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## An Empty Guarantee?

KEVIN THOMAS FRAZIER\*

### ABSTRACT

Self-governance constitutes the foundation of a republican form of governance. Three pressing threats to self-governance warrant closer scrutiny of the long-forgotten and wrongly interpreted Guarantee Clause (the Clause). Election interference and other limitations on the right to vote may deny individuals the control over their officials required by republican governance. Corporate consolidation of economic, cultural, and political capital likewise threatens to disturb the ability of individuals to act as free agents—un beholden to one or a few companies for critical information and free and able to pursue their own private goals. And, finally, intentional manipulation of citizens by state governments in order to increase lottery revenues, which diminishes the economic security of individuals already struggling to get by. Each of these threats constitutes a significant anti-republican trend.

This essay makes three important contributions to a growing body of scholarship focused on defending republican values and governance.<sup>1</sup> First, that the three aforementioned threats may trigger the federal government’s obligations under the Guarantee Clause.<sup>2</sup> Second, the Guarantee Clause protects not only republican forms of governance but also the substance of republican self-governance.<sup>3</sup> And, third, that specific federal interventions may be necessary to stem the aforementioned threats.<sup>4</sup>

### I. INTRODUCTION

The idea that “the Constitution is a charter of negative rather than positive liberties” has been explicitly and implicitly advanced by the Supreme Court and numerous Circuit Courts of Appeals.<sup>5</sup> Law professors, perhaps in a rush

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1. *See infra* Part II., III., IV.

2. *See infra* Part II.

3. *See infra* Part III.

4. *See infra* Part IV.

5. Arijeet Sensharma, *A “Charter of Negative Liberties” No Longer: Equal Dignity and the Positive Right to Education*, 97 N.Y.U. L. REV. 837 (2022).

to get through their syllabus, often repeat this interpretation.<sup>6</sup> This tired recital runs aground at Article IV, Section 4, known as the Guarantee Clause.<sup>7</sup> The Clause places an affirmative duty on the federal government to protect the republican liberty of every American.<sup>8</sup> The recognition and requirements of this duty is time sensitive. Interference with the 2024 election has already occurred,<sup>9</sup> was expected to increase before the election,<sup>10</sup> and was feared to persist after election day.<sup>11</sup> Such interference may disrupt a key attribute of republican governance—electoral participation—for years to come.

Republican governance faces another pressing threat from corporate consolidation and, by extension, the concentration of economic, cultural, and political power by corporations. Americans have been losing the economic capital required to achieve their full potential—concentrated markets allow for higher prices, which amounts to a \$5,000 hike in expenditures per year for the average American.<sup>12</sup> Corporate constraints on economic liberty do not end there. Americans also have fewer and fewer meaningful opportunities to pursue their private goals in a concentrated economic environment. The goliath corporations at the apex of many markets tend to hire fewer workers.<sup>13</sup> In fact, dominant firms fire more than they hire in most years.<sup>14</sup> The cumulative effect of these trends has been a frustration of the “equal right, [of Americans] to ye use our own faculties, [and] to ye acquisitions of our own industry . . . resulting not from birth but from our actions.”<sup>15</sup>

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6. See generally Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

7. U.S. CONST. art. IV, § 4.

8. *Id.*

9. *OpenAI has stopped five attempts to misuse its AI for 'deceptive activity'*, REUTERS (May 30, 2024), <https://www.reuters.com/technology/cybersecurity/openai-has-stopped-five-attempts-misuse-its-ai-deceptive-activity-2024-05-30/>.

10. Dan De Luce, *U.S. spy agencies are ready to warn voters about foreign election interference — if it's severe enough*, NBC NEWS (June 12, 2024), <https://www.nbcnews.com/politics/national-security/us-spy-agencies-are-ready-warn-voters-foreign-election-interference-rcna156895>.

11. Rashard Rose & Kate Sullivan, *Trump says he will only accept 2024 election results 'if everything's honest'*, CNN (May 2, 2024), <https://www.cnn.com/2024/05/02/politics/donald-trump-accept-2024-election-results/index.html>.

12. David Leonhardt, *Big Business Is Overcharging You \$5,000 a Year*, N.Y. TIMES (Nov. 10, 2019), <https://www.nytimes.com/2019/11/10/opinion/big-business-consumer-prices.html> (analyzing research by Thomas Philippon).

13. Jay Shambaugh et al., *The State of Competition and Dynamism: Facts about Concentration, Start-Ups, and Related Policies*, THE HAMILTON PROJECT (June 2018), [https://www.brookings.edu/wp-content/uploads/2018/06/ES\\_THP\\_20180611\\_CompetitionFacts\\_20180611.pdf](https://www.brookings.edu/wp-content/uploads/2018/06/ES_THP_20180611_CompetitionFacts_20180611.pdf).

14. *The Case for Economic Dynamism*, ECONOMIC INNOVATION GROUP, <https://eig.org/dynamism/> (last visited Nov. 8, 2024).

15. *Thomas Jefferson, March 4, 1801, Draft of First Inaugural, The Works of Thomas Jefferson in Twelve Volumes. Federal Edition. Collected and Edited by Paul Leicester Ford*, LIBRARY OF CONGRESS [https://tile.loc.gov/storage-services/service/mss/mtj/mtj1/023/023\\_0059\\_0071.pdf](https://tile.loc.gov/storage-services/service/mss/mtj/mtj1/023/023_0059_0071.pdf) (last visited Nov. 8, 2024).

The economic security essential to republican self-governance likewise is being eroded. State lotteries thrive, depend on, and prey on economically insecure residents. In doing so, state lotteries undermine the form and substance of republican governance. States deliberately advertise their respective lotteries to low-income residents. Those residents, despite lacking the funds to “play” the state’s games, disproportionately participate in the skewed games. This dynamic further entrenches the economic plight of the poor and reduces their political influence.

This essay starts with a more detailed analysis of those three threats to self-governance: first, interference with the right to vote; second, corporate consolidation constraining the ability of individuals to freely pursue their economic potential; and, third, state use of lotteries in a manner that erodes the economic security of many individuals.<sup>16</sup> The next part briefly explores the meaning of the Guarantee Clause, with a focus on judicial misconceptions of the Clause.<sup>17</sup> It concludes that despite judicial avoidance of interpreting the provision, the Clause minimally mandates a few actions by the federal government.<sup>18</sup> To ensure Americans can safely cast their votes in free and fair elections, Congress may, for example, need to prevent the use of insecure, opaque voting methods. To prevent undue concentrations of corporate power, Congress may need to prohibit states from granting corporate charters with few to no limits on excessive accumulation of economic, cultural, and political resources. Finally, to reduce state manipulation of their own residents, Congress may prohibit certain advertising tactics for their respective lottery systems. The essay’s chief contribution is to remind scholars, jurists, and all those who have sworn to uphold the Constitution that this Clause contains a substantive promise—one that may be open ended but is not empty.

## II. THREATS TO SELF-GOVERNANCE

The Founders aimed to shield individuals from oppression in law and in practice. In the political context, this aim was expressed by popular sovereignty and the right to suffrage.<sup>19</sup> In the economic context, this aim was codified in many states in the form of limits or bans on monopolies in their respective state constitutions<sup>20</sup> as well as in the U.S. Constitution’s

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16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part III.

19. *See* Erwin Chemerinsky, *Cases under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 868 (1994); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 529 (1962) (analyzing the connection between popular sovereignty and republican governance as well as the norms about voting in early America).

20. Steven G. Calabresi & Larissa Price, *Monopolies and the Constitution: A History of Crony Capitalism*, NW. FAC. WORKING PAPERS, 94-96 (2012).

prohibition on deprivations of liberty or property without due process.<sup>21</sup> Both of these foundational aspects of self-governance face contemporary challenges.

