

RECONSTRUCTING STATE REPUBLICS

Francesca L. Procaccini*

Our national political dysfunction is rooted in constitutionally dysfunctional states. States today are devolving into modern aristocracies through laws that depress popular control, entwine wealth and power, and insulate incumbents from democratic oversight and accountability. These unrepblican states corrupt the entire United States. It is for this reason that the Constitution obligates the United States to restore ailing states to their full republican strength. But how? For all its attention to process, the Constitution is silent on how the United States may exercise its sweeping Article IV power to “guarantee to every State in this Union a Republican Form of Government.” As states descend into aristocratic cabals, the question of how to enforce the guarantee is of existential importance. This Article illuminates three enforcement mechanisms: direct legislation, federal incentives, and reconstructing state governments. It establishes that Congress, not the U.S. Supreme Court, is the institutional actor most capable of addressing the republican rot now plaguing the states.

| | |
|---|------|
| INTRODUCTION..... | 2158 |
| I. A GUARANTEE AGAINST ARISTOCRACY | 2166 |
| A. <i>The Guarantee Clause’s Anti-aristocracy Origins</i> | 2168 |
| B. <i>The Reconstruction of Slave Aristocracies</i> | 2171 |
| C. <i>The Anti-aristocracy Guarantee Power</i> | 2175 |
| D. <i>Distinguishing Between Aristocratic and Republican Government</i> | 2178 |
| II. THE ARISTOCRATIC EXPERIMENTS OF SEVERAL STATES..... | 2184 |
| A. <i>Entrenchment Through Partisan Gerrymandering</i> | 2186 |
| B. <i>Criminal Disenfranchisement</i> | 2190 |
| III. ENFORCING THE GUARANTEE CLAUSE AGAINST ARISTOCRATIC STATES | 2195 |
| A. <i>Legislating Against Unrepblican State Practices</i> | 2198 |

* Climenko Fellow and Lecturer on Law, Harvard Law School; Visiting Lecturer in Law, Yale Law School; Visiting Fellow, Information Society Project at Yale Law School. I am especially grateful to Jack Balkin, Richard Fallon, Michael Klarman, Martha Minow, Laura Weinrib, and participants in the Information Society Project workshop, for invaluable insights and comments.

| | |
|---|------|
| <i>B. Incentivizing State Political Reform</i> | 2201 |
| 1. Constitutional Conditions: States Passing Laws and Amendments | 2202 |
| 2. Constitutional Incentives: Financial Carrots and Seating Sticks | 2204 |
| <i>C. Dissolving and Reconstructing State Government</i> | 2208 |
| IV. THE SEPARATION OF THE GUARANTEE POWER | 2214 |
| <i>A. Congressional Predominance</i> | 2216 |
| <i>B. Judicial Restraint</i> | 2221 |
| 1. Modest Review | 2221 |
| 2. The Empty Promise of Judicial Enforcement | 2225 |
| CONCLUSION..... | 2230 |

INTRODUCTION

Something is rotten in the American states. Currently, fifty-nine million Americans live under minority legislative rule in their states.¹ Nearly half suffer extreme misrepresentation under state legislatures whose political makeup differs from the state's popular vote by fifteen percentage points or more.² In some states, the legislature is stacked with 25 to 30 percent more party members than that party won at the polls.³

A separate group of over five million adult citizens is explicitly deprived of the right to vote by state law.⁴ This is more people than the total state population in twenty-nine states.⁵ In six states—with a combined population of over forty-nine million Americans—these disenfranchisement laws prohibit between 6 and 11 percent of the adult citizenry from voting.⁶ Seven states disenfranchise over 15 percent of their Black populations—two disenfranchise over 20 percent.⁷

At the same time, it costs over three times the median household income to win a state legislative seat.⁸ Nearly impenetrable class stratification

1. CHRISTIAN R. GROSE ET AL., *THE WORST PARTISAN GERRYMANDERS IN U.S. STATE LEGISLATURES* 6 (2019).

2. *Id.* at 7–9.

3. *Id.* at 12–13.

4. CHRISTOPHER UGGEN ET AL., *THE SENT'G PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION* 4 (2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/> [https://perma.cc/LV4F-3ZA6].

5. *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019*, U.S. CENSUS BUREAU, https://files.hawaii.gov/dbedt/census/popestimate/2019_state_pop_hi/nst-est2019-01.pdf [https://perma.cc/8TSS-FADD] (last visited Mar. 16, 2021).

6. UGGEN ET AL., *supra* note 4, at 16.

7. *Id.* at 17.

8. See Geoff Mulvihill, *Political Money in State-Level Campaigns Exceeds \$2B*, ASSOCIATED PRESS (Nov. 1, 2018), <https://apnews.com/b3ead0614b664bd89fbc1c8c19c42131> [https://perma.cc/KVY4-APGG].

ensures that only elites can afford to run or win elections.⁹ Once in office, representatives are nearly impossible to remove, even as they consistently act solely in the interests of economic elites.¹⁰ The views of ordinary citizens have little to no effect on the laws by which they are governed.¹¹

What is rotting is the foundation of republican government in the states—through modern-day manifestations of aristocratic governing tactics that subvert popular control of government and create stark levels of political inequality amongst citizens. In particular, the sum processes of widespread voter suppression, political entrenchment, unresponsive governance, and undemocratic ploys to subvert majoritarian rule are eroding republican structures and allowing aristocratic rule to fester in its place. This is a period of decay that rivals the worst episodes of republican crisis in American history.

When confronted with a similarly egregious period of republican rot in the wake of the Civil War, a reformist Congress embraced a radical idea to deconstruct and reconstitute the foundations of American democracy in the states. It used a little remembered power, thereafter forgotten again, to enact a sweeping program of political and constitutional reconstruction. Article IV, Section 4 of the Constitution¹²—the Guarantee Clause—was Congress's sledgehammer against un-republican practices and its scalpel for sculpting a new political equality. Under this authority, Congress fundamentally reconstituted both the state and federal structures of political power, including by dismantling the Southern states' governments, requiring new state constitutions, and orchestrating the ratification of the Fourteenth¹³ and Fifteenth Amendments.¹⁴

It is now time for another major republican renovation of state governments. The country is again at that same tumultuous crossroad of severe republican rot, extreme partisan polarization, a legitimization crisis, and constitutional gridlock that attended the postwar Reconstruction era. It is therefore imperative in this moment to refocus attention on the Constitution's buried reset button: the Guarantee Clause.

Understanding *how* to use this power is of utmost importance and yet critically underexamined. This Article presents a needed analysis of the clause's modern salience and modes of application. Relying on text, purpose,

9. See Richard V. Reeves & Nathan Joo, *The Glass Barrier to the Upper Middle Class Is Hardening*, BROOKINGS INST. (May 11, 2016), <https://www.brookings.edu/blog/social-mobility-memos/2016/05/11/the-glass-barrier-to-the-upper-middle-class-is-hardening/> [<https://perma.cc/92XL-SFQ8>] (citing studies showing increasing class stratification, multidimensional poverty, and the unavailability of class mobility).

10. See Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 113 (2000).

11. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 565 (2014).

12. U.S. CONST. art. IV, § 4.

13. *Id.* amend. XIV.

14. *Id.* amend. XV; see Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 540–41 (1962); G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 801 (1994).

and historical use, it reveals three enforcement schemes, each with their own limits: (1) direct federal legislation, (2) congressional incentives—through the carrot of monetary inducements as well as the stick of refusing to seat uncooperative states’ representatives in Congress—and (3) dissolving a state government and convening a state constitutional convention to replace it.

The guarantee power is thus a strikingly direct and potent authority for remediating republican rot in the states—and therefore for remedying political dysfunction at the federal level as well. In our federalist system of government, the republican health of the states determines the democratic vitality of the federal system as a whole.¹⁵ It is the states that are the structural building blocks of federal political power. State delegations comprise both legislative chambers of Congress. In the Senate, these delegations serve a gatekeeping function for federal judicial and officer confirmations.¹⁶ State governments have the prerogative to decide whether to abide by most major federal policies, including education standards, antidiscrimination laws, health care and welfare programs, and even immigration policies.¹⁷ Upon opting in to federal policies and programs, state governments then largely administer them through state and local agencies. Even the president, ostensibly a nationally elected official, is selected via a state ballot system fully within the control of each state’s legislature.¹⁸

This composite state design of the national government ensures that un-republican practices at the state level lead to un-republican outcomes at the federal level. The obviousness of this truism should not mask the magnitude of its consequences. In just the last two decades, republican rot in the states has directly caused the undemocratic election of dozens of congressmembers

15. The relationship between republicanism and democracy is rich and complex and quite beyond the scope of this Article. Suffice it to explain here that republican systems of government help to ensure democratic rule by fostering popular input in and control over government. *See, e.g.,* McConnell, *supra* note 10, at 115 (stating that “the values of democratic accountability and majority rule . . . are at the heart of republican government”).

16. *See* Carl Tobias, *Senate Blue Slips and Senate Regular Order*, YALE L. & POL’Y REV. INTER ALIA, 2018, at 1, 1–2.

17. For example, adherence to federal education standards is optional under the Elementary and Secondary Education Act of 1965, the nation’s premier public education law. *See* 20 U.S.C. § 7371. The same is true for participation in Medicaid, which operates as a voluntary federal-state partnership and permits states wide flexibility in determining covered populations, covered services, health care delivery models, and methods for paying physicians and hospitals. Title IX of the Education Amendments of 1972, which mandates equality in educational institutions, is similarly an opt-in law tied to the receipt of federal funding for schools. *See id.* §§ 1681–1688. Recently, certain localities described as “sanctuary cities” have refused to cooperate with the federal government’s immigration policies, showing how even areas of law under complete federal control are reliant on state buy-in. *See* Colleen Long, *Immigration Agency Subpoenas Sanctuary City Law Enforcement*, ASSOCIATED PRESS (Jan. 15, 2020), <https://apnews.com/article/ba19871e3754e9c4c9838bd3b600154e> [<https://perma.cc/YNP9-7PD3>].

18. *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2320 (2020) (holding states may bind electors to vote for the candidate the state legislature chooses).

and a U.S. president.¹⁹ On the environment, taxes, health care, gun control, immigration, reproductive rights, and countless other vital issues, the will of the majority is flouted by intransigent states suffering republican rot.²⁰

To reform the whole, it is now necessary to reform the parts; to protect popular interests nationally, it is necessary to improve political institutions locally. At bottom, big structural policy reforms are not possible without foundational structural political reforms. This is the constitutional task of our era.

The republican rot infecting the states is severe. Republican rot describes corrosion of the two pillars of republican government: popular sovereignty and equal citizenship.²¹ These core principles locate all sovereignty in the people and require political power to be equally distributed amongst them. Commitment to these principles defines American republicanism and distinguishes it from the aristocratic forms of government the Constitution eschews. There are many design variations to republican government, and American republicanism itself has certainly never fully lived up to both commitments. Vast levels of political inequality, oppression, and disenfranchisement throughout our history reveal both cruel defiance and myopic miscalculations over exactly which people are sovereign and equal. But the nation's irregular or failing commitment to these principles does not undermine their place as the defining, if aspirational, cornerstones of republican government.

Yet, increasingly, many states are embracing forms of government that stray, if not outright flout, these principles. This rotting of equal popular sovereignty is causing states to abandon republican values and erect oligarchical power structures that disenfranchise significant portions of their citizenries. They are proliferating electoral and governing systems designed to advantage the few and remain unaccountable to the many. Worse, the decay of equal popular sovereignty is quickening as it feeds off of the divisive energy of extreme partisan polarization.

19. In 2000, Florida purged thousands of properly registered citizens from its voting roles, blocking their ability to vote in the U.S. presidential election. See U.S. COMM'N ON C.R., VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION: EXECUTIVE SUMMARY (2001), <https://www.usccr.gov/pubs/vote2000/report/exesum.htm> [https://perma.cc/WNH7-MQ5E]. The U.S. Commission on Civil Rights estimates that the purge cost 5000 votes for Al Gore. See *id.* ch. 5. George Bush ultimately won Florida by a margin of 537 votes. David Barstow & Don van Natta Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES (July 15, 2001), <https://www.nytimes.com/2001/07/15/us/examining-the-vote-how-bush-took-florida-mining-the-overseas-absentee-vote.html> [https://perma.cc/46GZ-G92E].

20. See, e.g., ALEX TAUSANOVITCH ET AL., CTR. FOR AM. PROGRESS, HOW PARTISAN GERRYMANDERING PREVENTS LEGISLATIVE ACTION ON GUN VIOLENCE 4–12 (2019), https://cdn.americanprogress.org/content/uploads/2019/12/16110028/GerrymanderingGunControl-report-4.pdf?_ga=2.84156697.1801728618.1609687404-1575933482.1609000059 [https://perma.cc/3EVB-K8LZ].

21. See *infra* Part I.C. Professor Jack Balkin describes a similar and broader phenomenon he terms “constitutional rot.” See Jack M. Balkin, *Constitutional Rot*, in CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA 19, 19 (Cass R. Sunstein ed., 2018).

The statistics flagged at the outset of this Article present snapshots of this unrepublican reality for millions of Americans. Those snapshots describe only two of many unrepublican practices accelerating the demise of republicanism across the country: partisan gerrymandering and the disenfranchisement of individuals with criminal convictions.²² Both of these practices deny sovereignty to the full polis and privilege an elite class with outsize political influence over the composition and decisions of government. Partisan gerrymandering subverts the core tenet of popular sovereignty that the ruled choose their rulers and devalues the political participation of some citizens while elevating that of others. Likewise, criminal disenfranchisement excludes a significant percentage of the citizenry from full and equal participation in self-government. These are not the only badges and incidents of unrepublican rule, but they are two of the more widespread and egregious.

The Constitution envisioned such a crisis of popular sovereignty and expressly granted the federal government the authority and the obligation to act. Consistent with its general approach of protecting rights through power as opposed to parchment, Article IV, Section 4 bestows a power on the federal government to ensure republican government in the states.²³ It provides, simply, that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”²⁴ It does not grant an individual right to state republican government per se but rather the federal means of securing republican government in the states as that concept evolves.

A republican form of government complies with the bedrock principles of popular sovereignty and equal citizenship. These criteria are best understood through contraposition. A “republican form of government” under the Guarantee Clause is a government that eschews any expression of aristocratic rule.²⁵ Aristocracy is the contrasting touchstone to republicanism under the clause. Aristocracy is a hereditarily entrenched, politically imbalanced, and economically unequal style of government. A state that embraces these forms of government has abandoned its republican form and opened itself up to federal intervention under the Guarantee Clause. Practices like partisan gerrymandering and criminal disenfranchisement are modern manifestations

22. A third practice that undoubtedly corrupts the relationship between the people and their rulers by privileging the political power of wealthy individuals and subverting constituents’ control over and access to their representatives is the level of money in politics. The current campaign finance regime is, therefore, also a driver of republican rot. However, unlike other causes of rot, like partisan gerrymandering and criminal disenfranchisement, reforming this practice would require an extremely robust exercise of the Guarantee Clause, such as that discussed in Part III.C, *infra*, and implicates difficult free speech and democratic participation questions. For these reasons, it makes practical as well as prudential sense to begin remediating the republican rot in the states through politically and constitutionally simpler reforms. That said, the relationship between campaign finance reform and the Guarantee Clause is fertile ground for further scholarly work.

23. U.S. CONST. art. IV, § 4.

24. *Id.*

25. *See infra* Part I.

of old aristocratic practices: they unequally place power in the hands of the few and serve to entrench a political class of economic elites. They are exactly the type of republican rot the Guarantee Clause authorizes Congress to address.

This Article argues that Congress should exercise its authority under the Guarantee Clause to pass a sweeping program of republican reforms. Congress should use all means available to it under the clause to accomplish this goal: it should legislate against unrepublican practices, create individual remedies for the denial of political process rights, offer monetary incentives for states to pass republican reforms, sharpen that incentive by denying unrepublican state representatives admittance to Congress, and if necessary, dismantle and reconfigure recalcitrant state governments claspings to severely unrepublican rule. Such a reform program would include outlawing unrepublican practices like partisan gerrymandering and incentivizing the passage of state voter protection and enfranchising laws. It would also involve incentivizing states to ratify new constitutional amendments addressing the Electoral College, unequal representation in the Senate, and an affirmative right to vote and partake equally in democratic processes. In essence, Congress should embark on a second Reconstruction.

This Article thus bridges two bodies of scholarship: the study of political process rights and the analysis of the Guarantee Clause. It uses each to fill gaps in the other. Scholars of political process rights recognize the deep structural problems with disenfranchisement, entrenchment, and the anticompetitive lockup of democratic processes.²⁶ They also recognize the relative inaptitude of courts to remedy these structural deficiencies.²⁷ But the reforms they advocate are often piecemeal and their analyses are largely siloed within conventional legal divisions, such as election law, public corruption, or equal protection law.²⁸ The scholarship has not produced a grand legislative vision or constitutional strategy for renovating the system.

Guarantee Clause scholarship suffers the opposite infirmity. It has identified a grand mechanism for reform but would wield it for limited ends and through ineffective means. This body of scholarship is preoccupied with the outer limits of what a “republican form of government” might require and

26. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643 (1998); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 *VA. L. REV.* 747 (1991); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *YALE L.J.* 400 (2015); see also *Vieth v. Jubelirer*, 541 U.S. 267, 357–64 (2004) (Breyer, J., dissenting) (noting some structural harms that inhere in partisan gerrymandering).

27. See Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 *U. PA. L. REV.* 503, 504 (2004); Levinson & Sachs, *supra* note 26, at 417; Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 *COLUM. L. REV.* 283, 293–94 (2014).

28. See, e.g., RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE 7–10* (2003) (voting rights lens); Gerken, *supra* note 27, at 517–18 (election law analysis); Issacharoff & Pildes, *supra* note 26, at 713 (antitrust framework); Pamela S. Karlan, *Politics by Other Means*, 85 *VA. L. REV.* 1697, 1698–99 (1999) (market analysis).

is fixated on operatizing the clause's potential through the courts.²⁹ Both strands of argument are premised on underexamined assumptions. The first argument assumes that the original anti-aristocracy function of the clause is anachronistic, and the second argument presumes that courts are the best constitutional actors for enforcing constitutional rights. Neither is tenable in the context of the Guarantee Clause. By looking straight past the clause's primary function, scholars miss its contemporary utility for reforming state political practices that impose de facto modern-day aristocratic rule on their citizens. And by focusing so intently on the clause's justiciability, scholars have not paused to consider the federal courts' relative incompetence to vindicate structural political rights. Thus, whereas political process theorists do not recognize violations of structural political rights as aristocratic, Guarantee Clause scholars do not view the clause's core anti-aristocracy function as salient for addressing modern breakdowns in democratic processes.

This Article stitches these two parallel bodies of study into a cohesive constitutional strategy for enacting a program of structural political reform. It resurrects the forgotten function of the Guarantee Clause to prohibit aristocratic rule, illuminates the salience of this function of the clause in today's political landscape, and offers several constitutional paths forward for Congress to restructure political processes and protect structural rights. It thus establishes a missing link between theories of constitutional change and theories of political reform to design a program of federal legislative intervention to excise republican rot from the states.

In so doing, this Article makes two necessary contributions to the literature on the Guarantee Clause. First, it resurfaces the main purpose of the clause as guarding against aristocratic rule in the states and shows how states are operating in violation of this seminal prohibition today. Specifically, the sum processes of political entrenchment, voter suppression, and plutocratic corruption so excessively and unequally depress popular control of government that they are transforming state governments into modern-day

29. See, e.g., JACK BALKIN, *LIVING ORIGINALISM* 241–42 (2011); WILLIAM WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 287–89 (1972); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 753–54 (1994); Bonfield, *supra* note 14, at 560; Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 864–69 (1994); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 70–78 (1988); Fred O. Smith Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. REV. 582, 648–53 (2014); Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1749–52 (2010); Jarret A. Zafran, Comment, *Referees of Republicanism: How the Guarantee Clause Can Address State Political Lockup*, 91 N.Y.U. L. REV. 1418, 1446–49 (2016); cf. ELY, *supra* note 26, at 118; Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 WASH. & LEE L. REV. 767, 825–27 (2003) (cautioning against justiciability); Richard L. Hasen, *Leaving the Empty Vessel of “Republicanism” Unfulfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 75, 85 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) (arguing against judicial review of Guarantee Clause legislation).

aristocracies. Two specific unrepblican practices this Article explores are partisan gerrymandering and the disenfranchisement of individuals with criminal convictions.

Second, this Article details for the first time exactly how the Guarantee Clause may be constitutionally enforced against unrepblican state practices, without resort to the use of force and occupation that attended the restoration of republican government during Reconstruction. It provides a sorely missing defense of the unconventional position that Congress, and not the U.S. Supreme Court, is the best-suited and most likely institution to exercise the guarantee power to restore republican government. In the most recent exposition of the clause, Ryan Williams began to push back on the overwhelming support for the clause's justiciability by locating the origins of the clause in a diplomatic commitment more properly assigned to the political branches.³⁰ Where his analysis stops, however—and where this Article in part picks up—is explaining *how* Congress may constitutionally fulfill this commitment in a domestic, federalist system. In this way, this Article opens a more fertile opportunity for examining the substantive dimensions of a second reconstruction program.

The Article proceeds in four parts. Part I retraces the core meaning and historical use of the Guarantee Clause as supplying Congress with the authority to prevent aristocratic rule in the states, and it explains the specific features of aristocracy that are antithetical to republican government. The analysis concludes that political practices that violate the foundational principles of popular sovereignty and equal citizenship are fundamentally aristocratic in nature and are therefore subject to federal intervention under the Guarantee Clause.

Part II shows that, contrary to widespread assumption, this anti-aristocracy purpose of the Guarantee Clause is not at all obsolete. In reality, many states are increasingly adopting aristocratic forms of government through an interrelated web of voter suppression, entrenchment, and corrupt oligarchical forms of government. This part examines two such practices—partisan gerrymandering and criminal disenfranchisement—as examples of modern manifestations of aristocratic rule that are ripe for federal intervention under the Guarantee Clause.

Part III explores, for the first time, exactly how Congress may exercise the guarantee power. It explains that the clause permits Congress to legislate directly against unrepblican state practices, incentivize states to adopt political process reforms under the spending and seating powers, and dissolve a state government and convene a state constitutional convention. This part also begins to address the important and diverse limits on

30. Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602, 611, 679–87 (2018) (investigating the meaning of the clause's instruction that the United States "guarantee" a republican form of government and concluding that the power resembles a quasi-diplomatic commitment adapted from treaty practice, which supports the federal courts' reluctance to treat the clause as nonjusticiable).

Congress's guarantee power when pursuing each of these enforcement mechanisms.

Finally, Part IV defends the uncommon position that enforcement of the guarantee is best left to Congress, not the federal courts. Congress is the most institutionally competent branch for this task and, as the most politically self-interested branch, is the most likely to address republican crises, which present feasible opportunities for politically advantageous reforms. At the same time, Congress is subject to the most robust internal and external checks, including constitutional and parliamentary requirements for acting, executive and judicial overrides, frequent elections, popular opinion, and mass mobilization. This combination of incentives and limits creates a default position of inaction coupled with a high likelihood of intervention in periods of genuine crisis. In contrast to Congress, the federal courts are ill-equipped to address political process failures and unlikely to act precisely in moments of crisis. The Supreme Court has underdeveloped doctrinal tools for protecting structural rights and lacks the institutional design to legitimately and effectively interfere in state political processes. A protracted history of poor judicial protection for political process rights, which this part briefly outlines, simply confirms the Court's unsuitability for this task.

Ultimately, this Article reaffirms that the political dysfunction in this country, while seemingly boundless in scope, is not endless in time. This current period of intense partisan divide and republican rot echoes the major cycles of political breakdown and rebuilding of the past. Prior reconstructions enabled the federal government to adapt and survive by ushering in political reforms to its composite parts: the states. These periods of reconstruction make clear that when norms of democratic governance are shattered, it becomes necessary to shatter other norms to restore republican government. This Article provides the blueprint for how.

I. A GUARANTEE AGAINST ARISTOCRACY

The Constitution's directive that the United States guarantee a "Republican Form of Government" to every state endows the federal government with the authority to prevent states from adopting aristocratic forms of government. This meaning of the clause is uncontroversial. Scholars of all stripes agree that whatever else the clause might mean, it clearly empowers the federal government to prevent aristocracy in the states.³¹ Though there is ample disagreement as to how far beyond the

31. See WIECEK, *supra* note 30, at 62–63 (“In the clause’s negative thrust, it was designed to prohibit monarchical or aristocratic institutions in the states.”); Alexander, *supra* note 29, at 773 (“In designing a new governmental structure, the Framers specifically rejected two forms, monarchy and aristocracy.”); Amar, *supra* note 29, at 764 (“Republicanism must be defined as against aristocracy and monarchy.”); Merritt, *supra* note 29, at 25, 35 n.194 (noting that the Guarantee Clause plainly restricts the freedom of the states . . . [to] establish a monarchy, a dictatorship, or any other form of government inconsistent with popular representation,” that the “original impulse behind the clause might have been a desire to protect the states from the dangers of aristocratic government,” and that the ultimate adoption

prevention of monarchy and aristocracy the clause reaches, even the most prolific defenders of a narrow interpretation of the guarantee power agree it includes the authority to prevent the adoption of aristocratic forms of government in the states.³² This meaning inexorably comports with the text and history of the clause, its common understanding at the founding, the structure of the Constitution and the federalist system it erects, as well as evolving standards of constitutional rights and norms.

