
**JUSTIFYING A REVISED VOTING RIGHTS ACT: THE
GUARANTEE CLAUSE AND THE PROBLEM OF
MINORITY RULE**

GABRIEL J. CHIN*

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In Shelby County v. Holder, the Supreme Court invalidated Section 4 of the Voting Rights Act of 1965, which required certain jurisdictions with histories of discrimination to “preclear” changes to their voting practices under Section 5 before those changes could become effective. This Article proposes that Congress ground its responsive voting rights legislation in the Constitution’s Guarantee Clause, in addition to the Fourteenth and Fifteenth Amendments. The Court has made clear that the Guarantee Clause is a power granted exclusively to Congress and that questions of its exercise are nonjusticiable. It is also clear from the Federalist Papers and from scholarly writing – as well as from what little the Court has said – that the purpose of the Guarantee Clause is to protect majority rule. That is precisely what was at issue after the Civil War when Congress first used the Guarantee Clause to protect African American votes. As an absolute majority in three states and over forty percent of the population in four others, African Americans possessed political control when allowed to vote; when disenfranchised, they were subjected to minority rule. African Americans are no longer the majority in any state. But in a closely divided political environment, whether African Americans and other

* Professor of Law, University of California, Davis School of Law. Randy Wagner and I worked on an iteration of project several years ago, and I am extremely grateful for his insight and expertise. Thanks to Chris Elmendorf and James Gardner for helpful comments; I also benefitted from discussions with Spencer Overton, Dan Tokaji and Franita Tolson. I was a signer of a law professor’s amicus brief supporting the constitutionality of the Voting Rights Act in *Shelby County*.

minorities can vote freely may be decisive in many elections. For this reason, Congress could legitimately ground a revised Voting Rights Act in the Guarantee Clause, and the Court should treat its validity as a nonjusticiable political question committed by the Constitution to Congress.

INTRODUCTION

In one of its most momentous and shocking decisions in decades, *Shelby County v. Holder*,¹ the Supreme Court struck down Section 4 of the Voting Rights Act of 1965² by a vote of five to four.³ Section 4 made certain jurisdictions with histories of racial discrimination in voting subject to Section 5,⁴ which in turn required them to “preclear” changes to their voting practices with the Attorney General or the U.S. District Court for the District of Columbia.⁵ The preclearance requirement of Section 5 prevented jurisdictions from disenfranchising voters and affecting the outcome of elections, perhaps irremediably, before those changes could be challenged.⁶

Essentially, the majority concluded that the Voting Rights Act worked; the Act ended the century of systematic suppression of the votes of African

¹ 133 S. Ct. 2612 (2013).

² Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973–1973bb-1 (2006)) (subjecting certain jurisdictions to preclearance requirement of Section 5).

³ *Shelby Cnty.*, 133 S. Ct. at 2631.

⁴ *Id.* at § 5 (“Whenever a State . . . shall enact or seek to administer any voting qualification . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.”). See generally J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667, 680 (2008) (explaining that Section 5 required the Justice Department to preclear all changes in election laws in “Deep South jurisdictions”).

⁵ See generally U.S. COMM’N ON CIVIL RIGHTS, REAUTHORIZATION OF THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT: AN EXAMINATION OF THE ACT’S SECTION 5 PRECLEARANCE PROVISION 12-13 (2006), archived at <http://perma.cc/9RM7-GE2A> (stating that the Department of Justice “must preclear (approve) any changes in the method of voting that do not leave voters worse off” in effectively exercising the right to vote).

⁶ Section 2 of the Act prohibits actions that have the purpose or effect of denying the right to vote on account of race. See generally Ming Hsu Chen & Taeku Lee, *Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act*, 3 U.C. IRVINE L. REV. 359 (2013); Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377 (2012); Luis E. Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL’Y 125 (2010); Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579 (2013); Terry Smith, *Disappearing Districts: Minority Vote Dilution Doctrine as Politics*, 93 MINN. L. REV. 1680 (2009).

Americans, and the very increase in minority registration and turnout achieved by the Act eliminated the justification for special regulation of particular jurisdictions.⁷ After the decision, many formerly covered jurisdictions immediately implemented voting changes that were likely to suppress Democratic voter turnout.⁸

Congress, which in 2006 virtually unanimously extended the expiring provisions of the statute struck down by the Court,⁹ introduced a bipartisan bill to create a new coverage formula for Section 4 so certain jurisdictions will again be subject to preclearance under Section 5.¹⁰ This article proposes that when Congress acts in the area of voting rights, it should explicitly ground the law not only in the Fourteenth¹¹ and Fifteenth Amendments¹² but also in an exclusive power of Congress which the Court did not consider in *Shelby*

⁷ *Shelby Cnty.*, 133 S. Ct. at 2628-29 (2013) (explaining that “because of the Voting Rights Act voting tests were abolished . . . and African-Americans attained political office in record numbers.”). See also *id.* at 2632 (Ginsburg, J., dissenting) (“In the Court’s view, the very success of § 5 of the Voting Rights Act demands its dormancy.”). Many scholars have also noted its success. See, e.g., Kareem U. Crayton, *Reinventing Voting Rights Preclearance*, 44 IND. L. REV. 201, 202 (2010) (asserting that the “preclearance regime has promoted improvements in political participation and office-holding for racial minority groups”); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1712 (2004) (stating that the Voting Rights Act resulted in “tremendous political gains for minorities”); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 177 (2007) (describing the Voting Rights Act as the “cornerstone of the architecture of the federal election law and civil rights guarantees”); Daniel P. Tokaji, *If It’s Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 785 (2006) (“There can be no question that the Voting Rights Act of 1965 (VRA) has been extremely effective in removing barriers to participation in the democratic process by people of color.”).

⁸ See Kara Brandeisky & Mike Tigas, *Everything That’s Happened Since the Supreme Court Ruled on Voting Rights*, PROPUBLICA (Nov. 1, 2013, 12:24 PM), archived at <http://perma.cc/G9UJ-XZV2> (reporting that more restrictive voting policies have been enacted post-*Shelby County* in the South); Tomas Lopez, *Shelby County: One Year Later*, BRENNAN CTR. FOR JUST. (June 24, 2014), archived at <http://perma.cc/8V5P-9VW3>.

⁹ See Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 385 (2008) (explaining that Congress overwhelmingly extended the expiring provisions of the Voting Rights Act in July 2006).

¹⁰ See Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (as introduced Jan. 16, 2014); see generally William Youmans et al., *The Voting Rights Amendment Act of 2014: A Constitutional Response to Shelby County*, AM. CONST. SOC’Y FOR L. & POL’Y (May 8, 2014), archived at <http://perma.cc/CU32-DSDN>.

¹¹ U.S. CONST. amend. XIV, § 1 (prohibiting states from denying “equal protection of the laws”).

¹² *Id.* at amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

County or its other voting rights jurisprudence: the Guarantee Clause. The Guarantee Clause provides: “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.”¹³

Election law scholars Pamela Karlan¹⁴ and Richard Hasen¹⁵ have alluded to the Guarantee Clause as a basis to support congressional regulation of voting rights. This article, however, is the first to outline in detail how the Clause can support preclearance and other congressional action under the Voting Rights Act.

Part I describes the background of the preclearance regime of the Voting Rights Act and the series of Supreme Court decisions upholding it.¹⁶ It also discusses the background and implications of the Court’s decision in *Shelby County*.¹⁷

Part II proposes that the Guarantee Clause is an appropriate source of authority for federal protection of voting rights.¹⁸ It is clear from the *Federalist Papers*, from the few sentences the Court has offered about the substance of the Clause, and from legal scholarship that its core purpose is to promote majority rule and prevent minority tyranny.¹⁹

Minority tyranny has been the fundamental burden on the African American voter.²⁰ Because of their geographical concentration, African Americans represented a majority of the population in three former Confederate states after the Civil War and over forty percent of the population in four others.²¹ Accordingly, African American suffrage was not only a question of individual dignity and fairness, as important as those things are, but also a question of

¹³ *Id.* at art. IV, § 4.

¹⁴ See *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the U.S. S. Comm. on the Judiciary*, 109th Cong. (2006) (testimony of Pamela S. Karlan, Professor, Stanford Law School), reprinted in 5 ELECTION L.J.: RULES, POL., & POL’Y 331, 339 (2006) (explaining that Congress can choose to implement standards to ensure fair voting and representation). See also Brief of Rep. John Conyers, Jr. et al. as Amici Curiae in Support of Appellees at 33-35, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322) (arguing that “Congress is best equipped to address such matters as how to ensure political fairness in democratic elections” under the Guarantee Clause; Pamela Karlan is Counsel of Record).

¹⁵ 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) (discussing Guarantee Clause as a basis for Section 5).

¹⁶ See *infra* Part I.

¹⁷ See *id.*

¹⁸ See *infra* Part II.

¹⁹ See *infra* notes 73-92 and accompanying text.

²⁰ See *infra* notes 147-149 and accompanying text.

²¹ See *infra* note 148 and accompanying text.

whether a majority of citizens and lawful voters could, if they chose, control the outcome of elections.

Similarly, the Voting Rights Act is relevant now not least because the votes of disenfranchised citizens could alter the outcomes of many elections. Protection of discrete and insular minorities is important regardless of its electoral consequences. But the ability of substantial groups of lawful voters to cast ballots and have them counted also has important political and practical effects because their votes may decide who wins and who loses. An amended Voting Rights Act aimed at preventing racial discrimination fits the purposes of the Guarantee Clause because there are enormous potential rewards from disenfranchising minority groups in a nation that is closely divided politically. In jurisdictions where minority rule has prevailed in the past and where it risks reappearing, Congress is obligated to ensure that it does not happen again.

Part III proposes that resting the Voting Rights Act in part on the Guarantee Clause simplifies judicial review substantially.²² First, exercise of Guarantee Clause authority need not be tied to a judicially determined constitutional violation; because the Court has disclaimed authority in the area, there is no jurisprudence against which laws can be measured. Therefore, the Court's concern in *Shelby County* and other cases that congressional remedies under the Fourteenth or Fifteenth Amendments not be unduly broad is simply inapplicable. Equally importantly, the Court itself has made clear in over a century of jurisprudence that "the settled rule" is that a Guarantee Clause claim "presents no justiciable controversy, but involves the exercise by Congress of the authority vested in it by the Constitution."²³ Part III also offers some considerations for Congress should it incorporate Guarantee Clause concerns into the amended Voting Rights Act.²⁴

I. THE RISE AND FALL OF THE VOTING RIGHTS ACT

From 1965 until the decision in *Shelby County* in 2013, Section 5 of the Voting Rights Act required certain jurisdictions with histories of racial discrimination – mostly in the South – to "preclear" changes to their voting rules with the Department of Justice or the U.S. District Court for the District of Columbia before those changes could become effective.²⁵ Changes could not be precleared if they had a discriminatory purpose or if they were "retrogressive" in the sense that they reduced minority voting power.²⁶

²² See *infra* notes 172-216 and accompanying text.

²³ *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569 (1916). See *infra* note 173.

²⁴ See *infra* Part III.B.

²⁵ Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (2006) (requiring a determination or judgment that election law changes "do not have the effect of denying or abridging the right to vote on account of race or color" in order for such change to be implemented).