*A. Limits on Electoral Participation*

Threats to the ability of Americans to freely participate in elections warrant attention to whether states have drifted from a form of government that allows for self-governance. Voters in many states face structural and logistical barriers to lending their voice to the democratic process.

One key structural barrier takes the form of closed partisan primaries.<sup>22</sup> These primaries prevent any voters, other than registered party members, from participating in a primary election.<sup>23</sup> Under competitive electoral conditions, this might not give rise to many issues—a strong Democrat and Republican would head to the general election and allow the rest of the electorate some degree of meaningful choice. In my home state of Oregon, however, such conditions do not exist.<sup>24</sup> The winner of the Democratic primary nearly always wins.<sup>25</sup>

Unfortunately, this is not one of those instances of Oregon being weird. Parties in 14 other states host closed primaries.<sup>26</sup> To the extent these primaries occur in uncompetitive political settings, as in Oregon, primaries serve as the *de facto* general election.<sup>27</sup> Under such conditions, a fraction of a fraction of the electorate—the few Democrats or Republicans who opt to participate in the primary—selects the state’s leaders and federal representatives.<sup>28</sup> This system seems to fly in the face of self-governance.

A logistical barrier is the number of polling places available in states.<sup>29</sup> Since 2018, the number of polling places has declined with each election.<sup>30</sup> In that election, around 200,000 polling places were available.<sup>31</sup> The 2020

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21. U.S. CONST. amend. XIV, § 1.

22. Jeremy Gruber, *Opening Up Primary Elections Is a Voting Rights Issue*, GOVERNING (Dec. 11, 2023), <https://www.governing.com/politics/opening-up-primary-elections-is-a-voting-rights-issue>.

23. *Id.*

24. Dirk VanderHart, *Democrats' total control over Oregon politics could end with the race for governor*, OPB (Oct. 22, 2022), <https://www.opb.org/article/2022/10/22/democrats-total-control-over-oregon-politics-could-end-with-the-race-for-governor/>.

25. *Id.*

26. Gruber, *supra* note 22.

27. *Id.*

28. Jennifer Ruff, *Nearly 80% of Eligible Voters Don't Participate in Primaries*, BIPARTISAN POL'Y CTR. (Mar. 7, 2023), <https://bipartisanpolicy.org/press-release/voters-dont-participate-primaries/>.

29. Chris Teale, *There are 100,000 fewer Election Day Polling Places in 2024*, ROUTE FIFTY (Mar. 14, 2024), <https://www.route-fifty.com/management/2024/03/there-are-100000-fewer-election-day-polling-places-2024/394959/>.

30. *Id.*

31. *Id.*

number dropped to about 132,000.<sup>32</sup> The 2022 included fewer than 100,000 polling places.<sup>33</sup> Fewer polling places increase the odds of voters having to wait an unacceptably and, potentially, an anti-republican amount of time to vote. The Presidential Commission on Election Administration (PCEA) regards any wait time over 30 minutes as unacceptable.<sup>34</sup> The MIT Election Lab estimated that nearly twenty percent of voters waited longer than the PCEA's recommendation in the 2020 election.<sup>35</sup> Excessive wait times were disproportionately likely for some voters, "some 6.6 percent of Latino voters and 7.0 percent of Black voters reported waiting 30 minutes or longer to vote" in the 2020 election.<sup>36</sup> The rate for white voters was closer to four percent.<sup>37</sup>

Diminished participation from too few polling places is worsened by at least two other factors. The Election Lab also detected that news coverage of long lines during elections often further reduced turnout—in other words, not only does too few polling places discourage folks from voting, but the resulting voter backlog can exacerbate the likelihood of would-be voters staying home.<sup>38</sup> Another factor is concerns about violence at polling places, which may result in planned polling locations no longer opening their doors come election day.<sup>39</sup> Schools in Arizona, for example, have expressed a desire to not host any election day events due to possible violence.<sup>40</sup>

Even if states ban closed partisan primaries, open numerous polling places, and otherwise work to increase voter participation, technical barriers may result in casted votes being subject to opaque recounts that may sow doubts among voters as to whether their vote was accurately counted. About seven percent of voting jurisdictions relied on direct-recording electronic (DRE) devices without voter-verified paper audit trails in the 2022 election.<sup>41</sup> Experts warn that DREs may undermine electoral transparency and security.<sup>42</sup> Some forms of post-election audits are not possible in DRE

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32. *Id.*

33. *Id.*

34. Hannah Klain et al., *Waiting to Vote*, BRENNAN CTR. (June 3, 2020), <https://www.brennancenter.org/our-work/research-reports/waiting-vote>.

35. Kathleen Searles & Christopher Mann, *News coverage that shows long voting lines may discourage people from voting*, MIT ELECTION LAB (Apr. 7, 2023), <https://electionlab.mit.edu/articles/news-coverage-shows-long-voting-lines-may-discourage-people-from-voting>.

36. Klain et. al, *supra* note 34.

37. *Id.*

38. *Id.*

39. Yvonne Wingett Sanchez, *With voting under attack, Arizona schools don't want to be polling locations*, WASHINGTON POST (Aug. 5, 2024), <https://archive.ph/Clp1t>.

40. *Id.*

41. *Election Administration and Voting Survey 2022 Comprehensive Report*, U.S. ELECTION ASSISTANCE COMM'N, 25 (June 2023), [https://www.eac.gov/sites/default/files/2023-06/2022\\_EAVS\\_Report\\_508c.pdf](https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf).

42. *Id.*

jurisdictions.<sup>43</sup> Given the stakes of the 2024 election and the likelihood of the results being contested, reliance on DREs without paper audit trails in even a few jurisdictions could entrench distrust in American elections, accelerating and prolonging a trend of people opting out of the very process intended to ensure officials remain accountable to the people.<sup>44</sup>

This is not an exhaustive summary of issues related to election interference or, more broadly, the diminution of the political control available to each citizen. Officials on both sides of the aisle, for example, may list the *lack* of voter identification laws as an anti-republican status quo: increasing the odds of improperly casted ballots and diluting the effect of properly casted ballots.<sup>45</sup> Others may point to initiatives and referendums as undermining the legislative authority granted to state legislators by the electorate as yet another example of an anti-republican attribute of many state electoral systems.<sup>46</sup>

Rather than attempt to address each of those concerns, this section merely aims to make clear that the extent to which states have maintained a republican form of governance is a contested question. The possibility of states having veered too far from the fundamentals of republican governance should trigger a Guarantee Clause analysis.

### B. *Limits on Freedom from Dependence*

The obligation to faithfully, fully interpret, and *enforce* the Guarantee Clause is especially important given the threat to core republican ideals that the Founders did not fully anticipate: multinational corporations or “global goliaths of modern times” and, relatedly, corporate concentration of power.<sup>47</sup> “Most of the early American corporations, operating within a state or in a city or town, were small by later standards.”<sup>48</sup> That said, early Americans such as Jefferson detested the aristocracies of the Old World, which “consolidated their control over land and property across generations, and . . . parlayed [that] wealth into political power.”<sup>49</sup> Jefferson and others sought to prevent undue

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43. *Id.*

44. Peter Grier, *How America lost trust in elections – and why that matters*, CHRISTIAN SCI. MONITOR (Apr. 12, 2024), <https://www.csmonitor.com/USA/Politics/2024/0412/trust-american-elections-voters-trump>.

45. Jonathan Weisman & Nick Corasaniti, *Why Democrats Are Reluctantly Making Voter ID Laws a Bargaining Chip*, N.Y. TIMES (Sept. 17, 2021), <https://www.nytimes.com/2021/06/23/us/politics/democrats-voter-id-laws.html>.

