

Waking the Giant: A Role for the Guarantee Clause Exclusion Power in the Twenty-First Century

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ABSTRACT: In 1849, the Supreme Court found in Luther v. Borden that the constitutional guarantee of republican state government was a political question which Congress could enforce by excluding the representatives of unrepublican state governments. Following the American Civil War, the Guarantee Clause served as a constitutional foundation of the Reconstruction Congress's attempt to transform the former slave states into a stable, interracial democracies. Taking its inspiration from the Reconstruction Congress, this Note proposes that today's Congress use its Guarantee Clause exclusion power by articulating a standard for exclusion to deter voter suppressive measures by state governments.

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I. INTRODUCTION

In 1867, Senator Charles Sumner of Massachusetts¹ proposed a bill to end racial discrimination in voting rights.² Sumner anticipated a counterargument that such a bill was outside the constitutional parameters of federal power. He conceded that because the bill would affect those states which remained loyal to the Union during the Civil War it could not be “founded . . . simply on the fact of rebellion.”³ It was however, Sumner argued, within the power granted to Congress by “the guaranty clause in the National Constitution.”⁴ This “sleeping giant of the Constitution, never until this recent war awakened, [now came] forward with a giant’s power.”⁵ “There is no clause like it,” Sumner argued, “[t]here is no text in the Constitution which gives to Congress such supreme power over the states” to promote voting rights.⁶

Sumner’s bill failed; in 1870, Congress ratified the Fifteenth Amendment to accomplish its aim.⁷ However, Sumner’s assertion that the Guarantee

1. Charles Sumner was a Radical Republican and one of the foremost proponents of Congressional Reconstruction, and perhaps most famous for being the victim of an infamous cane attack in 1856.

2. 15 CHARLES SUMNER, *Remarks in the Senate on a Bill to Enforce Several Provisions of the Constitution by Securing the Elective Franchise to Colored Citizens, July 12, 1867*, in CHARLES SUMNER: HIS COMPLETE WORKS 229, 229 (1875).

3. *Id.*; see U.S. CONST. art. IV, § 4.

4. 15 SUMNER, *supra* note 2, at 229–31; see U.S. CONST. art. IV, § 4.

5. 15 SUMNER, *supra* note 2, at 231.

6. *Id.* Sumner did not intend to make a legal argument stating in the following paragraph:

I am not to be betrayed into the constitutional argument . . . I invite discussion. I challenge the expression of any reason against it, or of any doubt with regard to its constitutionality; and I ask Senators to look at it as a great measure of expediency as well as of justice.

Id. at 231–32. This was not the first-time Sumner insisted that the Guarantee Clause vested in Congress the power to ban race-based discrimination in voting rights. A year previously, he had written in a public letter to a New York newspaper:

I vouch the authoritative words of the National Constitution, making it our duty to guaranty a republican form of government in the States. Now the greatest victory of the war, to which all other victories, whether in Congress or on the bloody field, were only tributary, was the definition of a republican government according to the principles of the Declaration of Independence. A government which denies the elective franchise on account of color, or, in other words, sets up any “qualifications” of voters in their nature insurmountable, cannot be republican; for the first principle in a republican government is Equality of Rights, according to the principles of the Declaration of Independence. And this definition, I insist, is the crowning glory of the war which beat down Rebellion under its feet. It only remains for Congress to enforce it by appropriate legislation.

15 CHARLES SUMNER, *Letter to the New York Independent, April 20, 1867*, in CHARLES SUMNER: HIS COMPLETE WORKS, *supra* note 2, at 176, 178–79.

7. 15 SUMNER, *supra* note 2, at 233. Black manhood suffrage would be achieved by the ratification of the Fifteenth Amendment in 1870. U.S. CONST. amend. XV.

Clause was a “giant” awakened by the war has not been lost on legal scholars.⁸ The Clause itself is short: “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”⁹ But its potential applications are vast. During Reconstruction, “an era when the foundations of public life were thrown open for discussion,”¹⁰ a dynamic interpretation of the Guarantee Clause helped to facilitate “a stunning and unprecedented experiment in interracial democracy.”¹¹ Armed with the Supreme Court’s holding in *Luther v. Borden* that the Clause was a political question enforceable by Congress without judicial interference, the Reconstruction Congress interpreted the Clause as a grant of power to the federal government so extensive that it justified the disestablishment of ten state governments.¹² In *Stanton v. Georgia*, the Supreme Court acquiesced to this interpretation.¹³ In the years immediately following the readmission of the former Confederate states, the United States Senate exercised the exclusion power recognized in *Luther* when faced with an election dispute created by state measures to suppress black voter turnout.¹⁴ The latter decades of the twentieth century saw a burst of scholarship debating the Court’s century-old doctrine that the Guarantee Clause is a political question.¹⁵ Rather than retreading this question, this Note will accept the Guarantee Clause’s non-justiciability.

Today, state and local governments continue to engage in conduct that unreasonably hinders ballot access.¹⁶ These measures disproportionately affect racial minority communities and threaten the majoritarian integrity of local, state, and federal elections.¹⁷ As the House of Representatives considers legislation to combat these measures,¹⁸ this Note offers the Guarantee Clause exclusion power as a tool to deter voter suppression.

8. See Jonathan K. Waldrop, Note, *Rousing the Sleeping Giant? Federalism and the Guarantee Clause*, 15 J.L. & POL. 267, 267 (1999).

9. U.S. CONST. art. IV, § 4, cl. 1. The Guarantee Clause is followed by the Domestic Violence Clause which reads “[the United States] . . . shall protect each of [the states] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” *Id.* art. IV, § 4, cl. 2.

10. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at 278 (1988).

11. *Id.*

12. See *infra* Section II.B.

13. See *infra* Section II.B.

14. See *infra* Section III.C.

15. Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994). Chemerinsky credits Arthur E. Bonfield’s article, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962) as the “primary article” advocating for a justiciable Guarantee Clause before 1980. Chemerinsky, *supra*, at 850 n.4.

16. See *infra* Section III.A.

17. See *infra* Section III.A.

18. Osita Nwanevu, *With H.R. 1, Democrats Announce a New Program for Electoral Reform*, NEW YORKER (Nov. 30, 2018, 6:37 PM), <https://www.newyorker.com/news/current/with-hr-1-democrats-announce-a-new-program-for-electoral-reform> [<https://perma.cc/5HAU-6HF7>].

Part II will begin with a discussion of the early understanding of the Guarantee Clause and the Supreme Court's decision in *Luther v. Borden* recognizing the Guarantee Clause as a political question. Then it will move to a discussion about how the Reconstruction Congress used the Guarantee Clause to fulfill its agenda and the judicial reaction to this expansion of federal power, before explaining the evolution of Guarantee Clause jurisprudence to the modern political question doctrine. Part III will begin by discussing voter suppressive measures in the 2018 Congressional elections. Then, after demonstrating the current constitutionality of the Guarantee Clause exclusion power, the Note will analyze the Senate's handling of the disputed Louisiana election of 1872 as a case study about how this power is implemented. Finally, Part IV applies the lessons of that analysis to provide a framework for how today's Congress should use this power to deter voter suppression by state governments.

II. BACKGROUND

This Part examines the history of the Guarantee Clause with a focus on its role in Congressional Reconstruction. Section II.A will introduce the Guarantee Clause with a brief discussion of how it was understood by the framing generation, before discussing in greater detail the Court's interpretation of the Clause in *Luther v. Borden*. Section II.B will describe how the Reconstruction Congress used the Guarantee Clause to justify its unprecedented Reconstruction Acts and how the Supreme Court deferred to its expansive definition. Section II.C will describe the post-Reconstruction history of Guarantee Clause challenges and the modern political question doctrine.

A. THE ANTEBELLUM GUARANTEE CLAUSE

Concerns about the ambiguity of the Guarantee Clause date to the Constitutional Convention.¹⁹ While rendered irrelevant by the modern political question doctrine, the framing generation's understanding of the Clause informed both Reconstruction era and present-day interpretations of the Clause.²⁰

Many attempts to ascertain the original meaning of constitutional provisions begin with the Federalist Papers. In Federalist 43, James Madison believed the Clause was a necessary precaution to defend the Union from internal subversion:

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic

19. See Waldrop, *supra* note 8, at 274. For a discussion of the "original understandings" of the Guarantee Clause, see Bonfield, *supra* note 15, at 516–30.

20. See *infra* Sections II.B, III.C.

or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be SUBSTANTIALLY maintained.²¹

Madison defended the Guarantee Clause from concerns about the extent of its grant of power to the federal government to interfere with state government by insisting that the federal government's authority under the clause could not be used to interfere with any state's "pre-existing [form of] government."²² "The only restriction imposed on [the states by the Guarantee Clause] is, that they shall not exchange republican for antirepublican Constitutions"²³ And this restriction could "hardly be considered as a grievance."²⁴ In Federalist 21, Alexander Hamilton offered an even more restricted view of federal authority under the Guarantee Clause, asserting that not only would the Clause "be no impediment to reforms of the State constitution by a majority of the people in a legal and peaceable mode," but would also allow the federal government to "only operate against changes to be effected by violence."²⁵

With Hamilton's interpretation of the Clause as an outlier, the Clause's ambiguity is largely a product of the many potential interpretations of the word "republican." Though varying in significant ways, these definitions shared some form of connection to the principle of majority rule,²⁶ which was integral to the framing generation's conception of "republican

21. THE FEDERALIST NO. 43 (James Madison). Madison's justifications for the Guarantee Clause could be understood as the fruit of the knowledge that might does not always make right. "Nothing can be more chimerical than to imagine that in a trial of actual force, victory may be calculated by the rules which prevail in a census of the inhabitants, or which determine the event of an election!" *Id.* Thus, the Guarantee Clause existed to protect the state, its sister states, and the federal government from the adverse effects of despotism. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 280 (2006).

22. THE FEDERALIST NO. 43 (James Madison). Madison explained that

the authority extends no further than to a GUARANTY of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. 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.

Id.

23. *Id.*

24. *Id.* If never needed, Madison argued, the Guarantee Clause would be merely a "harmless superfluity." *Id.*

25. THE FEDERALIST NO. 21 (Alexander Hamilton). Like Madison, Hamilton describes the importance of the Clause as a precaution. "The peace of society and the stability of government depend absolutely on the efficacy of the precautions adopted on this head." *Id.*

26. A majority of the eligible electorate, not the population as a whole.

government.”²⁷ During the Constitutional Convention in 1787 and the ensuing debate in the states over ratification from 1787 to 1790, there was no consensus definition of the word.²⁸ In Federalist 39, Madison defined “republic” rather simply as “a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.”²⁹ “Republican” had a far broader meaning to the framing generation than merely a government in which a small body represents the people as a whole.³⁰ Madison prefaced his definition by stating “by which I mean,” arguably stipulating that his meaning was not consistent with the common understanding of the word.³¹ In Federalist 14, he conceded that the colloquial meaning of “republican” was synonymous with “democratic.”³² The two adjectives were used interchangeably in the state constitutional conventions,³³ but other definitions were also in common usage. Samuel Johnson’s 1766 dictionary defined the adjective “republican” as “[p]lacing the government in the people,” the noun “republican” as “[o]ne who thinks a commonwealth without monarchy the best government,” and a “[r]epublick” [sic] as a “[state] in which the power is lodged in more than one.”³⁴ Thomas Paine, the author of *Common Sense*, simply defined “the word *republic* [as] the *public good*, or the good of the whole”³⁵ The word did not become better defined after the Constitution was ratified. In the early American republic, “republican” became “an all-purpose positive descriptor,”³⁶ whose ambiguity was remarked upon and even recognized as dangerous by surviving members of the framing generation.³⁷ In 1807, former

27. Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 823–24 (2002). The principle underlying the republican guarantee was the preservation of popular sovereignty. See AMAR, *supra* note 21, at 279–80. It is also important to clarify what it means to be an “originalist.” “Originalists believe that the constitutional text ought to be given the original public meaning that it would have had at the time that it became law.” Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/white-papers/on-originalism-in-constitutional-interpretation> [<https://perma.cc/Y4H2-7J3M>].

28. Bonfield, *supra* note 15, at 526–27.

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

30. Natelson, *supra* note 27, at 822–25.

31. AMAR, *supra* note 21, at 276.

32. *Id.* at 277.

33. *Id.* at 277–78.

34. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 499 (London, A. Millar ed., 1766), available at <https://archive.org/details/dictionaryofenglo2johnuoft/page/n499> [<https://perma.cc/8W66-RDF9>].

35. THOMAS PAINE, DISSERTATIONS ON GOVERNMENT; THE AFFAIRS OF THE BANK; AND PAPER MONEY (1786), reprinted in 2 THE WRITINGS OF THOMAS PAINE 132, 137 (Moncure Daniel Conway ed., 1894).

36. JENNIFER R. MERCECA, FOUNDING FICTIONS 19–21 (2010).

37. *Id.*

President John Adams wrote “[t]here is not a more unintelligible word in the English language than republicanism,”³⁸ and that a tyrant, intent on overthrowing the American republic, would exploit that ambiguity to his advantage.³⁹

In 1849, the Supreme Court adjudicated the Guarantee Clause for the first time in *Luther v. Borden*.⁴⁰ In the century after Chief Justice Roger Taney delivered the opinion of the Court deferring to the determinations of the political branches concerning whether a state government was sufficiently republican, its “limited holding metamorphosed into the sweeping assertion that ‘[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts.’”⁴¹ The *Luther* Court did not employ the political question doctrine as it is understood today. Rather than dismissing the case for lack of jurisdiction, the Court determined it was bound by the judgment of the political branches.⁴² This concept has been called the “traditional political question doctrine” in which the Court treats the determination of the political branches as conclusive fact.⁴³ Since Reconstruction occurred before this metamorphosis, this Section will first

38. Letter from John Adams to Mercy Warren (Aug. 8, 1807), in CORRESPONDENCE BETWEEN JOHN ADAMS AND MERCY WARREN RELATING TO HER “HISTORY OF THE AMERICAN REVOLUTION,” JULY–AUGUST, 1807, at 432 (John Adams & William Heath eds., 1878). “The word Republic has been used . . . to signify every actual and every possible government among men.” Letter from John Adams to Mercy Warren (July 20, 1807), in CORRESPONDENCE BETWEEN JOHN ADAMS AND MERCY WARREN RELATING TO HER “HISTORY OF THE AMERICAN REVOLUTION,” JULY–AUGUST, 1807, *supra*, at 353. Adams was responding to Warren’s history of the Revolution which had alleged that “some interested and ambitious men . . . asserting that republicanism was an indefinite term” in a sinister pursuit of power. MERCIÉCA, *supra* note 36, at 20. For a counterargument to Adams’s assertion, see generally Jonathan E. Maddison, *House of Cards: How Rediscovering Republicanism Brings It Crashing Down*, 64 CATH. U. L. REV. 649, 659 (2015) (arguing that the definition and constitutional implications of Republicanism are clear).

