

Reconstructing the Congressional Guarantee of Republican Government

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The Republican Guarantee Clause of Article IV, Section 4 promises that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.” Although this clause might seem to confer significant power to oversee the political structures of the states, ambiguity about the Clause’s meaning, coupled with the Supreme Court’s historic disinclination to define its contours, have led some observers to question whether the Clause is a paper tiger. While recent scholarship has focused mostly on what a “Republican Form of Government” might entail, less attention has been given to the threshold questions of who might serve as guarantors of the Clause and precisely what forms of action they might take under it.

This Article concludes that while all federal branches may have a role to play as guarantors of republican government, the logic, location, and history of the Republican Guarantee Clause suggest that the Clause most directly empowers the political branches, and especially Congress, to act as guarantor. Often forgotten, but of critical importance, is that the Clause served as the chief constitutional basis for Reconstruction after the Civil War, and it helped pave the way for ratification of the Fourteenth and Fifteenth Amendments in the southern states. This history suggests that the Clause and those Amendments—on which twentieth-century voting rights legislation was based—should be understood and interpreted in light of one another.

This Article explores the role the Clause might play as an alternative source of federal legislative power to guarantee basic political processes alongside—or in place of—these Reconstruction Amendments. These questions have renewed significance today, given recent and frequent constitutional confrontations between Congress and the Supreme Court regarding the scope of Congress’s constitutional power to interpret and enforce the Reconstruction

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Amendments. Most recently, in Shelby County v. Holder (2013), the Court struck down portions of the Voting Rights Act as extending beyond Congress's Fifteenth Amendment Enforcement Clause power. Around the same time, many state governments began to impose new restrictions on voter registration and access to the ballot box. These new measures, coupled with the Supreme Court's holding in Rucho v. Common Cause (2019) that legal challenges to partisan gerrymandering are not justiciable in federal courts, has provoked renewed calls for federal protections to guarantee fairness in state political processes. Other recent developments, including the 2020 coronavirus pandemic, have also led to calls for greater congressional oversight of state electoral procedures.

This Article considers whether the Clause might serve as an additional constitutional basis for federal legislation and explores the interpretive arguments Congress might raise to justify the power to reform electoral processes in the states under the Clause. This Article also questions the prevailing view that the Supreme Court has always treated the Clause as functionally nonjusticiable. It argues that even following established precedents, the contemporary Court might well engage with the merits of legislation and litigation commenced under the Clause, given the Court's recent penchant for enhanced scrutiny of congressional enforcement powers under the Reconstruction Amendments. Such challenges would spark a historical constitutional confrontation between Congress and the Court as to the meaning of the Clause. The Court might take one of several approaches when interpreting Congress's power to legislate under the Clause, and this Article concludes that the Clause is the rare constitutional provision that would seem to grant both the courts and the political branches independent and complementary bases to guarantee republican government. Judicial scrutiny of congressional actions taken under the Clause should be heightened when congressional efforts can more readily be achieved by the states or by the courts and diminished when only Congress or president could effectively serve as the guarantor.

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The United States *shall guarantee to every State in this Union a Republican Form of Government*

—Article IV, Section 4¹

INTRODUCTION

The civics-textbook account of the U.S. Constitution is that it sets out a separation of powers by allocating particular roles and functions to each of the three branches of government.² Article I specifies the legislative powers and responsibilities of Congress, Article II sets forth the executive powers of the president, and Article III describes the judicial authority of the Supreme Court and lower federal courts. Yet the structure of the Constitution is not quite so straightforward. Section 4 of Article IV, for instance, provides in one clause that “[t]he United States shall guarantee to every State . . . a Republican Form of Government,”³ but the Section fails to clarify the identity of the guarantor. Which branches and actors may act on behalf of “The United States,” and what actions may they take to fulfill that guarantee?

The Republican Guarantee Clause is the only clause in the Constitution to raise this captivating interpretive problem. It is one thing to create and assign distinct constitutional powers to each of the three branches, as the Constitution’s first three articles do. It is quite another to create a power under the Constitution and fail to clearly assign it at all: the Clause marks the *only* place in the originally ratified Constitution where “[t]he United States” appears in the nominative form as the subject of a sentence.

The Clause’s textual ambiguity, its location within Article IV,⁴ and its seemingly broad potential render the Clause something of an alluring constitutional lacuna. Over the years, scholars have repeatedly explored possible meanings of the term “Republican Form of

1. U.S. CONST. art. IV, § 4 (emphasis added).

2. *E.g.*, BENJAMIN GINSBURG ET AL., *WE THE PEOPLE: AN INTRODUCTION TO AMERICAN POLITICS* 43 (Ann Shin ed., 11th ed. 2017) (“To prevent the new government from abusing its power, the framers incorporated principles such as the separation of powers (the division of governmental power among several institutions that must cooperate in decision making)” (emphasis omitted)).

3. U.S. CONST. art. IV, § 4.

4. *See* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1472–74 (2007) (noting that Article IV of the U.S. Constitution is generally textually vague as to whether it limits or empowers the federal government’s ability to structure interstate relations).

Government,”⁵ and a few have examined what might it might mean to make or enforce a “guarantee.”⁶ Yet the puzzle of what “[t]he United States” refers to remains underexplored,⁷ despite posing perhaps the most critical question about the Clause’s meaning and potential application. Determining *who* may serve as the guarantor—whether that be Congress, the president, the courts, or the states (or even some combination thereof)—will necessarily shape the potential meanings and forms such a guarantee might take. Depending on the guarantor, such actions could, in theory, take the form of legislation enacted by Congress, an executive order decreed by the president, or an injunction issued by a court, among other things.

In part due to this unusually open-ended textual ambiguity, the predominant modern understanding of the Clause is that it is a potentially attractive yet largely inert constitutional provision. This is in part because the Clause remains one of the few provisions of the

5. Most scholars have concluded that the Clause at minimum guarantees some form of majority rule in the governance of the states. *E.g.*, WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE CONSTITUTION* 67 (1972) (“The guarantee clause emerged from the pages of *The Federalist* with its assurance of popular control of government, rule by majorities in the states with safeguards for the rights of minorities, and emphasis on the substance as well as the form of republican government . . .”); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (concluding that what the Clause does “require is that the structure of day-to-day government—the Constitution—be derived from ‘the People’ and be legally alterable by a ‘majority’ of them”); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 560 (1962) (“Among such eternal requisites of republican government might be some sort of effective elections with a fairly large group of society participating therein . . .”); Gabriel J. Chin, *Justifying a Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule*, 94 B.U. L. REV. 1551, 1562 (2014) (“[T]he Guarantee Clause was designed to protect majority rule.”); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 114 (2000) (“[A]t a minimum, the Clause must mean that a majority of the whole body of the people ultimately governs.”); Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1718 (2010) (“In short, republican governments rule (1) by the majority (and not a monarch), (2) through elected representatives, (3) in separate, coequal branches.”). *But see* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 851 (1994) (“[T]he Guarantee Clause should be regarded as a protector of basic individual rights . . .”); Deborah Jones Merritt, *The Guarantee Clause and State Authority: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) (arguing that the Clause exists to protect the states from federal overinterference); Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807, 810 (2002) (“[P]erhaps the most durable argument in opposition to citizen lawmaking is that it violates the Guarantee Clause . . . Republican lawmaking, the argument goes, is lawmaking only through legislative representatives. Lawmaking by plebiscite renders the government a democracy rather than a republic.” (footnotes omitted)).

6. *E.g.*, Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602 (2019).

7. Several scholars have considered this question with respect to Congress. *See* Chin, *supra* note 5, at 1577–83; Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 204–05 (2005); Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183 (2020).

Constitution for which the Supreme Court has never provided a resounding and affirmative interpretation as to its meaning. Instead, in several high-profile cases, including 2019's *Rucho v. Common Cause*, the Court has seemed to suggest that the Clause raises nonjusticiable political questions better suited to the political branches.⁸ The Court's claims about the Clause could be understood broadly, and several scholars have read those claims to mean that the Clause is nonjusticiable altogether.⁹ That interpretation would exclude the courts from among the Clause's potential guarantors. After all, if the Clause is always nonjusticiable, then the courts would have no occasion to enforce it.¹⁰

But if the Clause is not directed at the courts, it raises troubling interpretive questions. Who may act as the guarantor, what may they do to enforce the guarantee, and how might the courts review challenges to those actions, if at all? If "[t]he United States" refers to the political branches, and if judicial review of claims about the Clause's meaning truly are nonjusticiable, then the Clause would seem an invitation for "legislative constitutionalism," a form of constitutional departmentalism where "both Congress and the Court should be regarded as having independent authority to ascertain constitutional meaning."¹¹ That reading of the Clause would suggest that Congress could claim independent—and potentially preemptory—authority to interpret the Clause's constitutional meaning in the course of taking action to fulfill the guarantee. Yet from a twenty-first-century vantage point, a claim of authoritative extrajudicial constitutional interpretation seems at odds with the now well-settled doctrine of

8. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) ("This Court has several times concluded . . . that the Guarantee Clause does not provide the basis for a justiciable claim.").

9. *E.g.*, Bonfield, *supra* note 5, at 554 n.180, 560 (noting courts that have maintained the nonjusticiability of the Clause and that "since 1912 the Court has denominated all issues raised under the guarantee clause nonjusticiable"); J. Andrew Heaton, *The Guarantee Clause: A Role for the Courts*, 16 CUMB. L. REV. 477, 478 (1986) ("[I]t is the only clause which the Court holds to be completely nonjusticiable."); John R. Vile, *John C. Calhoun on the Guarantee Clause*, 40 S.C. L. REV. 667, 675 (1989) (concluding that the Court has found the Clause as speaking "solely to Congress and the President" and that it has "constru[ed] the guarantee clause as a nonjusticiable provision"); Williams, *supra* note 6, at 681, 687 (arguing that an "international law interpretation" of the Clause would "tend[] to buttress the judiciary's longstanding practice of refusing to adjudicate Guarantee Clause claims"). *But see* Chemerinsky, *supra* note 5, at 861 (concluding that it is a "common myth about [the Clause] that it was deemed to be nonjusticiable in 1849 in *Luther v. Borden*").

10. As I will discuss, I believe this view is incorrect, the result of a misunderstanding about the Court's justiciability jurisprudence.

11. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2023 (2003) [hereinafter Post & Siegel, *Legislative Constitutionalism*]; see also Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) [hereinafter Post & Siegel, *Juricentric Restrictions*].

judicial supremacy, whereby the courts—and not the political branches—are the ultimate arbiters of the Constitution’s meaning.¹²

This inquiry arises at an especially relevant time. Historically, higher-profile debates about the Clause’s meaning have been closely linked to acute moments of contestation about the appropriate role of the federal government in guaranteeing enfranchisement and fair political participation in both state and local elections, as well as in federal elections operated by the states. Debates about the Clause’s meaning peaked during the mid-nineteenth century and fell into dormancy after the Civil War. They did so, I will argue, because the Fourteenth and Fifteenth Amendments—whose ratifications during Reconstruction were substantially aided by the Republican Guarantee Clause¹³—provided the federal government with far more specific enforcement powers to ensure fair political participation and republican governance in the states.¹⁴ Indeed, the ratification of these Amendments fundamentally redefined the permissible baseline of republican government for the states under the Constitution.

Yet the full promise of those amendments was largely unfulfilled for almost a century, impeded in large part by the racial caste systems of Jim Crow law and Black Codes. It is perhaps not coincidental that just as the civil rights movements of the 1950s and early 1960s began to crest, a renewed scholarly movement emerged calling for the Republican Guarantee Clause to be made constitutionally relevant again.¹⁵ The lower federal courts also began to draw on the Clause to further federal efforts to enhance civil rights and ensure school desegregation.¹⁶ Shortly thereafter, Congress drew on its constitutional powers under the enforcement clauses of the Fourteenth and Fifteenth

12. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (declaring “the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution”).

13. See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 79–88 (2012); David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 384 (2008). See generally *infra* Section II.B (discussing the Republican Guarantee Clause in the Reconstruction era).

14. See U.S. CONST. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriation legislation.”); *id.* amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); *id.* amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”). Although the precise semantic text varies among each of the three enforcement clauses, they have long been treated as granting the same kind of enforcement power to Congress.

15. Exemplary of this interpretive movement was Arthur Bonfield’s seminal 1961 law review article, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, see Bonfield, *supra* note 5, as well as William M. Wiecek’s 1972 book on the Clause, see WIECEK, *supra* note 5, both of which reviewed a range of emerging assertions about the Clause’s meaning and remain seminal works on the history of constitutional confrontations over the meaning of the Clause.

16. See *infra* notes 80–83 and accompanying text.

Amendments to enact the Civil Rights Act of 1964¹⁷ and the Voting Rights Act of 1965 (“VRA”).¹⁸ Legislation enacted under these Reconstruction Amendments largely obviated the need for Congress to contemplate taking action directly under the Clause and seemed to assuage scholarly urgings for Congress to breathe new life into it.

The scope of the Congress’s power to regulate matters of political participation in the states is again at the forefront of the national constitutional dialogue. In a series of decisions over the past several decades, the Supreme Court has come to increasingly second-guess Congress’s determinations about the scope of its legislative enforcement powers under the Reconstruction Amendments. In cases such as *City of Boerne v. Flores*¹⁹ and *Board of Trustees of University of Alabama v. Garrett*,²⁰ the Court has rejected federal legislation as going beyond Congress’s enforcement powers under those Amendments. And in *Shelby County v. Holder* in 2013, the Court invalidated section 4(b) of the VRA on the basis that Congress’s 2006 reenactment of the statute was an impermissible exercise of Congress’s Fifteenth Amendment Enforcement Clause power.²¹

In *Shelby County*, the Court for the first time second-guessed the adequacy and sufficiency of the congressional findings necessary to justify the legislative remedy it enacted under the VRA.²² As framed by the dissent, the ultimate question the Court faced in *Shelby County* was which branch of government should decide whether the VRA’s preclearance coverage formula should remain operative: “[The] Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments ‘by appropriate legislation’”?²³ Questions about the comparative institutional competence of the federal branches to ensure fair political participation arose again in 2019 in *Rucho v. Common Cause*.²⁴ Prior to *Rucho*, the Court had repeatedly suggested that it might yet provide relief for legal claims related to partisan gerrymandering if it were presented with a “workable standard” for

17. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

18. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

19. 521 U.S. 507 (1997), *superseded in part by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

20. 531 U.S. 356 (2001).

21. 570 U.S. 529 (2013).

22. In *Shelby County*, the Court found section (4)(b)’s coverage formula unconstitutional in part because it was “based on decades-old data and eradicated practices” and was not “grounded in current conditions,” “having no logical relation to the present day.” *Id.* at 551, 554.

23. *Id.* at 559 (Ginsburg, J., dissenting) (quoting U.S. CONST. amend. XV, § 2).

24. 139 S. Ct. 2484 (2019).

identifying and adjudicating such claims.²⁵ A majority of the Court in *Rucho*, however, shut the door to judicial remedies, concluding that “partisan gerrymandering claims present political questions beyond the reach of the federal courts.”²⁶

Past constitutional conflicts concerning voting rights and access to political participation have thus returned to prominence again today. Since 2010, at least twenty-five states have taken actions whose effect has been to restrict or narrow access to voting and participation in state political processes that affect local, state, and federal elections.²⁷ At the same time, advances in computer technology and the development of datasets with fine-grained voter information down to the individual-voter level have enabled state lawmakers and mapmakers to “put that information to use with unprecedented efficiency and precision,” making gerrymanders, as Justice Kagan explained in dissent in *Rucho*, “far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides.”²⁸

In the wake of *Shelby County* and *Rucho*, those concerned with protecting voting rights and ensuring robust and fair political participation have explored new actions the federal government could take to oversee the states’ electoral apparatuses and guarantee fair political participation for citizens in both state and federal elections.²⁹ These efforts recently culminated in the U.S. House of Representatives passing H.R. 1, the *For the People Act of 2019*, which seeks, through federal legislation, to address a wide array of electoral problems among the states.³⁰ Because the states operate not only state and local elections but also federal elections, unless the states develop entirely independent systems to oversee their own non-federal elections, efforts like H.R. 1’s, to remediate problems with federal elections, will also alter the operation of *state* elections. Because some federal remedies may reach beyond the regulation of only *federal* elections, commentators have questioned whether Congress has the power to enact such legislation under any of its Article I Commerce Clause and

25. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 270 (2004) (“That a workable standard for measuring a gerrymander’s burden on representational rights has not yet emerged does not mean that none will emerge in the future. The Court should adjudicate only what is in the case before it.”).

26. 139 S. Ct. at 2506–07.

27. See generally *New Voting Restrictions in America*, BRENNAN CTR., <https://www.brennancenter.org/new-voting-restrictions-america> (last updated Nov. 19, 2019) [<https://perma.cc/3HEJ-6FZX>] (identifying changes to state electoral laws since 2010).

28. 139 S. Ct. at 2513 (Kagan, J., dissenting).

29. E.g., CAROL ANDERSON, *ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY* (2018).

30. For the People Act of 2019, H.R. 1, 116th Cong. (2019).

Elections Clause powers³¹ or its Reconstruction Amendment enforcement clause powers.³² Others have called on Congress to explicitly invoke the Republican Guarantee Clause as a source of power to protect voting rights in the states.³³ And most recently, the 2020 coronavirus pandemic has raised new and urgent questions about the permissible role of Congress in ensuring safe and fair elections in the states.³⁴

Past legal and political precedents are thus instructive for today's constitutional controversies surrounding voting rights. Both the mid-nineteenth century and the mid-twentieth century were marked by heated national constitutional conflicts about the permissible scope of Congress to intervene in state political processes, as well as the role of the courts to review such federal intervention. The present moment is thus an appropriate one to reexamine the Republican Guarantee Clause's role in historical constitutional confrontations about enfranchisement and political participation among the political branches, the courts, and the states. The Clause has played an often overlooked but central role, and the Reconstruction-era *congressional* interpretations of the Clause were important in paving the way for the ratification of the Fourteenth and Fifteenth Amendments.³⁵ Those

31. For the constitutional authority to engage in redistricting reform at the federal level, the House cited to the Elections Clause of Article I, Section 4. *See* H.R. 1, § 2400(b)(1) (citing U.S. CONST. art. I, § 4). The Elections Clause of the Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4. While the Clause provides Congress with the power to regulate elections for federal representatives, it is silent about Congress's power, if any, to regulate elections of state officers.

32. *See, e.g., The Facts About H.R. 1—the For the People Act of 2019*, HERITAGE FOUND. (Feb. 1, 2019), <https://www.heritage.org/election-integrity/report/the-facts-about-hr-1-the-the-people-act-2019> [<https://perma.cc/H8L2-E8AX>] (arguing that H.R. 1 "federalizes and micromanages the election process administered by the states, imposing unnecessary, unwise, and unconstitutional mandates on the states"); Kate Ruane & Sonia Gill, *Congress, Let's Fix the Problems in H.R. 1 so We Can Enact the Bill's Much-Needed Reforms*, ACLU (Mar. 5, 2019, 8:30 PM), <https://www.aclu.org/blog/free-speech/campaign-finance-reform/congress-lets-fix-problems-hr-1-so-we-can-enact-bills-much> [<https://perma.cc/YNL8-RYUU>]; Ilya Shapiro & Nathan Harvey, *What Left-Wing Populism Looks Like*, NAT'L REV. (Mar. 7, 2019, 6:30 AM), <https://www.nationalreview.com/2019/03/democrats-for-the-people-act-unconstitutional-left-wing-populism/> [<https://perma.cc/JP4B-HT4K>].

33. *E.g.,* Chin, *supra* note 5; Shapiro, *supra* note 7.

34. Compare Richard L. Hasen, *How to Protect the 2020 Election from the Coronavirus*, SLATE (Mar. 13, 2020, 2:45 PM), <https://slate.com/news-and-politics/2020/03/2020-election-coronavirus-bill-vote-by-mail.html> [<https://perma.cc/Q9ZC-VRTG>] (advocating for federal legislation requiring the states to offer no-excuse absentee balloting), with Hans A. von Spakovsky & J. Christian Adams, *Avenues to Voter Fraud Have No Place in Coronavirus Bill*, THE HERITAGE FOUNDATION (Mar. 25, 2020), <https://www.heritage.org/election-integrity/commentary/avenues-voter-fraud-have-no-place-coronavirus-bill> (arguing that proposed congressional responses would flout the Constitution's decentralized system of elections).

35. *See infra* notes 214–217 and accompanying text.

congressional precedents bear significantly on how the Clause might be interpreted in the future, but they have tended to be overlooked by the lawyerly professional tendency to focus on the constitutional interpretations of *courts*, not the political branches. Insofar as the Supreme Court has repeatedly concluded that the Clause's application raises political questions best left to the political branches, it is somewhat surprising that these nineteenth-century congressional interpretations have not been more central to modern understandings of the Clause's meaning. The constitutional histories of the Clause and the Reconstruction Amendments are deeply linked. The ratification of these Amendments fundamentally reconfigured the nature of the relationships between the states and the federal government, as well as the relationships between the citizens and their states.³⁶ It is difficult to see how the Clause's meaning itself did not at least functionally transform in the wake of their ratification.

Given that history, the Clause may well play an important role in future confrontations between Congress and the Court over Congress's power under the Constitution. The best reading of the Clause's text, structure, and constitutional history suggests that the Clause is directed primarily at the political branches, and especially at Congress, and there are strong arguments that the Clause may provide a basis for federal intervention in state election procedures to ensure republican government. Situated against the Court's recent "juricentric"³⁷ turn in second-guessing congressional actions under the Commerce Clause and the Reconstruction Amendments, however, the Court would be unlikely to permit Congress to take any and all actions it might want under the Clause. The most pertinent issue, then, is determining what actions Congress might reasonably take under the Clause, and what the Court might do in response. Thus, this Article also contributes to the literature by providing the first serious consideration of the several distinctive approaches courts might take in reviewing challenges to Congress's Republican Guarantee Clause powers.

This Article proceeds in four parts. Part I begins by situating the Republican Guarantee Clause jurisprudence alongside the jurisprudence of the Reconstruction Amendments, arguing that the

36. ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* xx (2019) ("Reconstruction amendments greatly enhanced the power of the federal government, transferring much of the authority to define citizens' rights from the states to the nation.").

37. Robert Post and Reva Siegel have described the Court's approach in cases like *Boerne* and *Garrett* as evincing a "juricentric constitutionalism," a view of constitutional interpretation that sees "the Constitution as a document that speaks only to courts." Post & Siegel, *Juricentric Restrictions*, *supra* note 11, at 2.

meaning of the constitutional provisions can only be fully understood together. Part II then demonstrates why this is so. The Republican Guarantee Clause's greatest period of constitutional significance was in the decades leading up to the ratification of the Reconstruction Amendments. The Clause played an essential role in the ratification of these amendments and in the constitutionality of federal Reconstruction more generally. Because the Clause served as the basis for their ratification, there is a strong argument that inquiry into the meaning of the Clause's "republican government" guarantee cannot be severed from the enactment history of those amendments.

