

# The New Pro-Majoritarian Powers

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*In her Jorde Lecture, Pam Karlan paints a grim picture of American democracy under siege. Together, the malapportioned Senate, the obsolete Electoral College, rampant voter suppression and gerrymandering, and a Supreme Court happy to greenlight these practices threaten the very notion of majority rule. I share Karlan's bleak assessment. I'm also skeptical that conventional tools—judicial decisions and congressional statutes—will solve our current problems. So in this response, I explore a pair of less familiar but possibly more potent alternatives: the authority of each chamber of Congress to judge its members' elections, and presidential enforcement of the Guarantee Clause. These powers are explicitly delineated by the Constitution. They can't be stymied by either the Senate's filibuster or the Court's hostility. And they hold enormous democratic potential, especially if channeled through the procedures I outline.*

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## INTRODUCTION

To much of the legal academy, the countermajoritarian difficulty—the anxiety about unelected courts striking down the handiwork of the political

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branches—is an obsession.<sup>1</sup> To Pam Karlan, it’s more of an afterthought. Nonjudicial institutions, Karlan argues in her Jorde Lecture, pose a greater danger to majoritarian democracy than do the courts. Consider the Senate with its unamendable rule that each state, no matter how large or small, must have two senators. As a result, the majority of Americans, who live in the ten biggest states, are represented by just twenty senators.<sup>2</sup> A popular minority controls a Senate supermajority of eighty seats.<sup>3</sup> Or take the Electoral College, our convoluted system for electing the President. In two of the last six elections, it has produced a countermajoritarian outcome: a President opposed by a majority of the electorate.<sup>4</sup>

Even as to the courts, Karlan continues, the conventional wisdom has it wrong. Their vice isn’t that they routinely nullify policies supported by a majority of voters. It’s that, all too often, they *decline* to invalidate policies aimed at *preventing* a majority of voters from exercising their rightful influence.<sup>5</sup> For example, the Roberts Court has never ruled in favor of plaintiffs alleging that an electoral regulation violates their right to vote.<sup>6</sup> Photo-ID requirements for voting, restrictions on mail-in voting, purges of voter rolls—the Roberts Court has greenlighted them all.<sup>7</sup> Similarly, rather than confront the invidious practice of partisan gerrymandering, the Roberts Court has held that it presents a nonjusticiable political question.<sup>8</sup> Consequently, states can now crack and pack disfavored voters to political oblivion, free from any judicial restraint. Plainly, this isn’t a record of countermajoritarian intervention. It’s a pattern of failing to intervene in defense of majoritarianism.<sup>9</sup>

I share Karlan’s dim view of our political and legal situation. So I originally thought I’d begin this response where Karlan’s lecture ends, by exploring the ways in which Congress and the President, acting together, could “mov[e] towards a democracy reflective of ‘We the People.’”<sup>10</sup> In tandem, the elected branches have many tools to make American government more majoritarian.

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1. Indeed, Barry Friedman once published a *five-part* series of articles about it. See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

2. See Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2338 (2021).

3. See *id.*

4. See *id.* at 2341.

5. See *id.* at 2342–47.

6. See Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 160 [hereinafter Stephanopoulos, *The Anti-Carolene Court*].

7. See *id.* at 127; see also, e.g., Crawford v. Marion Cnty. Elections Bd., 553 U.S. 181 (2008) (upholding Indiana’s photo-ID requirement for voting).

8. See Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

9. More specifically, it isn’t *just* a record of countermajoritarian intervention, though there’s plenty of that, too. See Stephanopoulos, *The Anti-Carolene Court*, *supra* note 6, at 147–69 (discussing the Roberts Court’s “perverse *Carolene*” decisions, which prevent the political branches from addressing democratic defects).

10. Karlan, *supra* note 2, at 2354.

They could admit new states, like Washington, D.C. and Puerto Rico, that would offset the conservative skew of the current Senate. They could entice (maybe even induce) states to assign their presidential electors to the winner of the national popular vote.<sup>11</sup> And as demonstrated by bills recently passed by the House, they could end voter suppression and gerrymandering, revitalize the Voting Rights Act, and supplant private money with the public financing of campaigns.<sup>12</sup>

However, the capacity of legislation to promote majoritarianism is ground that both I<sup>13</sup> and Franita Tolson,<sup>14</sup> another commenter on Karlan’s lecture, have covered in prior scholarship. I decided not to repeat here all our reasons why the elected branches could and should enact sweeping electoral reforms. Additionally, as of this piece’s writing, the House and Senate are almost evenly divided and the filibuster, a virtually insurmountable obstacle to the bold steps Tolson and I would like the elected branches to take, remains in force. To urge the passage of new legislation, in this political moment, thus has an air of unreality, a sense of wishing for the impossible.

Instead, I focus here on a pair of *non-legislative* powers with the potential to bring about a more majoritarian democracy. Because these powers aren’t legislative, they aren’t subject to the hurdles a bill must vault to become law: bicameralism, presentment, and (for now) the filibuster. Accordingly, federal authorities can exercise these powers immediately, even in the absence of bipartisan, supermajority support for their use. Under current law, moreover, actions taken under these powers can’t be reviewed by the courts. So such measures would circumvent not just the usual impediments to legislation but also the anti-majoritarian tendencies of the Roberts Court.

The first power I have in mind is the right of each chamber of Congress, under Article I, Section 5 of the Constitution, to be “the Judge of the Elections . . . of its own Members.”<sup>15</sup> Pursuant to this power—and without the involvement of either the other chamber or the President—each chamber could set rules for free and fair elections, such as the absence of voter suppression and gerrymandering. Each chamber could then refuse to seat candidates—again by simple majority vote—who benefited from these anti-majoritarian practices. This may seem like a radical proposition to modern ears: denying apparently victorious candidates their seats due to defects in their elections. But it was an utterly familiar idea in the decades after the Civil War, another era in which

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11. See Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1, 81–83 (2021) [hereinafter Stephanopoulos, *The Sweep of the Electoral Power*].

12. See For the People Act of 2021, H.R. 1, 117th Cong. (2021); Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2021).

13. See Stephanopoulos, *The Sweep of the Electoral Power*, *supra* note 11.

14. See, e.g., Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. F. 171 (2019); Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317 (2019).

15. U.S. CONST. art. I, § 5.

systematic efforts were made to thwart popular majorities. Between the late 1860s and the early 1900s, the House unseated *dozens* of its members (mostly southern Democrats) who owed their supposed wins to disenfranchisement, fraud, and violence.<sup>16</sup>

The other power I'd like to rescue from obscurity is the President's authority to guarantee a republican form of government. Alone among the Constitution's power-conferring provisions, the Guarantee Clause applies to "[t]he United States" as a whole.<sup>17</sup> The President, of course, is the head of the executive branch of the United States. Thanks to this position, the President could take whatever steps are necessary, in the chief executive's judgment, to prevent states from lapsing into non-republicanism or to remedy anti-republican abuses. The only limits on the President's discretion are that exigent circumstances must exist, and that Congress must be unwilling or unable to act. This prospect of unilateral presidential intervention, too, may startle certain readers. Again, though, it's firmly rooted in historical precedent. During the presidential phase of Reconstruction, President Johnson relied on the Guarantee Clause to appoint governors for the ex-Confederate states, whom he instructed to manage the states' democratic transitions.<sup>18</sup>

The obvious rejoinder to my proposal is consequentialist. As I write this piece, Democrats control both congressional chambers as well as the presidency. But their political position won't always be so auspicious. Someday—maybe sooner rather than later—Republicans will again command one or both of the elected branches. With this authority, if the Judging Elections Clause<sup>19</sup> has been resuscitated, congressional Republicans could decline to seat scores of Democrats on spurious grounds of electoral fraud. If the Guarantee Clause has been revived, a Republican President could justify almost any electoral interference as an attempt to vindicate republican values. For many observers, this possibility of President Trump's Republican Party wielding these potent powers in bad faith is enough to discredit the whole enterprise. Better to let sleeping dogs lie.