39. Since the people of many historical republics were no more free than their monarchical contemporaries and that a “free republican government” is not guaranteed by the Constitution, Adams concluded the “word [republic] is so loose and indefinite that successive predominant factions will put glosses and constructions upon it as different as light and darkness; and if ever there should be a civil war . . . the Conquering general . . . may establish a military despotism, and yet call it a constitutional republic.” Letter from John Adams to Mercy Warren (July 20, 1807), in CORRESPONDENCE BETWEEN JOHN ADAMS AND MERCY WARREN RELATING TO HER “HISTORY OF THE AMERICAN REVOLUTION,” JULY–AUGUST, 1807, *supra* note 38, at 353.

40. Note, *A Niche for the Guarantee Clause*, 94 HARV. L. REV. 681, 682 (1981) (discussing *Luther v. Borden*, 48 U.S. (7 How.) 1, 19–20 (1849)).

41. *New York v. United States*, 505 U.S. 144, 184 (1992) (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946)).

42. John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 424 n.241 (2001); see also Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1911 (2015). Even before the *Luther* decision, his judicial deference to political branch determinations as a conclusive fact was established, first in the recognition of foreign nations—this deference continues to today. See *Williams v. Suffolk Ins. Co.*, 38 U.S. (1 Pet.) 415, 420 (1839) (finding that when the executive branch “assume[s] a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department”).

43. Grove, *supra* note 42, at 1911.

address the *Luther* decision as it was delivered, while development of the modern political question doctrine will be discussed in Section II.C.

Luther v. Borden arose out of a political conflict in Rhode Island known as the Dorr Rebellion.⁴⁴ In 1841, the state was still governed under its colonial charter with property restrictions on voting and a legislature apportioned to favor rural landowners over urban dwellers.⁴⁵ Advocates for expanding the suffrage to all white men over the age of 21 met and drafted a constitution which was then ratified by a popular referendum.⁴⁶ The charter government did not recognize the legitimacy of this constitutional convention or its referendum.⁴⁷ In 1842, elections were held under both the colonial charter and the new constitution.⁴⁸ Thomas Dorr, elected governor under the new constitution, led a short-lived uprising against the Charter government.⁴⁹ Charter Governor Samuel King declared martial law and ordered a crackdown on Dorr's supporters.⁵⁰ Agents of the charter government, including a man named Luther Borden, forcefully entered the home of Martin Luther, a Dorr supporter, and arrested him. Martin Luther sued Borden for trespass; claiming the charter government was un-republican and therefore, under the Guarantee Clause, not a legitimate state government whose agents could make arrests.⁵¹

Rather than determine which of the two governments was legitimate, based on its own interpretation of the word "republican," the Court interpreted the Guarantee Clause as deferring that determination to Congress:

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when

44. Harrison, *supra* note 42, at 424 n.241.

45. *Id.* By 1840, only Virginia and Rhode Island still placed property restrictions on white male suffrage. Stanley L. Engerman & Kenneth L. Sokoloff, The Evolution of Suffrage Institutions in the New World 15 (Feb. 2005) (unpublished manuscript), available at <https://economics.yale.edu/sites/default/files/files/Workshops-Seminars/Economic-History/sokoloff-050406.pdf> [<https://perma.cc/W6DF-UZZ9>].

46. Justin Shatwell, *Dorr Rebellion: Rhode Island's Very Own, Very Small Civil War*, NEW ENGLAND TODAY: LIVING (Mar. 14, 2019), <https://newengland.com/today/living/new-england-history/dorr-rebellion> [<https://perma.cc/V3Y9-DL9Y>].

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Luther v. Borden*, 48 U.S. (7 How.) 1, 19–20 (1849). For a discussion of attempts at judicial review during the Dorr Rebellion, see generally John S. Schuchman, *The Political Background of the Political-Question Doctrine: The Judges and the Dorr War*, 16 AM. J. LEGAL HIST. 111 (1972) (describing the history and contextual background).

the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.⁵²

This passage establishes two fundamental principles for the later discussion of the Reconstruction and modern Guarantee Clause. First, the Court recognized that the Guarantee Clause provided both houses of Congress with power to deny admittance to the representatives of states whose governments were insufficiently republican.⁵³ Second, it explicated once Congress determined whether a particular state government was un-republican, the Court must abide by that determination.⁵⁴ This interpretation of the Clause differs from the interpretation advanced by Madison in *Federalist* 43 that the form of government existing in a state at the time it ratified the Constitution could not be later classified as un-republican. Under that interpretation of the Clause, the Court's finding that the charter government was the form of government under which Rhode Island "ratified the Constitution of the United States and became a member of this Union" would have been in itself sufficient to settle the Guarantee Clause dispute.⁵⁵

This doctrine of deference to Congress, however, did not resolve the issue before the Court. The crisis had been resolved before Dorr's government held Congressional elections or chose a senator, so Congress lacked the opportunity to determine the legitimate government of Rhode Island under the Guarantee Clause by admitting one congressional delegation over the other.⁵⁶ The Court next looked to the other political

52. *Luther*, 48 U.S. (7 How.) at 42. This passage is dicta. Bonfield, *supra* note 15, at 535 ("The notion that *Luther* held all questions arising under the guarantee nonjusticiable stems from its unfortunate dicta . . ."). In his dissent, Justice Woodbury argued strongly for a political question doctrine arguing that rather than seeking redress from the judiciary, aggrieved parties should seek redress at "the ballot-boxes" or constitutional conventions. *Luther*, 48 U.S. (7 How.) at 55 (Woodbury, J., dissenting). "[I]n extreme cases" when change cannot be made by either of those mechanism and "the suffering is intolerable," Woodbury suggested that those desiring change should follow the example of rebellion set by the English in 1689 and the Americans in 1776. *Id.* However, Woodbury, after an extensive study of the history of martial law in the British Empire and the United States, concluded that the *Luther*'s claim was not a political question and that he had a right to seek legal redress. *Id.* at 86–88.

53. The Constitution does not explicitly assign the Guarantee Clause determination. U.S. CONST. art. IV, § 4. The Guarantee Clause is the only duty given to the "United States" in the text of the Constitution. Bonfield, *supra* note 15, at 523. *See generally* U.S. CONST. (assigning no other duties to the United States).

54. The *Luther* Court did not explain how a dispute between the Senate and the House of Representatives would be settled under this framework.

55. *Luther*, 48 U.S. (7 How.) at 35; *see* THE FEDERALIST NO. 43 (James Madison).

56. *Luther*, 48 U.S. (7 How.) at 42 ("Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.").

branch and the Article IV guarantee against domestic violence to resolve the case. It found that Congress had the power “to determine . . . the means proper . . . to fulfil this guarantee” against Domestic Violence and that it had invested this power in the President in the Militia Act of 1795.⁵⁷ Because the Militia Act granted the president the authority to determine—“when the legislature cannot be convened”—“[on] application of the legislature of such State or of the executive” whether an exigency exists sufficient for the federal government to intervene, it necessarily also vested the president with the authority to “determine what body of men constitute the legislature, and who is the governor, before he can act.”⁵⁸ Once the president made this determination, it had binding effect on the federal courts. If the judicial branch were free to undermine the president’s decision during the crisis, the Court reasoned, “the guarantee contained in the Constitution . . . [would be] a guarantee of anarchy, and not of order” and the courts “must be equally bound when the contest is over.”⁵⁹

Though President Tyler never intervened militarily in the Dorr Rebellion to defend the charter government, the court determined that his recognition of Governor King’s application for military intervention and public threat to deploy military force to defend the charter government behalf was “equally authoritative” as a recognition of the charter government’s legitimacy.⁶⁰

The difference between “traditional” and “modern” political question doctrines is illustrated by the Court’s implicit invocation in *Luther* of prior holdings whose modern progeny are not treated as non-justiciable political questions. For example, the Court found that by passing the Militia Act, Congress granted the president’s recognition of state governments the same effect on judicial proceedings as his recognition of foreign governments.⁶¹ A decade before *Luther*, it had recognized the executive branch’s determination of the geographic boundaries of a foreign nation’s territory as a conclusive fact binding on the judicial branch in *Williams v. Suffolk Insurance Company*.⁶²

57. *Id.* at 43.

58. *Id.* (“[T]he President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.”).

59. *Id.* Taney dismissed concerns that such broad presidential authority without a judicial check was “dangerous to liberty,” by asserting that in a time of rebellion the “courts of justice would be utterly unfit for the crisis” and in no “other hands” but the president’s would it “be more safe, and at the same time equally effectual.” *Id.* at 44.

60. *Id.* at 44. After receiving Charter Governor King’s request for military intervention, President Tyler made an ambivalent promise to provide troops to maintain civic order if an insurrection occurred, while expressly declining to consider the legitimacy question. Michael A. Conron, Comment, *Law, Politics, and Chief Justice Taney: A Reconsideration of the Luther v. Borden Decision*, 11 AM. J. LEGAL HIST. 377, 380 (1967).

61. *Luther*, 48 U.S. (7 How.) at 44.

62. *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) (finding “that when the executive branch . . . assume[s] a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department”).

This core holding of *Williams* has survived unscathed into the twenty-first century.⁶³ In *Zivotofsky ex rel. Zivotofsky v. Kerry*,⁶⁴ decided in 2015, the Roberts Court cited *Williams* in rejecting the argument that a dispute between the Executive and Legislative branches over whether individuals born in Jerusalem could list Israel as their birthplace on passports was a non-justiciable political question, holding instead that the president's recognition power made the executive branch's determination binding on the Court.⁶⁵

B. THE GUARANTEE CLAUSE AND RECONSTRUCTION

In 1865, Congress refused to immediately readmit representatives from former Confederate states.⁶⁶ Congressional Republicans were fully aware of *Luther's* holding that Congress possessed the supreme authority to determine the legitimacy of state governments under the Guarantee Clause and fully utilized this authority when they refused to seat certain candidates amongst them.⁶⁷ Congressional Democrats, who were the minority party, dissented from this decision arguing that the elections were conducted under state constitutions considered republican in 1860, and therefore they could not be deemed un-republican now.⁶⁸ The Republican majority, particularly the more racially egalitarian Radicals, asserted that the un-republican nature of these state constitutions was demonstrated in 1861 by their rebellion against the United States in response to a fair election and remained un-republican postbellum by refusing voting rights to male former slaves.⁶⁹ They advanced the majoritarian definition of "republican." This definition required the enfranchisement of black men in the former Confederate states, because they were a significant portion if not an actual majority of voting age men⁷⁰ without delegitimizing Northern states which had also denied suffrage to black men

63. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086–88 (2015).

64. *Id.*

65. *Id.* at 2086, 2088.

66. AMAR, *supra* note 21, at 373.

67. *See id.* at 370; Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 753 (1994) [hereinafter Amar, *The Central Meaning of Republican Government*]; David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 413 (2008).

68. Currie, *supra* note 67.

69. *Id.*

70. Amar, *The Central Meaning of Republican Government*, *supra* note 67, at 785–86. For example, Congressman John Bingham of Ohio (drafter of the Fourteenth Amendment) said:

Now sir, what is a republican form of government? If there is anything settled under the American Constitution by the traditions of our people and by the express laws of this land, it is the absolute, unquestioned, unchallenged right of a majority of American male citizens, of full age, resident within an organized constitutional State of this Union, to control its entire political power . . . in the mode prescribed by the Constitution of the United States . . .

Id. (quoting CONG. GLOBE, 39th Cong., 2d Sess. 450 (1867)).

in 1860 and continued to deny suffrage in 1865.⁷¹ To combat this majoritarian approach, Democrats argued that the rationale was a slippery slope to women's suffrage,⁷² an argument Congressional Republicans dismissed with the claim that women had never been allowed to vote anywhere, while black men could vote in several states.⁷³

This majoritarian approach did have a downside for Radical Republicans who wanted to prevent former rebels from returning to political power because those former rebels would try to disenfranchise and persecute former slaves. Because a majority of Southern whites had supported the Confederacy, their disenfranchisement would have an even more counter-majoritarian effect than the disenfranchisement of former slaves in most of the former Confederate states.⁷⁴ Thus, the republican ideal promoted by Congressional Republicans required that the people of a state must be able to elect their own government which lacks the ability to disenfranchise and oppress their citizens even when a majority of the electorate desired that outcome.⁷⁵ While Congressional Republicans would pass the Fourteenth and Fifteenth Amendments in an attempt to solve this problem by explicitly prohibiting states from discriminating on the basis of race, Senator Sumner and some of his fellow Radical Republicans believed the constitutional amendments were unnecessary, because the Guarantee Clause already granted Congress the power to protect the civil and voting rights of the formerly enslaved.⁷⁶

On December 4, 1865, Congress established a Joint Committee of Fifteen (six senators and nine congressmen) to "inquire into the condition of the States which formed the so-called Confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress."⁷⁷ With Congressman Thaddeus Stevens, leader of the House Radicals, playing an important role in shaping the agenda, this Committee drafted a plan for reconstructing the former rebel states comprised of a proposal for a constitutional amendment (an early draft of what would become the Fourteenth Amendment), a bill declaring certain categories of high-ranking former Confederates ineligible to hold federal office, and the bill which would come to be known as the First Reconstruction Act.⁷⁸

71. AMAR, *supra* note 21, at 374.

72. *Id.* at 376.

