I. INTRODUCTION

The interpretation of words is a storied and old practice in the United States, where legal construction has become an art.[1] Words have power, and we have made the interpretation of them, sometimes with the most subtle of distinctions, a professional vocation for scholars and attorneys. Resultantly, there are treatises on the methodology of language interpretation and the norms of interpretive behavior.[2] The United States Supreme Court has been interpreting the meaning of the Constitution since *Marbury v. Madison*[3] in 1803, and scholars have been interpreting the meaning of that decision and subsequent cases ever since.[4]

There is a logic to this approach, as we are a nation of written constitutions that set forth federal and state authorities. Many scholars begin with the premise that since the Constitution describes

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1. *See*, Mirjan R. Damaska, *Reflections on American Constitutionalism*, 38 AM. J. COMP. L. (VOL. 2) 421 (1990). Various constitutional scholars, including current members of the U.S. Supreme Court, have written extensively about how to interpret language. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION (2001); STEPHEN G. BREYER

VER WORDS: LANGUAGE AND CIVIL LAW CASES (2008).

3. 5 U.S. 137 (1803).

4. *Seee*

the nature and scope of state power, it is the document that defines the nation and it must be at the center of any attempt to understand the power structure of the American state. This method of studying government, sometimes referred to as "constitutionalism," is largely value-neutral and focuses on the norms as delineated in the constitution and supporting documents.[5] The natural outgrowth of this approach is the focus on issues associated with the formation, creation and exercise of constitutional authority as set forth in the foundational documents and subsequent amendments. Although often omitted from the actual analysis, constitutional analysis is based on the understanding that analysis is adrift when issues or institutions range beyond even the most generously-construed scope of constitutional interpretation. Outside of this core of constitutionalism, decision-makers inform their interpretations with social or other policies, even while maintaining that their decisions are still the most legitimate reading of the text.[6] This is the heart of the difficulty in constitutional systems; words are static while society surely is not.

It is in this more obscure reality that the functions and scope of state authority are defined, redefined and confirmed. The ability of institutions to adapt and change while the construct itself remains facially static is the heart of the American experience. It is proposed herein that the extension and expansion of an institution's authority are products of the interaction of government structures with each other and with society as new stimuli are applied. The scope of an institution's power is defined through a process by which it engages and interacts with society to create and confirm its authority. As a result, the essential element to understanding the evolution of power within American institutions is this interactive relationship between the people and the instruments of the state. In our democracy, institutional authority is defined not only by what a written constitution allows, but also by what consensus the people reach while engaged with the government institutions.

The judiciary presents an illuminating window into this process of change, as the courts act by readily available written decisions. In other words, by exercising its authority through the application of language, courts show the movement of ideas and functions through

5. *See* John Elster, *Introduction*, *in* CONSTITUTIONALISM AND DEMOCRACY 1, 6 (Jon Elster & Rune Slagstad eds., 1993).

6. *See* Richard F. Fenno, *The House Appropriations Committee as a Political System: The Problem of Integration*, 56 AM. POL. SCI. REV. (VOL. 2) 310 (1965).

expanded the reach and authority of the courts as an institution has received less focus. I propose that the methodology of court-ordered change is one based on shifts in popular understanding and confirmation through judicial institutions. Courts are largely unique as an institution, as they adopt legitimacy through claiming to be the arbiter of the Constitution. The American regard for the rule of law

system. Arguably, it was intended to be so.[12] The Court has increased its power by claiming that the law and people's belief in the power of the law to be equitable and just as its own. The Court thusly exercises its power in the name of the law, allowing it to engage in policy-making and politics as long as it maintains an image as the spokesman for "the rule of law." In this sense, the judiciary's power is premised on an image based on a myth.

The law then becomes a system of adjudication based on the fixed and predictable notions of fairness, even if developed, as in Thompson's observation, in a system intended to favor one interest group. The law or due process becomes good, even if the people are not.[13] The courts occupy a position of legitimacy in the enforcement of social norms and policy, whether by design[14] or perhaps by circumstance.[15] Courts have legitimated their role and increased their autonomy within the government structure by taking the dominant role as the adjudicator of human rights as well as the enforcer in the federal system of discipline on member states within a constitutional structure.[16] Further, law has become more than operational rules and may represent commonly held values values such as human rights or even capitalism.[17]

12. *See* ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY 106–108 (1956). Alexander Hamilton had predicted that the Judiciary would always be the weakest of our Constitutional Branches; it controlled neither the sword nor the purse. THE FEDERALIST No. 78 (Jacob E. Cook ed., 1961).