This objection has real force. Its bite could be lessened, though, by establishing procedures for the exercise of the Judging Elections Clause and the Guarantee Clause—by domesticating these potentially unruly provisions. If followed (a big if), these procedures could reduce the likelihood of malicious actors using their powers to subvert, rather than to enable, majoritarian democracy. With respect to the House and Senate, they should each delegate their authority to judge elections to a nonpartisan panel made up of attorneys,

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16. See Jeffery A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789–2002*, 18 *STUD. AM. POL. DEV.* 112, 131 (2004).

17. U.S. CONST. art. IV, § 4.

18. See Proclamation No. 38 (May 29, 1865), *reprinted in* 13 Stat. 760 (1865).

19. I use this term to refer to Article I, Section 5 of the Constitution, which has no commonly accepted nickname.

administrators, and academics. Instead of deciding itself whom to seat, each chamber should then rubberstamp the panel's recommendations. With respect to the President, before taking any action in the name of republicanism, the chief executive should explain why an emergency exists that Congress can't handle. Also before acting, the President should go through an expedited version of notice and comment, thereby soliciting feedback on the planned intercession.

Two assessments, both of which I share with Karlan, motivate my proposal. The first is that American democracy is in real peril. Thanks to the malapportioned Senate, the obsolete Electoral College, voter suppression, gerrymandering, and so on, countermajoritarian outcomes are so common that the will of the people often scarcely seems to matter. The second conviction is that conventional roads won't lead us out of this morass. As Karlan points out, the Roberts Court is itself part of the problem, having "abandoned majoritarian, representation-reinforcing judicial review."<sup>20</sup> Congress also won't be able to enact serious reforms as long as it needs sixty Senate votes to do so. That leaves the novel powers I analyze in this response: tools that can be blunted by neither a Senate filibuster nor a hostile Court. Yes, the Judging Elections Clause and the Guarantee Clause could be abused by future Congresses and Presidents, respectively, even with the precautions I suggest. But this is a risk we should be willing to incur. Desperate times call for desperate measures.

## I.

### JUDGING ELECTIONS

I begin with each congressional chamber's authority to judge the elections of its members. I first describe the history of this power's use. This history includes hundreds of electoral disputes and dozens of cases in which members of Congress were unseated for assorted offenses. Next, I turn to the limited doctrine on the Judging Elections Clause. Under this case law, each chamber has complete, nonreviewable discretion to decide, by majority vote, when elections have been properly conducted and who has prevailed in these races. Lastly, I outline a procedure that could tame this power and prevent its exploitation for partisan ends. The crux of this process is delegation to a body less biased and more expert than members of Congress themselves.

#### A. History

Given its low profile today, one might think the Judging Elections Clause has rarely been invoked in the past. Nothing could be further from the truth. The House started resolving electoral disputes during the very first Congress.<sup>21</sup> In sum, it has ruled in more than *six hundred* cases, an average of more than five

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20. Karlan, *supra* note 2, at 2354.

21. See EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 33–40 (2016) (describing the controversy over New Jersey's statewide House election).

per Congress.<sup>22</sup> The Senate had no cause to probe popular elections until 1913, when the Seventeenth Amendment stripped state legislatures of their right to appoint senators. Since then, the Senate has settled more than forty electoral challenges, an average of more than one per Congress.<sup>23</sup>

In the lengthier series of House electoral disputes, cases have been distributed unevenly over time. There were relatively few challenges between the Founding and the Civil War, generally fewer than five per Congress.<sup>24</sup> Disputes then spiked between 1860 and 1930, a period that routinely saw more than ten cases per Congress, including an all-time high of almost forty challenges in 1896–97.<sup>25</sup> In the modern era, use of the Judging Elections Clause has returned to its pre-Civil War level, again averaging fewer than five disputes per Congress.<sup>26</sup>

Nor have these cases been evenly dispersed geographically. More than 40 percent of challenges have arisen in former Confederate states.<sup>27</sup> Meanwhile, several northeastern and western states have seen fewer than five House electoral disputes over their entire histories.<sup>28</sup> As for the subjects of these cases, ballot fraud—“stuffing the ballot box, stealing and destroying ballots, or intentionally miscounting ballots”—has been the basis for more than two hundred challenges.<sup>29</sup> Registration fraud, in the form of preventing registered voters from casting ballots or bringing nonregistered voters to the polls, has given rise to more than 150 disputes.<sup>30</sup> Somewhat less common, though still accounting for more than fifty cases each, have been the bribery of voters and the resort to violence to deter people from voting.<sup>31</sup>

Crucially, the House has done more than just *hear* electoral challenges. With surprising frequency, it has voted to oust apparent electoral winners from their seats. Overall, more than 20 percent of contestants (more than 120 in number) have prevailed in their cases and thus been seated in place of their opponents.<sup>32</sup> Another 10 percent or so of contestants (close to seventy in number) have convinced the House to vacate the seat in question and call for a new

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22. See Didi Kuo & Jan Teorell, *Illicit Tactics as Substitutes: Election Fraud, Ballot Reform, and Contested Congressional Elections in the United States, 1860–1930*, 50 COMPAR. POL. STUD. 665, 677 (2017); Jenkins, *supra* note 16, at 115.

23. See ANNE M. BUTLER & WENDY WOLFF, UNITED STATES SENATE ELECTION, EXPULSION AND CENSURE CASES 1793–1990, at viii–ix (1995).

24. See Matthew N. Green, *Race, Party, and Contested Elections to the U.S. House of Representatives*, 39 POLITY 155, 158 (2007); Kuo & Teorell, *supra* note 22, at 678, fig. 1; Jenkins, *supra* note 16, at 116, fig. 1.

25. See Green, *supra* note 24, at 158.

26. See *id.*

27. See Jenkins, *supra* note 16, at 117.

28. See *id.* at tbl. 1.

29. Kuo & Teorell, *supra* note 22, at 678, fig. 2, 680.

30. See *id.*

31. See *id.*; see also Jenkins, *supra* note 16, at 117 (offering a different categorization scheme for the grievances in contested election cases).