This overwhelming consensus has worked a sleight of hand, however. The inconvertibility of the Guarantee Clause's anti-aristocracy function has lent it an aura of inconsequentiality. It is regularly dismissed as archaic and, even worse, has seduced some scholars into discarding the entire guarantee power as anachronistic—a relic of another era condemned to constitutional irrelevance. But it is a mistake to dismiss the clause's anti-aristocracy meaning as antiquated or irrelevant. Properly understood, the clause's anti-aristocracy function remains both a supremely potent and pertinent authority.

Aristocracy and republican government are the flip sides of the same coin. Examining our politics through the lens of aristocracy, however, offers distinct advantages. First, by focusing on the inverse of republican government, it is easier to delineate the practices that stray away from it. Searching for forms of aristocracy in our politics provides a clearer method of identifying obviously un-republican state practices. Second, by reading the clause according to its widely accepted definition, debate over its contemporary application can move beyond theoretical arguments over the meaning of “republican government” to concrete analyses of which state practices run afoul of the guarantee. While the outer-bound definitions of “a republican form of government” are far from settled, the scholarly focus on the clause's possible interpretations has left the settled meaning of the clause understudied and underappreciated. Of course, the debate may simply shift to arguments over the meaning of “aristocracy,” but there is less risk of quagmire in this debate as the historical definition of English “aristocracy” is narrower and more precise than the phrase “republican form of government.” The clause's purpose and ultimately its potential, therefore, are best fulfilled by returning to its central meaning and applying its dictates to today's democratic shortcomings.

This part traces the anti-aristocratic meaning of the clause and relies on its origins and history, set against republican theory, to drill down on exactly what an anti-aristocracy guarantee protects against. It first retraces how, under every primary methodological tool of constitutional interpretation, the Guarantee Clause bestows on the federal government the power to eliminate aristocratic forms of government in the states. The plain meaning of the text,

of the “broader language” to secure “republican government” refers to more than just the danger of “incipient aristocracy”); Williams, *supra* note 30, at 652 (“Virtually all supporters of the Constitution who spoke publicly about the provision's scope insisted that it would provide a ground for federal intervention only in situations involving the most extreme forms of deviation from republican principles—meaning the erection of a hereditary monarchy, despotism, or (perhaps) aristocracy within a state.”).

32. See, e.g., Merritt, *supra* note 29, at 25.

now and according to its ordinary public meaning at the time of ratification, points directly to the clause's anti-aristocracy meaning; and this textual interpretation then fully comports with all evidence of the Framers' intent in drafting the clause, as well as how the clause was subsequently used by the Reconstruction Congress generations thereafter. This analysis ultimately makes clear that a "republican form of government," when properly understood as the opposite of an aristocratic form of government, at minimum, means a government premised on equal, popular sovereignty.

A. *The Guarantee Clause's Anti-aristocracy Origins*

In the founding period, both the Framers and the American public broadly understood the concept of republican government in diametric terms: it was, simply put, the opposite of monarchy, aristocracy, and despotism.³³ These latter forms of government had a monopoly on the governing structures of nation-states, and they were the sole points of reference against which American political philosophies evolved and the Constitution was drafted, evaluated, and ultimately ratified.

The idea for the Guarantee Clause sprung from James Madison's intertwined preoccupations with federal impotence under the Articles of Confederation to both rebuff foreign interference and to quell domestic violence in the states. In his April 8, 1787, letter to Virginia governor Edmund Randolph, which contained the original blueprint for the Virginia Plan, Madison recognized both the need to "expressly guarantee[] the tranquillity of the States against internal as well as external dangers" and the danger "that, unless the Union be organized efficiently on republican principles, innovations of a much more objectionable form may be obtruded."³⁴ Thinking about these two concepts in tandem was common at the time.³⁵ Drawing from Montesquieu's observation that a monarchy established in one state will tend to subvert the freedoms enjoyed in a neighboring state, the founders viewed the proliferation of monarchical or aristocratic elements in any state as a security threat to the liberties of the people of all states.³⁶

The Virginia Plan submitted to the Constitutional Convention fused responses to these two concerns by proposing an article "[resolving] that a republican government . . . ought to be guaranteed by the United States to each state."³⁷ This clause underwent minor revisions and debate over the course of the summer, as proxy battles between the small and large states

33. WIECEK, *supra* note 29, at 17.

34. Letter from James Madison to Edmund Randolph (Apr. 8, 1787), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 336, 340 (Gaillard Hunt ed., 1901). This letter contained Madison's thoughts on necessary reforms and became the basis of the Virginia Plan submitted to the Constitutional Convention in May 1787. *See* Merritt, *supra* note 29, at 29–30.

35. *See* Merritt, *supra* note 29, at 29–31.

36. *Cf.* Williams, *supra* note 30, at 628–29.

37. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND'S RECORDS].

over other clauses dominated.³⁸ In the wake of the first small-state onslaught against the Virginia Plan in late June 1787, the clause was reformulated by Madison and approved by unanimous vote to read: “Resol[ved] . . . ‘That a Republican Constitution & its existing laws ought to be guaranteed to each State by the U. States.’”³⁹ A second adopted iteration broke out the twin purposes of the clause more clearly, resolving that “a Republican form of Governmt. shall be guaranteed to each State & that each State shall be protected [against] foreign & domestic violence.”⁴⁰ In the Committee on Detail, Governor Randolph’s outline for the Constitution’s draft further teased out the clause’s distinct purposes: “1. to prevent the establishment of any government, not republican: 2. to protect each state against internal commotion: and 3. against external invasion.”⁴¹ James Wilson restyled the clause to its current formulation, which was approved with minor changes and no debate.⁴² It was placed as the fourth section of the fourth article, which reads: “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.”⁴³

The ratified text quite clearly captures the Framers’ supposed intent.⁴⁴ It plainly establishes a source of federal authority to protect against aristocratic usurpations of state government. The clause obligates the United States to “Guarantee” to each state a “Republican Form of Government.” The verb guarantee, as customarily used in treaty practice at the time, signifies an obligation and authority for one sovereign to intervene and enforce a preestablished right existing between two other sovereign entities—here, the states and the sovereign people of those states.⁴⁵ The word “form” relates to the structure of government, which concerns where power resides and how it is exercised. A republican form of government is one that is comprised of representatives drawn from and accountable to the public, as opposed to an aristocratic form, which is comprised of nobles dependent on hereditary lines of power.⁴⁶ To be sure, the word “form,” as used here, is not so synonymous with structure to the point it eschews any concern for substance; rather, “form” would have been understood to mean “kind” or “sort,” indicating that

38. See WIECEK, *supra* note 29, at 52–54.

39. 2 FARRAND’S RECORDS, *supra* note 37, at 47.

40. *Id.* at 48–49.

41. 4 *id.* at 49.

42. See 2 *id.* at 459, 578, 621.

43. U.S. CONST. art. IV, § 4.

44. That is, their self-articulated intent as can best be gleaned from the historical record available. See *infra* notes 106–23, 134–35 and accompanying text.

45. Williams, *supra* note 30, at 615–20.

46. See Fred O. Smith Jr., *Awakening the People’s Giant: Sovereign Immunity and the Constitution’s Republican Commitment*, 80 *FORDHAM L. REV.* 1941, 1955–56 (2012).

the clause guarantees a republican system of government whose function and output align with republican principles.⁴⁷

The clause's placement in Article IV, Section 4, alongside clauses protecting against invasion and domestic violence, further underscores its central purpose of preventing aristocratic rule in the states. Section 4 is, in every way, aimed at protecting against aristocratic usurpation. The foreign nations presenting a threat of invasion at the time were all monarchical aristocracies. Additionally, the founders deeply believed that internal insurrection invariably led to anarchy, counterinsurgency, or military coup—all of which generated fertile grounds for the installment of a monarch and ruling class.⁴⁸

More broadly, Article IV is devoted to intrastate relations and is the only place in the 1788 Constitution that delineates rights individuals hold against the states. The first two sections contain the Full Faith and Credit Clause, the Privileges and Immunities Clause, and the Fugitive Slave Clause—all of which order individuals' relationships to the states. A guarantee of republican government similarly protects the political process rights of individuals in each state and directs an important element of intrastate relations by foreclosing the threat of an aristocratic coup migrating across state lines.⁴⁹

The historical evolution and use of the clause paint a similarly incontrovertible picture of a power intended to thwart and undo aristocratic innovations in the states. Though its place in constitutional history is relatively small—having been sidelined by lack of enforcement and the adoption of other civil and political constitutional rights—it is anything but insignificant.

To begin, it played some role in ratifying the Constitution, with proponents of ratification invariably describing the clause in anti-aristocracy terms. Such a description would have appealed to skeptics on both sides by ensuring that the proposed Constitution was both sufficiently rights protective, despite lacking a bill of rights, and sufficiently federalist in limiting federal intervention to preventing aristocracy.⁵⁰ James Iredell explained to the North Carolina ratifying convention that the clause would empower the federal government to guarantee “that no state should have a right to establish an aristocracy or monarchy.”⁵¹ In newspapers, advocates identified the clause's

47. See Bonfield, *supra* note 14, at 530 (arguing that founding-era courts would have understood “form” to mean “kind” or “sort,” based on the purpose of Article IV, Section 4 and existing definitions of the word).

48. See THE FEDERALIST NO. 21, at 95–96 (Alexander Hamilton) (Terence Ball ed., 2003) (“A guarantee by the national authority would be as much levelled against the usurpations of rulers, as against the ferments and outrages of faction and sedition in the community.”); see also WIECEK, *supra* note 29, at 49; White, *supra* note 14, at 797–98.

49. See Amar, *supra* note 29, at 765.

50. See Williams, *supra* note 30, at 652–53, 652 n.308 (noting anti-Federalist concerns with the potential for federal intervention under the clause).

51. See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 195 (Jonathan Elliot ed., Philadelphia, J. B. Lippincott Co. 2d ed. 1891) [hereinafter ELLIOT'S DEBATES].

central function as ensuring that state constitutions “cannot be royal forms, cannot be aristocratical, but must be republican.”⁵² Essays, including *The Federalist Papers*, assured the public that the clause was a source of federal protection for states “against monarchical or aristocratical encroachments”⁵³ and a necessary power in “a confederacy founded on republican principles, and composed of republican members . . . to defend the system against aristocratic or monarchical innovations.”⁵⁴

After ratification, the clause was periodically invoked in the early and mid-nineteenth century as two deeply unrepresentative failings came under increasing scrutiny. The first was the severe and violent political subjugation of poor laborers.⁵⁵ This type of political inequality prompted national attention on the Guarantee Clause, for the first time, in the 1840s, when small property owners in Rhode Island revolted in response to extreme malapportionment and disenfranchisement in an episode known as Dorr’s Rebellion, which led both President John Tyler and the Supreme Court to consider (and decline) federal interference in settling the dispute under the Guarantee Clause.⁵⁶ The second unrepresentative failing was the even more severe and violent subjugation of enslaved human beings. But though the clause was tailor-made to redress both failings, a fractured and reticent federal government on the brink of collapse did not muster the political capital to enforce the guarantee until the government did collapse, and all the reasons for inaction turned into reasons for intervention.

B. *The Reconstruction of Slave Aristocracies*

The guarantee power has been used in earnest only once. It formed the constitutional basis for Congress’s reconstruction of the South after the Civil War, and indeed, its reconstruction of the entire federalist system. It is largely understood that the Guarantee Clause justified this program because chattel slavery is deeply incompatible with basic republican values. But that is not the full story. The Guarantee Clause was such a natural fit for reconstructing the South because the task involved more than abolishing slavery. It required dismantling and replacing an entire political slave

52. Tench Coxe, *An American Citizen: An Examination of the Constitution of the United States* (pt. 3), INDEP. GAZETTEER, Sept. 29, 1788, reprinted in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS, 1787–1788, at 466, 470 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

53. Plain Truth, *Reply to an Officer of the Late Continental Army*, INDEP. GAZETTEER, Nov. 10, 1787, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 216, 218 (Merrill Jensen ed., 1976).

54. THE FEDERALIST NO. 43, *supra* note 48, at 211 (James Madison).

55. See AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 371 (2005); Amar, *supra* note 29, at 778. See generally WIECEK, *supra* note 29, at 78–110 (discussing the clause’s invocations in Shays’s Rebellion, the Whiskey Rebellion, Dorr’s Rebellion, and the “Bleeding Kansas” civil war).

56. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 40 (1849). For additional discussion of this episode and how it informs the modern applicability of the Guarantee Clause to partisan gerrymandering, see *infra* Part II.A.

economy, a task on all fours with the core purpose of the clause to expel aristocratic forms of government in the states.

American slavery was many horrendous things; and one of these things was a network of slave aristocracies. Aristocracy is a form of government in which power is held by a class of noble citizens, whose membership in that class entitles them to hereditary rights of power and property. It is government by the “well-born” and generally describes a political economy in which the noble and common classes are bonded in property relationships. In particular, an aristocracy’s nobility has rights to the economic output of nonnoble citizens, who are entitled to fewer social and political rights than their rulers.

So too in the American slave states. Slave governments embraced a form of government in which power was held by a class of white nobility, whose membership in this hereditary, racial caste entitled them to rights and powers under law that were denied slaves and racial minorities. It was government by the “well-born,” as slave and master status were determined by birth. And it comprised a political economy defined by property relationships between human beings of different hereditary castes, where white masters were legally entitled to all the economic output of their Black slaves—even their children—while slaves had virtually no social, political, or legal rights of their own. If anything, slavery was racial aristocracy on steroids.

Abolitionists began making the connection between slavery and republicanism in the late 1830s, invoking the Guarantee Clause with increasing frequency for the argument that slavery, as an institution, is incompatible with republican government. In particular, these antislavery advocates began formulating a theory of abolition based on the principle of popular sovereignty, arguing that slavery eviscerated this necessary pillar of republican government in states with a majority or near-majority slave population.⁵⁷

Theoretical arguments for the abolition of slavery ultimately gave way to the practical realities of war. By spring 1861, eleven states had seceded from the Union, kicking off a yearslong humanitarian and constitutional crisis.⁵⁸ As war pushed Unionists first to accept and then to demand abolition, federal officials endeavored to make constitutional sense of secession and to plan for eventual reconciliation and reconstruction.⁵⁹

The Guarantee Clause quickly emerged as pivotal to both these projects. First, a “state suicide” theory of secession relied on the Guarantee Clause to explain how the divided nation nonetheless remained an indivisible Union, positing that secession effectively killed the *constitutional* relationship between the rebel state governments and the Union, leaving those states with a constitutionally unrecognizable—and therefore un-republican—form of government, exactly what Article IV had anticipated and provided a remedy

57. WIECEK, *supra* note 29, at 156–62.

58. *See* AMAR, *supra* note 55, at 354–55.

59. *See id.* at 355.

for.⁶⁰ Second, forward-looking U.S. senators turned to the Guarantee Clause early on in the war effort to envision a concrete plan for postwar reconstruction.⁶¹ Two competing perspectives emerged. Senator Ira Harris, a conservative Republican, proposed empowering the president to establish provisional governments in the rebel states until loyal state governments could be organized through new constitutional conventions.⁶² Senator Charles Sumner, a progressive Republican and staunch abolitionist, advocated that the federal government administer the rebel states while new governments were convened and that Congress evaluate the new states' constitutions and governments for their republican character.⁶³

Four momentous years—the loss of nearly three-quarters of a million Americans,⁶⁴ the emancipation of slaves, and the reelection and assassination of President Abraham Lincoln—left the aristocratic plantation system of the South in ashes. By the summer of 1865, the last Confederate troops had surrendered and the ex-rebel states convened state constitutional conventions, ratified new state constitutions that repudiated slavery and secession, and elected new state legislatures.⁶⁵ But on December 4, 1865, the Thirty-Ninth Congress, convening for the first time, refused to seat any of the representatives from the eleven former Confederate states on the basis that no legal state governments yet existed in these states because of their continued embrace of a political slave aristocracy, including the disenfranchisement of their now free Black citizens.⁶⁶ Whereas President Andrew Johnson was content with a strategy of appeasement and transition, congressional Republicans were committed not just to peace and rebuilding but also to dismantling in earnest the former slave aristocracies of the South and reconfiguring the relationship between the Union, the states, and the people.⁶⁷

The task of developing this grand strategy fell to the newly created Joint Committee on Reconstruction, which issued its report the following summer.⁶⁸ The committee labored in a politically fraught environment, as simmering tensions between the Republican-led Congress and President Johnson erupted into all-out blows over the passage of the Civil Rights Act

60. See WIECEK, *supra* note 29, at 176.

61. See *id.* at 179–85.

62. CONG. GLOBE, 37th Cong., 2d Sess. 3139–42 (1862) (statement of Sen. Ira Harris); see WIECEK, *supra* note 29, at 179–80.

63. See CONG. GLOBE, 37th Cong., 2d Sess. 736–37, 3139 (statement of Sen. Charles Sumner); WIECEK, *supra* note 29, at 175–77, 181. For a more detailed history of how the Guarantee Clause was utilized by the Republicans in the lead-up to Reconstruction, see *id.* at 166–94.

64. See J. David Hacker, *A Census-Based Count of the Civil War Dead*, 57 CIV. WAR HIST. 307, 307 (2011).

65. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 100–01 (1998).

66. See AMAR, *supra* note 55, at 366.

67. See 2 ACKERMAN, *supra* note 65, at 19–20.

68. JOINT COMM. ON RECONSTRUCTION, 39TH CONG., REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION (1866).

of 1866⁶⁹ and the Second Freedmen's Bureau Act,⁷⁰ both of which Johnson vetoed and Congress eventually overrode to pass into law. The committee's report presented Congress a prime opportunity to expand its arsenal in the fight against President Johnson's and the Southern states' push for a speedy readmission and a return to the states' rights model of federalism.⁷¹ The final report was unequivocal and comprehensive. It essentially adopted Senator Sumner's proposed constitutional architecture for Reconstruction: it embraced a robust view of the guarantee power, accepted that republican government is impossible where a large minority of the adult male population is disenfranchised, and claimed for Congress primary responsibility to govern Reconstruction.⁷²

Operating under this framework, Congress set to work transforming the Southern governments from slave aristocracies into republics founded on the twin principles of popular sovereignty and equal citizenship. Its first inroad was proposing ratification of the Fourteenth Amendment⁷³ in June 1866,⁷⁴ which advanced both goals by redefining who was included in the class of "sovereign people" ("all persons born or naturalized in the United States"⁷⁵) and conferring equal legal and political rights on every citizen within that class.⁷⁶ But in the wake of continued Southern intransigence and landslide Republican victories in the November 1866 congressional elections, Congress launched an unprecedentedly forceful and intrusive campaign to reform state governments under the Guarantee Clause.⁷⁷

The centerpiece of Congress's campaign to establish republican forms of government in the former Confederate states was the First Reconstruction Act of 1867.⁷⁸ The Act declared that no legal state governments or adequate protections for life and property existed in ten Confederate states, divided these states into five military districts, imposed federal military rule until new governments could be formed, empowered the army to compile new voter registries that included the male former slaves, and directed the Army to convene new state constitutional conventions.⁷⁹ Under these procedures, nearly three-quarters of a million former slaves registered to vote.⁸⁰ The Act also established the conditions for readmission: each state was required to

69. Ch. 31, 14 Stat. 27.

70. Ch. 200, 14 Stat. 173 (1866).

71. See WIECEK, *supra* note 29, at 189–91.

72. JOINT COMM. ON RECONSTRUCTION, *supra* note 68, at xiii, xviii–xxi.

73. U.S. CONST. amend. XIV.

74. JOINT COMM. ON RECONSTRUCTION, *supra* note 68, at vi.

75. *Id.*

76. *See id.* at xiii.

77. *See id.* at xvi; 1 ENCYCLOPEDIA OF THE RECONSTRUCTION ERA 296 (Richard Zuczek ed., 2006).

78. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

79. The process for registering new voters, holding the state conventions, and adopting new state constitutions was further outlined in the Second Reconstruction Act of 1867, passed March 23, 1867. *See* Act of Mar. 23, 1867, ch. 6, 15 Stat. 2.

80. *See* KEVEN J. COLEMAN, CONG. RSCH. SERV., R43626, THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW 4 (2015).

adopt a new state constitution, under which the people would elect a new state legislature, which was required to pass the Fourteenth Amendment.⁸¹

Reconstruction under this formula took a little over a year. In the summer of 1868, Congress determined that seven of the excluded states had satisfactorily renounced their slave aristocracies and adopted republican forms of government.⁸² It was through these states' compliance with the imposed conditions for readmission that the Fourteenth Amendment was ratified in July 1868.⁸³ When one of these readmitted states, Georgia, then expelled all of its duly elected Black state representatives and seated nonjuring ex-Confederates in its state legislature, Congress reimposed federal military rule and rerevoked the admission of Georgia's congressional delegation.⁸⁴ It was not until 1870 that Congress passed a bill for the reconstruction of Georgia, which mirrored the First Reconstruction Act and required passage of the now pending Fifteenth Amendment⁸⁵ as an additional condition of readmission.⁸⁶ The remaining three states—Virginia, Mississippi, and Texas⁸⁷—were also obliged to ratify the Fourteenth and Fifteenth Amendments as a condition of readmission.⁸⁸ They did so in the early months of 1870 and were promptly readmitted to Congress.⁸⁹ Virginia, Mississippi, and Georgia's ratifications were among the twenty-eight state ratifications necessary for the Fifteenth Amendment to become law.

C. *The Anti-aristocracy Guarantee Power*

Several conclusions about the meaning of the guarantee power are gleaned by reading its text, origins, and historical use in light of its undisputed function as a tool for eradicating aristocracy in the states. In particular, its anti-aristocracy function makes clear the clause bestows a prophylactic legislative power designed to usher in new legal paradigms of political rights.

First, the considered decision by the Framers to independently guarantee republican government separate and apart from guaranteeing protection against foreign invasion and domestic violence indicates the guarantee power is prophylactic. The Guarantee Clause must apply to a state that *peaceably* devolves into aristocracy or monarchy because the foreign invasion and domestic violence clauses already cover the violent overthrow of republican government. A state that peaceably abandons republican government likely does so incrementally. Fulfilling the guarantee in the context of incremental

81. *See id.*

82. *See id.* at 5. They were Arkansas (June 22, 1868), Florida (June 25, 1868), North Carolina (July 4, 1868), Louisiana (July 9, 1868), South Carolina (July 9, 1868), Alabama (July 13, 1868), and Georgia (July 21, 1868). 2 ENCYCLOPEDIA OF THE RECONSTRUCTION ERA, *supra* note 77, at 833–35.

83. COLEMAN, *supra* note 80, at 4.

84. *See* WIECEK, *supra* note 29, at 217–20.

85. U.S. CONST. amend. XV.

86. *See* WIECEK, *supra* note 29, at 219–20.

87. AMAR, *supra* note 55, at 397.

88. COLEMAN, *supra* note 80, at 5; Bonfield, *supra* note 14, at 541.

89. Georgia was not readmitted until July 15, 1870. 2 ENCYCLOPEDIA OF THE RECONSTRUCTION ERA, *supra* note 77, at 833.

decline would require federal intervention at a point short of the state devolving into full aristocracy. Moreover, the clause is a positive pledge of a republican form of government, as opposed to a negative guarantee *against* aristocracy. The choice is striking given that the other two obligations imposed on the United States in the same clause are to *protect against* invasion and domestic violence. The same negative guarantee in the context of protecting republican government would tether federal intervention to the realization of a full aristocracy or monarchy in a state. The text takes the opposite tack.