That interpretation is in part supported by several Reconstruction-era Supreme Court precedents that suggest that the Court has implicitly rejected a second and competing meaning of "[t]he United States." That seemingly refuted meaning, explored in Part III, is that the Clause affords the courts the capacity to guarantee to the states that they are free *from* federal interference in their self-governance. Such an interpretation would instead situate *courts* as the primary guarantors of the Clause, protecting the states from the federal government. In addition to (a) this "negative guarantee" from federal interference, this Part also briefly considers several other ways in which the courts might serve as guarantors. These include (b) protecting the state citizens and their elected representatives from antirepublican actions taken by their state governments or from the delegation of lawmaking authority to unelected bureaucrats, as well as (c) protecting state citizens from deprivations by their state governments of individual rights that are inherent to any republican form of government. Recent litigation in the U.S. Court of Appeals for the Tenth Circuit suggests that lower courts may be revisiting whether such claims could be justiciable in limited circumstances.

The question, then, is whether legal claims arising under the Clause would be justiciable today if Congress, rather than the courts, were to act as the guarantor and in so doing attribute a particular meaning to the Clause. Civil War-era legal precedents may provide a ceiling above which courts may defer to the political branches in cases of extreme exigency and emergency, but those precedents do not necessarily provide a useful floor below which courts may reasonably second-guess the constitutionality of the more ordinary actions Congress takes in legislating.

Thus, Part IV of this Article explores the range of possible actions Congress might take under this "sleeping giant"³⁸ clause to

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

address problems at the *sub*-emergency level of republican governance, in federal efforts to ensure republican governance and fair political participation. Based on both judicial and congressional Reconstruction-era precedents, this Article argues that the best understanding of the Clause is one that grants Congress substantial authority to act, but that also affords judicial review of challenges to such actions according to the familiar “necessary and proper” standard of judicial review applied to challenges to Congress’s Commerce Clause powers.

Whether congressional intervention in state electoral apparatuses would be deemed “necessary and proper” would depend in part on a congressional demonstration that appropriate measures could not be feasibly undertaken by other governmental entities. Where a state has shown a concerted resistance to addressing barriers to fair political participation, or where the federal courts are unable (or unwilling) to provide remedy such barriers, a federal legislative response may be most warranted. In those circumstances, judicial deference to Congress’s conclusion that federal intervention is necessary may be more appropriate. The Supreme Court exhibited such deference during Reconstruction after the Civil War,³⁹ and it may well be appropriate for it to do so again in the future. The Court’s recent holding in *Rucho* that partisan gerrymandering claims are essentially nonjusticiable in federal courts (including under the Clause) suggests that *Congress* might have substantial latitude to intervene in state electoral processes, at least in limited circumstances. This might occur where Congress has concluded that these processes have been instituted or implemented so as to deny fair participation or equal representation to voters, or when it seems likely that such impediments will handicap a majority of citizens from being able to remedy them at the ballot box.

The increasingly political and high-profile nature of debates about enfranchisement and access to political participation in the states,⁴⁰ coupled with the reduced scope of the Reconstruction Amendments in the Court’s current jurisprudence, mean that it may be only a matter of time before a historic constitutional confrontation between the Court and the political branches emerges as to the role the federal government may play in guaranteeing republican governance in the twenty-first century.

39. See *infra* Section II.B.4.

40. E.g., Michael Wines, *With 2020 Looming, Parties Fight State by State over Voting Access*, N.Y. TIMES (June 3, 2019), <https://www.nytimes.com/2019/06/03/us/voting-rights-states.html> [<https://perma.cc/N6F8-VDMW>].

I. THE COURT AND CONGRESS AS CONSTITUTIONAL INTERPRETERS

Although easily overlooked today, the constitutional histories of the Reconstruction Amendments and the Republican Guarantee Clause are deeply intertwined, for they share three important characteristics. The first is that both figured prominently in historical debates about political participation, voting rights, and redefining the nature of republican government in the United States. Indeed, until the Reconstruction Amendments were enacted in the wake of the Civil War, most constitutional claims that we associate with them today—and especially claims about political enfranchisement—were largely associated with the guarantee provided by the Republican Guarantee Clause.

The second is the importance of each constitutional provision to the others. I will argue that it is precisely *because* the Reconstruction Amendments were enacted that the Republican Guarantee Clause became the largely dormant constitutional provision it was for most of the twentieth century. Both Congress and multiple presidents drew directly on the Clause as a source of constitutional power to pursue Reconstruction and help pave the way for the ratification of the Reconstruction Amendments. In turn, those amendments—and the federal legislation Congress enacted through them—contain more specific and direct delegations of legislative power to enforce the substantive rights guaranteed. In this way, each does important work in establishing a newly redefined, post-Civil War baseline for the minimally necessary aspects of a republican government.

The third commonality is that both the Republican Guarantee Clause and the Reconstruction Amendments raise important questions about the extent to which Congress may legislate to enforce their constitutional guarantees. That question necessitates identifying which branch has the authority to define the meaning of those guarantees. Here, a contrast between the Republican Guarantee Clause and the Reconstruction Amendments emerges: whereas justiciability concerns have traditionally left courts at the sidelines of defining the meaning of the republican guarantee, the Supreme Court has in recent decades articulated an increasingly expansive role for courts in policing the scope and nature of congressional actions to enforce and protect the rights guaranteed by the Reconstruction Amendments.

A. The Coequal Interpreters Account: The Republican Guarantee Clause, the Political Question Doctrine, and Legislative Constitutionalism

The conventional account of the Republican Guarantee Clause is something like this: from 1849, when the Court first had occasion to interpret the Clause in *Luther v. Borden*,⁴¹ up to the present day, the Court has repeatedly disclaimed opportunities to give the Clause meaning on the basis of the Clause’s nonjusticiability.⁴² Exemplary of this understanding is the Court’s famous statement in *Baker v. Carr* that claims arising under the Republican Guarantee Clause “involve those elements which define a ‘political question,’ and for that reason and no other, they are nonjusticiable.”⁴³ Such nonjusticiable political questions, the Court has repeatedly stated, are more appropriately resolved by the political branches than the courts.⁴⁴ The Court’s reasoning has an intuitive appeal. Just what a republican form of government is, and what it means to guarantee that form to a state, would seem to be an inextricably political inquiry, one courts are not well situated to resolve.⁴⁵

If that account is correct, it suggests that the political branches may sometimes be coequal interpreters of the Constitution, at least insofar as they, rather than courts, have been tasked by the Clause with deciding what constitutes a republican form of government as set out in the Constitution. Robert Post and Reva Siegel have described such activity as “legislative” or “poliocentric” constitutionalism—“the distribution of constitutional interpretation in our legal system across multiple institutions, many of which are political in character.”⁴⁶ From our contemporary vantage point, that notion appears at odds with the well-accepted principle of judicial supremacy. Yet as critics of judicial supremacy on both the left and the right have pointed out—among them former Stanford Law School Dean Larry Kramer,⁴⁷ former Reagan

41. 48 U.S. (7 How.) 1, 42–43 (1849).

42. *E.g.*, Zachary M. Vaughan, Note, *The Reach of the Writ: Boumediene v. Bush and the Political Question Doctrine*, 99 GEO. L.J. 869, 872 (2011) (“The *Luther* Court’s declaration that the [Republican] Guarantee Clause [raises] a nonjusticiable political question has been consistently followed.”).

43. 369 U.S. 186, 218 (1962).

44. *E.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (“This Court has several times concluded . . . that the Guarantee Clause does not provide the basis for a justiciable claim” (citing *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1918)).

45. *Baker*, 369 U.S. at 222 (noting “the lack of criteria by which a court could determine which form of government was republican”).

46. Post & Siegel, *Legislative Constitutionalism*, *supra* note 11, at 2022–23.

47. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 228 (2004):

Administration Attorney General Edwin Meese,⁴⁸ and former Tenth Circuit Judge Michael McConnell⁴⁹—neither the Framers nor early American jurists understood the Constitution as a document whose meaning was to be developed and determined exclusively by the (then-limited) federal courts. On a very technical level, such a clean division of labor may be impossible: when Congress enacts legislation to fulfill constitutional guarantees, or when the executive branch acts to enforce such protections, the political branches necessarily make claims about the Constitution’s meaning to establish the appropriate basis for legislative or executive authority.⁵⁰

Given these dynamics, even proponents of judicial supremacy must acknowledge that the concept is often rife with internal tensions, especially when situated alongside the political question doctrine. Under the latter doctrine, since *Marbury v. Madison*⁵¹ the Court has on occasion chosen to “abstain from resolving constitutional issues that are better left to other departments of government.”⁵² Whereas judicial supremacy stands for the preemptory role of courts, the political question doctrine calls for their restraint.

This tension is central to understanding how the Court has dealt with interpretive questions arising under not only the Republican Guarantee Clause, but also the Reconstruction Amendments. Some, such as Herbert Wechsler, have sought to reconcile the political question doctrine with the concept of judicial supremacy by concluding that the political question doctrine must have limited application only

Neither the Founding generation nor their children nor their children’s children, right on down to our grandparents’ generation, were so passive about their role as republican citizens. They would not have accepted—did not accept—being told that a lawyerly elite had charge of the Constitution, and . . . [s]omething would have gone terribly wrong, they believed, if an unelected judiciary were being given that kind of importance and deference.

48. See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985–86 (1987) (“The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions.”).

49. See Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 171 (1997) (“This idea of congressional interpretive authority corresponds to the most straightforward reading of *Marbury*, in which judicial review is justified . . . by the supremacy of the Constitution over other sources of law, and the duty of all officials, not only judges, to enforce the Constitution.”).

50. See Edwin Meese III, *The Tulane Speech: What I Meant*, 61 TUL. L. REV. 1003, 1005–06 (1987) (“Members of Congress, in voting on legislation, are bound by the oaths they take to act in a constitutional manner. Similarly the president, in exercising his veto and in enforcing the laws, is bound by his oath to respect the Constitution.”).

51. 5 U.S. (1 Cranch) 137 (1803).

52. Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1458 (2005).

in instances where the Constitution *itself* seems to call for judicial deference.⁵³ Rachel Barkow has described this approach as the “classical” articulation of the political question doctrine, where “[t]he Constitution [itself] carves out certain categories of issues that will be resolved as a matter of total legislative or executive discretion.”⁵⁴ On this view, it is the Constitution *itself* that commands judicial abstinence. For instance, many have concluded that the precise definition of the constitutional term “high Crimes and Misdemeanors”—for which the president and other civil officers of the United States may be removed from office—is a determination for Congress, rather than the courts, to make.⁵⁵

Instances of classical political questions would seem to be most amenable to the theories of “popular” or “legislative” constitutionalism advanced by Kramer, Meese, and Post and Siegel, for within that narrow band of constitutional questions reserved for the political branches, Congress and the president, rather than the Court, would be the Constitution’s peremptory interpreters. And if the Constitution truly does reserve some questions of interpretation for the political branches—however rare they may be—the political question doctrine could be reconciled more easily with the theory of judicial supremacy. The judiciary’s interpretive authority would remain unquestioned for all interpretive constitutional issues but those few for which the Constitution expressly allocates interpretive power to the political branches.

An alternative understanding of the political question doctrine is as a more pragmatic judicial approach. Emphasizing the passive virtues of the Court, those such as Alexander Bickel have long argued that the political question doctrine should arise not from a mandate under the Constitution itself, but rather from an exercise of case-specific pragmatic judicial discretion.⁵⁶ On this view, the political question doctrine emerges from a coupling of both “guiding principle

53. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–8 (1959).

54. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 247–48 (2002).

55. *E.g.*, Gary L. McDowell, “*High Crimes and Misdemeanors*”: *Recovering the Intentions of the Founders*, 67 GEO. WASH. L. REV. 626, 649 (1999) (“[T]he determination of whether presidential misconduct rises to the level of ‘high Crimes and Misdemeanors,’ as used by the Framers, is left to the discretion and deliberation of the House of Representatives.”).

56. See Alexander M. Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961). Wechsler’s strict constructionist position, Bickel argued, is hard to reconcile with the Court’s recurring decisions to decline jurisdiction in denials of certiorari or dismissals of appeals for want of a substantial federal question. *Id.*

and expedient compromise.”⁵⁷ Barkow has described Bickel’s articulation as the “prudential” form of the political question doctrine.⁵⁸

This distinction between the classical and prudential political questions is critical to understanding precisely what the Court has said about the Republican Guarantee Clause in the past, and what it may say in the future. For if the Clause raises *classical* political questions, then it is because the Clause tasks the political branches with the peremptory discretion to decide what constitutes a republican form of government, and what actions those branches may take to guarantee that form. This would present a genuine opportunity for legislative or executive constitutionalism. By contrast, if the Court’s invocations of the political question doctrine in cases concerning the Clause have been of the *prudential* form, there is no reason to think that, under different circumstances, the Court would remain disinclined to give the Clause affirmative meaning.

But skepticism that the Clause raises a classical form of the political question doctrine may be warranted, for the Court has in recent years narrowed its application of the political question doctrine⁵⁹ and shown an increasing appetite for second-guessing the political branches’ understanding of the scope of their constitutional powers.⁶⁰ Indeed, in light of the Court’s recent jurisprudence interpreting (and narrowing) Congress’s capacity to act under the enforcement clauses of the Reconstruction Amendments, there is good reason to doubt that the Court would be inclined to remain entirely hands-off, as the next Section suggests.

57. *Id.* at 49.

58. Barkow, *supra* note 54, at 253. According to Barkow, prudential political questions implicate as many as five of the six factors identified by Justice Brennan in *Baker v. Carr* in his account of the type of cases that warrant application of the political question doctrine. *See id.* at 265; *see also* 369 U.S. 186, 217 (1962).

59. *See, e.g.*, Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The Political Question Doctrine as a Justiciability Doctrine*, 29 J.L. POL. 427, 428 (2014) (noting that the Court in *Zivotofsky v. Clinton*, 566 U.S. 189 (2012), “once and for all rung the death knell for the application of the ‘political question doctrine’ as a justiciability doctrine”).

60. *See, e.g.*, Lawrence H. Tribe, *Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 YALE L.J. FORUM 86, 91 (2016) (noting “the Roberts Court’s recent turn away from the political question doctrine and the Court’s juricentric focus”).

*B. The Judicial Supremacy Account:
The Reconstruction Amendments and Juricentric Constitutionalism*

The Reconstruction Amendments have had a “strange career.”⁶¹ Enacted into law by the “Radical” Republican Congresses of the late 1860s, the Thirteenth, Fourteenth, and Fifteenth Amendments have been called a “second founding,” a “quantum leap . . . in nationalizing the protection of individual rights against state abridgment,”⁶² and a “‘constitutional revolution’ . . . that created a fundamentally new [Constitution] with a new definition of both the status of blacks and the rights of all Americans.”⁶³ Though the Amendments promised guarantees of equality in terms of both protection of individual rights and access to political participation and representation, it took the better part of a century after their ratification for the federal government to provide meaningful protection under the amendments and consolidate the temporary gains made during Reconstruction.

The Amendments’ slow start was the result of factors both political and judicial. Politically, Congress’s appetite for supervising southern state institutions directly, including the state electoral processes used to select federal representatives, had waned by the early 1870s in the face of widespread resistance and violence by white southerners and an economic depression that emerged in the north.⁶⁴ This culminated after the 1876 presidential election with the Hayes-Tilden compromise of 1877, which is largely understood as signaling the end of federal Reconstruction efforts and ushering in federal capitulation to the rise of the Jim Crow racial caste system in the South.⁶⁵

Equally significantly, during this same period the Supreme Court cynically narrowed the meaning of the Reconstruction Amendments themselves, as well as the Reconstruction-era laws enacted under them. In a series of cases in the 1870s and 1880s,⁶⁶

61. Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003, 2003 (1999).

62. I BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 82 (1991).

63. See FONER, *supra* note 36, at xx (quoting Republican leader Carl Schurz).

64. See *id.* at 143–44.

65. See, e.g., C.V. WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* 3–14 (1951) (depicting the Hayes-Tilden compromise of 1877 as bringing the end of Reconstruction in the South).

66. See Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 133–40 (1994) (describing the legal and practical effects of various Supreme Court cases as the “judicial codification” of “Jim Crow constitutionalism”).

including the *Slaughterhouse Cases*,⁶⁷ *United States v. Reese*,⁶⁸ *United States v. Cruikshank*,⁶⁹ and the *Civil Rights Cases* of 1883,⁷⁰ the Court set in motion the *constitutional* capacity for the South to implement the Jim Crow and the Black Codes by narrowing private rights claims and federal judicial means of enforcement in the absence of federal executive-branch intervention.

Historians, too, played an important social role in deconstructing the validity of federal Reconstruction efforts in the South. As African-American historian W.E.B. Du Bois noted in *Black Reconstruction* in 1935, white historians had delegitimized not only black contributions to Reconstruction, but also Reconstruction itself, by “ascrib[ing] the faults and failures of Reconstruction to Negro ignorance and corruption,” depicting Reconstruction as “a disgraceful attempt to subject white people to ignorant Negro rule.”⁷¹ Historian Eric Foner has documented how this account of Reconstruction “dominated historical writing, legal scholarship, and popular consciousness” for most of the twentieth century.⁷² The net effect was to maintain for nearly another century the widespread racial inequality and voter disenfranchisement the Reconstruction Congress had sought to extirpate through the ratification of the Reconstruction Amendments.

Between the lack of congressional efforts to enforce the Amendments and nearly a century of judicial narrowing of their meaning, it is perhaps not surprising that by the mid-twentieth century, scholars began to search for other sources of constitutional protection for equal rights, and they turned once again to the Republican Guarantee Clause. In the years leading up to the civil rights movement of the 1950s and 1960s, scholars and activists argued anew that the Clause directly addressed the rights of individual citizens, who could derive from the Clause claims of constitutionally protected individual rights vis-à-vis their insufficiently republican state governments.

67. 83 U.S. (16 Wall.) 36 (1873) (construing the “privileges and immunities” guaranteed by the Fourteenth Amendment to those provided under federal rather than state law).

68. 92 U.S. 214 (1876) (invalidating a federal law enacted under the Fifteenth Amendment that criminalized sanctions on local officials who denied citizens the right to vote).

69. 92 U.S. 542 (1876) (holding that private individuals could not be held liable for violating the Fourteenth Amendment rights of other individuals).

70. 109 U.S. 3 (1883).

71. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880*, at 636–37 (Transaction Publishers 2013) (1935).

72. FONER, *supra* note 36, at xxi–xxiv.

This “activist view” of the Clause was said to be “dominant among scholars and commentators” by the early 1960s.⁷³ Exemplary of this interpretive movement was William Crosskey, whose “monumental” 1953 multivolume originalist examination of the Constitution was called by some contemporaries “‘the most fertile commentary’ on the Constitution since *The Federalist* papers.”⁷⁴ In it, Crosskey contended that the Clause was the “chief source” of congressional authority over the states, particularly in matters related to implementing and ensuring the right to vote.⁷⁵ Another astute scholar of that era cautioned that while “[a]t the present time there is no particular movement under way to give the guarantee an effective content,” it was easy to imagine possible events that would inspire such a movement, with “a South recalcitrant over civil rights [being] one that springs immediately to mind.”⁷⁶ He warned that the Clause “is a tremendous storehouse of power to reshape our federal system and only the good sense of the American people would be strong enough to keep it within bounds if it were once invoked.”⁷⁷ Others were less cautious: one argued that the Clause served as a broad source of individual rights claims that *should* be justiciable by courts,⁷⁸ and several suggested that the Clause provided *Congress* with the power to ensure access to the right to vote in the states.⁷⁹

Courts, too, were beginning to heed the call of potential guarantees that could be located in the Clause. Often overlooked by contemporary scholars is the 1956 decision *Hoxie School District No. 46 v. Brewer*,⁸⁰ in which a federal court enjoined a number of individuals

73. WIECEK, *supra* note 5, at 300.

74. Clinton Rossiter, *Politics and the Constitution*, 16 REV. POL. 237, 238 (1954) (reviewing WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953)).

75. 1 CROSSKEY, *supra* note 74, at 522–24.

76. Charles O. Lerche, Jr., *The Guarantee of a Republican Form of Government and the Admission of New States*, 11 J. POL. 578, 604 (1949).

77. *Id.*

78. See Bonfield, *supra* note 5, at 560 (“As previously noted, since 1912 the Court has denominated all issues raised under the guarantee nonjusticiable. This position is erroneous and should be modified. For in a proper case, no barriers, practical or otherwise, bar the judiciary from assuming its proper burden of enforcing section 4.”).

79. Arthur Bonfield, writing shortly before the passage of the Voting Rights Act in 1961, advocated for Congress to “liberalize state voting requirements” under the Clause in ways similar to those ultimately accomplished by the VRA just several years later. *Id.* at 567. In contrast to Congress’s eventual passage and subsequent amendment of the VRA, which relied on its enforcement powers under the Fourteenth and Fifteenth Amendments, Bonfield argued that the Fourteenth Amendment was an inadequate basis for the “fuller realization of our society’s democratic goals.” *Id.* at 514. Wiecek similarly argued that the Clause provided Congress with the authority to legislate proactively. See WIECEK, *supra* note 5, at 301.

80. 137 F. Supp. 364 (E.D. Ark. 1956), *aff’d*, 238 F.2d 91 (8th Cir. 1956).

and organizations, including the Arkansas White Citizens Council and “White America, Inc.,” from harassing school district officials seeking to implement school desegregation in the wake of the Supreme Court’s decision in *Brown v. Board of Education*.⁸¹ When the jurisdiction of the federal courts was questioned by Defendants, the court in *Brewer* concluded that Plaintiff school officials could invoke the Republican Guarantee Clause insofar as it “was their sacred right to function their offices, and to live as citizens under a government of laws and not of men, [so] they logically appealed to the national courts for protection under the federal law.”⁸² That decision was affirmed by the Eighth Circuit, and the Clause’s potential was not lost on scholars like William Wiecek, who noted that “[i]f the anti-integrationist actions of the respondent individuals and organizations were not restrained, the petitioners would be deprived of representative government in violation of the guarantee clause.”⁸³

Widespread federal resort to the Republican Guarantee Clause ultimately proved unnecessary. When Congress enacted the sweeping Civil Rights Act of 1964 and the Voting Rights Act of 1965, it drew on its enforcement clause powers under the Reconstruction Amendments to prophylactically and affirmatively enforce the specific rights guaranteed by those amendments. Such an undertaking was not without controversy or opposition—which has continued to this day. The states and localities regulated by these laws have repeatedly challenged Congress’s authority to wield broad enforcement power, arguing that Congress has impermissibly interpreted these amendments in enacting legislation that has improperly altered the substantive meaning of the underlying rights protected. Shortly after the passage of the VRA, in *South Carolina v. Katzenbach*⁸⁴ and *Katzenbach v. Morgan* (known as *Morgan*),⁸⁵ the Supreme Court heard challenges to the scope of Congress’s enforcement clause powers to enact the VRA under the Fourteenth and Fifteenth Amendments. Both decisions are instructive for understanding the framework under which the Warren-era courts assessed congressional claims about constitutional meaning.