13. As noted above, this argument is founded on an American political culture which views the law as being impartial and equitable and the rule of law desirable. It derives in part from a jurisprudence that attempts to divor

In the end, the law becomes the intrinsic good and the Courts become the means to access it. As the Court maintains an image in society as the embodiment of the law, it can expand the scope of its authority based on the legitimacy that the law provides. As the Courts exist within the belief in the law, their scope of action is defined by logical extensions of that image. Hence, the expansion of the Court into a forum for partisan and ideological debates becomes problematic as it draws the Court away from the myth which sustains its authority.[18] The only means to such an extension is, as Howard Gillman suggests, to have courts cloak a partisan preference in the language of the law.[19] In short, the Court must define and redefine its image and operation within the scope of the law to society.

Because of the importance of image and the reliance on law to cloak policy, the courts regularly adapt and move the language of the law to match the desired outcome. This process is not undertaken in a vacuum, and thus courts are consistently engaging with the stimuli provided from society raised through cases and conflicts that force the adaptation of language to new and sometimes unanticipated ends. As a result, the courts become the means by which society attempts to shape and adapt the language of constitutionalism to greater change within society. Sometimes the results are inconsistent with the desires of the original authors of the legal system, as is illustrated by Thompson.[20] At times, the courts may attempt to move the language further than the society itself, at which point a judicial retreat usually follows. But in most cases, the Court trails societal trends and is a reluctant means of change. Courts are composed of the previous political coalition, not the newest. Nonetheless, the courts do ratify and define new understandings of constitutionalism as the stimuli are increasingly applied, and still marry it to the language of the law as if

18. Law cannot be constructed completely by ideological rhetoric or seen as arbitrary and unjust, because it will lose legitimacy within the population. Hence, repeated legal forms, even when initially established to support class divisions, will ultimately limit the rulers' ability to apply force directly and arbitrarily against the population. Laws passed codify inequity, but do so in such a fashion so as to limit the exercise of power by placing it within an institution governed by rules and structure. THOMPSON, *supra* note 8. Ironically, even in this more negative construction of the law and legal institutions, the judiciary supplies the people with the means to enforce equity and human rights.

19. Howard Gillman, *The Court as an Idea, Not a Building or a Game: Interpretive Institutionalism and Analysis of Supreme Court Decision-Making*, *in* SUPREME COURT DECISION MAKING: NEW INSTITUTIONALIST APPROACHES 65 (C. W. Clayton and H. Gillman eds., 1999).

20. THOMPSON, *supra* note 8.

no change has occurred at all. This is a practice that it engages in with some learned institutional skill, and will be explored below.

III. HISTORICAL GUARANTEE CLAUSE

The Guarantee Clause of the U.S. Constitution is a particularly important example of evolving meaning. Facially, the Guarantee Clause simply requires a republican form of government for each of the several states. Yet, the true meaning of the clause is not dependent on the words, but on the date.[21] The understanding of the Guarantee Clause of the American constitution shifted from initially favoring anti-majoritarian approaches to governance, to being discarded by the courts as a nullity, and finally to being championed as the basis for federal intervention into states as the means to enforce basic individual rights and liberties. At no point did the actual words ever change.[22]

To understand the meaning of the Guarantee Clause when it was ratified requires an understanding of the context. The founders of the American republic had clear concerns about the accumulation of power in the hands of public factions, especially popularly elected ones. While the drafters of our constitutional system rejected an authoritarian monarchy, they had little faith in the wisdom of mass public opinion.[23] This is most evident in the means chosen to select government leaders. The presidency was to be filled by electors, who in turn were to be chosen by means determined by state legislators. The upper house of the Congress—the Senate—also was to be selected only indirectly by the people through state legislators.[24] The judiciary was to be appointed by the President, with the nominations subject to the Senate. The only branch directly answerable to the voters was the aptly-named "People's House", or House of Representatives.

21. *See* Anja J. Stein, *The Guarantee Clause in the States: Structural Protections for Minority Rights and the Necessary Limits on the Initiative Power*, 37 HASTINGS CONST. L.Q. 343 (2010).

22. *See* Erwin Chemerinsky, *Conference of Constitutional Law: Guaranteeing a Republican Form of Government: Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994).

23. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny . . . ." THE FEDERALIST NO. 47, at 49 (Isaac Kramnick ed., 1987)

24. *See also* BARBARA SINCLAIR, THE TRANSFORMATION OF THE U.S. SENATE (1989) (reviewing the structural foundations and limitations of the U.S. Senate).

