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## THE “GUARANTEE” CLAUSE

*Ryan C. Williams*

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*Article IV’s command that “the United States shall guarantee to every State in this Union a Republican Form of Government” stands as one of the few remaining lacunae in the judicially enforced Constitution. For well over a century, federal courts have viewed the provision — traditionally known as the Guarantee Clause but now referred to by some as the “Republican Form of Government” Clause — as a paradigmatic example of a nonjusticiable political question. In recent years, however, both the Supreme Court and lower federal courts have signaled a new willingness to reconsider this much-criticized jurisdictional barrier in an appropriate case, leading many to predict that its eventual demise is only a matter of time.*

*The interpretive possibilities inherent in a judicially enforceable Guarantee Clause have tantalized generations of constitutional theorists, leading to a significant body of research attempting to uncover what was meant by the provision’s oblique reference to “a Republican Form of Government.” But this research has almost completely ignored a separate inquiry that is equally critical to understanding the provision’s meaning and significance — namely, what it means for the United States to “guarantee” such republican government to the states.*

*This Article seeks to shed new light on the original meaning of the term “guarantee” in the Guarantee Clause by looking to an unexpected source — namely, eighteenth-century treaty practice. The language of the Guarantee Clause closely parallels language that was frequently used in seventeenth- and eighteenth-century treaties. The interpretation of such treaty provisions was informed by well-settled background principles of international law, which attached particular legal significance to the term “guarantee.” As used in eighteenth-century treaties, the term “guarantee” signified a diplomatic commitment whereby one nation pledged its support to the protection of some preexisting right or entitlement possessed by another sovereign. Importantly, however, such provisions were deemed to exist solely for the benefit of the guaranteed sovereign and conferred no separate rights or entitlements on the nation pledging the guarantee.*

*Viewing the Guarantee Clause through the lens of eighteenth-century treaty practice casts significant doubt on claims by modern scholars that the provision should be understood as a repository of judicially enforceable individual rights. Rather, both the text of the provision and contextual evidence regarding its original understanding strongly suggest that the provision more likely reflected a quasi-diplomatic, treaty-like commitment on the part of the federal government to its quasi-sovereign component states. This evidence lends new, and heretofore unappreciated, support to the Supreme Court’s longstanding practice of treating Guarantee Clause claims as beyond the scope of judicial cognizance.*

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## INTRODUCTION

In 1867, Senator Charles Sumner famously likened the Article IV Guarantee Clause to “a sleeping giant in the Constitution.”<sup>1</sup> Nearly a century and a half later, and despite persistent prodding from scholars,<sup>2</sup> litigants, and even the occasional judge,<sup>3</sup> the giant continues to slumber. The roots of this somnolence are conventionally traced to the Supreme Court’s 1849 decision in *Luther v. Borden*,<sup>4</sup> which has long been construed as requiring that all constitutional challenges based on the Clause be treated as involving nonjusticiable political questions.<sup>5</sup>

There are signs, however, that the giant may be starting to stir. The political question doctrine is a shadow of what it once was, having been dealt a critical blow by the Supreme Court’s 1962 decision in *Baker v. Carr*.<sup>6</sup> In *Zivotofsky ex rel. Zivotofsky v. Clinton*,<sup>7</sup> one of its most thorough recent engagements with the doctrine, the Court continued the trend of diminishing its scope. The *Zivotofsky* Court reinforced and elaborated the Court’s previously articulated limitation of political questions to only those situations involving either “a textually demonstrable constitutional commitment of [an] issue to a coordinate political department” or “a lack of judicially discoverable and manageable standards for resolving it.”<sup>8</sup>

As the force of the political question doctrine has waned in other domains, the use of that doctrine to insulate Guarantee Clause challenges from any form of judicial review has grown increasingly difficult to defend. The refusal of federal courts to entertain challenges under the Guarantee Clause has drawn criticism from a veritable “who’s who” of modern constitutional theorists, including Professors Akhil Amar,<sup>9</sup>

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

<sup>2</sup> See *infra* notes 9–13 (citing scholarly critiques of the political question limitation on Guarantee Clause claims).

<sup>3</sup> See *infra* p. 605 (discussing recent case law that suggests that certain Guarantee Clause claims may be justiciable).

<sup>4</sup> 48 U.S. (7 How.) 1 (1849).

<sup>5</sup> *Id.* at 46–47; see also, e.g., *New York v. United States*, 505 U.S. 144, 184 (1992) (“The view that the Guarantee Clause implicates only nonjusticiable political questions has its origin in *Luther* . . .”). But see Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1911–13 (2015) (contending that this understanding of *Luther* is mistaken and that claims under the Clause were not held to be nonjusticiable until the Court’s decision in *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912)).

<sup>6</sup> 369 U.S. 186 (1962).

<sup>7</sup> 566 U.S. 189 (2012).

<sup>8</sup> *Id.* at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

<sup>9</sup> AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 276–80 (2005); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 753–54 (1994).

Jack Balkin,<sup>10</sup> Erwin Chemerinsky,<sup>11</sup> John Hart Ely,<sup>12</sup> and Laurence Tribe.<sup>13</sup> The courts themselves have also begun to question the longstanding assumption that *Luther* compels a categorical prohibition on adjudicating Guarantee Clause claims. In its most significant recent pronouncement on the Clause, the Supreme Court nudged open the door to future Guarantee Clause litigation by suggesting “that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.”<sup>14</sup> And though lower courts have been relatively cautious in taking up the Court’s invitation, a handful of lower court decisions have concluded that the political question doctrine no longer stands as an inflexible barrier to adjudicating claims under the Guarantee Clause.<sup>15</sup> For example, in its 2014 decision in *Kerr v. Hickenlooper*<sup>16</sup> — subsequently vacated on alternative jurisdictional grounds — the Tenth Circuit concluded that the political question doctrine posed no obstacle to federal adjudication of a claim that a state constitutional amendment adopted through a voter initiative process conflicted with the constitutional guarantee of a “Republican Form of Government.”<sup>17</sup>

<sup>10</sup> JACK M. BALKIN, *LIVING ORIGINALISM* 241–42 (2011) (asserting federal courts are, like Congress, “required to guarantee republican government where it is institutionally appropriate for them to do so,” *id.* at 242).

<sup>11</sup> Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 864–69 (1994).

<sup>12</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 118 n.\* (1980).

<sup>13</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 398 (2d ed. 1988); *see also, e.g.*, WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 287–89, 300 (1972); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 560–65 (1962); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1479 (2005) (“[T]he Guarantee Clause should be a proper subject for judicial review when it is invoked as a guarantor of individual rights.”); Ethan J. Leib, *Redeeming the Welshed Guarantee: A Scheme for Achieving Justiciability*, 24 WHITTIER L. REV. 143, 148–49 (2002); Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887, 920–31 (1994); *cf.* *Risser v. Thompson*, 930 F.2d 549, 552 (7th Cir. 1991) (Posner, J.) (“The clause guaranteeing to each state a republican form of government has been held not to be justiciable, and although this result has been powerfully criticized, . . . it is too well entrenched to be overturned at our level of the judiciary.” (citations omitted)).

<sup>14</sup> *New York v. United States*, 505 U.S. 144, 185 (1992) (citing *Reynolds v. Sims*, 377 U.S. 533, 582 (1964)).

<sup>15</sup> *See, e.g.*, *Largess v. Supreme Judicial Court*, 373 F.3d 219, 226–29 (1st Cir. 2004) (per curiam) (rejecting a Guarantee Clause challenge on the merits); *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126, 1137–39 (Cal. 2006) (relying in part on the Guarantee Clause to hold tribal sovereign immunity did not bar enforcement of state law); *Vansickle v. Shanahan*, 511 P.2d 223, 234 (Kan. 1973) (concluding that Guarantee Clause claims are justiciable).

<sup>16</sup> 744 F.3d 1156 (10th Cir. 2014), *vacated*, 135 S. Ct. 2927 (2015) (mem.) (directing the lower court to reconsider the decision in light of *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652 (2015)), *remanded to* 824 F.3d 1207 (10th Cir. 2016).

<sup>17</sup> *Id.* at 1176, 1180. On remand from the Supreme Court, the Tenth Circuit concluded that the state legislator plaintiffs in the case lacked Article III standing and remanded the case to the district court. *Kerr*, 824 F.3d at 1217.

In view of these developments, several scholars have predicted that the eventual demise of the political question barrier to judicial enforcement of the Guarantee Clause is only a matter of time.<sup>18</sup> The possibility of a Guarantee Clause jurisprudence freed from the shackles of *Luther* and the political question doctrine has long fascinated constitutional scholars. The Clause has been suggested as support for a broad range of doctrinal innovations, extending from the relatively narrow and modest — such as providing firmer textual grounding for the Court’s reapportionment precedents from the 1960s<sup>19</sup> or its more recent federalism decisions<sup>20</sup> — to the novel and ambitious. The innovative judicial uses that scholars have suggested for the Clause include refashioning (or perhaps eliminating) the law of direct democracy in the states,<sup>21</sup> providing for federal judicial regulation of partisan gerrymandering,<sup>22</sup> grounding a federal constitutional right to an adequate public school education,<sup>23</sup> and many more.<sup>24</sup>

<sup>18</sup> See, e.g., Richard L. Hasen, *Leaving the Empty Vessel of “Republicanism” Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 75, 76 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) (contending that “there is good reason to believe that the Court will soon consider claims arising under the Guarantee Clause”); Chemerinsky, *supra* note 11, at 851 (“[T]he 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.”).

<sup>19</sup> See, e.g., Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1717–18 (1999) (arguing that the Guarantee Clause, rather than the Equal Protection Clause, would have provided a more natural textual source of the Warren Court’s reapportionment decisions); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 105–07 (2000) (same).

<sup>20</sup> See, e.g., Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 36 (1988) (contending that the Clause “prohibits the federal government from interfering with state sovereignty” and “thus provides a more definite limit on national power than the ambiguous language of the [T]enth [A]mendment”); cf. Fred O. Smith, Jr., *Awakening the People’s Giant: Sovereign Immunity and the Constitution’s Republican Commitment*, 80 FORDHAM L. REV. 1941, 1990–93 (2012) (contending that the Guarantee Clause might provide a stronger textual foundation than would the Eleventh Amendment for state sovereign immunity).

<sup>21</sup> See, e.g., Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1539–45 (1990); Hans A. Linde, *When Is Initiative Lawmaking Not “Republican Government”?*, 17 HASTINGS CONST. L.Q. 159, 160–61 (1989).

<sup>22</sup> See, e.g., Jarret A. Zafran, Note, *Referees of Republicanism: How the Guarantee Clause Can Address State Political Lockup*, 91 N.Y.U. L. REV. 1418, 1453–55 (2016).

<sup>23</sup> See, e.g., Bonfield, *supra* note 13, at 560 (“[U]niversal free public education, not a requisite to [a republican] government 150 years ago, must unavoidably be deemed so today.”); cf. Mitchell Franklin, *Interposition Interposed: I*, 21 LAW TRANSITION 1, 12 (1961) (suggesting that the Guarantee Clause gives the federal government power to maintain “a system of public education, in states which have wrecked, weakened, terrorized, or abandoned the public school system in order to avoid integration”).

<sup>24</sup> See, e.g., Samuel B. Johnson, *The District of Columbia and the Republican Form of Government Guarantee*, 37 HOW. L.J. 333, 386–91 (1994) (suggesting that the Guarantee Clause might be used to protect Washington, D.C., residents’ right to local self-government); Note, *A Niche for the Guarantee Clause*, 94 HARV. L. REV. 681, 696–99 (1981) (arguing that the Guarantee Clause should

But this enthusiasm for a judicially enforceable Guarantee Clause is not universally shared. Professor Richard Hasen, for example, views the “republicanism” to which the Clause refers as “an empty vessel” that can “be filled by whatever individual right the particular writer desires the courts to enforce.”<sup>25</sup> Given this potential for interpretive malleability, Hasen worries that judicial enforcement of the Guarantee Clause could “take . . . very serious questions about political structure out of the political process and leave them in the hands of judges to ossify in constitutional decisions binding on the entire nation.”<sup>26</sup>

Both the putative promise of the Guarantee Clause and its potential for mischief hinge on how the Clause will ultimately be interpreted by the courts. And given the relative dearth of Supreme Court case law construing the Clause, there is strong reason to believe that the courts’ emergent Guarantee Clause doctrine will be shaped to a significant extent by historical evidence regarding the Clause’s original meaning and purpose.<sup>27</sup> The Tenth Circuit in *Kerr* explicitly alluded to such a role by pointing to “the Federalist Papers, founding-era dictionaries, records of the Constitutional Convention, and other papers of the founders”<sup>28</sup> as possible sources from which to obtain “judicially manageable guidance” regarding the provision’s meaning and proper application.<sup>29</sup>

The original meaning of the Guarantee Clause has already been the subject of extensive scholarly commentary.<sup>30</sup> But virtually all of this scholarship has focused on attempts to determine the original meaning of the provision’s reference to “a Republican Form of Government.”<sup>31</sup> By contrast, the original meaning of the provision’s operative command — namely, the instruction that the United States “guarantee” such

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be used to protect certain forms of individual rights against state infringement); Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561, 561 (1984) (contending that the Guarantee Clause could be used to inhibit states from denying practical legal effect to rights recognized by state law).

<sup>25</sup> Hasen, *supra* note 18, at 82.

<sup>26</sup> *Id.* at 85.

<sup>27</sup> See, e.g., Jamal Greene, Essay, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL’Y REV. 325, 326 (2009) (suggesting that originalism may be “most useful” in “cases of constitutional first impression”).

<sup>28</sup> *Kerr v. Hickenlooper*, 744 F.3d 1156, 1178 (10th Cir. 2014), *vacated*, 135 S. Ct. 2927 (2015) (mem.), *remanded to 824 F.3d 1207* (10th Cir. 2016).

<sup>29</sup> *Id.* at 1179.

<sup>30</sup> See, e.g., AMAR, *supra* note 9, at 276–81; WIECEK, *supra* note 13, at 11–50; Amar, *supra* note 9, at 761–73; Bonfield, *supra* note 13, at 516–30; Merritt, *supra* note 20, at 29–36; Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807, 824–25 (2002).

<sup>31</sup> This language has been so central to modern debates about the Clause’s meaning that several prominent scholars have taken to referring to the provision as the “Republican Form of Government Clause” rather than the Guarantee Clause. See, e.g., AMAR, *supra* note 9, at 276–81; McConnell, *supra* note 19, at 106.

a government to each state — has received remarkably little serious scholarly consideration.<sup>32</sup>

This paucity of scholarly attention devoted to the original meaning of the term “guarantee” is somewhat curious. The meaning of the term is crucially important to understanding the Clause’s actual meaning and operation. Neither the nature of any duties the Clause imposes on the federal government nor the scope of any powers the Clause confers can be fully understood without a clear sense of what, exactly, was meant by “guarantee.”<sup>33</sup> And yet, the term itself is something of a constitutional anomaly. The word “guarantee” appears nowhere else in the federal Constitution of 1787 nor in any of the Amendments that were ratified within the first decade after its adoption. The language of “guarantee” is also conspicuously absent from many of the pre-Founding sources that are often pointed to as having influenced the federal Constitution’s design, such as the Articles of Confederation, the Declaration of Independence, early state constitutions, and the Northwest Ordinance of 1787.<sup>34</sup> In the absence of more definitive clues regarding the term’s originally understood meaning, most scholars have been content to either ignore the problem or to throw up their hands and declare the term hopelessly ambiguous.<sup>35</sup>

But such declarations of interpretive impossibility are of questionable reliability absent evidence that the interpreter has exhausted *all* of the potentially relevant historical sources that might plausibly bear on a provision’s original meaning. And one important category of eighteenth-century legal documents has been almost completely overlooked by prior scholarship addressing the Guarantee Clause’s original meaning — namely, international treaties.

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<sup>32</sup> See, e.g., Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1737 (2010) (noting that “besides a few cursory pages in the occasional law review article on the Clause, no court or scholar has seriously considered the word’s meaning or its implications for how the Clause should be implemented” (footnote omitted)).

<sup>33</sup> See, e.g., WIECEK, *supra* note 13, at 3 (observing that some of “the most important questions in the clause’s history” have turned upon the “precise definition” of the term); Heller, *supra* note 32, at 1737 (“Understanding what it means for the United States to ‘guarantee’ a republican form is central to understanding how the Clause was meant to be enforced.”).

<sup>34</sup> See, e.g., Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1148 n.128 (2003) (identifying “the Declaration of Independence, the Articles of Confederation, the secret proceedings of the Continental Congress, the early state constitutions, and the Northwest Ordinance of 1787” as among the “pre-Founding sources” that can help to “establish general background understandings or interpretive baselines for determining the original public meaning of the later-adopted Constitution”).

<sup>35</sup> See, e.g., WIECEK, *supra* note 13, at 75 (contending that “the ambiguity of the word ‘guarantee’ . . . was so great” as to amount to a “blank check[] to posterity”). *But see* Bonfield, *supra* note 13, at 523 (citing one Founding-era dictionary as evidence of the term’s meaning); Heller, *supra* note 32, at 1737–45 (examining contemporaneous dictionary definitions and drafting and ratification history bearing on the term’s meaning).

The language of "guarantee" recurred repeatedly throughout seventeenth- and eighteenth-century treaties. By the late eighteenth century, the term "guarantee" had taken on a fairly well-established term-of-art meaning that signified an engagement whereby one state party to a treaty promised to aid another state in its peaceable enjoyment of particular rights against interference by third parties.<sup>36</sup> The term could be used to signify either a mutual obligation between the state parties to a treaty or, in the term's more technical sense, a particular kind of treaty-enforcement mechanism whereby the contracting parties would invoke the aid of a third party to monitor compliance with the treaty's terms.<sup>37</sup> As explained by Emer de Vattel, the most widely recognized authority on the law of nations in the early Republic,<sup>38</sup> the term "guarantee," when used in a treaty, signified a commitment on the part of a guaranteeing state "to maintain the conditions of [a] treaty, and to cause it to be observed," including, if necessary, through the "use of force against the party" that breached its commitments.<sup>39</sup>

This international law meaning of "guarantee" has gone almost completely unmentioned in the significant body of scholarship addressing the original meaning of the Guarantee Clause. And to some extent this inattention is unsurprising. To a modern reader, accustomed to viewing the Constitution as a municipal law document designed for the governance of a unitary republic, the relevance of eighteenth-century treaty practice may seem far from obvious. But recent decades have seen growing scholarly awareness of the significant role that international law principles and practices played in shaping the Constitution's content.<sup>40</sup> One important insight of this scholarship has been to recognize

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<sup>36</sup> See, e.g., HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* pt. III, ch. II, § 10, at 192 (Philadelphia, Carey, Lea & Blanchard 1836) (describing a "guarantee" as "an engagement by which one state promises to aid another where it is interrupted, or threatened to be disturbed in the peaceable enjoyment of its rights by a third power").

<sup>37</sup> See *infra* section I.B, pp. 615–20 (discussing technical meaning of "guarantee" under eighteenth-century law of nations).

<sup>38</sup> Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 404 (2012) ("[F]rom the beginning of the United States through well after the founding period, Vattel was the preeminent authority on the law of nations."); see also *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978) ("The international jurist most widely cited in the first 50 years after the Revolution was" Vattel).

<sup>39</sup> EMER DE VATTEL, *THE LAW OF NATIONS* bk. II, ch. XVI, § 235 (Belá Kapossy & Richard Whitmore eds., Liberty Fund 2008) (1758). Although Vattel was baptized under the name "Emer," his name has often been mistakenly rendered in the German form "Emerich." See Belá Kapossy & Richard Whitmore, *Introduction*, in VATTEL, *supra*, at i, ix n.1.

<sup>40</sup> See, e.g., David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 989–1015 (2010) (discussing influence of international law principles and concerns in the drafting process).

the extent to which relations among the states and between the individual states and the federal government were assimilated to the model of international relations between independent sovereign nations.<sup>41</sup>

To be sure, the Articles of Confederation and, more significantly, the federal Constitution of 1787 bound the states together in a manner that deprived them of many sovereign attributes that independent nations would have enjoyed.<sup>42</sup> But the consolidation effected by the union was neither intended nor understood by members of the Founding generation to deprive states of their independent sovereign capacities entirely.<sup>43</sup> To the contrary, as Professor Thomas Lee observes, “the founding generation . . . perceived the States as sovereign nation-states in some respects and accordingly drafted constitutional text to incorporate certain useful international law rules.”<sup>44</sup> The close textual affinity between the language of the Guarantee Clause and similarly worded provisions in eighteenth-century treaties thus suggests a strong — though heretofore unrecognized — possibility that the Guarantee Clause itself may have been modeled on such an international law paradigm.<sup>45</sup>

Viewing the language of the Guarantee Clause through the lens of eighteenth-century international law casts new light on modern debates regarding the Clause’s potential doctrinal significance. In particular, an international law perspective on the Clause’s original meaning casts

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<sup>41</sup> See, e.g., ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 124–26 (2010) (emphasizing the influence of international law theorists such as Hugo Grotius and Samuel von Pufendorf on eighteenth-century ideas of American federalism); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1031 (2002) (explaining that “the Founders understood the States as sovereign entities bound together in an interdependent coexistence very much like the community of nations, and they therefore frequently consulted international law and political theory to craft rules conducive to a peaceful and mutually respectful coexistence”); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 832–38 (1999) (arguing that constitutional references to the “States” implicitly recognized their sovereign rights under international law).

<sup>42</sup> See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 259–60 (1992) (observing that “[m]uch of the Constitution addresses the task of creating one nation out of separate states,” *id.* at 259, and pointing to, *inter alia*, the Privileges and Immunities, Full Faith and Credit, Extradition, and Free Navigation Clauses as well as the constitutional prohibitions on war and diplomacy by states as meaningful constraints on state sovereignty).

<sup>43</sup> See JACK N. RAKOVE, *ORIGINAL MEANINGS* 168 (1996) (“[T]he new federal system would occupy a middle ground between a confederation of sovereign states and a consolidated nation.”).

<sup>44</sup> Lee, *supra* note 41, at 1049; see also, e.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838) (characterizing the states of the union as “sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes”).

<sup>45</sup> In his 2002 article, Lee did briefly allude to the possibility of an international law influence on the Guarantee Clause. See Lee, *supra* note 41, at 1051–53. But that article, which focused principally on the original meaning of the Eleventh Amendment, did not address the textual similarity between the Clause and eighteenth-century treaty documents that is the focus of this Article.

considerable doubt on those readings of the provision that would treat it as a safeguard of individual rights against state government.<sup>46</sup> Both the language of the Clause and relevant background principles of eighteenth-century international law strongly suggest that the Clause was designed to protect the rights of states in their sovereign governmental capacities, not the individual rights of those states' respective citizens.<sup>47</sup>

Moreover, the international law perspective on the Clause's background suggests that the federal courts' traditional reluctance to treat the provision as judicially enforceable may be defensible even under the modern deracinated conception of the political question doctrine. Critics of the political question limitation on the Clause's judicial enforcement have long maintained that the Clause is not meaningfully distinguishable from other provisions that have been held justiciable.<sup>48</sup> But viewing the Clause against the backdrop of eighteenth-century international law suggests the intriguing possibility that the provision may have embodied a quasi-diplomatic commitment of the type that would have been viewed as committed to the political branches of government rather than the judiciary.<sup>49</sup>

The Article proceeds in three Parts. Part I briefly surveys the predominant eighteenth-century dictionary definitions of the term "guarantee" and examines the specialized legal connotations the term conveyed when invoked in the international treaty context. Part II examines Founding-era evidence suggesting that the language of the Guarantee Clause may have been deliberately modeled on similar "guarantee" provisions in international treaties. Though the evidence supporting this specialized term-of-art understanding is not unequivocal, the case for understanding the Clause in its international term-of-art sense is far stronger than existing scholarship has recognized. Part III considers the potential significance this term-of-art reading might have for modern judicial doctrine interpreting the Clause. In particular, Part III contends

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<sup>46</sup> See, e.g., Bonfield, *supra* note 13, at 524–25 (arguing that the Clause "impos[es] an obligation on the United States to protect the people in their individual capacity from unrepresentative governance"); Chemerinsky, *supra* note 11, at 851 (arguing that "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"); Anya J. Stein, Note, *The Guarantee Clause in the States: Structural Protections for Minority Rights and Necessary Limits on the Initiative Power*, 37 HASTINGS CONST. L.Q. 343, 343 (2010) (contending that the Guarantee Clause "provides essential structural protections for individual rights").

<sup>47</sup> See *infra* section III.A, pp. 674–79.

<sup>48</sup> See, e.g., Chemerinsky, *supra* note 11, at 871 ("[T]here is no reason why 'republican form of government' is more lacking in standards than 'due process' or 'equal protection.'"); Louise Weinberg, *Luther v. Borden: A Taney Court Mystery Solved*, 37 PACE L. REV. 700, 736–38, 747–52 (2017) (contrasting *Luther* with *Baker*, in which the Court deemed justiciable a constitutional challenge implicating putatively similar concerns).

<sup>49</sup> See *infra* section III.B, pp. 679–87.

that accepting the term-of-art interpretation of the Clause should, at a minimum, lead to the conclusion that standing to invoke the Clause is limited to state governments in their institutional, governmental capacities and not to individual state citizens.<sup>50</sup> Part III also explores the argument that claims under the Guarantee Clause may have been originally viewed as inappropriate for judicial resolution<sup>51</sup> — a conclusion that, while consistent with current doctrine, has been widely viewed as lacking a robust foundation in constitutional text and history.

## I. THE EIGHTEENTH-CENTURY MEANINGS OF “GUARANTEE”

### A. Dictionary Definitions of “Guarantee” and “Guaranty”

In modern parlance, to “guarantee” something means roughly to provide a formal assurance or promise.<sup>52</sup> To “guarantee” a particular condition or state of affairs under this meaning is thus equivalent to promising or assuring its continued existence.<sup>53</sup> Most modern discussions of the Guarantee Clause assume that the relevant eighteenth-century meaning more or less tracks this modern meaning.<sup>54</sup>

But most eighteenth-century dictionary definitions of the term “guaranty,” the more common spelling of the term when used as a verb,<sup>55</sup> provided a more specific definition that connected the term to the performance of a stipulation, contract, or — especially — a treaty.<sup>56</sup> For example, the 1786 edition of Samuel Johnson’s famous *Dictionary of the English Language* defined “guaranty” as meaning “[t]o undertake to secure the performance of any articles,” with “articles” defined in the relevant sense as “[t]erms” or “stipulations.”<sup>57</sup> The second edition of

<sup>50</sup> *Infra* section III.A, pp. 674–79.

<sup>51</sup> *Infra* section III.B, pp. 679–87.

<sup>52</sup> See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 554 (11th ed. 2006).

<sup>53</sup> Many modern constitutions use the term in this sense. See, e.g., CAL. CONST. art. I, § 4 (“The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State . . . .”); N.Y. CONST. art. VI, § 18(a) (“Trial by jury is guaranteed as provided in article one of this constitution.”).

<sup>54</sup> See, e.g., Chemerinsky, *supra* note 11, at 852 (“[T]he Guarantee Clause should be regarded as assuring basic political rights” to individuals. (emphasis added)); Merritt, *supra* note 20, at 25 (“The guarantee clause . . . promises each state a government based on popular control.” (emphasis added)).

<sup>55</sup> Heller, *supra* note 32, at 1737 n.117 (noting that the spelling used in the Guarantee Clause was “peculiar”).

<sup>56</sup> See *id.* at 1737–38 (quoting THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 306 (London, C. Dilby 2d ed. 1789)) (observing that “[m]ost dictionaries at the time of the founding defined ‘guaranty’ as to ‘secure the performance’ of a stipulation, contract, or treaty between parties” (footnote omitted)).

<sup>57</sup> I SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al. 6th ed. 1785) [hereinafter JOHNSON 1785]. One of the few modern discussions of the Guarantee Clause to give specific attention to the meaning of “guaranty” focuses on a 1773 edition of Johnson’s *Dictionary*, which provides several alternative senses of the term, including

Thomas Sheridan's *Complete Dictionary of the English Language*, published in 1789, defined the term in a manner that more strongly suggested a link to treaties in particular: "To undertake to secure the *performance of a treaty* or stipulation between contending parties."<sup>58</sup> To similar effect was Frederick Barlow's *Complete English Dictionary*, published in 1772, which defined "guaranty" to mean: "[T]o undertake to see the articles of *any treaty* performed."<sup>59</sup> Other dictionaries published at around the same time similarly linked the concept of a "guarantee," or the act of guarantying, with the performance of an obligation arising from either an agreement in general<sup>60</sup> or a treaty specifically.<sup>61</sup>

When one turns to dictionary definitions of the related noun form "guarantee,"<sup>62</sup> the term's connection to treaties comes through even

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"[t]o watch by way of defence and security," "[t]o protect" or "defend," "[t]o preserve by caution," and "[t]o provide against objections." Heller, *supra* note 32, at 1738 (quoting 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan et al. 5th ed. 1773)). But in the prior edition of Johnson's *Dictionary*, published in 1770, the only definition of "guaranty" is consistent with that provided in the text above — namely, "[t]o undertake to secure the performance of any articles." 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan et al. 4th ed. 1770). Moreover, the definitions provided for the word that follows "guaranty" — the verb "to guard" — are nearly verbatim copies of the definitions provided for "guaranty" in the 1773 edition. *Id.* (providing definitions of "to guard" that include "[t]o watch by way of defence and security," "[t]o protect" or "defend," "[t]o preserve by caution," and "[t]o provide against objections"). This pattern strongly suggests that the definitions provided in Johnson's 1773 edition were inadvertently transposed from the neighboring entry, "to guard" — an inference that is supported by the fact that the edition following the 1773 revision, which was published in 1785, defined "guaranty" and "to guard" in a manner consistent with the 1770 edition, not the 1773 edition. *See* JOHNSON 1785, *supra*.

<sup>58</sup> SHERIDAN, *supra* note 56, at 306 (emphasis added).

