

A PRIVATE LITTLE *BUSH V. GORE*, OR, HOW NEVADA
VIOLATED THE REPUBLICAN GUARANTEE AND GOT
AWAY WITH IT

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I. INTRODUCTION	106
II. HOW <i>GUINN V. LEGISLATURE</i> CAME TO BE	106
III. THE <i>GUINN</i> CASE: TEN DAYS IN CARSON CITY	109
IV. THE REPUBLICAN GUARANTEE: BIRTH—AND DEATH?	121
A. <i>The Original Meaning Of the Guarantee Clause</i>	122
B. <i>The Supreme Court’s Interpretation of the Guarantee Clause</i>	127
1. <i>Luther v. Borden</i>	127
2. Between <i>Luther</i> and the Progressive Era	131
3. <i>Pacific Telephone</i> and Its Aftermath	133
V. HOW THE <i>GUINN</i> COURT VIOLATED THE GUARANTEE CLAUSE	137
A. <i>The New York Standard</i>	137
B. <i>Would Use of the Guarantee Clause in Guinn Wrongly Expand Federal Power?</i>	140
VI. CONCLUSION.....	144

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I. INTRODUCTION

*“For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments”*¹

On July 1, 2003, Nevada Governor Kenny Guinn filed a remarkable lawsuit.² He asked the Nevada Supreme Court to issue a writ of mandamus ordering the state legislature to pass a budget which had failed to garner the constitutionally required two-thirds vote in the State Assembly. As the lead attorneys for the Pacific Legal Foundation’s amicus curiae participation in the *Guinn* case, I had a unique perspective on this legal controversy and on the fundamental issues of American law that were involved, including one of the forgotten provisions of the United States Constitution: the Republican Guarantee Clause.³ This article examines the facts of *Guinn v. Legislature of Nevada* and related litigation, explains how the Nevada Supreme Court violated the Guarantee Clause, and explores the future constitutional implications of this unusual case.

II. HOW *GUINN v. LEGISLATURE* CAME TO BE

In 1996, Nevada voters enacted an amendment to their state constitution to require a two-thirds vote of both houses of the legislature to pass any bill increasing taxes.⁴ Amending the Nevada Constitution is not an easy matter; any such initiative must be passed at two separate elections,⁵ but the two-thirds amendment passed by over seventy percent of the vote in 1994 and by a similar margin again in 1996.⁶ Nevada is one of several states with some sort of supermajority requirement for tax

1. THE DECLARATION OF INDEPENDENCE para. 23 (U.S. 1776).

2. *Guinn v. Legislature of State of Nevada*, 71 P.3d 1269 (Nev. 2003).

3. U.S. CONST. art. IV, § 4.

4. NEV. CONST. art. IV, § 18, cl. 2.

5. *Id.* at art XIX, § 2, cl. 4.

6. See James Perry, *Americans Want Less Taxation, Now*, WASH. TIMES, Dec. 12, 1996, at A19, available at 1996 WL 2973423; Sean Whaley, *Gibbons Off to Congress, Leaving Tax Legacy Behind*, LAS VEGAS REV.-J., Nov. 8, 1996, at 1B, available at 1996 WL 2353204.

increases.⁷ Such requirements have been criticized by many as overly burdensome,⁸ and they do tend to cause stalemates when state legislatures come to passing budgets.⁹ But others see such requirements as an effective way of restraining legislatures from imposing overly burdensome taxes¹⁰ and of requiring a degree of fiscal discipline from government. Whatever the validity of these arguments, Nevada's voters evidently considered the two-thirds requirement a good idea and made it part of their constitution through state's constitutional process.

Another provision of the Nevada Constitution requires the state to fund public education:

The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.¹¹

This clause was part of Nevada's original constitution, written in 1860.¹² Other clauses of the state's constitution require the

7. "Sixteen states currently impose either a supermajority requirement, a revenue cap, or both." Max Minzner, *Entrenching Interests: State Supermajority Requirements to Raise Taxes*, 14 AKRON TAX J. 43, 55 (1999) (only California, Arizona, Nevada, and Louisiana have a two-thirds requirement for all tax increases).

8. See, e.g., Benjamin Lieber & Patrick Brown, *On Supermajorities and the Constitution*, 83 GEO. L.J. 2347 (1995).

9. For instance, California has entered the fiscal year without a budget twenty nine times in the past thirty-six years. Jim Finkle, *Economists Say California Budget Crisis Is Keeping Businesses from Hiring*, ORANGE COUNTY (CAL.) REG., July 3, 2003, available at 2003 WL 7001736.

10. See, e.g., Michael B. Rappaport, *Amending the Constitution to Establish Fiscal Supermajority Rules*, 13 J.L. & POL. 705 (1997); John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327 (1997); John O. McGinnis and Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999).

11. NEV. CONST. art. XI, § 2.

12. In *Guinn*, the Nevada Supreme Court held that "education is a basic constitutional right in Nevada." 71 P.3d at 1275. The Court provided no citations for this holding, and none appears in Nevada law, although other states have recognized a state-created constitutional right to an education. See, e.g., *Serrano v. Priest*, 5 Cal.3d 584, 589 (1971). The U.S. Supreme Court has specifically found no federally created constitutional right to an education. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973).

legislature to pass a balanced budget¹³ and to do so by July 1 of every other year.¹⁴ Another prohibits the imposition of state income taxes.¹⁵

All of these principles came into explosive conflict in the summer of 2003, when the Nevada legislature met to confer on the state budget. By the end of the session, lawmakers had failed to make appropriations for two matters: the operations of the legislature itself and the education spending bill. Yet with these two major appropriations still outstanding, the legislature had already spent almost all of its expected income. The alternatives were clear: either the legislature must go back and cut its previous spending decisions, or it must raise taxes. But these decisions were not made before the legislative session ended. So, pursuant to the Nevada Constitution,¹⁶ Gov. Guinn called a special session of the legislature to confer on these matters and finish the passage of a balanced budget. The state constitution permits the Governor to limit the subjects that can be discussed at special sessions,¹⁷ however, and Guinn, who endorsed increasing both taxes and spending, limited the special session to addressing only the tax and education bills.¹⁸ As a consequence, the special session could not cut previously settled spending levels to balance out the increase in spending due included in the education bill.

Several Republican legislators, having pledged to their constituents that they would not vote for any increase in taxes, voted against a proposal to impose a gross receipts tax on businesses. Opponents alleged that this tax was endorsed by the state's gambling interests because gambling (or "gaming") was specifically exempted.¹⁹ The tax fell heavily on high-volume retailers with small marginal profits, such as grocery stores.²⁰

At the first special session of the legislature, the budget and education bills passed the state senate, but failed in the state

13. NEV. CONST. art. IX, § 3.

14. The Nevada legislature meets biennially. NEV. CONST. art. IV, § 2.

15. NEV. CONST. art. X, § 1, cl. 9.

16. *Id.* at art. V, § 9.

17. *Id.*

18. See Proclamation by The Governor Calling 19th Special Session, June 3, 2003, at <http://www.leg.state.nv.us/19thSpecial/Governor/Announce.htm>.

19. See Erin Neff, *No Clear Winners Emerge*, LAS VEGAS SUN, July 23, 2003, available at 2003 WL 7822755.

20. See Ray Hagar and Tim Anderson, *Lawmakers Scramble to Pass Tax Package before Deadline*, RENO GAZETTE-J., June 2, 2003, at 1, available at 2003 WL 18772159.

assembly. Although Gov. Guinn extended the special session's time limitations,²¹ the assembly adjourned on June 12, 2003.²² Guinn immediately called a new special session, to open June 25.²³ Once again, a lengthy and heated debate ensued. Because the Nevada Constitution sets July 1 as the beginning of the fiscal year,²⁴ Gov. Guinn announced that if the legislature failed to pass the bill by that time, he would file a petition for a writ of mandate to compel the legislature to pass it.²⁵ The bill did fail—falling a single vote short of the required two-thirds majority. Shortly before midnight on June 30, assembly members Richard Perkins and Barbara Buckley introduced a resolution declaring that “the Nevada Legislature has the constitutional duty . . . to provide for the support and maintenance of the schools,” of the State of Nevada and declaring that “the amount of the proposed appropriations . . . set forth in the second reprint of Senate Bill No. 6” was the amount necessary for such support.²⁶ This totaled \$1,404,876,324.²⁷ Assemblywoman Buckley explained that “we thought it important that the supreme court have some intent. The intent is set forth very clearly in the resolution We want this intent very clear should this matter be considered by the supreme court and ultimately acted upon.”²⁸

III. THE *GUINN* CASE: TEN DAYS IN CARSON CITY

Attorney General Brian Sandoval filed the petition for a writ of mandamus in the State Supreme Court on July 1, 2003, naming the Nevada Legislature and each individual legislator as

21. See Proclamation by The Governor removing time limitations on 19th Special Session, June 8, 2003, at <http://www.leg.state.nv.us/19thSpecial/Journal/Assembly/Final/aj010.html>.

22. *Id.*

23. See Proclamation by the Governor calling 20th Special Session, June 12, 2003, <http://www.leg.state.nv.us/20thSpecial/Governor/Announce20th.htm>.

24. NEV. CONST. art. IX, § 1.

25. Ray Hagar & Tim Anderson, *GOP Hard-Liners Stand Firm on Taxes*, RENO GAZETTE-J., June 29, 2003, at 1, available at 2003 WL 18772885.

26. Assembly Resolution No. 4, at <http://www.leg.state.nv.us/20thSpecial/bills/ar/ar4.pdf>. As a resolution, this required only a majority vote to pass.

27. \$637,789,627 for the 2003–2004 fiscal year and \$767,086,697 for the 2004–2005 fiscal year. See Second Reprint of SB6, § 194.28(1), at http://www.leg.state.nv.us/20thSpecial/bills/SB/SB6_R2.pdf.

