THE LAW OF DEMOCRACY AND THE TWO *LUTHER V. BORDEN*S: A COUNTERHISTORY

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How, and how much, does the Constitution protect against political entrenchment? Judicial ineptitude in dealing with this question—on display in the modern Court's treatment of partisan gerrymandering—has its roots in Luther v. Borden*. One hundred and sixty years after the* Luther *Court refused jurisdiction over competing Rhode Island state constitutions, judicial regulation of American structural democracy has become commonplace. Yet getting here—by going around* Luther*—has deeply shaped the current Court's doctrinal posture and left the Court in profound disagreement about its role in addressing substantive questions of democratic fairness. While contemporary scholars have demonstrated enormous concern for the problem of the judicial role in policing political entrenchment,* Luther*'s central role in shaping this modern problem has not been fully acknowledged. In particular, Justice Woodbury's concurrence in* Luther*, which rooted its view of the political question doctrine in democratic theory, has been completely ignored. This Note tells* Luther*'s story with an eye to the road not taken.*

INTRODUCTION

The year 2012 promises a new round of legislative redistricting and gerrymandering,[1] a new round of money entering our electoral system from undisclosed sources,[2] and a new round of hyperpartisan

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[1] *See, e.g.*, Michael Cooper, *State Gains Could Give GOP Redistricting Edge*, N.Y. TIMES, Sept. 7, 2010, at A1 (discussing how legislatures may redraw district boundaries for the midterm elections); Kyle Trygstad & Steve Peoples, *Swing States Prepare for 2012, Redistricting*, ROLL CALL, Dec. 9, 2010, at 12. Indeed, the first wave of federal litigation following the post-2010 Census redistricting has already reached the courthouse steps. *See* Michael Cooper and Jennifer Medina, *Battles To Shape Maps, and Congress, Go to Courts*, N.Y. TIMES, Oct. 22, 2011, at A18 ("Lawsuits related to redistricting have been filed in more than half the states . . . .").

[2] *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010) (holding that corporations may spend freely on politics); *see also, e.g.*, Paul Blumenthal, *The* Citizens United *Effect: 40 Percent of Outside Money Made Possible by Supreme Court Ruling*, SUNLIGHT FOUND. BLOG (Nov. 4, 2010, 1:43 PM), http://sunlightfoundation.com/blog/2010/

elections.[3] "We the People" may not particularly like our political parties,[4] but they possess broad power to structure the rules of politics—such as election rules and districting schemes—in favor of their own entrenchment.[5] The role of courts in regulating the relationship between the People and their political agents remains startlingly undefined, notably in the area of partisan gerrymandering. So how much political entrenchment should the Constitution prevent?

Law of democracy scholars have addressed the political entrenchment problem, arguing that courts should play a special role in policing the democratic process.[6] Some have debated antitrust-style regulation of the political system, describing self-dealing incumbents and entrenched parties in terms of "political cartels" and "partisan lockups," or "foxes and henhouses."[7] Scholars, as well as the Supreme

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11/04/the-citizens-united-effect-40-percent-of-outside-money-made-possible-by-supreme-court-ruling/ (noting the practical impact of the *Citizens United* decision).

[3] In recognizing a legitimate state interest in our two-party system, the Supreme Court has constitutionally sanctioned the basic structures of our two-party system. *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 577–82 (2000) (striking down California's blanket primary system); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359–63 (1997) (refusing to allow "fusion" nominations by third parties).

[4] *See* E.J. DIONNE, WHY AMERICANS HATE POLITICS 10 (2d ed. 2004) ("Voters [are] tired of the false choices presented by an ideologically driven, 'either/or' politics."); David C. King, *The Polarization of American Parties and Mistrust of Government*, *in* WHY PEOPLE DON'T TRUST GOVERNMENT 155, 157 (Joseph S. Nye et al. eds., 1997) ("[T]he preferences of parties and political elites [are] more distant from the concerns of most Americans."); Nate Silver, *Unfavorable Ratings for Both Major Parties near Record Highs*, N.Y. TIMES: FIVE THIRTY EIGHT BLOG (July 23, 2011, 5:00 AM), http://fivethirtyeight.blogs.nytimes.com/2011/07/23/unfavorable-ratings-for-both-major-parties-near-record-highs/ ("The combined unfavorable score for both parties—104 percent—is also a record, and represents the first time that the figure has been above 100.").

[5] *See infra* notes 157–58 and accompanying text (describing the structural conflict of interest created by self-aggrandizing political parties setting the rules of politics). Indeed, some prominent commentators have connected the partisan feedback loop created by the party-driven districting process directly to the erosion of our political culture. *See* President Barack Obama, Remarks at University of Maryland Town Hall (July 22, 2011), *available at* http://m.whitehouse.gov/the-press-office/2011/07/22/remarks-president-university-maryland-town-hall ("[S]ome of these districts are so solidly Republican or so solidly Democrat [sic], that a lot of Republicans in the House of Representatives . . . [are] worried about somebody on the right running against them because they compromise. . . . So that leads them to dig in.").

[6] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 102–05 (1980) (describing appointed judges as "comparative outsiders in our governmental system" whose lack of concern about reelection allows them to evaluate alleged failures of democratic process objectively).

[7] *E.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 600 (2002) ("[B]ilateral cartelization of political markets . . . threatens a core tenet of democratic legitimacy: accountability to shifting voter preferences."); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 709 (1998) ("The problem of political lockups is analogous to the problem of monopoly economic power."); *see also* RICHARD A. POSNER, LAW,

Court, tend to view these problems through the legacy of *Baker v. Carr*,[8] the seminal case holding that legislative districting claims do not present nonjusticiable political questions.[9] Some have termed judicial ineptitude in dealing with structural democracy and political entrenchment questions "Frankfurter's revenge," invoking Justice Frankfurter's dissent in *Baker*,[10] which warned of the "futility" of judicial regulation of politics.[11]

Yet the scholarship and the Court have largely overlooked the foundational role *Luther v. Borden*,[12] through its influence before, in, and after *Baker*, has played in framing our modern response to political entrenchment problems.[13] *Luther* arose out of the Dorr Rebellion, an antebellum popular revolt against the entrenched political order in Rhode Island. *Luther* is the origin of the political question doctrine and of the nonjusticiability of the Constitution's promise that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[14] *Luther* presented two unique

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PRAGMATISM, AND DEMOCRACY 244–47 (2003) (analogizing between the regulation of politics and antitrust problems). *But see* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002) ("[T]he whole enterprise of expanding or reconceptualizing judicial authority in the political sphere to include a role as trustbuster of political cartels is fraught with problems.").

[8] 369 U.S. 186 (1962).

[9] *See, e.g.*, RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 2 (2003) ("*Baker* . . . opened up the courts to a variety of election law cases . . . ."); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 81 (2004) ("*Baker*[ ] made political rights justiciable in the first place.").

[10] *E.g.*, Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 529 (2004); Burt Neuborne, Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges, Lecture at the University of California, Irvine School of Law (Apr. 2, 2010), *in* 35 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2011).

[11] *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

[12] 48 U.S. 1 (1849).

[13] Scholars have chronicled the history of the Guarantee Clause from *Luther* through *Baker*. *See generally, e.g.*, WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION (1972) (describing the Clause from its origins through the *Baker* decision). They have also extensively examined how *Baker* has shaped the modern law of democracy. *See, e.g.*, Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103 (2000) (criticizing *Baker*'s use of equal protection in resolving districting cases). But none have tackled directly *Luther*'s significant influence on the modern law of democracy. *Cf.* Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899, 1915–21 (2006) (noting but not focusing on *Luther*); Note, *Political Rights as Political Questions: The Paradox of* Luther v. Borden, 100 HARV. L. REV. 1125, 1134–44 (1986) (discussing *Luther* in relation to republican theory and the problem of political competency).

[14] U.S. CONST. art. IV, § 4.

views of nonjusticiable political questions: one based in prudentialism and the other based in democratic theory.

Even as the prudential rationale against policing political entrenchment has broken down,[15] the Court and the scholarship have overlooked a crucial alternate theory of political questions offered by Justice Woodbury's *Luther* concurrence—one based in substantive democratic theory. Justice Woodbury's political question framework is better suited to the modern era, in which the prudential framework's breakdown in the law of democracy context has left the Court at an impasse in dealing with new forms of potential entrenchment, such as partisan gerrymandering.[16] This Note offers a novel approach to this impasse: returning to the source of the doctrine and examining the road not taken.

This Note revives Justice Woodbury's *Luther* concurrence as a crucial part of the debate over what makes a political question a "political question." It offers a counterhistory of the law of democracy in light of *Luther*'s influence and in light of subsequent judicial refusal to reexamine the first-order debate in *Luther* even as the Court entered the political thicket. The nineteenth-century political rationales underlying *Luther* are now obsolete.[17] Yet *Luther* has been hugely influential in framing our modern law of democracy. It continues to inform judicial reluctance to define what a fair political system should look like, both by anchoring the nonjusticiability of the Constitution's most explicit statement about structural democracy—the guarantee of a republican form of government—and by framing the Court's role in policing political entrenchment. Judicial ineptitude in dealing with democracy issues might better be called *Luther*'s revenge.

This Note proceeds in three parts. Part I describes *Luther* itself, focusing on the politics of the decision and the widely divergent opin-

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[15] Prudentialism is a cautious mode of constitutional interpretation that seeks to avoid interbranch conflict and judicial interference in political matters. *See, e.g.*, Rachel E. Barkow, *The Rise and Fall of the Political Question Doctrine*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 29, 33–40 (Bruce E. Cain & Nada Mourtada-Sabbah eds., 2007) (describing Chief Justice Taney's *Luther* opinion as the foundation of the prudential use of the political question doctrine and the doctrine's subsequent demise).

[16] *See infra* notes 178–82 and accompanying text (discussing the inability of prudentialism to explain the justiciability of partisan gerrymandering).