32. See Jenkins, *supra* note 16, at 120.

election.<sup>33</sup> During the period from 1867 to 1911 in particular—the heyday of the Judging Elections Clause—eighty seats changed hands as a result of successful electoral disputes.<sup>34</sup> The bulk of these cases involved southern Democrats unseated because their supposed victories were tainted by disenfranchisement, fraud, or violence.<sup>35</sup>

As striking as these statistics are, they mask the dramatic facts the House and Senate have sometimes confronted. I summarize a few of these scenarios here, emphasizing electoral problems that still persist today. First, prior to the 1894 election, South Carolina enacted an onerous voter registration law aimed at preventing Black citizens from getting onto the voter rolls. Under the law, each county could register voters only at a single location, and only for a single day each month.<sup>36</sup> In the 1894 race for South Carolina’s Seventh Congressional District, the incumbent Democrat received about 4,000 more votes than his Republican rival.<sup>37</sup> However, more than 7,000 eligible but unregistered voters, mostly Black Republicans, signed petitions stating that they had attempted but failed to register to vote.<sup>38</sup> In the face of this evidence, a House committee concluded that South Carolina’s voter registration law was unconstitutional.<sup>39</sup> A majority of the entire House voted to vacate the seat so that a new election could be held.<sup>40</sup>

Second, in 1908, Virginia redrew its Fifth Congressional District for the “specific purpose” of “political advantage.”<sup>41</sup> That constituency had previously been a “close district,” but its new configuration rendered it “safe for the dominant political party of the State” (the Democrats).<sup>42</sup> The revised boundaries also “destroyed [the Fifth District’s] former compact form” and arguably made it noncontiguous, since “a mountain ridge . . . prevent[ed] public travel” from one side of the district to the other.<sup>43</sup> In response to this brazen gerrymandering, a House committee voted to reject the putative winner and to award the seat to his opponent.<sup>44</sup> In this way, the committee hoped to “shut the door of the House

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33. *See id.*

34. *See id.* at 131 & tbl.10.

35. *See id.* at 131.

36. *See* 2 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 1126 (1907).

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*; *see also* Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965 - And Beyond*, 57 MISS. L.J. 591, 632–34 (1987) (describing this case).

41. VI CLARENCE CANNON, CANNON’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 53 (1935).

42. *Id.*

43. *Id.*

44. *Id.*

of Representatives to one of the most insidious and dangerous political offenses that can menace democratic government.”<sup>45</sup>

Third, in Pennsylvania’s 1926 Senate election, the boss of the Philadelphia political machine, Republican William Vare, outraged contemporaries with his lavish spending. Over his primary and general election campaigns, his outlays totaled “a staggering \$2 to \$5 million”—a record for the time.<sup>46</sup> “[T]he expenditure of such large sums of money,” the Senate declared in a resolution, “taints with fraud and corruption [Vare’s] credentials”<sup>47</sup> and is “harmful to the dignity and honor of the Senate.”<sup>48</sup> The Senate then voted to deny Vare his seat and thus “to check the growing public suspicion that millionaire candidates could buy a membership at will in the highest legislative body in the nation.”<sup>49</sup>

And fourth, the 1984 race for Indiana’s Eighth Congressional District was “the closest election in the history of the House of Representatives.”<sup>50</sup> The Republican candidate led by seventy-two votes after the initial count.<sup>51</sup> But this count excluded a substantial number of absentee ballots that, in violation of Indiana law, hadn’t been notarized.<sup>52</sup> A task force made up of three House members decided to include most of these ballots on the ground that voter intent was clear notwithstanding the lack of notarization.<sup>53</sup> As then-Judge Scalia put it, the task force “employ[ed] its own rules rather than those of Indiana state election law.”<sup>54</sup> With the inclusion of the non-notarized absentee ballots, the Democratic candidate pulled ahead by four votes.<sup>55</sup> Based on this result, first the task force, then the relevant House committee, and finally the entire House voted to seat the Democrat.<sup>56</sup>

To be clear, these are atypical exercises of the Judging Elections Clause. In many other electoral disputes, the House and Senate seated the candidates apparently receiving more votes despite allegations of voter suppression, gerrymandering, campaign finance violations, or burdensome state laws.<sup>57</sup> In even more cases, no challenge was brought, so representatives and senators took their seats without any investigation into whether they owed their victories to unsavory or illegal activities. That said, these examples (which could be

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45. *Id.* However, the full House returned the matter to the committee, which declined to proceed further. *See id.*

46. BUTLER & WOLFF, *supra* note 23, at 323.

47. CYNTHIA BROWN, CONG. RSCH SERV., R40105, AUTHORITY OF THE SENATE OVER SEATING ITS OWN MEMBERS: EXCLUSION OF A SENATOR-ELECT OR SENATOR-DESIGNATE 7 (2009).

48. BUTLER & WOLFF, *supra* note 23, at 327.

49. *Id.* at 329; *see also* Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 610 (1929) (discussing Vare’s case).

50. McIntyre v. Fallahay, 766 F.2d 1078, 1080 (7th Cir. 1985).

51. *See id.*

52. *See* Barkley v. O’Neill, 624 F. Supp. 664, 666 (S.D. Ind. 1985).

53. *See id.*

54. Morgan v. United States, 801 F.2d 445, 446 (D.C. Cir. 1986).

55. *See id.*

56. *See id.*

57. *See supra* notes 32–35 and accompanying text (providing statistics for electoral disputes).

multiplied) are a powerful proof of concept. They show that suggestions to police antimajoritarian practices through the Judging Elections Clause aren't merely academic musings. To the contrary, the House and Senate have done exactly that on numerous occasions, refusing to seat candidates whose elections breached legal or ethical norms, sometimes even seating their rivals instead. In my view, this historical record adds considerably to the plausibility of my proposal. I'm urging the House and Senate to revive a power they have deployed many times before—not to break new policy ground.

### B. Law

A natural question, at this point, is what the courts have said about the Judging Elections Clause. The answer is, not much. But the handful of relevant decisions make clear that each congressional chamber's authority under this provision is essentially unfettered. First, each chamber decides for itself when elections have been suitably conducted and which candidates have won these races, without the involvement of any other actor. As the Supreme Court explained in a 1928 case involving the objection to Vare's election to the Senate, that body "is fully empowered, and may determine such matters without the aid of the House of Representatives or the executive or judicial department."<sup>58</sup> Or as the Court noted in the 1969 case of *Powell v. McCormack*, to which I return below, "each House [has] the exclusive power to decide congressional election challenges."<sup>59</sup>

Second, this exclusive power includes the authority to take all steps conducive to judging members' elections. Each chamber can thus "compel attendance of witnesses and production of evidence in investigations," per the Court's 1928 decision.<sup>60</sup> Or per a 1929 Court case also stemming from the dispute over Vare's election, "[e]xercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law."<sup>61</sup> Importantly, these appropriate rules of law are whatever each chamber says, *not* what state statutes happen to specify. As Judge Easterbrook observed in a 1985 case about Indiana's hotly contested Eighth District, the House has developed an "elaborate set of precedents," under which it "counts all ballots from which the intent of the voter may be discerned."<sup>62</sup> These House precedents are "substitutes for the rules of

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58. *Reed v. Cnty. Comm'rs of Del. Cnty.*, 277 U.S. 376, 388 (1928). Moreover, the Senate's practice has always been to seat provisionally any member whose election is disputed, so that "if [an] investigation later determined that . . . the individual was not entitled to a seat, he could be 'excluded' from the Senate by a simple majority vote." BUTLER & WOLFF, *supra* note 23, at xviii.