28. Journal of Assembly, 20th Special Session, June 30, 2003, available at <http://www.leg.state.nv.us/20thSpecial/Journal/Assembly/Final/aj006.html>.

defendants.²⁹ The petition argued that the Nevada Constitution imposed a nondiscretionary duty for the legislature to fund public schools, and that by exceeding the budgetary deadline, the legislature had violated the constitution.³⁰ But rather than seeking declaratory relief,³¹ the petition asked the court to “[d]irect[] the Legislature and its members to act by a certain time to . . . authoriz[e] and appropriat[e] an amount sufficient for the support and maintenance of the common schools by direct legislative appropriation from the general fund,”³² and “provid[e] by law for an annual tax sufficient to defray the estimated expenses”³³ Attached to the writ was an affidavit by John P. Comeaux, Director of the state’s Department of Administration, declaring that “[t]he amount of general fund necessary to fund the Distributive School Account for FY 04 and FY 05 is \$1,643,253,297, based on Senate Bill 2 of the 19th Special Session.”³⁴

That same day, Chief Justice Deborah A. Agosti issued a statement setting July 7 as the deadline for replies to the writ petition.³⁵ The court, she declared, would “give this case top priority and . . . decide this matter expeditiously.”³⁶

In the next several days, the court accepted amicus curiae briefs supporting the Governor’s petition from the AFL-CIO and allied unions,³⁷ and from a variety of teacher unions and school districts, including Clark County and Washoe County School

29. Petition for Writ of Mandamus, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

30. *Id.* at 2.

31. The Nevada Constitution prohibits the State Supreme Court from issuing advisory opinions. See *Laxalt v. Cannon*, 80 Nev. 588, 591–93 (1964) (declining to issue an advisory opinion absent authorization to do so from the state constitution).

32. Petition for Writ of Mandamus at 4, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

33. *Id.*

34. *Id.* at 6. Note that this estimate differed from that provided in the second reprint of SB 6, to which the Assembly’s last minute resolution referred.

35. Statement of Chief Justice Agosti, July 1, 2003, *Guinn*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

36. *Id.* See also Order Directing Answer, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

37. Brief of Amicus Curiae AFL-CIO & SNEA, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

Districts,³⁸ the Nevada State Education Association (which joined several local education associations),³⁹ the Nevada PTA,⁴⁰ the Clark County Association School Administrators, the Nevada Faculty Alliance,⁴¹ and a group called Nevada Concerned Citizens.⁴² The court denied motions to intervene by the Nevada Board of Regents⁴³ and the Nevada Education Association.⁴⁴ Opposing the petition, State Senators Terry Care and Mark Amodei admitted that the legislature had exceeded the deadline, and conceded other points in the writ petition, but argued that the Governor had “not exhausted his remedies, as the Legislature is still in Session.”⁴⁵ The Nevada Legislature filed an opposition as well,⁴⁶ as did Assemblyman Lynn Hettrick and others.⁴⁷ Amicus briefs by the Pacific Legal Foundation and the Nevada Taxpayers Association opposed the petition as well.⁴⁸

From an early point, the briefs took on an amateurish and bitter quality. The Nevada Education Associations’ amicus brief,

38. Brief of Amicus Curiae Clark County and Washoe County School Districts, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

39. Brief of Amici Curiae Education Associations, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

40. Brief of Amicus Curiae Nevada PTA, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

41. Brief of Amicus Curiae Nevada Faculty Alliance, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

42. Brief of Amicus Curiae Nevada Concerned Citizens, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

43. Order Denying Motion to Intervene, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

44. *Id.*

45. Answer of Respondents Care and Amodei, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

46. Answer of Respondent Nevada Legislature, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

47. Answer of Respondents Hettrick, et al., *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html. Hettrick’s opposition brief also included a counterpetition against Governor Guinn.

48. Brief of Amicus Curiae Pacific Legal Foundation, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html; Brief of Amici Curiae Nevada Taxpayers Association, et al., *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

for instance, argued that “[t]his crisis has been precipitated by a small group of publicity-seeking legislators who have deliberately prevented the legislative majority from complying with the Legislature’s constitutional obligation to fund education . . . and they are using Nevada’s schoolchildren as the pawns in their game.”⁴⁹ The Associations referred to the holdout legislators as “radicals,”⁵⁰ even providing a dictionary definition of the term,⁵¹ although it later described these “radicals” as “those in public life . . . who resist change, who yearn for the past, and who react passionately when their power and influence are seen to wane.”⁵² Respondents’ briefs had only a slightly more elevated tone: Respondents Care and Amodei argued that the Governor’s petition was essentially undemocratic: “the collaboration of the legislative process is of a nature that at times requires a modicum of effort over a protracted period in order to attain the necessary voting support. It is that collaborative process, aimed at achieving inclusiveness, rather than ultimatums, that lies at the heart of the process represented by the legislative branch’s functions [*sic*].”⁵³ The Nevada Supreme Court could only require the legislature to continue their debates, they argued: “A spanking might help, but there is no authority for such a sanction. And indeed same should be applied in an inclusive fashion to the Executive branch and appropriate industry lobbyists.”⁵⁴ Assembly minority leader Lynn Hettrick opposed the writ petition, but asked for a counter-petition to permit the legislature to cut the previous spending levels, which the Governor’s proclamation prevented them from doing.⁵⁵ Because the majority of the legislature wanted the bill passed, the legislature’s defense against the Governor’s petition was

49. Brief of Amici Curiae Education Associations, *supra* note 39, at 1.

50. *Id.* at 2.

51. *Id.* at 2 n.2.

52. *Id.* at 22. This is, of course, the definition of a *reactionary*, which is the opposite of a *radical*. Compare MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 960 (10th ed. 2001) (defining radical as “tending or disposed to make extreme changes in existing views, conditions, or institutions . . . and policies of extreme change”) with *id.* at 969 (defining reactionary as “ultraconservative in politics.”).

53. Answer of Respondents Care and Amodei at 6, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

54. *Id.* at 11–12.

55. See Answer of Respondents Hettrick et al. at 20, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

pressed with something less than enthusiasm.⁵⁶ For instance, Assemblywoman Buckley, while opposing the Governor's petition, argued that "a small group of legislators have prevented [the passage of the budget] from being accomplished, time and time again, because they want the Governor to take action . . . when the Governor does not believe that it is prudent for the State. It is doubtful that the voters ever envisioned that a small group of legislators would play political games and disrupt our schools because of a disagreement with the Governor."⁵⁷

Among other defenses, legislators and amici asserted that the petition was barred by the principle of separation of powers⁵⁸ (which is explicitly preserved in a clause of the state constitution⁵⁹) and legislative immunity.⁶⁰ The respondents argued that even if the constitutional duty to fund education was nondiscretionary, the manner of complying with that provision was solely a legislative matter, and thus not within the reach of mandamus.⁶¹

The Governor filed a supplemental brief arguing that the separation of powers clause did not bar the suit because "constitutional questions exist regarding the interpretation and enforcement of the Nevada Constitution."⁶² Further, the Governor dismissed the argument that mandamus could not lie to compel a discretionary act, because "the Legislature has

56. The collusion between plaintiff Guinn and the defendant Legislature was revealed by the fact that, when the case reached the United States Supreme Court level, the Legislature actually *opposed* the petition, even though they were the losing defendants in the court below. See Petitioner's Reply Brief in Support of Petition for Certiorari, *Angle v. Guinn*, No. 03-1037 at 1 ("[T]he Legislature—or, more precisely, the Legislative Counsel, as we are aware of no act of the Legislature authorizing the filing of its brief—has weighed in to *oppose* this Court's review of a decision rendered *against* it. It makes every argument in the book to *defend* the adverse decision . . .").

57. See Answer of Assemblywoman Buckley at 8, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

58. See, e.g., Answer of Nevada Legislature at 35, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html; Brief of Amicus Curiae Pacific Legal Foundation, *supra* note 48, at 4.

59. NEV. CONST. art. III, § 1.

60. See Answer of Nevada Legislature, *supra* note 58, at 7; Brief of Amicus Curiae Pacific Legal Foundation, *supra* note 48, at 2.

61. See Answer of Nevada Legislature, *supra* note 58, at 7.

62. Supplemental Brief of Petitioner at 4, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

already decided *how much* revenue is need. The only issue left to them is *which* types of revenue are needed to fund that amount.”⁶³

Of particular importance, however, was the amicus brief filed by the Nevada Education Associations. It argued that the holdout legislators were using Nevada’s two-thirds clause “to hold Nevada’s schoolchildren hostage.”⁶⁴ But, it continued, that clause⁶⁵ conflicted with two other provisions of the state constitution: the provision holding that the legislature must fund public schools, and a provision limiting the length of legislative sessions to 120 days.⁶⁶ It also argued that the two-thirds provision violated the Fourteenth Amendment’s Equal Protection Clause in two ways:⁶⁷ first, by violating the “one-man, one-vote” rule of *Baker v. Carr*,⁶⁸ and second, by discriminating against “[t]he class of persons who benefit from expenditures for public education”⁶⁹

The court ultimately embraced the Associations’ argument that the two-thirds provision conflicted with the public schools provision. “The appropriations for education mandated by Article 11, Section 6 of the Nevada Constitution,” the Associations argued, “are, under Article 4, Section 18(1), to be passed by a *simple majority* of the legislators elected to each house But the [two-thirds provision] requires a *two-thirds ‘super-majority’* if it is necessary to provide any *revenue* Thus . . . there is a “dynamic tension” among these provisions.”⁷⁰

This “tension” evaporates on closer examination. Following the time-honored legal rules that specific provisions of the law take precedence over more general provisions,⁷¹ and that later-

63. *Id.* at 12.

64. Brief of Amici Curiae Education Associations, *supra* note 39, at 2.

65. The impetus for adding the two-thirds requirement to Nevada’s Constitution was the campaign of State Representative, later Congressman, James Gibbons. The Education Associations’ brief therefore referred to the requirement as “the Gibbons initiative.” See Brief of Amici Curiae Education Associations, *supra* note 39, at 2.

66. See *id.* at 19 (citing NEV. CONST. art IV, § 2).

67. See *id.* at 17 (citing U.S. CONST. amend IV, § 2).

68. *Id.* at 11 (citing 369 U.S. 186 (1962)).

69. *Id.* at 18. The Associations argued that this discrimination was accomplished by “impair[ing] the exercise of a fundamental right—the right to receive an education—by the citizens of our state because the [two-thirds Clause] has effectively precluded the passage of [the funding bill].”

70. *Id.* at 5.

71. See *State Indus. Ins. System v. Surman*, 741 P.2d 1357, 1359 (Nev. 1987).

enacted provisions trump earlier-enacted provisions,⁷² the three provisions are easily read as consistent: the legislature must fund schools, but the budget that it passes to do so must be passed by a simple majority if it does not increase taxes, and a two-thirds majority if it does increase taxes.