<sup>59</sup> 1 FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY (London, Frederick Barlow 1772) (emphasis added); *see also, e.g.*, 1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Vernor & Hood et al. 2d ed. 1795) (defining guaranty as "[t]o undertake to secure the performance of a stipulation between contracting parties"). The eighteenth-century meaning of the term "treaty" largely tracks the modern meaning of the term as a formal convention or compact between nations. *See, e.g.*, NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (Edinburgh, Neill & Co. 25th ed. 1783) (defining "treaty" as "a covenant or agreement between several nations for peace, commerce, navigation, *etc.*"); 2 JOHNSON 1785, *supra* note 57 (defining "treaty" as "[a] compact of accommodation relating to publick affairs"). *But see* Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 166–71 (1998) (contending that most Founding-era dictionaries failed to capture a distinction recognized by leading authorities on the law of nations between "treaties" and less formal or temporary international agreements that were referred to using other terms).

<sup>60</sup> *See, e.g.*, 1 JOHNSON 1785, *supra* note 57 (defining guarantee as "[a] power who undertakes to see stipulations performed").

<sup>61</sup> *See, e.g.*, JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (London, J.F. & C. Rivington et al. 1792) ("To undertake to see the articles of any treaty kept."); JOHN WALKER, A CRITICAL PRONOUNCING DICTIONARY AND EXPOSITOR OF THE ENGLISH LANGUAGE (London, G.G.J. & J. Robinson & T. Cadell 1791) ("To undertake to see the performance of a treaty or stipulation between contending parties.").

<sup>62</sup> Again, a spelling pattern that the Guarantee Clause itself did not track. *See supra* note 55 and accompanying text.

more clearly. For example, the 1783 edition of Nathan Bailey's *An Universal Etymological English Dictionary* defined "guarantee" when used as a noun to mean "a person agreed on to see articles performed in treaties between Princes."<sup>63</sup> John Ash's 1795 *Dictionary of the English Language* defined "guarantee" as "[a] state or power which engages for the performance of a treaty or stipulation between contracting parties."<sup>64</sup> Likewise, James Barclay's *Complete and Universal English Dictionary* defined "guarantee" to mean "a power who undertakes to see the conditions of any league, peace, or bargain performed."<sup>65</sup> Other contemporary dictionaries offered definitions of "guarantee" that were broadly consistent.<sup>66</sup>

Although it is certainly appropriate to exercise caution in ascribing too much significance to dictionary definitions,<sup>67</sup> the sheer frequency with which eighteenth-century dictionaries connected the concepts of "guarantee" and "guaranty" with the observance of treaties and similar international agreements suggests a strong possibility that members of the Founding generation may have been more attentive to the connection between the language of "guarantee" and international law concepts than are most individuals today.<sup>68</sup> A member of the Founding generation thumbing through any of a number of available lexicons of the pe-

<sup>63</sup> BAILEY, *supra* note 59. Bailey's dictionary did not include a separate definition for the verb form of the term. *Id.*

<sup>64</sup> 1 ASH, *supra* note 59 (emphasis added).

<sup>65</sup> BARCLAY, *supra* note 61.

<sup>66</sup> See, e.g., FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY (London, J. Wilson & J. Fell 1765) ("[A] power who undertakes to see the conditions of any league, peace, or bargain performed."); WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (Edinburgh, David Willison 1775) ("[O]ne who sees covenants performed."); WALKER, *supra* note 61 ("A power who undertakes to see stipulations performed."). At least one Founding-era dictionary offered a definition of the term "guarantee" that tracked its term-of-art meaning under eighteenth-century international law quite closely. See THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (London, Toplis & Bunney 18th ed. 1781) ("[A] prince or other person appointed by some other agreeing parties to see justice done between them."); cf. *infra* notes 85–87 and accompanying text (discussing Vattel's similar description of "guarantee").

<sup>67</sup> See, e.g., Gregory A. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 367–81 (2014) (noting that definitions in Founding-era dictionaries may be insufficient, incomplete, inapplicable, imprecise, or incorrect).

<sup>68</sup> The concept of "guarantee" still has some salience in modern international treaty law. See generally Peter E. Harrell, Note, *Modern-Day "Guarantee Clauses" and the Legal Authority of Multinational Organizations to Authorize the Use of Military Force*, 33 YALE J. INT'L L. 417 (2008) (discussing continuing significance of guarantee provisions in modern treaties). However, guarantee provisions have largely fallen out of favor among international legal actors since the mid-twentieth century. See Oona A. Hathaway et al., *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign*, 46 CORNELL INT'L L.J. 499, 556 (2013) (observing that "[s]tates, of their own accord, generally began eschewing such arrangements by the mid-twentieth century, primarily because of accusations that such treaties were used to further coercive, colonialist aims").

riod for guidance regarding these terms’ meanings would have been apprised that the terms had some particular connection to the observance of treaties. Such a reader might reasonably have considered the possibility that international law — or the “law of nations” as it was then known<sup>69</sup> — might have something important to say about the meaning of “guarantee” when used in a public law document such as the Constitution.<sup>70</sup>

*B. “Guarantee” as an International Law Term of Art*

Writing a few decades after the Founding period, diplomat and international law scholar Henry Wheaton described the “convention of guarantee” as “one of the most usual international contracts.”<sup>71</sup> As used in eighteenth-century treaties, the term “guarantee” typically carried one of two connotations. First, the term was sometimes used to signify a reciprocal promise between contracting nations to safeguard one another’s rights, privileges, or territories. A prominent example of this form of reciprocal guarantee appeared in the 1778 Treaty of Alliance between the United States and France, whereby the United States committed to “guarantee” the possessions of France in America and France pledged to “guarantee” the United States “their liberty, sovereignty and independence, absolute and unlimited.”<sup>72</sup> Although this usage of the term “guarantee” to refer to reciprocal obligations of the contracting treaty partners was common, Vattel viewed the usage as imprecise. He advised that such reciprocal obligations were more properly characterized as “treaties of alliance” for particular specified objectives.<sup>73</sup>

The more technical meaning of “guarantee” signified a commitment on the part of a third-party nation to enforce the terms of a treaty, including, if necessary, through the use of force.<sup>74</sup> To appreciate the significance of this latter form of guarantee provision, it is necessary to

<sup>69</sup> See Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 731 n.1 (2012) (referring to customary international law as the modern equivalent of the eighteenth-century law of nations).

<sup>70</sup> See generally Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 968 (2009) (describing “division of linguistic labor” whereby nonspecialist speakers encountering a seemingly technical term may “defer understanding of the term . . . to those who were members of the relevant [expert] group and those who shared the understandings of the members of the relevant group”).

<sup>71</sup> WHEATON, *supra* note 36, pt. III, ch. II, § 10, at 192.

<sup>72</sup> Treaty of Alliance Between the United States of America and His Most Christian Majesty, U.S.-Fr., art. XI, Feb. 6, 1778, 8 Stat. 6.

<sup>73</sup> VATTEL, *supra* note 39, bk. II, ch. XVI, § 238; see also GEORG FRIEDRICH DE MARTENS, *SUMMARY OF THE LAW OF NATIONS*, 337 n.\* (William Cobbett trans., Philadelphia, Thomas Bradford 1795) (1789) (observing that “[t]he reciprocal guarantee of the contracting parties is of a different nature” and that “such a guarantee” could be of “no effect with regard to the maintenance of” a bilateral treaty).

<sup>74</sup> See *infra* notes 85–96 and accompanying text (discussing Vattel’s account of “guarantee” provisions).

have a general understanding of certain background principles of eighteenth-century international law, and particularly the central role of violence and self-help as mechanisms of enforcing international legal obligations.<sup>75</sup> The eighteenth-century law of nations permitted one nation who believed itself wronged by another's violation of its international obligations to wage offensive war, both to obtain redress for its injuries and to punish the offender.<sup>76</sup> A treaty violation, which was itself a violation of the law of nations, could thus be invoked by an offended state as an excuse for war.<sup>77</sup>

The importance of war and lesser forms of state-to-state coercion raised a two-fold problem for states seeking enforceable treaty commitments: First, coercion was a fairly blunt instrument and was not always practicably available to a state seeking to enforce its treaty rights. This was a particular problem for weak states seeking to enforce their rights against more powerful nations. Second, entering into a treaty could subject the state itself to the risk of reprisal in the event it was later unable to comply with its commitments. Even a nation that scrupulously adhered to its treaty commitments faced some residual risk that a stronger counterparty could use a purported violation as a pretext for invasion or intermeddling.<sup>78</sup>

These dangers of treaty opportunism were mitigated to some extent by the potential reputational consequences that might attend either overt violations or transparently pretextual assertions of violations.<sup>79</sup> But reputation alone was an uncertain safeguard, particularly in cases where either the treaty itself or the evidence asserted in support of a

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<sup>75</sup> See Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 11 (2009) ("As the law of nations was understood in the late eighteenth century, each nation had certain perfect rights relative to other sovereigns . . . . Violation of a nation's perfect right gave that nation just cause to wage war.").

<sup>76</sup> See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES \*67–68 (offenses against the law of nations "are principally incident to whole states or nations; in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith, as are committed by one independent people against another"); 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES bk. 2, ch. XX, § 40, at 504 (James Brown Scott ed., Francis W. Kelsey trans., Oxford Univ. Press 1925) (1646) (acknowledging authority of sovereigns to wage war to punish those who "excessively violate the law of nature or of nations"); MARTENS, *supra* note 73, at 265–66 ("Forcible means are . . . the only ones that are left to sovereigns who acknowledge no judge or superior."); VATTEL, *supra* note 39, bk. III, ch. III, §§ 28, 41 (acknowledging the lawfulness of offensive wars of this type).

<sup>77</sup> VATTEL, *supra* note 39, bk. II, ch. XV, § 221 ("He who violates his treaties, violates at the same time the law of nations . . ."); *id.* bk. IV, ch. IV, § 54 (stating that a refusal of indemnification for violating a treaty of peace provides the injured party with "a very just cause for taking up arms again"); THE FEDERALIST NO. 3, at 37 (John Jay) (Clinton Rossiter ed., 2003) ("The just causes of war, for the most part, arise either from violation of treaties or from direct violence.").

<sup>78</sup> See, e.g., VATTEL, *supra* note 39, bk. II, ch. XVIII, § 335 (noting risk of pretextual invocations of international law violations as an excuse for "having recourse to arms").

<sup>79</sup> See *id.* ch. XII, § 163 (discussing reputational consequences of dishonoring treaties).

claimed violation was open to dispute.<sup>80</sup> The pledging of oaths and other religious rituals in connection with treaties might provide some additional assurance,<sup>81</sup> though the security provided extended only so far as the pledging sovereign's own moral or religious scruples demanded.<sup>82</sup> An exchange of hostages by the contracting states could provide some more tangible level of assurance.<sup>83</sup> But by the late eighteenth century, this practice had largely fallen into disuse.<sup>84</sup>

"Convinced by unhappy experience" that nations did not always scrupulously adhere to their commitments, treaty designers sought other mechanisms to assure performance, the "efficacy" of which would "not depend" solely "on the good-faith of the contracting parties."<sup>85</sup> By the late eighteenth century, one of the most familiar enforcement mechanisms was provided by the practice of *guarantee*.<sup>86</sup> Vattel described the role of guarantee provisions in the following terms:

When those who make a treaty of peace, or any other treaty, are not perfectly easy with respect to its observance, they require the guaranty of a powerful sovereign. The *guarantee* promises to maintain the conditions of the treaty, and to cause it to be observed. . . . The guaranty is a kind of treaty, by which assistance and succours are promised to any one, in case he has need of them, in order to compel a faithless ally to fulfil [sic] his engagements.<sup>87</sup>

<sup>80</sup> Cf. *id.* ch. XVII, § 262 (observing that "fraud seeks to take advantage . . . of the imperfection of language, and that men designedly throw obscurity and ambiguity into their treaties, in order to be provided with a pretense for eluding them upon occasion").

<sup>81</sup> See *id.* ch. XV, § 223 (discussing use of oaths in treaties).

<sup>82</sup> Cf. *id.* §§ 223–224 (discussing occasional practice of popes purporting to release Catholic sovereigns from obligations they had pledged in treaties with other nations).

<sup>83</sup> See *id.* ch. XVI, §§ 245–261 (describing the "very ancient institution," *id.* § 245, of requiring hostages as security for the performance of treaties). Alternatively, a nation might deliver valuable property or territory to another nation as a pledge for performance of its treaty commitments. *Id.* § 241.

<sup>84</sup> See Heinz Duchhardt, *Peace Treaties from Westphalia to the Revolutionary Era*, in PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY 45, 48–49 (Randall Lesaffer ed., 2004) (noting that provisions for the exchange of hostages "disappeared more or less silently from the treaty practice," *id.* at 48, in the eighteenth century and characterizing a provision in the 1748 Peace of Aix-La-Chapelle providing for such exchange as "a latecomer in this respect," *id.* at 48–49).

<sup>85</sup> VATTEL, *supra* note 39, bk. II, ch. XVI, § 235.

<sup>86</sup> Vattel addresses the guarantee mechanism first in his chapter discussing the various mechanisms for assuring the performance of treaties. See *id.*

<sup>87</sup> *Id.*; see also, e.g., J.J. BURLAMAQUI, THE PRINCIPLES OF POLITIC LAW 359 (Thomas Nugent trans., London, J. Nourse 1752) ("Another way . . . of securing peace, is, when princes or states . . . become guarantees, and engage their faith, that the articles shall be preserved on both sides . . ."); MARTENS, *supra* note 73, at 337 ("In general, a guarantee engages to maintain the treaty, in promising to lend assistance to the party who shall complain of an infraction of it, and who shall demand such assistance."); 8 SAMUEL FREIHERR VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS bk. VII, ch. VIII, at 856 (George Carew trans., London, J. Walthoe et al. 4th ed. 1729) (noting that guarantees "engage their *Faith*, that the *Articles* shall be observ'd on both

Although the commitment of guarantee could, in principle, be pledged to some contracting parties but not others or even to one party alone, the commitment was more “commonly promised to all in general.”<sup>88</sup> But even where the guaranteeing state committed to aid one state in preference to others, the guarantee was not “obliged to” immediately “assist him in favour of whom” the guarantee had been given.<sup>89</sup> Rather, the guarantee state’s responsibility was “to weigh the pretensions of him who claims his guaranty” and to come to that party’s aid only if the claim of violation was found to be credible.<sup>90</sup> By contrast, if the guarantee state determined that the claims were “ill founded,” it could “refuse to support [the party claiming the guarantee], without failing in [its] engagements.”<sup>91</sup> The guaranteeing power thus acted as a kind of neutral, third-party monitor of treaty compliance, capable of providing both assistance in obtaining redress for violations of treaty rights and some measure of protection against fabricated claims of violation.

Importantly, however, by agreeing to serve as the guarantee of a particular treaty, or particular provisions of a given treaty,<sup>92</sup> the guaranteeing state acquired no new or additional rights, apart from the obligation to come to the aid of a complaining state.<sup>93</sup> Because the provision of guarantee was given “in favour of the contracting powers,” the guarantee state was not “authorise[d] . . . to interfere in the execution of the treaty, or to enforce the observance of it, unasked, and of [its] own accord.”<sup>94</sup> Thus, if the contracting parties chose to alter the terms of their agreement, or even to cancel it altogether, the guarantee would have no just right to oppose them.<sup>95</sup> Nor could the guaranteeing state intervene in cases where one party to a treaty chose to “favour the other by a relaxation of any claim” arising from a breach of the treaty.<sup>96</sup>

This limitation on the power of the guaranteeing state was of great importance to the effective operation of the guarantee regime. Allowing guarantee states the power to intermeddle in the internal affairs of the

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Sides; which *Engagement* . . . implies a sort of *Agreement*, by which they oblige themselves to assist the *Party* invaded contrary to *Treaty*, against the injurious *Aggressor*”).

<sup>88</sup> VATTEL, *supra* note 39, bk. II, ch. XVI, § 235.

<sup>89</sup> *Id.* § 237.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See MARTENS, *supra* note 73, at 337 (noting that “[a] guarantee may extend to the treaty in general, or be confined to some particular article or articles of it”).

<sup>93</sup> VATTEL, *supra* note 39, bk. II, ch. XVI, § 236.

<sup>94</sup> *Id.*

<sup>95</sup> See *id.*; see also, e.g., MARTENS, *supra* note 73, at 338 (“A guarantee has no right to oppose the alterations that the contracting parties may afterwards make in the treaty by mutual consent . . .”). A guarantee would not, however, be bound to enforce any treaty or provision that was revised without obtaining the guarantee’s consent. *Id.*

<sup>96</sup> VATTEL, *supra* note 39, bk. II, ch. XVI, § 236.

guaranteed state without invitation would both diminish the sovereignty of the guaranteed state and deter nations from resorting to the guarantee mechanism as a means of treaty enforcement. For this reason, Vattel took particular care to emphasize the limited scope of the guarantee's authority, noting that "[t]his observation is of great importance: for care should be taken, lest, under colour of being a guarantee, a powerful sovereign should render [itself] the arbiter of the affairs of [its] neighbours, and pretend to give them laws."<sup>97</sup>

Although guarantee provisions often committed the contracting parties to defend either the territorial integrity of a guaranteed state<sup>98</sup> or compliance with particular treaty terms, such provisions could apply "to every species of right and obligation that can exist between nations."<sup>99</sup> Among other things, guarantee provisions could be and sometimes were drafted to ensure adherence to and recognition of certain internal governmental arrangements. One of the most famous examples of treaty provisions being used in this way involved the Pragmatic Sanction of 1713, through which Holy Roman Emperor Charles VI of Austria sought to secure the succession to the throne of his daughter, Maria Theresa, in contravention of preexisting rules of primogeniture.<sup>100</sup> Anticipating that Maria Theresa's right to rule would be challenged by other sovereigns, Charles VI sought to secure her inheritance through a series of treaties in which other nations pledged to "guaranty" the order of succession contemplated by Charles's decree.<sup>101</sup> In the aftermath of

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., CHARLES JENKINSON, EARL OF LIVERPOOL, A DISCOURSE ON THE CONDUCT OF THE GOVERNMENT OF GREAT-BRITAIN IN RESPECT TO NEUTRAL NATIONS DURING THE PRESENT WAR 44 (Dublin, Hulton Bradley 1759) ("The proper Object of Guaranties is the Preservation of some particular Country in the Possession of some particular Power.").

<sup>99</sup> WHEATON, *supra* note 36, pt. III, ch. II, § 10, at 192.

<sup>100</sup> C.A. Macartney, *The Habsburg Dominions*, in 7 THE NEW CAMBRIDGE MODERN HISTORY: THE OLD REGIME, 1713–63, at 391, 397 (J.O. Lindsay ed., 3d ed. 1966). Charles VI ascended to the throne upon the death of his brother, the Emperor Joseph I, bypassing Joseph's two surviving daughters. *Id.* at 393. At the time of his ascension, Charles was the last surviving member of the recognized Habsburg line of succession and had not yet fathered any children himself. *Id.* Prior to Joseph's death, Charles had pledged that if he were to die without a male heir, Joseph's daughters would succeed him. *Id.* The elaborate planning and diplomatic effort that Charles placed into securing international recognition of the Pragmatic Sanction reflected both an effort to avoid dismemberment of the Habsburg dominions as well as an effort to obviate his earlier pledge to recognize his nieces' claim to the throne. *Id.* at 393–98.

<sup>101</sup> See, e.g., Treaty of Peace and Alliance, Between the Emperor Charles VI, and George II, King of Great Britain, in Which the States of the United Provinces of the Netherlands Are Included, Austria-Gr. Brit., art. II, Mar. 16, 1731, in 2 CHARLES JENKINSON, A COLLECTION OF ALL THE TREATIES OF PEACE, ALLIANCE, AND COMMERCE, BETWEEN GREAT-BRITAIN AND OTHER POWERS, FROM THE TREATY SIGNED AT MUNSTER IN 1648, TO THE TREATIES SIGNED AT PARIS IN 1783, at 318, 320–21 (London, J. Debrett 1785) [hereinafter JENKINSON] (reflecting a pledge on the part of Great Britain and the United Provinces of the Netherlands to "guaranty, with all their forces, that order of succession which his Imperial Majesty [Charles VI] has declared and established," *id.* at 321). Though Vattel observed that "most of the powers of

the Glorious Revolution of 1688, which deposed the Catholic King James II, Great Britain extracted similar treaty commitments from other states pledging support for the “Protestant succession” to the throne in the line of its current possessors.<sup>102</sup>

At first glance, such matters of internal state governance might seem an unusual subject for treaty making. But the complex web of diplomatic, military, and familial relationships that bound together the states of Europe in the seventeenth and eighteenth centuries meant that conflicts over internal governance could easily spill over into international conflict. The treaty commitments secured by Charles VI on behalf of his daughter’s succession, for example, proved inadequate to preserve the peace following his death in 1740. Competing claims backed by Prussia, France, and other European powers (in contravention of their earlier treaty commitments) soon plunged the continent’s major powers into the eight-year War of Austrian Succession.<sup>103</sup> Against this background, it is hardly surprising that seventeenth- and eighteenth-century treaty drafters would resort to pledges of guarantee as an additional safeguard for the continued security and integrity of their existing forms of government.

## II. “GUARANTEE” IN THE GUARANTEE CLAUSE AS A TERM OF ART

Establishing that the term “guarantee” *could* carry a specialized term-of-art meaning in some contexts does not prove that the term, as used in Article IV of the 1787 Constitution, would, in fact, have been understood to carry such a specialized meaning.<sup>104</sup> The word

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Europe” had “*guarantied*” Charles’s decree, Vattel was of the view that such commitments were better characterized as “treaties of alliance” given the reciprocal nature of the pledges at issue and the absence of the neutral third-party enforcement mechanism for which he believed the term “guarantee” should be reserved. VATTEL, *supra* note 39, bk. II, ch. XVI, § 238.

<sup>102</sup> See, e.g., Treaty Between Ulrica Eleonora, Queen of Sweden; and George King of Great Britain, for 18 Years, Concluded by the Mediation of the Most Christian King; by Which the Parties Agree to Assist One Another Mutually, in Every Case of Necessity, on the Basis of Former Treaties, Which Are Hereby Reaffirmed, Gr. Brit.-Swed., art. XVI, Jan. 21, 1720, *in* 2 JENKINSON, *supra* note 101, at 251, 261 (reflecting pledge by Sweden to “maintain and guarantee the succession to the crown of Great Britain . . . in the family of his Britannick Majesty now upon the throne”); The Treaty of Guaranty for the Protestant Succession to the Crown of Great Britain, and the Barrier of the States General, Concluded at Utrecht, January 29, 1713, Between the Queen of Great Britain, and the States General of the United Netherlands, Gr. Brit.-Neth., Jan. 29, 1713, *in* 1 JENKINSON, *supra* note 101, at 364, 366.

<sup>103</sup> See generally HENRY WHEATON, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA: FROM THE EARLIEST TIMES TO THE TREATY OF WASHINGTON, 1842, at 166–71 (New York, Gould, Banks & Co. 1845) (discussing aftermath of Charles VI’s death and the collapse of the Pragmatic Sanction).

<sup>104</sup> Maggs, *supra* note 67, at 374 (“Just because a word may have a specialized legal meaning does not necessarily indicate that the specialized legal meaning was used in the Constitution.”).

"guarantee" was also sometimes used in the late eighteenth century to convey a meaning much closer to its conventional modern meaning — that is, as a promise or assurance of the continued existence of some particular state of affairs.<sup>105</sup> This section will therefore consider the textual and contextual evidence bearing on which of the possible meanings of the term "guarantee" is most plausibly reflected in Article IV's fourth section. Section II.A begins this analysis with a brief overview of the political condition of the several states with respect to one another at the time of the Constitution's framing and the influence of the international law paradigm in structuring thought regarding interstate relations. Section II.B considers what inferences can be drawn from the constitutional text, including by virtue of the Guarantee Clause's location in Article IV as well as the Clause's somewhat unusual syntactical structure. Section II.C considers a variety of contextual evidence that may bear on the most plausible understanding of the provision stretching from the preconstitutional period through the framing and ratification debates and into the early post-ratification period.

*A. The Founding-Era Background: Interstate Relations  
as International Relations*

Understanding the potential significance of international law principles to the original meaning of the Article IV Guarantee Clause requires a basic understanding of the complex and contested relationship between state and national sovereignty in the post-Revolutionary period. In the Declaration of Independence, the Second Continental Congress famously declared the "United Colonies" in North America "to be Free and Independent States."<sup>106</sup> But in this formulation lurked an ambiguity — was the independence asserted on behalf of these "Free and Independent States" declared in their collective capacity as a single sovereign entity? Or did the Declaration instead assert the independence of thirteen separate and distinct sovereign nations?<sup>107</sup>

The model of sovereign states uniting together in a loose confederacy of the type reflected in the Revolution-era Congress and, later, the Articles of Confederation was hardly unknown to eighteenth-century

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<sup>105</sup> See, e.g., NOAH WEBSTER, *An Address to the Dissenting Members of the Late Convention in Pennsylvania*, in A COLLECTION OF ESSAYS AND FUGITIVE WRITINGS ON MORAL, HISTORICAL, POLITICAL AND LITERARY SUBJECTS 99, 142, 145 (Boston, I. Thomas & E.T. Andrews 1790) ("Yes, gentlemen, you know, that under such a general license [of freedom of the press], a man who should publish a treatise to *prove his Maker a knave*, must be screened from legal punishment. . . . But the truth must not be concealed. The constitutions of several States *guarantee that very license*.").

<sup>106</sup> THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

<sup>107</sup> LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 19 (2d ed. 1996) ("There is disagreement as to whether the Declaration of Independence declared a single sovereign entity or thirteen independent nation-states.").

international law.<sup>108</sup> Vattel, for instance, acknowledged that “several sovereign and independent states may unite themselves together by perpetual confederacy, without ceasing to be, each individually, a perfect state.”<sup>109</sup> As examples, Vattel identified the ancient city-states of Greece as well as the United Provinces of the Netherlands and the Swiss cantons.<sup>110</sup> The voluntary agreement of such states to unite together in a single “federal republic,” according to Vattel, did not “impair the sovereignty of each member,” even though the states themselves might voluntarily “put some restraint on the exercise” of their sovereignty by mutual agreement.<sup>111</sup>

It is plain that at least some members of the Founding generation viewed the relationship between the newly established states and the nascent federal government — at least prior to the adoption of the federal Constitution in 1787 — in precisely this way. For example, the Pennsylvania High Court of Errors and Appeals declared in a 1784 opinion: “This State has all the powers of Independent Sovereignty by the Declaration of Independence . . . except what were resigned by the” Articles of Confederation, which were ratified in 1781.<sup>112</sup> In a pamphlet published shortly after the federal Constitution’s ratification, Massachusetts Attorney General James Sullivan opined that, through the Declaration of Independence, each of the thirteen former British colonies “became free, sovereign, and independent states,” and that the subsequently adopted Articles of Confederation were “in the nature of any other treaty between nations, who were equally independent of each other.”<sup>113</sup> The Articles of Confederation themselves acknowledged that “[e]ach State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to” the Confederation government.<sup>114</sup>

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<sup>108</sup> See, e.g., LACROIX, *supra* note 41, at 18–20, 124–26 (discussing influence of continental theories of divided sovereignty in early American discussions of federalism).

<sup>109</sup> VATTEL, *supra* note 39, bk. I, ch. I, § 10.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Talbot v. Commanders & Owners of Three Brigs*, 1 U.S. (1 Dall.) 95, 99 (Pa. 1784) (emphasis omitted).

<sup>113</sup> JAMES SULLIVAN, OBSERVATIONS UPON THE GOVERNMENT OF THE UNITED STATES OF AMERICA 24 (Boston, Samuel Hall 1791).

<sup>114</sup> ARTICLES OF CONFEDERATION of 1781, art. II; see also, e.g., Letter from Edmund Randolph to Thomas Jefferson (Jan. 30, 1784), in 6 THE PAPERS OF THOMAS JEFFERSON 513, 514 (Julian P. Boyd et al. eds., 1952) (“Virginia and [South Carolina] are as distinct from each other as France and [Great] Britain, except in the instances, provided for by the confederation.”).

Not everyone agreed, however, that the states were truly "sovereign" in the sense used by writers on the law of nations.<sup>115</sup> The sovereign status of the states — and the relationship between state sovereignty and national sovereignty — involved questions that were contested during the Founding period<sup>116</sup> and that remain so, to some extent, even today.<sup>117</sup> The adoption of the federal Constitution of 1787 clarified the boundaries between state and federal sovereign responsibilities to some extent but did not fully settle the sovereignty question. The Philadelphia debates featured some boldly nationalistic proposals that called for abolishing state sovereignty completely.<sup>118</sup> But such proposals did not find their way into the Convention's final product. The Constitution, as it emerged from Philadelphia, contemplated a powerful new national government — but one built upon a superstructure that both presupposed and depended on the continued existence of the states as separate sovereign (or at least, quasi-sovereign) entities.<sup>119</sup>

Although the newly established federal structure did not fit exactly within any established framework recognized by writers on the law of

<sup>115</sup> See, e.g., BENJAMIN RUSH, *On the Defects of the Confederation* (1787), in THE SELECTED WRITINGS OF BENJAMIN RUSH 26, 28 (Dagobert D. Runes ed., 1947) (contending that "[t]he people of America have mistaken the meaning of the word sovereignty" by characterizing states as sovereigns and arguing that true sovereignty must include "the power of making war and peace").

<sup>116</sup> See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 354 (1972) ("The problem of sovereignty was not solved by the Declaration of Independence. It continued to be the most important theoretical question of politics throughout the following decade, the ultimate abstract principle to which nearly all arguments were sooner or later reduced.")

<sup>117</sup> Compare *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . ."), with *Seminole Tribe v. Florida*, 517 U.S. 44, 149–50 (1996) (Souter, J., dissenting) ("[T]he Court's position runs afoul of the general theory of sovereignty that gave shape to the Framers' enterprise. An enquiry into the development of that concept demonstrates that American political thought had so revolutionized the concept of sovereignty itself that calling for the immunity of a State as against the jurisdiction of the national courts would have been sheer illogic.")

<sup>118</sup> See, e.g., William Paterson, Notes on the Constitutional Convention (June 9, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 185, 186 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (speech of Edmund Randolph) ("The States as States must be cut up, and destroyed — This is the way to form us into a Nation . . ."); Robert Yates, Notes on the Constitutional Convention (June 19, 1787), in FARRAND'S RECORDS, *supra*, at 294, 294 (speech of Alexander Hamilton) ("I have well considered the subject, and am convinced that no amendment of the confederation can answer the purpose of a good government, so long as state sovereignties do, in any shape, exist . . .").