Second, the anti-aristocracy meaning of the clause confirms a primary role for Congress in exercising the guarantee power. The power to interfere in peaceable state political processes is most properly exercised by a legislative branch. The Constitution consistently approves this allocation of power by granting Congress authority over intrastate relations, including in the other provisions of Article IV.⁹⁰ At the same time, as Ryan Williams explains at length, by empowering the United States to “guarantee” republican government, the clause permits the use of force to ensure state compliance with republican principles.⁹¹ Authorizing the use of force, particularly in the domestic context, is a power allocated to Congress in the first instance.⁹²

Third, viewing the clause as an anti-aristocracy bulwark sheds new light on the evolving character of its meaning. The Framers’ deliberate rejection of proposals to guarantee each state’s “territory,” “constitution,” or “laws,” indicates the clause does not guarantee states’ original structures of government but rather adopts a dynamic conception of republicanism that progresses as society evolves. The Supreme Court’s earliest case law shores up this understanding of the clause, as it continuously linked principles of republicanism to natural law, which by definition is an evolving standard.⁹³ But ultimately, it was Reconstruction that resoundingly solidified this interpretation of the clause. War, congressional action, popular reaffirmation, and judicial and executive acquiescence all gave fuller definition to the meaning of republican government and thereby confirmed the evolving nature of that guarantee. By branding the South’s political slave economy as fundamentally un-republican in 1865, this generation of Americans confirmed that the constitutional line between a republican and un-republican form of government is not static but evolves as society

90. See, e.g., U.S. CONST. art I, § 8, cl. 3 (Commerce Clause); *id.* art. IV, § 1; *id.* § 3, cl. 1.

91. Williams, *supra* note 30, at 615.

92. See U.S. CONST. art. I, § 8, cls. 11–16 (covering Congress’s powers to declare war, to raise armies, to maintain a navy, and to call forth the militia).

93. See *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815) (linking republican government and the “spirit and the letter of the constitution” to “the principles of natural justice”); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 143–44 (1810) (Johnson, J., concurring) (observing that republicanism is dictated by natural justice); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–89 (1798) (noting that states, as republican governments, are bound by natural justice); Bonfield, *supra* note 14, at 558–59 (articulating how the concept of republicanism was principally informed by natural justice, which inherently is an evolving concept like the common law).

progresses and gives truer meaning to the principles of popular sovereignty and equal citizenship. In the same vein, this history settled that the “sovereign people” entitled to republican government under the clause is a term defined according to contemporary democratic norms.⁹⁴

Finally, this analysis further elucidates that the proper target of the guarantee power is aristocratic structures and political processes. The text guarantees a republican *form* of government. The emphasis here on governmental structure indicates a preoccupation with preserving political process rights—the right and ability to participate in self-government. And though the Framers ultimately rejected the language of guaranteeing each state a “republican constitution,” their repeated description of the clause as having this effect emphasizes the focus on preserving structural rights. The Reconstruction generation reaffirmed this understanding of the clause’s focus by using it primarily to undo structures of power and to protect the political process from being corrupted by sedition or unequal representation. In so doing, the guarantee power, both in substance and in deed, redefined the structural relationship between the federal government and the states.

The clause’s structural focus and historical use also highlight its place as an enforcement power rather than an individual right. The Reconstruction Congress used the Guarantee Clause as the legal *mechanism* for imposing a program of reconstruction on the states; the social and political reforms that program aimed to accomplish were sought entirely through the passage of new substantive law, including new constitutional law through the Fourteenth and Fifteenth Amendments. In other words, the guarantee power may reconstitute the law but does not itself supply any legal requirements. The difference is significant because Congress’s guarantee power is inherently temporal, linked to the extent and duration of a state’s nonconformity with a republican form of government. Substantive law, on the other hand—and especially constitutional law—operates in perpetuity until overridden or otherwise negated. The Guarantee Clause was operative so long as the Southern states remained unrepublican, but much of the law it ushered through remains operative to this day.

The clause’s uncontroversial anti-aristocracy function thus helps bring out the less obvious features of the guarantee power. In sum, the text, structure, history, and evolution of the clause confirm that it confers authority on the federal government to prevent aristocratic forms of government from

94. Women were ultimately denied equal political rights in this reformist era in apparent accord with contemporary democratic norms. The hypocrisy did not go unnoticed and was vigorously challenged by women’s rights activists. The resounding incompleteness of the Reconstructionists’ republican reforms, however, does not undermine the use of the Guarantee Clause to correct another egregious violation of popular sovereignty and equal citizenship in the states, namely the denial of equal rights on account of race. For compelling histories of the failure to correct the separate unrepublican denial of women’s political rights during Reconstruction, see generally BERNADETTE CAHILL, *NO VOTE FOR WOMEN: THE DENIAL OF SUFFRAGE IN RECONSTRUCTION AMERICA* (2019); FAYE E. DUDDEN, *FIGHTING CHANCE: THE STRUGGLE OVER WOMAN SUFFRAGE AND BLACK SUFFRAGE IN RECONSTRUCTION AMERICA* (2011); LAURA E. FREE, *SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA* (2015).

supplanting the representative relationship between the people and the state and to eradicate any such forms that take hold. To this end, it inevitably bestows a prophylactic power on Congress to protect an evolving understanding of structural political rights.

D. Distinguishing Between Aristocratic and Republican Government

Having elucidated the Guarantee Clause's broad protection against evolving manifestations of aristocratic rule, the salient features of *republican* government that the clause requires the United States to guarantee are now brought into sharper relief. American republicanism evolved in direct contraposition to English aristocracy. It is therefore possible to trace the line between these two forms of government by looking to their points of departure. At its most basic level, the Constitution adopted two core innovations from the English system: it locates all sovereignty in the people and distributes power equally among them.⁹⁵ These two principles—popular sovereignty and equal citizenship—are what differentiate a republic from an aristocracy in constitutional terms. A state in violation of either principle takes on an aristocratic form and opens itself to federal intervention under the Guarantee Clause.

Popular sovereignty describes a system of self-rule in which government derives *all* its power from the people. A popular sovereign government is one operating with the consent of the people, formed of the people, and alterable by a majority of the people. It differs starkly from aristocratic rule, which is premised on power residing perpetually in a small and elite subset of the people through heredity. Equal citizenship is the second cornerstone of republican government and refers to the equal distribution of political power among the sovereign public. In a republic, no one person or class of people has a greater or lesser claim to political power. By contrast, political power is unevenly distributed in an aristocracy, which entitles a propertied nobility to a greater share of the governing authority.⁹⁶

Exactly which people constitute these sovereign and equal citizens has been the central struggle of republican progress. By excluding women and slaves from the franchise, for example, the founding generation adopted an imperfect and quite incomplete republic. A republic need not locate all sovereignty equally in *all* people, but it must at least locate equal sovereignty in those populations capable of self-government and civic participation. Determining who is so capable involves a calculus the nation has repeatedly botched. Many generations, either cruelly or myopically, long considered women and slaves unfit for civic participation. This error sowed the seeds of war, suffering, and ultimately reform, as society progressed and it became

95. See White, *supra* note 14, at 794 (explaining how, in establishing the Constitution, Americans relocated sovereignty from the king to the people and built into the essence of government the principle of representativeness).

96. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 476 (1793) (stating that republican government requires equality of popular sovereignty).

clear that denying these populations equal participation in government was indeed fundamentally unrepresentative.

This calculus was so glaringly wrong by contemporary standards that it is hard to describe American democracy as republican at all. But while we rightly fault past generations for erring in their calculus and maintaining a halting commitment to republicanism, it is critical to understand that this was, and still is, the accepted *formula* for republican government. Today, we regularly exclude children, noncitizen residents, the severely mentally incapacitated, and many with criminal convictions from the franchise based on this metric—that in one way or another these populations are unqualified participants in self-government. It is quite possible our current calculus is wrong, and I will argue below that for at least one of these populations, it is. But whether the founding generation, or indeed contemporary society, has succeeded in creating a genuine republic that fully lives up to the principles of popular sovereignty and equal citizenship is a separate question from what republican government requires and thus, what the Guarantee Clause empowers the federal government to require of the states.

Even as the Constitution was put into effect by an unrepresentative republic, it is clear from the document and the political philosophy undergirding its words that the republican form of government it envisions and demands of the states is one in which all power is derived from, and distributed equally amongst, the people. These are the central tenets of republican political theory, which supplies the philosophical foundations for the system of government established by the Constitution.⁹⁷

Republicanism is a political theory that places both sovereignty and governing authority in the hands of the people. From its origins in classical Greek and Roman societies, the principle novelty republicanism introduced was enlarging the definition of “the people” to include nonnoble professionals. The term derives from the Latin *res publica*, the thing of the people, and continued to be defined in founding-era dictionaries as “placing the government in the people.”⁹⁸ At its core, it is a philosophy of government that emphasizes the political participation of citizens for the good of the whole. The Framers were united in their commitment to establishing a

97. There is widespread scholarly agreement that a republican government requires popular rule by a politically equal citizenry. *See, e.g.,* Alexander, *supra* note 29, at 778 (“[W]hile scholars offer different perspectives and pursue different agendas, popular sovereignty is consistently believed to be at the core of the republican form of government.”); Amar, *supra* note 29, at 749 (stating republican government requires “that the structure of day-to-day government—the Constitution—be derived from ‘the People’ and be legally alterable by a ‘majority’ of them”); Merritt, *supra* note 29, at 23 (“[W]idespread agreement exists among scholars and jurists about the core meaning of republican government . . . [as] one in which the people control their rulers.”); Smith, *supra* note 46, at 1954 (“There is broad consensus that as a textual matter, ‘republican’ refers at a minimum to popular sovereignty and the principle of majority rule.”); Zafran, *supra* note 29, at 1445 (“For all the different conceptions of the Clause’s text, origins, and contemporary meaning, virtually all agree that popular control remains central to its guarantee.”).

98. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J. F. & C. Rivington 6th ed. 1785).

republic, even as they adhered to and fused different strands of republican theory to guide them in structuring a republic that could succeed in a diverse and geographically expansive nation.⁹⁹ The hallmark of such a republic was necessarily the process of democratic representation.¹⁰⁰ The two core principles indispensable to representativeness, and thus to American republicanism, are popular sovereignty and equal citizenship.¹⁰¹

One need look no further than the “two great title-deeds of the Republic, the Declaration of Independence and the National Constitution,”¹⁰² to understand how popular sovereignty and equal citizenship define republican government in the United States. The Declaration rests its argument for independence on these two precise principles by pronouncing “first, that all men are equal in rights, and, secondly, that just government stands only on the consent of the governed.”¹⁰³ The Constitution establishes a federal republican system by robustly incorporating the principles of popular sovereignty and equal citizenship at multiple levels. First, the document creates overlapping structural mechanisms for ensuring that the government reflects the contemporary and composite will of the people. It establishes multiple branches of government, each elected in different ways, by different constituencies, at different times, and pursuant to rules established by different bodies.¹⁰⁴ It then creates an extraordinarily low floor, by eighteenth-century standards, for participating in the franchise and for holding office, expanding the franchise to a much higher proportion of citizens than could vote in England.¹⁰⁵ The absence of any property requirement for holding office, in particular, significantly widened membership eligibility as compared to England, where even membership in

99. See Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1550, 1558–64 (1988). As Sunstein notes, even individually, many of the founders likely embraced and drew on commitments to both pluralist and republican thought. See *id.* Compare THE FEDERALIST NO. 10, *supra* note 48 (James Madison) (pluralist analysis), with THE FEDERALIST NO. 39, *supra* note 48 (James Madison) (republican lens).

100. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 164–65, 596–600 (1998) (underscoring the central principle of representativeness in republican theory); see also BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 161–75 (1967) (same).

101. Sunstein, *supra* note 99, at 1552. Sunstein writes that republicanism is characterized by a commitment to four principles: popular sovereignty (“citizenship,” in his terms), “equality of political actors,” deliberation, and universalism (agreement as the governing ideal). See *id.* at 1539, 1541. Together, these four principles comprise the foundational aspects of a representative system, i.e., a deliberative system, where majoritarian agreement governs, founded on the popular sovereignty and equality of political actors.

102. Senator Charles Sumner, *Admission of Mississippi to Representation in Congress: Speech in the Senate* (Feb. 17, 1870), reprinted in 13 THE WORKS OF CHARLES SUMNER 331, 333 (Boston, Lee & Shepard 1880).

103. *Id.*

104. See AMAR, *supra* note 55, at 38. This scheme aims to enhance legislative representativeness. In John Adams’s words, a republican legislature “should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them.” JOHN ADAMS, *THOUGHTS ON GOVERNMENT* 195 (Philadelphia, John Dunlap 1776).

105. See AMAR, *supra* note 55, at 13–17.

the House of Commons was limited to men of vast estates.¹⁰⁶ To further disentangle power from the aristocratic pillars of wealth and heredity, the Constitution prohibits titles of nobility, makes no distinction of birth,¹⁰⁷ eschews the traditional model of apportioning the upper legislative chamber by wealth, and bestows a salary on government members so that common citizens can afford to hold office, in stark contrast to the rule in England that members of Parliament serve without pay.¹⁰⁸

The few qualifications the Constitution does impose on membership—residency, age, and citizenship—were themselves designed to advance the principles of popular sovereignty and equal citizenship.¹⁰⁹ A residency requirement guarded against wealthy men from neighboring states seeking election after losing in their own states, as was the practice in England.¹¹⁰ An age requirement limited the risk that young men from wealthy and famous families would crowd out more representative members of the community from obtaining office.¹¹¹ The Constitution makes this short list of qualifications exclusive to preclude cunning politicians from manipulating membership qualifications to diminish or distort the wide stock of eligible citizens for office.¹¹² In the end, not just the lower legislative chamber but the entire federal government was designed to be “open to merit of every description, whether native or adoptive, whether young or old, and without regard to property or wealth, or to any particular profession or religious faith.”¹¹³

Finally, the Reconstruction Amendments fill out the meaning of constitutional republicanism and confirm the primacy of popular sovereignty and equal citizenship in this form of government. As discussed, the architects of the Reconstruction Amendments crafted those provisions to establish

106. See generally WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 315–27 (Rita & Robert Kimber trans., Rowman & Littlefield rev. ed. 2001) (1973); EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 264 (1988).

107. With the glaring exception of sanctioning the hereditary institution of slavery.

108. See U.S. CONST. art. I, §§ 6, 9; *id.* art. II, § 1, cl. 7; *id.* art. III, § 1. There was disagreement at the founding whether all property qualifications were strictly incompatible with republican government. Some state constitutions organized their upper bicameral chamber by wealth, and *Federalist No. 39* referred to England’s House of Commons as a “republican branch” within a hereditary aristocracy and monarchy. However, at the Constitutional Convention, specific and frequent proposals for a property qualification for membership in the Senate, for Senate positions to be unpaid, and for a property requirement to vote were advanced, considered, and ultimately rejected. As a result, this feature of government lost its republican compatibility through the constitution-making process. See THE FEDERALIST NO. 39, *supra* note 48, at 182 (James Madison); Chemerinsky, *supra* note 29, at 868.

109. See AMAR, *supra* note 55, at 68–70.

110. See *id.* at 70.

111. See *id.* at 70–71.

112. See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783, 808–09 (1995); Powell v. McCormack, 395 U.S. 486, 522, 535 (1969).

113. THE FEDERALIST NO. 52, *supra* note 48, at 256 (James Madison).

republican government in the ex-Confederate states.¹¹⁴ At their core, these amendments deal almost exclusively with achieving greater popular sovereignty and establishing political equality amongst the newly configured citizenry. By abolishing slavery, granting citizenship and expanding the franchise to the freed slaves, and restricting from membership in government certain public officials who engaged in rebellion, the Reconstruction Amendments recalculated the definition of the “sovereign people” to bring it into conformity with contemporary notions of republican civic virtue. Then, by guaranteeing the equal right to vote, the abolition of all badges and incidents of slavery, and the equal protection of the laws, the Reconstruction Amendments established the conditions for the newly freed slaves to enjoy political equality.¹¹⁵

In all these ways, the Constitution reflects that the central pillars of the republican government it establishes are popular sovereignty and equal citizenship. It does not “favor[] the elevation of the few on the ruins of the many” but is instead “scrupulously impartial to the rights and pretensions of every class and description of citizens.”¹¹⁶ It is formed by a body of politically equal citizens—“not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune . . . [but by] the great body of the people of the United States.”¹¹⁷ And it is governed by the same—by “every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people.”¹¹⁸ In short, it is structured as a government of, by, and for equally sovereign citizens.¹¹⁹

During ratification, Madison heralded the synthesis of popular sovereignty and equal citizenship as “the genius of Republican liberty” in the United States.¹²⁰ He elaborated on their interconnection, writing in *Federalist No. 39*, “It is ESSENTIAL to [a republican] government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it”¹²¹ Roger Sherman described republican government similarly in a letter to John Adams, explaining that “what especially

114. See *supra* Part I.B.

115. See Smith, *supra* note 29, at 639 (collecting quotes linking amendments to republicanism).

116. THE FEDERALIST NO. 57, *supra* note 48, at 277–78 (James Madison).

117. *Id.* at 278.

118. *Id.*

119. This is not to suggest that the Constitution is not elitist, only that it is not aristocratic. The Constitution contains a number of explicitly elitist forms, from the legislative selection of senators, to the Electoral College. These choices reflected a desire to populate the government with educated men of a certain stature in society. But creating incidental advantages for political elites is not the same as privileging a favored class with unequal political power. That said, to the extent these constitutional structures run afoul of contemporary notions of popular sovereignty and equal citizenship, they are fair targets for reform under the Guarantee Clause. See *infra* Part III.C.

120. THE FEDERALIST NO. 37, *supra* note 48, at 170 (James Madison).

121. THE FEDERALIST NO. 39, *supra* note 48, at 182 (James Madison) (emphasis added).

denominates [a government] a *republic* is its dependence on the *public* or *people at large*, without any hereditary powers.”¹²² Nearly a century later, congressmen attempting to reconstruct Southern slave states into republics would identify “liberty, equality before the law, and the consent of the governed [as the] essential elements of a republican government.”¹²³

Accordingly, these two core attributes of republican government are not only foundational, they are definitional. Every other viable model of national government to the Framers—of which there were two, monarchy and aristocracy—broke with these two principles.¹²⁴ Popular sovereignty and equal citizenship, therefore, describe the meaning of republicanism in as much as they define how republicanism differs from aristocracy. They are the distinguishing factors between the two systems of government.

A republic that ceases to adhere to the principles of popular sovereignty and equal citizenship devolves back into an aristocratic form of government—and it is precisely these forms of government that the Guarantee Clause prohibits. Put differently, state political processes that interfere with popular rule or that favor one political class over another amount to aristocratic regressions of the type Congress may proscribe under the Guarantee Clause. Specifically, political processes that strip away majority popular control over government in favor of exclusive or entrenched control violate the principle of popular sovereignty and cross the line from republican to aristocratic. Similarly, political processes that permit wealthy elites a greater share of governing power violate the republican principle of equal citizenship and are fundamentally aristocratic.¹²⁵

One caveat is necessary here: there may be other indispensable elements of a republican form of government that are not explicitly anti-aristocratic or that could easily exist in an aristocratic government. Such elements might include guarantees of due process, transparency, and some separation

122. Letter from Roger Sherman to John Adams (July 20, 1789), in CHARLES FRANCIS ADAMS, *WORKS OF JOHN ADAMS* 4, 437 (Boston, Cambridge Press 1851).

123. Letter from Charles Sumner to Francis Lieber (Oct. 12, 1864), in 4 EDWARD L. PIERCE, *MEMOIR AND LETTERS OF CHARLES SUMNER* 258, 259 (Boston, Roberts Bros. 1894).

124. Naturally, myriad other forms of government existed and flourished throughout the world, particularly indigenous governments, non-European governments, and European city-states. The available models for independent, national governments were quite limited, though. Even the Dutch Republic, ostensibly another national republican system, operated as a confederation and was functionally ruled by a closed, oligarchical “regent” class and a hereditary sovereign (the Stadtholder, Prince of Orange). See Catherine Secretane, “*True Freedom*” and the Dutch Tradition of Republicanism, *REPUBLICS OF LETTERS*, Dec. 2010, at 82, 84.

125. It bears repeating that this is not to say that popular sovereignty and equal citizenship have always entailed *full* participation in political power. There has been a constant struggle in this country over who counts in the popular citizenship denominator. Questions of which people are sovereign and enjoy equal citizenship have driven the country to war and to revolution. Though full popular sovereignty and full equal citizenship were not contemplated by the founders and indeed have not been embraced to this day, the political principles of popular sovereignty and equal citizenship were then, and remain now, the central defining pillars of a republican form of government.

between the executive, legislative, judicial, and military powers.¹²⁶ Should a state discard these precepts, it would run afoul of the Guarantee Clause, though it would not necessarily have devolved into an aristocracy. These two forms of government, aristocracy and republic, are not polar opposites, despite the founders' dichotic understanding of the two. Rather, they are successive models in a lineage of political development. While the Guarantee Clause may also prohibit departures from other foundational principles of republican government, the point here is only to recall that the clause surely and unequivocally bars states from imposing aristocratic rule on their citizens—and that, properly understood, this function is not at all obsolete. Our greatest democratic failures as a nation have violated one or both of the core principles of popular sovereignty and equal citizenship. Scholarly debate over what *more* the clause could stand to mean is, therefore, a bit of a distraction. The clause's anti-aristocracy meaning is, and always has been, up to the task the nation needs it for.

II. THE ARISTOCRATIC EXPERIMENTS OF SEVERAL STATES

Scholars wrongly assume that the threat of aristocratic encroachment that prompted the drafting of the Guarantee Clause became largely anachronistic soon after the founding.¹²⁷ This was not true by Reconstruction and it is not true today. Aristocratic innovations are again clogging up the machineries of representative democracy in many states. The problems of political entrenchment and the anticompetitive lockup of the political markets by incumbent powers, voter suppression, and the corruptive influence of money in politics are well known.¹²⁸ Yet, there is little serious acknowledgment that the laws and policies undergirding these political failures should be viewed as aristocratic and thus, as flouting republican government under the Guarantee Clause. Conversely, scholars of the Guarantee Clause do not

126. Though, one might argue that due process is fundamental to equal citizenship and that transparency and the separation of powers are indispensable to popular sovereignty, lest the people lack the knowledge and diverse levers of influence necessary to maintain effective control over their rulers. Indeed, litigants opposing the Massachusetts Supreme Judicial Court's 2003 decision protecting the right to same-sex marriage under the Massachusetts state constitution asked the federal courts to enjoin the decision under the Guarantee Clause, arguing that the state court violated a core aspect of representative government by usurping the legislative power to define marriage in violation of the separation of powers. The First Circuit rejected the argument and the Supreme Court denied certiorari. *Largess v. Supreme Jud. Ct.*, 373 F.3d 219, 229 (1st Cir.), *cert. denied*, 543 U.S. 801, 1002 (2004).

127. See, e.g., Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 435 (1989) ("Now, over 200 years later, the most obvious concerns that prompted adoption of the guarantee clause have long since passed."); see also Hasen, *supra* note 29, at 88 (intimating that the clause's anti-monarchical and anti-aristocratic function were pertinent in 1789 and no longer relevant); WIECEK, *supra* note 29, at 4, 291 (describing the danger of relapse to aristocracy as "obsolete today . . . [as] the threat of promonarchical backsliding vanished by 1800" and arguing that "[the founders'] fear of kings and aristocracies in America are irrelevant today").

128. See, e.g., Gerken, *supra* note 27, at 505–06; Issacharoff & Pildes, *supra* note 26, at 648–49; Michael Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 9–10, 46, 195, 207 (2020).

evaluate these widespread political practices as suppressing representative government in a way that runs afoul of states' obligation to maintain republican forms of government.¹²⁹ Understanding this connection is not simply a labor of constitutional excavation.¹³⁰ It is a process of translation and adaptation of the kind the founders anticipated and the Guarantee Clause requires. The Reconstruction Congress adapted the clause to address extraordinary problems of republican rot that the Framers did not foresee and at times, blindly ignored. The Guarantee Clause is now called on to do this work of republican reconstruction again.

Two contemporary political devices that violate both core principles of popular sovereignty and equal citizenship are worth examining as particularly egregious yet widely employed examples of the type of aristocratic encroachments the Guarantee Clause was designed to prevent. The first is partisan gerrymandering, which subverts the core tenet of popular sovereignty that the ruled choose their rulers, and devalues the political participation of some citizens while elevating that of others. The second is criminal disenfranchisement, which in some states excludes a significant percentage of the adult population from full and equal participation in self-government.¹³¹ Both of these practices deny sovereignty to the full polis and privilege an elite class with outsize political influence over the composition and decisions of government.¹³² And as will be discussed as to each, it

129. Two scholars have recognized the connection between the Guarantee Clause and the problem of malapportionment but focus on critiquing the Supreme Court's missed opportunity to address this practice under the Guarantee Clause as opposed to under an individual rights framework. McConnell, *supra* note 10, at 114–15; Ari J. Savitzky, Note, *The Law of Democracy and the Two Luther v. Borden's: A Counterhistory*, 86 N.Y.U. L. REV. 2028, 2057–58 (2011). Jarret Zafran expanded on this analysis by demonstrating the Guarantee Clause's salience for addressing entrenchment but again, only focused on the clause as a vehicle for judicial intervention. See Zafran, *supra* note 29, at 1454.