73. *Id.*

74. See FONER, *supra* note 10, at 278.

75. *Id.*

76. See *supra* Part I.

77. BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865-1867, at 37 (1914).

78. *Id.* at 110-29.

This First Reconstruction Act, passed by Congress on March 2, 1867,⁷⁹ proclaimed that “no legal State governments” existed in ten states formerly in rebellion.⁸⁰ To preserve “peace and good order . . . in said States until loyal and republican State governments [could] be legally established,” they were placed under military rule which would only end when the state met the bill’s preconditions for readmission to the Union on an equal basis.⁸¹ The state would have to adopt a new constitution “framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except” for former rebels and felons by a popular vote of the same electorate.⁸² This constitution must be “in conformity with the Constitution of the United States in all respects.”⁸³ The legislature created by the constitution must ratify the Fourteenth Amendment to the United States Constitution.⁸⁴

The First Reconstruction Act was soon followed by supplemental legislation. On March 23, 1867, Congress passed the second Reconstruction Act to provide a framework for how elections would take place under military supervision to ensure fidelity to the Congressional standard of republicanism.⁸⁵ That summer, Congress passed a third Reconstruction Act to clarify the extent of the power granted to the military, so the Johnson Administration could not adopt a more limited interpretation of military authority under the prior acts.⁸⁶ Later, Congress added ratification of the Fifteenth Amendment to the list of readmission prerequisites.⁸⁷

79. An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428–29 (1867).

80. *Id.*

81. *Id.*

82. *Id.* at 429. The categories of former rebel leaders identified by the Fourteenth Amendment were expressly barred from voting for or serving as delegates. *Id.*; see U.S. CONST. amend. XIV, § 4.

83. An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428–29 (1867).

84. *Id.* There is disagreement as to whether the clause making adoption of the Fourteenth Amendment a condition for readmission was constitutional. Professor Currie agreed with President Johnson that Article V establishes that ratification must be the free decisions of the states and that the Act constituted coercion. Currie, *supra* note 67, at 413–14. However, Professor Amar suggests a Guarantee Clause justification for the condition. The refusal to confirm Southern reentry without ratification of Fourteenth Amendment was “highly germane to the problem at hand—namely Southern unrepublicanism—precisely because the amendment itself resolved in tight orbit around core principles of republican government.” AMAR, *supra* note 21, at 377. The Fourteenth Amendment was intended to place important protections on civil liberties and its second clause was intended to ensure Southern states operate in Republican fashion. *Id.*

85. Currie, *supra* note 67, at 422–23.

86. *Id.* at 423–24.

87. *Id.* at 488.

In 1870, Sumner and the Radical Republicans attempted to impose additional prerequisites for readmission barring in perpetuity post-readmission amendments to state constitutions limiting suffrage or access to education.⁸⁸

This abolition of state governments and imposition of peacetime military rule by federal statute was controversial.⁸⁹ The peacetime expansion of federal power of this magnitude was unprecedented. Proponents of the Reconstruction Acts justified the military government and preconditions “as successive steps” necessary to implement a republican form of government.⁹⁰ Since the state governments were operating loyally under post-Confederate state constitutions, the Acts could only be constitutional under the Guarantee Clause. Therefore, the Acts could only be constitutional if “republican” meant something more than loyalty to the federal government, free from violence, and *as republican* as the state governments which ratified the Constitution in 1789.⁹¹ This interpretation of the Guarantee Clause remained a point of contention as Congress considered the readmission of former Confederate states under the Acts as Democrats continued to advance the originalist argument that “republican form of government” should be interpreted the same way it was in 1789.⁹²

Both the Democrats and some of those Republicans who would leave the party in 1872 to form the Liberal Republican movement alleged that the exclusions of Southern representatives—first in accordance with the Reconstruction Acts and then for former Confederate allegiance and other alleged criminalities—were motivated not by principles, but by the desire to preserve the Republican Congressional majority as it battled with President Johnson over Reconstruction policy. Senator Carl Schurz, a leader of the Liberal Republicans in 1872, wrote in his memoirs that “[Congressman Stevens] would have seated Beelzebub in preference to the angel Gabriel, had he believed Beelzebub to be more certain than Gabriel to aid him in beating the President’s reconstruction policy.”⁹³ As northern public opinion grew more conciliatory towards former rebels and less committed to Reconstruction policy, Congressional Republicans sought to disprove suspicions of partisan motives by adopting a policy of seating white

88. FONER, *supra* note 10, at 452. While the provisions passed the House, many supporters believed them to be practically unenforceable. *Id.*

89. *Id.* at 409.

90. *Id.* at 413.

91. *Id.* There was a contemporary claim that the existing state governments were insufficiently republican, since their constitutions were not ratified by popular vote, though the delegates to the convention had been elected by popular vote.

92. *Id.* at 491–94.

93. 3 CARL SHURZ, THE REMINISCENCES OF CARL SCHURZ 216 (1907). When Halbert E. Paine, Chairman of the House Committee on Elections, told Congressman Stevens that both candidates in a contested election were “rascals,” Stevens was said to have replied, “Well, which is *our* rascal?” *Id.* Schurz was Paine’s friend and former law partner. *Id.*

Democrats from readmitted states even when their electoral victories were controversial.⁹⁴ With an acquiescent Supreme Court, this decision was a self-imposed restriction and pursuant to a general retreat from the reconstructing of state governments.⁹⁵

The Reconstruction Congress was able to achieve these ends, because of the political question doctrine articulated in *Luther* and affirmed by an acquiescent Supreme Court in *Georgia v. Stanton*. When Congress considered the First Reconstruction Act, this acquiescence of the Court was far from assured. The Supreme Court's 1866 holdings in *Ex Parte Milligan*⁹⁶ and *Cummings v. Missouri*⁹⁷ led many Republicans to fear the judiciary would strike down critical provisions and effectively end Congressional Reconstruction before it could be even begin.⁹⁸

On April 15, 1867, Georgia filed for an injunction against Secretary of War Edwin Stanton, General of the Army Ulysses Grant, and Major General John Pope⁹⁹ from executing the law's provisions.¹⁰⁰ The defendants filed a motion to dismiss the bill for want of jurisdiction.¹⁰¹ Attorney General Henry Stanbery, representing the federal officials, argued that the matter was a political question unfit for adjudication in the courts and that the Supreme Court's adjudication of the case would amount to the unconstitutional judicial equivalent of a presidential veto.¹⁰² Stanbery argued that since the State of Georgia derived its power and property from the people of Georgia and the Reconstruction Acts would result in a new constitution ratified by the people of Georgia to create a new state government with that same power and property, no harm was suffered by the State of Georgia.¹⁰³ Once this new state

94. FONER, *supra* note 10, at 453.

95. *Id.* at 453–54.

96. *See generally* *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (holding that the trial of civilians by military tribunals in a state where civilian courts are still in operation was unconstitutional).

97. *See generally* *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (holding that a state provision requiring an oath that a person had not supported the Confederacy as a pre-requisite to enter certain professions violated the Constitution's prohibition on bills of attainder).

98. FONER, *supra* note 10, at 272.

99. General Pope commanded the Third Military District encompassing Georgia, Alabama, and Florida. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 50 (1867).

100. *Id.*; JOHN W. BURGESS, RECONSTRUCTION AND THE CONSTITUTION: 1866–1876, at 146 (Da Capo Press 1970) (1902). Georgia was not the first state to challenge the Acts; Mississippi had filed for an injunction against President Johnson's enforcement of the Reconstruction Acts—the Supreme Court declined to hear the case, finding there could be no injunction against the president's execution of an Act of Congress. *See* *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866); BURGESS, *supra*, at 145.

101. *Stanton*, 73 U.S. (6 Wall.) at 50.

102. *Id.* at 54–55. The argument for a judicial veto, Stanbery argued, was made and failed at the Constitutional Convention. *Id.* at 56. Stanbery relied heavily on the Justice Marshall's discussion of political questions in the Court's opinion in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). *Stanton*, 73 U.S. (6 Wall.) at 57.

103. *Id.* at 58.

government was established, any legal dispute between the new and old state governments would become functionally indistinguishable from the dispute in *Luther*.¹⁰⁴ Thus, “Congress and the President must decide which of these two is the rightful State; and when they decide it, it is decided for this court and for all; for that is the only tribunal that can decide it.”¹⁰⁵

In response, Georgia argued that the Reconstruction Acts denied the state’s republican government. The government had understated that the law’s “actual effect is to restrain at once the holding of any election within the State” and “to direct all future elections” under military authority while transforming the state’s electorate.¹⁰⁶ This constituted an “immediate paralysis” of state government and the coerced substitution of its constitution.¹⁰⁷ Defining a state as “a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others,” Georgia proclaimed that the state was “an *artificial* person” with its own “affairs,” “interests,” “rules,” and “rights.”¹⁰⁸

Those persons not “of the body politic known and recognized as the State” were not members of the “State” and possessed no political rights.¹⁰⁹ The Reconstruction Acts constituted a “fundamental and vital” change to Georgia’s body politic: by disenfranchising “a large portion” of white men long recognized as voters, while simultaneously granting suffrage to black men previously barred from the exercise of political power.¹¹⁰ Georgia argued this federal redefinition of the “State,” was itself a violation of the Guarantee Clause and that the Reconstruction Act was so “confessedly at war with the

104. *Id.* at 61.

105. *Id.* at 62.

106. *Id.* at 63–64.

107. *Id.* at 64.

108. *Id.* at 65 (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 455 (1793)). “A republican State, in every political, legal, constitutional, and juridical sense, as well under the law of nations, as the laws and usages of the mother country, is composed of those persons who, according to its existing constitution or fundamental law, are the constituent body.” *Id.*

109. *Id.* In its oral argument, Georgia contended that the *Luther* Court had recognized the right of a State to determine what constituted its body politic by finding for the Charter government. *Id.* at 61.

110. *Id.* at 66. The Court explained:

The State is to be Africanized. This will work a virtual extinction of the existing body politic, and the creation of a new, distinct, and independent body politic, to take its place and enjoy its rights and property. Such new State would be formed, not by the free will or consent of Georgia or her people, nor by the assent or acquiescence of her existing government or magistracy, but by external force. Instead of keeping the guaranty against a forcible overthrow of its government by foreign invaders or domestic insurgents, this is destroying that very government by force.

Id.

Constitution, repugnant to its whole spirit and intent” that the Court must invalidate it regardless of the question’s political nature.¹¹¹

In an opinion delivered by Justice Nelson, the Court rejected Georgia’s argument holding that the issue was “political and not judicial, and, therefore, not the subject of judicial cognizance.”¹¹² In doing so, the Court relied upon the dicta of its opinion authored by Chief Justice Marshall in *Cherokee Nation v. Georgia*, that certain matters “savour[ed] too much of the exercise of political power, to be within the proper province of the judicial department.”¹¹³ The Court found that the rights allegedly violated, the loss of state property caused by the destruction of state authority, were “not of persons or property, but of a political character” and therefore “not as a specific ground of relief.”¹¹⁴

Legal historians have characterized the *Stanton* decision as a product of the Supreme Court’s general retreat from the heated politics of Reconstruction motivated by Congressional intent to strip power away from the judiciary if it interfered with Reconstruction policy.¹¹⁵ Chief Justice Rehnquist once described this period as the Court’s “Babylonian captivity.”¹¹⁶ If the Court had ruled against the government, it would have invalidated the thirty-ninth Congress’s signature legislation and dealt a death blow to Congressional Reconstruction.¹¹⁷ Congress would be left with almost no power to fight racial discrimination in the Confederate states, as the Fourteenth Amendment had not yet been ratified and was unlikely to have ever been ratified without the Reconstruction Acts.¹¹⁸

111. *Id.* at 67.

112. *Id.* at 71.

113. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831); *Stanton*, 73 U.S. (6 Wall.) at 74.

114. *Stanton*, 73 U.S. (6 Wall.) at 77.

115. Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887, 932 (1994). For an extensive discussion of the Supreme Court’s acquiescence to the Reconstruction Congress, see Terence J. Lau, *Judicial Independence: A Call for Reform*, 9 NEV. L.J. 79, 102–14 (2008); and Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165, 1195 n.194 (2002).

116. William H. Rehnquist, *The Supreme Court: “The First Hundred Years Were the Hardest,”* 42 U. MIAMI L. REV. 475, 485 (1988).

117. Weinberg, *supra* note 115, at 933–34. This is why Professor Weinberg describes *Stanton* as “extra-constitutional,” with little relevance to modern law. *See id.* at 934.

In a case brought under the Guarantee Clause today, there is no important reason why a state should not be able to challenge the constitutionality of an act of Congress purporting to reorganize the state. Even if both parties relied alike on the Clause, and even if the Supreme Court ruled in favor of the state, nothing very exotic would happen. The effect of the Court’s opinion would be to send Congress scurrying back to the drafting table, while the parties were held *in status quo*.

Id. The Supreme Court did, however, cite to *Stanton* in *Baker v. Carr* as an application of the Guarantee Clause political question doctrine. *Baker v. Carr*, 369 U.S. 186, 224–25 (1962).

118. *See* Weinberg, *supra* note 115, at 934; *see also* U.S. CONST. amends. XIV, XV.