Ignoring this common-sense reading, the Associations proposed two solutions to the alleged tension between the constitutional provisions.⁷³ First, the court could strike down the two-thirds requirement as a violation of the state or federal constitutions.⁷⁴ Secondly, the court could “conclude that the [two-thirds requirement] is not intended to apply where revenues are *mandated* to meet *fundamental* requirements of the Constitution.”⁷⁵ The Associations illustrated their second alternative with an example:

Suppose that the issue here involved the funding of the *judicial* branch of government. Suppose, as in this case, that the rest of the state budget had been closed. Suppose, finally, that a small group of legislators, believing that *other* parts of the budget were inflated, decided to utilize the [two-thirds requirement] to hold the revenue required to operate the courts “hostage” until they were allowed to reopen the “inflated” portions of the budget. Would such an approach be consistent with the Constitution? Could a small group of legislators actually shut down the judicial bench?⁷⁶

The Associations concluded that the purported conflict between the two-thirds provision and the school funding provision should be solved by reading the two-thirds clause “to apply only to those revenue measures that provide funding for programs and purposes *other than those* that are mandated by the Constitution.”⁷⁷

On July 10, the Nevada Supreme Court adopted this approach when it announced its decision.⁷⁸ Over a single partial dissent,⁷⁹

72. See *State v. Economy*, 130 P.2d 264, 266 (Nev. 1942).

73. Brief of Amici Curiae Nevada Education Associations, *supra* note 39, at 6.

74. *Id.* at 6 n.9.

75. *Id.* at 7.

76. *Id.* The Associations left these questions in the rhetorical form, which ought to raise some suspicions. In fact, this sort of Legislative control over the courts is well established.

77. Brief of Amici Curiae Education Associations, *supra* note 39, at 7.

78. *Guinn v. Legislature of State of Nevada*, 71 P.3d 1269 (Nev. 2003).

the court held that the state constitution creates a fundamental right to a state-sponsored education,⁸⁰ the court concluded that this right was being obstructed by the constitution's two-thirds provision.⁸¹ This conflict, wrote the court, could only be resolved by absolving the legislature of the two-thirds requirement. The court held that "[w]hen a procedural requirement that is general in nature prevents funding for a basic, substantive right, the procedure must yield."⁸²

It is a waste of public resources to simply tell the Legislature to forge on and deliberate and negotiate further, since that body has failed to perform its constitutionally required function . . .

The two-thirds majority requirement is a procedural requirement. It is a process requirement by which legislative action is accomplished and decisions that weigh the public interests are accounted for The framers have elevated the public education of the youth of Nevada to a position of constitutional primacy. Public education is a right that the people, and the youth, of Nevada are entitled, through the Constitution, to access. If the procedural two-thirds revenue vote requirement in effect denies the public its expectation of access to public education, then the two-thirds requirement must yield to the specific substantive educational right.⁸³

The court therefore granted the writ petition against the legislature, ordering it "to proceed . . . under simple majority rule."⁸⁴

Many legal commentators were quick to condemn the decision. UCLA Law Professor Eugene Volokh wrote on his weblog, *The Volokh Conspiracy*, that the decision was "one of the most appalling judicial decisions I've ever seen."⁸⁵ The *Wall Street Journal* noted that the court had "ordered state legislators to

79. Justice Maupin explained that although he agreed with the majority, he "would decline the Governor's invitation to intervene in the legislative budgetary process . . . at this time." *Id.* at 1276 (Maupin, J., dissenting in part and concurring in part).

80. *Id.* at 1275.

81. *Id.*

82. *Id.* at 1276.

83. *Id.*

84. *Guinn*, 71 P.3d at 1276. The court denied the writ petition as filed against the individual legislators, and granted it only as filed against the legislature itself.

85. Eugene Volokh, *Nevada Supreme Court Orders Violation of Nevada Constitution*, THE VOLOKH CONSPIRACY (July 10, 2003), at http://volokh.com/2003_07_06_volokh_archive.html#105788769924713715.

violate the state constitution they have sworn to uphold.”⁸⁶ Within days, a spokesman for California Governor Gray Davis announced that Davis was considering filing a similar lawsuit to end the budget impasse in Sacramento.⁸⁷

Some of the legislative holdouts refused to give up, however. On Monday, July 14, they filed for a temporary restraining order in the federal district court in Nevada.⁸⁸ This new lawsuit included several new plaintiffs, including taxpayer groups, and named among the defendants the clerk of the legislature. This case sought to enjoin the defendants from deeming a tax bill as “passed” if it failed to receive the constitutionally required two-thirds vote.⁸⁹ The plaintiffs alleged that doing so would violate their Fourteenth Amendment rights to have their votes weighed equally, would deprive them of property without due process of law (by taxing them in an illegal manner) and deprive Nevadans of a republican form of government.⁹⁰

In an unusual move, the district court considered the temporary restraining order en banc, and granted it pending a Wednesday hearing. Defendants argued that this new case was barred by the *Rooker-Feldman* abstention doctrine,⁹¹ which holds that a federal district court has no jurisdiction to hear newly filed cases that are, in substance, appeals from a final order by a state court.⁹² Plaintiffs argued that this doctrine does not apply where the plaintiffs and defendants differ from those in the original suit, and where the federal issues had not been raised at the state level.⁹³ But on Friday, July 18, the district court ruled that *Rooker-Feldman* did apply, and it dismissed the lawsuit. Later

86. *Nevada's Judicial Dice-Throwers*, WALL ST. J., July 15, 2003 at A14, available at 2003 WL-WSJ 3974012.

87. Steve Geissinger, *Davis Eyes Nevada Ruling on Budget*, OAKLAND TRIB., July 11, 2003, available at 2003 WL 57838731.

88. *Angle v. Legislature of Nevada*, 274 F. Supp. 2d 1152 (D. Nev. 2003).

89. *Id.*

90. *Id.* See also Plaintiff's Memorandum of Points and Authorities in Support of Complaint, *Angle*, 274 F. Supp. 2d 1152 (D. Nev. 2003) (No. CV-N-03-0371).

91. See generally ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 449 (3d ed. 1999); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

92. See Reply Brief for Defendant Governor Guinn at 9, *Angle*, 274 F. Supp. 2d 1152 (D. Nev. 2003) (No. CV-N-03-0371).

93. The extremely fast pace of the litigation in *Guinn* accounts for the sloppy nature of some of the arguments. In addition, shortly after the Nevada Supreme Court's decision, some legislators, led by Sharron Angle, hired a new attorney, Dr. John C. Eastman, director of the Claremont Institute Center for Constitutional Jurisprudence, who filed the federal district court litigation.

that night, the Ninth Circuit Court of Appeals denied an emergency stay pending appeal.⁹⁴ These plaintiffs then returned to the state supreme court, filing a petition for rehearing on July 21.⁹⁵ This petition, like the complaint in the now-dismissed federal suit, argued (*inter alia*) that the Nevada Supreme Court had violated the Republican Guarantee Clause of the Federal Constitution.⁹⁶

Later that night, the legislature convened again, and again voted on the disputed budget. Two tax bills, SB 6—which had started the whole crisis—and SB 5, received only simple majorities. Over the objections of dissenting legislators, the speaker of the assembly declared the bills passed, on the basis of the state supreme court’s decision. But, at approximately 11:00 p.m., one of the holdout legislators, Assemblyman John Marvel, declared that he wanted to avoid “a constitutional crisis” and voted for a new tax bill, SB 8, which therefore received the required two-thirds vote.⁹⁷ This bill was then signed into law.

The next morning, attorneys for Sharron Angle and other legislative holdouts filed a motion to vacate the state supreme court’s decision as moot.⁹⁸ The court immediately permitted the other parties and amici to reply.⁹⁹ Two days later, on July 24, Angle’s attorneys filed a supplemental brief arguing that the federal issues involved in the case were not moot, and that the court should grant rehearing.¹⁰⁰ This supplemental brief argued,

94. Order Setting Expedited Briefing, *Angle et al. v. Legislature of Nevada* (No. 03-16326), available at http://www.claremont.org/static/nevada_ninthcircuit1.pdf.

95. Petition for Rehearing, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html. In keeping with the unorthodox rhetoric involved in the litigation papers, the petition urged the Court to adopt a new Constitutional rule requiring the Legislature to fund education before funding any other appropriation. *See id.* at 12. Of course, like the simple majority rule that the Court actually adopted, this proposal lacked any shred of textual legal support.

96. *See id.* at 17.

97. Erin Neff, *Tax Plan Finally Passes: Lawmakers Get Two-thirds Vote on \$836 Million Hike*, LAS VEGAS SUN, Jul. 22, 2003, at 1, available at 2003 WL 7822629; Sean Whaley and Ed Vogel, *State Legislature: Budget Approved*, LAS VEGAS REV.-J., Jul. 22, 2003, at A1, available at 2003 WL 4741878.

98. Supplement to Petition for Rehearing and Motion to Withdraw Opinion, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

99. Order Granting Legislature’s Motion for Extension to File Answer to Rehearing Petition, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

100. *See* Respondent’s Additional Points And Authorities on Why the Federal Issues are Not Moot, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

again, that the Nevada Supreme Court's ruling had violated the Republican Guarantee Clause.

The Nevada Supreme Court held off ruling on the petition for rehearing until September 17. Then it dismissed the rehearing petition as moot and clarified its former opinion.¹⁰¹ The court described at length the facts leading up to the lawsuit and criticized the two-thirds provision's passage. The campaign behind the two-thirds provision, the court claimed, had not "discuss[ed] the issue or the effect the proposal could have on other constitutional rights or the state's overall fiscal integrity."¹⁰² Indeed, "the voters were not informed of the problems the [two-thirds provision] would cause if a minority of legislators disagreed with the majority over the level of services to be provided to Nevada citizens, [and the court] could not determine how the voters intended to resolve such a conflict."¹⁰³ Thus, explained the court, it had attempted to balance allegedly conflicting provisions of the Nevada Constitution in the same way that the United States Supreme Court has balanced the allegedly conflicting Establishment and Free Exercise Clauses of the First Amendment.¹⁰⁴ The court had been required to "balance" the "interests" of, on one hand, "public education, the democratic process, and fiscal interests," with "the interests fostered by the supermajority requirement."¹⁰⁵ The latter interests the court explained, were to limit the influence of special interest groups and to promote government efficiency,¹⁰⁶ as well as "encourag[ing] state government to prioritize its spending and economize rather than explor[ing] new sources of revenue."¹⁰⁷ Thus, the court concluded "that the Legislature could suspend the supermajority rule in favor of a vote by a legislative majority, in this very narrow circumstance, in order to fulfill its obligations to fund education and balance the budget."¹⁰⁸

101. See Order Dismissing Petition for Rehearing And Clarifying Opinion, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html. [hereinafter Order Dismissing]

102. *Id.* at 26.