> What is meant by 'republic' in the United States is the slow and quiet action of society upon itself. It is an orderly state really founded on the enlightened will of the people. It is a conciliatory government under which resolutions have time to ripen, being discussed with deliberation and executed only when mature.[31]

This deliberation prevents policy by brute force or by unbridled passions which were understandably feared by the drafters of the Constitution.[32]

Hence, the challenge for the constitutional drafters was how to design a government that represented the people, yet would not be subject to the untrustworthy whims of popular opinion. This was a particularly difficult task in light of the implementation of a new expansive role for the federal government beyond the scope of the failing Articles of Confederation. This centralized authority challenged some of the bedrock principles justifying the revolution itself, which was predicated on a distrust of centralized political power that purported to govern faraway places.[33] The result like much of the American government was a compromise. While democratic, the underlying design of the U.S. system is one that insulates the major decision-making apparatus from the passions of the people. The federal government was to have powers that would permit it to coerce obedience over a vast area, and the mechanism of the purportedly democratic system would temper and limit popular will.

During the debates preceding the creation of the Constitution, the issues strayed beyond the nature and formation of the national government into the requirements for state governments. The chief proponent of the large state-supported Virginia plan, Governor Randolph, asserted that his proposal had the aim to secure a republican government.[34] This was a proposition that gained little initial traction.[35] With James Madison's support, this matter was

31. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 395 (2000).

32. William T. Mayton, *Direct Democracy, Federalism & The Guarantee Clause*, 2 GREEN BAG 269, 270-77 (1999).

33. *See* JOSEPH ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION (2000).

34. *See* WILLIAM M. W

later revived by Randolph with the provision that the states would be restricted to the formation of a "republican" form of government.[36] The proposal was essentially enshrined in the Constitution, though the wording itself was changed by James Wilson to the current Guarantee Clause of the U.S. Constitution:[37] "The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."[38]

While the meaning of this clause seems facially obvious, it meant something far different to the proponents of the clause than it does today. It is important to note that the Constitution does not "guarantee" democratic state governments, but rather a republican form of state government. This is a distinction of merit for the authors of our Constitution, who were concerned with protecting the mechanisms of government from the whims of the public at large, as well as protecting land-holders from violence. Ironically, the drafters instituted the clause as an anti-majoritarian provision. This understanding presents a new way to think about the democratic deficit debate. The drafters of the Constitution were clearly not concerned about seeing that all of the branches were legitimized through elections, nor were they focused on the need for such a design in the creation of the federal government. Instead, the drafters were more concerned with limiting the role of popular will and buffering the institutions of government from it, rather than increasing it. This alone stands in contrast to notions of popular sovereignty and the efforts of many to re-link institutions with perceived democratic deficits, such as the courts.[39]

The drafters were concerned with violence against state governments and landed persons in general. More particularly, the drafters were wary that the violence from Shays' Rebellion the

36. Madison wrote to Randolph in 1787 suggesting that the union be organized on republican principles and a clause should be inserted that guarantees protection for states against, "internal as well as external danger." Letter from James Madison to Peyton Randolph (1787) *in* THE WRITINGS OF JAMES MADISON, at 336 (G. Hunt ed., New York 1900).

37. While Governor Randolph spoke of the need for the clause to reject monarchy, others at the Constitutional Convention including James Madison, Colonel Mason and James Wilson spoke of the clause in terms of preventing violence not just from foreign sources, but from domestic ones as well. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, Vol. 2. (Max Fharrand ed., Yale University Press 1911).

38. U.S. CONST. art. IV, § 4.

39. *See* Caldiera, *supra* note 11, at 658 (analysis of democratic deficits).

armed revolt in Massachusetts against the state government would be the first of many armed assaults against men of property.[40] With the implications of the revolt clear, Madison observed that a "recent and well-known event among ourselves has warned us to be prepared for emergencies of a like nature."[41] As a result, the "Domestic Violence Clause," (as Madison referred to it) was added, but tempered the condition that any federal troops used to quell violence must first be requested by the governor or legislature of a state.[42] Understood in its entirety, the Guarantee Clause was simply part of a larger effort to de-legitimize violence as an extra-legal means to defend community interest by mandating their form of anti-majoritarian government with a linkage to popular election for legitimization purposes.