In both cases, the Court upheld Congress’s broad enforcement actions under the VRA as “appropriate legislation” under the enforcement clauses. In *Katzenbach*, the Court rejected South

81. 347 U.S. 483 (1954).

82. *Brewer*, 137 F. Supp. at 366–67.

83. WIECEK, *supra* note 5, at 298.

84. 383 U.S. 301 (1966).

85. 384 U.S. 641 (1966).

Carolina's assertion that Congress's exercise of its Fifteenth Amendment Enforcement Clause power to strike down state voting statutes and procedures would serve to "rob the courts of their rightful constitutional role."⁸⁶ Instead, the Court pointed to that section's explicit instruction to Congress as evidence that *Congress*, not the courts, would be chiefly responsible for implementing assurances of the rights created by the amendment.⁸⁷ Drawing on *Ex parte Virginia*,⁸⁸ which upheld congressional efforts to enforce the Reconstruction Amendments shortly after the end of the Civil War, Chief Justice Warren, writing for the Court, drew on Chief Justice Marshall's famous account in *McCulloch v. Maryland* of Congress's authority to act under the Necessary and Proper Clause in conjunction with its Commerce Clause power.⁸⁹

On that basis, the Chief Justice concluded that Congress could do more than merely forbid direct violations of the Fifteenth Amendment;⁹⁰ instead, he affirmed Congress's capacity to fashion inventive and prescriptive remedies, recognizing the insufficiency of case-by-case litigation to address the widespread problems of voting discrimination within the relevant covered states and political subdivisions.⁹¹ "As against the reserved powers of the States," the Chief Justice concluded, "Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting."⁹²

The Court elaborated on this test a few months later in *Morgan*, where Justice Brennan, this time writing for the unanimous Court, similarly equated Congress's Fourteenth Amendment Enforcement Clause power to the Necessary and Proper Clause, which authorized "Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."⁹³ The Court assessed the constitutionality of section 4(e) of the VRA, which legislatively prohibited literacy tests for voter eligibility that the Supreme Court had previously found to be *constitutional* under the Fourteenth Amendment in *Lassiter v. Northampton County Board of Election*, a case decided just seven years

86. 383 U.S. at 325.

87. *Id.* at 325–36.

88. 100 U.S. 339 (1880).

89. *Katzenbach*, 383 U.S. at 326–27 ("The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819))).

90. *Id.* at 327.

91. *Id.* at 328.

92. *Id.* at 324 (emphasis added).

93. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

prior to the VRA's enactment.⁹⁴ Applying the three-part Necessary-and-Proper-Clause analysis classically announced in *McCulloch v. Maryland*, Justice Brennan concluded that section 4(e)'s prohibition was (1) "appropriate legislation" to enforce the Amendment; (2) "plainly adapted to that end"; and (3) in accord with "the letter and spirit of the constitution."⁹⁵ This rational means test became a cornerstone of constitutional litigation related to the VRA, and for several decades thereafter, the Court continued to uphold Congressional enforcement actions under the clauses.⁹⁶ Thus, one might understand *Morgan* as standing for a form of legislative constitutionalism whereby *Congress* may act to further constitutional provisions beyond what *the Court* understands the underlying provision to strictly prohibit or require.

Nevertheless, the Court's seeming toleration for legislative constitutionalism waned by the 1990s. In *City of Boerne v. Flores*,⁹⁷ which concerned a challenge to the Religious Freedom Restoration Act of 1993 ("RFRA"),⁹⁸ Congress passed legislation in direct response to the Court's perceived narrowing of the Free Exercise Clause's potential applications in *Employment Division v. Smith*.⁹⁹ Congress had claimed during RFRA's passage that it was an appropriate exercise of its Fourteenth Amendment Section 5 enforcement authority insofar as that amendment has been understood to incorporate most First Amendment protections against the states.¹⁰⁰ Nevertheless, the Court

94. 360 U.S. 45 (1959).

95. *Morgan*, 384 U.S. at 651 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 321 (1819)). For a helpful discussion of the Court's internal debates while drafting these opinions, see Luis Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99 (2007).

96. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 174–75 (1980) (invoking the comparison to the Necessary and Proper Clause once more to uphold the Attorney General's denial of bailout to a city in a covered jurisdiction); *United States v. Bd. of Comm'rs*, 435 U.S. 110, 118–23 (1978) (holding that preclearance requirements applied to political subdivisions of covered jurisdictions even when these subdivisions are not responsible for registering voters); *Oregon v. Mitchell*, 400 U.S. 112, 128–29 (1970) (upholding amendments to the VRA enfranchising 18-year-olds in federal elections, abolishing literacy tests as prerequisites for voting, and abolishing state durational residency requirements in presidential elections as within Congress's power to enact).

97. See 521 U.S. 507, 536 (1997) ("Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."), *superseded in part by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

98. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to bb-4 (2012)).

99. 494 U.S. 872 (1990).

100. See H.R. REP. NO. 103-88, at 9 (1993) (stating that Congress had the authority to pass the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment); S. REP. NO. 103-111, at 13–14 (1993) (noting that the Religious Freedom Restoration Act is designed to implement the Free Exercise Clause, which falls squarely within Congress's Section 5 enforcement power).

invalidated RFRA's application to the states, finding that "the design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the *substance* of the Fourteenth Amendment's restrictions on the States."¹⁰¹

Justice Kennedy, writing for a divided Court, curbed the extent of Congress's enforcement—and *interpretive*—powers by rearticulating the Court's holding in *Morgan*: "There is language in our opinion in *Katzenbach v. Morgan* which *could* be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one."¹⁰² Justice Kennedy disclaimed the idea that Congress could do anything but enforce the substantive provisions of the Amendment, arguing that "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."¹⁰³ He went on to issue a new standard for determining whether Congress has acted in accordance with its enforcement powers: "There must be a *congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end."¹⁰⁴

Boerne signaled the Court's growing inclination toward what Robert Post and Reva Siegel have labelled "juricentric" constitutionalism,¹⁰⁵ under which the Court has invalidated several other federal laws as reaching beyond Congress's enforcement clause powers. In *Board of Trustees of University of Alabama v. Garrett*, a divided Court articulated a more exacting standard by which Congress must justify its proactive enforcement of the Reconstruction Amendments.¹⁰⁶ Writing for the five-member majority, Chief Justice Rehnquist elaborated that *Boerne* "confirmed . . . the long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."¹⁰⁷ Two years later, in *Nevada Department of Human Resources v. Hibbs*, the Court commented further, noting that while Congress's enforcement powers include the ability to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter

101. *Boerne*, 521 U.S. at 519 (emphasis added).

102. *Id.* at 527–28 (emphasis added) (citation omitted).

103. *Id.* at 519.

104. *Id.* at 520 (emphasis added).

105. See discussion *supra* note 37.

106. 531 U.S. 356 (2001).

107. *Id.* at 365.

unconstitutional conduct . . . it falls to this Court, not Congress, to define the substance of constitutional guarantees.”¹⁰⁸

More recently, the Court in *Shelby County v. Holder* disavowed the constitutionality of Congress’s most recently enacted VRA preclearance regime, seemingly calling into question whether the Court would continue to apply its more deferential “any rational means” standard of review for congressional enactments under the enforcement clauses, as set out in *Katzenbach* and *Morgan*.¹⁰⁹ Rather, the Court held that the VRA’s section 4 preclearance regime—based on formulas originally developed in the late 1960s and early 1970s and reenacted in 2006—had been an unconstitutional exercise of Congress’s Fifteenth Amendment Enforcement Clause power.¹¹⁰ Writing for a five-member majority, Chief Justice Roberts emphasized that when reenacting the VRA in 2006, Congress had not altered the decades-old formula for determining which states and districts were covered by preclearance requirements; instead, it had “reenacted” the same formula derived from facts that were (by then) forty years old, “reverse-engineer[ing]” the formula by first identifying covered jurisdictions and then developing criteria to justify their inclusion.¹¹¹ Concluding that Congress had acted beyond its Enforcement Clause powers through such an “irrational” approach,¹¹² the Chief Justice employed a standard similar to *Boerne*’s “congruence and proportionality” test and held that “Congress must ensure that the legislation it passes to remedy [a] problem speaks to current conditions” of that problem rather than outdated ones.¹¹³ *Shelby County* suggests that the contemporary Court will preserve for itself not only the role of interpreting the Constitution’s guarantees, as in *Boerne*, but also the role of determining whether the prophylactic legislation Congress enacts is appropriately tailored to protect those guarantees.

The Court’s decades-long juricentric turn against legislative constitutionalism of the Reconstruction Amendments seems to be in at least some tension with its Republican Guarantee Clause jurisprudence. After all, in those cases the Court has repeatedly

108. 538 U.S. 721, 727–28 (2003).

109. As the dissent noted, while the majority in *Shelby County* did not “purport to alter settled precedent” regarding the *Katzenbach* any rational means test, *Shelby County v. Holder*, 570 U.S. 529, 569 (2013) (Ginsburg, J., dissenting), the majority did not “even identify[] a standard of review” for determining whether Congress’s means were rational, *id.* at 580, instead simply concluding that continued reliance on the section 4 coverage formula was “irrational,” *id.* at 556 (majority opinion).

110. *Id.* at 557.

111. *Id.* at 551, 554.

112. *Id.* at 556.

113. *Id.* at 557.

invoked the political question doctrine to defer to other branches on interpretive questions about the meaning and potential applications of the Clause. Perhaps seeing an opening from this disjuncture, several scholars have called for Congress to reenact the VRA under the Republican Guarantee Clause instead of the Reconstruction Amendments, citing to the Court's repeated declarations that claims arising under the Clause raise nonjusticiable political questions.¹¹⁴ The question, then, is whether the other branches may act under the Clause, and if so, what they might do under it.

II. THE POLITICAL BRANCHES AS GUARANTORS OF REPUBLICAN GOVERNMENT

[T]he power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress.
—*Texas v. White*¹¹⁵

Although often overlooked today, Congress and the president were seen as central to the interpretation and enforcement of the Clause throughout the nineteenth century, far more so than were the courts. This Part discusses the roles that both the president and Congress played in interpreting, applying, and enforcing the Clause during this period, particularly during the Civil War and Reconstruction. Most notably, both the president and Congress drew on the Clause to justify federal Reconstruction in the South, and Congress also invoked the Clause as a basis for paving the way for ratification of the Fourteenth and Fifteenth Amendments. This history—and the judicial deference exhibited to the political branches when their actions were challenged in court—suggests that the Clause may be directed primarily at the political branches. It also suggests that, at a minimum, the Reconstruction Amendments irreparably altered what the Republican Guarantee Clause might mean, fundamentally redefining the notion of a constitutionally republican form of government. Nevertheless, this Part also shows why it is a mistake to understand the Clause as raising classical political questions that make the Clause *fully* nonjusticiable in court.

114. See, e.g., Chin, *supra* note 5, at 1577 (arguing that “judicial review of an amended Voting Rights Act grounded in part on the Guarantee Clause . . . would dramatically simplify the Court’s review of the Act’s constitutionality” because “the Court has recognized repeatedly that Guarantee Clause claims are for Congress to the exclusion of the courts”).

115. 74 U.S. (7 Wall.) 700, 730 (1868), *overruled in part by* Morgan v. United States, 113 U.S. 476 (1885).

*A. Presidential Action to Guarantee Republican
Government in Rhode Island*

From its earliest invocations, the Republican Guarantee Clause has always been closely linked to questions of voting, enfranchisement, and political participation. The Clause first emerged as an important part of constitutional debates in the mid-nineteenth century, as some states had continued colonial-era policies of limiting the franchise to the propertied who owned freehold estates.¹¹⁶ This practice was known as “freehold suffrage,”¹¹⁷ and because only free white males could legally own freehold estates under most state laws, the franchise was practically limited to a small fraction of the total population of the colonial-era states.¹¹⁸

In the subsequent decades, significant immigration and rapid population growth meant that by the early nineteenth century, freehold suffrage would result in effective minority rule, so nearly every state that had it underwent a constitutional convention to reform its suffrage rules.¹¹⁹ By 1840, Rhode Island was one of only two states that retained a structure closely resembling freehold suffrage.¹²⁰ Rhode Island had never adopted a new constitution, instead retaining the charter established under the reign of Charles II in 1663, which included freehold suffrage.¹²¹ Although the state’s General Assembly had the power to amend the charter by statute, calls to extend the franchise went unheeded, in part because apportionment in its lower house was set by city rather than by population, effectively ensuring minority rule by the landed gentry even among the already narrowly defined class of eligible voters.¹²²

These conditions spurred an insurgence among those opposed to freehold suffrage.¹²³ Discontented citizens convened in 1841 and held their own constitutional convention open to all free white males, electing their own government and officers in contravention of the

116. See Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 339–40 (1989) (discussing the significant extent of disenfranchisement among the propertyless in the American colonies).

117. See Jacob Katz Cogan, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L.J. 473, 476–78 (1997).

118. See *id.* at 477.

119. See *id.* at 477–78.

120. William M. Wiecek, “A Peculiar Conservatism” and the Dorr Rebellion: *Constitutional Clash in Jacksonian America*, 22 AM. J.L. HIST. 237, 240 (1978).

121. See AMASA M. EATON, THOMAS WILSON DORR AND THE DORR WAR: A PAPER READ BY HON. AMASA M. EATON 4–5 (1909).

122. Wiecek, *supra* note 120, at 241–42.

123. WIECEK, *supra* note 5, at 88.

charter government.¹²⁴ This revolutionary effort was led by Thomas Dorr, a celebrated lawyer and former member of the Rhode Island General Assembly.¹²⁵ Dorr was elected governor at the people's constitutional convention, and the suffrage movement associated with the cause came to be known as the Dorr Rebellion.¹²⁶ Out of the suffragists' constitutional convention came a constitution submitted for ratification to the people of Rhode Island. In response, the charter government also held a constitutional convention to reapportion representative districts across the state and submitted its constitution as well. Ultimately, the people's constitution was ratified and the charter constitution was rejected.¹²⁷

The Republican Guarantee Clause played an important role in conveying constitutional legitimacy on the suffragists' claims to popular sovereignty.¹²⁸ One of the rallying cries behind the convention was the claim that an almost exclusively freehold suffrage coupled with the malapportionment of electoral districts effectively rendered the government "unrepublican."¹²⁹ Both sides turned to the federal government to intervene and assist their cause, with the suffragists invoking the Republican Guarantee Clause of Article IV, Section 4, as the basis for federal assistance, and the charter government invoking the Invasion and Domestic Violence Clauses of the same section.¹³⁰ The suffragists notified President Tyler that a people's constitution had been adopted by a majority of the people of the state and a government had been duly organized under it, so the federal government should recognize *it* as the official government of Rhode Island.¹³¹

With the suffragists' constitution ratified and the charter government's rejected, there was now confusion as to the legitimate source of popular sovereignty in Rhode Island, and Rhode Island "careened on to crisis."¹³² In response to the convention and subsequent rebellion, the charter government declared martial law, seeking to force the suffragists' upstart governing body into dissolution, and some in the

124. *Id.* at 88–91.

125. EATON, *supra* note 121, at 2.

126. WIECEK, *supra* note 120, at 238.

127. WIECEK, *supra* note 5, at 91.

128. For an extensive discussion of the philosophical principles at stake in the rebellion, see GEORGE M. DENNISON, DORR WAR: REPUBLICANISM ON TRIAL, 1831-1861 (1976), and EATON, *supra* note 121.

129. WIECEK, *supra* note 5, at 90.

130. ELISHA R. POTTER, CONSIDERATIONS ON THE QUESTIONS OF THE ADOPTION OF A CONSTITUTION, AND EXTENSION OF SUFFRAGE IN RHODE ISLAND 10–11 (Boston, Thomas H. Webb & Co. 1842).

131. H.R. REP. NO. 28-546, at 52 (1844).

132. WIECEK, *supra* note 5, at 95.

charter government suspected the leaders of the rebellion to be recruiting arms and militiamen from Massachusetts to enforce the people's constitution against the charter government.¹³³

In responding to an appeal from the charter governor for the President to intervene by force,¹³⁴ President Tyler explained that while the Invasion and Domestic Violence Clauses might trigger *obligations* for the federal government to intervene under certain circumstances,¹³⁵ such circumstances had not yet actually arisen, for there had been no actual insurrection.¹³⁶ He assured them, however, that were an armed insurrection or invasion to occur, the federal government would rapidly intervene.¹³⁷ Moreover, President Tyler also seemed to disclaim the authority to intervene with force on the basis of the Republican Guarantee Clause, arguing that if he were to take sides in the conflict, it would “make the President the armed arbitrator between the people of the different states and their constituted authorities, and might lead to a usurped power.”¹³⁸ President Tyler nevertheless released a statement supporting the charter government and moved federal troops to Fort Adams in Newport, Rhode Island, which undermined the legitimacy of the rebellion and, scholars have since concluded, effectively ended the political will for a rebellion in Rhode Island.¹³⁹

Although the struggle for control of Rhode Island was now over, contestation over the meaning of the Republican Guarantee Clause continued. At the behest of a minority faction of the Rhode Island General Assembly sympathetic to the Rebellion, the U.S. House of Representatives appointed a select committee to explore the president's potential to act under the Clause, as well as to assess President Tyler's actions in response to the rebellion.¹⁴⁰ In the select committee's report

133. See, e.g., Affidavit of Samuel Currey as to Proceedings and Arming of Suffragemen (Feb. 5, 1842), in H.R. REP. NO. 28-546, at 655–66.

134. Letter from Samuel W. King, Governor of R.I., to President Tyler (Apr. 4, 1842), in H.R. REP. NO. 28-546, at 656–57.

135. Section 4 of Article IV reads in its entirety: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” U.S. CONST. art. IV, § 4.

136. Letter from President Tyler to Samuel W. King, Governor of R.I. (Apr. 11, 1842), in H.R. REP. NO. 28-546, at 658–59.

137. *Id.*

138. *Id.* at 659.

139. Vile, *supra* note 9, at 671.

140. WIECEK, *supra* note 5, at 108–09. The select committee was comprised of five members of the U.S. House of Representatives: three Democrats and two Whigs. See *Journal of the Select Committee on the Rhode Island Memorial*, in H.R. REP. NO. 28-546, at 87; see also *People Search*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Search/> (last visited Apr. 4, 2020) (providing a search function that produces information, including party affiliation, for U.S. representatives).

summarizing its findings, the committee rejected the President's interpretation of the Clause as potentially permitting him to interpose federal power in favor of the seated government seeking assistance without *also* inquiring into whether that state government *itself* was legitimate or usurpative—in essence, reading all three portions of Article IV, Section 4 together.¹⁴¹

But the committee also considered what powers *Congress* might be vested with under the Republican Guarantee Clause. It concluded that the Clause vests Congress with the power of “supervision” over the state constitutions, at least so far as the “ascertainment of their republican character is concerned.”¹⁴² It also concluded that “when those constitutions do not provide for a republican form of government . . . it is the duty of *Congress* to set [them] aside, and to recognise and enforce one[s] which possess[] this republican character.”¹⁴³ While Congress could not “prescribe to the people of a State the details of their constitution,” the committee did define a republican form of government as “one which exists in the consent of the people, and over which they have control.”¹⁴⁴ This relatively limited understanding of the Clause's conferral of power to Congress would ultimately be revisited by Congress after the Civil War.

Congress and the president were not the only federal actors to question their capacity to determine what the Clause meant and what they could do as a guarantor of it—so did the Supreme Court, albeit long after the Dorr crisis had abated. The case in which it was asked to decide the meaning of the Clause, *Luther v. Borden*, concerned a legal claim that radically undersold the potential significance of the case.¹⁴⁵ The precise legal claim was trespass related to a search of Luther's home by the charter militia during martial law. Luther claimed that the search and seizure was an illegal trespass, since the charter government had not been the legitimate government in Rhode Island. Thus, his tort claim rested on the illegitimacy of the charter government's imposition of martial law, in part as a violation of the federal Constitution's republican-government guarantee.¹⁴⁶

Given the minor nature of the tort claim at issue and the magnitude of what the Supreme Court was being asked to hold, it is perhaps unsurprising that the Court ducked the issue. It declined to render an answer as to the meaning of the Clause, concluding instead

141. H.R. REP. NO. 28-546, at 60.

142. *Id.* at 63.

143. *Id.* (emphasis added).

144. *Id.*

145. 48 U.S. (7 How.) 1 (1849).

146. *Id.* at 18.

that federal interference in the domestic concerns of a state was a power delegated by the Constitution to the political branches, not the courts.¹⁴⁷ Given the highly political and contentious nature of the confrontation between the charter government's and the rebel government's claims to sovereignty, it is little wonder the Supreme Court sought to avoid rendering a verdict as to the rightful bearer of state sovereignty, and with it, the legal power to act in a sovereign capacity.

Writing for a unanimous Court, Chief Justice Taney held that "*Congress* must necessarily decide what government is established in the State before it can determine whether it is republican or not."¹⁴⁸ Once the decision had been made by Congress to sit a state's senators and representatives, it "could not be questioned *in a judicial tribunal*."¹⁴⁹ Nonetheless, Chief Justice Taney noted that while the Rhode Island government's imposition of martial law was temporary, were a military government "established as the permanent government of the State, [it] would not be a Republican government, and it would be the duty of Congress to overthrow it."¹⁵⁰

Chief Justice Taney thus seemed to endorse the notion that the Republican Guarantee Clause is addressed at least in part to the political branches, and that they are not only permitted to act under the Clause, but perhaps *required* to do so—at least in circumstances where a state government has become insufficiently republican in form. Nevertheless, short of permanent martial law, Chief Justice Taney said nothing about what circumstances, if any, might occasion Congress taking action under the Republican Guarantee Clause. He did not clearly conclude that the judiciary could *never* render a verdict as to the meaning of the Clause. He only concluded that it was inappropriate to exercise the judicial power to second-guess a political determination reserved for Congress—the recognition of a state government's officers. The dicta in *Luther* thus suggested that while only Congress can decide whether a particular state government's composition is sufficiently republican to merit *admission*, it left unresolved the question of whether the Court could review congressional determinations related to subsequent developments in state law.¹⁵¹

147. *Id.* at 42.