46. *See generally* Hans A. Linde, *State Courts and Republican Government*, 41 SANTA CLARA L. REV. 951 (2001).

47. C. Fritz Foley et al., *Global Goliaths*, BROOKINGS (Apr. 2021), <https://www.brookings.edu/articles/multinational-corporations-in-the-21st-century/>.

48. Ralph Gomory & Richard Sylla, *The American Corporation*, 142 DAEDALUS 1, 104 (2013).

49. Johann N. Neem, *Developing Freedom: Thomas Jefferson, the State, and Human Capability*, 27 STUDIES AM. POL. DEVEL. 36, 40 (2013).

concentrations of resources while also empowering the poor to acquire sufficient capital to turn their “potential economic freedom into actual economic freedom.”<sup>50</sup>

As discussed in more detail below, republican self-governance rests on the twin economic aims relayed by Jefferson, jointly, freedom from dependence.<sup>51</sup> Any actor—public or private—that unduly imperils the ability of individuals to operate as free agents directly undermines that foundational republican ideal. Several multinational corporations that have become dominant firms in several markets do just that. For ease of simplicity, this section focuses on Amazon, Apple, Google, and Meta.<sup>52</sup> A state failing to rein in such threats to republican self-governance should trigger the Guarantee Clause. In this way, the Clause contains a sort of Antitrust Guarantee: a prohibition on any corporation accumulating so many resources that they crowd out economic opportunities and diminish economic security.

Freedom from dependence characterized the transition from rule under King George to rule by the people.<sup>53</sup> At the time of the American Revolution, legal and social conventions set forth a number of relationships in which certain individuals were *dependents*—subject to the will of another person or authority.<sup>54</sup> Paupers were dependents of the towns providing them with shelter.<sup>55</sup> Wives and children were dependents of the male head of the family.<sup>56</sup> Workers were dependents of their employers.<sup>57</sup> Colonists were dependents of their King.<sup>58</sup> Independence served to sever some of these forms of dependence.

“The traditional political concept of ruler and subject did not survive the American Revolution.”<sup>59</sup> At least the political concept was not intended to survive under republican self-governance. Individuals un beholden to the will of another—thereby, free agents—formed the basis of the nascent nation’s republican political community.<sup>60</sup> Workers freed from the will of employers and bound only by the terms of an explicit contract soon joined that

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50. *Id.* at 41.

51. *Id.* at 50.

52. *See infra* Part III.

53. Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 336 (1989).

54. *Id.* at 344.

55. *Id.* at 338.

56. *Id.* at 344.

57. *Id.*

58. JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870* 18 (1978) (quoting Calvin’s Case, 7 Coke’s Reporter 1a, 4b (1608)).

59. Steinfeld, *supra* note 53, at 350.

60. *See* GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 169 (1969) (reviewing the conditions under which an individual was regarded as a free agent in a political sense).



community.<sup>61</sup> This concept of free agency shaped early debates and policy decisions related to expanding the nation's republican community.<sup>62</sup> A straightforward principle guided those deliberations: "Americans had established the self-governing people as the ultimate source of political order."<sup>63</sup>

That conception of republican liberty and self-governance more generally, is under threat. In the same way that John Adams feared political participation by men who "talk and vote as they are directed by some man of property, who has attached their minds to his interest[s]," there is plenty of cause for concern that multinational corporations like Amazon, Apple, Google, and Meta (the Big Four) threaten our status as free agents.<sup>64</sup> A hearing held by the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law (the Subcommittee) revealed the extent to which these companies shape public discourse and, by extension, steer individual thinking about both actions in direct opposition to republican self-governance.<sup>65</sup>

Many Americans are effectively "dependents" of these companies.<sup>66</sup> A point made clear by a review of key findings by the Subcommittee:

Any single action by one of these companies can affect hundreds of millions of us in profound and lasting ways. Although these four corporations differ in important and meaningful ways, we have observed common patterns and competition problems over the course of this investigation.

First, each platform is a bottleneck for a key channel of distribution. Whether they control access to information or to a marketplace, these platforms have the incentive and ability to exploit this power. They can charge exorbitant fees, impose oppressive contracts, and extract valuable data from the people and businesses that rely on them.

Second, each platform uses its control over digital infrastructure to surveil other companies, their growth, business activity, and whether they might pose a competitive threat. Each platform has used this

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61. Steinfeld, *supra* note 53, at 369.

62. *Id.* at 375.

63. *Id.* at 350.

64. *Id.* at 341.

65. *Online Platforms and Mkt. Power: Hearing Before the Subcomm. on Antitrust, Com., and Admin. L.*, 116 Cong. (2020) [hereinafter *Online Platforms Hearing*].

66. *Id.*

data to protect its power by either buying, copying, or cutting off access for any actual or potential rival.

Third, these platforms abuse their control over current technologies to extend their power. Whether it is through self-preferencing, predatory pricing, or requiring users to buy additional products, the dominant platforms have wielded their power in destructive, harmful ways in order to expand.<sup>67</sup>

These findings have numerous statutory ramifications. For instance, similar conclusions undergirded a recent decision by Judge Amit Mehta that Google is unquestionably a monopoly under Section 2 of the Sherman Act.<sup>68</sup> However, the legal ramifications of these “destructive, harmful” practices do not end there or at least they do not end under a faithful application of the Antitrust Guarantee. The Constitution provides all Americans with another means of protection against actors that imperil their ability to self-govern. Under the Antitrust Guarantee in the Guarantee Clause, the federal government must insist that states with legal authority over these corporations prevent them from infringing on the republican liberty of individuals, especially those in other states who had no democratic voice in the incorporating state’s charter process.<sup>69</sup>

These corporations did not exist in the state of nature. They are explicitly and unequivocally creations of state governments.<sup>70</sup> Today, in most cases, the corporations are creations of the State of Delaware.<sup>71</sup> As with approximately 300 other Fortune 500 companies, the Big Four relied on the anti-republican laws of Delaware for their legal creation.<sup>72</sup> It is easy to see why they have flocked to this state in particular. Delaware not only has lax charter requirements, but it is also unable to meaningfully enforce those requirements on the 1.4 million companies incorporated there.<sup>73</sup> Corporations like the Big Four, in turn, have broad and excessive authority to

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67. *Id.*

68. *United States v. Google LLC*, No. 20-CV-3010, 2024 U.S. Dist. LEXIS 138798, at \*29 (D.C. Cir. Aug. 5, 2024).

69. *Antitrust Federalism, Preemption, and Judge-Made Law*, 133 HARV. L. REV. 2557 (2020).

70. Justin Fox, *What the Founding Fathers Really Thought About Corporations*, HARV. BUS. REV. (Apr. 1, 2010), <https://hbr.org/2010/04/what-the-founding-fathers-real> (interviewing history professor Brian Murphy).

71. Kellen Luey & Clifford A. DeGroot, *Why Do So Many Startups Form Their Corporations in Delaware?*, DAVIS WRIGHT TREMAINE (July 2, 2020), <https://www.dwt.com/blogs/startup-law-blog/2020/07/why-do-so-many-startups-form-corporations-delaware>.

72. Charlotte Morabito, *Here’s why more than 60% of Fortune 500 companies are incorporated in Delaware*, CNBC (Mar. 13, 2023), <https://www.cnbc.com/2023/03/13/why-more-than-60percent-of-fortune-500-companies-incorporated-in-delaware.html>.

