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Congressional Power to Guarantee State Democracy

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Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 **Ariz. L. Rev.** (forthcoming, 2020), available at SSRN.

How much power does Congress have to regulate state democracy? More than it may realize, suggests Professor Carolyn Shapiro, in her article, *Democracy, Federalism, and the Guarantee Clause*. Shapiro locates this untapped power in the Guarantee Clause, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." A significant body of scholarship has considered whether this clause empowers the federal judiciary to review undemocratic state practices (P. 2), a question the Supreme Court has repeatedly answered in the negative. But Shapiro flips the inquiry, focusing not on what the courts cannot do, but on what Congress can do. She concludes that Congress can do a great deal, arguing that the Guarantee Clause gives Congress the authority—and the duty—to intervene when necessary to ensure the democratic integrity of states.

Deploying a series of textual, functional, and historical arguments, Shapiro reframes the Guarantee Clause as a structural principle with dynamic substantive content. Modern democracy scholars might put it this way: antidemocratic practices in one state may produce negative "spillover" effects in another, causing an "antidemocratic spiral [that] is contagious." (P. 5.) The Framers did not think in these precise terms, but they recognized the need to protect every state by ensuring that each state had a similar form of republican government. Thus, Article IV Section 4 protects "each" state from "Invasion" and "domestic violence," but guarantees to "every" state a "Republican Form of Government." (Pp. 11-12.)

In the antebellum period, the federal government resisted calls to intervene in state affairs by enforcing the guarantee, but after the Civil War the Radical Republicans claimed the Guarantee Clause empowered Congress to enforce new democratic norms through Reconstruction. (P. 20.) Charles Sumner described the Guarantee Clause as a "sleeping giant" awakened by the Civil War that gave Congress, more than any other clause, "supreme power over the states." (P. 19.) From Reconstruction to modern times, the operational meaning of the guarantee has continued to evolve along with American democracy itself. The nationalization of American politics has rendered each state more vulnerable to antidemocratic spillovers from her neighbors. And the American polity has developed a more robust, universal, and egalitarian conception of the structural elements essential to ensure popular sovereignty and representative government, as evidenced by landmark legislation like the Voting Rights Act and constitutional amendments guaranteeing political participation rights, such as the Fourteenth Amendment, the Fifteenth Amendment, the Seventeenth Amendment, the Nineteenth Amendment, the Twenty-Third Amendment, the Twenty-Fourth Amendment, and the Twenty-Fifth Amendment.

Shapiro's "guaranteeing power" (my term, not hers) would enable Congress to address something beyond the reach of its other powers: structural problems with state democracy. The Elections Clause empowers Congress to regulate the "Time, Place, and Manner" of congressional elections, and the Fourteenth Amendment empowers Congress to "enforce" its provisions "by appropriate legislation." The former clause permits comprehensive regulation, but only for congressional elections. The latter permits regulation of state and local elections, but only to enforce individual rights in a way the Court deems "congruent and proportional" and consistent with "equal state sovereignty." Neither permits regulation of state institutions to vindicate structural principles.

These constraints on congressional authority limit the national policy debate. Take HR1, the omnibus electoral reform bill the Democrats introduced after retaking the House of Representatives in the 2018 midterms. A key component of

the bill requires every state to establish an independent redistricting commission (IRC). Another prohibits "double running"—an individual shall not run the very election in which she runs as a candidate. But both the mandate and the prohibition are limited to national elections. So Idaho must use an IRC to draw the single line that demarcates its two congressional districts, but not to draw the electoral maps for its state legislature. And the Secretary of State cannot administer the election if she is a candidate for Congress, but she can if she is a candidate for Governor.

Why limit these provisions to national elections? It's not because the democratic threats of gerrymandering and double running are limited to national elections. It's because Congress only has clear authority to address these threats in that context. But if Shapiro is correct about the scope and purpose of the Guarantee Clause, Congress may have the authority to mandate commissions for state legislative maps and to prohibit double running in state elections, not to enforce individual rights, but to guarantee a republican form of government.

Shapiro envisions a robust "guaranteeing power" that would recalibrate electoral federalism, enabling Congress to regulate the states more aggressively than it presently does and otherwise could. She suggests this power should be subject only to a "highly deferential" form of judicial review, one more deferential than what the Court applies to exercises of congressional enforcement power. (P. 49.) Shapiro contends that current practices—like gerrymandering, voter suppression, lame duck power grabs, and electoral maladministration—present the sort of democratic threats that warrant such unprecedented congressional action. And she suggests that Congress can and should adopt a broad array of preventive and remedial measures, such as national voter identification cards and national criteria for polling places and voting machines. (Pp. 47-48.)

Shapiro's proposal invites future scholarly attention to the scope of the guaranteeing power and the role of the Court in determining and policing its limits. On the one hand, the Court might struggle to satisfactorily explain why it cannot enforce the guarantee itself while it can determine the scope of congressional power to enforce the guarantee. On the other hand, as Shapiro herself recognizes, if the scope of the guaranteeing power presented a non-justiciable political question, Congress would suddenly enjoy "unlimited power to impose on the states whatever government it deemed republican." (P. 49.)

How could the Court constrain this power in a principled and determinate way, when the substantive content of the guarantee is dynamic? I suggest it may be instructive to consider the Court's Eighth Amendment jurisprudence. Despite strident opposition from Justices Scalia and Thomas, the Court has consistently held that the meaning of "cruel and unusual punishment" changes over time with society's "evolving standards of decency," so a punishment accepted at the Founding, like the death penalty for child rape, may become impermissible when eschewed by a sufficient number of states. Could an electoral practice, permitted at the Founding but now rejected by most states, such as lifetime felon disenfranchisement, offend society's evolving standards of democracy?

Note that the dynamism of the Eighth Amendment generally operates in one direction—practices once permitted may now be proscribed. But dynamism under the Guarantee Clause may operate in both directions—practices once permitted may now be proscribed, while practices once proscribed may now be permitted. For example, Shapiro suggests that Congress cannot prohibit Nebraska's use of a unicameral legislature or California's "ballot box budgeting," even though the Founders may have considered unicameralism or direct democracy fundamentally incompatible with a republican form of government, because even if such practices produce "significant state-level dysfunction," they do not produce "antidemocratic spillovers." (P. 44.) Does the Court have the institutional competence, and the requisite methodological tools, to make such determinations? And, more generally, to distinguish permissible from impermissible exercises of the guaranteeing power?

In this article, Shapiro's focus is appropriately limited: her intent "is not to set forth a fully developed legal doctrine but rather to lay out its conceptual framework." (P. 40.) Shapiro successfully makes a strong case that Congress can regulate state democracy under the Guarantee Clause. I hope that future work, by Shapiro and others, will flesh out these doctrinal details and further develop the case for a robust guaranteeing power.

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