Congressional Republicans harbored a distrust of the Supreme Court; opposition to the *Dred Scott* decision had been a unifying force in the Republican Party since it was decided.¹¹⁹ Congress passed legislation depriving the Supreme Court of jurisdiction over habeas corpus appeals from federal district courts,¹²⁰ and some Radical Republicans supported legislation to terminate judicial review entirely.¹²¹ Senator Sumner led an ultimately unsuccessful attempt to legislatively bar judicial review of the Reconstruction Acts,¹²² declaring that Congress had the sole power “to decide what government is the established one in a State.”¹²³ Proponents defended the constitutionality of the Reconstruction Acts by arguing that the legislation was only a statutory restatement of the Court’s own political question jurisprudence.¹²⁴

In 1868, the Supreme Court addressed the Guarantee Clause again in *Texas v. White* in its attempt to define the word “state” as used in the Constitution.¹²⁵ The Court found that “[a] state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.”¹²⁶ It is not a state government.¹²⁷ “In [the Guarantee] [C]ause a plain distinction is made between a State and the government of a State”¹²⁸ Since “it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty,” this definition of the “state” as the political community meant that with the abolition of slavery the formerly enslaved were part of the “state” to which the republican form of government was owed.¹²⁹

119. See Lau, *supra* note 115, at 105.

120. FONER, *supra* note 10, at 336. Another scheme was floated to capture judicial power by promising to continue to pay full salaries for justices who retired after the age of 70. Currie, *supra* note 67, at 476.

121. *Id.* at 479–80.

122. *Id.* at 480–82.

123. *Id.* at 481 (quoting CONG. GLOBE, 41st Cong., 2d Sess. 96 (1869)).

124. *But see id.* at 481–82 (finding that the bill was actually substantially broader than *Luther*).
 125. *Texas v. White*, 74 U.S. (7 Wall.) 700, 727–28 (1868) (defining “state” was necessary for Court’s holding that federal government duties under the Domestic Violence and Guarantee Clause meant the secessionist government of Texas was illegal); see also Gabriel J. Chin, *Justifying a Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule*, 94 B.U. L. REV. 1551, 1566, 1573–74 (“The [*White*] decision is famous for a line, misread in *Shelby County* and elsewhere as a defense of state’s rights.” (footnote omitted)).

126. *White*, 74 U.S. (7 Wall.) at 721 (finding that a union of these political communities “forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country”).

127. *Id.*

128. *Id.*

129. *Id.* at 729; see also Chin, *supra* note 125, at 1566 n.106 (“holding that the Guarantee Clause granted Congress the authority to create republican governments by amending State

The Court's "Babylonian captivity" ended in the 1870s, when the Supreme Court adopted more restrictive interpretations of constitutional provisions critical to Reconstruction policy.¹³⁰ In the "Slaughter-House Cases," the Supreme Court provided an extremely limited interpretation of the privileges and immunities protected under the Fourteenth Amendment.¹³¹ In *United States v. Cruikshank*, it limited the enforcement powers of Congress under the Fourteenth and Fifteenth Amendments to state actors and struck down the anti-Klan provisions of the Third Enforcement Act.¹³²

While the Guarantee Clause was not a major factor in the analysis, *Cruikshank* was the first decision in which the Court recognized the concomitance of the Equal Protection Clause and the Guarantee Clause in the domain of political rights.¹³³ In determining that the Fourteenth Amendment governed relations between individuals and their state government, not between individuals, the *Cruikshank* Court found that "[t]he equality of the rights of citizens is a principle of republicanism" and that federal power under the Fourteenth Amendment is limited by the enforcement of a consolidated guaranty.¹³⁴ Two decades later, in his famous dissent in *Plessy v. Ferguson*, Justice Harlan echoed *Cruikshank's* association of the Equal Protection Clause with the Guarantee Clause, asserting that a system of racial segregation "is inconsistent with the guaranty given by the constitution to each state of a republican form of government, and may be

constitutions so that they would 'conform . . . to the new conditions created by emancipation'" (quoting *White*, 74 U.S. (7 Wall.) at 729)).

130. See Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1591–92 (2012).

131. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78–80 (1872).

132. *United States v. Cruikshank*, 92 U.S. 542, 556–58 (1875). See generally James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L.L. REV. 385 (2014) (arguing that the vital role *Cruikshank's* restraints on the power of the federal government to protect civil rights played in the end of Reconstruction and the rise of Jim Crow governments in the American South is underappreciated by legal scholars).

133. In recent years, there has been criticism of *Cruikshank's* failure to consider the Guarantee Clause as justifying the applicability of the Third Enforcement Act to private parties. See Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1843 (2010) ("The Guarantee Clause appears in the same article as the Fugitive Slave Clause, and there is no reason to think that Congress enjoys less power to enforce the Guarantee Clause against private parties. In fact, the Clause's references to '[i]nvasion' and 'domestic [v]iolence' presume the power to reach private action. Congress can enforce the Guarantee Clause by making it a crime or a tort to attempt to keep people from exercising the rights necessary to a republican form of government—including the rights of members of the political community to vote, speak, publish, assemble, protest, and organize politically." (alteration in original) (footnote omitted)).

134. *Cruikshank*, 92 U.S. at 555 ("Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.").

stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land.”¹³⁵

C. THE GUARANTEE CLAUSE AFTER STANTON

In the decades after the giant awoke, a variety of claims were brought under the Guarantee Clause. Despite the Court’s later dating of the modern doctrine of Guarantee Clause non-justiciability to *Luther*, the Court adjudicated these claims on their merits.¹³⁶ In *Minor v. Happersett*, decided in 1874, the Court applied reasoning consistent with Madison’s interpretation of a “republican form of government” in Federalist 43 by rejecting the idea that the denial of suffrage to women constituted a violation of the Guarantee Clause.¹³⁷ Echoing the critics of the Reconstruction Acts, the Court reasoned that since the adoption of the Constitution had not changed the forms of government existing in the states at the framing, those governments provide “unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.”¹³⁸ Because almost all the states denied suffrage to women when the Constitution was adopted, the Court determined it was “certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.”¹³⁹

In *Duncan v. McCall*, the Court explicitly upheld *Luther* and adjudicated the plaintiff’s claim that the state legislature had violated the Guarantee Clause by failing to follow its procedural rules when enacting the murder statute under which he was convicted. Instead of applying the strict originalist approach from *Minor*,¹⁴⁰ it provided its own definition of a republican form of government:

135. *Plessy v. Ferguson*, 163 U.S. 537, 564 (1896) (Harlan, J., dissenting).

136. Chemerinsky, *supra* note 15, at 862; *see, e.g.*, *New York v. United States*, 505 U.S. 144, 184 (1992) (“In a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable.” (citations omitted)); *Attorney Gen. of Mich. v. Lowery*, 199 U.S. 233, 239 (1905) (holding that the creation of new school districts by a state legislature did not violate the Guarantee Clause); *Forsyth v. City of Hammond*, 166 U.S. 506, 519 (1897) (“The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under section 4 of article 4 of the constitution, the United States are bound to guaranty to every state in this Union”); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 176 (1874) (holding that denying women the right to vote does not violate the Guarantee Clause). *See infra* Section III.B for discussion of Reconstruction Era interpretation of the Guarantee Clause.

137. *See Minor*, 88 U.S. (21 Wall.) at 175; THE FEDERALIST NO. 43 (James Madison). Virginia Minor’s challenge to the Missouri Constitution’s denial of franchise to women was primarily on Fourteenth Amendment grounds, but the Court also considered the Guarantee Clause question. *Minor*, 88 U.S. (21 Wall.) at 165, 175–76.

138. *Id.* at 176.

139. *Id.*

140. *Duncan v. McCall*, 139 U.S. 449, 461 (1891).

By the constitution, a republican form of government is guaranteed [sic] to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.¹⁴¹

Applying its definition, the *Duncan* Court found that Texas had abided by the Guarantee Clause because it was “in full possession of its faculties as a member of the Union, and its legislative, executive, and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law.”¹⁴²

It was not until 1912, that the Court determined that the Clause was wholly nonjusticiable in *Pacific States Telephone and Telegraph Co. v. Oregon*.¹⁴³ In *Pacific States*, the Court was asked to adjudicate a telephone corporation’s claim that an amendment to the Oregon Constitution allowing laws to be enacted by popular referendum and by extension the tax measure placed on it by that process violated the Guarantee Clause by transforming the state into “a pure democracy.”¹⁴⁴ In the first paragraph of the opinion delivered by Chief Justice White, the Court declared that the Guarantee Clause “ha[d] long since been determined by this court . . . to be political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress.”¹⁴⁵ Declining to “content” itself “with a mere citation of the cases,” the Court declared that *Luther* was “leading and absolutely controlling.”¹⁴⁶ The Court then interpreted *Luther*’s total deference to the political branch’s determination of whether a state’s government was sufficiently republican as holding that any Guarantee Clause claim was outside the Court’s jurisdiction.¹⁴⁷

While inconsistent with the “absolutely controlling” *Luther*, *Pacific States* has been consistently applied ever since to dismiss Guarantee Clause claims

141. *Id.*

142. *Id.* at 462. The *Duncan* Court’s interpretation of *Luther* is consistent with the traditional political question doctrine: the elected branches determine which state government is legitimate and the courts are bound by that determination. See Grove, *supra* note 42, at 1911.

143. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912); Chemerinsky, *supra* note 15, at 863; Weinberg, *supra* note 115, at 920–21 n.126.

144. *Pac. States*, 223 U.S. at 133–38.

145. *Id.* at 133.

146. *Id.* at 143.

147. *Id.* at 151.

on jurisdictional grounds.¹⁴⁸ By the mid-twentieth century, the Guarantee Clause became the Supreme Court's exemplar of a political question.¹⁴⁹

However, this doctrine of Guarantee Clause non-justiciability does not foreclose the judicial review of claims alleging the violation of unenumerated political rights similar in kind to the types of claims brought under the Guarantee Clause before the rejection of justiciability in *Pacific States*. After affirming the non-justiciability of a Guarantee Clause claim against the unequal apportionment of state legislative districts in *Baker v. Carr*, the Supreme Court held that a challenge to the unequal districts under the Equal Protection Clause of the Fourteenth Amendment was justiciable,¹⁵⁰ because "the mere fact that the suit seeks protection of a political right does not mean it presents a political question."¹⁵¹

III. ANALYSIS

This Part will establish the foundations for a modern use of Guarantee Clause exclusion power by identifying the problem to which it can be applied, demonstrating its constitutionality, and examining a historical precedent. First, Section III.A will briefly discuss recent efforts by state governments to manipulate elections for partisan advantage in the 2018 midterm elections. Section III.B will address potential arguments to the constitutionality of Guarantee Clause exclusion. Finally, Section III.C will analyze the debates surrounding the Senate's use of the exclusion power in addressing the disputed Louisiana election of 1872 for lessons about how Congress could use the power today.

A. THE PROBLEM OF PARTISAN VOTER SUPPRESSION

Voter suppression is a term which can be defined in a variety of ways. For the purposes of this Note, this term refers to actions by officials or legislature that place unreasonable burdens on the ability of eligible voters to cast their ballots with the intent to advantage political allies. Demand the Vote, a voting

148. See, e.g., *O'Neill v. Leamer*, 239 U.S. 244, 248 (1915) ("The attempt to invoke section 4 of Article IV of the Federal Constitution is obviously futile."); see also, e.g., *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234 (1917) ("As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress, and not to the courts.").

149. See *Baker v. Carr*, 369 U.S. 186, 217-18 (1962).

150. *Id.* at 209.

151. *Id.* The *Baker* Court distinguished *Luther* from the claim at issue.

Clearly, several factors were thought by the Court in *Luther* to make the question there "political": the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive's decision; and the lack of criteria by which a court could determine which form of government was republican.

Id. at 222.

rights advocacy group, lists the following as methods of voter suppression:¹⁵² voter identification laws, the closure of offices issuing identification, voter roll purges based on flawed methodologies,¹⁵³ limitations on early voting opportunities, and the scheduling of local elections on off-years.¹⁵⁴ Under this definition, not every state action that makes it harder to vote is necessarily voter suppression. A balance has to be preserved between the burden the measure places on potential voters and any legitimate state interests it promotes. Identification-issuing offices and early voting opportunities cost states money; every day registered voters die and move out-of-state and can fairly be stricken from voter rolls. While in-person voter fraud is exceedingly rare in the twenty-first century United States,¹⁵⁵ if it was a common occurrence, then voter ID laws could be necessary to protect the integrity of elections. Closing a polling place in a town whose population has shrunk to five people may burden those voters, but in most cases will not unreasonably burden them.

Historically, voter suppression measures in the United States have been targeted against racial minorities. When Redeemers, white supremacist Democrats, seized control of state governments across the south to usher in the era of Jim Crow, they enacted voting policies to disenfranchise black voters. After 1965, the preclearance provisions of the Voting Rights Act of 1965 (“VRA”) imperfectly protected the voting rights of racial minorities from these voter suppression measures.¹⁵⁶ Section Five of the VRA required those states identified by the formula provided in Section Four to preclear changes

152. Demand the Vote defines “voter suppression” as “any effort, either legal or illegal, by way of laws, administrative rules, and/or tactics that prevents eligible voters from registering to vote or voting.” *What is Voter Suppression?*, DEMAND THE VOTE, <https://www.demandthevote.com/what-is-voter-suppression> [https://perma.cc/3KXC-9HGK].

153. *Id.* For example, the Crosscheck system employed by several states and proposed by former Kansas Secretary of State Kris Kobach as means to eliminate registrations which could be used for double voting eliminates 300 legitimate registrations for every one double-vote registration. See Christopher Ingraham, *How Trump’s Nationwide Voter Data Request Could Lead to Voter Suppression*, WASH. POST (June 30, 2017, 12:32 PM), <https://www.washingtonpost.com/news/wonk/wp/2017/06/30/how-trumps-nationwide-voter-data-request-could-lead-to-voter-suppression> [https://perma.cc/4XQF-LFT3]; see also Sharad Goel et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections 3* (Jan. 17, 2019) (unpublished manuscript), available at <https://scholar.harvard.edu/files/morse/files/1p1v.pdf> [https://perma.cc/7W4S-95V5].

154. *What is Voter Suppression?*, *supra* note 152.

155. See Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014, 5:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast> [https://perma.cc/4HP6-UFC5].