148. *Id.* (emphasis added).

149. *Id.* (emphasis added).

150. *Id.* at 45.

151. *Id.* at 42.

B. Civil War–Era Congressional and Presidential Restoration—and Redefinition—of the Republican Form of Government

That very question of Congress’s power to intervene in the states under the Republican Guarantee Clause was tested during and in the years after the Civil War, as Presidents Lincoln and Johnson and the Republican-controlled Congress debated how to go about reincorporating the Confederate states into the Union. In marked contrast to the circumstances in Rhode Island during the Dorr Rebellion, in which both sides in the conflict had eagerly sought federal intervention on their behalf, the southern states resisted federal Reconstruction policies tooth and nail. As a matter of formal law, President Lincoln had freed American slaves in his Emancipation Proclamation in 1863, and slavery itself had been formally outlawed as an institution with the ratification of the Thirteenth Amendment in late 1865. Yet by the end of 1865, just months after the Civil War had technically ended, unrepentant southern state governments were already seeking to resurrect a de facto system of formal inequality through the implementation of Black Codes.¹⁵²

In debates about how the federal government might reincorporate the southern states into the Union while adequately protecting the rights of newly freed African Americans, the Republican Guarantee Clause played a central role. The Clause was an especially important source of authority for congressional Republicans seeking a constitutionally legitimate basis for achieving the aims of Reconstruction. Indeed, it served as a basis for ensuring that the southern states guaranteed the privileges and immunities of citizenship to recently freed former slaves, including the right to vote and to participate in the state political processes—at least as a matter of formal law.¹⁵³ The Clause provided the legal foundation for many of the federal government’s actions taken at the behest of the Reconstruction Congress between the end of the war and the early 1870s, including helping to pave the way for ratification of the Fourteenth and Fifteenth Amendments.¹⁵⁴

152. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1217 (1992); see also FONER, *supra* note 36, at 47–48, 65–66 (describing white southerners’ efforts—in the words of one Reconstruction-era governor of Alabama—to make clear that “politically and socially, ours is a white man’s government”).

153. See Charles O. Lerche, Jr., *Congressional Interpretations of the Guarantee of a Republican Form of Government During Reconstruction*, 15 J.S. HIST. 192 (1949) (recounting a range of interpretations asserted by Republicans in Congress during the early years of Reconstruction).

154. See Akhil Reed Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 HARV. L. REV. FORUM 109, 112 (2013).

Congress's efforts during this period show the important ways that constitutional interpretation can evolve and develop outside of the courts, as the Reconstruction Congress sought the constitutional power to oversee internal affairs within the former Confederate states.¹⁵⁵ Initially, Republicans in Congress had considered founding the constitutional basis for Reconstruction on Congress's plenary powers over U.S. territories; if the seceded states were treated as territories prior to their formal readmission, that would put them directly under Congress's control.¹⁵⁶ This approach not only seemed too drastic as a matter of theory, but became increasingly unnecessary as a matter of policy, for Union military governments were *already* operating in several of the conquered Confederate states by the middle of 1862.¹⁵⁷

The concept of acting to guarantee formation of truly republican governments in the Confederate states soon replaced the territorialization framework as the predominant theory of Reconstruction.¹⁵⁸ The Clause had been invoked in Congress as early as 1862, when Senator Charles Sumner of Massachusetts argued that Congress could assume complete jurisdiction over the Confederate states to "proceed to establish therein republican forms of government under the Constitution."¹⁵⁹ Days later, Senator Ira Harris of New York introduced a bill that would organize provisional governments in the southern states in part on the basis of the Clause,¹⁶⁰ though at that still-early stage in the war, the bill never reached a vote.¹⁶¹ Harris's bill, taking a modified form of Chief Justice Taney's articulation of the Clause's meaning in *Luther*, proposed an alternative to the territorialization approach. It framed the southern states, in declaring their intent to rebel from the Union, as having ceased to have a republican form of government, and so the Clause would grant the federal government not just the power but the duty to reestablish such governments in republican form as a condition for the states' return to full standing in the Union.¹⁶² Such an approach would not only grant Congress the power to enact its Reconstruction agenda, but could theoretically be a sustained source of authority to supervise the states

155. See Lerche Jr., *supra* note 153, at 194–95.

156. See generally HERMAN BELZ, RECONSTRUCTING THE UNION: THEORY AND POLICY DURING THE CIVIL WAR 67–84 (1969) (describing congressional efforts to territorialize the Confederate states in order to justify federal reconstruction efforts).

157. See *id.* at 84.

158. *Id.* at 122.

159. CONG. GLOBE, 37th Cong., 2d Sess. 737 (1862).

160. *Id.* at 815.

161. See Lerche Jr., *supra* note 153, at 195.

162. CONG. GLOBE, 37th Cong., 2d Sess. 3141 (1862); see also Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 74 (1974).

even after they were readmitted, to ensure they would not go back on their promises.¹⁶³ In this way, the supervision of the state governments was akin to the conditions imposed on territories seeking statehood admission to the Union.¹⁶⁴

Initially, even the Radical Republicans in Congress expressed limited support for this approach to Reconstruction. As the extent of southern resistance became clear, however, support for drawing on the Clause as a source of federal power grew among Republicans in Congress. Harris introduced a revised version of his bill in 1863, which expressly drew on the Clause and was called “A Bill to guarantee in certain States a republican form of government.” It presaged what was to come, proposing that Congress could require the states to call new constitutional conventions that would establish in those states a republican form of government, and which would necessarily prohibit slavery.¹⁶⁵

As the Union government began to seize control of important southern cities by 1864, Congress initiated efforts to pass a series of bills setting out the basis for federal intervention in the southern states, and a number drew directly on the Clause. Both houses of Congress passed the first of these Reconstruction acts, called the Wade-Davis Bill of 1864, a full year before the Union government had completely prevailed over the Confederacy; the bill “guarant[eed] to certain States whose governments have been usurped or overthrown, a republican form of government.”¹⁶⁶ Cosponsor Henry Davis provided one of the more thorough interpretations of the Clause and argued that it gave Congress wide latitude to fulfill the guarantee. Davis argued that the Clause “vests [in] the Congress of the United States a plenary, supreme, unlimited political jurisdiction, paramount over courts, subject only to the judgment of the people of the United States, embracing within its scope every legislative measure necessary and proper to make it effectual.”¹⁶⁷ Davis likened the plenary power provided to Congress under the Clause to Congress’s plenary power to admit new states into the union or to make rules and regulations for U.S. territories.¹⁶⁸ He went on to argue that the “duty of guarantying carries with it the right

163. Benedict, *supra* note 162, at 75.

164. See Amar, *supra* note 154, at 113 (“Western territories seeking statehood had been required to establish their republican bona fides before they would be admitted to the Union as proper republican states in good standing.”).

165. See BELZ, *supra* note 156, at 124.

166. CONG. GLOBE, 38th Cong., 1st Sess. 3448 (1864).

167. *Id.* at app. at 82 (speech of Hon. H. Winter Davis).

168. *Id.* Davis also seemed to draw on the Court’s *dicta* in *Luther* in arguing that all of Article IV, Section 4 raised political questions inappropriate for review by the Courts. See *id.*

to pass all laws necessary and proper to guaranty” and “the duty to accomplish the result” such that “everything inconsistent with the permanent continuance of republican government shall be weeded out.”¹⁶⁹

The Wade-Davis Bill was far-reaching in its intervention into the governing affairs of the Confederate states. The bill would establish provisional governments controlled by presidentially appointed acting governors, set out qualifications for voting that would exclude high-ranking Confederate officials from running for statewide office, and require that any state’s constitutional convention include a permanent prohibition on involuntary servitude as a condition of constitutional ratification.¹⁷⁰ Davis grounded the constitutionality of such significant federal interventions in the Clause; he argued that “[i]t places in the hands of Congress the right to say what is and what is not, with all the light of experience and all the lessons of the past, inconsistent, in its judgment, with the permanent continuance of republican government.”¹⁷¹ Davis further contended that “there [was] no power, judicial or executive, in the United States, that can even question this judgment but the PEOPLE; and they can do it only by sending other Representatives here to undo our work.”¹⁷² Others echoed Davis’s view, arguing that Congress’s Article I powers to judge the elections and qualifications of its own members should be “understood in relation to a more important power of Congress to guarantee republican governments.”¹⁷³ On this line of thinking, those Article I powers “assumed a broader significance” due to their connection to the Clause and extended beyond the “merely[] technical aspects of the elections of representatives.”¹⁷⁴

1. Presidential Invocations During and After the War

Given Davis’s sweeping view of Congress’s powers under the Clause, it is remarkable that his bill was seen to occupy a “middle ground constitutionally” between those who opposed Reconstruction altogether and those who sought to treat the Confederate states as territories to be placed entirely in Congress’s control.¹⁷⁵ President Lincoln initially opposed expansive congressional efforts at

169. *Id.* at app. at 83.

170. *Id.* at 3448–49.

171. *Id.* at app. at 83.

172. *Id.*

173. See BELZ, *supra* note 156, at 207.

174. *Id.*

175. *Id.* at 206.

Reconstruction.¹⁷⁶ His successor, Andrew Johnson, was even more opposed to the Reconstruction Congress's interventionist agenda.¹⁷⁷ Yet neither president disclaimed the power of the federal government to act under the Clause, and both actively sought to preserve a role for the executive branch to engage in Reconstruction activities under the Clause. While President Lincoln declined to sign the Wade-Davis Bill, his reasons for doing so were *not* because he disagreed with Congress's interpretation of the Clause. Rather, he explained that he was not prepared "by a formal approval of this bill, to be inflexibly committed to any single plan of restoration."¹⁷⁸ In other words, President Lincoln sought to preserve the widest available scope in which the *executive* could act, but he did not reject Congress's assertion that he could draw on the republican guarantee as the basis for intervention.¹⁷⁹

Indeed, both during and after the Civil War, first Lincoln and then Johnson—and the provisional governors under their command—repeatedly cited the Clause as a source of constitutional executive power authorizing their Reconstruction agendas.¹⁸⁰ Military successes by the middle of 1863 had presented Lincoln with the opportunity to attempt the reorganization of loyal governments in Louisiana, Arkansas, and Tennessee, in part on a theory that President Lincoln had to "meet the war as he found it" while Congress was in recess between March and December of 1863.¹⁸¹ These initial efforts—which relied on loyal Unionists in the South taking the initiative in reorganization—quickly stalled, and by December President Lincoln sought to take matters into his own hands.¹⁸² In his December 1863 Proclamation of Amnesty and Reconstruction, Lincoln proclaimed that only when Union-loyal southerners "reestablish[ed] a state government which shall be republican" would those governments be recognized as the true government of the state and receive the constitutional benefits guaranteed by Article IV, Section 4.¹⁸³ Notably, President Lincoln

176. See *id.* at 300 (describing Lincoln's position that reconstruction was "fundamentally an executive function").

177. See FONER, *supra* note 36, at 55 (describing the "bitter split over Reconstruction policy [that] developed between President Andrew Johnson and the Republican majority in Congress" and the "evidence . . . of violent outrages against the freed people and the unwillingness of the governments Johnson had established in the South to deal justly with the former slave").

178. Proclamation No. 18 (July 8, 1864), *reprinted in* 13 Stat. 744, 744 (1864).

179. *Id.*, 13 Stat. at 744–45.

180. See OFFICE OF JUDGE ADVOCATE GEN., U.S. ARMY, WAR DEPARTMENT NO. 64, THE USE OF THE ARMY IN THE AID OF THE CIVIL POWER 7 (1898) (citing the use of the Clause to allow for the use of military force to preserve the peace, uphold guaranteed rights, and prevent voter intimidation).

181. See BELZ, *supra* note 156, at 126–28.

182. See *id.* at 150–56.

183. Proclamation No. 11 (Dec. 8, 1863), *reprinted in* 13 Stat. 737, 737–38 (1863).

reserved the right for the federal government to make “modifications” to “the subdivisions, the constitution, and the general code of laws” of the southern states as necessary to fulfill his promise of emancipation,¹⁸⁴ foreshadowing the much more extensive congressional Reconstruction plan that would unfold after his assassination.

President Johnson, too, repeatedly invoked the broad executive powers provided by the Clause in the months after the Civil War ended. He expressly cited the Republican Guarantee Clause in every one of his presidential proclamations setting out the provisional governments for each of the vanquished southern states. The first of these proclamations, concerning the reentry of North Carolina, exemplified the way the President would draw on the powers provided by the Clause in every subsequent proclamation. Johnson concluded that “it [had] become[] *necessary and proper* to carry out and enforce the obligations of the United States to the people of North Carolina, in securing them in the enjoyment of a republican form of government” and to “present such a republican form of state government as will entitle the state to the guarantee of the United States therefor.”¹⁸⁵

Under the terms of each proclamation, President Johnson would appoint a provisional governor to “prescribe such rules and regulations as may be necessary and proper for convening a convention” of “the people of said state who are loyal to the United States” to ensure a republican form of state government as provided for under the Clause.¹⁸⁶ While the Invasion and Domestic Violence Clauses of Article IV, Section 4 may have provided more straightforward bases for intervention, Johnson cited the Republican Guarantee Clause as the constitutional grounds for directly regulating state elections and overseeing the reconstitution of the southern states’ constitutions so as to ensure the rights of newly emancipated male African-American citizens. If anything, what is striking about the constitutionalism of the Republican Guarantee Clause during this period is that Congress and the president did not disagree about the scope of the power conferred by the Clause, but instead were engaged in a “bitter battle” over *which branch* would serve as the primary guarantor of republican government in the defeated southern states.¹⁸⁷

184. *Id.*, 13 Stat. at 738.

185. Proclamation No. 38 (May 29, 1865), *reprinted in* 13 Stat. 760, 760–61 (1865) (emphasis added). Johnson invoked the Clause in every one of these presidential proclamations setting out the provisional governments of each of the southern states. Others included Nos. 39 (Mississippi), 41 (Georgia), 42 (Texas), 43 (Alabama), and 47 (Florida).

186. *E.g.* Proclamation No. 38 (May 29, 1865), *reprinted in* 13 Stat. 760, 760–61 (1865).

187. *See* Lerche Jr., *supra* note 153, at 196–97.

2. Congressional Reconstruction of Republican Forms of Government

The Clause not only played a notable role for the presidency, but it was also central to the constitutionality of Congress's Reconstruction actions in the southern states as well as in the ratification process of the Fourteenth and Fifteenth Amendments. The Republican-controlled Congress had been uncertain of the precise legal criteria for assessing the readmission of the southern states, but they were committed to ensuring, at a minimum, the end of slavery and the guarantee of rights for newly emancipated African Americans in the southern states, including the right to vote and to participate in the state political processes. Because many Republicans in Congress sought to avoid permanent direct federal supervision of the southern states, however, they instead sought a constitutional basis to condition the readmission of the southern states to the Union on the permanent abolition of slavery and the guarantee of political rights for newly freed African Americans.¹⁸⁸ The theory, which would ultimately prove to be far too rosy, was that once the southern states were readmitted on these terms, they would have no choice but to guarantee these rights to their citizens, both black and white.

The Reconstruction Acts of 1867 accomplished this in a somewhat heavy-handed fashion.¹⁸⁹ The First Reconstruction Act of 1867—passed by a supermajority of Congress over President Johnson's veto¹⁹⁰—forcefully invoked the Clause as a basis for its constitutionality, premising federal intervention on the “necess[ity] that peace and good order should be enforced in said States until loyal and republican State governments can be legally established.”¹⁹¹ The First Reconstruction Act recognized the absence of legitimate governance in the southern states and so authorized the President to subdivide them into five military districts under the control of appointed officers of the army.¹⁹² Chief among the aims of the Act was to assign district officers “to protect all persons in their rights of person and property” and to oversee state constitutional conventions, which would ensure the enactment of constitutions that would “provide that the elective franchise shall be enjoyed by all such persons as have the

188. See Benedict, *supra* note 162, at 74.

189. See *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 50–52 (1867) (discussing the details of the First and Second Reconstruction Acts).

190. CONG. GLOBE, 40th Cong., 1st Sess. 729–32 (1867) (Veto Message of President Andrew Johnson, March. 2, 1867).

191. An Act to provide for the more efficient Government of the Rebel State, ch. 153, pmbll., 14 Stat. 428, 428 (1867). For simplicity's sake, this Article refers to this statute as the “First Reconstruction Act.”

192. § 1, 14 Stat. at 428.

qualifications herein stated for electors of delegates.”¹⁹³ As set out by the Act, such persons were to expressly include “the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition.”¹⁹⁴ The Act provided for a similarly wide franchise for all elections (including state and local) in the provisional southern governments,¹⁹⁵ actions that are difficult to justify under Congress’s Article I, Section 4 Elections Clause powers alone.¹⁹⁶

In the spring of 1867, Congress passed the Second Reconstruction Act, also over President Johnson’s veto,¹⁹⁷ picking up where the First Reconstruction Act left off. The Act set forth additional requirements related to the states’ guarantee of their citizens’ voting rights as a precondition for readmission. These included guaranteeing the privileges and immunities of citizenship for the former slaves, as well as the voting rights of all former confederates, provided they took an oath of loyalty to the Union.¹⁹⁸ The Second Reconstruction Act also established federally operated boards of registration to ensure that state officials did not thwart voter registration in the states and to directly oversee all relevant aspects of state and local as well as federal elections.¹⁹⁹ Finally, the Third Reconstruction Act, which followed later that summer, provided the military commanders with the power to suspend or remove from state office *any* disloyal person, and provided the boards of registration with broader powers to supervise federal elections as well as state and local elections.²⁰⁰

During this period, the Reconstruction Congress also drew on the Clause as a way of redefining the meaning of “republican government” as set out in the Constitution. Whatever the term “republican government” may have conveyed at the founding, the Reconstruction Congress forcefully repudiated the notion that a republican government could tolerate widespread disenfranchisement

193. §§ 3, 5, 14 Stat. at 428–29.

194. § 5, 14 Stat. at 429.

195. § 6, 14 Stat. at 429.

196. As noted above, federal congressional intervention in the states’ operations of their own state and local elections is not easily justified under the Elections Clause, and so justifying such sweeping federal conduct on the basis of the Republican Guarantee Clause is of some constitutional significance. *See supra* notes 30–32 and accompanying text.

197. CONG. GLOBE, 40th Cong., 2d Sess. 313–14 (1867) (Veto Message of President Andrew Johnson, March 23, 1867).

198. Second Reconstruction Act, ch. 6, § 1, 15 Stat. 2, 2 (1867). *See generally* *Georgia v. Stanton*, 73 U.S. 50, 52 (1867) (stating that the reorganized government of Georgia was to be “in the possession and enjoyment of all the rights and privileges . . . belonging to a State in the Union under the Constitution”).

199. Second Reconstruction Act, ch. 6, § 6, 15 Stat. at 3.

200. Third Reconstruction Act, ch. 30, §§ 2–3, 5, 15 Stat. 14, 14–15 (1867).

and inequality—at least on the basis of race.²⁰¹ Congress invoked the Clause as a basis for ensuring the southern states’ integration of African Americans into state political processes. In 1867, for example, the House of Representatives passed a resolution instructing the House Judiciary Committee to investigate “whether the States of Kentucky, Maryland, and Delaware now have State governments republican in form.”²⁰² This was an especially striking action because although each of these border states had permitted slavery leading up to the Civil War, none had been a member of the Confederacy, and so the basis for such inquiries could not be justified on questions of readmission alone.

Over time, Congress recognized that conditional readmission alone would not be sufficient, so the Reconstruction-era Congresses also sought to provide individual rights guarantees and direct private rights of action to vindicate those guarantees. Members of Congress explored enacting legislation under the Clause that would provide a *direct* federal guarantee of universal male suffrage, anticipating rights later guaranteed under the Fourteenth Amendment (which concretely established the citizenship of all African Americans born in the United States) and Fifteenth Amendment (which prohibited the denial of the right to vote on the basis of race). Several bills were introduced in Congress to guarantee universal male suffrage among citizens of the states, and the bills located congressional power to enact such legislation in the Clause.²⁰³

One problem with this approach was that while Congress rested its constitutional authority for these bills on the Republican Guarantee Clause, concerns grew that federal laws protecting individual rights in state electoral procedures could be foiled simply by a change in party control of Congress. Moreover, a number of representatives questioned whether Congress could rest such extensive legislative power under the Clause, given founding-era precedents. Elisha R. Potter, a representative from Rhode Island and future justice of the Rhode Island Supreme Court, argued that one of the strongest arguments *against* Congress’s power to enforce the Clause against the states rested on the same original constitutional practices interpretation that opponents of the Dorr Rebellion had used several decades prior: that at the country’s

201. Nevertheless, the Reconstruction Congress also introduced a gendered distinction into the Constitution for the first time, as Section 2 of the Fourteenth Amendment limited certain punitive measures for denying the right to vote only to “male citizens.” U.S. CONST. amend. XIV, § 2. Although female suffragists had lobbied heavily for either gender-neutral language around voting or else an equal guarantee for women, they were denied both when Congress drafted the Fourteenth and Fifteenth Amendments. See FONER, *supra* note 36, at 112–15.

202. CONG. GLOBE, 40th Cong., 1st Sess. 656–57 (1867).

203. Benedict, *supra* note 162, at 75 & n.24.

founding, nearly every state permitted slavery, and yet each state had apparently been considered sufficiently republican in form so as to be admitted into the Union.²⁰⁴ Unless it was admitted that nearly every state had been in violation of the Clause—including nearly all of the northern, Republican-controlled states—it was difficult to make the case that the republican guarantee included the guarantee of emancipation for all citizens.

Senator Sumner, sponsor of several of the Reconstruction Acts that imposed conditions on the southern states' political structures in exchange for readmission to the Union, countered that whether or not the guarantee promised by the Clause had been perfectly *enforced*, it *had* always been there: "Before the extinction of Slavery, State Rights were successful against this guarantee."²⁰⁵ Senator Sumner portrayed southern states as having "played the turtle, drawing head, legs, and tail all within an impenetrable shell."²⁰⁶ Rather, the "mighty power" of the Clause had been "[a]sleep" while slavery prevailed; henceforth, Congress's duty to guarantee a republican government under the Clause would be "constant and ever-present," "reënforced by all needful powers" and "executed at all hazards."²⁰⁷ He argued that allowing the post-Reconstruction southern states to continue in the same course would "dishonor the Constitution and . . . abandon the crowning victory over the Rebellion."²⁰⁸ In this sense, Senator Sumner's argument parallels the constitutional history of congressional legislation enacted under the Reconstruction Amendments: it took nearly a century after those Amendments were ratified before Congress sought to meaningfully enforce their promises through remedial legislation in the forms of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

Despite the broad claims of congressional power that some members of Congress such as Senator Sumner sought to derive from the Clause, in the end, congressional Republicans would only rely on the Clause as a "vague guide in setting the conditions that southern states had to meet before Congress would recognize them as entitled to normal state rights."²⁰⁹ Part of the problem was just as the Court in *Luther* had concluded: settling on a precise definition of republicanism was a difficult political question—not just for the courts, but for Congress also. Congressional Republicans struggled to articulate a

204. See POTTER, *supra* note 130, at 39–40.

205. CONG. GLOBE, 41st Cong., 2d Sess. 2423 (1870) (debating readmission of the State of Georgia).

206. *Id.* (emphasis omitted).