<sup>119</sup> See, e.g., John C. Harrison, *In the Beginning Are the States*, 22 HARV. J.L. & PUB. POL'Y 173, 173 (1998) ("[T]he Constitution, the federal government, and federal law are a superstructure built on top of something else — the states.")

nations or politics,<sup>120</sup> the continued existence of the states and the significant role accorded them under the new Constitution left plenty of room for viewing the states as fully sovereign and independent with respect to those powers not explicitly ceded to the federal government.<sup>121</sup>

Whatever the actual metaphysical status of state sovereignty during the Founding and Critical Periods,<sup>122</sup> it is clear that the international law paradigm governing relations between independent sovereigns provided at least a useful structural analogy for managing relationships between the states, as well as relations between the states and the nascent federal government.<sup>123</sup> Thus, for example, courts in the early Republic (both state and federal) routinely looked to international law principles in addressing such issues as border disputes,<sup>124</sup> interstate jurisdiction

<sup>120</sup> See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1580–81 (2002) (“Unlike the ‘confederate republic’ suggested by the Articles of Confederation, the governmental framework contemplated by the Constitution did not fit comfortably into any of the preexisting categories familiar to political scientists.” (footnote omitted)); see also, e.g., Debates of the Virginia Convention (June 6, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 970, 995 (John P. Kaminski et al. eds., 1990) [hereinafter DHRC] (reporting Madison’s statement that the “mixed nature” of the government provided for in the Constitution “is in a manner unprecedented: We cannot find one express example in the experience of the world: — It stands by itself”).

<sup>121</sup> See, e.g., *Bromley v. Hutchins*, 8 Vt. 194, 196 (1836) (“Except in those delegations of power invested in the general government and those restrictions provided in the United States constitution, each state is a national sovereignty and holds the same relation to the other states which it holds to other nations.”); *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89, 92 (1827) (“The jurisdictions of the several states as such, are distinct, and in most respects foreign. The constitution of the United States makes the people of the United States subjects of one government *quoad* every thing within the national power and jurisdiction, but leaves them subjects of separate and distinct governments.”); *Greenwood v. Curtis*, 6 Mass. (6 Tyng) 358, 374–75 n.\* (1810) (opinion of Sedgwick, J.) (“I consider the states of the Union as distinct and independent sovereignties, to all intents and purposes, except so far as their powers are controuled by the letter or manifest intention of the national compact.”); *Jackson v. Jackson*, 1 Johns. 424, 429 (N.Y. Sup. Ct. 1806) (“Notwithstanding the political compact that connects the *United States* as a federal republic, the several states must be considered as distinct and independent sovereignties, governed by different laws and customs.”); *State v. Knight*, 1 N.C. (Tay.) 44, 45 (1799) (“The States are to be considered, with respect to each other, as independent sovereignties, possessing powers completely adequate to their own government, in the exercise of which they are limited only by the nature and objects of government, by their respective constitutions, and by that of the United States.”).

<sup>122</sup> The Critical Period refers to the years between the end of the American Revolution in 1783 and the inauguration of George Washington in 1789. For further exposition of the term and an account of the importance of this period in early American history, see generally JOHN FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY 1783–1789* (rev. ed. 1902).

<sup>123</sup> Cf. Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 49 (2006) (noting the Supreme Court’s use of international law rules regulating “the loose association of nation states within the global legal system” as a “structural analogy” for interpreting constitutional provisions addressing relations between states in the U.S. federal system).

<sup>124</sup> See, e.g., *Handly’s Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374, 379–80 (1820) (relying upon *Vattel* to determine proper resolution of boundary dispute between Indiana and Kentucky).

and judgment recognition,<sup>125</sup> extradition,<sup>126</sup> choice of law,<sup>127</sup> and sovereign immunity.<sup>128</sup>

Of course, not every rule of public international law applicable to nation states should necessarily be imputed to the unique governmental structure contemplated by the 1787 Constitution.<sup>129</sup> But the background structural principle of state sovereignty provides a reasonable basis for believing that at least *some* international law concepts may have influenced understandings regarding the proper structural relationship between the states as well as between the states and the federal government. This background structural principle provides a useful prism through which to view the textual and historical evidence bearing on the original public meaning of the Guarantee Clause.

### B. Textual Evidence

A natural starting point for assessing the original meaning of the Guarantee Clause is with the constitutional text itself. Although the text of the Clause is relatively sparse, certain textual features, including its placement in the Constitution and its unusual syntactical structure, tend to support the view that the Clause may have been influenced by international law principles.

*i. Location, Location, Location: The Article IV Guarantee Clause.*<sup>130</sup> — As with real estate, when it comes to the constitutional text, location is not quite everything, but it is certainly a very important

<sup>125</sup> See, e.g., *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 174 (1851) (looking to "well-established rules of international law, regulating governments foreign to each other" to determine the scope of states' obligations to recognize one another's judgments under the Full Faith and Credit Clause).

<sup>126</sup> See, e.g., *State v. Anderson*, 19 S.C.L. (1 Hill) 327, 348–50 (1833) (looking to principles of "international law" governing "nations wholly foreign to each other," *id.* at 348, to determine scope of states' powers and responsibilities with respect to fugitive suspects).

<sup>127</sup> See, e.g., *Gibbons v. Livingston*, 6 N.J.L. 236, 283 (1822) (invoking Vattel to determine the "law of nations" applicable to a question of an asserted conflict between laws of New Jersey and New York); *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh.) 467, 474, 477 (1820) (citing Vattel as authority for necessity of comity in conflict between Kentucky and Indiana laws concerning slavery); *Williamson's Adm'rs v. Smart*, 1 N.C. (Cam. & Nor.) 355, 361 (1801) (opinion of Taylor, J.) (looking to "principle[s] of the law of nations" to determine whether Virginia or North Carolina law governed in a case involving succession to movable property).

<sup>128</sup> See, e.g., *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 n.a, 78 n.a (Pa. C.P. 1781) (argument of counsel) (citing Vattel as support for the principle that "a sovereign, when in a foreign country, is always considered by civilized nations, as exempt from its jurisdiction, privileged from arrests, and not subject to its laws").

<sup>129</sup> Cf. *Kentucky v. Dennison*, 65 U.S. (14 How.) 66, 99–100 (1860) (concluding that international state practice of refusing to extradite "political offenders," *id.* at 100, did not limit scope of state obligations under the Extradition Clause).

<sup>130</sup> This section title is inspired by (that is, stolen from) Professors Gary Lawson and Guy Seidman. See Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 43 (using a nearly identical heading title to emphasize the importance of the Treaty Clause's location in Article II).

thing.<sup>131</sup> Each of the seven numbered Articles of the 1787 Constitution corresponds in general terms to a particular thematic subject matter.<sup>132</sup> Articles I, II, and III define the composition and the powers of the three departments of the federal government — legislative, executive, and judicial, respectively.<sup>133</sup> Article V sets forth the procedures for amending the Constitution.<sup>134</sup> Article VI addresses the Constitution’s status as binding law and clarifies the relationship between the Constitution and other sources of legal obligation.<sup>135</sup> And Article VII specifies the conditions necessary for the “Establishment” of the Constitution through ratification by state conventions.<sup>136</sup>

Article IV, which follows immediately after the three Articles outlining the structure of the federal government, takes as its central focus the “horizontal” relationships between states within the federal Union.<sup>137</sup> Although Article IV is sometimes regarded as something of a hodgepodge of miscellaneous provisions with little thematic connection to one another,<sup>138</sup> the arrangement and content of its provisions clearly reflect the Article’s overarching concern with mediating and mitigating potential sources of tension between state governments.<sup>139</sup> Given this

<sup>131</sup> See, e.g., *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419 (1819) (pointing to the Necessary and Proper Clause’s placement “among the powers of Congress” — that is, in Article I, § 8, rather than “among the limitations on those powers” as in Article I, § 9 — as suggesting the provision was intended to enhance, rather than restrict, Congress’s power); *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487) (inferring from the Suspension Clause’s placement in Article I, which is “devoted to the legislative department of the United States, and has not the slightest reference to the executive department” that Congress, not the President, possesses the sole power to suspend the writ of habeas corpus).

<sup>132</sup> See, e.g., Matthew Spalding, *Introduction to the Constitution*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 7, 11 (David F. Forte & Matthew Spalding eds., 2d ed. 2014) (“The Constitution is divided into seven parts, or articles, each dealing with a general subject.”).

<sup>133</sup> U.S. CONST. art. I (defining the powers of Congress); *id.* art. II (defining the powers of the President); *id.* art. III (defining the powers of the federal courts).

<sup>134</sup> *Id.* art. V.

<sup>135</sup> *Id.* art. VI, cl. 1 (specifying that debts previously contracted and engagements entered into “shall be as valid against the United States under this Constitution, as under the Confederation”); *id.* cl. 2 (providing for the supremacy of the Constitution and federal laws and treaties over state law); *id.* cl. 3 (requiring officeholders to pledge an oath to support the Constitution).

<sup>136</sup> *Id.* art. VII.

<sup>137</sup> Jonathan Toren, Note, *Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4*, 2 N.Y.U. J.L. & LIBERTY 371, 385 (2007) (“Article IV as a whole deals with the states’ relationship with the federal government and with each other.”).

<sup>138</sup> See, e.g., GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 28 (2004) (referring to Article IV as a “grab bag of miscellaneous provisions”); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1477 (2007) (observing that “Article IV is not often considered as a single entity”).

<sup>139</sup> See Metzger, *supra* note 138, at 1471–72 (noting that Article IV’s “principal provisions limit the states’ ability to discriminate against one another — whether by not respecting sister state judgments, laws, and criminal proceedings, or by denying out-of-state residents the right to engage in economic and other activity within the state”).

emphasis on mediating horizontal relationships between distinct sovereign entities, Article IV provides the clearest example "of the Constitution as an international governance project."<sup>140</sup>

The Article's first two sections contain a set of requirements imposed on the states directly — obligating them to accord "Full Faith and Credit" to each other's "public Acts, Records, and judicial Proceedings,"<sup>141</sup> to extend to citizens of other states the same "Privileges and Immunities" they accord their own citizens,<sup>142</sup> and to cooperate with one another with respect to the extradition of fugitives and the return of escaped slaves.<sup>143</sup> The subjects addressed by each of these provisions had long been familiar subjects of international treaties between sovereign nations.<sup>144</sup>

<sup>140</sup> Lee, *supra* note 41, at 1051; *see also, e.g., In re Romaine*, 23 Cal. 585, 589 (1863) (describing certain provisions of Article IV as being "to a great extent, a recognition of rights founded upon principles of international law").

<sup>141</sup> U.S. CONST. art. IV, § 1.

<sup>142</sup> *Id.* § 2, cl. 1.

<sup>143</sup> *See id.* cl. 2 (obligating states to "deliver[] up" fugitives fleeing from justice in another state upon the demand of the "executive Authority" of that state); *id.* cl. 3 (obligating states to "deliver[] up" "Person[s] held to Service or Labour in one State . . . escaping into another").

<sup>144</sup> For examples of treaty provisions imposing obligations similar in nature to the Full Faith and Credit Clause, see Treaty of Amity and Commerce Between the Empire of Russia and the Crown of Denmark, Concluded at St. Petersburg, the 8/19 of October, 1782, Den.-Russ., art. VII, Oct. 8/19, 1782, *in* 3 JENKINSON, *supra* note 101, at 268, 271–72 (requiring that "full faith and credit" be given to the contents of certain "letters and passports," *id.* at 272, verifying the cargo of Russian ships); The Treaty of Peace Between the Crowns of France and Spain, Concluded and Sign'd by His Eminency Cardinal Mazarine, and Don Lewis Mendez de Haro, Plenipotentiarys of Their Most Christian and Catholick Majestys, in the Isle Call'd of the Pheasants, in the River of Bidassoa, upon the Confines of the Pyrenean Mountains, the Seventh of November, 1659, Fr.-Spain, art. XVII, Nov. 7, 1659, *in* 1 A GENERAL COLLECTION OF TREATYS, DECLARATIONS OF WAR, MANIFESTOS, AND OTHER PUBLIC PAPERS, RELATING TO PEACE AND WAR 39, 47 (London, J.J. & P. Knapton et al. 2d ed. 1732) [hereinafter A GENERAL COLLECTION OF TREATYS] (providing that "full Faith and Credit shall be given" to certain "Passes and Sea-Letters" issued by the contracting states). *See also* Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1216–20 (2009) (noting the similarity between language of Full Faith and Credit Clause and earlier treaties).

For an example of a treaty provisions imposing obligations similar in nature to the Privileges and Immunities Clause, see A Treaty of Peace Between Philip IV, King of Spain, and the United Provinces of the Low Countries, Made at Munster, the 30th of January 1648, Low Countries-Spain, art. XVI, Jan. 30, 1648, *in* 1 JENKINSON, *supra* note 101, at 10, 17 (providing that the inhabitants of certain towns shall "enjoy all the same rights, franchises, privileges and immunities" which the treaty granted to the United Provinces of the Low Countries). *See also, e.g.,* Stewart Jay, *Origins of the Privileges and Immunities of State Citizenship Under Article IV*, 45 LOY. U. CHI. L.J. 1, 27–28 (2013) (noting the similarity between Article IV's Privileges and Immunities Clause and earlier English treaties).

For examples of treaty provisions imposing obligations similar in nature to the Extradition and Fugitive Clauses, see Convention Between His Most Christian Majesty and the United States of America, for the Purpose of Defining and Establishing the Functions and Privileges of Their Respective Consuls and Vice Consuls, Fr.-U.S., art. 9, Nov. 14, 1788, *in* 1 JONATHAN ELLIOT, THE AMERICAN DIPLOMATIC CODE, EMBRACING A COLLECTION OF TREATIES AND CONVENTIONS BETWEEN THE UNITED STATES AND FOREIGN POWERS: FROM 1778 TO 1834, at 70, 78–79 (Washington, D.C., Jonathan Elliot, Jr. 1834) (providing for cooperation of contracting

The Article's third section contains no direct inhibition on the states but does empower Congress to admit new states to the Union and to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>145</sup> These provisions addressed one of the most significant sources of rivalry between the states at the time of the Constitution's formation — namely, rivalrous claims to sovereignty over western lands.<sup>146</sup> By assigning Congress the power to control any territories held by the United States in their collective sovereign capacity or which would thereafter be surrendered up to the federal government by particular states, the Territories Clause provided a framework for the eventual resolution of the western lands controversy.<sup>147</sup> The provision also provided a limited protection for the territorial integrity of the existing states by forbidding Congress from erecting new states in any portion of an existing state's territory without that state's consent<sup>148</sup> and by making clear that the Constitution's adoption would not "be so construed as to Prejudice" any existing land claims of the existing states.<sup>149</sup>

The Guarantee Clause appears in Article IV's fourth (and final) section. If the Clause were intended as a protection of individual citizens' right to democratic self-governance, as some modern interpreters contend,<sup>150</sup> this placement at the conclusion of Article IV would be quite odd. Although other provisions in Article IV had the effect of protecting individual rights — principally, the Full Faith and Credit, Privileges and Immunities, and Fugitive Slave Clauses — these protections existed primarily to limit potential sources of friction between the sovereign states and to bind the states into a more cohesive political union. Notably,

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nations in securing the return of deserting sailors); Treaty of Peace Between Charles II, King of England, and Osman Bassa, and the People of Tripoli; Made the 18th of October 1662, Eng.-Tripoli, art. XI, Oct. 18, 1662, in 2 THE LAWS, ORDINANCES, AND INSTITUTIONS OF THE ADMIRALTY OF GREAT BRITAIN, CIVIL AND MILITARY 35, 37–38 (London, A. Millar 1746) (obligating English consuls in Tripoli to either cooperate in the return of slaves escaping onto English ships or pay a ransom).

<sup>145</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>146</sup> See *infra* section II.C.1, pp. 635–46 (discussing late eighteenth-century controversies over western land claims); see also, e.g., Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 17 (2001) (observing that addressing the problems of the western land claims "and the related questions of whether new states could be created and, if so, by what authority . . . became one of the central concerns of the government under the Articles of Confederation and the subsequent Constitution").

<sup>147</sup> See *infra* notes 241–245 and accompanying text (discussing eventual resolution of the western lands controversy).

<sup>148</sup> U.S. CONST. art. IV, § 3, cl. 1.

<sup>149</sup> *Id.* cl. 2.

<sup>150</sup> See, e.g., Chemerinsky, *supra* note 11, at 867 ("The Guarantee Clause is best understood as protecting basic rights of political participation within state governments.").

each of these provisions dealt only with the rights citizens enjoyed in their dealings with states other than their own.<sup>151</sup>

No other provision of Article IV confers any rights on citizens when dealing with their native states. Had the Guarantee Clause been intended to protect individuals against their own state governments, it would have been far more natural to place the provision in Article I, Section 10: the only other place in the Constitution of 1787 that limits what states can do to their own citizens.<sup>152</sup> The individual rights interpretation also fits uncomfortably with the surrounding language of Section 4 itself, which, in addition to "guaranteeing" each State a Republican form of Government, also obligates the United States to "protect each of them against Invasion" and (under specified conditions) "domestic Violence."<sup>153</sup>

By contrast, interpreting the Guarantee Clause as a treaty-like commitment among separate sovereigns fits comfortably with Article IV's overarching thematic concern with balancing horizontal relations among the several states. As discussed above, matters of internal state governance were a familiar subject of treaty provisions, reflecting a recognition among diplomatic actors that the internal governmental arrangements through which a particular polity chose to govern itself could have profound consequences for that country's international relations.<sup>154</sup> And as discussed in further detail below, such concerns about potential spillover consequences from internal governmental arrangements within particular states for the peace and stability of neighboring states was a recurring focus of commentary surrounding the Article IV Guarantee Clause during the framing and ratification debates.<sup>155</sup>

2. *The Syntax of the Guarantee Clause.* — In addition to the Guarantee Clause's placement in Article IV, a further textual clue to the provision's original meaning is provided by its syntax, and particularly the arrangement of subject and object in the sentence embodying the Clause. Because "[t]he Constitution prohibits" — or, in some cases,

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<sup>151</sup> See, e.g., THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 15–17 (Boston, Little, Brown, & Co. 1868) (identifying the Full Faith and Credit, Privileges and Immunities, and Fugitive Clauses as among the class of provisions that "have for their object to prevent discrimination by the several States against the citizens and public proceedings of other States," *id.* at 15).

<sup>152</sup> See U.S. CONST. art. I, § 10, cl. 1 (prohibiting States from, *inter alia*, "pass[ing] any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts").

<sup>153</sup> *Id.* art. IV, § 4.

<sup>154</sup> See *supra* notes 98–103 and accompanying text (discussing treaty provisions that guaranteed internal governmental arrangements).

<sup>155</sup> See *infra* notes 308–315 and accompanying text (discussing concern that imposition of monarchy or despotism in one state may threaten security of other states).

requires — “certain *actions*,”<sup>156</sup> figuring out what the Constitution requires (or forbids) in any particular instance involves identifying some particular constitutional *actor* who is bound by the relevant requirement.<sup>157</sup> Both the object of the Guarantee Clause — that is, “every State” — and its subject — “the United States”<sup>158</sup> — have received insufficient scrutiny in modern scholarship addressing the Clause. It will therefore be useful to consider each of these facets of the Guarantee Clause’s syntax in turn.

(a) *The Object of the Guarantee Clause.* — Both the Supreme Court and most modern commentators have read the Guarantee Clause as a restriction on the states.<sup>159</sup> On this reading, the Clause obligates states to provide their own citizens with a “republican form of government” and empowers the federal government to subject the states to any form of compulsion needed should they fail to meet that obligation.<sup>160</sup> But this understanding is very nearly the opposite of what a literal reading of the Clause seems to suggest. The Clause clearly identifies “every State” as the *object* of the guarantee requirement, rather than its subject. This structure strongly suggests that the Clause was intended to benefit, rather than to burden, the several states.

This seeming mismatch between the language of the Guarantee Clause and its widespread modern understanding has received little attention in modern scholarship addressing the Clause’s meaning. To the extent the mismatch has been noticed at all, the overwhelming tendency has been to either dismiss the textual inconsistency or try to explain it away. For example, Professor Arthur Bonfield has suggested that the reference to “every State” in the Guarantee Clause may refer not to states in their sovereign or governmental capacity but rather “to the *people* of

<sup>156</sup> Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1212 (2010).

<sup>157</sup> *Id.* at 1212–14.

<sup>158</sup> U.S. CONST. art. IV, § 4.

<sup>159</sup> See, e.g., *Coyle v. Smith*, 221 U.S. 559, 567 (1911) (concluding the Clause “may imply the duty of [each] new State to provide itself with such [republican] state government”); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175 (1875) (declaring that the Clause “necessarily implies a duty on the part of the States themselves to provide” a republican form of government); Hans A. Linde, *When Initiative Lawmaking Is Not “Republican Government”*: *The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 20 (1993) (noting that the Clause “obligates each state to govern itself by republican institutions”); Merritt, *supra* note 20, at 25 (“[The Guarantee Clause] promise plainly restricts the freedom of the states.”); Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1533 (2007) (“The U.S. Constitution plainly requires each state to have a republican form of government . . . .”); Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 290 n.107 (1998) (“Article IV requires the states to guarantee to their citizens ‘a republican form of government’ . . . .” (emphasis added)).

<sup>160</sup> As described by one of the leading modern promoters of this reading, Judge Hans Linde, the Guarantee Clause imposes merely “a secondary, derivative duty on the United States” while “the primary responsibility for republican institutions is on each state.” Hans A. Linde, *State Courts and Republican Government*, 41 SANTA CLARA L. REV. 951, 952 (2001).

every state, for only they would benefit by such a provision."<sup>161</sup> As support for this interpretation, Bonfield leans heavily on the assumption that a contrary reading would render the Clause nugatory since a *non-republican* state government would never have occasion to demand assistance against its own conduct.<sup>162</sup>

But this analysis overlooks the possibility of multiple competing claimants to represent the legitimate government within a particular state. Such a possibility is hardly absurd. After all, the most famous case in Supreme Court history addressing the Clause's meaning — *Luther v. Borden* — involved precisely such a dispute between competing claimants.<sup>163</sup> Moreover, the example of international treaty guarantees addressing rights to succession and other matters of internal governance suggests that such competing claims to legitimacy were not unknown to the Founding generation.<sup>164</sup>

Further, while Bonfield observes that the term "state" could sometimes be understood as synonymous with the people of a state, the Constitution itself reflects a different drafting pattern — distinguishing a "State" from its "people" or "citizens."<sup>165</sup> For example, Section 2 of Article I provides that members of the House of Representatives are to be "chosen . . . by the *People* of the several States"<sup>166</sup> while the first section of Article II provides that "[e]ach *State* shall appoint" members of the Electoral College "in such Manner" as its legislature may direct.<sup>167</sup> Similarly, both Section 2 of Article III and the Eleventh Amendment distinguish between suits brought by "States" and suits brought by the states' "Citizens."<sup>168</sup> Indeed, the asserted equivalency between "State" and the state's citizens is not matched by *any* other constitutional provision.

(b) *The Subject of the Guarantee Clause.* — One of the most unusual textual features of the Guarantee Clause — apart from its use of the term "guarantee" — is its choice of subject. In nearly all other provisions of the Constitution where the federal government is empowered or compelled to take certain actions, the constitutional text itself singles out a particular branch or agent of the government as possessing the

<sup>161</sup> Bonfield, *supra* note 13, at 524.

<sup>162</sup> See *id.* (asserting that the "absurdity of such a construction would have become apparent. For what protection would the state government need against its own action?").

<sup>163</sup> See *infra* notes 414–428 and accompanying text (discussing *Luther*).

<sup>164</sup> See *supra* notes 98–103 and accompanying text (discussing treaty provisions that guaranteed internal governmental arrangements).

<sup>165</sup> Cf. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 791 (1999) ("Although the Constitution itself rarely defines a contested word self-consciously the way a dictionary does, the Constitution does illustrate word usage, and thus serves a basic dictionary function." (footnote omitted)).

<sup>166</sup> U.S. CONST. art. I, § 2, cl. 1 (emphasis added).

<sup>167</sup> *Id.* art. II, § 1, cl. 2 (emphasis added).

<sup>168</sup> *Id.* art. III, § 2, cl. 1; *id.* amend. XI.

relevant power or duty.<sup>169</sup> But Section 4 of Article IV marks the one and only instance in which the constitutional text explicitly identifies the “United States” itself as the subject of a constitutional command.<sup>170</sup>

Modern scholarship addressing the Clause’s original meaning sheds little light on the Guarantee Clause’s distinctive choice of subject. The modern suggestion that the Clause was intended to command all three branches of the federal government does not fully explain the generic reference to the “United States” as its subject. In other instances where the Constitution confers powers or imposes duties on different branches of the federal government with respect to the same subject matter, the text clearly and carefully specifies which branch possesses which powers or responsibilities with respect to that subject. For example, all three branches of the federal government share some responsibility for matters touching on war and international diplomacy.<sup>171</sup> And while the text certainly does not allow for a clear and unambiguous demarcation of the boundary line separating one branch’s powers from those of the others,<sup>172</sup> the existence of the lines themselves reflects a drafting strategy that is markedly different from the Guarantee Clause’s undifferentiated conferral of responsibility on the “United States” in its collective, corporate capacity.

Once again, the treaty analogy may shed some light on the Guarantee Clause’s reference to the “United States.” Under eighteenth-century international law, as today, a valid treaty bound the nation as a whole,

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<sup>169</sup> This pattern is so consistent that it is easy to overlook the Guarantee Clause’s distinctive exception. See Gary Lawson, *Delegation and the Constitution*, 22 REG. 23, 24 (1999) (asserting that “[t]he Constitution nowhere grants power to ‘the federal government’ as a unitary entity” without mentioning the Guarantee Clause); cf. John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1096 n.105 (2015) (mentioning a handful of other collective references to “the United States” that might be read to imply additional collective powers).

<sup>170</sup> Bonfield, *supra* note 13, at 523 (“The provision’s opening . . . provides the only instance where the government by its corporate name is given a duty.”).

<sup>171</sup> See U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress to “regulate Commerce with foreign Nations”); *id.* cl. 10 (authorizing Congress to “define and punish Piracies . . . and Offences against the Law of Nations”); *id.* cl. 11 (authorizing Congress to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”); *id.* art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”); *id.* cl. 2 (authorizing the President to make treaties “by and with the Advice and Consent of the Senate”); *id.* § 3 (providing the President “shall receive Ambassadors and other public Ministers”); *id.* art. III, § 2, cl. 1 (providing that federal judicial power “shall extend to” particular categories of suits, including, among others, cases “arising under” federal treaties, cases “affecting Ambassadors, other public Ministers and Consuls,” cases of “admiralty and maritime Jurisdiction” and controversies “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects”).

<sup>172</sup> Cf. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957*, at 171 (4th ed. 1957) (describing constitutional provisions allocating foreign affairs powers as “an invitation to struggle for the privilege of directing American foreign policy”).

irrespective of the internal governmental processes that might be necessary to comply with that treaty.<sup>173</sup> Treaty drafters thus typically had no need to carefully specify the precise domestic legal actors whose cooperation and compliance would be needed to carry the treaty into effect. Rather, once validly ratified, each contracting nation was responsible for ensuring compliance with its treaty commitments through whichever domestic mechanisms might have been required.<sup>174</sup>

As will be discussed in further detail below, negotiations over the text that would eventually evolve into the Guarantee Clause began during the Confederation Period, long before the Philadelphia Convention convened.<sup>175</sup> At that time, the relations between the several states and between the states and the nascent federal government were far different and far less settled than those set in place by the federal Constitution of 1787.<sup>176</sup> But under eighteenth-century international law, such changes in internal governmental structure would not affect the nature of the obligation imposed on a nation by virtue of a treaty. Vattel and other late eighteenth-century commentators agreed that a change in the form of government would not necessarily affect the binding force of its treaty commitments.<sup>177</sup>

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<sup>173</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 207 cmt. a (AM. LAW INST. 1987) (“A state acts through its government, but the state is responsible for carrying out its obligations under international law regardless of the manner in which its constitution and laws allocate the responsibilities and functions of government, or of any constitutional or other internal rules or limitations.”).

<sup>174</sup> For example, the eighteenth-century British constitutional system divided foreign affairs powers between the Crown and Parliament — vesting the Crown with virtually plenary formal authority to commit the nation to a treaty but requiring Parliament’s cooperation for the treaty to have any domestic legal authority. See, e.g., Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 697–98 (1995) (describing the British treaty practice). But a refusal of Parliament to enact auxiliary legislation needed to carry the treaty into effect did not affect the treaty’s validity as a matter of international law. Once validly ratified, the treaty was fully effectual as an international commitment, and a failure by any branch or department to take measures needed to carry it into execution would simply amount to a breach. See, e.g., James Madison, Notes on the Constitutional Convention (Aug. 23, 1787), in 2 FARRAND’S RECORDS, *supra* note 118, at 384, 393 (remarks of William Johnson) (noting that the British constitution vested “[f]ull & compleat power” in the “King of [Great Britain]” with respect to the making of treaties and that “[i]f the Parliament should fail to provide the necessary means of execution, the Treaty would be violated”).

<sup>175</sup> See *infra* section II.C.1.b, pp. 639–43.

<sup>176</sup> See *supra* notes 108–116 and accompanying text (discussing contested nature of sovereignty in Confederation era).

<sup>177</sup> VATTEL, *supra* note 39, bk. II, ch. XII, § 185 (“Since . . . a treaty directly relates to the body of the state, it subsists, though the form of the republic should happen to be changed, — even though it should be transformed into a monarchy.”). A similar principle is recognized under modern international law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 173, at § 208 cmt. a (“Under international law, the capacities, rights, and duties” of a state “appertain to the state, not to the government which represents it. . . . They are not affected by a mere change in the regime or in the form of government or its ideology.”).

Thus, if understood by reference to the treaty analogy, a commitment on behalf of the “United States” to guarantee the sovereign rights of particular states would impose a roughly equivalent obligation irrespective of whether the referent of that term was the loose confederation government that existed under the Articles or the newly empowered national government established by the 1787 Constitution. The Framers of the 1787 Constitution may thus have seen little difficulty in carrying over language that had been repeatedly suggested and debated during the Confederation Period on the understanding that the obligations thus imposed on the newly established federal government would be essentially identical.