59. 395 U.S. 486, 516 (1969).

60. *Reed*, 277 U.S. at 388.

61. *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929).

62. *McIntyre v. Fallahay*, 766 F.2d 1078, 1085 (7th Cir. 1985).

state law.”<sup>63</sup> Whatever the result would be under state electoral regulations—whatever ballots would be counted or discarded—is “just advice from the state to Congress.”<sup>64</sup>

Third, each chamber is free to delegate its power under the Judging Elections Clause. “[T]he Senate may . . . devolve upon a committee of its members the authority to investigate and report,” the Court stated in its 1929 decision.<sup>65</sup> Indeed, “this is the general, if not the uniform, practice.”<sup>66</sup> Delegation to an entity other than a committee is also perfectly permissible. That’s what the House did, for example, when it authorized a task force to carry out the recount for Indiana’s Eighth District.<sup>67</sup> Of course, no matter which body is entrusted with finding facts and issuing recommendations, the ultimate decision belongs to the chamber as a whole. Only it can seat or oust an apparently elected candidate.

And fourth, this choice to seat or oust is a nonjusticiable political question. No court can second-guess a chamber’s judgment as to whether an election was free and fair or which candidate won a race. A chamber’s verdict is “beyond the authority of any other tribunal to review,” the Court announced in its 1929 decision.<sup>68</sup> “Which candidate is entitled to be seated . . . is . . . a nonjusticiable political question,” the Court confirmed in the 1972 case of *Roudebush v. Hartke*.<sup>69</sup> Then-Judge Scalia expounded in a 1986 case about Indiana’s Eighth District: the Judging Elections Clause “states not merely that each House ‘may judge’ these matters, but that each House ‘shall be *the* Judge.’”<sup>70</sup> “The exclusion of others—and in particular of others who are judges—could not be more evident.”<sup>71</sup>

This conclusion might seem surprising given the Court’s holding in *Powell* that each chamber’s power to judge its members’ qualifications *is* justiciable.<sup>72</sup>

63. *Id.* at 1086.

64. *Id.*; see also, e.g., HENRY L. DAWES, *THE MODE OF PROCEDURE IN CASES OF CONTESTED ELECTIONS* 11 (New York, Nation Press 1869) (“[E]ach House takes up the investigation of each case, at full liberty to pursue it in the way then deemed most expedient or just. . . . It is at every step a law unto itself.”).

65. *Barry*, 279 U.S. at 613.

66. *Id.*

67. See *Barkley v. O’Neill*, 624 F. Supp. 664, 666 (S.D. Ind. 1985); see also I INST. FOR RSCH. IN PUB. SAFETY, IND. UNIV., BLOOMINGTON, AN ANALYSIS OF LAWS AND PROCEDURES GOVERNING CONTESTED ELECTIONS AND RECOUNTS: FINAL REPORT 119 (1978) [hereinafter FINAL REPORT] (noting that each chamber can “create non-committee investigative bodies to aid it in . . . judging the elections of its members”).

68. *Barry*, 279 U.S. at 613.

69. 405 U.S. 15, 19 (1972).

70. *Morgan v. United States*, 801 F.2d 445, 447 (D.C. Cir. 1986).

71. *Id.*; see also, e.g., *McIntyre v. Fallahay*, 766 F.2d 1078, 1081 (7th Cir. 1985) (“The House is not only ‘Judge’ but also final arbiter. Its decisions about which ballots count, and who won, are not reviewable in any court.”); Franita Tolson, *Congressional Authority to Protect Voting Rights After Shelby County and Arizona Inter Tribal*, 13 ELECTION L.J. 322, 329 (2014) (noting that “Article I, Section 5 is a source of authority . . . with few judicial constraints”).

72. See *Powell v. McCormack*, 395 U.S. 486, 516–49 (1969) (reviewing the House’s exclusion of Representative Adam Clayton Powell, Jr. on account of his alleged misconduct).

But the qualifications for serving as a representative and senator—age, United States citizenship, and state residency—are explicitly listed by Article I, Section 2 and Article I, Section 3, respectively.<sup>73</sup> So it's relatively easy for a court to determine both whether a given individual possesses these qualifications and whether (as in *Powell*) a chamber has unlawfully added a qualification not mentioned by the constitutional text. In contrast, the Constitution is entirely silent as to the meaning of properly held elections. This is also a far more complex and contested issue than whether someone is eligible to serve in Congress, implicating debates about participation, representation, and democracy itself. So a court would have no textual hook for analyzing the validity or the outcome of an election. And any judicial examination of these matters would necessarily delve into political questions that are the purview of the elected branches.

Judge Easterbrook followed precisely this logic in distinguishing *Powell* in his 1985 Seventh Circuit opinion. “The Constitution creates but a limited number of qualifications of office,” which are amenable to judicial scrutiny.<sup>74</sup> Conversely, nothing in *Powell* “suggest[s] that election contests present justiciable questions.”<sup>75</sup> In his 1986 D.C. Circuit opinion, then-Judge Scalia similarly noted that “*Powell*’s parsimony is more than overcome by the Supreme Court’s most recent expression on the subject.”<sup>76</sup> *Roudebush*, of course, was decided two years after *Powell*, and clearly held that the Judging Elections Clause is nonjusticiable.

Nevertheless, a caveat is in order here. Even if the courts can’t review whether a chamber has appropriately exercised its power to judge its members’ elections, they certainly *can* consider whether, in so doing, the body has abridged a *different* constitutional provision. Suppose the House resolves not to seat any libertarian candidates on the ground that all their elections were defective. This could easily be a First Amendment violation—governmental discrimination on the basis of viewpoint. Or say the Senate rejects one Black candidate-elect after another, all due to supposedly flawed elections. It wouldn’t be hard to infer a racially discriminatory purpose from this pattern, and thus a transgression of the Equal Protection Clause. Putting the point more generally, just because congressional action is nonjusticiable under a power-*conferring* provision (like the Judging Elections Clause) doesn’t mean it’s a political question under a power-*limiting* provision (like the First or Fourteenth Amendment). Justiciability is inherently claim-specific.<sup>77</sup>

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73. See U.S. CONST. art. I, §§ 2–3.

74. *McIntyre*, 766 F.2d at 1081 n.1.

75. *Id.*

76. *Morgan*, 801 F.2d at 448.

77. See, e.g., *Baker v. Carr*, 369 U.S. 186, 209–37 (1962) (holding that, even though malapportionment claims are nonjusticiable under the Guarantee Clause, they are justiciable under the Equal Protection Clause).

*C. Domestication*

Given the history and law of the Judging Elections Clause, the most familiar way for a congressional chamber to enforce the provision would be by refusing to seat candidates-elect whose elections the chamber deems defective. This sort of ex post enforcement—occurring only after elections have been held—has been both the historical norm and the sole approach on which the courts have commented. To illustrate, imagine that, in the wake of the 2020 election, states under unified Republican control enact stringent new voting restrictions: photo-ID requirements, cutbacks to early and mail-in voting, voter roll purges, and so on.<sup>78</sup> Also imagine that, in these states, several Republican candidates receive slightly more votes than their Democratic opponents in the 2022 election. Then, after that election, it would be a conventional application of the Judging Elections Clause for a chamber to decline to seat these Republican candidates-elect (and even to seat their rivals) because they owed their victories to voter suppression. This is exactly what the House and Senate have done many times before, especially in the decades after the Civil War.

