



DO CITIZEN VOTES ON TAXES AND LAWS VIOLATE THE CONSTITUTION'S REQUIREMENT OF A "REPUBLICAN FORM OF GOVERNMENT?"

by Robert G. Natelson

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EXECUTIVE SUMMARY

Opponents of popular participation in government have long argued that when a state constitution or legislature permits the people to vote on revenue measures and other laws, this puts the state out of compliance with the U.S. Constitution's Guarantee Clause: the requirement that all states have a "Republican Form of Government." Traditionally, their argument has been that the Constitution draws a sharp distinction between a republic and a democracy, and that citizen initiatives and referenda are too democratic to be republican. Recently, a group of plaintiffs sued in federal court, challenging Colorado's Taxpayer Bill of Rights (TABOR) relying on a variation of this theory.

In this Issue Paper, Professor Rob Natelson, Senior Fellow in Constitutional Jurisprudence and the author of the most important scholarly article on the Guarantee Clause, sets the record straight. Marshaling evidence from Founding-Era sources and from the words of the Founders themselves, he shows that the phrase "Republican Form of Government" permits citizen lawmaking—and that, in fact, most of the governments on the Founders' list of republics included far more citizen lawmaking than is permitted in Colorado or any other American state. He further shows that the principal purpose of the Guarantee Clause was not to restrict popular government, but to protect popular government by forestalling monarchy.

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THE "DEMOCRACY V. REPUBLIC" STORY: HOW IT GOT STARTED¹

In 1841 a democratic uprising—massive but largely peaceful—erupted in Rhode Island.² That state was still operating, with some amendment, under the royal charter that had governed the colony of Rhode Island prior to Independence. By the standards of the 1840s, this government was undemocratic. The rebels, led by Thomas Wilson Dorr, demanded a more widely-based government. When the state's ruling elite rejected their demands, the rebels held their own elections, choosing Dorr as their governor.

Conservatives across the country were horrified. They argued that the new government, even if resting on popular support, was not a "republican" one. They further argued that because it was not republican, the United States should not recognize it in any way. They cited the Guarantee Clause of the United States Constitution—Article IV, Section 4—which provides in part that, "[t]he United States shall guarantee to every State in this Union a Republican Form of Government. . . ."

The Supreme Court case of *Luther v. Borden*³ arose out of the Rhode Island controversy. The Court held that Congress, not the judiciary, was the proper venue for resolving Guarantee Clause issues. By the time of the Court's ruling, Dorr's uprising had been long suppressed.

The controversy presented ruling elites with an opportunity to develop a congenial theory of what kinds of state governments did, and did not, comply with the republican form. The theory they adopted was that to qualify as a "republic," a government could not be too democratic, because republics and democracies were mutually-exclusive forms of government.

In 1847, the Delaware Supreme Court ruled on the validity of a state law permitting citizens in each county to vote on whether the sale of alcoholic beverages would be permitted in their county. The

case was *Rice v. Foster*,⁴ and the Delaware justices could have decided it on fairly narrow grounds. But Chief Justice Booth, reacting unfavorably to the Dorr Rebellion,⁵ decided to make a larger statement about what he considered the nature of republican government.

When the people establish a republican form of government, Justice Booth wrote, they delegate all their sovereign lawmaking authority to state officials. They retain only the power to elect those officials. "Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it. . . . To do so would be an infraction of the constitution, and a dissolution of the government."⁶ Thus, to qualify as a "republic," the court ruled, a government must provide that only the legislature, never the people, enacts laws. Any provision for direct citizen lawmaking was unconstitutional.

Lest the people consider amending the Delaware constitution to permit direct citizen lawmaking, Justice Booth added:

And although the people have the power, in conformity with its provisions, to alter the [state] constitution; under no circumstances can they, so long as the Constitution of the United States remains the paramount law of the land, establish a democracy, or any other than a republican form of government.⁷

Despite this ruling, throughout the 19th and 20th centuries, states under the influence of the Progressive Movement inserted provisions in their constitutions allowing for referenda (electoral review of legislative decisions) and initiatives (popular votes on measures initiated by citizen petition). No major courts

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followed Delaware’s lead in voiding such provisions.⁸ Nevertheless, political elites continued to contend that initiatives and referenda were unrepresentative and therefore unconstitutional.⁹ As in *Rice v. Foster*, the argument usually was framed by assertions that there was a sharp difference between a “republic” and a “democracy,” and that permitting citizen lawmaking converted a state into a democracy.

During the 19th and early 20th centuries, the elites making this argument usually represented conservative interests. That is no longer true. Since the 1970s, states have enacted and considered numerous proposals for voter control of state taxing and spending. Naturally, those who benefit from government spending—usually on the political left—have resisted such proposals. One basis for doing so has been the claim that permitting voter review of revenue measures violates the Guarantee Clause.¹⁰ For example, the plaintiffs raised this argument in their 1999 suit to invalidate Montana’s Constitutional Initiative 75, although the state supreme court decided the case on other grounds.¹¹ A more recent example is a current federal lawsuit, *Kerr v. Hickenlooper*,¹² claiming that Colorado’s “Taxpayers Bill of Rights” (TABOR) violates the republican form.