The framework for the design of a republican government was derived from Virginia. With its tranquil politics and aristocratic leadership, the state was considered a model for a future government.[43] Leadership of learned men was favored over factionalism and the corrupting influence of political parties.[44] Instead of popular ideologies being translated into parties who would counterbalance each other—the basic pluralist vision of democracy

Guarantee Clause's requirement of a "republican" government which

people, although intending to do right, are the subject of impulse and passion; and have been betrayed into acts of folly, rashness and enormity, by the flattery, deception, and influence of demagogues."[52] Using the Guarantee Clause, the court wrote, "Although the people have the power in conformity with its provisions, to alter the 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

by freeholders would have been a reversal of the drafters' intent. As might have been expected by the drafters of the Guarantee, the Court refused to apply the clause to the case. Ultimately, the Supreme Court dismissed the suit without ever reaching the issue of what constitutes a republican form of government. Writing for the majority, Chief Justice Taney concluded, "Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so."[58] This interpretation of the Guarantee Clause (or lack of one) was later repeated by the Court, rendering the Guarantee nothing more than an unenforceable truism.[59] Since issues under the Guarantee Clause are political by definition, the Court essentially reduced the Guarantee to a statement with no enforceable meaning.

In the United States, no greater stimuli has been applied to the workings of our state institutions than the shift away from a slave-based agrarian nation. One of the first significant stimuli applied to the application of the Guarantee Clause was the equality of the races. An early attempt to reconstruct the meaning of the Guarantee Clause beyond its anti-majoritarian roots came from the judiciary. In *Plessy v. Ferguson*,[60] Justice Harlan tried to reinterpret the Guarantee Clause to enforce basic individual rights within the states and reject segregation. Writing in dissent of an opinion that legalized the doctrine of separate but equal, Harlan argued:

> I am of opinion that the state of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that state, and hostile to both the spirit and letter of the constitution of the United States. If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country; but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now

58. *Id.* at 46–47.

59. For an extensive discussion, *see* Chemerinsky, *supra* note 24.

60. Plessy v. Ferguson, 163 U.S. 537 (1896).

decision. One of the earliest challenges to direct democracy was rejected, but with no overt statement redefining democracy or republic in America. The Guarantee Clause had been presented as a rationale to reject these extra-legislative processes, but the U.S.

small step and refused to use the Guarantee Clause to restrict extra-legislative processes. This resulted in similar movements in the lower courts. Many courts simply avoided issues concerning the conflict between direct democracy and the purported republican form of government by claiming the issues were outside the jurisdiction of the judicial branch. In the tradition of *Marbury v. Madison*, the courts made a policy statement by rejecting their own jurisdiction. Courts had adjudicated the Guarantee Clause prior to *Pacific States*, but the Supreme Court implicitly accepted the challenged processes of direct democracy. On the state level, where the issues have been decided, courts repeatedly declined to declare referenda or initiatives as inconsistent with the Guarantee Clause.[81]

Scholars have written of the Court's decision in *Pacific States* as a conservative decision.[82] Yet, this conclusion is in error. The importance of the decision was not in defending state's rights, but in finishing a legal trend of nullifying the original meaning of the Guarantee Clause as a defender of representative government and deliberation. The refusal to enforce the provision made it a larger nullity in efforts to buffer or limit popular control over the policy, at least at the state level. Ironically, the Court's earlier unwillingness to use the Guarantee Clause to expand individual rights provided an easily adaptable framework to apply to the more contemporary issue of referenda. While facially this appears consistent and perhaps even conservative, it is not. Previously, the Court refused to create an enforceable provision for individual rights, which would plainly have been beyond the original meaning of the clause. Now, the Court was using the same language of restraint to nullify its use for its more traditional purpose the defense of existing deliberative and buffered state institutions.

This started in earnest an effort to redefine the clause and the very nature of our understanding of the American democracy. The stimuli for change out of society came from significant legal and historical scholarship on the role of the Guarantee Clause in American jurisprudence. Some of the leading law journals began serious advocacy of a shift in the judicial view of the Guarantee Clause in the 20th century with the most influential articles published in the latter

Gregory v. Ashcroft, 501 U.S. 452, 463 (1991).

81. Mayton, *supra* note 34.

82. *See* Chemerinsky, *supra* note 24 at 862–63.

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premise was declared by the United States Supreme Court, the legal meaning of the Constitution changed with only sporadic attempts to bring the original understanding of the constitutional construct back outside of scholarly work. After *Eastlake*, the power of popular sovereignty had largely become a truism, in spite of history.