103. *Id.* at 30.

104. See *id.* at 31.

105. *Id.* at 32.

106. See Order Dismissing, *supra* note 101, at 32.

107. *Id.* at 30.

108. *Id.* at 30.

The court's "clarification," was, if possible, even more extreme than the court's original decision. First, the assertion that the voters were misled by the two-thirds initiative is (as one dissenting justice noted¹⁰⁹) disingenuous. The plain language of the two-thirds provision makes quite clear "how the voters intended" such a conflict to be resolved: they expected the legislature to resolve the issue through deliberation, and decide on a tax bill that would garner two-thirds of the votes. To suppose that the voters did not know that a two-thirds provision would enable "a minority of legislators" to hold out and stop the passage of a tax bill is absurd. Likewise, the court defined "[t]he essential issue" in the case as "whether the supermajority requirement could be improperly used by a few to challenge the majority's budget decisions"¹¹⁰ Yet it is senseless to say that a two-thirds provision "improperly" allows "a few" to "challenge" a majority that comes to less than two-thirds, since that is *precisely* what the requirement is intended to allow.

The court further rejected the rehearing petition's vote-dilution arguments on the grounds that the holdout legislators' "proffered construction of the Constitution, if followed, would also result in vote dilution"¹¹¹ Although the court did not elaborate, the only possible meaning of this sentence is that the two-thirds provision forbids simple majorities from passing taxes. But the difference between the court's "construction" of the two-thirds clause and the "proffered construction" of the legislators is that the latter is based on the clear command of the state Constitution, while the former lacks any pretense at textual basis. The court's theory, as clarified in its second opinion, was simply that a the people couldn't possibly have meant for the two-thirds provision to allow a group of one-third plus one to prevent the legislature from raising taxes. "To avoid an impasse harmful to public education, we determined that the supermajority provision could not be *improperly used* to avoid majority rule on budget appropriations."¹¹²

The court then dismissed the petition, holding that it became moot when the Legislature passed its tax bill by a two-thirds

109. *See id.* at 34 (Maupin, J., dissenting).

110. *Id.* at 31.

111. *Id.* at 33.

112. Order Dismissing, *supra* note 101, at 32 (emphasis added).

majority.¹¹³ One Justice concurred separately, complaining that it was not “appropriate, in responding to a petition for rehearing, for this court to attempt to answer public criticism.”¹¹⁴ Justice Maupin dissented, holding that the entire matter was moot, and “strongly tak[ing] issue with the court’s comments . . . that the supermajority initiative was flawed from its inception.”¹¹⁵ The people had merely sought “to make it more onerous for the Legislature to create new revenue streams,” and “such initiatives, however inconvenient to the operatives of government . . . represent the ultimate form of citizen consent to government.”¹¹⁶

The legislators soon thereafter filed a petition for a writ of certiorari with the United States Supreme Court,¹¹⁷ arguing that the Nevada Supreme Court’s ruling ultimately violated the Republican Guarantee Clause, the Due Process Clause of the Fourteenth Amendment, and, by diluting the votes of the dissenting legislators, violated the Equal Protection Clause’s guarantee of one-person, one-vote. Amicus briefs supporting the petition were filed by the National Taxpayers Union, the Initiative and Referendum Institute, and the Pacific Legal Foundation, which represented itself and thirty-six members of the California Legislature. On March 22, 2004, the petition was denied.¹¹⁸

IV. THE REPUBLICAN GUARANTEE: BIRTH—AND DEATH?

The Nevada Supreme Court’s decision in *Guinn* deserves criticism on many levels.¹¹⁹ As detailed above, the decision was obviously motivated by political expediency; ignored both fundamental principles (like the separation of powers) and general rules of legal interpretation (such as the rule that specific clauses take precedence over general ones). It

113. *See id.* at 33.

114. *Id.* at 30 (Shearing, J., concurring).

115. *Id.* at 33 (Maupin, J., dissenting).

116. *Id.*

117. *See* Petition for Writ of Certiorari for Angle et al., *Angle v. Guinn*, 124 S.Ct. 1662 (2004) (No. 03-1037), *available at* 2004 WL 113601.

118. *Angle v. Guinn*, 124 S.Ct. 1662 (Mar. 22, 2004). The holdout legislators then petitioned for certiorari in the federal version of the *Guinn* litigation (which had been dismissed under the *Rooker-Feldman* abstention doctrine). The Supreme Court denied this petition on January 24, 2005. *Angle v. Legislature of Nevada*, No. 04-542, 2005 WL 126663 (U.S., Jan. 24, 2005).

119. *See generally Recent Cases: Nevada Supreme Court Sets Aside A Constitutional Amendment Requiring Two-Thirds Majority for Passing A Tax Increase Because It Conflicts with A Substantive Constitutional Right*, 117 HARV. L. REV. 972 (2004) [hereinafter *Recent Cases*].

established an unprincipled rule of law, that whenever a “mere” procedural rule obstructs the public’s “expectation of access” to a government-funded benefit, the procedure “must yield.”¹²⁰ But *Guinn* is also unique in that it presents a rare example of a violation of the Republican Guarantee Clause of the Constitution—a clause that has generally been considered dead letter.

A. *The Original Meaning of the Guarantee Clause*

The United States Constitution guarantees to every state a republican form of government.¹²¹ This Clause was added at the suggestion of James Madison, who, months before the Constitutional Convention assembled, noted that among the weaknesses of the Articles of Confederation was the “want of Guaranty to the States of their Constitutions & laws against internal violence.”¹²² Surely one of Madison’s primary concerns was insurrections such as Shays’ Rebellion, an armed insurrection that occurred shortly before the call for the Convention.¹²³ Uprisings of dispossessed minorities were a fundamental concern to Madison, who saw that differences in wealth would always create political factions, and that “rage[s] for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project,” were the likely consequences.¹²⁴ The problem of faction would not be restrained to the political process, however; as Madison explained, it could spread into unconstitutional acts, revolution and finally violence:

120. *See id.* at 976 (“The *Guinn* court also misapplied its canon that the specific governs the general . . . [I]t substituted for this rule a completely different rule—that substantive provisions necessarily prevail over procedural ones.”).

121. U.S. CONST. art. IV, § 4.

122. James Madison, *Vices of the Political System of the U. States*, in MADISON: WRITINGS 71 (J. Rakove ed., 1999).

123. *See* Ethan J. Leib, *Redeeming The Welshed Guarantee: A Scheme for Achieving Justiciability*, 24 WHITTIER L. REV. 143, 205 (2002).

In reaction to the extralegal violence perpetrated by Shays’ Rebellion, the Framers acutely felt the weakness of the Articles of Confederation. Thus, when Madison was to present his Virginia Plan, the Guarantee Clause was part of his larger program to give the federal government some constitutional authority to provide help to the states.

Id.

124. THE FEDERALIST No. 10, at 52 (James Madison) (Clinton Rossiter ed., 1999).

According to Republican Theory, Right and power being both vested in the majority, are held to be synonymous[, but a]ccording to fact and experience a minority may in an appeal to force, be an overmatch for the majority. 1. If the minority happen to include all such as possess the skills and habits of military life, & such as possess the great pecuniary resources, one third only may conquer the remaining two thirds. 2. One third of those who participate in the choice of the rulers may be rendered a majority by the accession of those whose poverty excludes them from a right of suffrage, and who for obvious reasons will be more likely to join the standard of sedition than that of the established government. 3. Where slavery exists the Republican Theory becomes still more fallacious.¹²⁵

In other words, republics could be swayed by the passions of the majority, or by an unusually powerful faction, which might overthrow the republic.¹²⁶ For the federal government to guarantee the stability of state governments would help to prevent states from being overthrown. The problem with this becomes immediately obvious: such a federal guarantee might interfere with the right of citizens to change elements of their state government when they discovered the need to do so. Resolving this tension was the goal of debates on the clause at the federal convention.

On May 29, 1787, Madison moved “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.”¹²⁷ A few weeks later, an amended version of the resolution was passed, declaring “that a republican Constitution & its existing laws ought to be guaranteed to each State by the U. States.”¹²⁸ On July 18, the Convention debated the proposal more thoroughly. Although several delegates defended the provision, arguing that “[t]he object is merely to secure the States agst. dangerous commotions, insurrections and rebellions,”¹²⁹ Governor Morris

125. Madison, *supra* note 122, at 71–72.

126. See THE FEDERALIST NO. 10, at 46 (James Madison) (Clinton Rossiter ed., 1999) (“By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”).

127. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, 22 (M. Farrand ed., 1911). [hereinafter Farrand]

128. *Id.* at 202.

129. 2 Farrand, *supra* note 127, at 47.

pointed out that the federal government should not guarantee all the existing laws of some states, which might be objectionable.¹³⁰ Madison suggested a compromise, “to substitute “that the Constitutional authority of the States shall be guaranteed to them respectively agst. domestic as well as foreign violence.”¹³¹ But other delegates were concerned that a guarantee of existing state governments would interfere with the ability of the people to change their state constitutions.¹³² Seeking effective compromise language, James Wilson proposed “that a Republican form of Government shall be guaranteed to each State & that each State shall be protected agst. foreign & domestic violence.”¹³³ This would permit states to change their constitutions lawfully (so long as they did not create monarchies or other non-republican forms of government) but would ensure states against internal lawlessness as well as invasion.

On August 17, the Convention considered what became the second half of the Guarantee Clause, which protects states “on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.”¹³⁴ Delegates argued over whether to require an application from the state legislature, however. Some thought the requirement necessary to prevent the federal government from overwhelming the states,¹³⁵ but others warned that “The Executive [of the State] may possibly be at the head of the Rebellion,”¹³⁶ and that it was “of essential importance to the tranquility of the U.S. that they should in all cases suppress domestic violence, which may proceed from the State Legislature itself.”¹³⁷

The result of these debates was a provision that guarantees to every state a republican form of government, but does not guarantee the laws, or anything more particular; and which, in a separate clause, requires state authorities to request assistance from the federal government before armed forces may be

130. *Id.*

131. *Id.* at 47–48.