TABOR was adopted by initiative in 1992 as an amendment to the Colorado constitution.¹³ It requires popular votes on most tax increases and some spending increases. Stated in more technical language, TABOR subjects certain legislative revenue measures to mandatory referendum. The plaintiffs in the *Kerr* case are mostly present or former government lawmakers, employees, or officials. They argue that to qualify as “republican” under the U.S. Constitution, each state government must have a “fully effective legislative.”

measures, the Colorado legislature is less than “fully effective.”

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Unfortunately for the *Kerr* plaintiffs, there are virtually no decided cases, other than *Rice v. Foster*, holding that popular limits on the legislature render a state “unrepresentative.” For this reason, the *Kerr* plaintiffs, like many before them, argue that the Founding-Era meaning of “republican form,” as that term is used in the U.S. Constitution, precluded or limited citizen lawmaking.

However, the historical basis for that assertion is extremely slim. As a result, Guarantee Clause challenges to direct popular lawmaking invariably have cited materials that reveal little or nothing of the Founding-Era meaning of “Republican Form of Government.” Some of these statements refer only to the Founders’ personal political preferences rather than to how they defined the term “Republican Form”). Other statements were composed long after the Constitution was adopted. Still others are doctored or irrelevant.¹⁴

One passage on all challengers’ lists, including that of the plaintiffs in the *Kerr* case, is an excerpt from James Madison’s *The Federalist* No. 10:

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. . . .

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference

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between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.¹⁵

Although this passage is the most-often cited evidence that initiatives and referenda violate the “republican” form, the careful reader will see it is not very relevant to the modern initiative and referendum process. First, Madison defined

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a republic as “a government in which the scheme of representation takes place.” He did not say that representation must be the *only* way laws are passed. He said merely that the state must have a “scheme of representation” (elected officials)—which, of course, all states do.

Second, Madison did not assert that all institutions of direct democracy are inconsistent with republicanism. He said that *pure* democracy was

inconsistent with republicanism. He defined pure democracy as “a society consisting of a small number of citizens, who assemble and administer the government in person.” Of course this does not define any modern American state utilizing initiative and referendum. In all such states the number of citizens is large, not small; those citizens do not assemble in one place but vote in widely-separate locations; and they elect magistrates to administer the government. No state using initiative and referendum qualifies as the “pure democracy” that Madison described as un-republican.

There are, however, further difficulties in enlisting this passage against measures like TABOR. To understand them, we must examine what the Founders in general—and not just James Madison—understood by the term “Republican Form of Government.”

WHAT DID “REPUBLICAN FORM OF GOVERNMENT” MEAN TO THE FOUNDERS?

WHAT DID HISTORY SAY?

The Founders recognized that, although they personally had grown up under monarchy, the new American government would have to be a republic. Accordingly, in the grand debate over the Constitution they spent much time investigating and discussing prior republics.

John Adams was in Europe when the Constitution was drafted and debated. However, the first volume of his *Defence of the Constitutions of the United States*,¹⁶ published in 1787, received a great deal of attention in America.¹⁷ Adams’ book was a defense of the American state constitutions against criticism by a leading French philosopher. Most of the *Defence* was a survey of prior and then-existing republican governments.

The education of John Adams and the rest of the founding generation focused largely on the history and literature of ancient Greece and Rome. Many of the Founders nurtured a love of ancient history all their lives.¹⁸ When borrowing books from the library of the College of St. Andrews in Scotland, for example, the young James Wilson showed a particular interest in Roman history;¹⁹ and he and other Founders cited extensively to Greek and Roman history in the constitutional debates.²⁰

Much of the discussion over the Constitution carried out by Founders such as Adams and Wilson involved the history of what they repeatedly referred to as the “republics” of Athens, Sparta, Carthage, Crete, and pre-imperial Rome. Participants also discussed the then-existing republican governments in Europe, such as the United Provinces of the Netherlands and various cantons in Switzerland.

The purpose of this discussion was not to distinguish among those governments as republican or not; they were generally admitted to be so (although Madison did not think the Netherlands democratic enough to be a republic).²¹ The purpose was to learn from them: to identify which of their institutions were appropriate, or inappropriate, for a the new federal government.

Although the finished Constitution contained no provision for direct citizen lawmaking at the federal level, this was not because direct citizen lawmaking was “unrepublican.” On the contrary, all the republics listed above except the Netherlands had utilized direct citizen lawmaking. As the Founders

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well knew, most of those “republics” featured more citizen lawmaking than even the most fervent modern democrat could desire.²² Some of the ancient republics featured *no* legislature separate from the people.