207. *Id.*

208. *Id.*

209. Benedict, *supra* note 162, at 75.

workable definition to guide federal intervention in a way that could be usefully applied on the ground. For example, during Senate debates over the conditions for readmission of the State of Mississippi to the Union, Senator George F. Edmunds of Vermont recognized that “we might change either one of these [proposed] provisions in the constitution of Mississippi, and the constitution would be republican still.”²¹⁰ Certainly, Congress unquestionably had the broad power to interfere and restore republican institutions to any state which “fail[ed] within the fair spirit of the Constitution to maintain republican government within its borders.”²¹¹ But to Senator Edmunds, the Clause seemed an underspecified basis for more specific action given the other tools in Congress’s constitutional arsenal.

This was because, in addition to serving as a free-standing basis for legislative action, the Clause could also be understood to work in tandem with Congress’s Article I powers. Alongside the broad Reconstruction supervisory powers Congress had invoked on the basis of the Republican Guarantee Clause, Congress also drew on other constitutional powers to enforce Reconstruction conditions on the southern states. For example, under its Article I, Section 5 power to judge the qualifications of its members, the Reconstruction Congress repeatedly refused to seat southern Democrats elected to serve as representatives in the House when Congress was of the view that the elections through which they had been selected had been conducted under circumstances that failed to meet the minimal republican government requirements of the Reconstruction Acts.²¹²

3. Guaranteeing Ratification of the Fourteenth and Fifteenth Amendments

The decline in congressional efforts to directly legislate under the Republican Guarantee Clause can also be traced to the rising momentum for enshrining specific republican guarantees directly in the Constitution. In this effort, the Clause also served as a chief basis for the process that would ensure the ratification of the Fourteenth Amendment. In addition to mandating reforms of the southern state constitutions and guaranteeing the political rights of African Americans, the First Reconstruction Act of 1867 also required the southern states to ratify the Fourteenth Amendment as a precondition

210. CONG. GLOBE, 41st Cong., 2d Sess. 1333 (1870).

211. *Id.*

212. *E.g.*, Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965 - And Beyond*, 57 MISS. L.J. 591, 593–95 & 593–94 nn.8–9 (1987).

for readmission.²¹³ And because Congress had predicated its power to enact the First Reconstruction Act on the Republican Guarantee Clause, the Clause can very much be understood to be the basis upon which the Fourteenth Amendment itself was assured of coming into being.²¹⁴

Akhil Amar has been perhaps the most forceful advocate for this understanding of the constitutional power granted to Congress under the Clause.²¹⁵ Amar has argued that “the Reconstruction Act’s additional directive that former Confederate states ratify the Fourteenth Amendment was also an appropriate instrument to further the republican-government ideal” because the Amendment’s requirements in incorporating many of the Bill of Rights protections—among them, that every state guarantee equal citizenship, free speech, free assembly, free religious exercise, and fair trials—were concrete elements of a “proper republican government.”²¹⁶ In this sense, ratification of the Fourteenth Amendment can be said to have substantively altered the meaning of “republican government” as guaranteed by the Republican Guarantee Clause, because the Amendment set a new baseline for equality below which no state government may descend. Whereas prior to the Fourteenth Amendment a state government could be republican in form without guaranteeing the rights and protections enshrined in the Bill of Rights, incorporation of those rights in the Amendment fundamentally reconfigured the permissible floor concerning what might constitute a republican form of state government.

Amar has also noted that the ratification requirement was not formally necessary to ensure the Amendment’s entry into the Constitution, for three-quarters of the Union states had already ratified

213. An Act to provide for the more efficient Government of the Rebel State, ch. 153, § 5, 14 Stat. 428, 429 (1867):

[W]hen said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as article fourteen, and when such article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom . . . ;

see also An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, § 1, 15 Stat. 73, 73 (1868) (“[T]he constitutions of neither of said States shall ever be so amended or changed as to deprive any citizen . . . of the right to vote in said States.”); An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, § 1, 15 Stat. 72, 72 (1868) (“[T]he constitution of Arkansas shall never be so amended or changed as to deprive any citizen . . . of the right to vote.”).

214. Amar, *supra* note 154, at 111–12.

215. See AMAR, *supra* note 13, at 84–88.

216. *Id.* at 86–87.

the Amendment by early 1867, well before Congress required the southern states to ratify it as a condition of readmission under the First Reconstruction Act.²¹⁷ Instead, the link between the Clause, the First Reconstruction Act, and the Fourteenth Amendment helps to reveal how Congress sought to transmute the vague power of the Clause into the more specific federal powers granted by the Fourteenth Amendment. The Fourteenth Amendment's origins can be thus traced in meaningful part to Congress's exercise of power under the Clause, and it suggests these constitutional provisions must be read and understood together. (This also suggests, as I will discuss further in Part III, that the ratification of the Reconstruction Amendments must be factored into any analysis of the Clause's meaning that can be derived from founding-era "original meaning" sources.)

Similar congressional legislation helped to ensure the ratification of the Fifteenth Amendment two years later among those recalcitrant southern states that had refused to ratify the Fourteenth Amendment as a precondition for readmission.²¹⁸ In contrast to the Fourteenth Amendment, however, the Fifteenth *did* rely on its ratification among the southern states seeking readmission, for several western states (fearing the future enfranchisement of Chinese residents), northern states (fearing enfranchisement of the Irish), and Union border states (Kentucky, Maryland, and Delaware) refused to immediately ratify it upon its passage.²¹⁹ Because the Republican Guarantee Clause served as a basis for the ratification of both amendments among the southern states, the enforcement clauses of the Reconstruction Amendments can in one sense be understood as a more specific and detailed manifestation of the broader legislative guarantee Congress sought to provide under the Republican Guarantee Clause. And what is especially striking about this period is that while the Supreme Court has never given an affirmative meaning to the Clause, it has tacitly endorsed Congress's actions during Reconstruction—even if the Court would largely go on to narrow and enervate the legislative

217. *Id.* at 87.

218. See An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80 (1870) (noting that adoption of a state constitution establishing a republican government and ratification of the Fourteenth and Fifteenth Amendments were preconditions to receiving representation in Congress); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67 (1870) (same); An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62 (1870) (same); see also FONER, *supra* note 36, at 107–08 (describing the ratification process of the Fifteenth Amendment among the southern states seeking readmission through Reconstruction).

219. See FONER, *supra* note 36, at 108.

and constitutional byproducts of Reconstruction in the latter half of the nineteenth century.

4. Judicial Deference to Republican Reconstruction

Radical Republicans were not the only ones who sought to draw on the Clause to support their political positions: the Republicans' reconstruction plans were challenged under the Clause by the southern states, which went to court seeking to put a halt to Reconstruction. Unsurprisingly, the southern states resisted federal reorganization of their state government officials and operations, and one state, Georgia, sued Edwin M. Stanton, the army officer overseeing its military district, under the Supreme Court's original jurisdiction, alleging that Congress had sought to "overthrow and to annul" the existing government and erect another one in its place without authority under the Constitution and in violation of its republican guarantee.²²⁰ In *Georgia v. Stanton*, the Court was confronted with a direct constitutional challenge to Reconstruction.

Often overlooked is precisely how the Court in *Stanton* resolved the claim, which turned as much on the *remedy* sought as on which branch of government could make claims about the Clause's meaning. Justice Nelson, writing for a unanimous Court, noted that while Article III federal courts had jurisdiction to entertain cases claiming violations of private rights or property, they lacked judicial power to remedy "merely political rights," which the Court said did not belong to the jurisdiction of courts.²²¹ The Court held that it could not reasonably grant the relief sought by Georgia—an order enjoining the army from annulling the state government of Georgia, reestablishing it in compliance with the Reconstruction Acts, and directly supervising state and local as well as federal elections.²²² Thus, because the challenge in *Stanton* was to the stripping of political rights from the State of Georgia, the Court concluded it had no jurisdiction to review such a challenge to the constitutionality of Reconstruction.²²³

The Court concluded that it lacked jurisdiction to resolve political questions implicated by the legal challenge seeking to undo all of Reconstruction: "[T]he rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, [and] of corporate existence as a State."²²⁴ Justice Nelson

220. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 50–52 (1867).

221. *Id.* at 75–76.

222. *Id.* at 76–77.

223. *Id.* at 77.

224. *Id.*

clarified that had the plaintiffs brought a claim only for “protection of the title and possession of [state] property” confiscated by the provisional government, “[s]uch relief would have called for a very different bill from the one before us.”²²⁵ Because the Court could not grant relief over the claim sought, it declined subject matter jurisdiction over the case and dismissed it entirely.²²⁶ It therefore never reached the question of the extent of Congress’s power under the Republican Guarantee Clause to intervene in the states in a manner that may affect the private rights of individual citizens.²²⁷ Yet the Court did not expressly disclaim its interpretive authority over the Clause altogether, and instead declined jurisdiction over the claims raised by the State of Georgia that would require it to second-guess Congress over its core political prerogatives as part of Reconstruction.²²⁸

Though the Reconstruction period was aberrational in many ways, *Stanton* cannot be understood as a one-off escape hatch for a Court eager to sidestep a conflict with the political branches. A second, less familiar post-Reconstruction dispute that drew on the Republican Guarantee Clause came before the Court two terms later, with seemingly lower stakes and yet a similar outcome—*Texas v. White*.²²⁹ Moreover, whereas the Court could escape interpreting the Clause by claiming that Georgia’s claim in *Stanton* did not implicate private rights, that approach to sidestepping the question would not last long.

White, which did implicate a private right of action, is often overlooked among those seeking to understand what the Republican Guarantee Clause may mean, despite providing perhaps the most lucid judicial explanation of the federal government’s power under the Clause. When the state of Texas seceded from the Union at the start of the Civil War, it helped finance the Confederacy by selling off many of the U.S. bonds in its possession; some were sold to the parties in the case, *White and Chiles*.²³⁰ After the war was over and the federal government had temporarily taken control of the Texas government, the federally installed governor of Texas sought to reclaim the U.S. bonds from *White and Chiles*, arguing that they had been seized by the unlawful secessionist state government and improperly sold by the secessionist government’s military board without proper

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. 74 U.S. (7 Wall.) 700 (1868), *overruled in part* by *Morgan v. United States*, 113 U.S. 476 (1885).

230. *Id.* at 705–06.

authorization.²³¹ The Court accepted Texas's argument, reasoning that because the secessionist government had been unlawful in the first place, and because the military board that sold the bonds had been organized for the purposes of "levying war against the United States," any acts the board took were illegal and invalid, including the transfer to White and Chiles.²³² As a result, the exchange with White and Chiles was "invalid and void," and the rightful owner of the bonds was the reconstructionist state government.²³³

In considering whether the federal government's reestablishment of the Texas government had been proper, the Court once again drew expressly on the Clause as the constitutional basis for Reconstruction.²³⁴ The Court bluntly stated that "the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress."²³⁵ The Court recognized that when the federal government exercises power under the Clause, "as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential *only that the means must be necessary and proper* for carrying into execution the power conferred"²³⁶

The Court's express linkage of Congress's powers to act under the Republican Guarantee Clause with the Necessary and Proper Clause of Article I, Section 8 is notable, and it suggests that the Republican Guarantee Clause may sometimes raise justiciable, nonpolitical questions.²³⁷ For if the Clause confers on Congress the power to act in ways necessary and proper to fulfilling the guarantee, then just as the federal courts can review whether congressional actions taken under the Commerce Clause are "necessary and proper," so too could courts determine whether specific actions taken under the Republican Guarantee Clause are necessary and proper.

That process would bear a striking similarity to the Court's review of Congress's Reconstruction Amendment enforcement clause powers in *Katzenbach* and *Morgan*, although the congressional efforts in question were quite different. The Court in *White* considered whether

231. *Id.* at 709.

232. *Id.* at 732–33.

233. *Id.* at 733–34.

234. *Id.* at 729.

235. *Id.* at 730.

236. *Id.* at 729 (emphasis added).

237. *See id.* (utilizing "necessary and proper"). The Necessary and Proper Clause reads in relevant part: "The Congress shall have Power . . . To make all Laws which shall be *necessary and proper* for carrying into Execution the foregoing Powers, and *all other Powers vested by this Constitution in the Government of the United States*, or in any Department or Officer thereof." U.S. CONST. art. I, § 8 (emphasis added).

Congress, in legislating to ensure the “restoration of the State to its constitutional relations” with the Union—a duty the Court suggested Congress had under the Clause—had done so in a manner that was necessary and proper for that task.²³⁸ In theory, one could infer from the Court’s dicta that Congress’s duty under the Clause rests only in ensuring the broad structural integrity of the constitutional relations between a state and the Union. If so, then Congress might face a higher bar to establish that a more everyday legislative intervention in the affairs of a state are a necessary and proper means of fulfilling its duty under the Clause, a question that is examined at length in Part IV, below.

Nevertheless, *White*, like *Stanton*, seemed to endorse Congress’s Reconstruction Acts as constitutionally premised in large part on the Clause. As a result, the subsequent acts stemming from federal intervention in the southern states were legally valid as well. *White* also suggests that in reviewing federal legislation enacted under the Clause, the proper interpretive framework is one similar to the necessary-and-proper analysis the Court employed in cases such as *Katzenbach* and *Morgan*, rather than the “congruence and proportionality” framework of *Boerne* and other subsequent decisions, a distinction that will be examined at greater length in Part IV.

A final note: although the Court exhibited great deference to Congress in *Stanton* and *White*, it is notable that shortly thereafter the Court imposed what has become known as the “equal footing” limit on how Congress may impose conditions on the states under the Clause. In *Coyle v. Smith*, the Court rejected a challenge to a 1910 state law relocating Oklahoma’s capital from Guthrie to Oklahoma City.²³⁹ That challenge was at least indirectly predicated on the Clause, for the congressional enabling act that admitted Oklahoma to the Union required that Oklahoma retain as its capital the city of Guthrie, until at least 1913.²⁴⁰ The Petitioner contended that Oklahoma had violated the enabling act, and thus the Clause, by relocating its capital. The Court concluded otherwise, holding that Congress, in acting under the Clause and admitting a new state to the Union, could not impose terms and conditions that differed from the existing states’ obligations, for doing so would “deprive it of equality with other members of the Union.”²⁴¹ *Coyle* does not categorically exclude Congress from taking any particular actions under the Clause, but it does suggest the Court

238. 74 U.S. (7 Wall.) at 729.

239. 221 U.S. 559, 563 (1911).

240. *Id.* at 564.

241. *Id.* at 567.

will scrutinize whether those actions apply equally to all states, which echoes the Court's much more recent holding in *Shelby County*.

III. THE COURTS AS GUARANTORS OF REPUBLICAN GOVERNMENT

The preceding part examined the political branches' Republican Guarantee Clause constitutionalism. Yet in theory, "[t]he United States" could also refer to the federal courts as guarantors—that is, if the Clause raises only prudential rather than classical political questions. This Part examines three different ways the courts may serve as guarantors under the Clause. The first is to protect the states from undue federal interference, an interpretation that came back into vogue alongside the Supreme Court's "New Federalism" jurisprudence of the past several decades.²⁴² A second interpretation is that the Clause protects the *citizens* of the states (and potentially even their lawmakers) from unduly unrepblican forms of state governance. That interpretation has recently gained new traction as a result of ongoing litigation in the Tenth Circuit. Finally, courts could serve as guarantors by protecting citizens' individual rights inherent in any government said to be republican in form.

As I will explain, there are reasons to be skeptical of each of these three interpretations of the Clause. Nevertheless, because the Court's statements about the Clause's nonjusticiability in these cases are better understood as raising *prudential* political questions, there is no reason to think today's Court would decline to hear any challenge to actions in which *Congress* serves as the guarantor. That question will be taken up in Part IV.

A. A Guarantee of Federal Noninterference in Minimally Republican State Sovereigns

In contrast to a focus on what Congress or the President may do in the name of the Clause, a contrasting understanding of the Clause's meaning is that it primarily exists to *protect* the states as beneficiaries, with the courts serving as guarantors of the states' republican self-governance. This understanding of the Clause would suggest a sort of interstate compact, a mutual guarantee among separate sovereigns. Because many antifederalists were wary of the possibility of the federal government accumulating too much power, this interpretation of the

242. See, e.g., Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1136 (2000) (describing how the Court's New Federalism jurisprudence evinces "the Court's faith in the states as primary centers for republican self-government").

Clause was promoted by antifederalists during the Constitution's ratification.²⁴³ Such an interpretation seems diametrically opposed to the understanding articulated by the Court in rejecting Georgia's claim in *Stanton*, insofar as that understanding of the Clause would situate it as protecting the States *from* unwanted interference by the federal government in matters of state sovereignty.

Historically, the states' rights interpretation was especially popular among freeholders and slave owners resisting expansion of the franchise in the early nineteenth century. Almost as soon as suffragists began to make claims of enfranchisement rights derived from the Clause, others, especially southern slaveholders, pushed back against such interpretations, for they recognized that such an understanding of the Clause's meaning would almost certainly lead to a prohibition on slavery as well. Writing during the time of the Dorr Rebellion, South Carolina Senator John C. Calhoun—former Vice President to both Presidents John Quincy Adams and Andrew Jackson, and future Secretary of State to President Tyler—was among those who vocally opposed the Rebellion's proposed understanding of the Clause's meaning.

Echoing the view of Elisha Potter in Rhode Island, as well as statements attributed to James Madison in the *Federalist Papers*,²⁴⁴ Calhoun's argument rested on the belief that properly understood, the Clause actually *limited* federal power to intervene in the states' internal affairs, rather than enhanced it.²⁴⁵ Calhoun drew on the Clause's placement next to the Invasion and Domestic Violence Clauses to argue that the three clauses combine to guarantee “the peace, safety, and liberty of the States.”²⁴⁶ Reading the three clauses together, Calhoun argued that the domestic violence provision protected the states from internal conflict, the invasion provision from external invasion, and the republican guarantee “from the ambition and usurpation of . . . governments, or . . . rulers.”²⁴⁷ A variation on this view has been echoed by in more recent constitutional law scholarship in the works of

243. See Williams, *supra* note 6, at 654–55.

244. See THE FEDERALIST NO. 43, at 272 (James Madison) (Clinton Rossiter ed., 2003) (writing that because the guarantee “supposes a pre-existing government of the form which is to be guaranteed,” as long as “the existing republican forms are continued by the States, they are guaranteed by the federal Constitution”).

245. See Vile, *supra* note 9, at 677–78 (citing Letter from John C. Calhoun to William Smith (July 3, 1843), *reprinted in* 17 THE PAPERS OF JOHN C. CALHOUN 270, 270–71 (C. Wilson ed., 1986)) (explaining Calhoun's analysis).

246. *Id.* at 678 (quoting Letter from John C. Calhoun to William Smith, *supra* note 245, at 272).

247. *Id.* (alterations in original) (quoting Letter from John C. Calhoun to William Smith, *supra* note 245, at 272).

Deborah Jones Merritt²⁴⁸ and Ryan Williams.²⁴⁹ Each has put forward potential interpretations of the Clause as primarily addressing the States and existing for the States' benefit vis-à-vis the federal government. And, indeed, at least during Justice O'Connor's tenure on the Supreme Court, this argument seemed to gain a modicum of traction among the judiciary.

The modern scholarly version of this argument takes two forms. The first is that the Clause, read alongside the Tenth Amendment, bolsters the federalist structure of the Constitution, limiting the extent to which the federal government can intrude into the sovereignty of the states. Merritt has argued that as a matter of political theory, states cannot enjoy republican governments unless they retain sufficient autonomy so as to establish and maintain their own forms of government; as a result, the Clause is best understood as implying a modest restraint on the federal power to interfere with state autonomy.²⁵⁰ On this reading, the Clause exists to ensure limits on federal interference in state and local franchise²⁵¹ and in the structure and mechanics of state government,²⁵² among other areas of state sovereignty. Merritt has argued that "some exercises of national power also shatter the republican bond between state voters and their state representatives."²⁵³ She has suggested that where the federal government intrudes on state autonomy, the Clause may in fact be justiciable, and courts should take up challenges under the Clause when states believe the federal government has interfered in an unwarranted—and unconstitutional—fashion.²⁵⁴

This position found some support in Justice O'Connor's brief considerations of the Clause in two challenges to federal intervention in the states that came before the Court in the early 1990s. In the first, *Gregory v. Ashcroft*, Justice O'Connor, writing for the majority, stated that the authority of the people of the states to determine the qualifications "of their most important government officials" lies "at the

248. See Merritt, *supra* note 5 (arguing that states need sufficient autonomy to create their own republican governments and that the Clause thus restricts the federal government's power to interfere with state autonomy).

249. See Williams, *supra* note 6 (arguing the Clause was meant to protect state sovereignty and that before the federal government can exercise power under the Clause, it must seek approval from the republican state government).

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

251. See Merritt, *supra* note 5, at 36–40.

252. *Id.* at 40–50.

253. Merritt, *supra* note 250, at 816.

254. See Merritt, *supra* note 5, at 70–78.

heart of representative government,’ ”²⁵⁵ a power not only reserved to the states under the Tenth Amendment, but also “guaranteed them” by the Republican Guarantee Clause.²⁵⁶ In the second case, *New York v. United States*, the Court concluded that Congress had legislated beyond its enumerated powers in violation of the Tenth Amendment, so it did not directly rule on New York’s additional Republican Guarantee Clause claim.²⁵⁷ Yet in dicta, Justice O’Connor briefly considered the Clause’s possible applications, writing that the states might invoke the Clause to limit overreach by the federal government.²⁵⁸ Justice O’Connor suggested that “perhaps not all claims under the Guarantee Clause present nonjusticiable political questions,” seeming to suggest that in at least some circumstances judicial intervention on behalf of the states under the Clause might be appropriate.²⁵⁹

More recently, Ryan Williams has put forward a novel but related argument drawing on an examination of the meaning of the term “guarantee” at the time of the founding.²⁶⁰ Williams has articulated how the Framers of the Constitution may have intended for the Clause to function akin to treaty guarantees common in international law around the founding era.²⁶¹ According to this view, such guarantees constituted diplomatic mutual compacts in which each compacting nation-state would pledge its support to aid in preserving the right or entitlement possessed by the other.²⁶² Some support for this “international law” interpretation of the Clause exists both in the Federalist Papers and in early commentaries in the years after the Constitution’s ratification.²⁶³ Williams also points to several state judicial opinions during this era that suggest that the provision would apply “only if a nonrepublican government were ‘imposed on’ a state by ‘external force,’ in which case ‘the arms of the Union’ would ‘be employed to repel that force.’ ”²⁶⁴

255. 501 U.S. 455, 463 (1991) (quoting *Bernal v. Fainter*, 467 U.S. 216 (1984)).