Of course, this distinctive choice of subject raises difficult interpretive questions regarding the precise manner in which responsibility for fulfilling the duty the Clause imposes should be partitioned out among the three branches of the federal government. Article I’s grant of power to Congress to “make all Laws” that may be “necessary and proper for carrying into Execution . . . all . . . Powers vested . . . in the Government of the United States, or in any Department or Officer thereof” suggests that Congress was likely expected to play a prominent role in the provision’s enforcement.<sup>178</sup> The President too might stake a plausible claim to at least some portion of authority with respect to the provision, by virtue of either the Vesting Clause<sup>179</sup> or the Take Care Clause.<sup>180</sup> A more difficult question involves what responsibilities, if any, the Guarantee Clause enjoins upon the federal courts. That question, in turn, raises questions regarding the nature of the obligation the Guarantee Clause imposed on the federal government and whether that obligation was of such a nature as to be comprehended within the textual grant to the courts of the “judicial Power of the United States.”<sup>181</sup> These questions will be considered in more detail in Part III below.<sup>182</sup>

### C. Contextual Evidence

While the text provides a useful starting point for assessing the meaning and purpose of the Guarantee Clause, such evidence is clearly

<sup>178</sup> See U.S. CONST. art. I, § 8, cl. 18.

<sup>179</sup> See *id.* art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); see also, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 256–57 (2001) (arguing that the Vesting Clause of Article II is properly read as a grant of additional substantive powers beyond those explicitly enumerated in other provisions of Article II).

<sup>180</sup> See U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . .”).

<sup>181</sup> *Id.* art. III, § 1; cf. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1176 (1992) (contending that the Article III Vesting Clause is the “only *explicit* constitutional source of the federal judiciary’s authority to act”).

<sup>182</sup> See *infra* section III.B, pp. 679–87.

incomplete. Because words have meaning only in context, and context includes historical context,<sup>183</sup> this section will focus on historical evidence relevant to assessing how the language of the Guarantee Clause would have been understood by members of the enacting public at the time of the Constitution's adoption. Section II.C.1 focuses on the pre-enactment history of the "guarantee" concept and particularly on the use of that concept in debates surrounding resolution of the controversy regarding the disposition of the western lands under the Articles of Confederation. Section II.C.2 focuses on the debates surrounding the framing and ratification of the Constitution, respectively. Section II.C.3 summarizes evidence concerning early interpretations of the Guarantee Clause during the post-ratification period. Section II.C.4 summarizes and assesses the evidence presented in the preceding sections.

*I. The Articles of Confederation and the State Land Claims Controversy.* — Many accounts of the Guarantee Clause's historical background begin with the records of the Philadelphia Convention.<sup>184</sup> Given the dearth of similarly worded provisions in the pre-Founding-era documents most widely recognized as possible inspirations for the Constitution's Framers,<sup>185</sup> this starting point is understandable.

A few scholars have suggested that the provision may have been inspired, in part, by earlier proposals from Virginia respecting the disposition of its western territorial claims — particularly Thomas Jefferson's drafts for the constitution of Virginia in 1776 and a 1781 Virginia statute proposing a cession of certain western territories to the Confederation Congress.<sup>186</sup> But neither of these provisions contained the critical "guarantee" language that is the focus of the present inquiry.<sup>187</sup> Nonetheless,

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<sup>183</sup> See, e.g., Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 18 (2015) ("[T]he communicative content of an utterance is . . . a function of context, and context is time-bound . . .").

<sup>184</sup> See, e.g., Bonfield, *supra* note 13, at 516–20 (discussing the Guarantee Clause's drafting history in the Philadelphia Convention); Merritt, *supra* note 20, at 29–31 (same); Smith, *supra* note 20, at 1957–59 (same).

<sup>185</sup> See *supra* note 34 and accompanying text (discussing absence of "guarantee" language in other Founding-era documents).

<sup>186</sup> See, e.g., WIECEK, *supra* note 13, at 15–16 (pointing to both the 1781 statute and Jefferson's draft constitution as possible inspirations for the Guarantee Clause); Heller, *supra* note 32, at 1735–36 (same); Smith, *supra* note 20, at 1958 (noting the 1781 statute).

<sup>187</sup> Jefferson's draft Virginia constitution proposed to cede certain of Virginia's western land claims on the condition that new "colonies" be established in the ceded territories "which . . . shall be established on the same fundamental laws contained in this instrument & shall be free & independent of this colony and of all the world." THOMAS JEFFERSON, Proposed Constitution for Virginia, June 1776, art. IV, *in* 2 THE WORKS OF THOMAS JEFFERSON 158, 179 (Paul Leicester Ford ed., 1904). Virginia's 1781 statute offering to cede its western land claims to the Confederation Congress similarly required, as a condition of the cession, that the ceded territory be "laid out and formed into states" and that "the states so formed shall be distinct republican states and be admitted members of the federal union, having the same rights of sovereignty freedom and independence as the other states." H.D. Resolutions, for a Cession of the Lands on the North West Side of Ohio to

these scholars are on the right track in looking to the controversy over the western land claims of various states for guidance on the original meaning of the Guarantee Clause.

The conflict over competing claims to sovereignty over western lands that rapidly emerged in the wake of the colonies' Declaration of Independence sparked a corresponding debate over the desirability and significance of a national "guarantee" of the territorial integrity of the states that composed the Union.<sup>188</sup>

(a) *Drafting the Articles of Confederation.* — The earliest clear progenitor of the Article IV Guarantee Clause appeared almost contemporaneously with the nation's Founding. On July 12, 1776, John Dickinson of Pennsylvania, the chair of a committee appointed by the Second Continental Congress "to prepare and digest the form of a confederation to be entered into between these colonies,"<sup>189</sup> presented to Congress an official draft of the Articles of Confederation.<sup>190</sup> Article XV of this initial draft provided that, "[w]hen the Boundaries of any Colony shall be ascertained," either by agreement or by Congress, "all the other Colonies shall guarantee to such Colony the full and peaceable Possession of, and the free and entire Jurisdiction in and over the Territory included within such Boundaries."<sup>191</sup> This mutual guarantee of territorial integrity paralleled the mutual guarantees of borders and boundaries that were routine in eighteenth-century treaties.<sup>192</sup>

Unfortunately, as Noah Webster would later observe, the "boundaries of the several states" had not been "drawn with a view to independence."<sup>193</sup> Prior to the Revolution, disputes about colonial boundaries

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the United States, 1781 Gen. Assemb., Reg. Sess. (Va. 1781), in 10 THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 564, 564 (William Waller Hening ed., Richmond, Va. George Cochran 1822) [hereinafter Resolution for a Cession of Lands].

<sup>188</sup> Cf. PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 13 (1983) (observing that "[t]he crucial question" in the early years of the new nation "was the willingness of the states to recognize and guarantee each other's territorial claims").

<sup>189</sup> 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 433 (Worthington Chauncey Ford ed., 1906) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS].

<sup>190</sup> *Id.* at 546.

<sup>191</sup> *Id.* at 549 (emphasis added). Article XVIII of the initial draft proposed to confer on Congress a power to "ascertain[]" the "Bounds of any . . . Colony that appear to be indeterminate." *Id.* at 551; see also *id.* at 550-51. Dickinson also included in his initial draft a marginal notation questioning "[t]he Propriety of the Union's garranteeing to every colony their respective Constitution and form of Government." *Id.* at 547 n.1.

<sup>192</sup> See *supra* section 1.B, pp. 615-20 (discussing guarantee provisions in eighteenth-century international treaties).

<sup>193</sup> NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA (1787), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 25, 62 (Paul Leicester Ford ed., Brooklyn 1888).

could be submitted for arbitration by the British government.<sup>194</sup> But the removal of superintending British authority and the competing and overlapping claims to sovereignty asserted by the newly independent states rendered the question of territorial boundaries a major source of interstate friction.<sup>195</sup>

The vast geographical disparities reflected in the colonial charter grants spurred tensions between the seven so-called "landed" states, which could assert colorable claims to some portion of the immense territories lying west of the Allegheny Mountains, and the six "landless" states, which lacked such claims.<sup>196</sup> Tensions also arose over conflicting or overlapping territorial claims in the West, as well as in the more heavily populated eastern regions. For example, Connecticut staked a claim to jurisdiction over a portion of Pennsylvania, at one point supporting its claim through an incursion of armed militia troops.<sup>197</sup> Along the contested border between New York and New Hampshire, a conflict over New York's refusal to recognize the validity of land grants issued by New Hampshire's governor led to the formation of the breakaway Republic of Vermont, which unilaterally declared its independence from New York and sought recognition as a sovereign and independent state.<sup>198</sup>

The conflict over the western land claims quickly emerged as one of the central challenges facing the nascent federal government. The landless states, wary of entering into a political union with states whose boundaries would dwarf their own, insisted that title and jurisdiction to the western lands should be held in collective trust by the Confederation government and used as a public fund to repay debts incurred during the Revolution.<sup>199</sup> The landed states insisted on the validity of their extensive territorial claims.<sup>200</sup>

<sup>194</sup> See ONUF, *supra* note 188, at 6.

<sup>195</sup> See *id.* at 13 ("[As] charter claims . . . became associated with pretensions to sovereignty . . . demands for renegotiated boundaries hardened the resolve of the landed states to insist on their extended claims, as a test of state sovereignty.").

<sup>196</sup> MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION 150-51* (1940).

<sup>197</sup> *Id.* at 91 (discussing border dispute between Connecticut and Pennsylvania over control of the Wyoming river valley).

<sup>198</sup> ONUF, *supra* note 188, at 127, 132-33.

<sup>199</sup> *Id.* at 14-15; see also JENSEN, *supra* note 196, at 133-36.

<sup>200</sup> For example, Virginia's constitution of 1776 claimed jurisdiction over all territories encompassed within the "Charter of King James I in the year one thousand six hundred and nine, and by the public treaty of peace between the Courts of Britain and France, in the year one thousand seven hundred and sixty-three," excepting only the territories belonging to Pennsylvania, Maryland, and North and South Carolina. VA. CONST. OF 1776, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3812, 3819 (Francis Newton Thorpe ed., 1909). As construed by Virginians at the time, these grants would have encompassed all of modern-day West Virginia, Kentucky, Ohio, Indiana, Illinois, Michigan, and Wisconsin, as well as parts of Minnesota and Pennsylvania. JOHN RICHARD

Against this backdrop, the framework contemplated by Dickinson's initial draft of the Articles, which would have conferred broad power on Congress to determine, and even "cut off," state boundaries, proved politically toxic to the landed states.<sup>201</sup> Both the proposal to confer on Congress the power to settle state boundaries and the related provision calling for a mutual "guarantee" of the boundaries so ascertained were dropped from the final draft of the Articles.<sup>202</sup>

Instead of conferring on Congress a power to settle state boundaries, as Dickinson's draft contemplated, the final version of the Articles provided for a complex adjudicative procedure for the settlement of disputed land claims with a proviso "that no State shall be deprived of territory for the benefit of the United States."<sup>203</sup> The pledge to "guarantee" existing state boundaries was also omitted from the final version, the landless states being reluctant to commit to such a guarantee until the controversies over territorial boundaries had been resolved.<sup>204</sup>

The final version did, however, include a provision specifying that each state would retain "its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled."<sup>205</sup> This reservation of sovereignty and jurisdiction, combined with the third Article's pledge of "a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare,"<sup>206</sup> was viewed by many as the functional equivalent of a guarantee and was often referred to as such throughout the Confederation Period.<sup>207</sup>

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ALDEN, *THE SOUTH IN THE REVOLUTION, 1763-1789*, at 131 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1957).

<sup>201</sup> Merrill Jensen, *The Cession of the Old Northwest*, 23 *MISS. VALLEY HIST. REV.* 27, 31-32 (1936).

<sup>202</sup> For a detailed account of the evolution of the Articles of Confederation, from the initial Dickinson draft, into its eventual final form, see JENSEN, *supra* note 196, at 126-84.

<sup>203</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, § 2.

<sup>204</sup> ONUF, *supra* note 188, at 14 ("The settlement of state western boundaries was a special category of interstate conflict that had to be resolved by extrajudicial means and, if the landless states could have their way, before any territorial guarantees became operative.")

<sup>205</sup> ARTICLES OF CONFEDERATION of 1781, art. II. The initial version of this provision in the Dickinson draft had been much milder, omitting references to "sovereignty," "independence," and "jurisdiction" and providing instead that "[e]ach Colony shall retain and enjoy as much of its present Laws, Rights and Customs, as it may think fit, and reserves to itself the sole and exclusive Regulation and Government of its internal police, in all matters that shall not interfere with the Articles of this Confederation." 5 *JOURNALS OF THE CONTINENTAL CONGRESS*, *supra* note 189, at 547.

<sup>206</sup> ARTICLES OF CONFEDERATION of 1781, art. III.

<sup>207</sup> See, e.g., Letter from Nathan Dane to Samuel Phillips (Jan. 20, 1786), in 23 *LETTERS OF DELEGATES TO CONGRESS 1774-1789*, at 97, 100-01 (Paul H. Smith & Ronald M. Gephart eds., 1995) [hereinafter *LETTERS OF THE DELEGATES*] ("It is fully agreed that the 2 & 3 art[icle]s are a guarantee of the States to each State of its territory, sovereignty & jurisdiction and that Congr. are bound at the reason[able] request of any State to give her aid & assistance in this Case for her preservation." (alterations in original)); Letter from Rhode Island Delegates to William Greene

(b) *Demands for "Guarantees" of Territorial Integrity During the Confederation Period.* — The omission of the "guarantee" provision from the final Articles of Confederation did not end debate over the desirability of a federal guarantee of state territorial integrity. The failure of the landless states to secure recognition in the Articles for federal control over the western territories spurred three such states — New Jersey, Delaware, and Maryland — to initially refuse ratification.<sup>208</sup> New Jersey and Delaware soon relented and ratified, but Maryland persisted in its refusal.<sup>209</sup> Because the Articles required unanimous approval by the states, Maryland's refusal prevented the Articles from taking legal effect, even among the twelve states that had already ratified.<sup>210</sup> When Maryland's legislature finally allowed its delegates in Congress to assent to the Articles in January 1781, it did so only with the express reservation that "no article in the said Confederation, can or ought to bind this or any other State, to guarantee any exclusive claim of any particular State, to" ownership of any portion of the disputed western territories.<sup>211</sup>

As early as 1778, a proposed solution to the jurisdictional impasse over the western lands emerged from a congressional committee on finance, which proposed that the states possessing "large uncultivated Territory" in the West might be "called on to cede" such territories voluntarily, with the promise that the ceded lands would be "erected into separate independent States, to be admitted into the Union."<sup>212</sup> In February 1780, New York took the first step toward putting the cession idea into practice by authorizing its delegates in Congress to cede its claims to western lands to the Confederation without condition.<sup>213</sup>

New York's example, and the difficulties the lack of a formal union of states posed for national objectives — including the ongoing war against Great Britain — spurred Virginia to act.<sup>214</sup> But unlike New

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(Sept. 8, 1783), in 20 LETTERS OF THE DELEGATES, *supra*, at 631, 635 (referring to "[t]he general guarantee contained in the 2nd and 3d articles of confederation").

<sup>208</sup> See Letter from Connecticut Delegates to Jonathan Trumbull, Sr. (Oct. 15, 1778), in 11 LETTERS OF THE DELEGATES, *supra* note 207, at 58, 58 (reporting that "[t]hese and some others of the States are dissatisfied, that the Western ungranted Lands Should be claimed by particular States").

<sup>209</sup> Jensen, *supra* note 201, at 33–34.

<sup>210</sup> See *id.* at 45.

<sup>211</sup> 19 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 189, at 139.

<sup>212</sup> 12 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 189, at 931.

<sup>213</sup> Jensen, *supra* note 201, at 43.

<sup>214</sup> *Id.* at 43–44. The notion that the state might cede some or all of her vast western claims to be formed into new states was not new — Thomas Jefferson had proposed a version of this scheme in his draft of a constitution for Virginia in 1776, and the idea was supported by many prominent Virginians. See JEFFERSON, *supra* note 187, at 158, 179; JENSEN, *supra* note 196, at 225 (describing Jefferson's proposal as "[p]robably the first expression of the idea of creating independent states in the West"); see also, e.g., Letter from Richard Henry Lee to Patrick Henry (Nov. 15, 1778), in 1 THE LETTERS OF RICHARD HENRY LEE 451, 453 (James Curtis Ballagh ed., 1911) (suggesting

York, which had volunteered to cede its western territory without condition, Virginia's representatives hoped to extract from Congress and the other confederating states certain concessions, including a formal "guaranty" of the state's remaining territory.<sup>215</sup>

In September 1780, Virginia's delegates to Congress proposed a resolution calling for Virginia, North Carolina, and Georgia to "cede to the United States" their unappropriated western lands and for the United States, in turn, to "guaranty the remaining Territory to the said States respectively."<sup>216</sup> In January of the following year, Virginia's legislature enacted a law offering to "yield" to Congress all right and title to lands lying north and west of the Ohio river, provided Congress would agree to a set of specified conditions.<sup>217</sup> One of these conditions was that "all the remaining territory of Virginia included between the Atlantic ocean and the south east side of the river Ohio, and the Maryland, Pennsylvania, and North Carolina boundaries, shall be guaranteed to the commonwealth of Virginia by the said United States."<sup>218</sup>

Although Virginia's political leadership anticipated that this offer of cession would resolve the controversy, their insistence on receiving a "guarantee" of the state's remaining territory soon emerged as a significant sticking point in negotiations.<sup>219</sup> New York's delegates to Congress, who had been authorized by the state's legislature to cede its western territorial claims without conditions, concluded that it would be "imprudent to bind our State in a special guarantee of the jurisdiction of Virginia, when our own was not secured in the same manner."<sup>220</sup> The delegates thus chose to make New York's cession conditional on a subsequent "ratification or disavowal" by the state's legislature "unless the boundaries reserved for the future jurisdiction of the . . . State . . . shall be guaranteed by the United States, in the same manner and form as the territorial rights of the other states shall be guaranteed."<sup>221</sup>

Virginia's offer of cession was reported to a committee of Congress, which eventually concluded that Congress could not agree to the guarantee Virginia insisted on as a condition of its cession "without entering into a discussion of the right of the State of Virginia to the said land."<sup>222</sup>

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that ceding lands west of the Ohio might be the "wisest course," both to allay concerns of the landless states and to render the state's remaining territory more easily administrable and defensible).

<sup>215</sup> See Resolution for a Cession of Lands, *supra* note 187, at 566.

<sup>216</sup> 17 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 189, at 808.

<sup>217</sup> Resolution for a Cession of Lands, *supra* note 187, at 564, 566.

<sup>218</sup> *Id.* at 566.

<sup>219</sup> ONUF, *supra* note 188, at 93-94.

<sup>220</sup> Letter from New York Delegates to George Clinton, Governor of New York (March 11, 1781), in 17 LETTERS OF THE DELEGATES, *supra* note 207, at 48, 50.

<sup>221</sup> 19 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 189, at 210.

<sup>222</sup> 25 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 189, at 563.

The committee characterized the guarantee request as "either unnecessary or unreasonable" because the land was either "really the property of the State," in which case it would be "sufficiently secured by the confederation," or it was not, in which case there would be "no reason or consideration for such guarantee."<sup>223</sup> On the basis of this recommendation, Congress voted to reject Virginia's cession offer on the terms proposed.<sup>224</sup>

As the debate over the western land cessions was working its way through Congress, Congress was also grappling with the distinct problem raised by the Vermonters' assertion of political independence from New York and New Hampshire.<sup>225</sup> In August 1781, Congress adopted a resolution authorizing a committee to confer with Vermont's representatives regarding Vermont's request for admission to the Union as a sovereign, independent state.<sup>226</sup> As part of that resolution, Congress declared that "in case Congress shall recognize the independence of the said people of Vermont, they will consider all the lands belonging to New Hampshire and New York, respectively, without the limits of Vermont . . . as coming within the mutual guaranty of territory contained in the Articles of Confederation"<sup>227</sup> — an apparent reference to the second and third Articles.<sup>228</sup> Accordingly, the resolution declared that "the United States" would "guarantee such lands, and the jurisdiction over the same, against any claims or encroachments from the inhabitants of Vermont aforesaid."<sup>229</sup>

New York's legislature initially objected to even these tentative steps toward recognizing Vermont's independence, insisting that "Congress have not any authority by the Articles of Confederation" to "intermeddle with" its territorial jurisdiction and that any effort to recognize Vermont would violate the rights "guarantied" to New York by the second and third Articles of Confederation.<sup>230</sup> Vermont, too, initially resisted Congress's proposal, with its delegates reporting that they lacked authority to agree to the proposed boundary lines and suggesting instead that the boundary question be submitted to the adjudicatory process outlined in Article IX.<sup>231</sup> In the interim, Vermont continued to claim

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 563–64.

<sup>225</sup> On the background of Vermont's statehood movement, see generally Peter S. Onuf, *State-Making in Revolutionary Crisis: Independent Vermont as a Case Study*, 67 J. AM. HIST. 797 (1981).

<sup>226</sup> 21 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 189, at 836–38.

<sup>227</sup> *Id.* at 839.

<sup>228</sup> See *supra* notes 205–207 and accompanying text (discussing the second and third Articles of Confederation).

<sup>229</sup> 21 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 189, at 839.

<sup>230</sup> S. Con. Res. of November 15 & 19, 1781, 1781 Legis., Reg. Sess. (N.Y. 1781), in 7 PUBLIC PAPERS OF GEORGE CLINTON, FIRST GOVERNOR OF NEW YORK 518 n.\* (Hugh Hastings ed., 1904).

<sup>231</sup> ONUF, *supra* note 188, at 120.

jurisdiction over towns and territories lying outside the boundaries contemplated by Congress.<sup>232</sup>

In response to Vermont's rejection, the committee tasked by Congress with considering the Vermont question recommended harsh measures for bringing the separatists into submission. In January 1782, the committee issued a report recommending that if the Vermonters did not within one month "desist from attempting to exercise jurisdiction over the lands guaranteed to New Hampshire and New York" by Congress's resolutions of August 1781 and assent to the terms Congress had set for Vermont's admission to the Union, such refusal should be regarded "as a manifest indication of designs hostile to these United States."<sup>233</sup> In the event the Vermonters persisted in their attempts to exercise jurisdiction beyond the boundaries set by Congress, the committee recommended that *all* of the territory claimed by the separatists be partitioned between the two neighboring states — New York and New Hampshire<sup>234</sup> — and that the "Commander in Chief of the armies of these United States" be authorized to "carry these resolutions as far as they respect his department into full execution" against any resisters.<sup>235</sup>

Vermont, for its part, denied that its dispute with New York and New Hampshire provided any just grounds for federal interference. A pamphlet published at the direction of the Vermont legislature to generate popular support for their cause insisted that even if the Articles of Confederation could be construed to provide for a guarantee of state territorial integrity, such guarantee would not extend to the Vermont controversy because Vermont's assertion of independence from New York and New Hampshire long predated the Articles' effective date of March 1, 1781.<sup>236</sup> Therefore, the Vermonters argued, the Vermont controversy could not "come within the reach of the guarantee of the confederation . . . nor is there any manner of propriety in any supposable demand [from either New York or New Hampshire] to interfere with or espouse their controversy with Vermont."<sup>237</sup>

Congress ultimately chose not to deliver the committee's proposed ultimatum threatening the use of force, the motion to do so failing by a narrow vote of six states in favor, six states against, and one state

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<sup>232</sup> *See id.*

<sup>233</sup> 22 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 189, at 59.

<sup>234</sup> *Id.* at 111–12.

<sup>235</sup> *Id.* at 113.

<sup>236</sup> ETHAN ALLEN, THE PRESENT STATE OF THE CONTROVERSY BETWEEN THE STATES OF NEW-YORK AND NEW-HAMPSHIRE, ON THE ONE PART, AND THE STATE OF VERMONT ON THE OTHER (1782), *reprinted in* 2 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 355, 362–63 (E.P. Walton ed., Montpelier, Vt., J. & J.M. Poland 1874) [hereinafter VERMONT RECORDS].

<sup>237</sup> *Id.* at 363.

coalition divided.<sup>238</sup> Nonetheless, Vermont soon reconsidered its earlier refusal of the terms Congress had offered and disclaimed jurisdiction over the territories Congress had recognized as lying within the boundaries of New York and New Hampshire.<sup>239</sup> By this point, however, support for the Vermonters’ cause in Congress had weakened, and Congress refused to extend the same terms — including recognition of independence and admission to the Union — it had been willing to offer in August 1781.<sup>240</sup>

Eventually, both the Vermont controversy and the related controversy surrounding control of the western lands were resolved peacefully. The conclusion of the Revolutionary War brought increased pressure on the national government to make good on its promises of land bounties to former soldiers and officers.<sup>241</sup> In response to calls from General Washington and others, Virginia eventually relented and agreed to cede its western claims to Congress without condition; Congress accepted that offer in 1784.<sup>242</sup> Resolution of the Vermont controversy was delayed until after the Constitution’s adoption. Although the language of Article IV, Section 3 governing admission of new states might arguably have allowed Vermont’s admission as a state notwithstanding New York’s objection,<sup>243</sup> New York ultimately agreed to negotiate its boundary with Vermont. Following an agreement between the two states, which provided for New York’s formal consent to Vermont’s admission as a state and an agreement by Vermont to pay \$30,000 in settlement of outstanding land claims,<sup>244</sup> Congress formally acknowledged Vermont’s statehood and admission to the Union in February 1791.<sup>245</sup>

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Most references to “guarantee” in the various Confederation-era documents discussing the western lands controversy were not accompanied by explanations or context that directly illuminate the term’s intended

<sup>238</sup> 22 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 189, at 114.

<sup>239</sup> Dissolution of the Eastern and Western Unions — February, 1782 (Feb. 1782), *in* VERMONT RECORDS, *supra* note 236, at 379, 381.

<sup>240</sup> ONUF, *supra* note 188, at 129.

<sup>241</sup> Jensen, *supra* note 201, at 48.

<sup>242</sup> *Id.*

<sup>243</sup> Vermonters may have been able to argue that even if their state lay within the legal borders of New York, Section 3’s prohibition on “form[ing] or erect[ing]” new states “within the Jurisdiction of any” existing state without the consent of that state’s legislature should not bar their admission because they were no longer “within the Jurisdiction” of New York. U.S. CONST. art. IV, § 3, cl. 1; *see also, e.g.*, Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 374–75 (2002) (discussing this theory); Earl M. Maltz, *The Constitution and the Annexation of Texas*, 23 CONST. COMMENT. 381, 393–95 (2006) (arguing that the “Jurisdiction” language of Article IV was deliberately chosen with the Vermont controversy in mind).

<sup>244</sup> WALTER HILL CROCKETT, 2 VERMONT: THE GREEN MOUNTAIN STATE 455–59 (1921).

<sup>245</sup> Act of Feb. 18, 1791, 1 Stat. 191 (1791).

meaning. Rather, most invocations of the term appear in contexts where its meaning and significance were assumed. Nonetheless, a few features of Confederation-era materials suggest that something like the international-law understanding of “guarantee” may have been both understood and intended by most usages of the term.

For one thing, the types of documents in which the term typically appeared — namely, in proposed agreements between the states or between Congress and particular states — were often described by contemporary observers as being in the nature of “treaties.” For example, in reporting back to the governor regarding the progress of their negotiations concerning the state’s western land claims, New York’s delegates to Congress reported that “[f]rom the manner in which this business was conducted it was left to us to make the cession without a formal treaty with Congress.”<sup>246</sup> Likewise, the instructions given by Vermont to the delegates it sent to represent its interests before Congress authorized them “to propose . . . and receive . . . terms for an union of this [state] with the United States, . . . such *terms of union or other treaty* agreed on by them to be subject to ratification of the Legislature of this State previous to their establishment.”<sup>247</sup>

It also seems clear that participants in the debates over the western land claims took the commitment established by guarantee provisions extremely seriously. The disputed status of the western lands led to the omission of the guarantee provision that had been included in the initial draft of the Articles of Confederation.<sup>248</sup> Even after this revision, Maryland refused to assent to the Articles out of concern that the remaining provisions could be construed as guarantees of the landed states’ territorial claims; it eventually agreed to confederate only on the express understanding that no provision of the Articles should be understood to require a federal “guarantee” of the disputed western lands.<sup>249</sup> Virginia’s insistence on a “guarantee” of its territorial integrity as a condition of its 1781 proposal to cede certain of its western lands to Congress proved a major sticking point that delayed resolution of the pressing national controversy by more than three years.<sup>250</sup> Vermont’s efforts to exercise sovereignty over territories that had been “guaranteed” by Congress to New York and New Hampshire, respectively,

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<sup>246</sup> Letter from the New York Delegates to George Clinton, Governor of New York (Mar. 11, 1781), in 17 LETTERS OF THE DELEGATES, *supra* note 207, at 48, 50.

<sup>247</sup> Notes on the Proceedings of Friday, June 22d, 1781, in VERMONT RECORDS, *supra* note 236, at 303, 303 (emphasis added); *see also, e.g.*, Letter from Richard Henry Lee to Samuel Adams (Sept. 10, 1780), in 2 THE LETTERS OF RICHARD HENRY LEE, *supra* note 214, at 200, 201 (“The present time appears to me to be a favorable crisis for Congress to open a treaty with Virginia upon [the cession of land claims].”).

<sup>248</sup> *See supra* notes 189–204 and accompanying text.

<sup>249</sup> *See supra* notes 208–211 and accompanying text.

<sup>250</sup> *See supra* notes 215–224 and accompanying text.

nearly led Congress to authorize military force to suppress the Vermont rebellion.<sup>251</sup> The repeated references to the concept of a "guarantee" in these debates, along with the widely assumed consequences of such a commitment, suggest that participants in these debates may have had in mind the connotations established by the centuries-long usage of the term "guarantee" in the context of international diplomacy.<sup>252</sup>

Finally, although specific discussions of the precise character and consequences of "guarantee" in the context of the western lands debates are relatively sparse, at least a handful of surviving discussions shed some light on how participants in those debates may have understood the term. For example, in a January 20, 1786, letter, Massachusetts congressional delegate Nathan Dane responded to reports that portions of the state were contemplating secession by insisting that the second and third Articles of Confederation had "been determined by Congr. 1781"<sup>253</sup> — an apparent reference to the August 1781 resolution concerning the territorial claims of Vermont<sup>254</sup> — to encompass "a positive guarantee of the States to each State of her territory and Jurisdiction."<sup>255</sup> Dane therefore concluded that Congress possessed no power under the Articles to "dismember a State" but rather was "bound at the reasona[ble] request of any State to give her aid & assistance in this Case for her preservation."<sup>256</sup>

A somewhat more qualified view of the implied "guarantee" suggested by the Articles was reflected in a September 8, 1783, letter from Rhode Island's delegates to the state's governor.<sup>257</sup> Although the Rhode Island delegates acknowledged that "the 2nd and 3d articles of confederation" constituted a "general guarantee" of the states' independence and sovereignty, they insisted that this guarantee ought to be given "a reasonable construction which is not to be made by the particular State; but by the United States in Congress assembled."<sup>258</sup> This claim to interpretive authority on the part of Congress was consistent with Vattel's characterization of international treaty obligations, which allowed the guaranteeing state "to search for the true sense of the treaty" and allowed it to reject "ill founded" claims by the guaranteed state.<sup>259</sup> To illustrate their point, the Rhode Island delegates observed that "should Georgia extend her" territorial claims into areas controlled by

<sup>251</sup> See *supra* notes 230–238 and accompanying text.