For example, in ancient Sparta all laws adopted had to be approved by an assembly of citizens. In other words, all laws, not just a few, were subject to a form of referendum.²³ In ancient Athens, the assembly of all citizens over 18 years old both

approved and initiated laws.²⁴ In Carthage, as John Adams noted, the people initiated laws unless their magistrates were unanimous.²⁵

During the constitutional debates, pre-imperial Rome was on everyone’s list of republics, and its ideals and constitution were uniquely influential among the participants.²⁶ As the Founders understood,²⁷ the sovereign power of the Roman state—the *Res Publica Populi Romani*—was in the *populus Romanus* (Roman people). This was the whole body of citizens²⁸ acting in person in their popular assemblies. One of those assemblies was the *concilium plebis*, a gathering consisting exclusively of the commons (plebs) and excluding the nobles (patricians). Its decisions were called *plebis scita* (roughly, “Acts of the People”): the modern “plebiscite.”

The Founders recognized that convening all citizens in a single assembly was not practical in an area as large as the United States, or even as large as most American states. Moreover, many Founders expressed concern at the sort of mob behavior sometimes exhibited in those assemblies. But the Founders clearly did not think direct voting was unrepublican *per se*, since they repeatedly referred to governments with direct citizen lawmaking as “republics.”

Moreover, the Founders acknowledged that the American states all had “republican forms of government.” Yet several of those states already incorporated institutions of direct democracy into their governing procedures. For example, Massachusetts ratified its 1780 constitution (largely drafted by John Adams) by popular referendum. And when first considering the U.S. Constitution, Rhode Island held a referendum for the purpose.

Indeed, when the Constitution was being debated, the historical oddity was a republic *without* institutions of direct democracy, such as the Constitution would create at the federal level. Previously, purely representative government had been associated more with limited monarchy than with republicanism. One task facing the Federalists—those who promoted the new Constitution—was to show that republicanism was viable even without direct democracy: that the new federal government would not necessarily degenerate into monarchy or aristocracy.

WHAT DID THE DICTIONARY SAY?

When investigating the meaning of a word such as “republic” or “republican,” the most reasonable way to begin is by consulting an English-language dictionary. The Founding Era was a literate and sophisticated time, and many competing dictionaries were available. Most of these dictionaries are still accessible in academic libraries and on the Internet. The U.S. Supreme Court regularly examines them when interpreting the Constitution. Yet in this author’s experience, not one of the writers claiming that voter approval is inconsistent with a *republic* or the *republican* form of government has ever shown the least familiarity with how the Founders’ dictionaries defined “republic” or “republican.”

For this paper, the author examined nine 18th-century dictionaries that defined the noun “republic,” the adjective “republican,” or both. When more than one edition of a dictionary was available, he selected the one published closest to, but not

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after, the thirteenth state (Rhode Island) ratified the Constitution in 1790.

In its recent case on the Affordable Care Act (“Obamacare”) the Supreme Court dissenters cited the 1777 work entitled *A New General English Dictionary*, by Thomas Dyche & William Pardon.²⁹ That work defined a “Republick” as “a commonwealth, or free sort of government, where many persons, and of all ranks, best rule.” It did not define the adjective “republican,” but it defined the noun “republican” as “one who prefers the government of a commonwealth, to that of a monarchy, [etc.]” Observe that the line of distinction is placed not between republics and democracies, but between republics and monarchies. The entry included nothing that barred direct democracy, or required an “effective legislature”—or, indeed, any sort of legislature.

Neither did any other dictionary of the time. For example, Thomas Sheridan’s dictionary³⁰ (which the Supreme Court relied on in its famous Second Amendment case, *District of Columbia v. Heller*),³¹ did not contain an entry for “republic,” but did define the adjective “republican.” The full definition for the latter was “[p]lacing the government in the people.” Still another dictionary the Supreme Court has relied on,³² the famous one by Samuel Johnson,³³ defined “republican” the same manner. It described a “republick” as “a commonwealth;state in which the power is lodged in more than one”—that is, a non-monarchy.

All other lexicographers of the period understood “republic” and “republican” in the same general way. Francis Allen’s dictionary defined “republic” as “a state in which the power is lodged in more than one” and “republican” as “belonging to a commonwealth.” John Ash’s work asserted that a “republic” was “A commonwealth;³⁴ a state or government in which the supreme power is lodged in more than one.”³⁵ Ash defined “republican” as “Belonging to a republic, having the supreme power lodged in more than one.” Nicholas Bailey’s dictionary described a republic as “a commonwealth, a free state.” Bailey’s work contained no entry for the adjective “republican,” but the noun “republican” was denoted as “a commonwealth’s

man, who thinks a commonwealth, without a monarch, to be the best form of government.”³⁶ Frederick Barlow’s definition of a “republic” was “a state in which the power is lodged in more than one. A commonwealth.” Barlow’s entry for the adjective “republican” was “belonging to a commonwealth; placing the government in the people.”³⁷ Alexander Donaldson defined “republic” simply as “commonwealth,” and “republican” as “placing the government in the people.”³⁸

Finally, Ephraim Chambers’ *Cyclopaedia* presented a more lengthy treatment. It stated that a “republic” was “a popular state or government; or a nation where the body, or only a part of the people, have the government in their own hands.” It then itemized two species of republics: “When the body of the people is possessed of the supreme power, this is called a DEMOCRACY. When the supreme power is lodged in the hands of a part of the people, it is then an ARISTOCRACY.” Chambers added that “The celebrated *republics* of antiquity are those of Athens, Sparta, Rome, and Carthage”³⁹—all of which, of course, featured institutions of direct democracy.

