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Citation Information

Robert F. Nagel, *Terminator 2*, 65 U. COLO. L. REV. 843 (1994), *available at* <https://scholar.law.colorado.edu/faculty-articles/773>.

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Citation: 65 U. Colo. L. Rev. 843 1993-1994

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Fri Jul 14 15:35:34 2017

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TERMINATOR 2

ROBERT F. NAGEL*

In the movie Terminator 2 there is a figure--I am told it is called a cyborg--that ostensibly looks like a person but has a frightful, supernatural capacity to re-form itself after it is destroyed. When the cyborg is shot or axed or crushed (or whatever), its horribly damaged body seems to melt or blend and then to re-shape itself until once again it appears to be an unharmed and powerful human.

Conventional constitutional interpretation is what makes me think of cyborgs. Consider this Conference. We are here after many decades of potent and apparently damaging criticisms of normal interpretive methods. Early in the century a clubbing was administered by the progressive realists. More recently an array of critics--from Bickel to Tushnet, from Bork to Ely, from Dworkin to Schlag, from Rosenberg to MacKinnon--have hacked away at the various limbs that support the enterprise. Text, tradition, authorial intent, structure, moral philosophy, democratic theory, neutrality, legal convention, practical effect--they all have been ripped, pummeled, and punctured.

Nevertheless, here in front of us we can see the thing is back, re-appearing out of its own dissolution. All four of the main papers presented at this Conference argue from highly conventional assumptions about text, history, and judicial role to conclude that the courts should enforce the Guarantee Clause. And, of course, it is not only in these proceedings. Think back to Ruth Bader Ginsburg's confirmation hearings or look at any issue of the *Harvard Law Review*. Conventional constitutional interpretation is back. Or, more precisely, it was never gone.

The reason, of course, is that in general Americans are committed to judicial review; certainly most lawyers are, and even most of those legal scholars who have questioned interpretive methodologies end up supporting the practice.¹ We simply want judges to solve modern problems by "interpreting" the Constitution.

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1. Mark Tushnet, for whom critique used to be all there was, can now sound much like the conventionalist, Ahkil Amar. See Mark Tushnet, *Constitutional Cultures*, 24 LAW & SOC'Y REV. 199, 209 (1990) (describing *Texas v. Johnson* as "simple and straightforward").

Whether or not this is actually possible or theoretically justifiable, we insist on it.

As I said, when a cyborg keeps coming after a mortal wound, it does so by a spooky process of transformation. Its body is at first grotesquely elastic but then increasingly substantial and eventually physical and familiar. The cyborg called constitutional interpretation depends upon a transformation, too. Part of what must be reshaped in order to sustain judicial power is our understanding of the Constitution. Professor Merritt's admirably clear and careful paper provides a good illustration.

If judicial enforcement is to be significant, what must the Constitution be made to look like? It must, obviously, be made capable of producing specific and authoritative answers to a set of modern day problems. If the document is silent, ambiguous, vague, or contradictory with respect to such a problem, the judge cannot claim (in the phrase popularized by nominee Ginsburg) to have gotten "it right." The Constitution must be simplified until it yields definite answers.

Professor Merritt considers the protection of state authority as a significant modern problem (as do I). She argues that the text of the Guarantee Clause, as well as its history, is sufficiently specific to help resolve aspects of that problem. To accomplish this, she has to submerge or de-emphasize significant historical evidence, including, for instance, indications that the Clause was mainly intended to prevent monarchical governments. She must attribute to words rather special and somewhat strained meanings. Notice, for example, how in her analysis the word "republican" is by degrees replaced by the phrase "state sovereignty," which connotes not only popular accountability but also governmental dignity and status. Similarly, the guarantor in the Clause is "the United States," but under her proposal the guarantors are the federal judiciary and, I presume, state judges.² Finally, as I will illustrate in a moment, she has to assume that competing provisions in the document are all cohesive (or at least irrelevant), so that they can be read as supportive of her interpretation of the Guarantee Clause. All this, of course, runs in the face of the likely possibility that the Constitution, which was drafted and ratified by many people for many reasons

2. A similar disregard for language allows the courts to have a role in regulating commerce among the states and to enforce rights reserved to the states and to the people.

over considerable time, expresses indecisive compromises, convenient platitudes, context-bound rules largely irrelevant to modern life, and ideas that are too complex or inconsistent to be very useful in resolving particular disputes.