[17] *Luther* addressed political entrenchment in Rhode Island during the initial stages of American mass politics, at a time when the Court had little institutional power and faced a constitutional and political crisis that would lead to civil war. Today, judicial regulation of state democratic structures is routine, and the Court regularly confronts serious structural democracy problems. *See infra* note 156 (listing recent major democracy cases).

ions of the two judges. Part II describes the clause shift[18] that occurred in *Baker v. Carr*, which allowed the Court to address structural democracy issues via the Equal Protection Clause while leaving *Luther* intact. It examines the arguments made, and missed, in that case about *Luther*'s meaning. Part III describes *Luther*'s influence in *Vieth v. Jubelier*,[19] the Court's most recent opinion on the constitutionality of partisan gerrymandering, and urges a reevaluation of Woodbury's *Luther* concurrence to help resolve the confusion in *Vieth*.

I
THE POLITICS OF *LUTHER V. BORDEN*

A. The Unstable Politics of Antebellum America

The first stirrings of mass politics in the 1830s and 1840s unleashed popular revolt against food prices, rents, and established power.[20] Property owners feared Jacobinism,[21] while those with less wealth feared antidemocratic control by landlords, Masons, banks, and immigrants.[22] Democracy was growing faster than the political institutions controlling it.[23]

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[18] For more on clause shifting, including the seminal example of the Privileges and Immunities Clause, see *infra* note 119 and accompanying text.

[19] 541 U.S. 267 (2004).

[20] The period saw a rapid democratization of politics. Examples of upheaval include the Anti-Masonic, Know-Nothing, and Locofoco movements, the Buckshot War in Pennsylvania, and the Anti-Rent and Flour uprisings in New York. *See generally* RONALD P. FORMISANO, FOR THE PEOPLE: AMERICAN POPULIST MOVEMENTS FROM THE REVOLUTION THROUGH THE 1850S, at 65–190 (2007) (cataloguing and identifying populist movements, with particular attention to the Anti-Masonic movement); WIECEK, *supra* note 13, at 85 (describing the political context of the Dorr Rebellion); SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY 413–55 (2005) (describing the upheaval and the class- and faction-based conflict during this period, including the Locofoco and Know-Nothing movements); William Henry Egle, *The Buckshot War*, 23 PENN. MAG. HIST. & BIOGRAPHY 137 (1899) (describing the Buckshot War).

[21] In modern political vernacular, Jacobinism is "class warfare." *See, e.g.*, ALEXANDER KEYSSAR, THE RIGHT TO VOTE 41 (2000) (describing Whig characterization of broad franchise as "a system of communism unjust and Jacobinical." (quoting John Spencer Bassett, *Suffrage in the State of North Carolina (1776–1861)*, 1896 AM. HIST. ASSOC. ANN. REP. 282)).

[22] *See, e.g.*, WILENTZ, *supra* note 20, at 510 ("Then let the working class, / As a congregated man, / Behold an insidious enemy: / For each *Banker* is a foe, / And his aim is for our woe— / He's the *canker-worm of liberty*!" (quoting a pro–Van Buren broadside)).

[23] *See id.* at 425 (quoting newspaper editorialist's complaint that "[t]he Republic . . . has degenerated into a Democracy"). In the 1830s, many states introduced liberal constitutions that expanded voting rights more broadly than ever before. *See* KEYSSAR, *supra* note 21, at 26–52 (describing how state constitutions expanded suffrage in the 1820s and 1830s).

Popular fear and fear of the People fed on the fierce debates about human slavery engulfing American politics.[24] The slavery debate split the newly formed Democratic Party apart—between a populist Northern wing and a pro-slavery Southern wing—even as the party jockeyed with the Whigs for power in an increasingly democratized, party-based political system.[25]

The Dorr Rebellion was the most legalistic of the popular uprisings that rocked Jacksonian democracy.[26] To Whigs and Southern Democrats, the popular power signified by the Dorr Rebellion was a wholesale threat to property in all its forms and to economic and political elites in the North and the South.

B. The Dorr Rebellion: Constitutional Rebellion as an Anti-Entrenchment Mechanism

The Dorr Rebellion was an extreme reaction to an extreme scheme of political entrenchment. In the 1830s, Rhode Island was highly undemocratic. The state's fundamental law remained an unamendable charter that King Charles II had granted to an aging Roger Williams in 1663.[27] Under this charter, steep real property

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[24] The Compromise of 1820 over the expansion of slavery may have been a "firebell in the night." Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), *available at* http://www.loc.gov/exhibits/jefferson/159.html. By the 1830s, a deep and lasting sectional rift in American politics over slavery and the nature of the Union lay exposed. *See, e.g.*, Sen. Robert Y. Hayne, Speech Before the Senate on Mr. Foot's Resolution (Jan. 21, 1830), *in* SPEECHES OF MESSRS. HAYNE AND WEBSTER IN THE UNITED STATES SENATE ON THE RESOLUTION OF MR. FOOT, JANUARY, 1830, at 3, 31 (Boston, Redding & Co. 1852) ("[Webster] has . . . ridicule[d] . . . the idea that a state has any constitutional remedy, by the exercise of its sovereign authority, against 'a gross, palpable, and deliberate violation of the constitution.' He calls it 'an idle' or 'a ridiculous notion,' . . . that it would make the Union a 'mere rope of sand.'").

[25] *See* WILENTZ, *supra* note 20, at 548–50 (describing intraparty divisions when "anti-slavery goes political"); *id.* at 532–34 (describing tension within the Democratic Party on economic issues ultimately related to slavery).

[26] On the Dorr Rebellion, see generally GEORGE M. DENNISON, THE DORR WAR: REPUBLICANISM ON TRIAL 1831–1861 (1976); MARVIN E. GETTLEMAN, THE DORR REBELLION: A STUDY IN AMERICAN RADICALISM 1833–1849 (1973).

[27] The charter was liberal for the seventeenth century, but illiberal for the nineteenth. Legislative supremacy was its guiding structural principle, along the lines of the British Parliament. *See In re* Advisory Opinion to the Governor (Rhode Island Ethics Commission—Separation of Powers), 732 A.2d 55, 80 n.10 (R.I. 1999) (Flanders, J., dissenting) (noting Rhode Island's "former parliamentary system of government"). The Constitution's Framers attacked and explicitly rejected the supremacy of parliament as incompatible with self-government. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 352, 452 (1969) (describing how the founding generation rejected the sovereignty of the British Parliament over the colonies during the debate over the Revolution and then rejected the underlying theory of legislative sovereignty during the debate over the Constitution). Indeed, some Suffragists claimed that "the continuation [after the American Revolution] of the old government without [the non-

requirements disenfranchised over fifty percent of white men.[28] Legislative districts were grossly malapportioned in a "rotten borough" system that placed tiny towns and burgeoning urban centers on equal footing.[29] Incumbent legislators stymied efforts to adopt a new constitution after the Revolution, and through the 1820s and 1830s, despite wide popular support.[30] The charter was structurally unable to prevent the entrenchment of a minority in power.

Rhode Island's "Suffragists" claimed sovereign power as their revolutionary birthright. "If the sovereignty don't reside in the people," asked one Rhode Island Suffrage Association member, "where in the hell does it reside?"[31] Backed by the national Democratic Party's Northern wing, the Suffragists appealed directly to an urban, disenfranchised, angry People to form a constitution without the existing state legislature's consent.[32]

The Suffragists used Article IV's guarantee of a "Republican Form of Government,"[33] the federal Constitution's clearest allusion to popular sovereignty, to justify their constitutional creativity.[34] They advanced an intellectually pedigreed conception of popular power: As a matter of natural and constitutional right, a majority may dissolve

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freeholders'] consent" was itself a constitutional violation. FRANCES H. WHIPPLE, MIGHT AND RIGHT 61 (Providence, A.H. Stillwell 1844).

[28] *See, e.g.*, GETTLEMAN, *supra* note 26, at 6–7 (describing how "less than half the adult white male population could vote"); KEYSSAR, *supra* note 21, at 71–72 (quoting workingman orator Seth Luther's indictment of Rhode Island's charter government, including the statement that "all men are created equal, except in Rhode Island").

[29] David A. Segal, *The Real Constitutionalists*, PROVIDENCE J., Oct. 22, 2009, *available at* http://www.rilin.state.ri.us/news/constitutionalistsoped.asp ("Under that charter, legislators were chosen via a system resembling the Electoral College—that 'rotten boroughs' system—which skewed the allocation of seats disproportionately in favor of the outlying communities."); *see also* DENNISON, *supra* note 26, at 14, 27–28 (discussing how the rural population effectively controlled those in more urban areas).

[30] Attempts throughout the 1830s to adopt a new constitution with broader suffrage failed. *See* GETTLEMAN, *supra* note 26, at 3–29 (describing failed attempts at reform before the rebellion).

[31] KEYSSAR, *supra* note 21, at 72 (citing DENNISON, *supra* note 26, at 37).

[32] GETTLEMAN, *supra* note 26, at 38–43; *see* WIECEK, *supra* note 13, at 89 n.12 ("The formation of the Rhode Island Suffrage Association was encouraged and perhaps originally suggested by a New York City Locofoco organization."); John B. Rae, *Democrats and the Dorr Rebellion*, 9 NEW ENG. Q. 476, 476 (1936) (describing national Democrats' support for the Dorr Rebellion).

[33] U.S. CONST. art. IV, § 4.

[34] *See* DENNISON, *supra* note 26, at 32–33 (describing the Suffragists' belief in the "recognized right of American majorities to change governments"); WIECEK, *supra* note 13, at 90 (describing Suffragist perspectives on the relationship between majoritarian self-rule and the guarantee of republican government). Republican government was "consistently linked . . . with popular self-rule, the people's right to alter or abolish, and the role of popular majority rule in moments of constitutional founding and change." Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 763 (1994).

and reconstitute government at its pleasure.[35] "Give us our rights," they said, "or we will take them."[36]

The Suffragists called "a Convention of the Whole People" to form a new constitution.[37] Led by urban workers, itinerant organizers, small landholders, and young guns of state politics like Thomas Wilson Dorr—and including, but only initially, free people of color[38]—the rebel coalition won a series of political victories.[39] But the existing charter government refused to give way.[40] Rhode Island had two claimants to its constitutional throne.