²⁶ *Beer v. United States*, 425 U.S. 130, 141, 146 (1976) ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the

Covered changes included both redistricting and alterations to electoral rules and procedures²⁷ such as requiring proof of identification at the polls,²⁸ eliminating polling places, or eliminating early voting opportunities.²⁹

Congress chose to “freeze” voting practices in certain jurisdictions because states committed to denying African American voting rights would implement new rules as soon as, or even before, old ones were declared unconstitutional. As the Court explained in 1966: “Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”³⁰ Further:

Congress knew that some of the States . . . had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.³¹

electoral franchise.”).

²⁷ For some recent scholarship on disenfranchisement through electoral administration, see Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach To Eliminating Election Administration Legislation That Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 59 (2008) (describing the current means of disenfranchising “unwanted voters” including voter identification laws and felon disenfranchisement); Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1025 (2009) (arguing that “photo identification [voting] laws represent a continuation of the use of economic forces as a way to block people of lower economic status from participation in the electorate”); James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643, 643 (2004) (describing partisan gerrymandering and the “drawing of election district boundaries with the deliberate purpose of helping or harming the fortunes of a particular political party”); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 634 (2007) (analyzing the connection between photo identification laws and voter fraud); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006) (discussing felon disenfranchisement, voter identification laws and polling equipment); Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 455 (2008) (discussing voter registration laws and the litigation surrounding such laws).

²⁸ See, e.g., *South Carolina v. United States*, 898 F. Supp. 2d 30, 39 (D.D.C. 2012) (discussing the effects of voter ID laws on minority voters).

²⁹ See, e.g., *Perkins v. Matthews*, 400 U.S. 379, 387-88 (1971) (explaining that altering polling locations falls within the scope of Section 5).

³⁰ *Katzenbach v. South Carolina*, 383 U.S. 301, 309 (1966).

³¹ *Id.* at 335 (footnote omitted).

Section 5 was a temporary provision when enacted in 1965, in effect for five years. Then, in 1970, it was extended for five years, in 1975 for seven years, in 1982 for twenty-five years, and in 2006 for another quarter century.³² The Court upheld Section 5 and its extensions in 1966,³³ 1973,³⁴ 1980,³⁵ and 1999.³⁶

Meanwhile, in a series of cases beginning in the late 1990s, the Supreme Court began cutting back on the power of Congress to remedy discrimination under Section 5 of the Fourteenth Amendment.³⁷ In *City of Boerne v. Flores*,³⁸ the Court partially invalidated the Religious Freedom Restoration Act (“RFRA”),³⁹ which provided an exemption from generally applicable laws if the law substantially burdened free exercise of religion without a compelling government interest.⁴⁰ RFRA was intended to legislatively overrule an earlier case holding that generally applicable, non-discriminatory laws were valid even if they burdened a particular religious practice, such as the use of peyote in certain religious ceremonies.⁴¹

The *Boerne* Court held that RFRA was not a proper exercise of the congressional power to enforce the Fourteenth Amendment, holding that:

Congress does not enforce a constitutional right by changing what the right is. It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the “provisions of [the Fourteenth Amendment].”⁴²

In short, if the Court determined that something was not a constitutional violation, Congress could not redefine it as one.⁴³

³² See *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504, 2510 (2009) (explaining the timeframe of the reauthorizations of the Voting Rights Act).

³³ See *Katzenbach*, 383 U.S. at 337 (holding that the Voting Rights Act is a “valid means for carrying out the commands of the Fifteenth Amendment”).

³⁴ See *Georgia v. United States*, 411 U.S. 526 (1973).

³⁵ See *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (holding that the “Act’s ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment”).

³⁶ See *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999).

³⁷ See U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); *id.* at amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”).

³⁸ 521 U.S. 507 (1997).

³⁹ 42 U.S.C. § 2000bb et seq. (2006).

⁴⁰ *City of Boerne*, 521 U.S. at 534-36. RFRA has been held valid as applied to the federal government. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 832 (9th Cir. 1999) (explaining that the *City of Boerne* decision was limited to state law).

⁴¹ See *City of Boerne*, 521 U.S. at 512-15.

⁴² *Id.* at 519.

⁴³ See *id.* (“The design of the Amendment and the text of §5 are inconsistent with the

The Court explained that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁴⁴ Based on the principle that Congress is restricted to remedying constitutional violations, the Court has struck down a number of statutes⁴⁵ while upholding others.⁴⁶

The implications of the *Boerne* line of cases for the Voting Rights Act became clear in the Supreme Court’s 2009 decision *Northwest Austin Municipal Utility District Number One v. Holder*⁴⁷ (*NAMUDNO*). In *NAMUDNO*, all nine justices wrote or joined opinions questioning the

suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States.”).

⁴⁴ *Id.* at 520.

⁴⁵ See *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1332 (2012) (holding that “suits against States under this provision are barred by the States’ immunity as sovereigns”); 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §19.4(b) (5th ed. 2013) (indicating that in 1999 the Supreme Court concluded that statutes abrogating state sovereign immunity and statutes subjecting states “to suit in state court by private parties” were unconstitutional); 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.10(d)(ii)(1) (5th ed. 2012) (explaining that suits for damages cannot be brought against states by private parties in state court). See also William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power To Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451, 463 (2010) (“*Boerne*’s judicial supremacy principle challenges legislation addressing discrimination that has only recently become known.”); Jennifer Mason McAward, *The Scope of Congress’s Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77, 80 (2010) (“Congress has altered its approach to enforcement legislation and shown itself far less willing to defer to Congress.”).

⁴⁶ See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (“Title 11, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress’ §5 authority.”); *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003) (concluding that The Family and Medical Leave Act of 1993 is “congruent and proportional to its remedial object”).

⁴⁷ 129 S. Ct. 2504, 2517 (2009) (holding that “all political subdivisions” can “seek relief” from preclearance requirements). *NAMUDNO* generated much scholarship. See, e.g., A. Christopher Bryant, *The Pursuit of Perfection: Congressional Power To Enforce the Reconstruction Amendments*, 47 HOUS. L. REV. 579, 582 (2010) (arguing that “acknowledging a congressional power to pursue constitutional perfection poses no significant danger to the reserved power of the states”); Luis Fuentes-Rohwer, *Is This the Beginning of the End of the Second Reconstruction?*, 59 FED. LAW. 54, 57 (2012) (arguing that the Supreme Court “punted” in *NAMUDNO* by deciding the case on statutory grounds); Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 79 (2010) (questioning the assumption in *NAMUDNO* “that second-generation discrimination does not evidence the continued need for Section 5” preclearance requirements); Ellen D. Katz, *Engineering the Endgame*, 109 MICH. L. REV. 349, 375 (2010) (calling the *NAMUDNO* decision a “blatant example of judicial overreaching”); Ellen D. Katz, *From Bush v. Gore to NAMUDNO: A Response to Professor Amar*, 61 FLA. L. REV. 991, 993 (2009).

continuing constitutionality of the Voting Rights Act as insufficiently “congruent and proportional” to constitutional violations to warrant the exercise congressional power under the Fourteenth and Fifteenth Amendments.⁴⁸ The majority found the coverage formula potentially problematic under *City of Boerne*, although it did not need to reach the question because it ruled for the plaintiff on an alternative ground.⁴⁹ The opinion was written by Chief Justice Roberts and joined by Justices Stevens, Scalia, Kennedy, Souter, Ginsburg, Breyer and Alito.⁵⁰ Justice Thomas believed that the invalidity of Section 5 was clear and would have struck it down at once.⁵¹

The core of the problem, according to the Court, was that “Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared”⁵² Such a prophylactic remedy may be warranted in cases of active resistance to African American voting rights, but the aims of the Voting Rights Act had been substantially achieved;⁵³ “[b]latantly discriminatory evasions of federal decrees are rare.”⁵⁴ The Court went on to declare, “the Act imposes current burdens and must be justified by current needs.”⁵⁵

In addition, Section 5 did not apply uniformly across the country:

The Act also differentiates between the States, despite our historic tradition that all the States enjoy “equal sovereignty.” Distinctions can be justified in some cases. “The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared.” But a departure from the fundamental principle of equal sovereignty

⁴⁸ *NAMUDNO*, 129 S. Ct. at 2504-07.

⁴⁹ *Id.* at 2516 (“Bailout and preclearance under § 5 are now governed by a principle of symmetry,” and thus “all political subdivisions” can file for bailout).

⁵⁰ *Id.* at 2507.

⁵¹ *Id.* at 2517 (Thomas, J., dissenting in part) (concluding that “§ 5 exceeds Congress’ power to enforce the Fifteenth Amendment”).

⁵² *Id.* at 2511 (majority opinion).

⁵³ *Id.* (“Things have changed in the South. Voter turnout and registration rates now approach parity.”).

⁵⁴ *Id.*

⁵⁵ *Id.* at 2512. For arguments that Section 5 did not, as a factual matter, impose substantial burdens on the states, see, e.g., Brief for Amici Curiae New York, Mississippi, and California, at 6, *Shelby Cnty. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012) (No. 11-5256) (stating that “the materials necessary for DOJ’s limited Section 5 review . . . are generally both readily accessible and easy to assemble”), and Michael Halberstam, *The Myth of “Conquered Provinces”: Probing the Extent of the VRA’s Encroachment on State and Local Autonomy*, 62 *HASTINGS L.J.* 923, 954 (2011) (“Section 5 does not go beyond what is substantively already required of states and localities.”).

requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.⁵⁶

In *Shelby County*, the Court decided the question that it avoided in precisely the way *NAMUDNO* implied. Chief Justice Roberts for the five-Justice majority emphasized the political and legal changes that had occurred since the Court upheld the Voting Rights Act: "Coverage today is based on decades-old data and eradicated practices."⁵⁷ The Court explained:

The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.⁵⁸

The Court concluded that Congress had failed to identify current grounds for discriminating against particular states: "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in [*NAMUDNO*], and we make it clear again today."⁵⁹

In one major respect, the opinion was disappointing. The coverage formula in the 2006 extension was indeed based on decades-old electoral statistics. This might at first appear to be an embarrassment, akin to the ancient apportionment of the Alabama legislature struck down in *Reynolds v. Sims*.⁶⁰ But under the Act, based on evidence of compliance with the law, jurisdictions could "bail out" of Section 5's coverage, that is, no longer be subject to preclearance.⁶¹ Because, as Justice Thomas explained in the desegregation context, "discriminatory intent does tend to persist through time,"⁶² it hardly seems unreasonable to ask a proven lawbreaker to cease breaking the law before being given an opportunity to do so again. In addition, non-covered jurisdictions could be "bailed in" under the statute based on evidence of current discriminatory actions and thereafter be required to "preclear" electoral changes.⁶³ Accordingly, there was a reasonable argument that, considered as a

⁵⁶ *NAMUDNO*, 129 S. Ct. at 2512 (citations omitted).

⁵⁷ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2627 (2013).

⁵⁸ *Id.* at 2627-28 (citations omitted).

⁵⁹ *Id.* at 2629.

⁶⁰ 377 U.S. 533, 568 (1964) (requiring that "seats in both houses of a bicameral state legislature must be apportioned on a population basis").

⁶¹ Voting Rights Act of 1965 § 4(a), 42 U.S.C. § 1973b(a) (2006) (including evidence of "minority participation" and the changes in participation over time).

⁶² *United States v. Fordice*, 505 U.S. 717, 747 (1992) (Thomas J., concurring) (citing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309-10 n.15 (1977)).

⁶³ Voting Rights Act of 1965 § 3(c), 42 U.S.C. § 1973a(c) (2006) (stating that a court can "retain jurisdiction" and that no voting requirement will be enforced without preclearance).

whole, the Act's coverage formula was reasonably tailored to current conditions. The Court did not address why bail-out and bail-in was insufficiently tailored to make the formula fair and reasonable.