156. See *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting) (discussing the success of the preclearance provisions of the Voting Rights Act).

in their election laws with the Justice Department to prevent racial discrimination.¹⁵⁷

In *Shelby County v. Holder*, the Supreme Court held “that [because] the conditions that originally justified these measures no longer characterize[d] voting in the covered jurisdictions,”¹⁵⁸ the Section 4 formula could “no longer be used as a basis for subjecting jurisdictions to preclearance.”¹⁵⁹ In the years since *Shelby County*, many of those states once subject to VRA preclearance have enacted election laws—like voter identification requirements—with the effect of decreasing voter turnout among racial minorities¹⁶⁰ and increasing voter registration purges.¹⁶¹

The modern Republican Party has an incentive to enact measures decreasing voter turnout among black Americans and other racial minority groups. As the Fourth Circuit recognized in *NAACP v. McCrory*, “[r]acially polarized voting . . . provide[s] an incentive for intentional discrimination in the regulation of elections.”¹⁶² The strong correlation between race and partisanship in American politics is common knowledge. In 2018, while a majority of white voters cast their ballots for Republicans, voters who identified as black, Asian, or Hispanic voted overwhelmingly for Democrats.¹⁶³ A Pew Research study conducted after the election found that 90 percent of black voters cast their ballots for Democratic candidates.¹⁶⁴

The 2018 midterm elections saw numerous allegations of voter suppression efforts targeting racial minorities. The Georgia gubernatorial election between Republican Brian Kemp and Democrat Stacey Abrams became the national focus of the voter suppression debate. As the sitting Georgia Secretary of State, Kemp had been charged with managing the state’s voter roll.¹⁶⁵ Under Kemp, Georgia purged twice as many voters between 2012

157. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439; Jaime Fuller, *How Has Voting Changed Since Shelby County v. Holder?*, WASH. POST (July 7, 2014, 2:24 PM), <https://www.washingtonpost.com/news/the-fix/wp/2014/07/07/how-has-voting-changed-since-shelby-county-v-holder> [<https://perma.cc/79NX-GEF6>].

158. *Shelby Cty.*, 570 U.S. at 535.

159. *Id.* at 557.

160. Zoltan L. Hajnal et al., *Do Voter Identification Laws Suppress Minority Voting? Yes. We Did the Research*, WASH. POST (Feb. 15, 2017, 5:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/do-voter-identification-laws-suppress-minority-voting-yes-we-did-the-research> [<https://perma.cc/B8BS-WTCS>].

161. JONATHAN BRATER ET AL., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 4 (2018).

162. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 222 (4th Cir. 2016).

163. Alec Tyson, *The 2018 Midterm Vote: Divisions by Race, Gender, Education*, PEW RES. CTR. (Nov. 8, 2018), <http://www.pewresearch.org/fact-tank/2018/11/08/the-2018-midterm-vote-divisions-by-race-gender-education> [<https://perma.cc/R84R-G959>].

164. *Id.*

165. P.R. Lockhart, *Georgia, 2018’s Most Prominent Voting Rights Battleground, Explained: How the Governor’s Race Between Stacey Abrams and Brian Kemp Has Fueled Ongoing Problems with Voter Access in Georgia*, VOX (Nov. 6, 2018, 8:35 PM), <https://www.vox.com/policy-and-politics/2018/>

and 2016 than it had between 2008 and 2012, and the registrations of black voters were disproportionately affected in these purges.¹⁶⁶ Removal rates increased in all but three of the state's 159 counties after the *Shelby County* decision.¹⁶⁷ A month before the election, 53,000 voter registration applications from mostly black applicants were held for additional scrutiny requiring those eligible voters to provide identification at the polls.¹⁶⁸ The controversy extended beyond Kemp's management of the voter roll. Though a proposal condemned by both Kemp and Abrams to close all but two polling places in rural majority black Randolph County ultimately failed, between 2012 and 2018, elections officials in 53 counties closed 214 voting precincts citing cost concerns and the growing popularity of early voting.¹⁶⁹ These closures, unmonitored by the Secretary of State's Office, disproportionately affected areas with higher poverty rates and significant black populations.¹⁷⁰ Election day itself saw long lines and problems with voting machines in majority black counties.¹⁷¹ Kemp won the governor's race by 54,723 votes (1.39 percent of the total votes cast)¹⁷² with voter turnout in the state at historic highs for an election in a nonpresidential year.¹⁷³ While some prominent Democrats described the election as "stolen" in the days after the election, these claims were made without compelling evidence showing that the alleged acts of voter suppression were the decisive factor.¹⁷⁴

10/26/18024468/georgia-voter-suppression-stacey-abrams-brian-kemp-voting-rights [https://perma.cc/F8SE-XR9S].

166. BRATER ET AL., *supra* note 161, at 9–10.

167. *Id.* at 3.

168. Mark Niese, *Lawsuit Challenges 53,000 Stalled Georgia Voter Registrations*, ATLANTA J.-CONST. (Oct. 11, 2018), <https://www.ajc.com/news/state—regional-govt—politics/lawsuit-challenges-000-stalled-georgia-voter-registrations/PK3tylROgZ1ICNzDcHoFyH> [https://perma.cc/GYSW-B5TH]; see also Ben Nadler, *Georgia Republican Candidate for Governor Puts 53,000 Voter Registrations on Hold*, USA TODAY (Oct. 12, 2018, 11:03 AM), <https://www.usatoday.com/story/news/politics/elections/2018/10/11/georgia-republican-candidate-brian-kemp-puts-53-000-voter-registrations-hold/1608507002> [https://perma.cc/8AM6-YBL8].

169. Mark Niese et al., *Voting Precincts Closed Across Georgia Since Election Oversight Lifted*, ATLANTA J.-CONST. (Aug. 31, 2018), <https://www.ajc.com/news/state—regional-govt—politics/voting-precincts-closed-across-georgia-since-election-oversight-lifted/bBkHxptlmoGppKu7dfrN> [https://perma.cc/53WG-VQFF].

170. *Id.*

171. Khushbu Shah, *'Textbook Voter Suppression': Georgia's Bitter Election a Battle Years in the Making*, GUARDIAN (Nov. 10, 2018, 6:00 AM), <https://www.theguardian.com/us-news/2018/nov/10/georgia-election-recount-stacey-abrams-brian-kemp> [https://perma.cc/HX52-KRL4].

172. *Georgia Governor Election Results 2018*, POLITICO, <https://www.politico.com/election-results/2018/georgia/governor> [https://perma.cc/44C6-5D95].

173. David French, *Brian Kemp Did Not Steal the Georgia Governor's Race*, NAT'L REV. (Nov. 19, 2018, 4:24 PM), <https://www.nationalreview.com/2018/11/brian-kemp-did-not-steal-georgia-governor-race> [https://perma.cc/KTH7-YXG6].

174. Richard L. Hasen, *Why Democrats Should Not Call the Georgia Governor's Race "Stolen"*, SLATE (Nov. 18, 2018, 6:57 PM), <https://slate.com/news-and-politics/2018/11/georgia-stacey-abrams-brian-kemp-election-not-stolen.html> [https://perma.cc/JQQ5-V256].

Allegations of voter suppression in 2018 were not limited to the American South. In North Dakota, the state's voter identification law was challenged in federal court as discriminatory against Native Americans.¹⁷⁵ The law required voters to provide an identification card issued by the state Department of Transportation ("DOT") or a tribal government which provided the voter's name, "current residential street address," and "[d]ate of birth."¹⁷⁶ If all three of these requirements were not met by the identification card, the information could be supplemented with one of a list of documents enumerated in the statute.¹⁷⁷ If not, a voter could receive a ballot, but that ballot would be provisional on the voter presenting valid identification within six days to election officials.¹⁷⁸ The district court enjoined enforcement of the requirement of an identification or supplemental document providing a "current residential street address" as violative of the VRA and Fourteenth Amendment, ordering that the state also accept mailing addresses.¹⁷⁹ Citing statistical data, it found "that Native American communities often lack residential street addresses or do not have clear residential addresses"¹⁸⁰ and thus the requirement constituted for those communities a "clear 'legal obstacle' inhibiting the opportunity to vote."¹⁸¹ The Eighth Circuit stayed the district court order on the address requirements.¹⁸² In a dissenting opinion, Judge Kelly highlighted the evidence presented to the district court demonstrating that while state law may require that a non-driver identification card be provided by the DOT without a fee, the DOT was, in actuality, charging a fee for the cards and even listed a required fee on its website.¹⁸³ This fee, according to Judge Kelly, was unconstitutional under the standard

175. Five years earlier, the Republican-majority North Dakota legislature enacted a controversial voter ID law. The legislation followed on the heels of incumbent Democratic Senator Heidi Heitkamp's reelection by less than 3,000 votes in 2012 and Democrats alleged the bill's purpose was the suppression of Native American voters in order to prevent future Democratic victories in the state. In 2016, a group of Native American voters challenged the law and the federal district court enjoined the law as unconstitutional and violative of the VRA. A year later, the state legislature enacted a new voter ID law, which critics alleged was inconsistent with the federal court's ruling. Maggie Astor, *A Look at Where North Dakota's Voter ID Controversy Stands*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/us/politics/north-dakota-voter-identification-registration> [<https://perma.cc/6CJ3-L88L>]; *Federal Judge Blocks North Dakota Voter Identification Law*, REUTERS (Aug. 2, 2016, 12:00 AM), <https://www.reuters.com/article/us-usa-election-northdakota/federal-judge-blocks-north-dakota-voter-identification-law-idUSKCN10DoBO> [<https://perma.cc/MK6E-8XSX>].

176. N.D. CENT. CODE ANN. § 16.1-01-04.1 (West 2017).

177. *See id.*

178. *Id.*

179. *Brakebill v. Jaeger*, 905 F.3d 553, 556 (8th Cir. 2018).

180. *Id.* at 557.

181. *Id.*

182. *Id.* at 560-61.

183. *Id.* at 562 (Kelly, J., dissenting).

provided by the Supreme Court¹⁸⁴ in *Harper v. Virginia State Board of Elections* that “fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.”¹⁸⁵ The 69,616 North Dakotans who lacked identification cards providing the required information were disproportionately Native American and impoverished.¹⁸⁶ In the 2018 North Dakota Senate election, Republican Kevin Cramer defeated Democratic incumbent Heidi Heitkamp by 35,344 votes of the 324,096 votes cast.¹⁸⁷

Rather than litigate here the difficult issue of whether the actions of the Georgia officials or the North Dakota legislature should be classified as voter suppression, this Note asks readers to consider how voter suppression measures could be used by actors with that intent in the future. Today, voter suppression is a partisan debate: an allegation primarily made by Democrats against Republicans. But the motivation for voter suppression is inherently neither red nor blue. By opposing efforts to consolidate election dates, Democratic legislatures also suppress voter turnout for political advantage.¹⁸⁸ Additionally, this inconsistency between national message and state application can be found in other election issues. While the national Democratic Party presents partisan gerrymandering as a Republican problem,¹⁸⁹ state governments under Democratic control have also engaged in partisan gerrymandering and may do so again.¹⁹⁰ While with current demographic voting trends, Democratic politicians have no incentive to enact measures to make voting more difficult for racial minorities, is it entirely unforeseeable that a Democratic legislature could in the not-too-distant future adopt legislation to make voting more difficult for rural white voters?

184. *Id.* at 563.

185. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

186. *Brakebill*, 905 F.3d at 563 (Kelly, J., dissenting). The State did not challenge the district court stay concerning the types of acceptable tribal identification documents. The Supreme Court denied an application to vacate the stay. Amy Howe, *Court Stays Out of North Dakota Voting Dispute*, SCOTUSBLOG (Oct. 9, 2018, 4:57 PM), <https://www.scotusblog.com/2018/10/court-stays-out-of-north-dakota-voting-dispute> [<https://perma.cc/V33H-AHCD>].

187. *North Dakota Senate Election Results 2018*, POLITICO, <https://www.politico.com/election-results/2018/north-dakota/senate> [<https://perma.cc/DD69-JTRV>].

188. Eitan Hersh, *How Democrats Suppress the Vote*, FIVETHIRTYEIGHT (Nov. 3, 2015, 6:30 AM), <https://fivethirtyeight.com/features/how-democrats-suppress-the-vote> [<https://perma.cc/MD64-RPT9>].

189. The National Democratic Redistricting Committee website promises a “fight to end Republican gerrymandering.” *Join the National Democratic Redistricting Committee*, NAT’L DEMOCRATIC REDISTRICTING COMMITTEE, <https://ndrc.bsd.net/page/s/join-the-national-democratic-redistricting-committee> [<https://perma.cc/G9QS-HX4H>].

190. Matt Lewis, *Democrats Hate Gerrymandering—Except When They Get to Do It*, DAILY BEAST, <https://www.thedailybeast.com/democrats-hate-gerrymandering-except-when-they-get-to-do-it> [<https://perma.cc/N66S-REPV>]; David Wasserman, *Hating Gerrymandering Is Easy. Fixing It Is Harder.*, FIVETHIRTYEIGHT, (Jan. 25, 2018), <https://fivethirtyeight.com/features/hating-gerrymandering-is-easy-fixing-it-is-harder> [<https://perma.cc/4GQP-CXN5>].

While the Guarantee Clause has been discussed as a possible solution to the problem of voter suppression as a constitutional justification for a new preclearance provisions,¹⁹¹ this Note proposes an alternative use of the Guarantee Clause to combat the issue: the threat of Congressional exclusion. A re-animated Guarantee Clause can attack the problem of voter suppression by combatting not only the methods used today, but also those which political parties may use in the future. The Guarantee Clause exclusion power provides Congress with a deterrent which it can apply to protect all sections of the American electorate from assaults on the integrity of our elections for partisan advantage.