73. Luey & DeGroot, *supra* note 71.

act in whatever means they see fit.<sup>74</sup> As outlined by the Subcommittee, this discretion often comes at great cost to the agency of other Americans, like residents of other states that have no real means to shield themselves from the tremendous power of these companies to dictate core parts of their daily lives.<sup>75</sup>

The excessive and growing authority of a few corporations necessitates the defense of economic liberty intended to exist under law and in practice following the American Revolution. Though federal antitrust statutes, state constitutions, and state statutes may play a part in protecting freedom from dependence, those possible remedies should not crowd out a Guarantee Clause analysis. The next part dives into the meaning of the Guarantee Clause, setting up a further investigation of whether and how the federal government could invoke the Clause to combat goliath corporations.<sup>76</sup>

### C. *Reduction of Economic Security via State Lotteries*

Revenue from state lotteries makes up a small, but essential part of state budgets. A tally by the Washington Post suggests that ticket sales amount to about two percent of tax revenue for the average state.<sup>77</sup> That may not seem significant, but states rely on those funds to support critical services, including but not limited to public education, arts and cultural institutions, infrastructure projects, and public parks.<sup>78</sup> The reliance of states on lottery funds is illustrated by their immense interest in developing new games and instituting new advertising techniques.<sup>79</sup>

The state officials tasked with maximizing lottery revenue seemingly have no qualms spending taxpayer dollars on deceiving their neighbors, friends, and fellow residents. Reporting by the Associated Press calculated that states spend upwards of half a billion dollars per year on “persuasive” advertising.<sup>80</sup> Here are a few of the broad messaging themes relied on by states:

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74. *Online Platforms Hearing*, *supra* note 65.

75. *Id.*

76. *See infra* Part III.

77. Andrew Van Dam, *Which states make the most from sports betting? How about lotteries?*, WASHINGTON POST (June 7, 2024), <https://www.washingtonpost.com/business/2024/06/07/sports-betting-lottery-state-budgets>.

78. *Where the Money Goes: FY 2023 Contributions and Beneficiaries by Jurisdiction*, NASPL, <https://www.naspl.org/where-the-money-goes> (last visited Nov. 26, 2024).

79. Shannon Clark et al., *State lottery advertising tells players half of the story*, AP NEWS (July 12, 2022), <https://apnews.com/article/entertainment-texas-education-lotteries-ba49f84f41fc63b739443513418d1ffc>.

80. *Id.*

A Texas Lottery internet ad tells players they can ‘unleash the power of luck’ by purchasing \$20 scratch tickets.

A sign outside a supermarket in New Jersey beckons passersby to ‘Give Your Dreams A Chance.’

A YouTube video reminds Virginia players they can win more if they wager more.

A phone app in Michigan sends alerts ‘reminding you to purchase tickets before the draw.’<sup>81</sup>

The messages appear to work. States typically earn \$128 in ticket sales for every \$1 spent on lottery advertisements.<sup>82</sup> The success of the advertisements is no surprise given the perverse incentives facing state regulators: If they prevent the most lucrative strategies, then they may deprive the state of an important source of revenue. This very dynamic helped kill a bill proposed in the South Dakota State Legislature.<sup>83</sup> It took one reminder of the state’s dependence on lottery funds to support public education for the legislators to lay off the proposed bill. South Dakotans and residents of other states looking for some federal oversight of these state agencies will have no luck. The Federal Trade Commission (FTC) and other federal regulators lack jurisdiction over state activities that supposedly only have intrastate economic effects.<sup>84</sup>

A glance at the indigent communities targeted by state lottery officials and the individuals who face economic calamity because of the lottery suggest that the effects of the lottery extend far beyond state borders. Despite some individuals justifying lottery expenditures as a sort of “Hail Mary” investment in a brighter economic future, a study of the average returns shows that such prayers will not be answered.<sup>85</sup> Individuals lose thirty-five cents for each dollar wasted on the lottery.<sup>86</sup>

Those most likely to make such gambles dig themselves into even deeper financial holes. About seven in ten players plan to spend any winnings on paying back debts.<sup>87</sup> In other words, states are effectively nudging their own

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81. *Id.*

82. *Id.*

83. *Id.*

84. Clark et al., *supra* note 79.

85. *Id.*; See Alex Skopic, *How the Lottery Became a Substitute for Actual Hope*, CURRENT AFF. (June 13, 2023), <https://www.currentaffairs.org/news/2023/06/how-the-lottery-became-a-substitute-for-actual-hope>.

86. Clark et al., *supra* note 79.

87. Leah Muncy, *It’s Time to Get Rid of the Lottery*, THE OUTLINE (July 31, 2019), <https://theoutline.com/post/7737/abolish-state-lotteries>.

residents to fall deeper into debt—debt that will assuredly result in spillover costs that require state and federal resources, such as subsidized housing. Nevertheless, state lotteries exploit these very users. A thorough investigation by the Howard Center for Investigative Journalism found that “stores that sell tickets are disproportionately clustered in lower-income communities in every state. In some states, these patterns also exist in Black and Hispanic neighborhoods.”<sup>88</sup> A cumulative analysis of these attributes of state lotteries reveals that they are “dangling the promise of instant riches in an age of inequality and limited social mobility.”<sup>89</sup>

### III. THE MEANING AND APPLICABILITY OF THE GUARANTEE CLAUSE

Pursuant to the Guarantee Clause, the federal government “shall guarantee to every State in this Union a Republican Form of Government.”<sup>90</sup> Use of any common tool of statutory interpretation makes clear that this Clause imposes an affirmative duty on the government. A textual reading, for example, leaves little doubt. The use of “shall” rather than “may” leaves little interpretative leeway as to whether the Clause places an obligation on the government.<sup>91</sup> Other comparable uses of “shall” in the Constitution affirm this understanding.<sup>92</sup> In several instances, the drafters identified an actor and assigned them a specific task.<sup>93</sup> For instance, Article II, Section 3 sets forth that the president “shall” take care that the laws be faithfully executed.<sup>94</sup> This language has been broadly interpreted as a direction rather than a suggestion.<sup>95</sup>

Analysis of the meaning of “guarantee” reinforces this interpretation.<sup>96</sup> Professor Ryan Williams conducted a thorough analysis of contemporaneous uses of “guarantee” in legal devices around the time of the Founding.<sup>97</sup> That inquiry uncovered that “the text of the provision and contextual evidence regarding its original understanding strongly suggest that the provision more likely reflected a quasi-diplomatic, treaty-like commitment on the part of the

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88. Aadit Tambe et al., *Lottery on Your Block*, HOWARD CTR FOR INVESTIGATIVE JOURNALISM, <https://cnsmaryland.org/interactives/spring-2022/app/> (last visited Nov. 26, 2024).

89. Emily Stewart, *What the lottery sells — and who pays*, VOX (May 4, 2023), <https://www.vox.com/money/23697885/lottery-mega-millions-powerball-state-history-scratch-off> (interviewing Jonathan D. Cohen).

90. U.S. CONST. art. IV, § 4.

91. *See generally* U.S. CONST. art. IV, § 4.

92. U.S. CONST. art. II, §§ 2, 3.

93. *Id.*

94. U.S. CONST. art. II, § 3.

95. William P. Marshall & Saikrishna B. Prakash, *Article II, Section 3: Common Interpretation*, NAT'L CONST. CTR, <https://constitutioncenter.org/the-constitution/articles/article-ii/clauses/348> (last visited Nov. 8, 2024).

96. Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602, 687-88 (2018).