The crisis went national. Whig President John Tyler publicly expressed "fear of an American War of the People against the Government."[41] Senator Henry Clay played to Whig and Southern anxieties, warning that suffragism would make revolution "the commonest occurrence[ ]" and lead to "complete subjugation to the blacks" in the South.[42] In his minority report for a special committee convened to examine the affair, Whig Representative John Causin of

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[35] One of the major intellectual architects of the American republic stated that "the leading principle in the politics . . . which pervades the American constitutions . . . [is] that the supreme power resides in the people." James Wilson, Remarks in the Pennsylvania Convention To Ratify the Constitution of the United States (Oct. 28, 1787), *in* 1 THE COLLECTED WORKS OF JAMES WILSON 178, 193 (Kermit L. Hall & Mark David Hall eds., 2007). James Wilson provided the intellectual framework for "active" popular sovereignty, including the popular right to abolish and annul constitutions. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 48 (2004). He told the delegates assembled at Pennsylvania's ratification convention that "[t]hose who ordain and establish have the power, if they think proper, to repeal and annul." Wilson, *supra*, at 193.

[36] Samuel H. Wales, State Comm., A Call to the People of Rhode-Island To Assemble in Convention (July 24, 1841), *in* THE BROADSIDES OF THE DORR REBELLION 29, 29 (Russell J. DeSimone & Daniel C. Schofield eds., 1992).

[37] *Id.*

[38] At first free people of color in Rhode Island participated in the Suffragist movement, but they later backed the charter government after the People's Convention made whiteness a condition of suffrage under its proposed constitution. *See* Erik J. Chaput & Russell J. DeSimone, *Strange Bedfellows: The Politics of Race in Antebellum Rhode Island*, COMMON-PLACE (Jan. 2010), http://www.common-place.org/vol-10/no-02/chaput-desimone/ (detailing the role of Rhode Island's free people of color during the Dorr Rebellion).

[39] The Suffragists achieved broad popular support for their constitution in December of 1841, GETTLEMAN, *supra* note 26, at 54, and organized to successfully defeat the charter assembly's competing Landholders constitution in March of 1842. *Id.* at 78–79. They then proceeded to elect a government, with the radical Whig-turned-Democrat Thomas Wilson Dorr as Governor. *Id.* at 86–87. In the run-up to the inauguration of a new "People's Government," its supporters filled the streets in celebratory procession. *Id.* at 101–02.

[40] *See* GETTLEMAN, *supra* note 26, at 102 ("The Suffrage Party had unsuccessfully petitioned Charter Government officials for permission to use the State House in Providence. Rebuffed, the rebel legislators and their spectators withdrew to the drafty hall of an unfinished foundry building nearby . . . .").

[41] DENNISON, *supra* note 26, at 81.

[42] *Id.* at 116.

Maryland warned of "more extensive destructiveness" to come.[43] Whig judges entered the political melee,[44] while the Whig press maligned Suffragist leader Dorr as a cloven-hoofed abolitionist backed by Locofoco interlopers.[45]

The Democratic Party, meanwhile, was rent in two. Northern Democratic and Suffragist publications lauded Dorr as a hero, "the People's Governor,"[46] and leaders in Washington and Tammany Hall promised Dorr military aid and political support.[47] Northern Democrats, including Senator Levi Woodbury, who later wrote the *Luther* concurrence, offered pro-Suffragist speeches on the hustings and the Senate floor.[48] Dorrite supporter and New Hampshire Representative Edmund Burke, in the Special Committee's majority report, argued strenuously for the natural right of majorities to alter

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[43] Causin referred specifically to destruction at the hands of immigrants and people of color. H.R. REP. NO. 28-581, at 17 (1844).

[44] *See, e.g.*, Patrick T. Conley, *No Tempest in a Teapot: The Dorr Rebellion in National Perspective*, 50 R.I. HIST. 67, 71–72 (1992) (describing how "[t]he prestigious judiciary spearheaded one thrust" of anti-Dorr attack); John S. Schuchman, *The Political Background of the Political-Question Doctrine: The Judges and the Dorr War*, 16 AM. J. L. HIST. 111, 113 (1972) (describing the involvement of judges, including federal judges Pitman and Story, in organizing against Dorr); *see also* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 290–91 (1971) (describing how Judges Pitman and Story would later preside over trials resulting from the Rebellion).

[45] *See* Chaput & DeSimone, *supra* note 38, at fig.4 (describing a print issued by Charter sympathizers depicting Dorr as cloven-hoofed, obese, and mad with power, and mocking Suffragist supporters). The Locofocos were a splinter group of radical Democrats who were influential in Tammany Hall at the time. *See* WILENTZ, *supra* note 20, at 421–23 (describing the origin of the Locofocos in Tammany Hall).

[46] *See* GETTLEMAN, *supra* note 26, at 102 (citing the fulsome praise of the pro-Dorr newspaper *New Age* on inauguration day of the People's Government); Conley, *supra* note 44, at 80–82 (describing support for Dorr in New York newspapers, *Evening Post* and *New Era*, and in John L. Sullivan's writings for the *United States Magazine and Democratic Review*).

[47] *See, e.g.*, DENNISON, *supra* note 26, at 78–81 (describing Dorr's initial trip to Washington and to Tammany Hall); Conley, *supra* note 44, at 67 (noting support was "drawn overwhelmingly from the . . . Democratic party"). For a disapproving account of Dorr's trip to Tammany Hall, see generally Arthur M. Mowry, *Tammany Hall and the Dorr Rebellion*, 3 AM. HIST. REV. 292 (1898).

[48] *E.g.*, Levi Woodbury, Speech at Eliot, Maine, Before the Presidential Election (1844), *in* 1 WRITINGS OF LEVI WOODBURY, LL.D. 593, 598 (Boston, Little, Brown & Co. 1852) ("[B]y the Declaration of Independence, by the express doctrines of almost every constitution in the Union, by the opinions of the best jurists . . . , [the free-suffrage] party had a right to accomplish those objects by peaceful conventions of a majority of the people, when no other mode of redress was provided for in their existing laws and charters."); Letter from Sen. Levi Woodbury to Thomas Wilson Dorr (Apr. 15, 1842), *in* Rae, *supra* note 32, at 476, 477 (pledging support for Dorr and urging caution); *see also* Patrick T. Conley, *Popular Sovereignty or Public Anarchy? America Debates the Dorr Rebellion*, 60 R.I. HIST. 71, 72, 80 (2002) ("[N]orthern Democrats . . . sought to make political hay by exploiting the alleged tyranny of the Whig-controlled charter government.").

government.[49] However, pro-slavery Southern Democrats, including Senator John Calhoun, saw this principle as the "death-blow of constitutional democracy."[50] The Dorr Rebellion thus played to the deepest fears of landed Whigs and pro-slavery Southern Democrats and implicated *the* political question of the antebellum period: the nature of state government power under the Constitution.

What began in 1841 as a popular constitutionalist attempt to root out extreme political entrenchment ended with a declaration of martial law and the roundup of Dorr sympathizers.[51] In late 1842, as the violence subsided, the freeholders adopted a liberal constitution backed by the charter government.[52] At his trial for treason the following year, Dorr unrepentantly pressed the sensitive issue of popular sovereignty:

> The sentence which you will pronounce . . . is a condemnation of the doctrines of '76, and a reversal of the great principles which sustain . . . our democratic republic, and which are . . . a portion of the birthright of a free people. . . . I appeal to the people of our state and of our country. They shall decide between us.[53]

This was true in a manner of speaking. The Suffragists were heading to the Supreme Court.[54]

C. The Political Question Presented

Luther v. Borden presented the question of whether the Court had the power to legitimate the popular dissolution of an entrenched state government—a question which terrified landed Whigs and Southerners.[55] Plaintiff Martin Luther, a Suffragist, had been arrested

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[49] H.R. REP. NO. 28-546, at 1–2 (1844).

[50] Paul M. Thompson, *Is There Anything "Legal" About Extralegal Action? The Debate over Dorr's Rebellion*, 36 NEW ENG. L. REV. 385, 424 (2002) (quoting Letter from John C. Calhoun to William Smith (July 3, 1843), *in* 17 THE PAPERS OF JOHN C. CALHOUN, 1843–1844, at 270, 284 (Clyde N. Wilson ed., 1986)).

[51] *See* DENNISON, *supra* note 26, at 96–97 (describing the effects of Dorr's efforts on his supporters).

[52] *Id.* at 98.

[53] DAN KING, THE LIFE AND TIMES OF THOMAS WILSON DORR 213 (Boston, Dan King 1859).

[54] *See* George M. Dennison, *Thomas Wilson Dorr: Counsel of Record in* Luther v. Borden, 15 ST. LOUIS U. L.J. 398, 402 (1971) (discussing the Suffragist strategy of pursuing a favorable Supreme Court decision). Dorr, who previously believed that "Tory" courts would never vindicate the Suffragists, now thought that the Supreme Court would risk "putting an end to their life tenure of office" if they decided "against the Sovereignty of the People." *Id.* at 405–06.

[55] While the situation in Rhode Island had cooled by 1849, the political conflict over slavery was at a fever pitch. Congress was in its third year of a four-year stalemate preceding the short-lived Compromise of 1850. Sean M. Theriault & Barry R. Weingast, *Agenda Manipulation, Strategic Voting, and Legislative Details in the Compromise of 1850*,

after the declaration of martial law but before the enactment of the more liberal Rhode Island Constitution of 1843.[56] Martial law troops had entered his home, arrested him, damaged his property, and harassed his elderly mother, Rachel.[57] Luther's trespass action against the troops depended on which was the lawful government of Rhode Island at the time of his arrest: the government under the royal charter or the one under the People's Constitution.[58]

At oral argument, Luther's lawyer, Benjamin Hallett, argued that "full, popular sovereignty" was incompatible with "the pernicious theory that the people cannot take a legal step to reform government, without the consent of the very government they wish to reform or abolish."[59] Hallett argued that a majority's right to oust an entrenched government is a basic exercise of its sovereignty.[60] The denial of that principle was the "condemnation of the principles of '76" to which Dorr had objected at his own trial.[61]

Arguing for the government, Daniel Webster[62] immediately conceded the question of popular sovereignty.[63] The problem, Webster

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in PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS 343, 343 (David W. Brady & Matthew D. McCubbins eds., 2002). *See generally* JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 70–76 (3d ed. 2001) (describing the conflict over the expansion of slavery that was raging in the country prior to the Compromise of 1850). The compromise had rested the future of slavery on popular referenda in the territories, which in turn led to the events known as "Bleeding Kansas." *See* DENNISON, *supra* note 26, at 197–205 (relating the idea of popular sovereignty and political violence in the Dorr Rebellion to slavery referenda).