A somewhat more novel strategy would be for a chamber to specify—*before* the next election—which electoral practices it sees as impermissible. Such pre-election guidance would give fair warning to all candidates, rendering unpersuasive any complaints that they couldn't have anticipated how the chamber would exercise its power to judge elections. Rules set forth in advance might also deter states from adopting the prohibited regulations in the first place. States would be on notice that, by passing these regulations, they might cost their preferred candidates their seats in Congress. For example, to curb partisan gerrymandering, the House could announce that plans will be considered gerrymandered if they're more skewed in the line-drawing party's favor than most maps randomly generated by a computer algorithm without taking partisanship into account.<sup>79</sup> The House could add that candidates affiliated with the line-drawing party and elected from a gerrymandered plan won't be seated. A pre-election policy along these lines might bring an immediate halt to gerrymandering. Few, if any, states would want to risk losing large swathes of their congressional delegations by distorting their district lines.

Despite (or maybe because of) the potency of these tactics, there's a major counterargument against their use. It's that the exercise of the Judging Elections Clause would be perceived as highly partisan and could give rise to antimajoritarian abuses in the future. To grasp the force of this objection, think of how the moves outlined above—Democratic-run chambers not seating

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78. This is far from a hypothetical scenario. See *Voting Laws Roundup: February 2021*, BRENNAN CTR. FOR JUSTICE (Feb. 8, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2021> [<https://perma.cc/4754-EW82>] (tallying 165 bills in thirty-three states proposing new voting restrictions since the 2020 election).

79. *Cf. Rucho v. Common Cause*, 139 S. Ct. 2484, 2517–23 (2019) (Kagan, J., dissenting) (discussing at length this method for detecting extreme partisan gerrymandering).

Republican candidates-elect due to alleged voter suppression and the House barring the beneficiaries of gerrymandering wholesale—would play out politically. Republicans would cry bloody murder. They would accuse Democrats of a naked power grab, of exploiting their majority status to entrench themselves in office, of trashing the tradition of state control over elections. And Republicans would threaten retribution. When they're next in charge, they would promise, they would decline to seat Democrats prevailing in elections *they* found unsatisfactory, for instance, because the elections lacked sufficient safeguards against fraud. In the words of Congressman Henry Dawes, chair of the House committee that handled electoral disputes after the Civil War, “[w]hat one party does through [this] machinery can be done all the easier [to] it by any other which may come after it.”<sup>80</sup>

I don't think this concern can be fully defanged. No matter how a party in control of a chamber deploys the Judging Elections Clause, it can't stop the opposition from charging it with partisanship or vowing future revenge. But I do think it's possible to make these consequences less likely and less extreme—to lower the partisan temperature from white-hot to merely warm. The key, in my view, is *delegation* to a less partial, more informed body than members of Congress themselves. This entity would then decide whom to seat or oust, and the chamber would simply rubberstamp its recommendations. As noted earlier, both the House and Senate have long engaged in delegation (primarily to committees),<sup>81</sup> and the Supreme Court has explicitly approved this practice.<sup>82</sup> Delegation to a neutral, expert body would undermine (if not eliminate) allegations of partisanship, since seating determinations would then be made by an entity without a vested interest in the chamber's composition. Such delegation would also complicate (if not preclude) attempts at future vengeance, since they would require amending or abolishing the body wielding the delegated power.

This isn't the place to delve into the details, but I envision something like the following procedure. First, a chamber would appoint a panel made up of administrators experienced in running elections, attorneys involved in election litigation, and academics (like political scientists and law professors) who study the theory, doctrine, and practice of elections. Second, well before the next election, this panel would articulate the criteria that would govern its seating recommendations. One such guideline might be the anti-gerrymandering policy mentioned above.<sup>83</sup> Others could include the exclusion of candidates-elect whose margins of victory are smaller than the numbers of votes suppressed by certain proscribed practices, and the exclusion of candidates-elect found guilty

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80. DAWES, *supra* note 64, at 10; *see also, e.g.*, FINAL REPORT, *supra* note 67, at 5 (“The most obvious cost [of aggressive use of the Judging Elections Clause] is that the opposition party will take the same advantage when they come to power.”).

81. *See supra* notes 53–56 and accompanying text (discussing an unusual case of delegation to a bipartisan task force).

82. *See supra* note 65–67 and accompanying text.

83. *See supra* note 79 and accompanying text.

of campaign finance violations. Third, after the election, the panel would apply its criteria and decide who, in its judgment, should be seated in the next Congress. The panel would thoroughly explain any suggestions that apparently elected candidates not be seated. The panel would also finish its work as expeditiously as possible, certainly before the next Congress is sworn in.

Fourth, the entire chamber would vote on the panel's seating recommendations. This vote, too, would take place before the start of the next Congress. The vote would be a formality, as well, with members of Congress deferring to the panel's conclusions and declining to relitigate their merit. Finally, when the first day of the next Congress arrives, the presiding officer (the Clerk in the House or the Vice President in the Senate) would recognize and swear in the individuals identified by the chamber's vote.<sup>84</sup> These individuals would comprise the next Congress. The next Congress, that is, wouldn't have to consider which of its elections were properly conducted or who won those races. All that analysis would have been done by the previous Congress.

To American ears, the idea of outsourcing the Judging Elections Clause may sound outlandish. But the legislative body from which the Clause was borrowed—the British House of Commons<sup>85</sup>—has taken a similar approach to resolving electoral disputes for centuries. In the late 1700s, the House of Commons assigned these cases to jury-like panels of thirteen members of Parliament.<sup>86</sup> Forty-nine members were initially chosen by lottery, then winnowed to thirteen through alternating strikes by the contestants.<sup>87</sup> In the late 1800s, the House of Commons further distanced itself from electoral challenges. Since then, these matters have been entrusted to judges who examine the evidence, interrogate witnesses, and make determinations that are almost always approved by the chamber as a whole.<sup>88</sup> In Britain, this system has brought about exactly the benefits I flagged earlier: transparency, legitimacy, and an end to tit-for-tat retaliation.<sup>89</sup> I see no reason why delegation wouldn't have the same benign consequences in America.

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84. For discussions of the first day of a new Congress, see CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., RL30725, THE FIRST DAY OF A NEW CONGRESS: A GUIDE TO PROCEEDINGS ON THE HOUSE FLOOR (2020), and VALERIE HEITSHUSEN, CONG. RSCH. SERV., RS20722, THE FIRST DAY OF A NEW CONGRESS: A GUIDE TO PROCEEDINGS ON THE SENATE FLOOR (2020). In the case of the House, the presiding officer would be the *previous* Clerk: “[t]he previous Clerk of the House calls the House to order and presides over the chamber until the Speaker is elected and sworn in.” DAVIS, *supra*, at 2.

85. See, e.g., I JOHN RANDOLPH TUCKER & HENRY ST. GEORGE TUCKER, THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION 426 (Chicago, Callaghan & Co. 1899) (“The provisions of [the Judging Elections Clause] are in substance such as were practiced in Great Britain before the Revolution, and are usual in all legislative bodies under free governments.”).