97. *Id.* at 636.

federal government to its quasi-sovereign component states.”<sup>98</sup> A glance at the 1786 edition of Dr. Johnson’s Dictionary bolsters Willams’ interpretation.<sup>99</sup> “To guarantee” meant “to undertake to secure the performance of any articles.”<sup>100</sup> “To secure” meant “to make certain, to make safe, to protect, to put out of hazard.”<sup>101</sup> Application of these definitions to the text of the Clause clarifies the proactive and ongoing obligations of the federal government: “The United States shall undertake to make certain, make safe, protect, put out of hazard republican forms of government in each state.”<sup>102</sup>

This commitment makes sense given the internal upheaval that characterized the United States under the Articles of Confederation. Under that flawed governing document, states rightfully came to fear that unrest in one state might spillover. That fear was the product of Shays’s Rebellion.<sup>103</sup> When a group of debtors in Massachusetts organized to shut down civil courts to prevent further foreclosures on delinquent properties, the state government had to turn to a private-financed army to quell the rebels.<sup>104</sup> Members of the public<sup>105</sup> and elected officials alike realized the need for a more robust check on chaos in one state sparking discord in another state.<sup>106</sup> The Guarantee Clause emerged in response to those concerns, requiring each state to “surrender[] those powers which might make them dangerous to each other.”<sup>107</sup> More specifically, states acquiesced to the possibility of federal intervention upon some threat to an anti-republican contagion propagating outwards from their territory.<sup>108</sup>

While the imposition of a duty is clear, the contents of that duty are less so. The meaning of “republican form of government” has evaded a precise definition. As a matter of constitutional necessity, at least thirteen forms of government, those of the initial states, qualify as republican.<sup>109</sup> The common characteristics of those initial state governments provide some insight into the

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98. *Id.* at 603.

99. Bonfield, *supra* note 19, at 523.

100. *Id.*

101. *Id.*

102. *Id.*

103. *The Events and Impact of Shays’s Rebellion*, CTR. FOR THE STUDY OF THE AM. CONST. <https://csac.history.wisc.edu/document-collections/confederation-period/shays-rebellion> (last visited Nov. 26, 2024).

104. *Id.*

105. John P. Kaminski et al., *The Documentary History of the Ratification of the Constitution*, PENNSYLVANIA GAZETTE (2009).

106. Jason Mazzone, *On the Guarantee Clause*, BALKIN (Oct. 20, 2011), <https://balkin.blogspot.com/2011/10/on-guarantee-clause.html>.

107. *Martin v. Hunter’s Lessee*, 14 U.S. 304, 373 (1816) (Johnson, J., concurring).

108. Mazzone, *supra* note 106.

109. Hans A. Linde, *State Courts and Republican Government*, 41 SANTA CLARA L. REV. 951, 951 (2001).

hallmarks of republican governance. Variance among those governments signal that republican governance cannot be distilled into a simple and exhaustive checklist.<sup>110</sup> The result is that republican governance has often been defined by negation.<sup>111</sup> Most importantly, it has been juxtaposed against aristocracy and monarchy.

The lived experiences of the Founders resulted in widespread concern about two threats to republican governance in the states: the potential for unrest in one state to disturb others and, in particular, the establishment of a monarchy or aristocracy precipitating such unrest.<sup>112</sup> That said, had those been the exclusive forms of government that gave rise to their concerns, then the Founders presumably would have altered the language of the Guarantee Clause to simply forbid aristocracy and monarchy. The decision to instead prohibit anti-republican developments or “innovations” in the states expands the protective sphere of the Clause.<sup>113</sup> This expanded approach merits a closer look at what the Founders likely characterized as republican governance and, more abstractly, republican ideals.

The core of the Guarantee Clause in the minds of the Founding Generation was rule by the people.<sup>114</sup> Patrick Henry distilled this idea further to mean regular and free elections.<sup>115</sup> James Madison added in Federalist No. 39 that it was *essential* that the power delegated to elected officials be “from the great body of the society, not from an inconsiderable proportion, or a favored class of it.”<sup>116</sup> At the Constitutional Convention, Madison connected the dots between that necessary condition for elected officials and elections when he labeled the right of suffrage as “one of the fundamental articles of republican Government.”<sup>117</sup> Thomas Jefferson likewise tied republican governance to representation and rules established by the majority.<sup>118</sup> A turn to “republican” in the 1786 edition of Johnson’s Dictionary indicates that Henry, Madison, and Jefferson advanced a common understanding of the term.<sup>119</sup> “Republican” referred to “[p]lacing the government in the people.”<sup>120</sup>

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110. Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEXAS L. REV. 807, 855 (2002).

111. THE FEDERALIST NO. 43 (James Madison); see Linde, *supra* note 46, at 966.

112. THE FEDERALIST NO. 43 (James Madison).

113. Ricardo N. Cordova, *Unleashing the Guarantee Clause Against the Spirit of Innovation*, 32 WM. & MARY BILL RTS. J. 437, 440 (2023).

114. THE FEDERALIST NO. 39 (James Madison).

115. Bonfield, *supra* note 19, at 526.

116. THE FEDERALIST NO. 39 (James Madison).

117. Bonfield, *supra* note 19, at 526.

118. *Thoman Jefferson, The Works, vol. 11 (Correspondence and Papers 1808-1816)*, THE ONLINE LIBR. OF LIBERTY, 62 (1905).

119. Bonfield, *supra* note 19, at 527.

120. *Id.*

It was not lost on the Founders that government by the people required not only providing them with a means to act on that power, but also preventing other actors from diluting that power. If private actors undermine the ability of the people to control their elected officials, then those actions fall within the protective sphere of the Guarantee Clause.<sup>121</sup> As pointed out by then-Professor Bonfield, “Can a state be deemed republican if it does not safeguard its citizens’ rights *in fact, as well as in law*, from the transgressions of others?”<sup>122</sup> One such infringement may be undermining the right to suffrage. Another may be denying individuals the economic security and opportunity to act as free agents in a republic.

This view was held by Jefferson and others.<sup>123</sup> Professor Deborah Jones Merritt notes that “[t]o Jefferson, political and economic freedoms were meaningless unless each citizen had access to the resources—the capital—to take advantage of economic opportunities.”<sup>124</sup> Madison likewise flagged possession of “the great pecuniary resources” by a minority as opposed to republican ideals.<sup>125</sup> More generally, the importance of economic security and opportunity to early Americans informed their “fears of power, corruption, and domination, whether by an entrenched few of an ineffectual many or by a capricious many of a vulnerable few.”<sup>126</sup> Jefferson’s views built a rich vein of political philosophy that shaped how the Founding Generation conceived of economic freedom.<sup>127</sup>

Stitching these conceptions of republican self-governance together, the Guarantee Clause mandates the whole of the federal government take responsibility for ensuring majority rule through regular elections and robust checks on private actors.<sup>128</sup> The traditional recounting of the Supreme Court’s jurisprudence on the Guarantee Clause is that the Court has definitively labeled the Clause as a non-justiciable political question that places too much weight on and likely misinterprets *Luther v. Borden*, a decision from 1849.<sup>129</sup>

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121. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 59 (1988).

122. Bonfield, *supra* note 19, at 565.

123. Merritt, *supra* note 121, at 23-24.

124. Johann N. Neem, *Developing Freedom: Thomas Jefferson, the State, and Human Capability*, CAMBRIDGE UNIV. PRESS (2013), <https://www.cambridge.org/core/journals/studies-in-american-political-development/article/developing-freedom-thomas-jefferson-the-state-and-human-capability/DD0439C5E6CB7180F4A8C4A2B2CE001E>.

125. See James Madison, *Vices of the Political System of the United States*, LIBRARY OF CONGRESS (May 7, 1787).

126. Kip W. Hustace, *Education, Antidomination, and the Republican Guarantee*, 30 WM. & MARY BILL RTS. J. 91, 122 (2021).

127. *Id.*

128. Gabriel J. Chin & Erin M. Hawley, *The Guarantee Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/articles/article-iv/clauses/42> (last visited Nov. 26, 2024).

