all judicial review of presidential or congressional actions obviously indicates some lack of respect for the actions of another branch of the federal government. Even *Marbury v. Madison*, by invalidating a part of a federal statute adopted by Congress and signed by the President, involved the judiciary indicating a certain lack of respect for the other branches.

100. 369 U.S. at 210.

101. *See, e.g.*, Van Sickle v. Shanahan, 511 P.2d 223 (Kan. 1973); Heimerl v. Ozaukee City, 40 N.W.2d 564 (Wis. 1949).

constitutional law. Although there are other areas where state courts might have such power in a particular case, such as where the state court decision rests on an independent and adequate state ground,[102] the Guarantee Clause is an area where state courts forever will have the ability to define the meaning of a United States constitutional provision. This is inconsistent with 200 years of precedent establishing the importance of Supreme Court review to assure that state courts properly interpret and apply the United States Constitution.[103]

Fifth, *Baker* says that a matter is a political question when there is a need for "unquestioning adherence to a political decision already made" or when there would be the potential of embarrassment from "multifarious pronouncements."[104] Yet, this is extremely unlikely under the Guarantee Clause because the other branches of government do not act pursuant to the provision. As explained in Part III, legislative or executive action to enforce the Guarantee Clause has been almost completely nonexistent and is likely to remain that way.[105]

There is no reason why the judiciary should continue to find that cases brought under the Guarantee Clause are a political question. There is no justification for judicial noninvolvement and, to the contrary, because the Clause implicates fundamental rights of political participation, it is very much the judicial role to decide such cases.

There is no assurance that judicial review under the Guarantee Clause will produce good decisions that make society better. But, of course, there is no such guarantee for judicial review under any constitutional provision. It is possible to imagine the Guarantee Clause being used by the courts for quite undesirable results. But that, too, is true of judicial review under all of the rest of the Constitution. The basic problem is that there is no reason to treat the Guarantee Clause differently from the rest of the Constitution and exclude it from judicial interpretation and enforcement.

---

102. *See* CHEMERINSKY, *supra* note 13, at 530-51 (describing the independent and adequate state ground doctrine).

103. *See* LEARNED HAND, THE BILL OF RIGHTS 30 (1958) (arguing that judicial review of other federal actions could be omitted, but not judicial review of state actions).

104. Baker v. Carr, 369 U.S. 186, 217 (1962).

105. *See infra* text accompanying notes 104-13.

III. THE GUARANTEE CLAUSE SHOULD NOT BE LEFT TO CONGRESS AND THE PRESIDENT TO INTERPRET AND ENFORCE

The political question doctrine should be applied in a particular area only if there is reason to believe that another branch of the federal government will do a superior job of interpreting and enforcing the constitutional provision. For example, the Court's determination that challenges to foreign policy decisions are not justiciable generally reflects its view that the meaning of the pertinent constitutional provisions is best determined through the interaction of Congress and the President. The political question doctrine should not be applied where doing so essentially would render a constitutional provision a nullity.

Yet, the effect of applying the political question doctrine to the Guarantee Clause is essentially to nullify that provision. The clause says that "[t]he United States shall guarantee." Thus, leaving it solely to the states to decide what is a republican form of government is inconsistent with the command that the federal government shall do this. Also, it is important to emphasize that the Clause is written in obligatory language using the word "shall." Therefore, the Clause only has meaning if either the President or Congress is likely to be willing and able to enforce the provision. Such is certainly not the case.

As to the President, it is difficult to imagine the mechanism the President could use to interpret and enforce the Clause. In the most egregious instances of state violations, conceivably the President could issue an executive order proclaiming that a particular state is denying its citizens a republican form of government and then send federal troops to the state to remedy the violation. Even assuming that this would be a constitutional exercise of presidential authority, it is extremely unlikely that this would ever occur. The type of violations that realistically would occur--denial of the right to vote, malapportionment, adoption of laws through initiatives rather than by representatives--are not ones that the President could remedy.