Chambers’ discussion followed the pattern suggested by one of the Founders’ very favorite political theorists: Charles de Secondat, Baron of Montesquieu.

Montesquieu had distinguished three kinds of government: monarchies, despotisms, and republics. Both monarchies and despotisms were characterized by the rule of one person. What distinguished them was that monarchy honored the rule of law, while despotism did not.⁴⁰ Republics were governments in which the whole people or a part thereof held the supreme power. Republics governed by merely a part of the people were aristocracies. Republics governed by the people as a whole were democracies. Thus, a democracy was not the opposite of a republic. A democracy was merely one kind of republic. Far from thinking that democracy and republicanism were polar opposites, Founders such as Patrick Henry (who opposed the Constitution) and John Marshall (who favored it) regularly referred to American republican government as “democracy.”⁴¹

In sum: Not one of these Founding-Era definitions and uses contains the least suggestion that a republic must be purely representative. None refers to any requirement that a republic feature a “fully effective legislature,” or, indeed, any legislature at all.

HOW, SPECIFICALLY, DID THE FOUNDERS DEFINE “REPUBLIC?”

We have seen that James Madison discussed republican government in *The Federalist*. For all his importance, however, Madison was only one of many Founders. There were 55 delegates to the Constitutional Convention, 1648 delegates to the thirteen state ratifying conventions, and hundreds of published contributors to the public debate over the Constitution. Many of these had occasion to discuss republics and republicanism. Virtually all seem to have agreed that republics could include direct citizen voting on policy.

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Some displayed this understanding by identifying as a “republic” a government known to feature direct citizen lawmaking. Thus, at the Constitutional Convention, both George Mason of Virginia⁴² and

Alexander Hamilton of New York referred to the ancient “Grecian Republics”⁴³ There were many similar references during the public debates over ratification. In *The Federalist* No. 6, Hamilton wrote, “Sparta, Athens, Rome, and Carthage were all republics. . . .”⁴⁴ Writers opposed to the Constitution agreed: Many identified the “Grecian states,” Carthage, and Rome as republics.⁴⁵ Similarly, in the state ratifying conventions, participants of all political stripes made numerous references to these and other ancient governments as “republics.” Several examples are in the endnote.⁴⁶

James Madison also agreed. In *The Federalist* No. 63, Madison listed five republics—all with direct citizen lawmaking: Sparta, Carthage, Rome, Athens, Crete.⁴⁷ He also referred to some of these governments as *both* republics and democracies. It is instructive that those claiming that Madison’s *Federalist* No. 10 limits republics to purely representative governments never mention his discussion in No. 63, when he identifies as republics

several governments featuring institutions of direct democracy.

Several participants in the constitutional debate defined “republic” and “republican” even more precisely. A good example is James Wilson of Pennsylvania, who some historians rank as the second most influential Constitutional Convention delegate (after Madison). During the lead-up to the Revolution, Wilson had written a widely read pamphlet in which he pointed out that the only reason the British House of Commons had the power of the purse was because it was impossible to gather all the British people in one place.⁴⁸ The real power of the purse derived from the people, not from their representatives.

Wilson also was one of the most important advocates for ratification. While leading the fight for the Constitution at the Pennsylvania ratifying convention, he distinguished “three simple species of government.” These were monarchy, aristocracy, and “a republic or democracy, where the people at large *retain* the supreme power, and act either collectively or by representation.”⁴⁹ In other words, a “republic or democracy” (the same thing!) is a government in which the people rule, and they can express that rule either through representatives or directly themselves.

Charles Pinckney of South Carolina was another influential delegate at the federal convention. When promoting the Constitution at the South Carolina ratification convention, he distinguished three kinds of government: despotism, aristocracy, and “[a] republic, where the people at large, *either collectively or by representation*, form the legislature.”⁵⁰ The clear assumption was that in a republic the people can legislate directly or through representatives. It is entirely their option.

Again, opponents of the Constitution agreed. One of their leading authors, “The Federal Farmer,” resorted to Montesquieu to make his point:

Add to this Montesquieu’s opinion, that “in a free state every man,

The clear assumption was that in a republic the people can legislate directly or through representatives. It is entirely their option.

who is supposed to be a free agent, ought to be concerned in his own government: therefore, *the legislative should reside in the whole body of the people, or their representatives.*"⁵¹ (emphasis added)

Although Federalists and Anti-Federalists disagreed about the Constitution, they did not differ materially (for this purpose) about the governments they deemed to be republics.

WHY MUST EACH STATE HAVE A "REPUBLICAN FORM OF GOVERNMENT?"