[56] *See* PATRICK T. CONLEY & ROBERT G. FLANDERS, THE RHODE ISLAND STATE CONSTITUTION: A REFERENCE GUIDE 21–24 (2007) (describing the 1843 Constitution and the events leading to its ratification).

[57] Luther v. Borden, 48 U.S. 1, 34 (1849). Rachel Luther also filed suit. GETTLEMAN, *supra* note 26, at 142.

[58] *See Luther*, 48 U.S. at 35 (suggesting that if the People's Constitution had been in force, then the martial law troops would not have been acting under state law).

[59] BENJAMIN FRANKLIN HALLETT, THE RIGHT OF THE PEOPLE TO ESTABLISH FORMS OF GOVERNMENT 35 (Boston, Beals & Greene 1848). Hallett stressed the Wilsonian conception of active popular sovereignty, citing Wilson, Madison, Jefferson, Locke, and Rhode Island founder and early civil libertarian Roger Williams. *Id.* at 35–42, 55. Virtually all of the Framers, even Hamilton, professed allegiance to this idea. *See* Amar, *supra* note 34, at 761–66 (noting the Framers' conception of popular majorities' right to create, alter, and abolish constitutions).

[60] HALLETT, *supra* note 59, at 35.

[61] KING, *supra* note 53, at 213.

[62] Webster had been, according to Dorr's allies in Washington, the power behind President Tyler's decision to back the charter government. *See* Letter from Edmund Burke to Thomas W. Dorr (May 8, 1842) *in* Rae, *supra* note 32, at 481, 482 ("The President is a weak and vacillating man, and completely under the influence of Webster.").

[63] Daniel Webster, Argument Before the U.S. Supreme Court in *Luther v. Borden* (Jan. 27, 1848), *in* THE RHODE ISLAND QUESTION: MR. WEBSTER'S ARGUMENT, at 1, 6 (Washington, J. & G.S. Gideon 1848) ("He who would argue against this, must argue without an adversary.").

argued, was not the People's power, but the "anarchy" inherent in popular power without "some authentic mode of ascertaining the will of the people."[64] Without pre-established laws, the American system would become "the law of the strongest, or, what is the same thing, of the most numerous for the moment, and all constitutions, and all legislative rights, [would be] prostrated and disregarded."[65] Webster argued that the Constitution proceeds on the assumption that elected state governments will enact the "changes[ ] which the people may judge necessary in their constitutions."[66] When the People act outside of the law, even to oust undemocratic entrenchment, the law cannot provide a post hoc remedy.

D. The Luther *Opinions*

Both opinions in *Luther* ultimately agreed with Webster, but for different reasons. Wary of interbranch conflict and protective of slavery, Chief Justice Taney, a Maryland Democrat and former attorney general, found the case nonjusticiable because it put the Court at odds with the state government and the national political branches. Justice Woodbury, an abolitionist New Hampshire Democrat, found the case nonjusticiable because it forced the Court to regulate the People as a popular sovereign, raising deep problems of democratic theory.

1. Chief Justice Taney, Prudentialist

Chief Justice Taney's opinion framed the case in institutional terms. If the Court could decide that the charter government was not lawful, it could throw Rhode Island into legal chaos—convictions would be reversed, compensation revoked, and legislation abrogated.[67] With such high stakes, the Court needed "to examine very carefully its own powers before . . . exercis[ing] jurisdiction."[68]

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[64] *Id.* at 12. Webster conceded that *Luther* involved "consideration . . . of . . . the true principles of government in our American system of public liberty," but argued that this was a task best "addressed to reason . . . before magistrates and lawyers, and not before excited masses out of doors." *Id.* at 4.

[65] *Id.* at 12. Justice Joseph Story and other institutionalist Northern Whigs made a similar distinction between the natural people and the "corporate people," with only the latter holding political rights like the franchise under the law. Conley, *supra* note 44, at 71–72 (citation omitted).

[66] Webster, *supra* note 63, at 15. Reading Article IV's guarantee of a republican form of government and protection from domestic insurrection in this light, Webster placed "proceedings *aliunde*, or outside of the law and the Constitution, for the purpose of amending the frame of Government" as outside of courts' purview. *Id.*

[67] Luther v. Borden, 48 U.S. 1, 38–39 (1849).

[68] *Id.* at 39. Rachel Barkow has argued that Taney's emphasis on the ostensibly severe results at stake indicated that "practical concerns colored the Court's perception and inter-

Taney found the power to decide which constitution was valid in state officials, in the President, and in Congress[69]—but not in federal court. Brushing aside the vote on the People's Constitution as proof of its lawful adoption, Taney declared:

> [C]ertainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State . . . nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision.[70]

The lack of established law authorizing popular action was the very core of Taney's political question argument.[71]

The *Luther* plaintiffs had argued that there was previous law on point: the Guarantee Clause of the Constitution.[72] But Taney rejected that argument. "Congress," he wrote, "must necessarily decide what government is established in [a] State before it can determine whether it is republican or not."[73] This is *Luther*'s narrow, prudential holding: Congress determines the legitimacy of state governments and holds the power to recognize them.[74]

Taney rejected the idea that the Court could free those imprisoned by federal troops for defending one ostensibly republican government if the political branches supported the other.[75] If the courts could invalidate congressional or presidential recognition of a state

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pretation of the Constitution." Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 255–56 (2002). Those practical concerns may well have included the ongoing national crisis over slavery. *See supra* note 55 (describing the battle over the Compromise of 1850). Others have argued that Taney's argument "rested heavily on the extreme facts presented" and the specter of martial interbranch conflict that they posed. *E.g.*, Thomas C. Berg, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208, 211 (1987).

[69] *See Luther*, 48 U.S. at 39–43 (identifying entities with the power to resolve this dispute).

[70] *Id.* at 41. For reasons of institutional stability, Taney rejected the argument that the People's Constitution had been lawfully adopted; bringing such questions into the courtroom would mean subjecting them to a jury, an "unstable foundation[ ]" on which to rest "[t]he authority and security of [a] State government[ ]." *Id*. at 42.

[71] *See id.* at 41 ("[B]y what rule could [a court] have determined the qualification of voters upon the adoption . . . of the proposed constitution, unless there was some previous law of the State to guide it?").

[72] *See* HALLETT, *supra* note 59, at 8–9 (arguing that the Guarantee Clause was the basis for deciding for Luther).

[73] *Luther*, 48 U.S. at 42; *see also* Amar, *supra* note 34, at 776 (comparing recognition of a state government in *Luther* to "the international question of 'recognition'—a question committed to the federal political branches").

[74] *Luther*, 48 U.S. at 42; *see also* Amar, *supra* note 34, at 776 ("The key issue . . . was not whether the charter regime was Republican, but whether it was a *Government*.").

[75] *Luther*, 48 U.S. at 43.

government, then the Clause would be "a guarantee of anarchy, and not of order."[76] Even if Rhode Island adopted a military dictatorship, Taney suggested, "it would be the duty of Congress to overthrow it."[77]

2. Justice Woodbury, Democratic Theorist

Justice Woodbury, the New Hampshire Democrat who had supported Dorr while a Senator,[78] framed the question in terms of democratic political theory rather than institutional politics.[79] The nation was debating questions ranging from "the power of the people, independent of the legislature, to make constitutions,—to the right of suffrage among different classes of them in doing this,—to the authority of naked majorities."[80] But, Woodbury wrote, the "merely political" questions implicated by competing claims of state governments to the support of the popular sovereign "belong[ ] to the people and their political representatives" and are "matters not to be settled on strict legal principles."[81] Justice Woodbury recognized that the act of constitutional formation was necessarily the province of the People alone as popular sovereign: "Our power begins," he wrote, "after theirs ends."[82] An act of the People in their sovereign capacity can "succeed or [be] defeated even by public policy alone, or mere naked power, rather than [by] intrinsic right."[83] Woodbury did not concede that naked majorities were never able to form constitutions *aliunde*,

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[76] *Id.*

[77] *Id.* at 45. Taney did not explicitly address whether the Guarantee Clause can determine if an established government is sufficiently republican in form. *See* Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1193–95 (2002) ("The Court did not hold that all complaints under the Guarantee Clause raised political questions."). *But see* Baker v. Carr, 369 U.S. 186, at 220–22 & n.48 (1962) (claiming Taney did hold so categorically). We can surmise Taney's view on this question, however.

[78] *See supra* note 48 (describing Woodbury's support for Dorr).

[79] Justice Woodbury's decision is reported as a dissent because Woodbury would have reversed the lower court on the separate issue of the validity of the Charter government's declaration of martial law. *Luther*, 48 U.S., at 48, 88 (Woodbury, J., concurring in part and dissenting in part). However, Woodbury described his treatment of the political question issue as a concurrence. *See id.* at 51 ("I concur with the rest of the court in the opinion, that the other leading question, the validity of the old charter at that time, is not within our constitutional jurisdiction."). Justice Woodbury's opinion is thus referred to as a concurrence throughout the text of this Note.

[80] *Id.* at 51. Foreshadowing a larger struggle to come, Woodbury described how, in Rhode Island, "brother became arrayed against brother in civil strife." *Id.* at 50.

[81] *Id.* at 51.

[82] *Id.* at 52 ("[W]hen constitutions and laws are made and put in force by others, then the courts, as empowered by the State or the Union, commence their functions and may decide on the rights which conflicting parties can legally set up under them, rather than about their formation itself.").