Thus, it is not surprising that the Supreme Court has never spoken of presidential enforcement of the Guarantee Clause, but instead repeatedly says that the provision is for Congress to interpret and enforce. As early as 1916, the Court said: "As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress and not the courts."[106]

106. Mountain Timber Co. v. State of Washington, 243 U.S. 219, 233 (1916).

Yet, it is very unlikely that Congress will act under the Clause. First, the focus of Congress is inevitably on national political problems or issues that involve constituents of a sufficient number of representatives and senators so as to provoke action. The political situation in a particular state generally will not warrant congressional attention. Moreover, the political benefits of acting seem minimal, and there is a natural disincentive to enforcement by Congress. States may fear that once Congress begins targeting the practices of particular states, then other state governments will be the focus. Rather than open this door, members of Congress will be pressured by their states to choose not to act.

At the very least, there certainly is nothing that requires that Congress address violations of the Guarantee Clause. As such, the command that the United States *shall* guarantee will not be met. Malapportionment of state legislatures existed for many decades, yet no congressional action was forthcoming. In fact, after the Court ordered reapportionment, bills were introduced into Congress to strip federal court jurisdiction over such cases.[107]

Second, if Congress acts, it is likely to be only in the most egregious cases, such as if a state government established a monarchy or eliminated its legislature. Only these types of instances will attract sufficient national attention and outrage so as to provoke federal attention and response. Yet, these are the types of violations that are least likely to happen, as evidenced by 200 years of American history. The challenges that will arise--issues over whether a state violates the Guarantee Clause by denying the right to vote or equal voting weight, or by adopting laws through direct democracy--are the ones that Congress is virtually certain not to address.

Third, members of Congress themselves might have a direct personal interest implicated in such cases. Election practices in the state might relate not only to state government offices, but to elections of representatives and senators as well. For example, denying some individuals the right to vote conceivably could benefit incumbents. Likewise, malapportionment can affect the way in which congressional districts are drawn. Thus, there is a special reason for not leaving enforcement of a check on the political process entirely to Congress.[108]

---

107. *See* H.R. 11,926, 88th Cong., 2d Sess. (1964); S. 3069, 88th Cong., 2d. Sess. (1964).

108. *See* ELY, *supra* note 40, at 4-5 (arguing for a special judicial role in policing the democratic process).

Fourth, congressional enforcement of the Guarantee Clause generally will be extremely difficult. Courts are well-suited to deciding specific cases, but the legislative process generally deals best with general problems. Even if all of the above problems were eliminated and Congress wanted to deal with a specific state, how could it do so? Imagine that Congress believed that a specific state had adopted a form of government that was not republican in nature. Conceivably, Congress would need to pass a law declaring the particular state practice illegal and commanding the state to adopt a new law changing its ways.

There would be potentially serious Tenth Amendment problems if Congress attempted this. In *Coyle v. Smith*,[109] the Court held unconstitutional a federal law that restricted the location of Oklahoma's state capital. *Coyle* has been understood as limiting the ability of Congress to restructure state governments.[110]

More importantly, just two years ago in *New York v. United States*,[111] the Supreme Court held that it is unconstitutional for Congress to compel states to adopt legislation or regulations. The Court ruled it unconstitutional for Congress to require states to clean up low-level nuclear waste by threatening that failure to do so would mean that states take title to the nuclear waste and become liable for all harms caused by them. The Court emphasized that compelling state legislative or regulatory activity violates the Constitution no matter how strong the federal interest. Justice O'Connor, writing for the majority, declared, "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."[112]

Arguably then, a federal law commanding that a state government reconstitute itself in a particular way would violate state sovereignty and the Tenth Amendment. *New York* might be distinguished from federal actions taken under the Guarantee Clause. For example, *New York* might be read narrowly to involve only instances in which Congress compels states to adopt and administer federal regulatory programs. Also, an exception to the *New York* holding could be recognized for instances in which Congress acts to guarantee that states have a

---

109. 221 U.S. 559 (1911). In *Coyle*, the Court upheld a 1910 Oklahoma law providing that its capitol would remain in Oklahoma City, despite a federal law conditioning admission of Oklahoma on a requirement that the state capitol remain in Guthrie until 1913. *Id.*

110. *See* National League of Cities v. Usery, 426 U.S. 833 (1976).

111. 112 S. Ct. 2408 (1992).

112. *Id.* at 2429.

republican form of government. Article IV's authorization could be viewed as trumping Tenth Amendment concerns because of the former's specific grant of power to the federal government over state government structure and processes.