The Founders, like their dictionaries, described monarchy rather than democracy as the polar opposite of republicanism.⁵² This presents a clue as to the principal purpose of the constitutional requirement that the United States guarantee to each state a "Republican Form of Government."

As noted earlier, Founding-Era education focused heavily on the Greco-Roman classics. The Founders were aware that several republican Greek city-states had united into a loose confederation called the Amphictyonic Council. Sometime after its formation, the Council admitted Macedonia to membership. Macedonia was a monarchy, then led by Alexander the Great's father, King Philip II. Pursuing the ambition common among kings, Philip abused the confederation for this own aggrandizement.⁵³

James Iredell, the Constitution's chief advocate at the North Carolina ratifying convention (and later a Supreme Court justice) explained the republican guarantee this way:

[i]f a monarchy was established in any one state, it would, endeavor to subvert the freedom of the others, and would, probably, by degrees succeed in it. . . . The king of Macedon . . . got himself admitted a member of the Amphictyonic council, which was the superintending government of the Grecian republics; and in a short time he became master of them all. It is, then, necessary that the members of a confederacy should have similar governments⁵⁴

Other aspects of the historical record further confirm

that the Guarantee Clause was adopted chiefly to forestall monarchy. It was not adopted to prevent democracy.

THE FOUNDERS ADD ONE REQUIREMENT

We have seen that 18th century dictionaries defined a republic as simply a popular government—that is, one under the control of the voters—as opposed to a monarchy or despotism. At least some sources stated that republics were of two kinds, depending on the proportion of the people who enjoyed the vote. Republics with narrow suffrage were aristocracies. Those with wider suffrage were democracies. We have seen also that the Founders agreed substantially with this view, that they thought of monarchy and republicanism as opposites, and that the principal purpose of the Guarantee Clause was to prevent any American states from becoming monarchies.

Now we return to *The Federalist* No. 10 to explain why Madison distinguished between republics and pure democracies.

Many Founders believed that to qualify as a republic a government must honor the rule of law. Iredell, for example, told the North Carolina ratifying convention that "in [a republican] government, the law is superior to every man"⁵⁶ John Adams had quoted with approval earlier writers who, he said, had defined "a republic to be a *government of laws, and not of men.*"⁵⁷ Other illustrations appear in the endnote.⁵⁸

Aristotle, Madison's favorite political philosopher, had identified a corrupt form of democracy he called *teleutaia demokratia*, in which all governmental functions—legislative, executive, and judicial—were exercised by the mob, without the rule of law. The phrase *teleutaia demokratia* can be translated as "ultimate democracy," "extreme democracy," or, to use Madison's formulation, "pure democracy."⁵⁹ John Adams called the same concept "simple and perfect democracy."⁶⁰ (In 18th century usage, "perfect" usually meant "complete.") Adams also acknowledged that the concept was so impractical it "never yet existed among men."⁶¹

This explains why, in the view of Madison and

others, *teleutaia demokratia* was not republican: the disqualifying fact was not ordinary citizen lawmaking, but direct mob control of *all* the arms of the state, ungoverned by law.⁶² Other, more restrained, forms of democracy were republican.

To be sure, Madison, like some other Founders, believed that in the conditions of the time the purely representative form was superior to republicanism in which the people made laws directly. But they understood that their personal views were not binding on the states, which were entitled to choose their own forms of government. As between their own preferences and what was republican, the Founders understood the difference. As Madison observed:

As long, therefore, as the existing republican forms are continued by the states, they are guaranteed by the federal constitution. *Whenever the states may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter.*⁶³

Other participants in the constitutional debate also emphasized the states' flexibility under the Guarantee Clause to adopt new institutions, so long as those institutions were republican.⁶⁴

They were wise to be flexible. Broad federal discretion to interfere with the governments of states would not only have been inconsistent with residual state sovereignty, but would have encouraged the kind of congressional or judicial meddling that could destroy federalism. Moreover, the Founders understood that they were drafting the Constitution, as John Dickinson wrote, not "for a Day Month Year or Age, but for Eternity."⁶⁵ They knew that governance technology might change.

The Founders' distrust of direct citizen voting was based on the technology prevailing in prior republics. Previously, voters were required to travel to a central location to listen to arguments and to cast their ballots. Given the size of American polities and contemporaneous methods of transportation, central voting was impractical for most citizens of the United States or of any state except, perhaps, Rhode Island. Moreover, huge assemblies tended to

be subject to mob behavior. That is why the Framers required presidential electors to meet in their own state capitals—that is, in separate locations, away from the seat of the federal government.⁶⁶

Yet technology could change and, indeed, was already changing. The referendum by which the Massachusetts constitution was adopted, for example, was conducted not in one central location, but in hundreds of individual towns, with town officials transmitting the results to the Capitol at Boston. Today, of course, referendum voters cast their ballots anonymously, in disparate locations, close to their own homes, and after months-long campaigns in which the issues can be fully vetted. The risk of mob behavior under such conditions is very small. Further, all states that recognize the institutions of initiative and referendum are committed, at least formally, to the rule of law.