An important passage concludes that the Court, rather than Congress, must have the last word on whether the law is justified.⁶⁴ The United States argued that improvements in voting rights “can be attributed to the deterrent effect of § 5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should § 5 be struck down.”⁶⁵ This is an empirical claim based on facts and political judgments, which could, in the real world, be right or wrong. If correct, it would sustain the Voting Rights Act on the same rationale as the earlier decisions; the Act would be necessary to achieve an important purpose.

The Court rejected the argument not because it thought Congress's conclusion was unreasonable or unsupported; instead, it based its conclusion on principles of separation of powers.⁶⁶ Evaluation of the rationale for the law was necessarily a judicial function.⁶⁷ The Court explained: “[u]nder this theory, however, § 5 would be effectively immune from scrutiny; no matter how ‘clean’ the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.”⁶⁸

Election lawyers Jerry H. Goldfeder and Myrna Pérez wrote that “[t]he most dramatic consequence of *Shelby County* is that new election laws and regulations are being proposed or implemented that probably would not have seen the light of day had the protections of Section 5 still been in effect.”⁶⁹ Since *Shelby County* was decided in June 2013, there have been voter purges, implementation of identification requirements, restrictions on registration, restrictions on early voting, and other changes in voting procedures likely to reduce turnout or the number of ballots cast or counted in nine states formerly

See generally Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010).

⁶⁴ *Shelby Cnty.*, 133 S. Ct. at 2631 (stating that the Supreme Court must act to invalidate the law because Congress previously failed to respond to the Supreme Court's concerns about the constitutionality of the Act).

⁶⁵ *Id.* at 2627.

⁶⁶ *Id.*

⁶⁷ *See id.*

⁶⁸ *Id.* The Court's actions might also be explained based on its conception of politics. *See* Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1633 (2013) (arguing that the Supreme Court has taken a conservative view of the “democratic victories of minority groups”).

⁶⁹ Jerry H. Goldfeder and Myrna Pérez, *After Shelby County Ruling, Are Voting Rights Endangered?*, BRENNAN CTR. FOR JUST. (Sept. 23, 2013), *archived at* <http://perma.cc/K9W3-UEK7>.

covered by Section 5: Alabama, Arizona, Florida, Mississippi, North Carolina, South Carolina, South Dakota, Texas, and Virginia.⁷⁰

II. THE GUARANTEE CLAUSE, VOTING RIGHTS AND MAJORITY RULE

Congress should ground an amended Voting Rights Act on the Guarantee Clause as well as the Fourteenth and Fifteenth Amendments.⁷¹ As this section explains, the Guarantee Clause was designed to protect majority rule. Historically, what has been at stake in the question of African American voting is majority rule; specifically, whether a majority of lawful voters will be able to win elections that give them control of a given government. Both logic and history suggest that people are more likely to invest in suppressing the vote if it might change the outcome of elections.⁷² Congress is entitled to use its power to prevent such manipulation.

A. *The Purposes of the Clause*

The Guarantee Clause was designed to ensure the maintenance of republican governments in the states.⁷³ The Framers understood the clause to operate, in some ways, as a states' rights provision, mandating respect for the authority of the states joining the Union to continue their existing ways of governing.⁷⁴ The clause rested, James Madison explained, on the assumption that existing state governments were republican.⁷⁵ These existing forms "should be *substantially* maintained."⁷⁶ The power created by the Guarantee Clause "may not become a pretext for alterations in the State governments, without the concurrence of the

⁷⁰ Brandeisky & Tigas, *supra* note 8 (explaining that these nine states were formerly subject to the preclearance requirements of Section 5).

⁷¹ It should also rely on the Elections Clause. See Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1201-02 (2012) ("[T]he Elections Clause gives the states autonomy, or broad authority, over the matter of elections as part of a decentralized organizational structure that requires the Court to defer to Congress when it exercises its authority over elections.").

⁷² See Steven Yaccino & Lizette Alvarez, *New G.O.P. Bid to Limit Voting in Swing States*, N.Y. TIMES, March 30, 2014, at A1.

⁷³ U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . ."); see also, e.g., James A. Gardner, *The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections*, 29 FLA. ST. U. L. REV. 625 (2001); Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711 (2010); Thomas A. Smith, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561 (1984).

⁷⁴ Cf. Smith, *supra* note 73, at 567-68 (explaining that the Framers amended earlier versions of the Guarantee Clause to ensure that state governments retain the power over their own constitutions).

⁷⁵ THE FEDERALIST NO. 43, at 275 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he authority . . . supposes a pre-existing government of the form which is to be guaranteed.").

⁷⁶ *Id.* at 274.

States themselves,” so long “as the existing republican forms are continued by the States.”⁷⁷ Moreover, “the States may choose to substitute other republican forms”⁷⁸

However, according to Madison, “[i]t is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it”⁷⁹ Before the Fourteenth and Fifteenth Amendments, there was a legitimate question whether the United States had a republican form of government while many states disenfranchised African Americans.⁸⁰ But once African Americans became both citizens and legal voters, Congress was entitled to conclude that a state in which African Americans were not allowed to vote was non-republican.

The Constitution imposed an obligation on the national government to ensure that republican forms continued in state governments. The Framers recognized that this was necessary not only for the benefit of individual states but also for the protection of the United States as a whole.⁸¹ Maintaining republican government in all states would benefit the federal coalition⁸² and guard against “experiments [that might be] produced by the caprice of particular States, by the ambition of enterprising leaders”⁸³ The Guarantee Clause, Madison explained, imposed on the States a restriction “that they shall not exchange republican for anti-republican Constitutions.”⁸⁴

Decisions of the Supreme Court are consistent with the idea that the Guarantee Clause is intended to both protect state autonomy as to choice of republican forms and to deny states the right to create non-republican governments. In *Luther v. Borden*⁸⁵, the Court explained: “No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure.”⁸⁶ In 1891, the Court stated:

⁷⁷ *Id.* at 275.

⁷⁸ *Id.*

⁷⁹ THE FEDERALIST NO. 39, *supra* note 75, at 241 (James Madison).

⁸⁰ See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 782 (1994) (describing abolitionists’ views that the slavery violated the Guarantee Clause).

⁸¹ See WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 26 (1972) (explaining that the Framers thought that the Guarantee Clause would ensure that no one state would institute a monarchy that would “swallow up its republican neighbors”).

⁸² THE FEDERALIST NO. 43, *supra* note 75, at 275 (James Madison) (“Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort than those of a kindred nature.”).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ 48 U.S. (7 How.) 1 (1849).

⁸⁶ *Id.* at 47.

By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves⁸⁷

In *Downes v. Bidwell*,⁸⁸ the Court understood the “republican form of government” protected by the Guarantee Clause, “according to the definition of Webster,” as “a government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them.”⁸⁹ In 1992, in *New York v. United States*,⁹⁰ the Court observed that imposition of federal environmental laws did not render the states non-republican: “[t]he States thereby retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate.”⁹¹ Scholars agree with the general idea that the republicanism guaranteed to the states is some version of popular majoritarianism.⁹²

⁸⁷ *In re Duncan*, 139 U.S. 449, 461 (1891).

⁸⁸ 182 U.S. 244 (1901).

⁸⁹ *Id.* at 279.

⁹⁰ 505 U.S. 144 (1992).

⁹¹ *Id.* at 185; *see also* *Baker v. Carr*, 369 U.S. 186, 242 (1962) (Douglas, J., concurring) (“[T]he right to vote is inherent in the republican form of government envisaged by Article IV, Section 4 of the Constitution.”); *MacDougall v. Green*, 335 U.S. 281, 288 (1948) (Douglas, J., dissenting) (“Free and honest elections are the very foundation of our republican form of government.”), *overruled by* *Moore v. Ogilvie*, 394 U.S. 814 (1969).

⁹² *See, e.g.*, Amar, *supra* note 80, at 749 (“The central pillar of Republican Government, I claim, is popular sovereignty.”); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 114 (2000) (“The gravamen of a Republican Form of Government challenge is not that individual voters are treated unequally, but that the districting scheme systematically prevents effective majority rule. There are many systems of representation that would satisfy the Republicanism requirement. But at a minimum, the Clause must mean that a majority of the whole body of the people ultimately governs.” (footnote omitted)); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy*, 88 COLUM. L. REV. 1, 34-35 (1988) (arguing that, while also ensuring republican governments in the states, the main purpose of the Guarantee Clause was to protect state sovereignty); Catherine A. Rogers & David L. Faigman, “*And to the Republic for Which it Stands*”: *Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057, 1067 (1996) (“The language of the Guarantee Clause indicates its structural purpose.”); Thomas C. Berg, Comment, *The Guarantee of Republican Government*, 54 U. CHI. L. REV. 208, 231 (1987) (explaining that the Guarantee Clause ensures “accountability of government decision makers to the people” and that “government decisions be made deliberatively and by reference to a public value, rather than by simply deferring to the interests of powerful private groups”).

B. *African American Suffrage and the Guarantee Clause*

Congress and the Supreme Court recognized the Guarantee Clause as a source of guidance as they addressed the situation of African Americans after the Civil War.⁹³ A key milestone in the history of African American suffrage was the March 2, 1867 Reconstruction Act. It declared that “no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas” and that Congress had to take action “until loyal and republican State governments can be legally established.”⁹⁴ The Act provided that a state would not be entitled to representation in Congress until, among other things, the state formed a constitution that enfranchised

the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disenfranchised for participation in the rebellion or for felony at common law.⁹⁵

All of these states duly complied, and Congress passed legislation readmitting them to representation in Congress, finding that each had adopted a “constitution of State government, which is republican.”⁹⁶ The states were subject to several “fundamental conditions,” including that their constitutions

shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all of the inhabitants of said State.⁹⁷

⁹³ See, e.g., Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 930-31 (1998) (discussing members of Congress relying on the Guarantee Clause in support of African American suffrage).

⁹⁴ Reconstruction Act, ch. 153, 14 Stat. 428 (1867); see generally, Gabriel J. Chin, *The “Voting Rights Act of 1867”: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1595-97 (2004) (reviewing arguments that the Reconstruction Act violated the equality of states doctrine).

⁹⁵ 14 Stat. at 429 (1867).

⁹⁶ An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72, 72 (1868). See also An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80, 80 (1870); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 67 (1870); An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 62 (1870); An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73, 73 (1868).

⁹⁷ An Act to Admit the State of Virginia to Representation in the Congress of the United

African Americans in the South were enfranchised partly for their own benefit, but also to avoid diluting Northern votes. The House of Representatives is apportioned by population⁹⁸ (and, therefore, so are presidential electors⁹⁹). Under the original Constitution, enslaved persons were counted as three-fifths of a person.¹⁰⁰ After the Thirteenth Amendment abolished slavery, all African Americans counted as full people.¹⁰¹ As a result, the apportionment of Congressional representatives shifted in favor of the South.¹⁰² But conservative governments in the South gave no indication that they were willing to let African Americans vote, particularly in the seven states where they could plausibly control elections – making the votes of Southern whites who could vote all the more influential.¹⁰³ Many Northerners found it ironic, and unacceptable, that as a consequence of rebellion, the South might obtain a substantial political reward.¹⁰⁴

The Supreme Court's decision in *Texas v. White*¹⁰⁵ makes clear that Congress had power under the Guarantee Clause to protect African American electoral power.¹⁰⁶ The decision is famous for a line, misread in *Shelby County*¹⁰⁷ and elsewhere as a defense of state's rights¹⁰⁸: "The Constitution, in

States, ch. 10, 16 Stat. 62, 63 (1870).