130. See Sunstein, *supra* note 99, at 1539 (recognizing the task for modern republicans “is not simply one of excavation” and that “[h]istory does not supply conceptions of political life that can be applied mechanically to current problems . . . contemporary social and legal issues can never be resolved merely through recovery of features, however important and attractive, of the distant past”).

131. A third category of aristocratic political devices that may well also violate the principles of republican government are practices that permit the audacious influence of money in politics, both at the campaign and lobbying levels. These devices, at their extremes, sever the representative and dependent relationship between the governed and the governors in ways that grant the wealthy a greater share of political power. A full explanation of the specific aspects of states' current campaign finance, ethics, and lobbying regimes that run afoul of republican government is outside of the scope of this Article; suffice it to say here that they may likewise prove to be modern manifestations of aristocratic devices Congress may act against under the Guarantee Clause.

132. Professor Deborah Merritt's argument that the Guarantee Clause protects republican states against just such kinds of federal encroachment into state political process rights is unavailing. See Merritt, *supra* note 29, at 25, 36. Merritt argues that the power to define the franchise is an exclusively state prerogative. Yet, she concedes that where a state has become un-republican, the clause is no barrier to federal intrusion into what she claims are traditional areas of state autonomy. Indeed, Merritt admits that certain voting qualifications would render a state's practices “[in]consistent with republican principles.” *Id.* at 38. However, she cabins such voting qualifications to those that the Constitution outlaws under the Fourteenth, Fifteenth, Nineteen, Twenty-Fourth, and Twenty-Sixth Amendments. Outside of these limits,

matters not under the Guarantee Clause whether the Constitution otherwise prohibits or permits such practices. Neither constitutional silence nor acquiescence to a political practice permanently imprints that practice with republican legitimacy. As specific parts of the Constitution grow incompatible with evolving standards of republican government, the general command to ensure states retain a republican government may supersede the document's outdated omissions or endorsements.

A. *Entrenchment Through Partisan Gerrymandering*

Essential to any republic of size is a system of representation, whereby governing authority is delegated to legislators who remain accountable to the political will of the sovereign people. Accountability is accomplished through frequent and fair elections to ensure representatives retain “an immediate dependence on, & an intimate sympathy with the people.”¹³³ In the words of John Adams, a republican legislature “should be an equal representation, or, in other words, equal interests among the people should have equal interests in it. Great care should be taken to effect this, and to prevent unfair, partial, and corrupt elections.”¹³⁴ Indispensable to this goal

she does not see how other voting restrictions might be inconsistent with popular representation and intimates that all other restrictions on voting are within a “reservoir of state power” that could only render a state unrepublican if subsequently outlawed by a constitutional amendment. *Id.* at 40. She employs the same analysis for the authority to organize the structure and mechanics of state government, acknowledging that states cannot make certain internal governmental process choices that violate the Fourteenth and Fifteenth Amendments but claims states are otherwise free from “the federal government’s power to interfere with the organizational structure and governmental process chosen by a state’s residents.” *Id.* at 41. She notes in particular that felon disenfranchisement is within a state’s power to effect, as are drawing state election districts and other election procedures. *Id.* at 39, 41. Her analysis errs in at least three ways. First, a voting qualification or election procedure can render a state unrepublican without constituting a separate constitutional violation because it is the suppression of popular representation that makes a voting restriction unrepublican, not its defiance of the rule of law. Indeed, there are myriad unrepublican innovations a state could enact that do not violate an express constitutional provision or federal law, most especially restrictions that have a disparate political or socioeconomic impact on minority voters. Currently, voter roll purges, the closing of polling sites, and voter registration barriers all have an unrepublican impact but are not strictly unconstitutional. The second problem with her analysis is that it incorrectly interprets the clause as a static right, incapable of responding to aristocratic “innovations” in the states. Yet, as discussed at length above, all textual and historical evidence, as well as Supreme Court precedent, belies this interpretation of the clause. Finally, Merritt does not properly contend with the sovereignty denominator problem in a federalist society. The American public, as well as the federal government, has a national sovereign interest in ensuring that each state comports with republican government. While federal intervention does sometimes override state popular sovereignty, it does so under the authority of a higher sovereign mandate.

133. THE FEDERALIST NO. 52, *supra* note 48, at 256 (James Madison).

134. ADAMS, *supra* note 104, at 195. The Constitution took pains to forestall entrenchment. Short terms, fixed elections, the inability to tinker with membership qualifications, and a required decennial census were all included precisely to keep those in power dependent on the will of the people. Regular and fixed elections and enumerations were designed to essentially constitutionalize popular representation. See AMAR, *supra* note 55, at 68, 84; 3 ELLIOT’S DEBATES, *supra* note 51, at 369 (statement of Patrick Henry); THE FEDERALIST NO. 37, *supra* note 48 (James Madison).

is officeholders' dependence on "the great body of the society, not [on] an inconsiderable proportion, or a favored class of it."¹³⁵

Partisan gerrymandering is government by a favored class. It is the legislative practice of drawing electoral districts to discount the votes of some citizens and to favor the votes of others to ensure the election of an incumbent party member regardless of popular will. It works by "packing," "cracking," or otherwise assigning citizens to districts in ways designed to minimize the political efficacy of certain voters' political participation, ensuring that the legislature's preferred candidate will prevail. Sophisticated computer software has made the tactic cuttingly precise and highly successful,¹³⁶ helping to create an "incumbent retention rate that rivals the Soviet Union's at its height."¹³⁷ By facilitating this level of entrenchment, partisan gerrymandering subverts the dependence relationship between ruler and ruled. It enables legislators to shape their own districts to ensure their own reelections to power. In short, it corrupts the fundamental principle of republican government that the people choose their representatives and not the other way around.

Contemporary partisan gerrymandering does more than corrupt the dependence relationship between voters and their representatives, though; its accuracy is so sophisticated it now threatens the foundational principle of majority rule. Gerrymanders are most subversive in battleground states, where democracy ought to be at its zenith as a result of robustly contested elections. It is in these states, like Michigan, North Carolina, Ohio, Pennsylvania, and Wisconsin, that partisan gerrymandering is causing extreme misrepresentation, to the point of installing minority rule. In the 2018 election cycle, it is estimated that seven state legislative chambers that should have flipped party control based on voter preference did not do so as a result of partisan gerrymandering.¹³⁸ In at least Michigan, North Carolina, Pennsylvania, and Wisconsin, state Democratic candidates won a clear majority of the statewide popular vote but a minority of the state's legislative seats.¹³⁹

135. THE FEDERALIST NO. 39, *supra* note 48, at 182 (James Madison).

136. Michael Wines, *Just How Bad Is Partisan Gerrymandering?: Ask the Mapmakers*, N.Y. TIMES (Jan. 29, 2018), <https://www.nytimes.com/2018/01/29/us/gerrymander-political-maps-maryland.html> [<https://perma.cc/ST5M-YZ95>].

137. Pamela S. Karlan, *A Bigger Picture*, in REFLECTING ALL OF US: THE CASE FOR PROPORTIONAL REPRESENTATION 73, 73 (Joshua Cohen & Joel Rogers eds., 1999); *see also Election Trends*, OPENSECRETS.ORG, <https://www.opensecrets.org/elections-overview/election-trends> [<https://perma.cc/A38Q-JYXP>] (last visited Mar. 16, 2021).

138. David A. Lieb, *GOP Won More Seats in 2018 than Suggested by Vote Share*, ASSOCIATED PRESS (Mar. 21, 2019), <https://apnews.com/9fd72a4c1c5742aead977ee27815d776> [<https://perma.cc/FA8Y-BZYZ>].

139. Christopher Ingraham, *In at Least Three States, Republicans Lost the Popular Vote but Won the House*, WASH. POST (Nov. 13, 2018), <https://www.washingtonpost.com/business/2018/11/13/least-three-states-republicans-lost-popular-vote-won-house/> [<https://perma.cc/3G8G-RSEA>]. Particularly egregious was Wisconsin's election, in which Democrats won 53 percent of the popular vote but only 36 percent of the state assembly's legislative seats. *See* Angeliki Kastanis et al., *Moving the Flip Zone: Democrats March Deeper into Suburbia*, ASSOCIATED PRESS (Oct. 6, 2020), <https://apnews.com/article/election->

Just as problematic as partisan gerrymandering's self-entrenchment aspect is its disparate racial impact. There is a very strong relationship between race discrimination in voting and partisan gerrymandering, particularly in the South. Racial minorities overwhelmingly support one of the two major political parties: 84 percent of Black Americans align with the Democratic Party, while just 8 percent identify in some way with the Republican Party.¹⁴⁰ Partisan disenfranchisement thus in reality amounts to a proxy for racial disenfranchisement. It is no wonder that partisan gerrymandering increased precisely when malapportionment subsided, which had served to dilute the voting power of Black Americans concentrated in cities.¹⁴¹ By drawing districts to weaken the political ability of Black Americans to elect their chosen representatives, partisan gerrymandering works an especially insidious aristocratic encroachment in the tradition of slave aristocracies.

State partisan gerrymandering then quickly translates into unrepresentativeness at the federal level. In North Carolina and Pennsylvania, Democratic congressional candidates won a majority of the popular vote but only a quarter of the state's congressional seats because of partisan gerrymandering.¹⁴² Across the country, partisan gerrymandering tactics ensured that Republicans won sixteen more seats in the U.S. House of Representatives in 2018 than they otherwise should have.¹⁴³ More than twenty bills introduced in that congressional term, addressing security, defense, climate change, immigration, voting rights, and economic policies, failed by fewer than twenty votes in the House.¹⁴⁴

This self-dealing entrenchment transforms republican government into a modern form of aristocracy.¹⁴⁵ It flouts the core republican principles that representatives serve at the pleasure of the people and that citizens are

2020-virus-outbreak-phoenix-suburbs-health-care-reform-76dea954e5f5dc13b3ad65fd29ac678c [https://perma.cc/8HR5-HQE9].

140. PEW RSCH. CTR., WIDE GENDER GAP, GROWING EDUCATIONAL DIVIDE IN VOTERS' PARTY IDENTIFICATION 2 (2018), <https://www.pewresearch.org/politics/2018/03/20/wide-gender-gap-growing-educational-divide-in-voters-party-identification/> [https://perma.cc/5FZT-85H9].

141. See Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One Vote*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 207, 219 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

142. In North Carolina, Democrats won almost exactly half of the votes cast but only three of the thirteen (23 percent) state congressional districts. See Thomas Wolf & Peter Miller, *How Gerrymandering Kept Democrats from Winning Even More Seats Tuesday*, WASH. POST (Nov. 8, 2018), <https://www.washingtonpost.com/outlook/2018/11/08/how-gerrymandering-kept-democrats-winning-even-more-seats-tuesday/> [https://perma.cc/8K6E-H57W]. In Pennsylvania, Democrats won 51 percent of the statewide congressional vote but only secured five out of eighteen (28 percent) congressional seats. See Christopher Ingraham, *How Pennsylvania Republicans Pulled off Their Aggressive Gerrymander*, WASH. POST (Feb. 6, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/02/06/how-pennsylvania-republicans-pulled-off-their-aggressive-gerrymander/> [https://perma.cc/KH8S-UG45].

143. See Lieb, *supra* note 138.

144. See *Voting Records*, GOVTRACK.US, [https://www.govtrack.us/congress/votes#session=303&chamber\[\]=2&passed\[\]=false](https://www.govtrack.us/congress/votes#session=303&chamber[]=2&passed[]=false) [https://perma.cc/SU8J-NTHU] (last visited Mar. 16, 2021) (displaying voting records of failed House bills in the 116th Congress).

145. AMAR, *supra* note 55, at 68.

entitled to an equal say in who represents them.¹⁴⁶ In place of these principles, gerrymandering substitutes the aristocratic model, in which power resides in an entrenched class of elite citizens who exercise an outsize share of political authority to determine the composition of government. Though partisan gerrymandering does not ensure hereditary entrenchment of power, heredity is not a necessary feature of aristocratic rule. Heredity is simply a dated mechanism of entrenchment. Like partisan gerrymandering, it destroys the representative relationship between the rulers and the ruled, just as it also elevates the governing authority of one class of citizens over another. By replacing lineage with data analytics, partisan gerrymandering accomplishes the same aristocratic goal of perpetually entrenching power in one group, independent of popular will.

That political gerrymandering is fundamentally unrepresentative is not a novel criticism. As with racial and gender inequality in voting, there is a prolific history of its disapproval as contrary to republican government from the outset. The first partisan gerrymander, occurring in Virginia in 1788, was immediately condemned as unrepresentative for being “a violation of the right of a free people to choose their representatives.”¹⁴⁷ The term “gerrymander” entered the national lexicon a quarter century later when Massachusetts governor Elbridge Gerry approved an outrageous map that resembled a salamander.¹⁴⁸ The map was emphatically criticized not only as unconstitutional but also because “it in fact subverts and *changes our Form of Government*.”¹⁴⁹ Popular condemnation of partisan gerrymandering has consistently taken the position that it deprives the people of their sovereign function in a republic.¹⁵⁰ A milestone democracy reform bill currently pending in Congress takes aim at partisan gerrymandering as antithetical to democracy and finds its elimination necessary “to fulfill the promise of article IV, section 4.”¹⁵¹

So it was that one of the first times the Guarantee Clause bubbled into the national political conversation was in response to an uprising that stemmed from popular discontent with severe disenfranchisement and malapportionment. The 1841 Dorr Rebellion in Rhode Island saw dueling political factions convene two competing state constitutional conventions to

146. *Id.* at 68, 84.

147. ELMER C. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* 41 (1907); see also Thomas Rogers Hunter, *The First Gerrymander?: Patrick Henry, James Madison, James Monroe, and Virginia’s 1788 Congressional Districting*, 9 *EARLY AM. STUD.* 781, 785 (2011).

148. GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY’S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* 3 (2004); Hunter, *supra* note 147, at 807.

149. *The Gerry-Mander, or Essex South District Formed into a Monster!*, *SALEM GAZETTE*, Apr. 2, 1813, <https://digital.library.cornell.edu/catalog/ss:3293783> [<https://perma.cc/KAE9-NSMV>].

150. See Brief of Amici Curiae Historians in Support of Appellees at 3–4, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017 WL 4311107, at *3–4; GRIFFITH, *supra* note 147, at 106–07.

151. See For The People Act of 2021, H.R. 1, 117th Cong. § 3 (2021).

address the unequal political power between country and city folk as a result of extremely malapportioned state voting districts.¹⁵² The two factions ultimately established alternative governments and each appealed to the federal government for recognition and assistance under the Guarantee Clause.¹⁵³ While all three branches of the federal government successfully sidestepped intervening in that political dispute, the relationship between the Guarantee Clause and the problem of gerrymandering was forged, only to become stronger ever since.¹⁵⁴

As was made clear during Reconstruction, it matters not whether the Constitution otherwise prohibits partisan gerrymandering or that the practice has a long history of use for it to be deemed unrepresentative under the Guarantee Clause. Neither long-standing practice nor constitutional acquiescence to a practice endows it with permanent republican bona fides. The Constitution did not prohibit racial discrimination or the alienation of slaves—indeed it explicitly endorsed the political subjugation of slaves. The practice of disenfranchising and legally discriminating against Blacks, both slave and free, was ubiquitous throughout the United States, from the founding, through the Civil War, and thereafter. Yet, such unequal treatment on the basis of race came to be accepted as antithetical to republican government and a legitimate target of federal abolition under the Guarantee Clause. The continued disenfranchisement and discrimination against Black Americans into the twentieth and twenty-first centuries certainly calls into question our national commitment to republicanism, but it does not erase the acceptance of a new democratic norm that unequal treatment on the basis of race is unrepresentative. The same applies to partisan gerrymandering and any other electoral or political practice that has a deep, if altogether shameful, history. Neither its historical use, dubious constitutional approval, nor continued embrace are dispositive for whether, by contemporary standards, partisan gerrymandering violates the principles of popular sovereignty and equal citizenship. It clearly does.

B. Criminal Disenfranchisement

The denial of the right to vote is more than an individual rights violation, it is an infringement on the republican character of a state. Depleting the pool of citizens rightfully entitled to partake in the franchise leaves government without the full consent of the governed. The right of suffrage “is fundamental to republics,” and “consequently secured, because the . . . constitution, guarantees to every state in the union, a republican form of government.”¹⁵⁵ Where a state disenfranchises a significant number of its

152. See WIECEK, *supra* note 29, at 91–95.

153. *See id.*

154. The Court considered challenges to malapportionment under the Guarantee Clause but ultimately held any reliance on that clause was “futile,” opting instead to rest its decision on the Equal Protection Clause of the Fourteenth Amendment (for state districts) and Article I, Section 2 (for congressional districts). *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964); *Baker v. Carr*, 369 U.S. 186, 226–27 (1962).

155. 2 ELLIOT’S DEBATES, *supra* note 51, at 448 (statement of James Wilson).

citizens, thus denying them equal sovereignty, it devolves into an aristocratic form of government that does not rest on the consent of the people but on the approval of a favored class.

The Reconstruction Republicans understood this basic rule of republicanism. When the ex-Confederate states adopted new state constitutions that continued to disfranchise the now free Black male citizens of their states, Republicans declared such levels of disenfranchisement to “violat[e] a distinctive principle of republican government.”¹⁵⁶ These states were, collectively, denying the vote to nearly four million newly freed slaves, or 12.6 percent of the national population.¹⁵⁷ It can be estimated that between a quarter and half were males of voting age.¹⁵⁸ As a percentage of state population, all of the ex-rebel states were disenfranchising between 10 to 30 percent of their adult male populations on account of race.¹⁵⁹ It was only with the First Reconstruction Act of 1867 that some 703,000 Black Americans registered to exercise their right to vote in the South.¹⁶⁰ In five states—Alabama, Florida, Louisiana, Mississippi, and South Carolina—Black voters became the majority of the registered voting population.¹⁶¹

Today, criminal disenfranchisement produces modern versions of these levels of illegitimate disenfranchisement. Five and a quarter million citizens of voting age are denied the right to vote because of a conviction.¹⁶² Put in context, a state of this size would be the twenty-fourth most populous state, entitled to seven seats in the House of Representatives and nine votes in the Electoral College. Approximately 1.3 million are disenfranchised prisoners currently serving sentences,¹⁶³ possibly for nonfelony offenses, and nearly 3.9 million are not incarcerated and living in our communities.¹⁶⁴ Thirty-one states deny the right to vote to released individuals with certain felony

156. Senator Charles Sumner, Speech in the Senate on the Proposed Amendment of the Constitution Fixing the Basis of Representation (Feb. 5–6, 1866), in 10 THE WORKS OF CHARLES SUMNER, *supra* note 102, at 118, 207. While the Northern states also disenfranchised their adult Black male citizens, Congress determined, with varying degrees of embitterment, that this was consistent with republican government because that level of disenfranchisement was “on so small a scale that it is not perilous to the Republic.” *Id.* at 135.

157. JOSEPH C. G. KENNEDY, BUREAU OF THE CENSUS LIBR., POPULATION OF THE UNITED STATES IN 1860, at viii, xii (1864), <https://www2.census.gov/library/publications/decennial/1860/population/1860a-02.pdf> [<https://perma.cc/E9L4-289G>].

158. *Id.* at xvii. The ratio of male to female slaves was approximately even (2,216,744 males to 2,225,086 females) and the life expectancy of a slave was thirty-six years. See ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY 125 (1974).

159. See KENNEDY, *supra* note 157, at xii, xvii. For individual state census data from 1860, see 1860 Census: Population of the United States, U.S. CENSUS BUREAU, <https://www.census.gov/library/publications/1864/dec/1860a.html> [<https://perma.cc/Z7QM-GJ96>] (last visited Mar. 16, 2021).

160. COLEMAN, *supra* note 80, at 4.

161. See LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 546 (1979).

162. UGGEN ET AL., *supra* note 4, at 4.

163. See Emmett Sanders, *Full Human Beings: An Argument for Incarcerated Voter Enfranchisement*, PEOPLE’S POL’Y PROJECT, <https://www.peoplespolicyproject.org/projects/prisoner-voting/> [<https://perma.cc/K55N-BJPT>] (last visited Mar. 16, 2021).

164. UGGEN ET AL., *supra* note 4, at 16.

convictions who are on parole or probation.¹⁶⁵ Thirteen of these states restrict some or all felons' right to vote even after they are no longer on parole or probation.¹⁶⁶ Twelve states impose some form of permanent felon disenfranchisement.¹⁶⁷ In all, an estimated 2.3 million people are disenfranchised under state laws that restrict voting rights *after* completion of sentences.¹⁶⁸

These levels of disenfranchisement mostly hail from ten states, which together deny over three quarters of these 5.2 million individuals the right to vote.¹⁶⁹ In six of these states—Alabama, Florida, Kentucky, Mississippi, Tennessee, and Virginia—between 6 and 11 percent of the state's total adult population is disenfranchised due to prisoner or felon status.¹⁷⁰ This is comparable to the levels of Black male disenfranchisement in several of the ex-Confederate states deemed unrepugnant and subject to the Guarantee Clause in 1865.

The comparison is made all the more poignant when viewed through a racial lens. In five states, more than one in six Black Americans is disenfranchised, and in another four states, more than 10 percent of the state's total Black population is denied the right to vote.¹⁷¹ In Tennessee and Wyoming respectively, over one fifth and one third of adult Black Americans cannot vote.¹⁷² To compound this racial disparity in voting power, prisoners are almost always counted in the populations of the locations where they are incarcerated, as opposed to their communities of origin.¹⁷³ This discrepancy has the effect of transferring congressional power away from Black communities into predominantly white, rural communities where prisons are located.¹⁷⁴ The counting of Black prisoners toward the apportionment of representatives for their predominately white overseers, while simultaneously denying these prisoners the right to vote, is nothing less than

165. *Id.* at 5–6.

166. *Id.*

167. *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUST. (Dec. 3, 2020), <https://www.brennancenter.org/our-work/research-reports/criminal-disenfranchisement-laws-across-united-states> [<https://perma.cc/7D38-6NCR>]; Shayanne Gal & Grace Panetta, *States Have Restored Voting Rights for Thousands with Felony Convictions Since 2016. See the Laws in Every State*, BUS. INSIDER (Sept. 8, 2020, 11:39 AM), <https://www.businessinsider.com/where-americans-with-felony-convictions-can-vote-in-2020-election-2020-9> [<https://perma.cc/E9MD-MNHA>].

168. UGGEN ET AL., *supra* note 4, at 16.

169. They are: Alabama, Arizona, California, Florida, Georgia, Kentucky, Mississippi, Tennessee, Texas, and Virginia. *See id.*

170. *See id.*

171. *See id.* at 17.

172. *See id.*

173. *See Residence Criteria and Residence Situations for the 2020 Census of the United States*, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf> [<https://perma.cc/X5XP-9TNZ>] (last visited Mar. 16, 2021).

174. *See* Tim Henderson, *Counting Prison Inmates Differently Could Shift Political Power*, PEW CHARITABLE TR. (Jan. 2, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/01/02/counting-prison-inmates-differently-could-shift-political-power-to-cities> [<https://perma.cc/DS24-UN44>].

a modern manifestation of the Three-Fifths Clause—which time, war, and constitutional progress have relegated to the graveyard of grossly unrepresentative political practices.

These statistics lay bare an intolerable abandonment of republican principles. Disenfranchisement based on conviction unequally excludes a significant number of citizens from the sovereign public on an illegitimate basis. The principal reason put forward for denying equal citizenship to those convicted of a crime is that criminality reflects a lack of civic virtue—an inability to contribute responsibly to the common task of self-government. But the commission of a crime is as ill founded an indicator of civic virtue as race, religion, sex, or gender. There is no evidence that criminality is correlated with intelligence or virtue. Moreover, criminal law and its enforcement reflect a series of policy decisions to prioritize the criminalization and punishment of particular activities that often have little or no bearing on one's fitness to participate in the political process. Worse yet, those policy decisions disparately impact communities on the basis of intrinsic characteristics—including race, ethnicity, sexuality, and disability—as well as socioeconomic status, which itself is largely a product of other policy decisions that negatively impact these demographics.¹⁷⁵

Another defense offered for criminal disenfranchisement is that it is a just punishment. But the argument that the state may penalize citizens by depriving them of their sovereignty is untenable. While the choice to break a law can certainly reflect poor judgment, it is outside the power of a republican state, whose authority is delegated to it by the sovereign people, to deprive any of the citizens it answers to of their sovereignty based on their choices or judgments. To illustrate the point, a boss who delegates interim authority to a subordinate to govern a meeting does not, indeed cannot, delegate to the subordinate the power to fire the boss—the boss retains her position and ultimate authority over the subordinate, whether or not she submits to following any ground rules the subordinate lays out in the course of managing the meeting. So too in a republic—the state is ever dependent on and subordinate to the people; even as it exercises legal authority over them, it cannot tamper with their sovereign authority over the state so long as they remain capable citizens.