256. *Id.* To support this proposition, O’Connor cited Merritt’s law review article and *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973), which itself cited to *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), for that proposition. Curiously, *Luther* is silent about the congressional power to prescribe rules concerning the selection of state government officials. 48 U.S. at 41.

257. 505 U.S. 144, 184–85 (1992).

258. *Id.* at 185–86.

259. *Id.*

260. See Williams, *supra* note 6, at 671–74.

261. See *id.*

262. *Id.* at 615–20, 681.

263. See *id.* at 651–66.

264. *Id.* at 667–68 (quoting *State ex rel. M’Cready v. Hunt*, 20 S.C.L. (2 Hill) 1, 265 (S.C. 1834) (opinion of Harper, J.)).

The upshot of the international law interpretation is twofold. First, if the Clause were to function like a treaty guarantee, this would suggest that the individual (but “United”) *states*, rather the federal government, would be the proper subject of the Clause, and thus the only parties who could properly invoke it.²⁶⁵ On this interpretation, the Clause would serve as a “safeguard of state autonomy and independence . . . , empowering a guaranteed state to call upon the assistance” of the federal government if necessary.²⁶⁶

The second consequence of the international law interpretation is that any time the Clause “is invoked as a direct source of federal power, . . . the exercise of such power will always involve a threshold question regarding whether the existing republican government within the state has, in fact, *requested such assistance*.”²⁶⁷ If not, the federal government would “lack[] authority to invoke the Clause as a source of power, no matter how dissatisfied individual state residents may be with a state’s existing governmental arrangements or how inconsistent such arrangements may be with federal authorities’ shared conception of republican ideals.”²⁶⁸

This international law version of the state sovereignty interpretation of the Clause raises two potential problems. The first is that it seems in tension with the actions the federal government took during Reconstruction. The Reconstruction Congress and President Lincoln “were one in extending national power into areas of policy traditionally reserved for the states”²⁶⁹ and in doing so on the basis of the Clause. Congressional Democrats loudly opposed the Radical Republicans’ attempts to ground the constitutionality of Reconstruction in the Republican Guarantee Clause: “Whereas Republicans defined republican government in terms of a state’s acceptance of the Constitution and the Union and of its hostility toward slavery, the Democrats defined it as self-government.”²⁷⁰ And yet the Democrats’ view not only lost out in Congress, but also in the courts.

As discussed above in Section II.B.4, in both *Stanton* and *White* the Court sanctioned the federal government’s Reconstruction efforts

265. *See id.* at 675 (“[T]he text of the Guarantee Clause clearly identifies each ‘State’ as the beneficiary, rather than the obligee, of the ‘guarantee’ the provision promises.”). This would seem to be in conflict with comments attributed to Alexander Hamilton in *Federalist* No. 83, in which he explained that “The United States, *in their united or collective capacity*, are the OBJECT to which all general provisions in the Constitution must necessarily be construed to refer.” THE FEDERALIST NO. 83, *supra* note 244, at 502 (Alexander Hamilton) (emphasis added).

266. Williams, *supra* note 6, at 660–61.

267. *Id.* at 679 (emphasis added).

268. *Id.*

269. *See* BELZ, *supra* note 156, at 285.

270. *Id.* at 209.

under the Clause, going so far as to set out a standard of review akin to the Court's "necessary and proper" review of congressional actions taken under the Commerce Clause. Notably, this was precisely how some congressional Republican leaders during Reconstruction had defined the extent of Congress's power to legislate under the Clause.²⁷¹ Because the international law account of the Clause draws almost exclusively on eighteenth century ratification-era evidence of linguistic meaning of the term "guarantee," this approach sidesteps the serious and significant nineteenth century precedents that radically restructured how we might understand the meaning of the Clause in the wake of both Congress's and the Court's Reconstruction-era interpretive precedents.

Given the Clause's central role in ensuring the ratification of the Fourteenth and Fifteenth Amendments—amendments whose chief purpose was to *restrain* the states and *empower* federal intervention—it is difficult to afford the Clause this reading without calling into question the legitimacy of those Amendments. One way to reconcile the Clause's history with this interpretation would be to suggest that the Clause would permit unsolicited federal intervention in a state only in times of extraordinary exigency. But even then, the international law interpretation of the Clause does not fit comfortably alongside the significant role the Clause played in legitimating Reconstruction and ensuring the ratification of the Fourteenth and Fifteenth Amendments among the southern states. Many of those federal laws (as well as the Amendments) continue to apply today, long after the Reconstruction-era exigencies have abated.²⁷² Indeed, they were enacted precisely to recalibrate the balance of power, shifting more power to the federal government at the expense of the states.²⁷³

As a matter of textual integrity, moreover, the international law interpretation of the Clause also seems to render the Invasion and Domestic Violence Clauses of Article IV, Section 4 largely superfluous. After all, if the Republican Guarantee Clause exists only for invocation by states seeking federal assistance, it is difficult to imagine the circumstances in which an extant and republican-in-form state government would have cause to seek federal remediation for defects in the state's republican form beyond those of foreign invasion or domestic

271. See *infra* note 167 and accompanying text.

272. See Amar, *supra* note 154, at 112–13; see also Richard Primus & Cameron O. Kistler, *The Support-or-Advocacy Clauses*, FORDHAM L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547579 [<https://perma.cc/WM96-WVP2>] (arguing that the "support-or-advocacy" clauses of the Civil Rights of Act of 1871 remain potentially powerful weapons for protecting the integrity of federal elections).

273. See FONER, *supra* note 36, at 91.

violence. Those guarantees, of course, are provided by the Invasion and Domestic Violence Clauses.²⁷⁴ In other words, if federal intervention under the Clause may only be invoked by an *existing* republican government of the given state—no matter how many individual residents are dissatisfied with its form—then what purpose would a *republican* guarantee have, as opposed to a more generic guarantee of assistance to preserve governmental integrity altogether as provided by those other clauses? A *republican* guarantee would have significance only in circumstances in which the extant government was arguably *not* republican in form. If so, it would presumably be the citizens *out of power*, rather than those wielding it, who would need to seek assistance from the federal government. (Indeed, that was precisely what happened during the Dorr Rebellion in Rhode Island.) Otherwise, it is difficult to imagine circumstances in which those in control of a state government would call for federal intervention on the basis that the government *they control* was not republican in form.

The state sovereignty and international law interpretations of the Clause also do not resolve the question of how to determine when a once-republican government is republican no longer, nor which branch of the federal government may make that determination. Returning again to the Civil War era, the decline of republican government was a state of existence that Akhil Amar has argued had developed in the southern states by the 1860s.²⁷⁵ After all, he notes, in the election of 1860, “Lincoln received not a single popular vote—not one!—south of Virginia. One does not find such perfectly one-sided election returns or such savagely skewed public debates in true republics.”²⁷⁶ It must be the case, as the Court repeatedly countenanced in *Luther*, *Stanton*, and *White*, that if and when a state government becomes sufficiently antirepublican in form, some branch of the federal government must be able to intervene under the Clause. In all three opinions, the Court seemed to indicate it would be the political branches. After all, as Madison wrote in Federalist No. 43 in explaining the purpose of the republican guarantee, “[T]here are certain parts of the State constitutions which are so interwoven with the federal Constitution that a violent blow cannot be given to the one without communicating the wound to the other.”²⁷⁷ And earlier, in Federalist No. 21, Alexander Hamilton argued that “[t]he natural cure for an ill administration in a popular or representative constitution is a change of men. A guaranty

274. See U.S. CONST. art. IV, § 4, cl. 2.

275. AMAR, *supra* note 13, at 84–86.

276. *Id.* at 85.

277. THE FEDERALIST NO. 43, *supra* note 244, at 276 (James Madison).

by the national authority would be as much leveled against the usurpations of rulers as against the ferments and outrages of faction and sedition in the community.”²⁷⁸ As Amar has concluded, while the Clause *does* guarantee a measure of governmental autonomy to the states, this is only one side of the coin, and the “federal government may (or perhaps must) intervene and restructure state government under the invitation (or mandate)” of the Clause.²⁷⁹

B. A Guarantee Against Plebiscites and Delegations of Lawful State Authority

A second interpretation of the Clause is that it functions as an *internal* guarantee to the citizens of the states (and possibly also their lawmakers) that state forms of lawmaking will remain republican in character. Under this theory, the Clause would prohibit the states from passing laws through means that supersede lawmaking done through the republican form, such as by popular initiative overriding state laws passed by the state legislature. This interpretation might also prohibit forms of governance that are not directly operated by, or are not accountable to, elected officials. Supreme Court precedent has long seemed to foreclose such an interpretation, which has recently been revived by the Tenth Circuit in ongoing litigation. This interpretation traces its roots to objections to popular lawmaking that were part of the progressive movement in the early part of the twentieth century. The first such challenge to reach the Court was the 1912 case of *Pacific States Telephone & Telegraph Co. v. Oregon*,²⁸⁰ which raised the question of whether the state of Oregon had ceased to be republican in form when it adopted a law by popular initiative. While the Court did reject this argument by citing *Luther* as having established the nonjusticiability of the Clause,²⁸¹ the Court in *Pacific States* declined to say it raised a classical political question in all circumstances.²⁸²

Rather, the Court emphasized the troublesome breadth of the remedy sought: the invalidation of a state law solely on the basis that it had been enacted by popular initiative.²⁸³ Such relief, the Court argued, “would necessarily affect the validity, *not only of the particular statute which is before us*, but of every other statute passed in Oregon

278. THE FEDERALIST NO. 21, *supra* note 244, at 140 (Alexander Hamilton).

279. Amar, *supra* note 5, at 754.

280. 223 U.S. 118 (1912).

281. *Id.* at 149 (“It was long ago settled that the enforcement of this guaranty belonged to the political department.”).

282. *Id.*

283. *Id.* at 141.

since the adoption of the initiative and referendum.”²⁸⁴ Such relief would in turn require the Court to render a verdict on the constitutionality of *every* state statutory and constitutional provision that had been enacted via popular initiative or referendum. In Oregon, this constituted a substantial portion of its state laws. It was this act—“to examine as a justiciable issue the contention as to the illegal existence of a state”²⁸⁵—which the Court held to be improper, for it would imply the power to “control the legislative department . . . in the recognition of such new government and the admission of representatives therefrom,” which in turn would “obliterate the division between judicial authority and legislative power upon which the Constitution rests.”²⁸⁶

The best reading of the claim in *Pacific States* is thus that it raised prudential political questions better left to the political branches. Despite this, *Pacific States* has been understood as firmly establishing the wholesale nonjusticiability of the Clause, even though the Court was careful to reserve some possibility that it could take up challenges arising under the Clause in the future, provided they were “in a controversy properly submitted, to enforce and uphold the applicable provisions of the Constitution *as to each and every exercise of governmental power.*”²⁸⁷ In the years after *Pacific States*, the Court cited the case to reject challenges to several additional state actions: the creation and taxation of park districts by probate judges and appointed commissioners;²⁸⁸ the operation of a drainage district by a public corporation;²⁸⁹ a state worker’s compensation board;²⁹⁰ and a state referendum vetoing redistricting legislation passed by the state general assembly,²⁹¹ among others. In each circumstance, the Court denied that the Clause permitted federal legal challenges to nonrepresentative forms of lawmaking in the states.

This interpretation—that the Clause raises prudential rather than classical political questions and therefore permits judicial

284. *Id.* (emphasis added).

285. *Id.* at 142.

286. *Id.*

287. *Id.* at 150 (emphasis added).

288. *See* *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 78–80 (1930) (“[I]t is well settled that the questions arising under [the Clause] are political, not judicial, in character, and thus are for the consideration of the Congress and not the courts.”).

289. *See* *O’Neill v. Leamer*, 239 U.S. 244, 247–48 (1915) (calling an attempt to invoke the Clause “obviously futile” under the circumstances).

290. *See* *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234–35 (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.”).

291. *See* *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916) (explaining the “settled rule” that questions as to whether the Clause has been violated are nonjusticiable).

adjudication in at least some circumstances—has gained traction in at least one federal court in recent years. In 2019, the Tenth Circuit held in *Kerr v. Polis* that anti-direct democracy claims arising under the Republican Guarantee Clause *may* be justiciable in certain circumstances.²⁹² *Kerr* has had a meandering, decades-long procedural history, but it began as a challenge by a coalition of citizens’ groups and state legislators to a Colorado constitutional amendment (the Colorado Taxpayer’s Bill of Rights, or “TABOR”), which was passed by popular initiative and which requires a plebiscitary vote to affirm new tax increases passed by the state legislature. TABOR also establishes a flat cap on how much additional revenue the state government may spend from one year to the next. Among the plaintiffs’ initial claims in *Kerr* was that TABOR violated the Republican Guarantee Clause because it removed the taxing power from Colorado’s legislative bodies such that they are unable to fulfill their constitutionally mandated obligations under the Colorado Constitution.²⁹³

In *Kerr*, the Tenth Circuit took note of Justice O’Connor’s dicta in *New York v. United States* as an invitation to determine whether the specific case before it fully satisfied any of the six factors identified in *Baker* as requiring a finding of nonjusticiability.²⁹⁴ The court initially declined to interpret the Clause as raising a classical political question, concluding that the Clause itself does not obviously contain a textual commitment to the political branches alone.²⁹⁵ The Tenth Circuit instead contended that because “[t]he case before us requires that we determine the meaning of a piece of constitutional text and then decide whether a state constitutional provision contravenes the federal command,” a claim raised under the Clause would not be automatically nonjusticiable.²⁹⁶ In addition to a claim arising under the Clause, plaintiffs also brought a claim that TABOR violated the Colorado Enabling Act, the federal statute under which Colorado was admitted to the Union as a state in 1875 and “which requires ‘[t]hat the constitution [of Colorado] shall be republican in form.’ ”²⁹⁷ The district court had initially concluded that even if the Republican Guarantee

292. 930 F.3d 1190, 1192 (10th Cir. 2019).

293. *Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112, 1120–21 (D. Colo. 2012), *opinion amended and supplemented*, No. 11-CV-01350-WJM-BNB, 2012 WL 4359076 (D. Colo. Sept. 21, 2012), *aff’d and remanded*, 744 F.3d 1156 (10th Cir. 2014), *vacated*, 135 S. Ct. 2927 (2015) (mem), and *vacated*, 824 F.3d 1207 (10th Cir. 2016).

294. *Kerr v. Hickenlooper*, 744 F.3d 1156, 1175–76 (10th Cir. 2014), *vacated*, 135 S. Ct. 2927 (2015) (mem).

295. *Id.* at 1176–77.

296. *Id.* at 1180.

297. *Id.* at 1181–82 (alteration in original) (quoting Colorado Enabling Act, ch. 139, § 4, 18 Stat. 474, 474 (1875)).

Clause claim was found nonjusticiable, the plaintiffs could proceed on the statutory Enabling Act claim by alleging that TABOR violated the Supremacy Clause of the Constitution in contravening the Enabling Act.²⁹⁸ The Tenth Circuit affirmed the district court and concluded that the Enabling Act claim was independently justiciable.²⁹⁹

On appeal, the Supreme Court vacated the Circuit's judgment and remanded the case for further consideration in light of *Arizona State Legislature v. Arizona Independent Redistricting Commission*,³⁰⁰ which explained the circumstances under which state representatives have standing to bring constitutional claims in federal court; two of the initial plaintiffs in *Kerr* were state legislators.³⁰¹ On remand, the Tenth Circuit dismissed the state legislators from the case, arguing that they lacked both institutional and individual standing to bring the claim.³⁰² After the case was remanded to the district court, the district court dismissed the case entirely on the grounds that the political-subdivision plaintiffs that had since been added to the case to preserve standing did not in fact have standing to bring their claim.³⁰³

The case was once again appealed to the Tenth Circuit, and in late July 2019, the Circuit reversed, concluding that those plaintiffs *did* have standing at the motion-to-dismiss stage.³⁰⁴ The Tenth Circuit reiterated that the claims brought by plaintiffs under the Republican Guarantee Clause were not *clearly* nonjusticiable under the Clause, for while the district court declared that it “‘d[id] not believe’ that the requirement of a Constitution ‘republican in form’ stretches to the political-subdivision plaintiffs,” that question was the merits question at issue that could not be properly dismissed at this stage.³⁰⁵

On the one hand, given the Court's jurisprudence in *Pacific States* and, more recently, *Rucho v. Common Cause*,³⁰⁶ it seems unlikely that the Court would suddenly find the Clause to grant the plaintiffs judicial relief for their claim. On the other hand, the relief sought in *Kerr* might be considerably narrower than that in *Pacific States*—invalidating just the TABOR, and only on the narrow grounds that it puts a total cap on annual expenditures that the Colorado legislature

298. *Id.* at 1182.

299. *Id.* at 1182–83.

300. *Hickenlooper v. Kerr*, 135 S. Ct. 2927 (2015) (granting certiorari to the Tenth Circuit, vacating the judgment, and remanding the case to the Tenth Circuit).

301. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

302. *Kerr v. Hickenlooper*, 824 F.3d 1207, 1218 (10th Cir. 2016).

303. *Kerr v. Hickenlooper*, 259 F. Supp. 3d 1178, 1192 (D. Colo. 2017).

304. *Kerr v. Polis*, 930 F.3d 1190, 1192 (10th Cir. 2019).

305. *Id.* at 1198.

306. 139 S. Ct. 2484 (2019).

may allocate. It remains to be seen how this litigation will ultimately resolve.

*C. A Guarantee of Individual Rights Inherent in
Any Republican Form of Government*

For much of the late nineteenth and early twentieth centuries, debate about the Clause’s meaning focused on whether it might also convey individual rights directly to the citizens of the states. Thus, many have contended that the Clause not only speaks to the branches of government or the states, but also directly to the people, by way of claims that individual citizens may bring to court regarding violations of basic rights associated with a republican form of government. This interpretation of the Clause has at least twice been rejected by the Supreme Court, seemingly on the merits, which suggests that the Clause is at least in some circumstances justiciable. Notably, both cases—*Minor v. Happersett*³⁰⁷ and *Plessy v. Ferguson*³⁰⁸—are much better known for their interpretations of the Fourteenth Amendment, but both also raised related Republican Guarantee Clause claims. (This is further evidence, as argued above in Part II, that until the late nineteenth century, the Reconstruction Amendments and the Republican Guarantee Clause were often invoked and interpreted together.)

In *Minor*, suffragist Virginia Minor had been denied the right to register to vote because she was not male, and the privileges of citizenship guaranteed in the Fourteenth Amendment extended only to men.³⁰⁹ Minor sued, arguing that not only did the Fourteenth Amendment’s Privileges and Immunities Clause bar Missouri from prohibiting her the right to vote as a lawful citizen, but that the Republican Guarantee Clause did too.³¹⁰ It is well known that the Supreme Court rejected Minor’s Privileges and Immunities Clause argument, holding that federal citizenship status alone did not convey the right to vote as set forth under state law.³¹¹

But the Court also rejected her Republican Guarantee Clause claim, pointing to the “unmistakable evidence” that at the nation’s founding, “all the citizens of the States were not invested with the right of suffrage,” including women.³¹² On this basis, the Court concluded

307. 88 U.S. (21 Wall.) 162 (1874).

308. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

309. *See Minor*, 88 U.S. at 165.

310. *Id.* at 175.

311. *Id.* at 170–71.

312. *Id.* at 176.

that “it is 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.”³¹³ *Minor* is often overlooked in scholarship concerning the Clause, and yet the decision is among the most relevant to lingering questions about whether the Clause may be nonjusticiable in all circumstances.³¹⁴

The Clause was considered again two decades later in the anticanonical³¹⁵ case of *Plessy v. Ferguson*.³¹⁶ In *Plessy*, an eight-member majority declared that the doctrine of “separate but equal” permitted state legislation that enforced racial segregation of train cars despite the Fourteenth Amendment’s express textual prohibition on racial discrimination by the states. Justice Harlan, alone in dissent, vehemently disagreed with the majority’s resolution of the case, arguing that they had misinterpreted the Fourteenth Amendment.³¹⁷ But Justice Harlan also invoked the Republican Guarantee Clause as an additional source of constitutional support to overturn the law. Strikingly, he noted that either the courts *or* Congress could take action to enforce the Clause, arguing that a state law that mandated “separate but equal” treatment of the races “is inconsistent with the guaranty given by the constitution to each state of a republican form of government, and may be stricken down by congressional action.”³¹⁸

IV. INTERPRETATION AS CONFRONTATION: THE COURT, CONGRESS, AND THE MEANING OF THE REPUBLICAN GUARANTEE CLAUSE

*It is the policy of the United States that . . . the integrity, security, and accountability of the voting process must be vigilantly protected, maintained, and enhanced in order to protect and preserve electoral and participatory democracy in the United States.*³¹⁹

Given today’s increasingly fraught battles around redistricting, voting rights, and access to fair political participation, Justice Harlan’s *Plessy v. Ferguson* dissent invites an intriguing question: Just what

313. *Id.*

314. As Erwin Chemerinsky has noted, “what is notable is that the Court ruled on the merits of the issue.” Chemerinsky, *supra* note 5, at 862.

315. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011).

316. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

317. *Id.* at 552–64 (Harlan, J., dissenting).

318. *Id.* at 564. Of course, such an outcome was precisely what Congress had intended in the first place when it enacted the Fourteenth Amendment, assisted by, and in order to fulfill, the Republican Guarantee Clause.

319. For the People Act of 2019, H.R. 1, 116th Cong. § 1000(b)(2) (2019).

could Congress “strike[] down”³²⁰ or seek to do under the Clause? As the previous Parts have shown, the text, history, and constitutional jurisprudence of the Clause together strongly suggest that the Clause *primarily* addresses the political branches, especially Congress, and that it conveys to Congress the power to take legislative action to ensure the states have and maintain a republican form of government. If this understanding is correct, then the appropriate inquiry turns to the actions Congress might permissibly take to guarantee republican governance, and—equally importantly—how courts might reasonably review Congress’s interpretation of the Clause and its actions taken under it. Given the Court’s juricentric turn in reviewing Congress’s Reconstruction Amendment enforcement clause powers, it seems improbable that the Court would decline any possible challenge to congressional action arising under the Clause on the basis that such a challenge raises a classical political question.