[83] *Id.* at 51. George Dennison distinguished Taney's institutionalism from Woodbury's "Jeffersonian politicism," noting that neither was willing to embrace a Wilsonian theory of

or outside the legal system. He conceded the Court's role in blessing them.[84]

Woodbury identified a serious problem with the *Luther* litigants' claim: If the Court decides which iteration of the People is sovereign, it risks "dethron[ing]" the People and making itself the "new sovereign power in the republic."[85] This was the core democratic theory problem with judicial intervention in *Luther*. Only a revolution could reverse the Court: "[A]ll political privileges and rights would, in a dispute among the people, depend on our decision."[86]

Unlike Taney, Woodbury distinguished between the justiciable unconstitutional acts of an existing government's political branches and the nonjusticiable political act of the People in ordaining a constitution.[87] In Woodbury's formulation, the judiciary serves as "a check on the legislature, who may attempt to pass laws contrary to the Constitution, or on the executive, who may violate both the laws and Constitution."[88] However, the judiciary cannot "control[ ] the people in political affairs."[89]

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popular sovereignty. DENNISON, *supra* note 26, at 191–92. The notion that this question must be resolved on the political (or actual) battlefield was prescient.

[84] *See id.* at 52. ("Constitutions and laws precede the judiciary, and we act only under and after them, and as to disputed rights beneath them, rather than disputed points in making them."). In a sense, Woodbury's take was shrewdly political: He had argued as a Senator that the American system was a farce without active sovereignty, but at that time he was trying to win an election. *See supra* note 48 and accompanying text (providing examples of Woodbury's pro-Suffragist claims and political strategy).

[85] *Luther*, 48 U.S. at 52–53 (Woodbury, J., concurring in part and dissenting in part). Hobbes raised this exact point in his attack on the theory of republican government: "Which errour, because it setteth the Lawes above the Soveraign, setteth also a Judge above him, and a Power to punish him; which is to make a new Soveraign; and again for the same reason a third, . . . continually without end, to the Confusion, and Dissolution of the Common-wealth." THOMAS HOBBES, LEVIATHAN 256 (G.A.J. Rogers & Karl Schuhmann eds., Thoemmes Continuum 2003) (1651). Today, in the context of a challenge to a government's form as opposed to its existence, we might frame the issue in terms of judicial supremacy. *See* Barkow, *supra* note 68, at 240–41 (discussing the interaction among the branches of government in relation to the political question doctrine).

[86] *Luther*, 48 U.S. at 52. Ironically, the Taney Court took on such a role with regard to the question of the expansion of slavery in the *Dred Scott* decision. *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 44–45 (2010) (discussing the political origins and effects of *Dred Scott*'s constitutional holding); ETHAN GREENBERG, *DRED SCOTT* AND THE DANGERS OF A POLITICAL COURT 309–19 (2009) (explaining that *Dred Scott* had more to do with the political interests of the slaveholding South than with constitutional methodology).

[87] *Luther*, 48 U.S. at 51–52 ("Judges, for constitutions, must go to the people of their own country, and must merely enforce such as the people themselves, whose judicial servants they are, have been pleased to put into operation.").

[88] *Id.* at 53.

[89] *Id.* ("[I]f the judiciary at times seems to fill the important station of a check in the government, it is rather a check on the legislature, who may attempt to pass laws contrary to the Constitution, or on the executive, who may violate both the laws and Constitution,

In this sense, Woodbury's framework expanded considerably the notion of a political question first developed in *Marbury v. Madison*.[90] There, Chief Justice Marshall had conceived of political questions as those committed to the discretion of political officials.[91] Chief Justice Taney's *Luther* opinion similarly cast the question of who validly might vote and how as one committed to the discretion of elected legislators, without judicial interference. But Justice Woodbury, in finding that the nonjusticiable act was not the legislature's structuring of Rhode Island's old electoral system but the People's attempt to ordain a new one, defined a new type of political question.

Woodbury's concurrence left future courts to decide whether a duly recognized state government might be evaluated against the Constitution's guarantee of a republican form of government.[92] Indeed, Woodbury left open both the institutional question of what a court could do if it found unconstitutional antirepublican entrenchment and the substantive question of how such unconstitutional democratic structures might appear. Taney held that the Court didn't have the power to enter the democratic sphere because of its inherent structural incompetence in the political realm.[93] But Woodbury found that the Constitution simply did not provide "legal principles" to support the extraordinary and extralegal anti-entrenchment measures taken by the Rhode Island Suffragists.

Luther defined a category of political questions that the judiciary might be reluctant to entertain,[94] but it also offered two very different frameworks for determining when a challenge to the democratic political process falls into that category. Taney's prudentialism saw the structural rules of politics as off-limits. Woodbury's democratic framework balanced the Court's role in checking unconstitutional government action with its duty not to usurp the political power exercised by the People.

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than on the people themselves in their primary capacity as makers and amenders of constitutions.").

[90] 5 U.S. (1 Cranch) 137 (1803).

[91] *Id.* at 166 ("[W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political.").

[92] Indeed, many have argued that *Luther* should be read not to apply to such a situation. *See, e.g.*, Amar, *supra* note 34, at 776 (arguing that *Luther* is inapposite where there is a recognized state government).

[93] This is not necessarily Taney's position but was attributed to him by subsequent Courts. *See infra* notes 100–09 and accompanying text (discussing the reinterpretation of *Luther* by *Pacific States* and its progeny).

[94] *See* Barkow, *supra* note 15, at 29 (discussing *Luther* as a basis for both prudential and classical political question doctrine).

II
WORKING AROUND *LUTHER*: THE ORIGINS OF MODERN POLITICAL QUESTION DOCTRINE

A. Clause Split . . .

1. Luther *and the Nonjusticiable Guarantee Clause*

In the late nineteenth and early twentieth centuries, the Court took a dim view of its own power to "enforce political rights" under any provision of the Constitution.[95] It did not, however, treat all Guarantee Clause claims as nonjusticiable.[96] In the famous case of *Minor v. Hapersett*,[97] which involved a challenge to state laws disenfranchising women, the Court unanimously held that "the Constitution of the United States does not confer the right of suffrage upon any one."[98] Addressing the argument that female citizens must have the right to vote in a republican government, the *Minor* Court found that the disenfranchisement of women at the time of the founding was "unmistakable evidence of what was republican in form."[99]

In *Pacific States Telephone and Telegraph Co. v. Oregon*,[100] at the height of the *Lochner* era, the Supreme Court broadly reinterpreted *Luther* to create a per se rule of nonjusticiability for the Guarantee Clause. The *Pacific States* Court faced a challenge to Oregon's progressive-era ballot initiative system: The state brought a suit against a phone company to enforce payment of a voter-imposed corporate tax hike, and the company claimed in response that the ballot

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[95] Giles v. Harris, 189 U.S. 475, 487 (1903). In *Giles*, a black man, during the rise of Jim Crow, sued in federal court alleging that Alabama's voter registration scheme under the state constitution was racially discriminatory, in violation of the Fourteenth Amendment. *Id.* at 475. Over three dissents, the Court denied him relief. Echoing *Luther*, the Court reasoned that "relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States." *Id.* at 488. *Giles* was not a Guarantee Clause case, but its reasoning, like Taney's in *Luther*, exhibited a limited view of the Court's powers in political process matters. *See* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 298 (2000) (describing *Giles* as emblematic of the early modern Court's view of democratic rights).

[96] See *Duncan v. McCall*, 139 U.S. 449, 461–62 (1891), for an example of the Court treating a Guarantee Clause case as justiciable.

[97] 88 U.S. 162 (1874).

[98] *Id.* at 178. Virginia Minor sued the state of Missouri for the right to vote, but the Court found that neither the Equal Protection Clause nor the Guarantee Clause gave Ms. Minor the right to vote. *Id.* at 164–75.

[99] *Id.* at 176. Ms. Minor should have argued before the delegates assembled in Philadelphia, he opined, because it was "now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters." *Id.*

[100] 223 U.S. 118 (1912).

initiative system was unconstitutional.[101] In holding that the company's claim was nonjusticiable, the Court framed the challenge as requiring, if successful, the destruction of the state of Oregon.[102] The *Pacific States* Court swaddled its decision in *Luther*'s prudentialist rhetoric of political recognition and the threat of anarchy.[103]

Pacific States has been widely criticized because it used political recognition as a straw man: The Court projected *Luther*'s sovereignty crisis onto a straight question of constitutional interpretation.[104] There was no debate about which was the properly constituted government of Oregon. But deciding whether initiatives comport with a republican form of government might have forced the Court to enforce political rights under the Guarantee Clause. Instead, the Court held that *Luther* was "absolutely controlling."[105] In subsequent cases, *Luther*

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[101] *Id.* at 135–36. The challenge came under both the Guarantee Clause and the Fourteenth Amendment. *Id.* at 137–38.

[102] *Id.* at 142 (framing the choice as either letting "anarchy . . . ensue," or instead usurping Congress's power to recognize state governments—an option that would violate separation of powers principles and force the Court to build "upon the ruins of the previously established government a new one").

[103] *See* Barkow, *supra* note 15, at 29 (explaining that *Pacific States* "relied on prudential factors to a much greater extent" than *Luther*).

[104] *See, e.g.*, Amar, *supra* note 34, at 777 (arguing that the Court was "sophistic" to apply this logic to questions of normal constitutional adjudication); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 872–79 (1994) (explaining the "many obvious flaws" with the argument that an entire government would need to be declared unconstitutional); Catherine Engberg, Note, *Taking the Initiative: May Congress Reform State Initiative Lawmaking To Guarantee a Republican Form of Government?*, 54 STAN. L. REV. 569, 579 (2001) (noting criticism of the *Pacific States* Court's anomalous use of the political question doctrine for challenges to actions of state governments). Even scholars who argue that the Guarantee Clause is nonjusticiable find the reasoning of *Pacific States* untenable. *See, e.g.*, Richard L. Hasen, *Leaving the Empty Vessel of "Republicanism" Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES, *supra* note 15, at 75, 79 (acknowledging that the case's textual argument "is weak"). *Pacific States* presented a straight question of constitutional interpretation because there was no sovereignty or political crisis at issue—only a legal question about whether a ballot initiative system comported with the Guarantee Clause and the Equal Protection Clause. Manufacturing such a crisis allowed the *Pacific States* Court to deal with the phone company's Fourteenth Amendment claims as if they were really Guarantee Clause claims. *Cf.* Baker v. Carr, 369 U.S. 186, 297 (1962) (Frankfurter, J., dissenting) ("It is, in effect, a Guarantee Clause claim masquerading under a different label.").