Finally, criminal disenfranchisement is often defended on the basis that it is implicitly authorized under Section 2 of the Fourteenth Amendment. Section 2 reduces a state's representation in Congress proportionately to the number of adult male citizens the state disenfranchises, with the exception of any such citizens disenfranchised for “participation in rebellion, or other crime.”¹⁷⁶ The Supreme Court has interpreted this clause as affirmatively

175. For further reading on the criminalization of poverty, see generally Monica C. Bell, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1 (2018); Peter B. Edelman, *Criminalization of Poverty: Much More to Do*, 69 DUKE L.J. ONLINE 114 (2020); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009); Fred O. Smith Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283 (2018).

176. U.S. CONST. amend. XIV, § 2.

sanctioning criminal disenfranchisement.¹⁷⁷ Regardless of the soundness of this interpretation, constitutional endorsement of a practice is not permanently conclusive as to that practice's republican character. Like partisan gerrymandering, criminal disenfranchisement violates the principles of popular sovereignty and equal citizenship by its nature, but its incompatibility with republicanism grew all the more extreme as the practice exploded and it became highly racialized. Thus, where provisions of the Constitution may be *democratically* legitimate, as reflective of the majority will of the people, their ratification does not permanently imbue these provisions with *republican* legitimacy. One may presume that a majority of the people's representatives ratify amendments in compliance with contemporary standards of popular sovereignty and equal citizenship; but as those standards evolve, the Guarantee Clause permits a current Congress to address outmoded practices that no longer comport with republican government, whether sanctioned by law, historical practice, or constitutional endorsement.

Current members of Congress have recognized that criminal disenfranchisement is unrepublican but have failed to follow the constitutional trail blazed by their predecessors under the Guarantee Clause. Their bill, the For the People Act,¹⁷⁸ would only protect the right of individuals with criminal convictions to vote in *federal* elections and would not extend the franchise to individuals currently serving felony sentences.¹⁷⁹ The narrowness of this intervention and its failure to address criminal disenfranchisement in state elections misses the mark. The same shortcoming applies to the pending bill's sections on redistricting reform.¹⁸⁰ The bill would only eliminate partisan gerrymandering in the drawing of *congressional* districts. These practices at the state level are as unrepublican as they are at the federal level and greatly impact the democratic integrity of the federal government. Congress ought to legislate against them at the state level too.

The newest version of the For the People Act does purport to rely on Congress's "authority and responsibility to enforce the Guarantee Clause,"¹⁸¹ whereas the original version of the bill only relied on Congress's power to set the manner of elections under Article I, Section 4 and its power to enforce the Eighth, Thirteenth, Fourteenth, Fifteenth, Nineteenth, and Twenty-Fourth Amendments.¹⁸² This addition is a welcome sign that Congress understands these problems are not simply individual rights issues. It is not just the individual who suffers and requires recourse when her political equality is undermined. It is the entire community and, indeed, the people at large. As Justice John Marshall Harlan understood in his dissent in *Plessy v.*

177. *Richardson v. Ramirez*, 418 U.S. 24, 53–56 (1974).

178. H.R. 1, 117th Cong. (2021).

179. *Id.* §§ 1400–1409.

180. *Id.* §§ 2400–2435.

181. *Id.* § 3.

182. S. 1068, 116th Cong. (2019).

Ferguson,¹⁸³ denying civil rights to citizens “constituting a part of the political community, called the ‘People of the United States,’ for whom, and by whom through representatives, our government is administered . . . is inconsistent with the guaranty given by the constitution to each state of a republican form of government.”¹⁸⁴ Having recognized the underlying harm to republican government that criminal disenfranchisement and partisan gerrymandering inflict, Congress ought now to use its guarantee power in earnest to ban these practices at the state level.

III. ENFORCING THE GUARANTEE CLAUSE AGAINST ARISTOCRATIC STATES

That the Guarantee Clause’s salience is not lost to history raises the question: how should it be used? Unlike other powers the Constitution delegates to the federal government, the question of enforcement under the Guarantee Clause is quite unclear. The clause obscures which federal actor is the first mover by placing the obligation in Article IV and designating the entire United States as guarantor.¹⁸⁵ Furthermore, the clause is oddly silent as to its precise enforcement mechanism, making no mention of “appropriate legislation,”¹⁸⁶ “calling forth the Militia,”¹⁸⁷ laying taxes,¹⁸⁸ judicial enforcement,¹⁸⁹ or any other mode of exercising government authority.¹⁹⁰ This omission is in stark contrast to the fairly precise detail the Constitution supplies for exercising most other powers delegated to the federal government—such as providing specifics for how to populate the federal bureaucracy, how to impeach a president, how to ratify an amendment, and how to join two states.¹⁹¹

Yet, this unanswered, extremely consequential question continues to be overlooked. The reason, presumably, is that scholars have declared the clause a constitutional nullity.¹⁹² Such disregard stems not only from a misunderstanding of the clause’s current salience but also from an overactive focus on judicial enforcement of constitutional rights. In the wake of a nearly two-hundred-year line of unbroken precedent declaring the Guarantee Clause nonjusticiable, nearly all scholarly discussion of the clause has nonetheless fixated on dissecting, debating, and disagreeing with this decision.¹⁹³ Avenues for enforcing constitutional rights do not start and end at the

183. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

184. *Id.* at 563–64 (Harlan, J., dissenting).

185. U.S. CONST. art. IV, § 4.

186. *See, e.g., id.* amend. XIII, § 2.

187. *Id.* art I, § 8, cl. 15.

188. *Id.* cl. 1.

189. *Id.* art III.

190. *Id.* art. IV, § 4.

191. *See id.* art. I, §§ 2–3; *id.* art. V; *id.* art. IV, § 3.

192. *See Chemerinsky, supra* note 29, at 850–53; *Zafran, supra* note 29, at 1435.

193. *See supra* note 29.

courthouse steps. Indeed, the Supreme Court is often the least likely and least capable enforcer of many constitutional rights.¹⁹⁴

Few scholars have offered ideas for congressional enforcement of the Guarantee Clause, and none has fleshed out the mechanisms of congressional enforcement beyond proposing that Congress pass a specific law addressing unrepresentative activity. Adam Kurland, for example, proposes Congress pass a state anticorruption law pursuant to the Guarantee Clause,¹⁹⁵ and Professor Mark Alexander argues that the Guarantee Clause enables Congress to pass campaign finance legislation that satisfies First Amendment scrutiny.¹⁹⁶ But both limit their proposals to passing new legislation, contemplating no more than Congress's standard legislative prerogative to impose direct legal obligations on individuals.¹⁹⁷

Substantive legislation that acts on individuals is but one way to rectify unrepresentative activity in the states, but it is not the only way. The Guarantee Clause endows Congress with three distinct mechanisms for enforcing the guarantee: it may legislate directly under the Guarantee Clause against individuals and state governments to prohibit unrepresentative state practices; it may use its ancillary Article I powers to incentivize states to adopt needed representative reforms; and, in cases of necessity, it may dissolve a state government and convene a state constitutional convention.

Textual, purposivist, and historical analyses of the clause all support this interpretation. Importantly, this reading recognizes that the "clause was powerfully and publicly glossed" by its use in the aftermath of the Civil War to carry Reconstruction into effect and by the repeated endorsement of this use of the clause by the American people in a series of watershed elections during Reconstruction.¹⁹⁸

What little the Supreme Court has said about the scope and substance of Congress's guarantee power also supports a broad and dynamic understanding of this authority. The Court's early opinions on the separation of powers squarely place responsibility for effectuating the Constitution's general powers in Congress and embrace the notion of wide legislative discretion to adopt "new changes and modifications of power [that] might be indispensable to effectuate the general objects of the charter."¹⁹⁹ Where details are scant and power is expressed in general terms, the Constitution

194. See *infra* Part IV.B.

195. Kurland, *supra* note 127, at 435–36.

196. Alexander, *supra* note 29, at 823–38.

197. Rick Hasen gets closer by contemplating whether a system of federal preclearance for state changes to voting laws could be justified under the Guarantee Clause, but he does not flesh out this idea in depth. See 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, 204–06 (2005). Arthur Bonfield also envisions a robust role for Congress in enforcing the Guarantee Clause, but he focuses his analysis on the scope of the guarantee as opposed to the mechanisms of enforcement, assuming the clause would operate through the passage of new legislation protecting social and political rights. Bonfield, *supra* note 14, at 565–69.

198. Akhil Reed Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 HARV. L. REV. F. 109, 110 (2013).

199. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).

“leav[es] to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require.”²⁰⁰

The Court reiterated this model of congressional primacy and latitude in its first major exposition of the Guarantee Clause, declaring that, “[u]nder this article of the Constitution it rests with Congress to decide what government is the established one in a State,” to “determine whether it is republican or not,” and “the means proper to be adopted to fulfil this guarantee.”²⁰¹ The Court has not waived on this holding. Even in the midst of Reconstruction, an unsympathetic, conservative Supreme Court ultimately sanctioned Congress’s use of the Guarantee Clause to impose military rule and direct the formation of new state governments, acknowledging that “a discretion in the choice of means is necessarily allowed” for Congress to restore “the State to its constitutional relations, under a republican form of government.”²⁰² Even as the Court subsequently dismantled the advances of Reconstruction piece by piece,²⁰³ it never renounced its endorsement of the Guarantee Clause as empowering Congress to use all means necessary and proper to intervene in the political affairs of the states.²⁰⁴

The Framers of the Guarantee Clause understood that the American experiment with republicanism was fragile—that internal and external threats to the system abounded. They meant to give the federal government a powerful and adaptive tool to protect the nascent and tenuous national project they had launched.²⁰⁵ This tool was designed to address the immediate

200. *Id.* at 326–27.

201. *Luther v. Borden*, 48 U.S. (7 How.) 1, 42–43 (1849). The *Luther* opinion deals mostly with the power of the president, vis-à-vis the courts, to determine the rightful government of a state and suppress insurrection against it. That analysis, however, does not pertain to the president’s constitutional authority under the Guarantee Clause but rather, to the president’s statutory authority under the Militia Act of 1795, ch. 36, 1 Stat. 424, in which Congress delegated “the power of deciding whether [an] exigency had arisen upon which the government of the United States is bound to interfere.” *Id.* at 43.

202. *Texas v. White*, 74 U.S. (7 Wall.) 700, 729 (1868).

203. *See* *Hodges v. United States*, 203 U.S. 1, 18–19 (1906) (gutting congressional authority to enforce the Thirteenth Amendment); *Plessy v. Ferguson*, 163 U.S. 537, 548–52 (1896) (sanctioning racial segregation under the Equal Protection Clause), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *The Civil Rights Cases*, 109 U.S. 3, 24–25 (1883) (denying federal authority under the Thirteenth and Fourteenth Amendments to outlaw racial discrimination by private actors); *United States v. Harris*, 106 U.S. 629, 644 (1883) (immunizing state inaction against civil rights violations); *United States v. Cruikshank*, 92 U.S. 542, 551, 553–55 (1876) (restricting the Fourteenth Amendment to state action and holding it did not incorporate the Bill of Rights); *United States v. Reese*, 92 U.S. 214, 216 (1876) (eviscerating the right to vote under the Fifteenth Amendment); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77–81 (1873) (nullifying the Privileges or Immunities Clause of the Fourteenth Amendment); *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 590–93 (1871) (circumscribing the Civil Rights Act of 1866).

204. *See* *Boyd v. Nebraska*, 143 U.S. (1 Wheat.) 135, 183 (1892) (Field, J., dissenting) (acknowledging that the Guarantee Clause authorizes Congress to intervene in the “administration of the affairs of the state” to secure republican government).

205. *See* *Martin*, 14 U.S. at 326 (“The [Constitution] was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen

known threats of monarchical usurpation and aristocratic encroachments and to provide a sufficiently nimble and broad grant of authority to confront the unforeseeable manifestations of this threat in the future.

The threat did indeed metastasize in other forms, including through the institution of slavery and various subsequent manifestations of disempowerment, discrimination, and disenfranchisement. Yet, the constitutionally available mechanisms for excising these political practices via the guarantee power have lain dormant. Understanding this power through a textual, purposivist, and historical lens excavates at least three means of enforcement: federal legislation, federal incentives, and state reconstruction. Only by moving beyond *what* the clause guarantees to *how* it guarantees it will the political potential of the Guarantee Clause reawaken.²⁰⁶

A. *Legislating Against Unrepublican State Practices*

The Guarantee Clause is an independent source of legislative power to restructure state governments in conformity with republican principles. This legislative function of the clause supplements Congress's other legislative powers in a distinct way, even as it complements Congress's auxiliary authorities to protect due process, equal protection, and constitutional franchise requirements. It was an entirely unique grant of authority under the 1788 Constitution, and it was then reinforced by new provisions expanding Congress's legislative enforcement powers under the voting rights and Reconstruction Amendments. The guarantee power remains, however, the only general federal authority to intervene directly in the states' republican relations with its people, not limited to specific prohibitions like poll taxes or to practices that are racially discriminatory or that affect interstate commerce.

The clause makes clear that one vehicle for exercising this general grant of power is through congressional legislation. The Constitution attaches the guarantee obligation to "The United States." The Necessary and Proper Clause of Article I grants Congress the authority to "make all laws" necessary for carrying into execution the powers the Constitution vests in "the United States."²⁰⁷ In addition, the Constitution uses the term "United States" when referring to the federal government as a sovereign whole, comprised of three branches, each exercising a separate core governing function.²⁰⁸ A general grant of authority to "the United States," therefore, is a grant to each branch to exercise its constitutionally assigned function in enforcing that provision. Under the Guarantee Clause, it is for Congress to legislate against

what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself").

206. Senator Charles Sumner famously depicted the Guarantee Clause as the "sleeping giant in the Constitution, never until this recent war awakened, but now it comes forward with a giant's power." CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (statement of Sen. Charles Sumner).

207. U.S. CONST. art I, § 8, cl. 18.

208. See, e.g., *id.* pmb1; *id.* art. VI.

unrepublican practices, the executive to enforce that legislation, and the judiciary to adjudicate any resulting disputes.

The clause's verbiage is similarly instructive. It obligates the federal government to "guarantee" a republican form of government to every state, conferring one of the only positive rights in the original Constitution. As discussed, this affirmative obligation necessarily implies the authority to employ both preventive and corrective measures.²⁰⁹ It similarly permits interventions short of using military force. The primary constitutional method for enacting preventative, peaceful measures is congressional legislation.

Even the placement of the Guarantee Clause in Article IV points to its found as a source of legislative authority. Article IV consists of seven clauses on states' relations and obligations, including several grants of lawmaking authority to Congress to enforce these obligations. At the same time, it is not where the Constitution places its negative restraints on states' authority. Those are listed in Article I, Section 10. The placement of the Guarantee Clause in Article IV, therefore, emphasizes its role as a positive grant of lawmaking authority as opposed to a negative restraint on states' authority.

The enforcement clauses of the Reconstruction Amendments shed further light on the proper interpretation of the Guarantee Clause's legislative function. Each of the Reconstruction Amendments includes a provision explicitly empowering Congress to enforce the rights established by that amendment through appropriate legislation. Congress drafted these enforcement clauses as it was passing legislation to impose the very legal transformations it intended to make permanent through the Reconstruction Amendments. In so doing, Congress likely modeled the enforcement provisions it drafted on the enforcement authority it was currently exercising to preserve for itself the authority to protect and advance the rights won under the Thirteenth, Fourteenth, and Fifteenth Amendments.²¹⁰

209. See *supra* Part I.C. Classical republicanism, as a political theory, is distinct for promising a positive conception of freedom: "Where liberalism has historically promised 'negative' freedom or 'freedom from' government intrusions into a protected domain of private right, republicanism affirms the possibility of a more encompassing 'positive' freedom—the freedom of prescribing to one's self, across a more encompassing domain, the laws to which one will be subject." Richard Fallon Jr., Comment, *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1721 (1989).

210. It is an open question what space lies between Congress's enforcement powers under the Fourteenth Amendment and the Guarantee Clause. While the original purposes of the provisions are quite similar in that they both aim to empower the federal government to ensure republican government in the states, the Fourteenth Amendment was primarily concerned with denying the abridgment of natural law rights by states, whereas the guarantee power is concerned with ensuring that state structures adhere to republican principles. In theory, there is little room here between substance and form. But the space between the two provisions has ultimately widened drastically as a result of the Supreme Court cabinining the scope of the rights protected by Section 1 and Congress's enforcement power under Section 5 of the Fourteenth Amendment. See *United States v. Morrison*, 529 U.S. 598, 625–27 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 532–36 (1997); *The Civil Rights Cases*, 109 U.S. 3, 24–25 (1883); *United States v. Cruikshank*, 92 U.S. 542, 553–55 (1876); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77–81 (1873).

Finally, the Guarantee Clause's lawmaking power is confirmed by the surplusage canon. The guarantee power is not redundant of Congress's other legislative reserves and should not be interpreted as such. It does enjoy some overlap, as many constitutional provisions do.²¹¹ But even setting aside that the clause would have filled a major gap in Congress's legislative power at the founding, before there were any amendments guaranteeing the rights of republican citizens and when the Commerce Clause had only a fragment of its current stature, the guarantee power still retains a distinct legislative function today.

First, the clause permits tailored legislation against specific states that the principle of equal state sovereignty otherwise makes difficult under other legislative authorities.²¹² The clause applies to "every State," in the singular, not to all the states as a group.²¹³ It was conceived amidst concerns over turmoil in specific states,²¹⁴ and it was drafted and has only ever been used to intervene in individual states where republican government has broken down.²¹⁵ Moreover, it explicitly displaces background principles of federalism by speaking directly to the proper constitutional balance between federal power and state sovereignty under the clause—in instances of domestic violence, the state must approve the federal interference,²¹⁶ and in cases of invasion or breakdown of republican government, the federal government is obligated to intervene, with no prior consent of the state required.²¹⁷

Substantively, the guarantee power may be the exclusive vehicle for imposing a host of necessary republican reforms. For example, it is likely the only means of redressing non-voting-related state political practices that corrode the dependency relationship between representatives and the people. Such practices include corrupt lobbying, special access, and campaign finance practices that trade influence, access, money, and favors for power. It would also reach state actions that have an outside effect on the ability of the poor to participate in self-government, including the closure of polling sites, voter roll purges, the absence of early voting procedures, and holding elections on weekdays. Indeed, it is the apex of aristocracy to have to pay to vote because one is forced to choose whether to go to work or to the polls.

211. For example, Congress's commerce and enforcement powers under the Fourteenth Amendment both permit it to enact legislation outlawing employment discrimination. Similarly, a combination of the Elections and Commerce Clauses and Fourteenth and Fifteenth Amendments provide overlapping authority to legislate against unrepublican state practices. It is perhaps no surprise, therefore, that Congress has never purported to act exclusively pursuant to the Guarantee Clause.

212. *See* *Shelby County v. Holder*, 570 U.S. 529, 544–46 (2013).

213. U.S. CONST. art. IV, § 4.

214. *See supra* Part I.A.

215. *See supra* Part I.B.

216. U.S. CONST. art. IV, § 4 (requiring the federal government to guarantee each state a republican government "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence").

217. *Id.*

Furthermore, the guarantee power could further singularly reach unrepresentative state practices that are not explicitly racially discriminatory, such as the failure to provide adequate state services.²¹⁸ It is also the only constitutional means of abrogating state sovereign immunity for unrepresentative practices that fall outside the protective umbrella of the Fourteenth and Fifteenth Amendments. It can further be employed against unchecked unrepresentative practices by private actors that do not substantially affect interstate commerce, such as gender-based violence or gun violence, on a finding these activities interfere with individuals' exercise of their full political rights as citizens.²¹⁹ In all these ways, the legislative potential of the guarantee power is not superfluous. But it is also not the only, or even the most effective, mechanism for enforcing the guarantee.

B. Incentivizing State Political Reform

Beyond the power to act directly on the states, the Guarantee Clause permits Congress to use its other Article I powers to incentivize state compliance with republican principles. Offering incentives instead of legislating directly has optical and practical advantages. Incentives are more politically palatable and thus more politically feasible to enact. They foster state buy-in for effectuating large-scale shifts in social and political norms and permit Congress to seek legal changes it cannot otherwise constitutionally mandate.

The use of incentives is especially valuable for ushering in more permanent republican reforms. Federal legislation is but one source of law for addressing unrepresentative practices; three others include state statutes, state constitutions, and the U.S. Constitution—the latter two being far more secure avenues for implementing lasting republican reforms. While Congress may not legislate a change to these bodies of law, it may use federal incentives to spur lasting changes in all three.

Principles of federalism baked into our constitutional scheme prevent the federal government from compelling a state to change its law or commandeering state agents, including a state legislature, into implementing federal policy.²²⁰ But it is uncontroversial that Congress may condition a federal incentive on a state adopting a particular legal policy.²²¹ The primary limitations on this power are: (1) that the required condition relate to a federal interest and not violate another constitutional provision and (2) that the incentive not be unduly coercive or fall outside Congress's power to offer.²²² Congress may, consistent with these limitations, fulfill its guarantee

218. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44, 57 (1973).

219. *Cf. United States v. Morrison*, 529 U.S. 598, 617–18 (2000); *United States v. Lopez*, 514 U.S. 549, 567 (1995).

220. *See Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

221. *See New York*, 505 U.S. at 167; *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

222. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012); *Dole*, 483 U.S. at 207–08, 210–12. The condition must also promote the general welfare and be unambiguous and should relate to “the federal interest in particular national projects or programs.” *Sebelius*,

obligation by inducing states to pass new law—including constitutional law—in exchange for monetary incentives or, in certain circumstances, for seating a state’s congressional delegation in Congress.

1. Constitutional Conditions: States Passing Laws and Amendments

The Supreme Court has repeatedly confirmed that Congress may seek to induce a state to change its law without running afoul of any constitutional limitations.²²³ This is because a state is free to accept or rebuff a federal offer. In other words, the privilege of state sovereignty in a federal system sometimes requires the states to act autonomously. Today, most states have ethics, election access, and voting integrity laws pending in their legislatures.²²⁴ The federal government can, and should, incentivize states’ passage of these republican reforms.

The analysis is the same for a condition requiring a state legislature to approve a state or federal constitutional amendment addressing an un-republican practice. Such state legislative votes are no different than those cast to pass a state statute. Indeed, this type of condition is somewhat less intrusive on state sovereignty because these votes have no binding legal effect without additional popular approval: a state legislature’s vote for a state constitutional amendment requires approval by popular referendum in all but one state before it becomes law,²²⁵ and a vote to ratify a federal constitutional amendment requires the assent of thirty-seven other states and two-thirds of the Congress.²²⁶

A condition for states to pass a constitutional amendment aimed at improving governing structures and political process rights complies with both limitations on Congress’s conditioning power. First, it relates to the legitimate federal interest in guaranteeing republican government in the states.²²⁷ Recall that the Reconstruction Congress conditioned readmission

567 U.S. at 676 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)); *Dole*, 483 U.S. at 207.

223. See *Sebelius*, 567 U.S. at 577–78.

224. See, e.g., H.R. 37, 2021 Leg., Reg. Sess. (Ala. 2021) (restoring voting rights to persons who have been released from incarceration for five or more years and eliminating the requirement that persons with past criminal convictions pay fines and victim restitution before having their voting rights restored); H.R. 417, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (establishing recusal requirements for the secretary of state and an independent election board to supervise elections upon recusal); H.R. 411, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (allowing certain incarcerated individuals to vote by absentee ballot); H.R. 377, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (requiring schools to allow students to leave school temporarily to vote); S.J. Res. 272, 2021 Leg., Reg. Sess. (Va. 2021) (removing restrictions on qualifications to vote for convicted felons or individuals adjudicated to be “mentally incompetent”); S. 739, 219th Leg., Reg. Sess. (N.J. 2020) (concerning language accessibility requirements on ballots).

225. Delaware is the only state that permits its legislature to pass an amendment to its state constitution without popular ratification. See DEL. CONST. art. XVI, § 1.

226. U.S. CONST. art V.

227. Cf. Merritt, *supra* note 29, at 70. Merritt argues that “this ability of Congress to override state substantive authority through the supremacy clause—while preserving the autonomy of state governmental processes under the guarantee clause—assures a proper

of the ex-Confederate states on their ratifying the Fourteenth and, in some cases the Fifteenth, Amendment.²²⁸ The condition to ratify these amendments directly related to the federal interest in reconstructing republican government in those states, “precisely because the amendment[s] . . . revolved in tight orbit around core principles of republican government.”²²⁹ Campaigns for state constitutional amendments proposing political reforms have been initiated in a number of the states, including amendments designed to reform the redistricting process, improve campaign finance accountability and transparency, and expand access to voting.²³⁰ Congress may condition an incentive on a state’s passing these state constitutional amendments or similar federal constitutional amendments.