⁹⁸ U.S. CONST. amend. XIV, § 2.

⁹⁹ *Id.* at art. II, § 1, cl. 2 ("Each State shall appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .").

¹⁰⁰ *Id.* at art. I, § 2, cl. 3 (directing that state population is calculated by adding the "whole Number of free Persons" and "three fifths of all other Persons").

¹⁰¹ *Id.* at amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . .").

¹⁰² See *Oregon v. Mitchell*, 400 U.S. 112, 157 (1970) (Harlan J., concurring in part and dissenting in part) ("The problem of congressional representation was acute. With the freeing of the slaves, the Three-Fifths Compromise ceased to have any effect. While predictions of the precise effect of the change varied with the person doing the calculating, the consensus was that the South would be entitled to at least 15 new members of Congress, and, of course, a like number of new presidential electors.").

¹⁰³ See Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 80-84 (2008) (explaining that African Americans made up at least forty percent of seven former Confederate states – Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Virginia – but that by 1880, southern conservatives had successfully disenfranchised African Americans).

¹⁰⁴ See William E. Chandler, *Our Southern Masters*, 5 FORUM 508, 508 (1887) ("Now, as then, the negroes have no voice or vote; but the white men vote for them and wield their power, and thereby rule the North and the nation.").

¹⁰⁵ 74 U.S. 700 (1868).

¹⁰⁶ *Id.* at 729-30 (holding that the Guarantee Clause granted Congress the authority to create republican governments by amending State constitutions so that they would "conform . . . to the new conditions created by emancipation").

¹⁰⁷ 133 S. Ct. 2612, 2623 (2013) (citing *White* to support a proposition of equal

all its provisions, looks to an indestructible Union, composed of indestructible States.”¹⁰⁹ But the Court was addressing the rights and obligations of a former Confederate state in 1869, in the context of an opinion holding that the federal government had the power to impose a provisional government on the state.¹¹⁰ The Court’s point was that the treasonous acts of the purported Texas legislature under the Confederacy were nullities. The Court explained: “The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired.”¹¹¹ Further, “[t]he government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.”¹¹² This was hardly a holding that Texas had the full powers of the states notwithstanding its misconduct. To the contrary, the Court explained: “The legislature of Texas . . . constituted one of the departments of a State government, established in hostility to the Constitution of the United States. It cannot be regarded, therefore, in the courts of the United States, as a lawful legislature, or its acts as lawful acts.”¹¹³

The Court explained that the United States had authority to “re-establish[] the broken relations of the State with the Union” that arose from “the obligation of the United States to guarantee to every State in the Union a republican form of government.”¹¹⁴ As to the African American population, “[t]he new freemen necessarily became part of the people, and the people still constituted the State And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty.”¹¹⁵

sovereignty among the states).

¹⁰⁸ See, e.g., J.C. Pritchard, *The Constitutional Power and Relation of the State and Federal Courts*, 18 YALE L.J. 165, 179 (1909) (asserting that in *Texas v. White*, the Court “interposed its powerful shield for the protection of the real rights of the states”).

¹⁰⁹ *White*, 74 U.S. at 725.

¹¹⁰ *Id.* (“[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.”).

¹¹¹ *Id.* at 726.

¹¹² *Id.* at 727.

¹¹³ *Id.* at 732-33.

¹¹⁴ *Id.* at 727-28.

¹¹⁵ *Id.* at 728-29. Earlier, the Court explained that the people, not the government, are entitled to the benefit of guarantee. After discussing several ways in which the Constitution uses the concept of a “state,” the Court said:

And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government.

In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.

In this clause a plain distinction is made between a State and the government of a State.

Because of the Reconstruction Acts and the state constitutions to which they gave rise, African Americans voted and exercised substantial political power throughout the former Confederacy.¹¹⁶ These statutes by their terms had no effect outside the South; Northern states were free to continue disenfranchising African Americans. Of course, when the Fourteenth Amendment became law in 1868, Section 2 threatened to reduce the representation in Congress of any State failing to enfranchise African Americans.¹¹⁷ But few states seemed to be influenced by this possibility.¹¹⁸

To enfranchise African Americans in the North, and to constitutionalize the practice of African American voting in the South, Congress proposed and the States ratified the Fifteenth Amendment.¹¹⁹ A key idea behind the Amendment was that African Americans were part of “the people” and thus entitled to participate in Republican government.¹²⁰

The Guarantee Clause, said Massachusetts Representative George Boutwell, is one of the “provisions of the Constitution, which give us ample basis for all the legislation we now propose.”¹²¹ Massachusetts Senator Charles Sumner, too, saw in the Clause “a bountiful source of power, which cannot be called into question. In the execution of the guarantee Congress may – nay, must – require that there shall be no Caste or Oligarchy of the skin.”¹²² South

Id. at 721. *See also* United States v. Reese, 92 U.S. 214, 251 (1875) (Hunt, J., dissenting) (“The provision, that ‘the United States shall guarantee to every State a republican form of government,’ is a guaranty to the people of the State, and may be exercised in their favor against the political power called the ‘State.’”).

¹¹⁶ Chin & Wagner, *supra* note 103, at 82-83 (reviewing the political participation of African Americans in high African American voter participation in former Confederate States, which included high voter turnout and election of African American officials to political office).

¹¹⁷ U.S. CONST. amend. XIV, § 2 (“[W]hen the right to vote . . . is denied to any of the male [adult citizens] of such State . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens . . .”).

¹¹⁸ Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 269 (2004) (explaining that “Section 2 was a dead letter before it came law” because of the “South’s emphatic rejection of the Fourteenth Amendment.”).

¹¹⁹ U.S. CONST. amend. XIV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged . . .”).

¹²⁰ *White*, 74 U.S. at 728-29 (explaining that freemen “became part of the people” of the state and that this new version of the state is “entitled to the benefit of the constitutional guaranty”); *see also, e.g., Oregon v. Mitchell*, 400 U.S. 112, 194 n.70 (1970) (Harlan, J., concurring in part and dissenting in part) (discussing remarks of Representatives in debate over the proposed Fourteenth Amendment “that Congress had some power, usually by way of the Guarantee Clause . . . to oversee state voter qualifications”).

¹²¹ CONG. GLOBE, 40th Cong., 3d. Sess. 557 (1869).

¹²² *Id.* at 903.

Carolinian Manuel Corley urged the House to “show the enemies of republicanism in the North, as well as in the South, that the right to regulate suffrage in the States is subject to the decision of the people’s representatives in the Congress of the nation”¹²³

The proposed Amendment was in line with prior congressional measures “requir[ing] the reconstructed States to submit to equal suffrage,”¹²⁴ stated Representative Samuel Shellabarger of Ohio. The Guarantee Clause necessitated this latest in a string of actions intended to extend the vote: “We have done this mainly, I admit, because it was absolutely impossible to organize or guaranty republican governments down there at all unless we enabled the only loyal race there was there to vote.”¹²⁵

Republican government required actually allowing African Americans to vote. “The Constitution . . . makes it our imperative duty to guaranty to every man who claims himself an American citizen the benefits of a republican form of government,” South Carolina Representative Benjamin Whittemore explained on the House floor;¹²⁶ “[I]s that Government republican which creates and maintains distinctions in franchise; that gives the vote to one and withholds it from another?”¹²⁷ Whittemore’s fellow South Carolinian, Representative Corley, made the claim in a more expansive way: “The Constitution guaranties a republican form of government to the States, but while there remains a single friend of the Government and freedom, male or female, disfranchised in a single one of those States, we are unfaithful to the Constitution and best interests of our common country.”¹²⁸

What constitutes republican government, and what must be guaranteed the states, Amendment supporter Charles Hamilton maintained, is for Congress to determine “[w]hen the question is raised as to the anti-republican character of any State government Congress is bound to take up the question and decide it according to its own judgment.”¹²⁹ One essential characteristic is a franchise widely extended.¹³⁰ “What is a republic?” Representative William Loughridge queried the House chamber.¹³¹ His answer: “A government by the people; not by a portion of the people, but by all the people.”¹³²

¹²³ CONG. GLOBE, 40th Cong., 3d Sess. Appx. 95 (1869) (remarks of Rep. Corley).

¹²⁴ *Id.* at 99 (remarks of Rep. Shellabarger).

¹²⁵ *Id.*

¹²⁶ *Id.* at 93 (remarks of Rep. Whittemore).

¹²⁷ *Id.*

¹²⁸ *Id.* at 94 (remarks of Rep. Corley).

¹²⁹ *Id.* at 100 (remarks of Rep. Hamilton).

¹³⁰ *Id.* (“I hold it to be an essential principle of republican government that representative officers ‘shall be freely chosen by the people from among themselves.’”).

¹³¹ *Id.* at 200.

¹³² *Id.* at 200 (remarks of Rep. Loughridge); *see also* CONG. GLOBE, 40th Cong., 3d Sess. 903 (1869) (“There is that key-stone clause, by which it is expressly declared that, ‘the United States shall guaranty to every State in this Union a republican form of government,’

There was, of course, resistance. The recently ratified Fourteenth Amendment, pointed out Wisconsin's James Doolittle, "expressly provides that this very question of suffrage shall be left to the people of the States, each State acting independently for itself."¹³³ Another opponent chastised Congress for "forc[ing] upon the respective States negro suffrage, regardless of the existing constitutions and laws therein . . ."¹³⁴

But, said Senator Sumner, the Fourteenth Amendment's provision to penalize a state failing to extend suffrage to African Americans "does not in any way, by the most distant implication, impair the plenary powers of Congress to enforce the guarantee of a republican government . . ."¹³⁵ The proposed amendment, according to its supporters, addressed the Fourteenth Amendment's failure to bring about republican government.¹³⁶ This step was necessary because "in some of the States of the Union the colored man is still persistently denied his rights, and will continue to be . . . Tell me not that the governments of those States are republican in form."¹³⁷ Congress "deemed it to be indispensable" to allow and ensure African American suffrage, explained Representative Whittemore,¹³⁸ and the proposed Amendment, if it passed, would – according to Representative George Miller – "settle forever this vexed question of suffrage . . ."¹³⁹

The Voting Rights Act of 1965 was enacted primarily based on the Fifteenth Amendment power of Congress.¹⁴⁰ However, many of its supporters in Congress – as well as legal scholars – argued that it,¹⁴¹ and several amendments and extensions,¹⁴² also reflected reliance on the Guarantee Clause.

and Congress is empowered to enforce this guarantee. . . . Here is a bountiful source of power, which cannot be called in question.").

¹³³ CONG. GLOBE, 40th Cong., 3d Sess. Appx. 152 (1869).

¹³⁴ *Id.* at 91 (remarks of Rep. Miller).

¹³⁵ CONG. GLOBE, 40th Cong., 3d Sess. 903 (1869).

¹³⁶ CONG. GLOBE, 40th Cong., 3d Sess. Appx. 294 (1869) (remarks of Rep. Higby) ("It would seem that every right pertaining to citizenship was conferred [by the Fourteenth Amendment], and yet the language of the second section implies that a State may deny or abridge the right of the citizen to vote. The amendment proposed will do away with much of the difficulty, confusion, and misconception that have grown out of the apparent conflict between the first and second sections of the fourteenth article, and will secure to the citizen the political rights to which he is entitled . . .").