132. *See, e.g., id.* at 48 (“Mr. Houston was afraid of perpetuating the existing Constitutions of the States. That of Georgia was a very bad one, and he hoped would be revised . . .”).

133. *Id.* at 48–49.

134. U.S. CONST. art IV, § 4, cl. 2.

135. 2 Farrand, *supra* note 127, at 317 (“Mr. L—Martin . . . [said that] [t]he consent of the State ought to precede the introduction of any extraneous force whatever.”).

136. *Id.*

137. *Id.* at 466–67.

introduced to put down domestic violence. The Guarantee Clause represents a careful balance which preserves state autonomy within bounds, but permits effective federal control over *coups d'etat*.¹³⁸ As one pro-ratification pamphleteer explained, the Clause would stop any group “who shall make an alteration in the form of government of any state, whereby the powers thereof shall be attempted to be taken out of the hands of the people at large.”¹³⁹

The *Federalist* elaborated that the Clause would enable the federal government to prevent the overthrow of the states’ republican forms even by the states’ own legislatures. Since a state constitution might be subverted even “by a majority of a State,” wrote Madison, the “federal authority” should be empowered to “support the State authority[.]”¹⁴⁰ Federal officials would not be “heated by the local flame,” and would thus be impartial judges.¹⁴¹

Alexander Hamilton wrote that the clause would present “no impediment to reforms of the State constitutions by a majority of the people in a legal and peaceable mode.”¹⁴² Rather, it would prevent the sudden and undemocratic alteration of a state’s constitution:

The guaranty could only operate against changes to be effected by violence. Towards the preventions of calamities of this kind, too many checks cannot be provided. The peace of society and the stability of government depend absolutely on the efficacy of the precautions adopted on this head. Where the whole power of the government is in the hands of the people, there is the less pretense for the use of violent remedies in partial or occasional distempers of the State. The natural cure for an ill-administration, in a popular or representative constitution, is a change of men. A guaranty by the national authority would be as much leveled against the

138. See Louise Weinberg, *Political Questions And The Guarantee Clause*, 65 U. COLO. L. REV. 887, 944–45 (1994) (proposing hypothetical in which state becomes despotism).

139. Tench Coxe, *An Examination of the Constitution*, in 4 THE FOUNDERS’ CONSTITUTION 561 (P. Kurland & R. Lerner eds., 1987).

140. THE FEDERALIST NO. 43, at 244 (James Madison) (Clinton Rossiter ed., 1999).

141. *Id.*

142. THE FEDERALIST NO. 21, at 108 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

usurpations of rulers as against the ferments and outrages of faction and sedition in the community.¹⁴³

Decades later, Justice Joseph Story concluded that “the PEOPLE of each State have a right to protection against the tyranny of domestic faction, and to have a firm guarantee, that their political liberties shall not be overturned by a successful demagogue who shall arrive at power by corrupt arts, and then plan a scheme for permanent possession of it.”¹⁴⁴ Like the authors of the Constitution, Justice Story understood the Guarantee Clause as protecting the citizens of the states from having their constitutions subverted, even by those acting under the color of law.¹⁴⁵

To put this in modern terms, the Guarantee Clause is a device for controlling the “agency problem.” The “agency problem,” or the “principal-agent problem,” is created by the divergent interests of any principal and the agent that he or she employs. The greater this divergence, the greater the temptation of the agent to maximize his or her benefit, even when doing so might be adverse to the interests of the principal.¹⁴⁶ This divergence will be greater than zero so long as the principal employs an agent—or, to put it colloquially, the only way to ensure that a thing is done right is to do it yourself. If government is an agent of the people, then the Constitution is an attempt to prevent this divergence from getting too far out of hand—that is to say, it ensures that the government remains the servant rather than the master.¹⁴⁷ The Guarantee Clause was intended to ensure the

143. *Id.* The term “violence” does not appear to have been used exclusively in the sense of open physical combat, but also in the more general sense of wrongful violation of the laws. *See, e.g.*, NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 343 (1806) (“Violence, *n.* force, fury, outrage, injury, an attack.”).

144. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 295 (1840).

145. *Id.* Story distinguished between the Guarantee Clause and the Domestic Insurrection Clause, the latter of which was designed to prevent “domestic violence by popular insurrection,” a problem “equally repugnant to the good order and safety of the Union.” *Id.*

146. *See* *Menichini v. Grant*, 995 F.2d 1224, 1232–33 (3d Cir. 1993) (explaining agency problem.).

147. From early on, constitutions have been seen as a higher, or more important law than the laws promulgated by legislators. As Alexander Hamilton wrote in the *Federalist*, “[n]o legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves . . .” THE FEDERALIST NO. 78, at 435 (Alexander Hamilton) (Clinton Rossiter ed., 1999). The distinction between republican government and arbitrary, or absolute, government is two-fold: the ability of the people to control their government, and the limited nature

stability of state laws and prevent usurpation.¹⁴⁸ In such cases, wrote Hamilton, “the friends and supporters of the government” look to the federal government for “succor.”¹⁴⁹ At the same time, the Clause protected their right to change their state government when it suited them.

B. *The Supreme Court’s Interpretation of the Guarantee Clause*

1. *Luther v. Borden*

Despite frequent scholarly attempts to revive the Guarantee Clause, it is generally believed that the Clause was rendered dead letter in the 1849 case of *Luther v. Borden*,¹⁵⁰ when the Supreme Court held that it could not decide which of two rival governments of Rhode Island was the legitimate one. When “the people of the State . . . alter and change their form of government,” said the Court, it is for Congress alone to determine whether their doing so violates the Republican Guarantee Clause.¹⁵¹

Although *Luther* has been interpreted as limiting enforcement of the Guarantee Clause solely and entirely to the political branches, it was not until the twentieth century that this became

of the lawmaker’s powers. See THE FEDERALIST NO. 39, at 209 (James Madison) (Clinton Rossiter ed., 1999) (“We may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.”); THE FEDERALIST NO. 57, at 318 (James Madison) (Clinton Rossiter ed., 1999) (“The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.”). The agency problem is the reason why these two are related: if the constitution grants a lawmaker *total* discretion, then the people are not actually in control of the government, and it cannot be described as republican.

148. There is much to be said for the argument that the Guarantee Clause was also meant to protect the federalist structure by preventing the federal government from taking over state powers. See Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). This was certainly the perspective from which the Supreme Court read the Clause in *New York v. United States*, 505 U.S. 144, 184–86 (1992) (discussing ways in which earlier courts have interpreted the Guarantee Clause). See also 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 100 (J. Elliot, ed., 1836) (statement of Mr. Singletary) (arguing that Guarantee Clause protected states from federal overreaching). That, however, is beyond the scope of the present paper.

149. THE FEDERALIST NO. 21, *supra* note 142, at 108.

150. 48 U.S. (7 How.) 1 (1849).

151. *Id.* at 47.

the dominant interpretation of *Luther*.¹⁵² In fact, that case rejected the Guarantee Clause argument because the claim was nonjusticiable for complicated reasons unique to that case.

The facts that gave rise to *Luther* are complicated to the point of comedy; indeed, one commentator has likened it to a Monty Python sketch.¹⁵³ By 1849, the state of Rhode Island had been operating under its original royal colonial charter for well over a century and a half. Complaining of the state legislature's malapportionment and other abuses, a group of citizens called an unauthorized state constitutional convention, and drew up a new state constitution, which was then submitted to the voters—again without authorization. The new constitution was overwhelmingly approved by the voters. The legislature drafted an alternative proposed constitution, which the voters rejected. Nevertheless, the legislature refused to concede to the officers elected under the unauthorized constitution, such as the new “governor,” Thomas Dorr. The legislature and the incumbent governor asked President John Tyler for military assistance in case violence broke out, and Tyler agreed.¹⁵⁴ After Dorr and his supporters failed in an armed attack on the authorized government, Dorr was arrested and convicted of treason by the Rhode Island Supreme Court. During the investigation, one of Dorr's supporters, named Martin Luther, sued a state militia officer who had searched Luther's home without a warrant. Among other arguments, Luther asserted that the search was not authorized because the “new” government of Rhode Island had been adopted by the people's vote, and therefore the Guarantee Clause required the federal government to recognize it, rather than the old charter government, as the state's legitimate sovereign.¹⁵⁵

The Supreme Court held that it could not address the origin of sovereignty in a political state,¹⁵⁶ or decide “[w]hich must be regarded as the rightful government abroad between two

152. See *New York v. United States*, 505 U.S. 144, 184 (1992) (citing *Colgrove v. Green*, 328 U.S. 549, 556 (1946)); *VanSickle v. Shanahan*, 511 P.2d 223 (Kan. 1973).

153. See HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND* 209 (1994). The facts described in this paragraph are drawn from Paul M. Thompson, *Is There Anything 'Legal' About Extralegal Action? The Debate over Dorr's Rebellion*, 36 *NEW ENG. L. REV.* 385, 396–405 (2002).

154. *Id.* at 402. See also *Luther*, 48 U.S. (7 How.) at 33.

155. *Luther*, 48 U.S. at 38.

156. *Id.* at 57–58.

contending parties[.]”¹⁵⁷ Inquiring into the legitimacy of government’s origins was no place for the courts,¹⁵⁸ which was solely entrusted with deciding “matter[s] of private personal authority and right, set up . . . under constitutions and laws.”¹⁵⁹ Thus, the *Luther* court’s primary focus was not on the substance of the different constitutions, but on whether the Dorr Constitution had been legitimately adopted by the people:

In forming the constitutions of the different States . . . the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power.¹⁶⁰

Further, as the *Luther* Court well knew, the federal government had already essentially recognized one of the two rival governments by the time the Court rendered its decision.¹⁶¹ For the Court to intervene could therefore conflict with other

157. *Id.* at 56–57.

158. *See id.* at 39 (It “rested with the political power to decide whether the charter government had been displaced or not . . .”).

159. *Id.* at 59. *Cf.* *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) (“Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”).

160. *Luther*, 48 U.S. (7 How.) at 39–40.