Second, such a ratification condition does not run afoul of any other constitutional provision. It does not induce an unconstitutional act by the states, as the Constitution grants state legislatures the authority to ratify an amending bill. It is also a constitutional exercise of congressional power, consistent with both Article V and the Necessary and Proper Clause. The Article V amendment process is a political process within Congress’s purview to control.²³¹ If it so wishes to spur that process along via its ancillary powers, it is within Congress’s political prerogative to do so. Indeed, the Constitution twice approves the notion of binding states to constitutional reforms without perfect consent. Article V only requires three-fourths of the states to ratify an amendment, and Article VII approves binding all thirteen original states to a new Constitution upon the consent of only nine.²³² A “ratification condition” scheme does not come close to imposing this level of constitutional coercion on the states.²³³

balance between national power and state independence.” *Id.* Just the opposite balance is appropriate. The federal government is dependent on, and largely comprised of, state actors, giving the federal government a significant interest in the integrity of state political processes. Additionally, the Constitution is structured to keep most substantive law within the states’ prerogatives. Thus, while the Supremacy Clause does some work in balancing out federal-state relations, it does not replace the federal government’s distinct self-preservation interest in republican state governmental processes. Indeed, a potentially more efficient way of ensuring beneficial state substantive law is to ensure a well-functioning state political process that produces law responsive to the people’s interests, rather than to override every detrimental state law via the Supremacy Clause.

228. See Bonfield, *supra* note 14, at 540–41; White, *supra* note 14, at 801.

229. AMAR, *supra* note 55, at 377.

230. See, e.g., S. 668, 2019 Leg., 54th Reg. Sess. (N.M. 2019) (containing recently ratified New Mexico ethics reforms); Ark. Op. Att’y Gen. No. 2018-135 (Oct. 26, 2018), <https://www.arkansasag.gov/assets/opinions/2018-135.pdf> [<https://perma.cc/JS47-8RA7>] (discussing fair redistricting state constitutional amendments pending in Arkansas); Letter from Donald J. McTigue, Att’y, Ohioans for Secure and Fair Elections, to Dave Yost, Ohio Att’y Gen. (Feb. 10, 2020), [https://www.ohioattorneygeneral.gov/getattachment/c380e08c-ef3f-4408-bfb6-ad4530339393/The-Secure-and-Fair-Elections-Amendment-\(Resubmiss.aspx](https://www.ohioattorneygeneral.gov/getattachment/c380e08c-ef3f-4408-bfb6-ad4530339393/The-Secure-and-Fair-Elections-Amendment-(Resubmiss.aspx) [<https://perma.cc/5NFM-QVEW>] (election access); S.D. Att’y Gen, Constitutional Amendment: Attorney General’s Statement (June 19, 2017), https://sdsos.gov/elections-voting/assets/Ballot%20Question%20Documents/2018/2018_CA_AGStatement_V1.pdf [<https://perma.cc/2APD-8DCC>] (anti-corruption).

231. *Coleman v. Miller*, 307 U.S. 433, 450–51 (1939).

232. U.S. CONST. arts. V, VII.

233. See Merritt, *supra* note 29, at 50.

Enforcing the guarantee through a ratification condition is also consistent with the Necessary and Proper Clause, especially where a constitution (state or federal) is facilitating unrepresentative practices. Constitutions impose unrepresentative government on the people when a court interprets a provision to create an unrepresentative outcome or when a provision of a constitution comes to be recognized as unrepresentative. An example of the first scenario is the infamous *Dred Scott v. Sandford*²³⁴ case, in which the Supreme Court interpreted the word “citizens” in the Constitution not to include Black Americans.²³⁵ An example of the second scenario is the Three-Fifths Clause, which granted slave states extra representation in Congress. To restore representative government in either scenario, it is necessary to pass an amendment overturning a constitutional holding or superseding a constitutional provision. Modern examples of this might include spurring an amendment to overturn the Supreme Court’s campaign finance holdings or to supersede the constitutional provisions establishing the Electoral College or equal state representation in the Senate.

Not only are ratification conditions consistent with Articles I and V, but they closely mirror Congress’s well-settled authority under Article IV to condition the admission of new states into the Union on changes to the proposed state’s law. Like the Guarantee Clause, the section empowering Congress to admit new states into the Union does not specify any procedures for, or limits on, executing this authority.²³⁶ Yet, Congress has consistently used this power to impose conditions on new states to ensure the state is a cohesive member of a representative federal system.²³⁷ Indeed, Congress has imposed conditions on nearly every state admitted to the Union post-1788, including conditions to alter a territory’s legal system and to guarantee certain civil liberties when Congress was suspicious of a new state’s commitment to democratic governance.²³⁸

2. Constitutional Incentives: Financial Carrots and Seating Sticks

Congress has two principal powers at its disposal for incentivizing states to enact representative reforms: the spending power (a carrot) and the seating power (a stick).²³⁹ When acting pursuant to the Guarantee Clause, Congress may use these Article I powers to condition federal money and representatives’ seating in Congress on state legislatures approving new laws necessary to restore representative government.

234. 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

235. *Id.* at 404.

236. *See* U.S. CONST. art. IV, § 3.

237. *See* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 120–21 (2004).

238. *See id.* at 139.

239. *See* U.S. CONST. art. I, § 8.

Use of the spending power to this end is clearly constitutional.²⁴⁰ As discussed, the Supreme Court has repeatedly confirmed Congress's power to financially incentivize state action, so long as the financial inducement offered is not "so coercive as to pass the point at which 'pressure turns into compulsion.'"²⁴¹ In using its spending power to enforce its guarantee obligation, Congress may offer new funds in exchange for the adoption of new policies or offer to pay for the political reforms it seeks. It may also threaten to withdraw funding from state agencies engaging in unrepresentative practices or condition the continued receipt of a reasonable amount of existing funding on a state enacting desired reforms.²⁴² The Supreme Court has already sanctioned Congress's use of its spending power in this way at least once by upholding, as a condition of funding, a requirement that state agencies prohibit their employees from taking active part in political campaigns.²⁴³

The seating power is a more limited, yet very powerful, stick available to Congress to incentivize state compliance with republican principles. Article I permits each chamber of Congress to "be the Judge of the Elections, Returns and Qualifications of its own Members."²⁴⁴ Under this provision, Congress is the ultimate authority on whether one of its members was duly elected and is duly qualified to serve. Article I lists three qualifications for membership, in the form of age, residency, and citizenship requirements.²⁴⁵

But it also implies a fourth, tacit requirement that members are elected in a republican manner and represent republican states. The Constitution requires members of Congress to be *elected by the people*.²⁴⁶ These words carry the implicit requirement that members be chosen in a republican manner by citizens who enjoy complete equality in their shared right to popular representation.²⁴⁷ The Constitution's vesting of the legislative

240. Even Professor Merritt agrees that "induc[ing] changes in state governmental structures" through the spending clause is a legitimate use of federal power that comports with federalism principles. Merritt, *supra* note 29, at 46–49.

241. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

242. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578 (2012).

243. *See Oklahoma v. U.S. Civ. Serv. Comm'n*, 330 U.S. 127, 143–44 (1947).

244. U.S. CONST. art. I, § 5, cl. 1.

245. *Id.* § 3.

246. *Id.* § 2 (providing that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States," who shall, "when elected, be an Inhabitant of that State in which he shall be chosen"); *id.* amend. XVII ("The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years.").

247. *See Wesberry v. Sanders*, 376 U.S. 1, 8, 14 (1964). In *Wesberry*, the Court held malapportionment in congressional districts unconstitutional, reasoning that, "construed in its historical context, the command of Art. I, § 2 that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7–8 (quoting U.S. CONST. art. I, § 2). The Court continued:

To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People"

power in a *Congress* similarly presumes this body to be exactly what that word implies—a republican deliberative body comprised of representatives from republican states.²⁴⁸ Reading an implied republican requirement into Article I’s qualifications for office does not run afoul of the separate requirements that each state have at least one representative and that no state be deprived of its equal suffrage in the Senate, because both those provisions assume that the representatives and states in question are true *representatives* and proper *states* in good constitutional standing under the Guarantee Clause. A tacit republican qualification is also consistent with the Constitution’s recognition that Congress has an independent institutional interest in the integrity of congressional elections.²⁴⁹ For this reason, Article I permits Congress to supersede the states’ authority to make the rules for federal elections.²⁵⁰ It also permits Congress to punish a member for bad behavior and to expel a member.²⁵¹ In the same way, the seating power enables Congress to protect its institutional interests by refusing to admit a representative elected in an unrepresentative manner.

It is thus constitutionally appropriate for Congress to incentivize a state to pass republican reforms by refusing to seat that state’s representatives where the states’ unrepresentative practices directly impacted the unrepresentative character of its congressional delegation. Use of the seating power in this particular way is not unduly coercive because it is fully within both Congress’s power and its duty to ensure its own compliance with Article I.²⁵² While Congress may remedy most problems related to the republican integrity of federal elections under the Elections Clause, the Guarantee Clause recognizes the interrelation between state and federal political systems and how state and local unrepresentative practices can directly impinge the ability of citizens to participate fairly and equally in federal elections. Where a state has proven demonstrably recalcitrant to self-correcting those unrepresentative practices affecting the integrity of its election systems, Congress may use the seating power to induce the state into enacting the necessary republican reforms.

...
 ... The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter.
Id. at 8, 14.

248. Cf. Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 DUKE J. CONST. L. & PUB. POL’Y 167, 174 (2017) (arguing that a tacit loyalty requirement should be read into Article V and indeed, into the grant of all federal political power).

249. See *supra* note 227 and accompanying text.

250. 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 choosing Senators.”).

251. *Id.* § 5.

252. See Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1347 (2013) (“[A] conditional proposal is coercive if it would be wrongful for the maker to do as it threatens.”).

Unlike the spending power, therefore, the seating power may only be used reactively to enforce the Guarantee Clause. It would be undemocratic to refuse to seat a member in anticipation of, or speculation over, a state's un-republican character. Similarly, where a state's federal election system fully complies with the principles of popular sovereignty and equal citizenship, Congress may not use the seating power to induce entirely unrelated republican reforms. Otherwise, Congress would be attempting to restore republicanism in a way that risks eviscerating it. Refusing to seat a duly elected representative would itself violate the principle of popular sovereignty and discriminate among equal citizens of different states.

Case law and historical practice support Congress's use of the seating power to enforce the Guarantee Clause. The Supreme Court grasped the link between Congress's seating power and the Guarantee Clause from the outset, reasoning in its first exposition of the guarantee power that Congress's admission of senators and representatives under Article I amounts to its recognition under Article IV that the states from which they are elected are republican in character.²⁵³ It was this analysis that later inspired the Reconstruction Republicans to use the seating power to enforce the guarantee of republican government in the ex-Confederate states.²⁵⁴ Having determined that the representatives these states sent to Congress in 1865 were not elected in a republican manner, they deemed them unqualified under Article I to serve in Congress.²⁵⁵

Importantly, their conclusion was not based on the ex-Confederate states' former support for slavery and secession. Rather, it was based on their ongoing disenfranchisement of the freed slaves, their adoption of Black Codes to undo the recently ratified Thirteenth Amendment, and their refusal to ratify the then pending Fourteenth Amendment.²⁵⁶ These acts evinced an obstinate commitment to retaining a race-based aristocracy instead of embracing a new republican norm of race-blind citizenship. By perpetuating a web of political, social, and economic discrimination, the entire political apparatus of the ex-Confederate states retained its un-republican character, which impugned the republican qualification of its delegations to Congress. In response, Congress conditioned the readmission of representatives from these states on their establishing republican forms of government, specifically by adopting a requirement of race-blind suffrage in their state constitutions and ratifying the Fourteenth Amendment, which requires equal citizenship and the exclusion of disloyal citizens from the ranks of government.²⁵⁷

In its most extreme iteration, therefore, the Guarantee Clause empowers Congress to use the seating power to induce a state into voting to ratify an amendment to the Constitution. Bruce Ackerman has argued that such a

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

254. See AMAR, *supra* note 55, at 370.

255. See *id.* at 368–69.

256. See *id.* at 368–69, 377–78.

257. See COLEMAN, *supra* note 80, at 4.

process, as was used during Reconstruction, is so irregular that it does not comport with Article V.²⁵⁸ Akhil Amar has countered that the ex-Confederate members were properly excluded because they were elected under unrepresentative conditions, and the ratification condition was necessary to restore republican government in those states.²⁵⁹ The disagreement has been framed in terms of constitutional theory. But a more basic way to understand the divergence is that Ackerman finds such an incentive scheme unconstitutionally coercive, whereas Amar recognizes that withholding something one is not qualified to have in the first place cannot, by definition, be coercive. Amar is right. Such a scheme lacks duress or undue influence. First, the state remains free to restore republican government voluntarily by its own means, which would render the incentive scheme unjustified and thus inoperable. Second, both the inducement (seating in Congress) and the condition (ratification) are legal, discretionary acts. Congress has full authority to expel members from unrepresentative states, and this slimmed-down Congress may propose amendments and attach ratification conditions to them consistent with Article V. It is true that Article V authorizes “The Congress” to propose amendments for ratification, but it is also Congress who judges its own membership and therefore defines what body properly constitutes “The Congress” for purposes of Article V.

In sum, incentivizing a state to approve new law—including a new constitutional amendment—under either the spending or the seating power is, in certain circumstances, a constitutional exercise of the guarantee power. Under the spending power, such an incentive scheme falls squarely within Congress’s Article I powers and is not inconsistent with Article V so long as it is not coercive. Under the seating power, it is proper to demand new laws ensuring congressional representatives are elected in a republican manner when such a law or amendment is necessary to restore republican government in the states and in Congress.

C. *Dissolving and Reconstructing State Government*

Finally, in cases of severe republican collapse, the Guarantee Clause empowers Congress to dissolve a state government and convene a state constitutional convention to replace it.²⁶⁰ This was the tactic successfully pursued during Reconstruction, but it is undertheorized whether, outside the context of secession and war, doing so is within Congress’s constitutional purview. It is. The Guarantee Clause permits this extreme remedy in response to a total breakdown in republican government, such as when a state operates under a political caste system—whether on the basis of race, gender, class, property, or any other intrinsic or constructed distinction—or when a state eviscerates popular sovereignty by cancelling, stealing, or corrupting its elections.

258. See generally ACKERMAN, *supra* note 65, at 22–119.

259. AMAR, *supra* note 55, at 364–80.

260. See *supra* Part I.B.

The clause guarantees every state a republican “form” of government. At the time of the clause’s drafting, the “form” of a state government was predominately established by state constitution, not substantive law.²⁶¹ Textually, the clause thus empowers Congress to guarantee a republican constitution to each state. Focusing on this connection between the guarantee and the law of state constitutions, early abolitionists read the clause as empowering Congress to “dictate the form of [a state’s] fundamental code or constitution, with a view of rendering it consistent with . . . [a republican] form of government.”²⁶² Not long after, the Supreme Court recognized Congress’s authority under the clause to decide “what government is the established one in a State.”²⁶³ The power to recognize a state government includes the inverse power of nonrecognition—or rather, the power to recognize the currently constituted government as illegitimate.²⁶⁴

The Reconstruction Congress interpreted its power under the Guarantee Clause in exactly this way. The linchpin of its Reconstruction agenda was unrecognizing the ex-Confederate states, dissolving these states’ governments and their post-Confederate constitutions, and convening new state conventions for the adoption of new state constitutions that were subject to congressional approval.²⁶⁵

This use of the Guarantee Clause was reaffirmed by both coordinate branches and the people of the United States, imprinting it with constitutional legitimacy. The public twice lent its consent at the ballot box, reelecting the Republicans overwhelmingly in 1866, after Congress had excluded Southern delegates from its membership, and again in 1868, following the implementation of Reconstruction in all eleven ex-Confederate states.²⁶⁶ Importantly, the 1868 election was held after the reformation and readmittance of seven Southern states under the terms of the First Reconstruction Act, with the participation of voters in those states.²⁶⁷

Both President Johnson and the Supreme Court, while at furious odds with this scheme, nonetheless acquiesced to this use of the guarantee power.²⁶⁸ Johnson’s military maintained martial law, registered the freed Blacks to vote, and convened the state constitutional conventions.²⁶⁹ The Supreme Court similarly acceded in a trio of cases. In *Mississippi v. Johnson*,²⁷⁰ the Court refused to prevent the president’s implementation of the First Reconstruction Act, even as it described the Act as “annihilat[ing] the State and its government, by assuming for Congress the power to control, modify,

261. See Heller, *supra* note 29, at 1717, 1745–46.

262. 12 REG. DEB. 4269 (1836).

263. Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).

264. Cf. Zivotofsky v. Kerry, 576 U.S. 1, 30 (2015).

265. See Bonfield, *supra* note 14, at 540–41; *supra* Part I.B.

266. See ACKERMAN, *supra* note 65, at 19–21.

267. See *supra* note 82 and accompanying text.

268. WIECEK, *supra* note 29, at 233–37.

269. See COLEMAN, *supra* note 80, at 4–5.

270. 71 U.S. (4 Wall.) 475 (1867).

and even abolish its government.”²⁷¹ Next, in *Georgia v. Stanton*,²⁷² the Court declined again to intercede to protect the Southern states’ “rights of sovereignty, of political jurisdiction, of government, [and] of corporate existence as a state” from federal intervention.²⁷³ It deemed these rights judicially unenforceable, fully understanding that judicial abstention would permit Congress to

annul, and totally abolish the existing State government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of all the means and instrumentalities whereby its existence might, and, otherwise would, be maintained.²⁷⁴

Finally, in *Texas v. White*,²⁷⁵ unable to dispose of the question on jurisdictional grounds, the Court gave its constitutional imprimatur to Reconstruction.²⁷⁶ It held that the excluded states remained sovereign entities, inescapably implying that their status as wards of federal Reconstruction did not unconstitutionally violate their state sovereignty.²⁷⁷ The Court further confirmed that the guarantee of a republican form of government is bestowed on the people of a state, not on the state government, holding in essence that destruction of a state government to provide a republican state to the people is within Congress’s authority under the Guarantee Clause.²⁷⁸

As the Supreme Court ultimately conceded, enforcing the Guarantee Clause by dissolving a state government, nullifying its constitution, and erecting a new republican government in its place is fully consistent with republicanism itself. Undeniably, the people of the states must be able to form their own state governments free of undue federal interference or compulsion, otherwise the resulting state would also violate popular sovereignty.²⁷⁹ But federal intervention does not necessarily destroy the republican relationship between the people and their elected representatives. In certain instances, intervention is necessary to uphold and protect that relationship. For example, the mechanism of federal preclearance adopted

271. *Id.* at 476.

272. 73 U.S. (6 Wall.) 50 (1868).

273. *Id.* at 77.

274. *Id.* at 76.

275. 74 U.S. (7 Wall.) 700 (1869).

276. *See id.* at 727–29, 731.

277. *See id.* at 726–29.

278. *See id.* at 721. The Court nonetheless insisted that it was not passing judgment on the constitutionality of the First Reconstruction Act. *Id.* at 731 (“Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these acts We do not inquire here into the constitutionality of this legislation so far as it relates to military authority, or to the paramount authority of Congress.”).

279. *See Merritt, supra* note 29, at 25, 61; Andrew Johnson, Veto Message (Mar. 2, 1867), reprinted in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 498, 511 (James D. Richardson ed., Washington, D.C., Gov’t Printing Off. 1897) (vetoing the First Reconstruction Act).

in the Voting Rights Act of 1965²⁸⁰ constitutionally permits federal review of laws passed by a state legislature exercising popularly delegated authority.²⁸¹ It does so not to depress popular control but to vindicate it—to ensure that state law does not ultimately hamper the people’s ability to exercise their popular sovereignty. So too with a republican reconstruction of a state government. In that case, Congress would be interfering to facilitate a process by which the people could more freely exercise their sovereignty in a new convention.

Moreover, it is imperative to grasp that popular sovereignty does not end at the state border. While federal intervention may be unrepugnant at one level, it is also the manifestation of a national republican system operating to ensure compliance with a national republican Constitution. The people of the United States are also a popularly sovereign body and their collective will, as represented through federal action, is deserving of recognition in a republican system.²⁸²

Where a state is not simply engaging in unrepugnant practices but has abandoned a republican form of government, it is no longer in a constitutional federalist relationship with the Union. In this case, the unrepugnant state is more akin to a territory seeking admission as a new state. The process of admitting a new state generally begins with a congressional enabling act that establishes a process by which the territory will hold a state constitutional convention and elections for state officers and congressional representatives. The enabling act also includes conditions for admission to statehood, including conditions of specific constitutional provisions the state is required to incorporate into its state constitution.²⁸³

The permissible use of this enforcement mechanism is extremely restricted. Here, the Necessary and Proper Clause actually performs a critical limiting function.²⁸⁴ It is only *necessary* to dissolve a state government and reconstitute the state’s constitution when faced with a total breakdown in republican government and the state’s unwillingness or inability to implement voluntary or federally mandated reforms. It is only *proper* to do so when the democratic relationship between the state and its people is broken, such as when the state’s franchise is not a republican representation

280. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.).

281. The Supreme Court did not hold that a federal preclearance scheme is unconstitutional in *Shelby County v. Holder*, 570 U.S. 529 (2013). Rather, it held that any such scheme must be justified by current conditions. *Shelby County*, 570 U.S. at 553.

282. As Chief Justice John Marshall opined, “the government of the Union . . . is, emphatically, and truly, a government of the people.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404–05 (1819). This was a recurrent theme in his jurisprudence: the federal government represents the people of the United States as national citizens, not as citizens of individual states. *See id.*; *see also* Amar, *supra* note 29, at 751.

283. Biber, *supra* note 237, at 128.

284. In the context of the Guarantee Clause, the necessary and proper analysis may take on a sort of proportionality analysis, as Ryan Williams’s work suggests. *See* Williams, *supra* note 30, at 634. If indeed the guarantee reads as an international treaty-type commitment, as he posits, then the use of force to exercise that guarantee would be subject to international law rules of proportionality. *See id.* at 608–11.

of the democratic majority or its electoral system is completely corrupt. In this case, making state officials responsive to the federal government, as opposed to their constituency, does not interfere with an otherwise existing republican relationship between the state and its people. Put differently, where there is no state government “in constitutional relations with the Union, it [becomes] the duty of the United States to provide for the restoration of such a government.”²⁸⁵

At the same time, neither violence nor secession is a necessary precursor to the constitutional use of this enforcement mechanism. The clause guarantees a republican form of government to “every State in this Union,” meaning a state is subject to even the most extreme exercise of the guarantee power while it is still in the Union. And while the guarantee would certainly operate to prevent un-republican changes effectuated through state-sanctioned violence, such violence is not a necessary predicate to enforcing the guarantee through dissolution and reconstitution. The cure for a breakdown in republicanism is, firstly, other democratic mechanisms of restoring republican rule, such as federal incentives or legislation. But where the state government prevents a republican change in representation, even without resort to violence, then the government is no longer in the hands of the people and is subject to federal takeover.²⁸⁶

Finally, though the clause permits dissolution of a state government and state constitution, it does not empower the federal government to eject a state from the Union. Such power is not only outside the scope of the clear language, purpose, and history of the Guarantee Clause, it is at odds with the very structure of the Constitution, which, “in all its provisions, looks to an indestructible Union, composed of indestructible States.”²⁸⁷ The people of a state remain entitled to all the protections and privileges statehood provides, including the federal guarantee of a republican form of government, which conditions some of the privileges of states on their fulfilling their own constitutional obligations.²⁸⁸

What kind of situation would warrant this remedy today? The prospect of civil war and secession is tragically not such a farcical fear in this time of extreme political polarization. The idea of states adopting governments resembling the antebellum Southern slave aristocracies is, thankfully, more outlandish. There are, however, other equally un-republican, if not comparably savage, forms of government that realistically threaten to take hold. Part II discussed the widespread un-republican practices of partisan gerrymandering and criminal disenfranchisement. Such practices should be

285. *Texas v. White*, 74 U.S. (7 Wall.) 700, 729 (1868).

286. See THE FEDERALIST NO. 21, *supra* note 48, at 95 (Alexander Hamilton) (arguing that the guarantee would only apply to prevent changes effectuated by violence, insofar as “the whole power of the government is in the hands of the people”). Thus, while the “natural cure for an ill administration, in a popular or representative constitution, is a change in men,” where there is no representative constitution, the federal government must compel a change in men even absent a breakout of violence. See *id.* (emphasis added).

287. *White*, 74 U.S. (7 Wall.) at 725.