86. See, e.g., DAWES, *supra* note 64, at 66.

87. See, e.g., *id.*

88. See, e.g., DE ALVA STANWOOD ALEXANDER, HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES 328 (1916).

89. See, e.g., FOLEY, *supra* note 21, at 5 (commenting with respect to the House of Commons that “[a]n impartial result required an impartial tribunal”).

My proposal, however, does diverge in one notable respect from the British model: timing.<sup>90</sup> In Britain, electoral disputes aren't decided on any particular schedule and commonly linger into the next parliamentary session. In contrast, if at all possible, I advocate settling seating issues before the next Congress is sworn in. This accelerated timetable, first, would ensure that the next Congress's composition is fixed before it begins its business. Such stability would help prevent the policymaking swerves that can sometimes follow from changes in membership.

Second, and more importantly, the early resolution of electoral challenges would avoid some of the mischief that might otherwise ensue under hyperpartisan modern conditions. Suppose that an election apparently flipped a chamber from one party to the other, but that the potential new majority's control rests on seats called into question by voter suppression, gerrymandering, and the like. Then everything hinges on when the status of these contested seats is determined. If (as I urge) the previous Congress makes these rulings (consistent with the panel's recommendations), then most likely these candidates-elect won't be seated and the chamber won't change hands. Conversely, if these candidates-elect are provisionally seated and their fate is left to the next Congress, then upon their swearing in, the chamber will indeed flip. At that point, the new majority will be sorely tempted to overrule the panel and to keep these members in their ill-gotten seats. The new majority will be sorely tempted, that is, to unravel the procedure I've laid out, in the name of partisan advantage. Timing, then, might seem like a secondary consideration. In certain plausible scenarios, though, it's the linchpin of my entire proposal.<sup>91</sup>

## II.

### GUARANTEEING REPUBLICAN GOVERNMENT

Let's proceed, next, from one end of Pennsylvania Avenue to the other—from the chambers of Congress and their authority to judge their members' elections to the President and the executive power to guarantee a republican form of government. As in the previous Part, I examine the history and law of presidential enforcement of the Guarantee Clause and then suggest ways in which this provision could be made less susceptible to abuse. But my discussion here is briefer because, while congressional chambers have invoked the Judging Elections Clause hundreds of times, presidents have relied on the Guarantee Clause on only a handful of occasions.

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90. My proposal also diverges in the body to whom the power to judge elections is delegated: a panel of neutral experts rather than a court.

91. In this discussion, I'm assuming a benign majority in the previous Congress and a potential new majority in the next Congress that endorses antimajoritarian practices. Of course, if the previous Congress is already controlled by a majority comfortable with countermajoritarianism, then that majority is unlikely to adopt my proposal in the first place.

*A. History*

John Tyler was the first president to take action under the Guarantee Clause, during the Dorr Rebellion of 1842. Two rival governments claimed the right to rule Rhode Island: one constituted under the state's charter, the other led by Thomas Dorr and objecting to the charter's property requirement for voting.<sup>92</sup> After fighting broke out between these factions, the governor of the charter government appealed to Washington for assistance.<sup>93</sup> In response, as the Supreme Court later recounted, "the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority."<sup>94</sup> In other words, President Tyler concluded that the charter government was a republican government, that Dorr's uprising was a threat to republicanism, and that federal military force should be deployed to protect the charter government.<sup>95</sup> President Tyler's intervention quickly achieved its aim: "the knowledge of [his] decision . . . put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution."<sup>96</sup> Republicanism in Rhode Island, at least as assessed by President Tyler, was preserved.

Two decades later, President Lincoln justified his famous December 1863 Proclamation of Amnesty and Reconstruction by reference to the Guarantee Clause.<sup>97</sup> In this statement, President Lincoln addressed the reincorporation of the Confederate states. As soon as 10 percent of a state's voters swore allegiance to the United States and "reestablish[ed] a state government which shall be republican," "such [would] be recognized as the true government of the state."<sup>98</sup> Additionally, "the state [would] receive . . . the benefits of the constitutional provision which declares that 'the United States shall guaranty to every State in this Union a republican form of government.'"<sup>99</sup> However, to ensure the republicanism of each new government, "modifications" might be "necessary" to "the subdivisions, the constitution, and the general code of laws" of the

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92. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 35–38 (1849) (describing the Dorr Rebellion).

93. See *id.* at 44.

94. *Id.* Importantly, President Tyler did so under both his own Guarantee Clause authority and a congressional statute granting him "the power of deciding whether [an] exigency had arisen upon which the government of the United States is bound to interfere." *Id.* at 43.

95. Notwithstanding this intervention, President Tyler's interpretation of the Guarantee Clause wasn't particularly expansive. He thought "actual violence, not just the threat of disorder, must have taken place or be unavoidably imminent as a prerequisite of presidential action." WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 105 (1972). He also thought "the guarantee of republican government extended to the recognized government of a state, not to the faction challenging it." *Id.*

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

97. In an 1861 message to Congress, President Lincoln also previously "sought in the [Guarantee Clause] an authorization for extraordinary national authority to put down the rebellion." WIECEK, *supra* note 95, at 171.

98. Proclamation No. 11 (Dec. 8, 1863), *reprinted in* 13 Stat. 737, 738 (1863).

99. *Id.*

state.<sup>100</sup> Mere reversion to the pre-Civil War status quo, that is, might not satisfy President Lincoln's definition of republicanism. He might require further changes (beyond the emancipation of the slaves) before deeming a state government republican and thus in compliance with the Guarantee Clause.<sup>101</sup>

Of course, President Lincoln was killed before the Civil War ended and Reconstruction commenced. His successor, President Johnson, "indicated [an even] greater interest in the [G]uarantee [C]lause than did Lincoln."<sup>102</sup> During the presidential phase of Reconstruction, President Johnson issued a separate proclamation for each ex-Confederate state appointing a provisional governor and instructing him to supervise the enactment of a new state constitution. Each of these proclamations began by citing the Guarantee Clause: "[w]hereas the fourth section of the fourth article of the Constitution of the United States declares that the United States shall guarantee to every state in the Union a republican form of government."<sup>103</sup> Each proclamation's preamble also announced that it was "necessary and proper to carry out and enforce the obligations of the United States to the people of [the state], in securing them in the enjoyment of a republican form of government."<sup>104</sup>

Pursuant to the President's authority to enforce the Guarantee Clause, each proclamation then directed a wide range of measures. A provisional governor was named.<sup>105</sup> He was charged with "prescrib[ing] such rules and regulations as may be necessary and proper for convening a [state constitutional] convention."<sup>106</sup> Both the voters who elected the convention delegates, and the delegates themselves, had to swear their loyalty to the United States.<sup>107</sup> The governor was also granted "all the powers necessary and proper to enable such loyal people . . . to present such a republican form of state government as will entitle the state to the guarantee of the United States therefor."<sup>108</sup> Separate from the governor, other federal officials were assigned tasks of their own. The military commander of the state had to "aid and assist the said provisional governor in carrying into effect this Proclamation."<sup>109</sup> The Secretary of the Treasury had to appoint tax and customs officers.<sup>110</sup> The Postmaster General had

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100. *Id.*

101. See Davis S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 VAND. L. REV. 673, 710 (2020) (noting that this language "foreshadow[ed] the much more extensive congressional Reconstruction plan that would unfold after [President Lincoln's] assassination").