<sup>252</sup> See *supra* section I.B, pp. 615–20.

<sup>253</sup> Letter from Nathan Dane to Samuel Phillips, *supra* note 207, at 101.

<sup>254</sup> See *supra* note 226 and accompanying text.

<sup>255</sup> Letter from Nathan Dane to Samuel Phillips, *supra* note 207, at 101.

<sup>256</sup> *Id.* (alteration in original).

<sup>257</sup> Letter from Rhode Island Delegates to William Greene, *supra* note 207, at 635–36.

<sup>258</sup> *Id.* at 635.

<sup>259</sup> VATTEL, *supra* note 39, bk. II, ch. XVI, § 237; see also *supra* notes 89–91 and accompanying text (discussing this limitation of the guaranteeing state's obligation).

Spain or if one state were to “extend its claims to the injury of a neighbour,” Congress, in its capacity as “the dernier resort of justice” would “undoubtedly determin[e] how far they will guarantee to such particular State.”<sup>260</sup> By the same reasoning, the Rhode Islanders contended that Congress could judge for itself the legitimacy of the states’ asserted western boundaries and assert federal jurisdiction over all lands determined to lie beyond “the line of guarantee” determined by Congress.<sup>261</sup>

A final illustration of the significance of the term “guarantee,” as used in the debates over the western lands, is provided by an August 21, 1785, letter to James Madison from Virginia delegate William Grayson discussing the secessionist movement in the state’s western regions that would eventually lead to the formation of Kentucky.<sup>262</sup> Though Grayson was not opposed to Kentucky’s independence, he advised that Virginia should agree to the “dismemberment” only on the condition that Congress simultaneously admit Kentucky to the Confederation as a new and independent state.<sup>263</sup> As an additional consideration in favor of involving Congress in the partition decision, Grayson contended that “the conditions for the security of property & other matters” would “be more likely to be observed, if the *pacta conventa* [that is, the conditions agreed upon<sup>264</sup>] are tripartite, & the U.S. as one of the *dramatis personæ* can be induced to guaranty them.”<sup>265</sup> Grayson’s description of this “tripartite” arrangement, in which the United States would be brought in to act as “guaranty” of any terms agreed upon between Virginia and the newly independent state of Kentucky in order to better secure observance of those terms, bears a strong resemblance, in both function and form, to the type of “guarantee” mechanism described by Vattel and other eighteenth-century commenters on the law of nations.<sup>266</sup>

2. *The Framing and Ratification Debates.* —

(a) *The Philadelphia Convention.* — On May 29, 1787, shortly after the Philadelphia Convention convened, Edmund Randolph introduced a set of fifteen resolutions prepared by the Virginia delegation — the

<sup>260</sup> Letter from Rhode Island Delegates to William Greene, *supra* note 207, at 635.

<sup>261</sup> *Id.*

<sup>262</sup> Letter from William Grayson to James Madison (Aug. 21, 1785), in 22 LETTERS OF THE DELEGATES, *supra* note 207, at 576, 577.

<sup>263</sup> *Id.* Grayson expressed concern that, without such a condition, other states that were “jealous” of Virginia’s vast territorial extent might be “gratified with a simple dismemberment [of Virginia] witht. admitting the new State into the Confœderation.” *Id.*

<sup>264</sup> See D.E. MACDONNELL, A DICTIONARY OF QUOTATIONS, IN MOST FREQUENT USE (D.E. MacDonnell, ed., London, G. Wilkie & J. Robinson 1811) (defining “*pacta conventa*” as “[c]onditions agreed upon” and describing it as “[a] diplomatic phrase used to describe certain articles, which are to be observed — until one of the parties finds a convenience in their violation”).

<sup>265</sup> Letter from William Grayson to James Madison, *supra* note 262, at 577.

<sup>266</sup> See *supra* section I.B, pp. 615–20 (describing the role of third-party “guarantees” in eighteenth-century treaty practice).

famous Virginia Plan — to address several of the most glaring deficiencies in the Articles of Confederation.<sup>267</sup> The eleventh resolution in the Virginia Plan provided “that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State.”<sup>268</sup> Though the Virginia Plan was the joint product of the Virginia delegation, most historians agree that James Madison was the principal intellectual force behind the resolutions.<sup>269</sup>

As with the initial Dickinson draft of the Articles of Confederation a decade earlier, the Virginia Plan’s proposal for a national “guarantee” of state territorial integrity drew immediate objections from representatives of the landless states.<sup>270</sup> During the first substantive debate on the proposed Resolution XI, Delaware delegate George Read objected that such a national guarantee would “confirm the assumed rights of several states to lands which do belong to the confederation.”<sup>271</sup>

To allay such concerns, Madison moved successfully that the provision be amended to provide that “[t]he republican constitutions and the existing laws of each state” would “be guaranteed by the United States.”<sup>272</sup> This revision effectively ended any meaningful debate regarding inclusion of a national guarantee of states’ territorial boundaries in the proposed Constitution. The document that eventually emerged from Philadelphia included a provision expressly disclaiming any legal effect on the legitimacy of preexisting territorial claims of either the United States or of any state.<sup>273</sup>

With the proposed guarantee of state territory removed, the text of the revised resolution guaranteed solely the “republican constitutions” of the several states and their “existing laws.” As so revised, the provision had two principal objectives — (1) to preserve the states’ republican governments against threats of monarchy or tyranny, and (2) to protect

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<sup>267</sup> James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 FARRAND’S RECORDS, *supra* note 118, at 20, 20–23; *see also generally* MICHAEL J. KLARMAN, THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 11–72 (2016) (surveying various deficiencies of the Confederation government).

<sup>268</sup> Madison, *supra* note 267, at 22.

<sup>269</sup> *See, e.g.*, LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 114–15 (1995) (identifying Madison as the principal architect of the Virginia Plan); LACROIX, *supra* note 41, at 147–49 (same); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 60 (1996) (same).

<sup>270</sup> *See supra* notes 189–207 and accompanying text (discussing the guarantee provision in the initial Dickinson draft of the Articles).

<sup>271</sup> Robert Yates, Notes on the Constitutional Convention (June 11, 1787), in 1 FARRAND’S RECORDS, *supra* note 118, at 204, 206 (statement of George Read).

<sup>272</sup> *Id.* (emphasis omitted).

<sup>273</sup> U.S. CONST. art. IV, § 3, cl. 2 (“[N]othing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”).

the states against domestic insurrections.<sup>274</sup> These two concerns were closely linked with one another. In his personal notes prepared in advance of the Philadelphia Convention, Madison identified the “[w]ant of Guaranty to the States of their Constitutions and laws” as being among the principal vices of the political system of the United States.<sup>275</sup> Such a “guaranty” was needed, in Madison’s view, because “fact and experience” had demonstrated that “a minority may, in an appeal to force, be an overmatch for the majority,” particularly if the minority “happen to include all such as possess the skill and habits of military life.”<sup>276</sup> Madison thus viewed an “appeal to force” by a well-armed and organized minority as the most likely mechanism through which the “Republican Theory” of “[r]ight and power, being both vested in the majority,” might be thwarted in practice.<sup>277</sup> Such concerns were far from hypothetical. The insurrection in western Massachusetts that came to be known as Shays’s Rebellion had been suppressed only a few months before the Philadelphia Convention convened and was still very much present in the delegates’ minds.<sup>278</sup>

This perceived connection between violence and the threat to republicanism was so central that some delegates expressed doubts that the provision could ever be invoked in the absence of an insurrection. Nathaniel Gorham of Massachusetts contended that “[w]ith regard to different parties in a State; as long as they confine their disputes to words they will be harmless to the Genl. Govt. & to each other” and that only in the case of an “appeal to the sword” would it be “necessary for the Genl. Govt.” to intervene.<sup>279</sup> James Wilson of Pennsylvania likewise asserted that “[t]he object” of the provision was “merely to secure the States agst. dangerous commotions, insurrections and rebellions.”<sup>280</sup>

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<sup>274</sup> See James Madison, Notes on the Constitutional Convention (July 18, 1787), in 2 FARRAND’S RECORDS, *supra* note 118, at 47 (statement of Edmund Randolph) (“The Resoln. has 2. Objects. 1. to secure Republican Government. 2. to suppress domestic commotions.”); *id.* at 48 (statement of Nathaniel Ghorum) (expressing concern that, without such a provision, “an enterprising Citizen might erect the standard of Monarchy in a particular State” and “extend his views from State to State, and threaten to establish a tyranny over the whole” while “the Genl. Govt.” would “be compelled to remain an inactive witness of its own destruction”).

<sup>275</sup> James Madison, Notes on the Confederacy (Apr. 1787), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 320, 322 (Philadelphia, J.P. Lippincott & Co. 1865) [hereinafter MADISON WRITINGS].

<sup>276</sup> *Id.* Madison also noted that a minority of the voting population might ally with “those whose poverty excludes them from a right of suffrage, and who, for obvious reasons, [would] be more likely to join the standard of sedition than that of the established Government.” *Id.* Slavery provided a further complication, which rendered the “republican Theory . . . still more fallacious” in those states where the institution existed. *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> WIECEK, *supra* note 13, at 27–33.

<sup>279</sup> Madison, *supra* note 274, at 48 (statement of Nathaniel Ghorum).

<sup>280</sup> *Id.* at 47 (statement of James Wilson).

But not everyone was so certain. The most forceful proponent of limiting the states' ability to revise their forms of government voluntarily was Edmund Randolph, who insisted that "a republican government must be the basis of our national union" and that, therefore, "no state . . . ought to have it in their power to change its government into a monarchy."<sup>281</sup> Later in the debates, Randolph moved unsuccessfully to make such a limitation explicit, proposing that language be added to the provision making clear "that no State be at liberty to form any other than a Republican Govt."<sup>282</sup>

Other delegates who were less enthusiastic about limiting the states' ability to voluntarily change their laws expressed concern that the provision might be construed to have that effect. Gouverneur Morris, for example, found Madison's proposed language guaranteeing the states' "republican constitutions" and "existing laws" to be "very objectionable," citing particularly the example of Rhode Island, whose laws Morris was "very unwilling" to see guaranteed.<sup>283</sup> Likewise, Georgia delegate William Houston expressed concern that the provision might "perpetuat[e] the existing Constitutions of the States," including that of his own state, which he viewed as "a very bad one" that "he hoped would be revised & amended."<sup>284</sup> Houston also noted the "difficult[y]" of "decid[ing] between contending parties each of which claim the sanction of the Constitution."<sup>285</sup>

In response to these objections, James Wilson proposed a further revision that he believed provided a "better expression of the idea"<sup>286</sup> — namely, "that a Republican [form of Governmt. shall] be guarantied to each State & that each State shall be protected agst. foreign & domestic violence."<sup>287</sup> The provision was referred in this form to the Committee of Detail,<sup>288</sup> which made further stylistic revisions, including shifting the text from a passive voice construction into the active voice and identifying the "United States" as the entity pledged to "guaranty" the states.<sup>289</sup> Following a handful of further revisions, focusing primarily

<sup>281</sup> Yates, *supra* note 118, at 206 (statement of Edmund Randolph).

<sup>282</sup> Madison, *supra* note 274, at 48 (statement of Edmund Randolph).

<sup>283</sup> *Id.* at 47 (statement of Gouverneur Morris).

<sup>284</sup> *Id.* at 48 (statement of William Houston).

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 48 (statement of James Wilson).

<sup>287</sup> *Id.* at 48–49 (alteration in original).

<sup>288</sup> Report of Committee of Detail, I, *in* 2 FARRAND'S RECORDS, *supra* note 118, at 129, 133.

<sup>289</sup> James Madison, Notes on the Constitutional Convention (Aug. 6, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 118, at 176, 188 ("The United States shall guaranty to each State a Republican form of Government; and shall protect each State against foreign invasions, and, on the application of its Legislature, against domestic violence."). At one point, the Committee seems to have considered framing the provision as a mutual pledge of the several states to one another. Report of Committee of Detail, IV, *in* 2 FARRAND'S RECORDS, *supra* note 118, at 137, 137 ("The said States

on the language securing states against invasion and domestic violence, the Committee of Detail placed the language of the Guarantee Clause in its near final form.<sup>290</sup>

On the whole, the Philadelphia debates shed relatively little light on the meaning of the key term “guarantee.” The recorded substantive debate over the resolution that would eventually evolve into the Guarantee Clause was limited to two principal days — June 11, when objections from the landless state delegates prompted the removal of the guarantee for state territory,<sup>291</sup> and July 18, when concern over Madison’s “existing laws” formulation prompted the substitution of Wilson’s proposal to guarantee states their “republican form” of government.<sup>292</sup> And only a handful of delegates commented on the provision on either of those days.<sup>293</sup>

The key point of debate regarding the meaning of the provision centered on whether it would inhibit states from making voluntary changes to their existing governments or rather was merely a protection against violent usurpations of political authority.<sup>294</sup> The latter understanding fits much more comfortably with the eighteenth-century international law framework, which recognized that a guaranteeing power acquired no new rights over the sovereign parties guaranteed.<sup>295</sup>

Some in the Philadelphia Convention seem to have adhered to this view regarding the significance of the proposed constitutional guarantee.<sup>296</sup> But others expressed concern that such a provision might limit states’ ability to alter their respective governmental forms voluntarily.<sup>297</sup> Such concerns would not have been wholly misplaced even if the international law understanding had been intended. Though leading authorities on the law of nations denied that a guaranteed party forfeited any

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of N.H. &c guarantee mutually each other and their Rights against all other Powers and against all Rebellions &c.”).

<sup>290</sup> Report of Committee of Detail, in 2 FARRAND’S RECORDS, *supra* note 118, at 590, 602.

<sup>291</sup> See *supra* notes 270–273 and accompanying text (discussing June 11 debate).

<sup>292</sup> See *supra* notes 279–290 and accompanying text (discussing July 18 debate).

<sup>293</sup> It is also important to keep in mind that significant questions have been raised about the reliability of the surviving records of the Philadelphia Convention, particularly James Madison’s notes on the Convention. See MARY SARAH BILDER, MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION 141–223 (2015) (contending that Madison likely made substantial revisions to his notes long after the Constitutional Convention concluded and questioning their reliability as an accurate record of what was said).

<sup>294</sup> See *supra* notes 279–285 and accompanying text (discussing competing positions regarding the provision’s effect on voluntary changes to state government).

<sup>295</sup> See *supra* section I.B, pp. 615–20 (discussing the international law understanding of “guarantee”).

<sup>296</sup> See *supra* notes 279–280 and accompanying text (discussing statements of Nathaniel Gorham and James Wilson).

<sup>297</sup> See *supra* notes 283–285 and accompanying text (discussing concerns of Gouverneur Morris and William Houston).

of its preexisting sovereign rights by agreeing to a treaty guarantee,<sup>298</sup> the pretextual invocation of such provisions as an excuse for intermeddling was not unheard of.<sup>299</sup> The most outspoken proponent of limiting states' sovereign rights to deviate from republican principles — Edmund Randolph — arguably recognized the inadequacy of the chosen language to limit states' freedom and proposed alternative language that would have expressed the idea more explicitly.<sup>300</sup> But that alternative language was never taken up or seriously debated by the Convention delegates.

(b) *The Ratification Debates.* — When debate regarding the proposed Constitution moved from behind the Philadelphia Convention's closed doors into the public arena of ratification, opinions regarding the meaning and significance of the proposed Guarantee Clause multiplied rapidly. Some who spoke publicly on the provision embraced the view that it would function as a restriction on the voluntary actions of the states. For instance, Tench Coxe — a Pennsylvania delegate to the Confederation Congress — published a series of pseudonymous essays in which he contended that the provision would “restrain[] [the states] from [making] any alterations” to their respective forms of government that were “not *really republican*”<sup>301</sup> and that any citizen attempting to erect such a non-republican government in a state would stand “*guilty of treason*.”<sup>302</sup> James Iredell, in the North Carolina ratifying convention, similarly asserted that the provision would deprive each state of its “right to establish an aristocracy or monarchy.”<sup>303</sup>

<sup>298</sup> See *supra* notes 92–97 and accompanying text (discussing statements to this effect by Vattel and others).

<sup>299</sup> See, e.g., WHEATON, *supra* note 103, at 273–74 (discussing pretextual invocations of a treaty guarantee provision by Russia, Austria, and Prussia to justify “their perpetual interference in the internal affairs of Poland,” *id.* at 274); *id.* at 281 (discussing Russia’s pretextual use of guarantee provisions as a basis for interference with internal affairs of the German states).

<sup>300</sup> See *supra* notes 281–282 and accompanying text (discussing Randolph’s comments at the Philadelphia Convention).

<sup>301</sup> *A Freeman II*, PA. GAZETTE, Jan. 30, 1788, *reprinted in* 15 DHRC, *supra* note 120, at 508, 509.

<sup>302</sup> AN AMERICAN CITIZEN IV: ON THE FEDERAL GOVERNMENT (1787), *reprinted in* 13 DHRC, *supra* note 120, at 431, 432.

<sup>303</sup> James Iredell, Address to the North Carolina Convention (July 30, 1788), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 192, 195 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 2d ed. 1861) [hereinafter ELLIOT]; see also, e.g., THE FEDERALIST NO. 43, *supra* note 77, at 271 (James Madison) (arguing that the Guarantee Clause gives “the superintending government . . . authority to defend the system against aristocratic or monarchical innovations” in the states). Both Iredell and Madison alluded to the danger that a monarchical government might be more inclined to jeopardize the peace and security of neighboring states than would a republic. See Iredell, *supra*, at 195 (statement of James Iredell) (“Every one must be convinced of the mischief that would ensue, if any state had a right to change its government to a monarchy. If a monarchy was established in any one state, it would endeavor to subvert the freedom of the others, and would, probably, by degrees succeed in it.”); THE FEDERALIST NO. 43, *supra* note 77, at 271 (alluding to Montesquieu’s warning that ancient

Other commentators, echoing sentiments that had been expressed by members of the Philadelphia Convention, denied that the Clause would place any meaningful restrictions on voluntary changes a state might make to its own government. Alexander Hamilton, writing in *The Federalist No. 21*, acknowledged the existence of concerns that “a guaranty in the federal government”<sup>304</sup> might involve “an officious interference in the domestic concerns of the [states].”<sup>305</sup> But Hamilton contended that such concerns could “only flow from a misapprehension of the nature of the provision itself.”<sup>306</sup> “The guaranty,” Hamilton asserted, “could only operate against changes to be effected by violence” or “usurpations of rulers” and “could be no impediment to reforms of the State constitutions by a majority of the people in a legal and peaceable mode.”<sup>307</sup>

At least some of the seeming disagreement regarding the effect of the Guarantee Clause on voluntary changes in a state’s government may have been more apparent than real. Virtually all supporters of the Constitution who spoke publicly about the provision’s scope insisted that it would provide a ground for federal intervention only in situations involving the most extreme forms of deviation from republican principles — meaning the erection of a hereditary monarchy, despotism, or (perhaps) aristocracy within a state.<sup>308</sup> Both Iredell and Madison connected the provision to the putative warlike tendencies of monarchical

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Greece was “undone” by its confederation with Macedon and suggesting that “the disproportionate force, as well as the monarchical form of the new confederate, had its share of influence on the events”).

At least some who viewed the Guarantee Clause as a potential constraint on state experimentation with monarchical or aristocratic forms of government were opposed to such constraints on policy grounds. For example, William Symmes, an Antifederalist delegate to the Massachusetts ratifying convention, expressed concern that the guarantee provided for in Article IV would “meddle[] too much with the independence of the several States,” noting that “though it is improbable, that any State will choose to alter the form of its government; yet it ought to be the privilege [sic] of every State to do as it will in this affair.” Letter from William Symmes to Capt. Peter Osgood, Jr. (Nov. 15, 1787), in 4 THE COMPLETE ANTI-FEDERALIST 54, 61–62 (Herbert J. Storing ed., 1981) [hereinafter STORING]. Symmes further worried about the powers that might be claimed on behalf of the general government under the provision, stating that it would be impossible to know “what Congress may see in our present constitution, or any future amendments” that was “not strictly republican in their opinions.” *Id.* at 61.

<sup>304</sup> THE FEDERALIST NO. 21, *supra* note 77, at 135–36 (Alexander Hamilton).

<sup>305</sup> *Id.* at 136.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> See, e.g., Iredell, *supra* note 303, at 195 (asserting that the meaning of the guarantee was “that each [state] should be a republican government, and that no state should have a right to establish an aristocracy or monarchy”); THE FEDERALIST NO. 43, *supra* note 77, at 271 (James Madison) (arguing that the Guarantee Clause gives “the superintending government . . . authority to defend the system against aristocratic or monarchical innovations” in the states); *Plain Truth: Reply to an Officer of the Late Continental Army*, INDEP. GAZETTEER, Nov. 10, 1787, reprinted in 2 DHRC, *supra* note 120, at 216, 218–19 (“The United States shall guarantee to every state, a republican form of government.’ That is, they shall guarantee it against monarchical or aristocratical encroachments. Congress can go no further, for the states would justly think themselves insulted, if

governments in particular, contending that the erection of a monarchy in one state would threaten the freedom and independence of the others.<sup>309</sup> But given the deep public antipathy to monarchical government among the populace at the time,<sup>310</sup> the most plausible mechanism through which such an extreme revision in a state's government could be achieved was through violent overthrow of legitimate state authorities or, perhaps, through usurpation by the state's rulers.<sup>311</sup>

Many articulated defenses of the provision relied on the sheer implausibility of any state voluntarily surrendering itself to monarchy or aristocracy, combined with reassurance that any other changes a state might make to its existing government would not be a proper subject for federal interference. In *The Federalist No. 43*, for example, Madison assured his readers that the Clause would be, at worst, "a harmless superfluity" that might nonetheless be of some value in guarding against "experiments" that "may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers."<sup>312</sup> In response to concerns that the Clause might be invoked as a "pretext for alterations in the State governments, without the concurrence of the States themselves,"<sup>313</sup> Madison responded that:

[The guarantee] supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican

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they should presume to interfere in other alterations which may be individually thought more consistent with the good of the people." (quoting U.S. CONST. art. IV, § 4).

<sup>309</sup> See *supra* note 303 (quoting statements by Iredell and Madison).

<sup>310</sup> The anxieties surrounding Shays's Rebellion, combined with dissatisfaction with the deficiencies of the state and Confederate governments, led a few prominent New England citizens to openly advocate a return to monarchy. See, e.g., KLARMAN, *supra* note 267, at 99–101 (collecting sources). However, other statements made around the time of the Founding indicate that monarchical government remained deeply unpopular among the vast majority of the citizenry. See, e.g., James Madison, Notes on the Constitutional Convention (June 2, 1787), in 1 FARRAND'S RECORDS, *supra* note 118, at 76, 87 (statement of John Dickinson) (stating that even "if it were desirable [sic]," a "limited monarchy" would be "out of the question" because "[t]he spirit of the times — the state of our affairs, forbade the experiment"); *id.* at 88 (statement of Edmund Randolph) ("[T]he permanent temper of the people was adverse to the very semblance of Monarchy"); Letter from George Washington to James Madison (Mar. 31, 1787), in 5 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 114, 115 (W.W. Abbott ed., 1997) ("I also am clear, that even admitting the utility; nay necessity of the [monarchical] form — yet that the period is not arrived for adopting the change without shaking the Peace of this Country to its foundation.").

<sup>311</sup> See THE FEDERALIST NO. 21, *supra* note 77, at 136 (Alexander Hamilton) (contending that the "guaranty by the national authority" would only "operate against changes to be effected by violence" or "against the usurpations of rulers").

<sup>312</sup> THE FEDERALIST NO. 43, *supra* note 77, at 271 (James Madison).

<sup>313</sup> *Id.*

for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.<sup>314</sup>

In his speech to the North Carolina ratifying convention, Iredell similarly asserted that the Clause would only limit the right of a state “to establish an aristocracy or monarchy,” but that, “consistently with this restriction, the states may make what change in their own governments they think proper.”<sup>315</sup>

Far from viewing the Guarantee Clause as a limitation of the powers and prerogatives of the states, many of the Constitution’s supporters who spoke publicly regarding the provision’s meaning identified it as a source of protection for such powers and prerogatives.<sup>316</sup> For example, an anonymous Federalist commentator writing under the name Uncus declared that the Framers of the proposed Constitution had been:

So decided . . . in not infringing upon the internal police of the states, that they ordain in art. 4, sect. 4, that Congress shall not only allow, but “shall guarantee to every state in the Union, a republican form of government,” and shall support them in the same, against either external or internal opposition.<sup>317</sup>

Jasper Yeates, speaking in the Pennsylvania ratifying convention, insisted that the Guarantee Clause should be sufficient “to assure us of the intention of the framers of this constitution to preserve the individual sovereignty and independence of the States inviolate.”<sup>318</sup> Many other

<sup>314</sup> *Id.* at 272.

<sup>315</sup> Iredell, *supra* note 303, at 195; *see also, e.g.*, Rev. Mr. Samuel Stillman, Address to the Massachusetts Convention (Feb. 6, 1787), in 2 ELLIOT, *supra* note 303, at 168, 173 (“[E]ach state shall choose such republican form of government as they please, and [C]ongress solemnly engage themselves to protect it from every kind of violence, whether of faction at home, or enemies abroad.”); *The State Soldier I*, VA. INDEP. CHRON., Jan. 16, 1788, reprinted in 8 DHRC, *supra* note 120, at 303, 306 (“And of what is the republican form of government which Congress is now to guarantee to each state to consist? Certainly of any thing each state shall think proper that does not take from Congress what this constitution absolutely claims. Even the very one we now have, or such parts of it as do not extend that far, may be that form of government which this new plan obliges Congress to guarantee.”).

Of course, the protection against *involuntary* usurpations of state governmental authority by antirepublican forces within a particular state would not fully respond to all concerns expressed in relation to the Guarantee Clause. For instance, the concern expressed by Iredell and Madison about the possible warlike tendencies of monarchical governments and the possible threat such governments might pose to the federal government and neighboring states would hold true regardless of whether a state chose to adopt monarchy voluntarily or had it thrust upon them by force. *See supra* note 303 (citing concerns of Iredell and Madison). But the mere fact that a particular interpretation of a provision might not reach every instance of the evil that some of its proponents would like to address does not necessarily prove that that interpretation is incorrect. *Cf.* Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 546–47 (1983) (observing that many enactments are imprecise and are underinclusive or overinclusive relative to their background objectives).

<sup>316</sup> *See* Merritt, *supra* note 20, at 31–34 (summarizing arguments).

<sup>317</sup> Uncus, MD. J., Nov. 9, 1787, reprinted in 14 DHRC, *supra* note 120, at 76, 79 (quoting U.S. CONST. art. IV, § 4).

<sup>318</sup> Jasper Yeates, Address at the Pennsylvania Convention (Nov. 30, 1787), in PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, at 295, 297 (John Bach McMaster & Frederick

supporters of the Constitution invoked the Guarantee Clause to respond to concerns that the state governments would be “annihilated” or “swallow[ed] up” by the federal government<sup>319</sup> as well as to concerns stemming from the omission of a federal bill of rights.<sup>320</sup>

Antifederalist critics of the proposed Constitution, for the most part, accepted this framing of the Guarantee Clause’s significance, viewing the provision primarily as a shield of state sovereignty rather than as a source of federal interference.<sup>321</sup> To the extent critics addressed the Guarantee Clause at all, their arguments tended to focus on the asserted insufficiency of the provision to secure state autonomy against federal encroachment.<sup>322</sup>

Modern scholars have recognized the prevalence of this “state autonomy” interpretation of the Guarantee Clause during the ratification debates.<sup>323</sup> But they lack a convincing account of how participants in those debates derived such a limitation on national power from the provision’s text. Professor Deborah Merritt — the leading modern expositor of the state autonomy interpretation — argues that the limit on federal interference inheres in the pledge of a “Republican Form of Government” because undue federal interference would inhibit citizens’

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D. Stone eds., Lancaster, Pa., Inquirer Printing & Publishing Co. 1888) [hereinafter PENNSYLVANIA AND THE CONSTITUTION].

<sup>319</sup> Stillman, *supra* note 315, at 173 (pointing to the Guarantee Clause as “an admirable security of the people at large, as well as of the several governments of the states” and as demonstrating that “the general government cannot swallow up the local governments, as some gentlemen have suggested”); *see also, e.g.*, General Eleazer Brooks, Statement in the Massachusetts Convention (Jan. 23, 1788), in 2 ELLIOT, *supra* note 303, at 115, 115–16 (responding to concerns that the Constitution would “produce a dissolution of the state governments, or a consolidation of the whole,” *id.* at 115, by observing, *inter alia*, that “as the United States guarantee to *each state* a republican form of government, the state governments were as effectually secured, as though this [C]onstitution should never be in force,” *id.* at 116); A Jerseyman, *To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1787, *reprinted in* 3 DHRC, *supra* note 120, at 146, 149 (pointing to the Guarantee Clause as a response to asserted concerns regarding “the danger of our state governments being annihilated”).

<sup>320</sup> *See, e.g.*, Yeates, *supra* note 318, at 297 (asserting that the “constitutional security” afforded by the Guarantee Clause would be “far superior to the fancied advantages of a bill of rights”); *The State Soldier I*, *supra* note 315, at 306 (asserting that the Guarantee Clause “diminished” the objection “respecting a bill of rights, and the liberty of the press” by providing additional security to state constitutions).