[105] *Pac. States*, 223 U.S. at 143. The *Pacific States* Court reached a plausible result despite its overreliance on *Luther*. Strong federalism arguments support upholding duly passed voter initiatives to amend state law. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988) ("[T]he states cannot enjoy republican governments unless they retain sufficient autonomy to establish and maintain their own forms of government. The guarantee clause, therefore, implies a modest restraint on federal power to interfere with state autonomy."). More basically, initiatives extend *greater* control over government to the People. *See* Amar, *supra*

and *Pacific States* became the doctrinal anchors for the nonjusticiability of challenges to states' democratic structures.[106]

In *Colegrove v. Green*, the most notable of those subsequent cases, Justice Frankfurter famously urged the Court to stay out of the "political thicket" of legislative apportionment.[107] In language reminiscent of *Luther*, Frankfurter's plurality opinion held that the Court should play no role in determining the fairness of a state's democratic structures and that the Constitution's guarantee of a republican government was not justiciable.[108] *Luther* had become a sweeping per se rule.[109]

2. *The Law of Democracy, Rising*

Yet even as the Court professed in *Colegrove* to lack the power to comprehend political structures, it was peeling back the Southern states' white primary laws as violations of the Equal Protection Clause.[110] Two years before *Colegrove*, in 1944, the Court struck down internal political party rules barring black voters from party conven-

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note 34, at 786 ("The central meaning of Republican Government revolved tightly around popular sovereignty, majority rule, and the people's right to alter or abolish."). Ironically, the *Pacific States* Court's refusal of jurisdiction accorded the states greater power to police political entrenchment through direct democracy, by allowing voters to implement structural reforms without the support of elected officials or party leaders. *Cf.* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 444 (2008) (evaluating nonpartisan primary election reforms instituted by ballot initiative).

[106] *See, e.g.*, Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."); *see also* WIECEK, *supra* note 13, at 267 n.29 (listing subsequent cases); Chemerinsky, *supra* note 104, at 863 (same).

[107] 328 U.S. 549, 556 (1946) (plurality opinion). In *Colegrove*, an Illinois professor sued for equitable apportionment of the state's legislative districts, claiming he had been denied equal protection because his vote was worth one-tenth of a rural county vote. Frankfurter argued that the case was really a Guarantee Clause case about political rights. *Id.*

[108] *Id.* ("The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.").

[109] *See* New York v. United States, 505 U.S. 144, 184 (1992) ("Over the following century, [*Luther*'s] limited holding metamorphosed into the sweeping assertion that '[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts.'" (quoting *Colegrove*, 328 U.S. at 556)); South v. Peters, 339 U.S. 276, 277 (1950) ("Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." (citing *Colegrove*, 328 U.S. 549)).

[110] *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 208–12 (3d ed. 2007) (discussing the "White Primary" cases). In *Nixon v. Herndon*, the Court struck down a state-mandated white primary in Texas. 273 U.S. 536, 541 (1927). Justice Holmes, who authored *Giles* two decades earlier, held that the unconstitutionality of an explicitly white primary "does not seem . . . open to a doubt." *Id*. at 540. Such inequality violated not only the Fifteenth Amendment, but also the Fourteenth Amendment, failing rational basis review. *Id.* at 541. The claim that the *Herndon* primary was a nonjusticiable political question was a "play upon words." *Id.* at 540.

tions under the Equal Protection Clause.[111] By the last of these "White Primary" cases, the Court had begun to look past formal arrangements to ask if politics were functionally fair.[112]

Equal protection cases thus moved the Court deeper into the regulation of structural politics as it confronted racist political entrenchment.[113] In *Gomillion v. Lightfoot*, in 1960, the Court struck down Tuskeegee, Alabama's newly drawn city lines as an "uncouth twenty-eight-sided figure" that placed black communities outside of the municipal system.[114] While the Court held the Fourteenth Amendment question open by basing its decision on the Fifteenth Amendment, its annihilation of the Tuskeegee lines undercut the idea that the Court played no role in policing states' democratic struc-

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The Court grappled with white primaries for the next 15 years, struggling to move beyond formal structure to address substantive rights. *See* Nixon v. Condon, 286 U.S. 73 (1932) (holding that political party rules are justiciable state action); Grovey v. Townsend, 295 U.S. 45 (1935) (holding political party rules may bar blacks from private party convention); Smith v. Allwright, 321 U.S. 649 (1944) (overruling *Grovey*). *See generally* ISSACHAROFF ET AL., *supra* at 210–12 (describing the progression of the White Primary cases).

111 *Smith*, 321 U.S. at 664 ("The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race.").

112 This is true at least with regard to racial discrimination. In *Terry v. Adams*, the Court struck down Texas's "Jaybird primary," a whites-only primary meant to circumvent the official Democratic primary because it had become "the only effective part[ ] of the elective process that determines who shall rule and govern." 345 U.S. 461, 469 (1953).

113 The legal success of the civil rights movement indicated how much the world had changed since the Court considered the nature of political questions in *Luther*. Writing in 1965, C. Vann Woodward looked back on the Court's decisions as confirming to black Americans that they "had the law and the courts on their side." C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 154 (2d rev. ed. 1966). In *Sweatt v. Painter*, 339 U.S. 629 (1950), and *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court entered into the realm of direct regulation of state institutions, integrating state law schools and then public schools in the Jim Crow South. The civil rights cases announced a judicial willingness to rule on questions concerning the ordering of state political systems and to craft and administer injunctive remedies with a flexibility and specificity that was unheard of in 1912, let alone 1849. *See* Berg, *supra* note 68, at 219 ("Courts also have more remedial flexibility today than in the era of *Pacific Telephone*: [D]eclaratory judgments, delayed injunctions, and other measures can allow the parties time to conform to far-reaching orders, and prospective orders can avoid unsettling necessary government operations."). The institutional and political dynamics of the *Luther* Court's world were gone by the early 1960s. *See* Baker v. Carr, 369 U.S. 186, 242 n.2 (1962) (Douglas, J., concurring) (noting the peculiarities of the era in which *Luther* was decided). *See generally, e.g.*, 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANFORMATIONS (1998) (arguing that "constitutional moments" fundamentally changed the legal order in the years between *Luther* and *Baker*); Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1 (2011) (comprehensive legal regulation of American democracy occurred during a discrete period around the turn of the twentieth century).

114 364 U.S. 339, 340 (1960).

tures.[115] *Gomillion*'s move into the regulation of structural democracy imbued the reconstruction amendments with new power to scrutinize political mechanisms—a power now in tension with *Luther*, *Pacific States*, and *Colegrove*. The rising Fourteenth Amendment and the nonjusticiable Guarantee Clause were on a collision course.

B. . . . And Clause Shift: Luther *in* Baker

The clause split between the Fourteenth Amendment and the Guarantee Clause was squarely before the Court in *Baker v. Carr*, the seminal case of our modern law of democracy. Yet now, the Court, in stark contrast to the *Luther* Court, had the political wind at its back.[116]

Baker asked whether unequal systems of legislative apportionment were justiciable constitutional violations. Undisputedly, plaintiffs were the "intended and actual victims of a statutory scheme which devalues, reduces, their right to vote"; one-third of Tennessee voters elected two-thirds of the legislature.[117] The district court found a Fourteenth Amendment violation but cited *Colegrove* as "accepted doctrine that there are indeed some rights guaranteed by the Constitution for the violation of which the courts cannot give redress."[118]

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[115] The Fifteenth Amendment, Justice Frankfurter wrote, "lift[s] this controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation." *Id.* at 346–47. Because it refused to apply the Fourteenth Amendment to the drawing of political lines, the Court did not have to engage with the fractured *Colegrove* opinion. Indeed, Frankfurter took on a passionate tone in distinguishing *Colegrove* from the racial discrimination in *Gomillion*: "[T]he inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. That was not *Colegrove v. Green*." *Id.* at 347.

[116] The Court did not face the prospect of ordering a decision that would put them, as Taney had scoffed, in opposition to federal troops. Federal troops had already been deployed to enforce the Court's desegregation decisions in Arkansas, with more instances to come. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 12 (1958) ("[T]he President of the United States dispatched federal troops to Central High School and admission of the Negro students to the school was thereby effected."). In *Baker*, the Kennedy Administration had sent Solicitor General Archibald Cox to argue specially before the Court that there was jurisdiction to hear the case. *Baker*, 369 U.S. at 276.

[117] Transcript of Oral Argument at 1, *Baker*, 369 U.S. 186 (No. 6); *see* Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713 (1964) (striking down Colorado's state scheme modeled after the U.S. Senate because it violated "one person, one vote").

[118] Baker v. Carr, 179 F. Supp. 824, 828 (M.D. Tenn. 1959) (noting the court's inability to "overcome its reluctance to intervene in matters of a local political nature" despite the fact "that the evil is a serious one which should be corrected without further delay"), *rev'd*, 369 U.S. 186. Counsel for Tennessee pressed a similar point before the Supreme Court. Transcript of Oral Argument at 16, *Baker*, 369 U.S. 186 (No. 6) ("[I]f the complaint is in the General Assembly of Tennessee, in the halls, and not at the polling places . . . this Court . . . has recognized that distinction, has consistently held, from the *Colegrove* case up

Luther was a central field of debate for the Supreme Court in *Baker*. The Court decisively entered the political thicket, but just as decisively denied the justiciability of the Guarantee Clause as a basis for entry. Justice Brennan used *Luther* to forge the modern political question doctrine, effecting a clause shift whereby legislative apportionment could be reached through a muscular Equal Protection Clause.[119] Justice Frankfurter assailed the Court's clause shift and entry into the field of structural politics. He, too, relied on *Luther* to support his argument for judicial restraint when dealing with substantive structural democracy questions. Yet, despite *Luther*'s prominence in *Baker*, Justice Woodbury's *Luther* concurrence received scant attention.