B. THE CONSTITUTIONALITY OF THE GUARANTEE CLAUSE EXCLUSION POWER

Today, the Supreme Court considers the Guarantee Clause to be a non-justiciable political question.¹⁹² The Court's holding in *Luther* that Congress possesses the authority to determine whether a state government is republican and to exclude the representatives of insufficiently republican governments on Guarantee Clause grounds has never been overruled.¹⁹³

One argument against the legality of exclusion on Guarantee Clause grounds would likely rely on the Supreme Court's 1969 decision in *Powell v. McCormack* concerning the exclusion of Representative Adam Clayton Powell Jr. from the House seat to which he had been re-elected after multiple allegations of political corruption.¹⁹⁴ While Speaker of the House John McCormack argued that excluding Powell from his seat was a political question, the Court rejected this argument, instead holding that Powell's exclusion was unconstitutional,¹⁹⁵ and declaring that the House of Representatives is "without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."¹⁹⁶ While this holding may on its surface seem to threaten the constitutionality of *Luther* exclusion, a close and contextualized reading of the *Powell* decision provides no justification for dismissing the constitutionality of the Guarantee Clause exclusion power.

First, the text of the Court's decision can be reconciled with Guarantee Clause jurisprudence by the mere assertion that a candidate whose election was orchestrated by an unrepugnant state government was not "duly elected."

191. See generally Chin, *supra* note 125 (arguing that the Guarantee Clause justifies revised preclearance provisions).

192. See *Baker v. Carr*, 369 U.S. 186, 209 (1962); *supra* Section II.C.

193. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).

194. *Powell v. McCormack*, 395 U.S. 486, 490 (1969).

195. *Id.* at 495, 550.

196. *Id.* at 522.

Second, the Court explicitly limited its *Powell* analysis to “the scope of any ‘textual commitment’ under Art. I, § 5.”¹⁹⁷ Thus, the Court did not consider its ruling under the textual hook of the Guarantee Clause.

Third, *Powell* should be read as in harmony with *Luther*, because its reasoning was descended from *Luther*. While *Powell* does not directly cite *Luther*, it applies *Baker*’s formulation of the political question doctrine.¹⁹⁸ The *Baker* Court’s finding that a non-justiciable political question exists when there is “textually demonstrable constitutional commitment of the issue to a coordinate political department” is central to the *Powell* Court’s analysis.¹⁹⁹ This finding was a product of the *Baker* Court’s interpretation of Guarantee Clause jurisprudence beginning with *Luther*. The *Baker* Court discusses *Luther* at length and approves of “its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State’s lawful government” and therefore represents a political question.²⁰⁰ Furthermore, *Baker* cites *Stanton v. Georgia* as establishing “that challenges to congressional action on the ground of inconsistency with [the Guarantee] [C]ause present no justiciable question.”²⁰¹ Thus, reading *Powell* as inconsistent with a Guarantee Clause exclusion power would have the absurd result of interpreting the political question doctrine articulated in *Baker* as overturning the same body of Guarantee Clause jurisprudence upon which the *Baker* Court explicitly relied.

While the *Powell* Court did discuss Reconstruction as an era of unprecedented legislative exclusion, it only discussed those individuals excluded for rebel loyalty and corruption in 1868.²⁰² Condemning those exclusions as acts of political expediency without doctrinal support, the Court made no mention of the Guarantee Clause.²⁰³ Nor should it have. Both prior rebel loyalty and allegations of corruption, including those against Congressman Powell, are failings of individual politicians. The Guarantee Clause is not concerned with the character of individual candidates, but the

197. *Id.* at 521. This “analysis of the ‘textual commitment’ under Art. I, § 5 . . . has demonstrated that in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution.” *Id.* at 550.

198. *Id.* at 518–21.

199. *Id.* at 518, 521 (quoting *Baker*, 369 U.S. at 217); *Baker*, 369 U.S. at 217.

200. *Baker*, 369 U.S. at 223.

201. *Id.* at 224. Since

Congress had clearly refused to recognize the republican character of the government of the suing State[] the Court [found] that the only constitutional claim that could be presented was under the Guaranty Clause, and Congress having determined that the effects of the recent hostilities required extraordinary measures to restore governments of a republican form, this Court refused to interfere with Congress’ action at the behest of a claimant relying on that very guaranty.

Id. at 224–25.

202. *Powell*, 395 U.S. at 544 & n.81.

203. *Id.* at 545–46.

character of state governments and the elections conducted under their authority.²⁰⁴

Beyond *Powell*, an argument could be made that the Clause explicitly guarantees only republican state governments, and as such it is only applicable when considering members of Congress chosen directly by state governments and irrelevant to considering those chosen by a popular election.²⁰⁵ This line of reasoning would mean the Clause never justified exclusion in the House and has not justified exclusion in the Senate since the Seventeenth Amendment went into effect. This argument is incompatible with *Luther*, which explicitly recognizes the power to recognize by admission as belonging to both houses of Congress, not exclusively to the Senate as the body whose members were chosen by state legislatures.²⁰⁶ Additionally, this argument understates the important role of state government in selecting members of Congress today.²⁰⁷ The Seventeenth Amendment gives state governments the power to fill vacant Senate seats.²⁰⁸ This power is not insignificant: Since the Seventeenth Amendment went into effect, at a minimum, 196 senators have been admitted as state government appointees.²⁰⁹ While members of the House cannot be appointed by state governments, state governments are constitutionally charged with drawing their districts.²¹⁰ Most importantly, state governments are constitutionally vested with authority over “[t]he Times, Places and Manner of holding Elections for Senators and Representatives”²¹¹ Congressional elections are administered by state officials acting under the authority of state constitutions and executing voting law passed by state legislatures. While the most parsimonious Guarantee Clause argument may be for its application regarding a Senator appointed by state legislatures,²¹² an unrepublican state government does not constitutionally possess the authority to perform any of these tasks and, therefore, under *Luther*, if Congress determines that a state government is unrepublican it can refuse to seat any representative from that state.

But what would exclusion on Guarantee Clause grounds look like in practice? What sorts of criteria ought to be considered? There is historical precedent for Guarantee Clause exclusion to assist in answering these questions.

204. See U.S. CONST. art. 4, § 4, cl. 2.

205. See *id.*

206. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).

207. U.S. CONST. art. I; *id.* amend. XVII.

208. *Id.* amend. XVII.

209. *Appointed Senators (1913–Present)*, U.S. SENATE, <https://www.senate.gov/senators/AppointedSenators.htm> [<https://perma.cc/8867-5WPQ>].

210. U.S. CONST. art. I, § 2.

211. *Id.* art. I, § 4, cl. 1.

212. See *supra* Section III.B.

C. THE LOUISIANA QUESTION

Returning to the Reconstruction era provides some precedential grounding for a modern Guarantee Clause exclusion framework.²¹³ This Section will examine the admission proceedings in the United States Senate following the disputed Louisiana election of 1872. Unlike other electoral disputes in post-readmission Southern states, this election was disputed not because of mass violence committed against black voters, but because of a state election policy that may be seen again in the twenty-first century.

Like the Dorr Rebellion which gave rise to *Luther*, the Louisiana Question of 1872 involved two rival claimants to state government. However, unlike *Luther*, the conflict arose from a disputed election with both parties claiming their legitimacy under the same state constitution—accepted by Congress as meeting the requirements for readmission under the Reconstruction Acts in 1868.²¹⁴

The 1872 Louisiana gubernatorial election pitted Republican U.S. Senator William P. Kellogg against John McEnery who was running on a fusion ticket of Democrats and Liberal Republicans.²¹⁵ The state's Liberal Republican Governor Henry C. Warmouth organized a board of canvassers to determine the victor, but a preexisting board of canvassers disputed the legality of the Warmouth Board.²¹⁶ Before Warmouth announced McEnery as the election's winner, Kellogg brought a claim in federal district court alleging that Governor Warmouth had refused to register thousands of eligible black voters and that the Warmouth Board was falsifying election returns by not counting "a number of ballots of citizens of color."²¹⁷ The court found for Kellogg²¹⁸ and Republicans in the outgoing legislature initiated impeachment proceedings against Warmouth: suspending him from office and replacing him with Republican Lieutenant Governor P.B.S. Pinchback.²¹⁹ Democrats formed a rival legislature which recognized McEnery as governor-elect along

213. To quote Justice Holmes, "[u]pon this point a page of history is worth a volume of logic." *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921).

214. MATTHEW CARPENTER, REPORT OF COMMITTEE IN THE SENATE OF THE UNITED STATES (Feb. 20, 1873), reprinted in COMPILATION OF SENATE ELECTION CASES FROM 1789 TO 1885, at 433 (George S. Taft ed., 1885).

215. *Id.*

216. *Id.*

217. *Id.* at 427, 434.

218. Judge Henry Durell of the United States District Court for the District of Louisiana ordered that the Warmouth board cease "pretending to consider" the election results and restraining McEnery from "acting or pretending to act as governor of the State of Louisiana." *Id.* at 436–37.

219. *Id.* at 459. With his Warmouth's suspension, P.B.S. Pinchback became the only African-American governor to serve during American reconstruction. Eric R. Jackson, *Pinchback, P.B.S.*, AM. NAT'L. BIOGRAPHY (Feb. 2000), <https://www.anb.org/view/10.1093/anb/9780198606697.001.0001/anb-9780198606697-e-0400792?rskey=yyPkBA&result=1> [<https://perma.cc/72PR-QLHK>].

with the Warmouth Board.²²⁰ Now with two state legislatures recognizing two governors-elect, Louisiana was on the verge of civil war.²²¹ When Kellogg requested aid from President Grant to restore order, Grant recognized Kellogg as the state's governor and dispatched federal troops.²²²

Soon, the Louisiana Question arrived in the United States Senate, when both the Kellogg and McEnery legislatures selected candidates to fill the Senate term left vacant by Kellogg's resignation.²²³ The Senate Committee on Privileges and Elections understood that under *Luther*, the decision to seat either candidate constituted legal recognition of the legitimacy of the government which selected the candidate. The Committee dispatched Republican Senator Matthew Carpenter of Wisconsin²²⁴ on a fact-finding mission to Louisiana to provide his recommendation about which candidate should be admitted.²²⁵

In his report, adopted by the Committee, Carpenter found that the Warmouth Board's vote tally was the more accurate of the two canvassing boards and therefore "[i]f the Senate should be inclined not to go behind the official returns of the election, then the McEnery government and legislature must be recognized as the lawful government of the State," and its appointee should be admitted.²²⁶ However he believed the Senate needed to go "behind" the official returns, because the election itself and therefore the McEnery

220. CARPENTER, *supra* note 214, at 435.

221. Judge Durell ordered federal marshals to break up the McEnery government's "unlawful assemblage." LYMAN TRUMBULL, REPORT IN THE SENATE OF THE UNITED STATES (Feb. 20, 1873), reprinted in COMPILATION OF SENATE ELECTION CASES FROM 1789 TO 1885, *supra* note 214, at 462. The Supreme Court of Louisiana determined that the Warmoth Board was illegitimate under the state constitution and recognized Kellogg as governor. *Id.* at 463.

222. See Letter from President Ulysses S. Grant to Congress (Feb. 25, 1873), in 23 THE PAPERS OF ULYSSES S. GRANT 51-54 (John Y. Simon ed. 2000).

223. CARPENTER, *supra* note 214, at 428.

224. In his career as a Supreme Court litigator, Carpenter would argue both for and against the constitutionality of Reconstruction policy and a limited interpretation of the Fourteenth Amendment. Before his term in the Senate, Carpenter represented the plaintiff in *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866) a successful challenge to oath requirements by the Reconstruction but represented the United States in *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1869). In 1873, Carpenter represented Louisiana in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), substantially limiting the protections of the Fourteenth Amendment, while in the same Supreme Court term, representing Myra Bradwell in her claim that the Fourteenth Amendment prohibited the Illinois from denying her admission to the bar, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873). In the aftermath of the disputed election of 1876, Carpenter represented the Democrat Samuel Tilden before the Electoral Commission. Brooks D. Simpson, *Carpenter, Matthew Hale*, AM. NAT. BIOGRAPHY (Feb. 2000), <http://www.anb.org/view/10.1093/anb/9780198606697.001.0001/anb-9780198606697-e-0400208#anb-9780198606697-e-0400208> [https://perma.cc/6LU7-WDNG].

225. CARPENTER, *supra* note 214, at 427. The Carpenter report was also highly critical of Judge Durell, calling the intervention of federal judicial power as "the saddest chapter in this melancholy business." *Id.* at 433.

226. *Id.* at 457.

government which won that election were not republican in form.²²⁷ Describing the election as “void for fraud,” he reasoned that Kellogg would have won if it had “been fairly conducted and returned,” because the state’s black “voters were almost unanimous in their support of” Kellogg and the population of eligible black voters outnumbered the eligible white population.²²⁸ This outcome had been thwarted by Governor Warmouth. While the election itself had been “unusually free from disturbance or riot,” the power of the black electorate had been suppressed by Warmouth’s corruption of “the . . . machinery of the election.”²²⁹

The testimony show[ed] a systematic purpose on the part of those conducting the election to throw every possible difficulty in the way of the colored voters in the matter of registration. The polling places are not fixed by law, and at the last election they were purposely established by those conducting the election at places inconvenient of access, in those parishes which were known to be largely Republican; so that, in some instances, voters had to travel over twenty miles to reach the polls.²³⁰

Despite finding that Kellogg would have won a fair election, Carpenter also concluded that his government was insufficiently republican, since the non-Warmouth board, “circumventing fraud by fraud,” had provided estimates rather than a reliable vote count.²³¹ Believing Congress should neither recognize the actual losers of an election or a victor whose election was “based upon fraud, in defiance of the wishes and intention of the voters of that State,” Carpenter proposed a third option: a new election.²³²

Carpenter recognized the question of whether Congress had the authority to order a new state election as “one of the most important and delicate questions that can arise under the Constitution,” but believed it was within the power granted to the federal government under the Guarantee Clause.²³³ Beginning his analysis with *Luther*, he determined that Louisiana lacked a legitimate government because McEnery’s government was only *de jure* and Kellogg’s was only *de facto*, as its authority was sustained by federal troops.²³⁴ Without a legitimate government to recognize, Carpenter argued that Congress must act swiftly to facilitate one’s creation. Predicting that the

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 457–58.