¹³⁷ *Id.* at 200 (remarks of Rep. Loughridge).

¹³⁸ *Id.* at 92 (remarks of Rep. Whittemore).

¹³⁹ *Id.* (remarks of Rep. Miller); *but see id.* at 98 (remarks of Rep. Shellabarger) ("[T]his amendment will add to the mischiefs it aims at remedying instead of relieving them. . . . [W]e will enable [the States] to disfranchise for every conceivable cause except only [race, color, or former condition of slavery].").

¹⁴⁰ S. REP. NO. 89-162, at 1 (1965) (explaining that the Voting Rights bill was intended to enforce the Fifteenth Amendment).

¹⁴¹ *See Voting Rights: Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, on H.R. 6400 and Other Proposals to Enforce the 15th Amendment to the*

C. *Republican Government and Minority Rule*

A system of entrenched minority rule is not republican. This conclusion is implied by *Reynolds v. Sims*,¹⁴³ decided on equal protection grounds rather than the Guarantee Clause but which is nevertheless suggestive:

Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.¹⁴⁴

Whatever the scope of state sovereignty, it does not include a fair opportunity to establish permanent minority rule. *Reynolds v. Sims* invalidated a democratically adopted plan that malapportioned the legislature. The argument for this outcome would have been far more compelling in a case

Constitution of the United States, 89th Cong. 412 (1965) (Statement of Rep. John D. Dingell) (“Denial of this most fundamental right negates the fundamental existence of a republican form of government.”); *id.* at 732 (statement of Profs. Jeanus B. Parks, Jr. and Herbert O. Reid of Howard University Law School) (“[T]he command of [the Guarantee Clause] may be executed by the congressional declaration of the elemental factors constituting a republican form of government.”); *id.* at 742-47 (including in the record S. Rep. 77-1662, proposing to eliminate the poll tax on Elections Clause and Guarantee Clause grounds, as well as based on the Fourteenth Amendment); *id.* at 744 (“One might add that since voting is one of the fundamental governmental rights, the right to tax the fundamental privilege by a State would be giving to the State the power to destroy the Federal Government.”); 111 CONG. REC. 15992 (July 8, 1965) (Statement of Rep. Tunney) (“To deny [one] the right to vote is to deprive him of the right to participate in a republican form of government.”); *see also infra* note 165 and accompanying text (highlighting twelve Senators’ assertion that the Voting Rights Act should be based on the Guarantee Clause).

¹⁴² *See* 152 CONG. REC. 14281 (2006) (remarks of Rep. Gohmert) (voicing support of the 2006 extension and asserting, “I would also like to finish by saying that this is far too important a piece of civil rights legislation not to force reconsideration before 2032. The right to vote is a lynch pin of our Republican form of government. Its protections should not be rejected or neglected for 25 years. I still look forward to the day when we can actually live Dr. Martin Luther King Jr.’s dream where individuals are actually judged by the content of their character and not by the color of their skin”); 138 CONG. REC. 22170 (1992) (remarks of Sen. Kennedy) (voicing support for the 1992 Language Amendments and stating, “Under the Constitution, a State has a solemn responsibility to provide a Republican form of government and to assure all persons of the equal protection of the law. The bilingual assistance provisions of the Voting Rights Act are necessary to assure all citizens have a meaningful opportunity to participate in the electoral process”); S. REP. NO. 94-295, at 73 (1970) (minority views of Sens. Eastland, McClellan, Thurmond, and Scott) (“[O]ur republican form of Government cannot reach its full potential without the right of participation in the affairs of Government by all of our citizens . . .”).

¹⁴³ 377 U.S. 533 (1964).

¹⁴⁴ *Id.* at 565.

where the minority gained control illegally and undemocratically. Thus, in *Luther v. Borden*,¹⁴⁵ the Court stated: “Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it.”¹⁴⁶ Similarly, in the *Federalist Papers*, Madison wrote:

May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succors from foreign powers, as will render it superior also in an appeal to the sword? May not a more compact and advantageous position turn the scale on the same side against a superior number so situated as to be less capable of a prompt and collected exertion of its strength?¹⁴⁷

Madison’s nightmare scenario almost perfectly described what happened in the South after Reconstruction. African Americans represented fifty percent or more of the population in Louisiana, Mississippi, and South Carolina, and more than forty percent of Alabama, Florida, Georgia, and Virginia.¹⁴⁸ They had been made citizens by the Fourteenth Amendment and made voters by the Reconstruction Acts and the Fifteenth Amendment. In free and fair elections, one would have expected them to hold the balance of power in several states thereafter. That is not what happened, however; after a period of wielding political authority, African Americans were disenfranchised through mechanisms now recognized as illegal. According to Southern conservatives themselves, the African American majority was disenfranchised by a more effective conservative minority. As a unanimous Mississippi Supreme Court explained, for example:

Our unhappy state had passed in rapid succession from civil war through a period of military occupancy, followed by another, in which the control of public affairs had passed to a recently enfranchised race, unfitted by educational experience for the responsibility thrust upon it. This was succeeded by a semimilitary, semicivil uprising, under which the white race, inferior in number, but superior in spirit, in governmental instinct, and in intelligence, was restored to power. The anomaly was then presented of a government whose distinctive characteristic was that it rested upon the will of the majority, being controlled and administered by a minority of those entitled under its organic law to exercise the electoral franchise.¹⁴⁹

In short, the conservatives disenfranchised African Americans even though the latter were a majority of the population.

¹⁴⁵ 48 U.S. (7 How.) 1 (1849).

¹⁴⁶ *Id.* at 45.

¹⁴⁷ THE FEDERALIST NO. 43, *supra* note 75, at 276-77 (James Madison).

¹⁴⁸ Chin & Wagner, *supra* note 103, at 80-81.

¹⁴⁹ *Ratliff v. Beale*, 20 So. 865, 867 (Miss. 1896).

To conservative Southerners, creation of these new citizens must have seemed like a major injustice. The Constitution – the Nation itself – was formed, and its Constitution framed, to protect “slave property,” and *Dred Scott*¹⁵⁰ made clear that no persons of African descent were part of “the people” of the United States.¹⁵¹ The Reconstruction Amendments reversed the assumptions upon which the Union was created; articles published in the *Harvard Law Review*¹⁵² and *Yale Law Journal*¹⁵³ expressed doubts about their wisdom and legitimacy.

At one level, the legal answer was simple: As the Supreme Court explained, “[t]he new freemen necessarily became part of the people, and the people still constituted the State.”¹⁵⁴ If Madison was right that under republican government “[i]t is *essential* . . . that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it,” then African American suffrage had to be protected, or the government would not be republican in form.¹⁵⁵ Yet, the rights and abilities of African Americans to

¹⁵⁰ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

¹⁵¹ *Id.* at 404 (“The words ‘people of the United States’ and ‘citizens’ are synonymous terms, and mean the same thing. . . . [W]e think [African Americans] . . . were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”).

¹⁵² Thus, in arguing in the *Harvard Law Review* that the Fifteenth Amendment was void, one scholar explained:

Take as an illustration a state like South Carolina within whose borders the negroes outnumbered the whites. Notwithstanding their numerical majority they were mere property, and enjoyed no political or even civil rights. They were not members of the body politic, and were not parties to the social compact. The white people and they alone constituted the State of South Carolina. Now, could a constitutional amendment without the consent of the government of South Carolina, or of those persons who constituted that state, annex to their body politic the large black majority in their midst and give these blacks – whom South Carolina had never recognized as her citizens – the power to outvote the whites in the election of members of the state legislature and thus indirectly in the choice of two United States senators? Would not such a constitutional amendment deprive the people whom alone the original Constitution of the United States and the laws of South Carolina recognized as constituting that state – would it not deprive them of their “equal suffrage,” or indeed of any suffrage at all, in the Senate?

Arthur W. Machen, Jr., *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169, 178 (1910).

¹⁵³ John R. Dos Passos, *The Negro Question*, 12 YALE L.J. 467, 472 (1903) (proposing to “plac[e] in the hands of the individual States the power to control the question, to determine and announce who shall and who shall not be entitled to vote within their respective borders. This means a retrograde movement in our constitutional history. It means we must retrace our steps and undo organic legislation which was hastily enacted after the rebellion; to take back that which was given.”).

¹⁵⁴ *Texas v. White*, 74 U.S. (1 Wall.) 700, 728 (1868).

¹⁵⁵ THE FEDERALIST NO. 43, *supra* note 75, at 276-77 (James Madison).

wield substantial political power in the former Confederate states created a problem of which the Framers could hardly have dreamed: the desire of a conservative minority, admittedly composed of the "Posterity" of the "ourselves" who formed the United States and its Constitution,¹⁵⁶ to suppress the rights of majorities in order to obtain or maintain political power in the states.

Members of the Reconstruction Congresses recognized that the question of African American suffrage implicated political control of a number of states.¹⁵⁷ The proposed Fifteenth Amendment, Representative Loughridge calculated, would enforce and protect a voice in the government for a fourth or a fifth of the citizenry, five million in all.¹⁵⁸ Most African Americans lived in the South. Thus, Senator Garrett Davis, opposed to the Amendment, predicted it would "give the right of suffrage to a majority" and to the party winning their votes would go "control of all the State elections in the southern States."¹⁵⁹ African Americans, he claimed,¹⁶⁰ would "take charge of the government of [South Carolina] and . . . its polity."¹⁶¹ Great power and wide influence would inevitably result if the proposed Amendment were ratified, according to Senator Doolittle (also opposed to the Amendment), particularly "where the negro exists in such numbers that he can, by force of numbers, place himself in such a position as not only to bring on political equality, but to force social equality also."¹⁶² Further:

If they can vote they can be voted for; if they can be voted for they can be elected Face the music, gentlemen; acknowledge the truth that this is the necessary, direct tendency, and the inevitable result which must come, in States where a majority of the population are colored, if you force upon the States unrestricted and unqualified negro suffrage.¹⁶³

¹⁵⁶ U.S. CONST. pmbl.

¹⁵⁷ See e.g., Amar & Brownstein, *supra* note 93, at 946-50 (discussing sources making clear that African American suffrage was expected to affect election outcomes); WIECEK, *supra* note 81, at 200 (explaining that in the Thirty-ninth Congress there was "the acceptance of the idea that republican government was impossible where a large minority of a state's citizens were disenfranchised. The guarantee clause did not necessarily require the enfranchisement of all Negroes everywhere, but it forbade their wholesale proscription where they were numerous").

¹⁵⁸ CONG. GLOBE, 40th Cong., 3d Sess. Appx. 200 (1869) (remarks of Rep. Loughridge).

¹⁵⁹ *Id.* at 285, 288 (remarks of Sen. Davis).

¹⁶⁰ Or, complained. "You are to [reach the control of all State elections in southern States] by the negro vote. You are to do that by giving the right of suffrage to a majority of ignorant, half barbarians, totally unfit; men of an inferior race . . ." *Id.* at 288.

¹⁶¹ CONG. GLOBE, 40th Cong., 3d Sess. 998 (1869).

¹⁶² *Id.* at 1011.