1. The Brennan Majority

Justice Brennan's majority opinion held that vote dilution claims were justiciable by the federal courts, redefining the modern political question doctrine to work around *Luther*, *Pacific States*, and *Colegrove*.[120] This new political question doctrine allowed the majority to concede entirely the nonjusticiability of the Guarantee Clause, while applying the Equal Protection Clause to states' election systems.

Brennan dissected *Luther*, tying nonjusticiability to the Guarantee Clause alone.[121] Taney, he explained, had ruled out any standards by which the Court could reach the case "acting indepen-

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to this very minute . . . that there is a difference. . . . [A]nd this Court has refused almost all of the time even to hear the cases on the merits.").

[119] While clause shifting has received much treatment in the literature on the Privileges and Immunities Clause, the *Baker* Court's move has not been explicitly framed in this way. *See* WIECEK, *supra* note 13, at 270–71 ("[T]he Court . . . preferred to circumvent a doctrinal obstacle rather than to meet it head-on."); McConnell, *supra* note 13, at 105–07 (discussing the Court's shift to the Equal Protection Clause without invoking the term).

[120] *See, e.g.*, Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 521 (1998) ("*Baker v. Carr* was significantly limited by the need to gain Justice Stewart's fifth vote."); McConnell, *supra* note 13, at 107 (concluding that "the fateful decision to shift ground to equal protection was made for no reason other than to avoid the *appearance* of a departure from the nonjusticiability precedents").

[121] *Baker*, 369 U.S. at 218 ("Guaranty Clause claims involve those elements which define a 'political question' and for that reason and no other, they are nonjusticiable.").

dently,"[122] and only then turned to the Guarantee Clause, which was nonjusticiable for "further textual and practical reasons."[123]

The *Baker* majority did not defend Taney's textual argument, focusing instead on *Luther*'s "only significance . . . for [the] immediate purposes": "its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government."[124] Justice Brennan did not attempt to distinguish between the extraordinary claim in *Luther* for judicial recognition of a shadow government and the more ordinary claim in *Baker* for applying the Constitution to a state law. The distinction between equal protection and republican form lay instead in past doctrinal development. Civil rights and voting rights litigation had created "well developed and familiar" equal protection standards,[125] while precedent unlikely to be overruled prevented the Guarantee Clause from taking on any substantive meaning.[126]

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[122] *Id.* at 220. This refers to Taney's unwillingness to examine the election results proffered by the *Luther* plaintiffs. *See* Luther v. Borden, 48 U.S. 1, 41 (1849) ("The written returns of the moderators and clerks of mere voluntary meetings, verified by affidavit, certainly would not be admissible; nor their opinions . . . as to the freehold qualification of the persons who voted.").

[123] *Baker*, 369 U.S. at 220–22 (citing *Luther*, 48 U.S. at 42–44). These "textual and practical reasons," quoted at length by Justice Brennan, amount to Taney's flawed recognition argument. *See supra* notes 73–74, 102–05 and accompanying text (describing Taney's argument and academic criticism of it).

[124] *Baker*, 369 U.S. at 223. Susceptibility to judicially manageable standards was one of the six factors that comprised the modern political question doctrine as announced in Brennan's opinion. *See id.* at 227 (stating factors as "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question").

[125] *Id.* at 226.

[126] *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion) (failing to enforce the Guarantee Clause). Brennan's most elaborate statement about the lack of manageable standards under the Guarantee Clause came in a footnote quoting *Minor v. Hapersett*'s originalist argument that every state government in the original union was by definition republican in form. *Baker*, 369 U.S. at 222 n.48 (quoting Minor v. Hapersett, 88 U.S. 162, 175–76 (1874)). Yet footnote 48 suggests that the Guarantee Clause might have some fundamental principles of which violation would be judicially discernable: "[T]he distinguishing feature of [a republican] form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *Id.* (citing *In re* Duncan, 139 U.S. 449, 461 (1891)). On the Court's unwillingness to overrule *Colegrove*, see *supra* note 120.

The *Baker* majority thus sidestepped the debate in *Luther* about the Court's power to police political entrenchment or regulate state democratic processes. In doing so, it missed the opportunity to distinguish Taney's prudential theory of political questions from Woodbury's democratic theory. Brennan's opinion did not question whether *Luther* itself actually stood for a per se rule of nonjusticiability for the Guarantee Clause. Rather, *Baker* accepted that interpretation of *Luther* and used it to bolster the new political question framework.[127] *Luther* was thus recast as a case about the Guarantee Clause and as not controlling on the question of the Court's power in political matters. Brennan ignored Taney's more categorical admonition that prescribing qualifications to vote or inquiring into a recognized political system's validity was "no part of the judicial function[ ]."[128] Brennan similarly ignored Justice Woodbury's emphasis on the judiciary's limitations in reviewing action by the People, which had left open the Guarantee Clause as a standard by which to review action by state or federal actors.

In *Baker*, according to Brennan, the Court was engaged in the routine judicial function of evaluating state laws against a constitutional standard—a function described approvingly by Justice Woodbury even in 1849.[129] The Court was not, as Justice Woodbury had cautioned, rendering itself a new sovereign by choosing which government was truly of the People; it was not "enter[ing] upon policy determinations for which judicially manageable standards are lacking."[130] The *Baker* clause shift thus transformed nonjusticiable Guarantee Clause questions into justiciable equal protection questions.[131] But even as it rewrote the law of political questions, *Baker*

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[127] *Baker*, 369 U.S. at 227–28 (citing Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 150–51 (1912)); *see* Arthur Early Bonfield, Baker v. Carr*: New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245, 246–52 (1962) (discussing the *Baker* majority's acceptance of this problematic interpretation of *Luther*); *supra* notes 121–24 and accompanying text (discussing Brennan's use of *Luther*).

[128] *Luther*, 48 U.S. at 41.

[129] *Luther*, 48 U.S. at 53 (Woodbury, J., concurring in part and dissenting in part) ("The judiciary, by its mode of appointment, long duration in office, and slight accountability is rather fitted to check legislative power than political . . . ."); *see supra* note 82–84 and accompanying text (describing Justice Woodbury's conception of the judicial role).

[130] *Baker*, 369 U.S. at 226. *But see Luther*, 48 U.S. at 51 (questions which "succeed or are defeated even by public policy alone, or mere naked power, rather than intrinsic right" are nonjusticiable, as opposed to those settled on "strict legal principles"). The limitation that Woodbury believed stopped the *Luther* Court from acting was the absence of a *constitution* on point. *See supra* notes 82–89 and accompanying text.

[131] The clause shift envisioned a muscular Equal Protection Clause, capable of reaching functionally unfair or unequal structural political arrangements, or which "reflect[ ] no policy, but simply arbitrary and capricious action." *Baker*, 369 U.S. at 226; *see, e.g.*, ISSACHAROFF ET AL., *supra* note 110, at 112 ("In searching for a more robust under-

did not explain the purpose of the political question doctrine in the structural democracy context. To do so would have required a more careful analysis of Justice Woodbury's *Luther* concurrence and a more forceful repudiation of Justice Taney's outmoded majority opinion.

2. *The Frankfurter Dissent*

Justice Frankfurter argued that adjudicating the claim in *Baker* under *any* provision of the Constitution meant "asserting destructively novel judicial power,"[132] and, in effect, choosing "among competing theories of political philosophy."[133] Justice Frankfurter echoed both *Colegrove* and *Luther* in his insistence on the limited judicial role in democratic politics. His complaint was more prudential than theoretical—more Taney than Woodbury. Allowing courts to adjudicate apportionment claims would "[d]isregard . . . inherent limits" on the Court's power, "presag[ing] the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation . . . is determined."[134]

Frankfurter assailed the majority's sidestepping of *Luther* and characterized the clause shift as unworkable: "To divorce 'equal protection' from 'Republican Form' is to talk about half a question."[135] Whether a citizen is accorded equal protection of the law governing

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standing of voting in a democratic society, the inquiry must turn to the act of casting a *meaningful* vote."). Equal protection may have been more "familiar," *Baker*, 369 U.S. at 226, because the Fourteenth Amendment was not created directly to address structural political rights, and, thus, the more timorous pre–Warren Era Courts were able to develop the substantive conception of a muscular equality as part of America's democratic character and then back the doctrine into the political thicket. *See* Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."); Plessy v. Ferguson, 163 U.S. 537, 563–64 (1896) (Harlan, J., dissenting) (arguing that racial segregation is "inconsistent with the guarantee given by the Constitution to each State of a republican form of government"); *infra* note 182 (describing "political process theory" rooted in the *Carolene Products* footnote 4).

132 *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

133 *Id.* at 300.

134 *Id.* at 267; *cf. Luther*, 48 U.S. at 52 (Woodbury, J., concurring in part and dissenting in part) ("[D]isputed points in making constitutions, depending often, as before shown, on policy, inclination, popular resolves, and popular will, and arising . . . in relation to politics, they belong to politics, and they are settled by political tribunals . . . ."). Justice Frankfurter could not claim that the judiciary was actually powerless with the same practical force as Taney had. *See supra* notes 69–70 and accompanying text (noting Taney's concern in pitting the judiciary against Congress or the President in resolving a contest of state constitutions). Instead, Frankfurter argued that judicial involvement would "impair the Court's position as the ultimate organ of 'the supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling." *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

135 *Baker*, 369 U.S. at 301 (Frankfurter, J., dissenting) ("'[E]qual protection of the laws' can only mean an equality of persons standing in the same relation to whatever govern-

democratic structures depends on substantive judgments of "what frame of government . . . is allowed."[136]

While Frankfurter was surely correct that well-developed and familiar doctrine might still be used to make inappropriate policy determinations,[137] he did not explain *why* the other half of the question was necessarily nonjusticiable. Like Justice Brennan, Frankfurter failed to consider *Luther* as providing a coherent theory of political questions in the modern political context. Instead, Frankfurter categorically argued against entering the thicket of structural democracy.