CONCLUSION

The constitutional mandate that the federal government guarantee to each state a republican form of government permits the states to organize their governments as they wish, so long as they respect the rule of law, avoid monarchy, and vest state government, directly or indirectly, in the citizens. That state flexibility is an important element of federalism.

The Constitution's guarantee of a republican government was designed to prohibit monarchy, not to restrict lawful democracy. It was worded to permit the states wide flexibility in organizing their own affairs. Most importantly, the Guarantee Clause was not designed to protect the assumed prerogatives of elites from review by the people. It was designed to protect the rights of the people from the power of elites.

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ENDNOTES

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Professor Natelson also authored the entry on the Guarantee Clause in the *Heritage Guide to the Constitution* and the entry on Magna Carta in the *Encyclopedia of the Supreme Court of the United States*. His biography and bibliography are located at <http://constitution.i2i.org/about>.

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¹ Readers interested in many more Founding-Era citations on the subject of this Issue Paper can find them in Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807 (2002); this paper, by necessity, is more abbreviated.

Following are the sources in this Issue Paper cited more than once, together with their short titles:

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Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807 (2002) ("Natelson").

Oxford Classical Dictionary (1970) ("OCD").

² On the Dorr Rebellion, see Dennison, *supra* note 1, and William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* (1972).

³ 48 U.S. (How.) 1 (1849).

⁴ *Rice v. Foster*, 4 Del. (4 Harr.) 479 (1847) (Booth, C.J.).

⁵ Dennison, *supra* note 1, at 128, writes: Rice appears to have reflected the legal climate of the time:

In the wake of the Dorr War and the national reaction to it, American constitutional thought veered sharply to the right, and institutionalism won acceptance within the nation at large.

⁶ *Rice*, *supra* note 4, at 488.

- ⁷ *Id.*
- ⁸ For the case law, see Natelson, *supra* note 1, at 810-13.
- ⁹ Natelson, *supra* note 1, at 809-10.
- ¹⁰ *E.g.* Hans A. Linde, *Who is Responsible for Republican Government?* 65 U. COLO. L. REV. 709, 725 (1994) (“The guarantee precludes initiatives to enact laws that would be valid if enacted by the legislature”); Jesse H. Choper, *Observations on the Guarantee Clause – As Thoughtfully Addressed by Justice Linde and Professor Eule*, 65 U. COLO. L. REV. 741, 746 (1994) (opposing “constitutional amendment by plebiscite”).
- See also Catherine A. Rogers & David L. Faigman, *“And to the Republic for Which It Stands:” Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057 (1996) (all initiatives are unconstitutional); Debra F. Salz, *Note: Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court*, 62 GEO. WASH. L. REV. 100, 103 (1993) (“Thus it is apparent that the defining characteristic of republicanism is government through representation...”); Charles R. Brock, *Republican Form of Government Imperiled*, 7 A.B.A. J. 133 (1921) (equating republican with representative government).
- ¹¹ *Marshall v. Montana*, 293 Mont. 274, 975 P.2d 325 (1999). The court voided CI-75 by retroactively altering its election rules after the election had been held. See Robert G. Natelson, *The Montana Supreme Court v. The Rule of Law: A Barrier to Prosperity* (Montana Policy Institute, 2012) (forthcoming).
- ¹² *Kerr v. Hickenlooper*, Case 11-CV-01350-WJM-BNB (D. Colo. 2012).
- ¹³ Colo. Const. art. X, §20.
- ¹⁴ Natelson, *supra* note 1, at 840-55.
- ¹⁵ *The Federalist*, No. 10, *supra* note 1, at 46.
- ¹⁶ *Adams, supra* note 1.
- ¹⁷ Natelson, *supra* note 1, at 821.
- ¹⁸ Carl J. Richard, *The Founders and the Classics: Greece, Rome, and the American Enlightenment* (1994).
- ¹⁹ In 2009, this author was given personal access to Wilson’s library list by the University of St. Andrews.
- ²⁰ Natelson, *supra* note 1, at 815-20.
- ²¹ 3 Elliot, *supra* note 1, at 310 (speaking at the Virginia ratifying convention).
- ²² *E.g.*, 3 Elliot, *supra* note 1, at 199 (Gov. Edmund Randolph discusses popular assemblies in ancient world); 210 (James Monroe states, “Thebes was a democracy, but on different principles from modern democracies. Representation was not known then. Athens, like Thebes, was generally democratic, but sometimes changed. In these two states, the people transacted their [public] business in person.”); 232 (John Marshall mentions that representation did not exist in ancient republics).
- ²³ OCD, *supra* note 1, at 79 (entry for “Apellai”) & 272 (entry for “Comitia”).
- ²⁴ *Id.* at 376-77 (entry for “Ekklesia”).
- ²⁵ *Adams, supra* note 1, at 213.
- ²⁶ Bernard Bailyn, *The Ideological Origins of the American Revolution* 25 (1967). Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (1985) discusses the impact of Roman Republican ideals on the Framers. See, *e.g.*, *id.* at 67-68.
- ²⁷ See, *e.g.*, THE FEDERALIST No. 34, *supra* note 1, at 162-63 (Hamilton refers to two of the Assemblies of the Roman Republic, the *Comitia Centuriata* and the *Comitia Tributa*, where the Roman people directly voted on laws, judicial decisions, and other matters); 3 Elliot, *supra* note 1, at 175-76 (Patrick Henry, speaking at the Virginia ratifying convention, discusses voting in the same two assemblies).
- Actually, there were four assemblies of citizens, each apportioned under different principles and serving different purposes. OCD, *supra* note 1, at 272.
- ²⁸ There are innumerable books discussing the structure of Roman government. For a scholarly survey, see OCD, *supra* note 1, at 272. For focus on the republic at its height, see Donald R. Dudley, *The Civilization of Rome* 37-39 (1962).
- ²⁹ *National Federation of Independence Business v. Sebelius*, slip op., *Four-Justice Dissent*, at 4.
- ³⁰ The version referred to here is Thomas Sheridan, *A Complete Dictionary of the English Language* (2d ed. 1789) (unpaginated).
- ³¹ 554 U.S. 570 584 (2008).
- ³² *E.g.*, *id.* at 581.
- ³³ 2 Samuel Johnson, *A Dictionary of the English Language* (8 ed. 1786) (unpaginated).
- ³⁴ Francis Allen, *A Complete English Dictionary* (1765) (unpaginated).
- ³⁵ 2 John Ash, *A New and Complete Dictionary of the English Language* (1775) (unpaginated).
- ³⁶ Nicholas Bailey, *An Universal Etymological English Dictionary* (25 ed. 1783) (unpaginated).
- ³⁷ 2 Frederick Barlow, *The Complete English Dictionary* (1772-73) (unpaginated).
- ³⁸ Alexander Donaldson, *An Universal Diction of the English Language* (1763) (unpaginated).
- ³⁹ 4 Ephraim Chambers, *Cyclopaedia or an Universal Dictionary of Arts and Sciences* (1783) (unpaginated).
- ⁴⁰ Montesquieu, *supra* note 1, at 9.
- ⁴¹ *E.g.*, 3 Elliot, *supra* note 1, at 50 (Patrick Henry at the Virginia ratifying convention referring to Virginia’s government as a “democracy.” See also *id.* at 222, 223 & 224 (speaking of “democracy” as the political ideal for America).
- ⁴² 1 Farrand, *supra* note 1, at 112.
- ⁴³ *Id.* at 307.
- ⁴⁴ *The Federalist, supra* note 1, at 23. Cf. Hamilton, *id.*, No. 70, at 362 (Rome described as a republic).
- ⁴⁵ Natelson, *supra* note 1, at 838.
- ⁴⁶ *E.g.*: Massachusetts: 3 Elliot, *supra* note 1, at 68 (Willard so identifies Sparta, Athens, Rome), 69 (Bowdoin mentions “ancient republics”); 136 (Nason so identifies Rome).
- New York: id.* at 214 (R. Livingston mentions “ancient republics”), 228 (M. Smith, same), 235 (Hamilton so identifies the Amphictyonic and Achaean leagues);