The power of this shift would trickle down to state jurisprudence with the result going even further in defense of direct democracy than the U.S. Supreme Court. The Florida Supreme Court has echoed the U. S. Supreme Court in recognizing the fundamental importance of the referendum as a means of direct democracy for the citizens of the state. In *Florida Land Co. v. City of Winter Springs* the court stated, "[t]he concept of referendum is thought by many to be a keystone of self-government, and its increasing use is indicative of a desire on the part of the electorate to exercise greater control over the laws which directly affect them."[99] Because the referendum is a reserved power, even normally legitimate questions of due process are inapplicable. In holding the power of referendum above such concerns, the Florida Supreme Court in *Florida Land Co.* quoted the rationale and analysis of the California Supreme Court in *Dwyer v. City Council of Berkeley*:[100]

> By the petition for a referendum the matter has been removed from the forum of the council to the forum of the electorate. The proponents and opponents are given all the privileges and rights to express themselves in an open election that *a democracy or republican form* of government can afford to its citizens upon any municipal or public affair.[101]

The *Dwyer* decision and its progeny are noteworthy, not just for the reverence the Court gives popular sovereignty, but for the blending of the notions of the republicanism with democracy and the shedding of any pretense to reassert the Madisonian view that representative government was a necessary component for the avoidance of tyranny and the fallacy of faction-driven popular will. The meaning of the Constitution changed, because the greater society changed and the institutions followed the public stimuli without

99. 427 So.2d 170, 172 (Fla. 1983).

100. 253 P. 932 (Cal. 1927).

101. *Florida Land Co.*, 427 So. 2d at 172.

change, but rather a more open admission of an often well-known, if understated, role of pressures from the greater society on the implementation of constitutional principles. This is increasingly apparent in the efforts of scholars to encourage the Court to revive the provision into a meaningful statement of federal or state authority, even if the scholars themselves cannot agree on what that authority should be. O'Connor's acknowledgment of this influence is not a great surprise, but unusual for its candor.[105]

While at the federal level the implications of this legal evolution are still being written, at the state level the courts have moved quickly to turn notions of direct democracy into constitutionally-protected principles. Any interpretation that relies upon the Constitutional design attempting to structurally constrain democratic whim, as was the clear intent of the drafters, has rapidly faded in state courts. For instance, in *Brooks v. Watchtower*,[106] a case before Florida's 4th District Court of Appeal, two parties vied over whether the sale of a city-owned auditorium could be the subject of a public vote. In attempting to convince the court that a disputed municipal ordinance authorizing the sale should be allowed to go to the people in a special election, Brooks claimed in part that "an attempt to halt a referendum strikes at the heart of the American democracy"[107] Elections are democratic; opposition to them is obviously counter to democracy and therefore un-American. This premise later was validated by the court, which ordered that a referendum be held. It noted that under U.S. and Florida Law, a referendum is so central to the American democracy that it should be permitted, except in exceptional circumstances such as clear fraud.[108]

Initially, it is noteworthy that the claim that referenda are central to American democracy goes unchallenged in the case. In fact, it is the appellant Brooks that makes reference to the Federalist Papers for support of the referendum.[109] What is apparent in the state of the case law is the utter negation of that former construct envisioned in the U.S. Constitution. The nation has gone from distrust to trust of popular decision-making without changing the

105. Alternatively, some have argued against this approach to constitutional interpretation. *See* ROBERT BORK, SLOUCHING TOWARDS GOMORRAH (1996).

106. 706 So.2d 85 (Fla. 4th DCA 1998) [hereinafter *Brooks*].

107. Appellant's Opening Brief at 4, *Brooks*, *supra* note 105.

108. *Brooks*, *supra* note 105.

109. Appellant's Opening Brief, *Brooks*, *supra* note 105.

What has changed more recently is the willingness of leading judicial figures to concede that this is true. Modern courts openly admit being influenced by the scholarship of the time, even in the text of a decision. In her review of the Guarantee Clause, Justice O'Connor justifies shifting to a more active use of the provisions in part because of the "*contemporary commentators*" who have urged such a course of action.[119] Similarly, in *Roper v. Simmons*,[120] Justice Anthony Kennedy reversed himself and the U.S. Supreme Court on the death penalty for juveniles, noting that the nation had reached a consensus against the juvenile death penalty since the number of states that either have no capital punishment or do not allow it for offenders under 18 had risen to 30.[121] In this case, society itself has started to create meaning within the Constitution; one the Court openly felt compelled to follow, and by doing so, wrote a new meaning to what constitutes cruel and unusual punishment in the United States Constitution.

Where the meaning of the Guarantee Clause will go is unclear, with its meaning very much open to varying interpretations.[122]

of the Guarantee Clause argue for its use as a means to protect a state's autonomy from federal encroachment.