232. *Id.* at 458.

233. *Id.*

234. *Id.* at 458. Citing *Luther*, Carpenter argued that the state supreme court’s finding for the Kellogg government was in no way binding on Congress, since its own power as the state’s highest court “necessarily affirms the existence and authority of the government under which it is exercising judicial power.” *Id.* at 459 (quoting *Luther v. Borden*, 48 U.S. (7 How.) 1, 40 (1849)).

removal of federal troops would lead to civil war between the factions while simultaneously holding onto the idea that the Kellogg government was unrepresentative and therefore could not morally be secured by federal force, he concluded that the “best solution” was a federally compelled election to provide a government “elected by the people, to which they will submit, or which, in case of disturbance, the United States can honestly maintain.”²³⁵

His recommended preamble for the new election bill provided his arguments for both the measure’s constitutionality and its necessity:

We are aware that ordering an election in a State upon the ground that an election which has been held is void for fraud is an exercise of power which ought never to be undertaken by Congress without stern necessity. It will be said that if such power resides in Congress it may be exercised improperly. This is true. But the same may be said of every power conferred upon a government. The people, in adopting the Constitution of the United States, saw fit to confer upon the General Government authority to guarantee to each of the States a government republican in form. This undoubtedly confers the power to determine whether a particular State has a government, and, if so, whether it be republican in form. There is no doubt Congress might to-morrow, as a question of mere power, declare that the government of Massachusetts is not republican in form, and set up in its place a government which it might determine to be so. This would, of course, be a great abuse of this power. When a judge has jurisdiction to decide a cause, he has as much power to decide it wrong as right; and an erroneous judgment is as valid as any other, until vacated or reversed by competent authority. In exercising this power Congress should act with great caution and prudence. The clamor usually raised by those who are defeated in an election should not, and would not, induce Congress to interfere. Ordinarily, even a government elected by fraud, but going quietly into the exercise of power, and submitted to by the people, may better be left to fill its brief term than be interfered with by Congress. But when the frauds committed are so glaring and widespread as to create public discontent in the State, and the organization of two rival governments threatening civil war, and it is manifest that neither government has been fairly elected, this power of the National Government must be regarded as wise and salutary. It cannot be maintained that its prudent exercise violates the rights of the States, because the States, for their own protection and security, have conferred the power upon the National Government; and this Government cannot refuse or neglect to exercise it, in a proper case, without disregarding the obligation which the Constitution has

235. *Id.* at 461.

devolved upon it. We think the melancholy condition of the people of Louisiana, who are substantially in a state of anarchy, makes it the duty of Congress to act in the premises.²³⁶

When the Committee adopted Carpenter's report, there were dissenters in the Committee from across the political spectrum. Liberal Republican Senator Lyman Trumbull of Illinois²³⁷ argued that the McEnery government was entirely legitimate, its nominee should be admitted, and President Grant should recall the federal troops protecting the Kellogg "usurpation."²³⁸ While Trumbull agreed that "[t]he inquiry [of] what is the established government in a State, belongs to the political, and not the judicial power,"²³⁹ he believed that the determination that McEnery had won the most votes ought to have been the end of it.²⁴⁰ Congress had no "authority to inquire into the fairness and regularity of a State election," let alone void "one of the most quiet and peaceful elections ever held in the State."²⁴¹

Republican Senator and Committee Chairman Oliver P. Morton of Indiana dissented from the majority report because he believed that Kellogg's government was the legitimate, republican government of Louisiana.²⁴² Agreeing with Carpenter that the 1872 election had been fraudulent and that McEnery's government was un-republican and illegitimate, he attacked

^{236.} *Id.*

^{237.} David Osborn, *Trumbull, Lyman*, AM. NAT'L BIOGRAPHY (Feb. 2000), <http://www.anb.org/view/10.1093/anb/9780198606697.001.0001/anb-9780198606697-e-0400998> [<https://perma.cc/8T86-VA7J>]. In addition to being one of the principal leaders of the Liberal Republican movement and a member of the Senate Committee on Elections and Privileges, Lyman Trumbull was also a well-respected scholar of constitutional law. He was Carpenter's co-counsel for the United States in *Ex Parte McCordle* and, as a member of the Senate Judiciary Committee, was one of the principal drafters of the Thirteenth Amendment. *Id.*

^{238.} LYMAN TRUMBULL, REPORT IN THE SENATE OF THE UNITED STATES (Feb. 20, 1873), reprinted in COMPILATION OF SENATE ELECTION CASES FROM 1789 TO 1885, *supra* note 214, at 462.

^{239.} *Id.* at 468.

^{240.} *Id.* at 469.

^{241.} See *id.* at 468–69 ("The history of the world does not furnish a more palpable instance of usurpation than that by which Pinchback was made governor and the persons returned by the Lynch board the legislature of Louisiana; nor can a parallel be found for the unfeeling and despotic answers sent by order of the President to the respectful appeals of the people of Louisiana."). Despite the overarching differences, Lyman, like Carpenter, railed against the actions of Judge Durell, arguing that "but for such illegal and unwarranted interference, the McEnery State government and legislature would have been peacefully inaugurated." *Id.* at 462. He also agreed that the Louisiana Supreme Court's recognition of the Kellogg government was irrelevant, because Congress was not bound by the decision of any court "upon political questions." *Id.* at 468.

^{242.} OLIVER MORTON, REPORT IN THE SENATE OF THE UNITED STATES (Feb. 20, 1873), reprinted in COMPILATION OF SENATE ELECTION CASES FROM 1789 TO 1885, *supra* note 214, at 475. Senator Morton recognized that the situation was substantially different from that faced in 1865 where they formerly "were without governments of any kind" and the contemporary "condition of Louisiana" in which Congress was tasked with ascertaining which government was the "legal actual government" and if it was "republican in form." *Id.*

Carpenter's new election proposal. Identifying that "[t]he theory of our system is that every State government possesses the power and machinery to correct the wrongs and frauds within itself,"²⁴³ he argued that Kellogg's government was not only the *de facto* government of the state, but also that it had been recognized by the Louisiana Supreme Court, and was therefore the state's *de jure* government as well. As such, if

Congress declare[s] that Louisiana has no legal State government and provide by law for a new election, it would establish a precedent for overturning State governments and setting up new ones under which the government of every State would be at the mercy of Congress as controlled by the passions or exigency of parties.²⁴⁴

Furthermore, even "if Congress could, without exercising a dangerous power and establishing a perilous precedent, set aside the election and provide for a new one, with security that it should be fair, [and] it would be far more satisfactory to the people of the whole nation" such action was simply unconstitutional.²⁴⁵ Senator Morton went on to say:

Congress has not the jurisdiction to examine and redress every great wrong that may take place in a State. Where, by the constitution and laws of a State, legal remedies are provided for the redress of all wrongs that may take place in regard to elections, it would be inconsistent with the independence and integrity of the State governments for the United States to interfere and assume jurisdiction upon the ground that the State tribunals have acted wrongfully and fraudulently, or will so act. The Government of the United States is not a Don Quixote, going forth to hunt up and redress all the wrongs that may be inflicted upon the people in any part of the country; but is a Government limited and restrained in its jurisdiction by the charter of its creation, and that charter distinctly recognizes the existence of State governments to be constituted legally by the States themselves, subject only to the provision of the higher law that they shall be republican in form.²⁴⁶

²⁴³. *Id.*

²⁴⁴. *Id.* at 478. Though he agreed that Judge Durell "grossly exceeded his jurisdiction, and assumed the exercise of powers to which he could lay no claim," Morton believed his decision ultimately produced a just result by protecting the government preferred by the state's electorate. *Id.* at 477.

²⁴⁵. *Id.* at 476.

²⁴⁶. *Id.*

Ultimately, the Senate rejected Carpenter's proposal for a new election,²⁴⁷ and abstained from recognizing either faction's claim to legitimacy excluding both candidates.²⁴⁸

When the Senate took up the issue again,²⁴⁹ Morton's position won out in the Committee and it recommended admitting the new appointee of the Kellogg legislature, former Governor P.B.S. Pinchback.²⁵⁰ Two Democrats on the Committee co-authored a dissenting report deriding the Kellogg government as illegitimate.²⁵¹ "No one . . . can be the constitutional governor of that State unless he be chosen in the manner prescribed" by its Constitution, and as Carpenter had found in his previous report, Kellogg had not won the most votes in the 1872 election.²⁵²

In the ensuing debate on the Senate floor, Republican Senator Theodore Frelinghuysen of New Jersey advanced the compromise position that as the state's presidentially recognized executive, Kellogg, should remain governor, but the Senate should not wait to fill the vacant seat until after Louisiana's next state election.²⁵³ He grounded his argument in an interpretation of the Guarantee Clause prioritizing the legitimacy of state governments:

It is a guarantee to every State of a government. It is a guarantee against anarchy, a guarantee against violence, a guarantee against one government neutralizing another, a guarantee of the unity of government, for a government to be a government must be a unit. That the government shall be "republican in form" is an incident, an attribute, a quality of the thing guaranteed, which is government, and, as a consequence, order, peace, tranquility. The primary object of the guarantee is government, and the secondary object security against monarchy, despotism, or aristocracy.²⁵⁴

247. REPORT OF COMMITTEE IN THE SENATE OF THE UNITED STATES (Mar. 22, 1878), *reprinted in* COMPILATION OF SENATE ELECTION CASES FROM 1789 TO 1885, *supra* note 214, at 481–82.

248. *Id.* On Easter Sunday, 1874, a white militia recognizing McEnery as the rightful governor attacked and slaughtered a mixed-race group of Kellogg supporters in Colfax. FONER, *supra* note 10, at 550. *United States v. Cruikshank*, 92 U.S. 542 (1875), concerned the constitutionality of prosecuting alleged perpetrators of the Colfax Massacre under the Third Enforcement Act. *See supra* Section II.B.

249. FIRST SESSION OF THE FORTY-THIRD CONGRESS, *reprinted in* COMPILATION OF SENATE ELECTION CASES FROM 1789 TO 1885, *supra* note 214, at 484.

250. *Id.* at 484–85.

251. WILLIAM HAMILTON & ELI SAULSBURY, VIEWS OF THE MINORITY IN THE SENATE OF THE UNITED STATES (Feb. 11, 1875), *reprinted in* COMPILATION OF SENATE ELECTION CASES FROM 1789 TO 1885, *supra* note 214, at 486–502.

252. *Id.* at 490.

253. 2 CONG. REC. 1109–11 (1874). Senator Carpenter, speaking before Frelinghuysen, criticized the proposition that the President's recognition of the Kellogg Government rendered it legitimate.

254. *Id.* at 1109.

Citing *Luther*, Frelinghuysen discussed the intertwined nature of the Guarantee Clause and Domestic Violence Clause: The necessity of acting against domestic violence required the recognition of a government since “the very essence of order is the unity of government.”²⁵⁵ Thus, while President Grant was within his constitutional authority in recognizing and sending federal troops to defend the Kellogg Government,²⁵⁶ Congress was not bound by the President’s recognition of a state government when evaluating if the state government was sufficiently republican to admit its representatives.²⁵⁷ As neither faction satisfied the requirements of the Guarantee Clause, neither should be recognized and the seat should remain vacant until a free and fair state election provided a republican government recognized as legitimate by its citizenry.²⁵⁸

Even after that next state election, the seat remained vacant.²⁵⁹ On March 8, 1876, a resolution to exclude Pinchback passed by a vote of 32 to 29, with both Morton and Frelinghuysen voting for admission.²⁶⁰

An analysis of these arguments provides answers to important questions relevant to modern employment of the Guarantee Clause exclusion power. While on a jurisdictional level, each senator accepted that the Guarantee Clause was a political question and that the federal courts would and should not interfere with Congress’s determination,²⁶¹ the parameters of the debate were controversial. When an election is peacefully carried out under a state constitution, recognized by Congress as republican, is Congress bound to accept the victor or should it evaluate whether the vote tally was truly the will of the electorate? The former, more restrained alternative, supported by Trumbull, is most consistent with Madison’s interpretation of the Clause, though the Illinois Senator recognized the legality of the Reconstruction Acts. The latter, more proactive option, as championed by Carpenter and Morton, was tempered with restraint. Both Republicans were clear that the Guarantee

255. *Id.* at 1110.

256. *Id.*

257. *Id.*

258. *Id.*

259. REPORT OF COMMITTEE, *reprinted in* COMPILATION OF SENATE ELECTION CASES FROM 1789 TO 1885, *supra* note 214, at 506. The violence continued in Louisiana—in the spring of 1874, the McEnery-aligned White League assassinated several Republican officials. On September 14, 1874 in New Orleans, White League forces launched an attack on state militiamen and police officers, killing dozens and only dissipating with the arrival of federal troops. FONER, *supra* note 10, at 550–51.

260. REPORT OF COMMITTEE, *reprinted in* COMPILATION OF SENATE ELECTION CASES FROM 1789 TO 1885, *supra* note 214, at 506.

261. Even Senator Morton, who agreed with the grounds of Judge Durell’s order—that the Warmouth Board was illegitimate, and Kellogg should be recognized as the victor of the election—condemned Durell for issuing it. While Morton did invoke the Louisiana Supreme Court’s decision, this reference can be interpreted as persuasive, rather than binding. OLIVER MORTON, REPORT IN THE SENATE OF THE UNITED STATES (Feb. 20, 1873), *reprinted in* COMPILATION OF SENATE ELECTION CASES FROM 1789 TO 1885, *supra* note 214, at 478.

Clause exclusion power was to be used sparingly and only when the election was clearly fraudulent; in this particular case, won by a “systematic” process to disenfranchise black voters.