¹⁶³ *Id.*; see also, e.g., Dos Passos, *supra* note 153, at 477 ("If all the negroes of the North were to concentrate their votes they could accomplish no political results. A combination of the negro voters of the South would mean the domination and control of the whites, and of

Doolittle presciently warned that “they might perhaps in the end elect some negro as President of the United States.”¹⁶⁴

By the time of the Voting Rights Act, the problems had changed. African Americans no longer represented the majority of the population in any state. Yet they were majorities in certain counties and districts, and Congress was entitled to conclude that in a closely divided nation, their votes could often make the difference. Indeed, in 1965, twelve Senators argued that the Voting Rights Act should be based on the Guarantee Clause in part because without it a majority might be denied the right to vote:

Beside the fact that Congress has an explicit mandate to see to it that the guarantees of the 14th and 15th amendments are enforced, Congress also has the responsibility under the Constitution to protect our “republican form of government” under section 4 of article IV. Not only does Congress have this authority, but since the landmark decision in *Luther v. Borden* . . . , i[t] is clear that its judgment in exercising this authority is conclusive and nonreviewable. As the Senate Judiciary Committee stated in the 1st session of the 78th Congress:

Can we have a republican form of government in any State if within that State a large portion and perhaps the majority of the citizens residing therein are denied the right to participate in governmental affairs because they are poor? . . . The most sacred right in our republican form of government is the right to vote. It is fundamental that that right should not be denied unless there are valid constitutional reasons therefor. It must be exercised freely by free men. If it is not then we do not have a republican form of government¹⁶⁵

When allowed to vote in the war’s immediate aftermath, African Americans contributed crucial electoral support to successful Republican candidates, including a large number of officeholders who themselves were African American.¹⁶⁶ The Framers’ fears of unchecked majority will¹⁶⁷ did not include

all their property and rights.”).

¹⁶⁴ CONG. GLOBE, 40th Cong. 3d Sess., 1011 (1869).

¹⁶⁵ *Joint Statement of Individual Views by Mr. Dodd, Mr. Hart, Mr. Long of Missouri, Mr. Kennedy of Massachusetts, Mr. Bayh, Mr. Burdick, Mr. Tydings, Mr. Dirksen, Mr. Hruska, Mr. Fong, Mr. Scott, and Mr. Javits, of the Committee of the Judiciary Supporting the Adoption of S. 1564: The Voting Rights Act of 1965*, S. REP. 89-162, Pt. 3, at 34 (citation omitted); see also 111 CONG. REC. 9927-29 (daily ed. May 7, 1965) (statement of Sam S. Crutchfield, Jr., introduced into the record by Sen. Robertson) (discussing whether “Congress may pass appropriate legislation under the ‘Necessary and Proper’ clause to outlaw the poll tax because it reduces the size of the electorate, therefore denying a republican form of government”).

¹⁶⁶ Chin & Wagner, *supra* note 103, at 82-83.

¹⁶⁷ See, e.g., THE FEDERALIST NO. 10, *supra* note 75, at 77 (James Madison) (“Complaints are everywhere heard from our most considerate and virtuous citizens . . . that measures are too often decided, not according to the rules of justice and rights of the minor party, but by

the proposition that a minority, owing its power to violence and manipulation of election laws, could legitimately rule. Although minorities surely have rights under the Constitution, the idea that the candidate of the party coming in second, third, or fourth was nonetheless entitled to office was no principle of “republican government” as that term was understood by those who convened to debate and draft the Constitution. Had African Americans been allowed to vote throughout the nineteenth and twentieth centuries, it is no stretch to assume that African Americans would have substantially maintained the political power they enjoyed under Reconstruction. The shape of Southern state governments and the direction of policies that developed under them would have been dramatically altered. National policy also would likely have been very different.

Today, African Americans are closely identified with the Democratic Party,¹⁶⁸ are often ineradicably visually identifiable, and tend to be segregated by residence.¹⁶⁹ The same is true, although to a lesser degree, of other racial minorities.¹⁷⁰ Accordingly, there is an ability to target African Americans and other minorities for disenfranchisement, and a payoff that does not exist with other demographic groups in the United States. Congress could reasonably find that non-whites, including African Americans, Asian Americans, Latinos, and American Indians, are uniquely susceptible to disenfranchisement and that disenfranchisement is uniquely rewarding. The minority rules just as much if a 39% minority refuses to count the ballots of 23% of its opponents, or if a 49.5% minority unlawfully disenfranchises 51% of its opponents.¹⁷¹ There is a

the superior force of an interested and overbearing majority.”)

¹⁶⁸ See HANES WALTON, JR. ET AL., *THE AFRICAN AMERICAN ELECTORATE: A STATISTICAL HISTORY* (2012).

¹⁶⁹ JOHN R. LOGAN, BROWN UNIV., *SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS AND ASIANS IN METROPOLITAN AMERICA 1*, available at <http://www.s4.brown.edu/us2010/Data/Report/report0727.pdf>, archived at <http://perma.cc/CY4R-F9W3>.

¹⁷⁰ See, e.g., MARK HUGO LOPEZ & PAUL TAYLOR, PEW HISPANIC CENTER, *LATINO VOTERS IN THE 2012 ELECTION 4* (2012), archived at <http://perma.cc/L4EA-AFLB> (seventy-one percent of Hispanics voted for President Obama in 2012); JANELLE WONG ET AL., *ASIAN AMERICAN POLITICAL PARTICIPATION: EMERGING CONSTITUENTS AND THEIR POLITICAL IDENTITIES* (2011) (pointing out that Asian Americans increasingly lean toward the Democratic party); Press Release, Asian Am. Legal Def. & Educ. Fund, *New Findings: Asian American Vote in 2012 Varied by Ethnic Group and Geographic Location* (Jan. 17, 2013), archived at <http://perma.cc/66XE-UYTE> (showing seventy-seven percent of Asian Americans voted for President Obama in 2012).

¹⁷¹ See SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION 14* (2006) (“In reality, the will of the people is channeled by a predetermined matrix of thousands of electoral regulations and practices that most people accept as natural This structure of election rules, practices, and decisions filters out certain citizens from voting and organizes the electorate. There is no ‘right’ to vote outside of the terms, conditions, hurdles, and boundaries set by the matrix.”). Of course, the minority rules in precisely the same way if the margin of victory comes through unauthorized votes rather

clear Guarantee Clause interest in avoiding minority rule though cheating, whether that cheating is on a large scale or small.

III. JUDICIAL REVIEW OF THE NEW VOTING RIGHTS ACT

This part addresses the question of judicial review of an amended Voting Rights Act grounded in part on the Guarantee Clause. Protecting African Americans and other voters under the Guarantee Clause would dramatically simplify the Court's review of the Act's constitutionality. First, the Court has recognized repeatedly that Guarantee Clause claims are for Congress to the exclusion of the courts; "the settled rule" is that a Guarantee Clause claim "presents no justiciable controversy but involves the exercise by Congress of the authority vested in it by the Constitution."¹⁷² As a result, the *Boerne* problem disappears in two senses. First, the Court has disclaimed a supervisory role over the exercise of that power; rather than a separation of powers rationale for the Court to intervene, there is the opposite: a duty to defer to congressional judgment. Second, because Guarantee Clause claims are political, there is no body of decisional law against which federal actions could be tested.

Finally, federalism problems are much diminished. Unlike, say, the Commerce Clause, the Guarantee Clause facially operates to give the federal government direct responsibility for the states. In addition, the disparate treatment problem disappears. By its nature, the Guarantee Clause anticipates that states might well be subject to different federal responses; only those at risk of becoming non-republican can be assisted under the Clause.

A. *Who Interprets and Enforces the Guarantee Clause?*

The Court has made clear that the Constitution commits interpretation and enforcement of the Guarantee Clause to Congress.¹⁷³ *Baker v. Carr*¹⁷⁴

than suppression of authorized votes. *See generally* J. Kenneth Blackwell & Kenneth A. Klukowski, *The Other Voting Right: Protecting Every Citizen's Vote by Safeguarding the Integrity of the Ballot Box*, 28 YALE L. & POL'Y REV. 107 (2009).

¹⁷² *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916).

¹⁷³ *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion) (Guarantee Clause claims "are said to be 'nonjusticiable,' or 'political questions'"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.") (citations omitted); *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) ("[T]he enforcement of [the Guarantee Clause], according to the settled doctrine, is for Congress, not the courts." (citing *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912) ("[T]he issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not, therefore within the reach of judicial power."))); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281

explained that legal claims were nonjusticiable if there was “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it,”¹⁷⁵ and that Guarantee Clause claims had both of these characteristics.¹⁷⁶

One class of nonjusticiable claims, according to the Court, was affirmative contentions that some state action violated the Guarantee Clause. *Luther v. Borden*,¹⁷⁷ which involved two competing claims to the lawful government of Rhode Island, is the classic formulation that such claims are nonjusticiable. The *Baker* Court explained:

Clearly, several factors were thought by the Court in *Luther* to make the question there “political”: the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive’s decision; and the lack of criteria by which a court could determine which form of government was republican.¹⁷⁸

The decision noted the *Luther* Court’s “holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State’s lawful government.”¹⁷⁹

Even in a clear-cut case, where there is no doubt that action violated the Guarantee Clause, the Court might still stay its hand. It noted that in *Luther*, the Court found that “a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it.”¹⁸⁰ However, “it does not necessarily follow that if Congress did not act, the Court would.” Even if the violation was plain, “and thus the factor of lack of criteria might fall away, there would remain other possible barriers to decision because of primary commitment to

U.S. 74, 79-80 (1930) (“As to the guaranty to every state of a republican form of government (Sec. 4, Art. IV), it is well settled that the questions arising under it are political, not judicial, in character and thus are for the consideration of the Congress and not the courts.”); *Davis*, 241 U.S. at 569 (stating that Guarantee Clause claims disregard “the settled rule that the question of whether that guarantee of the Constitution has been disregarded presents no justiciable controversy but involves the exercise by Congress of the authority vested in it by the Constitution”).

¹⁷⁴ 369 U.S. 186 (1962).

¹⁷⁵ *Id.* at 217.

¹⁷⁶ *Id.* at 218 (“We shall discover that Guaranty Clause claims involve those elements which define a ‘political question.’”).

¹⁷⁷ 48 U.S. (7 How.) 1 (1849).

¹⁷⁸ *Baker*, 369 U.S. at 222.

¹⁷⁹ *Id.* at 223.

¹⁸⁰ *Id.* at 222 n.48 (quoting *Luther*, 48 U.S. (7 How.) at 45).

another branch, which would have to be considered in the particular fact setting presented.”¹⁸¹

The Court identified another category of Guarantee Clause cases as equally nonjusticiable: “Just as the Court has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question . . . challenges to congressional action on the ground of inconsistency with that clause present no justiciable question.”¹⁸² Although the dissenters disagreed with the majority regarding whether state legislative malapportionment could be reached under the Equal Protection Clause of the Fourteenth Amendment, they agreed that the Guarantee Clause claim was nonjusticiable.¹⁸³ The structure of Article IV, § 4 indicates that the Court is right about this; it cannot be that the judicial branch owes a duty to the states to “protect each of them against Invasion” or to send troops to address “domestic violence.”¹⁸⁴ Commitment of authority to another branch and lack of judicially manageable standards remain grounds for nonjusticiability.¹⁸⁵

A 1992 opinion suggested that the Court might be willing to consider Guarantee Clause claims.¹⁸⁶ This prospect is problematic for two reasons. First, there are two sides to almost any Guarantee Clause claim. Advocates of what might be called the “procedural approach” contend that federal invalidation of state choice about the structure of state government or a particular piece of legislation denies the state a republican form of government because it interferes with the choice of their elected leaders. Advocates of a substantive

¹⁸¹ *Id.*

¹⁸² *Id.* at 224.