Complicating matters it that the Republican Guarantee Clause is a somewhat unorthodox constitutional vehicle for legislation. After all, implementing a “guarantee” of a “republican form of government” is not the standard activity of a legislative body. How would Congress define the indicia of a minimally republican form of government, and how might it identify governmental forms, practices, or laws that fall beneath that minimal floor? And what kinds of actions might Congress take to remedy insufficiently republican forms of government? At the outer pole, Congress’s Reconstruction-era legislative precedents suggest that conditions such as slavery and the absolute denial of the right to vote are plausible bases for federal intervention in the states’ electoral processes; the Court declined to second-guess these interventions in *Georgia v. Stanton*. Moreover, the Clause was an essential basis for the Reconstruction-era legislation that helped to ensure the ratification of the Fourteenth and Fifteenth Amendments. This suggests that the Clause may also serve as a federal tool to enforce state compliance with federal prerogatives, at least as a condition for full federal recognition. Yet precisely because Congress gave itself a more straightforward toolkit for legislating via the Reconstruction Amendments, the Republican Guarantee Clause seems, by comparison, a heavier and more unwieldy legislative bludgeon.

It also remains unsettled how the Court would assess legislation enacted directly under the Republican Guarantee Clause, and which of several frameworks it might use to evaluate the constitutionality of Congress’s actions. This is because the Court would not only have to scrutinize the *meaning* that Congress associates with the term

320. 163 U.S. at 564 (Harlan, J., dissenting).

“republican form of government.” The Court would also need to scrutinize the *means* by which Congress might implement that guarantee, as well as the fit between Congress’s (or the Court’s) definition of republican government and Congress’s legislative guarantee. After all, as *Shelby County v. Holder* makes clear, even where the Court may accept Congress’s constitutional basis for legislation, it may nevertheless second-guess the fit between Congress’s intervention and its evidentiary findings substantiating the need for a prophylactic legislative remedy. That scrutiny seems all the more probable in the case of the Republican Guarantee Clause given the relatively uncharted territory such review would require.

This Part provides a preliminary analysis of how the Court might be likely to confront claims of congressional interpretation of the Republican Guarantee Clause.

A. A Twenty-First-Century Legislative Guarantee of Republican State Governments

Numerous scholars have put forward extensive accounts of what it means to constitute a republican form of government. A broad consensus seems to be that at minimum, the will of the majority must be reflected in the selection of legislators and government representatives.³²¹ And indeed, the original preclearance maps under the 1965 Voting Rights Act targeted districts where either less than half of eligible voters were registered to vote, or where less than half of those eligible to vote did in fact vote in the last presidential election.³²²

On this basis, perhaps the most straightforward pathway by which Congress might seek to legislate under the Clause would be to enact a statutory scheme akin to the VRA’s section 4(b) preclearance coverage formula struck down by the Court in *Shelby County* and targeting districts where there is reason to think that state election procedures function to thwart majority rule, as others have suggested could be done under the Republican Guarantee Clause.³²³ Yet if the Court were to deem this coverage formula sufficiently justified by evidence of racially discriminatory practices prohibited by the Fifteenth Amendment, such a formula would already be constitutional under

321. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators.”); see also sources cited *supra* note 5 for numerous arguments to this effect.

322. See *South Carolina v. Katzenbach*, 383 U.S. 301, 317–18 (1966) (discussing the findings required for the applicability of the remedial sections of the Voting Rights Act).

323. See Chin, *supra* note 5, at 1562; Hasen, *supra* note 7, at 204–05.

existing precedents. This means Congress would not need to invoke the Clause to provide new preclearance coverage maps based on updated findings of the states and localities whose state electoral processes have functioned to discriminate against minority voters.

Many members of today's Congress appear to be more ambitious, however, for many seek to go beyond simply reinstating what the Court struck down in *Shelby County*, particularly in tackling partisan gerrymandering. And some, such as Carolyn Shapiro, have recently called for Congress to invoke the Clause and legislate to address partisan gerrymandering in the states.³²⁴ H.R. 1, the "For the People Act," which the House passed in early 2019, reaches farther than the Voting Rights Act, for it also seeks to tackle *partisan* gerrymandering, a problem that Congress has never before sought to curtail legislatively.³²⁵ H.R. 1 requires all states to use independent commissions to draw federal congressional lines; provides a cause of action for citizens to challenge gerrymandered districts under federal law; requires a uniform set of map-drawing requirements for every state in the country; and provides a statutorily guaranteed role for citizen review and feedback of proposed maps.³²⁶ As drafted, H.R. 1's provisions apply nearly uniformly to all states,³²⁷ rather than to only a select number of targeted jurisdictions, as the preclearance maps of section 4(b) of the VRA did. Thus H.R. 1 might draw less scrutiny insofar as it treats all states equally, sidestepping the equal footing doctrine that arose in *Coyle v. Smith*.³²⁸

Yet potential future legislation in the mold of H.R. 1 may be considerably more invasive than the stricken provisions of the VRA, as Congress has generally not legislated to regulate the drawing of electoral districts in the states for federal elections, having left those processes largely to the states, with a few exceptions enacted under the

324. See Shapiro, *supra* note 7, at 188 (arguing that "[t]he ball is unmistakably in Congress's court" to address partisan gerrymandering in the states and to do so under the Clause).

325. Congress has, however, previously legislated to require that every federal congressional district is fully contiguous. See Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491, 491.

326. See Michael Li, *Five Ways H.R. 1 Would Transform Redistricting*, BRENNAN CTR. FOR JUST. (June 19, 2019), <https://www.brennancenter.org/blog/five-ways-hr-1-would-transform-redistricting> [https://perma.cc/9RVG-R2ME].

327. H.R. 1 carves out an exception for Iowa, see For the People Act of 2019, H.R. 1, 116th Cong. § 2401(d), which already provides that redistricting be conducted by nonpartisan state legislative staff members using a nonpartisan approach. See *The "Iowa Model" for Redistricting*, NAT'L CONF. ST. LEGISLATURES (Apr. 6, 2018), <https://www.ncsl.org/research/redistricting/the-iowa-model-for-redistricting.aspx> [https://perma.cc/C8UL-D4V7].

328. 221 U.S. 559, 563 (1911). H.R. 1's carve-out for Iowa, however, might arguably run afoul of the equal footing doctrine. See *supra* notes 239–241 and accompanying text.

Elections Clause.³²⁹ Unlike the preclearance maps used under the VRA, moreover, H.R. 1 is not expressly tied to concerns about *racial* discrimination in elections. The lack of a tie between partisan gerrymandering and racial discrimination was one reason why the Court in *Rucho v. Common Cause* concluded that a legal claim challenging only *partisan* gerrymandering would be nonjusticiable.³³⁰ Moreover, while H.R. 1 cites as its constitutional basis Congress's Fourteenth Amendment Enforcement Clause power to enforce Section 2's Apportionment Clause,³³¹ Congress has heretofore never attempted to enforce that provision, which was functionally a dead letter even at the time of the Amendment's ratification.³³²

Other federal legislative reforms that would reach the conduct of purely *state* and *local* elections in addition to federal ones would be considered even more aggressive still. Whereas Congress may have a more straightforward argument under the Elections Clause that they may regulate various aspects of state rules related to federal elections,³³³ the regulation of state and local elections does not seem to be textually permitted under the Clause, which refers only to elections for federal office.³³⁴ And it seems probable that were legislation like H.R. 1 enacted into law, some states might seek to evade the full application of federal law by creating two-tiered systems of voter registration and electoral processes that distinguish between state and local elections and federal elections.

Several states have already attempted this. In response to the Court's 2013 decision in *Arizona v. Inter Tribal Council of Arizona, Inc.* that the federal National Voter Registration Act ("NVRA") precluded Arizona's proof-of-citizenship requirement for voter registration,³³⁵ both Arizona and Kansas sought to implement two-tier voter registration

329. In addition to requiring contiguous districts, Congress has also required that districts be sufficiently compact, *see* Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733, 734, and have equal populations, *see* Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28, 28.

330. 139 S. Ct. 2484, 2497 (2019) ("Partisan gerrymandering claims have proved far more difficult to adjudicate. . . . [This is because,] while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political gerrymandering.'" (citation omitted)).

331. H.R. 1, § 2400(b)(2). H.R. 1 also cites to Congress's Article I, Section 4 Elections Clause power. *Id.* § 2400(b)(1).

332. *See* FONER, *supra* note 36, at 85 ("Section 2 . . . has never been implemented, even when post-Reconstruction southern governments took the right to vote away from blacks.").

333. *See, e.g., Rucho*, 139 S. Ct. at 2495 ("Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering.").

334. U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

335. 570 U.S. 1 (2013).

systems.³³⁶ Kansas's efforts were ultimately blocked by a state judge for violating the Kansas Constitution,³³⁷ while Arizona eventually settled a state lawsuit challenging its two-tier system.³³⁸ Other states that have attempted to avoid application of the NVRA, including Mississippi, were blocked by the VRA preclearance requirements struck down by the Court in *Shelby County*.³³⁹ It seems probable that at least some state governments would seek to avoid the reach of federal interventions of the kind envisioned by H.R. 1, which could then spur more interventionist responses from Congress that would reach the conduct of purely state and local elections.

What has not been provided in prior scholarship, then, is a thorough analysis of how contemporary courts might evaluate challenges to congressional actions taken under the Republican Guarantee Clause. This would include whether the Clause could provide a constitutional basis for more than simply new preclearance coverage formulas under the VRA, something that some scholars have argued should already be permissible under the Fifteenth Amendment.³⁴⁰ Indeed, there has yet to be a careful consideration of how more expansive congressional actions taken under the Clause to combat partisan gerrymandering or restrictions to ballot access could fit within the contemporary Supreme Court's jurisprudence.

The Clause raises especially intriguing interpretive questions given its unique textual structure as compared with the Reconstruction Amendments. Those Amendments provide a relatively tidy division of labor between the first sections, which enumerate specific individual-rights guarantees (e.g., "The *right* of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."),³⁴¹ and the enforcement clauses that provide Congress with lawmaking authority

336. See Fernanda Santos & John Eligon, *2 States Plan 2-Tier System for Balloting*, N.Y. TIMES (Oct. 11, 2013), <https://www.nytimes.com/2013/10/12/us/2-states-plan-2-tier-system-for-balloting.html> [<https://perma.cc/9W5E-ZPRT>].

337. See Memorandum Decision and Order, *Brown v. Kobach*, No. 2016-CV-550 (Kan. Dist. Ct. Nov. 4, 2016), https://www.aclu.org/sites/default/files/field_document/memorandum_decision_brown_v_kobach_2016.pdf [<https://perma.cc/REV6-4RQB>] (refusing to grant a permanent injunction because "[t]he Defendant simply lacks the authority to create a two-tiered system of voter registration").

338. *Arizona Settles Suit over Handling of Voter Registration*, ASSOCIATED PRESS (June 4, 2018), <https://apnews.com/bb1efeb4d596426096e66b07da8f7ad1> [<https://perma.cc/5EHN-MMT7>].

339. See Ari Berman, *Separate and Unequal Voting in Arizona and Kansas*, NATION (Oct. 15, 2013), <https://www.thenation.com/article/archive/separate-and-unequal-voting-arizona-and-kansas/> [<https://perma.cc/3HLK-RZG8>].

340. E.g., Travis Crum, *Raising Red Flags About Shelby County*, TAKE CARE BLOG (Oct. 15, 2018), <https://takecareblog.com/blog/raising-red-flags-about-shelby-county> [<https://perma.cc/7BK9-GN9J>].

341. U.S. CONST. amend. XV, § 1.

to prophylactically enforce them (e.g., “The Congress shall have power to enforce this article by appropriate legislation.”).³⁴²

This textual ambiguity may also be the Clause’s virtue, however, for the Clause may speak to the branches in distinctive ways, inviting the different branches to give the Clause complementary rather than competing meanings. The Clause might, for example, grant Congress more expansive or intensive power in acting as a guarantor of republican governance than that possessed by the Court, at least in circumstances where the Court concludes the guarantee is better fulfilled by the political branches than by courts. Indeed, if there is any portion of the Constitution that seems to warrant a departmentalist approach to constitutional interpretation inviting multiple branches to enforce the Constitution, it is the Republican Guarantee Clause. There is no other part of the Constitution that so explicitly links state-level governance practices to federal scrutiny, nor that leaves open the possibility that all branches may have some role in acting as guarantors.

B. Constitutional Confrontation: How the Court Might Review Congressional Action and Interpretation

Were Congress to expressly premise federal legislation such as H.R. 1 or a reinvigorated Voting Rights Act under the Republican Guarantee Clause, two important questions would emerge. First, which parties would have standing to sue—state or local actors, or other parties who have a constitutional injury whose nexus could be fairly traced to the legislation? Second, if at least some parties would have standing, would the Court find justiciable a challenge to Congress’s power to legislate under the Clause? This, of course, is what is at stake in determining whether the interpretation of the Clause raises classical or prudential political questions.

If the Clause’s interpretation raises prudential political questions, and the Court were to conclude that a claim challenging federal legislation enacted under it is justiciable, then the Court would then be tasked with providing an authoritative and affirmative interpretation of the Clause—something it has managed to avoid doing for well over two centuries. And even if the Court provided some minimal and vague account of what the Clause means, permits, or requires, interesting questions would arise about whether and how the Court might recognize a separate role for Congress in interpreting and enforcing the Republican Guarantee Clause vis-à-vis the courts. After

342. *Id.* § 2.

all, there may be deficiencies in state governments not easily rectified by courts, as the majority suggested in *Rucho*.³⁴³ The history of federal Reconstruction—and the Court’s deferential jurisprudence to Congress during that period—also suggest the Clause may provide the political branches with significant power, at least in extraordinary circumstances.

1. Justiciability

The first question a court would face in hearing a claim challenging Congress’s power to act under the Clause would be whether the claim raised either a classical or prudential political question that would preclude judicial review altogether. If the Republican Guarantee Clause raises classical political questions, then the Clause might be effectively off limits to the Court altogether. Dicta in the Court’s jurisprudence suggests the Court might decline to intervene entirely. For example, in *Stanton* the Court concluded that the challenges related to federal Reconstruction and Congress’s power to implement it through federal legislation raised political questions about the relationship between Congress and the southern states that were inappropriate for judicial involvement.³⁴⁴ And in 2019, the Court in *Rucho* seemed to definitively reiterate the broad claim that the Court “has several times concluded . . . that the Guarantee Clause does not provide the basis for a justiciable claim.”³⁴⁵

There is good reason, however, to be suspicious that the Court would treat legal challenges to Congress’s power to legislate under the Clause as raising wholly nonjusticiable classical political questions, notwithstanding some reasoned speculation that the Court might be eager to sidestep the interpretive conflict altogether.³⁴⁶ First, as discussed in Part I, the Court has in recent decades been increasingly hostile to the notion that Congress may interpret the Constitution in a manner that deviates in any meaningful way from the Court’s, even in complex matters of judgment about the appropriate remedy to stave off violations of rights protected under the Reconstruction Amendments.

343. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019) (“Any judicial decision on what is ‘fair’ in this context would be an ‘unmoored determination’ of the sort characteristic of a political question beyond the competence of the federal courts.” (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012))).

344. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1867). See generally *supra* Section II.B.2.

345. 139 S. Ct. at 2506.

346. See *Chin*, *supra* note 5, at 1586 (“[I]f [a] new Act is clearly a bona fide effort to enforce the Guarantee Clause (among other provisions of the Constitution), its validity should be regarded as a political question.”); *Hasen*, *supra* note 7, at 206 (“The Court might not want to open itself up to Guarantee Clause claims, which will draw the Court even further in the political thicket.”).

In a string of cases beginning with *City of Boerne v. Flores*, the Court has repeatedly held that there must be congruence and proportionality between the right protected under the Amendment in question and Congress's prophylactic legislation that seeks to protect that right.³⁴⁷ Since the Court has seemed disinclined to defer to Congress in deciding which responses might be proportional under those Amendments, it seems unlikely the Court would defer entirely to Congress's interpretation of the Clause, either.

Second, the kind of election-reform and anti-gerrymandering legislation Congress would be most likely to pass under the Clause would be in response to very different political conditions than those the country faced when the Reconstruction Acts were enacted after the Civil War. The late 1860s were an extraordinary period in American history, and the federal government faced grave circumstances during this period that necessitated unprecedented federal intervention in the southern states. In some sense, the Court in *Stanton* had little choice but to decline to intervene. It seems highly improbable that the federal government would have ceased Reconstruction simply because the Court told it to. The Court's nonjusticiability holding in *Stanton* might therefore be better explained as a form of *prudential* political question deference, rather than a holding as to the inherent nonjusticiability of the Clause in all circumstances. Moreover, the Court did seem to reach the merits of claims arising under the Clause in *Minor v. Happersett*, *Plessy v. Ferguson*, and *Coyle v. Smith*, and it flirted with doing so more recently in *New York v. United States*.³⁴⁸ Those holdings suggest that the Court has not concluded that the interpretation of the Clause speaks *only* to the political branches.

Compared with Reconstruction, modern-day federal election reform legislation would have a character far more familiar to modern lawyers. The contemporary Court has repeatedly struck down federal legislation that it has held exceeds Congress's constitutional lawmaking authority.³⁴⁹ It has also struck down federal legislation in violation of the Tenth Amendment, a constraint on federal legislative power not widely recognized by courts between the Reconstruction era and Warren Court, but which the modern-day Court—beginning with the Burger Court in the mid-1970s³⁵⁰—has repeatedly invoked as a

347. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), *superseded in part by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

348. *See supra* notes 294, 309–318 and accompanying text.

349. *E.g.*, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Boerne*, 521 U.S. 507.

350. *See* David Scott Louk, *Repairing the Irreparable: Revisiting the Federalism Decisions of the Burger Court*, 125 *YALE L.J.* 682 (2016).

safeguard to preserve states as coequals in the American federal system.³⁵¹ When the Court in *Shelby County* struck down portions of the Voting Rights Act, it saw no reason to defer on the basis of prudential political question concerns. Accordingly, there is no good reason to think similar kinds of legislation enacted under the Republican Guarantee Clause would be treated differently today, provided the Clause does in fact raise prudential rather than classical political questions.

The critical question is thus not whether the Court would be inclined to find challenges to legislation enacted under the Clause fully nonjusticiable—that seems improbable given the Court’s post-*Boerne* jurisprudence. Rather, the novel question is how the Court would resolve such challenges, for striking down legislation as exceeding Congress’s power under the Clause would put the Court in a somewhat awkward position. After all, the Court recently disclaimed any judicial responsibility for partisan gerrymandering whatsoever in *Rucho*, and even seemed to hint that Congress, not the courts, should be the branch to remediate such conditions.³⁵² Given that dicta, it would be odd for the Court to invoke the Tenth Amendment as a safeguard against federal intervention altogether.

2. The Meaning of Each Part of the Clause

Assuming challenges to federal legislation enacted under the Republican Guarantee Clause are neither nonjusticiable per se nor categorically in violation of the Tenth Amendment, then the Court would be confronted with interpreting one or more portions of the Clause. In so doing, it would have to decide whether to defer to Congress’s interpretation both of the meaning of the Clause’s guarantee as well as the appropriateness of Congress’s intervention as guarantor. This raises issues about who or what constitutes “[t]he United States”; what actions may be considered a permissible form of “guarantee”; what “Form[s] of Government” can be said to be “Republican”; and which branch of government should decide each of these three questions. This section briefly addresses each, drawing on the historical and legal materials reviewed above.

351. *E.g.*, *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018); *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

352. *Rucho v. Common Clause*, 139 S. Ct. 2484, 2508 (2019) (“[T]he Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause.”).

a. "The United States"

As to which branches or institutions constitute "[t]he United States," the Court's own precedents clearly establish that in at least some circumstances, Congress may act as the United States for the purposes of the Republican Guarantee Clause. The Clause was a chief constitutional premise behind the federal Reconstruction Acts in the wake of the Civil War, and the Court seemed to tacitly endorse this understanding in *Stanton* when it wrote that the actions Congress took under the Clause with regard to Reconstruction were political questions best left to the political branches.³⁵³ It reiterated this understanding even more bluntly in *Texas v. White*, when it stated that "the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress."³⁵⁴ And, as Akhil Amar has argued, such an understanding is further reinforced by the ratification processes of the Fourteenth and Fifteenth Amendments, which were themselves predicated on Congress's powers under the Clause.³⁵⁵

b. A "Republican Form of Government"

If the Clause is interpreted such that "[t]he United States" includes Congress as a guarantor, the question would then shift to examining what it means to be a "Republican Form of Government." This portion of the Clause has traditionally received the bulk of proposed interpretations, for debates about what constitutes a republican form of government have extended well beyond both the Clause and American legal jurisprudence more generally. Arguably, the most straightforward approach would be for the Court to reinvigorate arguments first made by preservationists like John C. Calhoun that whatever form of government the states had when first admitted, that form necessarily constitutes an adequately republican form for the purposes of the Clause's guarantee.³⁵⁶ There are at least three potential rebuttals to the founding-era status quo argument.

First, the arguments of Calhoun and other slaveholders predate the Reconstruction Amendments and all that has come since. Reconstruction-era constitutionalism obviates much of the viability of that interpretation, for none of the southern states were permitted to restore full relations with the Union on the terms of their antebellum

353. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1867).

354. 74 U.S. (7 Wall.) 700, 730 (1868), *overruled in part by* *Morgan v. United States*, 113 U.S. 476 (1885).

355. Amar, *supra* note 154, at 112.

356. *See supra* Section III.A.

state constitutions. Instead, full federal recognition of those state governments was predicated on compliance with the Reconstruction Acts in developing new state constitutions, as well as in ratifying the Fourteenth and Fifteenth Amendments. Congress justified its legislative mandates in part on the basis of its powers under the Clause. It does not seem credible to argue that structures of representative governance at the founding—like those in Dorr’s Rhode Island that denied the vote to women, people of color, and males without property—would be said to be republican in form today. At a minimum, the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as the heightened conditions imposed on states admitted to the Union after the Civil War, have all altered the constitutional floor for American republican government. This transformation hardly ended at Reconstruction. The Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, and the Court’s incorporation doctrine under the Fourteenth Amendment,³⁵⁷ have continued to alter the minimal contours of the states’ republican governments. This argument might also find support in recent theories of constitutional liquidation, the Madisonian notion that indeterminate constitutional provisions may take on meaning over time through a deliberate course of practice and a settlement as to their meaning.³⁵⁸

Second, Congress might argue that the founding-era status quo definition of republican government sets a floor, but not a ceiling, for federal supervision. In this sense, Congress might be said to have historically underenforced its guarantee. This was the argument Charles Sumner made during congressional debates over Reconstruction: while Congress’s “mighty power” under the Clause had been “[a]sleep,” it remained available for enforcement when necessary.³⁵⁹ Certainly, the rapid escalation of federal intervention in the states’ government affairs during Reconstruction suggests that Congress had kept at least some of its constitutional powder dry in the near century between the founding era and Reconstruction. *Minor* did hold that the Clause does not create evolving *justiciable* rights for citizens vis-à-vis their states beyond what had been guaranteed at the state’s admission.³⁶⁰ Yet that understanding does not preclude a reading of the Clause as providing *Congress* with unexercised powers to act. As Justice Harlan argued in his famous dissent in *Plessy*, even if the Clause afforded no judicial remedy to inequality stemming from

357. See AMAR, *supra* note 13, at 86–87.

358. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13–21 (2019).