Finally, having established that a candidate ought to be excluded from the Senate on Guarantee Clause grounds, the Senate had to decide what to do with the vacant seat. Carpenter argued that a new election overseen by the federal government would be the only fair recourse: It would render the Senate’s perception of the electorate’s true choice a testable hypothesis, justify federal intervention on its behalf, and most importantly provide the new government and its appointee with legitimacy in the eyes of the public at large. Morton argued that in this case with two rival factions, the appointee of the losing faction in the fraudulent election should be admitted because the legislature which appointed him was recognized as legitimate by the state supreme court. Though an analogous situation is unlikely to arise in the twenty-first century, the opposing arguments he offered to Carpenter’s proposal are persuasive. Setting aside the constitutional issues, a federally mandated do-over election was unprecedented, impractical, and unlikely to be received as legitimate by McEnery supporters.

The third and ultimately adopted alternative, promoted by Senator Frelinghuysen among others, to leave the seat vacant until a republican government is produced by a free and fair state election, proved to be the superior option, because it was politically practical.

This wait-and-see approach understood that the entire debate could appear to the public as a partisan power-grab. Certainly, the debate was to some extent a partisan exercise: The support for recognizing the McEnery government came from Senate Democrats and Liberal Republicans, while Republicans Morton, Frelinghuysen, and Carpenter were united in their finding that the McEnery government was illegitimate. Any exclusion of a minority party’s candidate will invoke a suspicion of partisanship. However, admitting a majority party candidate to the seat instead would undoubtedly appear even worse to the public, potentially resulting in severe political consequences for the majority party in the next election. And forcing a new election upon the state’s electorate would not look much better. Waiting permits the candidate next admitted to claim the legitimacy of a regularly scheduled and actually-won election without federal interference.

Perhaps, most importantly, the Louisiana Question of 1872 provides some precedent for what state actions constitute the grounds for finding an election to be fraudulent. The Carpenter Report concluded the election had violated the Guarantee Clause, because Governor Warmouth and state election officials acting on his orders manipulated the “machinery of the

election” with a “systematic purpose” to decrease black voter turnout, so that McEnergy would win the gubernatorial election.²⁶²

The methods by which Warmouth manipulated the election of 1872 can be analogized to state actions taken during the 2018 midterm elections allegedly to suppress voter turnout in minority communities. Carpenter found that Louisiana state election officials “thr[e]w every possible difficulty in the way of the colored voters in the matter of registration.”²⁶³ Senator Carpenter found that the Warmouth Administration had moved polling sites in majority black parishes to “places inconvenient of access” as another method of disenfranchising voters.²⁶⁴ Similarly, in 2018 in Kansas, county officials moved the only polling place in majority Hispanic Dodge City to a location outside city limits and more than a mile from the nearest bus stop.²⁶⁵

IV. RECOMMENDATION

Congress should publicly recognize its exclusion power under the Guarantee Clause to deter state manipulation of the “machinery of the election” for partisan gain. This can be accomplished with a joint resolution adopting a majoritarian interpretation of “republican” and providing a clear test for excluding candidates whose election is shown to be the product of voter suppression. Partisan voter suppression measures are pursued to win elections, and this resolution protects the integrity of state, local, and federal elections by removing up-ballot prizes for voter suppression which provide a share of the incentive to engage in such behavior. While ideally the deterrent alone would be enough, Congress would need to enforce its resolution by excluding candidates whose elections violate its standard to preserve that standard’s value as a deterrent. This Note proposes a relatively simple three-pronged test to determine if a candidate should be excluded.²⁶⁶ Given the

262. CARPENTER, *supra* note 214, at 431, 457. While believing that even fraudulent elections did not in all circumstances merit intervention, Carpenter argued Congress had to intervene in this particular situation since “the frauds committed are [(1)] so glaring and widespread as to create public discontent in the State, [(2)] the organization of two rival governments threaten[s] civil war, and [(3)] neither government has been fairly elected.” *Id.* at 461.

263. *See id.* at 457.

264. *See id.*

265. Roxana Hegeman, *Iconic Dodge City Moves Its Only Polling Place Outside Town*, TOPEKA CAP.-J. (Oct. 19, 2018, 9:58 AM), <https://www.cjonline.com/news/20181019/iconic-dodge-city-moves-its-only-polling-place-outside-town> [<https://perma.cc/P26T-YW3K>]. For a discussion of the Dodge City community’s reactions to the moving of the polling place, see Katie Moore, *Hispanic Voters Speak Out in Wake of Dodge City Polling Controversy*, TOPEKA CAP.-J. (Nov. 5, 2018, 12:12 PM), <https://www.cjonline.com/news/20181104/hispanic-voters-speak-out-in-wake-of-dodge-city-polling-controversy> [<https://perma.cc/LA34-A5Y4>].

266. The three-pronged test for Guarantee Clause exclusion should not be read as the only acceptable course for exclusion. Congress should also exclude candidates whom it determines to not be duly elected because of the illegal activities of private actors. The 2018 election in North Carolina’s congressional district highlight the need for this power. While the state board of elections acted appropriately in refusing to certify a victor in that election and ordering a new

harsh punishment, the burden of proof should be on those who seek to exclude and require ample evidentiary support.

In its preface to the standard, Congress should endorse a majoritarian definition of “republican:” Defining a republican state government as one committed in its election policy to the principle of majority rule. While more aspirational than practical, this big tent statement of values provides the moral justification for the standard. If Congress is threatening to punish states for being un-republican by denying them representation, it needs to provide a definition of republican that is palatable to Americans across party lines and rooted in our nation’s history.

Once the definition is established, Congress can move to the test itself. This Note’s test proposal is three-pronged. If all three prongs are met, then the candidate is excluded. Proper deliberation on each prong would require extensive fact-finding and the procedure ought only to be applied if Congress already has considerable doubt about the legitimacy of the candidate’s election.

First, the government of the state from which the candidate was elected must have implemented, through legislation or other means, a policy or set of policies which unreasonably burdened eligible voters who desired to cast their votes in the election won by the candidate. This prong is a simple reasonableness test: Did the policy’s burdens on eligible voters outweigh its benefits to serving legitimate state interests like lower budgetary costs and increased election security? This prong ought to be the easiest to prove for proponents of exclusion.

Second, the policy must have been implemented with the intent, at least in part, to provide an electoral advantage to the implementers or their political allies by decreasing the turnout of voters supporting opposing candidates. This prong would require the kind of evaluation of legislative intent that is a controversial subject in the federal courts. As the late Justice Scalia illustrated in his dissent in *Edwards v. Aguillard*, legislators may vote for a particular piece of legislation for all sorts of reasons.²⁶⁷ However, the Supreme Court continues to evaluate discriminatory intent in its Equal

election, if it had certified Republican Mark Harris as the victor despite his campaign contractor’s potentially decisive ballot forging and stealing operation, then Congress would and should have excluded Harris. For a discussion of the controversy in North Carolina’s ninth congressional district, see Nathaniel Rakich, *What the Heck Is Happening in that North Carolina House Race?*, FIVETHIRTYEIGHT (Nov. 30, 2018, 5:58 PM), <https://fivethirtyeight.com/features/what-the-heck-is-happening-in-that-north-carolina-house-race> [<https://perma.cc/SD3S-CBSQ>]. See also Alan Blinder, *Election Fraud in North Carolina Leads to New Charges for Republican Operative*, N.Y. TIMES (July 30, 2019), <https://www.nytimes.com/2019/07/30/us/mccrae-dowless-indictment.html> [<https://perma.cc/X82R-X9PL>]; Leigh Ann Caldwell & Dartunorro Clark, *New Election Ordered in North Carolina House District After Possible Illegal Activities*, NBC NEWS (Feb. 21, 2019, 3:04 PM), <https://www.nbcnews.com/politics/congress/republican-candidate-mark-harris-calls-new-election-north-carolina-disputed-n974176> [<https://perma.cc/8GMX-9UGD>].

²⁶⁷. See *Edwards v. Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting).

Protection Clause analysis.²⁶⁸ And the evaluation may not always be that difficult; state legislators are sometimes remarkably transparent about the motivation behind election laws passed to increase their party's electoral fortunes. In 2012, Republican Pennsylvania House Majority Leader Mike Turzai touted a voter ID law passed under his leadership as "going to allow Governor Romney to win the state of Pennsylvania."²⁶⁹

Four years later in *North Carolina State Conference of NAACP v. McCrory*, the Fourth Circuit struck down voting laws in North Carolina after determining that laws "intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose"²⁷⁰ after finding that North Carolina state legislators had requested racial breakdowns of voter information and then enacted legislation targeting voting behaviors favored by those black voters.²⁷¹

Third, the election policy must have been a decisive factor in the disputed candidate's election. In other words, without the policy in place, the candidate would have been defeated. On its face, this prong seems counterproductive for deterring voter suppression because it serves to protect candidates assisted by voter suppression merely because the voter suppression cannot be proven a necessary cause of their victory. However, while this standard seeks to decrease the potential harm inflicted on individuals by voter suppression measures by removing some of the incentive to enact such policies, its principal focus is ensuring the majority rule. Superfluous voter suppression—despite its harm to individual voters and the system as a whole—cannot, under the preface's majoritarian definition of "republican," justify voiding the will of the majority. Of the three, this prong would be the hardest to prove and require detailed statistical analysis.

Based on the 2018 North Dakota and Georgia voter suppression allegations summarized in Section III.A, neither scenario would merit exclusion under the proposed three-part test even if those actions do constitute voter suppression. While both the North Dakota voter identification law and the Georgia registration purges can be found unreasonable under the first prong of this test, it is unlikely either would meet the intent prong. As for the third prong, the margin of victory was clearly too high in the 2018 North Dakota Senate election for its voter identification law to have been characterized as a deciding factor. While the question is a closer one in regard to the Georgia Governor's race, it is hard to believe the evidence meets that the high burden of proof demanded by that prong. One case

268. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

269. Aaron Blake, *Republicans Keep Admitting that Voter ID Helps Them Win, for Some Reason*, WASH. POST (April 7, 2016, 11:34 AM), <https://www.washingtonpost.com/news/the-fix/wp/2016/04/07/republicans-should-really-stop-admitting-that-voter-id-helps-them-win> [https://perma.cc/VTJ2-PAPT].

270. *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016).

271. *Id.* at 217.

discussed in this Note, however, would warrant exclusion under the proposed solution. Regarding the Louisiana Question of 1872, an appointee from the McEnery government evaluated based on the information in Carpenter's report would meet all three prongs and be excluded under this standard.

A high burden of proof ought to be required, because exclusion has substantial costs. When a candidate is excluded, his or her would-be constituents are denied their representation in Congress until the next election. Even in border-line cases where a candidate is eventually admitted, the necessary factfinding and debate could cost constituents representation in Congress for a considerable period of time and delay the legislative agenda of the entire Congress. A representative elected by the suppression of a portion of the electorate, still represents the will of more of the electorate than no representative at all. However, the admission of such a representative preserves the incentive to enact voter suppression measures and cuts against the purpose of the Guarantee Clause as articulated by James Madison: protecting the nation's republican principles from internal subversion.²⁷²

In addition to costs in representation, exclusion could pose substantial political costs to the majority party. In this era of increasing party polarization, Americans' distrust of their political opponents is at its highest level in decades,²⁷³ excluding any elected candidate of a minority party will undoubtedly be condemned by many as a partisan exercise. Both Democratic and Republican voters were more likely to express confidence in the voting process in their communities, when their Congressional district was won by their party's candidate.²⁷⁴ In addition to ensuring fairness for its own sake, a clearly articulated and consistently applied test is necessary to counter this perception even if it could never be defeated. While perhaps chimeric in the current political climate, bipartisan support may be necessary to actually ensure this defeat.

Beyond the mere perception of partisan intrigue, there is a hazard that the power to deny admission on Guarantee Clause grounds could be exploited for partisan advantage and subverting the principles it should be protecting, but this hazard is not an argument for why the power should not be used; it is an argument for why the power should not exist in the form described. Modern political question doctrine forecloses judicial consequences, and without judicial review there is a disturbing lack of

272. See THE FEDERALIST NO. 43 (James Madison).

273. *Partisanship and Political Animosity in 2016*, PEW RES. CTR. (June 22, 2016), <http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016> [https://perma.cc/H6YL-GPJ6]; see also Niraj Chokshi, *U.S. Partisanship Is Highest in Decades, Pew Study Finds*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/politics/partisanship-republicans-democrats-pew-research.html> [https://perma.cc/B4J6-LLLg].

274. *Most Voters Have Positive Views of Their Midterm Voting Experiences*, PEW RES. CTR. (Dec. 17, 2018), <http://www.people-press.org/2018/12/17/most-voters-have-positive-views-of-their-midterm-voting-experiences> [https://perma.cc/H3YU-GTCB].

safeguards to prevent abuse. Those that do exist are, of course, political in nature: Members of Congress who would vote for abusing exclusion would still need to stand for re-election themselves and one hopes their electoral prospects could be considerably diminished. If exclusion power abuse became an issue and the Court retained its political question doctrine, perhaps the only solution would be the formation of state conventions to amend the Constitution under Article V.²⁷⁵ However, as long as the power to exclude exists, so does its capacity for both good and evil. If the giant can be awakened at any time to protect or destroy republican government, then it ought to be awakened to protect. If the giant is employed now to deter those who seek to manipulate American elections to achieve unrepresentative results, then it can prevent those bad actors from obtaining the requisite power to employ the giant towards an evil end.

V. CONCLUSION

When it first awoke in the aftermath of the American Civil War, the Guarantee Clause was used with dramatic effect to promote democratic principles we as a nation still aspire to today. With the end of Reconstruction and the giant's return to its slumber, many of that era's strides towards a multiracial democracy were lost for the better part of a century. Today, as the country once again grapples with a debate over voter suppression as a threat to the majoritarian integrity of our elections, Congress should take inspiration from the Reconstruction Congress and awaken the giant to protect the republican form of government by deterring those who may seek to subvert American democracy for partisan advantage.

²⁷⁵ See U.S. CONST. art. V.