102. WIECEK, *supra* note 95, at 189.

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

104. *E.g., id.*

105. *E.g., id.*

106. *E.g., id.*

107. *E.g., id.*

108. *E.g., id.*

109. *E.g., id.*

110. *E.g., id.* at 761.

to establish post offices.<sup>111</sup> And so on for the Secretary of State, the Secretary of the Navy, the Secretary of the Interior, and even the federal courts, which were ordered to resume operations.<sup>112</sup>

Presidential Reconstruction marked the high point of presidential use of the Guarantee Clause. After President Johnson's proclamations, the only presidential appraisals of republican status took place in the context of the admission of new states. Repeatedly in the late nineteenth century, Congress passed enabling acts that delegated to the President the responsibility of deciding whether a would-be state government was republican.<sup>113</sup> "This meant that the execution of the guarantee was being transferred by Congress to the executive, for the President was given no criteria to guide him in his determination of the republicanism of the [applicant] government."<sup>114</sup> Satisfied that Colorado's constitution was suitably republican, President Grant thus proclaimed the state's admission in 1876.<sup>115</sup> President Harrison similarly welcomed Montana, North Dakota, South Dakota, and Washington in 1889 after confirming the republicanism of their governments.<sup>116</sup>

### B. Law

Turning from the history to the law of presidential enforcement of the Guarantee Clause, the limited doctrine supports three propositions. The first is that the President indeed has some authority to implement the provision alone, without the involvement or approval of any other actor. In the 1849 case of *Luther v. Borden*, in which the Court considered the events of the Dorr Rebellion, it commented that the President's Guarantee Clause power "is conferred upon him by the Constitution."<sup>117</sup> This power "must therefore be respected and enforced in [federal] judicial tribunals."<sup>118</sup> In the 1868 case of *Texas v. White*, which involved President Johnson's proclamation for Texas, the Court likewise stated that "it cannot be denied that [the President] might institute temporary government within insurgent districts."<sup>119</sup> The President could also "take

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111. *E.g., id.*

112. *E.g., id.*; see also WIECEK, *supra* note 95, at 189–90 (discussing "Johnson's theory of the [G]uarantee [C]lause: the clause could be enforced by the President without any special authorization of Congress"); Louk, *supra* note 101, at 710 (noting that President Johnson "repeatedly invoked the broad executive powers provided by the Clause in the months after the Civil War ended").

113. See Charles O. Lerche, Jr., *The Guarantee of a Republican Form of Government and the Admission of New States*, 11 J. POL. 578, 591–92 (1949).

114. *Id.* at 592.

115. *See id.*

116. *See id.*

117. 48 U.S. (7 How.) 1, 44 (1849).

118. *Id.*

119. 74 U.S. (7 Wall.) 700, 730 (1868).

measures, in any State, for the restoration of State government faithful to the Union.”<sup>120</sup>

Second, however, the President’s Guarantee Clause authority *isn’t* plenary. It can be exercised only in emergencies, such as uprisings and outright warfare, when Congress is unable or unwilling to act. As the Court explained in *White*, “the power to carry into effect the clause of guaranty is primarily a legislative power.”<sup>121</sup> It was only permissible for President Johnson to issue his Texas proclamation because he did so “almost immediately after the cessation of organized hostilities, and while the war yet smoldered.”<sup>122</sup> Relatedly, presidential action under the Guarantee Clause is conditional, subject to amendment or rescission if Congress manages to legislate. Again per *White*, President Johnson’s Texas proclamation “must . . . be considered as provisional,” and that is how “it seems to have been regarded by Congress.”<sup>123</sup> Through its Reconstruction Acts, Congress overrode President Johnson’s proclamations and “restored [the ex-Confederate states] to their constitutional relations, under forms of government, adjudged to be republican by Congress”—not the President.<sup>124</sup>

And third, nevertheless, no court can review the President’s judgment that certain steps are warranted to enforce the Guarantee Clause. The validity of these measures, in other words, presents a nonjusticiable political question. “After the President has acted [on the basis of the Guarantee Clause],” the Court asked in *Luther*, “is a Circuit Court of the United States authorized to inquire whether his decision was right?”<sup>125</sup> Certainly not, the Court answered. “If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order.”<sup>126</sup> The *Luther* Court also responded to the objection that “this power in the President is dangerous to liberty, and may be abused.”<sup>127</sup> “All power may be abused if placed in unworthy hands,” the Court observed.<sup>128</sup> Moreover, the alternatives to presidential authority are worse: “it

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120. *Id.*; see also, e.g., WIECEK, *supra* note 94, at 77 (“The phrasing of the clause and its context and location support the conclusion that it might be enforced by all branches of the government.”); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 523 (1962) (“[T]he obligation [to enforce the Guarantee Clause] rests on all the departments of the government, in their appropriate spheres.”).

121. 74 U.S. (7 Wall.) at 730.

122. *Id.* at 729.

123. *Id.* at 730.

124. *Id.* at 731; see also, e.g., WIECEK, *supra* note 95, at 105 (approvingly discussing the “limitations on executive discretion” under the Guarantee Clause); Louk, *supra* note 101, at 749 (noting that “the guarantee could be understood as an emergency powers provision that applies only in extreme circumstances”).

125. *Luther v. Borden*, 48 U.S. (7 How.) 1, 43 (1849).

126. *Id.*

127. *Id.* at 44.

128. *Id.*

would be difficult . . . to point out any other hands in which this power would be more safe, and at the same time equally effectual.”<sup>129</sup>

### C. Domestication

In certain respects, then, the President’s power to enforce the Guarantee Clause is far broader than the authority of each congressional chamber to judge its members’ elections. The President’s power isn’t limited to federal elections (let alone the seating of representatives and senators). It extends, rather, to elections at all levels and even to non-electoral policies the President might deem unrepugnant. In fact, this authority is so sweeping that it was once used (by President Johnson) to reconstitute ex-Confederate state governments in their entirety.<sup>130</sup> Furthermore, the assent of just a single individual, the President, is necessary prior to the exercise of this power. In contrast, a majority of a multimember legislative body must be assembled before the House or Senate can refuse to seat an apparently elected candidate. And as just noted, even if the President exceeds the bounds of Guarantee Clause authority (by, say, taking action in the absence of an emergency), there’s almost<sup>131</sup> nothing the courts can do about it. The validity of the President’s intervention is nonjusticiable.

Power this expansive could certainly be deployed for good. The President might decide that particular voting regulations are unrepugnant because they make it needlessly hard to vote. Based on this judgment, the President might issue an executive order preventing states from implementing these policies. Alternatively, the President could embrace the view, popular in the academy,<sup>132</sup> that partisan gerrymandering offends the core republican value of popular sovereignty. On this ground, the President could declare that gerrymandered maps are invalid and must be judicially reconfigured. Even more aggressively, the President could order the establishment of independent redistricting commissions that would draw the lines instead of self-interested politicians.