359. See *supra* notes 205–208.

360. See *supra* notes 309–314.

segregation, Congress nevertheless had the reserved power under the Clause to intervene and remediate such inequality.³⁶¹

Third, even if the Clause stands for *some* kind of status-quo preservation understanding of republicanism, Congress may still have legitimate grounds to act under the Clause. Many of the ambitions of H.R. 1-like legislation could be understood as responding to significant alterations in the status quo of state electoral processes over the prior decade. Indeed, federal skepticism of change pervades the VRA. Its preclearance regime was predicated on the assumption that changes to state electoral processes warranted heightened federal scrutiny in covered jurisdictions with a history of election laws that resulted in diminished political participation and ballot access. On this basis, Congress might very well argue that federal legislation that seeks to address recent state-level changes in electoral processes serves to ensure that states do not fall below an acceptable floor of twenty-first-century republican governance.

If the Court rejected the founding-era status quo interpretation of the Clause, its interpretive inquiry would likely hew closely to the challenged congressional act in question: namely, (a) whether the Court must or should defer to Congress's definition of what constitutes a minimally republican form of government; and (b) if the Court were to defer, whether a role would remain for the Court to examine whether Congress's *actions* in furtherance of fulfilling the guarantee are sufficiently linked to the definition of republican governance provided.

The first inquiry is likely to turn on how expansive or ambitious Congress's proposed baseline for a republican form of government may be. An interpretation of the Clause as simply requiring majority rule would seem to be very hard to second-guess, as that interpretation of the Clause permeates both founding-era and Civil War-era discourses around the meaning of republican government.³⁶² It is also widely accepted among modern scholars.³⁶³ In this sense, Congress might argue that the concept of a republican form of government has not changed from the founding era, but the particular *conception* has, given changes in constitutional understandings of whom "the majority" consists.³⁶⁴

361. See *supra* note 318 and accompanying text.

362. See Amar, *supra* note 5, at 761–66, 778–86.

363. See sources cited *supra* note 5.

364. Akhil Amar has referred to this the "denominator problem." See Amar, *supra* note 5. For an especially helpful examination of the distinction between constitutional concepts and conceptions, and the circumstances under which the Constitution may set out constitutional conceptions that could evolve over time, see Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 42–61 (2015).

If so, then the Court's inquiry would likely turn to the fit between potential identified failures of majority rule in the states and the congressional interventions enacted under the Clause to remediate those shortcomings. After all, the majority in *Shelby County* did not disclaim Congress's ability to require preclearance under section 4(b) of the VRA *under any circumstances*; rather, the Court concluded that the record of evidence Congress introduced during the VRA's reenactment was *insufficient* to justify maintaining the same preclearance coverage maps that had been upheld in the past.³⁶⁵ Assuming arguendo that the majority rule definition were a plausible interpretation, it seems probable that the Court would instead focus on whether Congress's legislative remedies were appropriately tailored.

c. "Guarantee"

The locus of the constitutional confrontation between the branches would thus hinge on what Congress may do in furthering a guarantee of a republican form of government, and the extent of the evidence, if any, Congress must put forward to substantiate the basis for its actions as guarantor. At the outset, it is important to note that the interpretation of "guarantee" in the Clause is complicated by the fact that the text of the Clause seems to *mandate* a guarantee. The guarantee is preceded by the verb "shall" rather than the verb "may," and "shall" in legal interpretation is usually understood to convey an imperative meaning. It was in this sense that both the Dorr Rebellion and the charter government during the crisis in Rhode Island had petitioned the President to intervene, urging that the federal government had an affirmative responsibility to intercede.³⁶⁶ Nevertheless, neither the President nor Congress intervened, and when the Court addressed the Clause's meaning in *Luther*, it declined to find that either Congress or the President had any affirmative responsibility under the Clause short of the imposition of permanent martial law in a state.³⁶⁷

What else might the Clause mean by "guarantee"? Perhaps the most thorough argument about the meaning of "guarantee" is the international law interpretation proffered by Ryan Williams. On this view, the guarantee might function akin to the mutual-compact guarantees that nation-states made with one another as parties to international treaties during and before the founding era in the mid-to-

365. *Shelby Cty. v. Holder*, 570 U.S. 529, 554 (2013).

366. See *supra* notes 130–137 and accompanying text.

367. See *supra* note 150 and accompanying text.

late eighteenth century.³⁶⁸ Whatever specific actions Congress might take under that guarantee, the guarantee itself could only be triggered by a state government petitioning Congress to intervene on its behalf.³⁶⁹ That interpretation, although not grounded in the text alone, would at least logically address the grammatical matter of what it means for the guarantee to be an imperative: where a state petitions the federal government to intervene, it *shall* respond by acting to guarantee.

But as discussed above in Section III.A.2, that interpretation raises its own problems. It is difficult to imagine circumstances under which a sitting state government—*already* republican in form—would petition Congress or the president to intervene to guarantee its republican nature. After all, were it invaded by outside forces, or facing domestic violence from within, the Constitution already provides mechanisms for the sitting state government to seek help: the Invasion and Domestic Violence Clauses of Article IV, Section 4, whose mechanisms reside in the very same sentence as the Republican Guarantee Clause, and which expressly identify the role of Congress and the president in response.³⁷⁰ That view also seems to have been rejected during the Dorr Rebellion, for President Tyler spurned the Rhode Island charter government's argument that he had an obligation to intervene on the basis of the Clause.³⁷¹

A second problem is that the Supreme Court would not be interpreting the Clause against a blank slate today: the Clause played a central role in American constitutionalism during and immediately after the Civil War. It provided the basis for helping to ensure the ratification of the Fourteenth and Fifteenth Amendments and provided the federal government with the constitutional basis for its actions during Reconstruction more generally, actions which the Court declined to second-guess. None of those actions were premised on a petition from one of the Confederate state governments that had seceded from the Union. The most applicable direct historical precedent thus seems to bely the international treaty law interpretation of the meaning of the term "guarantee." And for the reasons stated above, even if one were inclined to look past the *Court's* formal Reconstruction-era precedents, the Reconstruction Amendments—as well as the Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments—have so fundamentally

368. See *supra* notes 260–264 and accompanying text.

369. See *supra* notes 265–266 and accompanying text.

370. To repeat, Article IV, Section 4 reads in full: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4.

371. See *supra* notes 134–139 and accompanying text.

altered the constitutional minima for modern American republican governmental institutions that whatever a republican form of government meant at the founding seems incidental to any reasonable meaning of that term today.

A third problem with reading too much into the “*shall* guarantee” imperative is that it is not clear that anyone can require either the courts or the political branches to provide the guarantee. After all, claims brought *directly* under the Clause are the ones to have been found nonjusticiable. It is improbable that an individual or state could sue seeking Congress’s affirmative obligation to act as a guarantor under the Clause. And if such a claim were nonjusticiable, as seems likely, it is not clear precisely what it would mean to say that the guarantee sets out an unenforceable mandate. The phrase may be better understood as explicitly empowering the political branches to monitor and determine when particular circumstances in a given state might warrant a federal response.

Another possibility is that the guarantee could be understood as an emergency powers provision that applies only in extreme circumstances akin to the instances of invasion and domestic violence contemplated in the other clauses of Article IV, Section 4. The Court’s Reconstruction-era jurisprudence is perhaps best squared with an emergency powers interpretation. The Court’s tacit endorsement of Congress’s actions in *Stanton* and *White* seemed to acknowledge the deference the courts owe the political branches in times of great exigency where the relationships between the ex-Confederate states and the Union had been upended. Yet for that reason, these cases are of limited utility. Both involved challenges to legislative acts associated with restoring ordinary relations between the states and the Union, rather than legislative acts regulating the everyday affairs of *already*-established state governments. A very narrow understanding of those precedents might suggest that few if any ordinary legislative actions could be enacted under the Clause.

At a minimum, then, federal action taken under the Clause during periods in which the political processes at the state level can be said to be in existential crisis—as during and after the Civil War—might constitute circumstances in which even the Court would be disinclined to second-guess the political branches. Should a genuine constitutional crisis emerge within a state, the Court would presumably permit Congress (or the president) to rely on the Clause as a constitutional justification to intervene, as was done during the Reconstruction era after the Civil War.

But this approach simply reconfigures the problem, for then the questions would be: What constitutes a state-level constitutional

emergency of republican governance, and who decides? And would the Court have the authority to second-guess a congressional determination that problems with state-level republican governance are of a sufficiently serious nature to warrant federal intervention under the Clause? Consider, for example, the case of a state governor postponing a state election due to alleged emergency circumstances—in the case of 2020’s coronavirus pandemic, hardly a hypothetical.³⁷² If a state election were postponed indefinitely, even over a state court’s instructions to the contrary, at what point would this constitute an emergency for which Congress would be justified in intervening under the Clause? And what arguments might those opposing federal intervention wield against it?³⁷³

Other hypotheticals, such as a federal mandate to implement mandatory mail-in balloting or no-excuse absentee voting in all local, state, and federal elections during a national health emergency, might also be conceivable—as election law scholars have called for in response to the 2020 coronavirus pandemic.³⁷⁴ It seems plausible that a national pandemic may warrant congressional intervention in the states in ways that would be impermissible in ordinary times.

What of less extreme exigencies? Some contend that the state of partisan gerrymandering in many states *is* a constitutional crisis.³⁷⁵ If a majority of both houses of Congress were to agree, would it be appropriate for the Court to second-guess them, especially in matters related to election hacking, widespread voter disenfranchisement, or other tampering with voter rolls or ballots? The Court has tended to be much more deferential to the political branches in matters of national security,³⁷⁶ and so the question is whether the Court would tread

372. See Zach Montellaro & Alice Miranda Ollstein, *Ohio Governor Shuttters Polling Places for Tuesday’s Primary, Citing Public Health*, POLITICO (Mar. 17, 2020), <https://www.politico.com/news/2020/03/16/ohio-governor-recommends-postponing-tuesdays-primary-132340> [<https://perma.cc/E9R3-572V>].

373. See, e.g., Ned Foley, *Public Health, Closing Polls, and the Tenth Amendment*, ELECTION L. BLOG (Mar. 19, 2020, 3:24 PM), <https://electionlawblog.org/?p=110123#more-110123> [<https://perma.cc/JD8P-9JDQ>] (arguing that the Tenth Amendment would protect the states from federal intervention in their state and local election procedures).

374. See, e.g., Richard L. Hasen, *How to Protect the 2020 Election from the Coronavirus*, SLATE (Mar. 13, 2020), <https://slate.com/news-and-politics/2020/03/2020-election-coronavirus-bill-vote-by-mail.html> [<https://perma.cc/Q9ZC-VRTG>].

375. See, e.g., ANDERSON, *supra* note 29, at 97–98 (“The deft art of gerrymandering . . . is key to understanding the decline of democracy in America.”); Shapiro, *supra* note 7, at 186 (arguing that extreme partisan gerrymandering risks “the erosion of fundamental democratic norms and practices”).

376. See Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009) (analyzing several cases in which the Court has given more deference in matters of national security and arguing that such deference is only justified in limited circumstances).

equally lightly in matters of domestic *election* security, especially where national security concerns may overlap with election meddling.³⁷⁷

A final possibility, explored further below, is that the plausibility of Congress's claim to urgency may hinge in large part on whether other less invasive avenues remain available to remedy the identified problem. If a recalcitrant state government suspended elections, Congress or the president might be better suited to act than the federal courts. In the case of extensive cyberattacks to the states' election infrastructure, election meddling concerns might be better addressed through carefully tailored uniform national standards than by piecemeal state responses or judicial interventions. And if neither the state nor federal courts appear able to remedy widespread partisan gerrymandering, congressional intervention under the Clause may present the only remaining avenue.

3. Modes of Judicial Scrutiny

Assuming the Court were to review the appropriateness of congressional actions taken to “guarantee” a republican form of government, the next question would be the form of scrutiny the Court would apply to that review. At least four approaches to assessing the appropriateness of Congress's actions as guarantor seem plausible.

a. The Katzenbach “Any Rational Means” Analysis

The first, most permissive form of review would be to find that the Clause is primarily addressed to Congress, and so the Court's review should be widely deferential. That approach might be similar to the “any rational means” review under the Fifteenth Amendment that the Court announced in *South Carolina v. Katzenbach*.³⁷⁸ This could manifest as a broad version of the general theory of departmentalism articulated by Michael McConnell and Michael Stokes Paulsen, among others. Paulsen has argued that where the underlying constitutional provision is fairly susceptible to two or more different readings that are consistent with text, history, and other relevant sources, then the Court cannot say Congress has acted beyond its authority if it has passed enforcement legislation based on one of those readings, even if the

377. *E.g.*, Steve Holland & Jeff Mason, *Trump National Security Team Says Russia Behind Effort to Meddle in U.S. Elections*, REUTERS (Aug. 2, 2018), <https://www.reuters.com/article/us-usa-election-security/trump-national-security-team-says-russia-behind-effort-to-meddle-in-us-elections-idUSKBN1KN2KQ> [<https://perma.cc/UDY9-UJDK>] (documenting the role of federal national security agencies in identifying foreign threats to domestic election integrity).

378. *See* 383 U.S. 301, 324 (1966).

Court—for the purposes of its *own* enforcement—would have thought another reading was superior.³⁷⁹

McConnell has described this argument as the “‘presumption of constitutionality,’ under which Acts of Congress are presumed constitutional unless they are plainly foreclosed by the pertinent legal materials.”³⁸⁰ After all, McConnell argues, there is a general principle that “each branch of government has the authority to interpret the Constitution for itself, within the scope of its own powers.”³⁸¹ On this view, as long as the scope of Congress’s guarantor actions were not *implausibly* beyond the reach of the Clause’s guarantee of republican government, the Court would not second-guess the precise actions taken under it, provided that the means are rational. Given the Court’s juricentric turn since *Boerne*, however, it is questionable that the Court would be likely to embrace such a potentially wide-reaching form of constitutional departmentalism. This approach is also a bit of an awkward fit for the Clause, insofar as it would not resolve the problem of what, precisely, a republican form of government might entail. And if Congress could take any action under the Clause generally furthering “majority rule” elections, this would seem to permit a fairly substantial role for the federal government in an area traditionally left to the states.

b. The Boerne “Congruence and Proportionality” Analysis

A second, more restrictive approach would be to adopt the “congruence and proportionality” framework that the Court first announced in *Boerne* and has since applied in a number of cases reviewing congressional legislative power under the Enforcement Clause of the Fourteenth Amendment. While less deferential than either the rational-means or necessary-and-proper tests, the Court has upheld legislation under this test in *Nevada Department of Human Resources v. Hibbs*³⁸² and *Tennessee v. Lane*.³⁸³ Yet in most other cases in which the Court has invoked this test, it has struck down legislation as reaching beyond Congress’s constitutional powers. Precisely how the test might apply here would depend on the specific contours of the legislation in question.

What might make this approach less suitable, however, is that it would require the Court to both (a) define the *precise* contours of the

379. Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 252 n.10 (1995).

380. McConnell, *supra* note 49, at 172–73.

381. *Id.* at 171.

382. 538 U.S. 721 (2003).

383. 541 U.S. 509 (2004).

meaning of republican governance, and then (b) decide whether the federal legislation was proportionate to that specific definition. Precisely because the guarantee is so vague and indeterminate, this approach would require the Court to provide a specific and affirmative definition of the meaning of a republican form of government, something it has thus far sought to avoid. This standard of review is less suitable for legislation enacted under the Clause than for legislation enforcing the specific rights set out in the Reconstruction Amendments, where decades of judicial precedents exist to guide courts in assessing the fit between the prophylactic legislation and the right protected.

c. A Departmentalist “Necessary and Proper” Analysis

A final, more departmentalist approach would focus on whether other avenues to remediate the issue in question were unavailable. Under this standard of review, the Court would examine which branch of government is best suited to remediate the problem identified by Congress, as well as what other legal or constitutional avenues had already been exhausted. For example, if, per the majority in *Rucho*, partisan gerrymanders cannot be remedied by the federal courts, then a plausible argument exists that Congress could act to ensure that state elections provide for majority-rule outcomes, especially if Congress were to point to evidence that neither state courts nor the states’ political processes could effectively address the issue.

This might manifest as a variation of the *Katzenbach v. Morgan* “necessary and proper” standard of review of congressional actions taken under the Fourteenth Amendment’s Enforcement Clause, borrowing from *McCulloch*’s three-part inquiry.³⁸⁴ Notably, this approach to judicial review of federal legislation enacted under the Clause was also the one envisioned by the Court in dicta in *White*.³⁸⁵ That inquiry would examine (a) whether the enactment is “appropriate legislation” to enforce the Clause;³⁸⁶ (b) whether it is “plainly adapted” to furthering the aims of the Clause;³⁸⁷ and (c) whether the legislation is “consistent ‘with the letter and spirit of the constitution.’ ”³⁸⁸ Analysis of the first two prongs would depend heavily on the specific legislation in question, but the third one would, in turn, require the Court to determine whether Congress’s interpretation of the Clause comported

384. See *Katzenbach v. Morgan*, 384 U.S. 641, 650–51 (1966).

385. See *supra* notes 234–237 and accompanying text.

386. *Katzenbach*, 384 U.S. at 651.

387. *Id.* at 652–63.

388. *Id.* at 656–57.

wholly, or at least “in spirit,” with its own. To the degree the Clause is understood to grant Congress power to act in certain urgent contexts, this flexible approach would recognize the departmentalist potential of the Clause in at least some limited circumstances. That the subject of the Clause is “[t]he United States” suggests that each of the branches of government might, under certain circumstances, play a role in guaranteeing a republican form of government in the states. And if, as the Court has continued to hold, there is little or no room for the *courts* to provide the guarantee directly, then there may be at least some narrow range of permissible actions that Congress could take.

Such a constitutional division of labor might warrant a modified application of the *Morgan* “necessary and proper” inquiry in which the judicial assessment of the necessity of congressional intervention would turn on the availability of feasible alternative channels for remediation. As applied to the Republican Guarantee Clause, the *necessary* prong of this standard of review would have to have more bite than in other applications. Consider, for example, the problem of partisan gerrymanders. To survive judicial review, congressional legislation seeking to remediate gerrymandering might be expected to include evidence that neither the state courts nor the ordinary operations of the states’ political processes would be likely to adequately address state partisan gerrymanders. Congress might point to the exhaustion of legal remedies in the state courts, as well as evidence of structural minority rule in the drawing of state electoral districts.

The strength of Congress’s claim might also depend on other developments in federal election law. For example, such a position might be enhanced were the Supreme Court to reconsider its narrow holding in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, in which a bare majority of the Court voted to uphold the constitutionality of independent redistricting commissions enacted by a *state* voter initiative as a permissible means to redistrict state electoral districts under the Elections Clause of Article I, Section 4.³⁸⁹ Because the composition of the Court has changed since that decision, it is conceivable that a recomposed Court may be inclined to revisit that holding in the future, something hinted at by the dissent in *Rucho*.³⁹⁰ If voters were entirely unable to enact independent state commissions themselves—as the *Arizona Independent*

389. 135 S. Ct. 2652 (2015).

390. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2524 (2019) (Kagan, J., dissenting) (“The majority notes that voters themselves have recently approved ballot initiatives to put power over districting in the hands of independent commissions or other non-partisan actors. Some Members of the majority, of course, once thought such initiatives unconstitutional.” (citation omitted)).

Redistricting Commission's four dissenters would have held³⁹¹—and if partisan gerrymandering claims remain nonjusticiable by federal courts,³⁹² then this would seem to support a departmentalist understanding of the Clause as permitting congressional intervention as a last resort. That interpretation would permit Congress to legislatively address partisan gerrymanders not remediable either by state voters or federal courts, for it is difficult to think that an issue so central to republican governance could not be remedied by *any* branch of the federal government or by the people of the states themselves.

While the precise application of this approach would depend on the legislation at issue and related juridical precedents, a departmentalist-minded interpretation of the Clause seems especially appropriate given that both the text and constitutional history of the Clause has seemed to invite all federal branches to have some role in developing the Clause's meaning and application. Understood in this way, the Clause would remain a "break glass in case of emergency" constitutional provision to be invoked only when other constitutional means have been exhausted or shown to be inadequate to resolving the problem at hand. This framework would provide deference to Congress when an intervention is necessary but would preserve as the primary avenues for remediation the more ordinary constitutional mechanisms for addressing disenfranchisement and concerns about fair political participation.

CONCLUSION

Disagreements between the branches about the interpretation and application of the Constitution are a necessary aspect of the American constitutional order. Such disputes are especially fraught when the Constitution does not clearly demarcate who may act and what actions may be taken, as with the Republican Guarantee Clause. The Clause presents the possibility of multiple guarantors and offers very little textual guidance as to how each branch (and the states) might interpret and enforce it. Legislative as well as judicial Reconstruction-era precedents suggest that, at least in times of great urgency, Congress (and the president) may meaningfully act under the Clause. Yet like so much about the Civil War and the Reconstruction that followed, those precedents may be so exceptional as to provide limited guidance for more ordinary invocations of the Clause.

391. 135 S. Ct. at 2692 (Roberts, C.J., dissenting).

392. *Rucho*, 139 S. Ct. 2484.

Nevertheless, just as legal and scholarly efforts to reinvigorate the Clause began to crest just before the 1960s civil rights revolution found other constitutional avenues for federal legislative relief, the present era suggests new momentum may be building for Congress to act under the Clause once again.³⁹³ Such a movement would implicate deep and ongoing tensions about the power of courts to second-guess the political branches in matters that concern urgent (though not exclusively) political questions. This Article has argued that the Court's increasingly juricentric approach, coupled with growing popular agitation for Congress to take action to reform election procedures in the states, suggests it may be only a matter of time before the Court will be confronted with the task of clarifying what the Republican Guarantee Clause means, and how Congress may legislate under it. While the precise contours of this conflict remain to be seen, this Article has sought to explore the argument that both Congress and the Court have a role to play in enforcing *and* interpreting the Clause, presenting the possibility for twenty-first-century constitutional departmentalism.

393. See *supra* note 7 and accompanying text.