254 (Hamilton identifies Rome), 302 (Hamilton mentions ancient republics), 352 (same).

North Carolina: id. at 195 (Iredell mentions "ancient republics").

Virginia: 3 Elliot, *supra* note 1, at 192 (Edmund Randolph identifies Rome and Sparta [the latter by reference to its lawgiver Lycurgus] as republics); 232 (John Marshall notes lack of representation in ancient republics); 242 (George Nicholas mentions "Grecian republics").

⁴⁷ The Federalist, *supra* note 1, at 328-29.

⁴⁸ Considerations on the Nature and Extent of the Legislative Authority of the British Parliament 13 (1774):

One of the more ancient maxims of the English law is, That no freeman can be taxed at pleasure. But taxes on freemen were absolutely necessary to defray the extraordinary charges of government. The consent of the freemen was, therefore, of necessity to be obtained. Numerous as they were, they could not assemble to give their consent in their proper persons; and for this reason, it was directed by the constitution, that they should give it by their representatives chosen by and out of themselves. Hence the indisputable and peculiar privilege of the House of Commons to grant taxes.

⁴⁹ 2 Elliot, *supra* note 1, at 433 (emphasis in original). Compare the comment by loyalist Samuel Seabury:

The position, that we are bound by no laws to which we have not consented *either by ourselves or our representatives* is a novel position unsupported by any authoritative record of the British constitution, ancient or modern. *It is republican in its very nature.* . . . (emphasis added)

Quoted in Bruce Frohnen, *Revolutions, not Made, But Prevented: 1776, 1688, and the Triumph of the Old Whigs*, in Gary L. Gregg II (ed.), *Vital Remnants: America's Founding and the Western Tradition* 295 (1999).