<sup>321</sup> *See* Merritt, *supra* note 20, at 34 (“Even opponents to the Constitution beheld the guarantee clause as an attempt to shield state sovereignty.”).

<sup>322</sup> *See, e.g.*, Address by Sydney, N.Y. J., June 13–14, 1788, *reprinted in* 6 STORING, *supra* note 303, at 107, 116 (“[W]e may be allowed the form and not the substance [of republican government], and that it was so intended will appear from the changing the word *constitution* to the word *form* and the omission of the words, *and its existing laws*.”); George Clinton, Speech at New York State Convention (July 11, 1788), *reprinted in* 6 STORING, *supra* note 303, at 181, 185 (contending that the constitutional guarantee was “too feeble a security to be relied on,” because “[t]he form [of republican government] may exist without the substance”).

<sup>323</sup> *See, e.g.*, Amar, *supra* note 9, at 754; Merritt, *supra* note 20, at 24–25; Smith, *supra* note 20, at 1951.

popular control over their state governments.<sup>324</sup> But such an understanding is hardly an obvious reading of the text, particularly if one views the provision as principally concerned with limiting the states' prerogative to alter their respective forms of government.<sup>325</sup>

Even Merritt concedes that this understanding may not have been immediately obvious, but rather emerged gradually over the course of the ratification debates as "political leaders and commentators began to perceive a broader meaning in the" Clause.<sup>326</sup> But this explanation does not fully account for the evidence of understandings reflected in the ratification debates. The Antifederalists' acquiescence in the state autonomy interpretation of the Guarantee Clause is particularly difficult to fathom absent some strong background principle connecting the language of the provision to notions of state autonomy. As a group, the Antifederalists shared a skepticism of centralized federal authority that verged on the paranoid.<sup>327</sup> Given their well-known tendency to perceive the specter of tyranny in seemingly anodyne provisions of the proposed Constitution,<sup>328</sup> it seems passing strange that they would have overlooked a provision that — according to modern interpreters — would have empowered federal officials to sit in judgment on whether each state's government was sufficiently "Republican" in form and to coercively impose whatever corrective measures they saw fit.<sup>329</sup> The fact that so many did so suggests that the state autonomy interpretation of the Guarantee Clause may have been supported by something more than an imaginative new gloss on the phrase "Republican Form of Government."<sup>330</sup>

The parallel between the Guarantee Clause's language and the language of similarly worded guarantee provisions in international treaties may go some way toward explaining the ease with which the state autonomy interpretation was so readily embraced by participants on both sides of the ratification debate. Americans of the late eighteenth century

<sup>324</sup> Merritt, *supra* note 20, at 24–25.

<sup>325</sup> See, e.g., Robert F. Nagel, *Terminator* 2, 65 U. COLO. L. REV. 843, 844 (1994) (asserting that Merritt's interpretation of the Guarantee Clause requires "attribut[ing] to words rather special and somewhat strained meanings"); Rappaport, *supra* note 41, at 830 n.41 (contending that the Guarantee Clause cannot provide a basis for state immunities from federal interference because "the language and structure of the clause indicate that it was addressed primarily to anti-republican actions taken on the state level rather than by the federal government").

<sup>326</sup> Merritt, *supra* note 20, at 31.

<sup>327</sup> See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 333 (50th Anniversary ed. 2017) ("The fear of a conspiracy against the fragile structure of freedom . . . pervaded the thought of the antifederalists.")

<sup>328</sup> See, e.g., RAKOVE, *supra* note 43, at 132–33 (noting "[t]he ease with which Anti-Federalists uncovered seeds of tyranny nestled in obscure provisions").

<sup>329</sup> See sources cited *supra* notes 19–24 (collecting modern sources proposing various applications of the Guarantee Clause to state governments).

<sup>330</sup> Cf. Nagel, *supra* note 325, at 844 (noting that in Merritt's account, "the word 'republican' is by degrees replaced by the phrase 'state sovereignty,' which connotes not only popular accountability but also governmental dignity and status").

were familiar with the significance of “guarantee” language in international treaty documents.<sup>331</sup> The guarantee of U.S. sovereignty France had pledged in its 1778 Treaty with the United States provided a particularly well-known example of such a commitment.<sup>332</sup> And similar language had been proposed or included in treaties negotiated with Native American tribes.<sup>333</sup> As discussed above, comparable wording had been mooted throughout the Confederation Period as a pledge of national protection for state territorial integrity.<sup>334</sup> As such, it would hardly be surprising if many participants in the ratification debates assumed that the national “guarantee” of republican government pledged by Article IV would be interpreted in accordance with background principles of international law applicable to the well-known treaty convention of guarantee — including, most significantly, the principle that a pledge of guarantee existed solely for the benefit of the party to whom the guarantee was pledged.<sup>335</sup>

At least a few statements during the ratification debates suggest that this international law understanding may have informed public understandings of the Guarantee Clause. For example, during the Virginia ratifying convention, delegate George Nicholas responded to assertions that the Constitution might inhibit states from suppressing insurrections or slave uprisings occurring within their own borders by insisting that the “fourth article” of Article IV had been “introduced wholly for the particular aid of the states,” and would “exclude the unnecessary

<sup>331</sup> See, e.g., CATO, OBSERVATIONS ON MR. JAY’S TREATY NO. 1, *reprinted in* 2 THE AMERICAN REMEMBRANCER; OR, AN IMPARTIAL COLLECTION OF ESSAYS, RESOLVES, SPEECHES, &C. RELATIVE, OR HAVING AFFINITY, TO THE TREATY WITH GREAT BRITAIN 114, 117 (Mathew Carey ed., Philadelphia, Henry Tuckniss 1795) [hereinafter AMERICAN REMEMBRANCER] (“[I]t is the practice of negociators [sic], where the character of the nation, or other circumstances, give reason to suspect a violation of their engagements, *not to rely* upon a naked promise, but to expect some guarantee or surety for the performance . . . .”); SAMUEL WHARTON, PLAIN FACTS 126 n.\* (Philadelphia, R. Aitken 1781) (“The King of *England* never esteemed himself in any other light than as an *ally*, bound to protect the *soil*, for the *Six Nations*; and that when they submitted their country to *his protection*, — it gave him no title to it; as he well knew, that *no engagement by one state, to guaranty another state in its possessions*, could, by any mode of construction, be made to imply a right over such possessions.” (final emphasis added)).

<sup>332</sup> See Treaty of Alliance Between the United States of America and His Most Christian Majesty, *supra* note 72, art. XI.

<sup>333</sup> See, e.g., Articles of Agreement and Confederation, U.S.-Delaware Nation, art. VI, Sept. 17, 1778, 7 Stat. 13 (“[T]he United States *do engage to guarantee* to the aforesaid nation of Delawares, and their heirs, all their teritoreal [sic] rights in the fullest and most ample manner, as it hath been bounded by former treaties, as long as they the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into.” (emphasis added)).

<sup>334</sup> See *supra* section II.C.1.b, pp. 639–43 (discussing use of “guarantee” language in Confederation Period).

<sup>335</sup> See *supra* notes 92–97 and accompanying text (discussing statements by Vattel and others to this effect).

interference of [C]ongress, in business of this sort.”<sup>336</sup> In the Massachusetts ratifying convention, General Eleazer Brooks referenced the guarantee of republican government in response to an assertion that the Constitution would lead to a consolidation of the States, insisting that a “guaranty does not imply a gift or grant” of something new but rather “a warrant and defence” of something that already exists.<sup>337</sup>

A more explicit connection between Article IV’s fourth section and the international treaty context was drawn by James Madison in *The Federalist No. 43*, in which Madison analogized the provision to a similar commitment found in the complex set of treaties that bound together the Swiss cantons.<sup>338</sup> Though deeply critical of the governmental structure of the Swiss Confederacy,<sup>339</sup> Madison praised the cantons’ stipulation for one another’s mutual defense, observing that such “mutual aid” had been “frequently claimed and afforded . . . as well by the most democratic, as the other cantons.”<sup>340</sup> Madison had earlier noted this particular aspect of the Swiss Confederacy in his famous “Notes on Ancient and Modern Confederacies,”<sup>341</sup> a private memorandum prepared sometime in the summer of 1786 in which Madison “painstakingly recorded the primary attributes and ‘vices’ of other” federated governments.<sup>342</sup>

<sup>336</sup> George Nicholas, Address to the Virginia Convention (June 14, 1788), in 3 ELLIOT, *supra* note 303, at 395, 396; cf. VATEL, *supra* note 39, bk. II, ch. XVI, § 236 (observing that the guaranteeing power acquires no new rights under a treaty because “[t]he treaty was not made for him”).

<sup>337</sup> Theophilus Parsons, Notes of Convention Debates, 24 January, P.M. (Jan. 24, 1788), in 6 DHRC, *supra* note 120, at 1341, 1343 (statement of General Eleazar Brooks) (emphasis omitted); see also, e.g., THE FEDERALIST NO. 43, *supra* note 77, at 271–72 (James Madison) (observing that the commitment “extends no further than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed”); cf. WHEATON, *supra* note 36, pt. III, ch. II, § 10, at 193 (observing that international treaty guarantees “apply only to rights and possessions existing at the time they are stipulated”).

<sup>338</sup> THE FEDERALIST NO. 43, *supra* note 77, at 271–72 (James Madison). The Swiss Confederacy grew out of a series of overlapping and mutually reinforcing treaties between its component cantons that stretched back to the fourteenth century. See WILLIAM COXE, Letter 12 from William Coxe to William Melmoth, in 1 TRAVELS IN SWITZERLAND IN A SERIES OF LETTERS TO WILLIAM MELMOTH, ESQ. FROM WILLIAM COXE, M.A. F.R.S. F.A.S., at 123, 123–25 (London, T. Cadell 1789) (tracing origins to a 1308 treaty and describing subsequent treaties that enlarged the confederacy and modified its terms).

<sup>339</sup> THE FEDERALIST NO. 43, *supra* note 77, at 272 (James Madison) (asserting that the cantons “properly speaking, [we]re not under one government”); see also THE FEDERALIST NO. 19, *supra* note 77, at 128 (James Madison with Alexander Hamilton) (“The connection among the Swiss cantons scarcely amounts to a confederacy . . . . They have no common treasury; no common troops even in war; no common coin; no common judicatory; nor any other common mark of sovereignty.” (emphasis omitted)).

<sup>340</sup> THE FEDERALIST NO. 43, *supra* note 77, at 272 (James Madison). Madison closed this passage by referring to a “recent and well-known event among ourselves [that] has warned us to be prepared for emergencies of a like nature,” *id.* — a thinly veiled reference to Shays’s Rebellion, WIECEK, *supra* note 13, at 27–33.

<sup>341</sup> James Madison, Of Ancient & Modern Confederacies, in 2 THE WRITINGS OF JAMES MADISON 369, 369 (Gaillard Hunt ed., 1901) [hereinafter Madison, Notes on Confederacies].

<sup>342</sup> Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 626 (1999).

After noting the absence of traditional features characteristic of a true national government, such as a common army, treasury, currency, or judiciary, Madison characterized the confederacy as consisting of "a perpetual defensive engagement ag<sup>st</sup>. external attacks and internal troubles" and noted that an "axiom" of the confederacy's public law was that "there are no particular or common possessions of the Cantons for the defence of which the others are not bound as Guarantees or auxillaries of Guarantees."<sup>343</sup> Madison further observed that it was "an essential Object of the league to preserve interior tranquillity by the reciprocal protection of the form of Governm<sup>t</sup> established in each Canton"<sup>344</sup> and that history had afforded "frequent instances of mutual succors for this purpose."<sup>345</sup>

The parallel between the Swiss cantons' mutual pledge to protect the "form of Government" each had chosen and the national commitment to "guarantee" to each State its chosen "Republican Form of Government" in Article IV suggests that Madison may have had the Swiss model in mind in proposing an early version of the Guarantee Clause's language at the federal Convention in Philadelphia.<sup>346</sup> At the same time, the stipulation that the governments so guaranteed be "Republican" in form went some way toward addressing what Madison perceived to be one of the principal "vices" of the Swiss confederacy — namely, the existence of "different principles of Governm[ent] in diff[erent] Cantons."<sup>347</sup>

Critics of the Constitution offered their own international analogue, which they contended demonstrated the inefficacy of the proposed national guarantee — the 1772 partition of Poland by Prussia, Austria, and Russia.<sup>348</sup> Though Poland was the beneficiary of a "long series of treaties, by which the integrity of [its] territory . . . had been guarantied by the very powers who now sought to despoil her," these treaties had done

<sup>343</sup> Madison, Notes on Confederacies, *supra* note 341, at 377.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 378.

<sup>346</sup> See *supra* notes 268–269 and accompanying text (noting Madison's role in proposing the language that would eventually evolve into the Guarantee Clause). The pledge of mutual support for the respective cantons' forms of government was set forth in the 1501 Convention of Stantz, which provided, among other things, that "all the Cantons oblige themselves to succour one another, in the support of the form of government then established in each of them." ABRAHAM STANYAN, AN ACCOUNT OF SWITZERLAND 116 (Edinburgh, Hamilton, Balfour & Neill 1716) (quoting the Convention of Stantz).

<sup>347</sup> Madison, Notes on Confederacies, *supra* note 341, at 378. Writing a few years after the Constitution's ratification, Chancellor James Kent echoed Madison by describing the "reciprocal guarantee of their respective forms of government, and of assistance in cases of domestic violence," as being "the only things desirable in the Swiss confederacy." JAMES KENT, DISSERTATIONS: BEING THE PRELIMINARY PART OF A COURSE OF LAW LECTURES 43 (New York, George Forman 1795).

<sup>348</sup> For background on the 1772 partition, see JERZY LUKOWSKI, THE PARTITIONS OF POLAND 1772, 1793, 1795, at 52–77 (1999).

nothing to prevent Poland's dismemberment.<sup>349</sup> The partitioning powers also imposed upon Poland a set of constitutional reforms designed to ensure its "pacification."<sup>350</sup> One of these imposed reforms commanded — in language that closely paralleled the language of the Article IV Guarantee Clause — that the Polish government should "be for ever free, independent, and of a republican form."<sup>351</sup>

Antifederalists pointed to the inefficacy of the treaty guarantees to preserve Polish independence as evidence that the promised "Guarantee" in the federal Constitution would be similarly valueless. For example, an anonymous pamphleteer writing in the *Philadelphia Freeman's Journal* under the pseudonym "A Farmer" observed that, though Poland had been "guaranteed," by "a league with the neighboring powers" — "in much the same words that are expressed in the new system [that is, the proposed Constitution]" — to be "forever independent and of a republican form," the people of that kingdom had been "reduced . . . by misery to a state of brutes."<sup>352</sup> Another author writing as "A Federal Republican" cited the example of Poland as evidence that the proposed Constitution would "tend to reduce the dignity and importance of the states" and that "the republican form . . . decreed to each state" by Article IV would "indeed be only *form*" rather than substance.<sup>353</sup>

On the whole, the ratification debates furnish significant evidence that is consistent with the international law interpretation of the Guarantee Clause. Both supporters of the proposed Constitution and its opponents tended to view the provision as serving two principal functions — securing the states against having antirepublican changes to their governments thrust upon them and serving as a safeguard of state autonomy and independence.<sup>354</sup> Treaty guarantees performed a similar function, empowering a guaranteed state to call upon the assistance of

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<sup>349</sup> WHEATON, *supra* note 103, at 273–74; *see also* STEPHEN JONES, THE HISTORY OF POLAND, FROM ITS ORIGIN AS A NATION TO THE COMMENCEMENT OF THE YEAR 1795, at 328 (London, Vernon & Hood 1795) ("Treaties upon treaties, and negotiations upon negotiations [sic], had guaranteed to Poland the possession of her territory . . .").

<sup>350</sup> JONES, *supra* note 349, at 345.

<sup>351</sup> *Id.* at 344.

<sup>352</sup> *The Fallacies of the Freeman Detected by a Farmer*, PHILA. FREEMAN'S J., Apr. 1788, reprinted in 3 STORING, *supra* note 303, at 181, 185.

<sup>353</sup> A REVIEW OF THE CONSTITUTION PROPOSED BY THE LATE CONVENTION, BY A FEDERAL REPUBLICAN (1787), reprinted in 3 STORING, *supra* note 303, at 65, 78; *see also* *Essays by a Farmer*, VII, MD. GAZETTE, Apr. 4, 1788, reprinted in 3 STORING, *supra* note 303, at 55, 58 ("It is true that each state is guaranteed a republican form of government [but in] . . . the treaty whereby the three arch despots of Russia, Germany, and Prussia, divided that poor distracted country, Poland — they solemnly guarantee (in express words) to the said Poland — a republican government forever.").

<sup>354</sup> *See supra* notes 301–322 and accompanying text (outlining arguments of Federalists and Antifederalists); *see also* Merritt, *supra* note 20, at 30–31 (noting that participants in the ratification debates argued that the provision would "protect[] the states not only from domestic rebellion or monarchy, but from unwanted federal intrusions into state sovereignty," *id.* at 31).

a foreign power while preserving its own sovereignty and autonomy.<sup>355</sup> And at least a few commentators drew an explicit parallel between the provision's language and similar commitments pledged in international treaty documents.<sup>356</sup> By contrast, there is very little evidence from the ratification debates suggesting that the Clause was intended to protect individual rights, as some modern commentators suggest.<sup>357</sup>

3. *Post-Ratification Evidence.* —

(a) *Early Commentaries on the Guarantee Clause.* — The Guarantee Clause was not a particularly prominent topic of discussion during the early years following ratification. Neither Justice James Wilson's 1791 *Lectures on Law* nor Chancellor James Kent's 1826 *Commentaries on American Law* contains any substantive discussion of the provision.<sup>358</sup> Justice Joseph Story's highly influential *Commentaries on the Constitution of the United States*, published in 1833, offered little original discussion of the provision but did set forth a lengthy recapitulation of what Hamilton and Madison had written about it in *The Federalist*.<sup>359</sup> St. George Tucker's annotated 1803 version of *Blackstone's Commentaries on the Laws of England* likewise drew upon Madison's explanation of the provision in *The Federalist*, concluding that each State had an interest in preserving republican government in the others because "[t]he spirit of monarchy is war, and the enlargement of dominion."<sup>360</sup>

A more intriguing invocation of the Guarantee Clause appears in a separate portion of Tucker's treatise addressing the scope of federal authority under the Treaty Clause of Article II.<sup>361</sup> Though a strong proponent of states' rights and a skeptic of broad claims to federal authority in other contexts,<sup>362</sup> Tucker took a capacious view of the federal government's power to enter into treaties with other nations. Indeed,

<sup>355</sup> See *supra* section I.B, pp. 615–20 (discussing eighteenth-century international law concerning treaty guarantees).

<sup>356</sup> See *supra* notes 338–353 and accompanying text (discussing commentary connecting the Guarantee Clause to Swiss and Polish analogues).

<sup>357</sup> See sources cited *supra* note 46.

<sup>358</sup> See generally JAMES KENT, COMMENTARIES ON AMERICAN LAW (New York, O. Halsted 1826); JAMES WILSON, *Lectures on Law*, reprinted in 1 & 2 THE WORKS OF JAMES WILSON (Robert Green McCloskey ed., 1967). On the respective influences of Wilson's and Kent's treatises, see Kesavan & Paulsen, *supra* note 34, at 1176–77 n.285, 1177 n.288.

<sup>359</sup> See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 677–78, 679, (Boston, Hilliard, Gray & Co. 1833) (paraphrasing Hamilton's argument in *The Federalist* No. 21).

<sup>360</sup> 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 367 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter TUCKER].

<sup>361</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>362</sup> See Kurt T. Lash, "Tucker's Rule": St. George Tucker and the Limited Construction of Federal Power, 47 WM. & MARY L. REV. 1343, 1349–52 (2006) (discussing Tucker's preference for a narrow construction of federal power and preservation of state rights).

Tucker acknowledged only one possible limitation on the scope of that power — namely, Article IV’s guarantee of a republican form of government and the accompanying pledge of protection against invasion and domestic violence.<sup>363</sup> Tucker noted that these provisions could “be construed to impose such a restriction, in behalf of the several states, against the dismemberment of the federal republic,” thereby prohibiting the national government from ceding any portion of a state’s territory.<sup>364</sup>

At first glance, Tucker’s invocation of the Guarantee Clause as the principal textual limit on the scope of the constitutional treaty power seems somewhat curious. Why, for example, would the treaty power be limited by the Guarantee Clause but not by the constitutional prohibitions on *ex post facto* laws, bills of attainder, or any of the other specific limitations set forth in Article I, Section 9?<sup>365</sup> But Tucker was not alone in viewing the Guarantee Clause as the principal restriction on the treaty power’s scope.<sup>366</sup>

Once again, the international law significance of the term “guarantee” may shed some light on Tucker’s assumption that the provision may have had particular significance in regard to the federal treaty power. The eighteenth-century law of nations placed very few substantive limits on the subject matter of treaties.<sup>367</sup> But one important limit endorsed by Vattel and other commentators was that “[a] sovereign already bound by a treaty” could not “enter into others contrary to the first.”<sup>368</sup> According to Vattel, “[i]f it happens that a posterior treaty be found, in any particular point, to clash with one of more ancient date, the new treaty

<sup>363</sup> 1 TUCKER, *supra* note 360, at 333 (“In our constitution, there is no restriction as to the subjects of treaties, [except] perhaps the guarantee of a republican form of government, and of protection from invasion, contained in the fourth article . . .”).

<sup>364</sup> *Id.*

<sup>365</sup> U.S. CONST. art. I, § 9, cls. 2–3.

<sup>366</sup> *See, e.g.*, 13 ANNALS OF CONG. 70 (1803) (statement of Sen. Nicholas) (“I do not believe therefore that the President and Senate would cede a State or any part of a State, because our common defence was one of the great purposes for which the Government was formed, and because the Constitution guaranties to every State in the Union a Republican form . . .”); Robert Livingston, *Cato No. XIII*, reprinted in 1 AMERICAN REMEMBRANCER, *supra* note 331, at 244, 250 (“[W]here [a] treaty is made relative to objects not surrendered by them, the treaty that is binding upon them, must be constitutionally made, and consist with the powers yielded to the federal government; otherwise the president might barter away the independence of individual states, which makes a necessary part of the constitution of the United States, and which is expressly guaranteed.”). Unlike Tucker, some of these other commentators argued that the treaty power was also constrained by other provisions of the Constitution in addition to the Guarantee Clause. *See, e.g.*, Livingston, *supra*, at 247–50 (contending that the treaty power could not be used to interfere with the enumerated powers of Congress or the judicial branch).

<sup>367</sup> *See, e.g.*, VATTEL, *supra* note 39, at lviii–lix (“[I]t rests at the option of nations to make in their treaties whatever agreements they please, or to introduce whatever custom or practice they think proper.” *Id.* at lix.). Vattel argued that the power of entering into treaties should be limited by the law of nature, rendering treaties made for unjust or dishonest purposes or that would be pernicious to the nation void and of no obligation. *Id.* bk. II, ch. XII, §§ 160–161.

<sup>368</sup> *Id.* bk. II, ch. XII, § 165.

is null and void with respect to that point, inasmuch as it tends to dispose of a thing that is no longer in the power of him who appears to dispose of it."<sup>369</sup> If the Guarantee Clause were, in fact, viewed as a treaty-like commitment from the national government to the states in their sovereign capacities, the national government would thus lack the power to relieve itself of that commitment by entering into a treaty with a foreign state. And any subsequent treaty commitment purporting to do so would thus be without legal effect, just as Tucker suggested.

One of the most extensive early commentaries on the Guarantee Clause appeared in Philadelphia attorney William Rawle's 1825 treatise, *A View of the Constitution of the United States of America*.<sup>370</sup> Rawle pointed to the Guarantee Clause as an "emphatical" declaration of the nature of the Union that the Constitution had erected among the states.<sup>371</sup> According to Rawle:

The Union is an association of the people of republics; its preservation is calculated to depend on the preservation of those republics. The people of each pledge themselves to preserve that form of government in all. Thus each becomes responsible to the rest, that no other form of government shall prevail in it, and all are bound to preserve it in every one. But the mere compact, without the power to enforce it, would be of little value. Now this power can be no where so properly lodged, as in the Union itself. Hence, the term guarantee, indicates that the United States are authorized to oppose, and if possible, prevent every state in the Union from relinquishing the republican form of government, and as auxiliary means, they are expressly authorized and required to employ their force on the application of the constituted authorities of each state, "to repress domestic violence."<sup>372</sup>

Rawle acknowledged that "[i]n what manner this guarantee shall be effectuated is not explained, and it presents a question of considerable nicety and importance."<sup>373</sup> But he was emphatic that the provision did not inhibit a state from "expung[ing] the representative system" of government within its borders through peaceful means, even if doing so meant "incapacitat[ing] [itself] from concurring . . . in the choice of certain public officers of the United States."<sup>374</sup> Should "the majority of the people of a state deliberately and peaceably resolve to relinquish the republican form of government," Rawle believed that the consequence

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<sup>369</sup> *Id.*

<sup>370</sup> WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 288–95 (Philadelphia, H.C. Carey & I. Lea 1825).

<sup>371</sup> *Id.* at 288.

<sup>372</sup> *Id.* at 288–89.

<sup>373</sup> *Id.* at 291.

<sup>374</sup> *Id.* at 289.

should be that the national government would be relieved of its obligation of protection while the state would “cease to be [a] member[] of the Union.”<sup>375</sup>

Though Rawle’s views regarding the permissibility of state secession were later repudiated,<sup>376</sup> his view that the Guarantee Clause would not inhibit the people of a state from “deliberately and peaceably” changing their form of government was in keeping with the views expressed by Hamilton and others at the time of enactment.<sup>377</sup> And his view that the voluntary adoption of a nonrepublican government by a state would relieve the national government of its obligation to extend protection was consistent with the background legal rules for interpreting guarantee provisions in international treaties. As Vattel explained, making any changes to the terms of an underlying treaty “without the consent and concurrence of the” guaranteeing state would relieve the latter state of its obligation because “the treaty thus changed is no longer that which he guaranteed.”<sup>378</sup>

Although the statements of Rawle and Tucker regarding the Guarantee Clause are broadly consistent with interpreting that provision in accord with background principles of international law, neither author explicitly drew a connection between the provision and international treaty guarantees. But there was another group of commentators who did explicitly recognize such a connection — namely, mid-nineteenth-century commenters on the law of nations.

For example, Henry Wheaton’s treatise, published in 1836, observed that the right of every state to “freely exercise all its sovereign rights in any manner not inconsistent with the equal rights of other states,”<sup>379</sup> could be qualified by “positive compact[s] . . . , such as treaties of mediation and guarantee,” which could grant another state a limited right to intervene in that state’s internal affairs.<sup>380</sup> To illustrate this principle, Wheaton referred to several examples of guarantee provisions in international treaties, including the treaties establishing the Peace of Westphalia in 1648 and the pledge of mutual defense in the treaties that

<sup>375</sup> *Id.* at 292.

<sup>376</sup> *See, e.g.,* *Texas v. White*, 74 U.S. (7 Wall.) 700, 726 (1869) (describing the “union between” the States as “complete, . . . perpetual, and . . . indissoluble”).

<sup>377</sup> *See supra* notes 304–307 and accompanying text (discussing Hamilton’s remarks regarding the Guarantee Clause); *see also supra* notes 279–280 and accompanying text (discussing similar remarks by others during the Philadelphia Convention).

<sup>378</sup> VATTEL, *supra* note 39, bk. II, ch. XVI, § 236; *see also, e.g.,* MARTENS, *supra* note 73, at 338 (“A guarantee has no right to oppose the alterations that the contracting parties may afterwards make in the treaty by mutual consent; but then, he is not obliged to guaranty the treaty when so altered.”).

<sup>379</sup> WHEATON, *supra* note 36, pt. II, ch. II, § 1, at 131.

<sup>380</sup> *Id.* § 2, at 132.

established the Swiss Confederacy.<sup>381</sup> The final example Wheaton mentioned in this regard was the Guarantee Clause in Article IV of the United States Constitution — an example Wheaton cited without any suggestion that the obligations growing out of this provision were different in nature or kind than the international commitments he had cited in his earlier pages.<sup>382</sup>

English jurist Robert Phillimore similarly identified the Article IV Guarantee Clause as an example of a provision that constituted an exception to the general rule that a foreign state had no right to intervene in the internal affairs of another state.<sup>383</sup> But unlike Wheaton, Phillimore — who took a deeply skeptical view of foreign interventions in general<sup>384</sup> — was somewhat more circumspect in describing the lessons that could be drawn from the American example, observing that because Article IV provided for “a guarantee from *within*” rather than “a guarantee from *without*,” the significance of the promised guarantee raised “a question rather of Public than International Law.”<sup>385</sup>

American lawyer Henry Halleck likewise analogized the Guarantee Clause to international treaty guarantees but, like Phillimore, was careful to distinguish such agreements between “a sovereign state” and “its component parts” from international commitments between two sovereign states of equal status.<sup>386</sup> This caveat was particularly significant for Halleck because he, unlike Phillimore, denied that a state could, by treaty, authorize another state to interfere with its purely internal affairs where such interference would not otherwise be authorized by international law.<sup>387</sup> But Halleck was clear that “[t]here can be no doubt that a sovereign state may guarantee a particular form of government to one of its component parts, as . . . the United States of America guarantees a *Republican* form to each state of the federal union.”<sup>388</sup>

<sup>381</sup> *Id.* at 132–33.

<sup>382</sup> *Id.* § 3, at 134.

<sup>383</sup> 1 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 319 (Philadelphia, T. & J.W. Johnson 1855).

<sup>384</sup> See 2 PHILLIMORE, *supra* note 383, at 65 (observing that “an engagement which binds a foreign power to take part in the civil quarrels of an Independent State, appears to be in theory not consistent with the perfect and uncontrolled freedom which is of the essence of such a State” while acknowledging that historical practice had established the permissibility of such guarantee agreements).

<sup>385</sup> 1 PHILLIMORE, *supra* note 383, at 319.

<sup>386</sup> 1 H.W. HALLECK, INTERNATIONAL LAW; OR, RULES REGULATING THE INTER-COURSE OF STATES IN PEACE AND WAR 86 (New York, D. Van Nostrand 1861).

<sup>387</sup> See *id.* (“If the interference is in itself unlawful, can any previously existing stipulation make it lawful? We think not; for the reason that a contract against public morals has no binding force . . . .”); cf. 2 PHILLIMORE, *supra* note 383, at 65 (“[I]t seems impossible to deny, that such a Right of Intervention . . . may be conceded by one nation to another, without entailing the loss of legal personality in the nation which concedes it . . . .”).