129. 48 U.S. 1, 46-47 (1849).



A properly narrow reading of that opinion reveals nothing more than the Supreme Court's refusal to determine which of two possible state governments actually represented Rhode Island.<sup>130</sup> In contrast, Supreme Court justices familiar with and, in some cases, involved in the drafting of the Guarantee Clause had no qualms commenting on what qualified as a republican form of government.<sup>131</sup> In 1793, Justice Wilson defined a republican form of government as "one constructed on this principle, that the Supreme Power resides in the body of the people."<sup>132</sup> Soon after, in 1798, the *Calder v. Bull* Court asserted that:

There are certain vital principles in our free [r]epublican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established.<sup>133</sup>

State courts similarly evidenced a willingness to interpret the Guarantee Clause.<sup>134</sup> A Delaware state court did so just two years before *Luther*.<sup>135</sup> An Illinois court did the same in 1848.<sup>136</sup> Even after *Luther*, state courts continued to analyze compliance with state innovations under the Guarantee Clause.<sup>137</sup> If the Clause was intended to be outside the bounds of judicial review due to its political nature, it seems unlikely some of the nation's earliest justices would have detailed their views on republican governance and that state courts would have done the same both before and after *Luther*.

A hypothetical makes clear that our republican system requires a robust Guarantee Clause doctrine—one that empowers Congress to respond when self-governance is threatened and allows for courts to assess if that congressional response went too far. An alternative conclusion is nonsensical with a constitution defined by checks and balances.

Imagine State X prohibits anyone from voting in local elections who has not lived in the state for more than five years. This disenfranchises twelve percent of the electorate, most of whom tend to vote with the party presently out of power. State legislators aim to prevent state politics from being steered

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130. Louise Weinberg, *Luther v. Borden: A Taney Court Mystery Solved*, 37 PACE L. REV. 700, 740 (2017).

131. See *Chisholm v. Georgia*, 2 U.S. 419, 457 (1793); *Calder v. Bull*, 3 U.S. 386, 388 (1798).

132. *Chisholm*, 2 U.S. at 457.

133. 3 U.S. at 388.

134. *Rice v. Foster*, 4 Del. 479, 497-98 (1847).

135. *Id.*

136. *People ex rel. Caldwell v. Reynolds*, 10 Ill. 1, 18 (1848).

137. *E.g.*, *People v. Toynbee*, 20 Barb. 168, 223 (N.Y. 1855).

by an influx of new residents with little to no knowledge of local affairs. In support of the legislation, the legislators point to numerous studies indicating a statistically meaningful difference in understanding of state history and public policy issues between new residents and long-term residents. They also point to research suggesting that most newcomers leave the state during the winter—resulting in those so-called residents lacking an understanding of the importance of infrastructure projects, for example.

A challenge to the law fails under the Fourteenth Amendment when a majority of the Supreme Court votes to overturn the 5-4 decision in *Dunn v. Blumstein* and return the law to *Pope v. Williams*. In the latter case, the Court held that a state may demand that newcomers be “exposed to state and local problems for a reasonable period” prior to voting in local and state elections. The surveys and other data suggest this is a perfectly reasonable regulation.

If the Guarantee Clause is judicially off-limits, as some suspect, then the new residents are left without recourse. Other states concerned with the influence of new residents soon follow suit and adopt “reasonable” duration requirements of up to seven years. In the ensuing years, these state governments adopt taxes, fees, and licensing schemes that all survive legal scrutiny but also serve to punish the newcomers. As a result, interstate migration slowly grinds to a halt. Factionalism soars. Talks of succession increase.

The Founders did not necessarily envision this hypothetical. They did, however, explicitly and intentionally provide the entirety of the federal government with the authority and *duty* to step in upon such a threat.<sup>138</sup> If such pressures did build, then Congress should and could intervene to stem unrepresentative residency requirements. They could, for instance, draw a line at one year for a reasonable residency requirement.

However, imagine if Congress goes too far. Assume Congress instead opts to completely ban residency requirements. Here again, the dangers of a dormant Guarantee Clause come to fruition. Do the courts have to sit on their hands when state governments insist that a one-year requirement is indeed reasonable? Under a faithful interpretation of the Guarantee Clause, no.<sup>139</sup> Courts in this instance should and could check Congress’s response under the Clause.<sup>140</sup>

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138. U.S. CONST. art. IV, § 4.

139. *Id.*

140. *Id.*

## IV. APPLICATION OF THE GUARANTEE CLAUSE TO MODERN THREATS TO SELF-GOVERNANCE

What constitutes the proper remedy for state variance from republican governance depends on the nature of the state's departure and the contemporary republican norms. During the Reconstruction, Congress relied on the Guarantee Clause to develop the conditions under which rebel states could rejoin the Union, and they added requirements that went above and beyond those that characterized the state governments at the Founding.<sup>141</sup> The Clause was cited as the authority for the Reconstruction Acts of 1867, which initially permitted federal intervention in the southern states "until loyal and republican [s]tate governments [could] be legally established."<sup>142</sup> The establishment of such governments required that all "male citizens of said [s]tate, twenty-one years old and upward, of whatever race, color, or previous condition" receive the right to vote.<sup>143</sup> The Second Reconstruction Act went further, creating federally operated boards of registration tasked with monitoring state officials and overseeing local and state elections.<sup>144</sup> The Third Reconstruction Act amplified the powers of those boards and authorized a series of other interventions.<sup>145</sup>

The conception of republican governance advanced by Congress during the Reconstruction markedly differed from that of the Founders.<sup>146</sup> This discrepancy was not lost on the former group nor the courts that heard challenges to the Acts.<sup>147</sup> Still, the Supreme Court "tacitly endorsed Congress's actions during Reconstruction," though it later substantially narrowed the intended byproducts of that legislative era.<sup>148</sup>

This brief case study indicates that the modern threats to self-governance outlined above may warrant a congressional response tailored to our current understanding of republican governance.<sup>149</sup> Few doubt that our conception of republican governance has morphed in meaning since the Reconstruction. In turn, the obligations of the federal government have also changed.<sup>150</sup>

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141. GOVERNMENT OF THE REBEL STATES, CH. 153, 14 STAT. 428, 428 (1867).

142. *Id.*

143. *Id.*

144. SECOND RECONSTRUCTION ACT, CH. 6, § 4, 15 STAT. 2, 3 (1867).

145. THIRD RECONSTRUCTION ACT, CH. 30, §§ 2-3, 5, 15 STAT. 14, 14-15 (1867).

146. David S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 VANDERBILT LAW REVIEW 673, 679 (2020).

147. *Id.* at 717-18.

148. *Id.* at 717.

149. *Id.* at 751.

150. *Id.* at 717-718.

*A. How the Guarantee Clause May Warrant Congressional Action in Response to Election Interference*

The majority of Americans have a broad understanding of what self-governance looks like at the ballot box. Upwards of ninety percent of Americans say the right to vote is “extremely important or very important to the United States’ identity as a nation.”<sup>151</sup> Nearly eighty percent support some form of early voting.<sup>152</sup> Sixty-five percent back automatic voter registration laws.<sup>153</sup> Almost sixty percent oppose the reduction of ballot drop-off locations.<sup>154</sup>

States blatantly, in defiance of these modern attributes of republican self-governance, threaten the cohesion and uniformity that spurred the Founders to adopt the Guarantee Clause. Consider that just three states—Alabama, Mississippi, and New Hampshire—prohibit early voting.<sup>155</sup> Relatedly, as of the 2020 election, voters in twenty-nine states and DC waited for fewer than twelve minutes to vote; voters in the remaining twenty-one states face abnormally long wait times.<sup>156</sup> As mentioned above, a small fraction of jurisdictions use DREs for voting.<sup>157</sup> Other anomalous and potentially unrepublican actions are still unfolding. The Georgia State Election Board may soon adopt rules that allow local election officials to take significant actions to disrupt normal election processes.<sup>158</sup> If enacted and sustained through likely legal challenges, the rules would empower local election officials to stop vote-counting and refrain from certifying the election upon any irregularities.<sup>159</sup>

Whether any of these areas merit congressional intervention should be subject to robust debate. The first step in that process is realizing that

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151. Gary Fields & Amelia Thomson Deveaux, *Yes, we’re divided. But new AP-NORC poll shows Americans still agree on most core American values*, AP NEWS (Apr. 3, 2024), <https://apnews.com/article/ap-poll-democracy-rights-freedoms-election-b1047da72551e13554a3959487e5181a>.