161. *Id.* at 44 (“[U]pon the application of the governor under the charter government, the President recognized him as the executive power of the State . . .”). *See* Edward A. Stelzer, Note, *Bearing The Judicial Mantle: State Court Enforcement of The Guarantee Clause*, 68 N.Y.U. L. REV. 870, 879 n.63 (1993) (describing President Tyler’s use of his Congressionally-dedicated authority, granted in the Militia Act of 1792, to support the charter government).

branches of the federal government, one of the factors prominent on the surface of a political question.¹⁶²

The Court did not, however, hold that *every* issue arising under the Guarantee Clause constituted a nonjusticiable political question. In the rare cases where the judiciary is capable of enforcing the guarantee, and there is little likelihood that the other branches of the federal government will do a superior job protecting the rights concerned, there would seem less reason to regard the Clause as nonjusticiable.¹⁶³ Indeed, in *Reynolds v. Sims*, the Supreme Court acknowledged that the Guarantee Clause does not *always* involve political questions, but only where judicially manageable standards for reaching a legal conclusion are absent.¹⁶⁴ This is the same standard for “political question” deference in other areas of constitutional law, where the issue is beyond judicial competence,¹⁶⁵ involving the sort of value judgments or policy determinations that would be inappropriate for judges to make. The political question doctrine is routinely invoked to avoid entangling the Court in a “political thicket.”¹⁶⁶ This sensible use of the doctrine is consistent with the result in *Luther*, where adjudication would have involved the Court in complicated internal political matters. But in cases that are otherwise justiciable, and involve no such complications, there is little sense in the Court invoking *Luther* to avoid addressing the merits. Forcing the plaintiff to obtain a political solution when the injury complained of is to the political process itself is dubious, and courts since at least the 1930s have been reluctant to deprive plaintiffs of a legal solution to such injuries.¹⁶⁷

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

163. See Erwin Chemerinsky, *Cases under The Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 853 (1994).

164. 377 U.S. 533, 582 (1964).

165. See also *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (“The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”).

166. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion).

167. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). (“[L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . [may] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment.”).

2. Between *Luther* and the Progressive Era

In the decades following *Luther*, the Supreme Court took several cases involving the Guarantee Clause, and “addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable.”¹⁶⁸ In *Minor v. Happersett*, for instance, the Court countenanced a Guarantee Clause challenge to laws which prohibited women from voting.¹⁶⁹ The Court addressed the merits, without rejecting jurisdiction under the political question doctrine. In *Forsyth v. City of Hammond*, the Court held the Clause was not violated by a state law allowing cities to annex adjacent landowners without their consent.¹⁷⁰ The Court did not hold that the Clause was always nonjusticiable.¹⁷¹ State courts have also found Guarantee Clause arguments to be justiciable.¹⁷²

Of those cases which have addressed the merits of Guarantee Clause claims, *Duncan v. McCall* probably provides the most thorough analysis.¹⁷³ Duncan had been convicted of murder in a Texas court, but he sought a writ of habeas corpus on the grounds that the Texas legislature had failed to follow the proper procedures in adopting the state’s criminal code. The application of the code, he argued, would therefore violate the Guarantee Clause by enforcing a law that had not been legitimately adopted.

The Court did not dismiss these allegations as nonjusticiable. Rather, it explained at length that the procedures for the adoption of the state’s laws had been complied with. “For 11 years prior to the conviction of Duncan, these Codes had been recognized and observed by the people of Texas; had been amended by the legislature, and republished under its authority; and their provisions had been repeatedly construed and enforced by the courts as the law of the land.”¹⁷⁴ Thus, the laws had been validly adopted and Duncan’s habeas petition was

168. *New York v. United States*, 505 U.S. 144, 184 (1992).

169. 88 U.S. 162, 165 (1874).

170. 166 U.S. 506, 520 (1897).

171. *Id.* at 519. *See also* *Attorney Gen. of State of Mich. v. Lowrey*, 199 U.S. 233, 239–40 (1905) (addressing merits of Guarantee Clause challenge with no mention of nonjusticiability).

172. *Kadderly v. City of Portland*, 74 P. 710, 719 (Or. 1903); *Beach v. Bradstreet*, 82 A. 1030, 1032 (Conn. 1912); *City of Cleveland v. Ruple*, 200 N.E. 507, 510 (Ohio 1936).

173. 139 U.S. 449 (1891).

174. *Id.* at 459.

denied. But the Court lingered on Duncan's Guarantee Clause argument.

By the constitution, a republican form of government is guarantied to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws . . . but, while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities¹⁷⁵

The Supreme Court acknowledged that the *Luther* Court had found the Clause nonjusticiable, but it adopted Daniel Webster's argument in *Luther* as a "masterly statement of the American system of government." The Court held that Webster had suggested some broad principles for the applicability of the Guarantee Clause:

[T]hat the people are the source of all political power, but that as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the constitution of the government and in the enactment of laws; that the people limit themselves . . . to certain forms of the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes; and that the constitution and laws do not proceed on the ground of revolution, or any right of revolution, but on the idea of results achieved by orderly action under the authority of existing governments, proceedings outside of which are not contemplated by our institutions [N]o violation of these fundamental principles in this instance is or could be suggested. The state of Texas is in full possession of its faculties as a member of the Union, and its legislative, executive, and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law.¹⁷⁶

175. *Id.* at 461.

176. *Id.* at 461–62.

This suggests that the Guarantee Clause prohibits “revolutionary” acts within a state which upset the “certain rule” or “orderly action” by which representative governments are arranged in state constitutions. That interpretation is consistent with Hamilton’s argument in *The Federalist* that the Clause would not prevent the people of the states from amending their constitutions or adopting new ones and it is consistent with the framers’ broader concerns with preventing lawlessness by state authorities, while still permitting the people to change their constitutions within the boundaries of republican principles.

Taylor v. Beckham reiterated the conclusion that the Clause protects the regular forms of state law from sudden, internal, undemocratic alteration.¹⁷⁷ That case involved a disputed gubernatorial election. The Court addressed the merits of the Guarantee Clause challenge, but rejected it because “[t]he procedure was in accordance with the Constitution and laws of the state.”¹⁷⁸ Since “the legislative, executive, and judicial departments of the state are peacefully operating by the orderly and settled methods prescribed by [the State’s] fundamental law,” and were “the result of the Constitution and laws under which they lived and by which they were bound,”¹⁷⁹ the Court found no violation.

3. *Pacific Telephone* and Its Aftermath

In 1992, in *New York v. United States*,¹⁸⁰ the Supreme Court noted that the *Luther* decision had “metamorphosed” into the sweeping assertion that “[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts.”¹⁸¹ That process began during the rise of the “Progressive Era,” when a nationwide reform movement championed the initiative, referendum, and recall procedures. These procedures were added to the constitutions of several states, despite the criticism that they were a form of direct democracy and thus incompatible with the Guarantee Clause.¹⁸²

177. 178 U.S. 548 (1900).

178. *Id.* at 573.

179. *Id.* at 579–80.

180. 505 U.S. 144 (1992).

181. *Id.* at 184 (quoting *Colegrove*, 328 U.S. at 556).

182. Such criticisms continue today. See, e.g., Steven William Marlowe, *Direct Democracy Is Not Republican Government*, 24 SEATTLE U. L. REV. 1035 (2001); Hans A. Linde, *When Initiative Lawmaking Is Not ‘Republican Government’: The Campaign Against Homosexuality*, 72

In a series of cases between 1907 and 1916, the Supreme Court rejected several challenges to the initiative concept on Guarantee Clause grounds. In *Pacific States Telephone & Telegraph Co. v. State of Oregon*,¹⁸³ the Court emphatically removed itself from what it saw as an overwhelmingly political venture. The case originated when an initiative imposed a tax on corporations including the telephone company; the company challenged the tax as violating the Guarantee Clause.

Writing for the majority, Chief Justice White reacted harshly against what he saw as a very extreme argument. “[T]he contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum,” he wrote.¹⁸⁴ For the Court to determine whether the initiative process was consistent with republicanism would be an “inconceivable expansion of the judicial power,” leading to “the ruinous destruction of legislative authority.”¹⁸⁵ It would mean that courts could

examine as a justiciable issue the contention as to the illegal existence of a state, and if such contention be thought well founded, to disregard the existence in fact of the state, of its recognition by all of the departments of the federal government, and practically award a decree absolving from all obligation to contribute to the support of, or obey the laws of, such established state government.¹⁸⁶

Citing *Luther* as “the leading and absolutely controlling case,”¹⁸⁷ White concluded that the Clause could only be enforced by Congress. The “essentially political nature” of the telephone company’s claim was demonstrated, wrote White, because the company did not attack

OR. L. REV. 19 (1993); Catherine Engberg, Note, *Taking The Initiative: May Congress Reform State Initiative Lawmaking to Guarantee A Republican Form of Government?* 54 STAN. L. REV. 569 (2001). But see Robert G. Natelson, *A Republic, Not A Democracy? Initiative, Referendum, and The Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807 (2002); Edward J. Erler, *Californians And Their Constitution: Progressivism, Direct Democracy, and the Administrative State*, 6 NEXUS 237 (2001) (defending initiative process against variety of criticisms).

183. 223 U.S. 118 (1912) [hereinafter *Pacific Telephone*].

184. *Id.* at 141.

185. *Id.*

186. *Id.* at 142.

187. *Id.* at 143.

the tax as a tax, but . . . the state as a state It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power . . . but to demand of the state that it establish its right to exist as a state, republican in form.¹⁸⁸

That, the Court held, was obviously beyond its power. In the following decade, the Court cited *Pacific Telephone* repeatedly when rejecting arguments that challenged the initiative, referendum, and recall processes.¹⁸⁹

But it would be inaccurate to read these cases as holding that the Court must be deaf to any claim invoking the Guarantee Clause. Chief Justice White's exaggerated language in *Pacific Telephone*¹⁹⁰ shows that the Court considered it extremely important to avoid what a later Justice would call a "political thicket."¹⁹¹ Moreover, the initiative processes involved in these cases had all been added to the state constitutions through amendments which followed the regular procedures for amendment. The Court's refusal to strike these down as violating the Republican Guarantee Clause is therefore consistent with Alexander Hamilton's view that the Clause would preserve the right of citizens to amend their Constitutions. Like *Luther*, the *Pacific Telephone* decision did not wholly abandon judicial review under the Guarantee Clause; it is better read as holding that the Court may not decide when a *lawfully enacted* procedure is sufficiently republican in form. Moreover, the *Pacific Telephone* Court must have been greatly concerned that using the Clause to strike down a Constitutional provision which the people themselves had adopted, and which broadened, rather than narrowed, popular control over the state government, would seem self-contradictory. It would be a very different question whether courts can enforce the Clause against undemocratic usurpations of the state's lawful procedures. This was recently reiterated in *New York*, which noted that a

188. *Id.* at 150–51.