<sup>388</sup> HALLECK, *supra* note 386, at 86.

(b) *Early Jurisprudence Under the Guarantee Clause.* — The first clear reference to the Guarantee Clause in a Supreme Court opinion appeared in Justice William Johnson’s 1816 concurring opinion in *Martin v. Hunter’s Lessee*.<sup>389</sup> *Martin* arose out of a decision by Virginia’s highest state court holding that the Supreme Court’s appellate jurisdiction did not extend to state court judgments.<sup>390</sup> By rejecting the Virginia court’s claim, Justice Joseph Story’s opinion for the Court established one of the most significant early precedents defining the relationship between state and federal authority.<sup>391</sup> In defending the primacy of federal authority, Justice Story insisted that “[t]he constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by ‘the people of the United States,’”<sup>392</sup> and that “it was competent to the people to invest the general government with all the powers which they might deem proper and necessary.”<sup>393</sup>

Although Justice Johnson agreed with Justice Story that the Court possessed jurisdiction over state court appeals, he took issue with the attempt to minimize the states’ role in the federal compact.<sup>394</sup> He pointed to the Guarantee Clause specifically as the principal illustration that the sovereign states, as well as the “people,” were parties to the compact:

To me the constitution appears, in every line of it, to be a contract, which, in legal language, may be denominated tripartite. The parties are the people, the states, and the United States. . . . That the states are recognised as parties to it is evident from various passages, and particularly that in which the United States guaranty to each state a republican form of government.<sup>395</sup>

Justice Johnson’s invocation of the Guarantee Clause as an illustration of the states’ role in the “contract” formed by the Constitution is in keeping with the international law understanding of the provision.

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<sup>389</sup> See 14 U.S. (1 Wheat.) 304, 373 (1816) (Johnson, J., concurring).

<sup>390</sup> *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 6–7 (1815) (refusing to follow the mandate resulting from the Supreme Court’s decision in *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603 (1813)).

<sup>391</sup> See H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 675 (1993) (“*Martin*’s holding that the Supreme Court may constitutionally review state court holdings on federal law matters is so foundational an element of the American legal system that it is difficult for us to take rejection of it seriously.”).

<sup>392</sup> *Martin*, 14 U.S. (1 Wheat.) at 324 (majority opinion) (quoting U.S. CONST. pmbl.).

<sup>393</sup> *Id.* at 324–25.

<sup>394</sup> *Id.* at 373 (Johnson, J., concurring) (“It is returning in a circle to contend, that it professes to be the exclusive act of the people, for what have the people done but to form this compact?”). Justice Johnson agreed with the majority on jurisdiction, *id.* at 379–81, but he contended that the Court could bind only the parties to the case and could not directly compel the state courts to comply with its decisions, *see id.* at 366–67 (concluding that the Virginia court would have been within its rights to treat the Supreme Court mandate as optional).

<sup>395</sup> *Id.* at 373.

After all, treaties themselves were essentially contracts between different sovereigns.<sup>396</sup> His identification of the Clause as a protection of state autonomy also echoed the numerous similar invocations of the provision during the ratification debates.<sup>397</sup>

A similar interpretation of the Guarantee Clause as a protection of state sovereignty is reflected in an 1835 opinion of Tennessee's highest court rejecting federal authority to exclude state sovereignty over Indian tribes situated within state boundaries.<sup>398</sup> The opinion's author — future Supreme Court Justice John Catron — declared that if federal treaties with Indian tribes were construed to “authorize[] congress to legislate, excluding the jurisdiction of the States from the Indian territory, then the treaty is a constitution as between the Cherokee nation and the federal government, to which, the States of the Union are no parties.”<sup>399</sup> Under this interpretation, “the treaty[,] and acts of congress grounded on its authority,” would be “superior to[,] and destructive of[,] the constitution, so far as this guaranties to every State a republican form of government, and sovereignty to the whole extent of its limits.”<sup>400</sup> This view of the Guarantee Clause as a protection of state sovereignty and a limit on the federal treaty power echoed the view expressed by St. George Tucker more than three decades earlier.<sup>401</sup>

In 1834, South Carolina's highest court addressed a constitutional challenge to a state law requiring all officers in the state militia to swear an oath of allegiance to South Carolina without any corresponding pledge of loyalty to the United States.<sup>402</sup> The plaintiff challenged the law as a violation of both the South Carolina Constitution and various provisions in the federal Constitution, including the Guarantee Clause.<sup>403</sup> Arguing on behalf of the State, Attorney General Robert Smith<sup>404</sup> rejected the plaintiff's characterization of the Guarantee Clause's significance, insisting that the provision was “intended to confer a *privilege*, and not to put a *restriction* upon the separate States.”<sup>405</sup>

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<sup>396</sup> See VATTEL, *supra* note 39, bk. II, ch. XII, § 152 (“A treaty, in Latin *foedus*, is a compact made with a view to the public welfare by the superior power . . . .”); *id.* § 154 (“Public treaties can only be made . . . by sovereigns who contract in the name of the state.”).

<sup>397</sup> See *supra* notes 315–320 and accompanying text (discussing statements in ratification debates linking Guarantee Clause to state autonomy).

<sup>398</sup> *State v. Foreman*, 16 Tenn. (8 Yer.) 256 (1835).

<sup>399</sup> *Id.* at 337.

<sup>400</sup> *Id.*

<sup>401</sup> See *supra* notes 361–366 and accompanying text (discussing Tucker's treatise).

<sup>402</sup> *State ex rel. M'Cready v. Hunt*, 20 S.C.L. (2 Hill) 1, 3–4 (S.C. 1834).

<sup>403</sup> See *id.* at 179 (argument of counsel) (contending that the states cannot be considered fully sovereign because, among other things, Article IV deprives them of their right to “establish any other than a republican form of government”).

<sup>404</sup> See *id.* at 60 (argument of counsel).

<sup>405</sup> *Id.* at 104.

Smith placed particular emphasis on the significance of the term “guarantee.” “A guaranty,” according to Smith, “is an *obligation* upon the party guaranteeing, by which a right or *privilege* is conferred upon the party to whom the guaranty is made.”<sup>406</sup> By virtue of the Guarantee Clause, each of the states “obligated themselves to secure” a republican form of government “to every State which may require it.”<sup>407</sup> But Smith argued that the provision did not give other states or the national government “a right to enforce such a form of government upon [a state]” because to do so would be to “convert[] a *privilege* into an *obligation*, plainly against the import of the clause.”<sup>408</sup>

Two of the three justices concluded that the statute was unconstitutional on state law grounds;<sup>409</sup> the third — Justice Harper — considered and rejected each of the plaintiff’s constitutional arguments, including the argument grounded in the Guarantee Clause.<sup>410</sup> Justice Harper rejected the view that the Guarantee Clause “restrict[ed] . . . the power of the people of a State to model and control their government at their own pleasure.”<sup>411</sup> Rather, Justice Harper believed that the provision would apply only if a nonrepublican government were “imposed on” a state by “external force,” in which case “the arms of the Union” would “be employed to repel that force.”<sup>412</sup> In support of this interpretation, Justice Harper drew a direct parallel between the Guarantee Clause of Article IV and similarly worded guarantee provisions in international treaties: “Nearly all the powers of Europe, by the compact called the Pragmatic Sanction, guaranteed the succession of Maria Theresa. So England and France guaranteed the Spanish succession. Yet Spain and the German States were not less sovereign on this account. The guarantee was to be made effectual by arms.”<sup>413</sup> Justice Harper thus clearly viewed the “guarantee” promised by Article IV as equivalent in substance to the similarly worded pledges in international treaties and used the latter as a guide to understanding the former.

By far the most significant antebellum judicial decision addressing the meaning of the Guarantee Clause was Chief Justice Taney’s 1849

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<sup>406</sup> *Id.* at 104–05.

<sup>407</sup> *Id.* at 105.

<sup>408</sup> *Id.*

<sup>409</sup> *See id.* at 225–26 (opinion of O’Neill, J.) (“[T]he people, and not the legislature, have the right to prescribe the duty of the officer . . . . They did prescribe it in the [state constitution], and the act of the legislature is unconstitutional and void.”); *id.* at 248 (opinion of Johnson, J.) (concluding that the statute violated the state constitution but that “if the people should think fit so to amend the [state constitution] as to authorize the administration of an oath of allegiance in the form prescribed . . . there is nothing in the Constitution of the United States opposed to it”).

<sup>410</sup> *Id.* at 248–81 (opinion of Harper, J.).

<sup>411</sup> *Id.* at 264.

<sup>412</sup> *Id.* at 265.

<sup>413</sup> *Id.*

decision for the Supreme Court in *Luther v. Borden*.<sup>414</sup> *Luther* involved a civil trespass action brought against an officer in Rhode Island's militia who had participated in the suppression of the "Dorr Rebellion." In 1841, after having been thwarted in repeated efforts to secure legislative reform of the state's restrictive suffrage laws, the Rhode Island Suffrage Party, led by Thomas Dorr, called its own constitutional convention designed to replace the 1663 colonial charter, which had served as the state's framework of government.<sup>415</sup> The resulting constitution was submitted to a popular referendum and overwhelmingly approved by the state's residents.<sup>416</sup> But the state's political leadership refused to acknowledge the constitution's legitimacy.<sup>417</sup> Elections held in early 1842 under the claimed authority of the 1841 constitution resulted in Dorr's election as governor; but the state's incumbent governor, Samuel King, refused to acknowledge the Dorr government's legitimacy.<sup>418</sup>

Following a poorly executed attempt by the Dorr faction to seize control of state institutions by force, the charter government moved to suppress the insurrection by declaring martial law and authorizing preemptory searches and mass arrests of individuals suspected of supporting the rebellion.<sup>419</sup> The victim of one such search and arrest, Martin Luther, sued militiaman Luther Borden, alleging that Borden had acted without legal authority notwithstanding the charter government's declaration of martial law.<sup>420</sup> Luther further contended that Borden's actions were unlawful because the charter government, under whose authority Borden had acted, had been supplanted as the state's legitimate government by the government elected under the 1841 constitution.<sup>421</sup>

Resolving the case on the terms proposed by the plaintiff would thus have required the federal courts to decide which of the competing factions represented the legitimate government of Rhode Island. But Chief Justice Taney's majority opinion declined the invitation, insisting that the question of which faction represented the state's legitimate government "belonged to the political power and not to the judicial."<sup>422</sup> Although the plaintiff's claim did not turn directly on the meaning of the Guarantee Clause, Chief Justice Taney invoked that provision as

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<sup>414</sup> 48 U.S. (7 How.) 1 (1849).

<sup>415</sup> See Michael A. Conron, *Law, Politics, and Chief Justice Taney: A Reconsideration of the Luther v. Borden Decision*, 11 AM. J. LEGAL HIST. 377, 378–79 (1967) (describing the political background of *Luther*); see also *Luther*, 48 U.S. (7 How.) at 13–16.

<sup>416</sup> *Luther*, 48 U.S. (7 How.) at 16 ("[T]he . . . constitution was adopted by a large majority of the male people of this State . . ."); Conron, *supra* note 415, at 378.

<sup>417</sup> Conron, *supra* note 415, at 378–79.

<sup>418</sup> *Id.* at 379.

<sup>419</sup> *Id.*

<sup>420</sup> *Id.* at 379–80.

<sup>421</sup> *Luther*, 48 U.S. (7 How.) at 38.

<sup>422</sup> *Id.* at 39.

reflecting the Framers' decision to treat the question of when "the general government" is authorized "to interfere in the domestic concerns of a State . . . as political in . . . nature" and thus inappropriate for judicial resolution.<sup>423</sup> "Under this article of the Constitution," Chief Justice Taney wrote, "it rests with Congress to decide what government is the established one in a State."<sup>424</sup> Admission of senators or representatives "into the councils of the Union" would constitute a conclusive recognition of not only "the authority of the government under which they are appointed" but also "its republican character."<sup>425</sup> And that conclusion would be "binding on every other department of the government," including the judiciary.<sup>426</sup>

Because no elections for senators or representatives were held under the Dorr government, Chief Justice Taney looked instead to the actions of the Executive. He concluded that a message from President John Tyler to Governor King expressing a willingness to call forth the militia "to support [Governor King's] authority if it should be found necessary for the general government to interfere" constituted a recognition of the King government's authority and was "as effectual as if the militia had been assembled under his orders."<sup>427</sup> "[N]o court of the United States," Chief Justice Taney wrote, "with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government; or in treating as wrongdoers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force."<sup>428</sup>

Although *Luther* had virtually nothing substantive to say about what the Article IV guarantee of republican government required, it established an enduring precedent regarding *who* possessed constitutional authority to determine whether the provision applied. As discussed above,

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<sup>423</sup> *Id.* at 42.

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> *Id.* at 44.

<sup>428</sup> *Id.* Chief Justice Taney thus concluded that Luther's claim against Borden must fail because Borden had been acting under lawful authority pursuant to the martial law declared by the charter government. *Id.* at 45-47. Justice Woodbury dissented from Chief Justice Taney's conclusion that Borden's actions were authorized by the state's declaration of martial law, but did not dissent from other portions of Chief Justice Taney's opinion. *See id.* at 51 (Woodbury, J., dissenting) ("This difference . . . between me and my brethren extends only to the points in issue concerning martial law."). Indeed, Justice Woodbury elaborated at great length on the propriety of treating the issue of the Dorr Government's legitimacy as a "political question," *id.*, beyond the proper scope of judicial cognizance. *See id.* at 51-58.

Chief Justice Taney's discussion of the Guarantee Clause — though arguably dicta<sup>429</sup> — has come to stand for the proposition that all constitutional challenges based on the Clause be treated as involving a non-justiciable political question.<sup>430</sup> Some modern critics of the political question doctrine have criticized Chief Justice Taney's conclusion that the Guarantee Clause was nonjusticiable.<sup>431</sup> Others have suggested that the rationale of Chief Justice Taney's decision, while perhaps defensible given the particular facts presented in that case, should not have been extended by later cases into a more general prohibition on adjudicating Guarantee Clause claims in all circumstances.<sup>432</sup>

The implications of the international law interpretation of the Guarantee Clause for modern debates about the provision's justiciability will be considered in further detail below.<sup>433</sup> For present purposes, it is sufficient to observe that nothing in *Luther* tends to contradict the international law interpretation of the Guarantee Clause. And at least some statements in earlier decisions (particularly Justice Harper's dissenting opinion in the South Carolina case<sup>434</sup>) tend to support such a reading.

4. *Summary.* — The Framers, ratifiers, and early interpreters of the Constitution failed to speak with a single, unequivocal voice on many

<sup>429</sup> See Grove, *supra* note 5, at 1928 (citing Bonfield, *supra* note 13, at 535 (describing Chief Justice Taney's remarks regarding the Guarantee Clause as "unfortunate dicta")) (observing that "because the plaintiff in *Luther* did not challenge the charter government as 'unrepublican'" but rather "claimed only that the charter government had been superseded by the Dorr regime," Chief Justice Taney's remarks regarding the Guarantee Clause were dicta).

<sup>430</sup> See *supra* notes 4–5 and accompanying text. A few Supreme Court decisions from the late nineteenth and early twentieth centuries seem to have departed from the *Luther* dicta by assuming claims premised on the Guarantee Clause might be judicially cognizable. See Grove, *supra* note 5, at 1932–34 (discussing, among other cases, *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875), and *Coyle v. Smith*, 221 U.S. 559 (1911)). The modern understanding of the political question doctrine as a barrier to all Guarantee Clause claims began to crystallize with the Court's 1912 decision in *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912). Grove, *supra* note 5, at 1912, 1940–43.

<sup>431</sup> See, e.g., Chemerinsky, *supra* note 11, at 872–73 (contending that there "are many obvious flaws," *id.* at 872, with Chief Justice Taney's reasoning in *Luther*); Weinberg, *supra* note 13, at 934 (arguing that "the issue presented in *Luther* — the issue of the legitimacy of the existing government of Rhode Island — was an adjudicable issue").

<sup>432</sup> See, e.g., BALKIN, *supra* note 10, at 241–42 (maintaining that *Luther*'s rationale has no proper bearing in a case where the Court is not required to determine which of two contending sides represents the legitimate government of a state); ELY, *supra* note 12, at 118–19 n.\* (positing that extrapolating a general prohibition on adjudicating Guarantee Clause claims from *Luther* involved a "gross mistake of logic"); Amar, *supra* note 9, at 776–77 (suggesting *Luther*'s reasoning could be confined to its facts).

<sup>433</sup> See *infra* section III.B, pp. 679–87.

<sup>434</sup> See *supra* notes 410–413 and accompanying text (discussing Justice Harper's dissenting opinion in *State ex rel. M'Creedy v. Hunt*, 20 S.C.L. (2 Hill) 1 (S.C. 1834)).

of the Constitution's most significant provisions.<sup>435</sup> The Guarantee Clause marks no exception to this more general pattern. At least some participants in the framing and ratification debates — including Edmund Randolph and Tench Coxe — expressed a view of the Guarantee Clause that would directly limit state officials and confer broad authority on the national government to police states' perceived deviations from "republican" principles.<sup>436</sup> For reasons discussed above, this understanding of the provision is difficult to reconcile with the international law understanding of the term "guarantee," which signified a pledge for the benefit of the guaranteed party that conferred no new rights or powers on the sovereign pledging the guarantee.<sup>437</sup>

But statements such as these were hardly the sole, or even predominant, account of the Guarantee Clause's significance. As discussed above, numerous statements during the framing and ratification debates suggested that the provision would serve as a bulwark of state sovereignty against federal interference.<sup>438</sup> As modern commenters have observed, this "state sovereignty" interpretation of the provision fits somewhat uncomfortably with the provision's actual text, at least if the term "guarantee" is understood in its modern-day sense.<sup>439</sup> But if the term "guarantee" is understood to carry the meaning it would have held under the eighteenth-century law of nations, such "sovereignist" connotations are easily explained.<sup>440</sup> Moreover, at least some participants in the ratification debates drew a direct analogy between the language of the Guarantee Clause and similarly worded provisions in international treaties, suggesting an assumption that the latter category of documents could provide a suitable reference point for interpreting the former.<sup>441</sup> At least one early-nineteenth-century court drew this connection explicitly, looking to international treaties for guidance in understanding the significance of the constitutionally specified guarantee.<sup>442</sup>

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<sup>435</sup> See Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 590–92 (2008) (summarizing various Founding-era disagreements over the meanings of particular provisions).

<sup>436</sup> See *supra* notes 281–282 and accompanying text (discussing Randolph) and notes 301–302 and accompanying text (discussing Coxe).

<sup>437</sup> See *supra* notes 92–97 and accompanying text (discussing statements to this effect by Vattel and other eighteenth-century commentators on the law of nations).

<sup>438</sup> See *supra* notes 316–322 and accompanying text; see also Merritt, *supra* note 20, at 29–36.

<sup>439</sup> See *supra* notes 323–330 and accompanying text (discussing text-based critiques of the "state sovereignty" interpretation of the Guarantee Clause).

<sup>440</sup> See *supra* notes 331–335 and accompanying text (discussing parallels between the international law interpretation and the state sovereignty theory).

<sup>441</sup> See *supra* notes 352–353 and accompanying text (discussing Antifederalist invocations of "guarantee" provisions in Poland's treaties); *supra* notes 338–347 and accompanying text (discussing Madison's analogy to the Swiss Confederacy).

<sup>442</sup> See *supra* notes 402–413 and accompanying text (discussing *State ex rel. M'Creedy v. Hunt*, 20 S.C.L. (2 Hill) 1 (S.C. 1834)).

At a minimum, the international law interpretation of the Guarantee Clause seems to fall within the range of plausible interpretations to which the provision would likely have been amenable at the time of enactment.<sup>443</sup> Indeed, the international law interpretation arguably constitutes the most plausible account of the available historical evidence regarding the provision's original meaning.<sup>444</sup> Perhaps most significantly, only the international law interpretation plausibly connects the constitutional usage of the term "guarantee" to a preexisting legal usage with which many members of the Founding generation would likely have been familiar. As noted above, the term "guarantee" appears in virtually none of the municipal law documents that are conventionally recognized as having informed the drafting decisions reflected in the Constitution of 1787.<sup>445</sup> And while the Framers may well have included language in some provisions that lacked a clear preexisting legal meaning,<sup>446</sup> it is also beyond dispute that they sometimes chose specialized terms of art to convey their meanings.<sup>447</sup>

For purposes of this Article, I am content to allow readers to draw their own conclusions from the historical evidence surveyed here. Undoubtedly, such assessments will depend in part on the extent to which individual readers believe contemporary constitutional interpretation should be informed by historical evidence regarding the original meaning of the constitutional text.<sup>448</sup> Although virtually all interpretive theories acknowledge at least some role for text and original understanding as part of the interpretive endeavor,<sup>449</sup> many theories acknowledge at least some role for other considerations — such as judicial precedent, postenactment historical practice, or practical consequences — as

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<sup>443</sup> Cf. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 690 (1987) (observing that history sometimes reveals "not a focused, specific answer, but a range of original understandings" of a particular provision).

<sup>444</sup> Cf. GARY LAWSON, *EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS* 75–76 (2017) (contending that the "best-available-alternative" is usually viewed as the default standard for assessing the validity of legal claims).

<sup>445</sup> See *supra* note 34 and accompanying text.

<sup>446</sup> See, e.g., *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 176–77 (1796) (opinion of Paterson, J.) (noting uncertainty regarding meaning of Constitution's references to "[d]irect taxes," *id.* at 176, in Article I).

<sup>447</sup> See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (opinion of Chase, J.) (concluding that the phrase "ex post facto laws" in Article I, § 10 was a legal term of art).

<sup>448</sup> Cf. William Baude, *Essay, Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015) (surveying various approaches one could take to the relationship between original meaning and contemporary constitutional law).

<sup>449</sup> See, e.g., J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 858 (2007) ("Most interpretive methods start with the text and original meanings and purposes of the constitutional provision at issue, even if they ultimately move beyond those moorings and make additional interpretive moves.").

well.<sup>450</sup> For proponents of interpretive theories of this sort, the decision of whether to accept the international law interpretation of the Guarantee Clause may turn, to at least some degree, on the extent to which that interpretation fits with existing judicial approaches to interpreting the provision as well as the contemporary practical consequences of adopting such an interpretation. These considerations will be taken up and explored in the next Part.

### III. IMPLICATIONS

The first set of issues regarding the implications of the international law interpretation of the Guarantee Clause for modern constitutional interpretation involves the questions of *what* particular set of protections the provision confers and *who* can claim the benefit of the Clause's protection. The second cluster of issues involves the implications of the international law interpretation for the justiciability of Guarantee Clause claims and the role of the federal courts in enforcing the provision's protection. As the following sections will show, adopting the international law interpretation may require a significant rethinking of the way many people have come to conceive the role of the Guarantee Clause in the constitutional framework and the nature of the obligation it imposes on the national government. At the same time, however, accepting that interpretation may require little change in — and may substantially strengthen and reinforce — the Supreme Court's longstanding practice of viewing litigation premised on the Guarantee Clause as beyond the bounds of judicial cognizance.

#### A. Substantive Interpretation of the Guarantee Clause

In its 1875 decision in *Minor v. Happersett*,<sup>451</sup> the Supreme Court assumed, in dicta, that “[t]he guaranty” of republican government extended in Article IV's fourth section “necessarily implies a duty on the part of the States themselves to provide [a republican form of] government.”<sup>452</sup> This understanding of the provision's significance has been echoed by myriad subsequent interpreters.<sup>453</sup> Under this interpretation, the Guarantee Clause exists in substantial part to protect the interests

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<sup>450</sup> See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–209 (1987) (setting forth a “typology of constitutional argument,” *id.* at 1194, including arguments from text and enactment-era history, as well as arguments from constitutional theory, precedent, and values); cf. Baude, *supra* note 448, at 2356–63 (observing that even “originalist” theories may sometimes allow decisionmakers to look to considerations other than text and original understanding).

<sup>451</sup> 88 U.S. (21 Wall.) 162 (1875).

<sup>452</sup> *Id.* at 175.

<sup>453</sup> See sources cited *supra* note 46.

of state *citizens* against antirepublican conduct by their elected officials in state *government*.<sup>454</sup>

But for reasons already outlined above, this understanding of the provision's significance fits poorly with the international law interpretation of the Guarantee Clause. As noted above, the text of the Guarantee Clause clearly identifies each "State" as the beneficiary, rather than the obligee, of the "guarantee" the provision promises.<sup>455</sup> This textual framing fits comfortably with the paradigm of international treaty obligations, which consisted exclusively of commitments between sovereign states. Indeed, the eighteenth-century conception of the law of nations conceived of sovereign states as the *only* entities capable of possessing international rights and duties.<sup>456</sup> This interpretation is also consistent with the more specific usage of the term "guarantee" as it appeared in eighteenth-century treaties. As discussed above, eighteenth- and early nineteenth-century commentators universally agreed that a guarantee provision in an international treaty existed exclusively for the benefit of the guaranteed party and could be waived by that party at any time.<sup>457</sup>

The international law interpretation also has implications for the scope of federal power under the Guarantee Clause. Although the Guarantee Clause itself is framed as a duty on the part of the federal government rather than as a source of power, "a well-known — and commonsensical — canon of textual interpretation instructs that the imposition of a duty necessarily implies a grant of power sufficient to see the duty fulfilled."<sup>458</sup> Nevertheless, assessing the scope of the power conferred by virtue of the provision requires careful attention to the precise nature of the duty it establishes. As noted above, the introduction of a treaty guarantee established no new rights or powers on the part of the guaranteeing party except those that were necessary to come to the aid of the guaranteed state.<sup>459</sup> And the guaranteed state always

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<sup>454</sup> See, e.g., Chemerinsky, *supra* note 11, at 868 ("[T]he Guarantee Clause is not primarily about guaranteeing a particular structure of government in states" but rather was "meant to protect the basic individual right of political participation").

<sup>455</sup> See *supra* section II.C.2.a, pp. 646-51.

<sup>456</sup> See, e.g., WHEATON, *supra* note 36, pt. I, ch. II, § 1, at 62 ("The subjects of international law are separate political societies of men living independently of each other, and especially those called Sovereign States."); Kent, *supra* note 449, at 849 (observing that "[i]ndividual persons were simply not subjects with international legal personality" until the twentieth century); Lee, *supra* note 41, at 1032 ("The classical law of nations imposed duties and conferred rights only upon sovereign states.").

<sup>457</sup> See VATTEL, *supra* note 39, bk. II, ch. XVI, § 236.

<sup>458</sup> Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1834, 1854 (2016); see also, e.g., 6 REG. DEB. 261 (1830) (speech of Sen. Livingston) ("No principle is clearer than that the grant of power or the requisition of a duty, implies a grant of all those [powers] necessary for its execution . . .").

<sup>459</sup> See *supra* notes 92-97 and accompanying text.

maintained the option of releasing the guaranteeing state from its obligation and foregoing whatever assistance it may have obtained by virtue of the guarantee.<sup>460</sup> An invocation of federal power under the Guarantee Clause will thus almost always depend, to some extent, on the existence of a request for assistance from a guaranteed state whose “republican form of government” is threatened by some outside force.

This is not to say that the federal government is necessarily bound by the decisions of those claiming to exercise authority on behalf of the state. Unlike Article IV’s Insurrection Clause, which also appears in that Article’s fourth section,<sup>461</sup> the Guarantee Clause contains no explicit requirement that a request for federal assistance be made by the “Legislature” or “Executive” of the requesting state. This textual distinction is sensible given the Framers’ recognition that threats to republican government can arise from “usurpation” as well as from violent overthrow.<sup>462</sup> If the holders of political power within a state sought to entrench themselves in office, contrary to the will of the people, and were met by organized resistance of the citizenry, questions could arise regarding which faction reflected the legitimate “republican” government of the state.<sup>463</sup>

This was essentially the nature of the conflict with which the Supreme Court was confronted in *Luther*.<sup>464</sup> There, the Court correctly recognized that questions regarding the scope of the Guarantee Clause’s protection were intimately bound up with the national government’s power to recognize state governments — questions akin to those presented in cases in which the courts have acknowledged the primacy of the political branches’ decisionmaking authority.<sup>465</sup> But contrary to the assumption of many modern commentators, the recognitional questions

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<sup>460</sup> VATTEL, *supra* note 39, bk. II, ch. XVI, § 236.

<sup>461</sup> See U.S. CONST. art. IV, § 4 (“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.” (emphasis added)).

<sup>462</sup> See THE FEDERALIST NO. 21, *supra* note 77, at 136 (Alexander Hamilton) (“A guaranty by the national authority would be as much leveled against the usurpations of rulers as against the ferments and outrages of faction and sedition in the community.”).

<sup>463</sup> Cf. Kesavan & Paulsen, *supra* note 243, at 297–325 (discussing a similar controversy regarding the locus of legitimate governmental power for the State of Virginia during the Civil War, which eventually led to the formation and recognition of the breakaway state of West Virginia).

<sup>464</sup> See *supra* notes 414–428 and accompanying text (discussing *Luther*).

<sup>465</sup> See, e.g., Guar. Tr. Co. v. United States, 304 U.S. 126, 137 (1938) (“What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government.”); United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1865) (“In reference to all matters [involving recognition of Indian tribes], it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.”).

implicated by the *Luther* decision were neither aberrational nor orthogonal to the central question regarding the scope of the federal government's power and duty under the Guarantee Clause.<sup>466</sup> Under the international law interpretation, the recognitional question is inescapable because *only* the states — not individual citizens or groups of citizens — possess the authority to invoke the Clause's protection.<sup>467</sup>

Thankfully, the type of violent contestation of state political authority that led to the *Luther* decision is not particularly common in our modern constitutional history.<sup>468</sup> But even in the absence of an express invocation of the Guarantee Clause by a particular state, the requirements of the provision may sometimes constrain federal decisionmaking in situations where the national government acts on the basis of some other enumerated power. For example, the *Luther* Court assumed that each House of Congress would be guided by the Guarantee Clause in assessing the qualifications of new members pursuant to their respective powers under Article I, Section 5 to judge the elections and qualifications of their own members.<sup>469</sup> The Guarantee Clause has also long been viewed as requiring Congress, in exercising its power to admit new states into the Union, to assess the republican nature of a state's proposed form of government before granting admission.<sup>470</sup>

A similar set of considerations may apply to constrain federal decisionmaking in areas where the ordinary operations of state government have been interrupted or supplanted as a result of war or insurrection, as was the case in the immediate aftermath of the American

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<sup>466</sup> Cf. *supra* note 431 (collecting modern sources expressing the opposite view of *Luther*).