¹⁸³ *Id.* at 295 (Frankfurter, J., dissenting) (footnotes omitted) (“In determining this issue non-justiciable, the Court [in *Luther*] was sensitive to the same considerations to which its later decisions have given the varied applications already discussed. It adverted to the delicacy of judicial intervention into the very structure of government. It acknowledged that tradition had long entrusted questions of this nature to non-judicial processes, and that judicial processes were unsuited to their decision. The absence of guiding standards for judgment was critical . . .”).

¹⁸⁴ U.S. CONST. art. IV, § 4.

¹⁸⁵ *See, e.g., Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (“We have explained that a controversy ‘involves a political question . . . where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’” (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)); *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion) (“Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness – because the question is entrusted to one of the political branches or involves no judicially enforceable rights. Such questions are said to be ‘nonjusticiable,’ or ‘political questions.’” (citing *Nixon, supra*, & *Pac. States Tel. & Tel. Co v. Oregon*, 223 U.S. 118 (1912)).

¹⁸⁶ *New York v. United States*, 505 U.S. 144, 185 (1992) (acknowledging arguments that the Court should adjudicate claims brought under the Guarantee Clause, but declining to “resolve this difficult question today”).

approach would say that federal failure to invalidate a state choice that either puts power in the hands of a few or that discriminates on an unconstitutional basis supports the argument that the government form is not republican.

Justice Black was perhaps the leading proponent of a proceduralist interpretation of the Guarantee Clause. In the context of a civil rights suit, he argued that a federal court order holding a state police officer in contempt for violating civil rights and restraining that officer from executing his duties usurped state authority and denied the state a republican form of government.¹⁸⁷ He took this position even though the order was intended to protect constitutional rights. The first Justice Harlan took another view. He argued in his *Plessy v. Ferguson*¹⁸⁸ dissent that permitting segregation recognized

a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community called the People of the United States.¹⁸⁹

This sort of discrimination, he contended, “is inconsistent with the guarantee given by the Constitution to each State of a republican form of government”¹⁹⁰ Thus, respectable jurists claimed, both preventing and allowing segregation violated the Guarantee Clause.

Similarly, Justice Black argued that Section 5’s preclearance process denied the states a republican form of government.¹⁹¹ By contrast, the District Court in

¹⁸⁷ *Lance v. Plummer*, 384 U.S. 929, 929 (1966) (Black, J., dissenting from denial of certiorari) (“To give federal judges such authority not only seems completely out of place in our federal form of government but also comes perilously close to violating the Constitutional obligation of the Federal Government to guarantee to every State a republican form of government.”).

¹⁸⁸ 163 U.S. 537 (1896).

¹⁸⁹ *Id.* at 563-64 (Harlan, J., dissenting).

¹⁹⁰ *Id.*

¹⁹¹ *South Carolina v. Katzenbach*, 383 U.S. 301, 359 (1966) (Black, J., concurring and dissenting) (“Moreover, it seems to me that § 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that ‘The United States shall guarantee to every State in this Union a Republican Form of Government.’”); see also *Voting Rights Hearings*, *supra* note 141, at 779-80 (reprinting, at the request of the Southern States Industrial Council, Thurman Sensing’s editorial “In a Time of Frenzy”; Sensing argued that if the Voting Rights Act passed, “[s]ix States will have been deprived of one of the foundations of republican government and will be in a Reconstruction era identical with the military occupation of 1865”); 121 CONG. REC. 24778 (daily ed. July 24, 1975) (remarks of Sen. Allen) (arguing that Section 5 may “deny the States the protection of the Constitution to a Republican form of government”); 121 CONG. REC. 24101 (daily ed. July 22, 1975) (remarks of Sen. Allen) (“What is happening to the theory of government which founded the Nation, that a republican form of government is best?”).

*City of Rome v. United States*¹⁹² suggested that Section 5 was an appropriate exercise of the federal power to guarantee a republican form of government because it protected the right to vote.¹⁹³ Further, as Professor William Wiecek's classic treatment explained, there have been contrasting conceptions of the content of republican government over time.¹⁹⁴ For this reason, if the Court were to undertake enforcement of the Guarantee Clause it would quickly find the thicket.¹⁹⁵

The second problem is that the Court is ill-suited to enforce a wide-open, discretionary provision like the Guarantee Clause. Because the Court has long held that it does not have the responsibility to resolve Guarantee Clause claims, it has developed no jurisprudence, established no principles, and explored no details of whether and how it can carry out a Guarantee Clause decree.¹⁹⁶ This

¹⁹² 472 F. Supp. 221, 241 (D.D.C. 1979), *aff'd* 446 U.S. 156, 182 n.17 (1980) ("We do not reach the merits of the appellants' argument that the Act violates the Guarantee Clause, Art. IV, § 4, since that issue is not justiciable. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962).").

¹⁹³ *City of Rome*, 472 F. Supp. at 241 (D.D.C. 1979) ("We need not reach the merits of plaintiffs' contention that section 5 constitutes a violation of the Guarantee Clause, since it has long been settled that such issues are generally not justiciable in federal court. We are bound to note, moreover, that section 5 would appear to be, if anything, an affirmative exercise of Congress' power under that provision rather than an abrogation of its duty. The purpose of section 5, simply speaking, is to guarantee to the covered jurisdiction one essential feature of a truly republican form of government—i.e., the equal right of any citizen, irrespective of race or color, to exercise the franchise." (footnotes omitted) (citations omitted)); *see also, e.g., S. REP. NO. 94-295*, at 73 (1975) ("[O]ur republican form of Government cannot reach its full potential without the right of participation in the affairs of Government by all of our citizens . . .").

¹⁹⁴ WIECEK, *supra* note 81, at 125 ("Whether or not republicanism in the 1840s required universal white manhood suffrage was sharply debated by the articulate public . . ."); *id.* at 145-51.

At the margin, the nature of republican government guaranteed by the Constitution is contested. Some argued that even before the Reconstruction Amendments those governments were not republican because African Americans could not vote and were not citizens; even before the Nineteenth Amendment, the disenfranchisement of female citizens violated the Clause. Although one might say that the critics were vindicated by the amendments, the clear implication was that the governments of the states at the time of ratification were republican. But denial of the vote to those who have no constitutional right to vote is a very different thing from denial of the right to vote to those who have it.

¹⁹⁵ Ultimately, however, there may be no real conflict. If, for example, a state, democratically and consistently with the terms of a republican constitution, adopted a new constitution with a non-republican form (say, a hereditary legislature), there would be a tension between the people's procedural rights to choose the form of their government and the substantive guarantee that the form be republican. Surely, the substantive requirement of a republican form of government must prevail. If this is right, then the substantive form takes priority over the procedural form of republicanism.

¹⁹⁶ *United States v. Louisiana*, 225 F. Supp. 353, 393 (E.D. La. 1963) (invalidating

sharply differentiates Guarantee Clause claims from those raised under, say, the Commerce Clause or the Equal Protection Clause. While those clauses are not always simple to understand and apply, the Court has deep expertise and experience in construing them. In addition, because of their numbers, experience, factfinding capabilities, and connection to the people, elected officials are in a better position than judges to identify and solve problems about the meaning of freedom than are courts.¹⁹⁷

There would also be, needless to say, a legitimacy problem if the Court were to suddenly assume a power it has denied it had for over a century. Whatever it did would be unprecedented and therefore questionable.

Leaving the Guarantee Clause in the hands of Congress without judicial review holds out the theoretical possibility of discrimination and tyranny. What if, in the name of promoting a republican form of government, Congress actually suppressed democratic authority in the states? One answer comes from reversing the question. Given the Court's oft-repeated claim that it is not expert in making political and policy choices, it might well exercise its newly assumed Guarantee Clause authority incorrectly, interfering where it is unnecessary, or failing to intervene when it is. Given that any final decisionmaker could be wrong, it is wise to leave the decision to the entity most capable of making a sound decision.

Another answer comes from Federalist No. 60 – speaking of the possibility of federal tyranny under the Elections Clause¹⁹⁸ but equally applicable to the Guarantee Clause – addressing the problem of the national government using its Elections Clause powers to dominate the states:

The improbability of the attempt may be satisfactorily inferred from this single reflection, that it could never be made without causing an

voting test that required interpretation of “republican form of government”; “[i]t is no small constitutional problem to define ‘a republican form of government’ and determine if the Board’s new test measures fairly an applicant’s understanding of the ‘duties and obligations of citizenship under a republican form of government’”), *aff’d*, 380 U.S. 145 (1965).

¹⁹⁷ See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (“[W]e possess neither the expertise nor the prerogative to make policy judgments.”); *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (“Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable.”) (citations omitted); *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) (“Finally, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, . . . as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court.”).

¹⁹⁸ U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

immediate revolt of the great body of the people, headed and directed by the State governments. It is not difficult to conceive that this characteristic right of freedom may, in certain turbulent and factious seasons, be violated, in respect to a particular class of citizens, by a victorious majority; but that so fundamental a privilege, in a country so situated and enlightened, should be invaded to the prejudice of the great mass of the people, by the deliberate policy of the government without occasioning a popular revolution, is altogether inconceivable and incredible.¹⁹⁹

That is, the Framers anticipated the theoretical possibility of misuse of power, and granted those powers to Congress anyway.

If the Court agrees that the validity of an amended Voting Rights Act based in part on the Guarantee Clause is a political question, another argument might arise. Perhaps not only the validity of the legislation, but also its application and enforcement, might be political in the sense of inherently nonjudicial. That is, perhaps the Guarantee Clause foundation of a statute renders it radioactive. If federal courts cannot evaluate the underlying validity of the law, perhaps they can have nothing at all to do with it. Perhaps, therefore, Congress can enforce Guarantee Clause-based laws, if at all, only through police, troops, and Article I or military tribunals, to the exclusion of Article III courts. The Court seems to have rejected this idea in *Texas v. White*, where the Court explained: “In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed.”²⁰⁰ If Congress has a choice, it can choose to have the cases decided in federal court.

There is another clear indication that a political Guarantee Clause issue does not keep a case out of court as to other questions: the decisions in which the Court declined to adjudicate Guarantee Clause challenges. The Court refused to determine whether state initiatives²⁰¹ and delegation of authority to state administrative agencies²⁰² rendered the governments of the enacting jurisdictions non-republican. Yet, the Court has since had no difficulty in deciding cases involving questions about initiatives and state administrative

¹⁹⁹ THE FEDERALIST NO. 60, *supra* note 75, at 367 (Alexander Hamilton).

²⁰⁰ *White*, 74 U.S. at 729.

²⁰¹ See *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569 (1916); *Kiernan v. City of Portland, Oregon*, 223 U.S. 151 (1912); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 134 (1912).

²⁰² See *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612-13 (1937) (regarding the powers of the Virginia Milk Commission); *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370, 374-75 (1930) (regarding the authority of a board of education); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 79-80 (1930) (discussing the powers of a park district board); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234-35 (1917) (addressing an administrative workers compensation system); *O’Neill v. Leamer*, 239 U.S. 244, 247-48 (1915) (determining the authority of drainage district).

agencies.²⁰³ This shows that laws may be enforced, reviewed, and applied in federal court even though one aspect of their validity cannot be directly evaluated because Guarantee Clause questions are nonjusticiable.