Nonetheless, it will be difficult, and of questionable constitutionality, for Congress to outlaw a specific state practice as violating the Guarantee Clause and to command a remedy. Two hundred years of experience demonstrates that such actions are not likely forthcoming. Indeed, it is much more the traditional judicial role to rule on allegations of specific violations and to impose a remedy. Thus, it makes little sense to leave the Guarantee Clause to the political process for enforcement and far more sense to allow courts to decide cases under it.

The one area where Congress has used the Guarantee Clause is in setting conditions for admission and readmission of states to the country. Pursuant to Article IV, section 3 of the Constitution, "[n]ew States may be admitted by Congress into the Union." In deciding whether to admit a particular state, Congress has evaluated whether the state has a republican form of government.[113] Similarly, during Reconstruction, Congress used the Guarantee Clause as the basis for setting criteria for the readmission of states into the union.[114]

This, then, is a place where the political question doctrine could be applied by the judiciary because Congress is interpreting and enforcing the Constitution.[115] For example, if Congress decides not to admit a territory into statehood because it decides that the territory lacks a republican form of government, the judiciary could defer to the legislature's interpretation of the Constitution. However, apart from this area, the great improbability of congressional action means that the Guarantee Clause cases should be justiciable.

IV. CONCLUSION

More than a decade ago, John Hart Ely wrote: "[I]t seems likely that this unfortunate doctrine--that all Republican Form cases necessarily involve political questions--will wholly pass from the scene one of these

113. *See* WIECEK, *supra* note 45, at 203-05; *see also* Charles O. Lerche, Jr., *The Guarantee of a Republican Form of Government and the Admission of New States*, 11 J. POL. 578 (1949).

114. Bonfield, *supra* note 4, at 539-43; *see also* Texas v. White, 74 U.S. (7 Wall.) 700, 727-29 (1868).

115. *See, e.g.*, Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867) (declining review of a challenge to the Reconstruction Act).

days."[116] The Guarantee Clause is in many ways unique among the areas where the Court has applied the political question doctrine.

First, it is virtually the only area where the deference imposed by the political question doctrine is to state governments and not to another branch of the federal government.[117] When the political question doctrine is applied to prevent judicial review of foreign policy decisions or the impeachment process, there is judicial deference to the decisions of Congress and the President. With the Guarantee Clause, though, the deference is to state governments. Although such deference to states in matters of constitutional law is generally quite questionable, it is especially objectionable given the existence of a provision commanding the "United States shall guarantee."

Second, of all the areas where the political question doctrine has been applied, the Guarantee Clause is the most clearly connected with individual rights. As such, it is very much the judicial role to interpret and enforce the provision. Indeed, the types of issues that are likely to arise--whether a particular state's practices deny a republican form of government--are typically the type resolved by the judiciary and not the legislature.

Third, more than in any other area, applying the political question doctrine to the Guarantee Clause nullifies a constitutional provision. When the Court holds that a challenge to the impeachment process or the method of approving a constitutional amendment or a foreign policy decision is a political question, those constitutional provisions still are given effect. But the Court's consistent refusal throughout this century to hear Guarantee Clause cases has robbed that constitutional provision of any significance.[118]

The conclusion that emerges is that it is time to resurrect the Guarantee Clause. One hundred and twenty five years ago, Charles Sumner

---

116. ELY, *supra* note 40, at 118.

117. *See* Gilligan v. Morgan, 413 U.S. 1 (1973) (declaring nonjusticiable a challenge to the training of the Ohio National Guard).

118. Professor Althouse suggests that judicial decisions under the Guarantee Clause could make the situation worse and that without judicial review, legislatures might be inspired to desirable action by the Clause. Althouse, *supra* note 82, at 885-86. The power of judicial review means that courts can make good or bad decisions. The Guarantee Clause is no different. Society accepts the risk of undesirable judicial decisions in all of the other areas of court involvement; there is no reason to treat the Guarantee Clause differently. Moreover, there is no indication that legislatures are inspired by the Guarantee Clause. I doubt many legislators--at the federal or state level--even know that the provision exists.

referred to the Clause as a "sleeping giant."[119] 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? What types of voting arrangements are inconsistent with the constitutional mandate? Does direct democracy, adoption of laws by initiative and referenda, deny a republican form of government? It is time for the Court to begin addressing these questions.

119. *See A Niche*, *supra* note 4.