<sup>467</sup> Nor was the Dorr Rebellion unique in confronting national decisionmakers with a conflict between competing claimants seeking recognition as the legitimate government of a state. See, e.g., EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 79–84 (2016) (discussing the “Buckshot War” that resulted from disputed election results in 1838 Pennsylvania election); CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* 13–14 (2008) (discussing dispute over 1872 Louisiana election requiring intervention of federal troops to support the faction recognized by President Grant as the legitimate government); Kesavan & Paulsen, *supra* note 243, at 297–325 (detailing the conflict between competing claimants of state government power in Virginia during the Civil War).

<sup>468</sup> See, e.g., FOLEY, *supra* note 467, at 346–48 (noting an overall trend toward more peaceful resolution of election disputes in recent history). But cf. Lucian Emery Dervan, *Georgia's Noble Revolution: Three Governors, Two Armies, the Georgia Supreme Court, and the Gubernatorial Election of 1946*, 15 J.S. LEGAL HIST. 167, 167–74 (2007) (discussing background of contested 1946 Georgia gubernatorial election, which resulted in competing claimants to the office backed by competing factions of the state's National Guard).

<sup>469</sup> See *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (“[W]hen 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.”).

<sup>470</sup> See, e.g., Charles O. Lerche, Jr., *The Guarantee of a Republican Form of Government and the Admission of New States*, 11 J. POL. 578, 578 (1949) (“In no area has the guarantee been so widely invoked as in the admission of new states into the Union.”).

Civil War.<sup>471</sup> In such circumstances, the Guarantee Clause may require the federal government to ensure that any replacement government formed under the auspices of its authority conforms to the principles of republican government.<sup>472</sup>

<sup>471</sup> See generally WIECEK, *supra* note 13, at 166–209 (discussing the role of the Guarantee Clause in public debates regarding reconstruction and readmission of the former Confederate states).

<sup>472</sup> See David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 413 (2008) (“When state and local government collapsed with the approach of the Union armies, the Guarantee Clause . . . demanded that the United States take action to restore republican government. The military governments . . . and the civilian governments established under military rule, may be viewed as successive steps in fulfillment of the constitutional guarantee.”); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 391–92 (2001) (describing the theory of Reconstruction-era congressional Republicans that the Confederate states had destroyed their state governments by seceding, requiring federal intervention to restore republican government in those states).

The prominence of the Guarantee Clause in constitutional debates surrounding the scope of Congress’s power over the former Confederate states raises interesting interpretive questions regarding that provision’s relationship to the three Reconstruction-era amendments to the Constitution — the Thirteenth, Fourteenth, and Fifteenth Amendments. One possibility might be that the original meanings of the Reconstruction Amendments are informed, to some extent, by prevailing understandings of the Guarantee Clause. See, e.g., Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. REV. 582, 640–51 (2014) (arguing that understandings of the guarantee of republican government should inform understandings of the Fourteenth Amendment’s Due Process Clause). To the extent understandings of the Guarantee Clause embraced by members of the Reconstruction generation diverged from the prevailing understanding of that provision in 1789 — a topic that is beyond the scope of this Article — the understandings of the enacting generation would likely be most relevant to assessing the original meanings of the relevant Reconstruction Amendment provisions. Cf. Gary Lawson, Response, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1826 (1997) (“[B]ecause every document is created at a particular moment in space and time, documents ordinarily, though not invariably, speak to an audience at the time of their creation and draw their meaning from that point.”).

Professor Akhil Amar has endorsed a more ambitious interpretive claim, urging interpreters to read the Guarantee Clause itself through the lens of the Reconstruction generation’s understandings of that provision. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 82–86 (2012). According to Amar, the Fourteenth Amendment’s enactment “pivoted on a fresh interpretation of the republican-government clause” reflecting a “principle of broad national control over undemocratic state franchise law.” *Id.* at 82. Therefore, Amar argues, this new, broadened understanding of the Guarantee Clause should be understood to have been incorporated into constitutional law by virtue of the Fourteenth Amendment’s successful ratification, even if that broadened interpretation would not necessarily have been recognized by the generation that enacted the Guarantee Clause in 1789. *Id.* Amar’s theory that extratextual principles underlying later-enacted texts can legitimately be read back into earlier-adopted constitutional provisions is not universally shared. See, e.g., Adrian Vermeule & Ernest A. Young, Commentary, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 732 (2000) (contending that “Amar’s strong assumption of coherence stands at odds both with the patchwork character of the Constitution and with the settled practice of constitutional interpreters”); cf. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 503–05 (2010) (questioning Amar’s similar claim that the Fourteenth Amendment’s ratification should be understood to have altered the meaning of the earlier-adopted Fifth Amendment Due Process Clause). For those inclined to accept the interpretive premises underlying Amar’s position, assessing the significance of the Fourteenth Amendment’s adoption for modern understandings of the Guarantee Clause would require a careful examination of the public understanding of the Guarantee Clause during Reconstruction — a topic that, again, is beyond the scope of this Article. Compare, e.g., CONG. GLOBE, 41st Cong., 2d Sess.

Finally, some scholars have suggested that the Guarantee Clause may limit the ability of the federal government, acting within the scope of its other enumerated powers, to interfere with certain internal state arrangements, particularly those that relate to the structure, composition, or function of the state's republican government itself.<sup>473</sup>

But where the Guarantee Clause itself is invoked as a direct source of federal power, the international law interpretation suggests that the exercise of such power will always involve a threshold question regarding whether the existing republican government within the state has, in fact, requested such assistance. If no such assistance is sought or required by the state, the federal government lacks authority to invoke the Clause as a source of power, no matter how dissatisfied individual state residents may be with a state's existing governmental arrangements or how inconsistent such arrangements may be with federal authorities' shared conception of republican ideals.

*B. Justiciability of Claims Asserted Under the Guarantee Clause*

In addition to shedding new light on the substantive content of the obligation the Guarantee Clause imposes on the national government, the international law interpretation also illuminates the more specific question of the federal courts' role in ensuring the Clause's enforcement. But whereas the international law interpretation may require a significant rethinking of the way the provision is understood as a substantive matter, this interpretation may actually be quite consistent with the way in which federal courts have historically regarded the provision. In fact, the international law interpretation may substantially strengthen and reinforce the Court's longstanding practice of treating litigation grounded in the Guarantee Clause as nonjusticiable.

As an initial matter, the international law interpretation has clear implications for the branch of justiciability doctrine relating to standing under Article III. Standing doctrine is centrally concerned with *who* is entitled to assert a particular claim before a federal tribunal.<sup>474</sup> One

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600 (1870) (statement of Republican Sen. William Stewart) (asserting that a regulation which would "exclude from the ballot a large proportion of the citizens" would "infringe upon that clause of the Constitution which requires the Government of the United States to guaranty to each State a republican form of government"), *with, e.g., id.* (statement of Republican Sen. Jacob Howard) (denying that the provision would restrict a state from adopting regulations that would effectively "disfranchise nine hundred and ninety-nine out of a thousand of the colored population" of the state).

<sup>473</sup> See, e.g., Merritt, *supra* note 20, at 41 ("The guarantee clause . . . restricts the federal government's power to interfere with the organizational structure and governmental processes chosen by a state's residents."); see also Smith, *supra* note 20, at 1949 (contending that the Guarantee Clause should "inform[] the background principle of state sovereign immunity in classes of cases not outlined in the Eleventh Amendment").

<sup>474</sup> See, e.g., Warth v. Seldin, 422 U.S. 490, 517–18 (1975) (ruling that "[t]he rules of standing," *id.* at 517, require a plaintiff to demonstrate "that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers," *id.* at 518).

prominent strand of this doctrine focuses on the nature of the injury a plaintiff must claim in order to invoke the judicial power of the federal courts.<sup>475</sup> But another important focus of standing addresses the question of whether a particular plaintiff who has suffered an otherwise cognizable injury can claim the benefit of a particular source of legal protection; this inquiry is sometimes framed as implicating the question of whether a plaintiff falls within the “zone of interests” that the relevant legal source was intended to protect.<sup>476</sup> Although the doctrine was traditionally regarded as a limit on the courts’ power to adjudicate cases — though perhaps a mere “prudential” limit that might be relaxed or excused in an appropriate case<sup>477</sup> — the Supreme Court has more recently suggested that this zone of interests inquiry might be more accurately characterized as a substantive limit on the availability of a plaintiff’s right of action.<sup>478</sup>

Regardless of whether this zone of interests inquiry is characterized as a limit on justiciability or a merits-based inquiry into who possesses a substantive right of action under the relevant legal rule, it is plain that proper identification of the persons or entities who fall within the relevant zone of interests for a particular provision has profound implications for the number of potentially successful legal claims that may be brought before the courts. And for reasons already discussed in detail above, the international law interpretation suggests that states — acting in their collective sovereign capacity — constitute the only entities falling within the zone of interests that the Guarantee Clause protects.<sup>479</sup>

But what of the more traditional basis for limiting judicial enforcement of Guarantee Clause claims — namely, the political question doctrine? As noted above, the parameters of the once-robust political question limitation on Article III jurisdiction have been progressively

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<sup>475</sup> See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (declaring that “the irreducible constitutional minimum of standing” requires, among other things, that the plaintiff “must have suffered an ‘injury in fact’ — an invasion of a legally protected interest” that is “concrete and particularized” and not “conjectural” or “hypothetical” (first quoting *Allen v. Wright*, 468 U.S. 737, 756 (1984); and then quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990))).

<sup>476</sup> See, e.g., *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152–53 (1970) (noting that in addition to “injury in fact,” a plaintiff must also demonstrate that “the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question,” *id.* at 153).

<sup>477</sup> See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (classifying the “zone of interests” inquiry as among “the prudential dimensions of the standing doctrine”).

<sup>478</sup> See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 & n.3 (2014).

<sup>479</sup> Cf. *Largess v. Supreme Judicial Court for the State of Mass.*, 373 F.3d 219, 224 n.5 (1st Cir. 2004) (per curiam) (observing that “the bare language of the [Guarantee] Clause does not directly confer any rights on individuals vis-à-vis the states” but declining to resolve the standing question given the conclusion that the Guarantee Clause claim was nonjusticiable on other grounds, *see id.* at 224–25, 229); *Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112, 1140 (D. Colo. 2012) (noting that there is “little to no case law authority indicating who falls within the zone of interests intended to be protected by the Guarantee Clause”), *vacated*, 824 F.3d 1207 (10th Cir. 2016).

narrowed by Supreme Court interpretation to the point where only “a textually demonstrable constitutional commitment of [an] issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving it” will provide a predictable barrier to adjudication.<sup>480</sup> The Supreme Court has recognized that these two inquiries — that is, the “textually demonstrable commitment” inquiry and the “judicially manageable standards” inquiry — are “not completely separate from”<sup>481</sup> one another because “the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”<sup>482</sup>

Although many scholars have questioned whether the political question doctrine is sensibly applied to limit adjudication of Guarantee Clause claims,<sup>483</sup> the term “guarantee” itself — if understood to carry the connotations it would have held under the eighteenth-century law of nations — might well provide the type of “textually demonstrable commitment” that the Supreme Court has signaled is sufficient for the doctrine’s application.

The linkage between the international law interpretation of the Guarantee Clause and the political question limit on justiciability stems from the nature of the political commitment that the term “guarantee” connotes. As used in eighteenth-century treaties, the term “guarantee” signified a diplomatic pledge by one sovereign to come to the aid or assistance of another sovereign for protection of the particular rights or privileges that the guarantee secured.<sup>484</sup> But such a pledge was never absolute. As Vattel observed, the obligation to provide aid to an ally — even an ally to whom aid had been pledged by treaty — was always conditioned on and qualified by a number of factors, including the justice of the ally’s cause and the potential for destructive consequences to the assisting state itself.<sup>485</sup> Thus, every invocation of a treaty of alliance or guarantee called for at least a tacit political judgment by the sovereign from whom assistance was sought regarding whether circumstances were such as to warrant invocation of the treaty.

For this reason, a commonplace view expressed during the period immediately surrounding the Constitution’s ratification was that deci-

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<sup>480</sup> See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (internal punctuation omitted) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)); see also *supra* p. 604 (discussing the political question doctrine).

<sup>481</sup> *Nixon*, 506 U.S. at 228.

<sup>482</sup> *Id.* at 228–29.

<sup>483</sup> See *supra* notes 9–13 and accompanying text (collecting sources).

<sup>484</sup> See *supra* section I.B, pp. 615–20.

<sup>485</sup> See VATTEL, *supra* note 39, bk. II, ch. XII, § 170 (“If the assistance and offices that are due by virtue of . . . a treaty, should on any occasion prove incompatible with the duties a nation owes to herself, . . . the case is tacitly and necessarily excepted in the treaty.”).

sions regarding those public rights of sovereigns that stemmed from international treaty commitments were inappropriate subjects for judicial cognizance. As early as 1674, the English Court of Chancery refused to send to “trial at law” a claim between English and Danish fishermen that would have depended, in part, on the enforcement of English fishing rights reflected in a peace treaty between England and Denmark.<sup>486</sup> In rejecting the defendant’s effort to lift an antisuit injunction that would have allowed the case to proceed, the Chancellor declared that to send the case “to a trial at law, where . . . the Court must pretend to judge . . . of the exposition and meaning of the articles of peace” would be “monstrous and absurd.”<sup>487</sup> In 1793, the Chancery Court refused jurisdiction over contract litigation between the East India Company and a local Indian ruler, concluding that the Company had entered into the contract in its sovereign capacity and that the contract therefore stood in the position of a treaty.<sup>488</sup> The Chancellor declared that because this treaty had been entered into with the local officials “not as subjects, but as a neighbouring independent state,” it was therefore “the same, as if it was a treaty between two sovereigns and consequently . . . not a subject of private, municipal, jurisdiction.”<sup>489</sup>

Early American interpreters seem to have shared a similar understanding regarding the incapacity of courts to adjudicate the mutual political obligations of sovereigns growing out of their respective treaty commitments. In his first pseudonymous *Pacificus* essay defending President Washington’s 1793 Neutrality Proclamation, Alexander Hamilton insisted that, although the judiciary was “charged with the interpretation of treaties” in “litigated cases,” questions regarding “the external political relations of Treaties between Government and Government” were “foreign to the Judiciary Department of the Government.”<sup>490</sup> Hamilton concluded this brief portion of his discussion by insisting that “[t]his position [was] too plain to need being insisted upon.”<sup>491</sup>

At around the same time Hamilton published his *Pacificus* essay, John Jay — the first Chief Justice of the United States — authored a

<sup>486</sup> *Blad v. Bamfield* (1674) 36 Eng. Rep. 992, 992–93 (Ch.), 3 Swans. 605, 605–07.

<sup>487</sup> *Blad*, 36 Eng. Rep. at 993, 3 Swans. at 607.

<sup>488</sup> *Nabob of the Carnatic v. E. India Co.* (1793) 30 Eng. Rep. 521, 523 (Ch.), 2 Ves. Jun. 56, 60.

<sup>489</sup> *Nabob of the Carnatic*, 30 Eng. Rep. at 523, 2 Ves. Jun. at 60 (internal punctuation omitted); see also, e.g., *Nabob of Arcot v. E. India Co.* (1793) 29 Eng. Rep. 841, 846 (Ch.), 4 Bro. C.C. 181 (rejecting a similar claim against the East India Company on the same grounds); cf. *Barclay v. Russell* (1797) 30 Eng. Rep. 1087, 1091–93 (Ch.), 3 Ves. Jun. 424, 431–37 (rejecting a claim premised on confiscatory acts by the State of Maryland during the Revolutionary War as involving considerations appropriate for “State to State” resolution, 30 Eng. Rep. at 1092, 3 Ves. Jun. at 435, rather than for resolution by a municipal court).

<sup>490</sup> Alexander Hamilton, *Pacificus No. 1*, GAZETTE OF THE U.S., June 29, 1793, reprinted in THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794, at 8, 11 (Morton J. Frisch ed., 2007).

<sup>491</sup> *Id.*

circuit court opinion that endorsed a similar distinction between judicially cognizable issues of treaty interpretation and questions that were reserved to the political branches of government.<sup>492</sup> Chief Justice Jay acknowledged that certain matters going to the validity of a treaty — such as whether the persons who entered into it were authorized to do so and whether it “contain[ed] articles repugnant to the [C]onstitution” — could present appropriate subjects for judicial consideration.<sup>493</sup> But questions going to what Chief Justice Jay termed the treaty’s “voluntary validity,” including whether the treaty had “been so violated as justly to become voidable by the injured nation” presented questions “of a political nature” and were not referable to the judiciary but rather to “those departments which are charged with the political interests of the state.”<sup>494</sup>

In a famous speech in the House of Representatives from 1800, Virginia Congressman (and future Chief Justice of the United States) John Marshall passionately insisted on this principle in arguing that the judiciary had no proper role in reviewing the Executive Branch’s decisions regarding interpretation and implementation of an extradition treaty with Great Britain.<sup>495</sup> Marshall’s speech covered a wide range of ground and is today most often remembered for its broad conception of the Executive’s power over foreign affairs.<sup>496</sup> But Marshall also emphasized the limited capacity of the courts to adjudicate questions concerning the extent to which the United States had complied with its treaty obligations.

Although Marshall acknowledged that “[a] case in law or equity proper for judicial decision may arise under a treaty, where the rights of individuals acquired or secured by a treaty are to be asserted or defended in court,”<sup>497</sup> he insisted that the particular treaty obligation that had become the subject of political dispute — involving the asserted obligation of the United States to deliver up a British subject suspected of murder on a British ship — reflected a commitment “of a very different nature.”<sup>498</sup> And although this latter commitment was itself governed

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<sup>492</sup> *Jones v. Walker*, 13 F. Cas. 1059, 1061–62 (C.C.D. Va. 1793) (No. 7,507).

<sup>493</sup> *Id.* at 1062.

<sup>494</sup> *Id.*; see also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 260 (1796) (opinion of Iredell, J.) (concluding that certain questions going to treaty validity, including “[w]hether the treaty was first violated on the part of the United States, or on that of the other contracting power” and the gravity of any claimed violation, involved “considerations of policy,” that were “certainly entirely incompetent to the examination and decision of a Court of Justice”).

<sup>495</sup> 10 ANNALS OF CONG. 596–618 (1800) (statement of Rep. John Marshall). The political context of Marshall’s speech, as well as the events giving rise to its delivery, are explored in detail in Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

<sup>496</sup> See Michael P. Van Alstine, *Taking Care of John Marshall’s Political Ghost*, 53 ST. LOUIS U. L.J. 93, 99–104 (2008) (examining the influence of Marshall’s speech on twentieth-century theories of the Executive’s foreign affairs power).

<sup>497</sup> 10 ANNALS OF CONG., *supra* note 495, at 606.

<sup>498</sup> *Id.* at 608.

by the law of nations applicable to treaty interpretation and enforcement, Marshall insisted that these legal determinations were inappropriate for cognizance in a court of municipal jurisdiction.<sup>499</sup> According to Marshall:

The *casus fæderis* [that is, the existence of circumstances giving rise to a duty owed to an ally<sup>500</sup>] of the guaranty was a question of law, but no man could have hazarded the opinion that such a question must be carried into court, and can only be there decided. So the *casus fæderis*, under the twenty-seventh article of the treaty with Great Britain, is a question of law[,] but of political law. The question to be decided is, whether the particular case proposed be one in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts.<sup>501</sup>

Marshall's invocation in this speech of a distinction between judicially enforceable private rights and "questions of political law, proper to be decided . . . by the Executive, and not by the courts"<sup>502</sup> presaged the distinction he would draw three years later in his celebrated decision in *Marbury v. Madison*<sup>503</sup> between the judiciary's unquestioned entitlement "to decide on the rights of individuals" and "[q]uestions, in their nature political, or which are, by the [C]onstitution and laws, submitted to the executive, [and] can never be made in this court."<sup>504</sup>

More than a quarter century after his *Marbury* opinion, Chief Justice Marshall applied this distinction between political questions and questions appropriate for the judiciary to a case specifically involving the applicability of a treaty. In *Foster v. Neilson*,<sup>505</sup> the Supreme Court was called upon to interpret a provision in a treaty between the United States and Spain providing that certain land grants in former Spanish territories ceded to the United States "shall be ratified and confirmed to the persons in possession."<sup>506</sup> Despite the seemingly mandatory language of this provision, Chief Justice Marshall concluded that the treaty did not "act directly on the grants, so as to give validity to those not otherwise valid" but rather merely "pledge[d] the faith of the United States to pass acts which shall ratify and confirm them."<sup>507</sup> Chief Justice Marshall acknowledged that, under the Supremacy Clause of Article VI, a treaty was "to be regarded in courts of justice as equivalent to an act of the

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<sup>499</sup> See *id.* at 613 ("The case was in its nature a national demand made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence, the demand is not a case for judicial cognizance.").

<sup>500</sup> Vattel, *supra* note 39, bk. III, ch. VI, § 88 (defining *casus fæderis*).

<sup>501</sup> 10 ANNALS OF CONG., *supra* note 495, at 613.

<sup>502</sup> *Id.*

<sup>503</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>504</sup> *Id.* at 170.

<sup>505</sup> 27 U.S. (2 Pet.) 253 (1829).

<sup>506</sup> *Id.* at 314 (quoting Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, Spain-U.S., art. 8, Feb. 22, 1819, 8 Stat. 252).

<sup>507</sup> *Id.*

legislature, whenever it operates of itself without the aid of any legislative provision."<sup>508</sup> But "when either of the parties" to a treaty "engages to perform a particular act," Chief Justice Marshall concluded that "the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."<sup>509</sup>

Standing alone, a conclusion that the Guarantee Clause reflects a type of commitment that had not traditionally been viewed as appropriate for judicial resolution might not be sufficient to warrant the further conclusion that the provision should be viewed as outside the scope of the Article III judicial power. For example, federal courts have long exercised jurisdiction over state boundary disputes notwithstanding the fact that such intersovereign controversies had not traditionally been perceived as a proper subject for municipal courts under English law.<sup>510</sup> But litigating such boundary disputes will usually require little more than applying preexisting rules to a particular set of facts.<sup>511</sup> The requirements imposed by the Guarantee Clause, by contrast, seem to hinge

<sup>508</sup> *Id.*

<sup>509</sup> *Id.* A similar distinction between judicial questions and political questions is reflected in other early Supreme Court opinions. *See, e.g.,* *Poole v. Fleeger's Lessee*, 36 U.S. (11 Pet.) 185, 209–10 (1837) (validity of land grants along disputed border between Kentucky and Tennessee involved a compact the two states entered into as an exercise of their sovereign powers, and which the Court was bound to recognize as the governing rule of decision); *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 711 (1832) (settlement of international boundaries not "a judicial but a political question" and courts are bound to abide by the decisions of the political branches); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831) (requested relief would, in effect, require the court to "control the legislature of" a state "and to restrain the exertion of its physical force . . . [which] savours too much of the exercise of political power to be within the proper province of the judicial department"). Early state court opinions also embraced the distinction. *See, e.g.,* *Caldwell v. State*, 1 Stew. & P. 327, 341 (Ala. 1832) ("If Congress, in defining the boundaries of Alabama, has been guilty of an act of injustice, however flagrant, against individual right, or against the rights of another government, the remedy, if any, must be sought through the political action of the government, and not through its judicial tribunals."); *People ex rel. Ewing v. Forquer*, 1 Ill. (Breese) 104, 118 (1825) (declining to resolve a collateral dispute regarding which of two competing claimants possessed constitutional authority to act as the state's governor and suggesting that that dispute might involve "purely a political question between the people and their executive," with which "this court . . . can not interfere"); *Jackson ex dem. Klock v. Hudson*, 3 Johns. 375, 384–85 (N.Y. 1808) ("The policy, or the abstract right of granting lands in the possession of the native Indians, without their previous consent . . . is a political question with which we have at present nothing to do." (emphasis omitted)).

<sup>510</sup> *See, e.g.,* *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 742–44 (1838) (concluding that the Constitution's grant of jurisdiction to adjudicate controversies between states changed the preexisting English rule that courts lacked power to adjudicate sovereign boundaries); *see also, e.g.,* *Virginia v. West Virginia*, 246 U.S. 565, 591 (1918) (holding that federal courts possess jurisdiction over suits between states arising out of alleged breaches of interstate compacts).

<sup>511</sup> *See, e.g.,* *Missouri v. Illinois*, 200 U.S. 496, 519–20 (1906) ("[W]hen a dispute arises about boundaries, this court must determine the line, and in doing so must be governed by rules explicitly or implicitly recognized."); *Rhode Island*, 37 U.S. (12 Pet.) at 734 ("No court acts differently in deciding on boundary between states, than on lines between separate tracts of land . . .").

much more on discretionary considerations of the type traditionally associated with political, rather than judicial, decisionmaking.<sup>512</sup>

Like the international treaty commitments that Chief Justice Marshall and other early commentators took as their principal illustration of matters not properly entrusted to the judiciary, the Guarantee Clause reflects a political commitment between separate sovereigns, the invocation of which must necessarily depend, in part, on a set of complex and delicate judgments about the nation's duties and its interests.<sup>513</sup> Such determinations require assessments that the judiciary is institutionally ill equipped to make, both because they may hinge on information not readily available to courts and because they may tend to implicate policy judgments more appropriately left to the electorally accountable branches of government.<sup>514</sup> More broadly, the types of policy-based decisionmaking that determinations of this kind require fall outside the traditional conception of the judicial function, which requires determination by reference to preexisting legal sources rather than all-things-considered judgments about what political theory and the national interest require.<sup>515</sup> As Justice Woodbury observed in his dissenting opinion in *Luther*:

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<sup>512</sup> See, e.g., *Rhode Island*, 37 U.S. (12 Pet.) at 738 (“[C]ontroversies between states” are “in their nature political,” rather than judicial, “when the sovereign or state reserves to itself the right of deciding on it . . . .”); cf. Simona Grossi, *The Claim*, 55 HOUS. L. REV. 1, 44 (2017) (“The distinction between discretion and duty forms the seeds of the political question doctrine.”).

<sup>513</sup> Among the questions that would likely need to be resolved in connection with any invocation of the Guarantee Clause as a basis for federal interference with a state's internal governance are the following: (1) Has the state properly invoked its constitutional entitlement to federal protection? (2) In the event of a conflict between competing factions within a state, which faction is authorized to speak on the state's behalf? (3) Are conditions such that a legitimate threat to the state's “Republican Form of Government” may be perceived at the time federal assistance is invoked? (4) What measures are needed to restore the state to its preexisting “republican” form? (5) Has the state, through its own conduct, taken any measures that would forfeit its claim to federal assistance (such as voluntarily adopting or acquiescing in nonrepublican governmental arrangements)? and (6) Are conditions such that meaningful federal assistance could be afforded that would preserve or restore the state's preexisting republican form of government without subjecting the federal government or other states to undue risk or detriment?

<sup>514</sup> See H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* 71 (2002) (noting that courts, among other things, may “lack the information to make such judgments wisely” and “lack the political accountability that legitimates a claim to speak for the nation”); cf. *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (explaining that executive determinations of foreign policy “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 and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 31 (1827) (recognizing that “in many instances, the evidence upon which the President might decide” whether a legally relevant state of affairs existed “might be of a nature not constituting strict technical proof” or involve “important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment”).

<sup>515</sup> See POWELL, *supra* note 514, at 71 (noting that judicial decisions, unlike those of the political branches, “are not supposed to be influenced by ‘consequences’ or ‘policy’”).

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[T]his court can never with propriety be called on officially to be the umpire in questions merely political. . . . These questions relate to matters not to be settled on strict legal principles. They are adjusted rather by inclination, — or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone, or mere naked power, rather than intrinsic right. . . . [J]udges, on the contrary, for their guides, have fixed constitutions and laws, given to them by others, and not provided by themselves.<sup>516</sup>

Considerations such as these suggest that, despite the significant shift in understanding of the Guarantee Clause that the international law interpretation reflects, the practical significance of the shift for the judiciary may be relatively minor. If anything, the international law interpretation tends to buttress the judiciary's longstanding practice of refusing to adjudicate Guarantee Clause claims.

### CONCLUSION

For those accustomed to viewing the judiciary as the principal expositor of constitutional meaning, it is tempting to view the Guarantee Clause's history as one of "missed opportunities and might-have-beens."<sup>517</sup> The prospect of a judicially enforceable constitutional commitment to "republican" state governance has tantalized generations of constitutional theorists, many of whom have placed their own unique gloss on what precisely a "Republican Form of Government" should be understood to entail. But the alluring interpretive possibilities of this evocative phrase have led nearly all observers to ignore an equally critical inquiry that is essential to understanding the provision's meaning and significance — namely, what it means for the United States to "guarantee" such republican government to the states.

The available evidence strongly suggests that the use of this term was likely informed by a centuries-long practice of using similar language to create binding international treaty commitments. The parallels between the language of the Guarantee Clause and contemporaneous international treaties support the conclusion that the provision was intended to signify a similar quasi-diplomatic obligation of protection flowing from the federal government to the sovereign "republican" governments of the several states.

Adopting this interpretation of the Guarantee Clause would require a rethinking of the obligations imposed by the Clause. Although it has become common to view the provision as a source of obligations imposed on the states with respect to the maintenance of republican government, this understanding is nearly the opposite of the obligations suggested by the provision's express terms. By its terms, the Guarantee Clause imposes a duty on the "United States" for the benefit of the

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<sup>516</sup> *Luther v. Borden*, 48 U.S. (7 How.) 1, 51 (1849) (Woodbury, J., dissenting).

<sup>517</sup> WIECEK, *supra* note 13, at 6.

“States.” And under well-settled principles of international law applicable to similarly worded “guarantee” provisions, such obligations conferred no new rights or entitlements on the part of the guaranteeing state to intervene unasked in the internal affairs of the guaranteed state.

At the same time, the international law interpretation would require markedly little practical change to the way in which courts have traditionally addressed claims asserted under the Guarantee Clause. To the contrary, the available evidence regarding the provision’s original meaning strongly supports the Supreme Court’s longstanding tradition of viewing Guarantee Clause claims as beyond the scope of judicial cognizance.