152. Nicole Willcoxson & Lydia Saad, *Eight in 10 Americans Favor Early Voting, Photo ID Laws*, GALLUP (Oct. 14, 2022), <https://news.gallup.com/poll/403052/eight-americans-favor-early-voting-photo-laws.aspx>.

153. *Id.*

154. *Id.*

155. *Early In-Person Voting*, NCSL (July 1, 2024), <https://www.ncsl.org/elections-and-campaigns/early-in-person-voting>.

156. *In-Person Voting Wait Time & Line Length*, MOVEMENT ADVANCEMENT PROJECT (Nov. 27, 2023), <https://www.lgbtmap.org/img/maps/citations-polling-place-line-length.pdf>.

157. *See generally Voting Methods and Equipment by State*, BALLOTPEdia (Oct. 23, 2024), [https://ballotpedia.org/Voting\\_methods\\_and\\_equipment\\_by\\_state](https://ballotpedia.org/Voting_methods_and_equipment_by_state).

158. Nick Corasaniti, *Georgia Board Grants Local Officials New Power Over Certifying Elections*, N.Y. TIMES (Aug. 6, 2024), <https://www.nytimes.com/2024/08/06/us/politics/georgia-elections-certification.html>.

159. *Id.*; *See generally* Norman Eisen et al., *Trump and his allies are previewing their election sabotage plan in Georgia*, MSNBC (Aug. 8, 2024), <https://www.msnbc.com/opinion/msnbc-opinion/georgia-election-board-trump-certification-rcna165784>.

Congress has the authority to hold such a debate under the Guarantee Clause.<sup>160</sup> “Congress may also regulate state elections in the interest of preserving the republican nature of their governments,” as Bonfield recognized in 1961 and early Americans intended as of 1789.<sup>161</sup> Pursuant to the duty imposed by the Clause, Congress “may legislate to insure that all elections are fairly held, and that no person is deprived by unrepresentative qualifications either of the ballot or of the right to hold office.”<sup>162</sup> Denial of Congress’s authority to intervene in such a manner pursuant to the Guarantee Clause would lead to undesirable, unconstitutional results. Any congressional action, though, must come with a judicial backstop, as made clear by the hypothetical.

*B. How the Guarantee Clause May Warrant Congressional Action in Response to Concentration of Power in Corporate Hands*

Broad bipartisan support for greater checks on big business, especially big technology, indicates sweeping discomfort with the power wielded by these private actors.<sup>163</sup> Between 2018 and 2021, public confidence in Facebook, Amazon, and Google plummeted.<sup>164</sup> For reference, during the same period, confidence in Congress, though already low in 2018, remained more or less the same.<sup>165</sup> This public loss of faith likely informed broad support for meaningful efforts to limit the scale and power of those companies. According to a 2021 Vox poll, nearly six in ten Americans backed breaking up Big Tech.<sup>166</sup> Even more Americans, nearly seven in ten, agreed that Big Tech’s economic power hinders rather than helps the nation’s economy.<sup>167</sup> Corporations have not managed to improve their image in the ensuing years.<sup>168</sup> When asked if large corporations have a positive effect on the country, fewer than three in ten Americans agreed as of late 2022.<sup>169</sup>

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160. Bonfield, *supra* note 19, at 566.

161. *Id.*

162. *Id.* at 566-67 (analyzing the connection between popular sovereignty and republican governance as well as the norms about voting in early America).

163. Monica Anderson, *Most Americans say social media companies have too much power, influence in politics*, PEW (July 22, 2020), <https://www.pewresearch.org/short-reads/2020/07/22/most-americans-say-social-media-companies-have-too-much-power-influence-in-politics/>.

164. Sean Kates et al., *How Americans’ confidence in technology firms has dropped*, BROOKINGS (June 14, 2023), <https://www.brookings.edu/articles/how-americans-confidence-in-technology-firms-has-dropped-evidence-from-the-second-wave-of-the-american-institutional-confidence-poll/>.

165. *Id.*

166. Rani Molla, *Poll: Most Americans want to break up Big Tech*, VOX (Jan. 26, 2021), <https://www.vox.com/2021/1/26/22241053/antitrust-google-facebook-break-up-big-tech-monopoly>.

167. *Id.*

168. Amina Dunn & Andy Cerda, *Anti-corporate sentiment in U.S. is now widespread in both parties*, PEW (Nov. 17, 2022), <https://www.pewresearch.org/short-reads/2022/11/17/anti-corporate-sentiment-in-u-s-is-now-widespread-in-both-parties/>.

169. *Id.*

Many Americans are particularly concerned that social media companies exercise too much power over our politics.<sup>170</sup>

Few signs suggest that the popular consensus that big business has grown too big in our economic and political ecosystems will wane in the coming years.<sup>171</sup> Assuming that this consensus persists, it will become more untenable for the federal government to enable certain states to effectively authorize big businesses to seize power that belongs to the people. How exactly the federal government should fulfill the Antitrust Guarantee in this context is worthy of additional scholarship. To jumpstart that process one proposal that is currently being investigated: “Congres[s] insisting on state enforcement of minimum charter provisions for all corporations engaged in interstate commerce.”<sup>172</sup> Stringent charter requirements were the norm for much of our nation’s history.<sup>173</sup> New restrictions tailored to contemporary threats of republican self-governance should be developed by states and imposed by the federal government, if necessary.

Numerous other interventions may satisfy the federal government’s obligations under the Antitrust Guarantee. The key takeaway from this essay is that the government has a duty to look beyond the Sherman Act, Clayton Act, or other antitrust statutory provisions when corporations act in anti-republican fashions.

To paraphrase then—Supreme Court Justice Louis Brandeis, we can have a republican form of governance in this country, “or we can have great wealth concentrated in the hands of a few, but we can’t have both.”<sup>174</sup> The Constitution obligates the federal government to proactively and perpetually pick the former over the latter.<sup>175</sup> As radical as this Antitrust Guarantee may seem today, as a result of the Guarantee Clause lying dormant, it comports with the understanding of many Founders.<sup>176</sup> Thomas Jefferson, for instance, “believed that to enjoy the freedoms that rights protected required constant government intervention in society and the economy.”<sup>177</sup> “Otherwise, economic, political, and religious liberty would be empty promises.”<sup>178</sup>

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170. Anderson, *supra* note 163.

171. *Id.*

172. Kevin T. Frazier, *The Antitrust Guarantee*, THE REGULATORY REV. (Sept. 23, 2024), <https://www.theregreview.org/2024/09/23/the-antitrust-guarantee/>.