B. *Drafting Considerations and the Remaining Scope of Review*

Mere incantation of the words “Guarantee Clause” cannot insulate a statute from any sort of review. First, the fact that a law is supported by the Clause does not mean it is not invalid under some other provision of the Constitution. A law enacted under the Guarantee Clause offering special protection to, or limitation of, voters of a particular religion would likely be invalid under several provisions of the First and Fourteenth Amendments. Second, it would create a grave problem – one which, tellingly, has rarely, if ever, arisen – if Congress or the president defended an action under a particularly potent clause of the Constitution when that action has no plausible relation to that clause. A law justified on Guarantee Clause grounds should palpably address Guarantee Clause concerns.

Third, as is suggested by the fact that the Court did not address the Guarantee Clause in *Shelby County*, it may be that it is necessary for Congress to invoke the Guarantee Clause explicitly, in the text or title of the law.²⁰⁴

²⁰³ See, e.g., *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 182 (2007) (upholding “a state initiative approved by the voters of Washington in 1992”); *Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346, 349 (1939) (rejecting a claim against the Pennsylvania milk commission brought under the Commerce Clause). Cf. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1435 (2012) (Sotomayor, J., concurring) (“It is not impossible to imagine a case involving the application or even the constitutionality of an enactment that would present a nonjusticiable issue. Indeed, this Court refused to determine whether an Ohio state constitutional provision offended the Republican Guarantee Clause, Art. IV, § 4, holding that “the question of whether that guarantee of the Constitution has been disregarded presents no justiciable controversy.” (citing *Davis*, 241 U.S. at 569)).

²⁰⁴ In *Shelby County*, the Court did not address whether the Voting Rights Act could be upheld under the Guarantee Clause. This is, arguably, odd. As a general rule, the Court will uphold a statute if Congress had the power to enact it on any basis. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012) (“The ‘question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.’”) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). This is particularly odd because the Court itself had previously suggested that the Voting Rights Act might be sustained on Guarantee Clause grounds. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Supreme Court upheld the constitutionality of § 4(e) of the Voting Rights Act, providing that those who had completed the sixth grade in an accredited Puerto Rican school could not be denied the right to vote based on their inability to read or write in English. *Katzenbach*, 384 U.S. at 658. The Court found that Section 5 of the Fourteenth Amendment was sufficient authority and concluded that “[i]t is therefore unnecessary for us to consider whether § 4(e) could be sustained as an exercise of power under” several other clauses, including “as an exercise of congressional power to enforce the clause guaranteeing to each State a republican form of government” *Id.* at 646 n.5. The Court may have failed to discuss the Guarantee Clause either because it was not raised by

An explicit purpose of the law should be to promote majority rule, as well as the right of every individual to vote, and to prevent the wrongful capture of political power through various forms of disenfranchisement. This should be made clear in the text; the legislative history may be insufficient for Justice Scalia²⁰⁵ and other justices.

It would not be difficult to integrate Guarantee Clause concerns. Section 3 of the current version of the proposed Voting Rights Amendment Act imposes a preclearance requirement on states and political subdivisions with a recent history of voting rights violations.²⁰⁶ Section 2 allows courts finding violations of the Constitution or of the Voting Rights Act to impose preclearance on jurisdictions not covered under the formula of Section 3.²⁰⁷ Section 6 enhances the availability of injunctive relief when a court finds a violation in an individual lawsuit.²⁰⁸ Sections 2 and 6 involve discretionary relief awarded by courts applying a range of factors. Congress could ask courts, when deciding whether to issue relief in the form of bail-in or an injunction, to consider the political context, and they should be more likely to grant relief if the election could go either way. Again, the point is not that small minorities who have been discriminated against do not deserve judicial relief; they do, even if they have little chance of affecting the outcome of an election. But there are sound reasons for courts to make sure that majorities, or large minority groups which have the possibility of becoming majorities, have their electoral interests protected with particular care.

Similarly, the new test for preclearance under Section 3 of the Voting Rights Amendment Act should include attention to jurisdictions where elections could reasonably go either way. The proposed test is based on voting rights violations; a state with five violations in the past fifteen years is covered. A political subdivision is covered if it had three or more violations, or a single violation if it had extremely low minority turnout. These thresholds apply regardless of whether the parties are closely divided or one has an overwhelming advantage. The formula might reasonably be scaled, requiring a lesser showing in jurisdictions that have recently had close elections. The formula might account for whether there has been a change in party control of a house of the legislature or governorship, or whether there is divided control, indicating that elections are competitive. It could also take into account evidence of voter bias against particular racial groups.²⁰⁹ That being said, a

the parties, or because the Clause is subject to a heretofore unwritten clear statement rule. In either case, explicit reliance would be ideal.

²⁰⁵ See Mark Tushnet, *Theory and Practice in Statutory Interpretation*, 43 TEX. TECH L. REV. 1185, 1199 (2011) (“As is well-known, Justice Scalia has engaged in a protracted battle against reliance on legislative history in statutory interpretation.”).

²⁰⁶ Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3 (2014).

²⁰⁷ *Id.* at § 2.

²⁰⁸ *Id.* at § 6.

²⁰⁹ See generally Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of*

formula based on the numbers of voting rights violations does intrinsically get at Guarantee Clause concerns. Suppression of voters is not costless; one might expect that politicians would not bother to do it unless there was something to be gotten out of it. Therefore, Congress is entitled to reason that places with substantial numbers of violations are likely to be places where voting denial can pay off in the political process and, therefore, are places where the Guarantee Clause is legitimately invoked.

Congress will also have to address the elections and levels of government to which the new Voting Rights Act will apply. The Guarantee Clause benefits the states, not the federal government, so some other rationale will have to be found to the extent that the Act applies to purely federal elections. The Guarantee Clause rationale clearly extends to districting of the state and to electoral changes at the state or local level. State districting and state or local electoral changes have the potential, at least, to work denial or abridgement of the right to vote and the control of the state as a whole.

There is a strong argument that the Guarantee Clause rationale applies to districting of county commissions, city councils, boards of election, and other sub-state legislative bodies. Because these bodies typically have funding and legislative authority over the local voting apparatus,²¹⁰ their fairness is within the zone of concern of the Guarantee Clause. It is hard to imagine an elective post or body with so little electoral, law enforcement, legislative, or economic power or responsibility that its wrongful appropriation had no implications for political control.²¹¹ But this is an issue that Congress must address.

But if the new Act is clearly a bona fide effort to enforce the Guarantee Clause (among other provisions of the Constitution), its validity should be regarded as a political question. This conclusion is not merely meant to trump or dismiss the Court, or to advance a formal argument in response to the Court's good faith concerns about the Voting Rights Act, its effect on the interests of the states, and its own rules. Rather, based on what the Court said in *Shelby County*, reliance on the Guarantee Clause actually addresses and resolves the Court's concerns.

As an initial matter, the question of whether the law is a congruent and proportional response to a prior constitutional violation under the *Boerne* framework largely falls away. Because the Court has not developed Guarantee Clause jurisprudence, there is no logical necessity, or, for that matter, possibility, of limiting congressional action to remedying constitutional violations previously articulated by the Court.

Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County, 102 CAL. L. REV. (forthcoming 2014).

²¹⁰ See, e.g., *Ellis v. Coffee Cnty. Bd. of Registrars*, 981 F.2d 1185 (11th Cir. 1993).

²¹¹ In a legal system where the dogcatcher can charge people with crimes leading to disenfranchisement, there may be no such offices or bodies. See FLA. CONST., art. VI, § 4; *Hynes v. State*, 1 So. 3d 328 (Fla. Dist. Ct. App. 2009).

State action, a critical question under both the Fourteenth and Fifteenth Amendments, also becomes irrelevant. If a private group deprived a state of a republican form of government by somehow preventing an election or corrupting its outcome, surely that warrants federal assistance under the Clause no less than would a coup d'état by government officials. Similarly, public or private actions having the effect of preventing a lawful majority of voters from exercising political control violates the Guarantee Clause regardless of intent.²¹²

Non-uniformity also disappears as an issue. Plainly, only the people of states that have lost or are at risk of losing their republican character may be the beneficiaries of federal assistance under the Clause. Thus, the Clause itself contemplates differential treatment of states. In addition, the nature and timing of help must surely be political questions. For example, if two states simultaneously are subject to loss of republican status, it must be that Congress has discretion to conclude that one or the other should be helped first, because the danger for one is more urgent or serious, or because ensuring the liberty of one state will help facilitate the protection of others. Alternatively, Congress must have the discretion to help neither state, if, for example, the government needs time to plan or prepare to offer effective aid. For these reasons, differential treatment of states raises no red flags under the Guarantee Clause.

More broadly, restoration of the Voting Rights Act through the Guarantee Clause would not undermine the Court's *Boerne* structure; for better or worse, this would not be the beginning of a technique for Congress to evade it generally. It is virtually impossible to see how the Guarantee Clause rationale could justify legislative overruling of constitutional decisions in the area of school desegregation, religious freedom, employment discrimination or employee benefits, which are far afield from elections. A frequent subject of congruence and proportionality analysis is abrogation of Eleventh Amendment immunity to allow money damage claims by private individuals.²¹³ That concern is largely absent because Section 5 is generally administered by the federal government rather than individuals and generally does not involve money damages.

Finally, as Justice Kennedy put it:

The dual requirement that Congress identify a pervasive pattern of unconstitutional state conduct and that its remedy be proportional and congruent to the violation is designed to separate permissible exercises of congressional power from instances where Congress seeks to enact a

²¹² Cf. Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1414-15 (2002) (arguing that intent to discriminate should not be required to prove a violation of the Fifteenth Amendment).

²¹³ See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363-65, 372 (2001) (discussing the congruence and proportionality concerns of *Boerne*).

substantive entitlement under the guise of its [Fourteenth Amendment] § 5 authority.²¹⁴

It is clear that Congress is not attempting to create a new substantive entitlement. No one disagrees that race discrimination in elections is unconstitutional; the substantive entitlement plainly exists. In addition, the Court in *Shelby County* acknowledged that “voting discrimination still exists; no one doubts that.”²¹⁵ Thus, the question is purely over political facts, incentives, and consequences and the effectiveness of particular remedies in the real world. The Court’s own rules provide that “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings.”²¹⁶ The Court could defer to Congress in this unusual case without doing violence to what it understands as its role.

CONCLUSION

The Voting Rights Act was not designed to solve a merely theoretical problem or just a potential threat. African American voting in the former confederacy was suppressed from the mid-1870s until nearly a century later when the Voting Rights Act of 1965 had a chance to work. That suppression had pervasive national political effects. If it is “essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people,”²¹⁷ then the United States itself and many of its states did not have a republican form of government.

Protecting African American voters is matter of a continuing practical interest. For better or worse, African Americans are still predominantly aligned with the Democratic Party. Accordingly, wholly independent of racial hostility or animus, there is substantial partisan advantage to be gained by disenfranchising them. Historically, currently, and for the foreseeable future, disenfranchising African Americans has a partisan payoff that is unsurpassed by disenfranchising any other identifiable group. In this highly partisan era, disenfranchising African Americans may change the outcome of important elections. Congress is entitled to use the Guarantee Clause, as well as other provisions of the Constitution, to protect the majority’s right to rule.

²¹⁴ Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 756 (2003) (Kennedy, J., dissenting); see also, e.g., Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1333-34 (2012) (plurality opinion) (“Whether a congressional Act passed under § 5 can impose monetary liability upon States requires an assessment of both the “evil” or “wrong” that Congress intended to remedy,’ *ibid.*, and the means Congress adopted to address that evil.”) (citing *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

²¹⁵ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619 (2013).

²¹⁶ SUP. CT. R. 10.

²¹⁷ *Ex parte Yarbrough*, 110 U.S. 651, 666 (1884).