288. See *id.*

the object of federal action under the Guarantee Clause pursuant to Congress's legislative, spending, and potentially, seating powers. But only more total and intractable unrepugnant schemes merit state reconstruction, such as the propagation of a political caste system or corrupt electoral democracy.

The potential reemergence of such antirepublican schemes is unfortunately no longer unimaginable. Some state officials in recent years have signaled the prospect of total republican breakdown in their states by threatening to cancel or disregard elections, refusing to comply with federal law, or disempowering a political party that has been duly elected. No example of this disturbing trend is starker than the recent attempts by various state lawmakers to overturn the outcome of the 2020 presidential election in their states.²⁸⁹ These subversive maneuvers came on the heels of numerous attempts by states to throw out hundreds of thousands of legally cast ballots in an effort to alter the outcome of the 2020 election.²⁹⁰ After their candidate lost the presidency, hundreds of state lawmakers propagated the lie that the election was stolen.²⁹¹ This lie sparked a deadly insurrectionist attack on the U.S. Capitol building while the vice president and Congress tallied the electoral votes.²⁹²

Such antirepublican schemes have been building for years. Last year, Wisconsin leaders forced citizens to brave death and disease from the COVID-19 virus to vote in a special election for a state supreme court vacancy in an effort to tip the odds of securing a conservative majority on

289. See, e.g., Dartunorro Clark, *Arizona GOP Lawmaker Introduces Bill to Give Legislature Power to Toss out Election Results*, NBC NEWS (Jan. 28, 2021), <https://www.nbcnews.com/politics/politics-news/arizona-gop-lawmaker-introduces-bill-give-legislature-power-toss-out-n1256097> [<https://perma.cc/K8ME-3SAB>]; Nick Corasaniti, *Pennsylvania G.O.P.'s Push for More Power over Judiciary Raises Alarms*, N.Y. TIMES (Feb. 15, 2021), <https://www.nytimes.com/2021/02/15/us/politics/pennsylvania-republicans.html> [<https://perma.cc/G7TF-S56E>].

290. See, e.g., Amy Gardner, *Ga. Secretary of State Says Fellow Republicans Are Pressuring Him to Find Ways to Exclude Ballots*, WASH. POST (Nov. 16, 2020), https://www.washingtonpost.com/politics/brad-raffensperger-georgia-vote/2020/11/16/6b6cb2f4-283e-11eb-8fa2-06e7cbb145c0_story.html [<https://perma.cc/U25C-XRSP>]; Eric Tucker, *Voting Lawsuits Pile up Across US as Election Approaches*, ASSOCIATED PRESS (Sept. 30, 2020), <https://apnews.com/article/election-2020-virus-outbreak-donald-trump-voting-lawsuits-124eca1b346c2fa64f6add1710031ec4> [<https://perma.cc/7T8L-SG6G>]; Alana Wise, *Republicans Seek to Toss out 127,000 Ballots in Democratic-Leaning Texas County*, NPR (Nov. 1, 2020), <https://www.npr.org/2020/11/01/930052598/republicans-seek-to-toss-out-127-000-ballots-in-democratic-leaning-texas-county> [<https://perma.cc/FFT3-N4MW>].

291. See, e.g., Matt Vasilogambro, *GOP Lawmakers in 28 States, Including Pa., Have Introduced More than 100 Bills Seeking to Restrict Ballot Access*, PENN. CAP.-STAR (Feb. 16, 2021), <https://www.penncapital-star.com/government-politics/gop-lawmakers-in-28-states-have-introduced-more-than-100-bills-seeking-to-restrict-ballot-access-analysis/> [<https://perma.cc/3SY5-553R>].

292. See, e.g., Dan Barry et al., *"Our President Wants Us Here": The Mob That Stormed the Capitol*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html> [<https://perma.cc/38BP-G62E>].

that court.²⁹³ In the aftermath of the 2018 and 2016 election cycles, at least four state legislatures controlled by one party attempted to disempower a duly elected governor of the opposing party by stripping the governor of executive powers and corrupting the redistricting process.²⁹⁴ In Kentucky's last gubernatorial election, incumbent governor Matt Bevin threatened to not leave office upon very narrowly losing reelection.²⁹⁵ Two other recent elections raised the serious possibility of a state cancelling or stealing a statewide election when the controlling party confronted defeat at the polls: one, when Republicans advocated for cancelling the 2017 Alabama Senate race,²⁹⁶ and another, when Republicans considered overturning the results of the 2016 North Carolina governor's race.²⁹⁷ At the same time, state officials are increasingly disregarding federal laws with which they disagree, such as when Supreme Court of Alabama Chief Judge Roy Moore refused to enforce the constitutional right to same-sex marriage.²⁹⁸

These escalating antirepublican threats and machinations are dangerous and corrupting. For now, they mostly remain the individual blusters of ideologues as opposed to the wholesale corruption of republican government in any one state. But they portend looming republican crises, especially in battleground states, that may eventually warrant federal takeover and reconstruction.

IV. THE SEPARATION OF THE GUARANTEE POWER

The Constitution vests the guarantee power in the United States, contemplating a role for each of the federal branches to guarantee a republican form of government to every state.²⁹⁹ It is the only time the Constitution gives the United States a constitutional command. As the obligation rests on the three branches in their composite form, it is shared according to the basic tripartite division of federal power established in

293. See Astead W. Herndon & Jim Rutenberg, *Wisconsin Election Fight Heralds a National Battle Over Virus-Era Voting*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/wisconsin-primary-voting-coronavirus.html> [https://perma.cc/5NUS-QWPG].

294. These states are Kansas, Michigan, North Carolina, and Wisconsin. See Klarman, *supra* note 128, at 60–62.

295. See Jonathan Martin, *Democrats Win Control in Virginia and Claim Narrow Victory in Kentucky Governor's Race*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/05/us/politics/ky-va-ms-elections-recap.html?auth=login-google> [https://perma.cc/7JZ7-6MER].

296. See Sean Sullivan et al., *National Republican Move Against Roy Moore Grows—but Key Alabama Republicans Are Not Joining In*, WASH. POST (Nov. 14, 2017), https://www.washingtonpost.com/powerpost/paul-ryan-joins-gop-calls-for-roy-moore-to-end-campaign-amid-sexual-misconduct-allegations/2017/11/14/65a4c824-c951-11e7-aa96-54417592cf72_story.html [https://perma.cc/WE5U-6PK5].

297. See Elliott C. McLaughlin, *N.C. Governor Wants Recounts, Though Signs Point to Cooper Win*, CNN (Nov. 22, 2016), <https://www.cnn.com/2016/11/22/politics/north-carolina-governor-race-recount-pat-mccrory-roy-cooper/index.html> [https://perma.cc/GK8K-BQZD].

298. See Campbell Robertson, *Roy Moore, Alabama Chief Justice, Suspended Over Gay Marriage Order*, N.Y. TIMES (Sept. 30, 2016), <https://www.nytimes.com/2016/10/01/us/roy-moore-alabama-chief-justice.html> [https://perma.cc/7LLP-CGYN].

299. U.S. CONST. art. IV, § 4.

Articles I, II, and III. Congress has the dominant role in enforcing the guarantee pursuant to its primary responsibility for overseeing national policy and calibrating federal relations.³⁰⁰ The executive and judiciary are charged with implementing and administering Congress's agenda.³⁰¹

This allotment of power under the Guarantee Clause is mandated by the explicit textual delegation to Congress of the power to make all laws for carrying into execution "all other Powers vested by this Constitution in the Government of the United States."³⁰² It is also implied from the character of the powers assigned to the legislative, executive, and judicial branches, including the assignment of nearly all matters of policy, security, and interstate affairs to Congress in Articles I and IV. Founding-era Supreme Court cases confirm Congress's primary role in discharging the duties entrusted to the federal government.³⁰³ Thereafter, an unbroken line of cases and executive branch precedent specifically affirm Congress's prerogative to enforce the Guarantee Clause.³⁰⁴ Finally, multiple generations of Americans have endorsed Congress's role as the primary enforcer of structural political rights by ratifying constitutional amendments vesting Congress with the authority to enforce such rights.³⁰⁵

As these amendments recognize, the assignment of power to Congress to effectuate political process rights comports with the Constitution's separation of powers and is most compatible with the institutional competencies of the three branches. Contrary to widespread scholarly opinion, the judiciary is quite ill equipped to review and to enforce the Guarantee Clause. The very nature of the guarantee power, therefore, demands judicial restraint. While courts have a proper checking role to play, as one part of the manifold checks and balances that interconnectedly constrain Congress's discretion under the Guarantee Clause, it would be improper for the courts to take a heavy hand in reviewing or exercising the guarantee power. Hard review threatens to dilute the clause out of existence, and enforcement of the guarantee from the bench, while permissible, risks poorly implemented, unaccountable, and politically disastrous reforms.³⁰⁶

300. See THE FEDERALIST NO. 51, *supra* note 48, at 253 (James Madison) ("In republican government the legislative authority, necessarily, predominates.").

301. U.S. CONST. arts. II–III.

302. *Id.* art. I, § 8.

303. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625 (1842); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 434–36 (1819).

304. See *City of Rome v. United States*, 446 U.S. 156, 182 n.17 (1980); *Reynolds v. Sims*, 377 U.S. 533, 582 (1964); *Baker v. Carr*, 369 U.S. 186, 242 (1962) (Douglas, J., concurring); *Colegrove v. Green*, 328 U.S. 549, 556 (1946); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 138 (1912); *White v. Hart*, 80 U.S. (13 Wall.) 646, 649–51 (1871); *Texas v. White*, 74 U.S. (7 Wall.) 700, 730 (1868); *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 513–14 (1868); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 76–77 (1867); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500–01 (1866); *Luther v. Borden*, 48 U.S. (7 How.) 1, 42–43 (1849).

305. See Amar, *supra* note 198, at 119.

306. A separate question concerns the role of the executive branch in enforcing the Guarantee Clause. Congress rejected the notion that the president has independent authority to enforce the guarantee in the Wade-Davis Bill of 1864, which claimed the reconstruction power for Congress alone. See CONG. GLOBE, 38th Cong., 1st Sess. 3450 (1864) (statement of

A. Congressional Predominance

The assignment to Congress of principal authority to enforce the Guarantee Clause is a valuable allocation of constitutional power. It leverages institutional competencies, democratic accountability, and competing institutional incentives to ensure the power is viable but not overly perilous. Congress is best suited to determine whether a state is unrepresentative, and how to reform it, because these are quintessential political questions that fall squarely within the legislative domain.³⁰⁷ They require political calculi and negotiation, as well as policy ingenuity and expertise.

Congress's legitimacy over these matters is furthered by the relative transparency and accountability of its operations. Congressional action is generally open to public view and allows a prompt appeal to the people through a biennial election cycle.³⁰⁸ It is also the branch most responsive to mass movements and most partnered with civil society, which permits a larger share of popular influence over congressional lawmaking, from policy inception to post hoc review. It is perhaps for these reasons that the dominant periods of constitutional transition in this country have stemmed from legislative action supported by a groundswell of popular support, including Reconstruction, the New Deal, and the civil rights era. These transitions can claim a popular mandate that executive and judicially managed constitutional changes have never enjoyed.³⁰⁹ Popular reaffirmation boosts the legal legitimacy of a practice, which in turn pulls other governing institutions in line. This process of snowballing legitimacy is how Congress has successfully revised constitutional norms through legislative feats.³¹⁰

What momentum Congress gains from its institutional competency and popular support, however, is usefully checked by its institutional

Sen. Benjamin Wade). The law passed in both chambers but was pocket vetoed by President Abraham Lincoln. *See* COLEMAN, *supra* note 80, at 2. The executive branch itself came to the same conclusion in a memo prepared for President Franklin D. Roosevelt amidst a breakdown in republican government in Louisiana under Governor Huey Long. Memorandum from Alexander Holtzoff to the Att'y Gen. (Apr. 8, 1935). Consistent with the tripartite division of power under the Guarantee Clause, it is for Congress to make the first move under the clause, at least where the target state remains in the Union and is not subject to invasion or insurrection (which is dealt with in separate constitutional provisions and which the president has delegated authority to address under the Militia Acts of 1792, ch. 28, 1 Stat. 264 (May 2, 1792); ch. 33, 1 Stat. 271 (May 8, 1792)).

307. *See* Alexander, *supra* note 29, at 768–69 (“Congress has both the expertise and experience to enforce the Guarantee Clause and to resolve the political matters it implicates.”).

308. While reelection is usually a poor correlate of public approval for any single government action, especially when elections are subverted through antidemocratic tactics like gerrymandering and vote denials, it is likely a decent indicator of public approval for reconstruction legislation. Such legislation would be a banner policy initiative and therefore, a top voting issue. It is also likely to make the next election cycle fairer and more representative and thus, more indicative of the people's stance on Congress's record.

309. For example, the women's rights movement has enjoyed greater success in the areas of education and employment equality than it has in the area of reproductive justice. The former was supported by popular appeal and congressional legislation; the latter has largely been advanced by courts and continues to be beset by backlash.

310. *See* ACKERMAN, *supra* note 65, at 17–25 (describing this process of constitutional transformation).

inefficiency. Congress is the least efficient branch, requiring majority consent for any legislative action, and the branch most responsive to the interests of the states. Being comprised of members accountable to state constituencies, Congress has an institutional self-interest in exercising restraint in its meddling in state affairs—after all, a vote to target a state is a self-inflicted wound on a body comprised of state representatives. There is, therefore, an internal *détente*, or mutually assured destruction, aspect to congressional exercise of the guarantee power that valuably ratchets down the political impetus to use it. In this way, vesting the guarantee power in Congress is itself a built-in check on that power.

Scholars have argued, however, that political process rights, and voting rights in particular, “cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo.”³¹¹ The argument assumes that breakdowns in republican government are the type of political problem a representative political body is unlikely to address.³¹² A similar criticism worries that entrusting a political body with the power to alter the political process will lead to self-dealing and self-entrenchment.³¹³ In essence, these objections assume that Congress is both least likely to enforce the guarantee and most likely to abuse the guarantee power because the power permits Congress to affect its own political prospects.

But both history and political psychology cast doubt on these objections to granting Congress primary authority for ensuring republican government in the states. As the Framers recognized, it is precisely *because* Congress has a political incentive to use the guarantee power to aggrandize its own influence that it should be vested there—with proper checks.³¹⁴ In times of severe republican rot, the electorate becomes both more closely divided and more dramatically polarized. This phenomenon inevitably incentivizes one of the major political parties—the one more reliant on broader popular support—to enact republican reforms so as to gain the upper edge in a closely divided electorate. It further incentivizes targeting specific states with the worst republican track records because, in this environment, electoral shifts in just a few states are likely to make a decisive difference in the Electoral College and the composition of the Senate. Republican reform is politically feasible, therefore, because it *is* political.³¹⁵

311. ELY, *supra* note 26, at 117.

312. See Chemerinsky, *supra* note 29, at 876 (“The challenges that will arise . . . over whether a state violates the Guarantee Clause . . . are the ones that Congress is virtually certain not to address.”).

313. See Issacharoff & Pildes, *supra* note 26, at 651, 669–70.

314. See THE FEDERALIST NO. 51, *supra* note 48, at 252 (James Madison) (“Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government.”).

315. Sandy Levinson has proposed a different method of constitutional reconstruction, which is to convene a new constitutional convention. But legislative action pursuant to the guarantee power can accomplish the same constitutional reforms as a convention and, for the reasons outlined, is far more politically feasible than convincing two-thirds of the states to call for a convention against self-interest. The republican rot in the states makes it harder to elect

While it is not certain that during every republican crisis the party that is politically positioned to desire republican reforms will come to power, the rapid oscillation of political power that attends these periods makes it likely that at some point during the crisis, that party will hold a majority. These large swings are the result of that same political phenomenon of an electorate that is simultaneously closely divided and deeply polarized. The confluence of these two traits in the electorate stimulates the renewed energy of base voters, heightens the political involvement of previously apolitical actors, and destabilizes the political allegiances of moderate voters as the parties move to the poles. Such dramatic shifts in the electorate result in sudden and dramatic shifts in the political landscape.

The American electorate has experienced these exact changes over the past three decades—becoming at once extremely polarized and exceptionally closely divided.³¹⁶ This shift has, predictably, resulted in frequent swings in power. Three times during this period, the political party with the incentive to enact republican reforms has had unified control of government—including now during the 117th Congress. That party is the Democratic Party in this moment, just as it was the Republican Party in 1865. Certainly, winning united control of the federal government requires the Democrats to overcome the unrepublican obstacles discussed throughout this Article,

majorities of a reform party than it would be to get a majority in Congress. In addition, Congress has a greater incentive to exert federal power over the states than states have to invite federal intrusion. See Nancy Martorano Miller, *One-Party Rule in 49 State Legislatures Reflects Flaws in Democratic Process*, THE CONVERSATION (Feb. 20, 2019), <https://theconversation.com/one-party-rule-in-49-state-legislatures-reflects-flaws-in-democratic-process-109395> [<https://perma.cc/PRG2-RAZC>] (showing how much harder it is to overcome unrepublican lockup in state elections, as compared to federal elections).

316. See Klarman, *supra* note 128, at 71, 110, 155–56. Like the political environments of Reconstruction and the New Deal, control of all three branches of government is now up for grabs in most elections. The margins are so close that two of the last four presidents lost the popular vote and three of the last five did not win a majority of the popular vote (Bill Clinton received 43.01 percent in 1992 and 49.23 percent in 1996; George W. Bush received 0.51 percent fewer votes than Al Gore, amounting to 543,816 votes; and Donald Trump received 2.09 percent fewer votes than Hillary Clinton, amounting to 2,868,686 votes). See FEC, FEDERAL ELECTIONS 92: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 9 (1993), <https://www.fec.gov/resources/cms-content/documents/federaelections92.pdf> [<https://perma.cc/7KAQ-M72V>]; FEC, FEDERAL ELECTIONS 96: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 11 (1997), <https://www.fec.gov/resources/cms-content/documents/federaelections96.pdf> [<https://perma.cc/J3X7-UVBB>]; FEC, FEDERAL ELECTIONS 2000: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 11 (2001), <https://www.fec.gov/resources/cms-content/documents/federaelections00.pdf> [<https://perma.cc/4DU5-5RMM>]; FEC, FEDERAL ELECTIONS 2016: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 5 (2017), <https://www.fec.gov/resources/cms-content/documents/federaelections2016.pdf> [<https://perma.cc/UL4Z-EPWC>]. Simultaneously, turnout in the last five presidential elections jumped over seven percentage points from the four before that, and the share of the electorate identifying as independent increased by 10 percent. PEW RSCH. CTR., A DEEP DIVE INTO PARTY AFFILIATION 1–2 (2015), <https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2015/04/4-7-2015-Party-ID-release.pdf> [<https://perma.cc/6YFW-FFMH>]; *Party Affiliation*, GALLUP, <https://news.gallup.com/poll/15370/party-affiliation.aspx> [<https://perma.cc/6XHN-UPBD>] (last visited Mar. 16, 2021).

including partisan gerrymandering, disenfranchisement, and the malapportionment of the Senate and Electoral College. They are boosted, however, by the cycles of political oscillation that characterize a deeply polarized and closely divided electorate. The base of the party is energized and prodemocracy reformers are well organized and well funded. In states across the country, election reformers are beating the odds to create independent redistricting commissions and put ethics, campaign finance, and election access initiatives on the ballot.³¹⁷ Democrats are also younger, more diverse in an increasingly diverse country, and more closely aligned with a majority of independent voters.³¹⁸

It is inaccurate, therefore, to assume that those in power have no incentive to reform the processes that put them in power. To the contrary, it is precisely periods of republican crisis that create the incentives to enact republican reforms and create a higher likelihood of political actors doing so. History bears this out. Congress has not indefinitely resisted changes to the status quo. Rather, it has quite consistently acted to expand and defend the franchise precisely in moments where the political process is suffering extreme distress. For example, it is clear that the Reconstruction Republicans used the Guarantee Clause to usher in radical political reforms in the South in an intertwined effort to effect social change *and* to expand their reach as a national party.³¹⁹ They understood the political reality that permitting Black Americans to vote in the South would keep Confederate elites from being elected and undoing the work of Reconstruction.³²⁰ The republican crisis that caused deep political division thus worked to incentivize pro-republican reform.

The same story repeated itself in the early part of the twentieth century. Republican rot stemming from massive disenfranchisement and political corruption, along with extreme partisan polarization, spurred Progressive-era Republicans to secure the direct election of senators,³²¹ the initiative and referendum, and the enfranchisement of women. It was a new Republican majority elected to both the House and Senate in 1919 that immediately set about ratifying the Nineteenth Amendment to shore up the party's political support in the upcoming 1920 presidential election.³²² In the civil rights era, a Democratic Congress and president acted to address the dramatically

317. Ten states have already adopted independent redistricting commissions: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Michigan, Missouri, Montana, and Washington. *Independent Redistricting Commissions*, BALLOTPEdia, https://ballotpedia.org/Independent_redistricting_commissions [<https://perma.cc/6AH3-N678>] (last visited Mar. 16, 2021).

318. 46 percent of independents (representing 17 percent of the total population) lean toward the Democratic Party, while 35 percent (representing 13 percent of the total population) lean Republican. John Laloggia, *6 Facts About U.S. Political Independents*, PEW RSCH. CTR. (May 15, 2019), <https://www.pewresearch.org/fact-tank/2019/05/15/facts-about-us-political-independents/> [<https://perma.cc/W5QY-3EMP>].

319. *See* Biber, *supra* note 237, at 144–47.

320. *See id.*

321. *See* AMAR, *supra* note 55, at 409–15.

322. *See id.* at 423–26.

unrepublican disenfranchisement of Black Americans by passing sweeping voting rights reforms that upended established federalist relations.³²³ Their reforms had the quite intentional consequence of also expanding Democratic power in the South.³²⁴ Again, during the Vietnam War, a time of intense political strife and republican infirmity, as young citizens dying for their country abroad were denied the right to help shape it at home, a Democratic Congress lowered the voting age to eighteen in all state and local elections ahead of the hotly contested 1972 election cycle.³²⁵ The Supreme Court struck down this law and was promptly overruled by legislative and popular command with the ratification of the Twenty-Sixth Amendment.³²⁶

This same confluence of party interest and republican distress has also driven Congress to usher in critical periods of broader constitutional reform. The founding, Reconstruction, the New Deal, and the civil rights era were all the culminations of periods “of political agitation that prepared the way for a decade of decisive change” led by Congress.³²⁷ These transformations progressively shifted the United States away from “a decentralized federal system enabling white men to pursue their self-interest within a market economy,”³²⁸ toward a strong national government with the power to ensure equality and economic welfare—but that remains captured by oligarchical interests and aristocratic political processes. Congress (or a legislative body like the Constitutional Convention) was a necessary engine of these badly needed transformations in the past precisely because such transformations were political, and politically advantageous, in nature.³²⁹

That there is a political valence to republican reform, or constitutional reform more broadly, should not be off-putting. Most republican reforms are wolves dressed in wolves’ clothing. Reconstruction that affords a political advantage should not be immediately dismissed as devolution into an autocratic power grab. The Reconstructionists were not autocrats, even as they cemented their power through republican reforms because, like the New Deal Democrats and civil rights leaders after them, they did not perpetuate their political power by delegitimizing democracy, stifling majority rule, or suppressing government transparency and accountability. To the contrary, they pursued political approval the quintessentially democratic way: by enacting popular reforms that expanded the democratic legitimacy of government.³³⁰

At the same time, the potential for abuse of the guarantee power is checked by various restraints. Besides the built-in inertia to use the guarantee power sparingly, congressional action must overcome various internal dissent

323. *See id.* at 441–45.

324. *See id.* at 444–45.

325. *See id.* at 445–47.

326. *Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970).

327. ACKERMAN, *supra* note 65, at 7.

328. *Id.* at 8.

329. Even the New Deal, which was primarily led by President Roosevelt, was carried out with the full institutional and political backing of a majority of the Congress. *See id.* at 24.

330. *See id.* at 20–22.

mechanisms, including constitutional requirements like majority rule and parliamentary hurdles innate to the committee system and to the debate and amendment processes. There are also prolific external checks on Congress's guarantee power: the presidential veto, executive nonenforcement, judicial review, public opinion, and mass mobilization, to name a few. The separation of parties, just as much as the separation of powers, also serves as a crucial check on a power that requires immense political capital and strategic planning. Each of these checks has proven especially potent in times of divided government and political polarization. These checks ensure that Congress's use of the Guarantee Clause, like its use of its Article I powers, comports with popular demand and constitutional limitations.