173. Fox, *supra* note 70.

174. JOSEPH R. CONLIN, THE MORROW BOOK OF QUOTATIONS IN AMERICAN HISTORY 48 (1984); See also Nicholas Lindberg, *From Athens to Elon: The Threat of Wealth on Democracy*, SANTA CLARA UNIV. (Mar. 25, 2023), <https://www.scu.edu/illuminate/thought-leaders/nicholas-lindberg/from-athens-to-elon-the-threat-of-wealth-on-democracy.html>.

175. Conlin, *supra* note 174.

176. Frazier, *supra* note 172.

177. Johann N. Neem, *Developing Freedom: Thomas Jefferson, the State, and Human Capability*, 27 STUDIES AM. POL. DEVEL. 36, 38 (2013).

178. *Id.*

C. *How the Guarantee Clause May Warrant Congressional Action in Response to Excessive and Manipulative Use of Lotteries by State Governments*

Congress can and should target the anti-republican aspects of state lotteries. State-use of deceptive advertising and marketing tactics qualifies as one such anti-republican aspect.<sup>179</sup> Research by the National Association for the Advancement of Colored People indicates that states often produce advertisements with language and cultural imagery specifically tailored to low-income communities.<sup>180</sup> States may engage in such behavior thanks, in part, to being outside the reach of the FTC's truth-in-advertising laws.<sup>181</sup> Though the Commerce Clause may hinder Congress's ability to reach certain in-state commercial activities,<sup>182</sup> the Guarantee Clause obligates Congress to intervene upon detection of anti-republican trends.<sup>183</sup> Application of truth-in-advertising laws to the states would likely not eliminate all anti-republican aspects of state lotteries, but would mark an important start. Americans should not actively employ state officials tasked with developing new and creative means to trick their neighbors into squandering their incomes.

Congress may also reduce excessive state reliance on lottery revenue, as well as excessive participation by those desperate for a financial windfall by limiting the frequency of lotteries and capping the total jackpot. If states could only raise a maximum of half of a percent of their budgets from state lottery dollars, for example, they would not have the ability to be running near constant games. Likewise, if jackpot totals came down, then citizens may feel less willing to participate or, at least, less willing to as buy as many tickets.<sup>184</sup> More creative congressional actions, such as banning lotteries during periods of pronouncement economic downfalls, could achieve similar effects.<sup>185</sup>

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179. *Ban Misleading Advertising in Lotteries and Ensuring Equitable Distribution of Lottery Proceeds Through Disclosure and Transparency*, NAACP (2023), <https://naacp.org/resources/ban-misleading-advertising-lotteries-and-ensuring-equitable-distribution-lottery-proceeds>.

180. *Id.*

181. Jonathan D. Cohen, *The \$1 billion Powerball jackpot exposed the prevalence of lottery ads*, WASHINGTON POST (July 20, 2023), <https://www.washingtonpost.com/made-by-history/2023/07/20/powerball-megamillions-lottery-advertising/>.

182. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 587-88 (2012) (emphasizing that the Commerce Clause only permits Congress to regulate interstate commerce).

183. *Id.*

184. *See generally* Janine Doyon & Noreen O'Donnell, *What to know about playing the lottery (from a math professor who won)*, NBC (Mar. 3, 2024), <https://www.nbcbayarea.com/news/national-international/what-increases-chance-lottery-win/3408041/>.

185. *See generally* Kathy Lohr, *More People Buying Lottery Tickets Despite Recession*, NPR (Aug. 24, 2010), <https://www.npr.org/2010/08/24/129401497/more-people-buying-lottery-tickets-despite-recession>.

Additional scholarship is necessary to identify how precisely the federal government should respond to this latest unrepugnant divergence. Other potential interventions include a prohibition on state lotteries or, less dramatically, the mandated transition of state lotteries into state savings pools, with some entrants earning surplus savings. This latter approach would still allow individuals to experience the supposed thrill of receiving winnings while turning their ticket purchases into deposits. Which of these interventions is simultaneously responsive to the unrepugnant aspects of state lotteries and within the power afforded by the Clause merits extensive analysis. The key is that the federal government ends its status as a bystander in the manipulation and exploitation of state residents.

#### V. CONCLUSION

“No part of the federal government can dodge duties outlined by a valid constitutional provision.”<sup>186</sup> “The Guarantee Clause may be a ‘sleeping giant,’ as Sen[ator] Charles Sumner noted in 1867, but a sleeping clause is distinct from a vestigial one.”<sup>187</sup> Corporations wielding unchecked power have made millions of Americans dependent on them for essential news and products.<sup>188</sup> Antitrust statutes are not the sole means of responding to such behavior and, in some cases, may not reach such behavior.<sup>189</sup> Realization of the Antitrust Guarantee, however, would prevent one-off states, such as Delaware, from subjecting the rest of America to the negative consequences of anti-republican laws.<sup>190</sup>

State governments adhering to out-of-date and unpopular electoral systems likewise raise Guarantee Clause concerns.<sup>191</sup> As the discrepancy grows between states easing access to the ballot and those few states that insist on maintaining and expanding barriers to the ballot, the case for congressional response under the Clause will become even stronger. If Congress fails to take proportional action, then the rest of the federal government will have to step in.

The use of lotteries by state governments to manipulate and impoverish residents is yet another anti-republican trend in contemporary governance. Madison and other members of the Founding Generation sought to anticipate,

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186. Kevin Frazier, *What Does the Guarantee Clause Actually Guarantee*, LAWFARE (Sept. 20, 2024), <https://www.lawfaremedia.org/article/what-does-the-guarantee-clause-actually-guarantee>.

187. Gerard N. Magliocca, *The Sleeping Giant is Awake*, Balkinization (Aug. 12, 2023), <https://balkin.blogspot.com/2023/08/the-sleeping-giant-is-awake.html>.

188. Frazier, *supra* note 172.

189. *Id.*

190. *Id.*

191. Nick Corasaniti, *Georgia Board Grants Local Officials New Power Over Certifying Elections*, N.Y. TIMES (Aug. 6, 2024), <https://www.nytimes.com/2024/08/06/us/politics/georgia-elections-certification.html>.



mitigate, and diminish the sort of self-interested behavior characteristic of gambling, rather than investing in oneself or one's community.<sup>192</sup> A bevy of scholars have confirmed this point.<sup>193</sup> Professor Lance Banning asserted that classical republicanism rested on “a willingness and an ability [of individuals] to put attention to the common good ahead of selfish ends.”<sup>194</sup> Banning also identified republican virtue as “individual readiness to sacrifice selfish interest for the interest of the whole.”<sup>195</sup> Professor Susan Carle relatedly observed that the Founders looked to Blackstone, Aristotle, and others to understand and respond to the connection between politics and civic virtue.<sup>196</sup> Based on those and other sources, the Founding Generation shared an understanding that liberty would go unrealized in a world marked by immoral, biased, corrupt morals. Liberty is very much threatened when public authorities—namely, state governments—actively nudge individuals to practice anti-republican virtues through participating in state-operated lotteries.

Few things united the Founding Fathers more than the importance of self-governance and, by extension, political participation, freedom from domination, and economic security. They carefully crafted a system of government meant to preserve and protect those republican values against any threat, including usurpation by the central government, the states, and private actors. The Guarantee Clause should operate as the ultimate constitutional safety valve—a release for un-republican developments. Instead, the significance of this Clause has led to its futility. Federal government actors have shied away from fulfilling their duty. This failure to act has enabled state governments and corporations to undermine the key republican values of popular sovereignty, independence, and self-sufficiency.

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192. Susan D. Carle, *Why the U.S. Founders' Conceptions of Human Agency Matter Today: The Example of Senate Malapportionment*, 9 TEX. A&M L. REV. 533, 541, 541 n.34 (2022).

193. See generally LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* (1978).

194. *Id.*

195. *Id.*

196. Carle, *supra* note 192, at 543.