It’s also easy, however, to imagine how the President’s authority to enforce the Guarantee Clause might be abused. Just think of President Trump and his endless false claims about voters committing fraud, election officials rigging races in the Democrats’ favor, voting machines deleting his votes, and the like.<sup>133</sup> What if he had forbidden states from expanding mail-in voting, in the throes of

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129. *Id.*

130. *See supra* notes 102–112 and accompanying text.

131. *Almost* nothing because even if the lawfulness of the President’s action *under the Guarantee Clause* is nonjusticiable, courts could still hold that the President transgressed some other constitutional limit, like the First or Fourteenth Amendment. *See supra* note 77 and accompanying text.

132. *See, e.g.*, Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 *YALE L.J.* 1021 (2005); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 *HARV. J.L. & PUB. POL’Y* 103 (2000).

133. *See, e.g.*, Jim Rutenberg, Jo Becker, Eric Lipton, Maggie Haberman, Jonathan Martin, Matthew Rosenberg, & Michael S. Schmidt, *77 Days: Trump’s Campaign to Subvert the Election*, *N.Y. TIMES* (Feb. 12, 2021), <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html> [<https://perma.cc/YC4Y-SKDJ>].

a pandemic, because this mode of voting is supposedly vulnerable to fraud? Or fired nonpartisan and Democratic election officials due to their alleged bias against him? Or instructed federal forces to confiscate purportedly malfunctioning voting machines in Democratic areas? All these acts could have been based on the Guarantee Clause—widespread fraud, partial election administration, and rigged election machinery being arguably inconsistent with republicanism. But if President Trump had taken these steps, the presidential enforcement power wouldn't have promoted democratic values. It would have led directly to their subversion.

I'm alarmed enough by these scenarios that I can't endorse the unregulated presidential implementation of the Guarantee Clause—no matter how much good it could do in other situations. Instead, I think this power should be channeled and constrained by congressional legislation, tamed so it's less likely to threaten the foundations of our democratic order. First, Congress should require the President, before any intervention on Guarantee Clause grounds, to explain why an emergency exists that Congress is unsuited to address. If Congress disagrees (via additional legislation) about the presence of an emergency or the President's proposed measures, the President should be barred from proceeding.<sup>134</sup> Second, even when presidential action isn't blocked, the President should go through an expedited version of notice and comment.<sup>135</sup> That is, the President should announce plans to guarantee republican government, solicit feedback on these plans, and then consider adjusting them in light of the responses. Judicial review for reasonableness should also be available, just as it is in the administrative law context.

Legislation implementing these proposals would almost certainly be upheld. The Supreme Court has stated that the authority to enforce the Guarantee Clause is “primarily a legislative power, and resides in Congress.”<sup>136</sup> The requirements that the President step in only in emergencies, and only unless or until Congress further legislates, also echo the limits the Court has articulated on presidential action.<sup>137</sup> And in any event, congressional (like presidential) implementation of the Guarantee Clause is nonjusticiable.<sup>138</sup> Moreover, such legislation has clear historical analogues. When President Tyler summoned the militia to defend Rhode Island's charter government, he did so pursuant to a statute.<sup>139</sup> Other laws authorized President Grant and President Harrison to

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134. Cf. War Powers Act of 1973, 50 U.S.C. §§ 1541–1548 (requiring the President to give notice to Congress of military action and compelling the withdrawal of forces unless congressional authorization is received).

135. Cf. Administrative Procedure Act, 5 U.S.C. § 553 (describing notice-and-comment agency rulemaking).

136. *Texas v. White*, 74 U.S. (7 Wall.) 700, 730 (1868).

137. See *supra* notes 121–124 and accompanying text.

138. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (holding that congressional action under the Guarantee Clause “is binding on every other department of the government, and could not be questioned in a judicial tribunal”).

139. See *supra* note 94 and accompanying text.

evaluate the republicanism of the governments of potential new states.<sup>140</sup> And when the Radical Republicans disapproved of President Johnson's unilateral measures under the Guarantee Clause, they simply superseded them through the landmark Reconstruction Acts.<sup>141</sup>

The safeguards I suggest would reduce the risk of the President using the Guarantee Clause for antimajoritarian purposes. Return to the parade of horrors that President Trump could have tried to set in motion.<sup>142</sup> No doubt, he would have told Congress that an emergency existed—pervasive fraud—that necessitated immediate presidential intervention. But Congress may well have disagreed with this assessment, thereby stopping President Trump's efforts in their tracks. Even if Congress was unable to enact new legislation, the notice-and-comment process (and the judicial review upon its conclusion) would likely have thwarted President Trump's moves. Comments would have poured in, pointing out that, not only is electoral fraud not an emergency, it barely even occurs in modern American politics. On the same basis, the courts would have probably deemed President Trump's measures arbitrary and capricious—untethered to any actual threat to republicanism.

On the other hand, my recommended regulations would less often block benign presidential action under the Guarantee Clause: for example, steps targeting voter suppression or gerrymandering. Congress would be more apt to agree that these are genuine problems—*dire* problems imperiling majoritarianism and requiring an urgent response.<sup>143</sup> Assuming no congressional override, notice and comment and judicial review would also pose smaller obstacles. Many comments would confirm the proliferation of restrictions on voting and gerrymandered maps. Precisely because these antimajoritarian practices are so common, the courts would likely conclude that the President's attempts to foil them are reasonable. Generalizing somewhat, the point is that additional procedures for the presidential enforcement of the Guarantee Clause don't equally hinder antimajoritarian and promajoritarian measures. These extra hoops are much bigger hurdles for the former.

#### CONCLUSION

As of this piece's writing, Karlan's worst fears about American democracy seem to be coming true. The Senate and the Electoral College—those two graveyards of majoritarianism—remain stubbornly in place. So does the Roberts Court, that implacable foe of promajoritarian judicial review.<sup>144</sup> Across the country, states are racing to make voting as difficult as possible and thus to avoid

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140. See *supra* note 113–116 and accompanying text.

141. See *supra* notes 123–124 and accompanying text.

142. See *supra* note 133 and accompanying text.

143. At least, Congress would be less likely to assemble a veto-proof majority against presidential action that promoted majoritarianism.

144. See Stephanopoulos, *The Anti-Carolene Court*, *supra* note 6.

any more elections with turnout as high as in 2020.<sup>145</sup> Another round of gerrymandering is right around the corner, this time (thanks to the Roberts Court<sup>146</sup>) entirely unconstrained by any judicial check. And while the House may soon pass sweeping electoral reforms, these bills are dead on arrival in the Senate as long as the filibuster endures.

This deeply troubling context is why my proposals here aren't quixotic. Yes, it has been about a century since either chamber of Congress used its authority to judge its members' elections to fight antimajoritarian practices. And yes, the President has done so under the Guarantee Clause on only one prior occasion (the aftermath of the Civil War). Nevertheless, these powers are explicitly delineated by the Constitution. They can't be stymied by either the Senate's filibuster or the Roberts Court's obstructionism. And they hold enormous promajoritarian potential—the capacity to end, in one fell swoop, most voter suppression and gerrymandering. The choice of our time, then, may be whether to stick to conventional tools that won't fix the glaring problems of American democracy or to consider less familiar, more potent alternatives. I know how I'd cast my lot.

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145. See *Voting Laws Roundup: February 2021*, *supra* note 78.

146. See *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).