⁵⁰ 4 Elliot, *supra* note 1, at 328 (emphasis added). Cf. Anti-Federalist No. 18, Part 2 ("An Old Whig"), maintaining, with Rousseau, that "the people should examine and determine every public act themselves. His words are, that `every law that the people have not ratified in person, is void; it is no law. . . .'" Borden, *supra* note 1.

⁵¹ 17 Documentary History, *supra* note 1, at 279.

⁵² E.g. in the ratifying conventions: *Connecticut:* 2 Elliot, *supra* note 1, at 196 (Oliver Ellsworth). *Pennsylvania: id.* at 421 (James Wilson), 428 (same), 433 (same). *Virginia:* 3 Elliot, *supra* note 1, at 152 (Patrick Henry), 161 (same), 166 (same), 172 (same), 282 & 615 (William Grayson), 325 (Patrick Henry), 583 (Henry), 485 (George Mason), 497 (same). Cf. *id.* at 648 (Zachariah Johnson, stating that during the interregnum England was "a kind of republic").

See also The Federalist, *supra* note 1, No.6, at 23 (Hamilton); No. 22, at 109 (Hamilton), No. 34 (same), at 165 and Thurston Greene, *The Language of the Constitution* 691-92 (1991) (quoting from Thomas Paine).

⁵³ For a modern version, see OCD, *supra* note 1, at 815 (entry on Philip II).

⁵⁴ 4 Elliot, *supra* note 1, at 195. See also 3 Elliot, *supra* note 1, at 209-11 (James Monroe, at the Virginia ratifying convention, making much the same point).

⁵⁵ 1 Farrand, *supra* note 1, at 206 (reporting remarks of Edmund Randolph, the sponsor of the Virginia plan, in which the first version of the clause appeared; *id.* at 22). Nathaniel Gorham recited the same purpose. 2 Farrand, *supra* note 1, at 48. See also comments on the James Madison, Preface to Debates in the Convention of 1787, 3 Farrand, *supra* note 1, at 548-49 (reciting danger of monarchy).

⁵⁶ 4 Elliot, *supra* note 1, at 111 (James Iredell in the North Carolina ratifying convention: "in [a republican] government, the law is superior to every man").

⁵⁷ John Adams, Novanglus, Letter VII.

⁵⁸ 3 Elliot, *supra* note 1, at 39 (Edmund Pendleton, at the Virginia ratifying convention), 84 (Edmund Randolph, on the same occasion), 295-96 ("In my mind the true principle of republicanism, and the greatest security of liberty, is regular government."), 478 (Edmund Randolph states that "justice and honor" are cornerstones of republicanism), 649 (Zachariah Johnson states that republics have sanction of laws and legal authority). See also Arthur E. Bonfield, *The Guarantee Clause of Article IV, §4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962) (republican governments must respect "natural justice," which, however, from the examples given, seems much the same as the rule of law. *Id.* at 527-28).

⁵⁹ Given the connection between *teleutaios* (the masculine form of *teleutaia*) and the Greek word for end (*telos*) the best translation is probably "ultimate democracy." See H.G. Liddell & Robert Scott, *An Intermediate Greek-English Lexicon* 798 (1889, 1980).

⁶⁰ Adams, *supra* note 1, at 7.

⁶¹ *Id.*

⁶² Cf. Adams, *supra* note 1, at 7 (describing a "simple and perfect democracy as one in which citizens "exercis[e] all the legislative, executive, and judicial powers, in public assemblies of the whole...")

This is inconsistent with the rule of law because if the mob tries to run the courts and police force directly, the rule of law is impossible. Incidentally, Montesquieu also said that monarchies can be corrupted for the same reason: Lawless monarchy is despotism. Montesquieu, *supra* note 1, at 139.

⁶³ *The Federalist*, *supra* note 1, No. 43, at 225-26 (emphasis added).

⁶⁴ See, e.g., the comments by Delegate Christopher Gore at the Massachusetts ratifying convention. 2 Elliot, *supra* note 1, at 101 (allowing for change in the state constitution). See also the statement by Delegate Stillman at the same convention. *Id.* at 168 ("...each

state shall choose such republican form of government as they please..."); and 4 Elliot, *supra* note 1, at 195 (James Iredell, at the North Carolina convention). *Cf.* the treatment of the Guarantee Clause and common law at 3 Elliot, *supra* note 1, at 469-70 (Edmund Randolph, at the Virginia ratifying convention).

See *also id.* at 427 (George Nicholas: "As to the fourth article, it was introduced wholly for the particular aid of the states. A republican form of government is guaranteed, and protection is secured against invasion and domestic violence on application. Is not this guard as strong as possible? Does it not exclude the unnecessary interference of Congress in business of this sort?"); see *also id.* at 424-25 (James Madison).

⁶⁵ Supplement to Max Farrand's *The Records of the Federal Convention of 1787* (James H. Hutson ed., 1987), at 129 (notes for a speech). The Founders made other references to their hope that the Constitution would last well into the future. See, e.g., *id.* at 280 (in which Rufus King and Nathaniel Gorham projected 1600 members of the House of Representatives in a century).

⁶⁶ U.S. Const., art. II, §1, cl. 3.