189. *See, e.g.*, *Kiernan v. City of Portland*, 223 U.S. 151, 159 (1912); *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916); *Marshall v. Dye*, 231 U.S. 250, 256 (1913).

190. *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1543 (1990) ("In arriving at this result, White overstated the nature of the taxpayer's claim.").

191. *Colegrove*, 328 U.S. at 556 (Frankfurter, Reed, Burton, JJ., concurring).

Guarantee Clause challenge might succeed where an undemocratic change in state law poses a “realistic risk of altering the form or the method of functioning of [a state]’s government.”¹⁹²

The 1946 case of *Colegrove v. Green*,¹⁹³ however, seemed to hammer the last nail in the justiciability coffin, by dismissing a Guarantee Clause challenge in a single sentence: “Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts.”¹⁹⁴ The guarantee, it would seem, was not very great, after all.

Colegrove rejected a challenge to political districting procedures on the grounds that they presented nonjusticiable political questions.¹⁹⁵ But *Colegrove* contains a serious flaw that has been noted in other contexts as well: abandoning judicial review in the service of “democratic” decisionmaking threatens the very dangers which judicial review is intended to avert. “It is hostile to a democratic system to involve the judiciary in the politics of the people,” wrote Justice Frankfurter.¹⁹⁶ But the entire purpose of judicial review is to prevent the politics of the people from reaching the points that the Constitution puts beyond the reach of politics.¹⁹⁷ Frankfurter’s assertion that “[t]he remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress”¹⁹⁸ would ring hollow, in a case where the legislature creates districts in a way that prevents the people from “securing” a reform-minded legislature.¹⁹⁹ Eliminating judicial review under the Guarantee Clause—like eliminating judicial review under any constitutional provision—invokes judicial restraint at the price of increased majoritarianism. In the context of *Pacific Telephone*, that choice makes sense, since, as

192. *New York v. United States*, 505 U.S. 144, 186 (1992).

193. 328 U.S. 549 (1946).

194. *Id.* at 556.

195. *Id.* at 552.

196. *Id.* at 553–54.

197. *Cf. West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”).

198. *Colegrove*, 328 U.S. at 556.

199. This was, after all, the reason the Court held that apportionment cases were justiciable. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 553 (1964) (“No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available.”).

Chief Justice White noted, the Court's interference in that case would mean that "the states are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the nation."²⁰⁰ But in a case where a sudden and undemocratic shift in state government alters the functions of the state government—either through an insurrection or usurpation by the existing government—no such paradox would be presented, and judicial review would seem more appropriate. Imagine, for example, that the governor of a state were to decide that he simply did not wish to relinquish the governorship at the end of his term. For the Court to assert judicial restraint as grounds for refusing relief would seem far less persuasive.

The Supreme Court had legitimate reasons to avoid a ruling on the merits of the Guarantee Clause claims in *Luther* and *Pacific Telephone*. The *Colegrove* Court's reasons were less compelling, but even that case does not warrant interpreting *Luther* and other cases as holding the Guarantee Clause is always nonjusticiable. Rather, the basic standard suggested by *Beckham* and *McCall*—that sudden, undemocratic shifts in the form and functioning of the state government can be challenged in federal courts—is consistent with the original intent of the clause and with the purposes of judicial review. Such a standard also combines well with the Court's reluctance to become involved in political thickets, where the people (as in *Pacific Telephone*) or their representative bodies (as in *Colegrove*) have acted consistently with the state constitutional procedures. It is fortunate that circumstances implicating that standard have been rare in American history. But when they do occur, it would be little comfort to a plaintiff to assert that her only recourse for the deprivation of her political rights is through the very political procedure that has been corrupted.

V. HOW THE *GUINN* COURT VIOLATED THE GUARANTEE CLAUSE

A. *The New York Standard*

This review of the history and intent of the Guarantee Clause reveals that it was intended to protect citizens against

200. *Pacific Telephone*, 223 U.S. at 142.

undemocratic subversion of their state constitutions,²⁰¹ as the Supreme Court recognized in *New York*.²⁰² Since *New York*, several courts have addressed challenges based on the Guarantee Clause, and although these courts have not found violations of the Clause, they have developed an emerging standard of analysis based on Justice O'Connor's "realistic risk" language. Courts devoting serious consideration to the issue have determined that the Clause would be violated if a government act "alter[s] the form or the method of functioning of [the state's] government,"²⁰³ or results in "a fundamental restructuring of [the] form of state governments" or deprives the citizens of the state the right to "structure their . . . government[] as they see fit."²⁰⁴ The Supreme Court of Oklahoma recently explained that "the purpose of Article IV, § 4 of the U.S. Constitution was to protect the people of the several states against . . . insurrections and domestic violence . . . [while preserving their] right . . . to amend the constitution"²⁰⁵ In each of the recent Guarantee Clause cases, courts have found that the complained-of action did not threaten the form of government or the citizens' right to structure their government, and thus that the Clause was not violated.²⁰⁶

These cases have not drawn precise lines, but they have drawn what appears to be a judicially manageable standard: that "where a sudden and undemocratic shift in the operations of government immediately alters the state's constitution, depriving citizens of the participatory rights they formerly enjoyed under their government's constitutional procedures, a

201. *Sugarman v. Dougal*, 413 U.S. 634, 648 (1973); *United States v. Vazquez*, 145 F.3d 74, 84 (2d Cir. 1998); *In re Initiative Petition No. 348*, 820 P.2d 772, 780 (Okla. 1991).

202. *See, e.g.*, *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *Kelley v. United States*, 69 F.3d 1503, 1511 (10th Cir. 1995).

203. *New Jersey v. United States*, 91 F.3d 463, 468-69 (3d Cir. 1996) (quoting *New York*, 505 U.S. at 186). *See also* *Deer Park Ind. Sch. Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095 (5th Cir. 1998) (finding no violation because state was still "governed by a freely elected legislature and executive, not a monarchy, military dictatorship, or any other type of government" *Id.* at 1099).

204. *Kelley*, 69 F.3d at 1510-11.

205. *In re Initiative Petition No. 348*, 820 P.2d at 780 (citation omitted).

206. *See, e.g.*, *Deer Park*, 132 F.3d at 1099-1100 (challenge to federal exemption from state taxes); *City of New York v. United States*, 179 F.3d 29, 37 (2d Cir. 1999) (upholding federal requirement that City officials report certain information); *Vazquez*, 145 F.3d at 77, 84; *Kelley v. United States*, 69 F.3d 1503, 1510-11 (10th Cir. 1995).

Republican Guarantee challenge is appropriate.”²⁰⁷ This standard is consistent with the original intent of the Clause, as well as cases addressing it during both the pre- and post-1912 periods. This standard was violated in *Guinn v. Legislature of Nevada*. There, the court instructed the legislature to ignore a legally enacted constitutional provision regulating the procedures by which laws are passed, *not* on the grounds that the requirement was itself unconstitutional (an argument which could hardly have held water), but because it was a mere “procedural” requirement. The Court acknowledged that the supermajority requirement was unambiguous, validly enacted, and that it did not violate any provision of the federal constitution. Nevertheless, The Nevada Supreme Court simply changed the rules in the middle of the game, a technique forbidden by the Guarantee Clause.²⁰⁸

The danger of such a ruling lies in the fact that a state’s constitution is written precisely to set forth the “process” by which legislation is created. If the state supreme court can simply waive the two-thirds requirement on the grounds that it interferes with state funding needs, there is no obvious reason why the court could not also waive the requirement of majority rule, since that, too, is a “mere” procedural requirement.²⁰⁹ If the “substantive” right to an education allows the court to dispense with a “procedural” requirement, there would seem to be no reason that the court could not also dispense with a warrant requirement for arrests, so long as a colorable argument exists that people have a “substantive” right to be free from crime. In its “clarification,” the court claimed that “[i]f the Legislature were to increase or raise taxes in the future under simple majority rule, this court would have ample opportunity to review that action,”²¹⁰ but since it did not explain on what criteria it would make that decision, this statement is actually quite worrisome, since it indicates that the court is even unwilling to

207. Brief of Amicus Curiae Pacific Legal Foundation in Support of Petition for Rehearing at 8, *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003) (No. 41679), available at http://www.nvsupremecourt.us/decisions/dec_sc41679.html.

208. *Cf. Bush v. Gore*, 531 U.S. 98, 106–07 (2000) (per curiam). Although *Gore* was decided under the Equal Protection Clause, the Republican Guarantee Clause would seem to apply even more, given the framers’ intention that the Clause secure the regular procedures of state government against usurpation.

209. *See Recent Cases, supra* note 119, at 978 (“[t]he fact that a requirement is procedural does not suffice to subordinate it to other constitutional provisions.”).

210. *Guinn v. Legislature of Nevada*, 76 P.3d 22, 33 (Nev. 2003).

state a blanket rule that the simple majority rule will always be enforced.

The Supreme Court's Guarantee Clause decisions, from *Taylor* to *New York*, recognize that republicanism is fundamentally procedural. The "method of functioning" of a state's government is the primary concern of that Clause. The *Guinn* decisions fundamentally alter that method by allowing a tax increase to pass on a bare majority. Regardless of the wisdom of the two-thirds requirement, it was legally added to the Nevada Constitution, and citizens had a federally-protected right to have it followed. Normally, that right would be protected by other branches of government through the checks and balances of the state's constitution, or by appeal to the state's nonpolitical branch. But in *Guinn*, the nonpolitical branch blessed the violation of the constitutional mandate; the state government was no longer functioning by the "orderly and settled methods prescribed by its fundamental law,"²¹¹ or following "the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes."²¹² This indicates a breakdown in republican government, since the agent is now exceeding its mandate from the principle. In such circumstances, reliance on the Guarantee Clause would be appropriate, since a state's supreme court cannot allow the state to violate federal constitutional standards.²¹³ Such a breakdown indicates a need for federal intervention, and where there are no convincing reasons for federal courts to defer to political branches of the federal government (such as existed in *Luther*) then the federal courts ought to intercede.²¹⁴

B. *Would Use of the Guarantee Clause in Guinn
Wrongly Expand Federal Power?*

Scholars and courts have avoided invoking the Guarantee Clause in large part because of the threat that using it could mean federal interference in affairs that the Constitution leaves

211. *Taylor*, 178 U.S. at 580.