B. Judicial Restraint

The textual delegation of the guarantee power to Congress, coupled with Congress's unique institutional capacity to exercise this power, supports a limited role for the courts in both reviewing congressional action under the clause and in exercising the guarantee power from the bench. The Supreme Court is fairly ill suited to the tasks of reviewing and enforcing a power to develop political process rights. On the reviewing side, the Court is accustomed to constraining congressional action to conform with conventional constitutional boundaries. But this is particularly inappropriate when reviewing a power that *permits* improvements to our constitutional scheme. On the enforcement side, the Court has proven itself doctrinally and institutionally ill equipped to protect political process rights in times of republican crisis. The Court is not prohibited by the Constitution to reverse course and develop the doctrinal framework for fulfilling the federal government's guarantee obligation. But its track record illustrates the folly in expecting, or even desiring, the Court to get into the business of enforcing the Guarantee Clause.

1. Modest Review

A circumscribed review process is vital for reviewing a power whose very purpose is to usher in major changes to state governments. Such reforms are likely to be novel and to upend constitutional norms. They will inevitably have some effect on both individual and structural constitutional rights. This is permissible under the Guarantee Clause in pursuit of safeguarding republican government in the states. Holding Congress to current understandings of rights and limits, therefore, would essentially amputate the Guarantee Clause from the Constitution. If the Court does not give sufficient discretion to Congress to alter constitutional norms pursuant to the Guarantee Clause, it will rewrite that power in the guise of reviewing it.

The Court's proper role in reviewing Guarantee Clause legislation, therefore, is not to ensure Congress comports precisely with the constitutional status quo but to ensure it is not abusing its power in pursuit of republican reform. There is no room between these limits for most exercises of congressional authority: if Congress oversteps its bounds, it has abused

its power. The Guarantee Clause is slightly different, however. Because it permits Congress to define the meaning of republican government, it inherently empowers Congress to reevaluate constitutional norms to bring the states into alignment with republican principles. What the clause does not permit is for Congress to use this power pretextually for the purpose of self-entrenchment or self-aggrandizement. The Court, therefore, must serve as a classic check on congressional power—meaning as a guardian against abuse of that power—without serving in its typical role as a steward of conventional constitutional boundaries.

There are three inflection points in the use of the guarantee power and thus, three places for possible abuse. The first is to determine what republican government requires, the second is to establish whether a state is in violation of this requirement, and the third is to select the means by which to correct the violation. The first and third determinations are quintessential political questions about which the Court should defer to Congress. These are questions of evolving norms and values, of policy and of politics. They fall squarely within Congress's constitutional bailiwick and should be subject to nothing more than rational basis review. The question here is solely whether Congress's criteria for republican government is rationally related to enhancing the principles of popular sovereignty and equal citizenship and whether the means selected is rationally related to enforcing that criteria.³³¹

The second point of analysis—whether a state has violated the new republican norm—is a question of fact and highly susceptible to pretextual determinations. Evaluating this type of legislative finding is within the judiciary's core competence. Though the Court should view congressional findings with deference, as it does when evaluating other legislative enactments, it should examine the adequacy of these findings and, most importantly, peek behind the legislative record to interrogate whether the determination that a state's republican form has devolved is a pretext for self-dealing or self-entrenchment. Courts regularly examine government motives when reviewing whether a government action violates the Equal Protection Clause or the First Amendment precisely because these rights protect against the abuse of government discrimination.³³² So too with political reform pursuant to the Guarantee Clause. The abuse to be checked is the

331. The analysis ought, therefore, to resemble that which the Court uses for reviewing legislation passed pursuant to the Thirteenth Amendment. Like the Guarantee Clause, the Thirteenth Amendment grants a positive guarantee against slavery, which itself is a political construct best left to Congress to define. Accordingly, the Court defers to Congress's rational determination as to "what are the badges and the incidents of slavery" and permits Congress to act rationally to legislate against them. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

332. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–42 (1993) (examining governmental purpose for laws burdening religious exercise under the Establishment Clause); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184–85 (1979) (examining government interests in the Equal Protection Clause context); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (requiring analysis of whether governmental interest is related to the suppression of free expression).

government's use of this power to treat certain citizens' political rights more favorably than others'.³³³

Two examples illustrate the proper analysis. Suppose Congress determines that partisan gerrymandering is unrepugnant and passes a law banning its use in drawing state voting districts. The Court should review the rationality of the determination that political gerrymandering violates the principles of popular sovereignty and equal justice and that the means selected for eliminating this practice are rationally related to accomplishing that end. It must then take a closer look at whether partisan gerrymandering is actually occurring in the states. If Congress can amass a record that it is occurring, the Court should uphold the law. Conversely, imagine Congress determines that overvoting is contrary to republican government and passes a law requiring voters to present government-issued identification to vote. The Court's review of whether overvoting is unrepugnant and whether the hypothetical voter identification law is a proper means of correcting this problem is limited to rational basis review. It must then take a closer look at whether overvoting is actually occurring in the states. If the problem is a pretextual excuse for imposing a politically convenient law, the Court must exercise its constitutional checking function and strike down the law as an abuse of the guarantee power.

These examples also illustrate, by way of juxtaposition, how the Supreme Court has recently fundamentally erred in reviewing similar legislation. In *Crawford v. Marian County Election Board*,³³⁴ the Court upheld Indiana's stringent voter photo identification law without requiring Indiana to present any real evidence that voter impersonation fraud was occurring in the state.³³⁵ The Court rightly accepted the state's determination that voter fraud is a legitimate problem states may address and that an identification law may help address the problem, but it refused to peek behind the curtain to see if the problem existed in the state at all.³³⁶ The Court also reasoned that the partisan nature of the law is of no avail so long as a valid, nonpartisan rationale is offered.³³⁷ Certainly, the partisan valence of a law is not a reason in itself to strike it down. But by focusing solely on the *legal* justification for the law, as opposed to its *factual* justification, the Court failed to

333. Only two scholars have engaged with this question of the appropriate standard of review, though both somewhat cursorily. Adam Kurland agrees the courts should review Guarantee Clause legislation under rational basis review, drawing on the standard the Supreme Court used to review Reconstruction legislation in *White*. See Kurland, *supra* note 127, at 458–59. Mark Alexander also cautions deference but goes further, taking the position that the power is textually committed to Congress and therefore nonreviewable under the political question doctrine. See Alexander, *supra* note 29, at 826–27. His analysis seems to interweave the policy reasons for judicial nonenforcement of the Guarantee Clause with judicial nonreview of Guarantee Clause legislation. Though the political question doctrine is employed to abstain both from judicial enforcement of a right and judicial review of congressional or executive action, the reasons for abstention in each context are different, as explained below.

334. 553 U.S. 181 (2008).

335. See *id.* at 191–97.

336. See *id.* at 194–96.

337. See *id.* at 203–04.

distinguish partisan abuse from political reform. The Court made the same analytical error in *Husted v. A. Philip Randolph Institute*,³³⁸ in upholding an Ohio law that removed voters from the state's voter rolls if they had not voted in the last two elections and failed to return a postcard.³³⁹ Again, the Court rightly deferred to Ohio on whether voter roll accuracy is a legitimate concern, but it shirked its checking responsibility by disregarding entirely the fact that voter roll inaccuracy is not a problem in Ohio and that the state's solution to this fictitious problem was not rationally related to solving it.³⁴⁰ In reality, the postcard system produced massive and racially biased inaccuracies in the rolls.³⁴¹

Judicial modesty in this area is consistent with the Supreme Court's understanding of the limits of its jurisdictional competence to address questions of a fundamentally political nature. As seminally articulated in *Baker v. Carr*,³⁴² the political question doctrine holds that claims that require the Court to make decisions the Constitution assigns to the political branches fall outside the Court's Article III jurisdiction.³⁴³ An act of Congress under the Guarantee Clause is not immunized from review by the political question doctrine; actions taken by the political branches that have a substantial effect on states or individuals rarely should be. But the same underlying policy considerations for political question abstention are present when the Court reviews an act pursuant to the guarantee power.³⁴⁴ In particular, a more robust review of Guarantee Clause legislation will require the courts to make judgments about the republican health of states. There are likely few *judicially* manageable standards for this, which risks drawing the Court into the thorniest of political thickets and sparking a catastrophic loss of trust and institutional integrity.³⁴⁵ The political question doctrine is therefore instructive for why courts should demonstrate heightened judicial humility when reviewing Congress's exercise of the guarantee power.

This was undoubtedly the Supreme Court's calculus during Reconstruction when it sidestepped reviewing Congress's use of the guarantee power to dismantle and reconfigure the ex-Confederate states. The Reconstruction Court's refusal to review Congress's ratification scheme for the Fourteenth and Fifteenth Amendments was particularly proper. Perhaps counterintuitively, judicial restraint is especially warranted where Congress acts to enforce the guarantee by inducing states to pass a constitutional amendment. The amendment process is the only tool available to the political

338. 138 S. Ct. 1833 (2018).

339. *See id.* at 1841–48.

340. *See id.* at 1847.

341. *See id.* at 1864 (Sotomayor, J., dissenting).

342. 369 U.S. 186 (1962).

343. *See id.* at 209–11.

344. Though some have suggested the political question doctrine is waning, the Court's full-throated embrace of the doctrine in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), puts a stop in that dam.

345. *See infra* Part IV.B; *see also* Hasen, *supra* note 197, 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.”).

branches to check the Supreme Court's authority to say what the Constitution means. It is for this reason that the Court refrains from reviewing the Article V amendment process. Where Congress effectuates an amendment under Article V via the guarantee power, therefore, it is vital to the system of checks and balances that the Court abstain from reviewing that use of the guarantee power.³⁴⁶ In this one context, Congress's actions cross the line from meriting deferential treatment to being unreviewable.

Though giving Congress wide discretion to make structural political changes in the states would recalibrate current separation of powers doctrine, there is less cause for concern than might immediately appear.³⁴⁷ The Supreme Court has far more often struck down or whittled away necessary reforms than been a guardian of republican rights against congressional overreach.³⁴⁸ Time and again, it has truncated the scope of constitutional rights and refused to interpret capacious rights language in the Constitution, well, capaciously. It has written out of the Constitution fundamental rights, including those protected by the Privileges or Immunities Clause of the Fourteenth Amendment, and it has significantly diminished Congress's rights-enforcement authority.³⁴⁹ Where it has struck down congressional overreach, it has mostly done so to vindicate economic liberty as opposed to political equality. Altering the balance of power between the judiciary and Congress under the Guarantee Clause, therefore, is more likely to enhance, rather than diminish, the advancement of political process rights.

2. The Empty Promise of Judicial Enforcement

Whether federal courts should be involved in *enforcing* the guarantee power in the first instance is a different question, but it is one that raises many of the same issues of judicial competence. The Supreme Court has a long and nearly unbroken line of precedent declaring the Guarantee Clause nonjusticiable.³⁵⁰ The reasoning underlying these decisions has been the subject of nearly universal criticism by scholars for the past half century.³⁵¹ Yet, as these scholars have argued for the clause's justiciability, eagerness for a judicial solution to antirepublican transgressions by states has crowded out any serious reflection on whether the Court is a desirable or effective vehicle for republican reform.

A holistic and candid assessment of the Court's record in defending and expanding political equality reveals a sorry tradition of preventing, curtailing, or ignoring deeply needed political reforms. In case after case, the

346. See Chemerinsky, *supra* note 29, at 854, 859, 870.

347. Hasen, *supra* note 197, at 206 ("Interpreting the Guarantee Clause to give Congress essentially *carte blanche* to make structural changes in the political process without Supreme Court oversight would work a fundamental change in Congress-Court relations.").

348. See *supra* notes 202–04 and accompanying text.

349. See *supra* notes 202–04 and accompanying text.

350. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 182 n.17 (1980); *Colegrove v. Green*, 328 U.S. 549, 556 (1946); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 79–80 (1930); *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).

351. See *supra* note 29 and accompanying text.

Court proves itself at best a mediocre champion of political rights and at worst, a complicit, if not active, perpetrator of political oppression. To wit, one of the only times the Court reviewed a Guarantee Clause claim, it held that denying women the right to vote did not render a state government unrepublican.³⁵² At the same time, at the height of the Jim Crow era, the Court neutered the Privileges or Immunities Clause, cabined the Fourteenth Amendment's reach to affirmative state action, and sanctioned extreme racial inequality and segregation.³⁵³ Thereafter, the Court endorsed literacy tests and poll taxes as prerequisites for voting.³⁵⁴ It continued to tolerate political subjugation and violence well into the twentieth century, including by acquiescing to the forceable denial of political and civil rights, upholding white primaries, and suppressing free speech and assembly.³⁵⁵ The trajectory of the Court's track record has never really improved. Over the past fifty years, it has not only permitted but actively exacerbated disenfranchisement and political inequality, while undercutting Congress's ability to enact civil rights reforms.³⁵⁶ The explanations for this miserable record are many and sometimes idiosyncratic, attributable perhaps to an unlucky confluence of timing, personalities, and political reality. But the principle causes of the Court's failures in this area are institutional—they are the direct result of structural disadvantages and doctrinal flaws.

First, as scholars of political entrenchment have increasingly brought to light, the Court has developed few analytical tools for resolving structural political problems by having committed itself to a doctrine that myopically reviews such questions solely through an individual rights framework.³⁵⁷ This self-inflicted wound on the Court's competence has led to an amassing of jurisdictional safety valves, including the political question doctrine and the generalized grievance doctrine of standing, that remove the Court entirely from safeguarding the health of the democratic process. Indeed, the few times the Court has vindicated political process rights, it only accomplished

352. *See* *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175–76 (1874).

353. *See* *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *The Civil Rights Cases*, 109 U.S. 3, 17–19 (1883); *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 80–82 (1873).

354. *Guinn v. United States*, 238 U.S. 347, 365–66 (1915); *Williams v. Mississippi*, 170 U.S. 213, 221–25 (1898).

355. *Korematsu v. United States*, 323 U.S. 214, 222–23 (1944) (sanctioning the forcible internment of Japanese-Americans), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Grovey v. Townsend*, 295 U.S. 45, 53–55 (1935) (upholding the white primary), *overruled in part by* *Smith v. Allwright*, 321 U.S. 649 (1944); *Schenck v. United States*, 249 U.S. 47, 52–53 (1919) (permitting the punishment of political speech); *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1876) (holding the Fourteenth Amendment does not protect against private suppression of constitutional rights).

356. *See* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–08 (2019); *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1843–44 (2018); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 814–18 (2015); *McCutcheon v. FEC*, 572 U.S. 185, 218–23 (2014); *Shelby County v. Holder*, 570 U.S. 529, 553–55 (2013); *Citizens United v. FEC*, 558 U.S. 310, 361–62 (2010); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200–03 (2007); *United States v. Morrison*, 529 U.S. 598, 619 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997); *Buckley v. Valeo*, 424 U.S. 1, 652–53 (1976) (*per curiam*).

357. *See supra* note 27.

this result because the political harm at issue was amenable to correction through an individual rights analysis under the Equal Protection Clause or the Fifteenth Amendment.³⁵⁸

Even if the Supreme Court were to develop the appropriate doctrinal standards for enforcing the Guarantee Clause, however, it would find it difficult to apply such standards in a manageable and evenhanded fashion.³⁵⁹ This is true as a matter of legal doctrine and institutional structure. First, as a matter of doctrine, there is no principled interpretive methodology for determining the contemporary meaning and requirements of republican government that is divorced from baseline political assumptions. For example, there is no legal formula for why partisan gerrymandering violates republicanism while majority-minority districts or term limits do not. All three work extraconstitutional, state-imposed limitations on the people's choice of representatives. The answer lies in policy determinations about what best serves political equality.

The Guarantee Clause is thus ill suited for judicial enforcement because its standards rely on political assessments. The power is bounded by nothing more than the meaning of republican government, which is an indefinite and evolving political concept. Its indefiniteness alone is not judicially unmanageable; the Due Process and Equal Protection Clauses are equally indeterminate. But unlike those clauses that relate to common-law rights, the guarantee of republican government refers to a contemporary set of politically constructed rights.

The guarantee power, unlike the Fourteenth Amendment, was designed to keep states within the specturm of contemporary republican norms—and there is no apolitical formula for defining that specturm. It is the contemporary political norms, not legal standards, that explain how slavery was apparently consistent with republicanism—until it was not—and why, when it no longer was, women's disenfranchisement was still unproblematic, until that too fell out of republican repute, even as young adults continued to be denied the vote. All of these practices violated popular sovereignty and equal citizenship, but those are political, not legal, principles. And while drawing these kinds of socially constructed lines is not a problem for Congress as a policymaking representative body, it is more difficult and problematic for courts to do so.

358. See *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183–87 (1979); *Lubin v. Panish*, 415 U.S. 709, 718 (1974) (holding a barrier to the ballot violated a candidate's individual rights under the Equal Protection Clause); *Bullock v. Carter*, 405 U.S. 134, 149 (1972); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (invalidating poll taxes in state elections under the Equal Protection Clause); *Reynolds v. Sims*, 377 U.S. 533, 576 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 5–8 (1964) (eliminating malapportionment under the Equal Protection Clause); *Baker v. Carr*, 369 U.S. 186, 237 (1962); *Gomillion v. Lightfoot*, 364 U.S. 339, 340–41 (1960) (holding racial gerrymanders unconstitutional under the Fifteenth Amendment); *Terry v. Adams*, 345 U.S. 461, 470 (1953) (striking down white primaries under the Fifteenth Amendment and the Equal Protection Clause); *Guinn*, 238 U.S. at 363–64 (invalidating grandfather clauses under the Fifteenth Amendment).

359. See *Baker*, 369 U.S. at 217–18 (reasoning that Guarantee Clause claims are unjusticiable because they lack discoverable and manageable standards).

Second, beyond the doctrinal difficulties in enforcing the Guarantee Clause, the Supreme Court is also institutionally ill suited to the task. The Court is an unrepresentative, unelected political body cloaked in the garb of a neutral arbiter. The Constitution designed it as such. It is part of an independent branch whose composition, jurisdiction, and regulations are controlled almost entirely by political processes. It does not operate impartially so much as autonomously, according to political ambitions and agendas. This design renders the Court neither legitimately political nor truly apolitical, putting it at an awkward disadvantage when it comes to the task of defining contemporary political norms.

The first hurdle this design presents is that it ensures the Court will exercise the guarantee power through the lens of the Justices' political priors but provides them with no political accountability mechanisms that would benefit their analyses. Lacking meaningful transparency, accountability, and representativeness, the Court is more likely to err in its political calculus about when and how to fulfill the guarantee. Worse still, any such attempts risk catastrophic institutional damage. The Court's power depends on public acceptance of its legitimacy, which itself depends on the Court maintaining a mirage of impartiality. Where the Court appears overtly political, it weakens public confidence and with it, its own authority. The Court appears to have understood this predicament recently when declining to intervene in the practice of partisan gerrymandering so as to avoid political pronouncements that risked undermining the public perception of judicial neutrality.³⁶⁰

The Court's lawmaking authority is also less suited to devising republican reforms. Its ability to pronounce legal reforms is highly constrained by the procedural posture and issues presented in the cases before it. Case-by-case review cabins courts' remedial discretion to mostly two options: upholding or invalidating the specific practice before them. It rarely permits the sort of fine-tuned and imaginative solutions required to remediate republican rot. A legislative body, conversely, has the authority to investigate political problems holistically, in their varying origins and iterations, and to craft nuanced and comprehensive reform programs that need not have a tight fit with remedying one specific political injury.

Indeed, it was not any of the Court's holdings expanding political process rights in the civil rights era—including its invalidation of malapportionment, racial disenfranchisement measures, and barriers to ballot access—that had anywhere near the democratizing impact of the suite of civil rights legislation Congress enacted. The crown jewel of Congress's legislative assault on the racist republican rot infecting the states at that time was the Voting Rights Act of 1965. That Act alone outlawed literacy and moral character tests, penalized public and private vote suppression tactics, and set up a system of federal preclearance, observation, and voter registration in problematic

360. See, e.g., *Rucho*, 139 S. Ct. at 2500 (holding that partisan gerrymandering claims are nonjusticiable political questions).

districts.³⁶¹ As a result of the Act, a quarter million Black Americans registered to vote the same year the law passed; within three years, the number of registered Black Americans doubled in the South; within twenty years, the number of Black Americans elected to the South's state legislatures grew from three to 176.³⁶² By abandoning a case-by-case approach for sweeping, federalized reform, Congress did what the Court had not for over one hundred years.

Finally, the Court is not well positioned to respond to political crises, and the guarantee power is essentially a republican emergency response power. This is true for many of the reasons just articulated: the Court is least able to negotiate political solutions or to act in an overtly political manner. It is also true because the Court requires far more time than the political branches to review and respond to an emergency. It is possible to circumvent the lengthy timeline of litigation through emergency petitions, but doing so would do nothing to address why the Court requires time in the first instance. It is underresourced and inexperienced at resolving issues without the benefit of the record that litigation produces. It is no wonder, therefore, that again and again, the Court proves incapable of or unwilling to resolve national or immediate political crises.

All these observations are not necessarily meant to identify undesirable traits in how the Court operates or to provide an especially negative assessment of the Court's role. They are rather meant to point out that the Court is fairly ill suited to address the republican rot in America today. Its limited doctrinal framework and weak historical record show it is a poor overseer of political process rights. This conclusion is also not meant to suggest that there is no role for the Court to play in enforcing the Guarantee Clause. Litigants should continue to press the Court to develop new doctrine to protect political process rights on a parallel track with the political branches and the states. What this analysis does argue is that placing all our eggs in the basket of judicial activism is highly improvident—it is a strategy with little chance of success that could only ever deliver incremental reform, while diverting our best legal and political resources away from the more viable avenue for accomplishing seismic, systemic reforms. Legislative intervention is a far more potent tool for resetting democracy than judicial tinkering. When republican reforms are within the majority party's political interest, there is no more powerful lever for breaking a cycle of tit-for-tat political devolution and engaging in a full reset of constitutional republicanism.

361. Congress passed the Voting Rights Act of 1965 precisely *because* the Supreme Court continuously failed to address the systemic disenfranchisement of minority voters. See Richard L. Hasen, *The Benefits of "Judicially Unmanageable" Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469, 1500–01 (2002).

362. Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 LEGIS. STUD. Q. 111, 112 (1991); see also AMIE JAMIESON ET AL., U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000 (2002), <https://www.census.gov/prod/2002pubs/p20-542.pdf> [https://perma.cc/YVJ7-KN2S].

The Guarantee Clause, then, is not so much an “empty vessel” absent judicial enforcement, as it has so often been described; it is instead a legislative vessel in which to pour our modern notions of popular sovereignty and equal citizenship. This was always the intended function of the clause. Writing in 1807, John Adams affirmed that the word republican “is so loose and indefinite that successive predominant factions will put glosses and constructions upon it as different as light and darkness.”³⁶³ The power to gloss the Constitution resides in the people; and the power to test new constructions of the clause properly belongs in Congress.

CONCLUSION

From the founders to the Reconstructionists, progressive era reformers, New Deal Democrats, and civil rights champions, multiple generations of Americans have periodically asserted the right to redefine the rules of the Republic. Their mission has been symbiotically destructive and restorative, centered on recalibrating state authority and expanding equal sovereignty. Through this work, our systems of government have endured grave episodes of republican rot. They have endured because they have adapted. As Giuseppe di Lampedusa’s *The Leopard* explains: for things to remain the same, everything must change.³⁶⁴ And everything can change quite rapidly when conditions are right—as they are right now.

Indeed, the conditions are not only ripe, they are fleeting. For republican government to survive, its modern failures must be addressed without delay. The place to start is a large-scale reconstruction of our political economy at the state level under the Guarantee Clause, which will have the effect of making the federal government less polarized and dysfunctional. To this end, the new Democratic Congress should pass laws under the Guarantee Clause reforming districting and protecting access to the ballot. It should further incentivize states to enfranchise all their adult citizens, limit political entrenchment and the anticompetitive lockup of democratic markets, and reduce the influence of money on governance. Congress should also send constitutional amendments to the states, along with incentives to ratify those amendments, addressing outmoded provisions that increasingly work unrepugnant harm to the nation, including abolishing the Electoral College, reconfiguring the Senate, and adding explicit protections for political process rights.

Congress, not the judiciary, is the right institution to lead this work. Scholars, policymakers, and activists ought, therefore, to focus less on litigation strategies for protecting our elections and more on developing the details of systemic political process reforms. In the guide of Reconstruction, part of this work must include critically rethinking the structural relationships between the federal branches, the federal and state governments, and the

363. Letter from John Adams to Mercy Warren (July 20, 1807), in 4 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 332, 353 (Boston, Mass. Hist. Soc’y ser. 5 1878).

364. See GIUSEPPE DI LAMPEDUSA, *THE LEOPARD* 40 (Archibald Colquhoun trans., William Collins Sons & Co. Ltd. 1960) (1958).

people and their governments to more robustly safeguard popular sovereignty and equal citizenship. The Guarantee Clause offers the most direct and viable path forward for implementing such reforms.