The requirement that the judge be able to "get it right" helps to explain what at first is a slightly surprising aspect of Professor Merritt's argument. Why does she insist that the Guarantee Clause is specific on the issue of state sovereignty but that the Tenth Amendment is a useless "truism"? After all, historical evidence can be used to flesh out the latter as well as the former. Even the spare text of the Tenth Amendment, reserving undelegated powers to the states and the people, can support certain inferences—for example, that the states were intended at least to have some kind of governmental status. Investigating why the framers wanted states to exercise these governmental functions will yield inferences about state sovereignty not altogether different from those Professor Merritt finds in the Guarantee Clause.³ But she rejects this opportunity. Her assumption, I think, is that there is one correct place to find the answer to the problem of state sovereignty. To acknowledge that two or more provisions bear on the issue—but only imperfectly—would be to grant the Constitution the inexactness that goes with redundancy. It would be to reduce the likelihood of authoritative discovery. *The* solution is there, if only the judge will look in the right place.⁴

It is not enough, of course, that the Constitution be simplified or stretched or compacted until it enables judges to "get it right." The answer must not only be correct but also significant under modern conditions. Consider an example from a different area. To interpret the First Amendment as prohibiting a national church would probably be correct but would not in itself provide much opportunity for important judicial activity. Similarly, to interpret the Guarantee Clause as prohibiting the elimination of the institutions of popular accountability at the state level might well be correct. But, except under conditions of a civil war, no act of the national government is likely to accomplish such wholesale displacement. Additional meaning, therefore, must be attributed to the clause, as Professor Merritt

3. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

4. The same impulse lends to urgent arguments about whether rights are located in the Privileges and Immunities Clause rather than the Due Process Clause, or the Ninth Amendment rather than the Fourteenth.

does, for example, when she deduces from the principle of popular sovereignty the conclusion that the national government may not compel states to enact or administer particular laws. Personally I approve of this rule, too, but I have to admit I do not see how a generally functioning state government becomes unrepugnant when it is coerced by the broader government of which it is a part to enact a single law. In fact, Professor Merritt acknowledges that a state government would continue to be republican even if there were many such coercions, as long as the national government was operating under proper authorization, such as the Equal Protection Clause or the Commerce Clause. The effect on the principle of republicanism is not less because the national law fits into one of those categories. (Ask the people of Kansas City, where the power of taxation was largely assumed by a federal judge enforcing a school desegregation decree.⁵) Conversely, a law under the commerce power that is aimed only at state governments, such as the one struck down in *New York v. United States*,⁶ is still only a single law and leaves the apparatus of accountable government generally intact.

If judges are to have the role we want them to have, then, the Constitution must be shaped so that it can provide correct answers applicable to specific disputes that are likely under modern conditions. In addition, the answers must be of a sort that judges can be expected to find. Some may think that judges are not especially likely to discover the principle that Professor Merritt proposes. Historically they have shown little interest in the Guarantee Clause; moreover, since 1937 the Supreme Court has enforced the idea of state sovereignty (based on a different clause) only twice, and in one of those cases Professor Merritt thinks they got it wrong. So she, like most good constitutional scholars, contorts her interpretation so that traces of it can be found somewhere, if only in latent form, in the Court's precedents. Her conception of governmental structure, for example, is strained; she says that the sovereign authority of states to "determine their own . . . structure" includes the power to locate a state capital, presumably because that decision--which is geographic, not organizational--is one of the Court's few concessions to state sovereignty. Similarly, her notion of "compulsion" is

5. *Missouri v. Jenkins*, 495 U.S. 33 (1990).

6. 112 S. Ct. 2408 (1992).

questionable.⁷ Professor Merritt adopts the Supreme Court's characterization that the state of New York was "compelled" to enact a law regulating radioactive waste even when New York had agreed voluntarily to the interstate compact that required the law.⁸

Finally, if judges are to have the role we want for them, the Constitution must provide meaning that is susceptible to judicial enforcement. Thus Professor Merritt interprets the word "guarantee" not only as authorizing, but also as constraining, national power. Given the practicalities of adjudication, limitations are more easily enforced by judges than are affirmative obligations. (Even better, structural principles can be converted to individual rights, as Professor Chemerinsky suggests.)⁹ To the considerable extent that historical evidence indicates that the intent behind the Guarantee Clause was mainly to authorize the national government to protect states against illegitimate insurrections and monarchical movements, the relevant judgments are largely political and the required actions are essentially military. Therefore, Professor Merritt must supplant or downplay such evidence.

In conclusion, I should admit that the cyborg created by Professor Merritt is not very frightening for me. It is similar to some that I have created myself. In any event, she is certainly not the worst offender. Her molding of the Constitution distorts but is not grotesque; it remains true to the idea that the people have some right to govern their affairs at the state level. In contrast, by the time that Judge Linde and Professors Abrams and Chemerinsky--and innumerable others waiting in the wings--get through, autocratic judges will be engaged, even more than they are already, in displacing the right of the people to govern themselves. They will do this, looking at you earnestly right in the eye, in the name of popular sovereignty, democratic participation, and political deliberation. Now that is a frightening transformation.

7. Deborah J. Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815, 828 (1994).

8. 112 S. Ct. at 2431.

9. Erwin Chemerinsky, *Cases Under The Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 868 (1994) (this issue).