212. *Duncan*, 139 U.S. at 461–62.

213. *See Gore*, 531 U.S. at 105.

214. *See also* Weinberg, *supra* note 138, at 924–28.

to the political branches of the federal government or to the states.²¹⁵

I have suggested above why *Guinn* did not present a political question. Unlike such cases as *Luther*, *Guinn* involved none of the considerations that have generally persuaded courts to defer to the political branches. Both early cases and *New York* suggest a broad, but judicially manageable, standard of review. Further, because Nevada law makes the procedures for tax bills plainly and easily discernible—simply counting the number that constitutes a two-thirds vote—*Guinn* involved no complicated political value judgments that would render the political branches more appropriate for redress.

What about state's rights? The standard I have proposed would seem dangerously inclusive; how would I distinguish *Guinn* from cases in which states have struck down democratically-enacted initiatives for reasons that all would consider legitimate, and where a Guarantee Clause challenge would be inappropriate?²¹⁶ Although a precise rule of distinction is difficult to formulate, the uniqueness of *Guinn* suggests several factors to be considered.

First, in *Guinn* the nonpolitical branch of the state government fundamentally altered the procedures of constitutional administration in a way that infringed on federally

215. See *Pacific Telephone*, 223 U.S. at 142 (“substitute its judgment as to a matter purely political for the judgment of Congress . . . and thus overthrow the Constitution . . .”); Stelzer, *supra* note 161, at 879–80 (explaining the Supreme Court’s continued position that the Guarantee Clause is non-justiciable). During litigation in *Guinn*, my colleagues and I received several comments from persons usually supportive of the Pacific Legal Foundation’s legal activities, concerned that judicial use of the Guarantee Clause would threaten the independence of states. Although I believe that this was not a serious danger in *Guinn*, I recognize that this could be a realistic concern in other cases. The rule I propose here, however, should not create a realistic threat to the power of state governments to enact legitimate policies.

216. I wish to emphasize that I am *not* arguing that the Guarantee Clause is automatically implicated whenever a court strikes down an initiative. It is certainly “a time-honored principle of American government that courts can overturn laws as unconstitutional, regardless of how popular they might be or their origin.” Phil Keisling, *The Role of Partisans in The Initiative Debate*, 34 WILLAMETTE L. REV. 707, 710 (1998). All instances of judicial review will be, to some extent, “undemocratic,” which is as it should be. See Richard H. Fallon, *Marbury And The Constitutional Mind: A Bicentennial Essay on The Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 35 (2003) (explaining the importance of prudential justiciability doctrine in balancing private rights and “majoritarian pressures”). But *Guinn* involved a unique situation in which a state’s legitimately enacted constitutional framework was altered to attain a political end, rather than to correct a political process’ failure to protect individual liberty. As such, it undermined the republican framework without accomplishing the essentially “republican” goal of safeguarding individual rights against majority overreaching.

protected participatory rights: the Supreme Court has already noted that “legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.”²¹⁷ This distinguishes *Guinn* from a case in which a state court strikes down a state law for violating, say, the equal protection clause,²¹⁸ or some state constitutional limitation. As noted above, the Guarantee Clause was written with a primary concern in mind—protecting “[t]he peace of society and the stability of government.”²¹⁹ Cases like *Guinn* would therefore seem to raise different issues than cases where courts strike down state laws for other reasons. One might imagine a case in which, say, a state supreme court declared the state’s election code void on the grounds that the governor was now governor for life. Such a situation would clearly violate the Guarantee Clause, whereas a decision striking down on equal protection grounds an initiative that prohibited a racial minority from certain benefits would not because only the latter subverts the duly enacted constitutional system.

Second, the suddenness of the court’s decision, and its unprecedented nature, raises a degree of suspicion not present in a case where a court legitimately finds that a legally enacted initiative²²⁰ violates other provisions of a state constitution. For instance, in *Bowie v. City of Columbia*,²²¹ the Supreme Court reversed a trespassing conviction even though the South Carolina Supreme Court had affirmed. The state court had, for the first time, held that the state’s trespassing law prohibited “not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on

217. *Raines v. Byrd*, 521 U.S. 811, 823 (1997). *See id.* at 823 n.6 (noting that local school board official might have federal standing under the Fourteenth Amendment if official’s vote were nullified).

218. *See, e.g., In re Ah Chong*, 2 Fed. 733 (C.C.D. Ca. 1880); *Romer v. Evans*, 517 U.S. 620 (1996).

219. THE FEDERALIST No. 21, *supra* note 142, at 108 (Alexander Hamilton).

220. This element is important. *Guinn* did not involve a claim that the initiative that added the two-thirds requirement violated the rules by which initiatives are enacted in Nevada. This distinguishes *Guinn* from a case like *League of Oregon Cities v. State*, 56 P.3d 892 (Or. 2002), or cases involving the “single subject rule,” by which courts have struck down initiatives for “technical” reasons. Those cases, I believe, would not implicate the Guarantee Clause standard that I have proposed.

221. 378 U.S. 347 (1964).

the premises of another after receiving notice to leave.”²²² In its decision reversing the conviction, the United States Supreme Court noted that this was an entirely new interpretation of the law involved. This “unforeseeable and retroactive judicial expansion of narrow and precise statutory language” was held to violate the Due Process Clause.²²³ Likewise, here, the state supreme court’s sudden and novel interpretation suggests that “the State has sought to [violate the constitution] by judicial construction of the statute”²²⁴

Finally, the *Guinn* court violated basic standards of legal construction in its decision. While this is not dispositive of the federalism objection (since state courts are free to misread their laws within the boundaries set by the Federal Constitution), it is certainly probative of the political motivations behind the court’s decision. The Supreme Court has considered such factors before, for instance in *NAACP v. Alabama ex rel. Patterson*,²²⁵ where the Court rejected the argument that the Alabama Supreme Court’s decision was based on independent state grounds and thus shielded from federal review. “Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.”²²⁶

These facts suggest that *Guinn* is an instance of the principal-agent problem that the Guarantee Clause was designed to prevent. The people of Nevada chose a system that allows a minority of legislators to stop tax increases. But since the majority of the legislature and the governor favored such tax increases, their union challenged the strength of the constitutional limitation—and the Nevada Supreme Court failed to uphold the Constitution. The presence of this combination recommends itself for federal intervention. While the objections to judicial enforcement of the Guarantee Clause are reasonable, they were largely absent in *Guinn*. Although states are generally free to set their own procedures and interpret their own laws,

222. *Id.* at 350.

223. *Id.* at 352.

224. *Id.* at 362.

225. 357 U.S. 449 (1958).

226. *Id.* at 457–58. *See Bouie*, 378 U.S. at 357 (citing “traditional” American law among reasons for overruling South Carolina Supreme Court decision).

federal courts will intervene where federal rights are at issue.²²⁷ This is even true where the violation has received the blessing of the state's highest court.²²⁸ And although *New York* and other Republican Guarantee cases provide a judicially manageable standard for determining when the citizens' right to have their state constitutions followed has been violated, these cases have not resulted in a flood of Guarantee Clause litigation, and are not likely to. In most cases, state policy decisions and state courts' interpretations of state law will not be subject to federal interference, because they will rest on adequate and independent state grounds.²²⁹ Moreover, it is exceedingly rare for a state to experience a sudden and undemocratic alteration in the form and functioning of state government. Indeed, in the eleven years since *New York*, none of the federal cases relying on it have found a challenged state action to violate the Clause.²³⁰

Where, as in *Guinn*, the mechanism of checks and balances normally relied upon to reign in the agency problem has broken down, and where no political question is presented, citizens should be able to rely on the courts to enforce the Guarantee Clause.

VI. CONCLUSION

It is unfortunate that the United States Supreme Court decided not to review *Guinn v. Legislature of Nevada*²³¹ or to give us further guidance on the import of the Guarantee Clause. Although it was a very unusual case, it contains the seeds of a serious threat to citizens' ability to control their government. Several state constitutions include supermajority requirements for tax increases. The willingness of courts to strike down these provisions on highly questionable grounds is a real danger. In fact, shortly after the Nevada Supreme Court reached its decision, California Superintendent of Public Instruction Jack

227. See, e.g., *Wright v. Georgia*, 373 U.S. 284, 291 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456–57 (1958).

228. See, e.g., *Bouie*, 378 U.S. at 356–357, 361–62; *Gore*, 531 U.S. at 114–115 (Rehnquist, C.J., Scalia & Thomas, JJ., concurring). Del Dickson, *State Court Defiance And The Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 YALE L.J. 1423 (1994).

229. See, e.g., *Herb v. Pitcairn*, 324 U.S. 117, 125–126 (1945).

230. See, e.g., *Vazquez*, 145 F.3d at 77; *New Jersey*, 91 F.3d at 468–69; *In re Initiative Petition No. 348*, 820 P.2d at 780; *Texas*, 106 F.3d at 666–67.

231. 71 P.3d 1269 (Nev. 2003), *cert. denied*, *Angle v. Guinn*, 124 S.Ct. 1662 (2004).

O’Connell held a press conference to announce that he would soon file a similar lawsuit in the California Supreme Court.²³² Although O’Connell never filed his suit, the potential is there for *Guinn*-style litigation to seriously damage state constitutional safeguards for taxpayers.²³³ More fundamentally, if state courts are willing to dispense with mere “procedural requirements” when they obstruct the “expectancy” of state-funded benefits, it is difficult to imagine what constitutional provision will be safe. When the people have created procedural safeguards against increased taxes (or against anything else they consider dangerous), those safeguards ought themselves to be protected under the Republican Guarantee Clause. The people have the right to have their government obey their constitutions. Until it is shown that rules they create genuinely threaten either specific constitutional protections or the natural rights retained by the people, then the Guarantee Clause ought to be taken seriously as a limit on state governments’ power to ignore their constitutions.

232. Jessica Portner, *Simple Majority Sought on Budget: Schools Chief to Ask High Court to Help Unlock Money for Education*, SAN JOSE MERCURY NEWS, July 18, 2003, available at 2003 WL 57855730.

233. See, e.g., David R. Matthews, *Lessons From Lake View: Some Questions And Answers from Lake View School District No. 25 v. Huckabee*, 56 ARK. L. REV. 519, 538–39 (2003) (noting the possibility of a *Guinn*-style case in Arkansas).