Baker, according to both Justice Frankfurter and Justice Douglas in concurrence,[138] was a Guarantee Clause case because it ultimately addressed a deeper question about democracy's substantive principles and our constitutional court's role in enforcing them. *Baker* asked not merely whether the laws structuring politics were equal but whether they were republican—whether they comported sufficiently with the substantive notion of popular sovereignty at the core of our demo-

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mental action is challenged . . . . This, with respect to apportionment, means an inquiry into the theoretic base of representation in an acceptably republican state.").

[136] *Id.* For example, if we assume that a republican government allows all of its citizens to vote, then property qualifications and literacy tests will likely violate both the guarantee of a republican form and the requirement of equality before the law. But if we distinguish, as Judge Story did with reference to the *Luther* case, *supra* note 65, between the "natural people" and the "corporate people," with only the latter holding the franchise under the law, then qualifications which disenfranchise large portions of the population—so long as they are race-neutral—might be perfectly consonant with republican government and therefore with equal protection of the laws governing its administration. *Compare* City of Mobile v. Bolden, 446 U.S. 55, 66–68 (1980) (holding that intentional racial discrimination in districting violates the Fourteenth Amendment), *and* Gomillion v. Lightfoot, 364 U.S. 339, 345–46 (1960) (holding that racial discrimination in districting violates the Fifteenth Amendment), *with* Lassiter v. Northhampton Cnty. Bd. of Elections, 360 U.S. 45 (1959) (holding that a literacy test is not a facial violation of the Fourteenth or Fifteenth Amendments). Frankfurter saw laws that actively discriminated against discrete classes as justiciable constitutional violations. *See Baker*, 369 U.S. at 300 ("This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote."). But that is different from saying that property qualifications like those opposed by the Rhode Island Suffragists are Equal Protection Clause violations. The latter requires the analytical leap which *Baker*'s progeny allowed: The right to vote is fundamental. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); *see also* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 622, 626–27 (1969) (holding that property requirements violate the Fourteenth Amendment and that the right to vote is fundamental (citing Carrington v. Rash, 383 U.S. 89, 96 (1965)); Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1965) (holding that a state poll tax violates the Fourteenth Amendment (citing *Reynolds*, 377 U.S. at 561–62)).

[137] *Accord Harper*, 383 U.S. at 672 (Black, J., dissenting) (arguing that the majority gave equal protection "a new meaning which it believes represents a better governmental policy"); *id.* at 683 (Harlan, J., dissenting) ("[T]he Court reverts to the highly subjective judicial approach manifested by *Reynolds*.").

[138] *See infra* notes 139–45 and accompanying text (discussing Douglas's concurrence).

cratic government. It made sense in historical context that the *Luther* Court failed to answer this question. However, the *Baker* majority's failure to recognize and answer that same question—a century later, in the context of normal constitutional adjudication—vexed both Justice Frankfurter and those justices who believed *Baker* did not go far enough.

3. The Douglas Concurrence

In contrast to Justices Brennan and Frankfurter, Justice Douglas would have simply overruled *Luther* as "not maintainable."[139] Douglas, in his overlooked concurrence,[140] viewed *Baker* as a decisive break with Taney's dim view of judicial protection for political rights.[141] Discussing the declaration of martial law in *Luther*, Douglas chided: "Today would this Court hold nonjusticiable or 'political' a suit to enjoin a Governor who, like Fidel Castro, takes everything into his own hands and suspends all election laws?"[142] Douglas's sarcasm highlighted the open question: How would the Court respond to a megalomaniacal governor who had crossed the line? How would *Baker*'s focus on the Equal Protection Clause help the Court deal with future political entrenchment claims? Unconstrained by *Luther*, Douglas argued for a positive, judicially determined interpretation of the Guarantee Clause: "[T]he right to vote is inherent in the republican form of government envisaged by Article IV, Section 4."[143]

Douglas recognized the functional purpose of the Court's move into the political thicket. Without the "prophylactic effect" of potential judicial review, "entrenched political regimes [will] make other relief . . . illusory."[144] Justiciability barriers in structural democracy cases invited new forms of entrenchment.[145]

Justice Douglas raised a central challenge to Frankfurter's position and to the expansive reading that prior Courts had given *Luther*: Why maintain a political question doctrine that restrains the judiciary

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[139] *Baker*, 369 U.S. at 242 n.2 (Douglas, J., concurring). Douglas found the opportunity to do so in "the modern decisions of the Court that give the full panoply of judicial protection to voting rights." *Id.*

[140] *See, e.g.*, ISSACHAROFF ET AL., *supra* note 110, at 122 (omitting the Douglas concurrence from the casebook).

[141] *Baker*, 369 U.S. at 242 n.2 (paraphrasing Taney's opinion in *Luther* that "abdication of all judicial functions respecting voting rights, however justified . . . at the time of Dorr's Rebellion, states no general principle"); *see also supra* note 70 and accompanying text.

[142] *Id.* at 246 n.3; *see* Luther v. Borden, 48 U.S. 1, 45 (1849) (arguing it would be Congress's duty to overthrow a dictatorship in a state).

[143] *Baker*, 369 U.S. at 242 (Douglas, J., concurring). The Court would soon reach the same conclusion using equal protection. *See infra* notes 160–61 and accompanying text.

[144] *Baker*, 369 U.S. at 248 (Douglas, J., concurring).

[145] *See infra* note 159 and accompanying text (describing Douglas's prescience).

from regulating structural politics if the Court is both willing and able to check "entrenched political regimes"? Douglas's rejection of the *Luther* majority allowed him to envision a world in which the Court could deal directly with political entrenchment. His dissent also came closer than any other *Baker* opinion to acknowledging Justice Woodbury's alternate framework. Justice Douglas predicated his functionalism on the fact that *Baker* challenged the legal architecture of an entrenched regime rather than an act by the People of Tennessee themselves.

C. What Luther *Wrought*

Luther had a dramatic effect in shaping *Baker*. *Baker* followed the path of least doctrinal resistance, expanding "well developed and familiar"[146] Equal Protection Clause doctrine and leaving previous interpretations of *Luther* undisturbed. Yet Justice Brennan's statement, based in *Luther*, that "republican form" lacks manageable standards while "equal protection" does not, failed to explain why, absent the extraordinary facts of *Luther*, one piece of constitutional text leads inexorably to standardless determinations while the other is a fount of doctrine and justiciable rights.

Luther was the fulcrum on which the clause shift turned. But the shift, and the powerful new tool for the regulation of political entrenchment that it birthed, rested even then on an uncertain premise: The Court's continued belief that the Equal Protection Clause could be a storehouse for substantive democratic values. If *Baker* announced a judicial willingness to employ a functional analysis in policing "entrenched political regimes,"[147] the continued viability of *Luther* as a per se rule against the Guarantee Clause ensured that the Court's power to regulate legislative districting would rise and fall with the reach of the Equal Protection Clause.

At the same time, *Baker* was the site of what Mark Tushnet has called the "doctrinalization" of the political question doctrine.[148] This doctrinalization surely broadened the Court's jurisdiction over formerly political questions,[149] and it was accomplished by reformulating

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146 *Baker*, 369 U.S. at 226.

147 *Id.* at 248 (Douglas, J., concurring).

148 Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES, *supra* note 15, at 47, 73.

149 *See id.* ("[D]octrinalization substantially reduced the possibility of the Court's deploying the political question and standing doctrines in the service of prudential judgments about what would be the best structures of governance in a democratic society."). Scholars at the time saw *Baker*'s "political questions, not political cases" distinction as weakening *Luther* significantly. *See, e.g.*, WIECEK, *supra* note 13, at 289 (expressing excite-

Taney's prudentialist *Luther* opinion. *Baker* thus both clause shifted from the Guarantee Clause to the Equal Protection Clause *and* sublimated an alternate, more substantive theory of the political question doctrine: the Woodbury concurrence.

While some have criticized *Baker* for not returning to "first principles" or rethinking "questionable precedents" on the justiciability of the Guarantee Clause,[150] scholars have overlooked the fact that the Court ignored Woodbury's concurrence to avoid a first-order inquiry into when and why structural democracy questions might be political questions. Even as the *Baker* Court shunted democracy jurisprudence through the Equal Protection Clause, it missed an opportunity to glean from *Luther* a theory of political questions built on republican theory and founded in precedent—a theory both animated and limited by popular sovereignty, rather than Separation of Powers or prudentialism.

Luther teaches that a court cannot competently choose *which* is a state's true constitution from competing alternatives and cannot recognize directly the sovereign People in their naked form.[151] The Guarantee Clause's inability to offer standards for clearing *those* hurdles does not necessarily mean that it cannot offer standards for campaign finance, party rights, voting rights, and legislative districting.[152]

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ment at *Baker*'s apparent weakening of *Luther*); Bonfield, *supra* note 127, at 248–52 (same).

150 McConnell, *supra* note 13, at 117.

151 As Tabatha Abu El-Haj notes in a fascinating new study of democracy in the early republic, early political parties presented themselves as manifestations of the sovereign People to avoid being labeled mere "factions." El-Haj, *supra* note 113, at 16–17.

152 *See* Reynolds v. Sims, 377 U.S. 533, 582 (1964) (holding, only two years after *Baker*, that only "*some* questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards" (emphasis added)). The Court has, since *Baker*, begun to regulate campaign finance, *see, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (striking down restrictions on corporate campaign expenditures); Buckley v. Valeo, 424 U.S. 1 (1976) (upholding restrictions on contributions to candidates for federal office), political party organization and access, *see, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) (upholding a blanket primary where candidates may list any party regardless of the party's actual endorsement); Williams v. Rhodes, 393 U.S. 23 (1968) (striking down a requirement that a party have received fifteen percent of the vote in the prior election to qualify for the ballot line), restrictions on the individual right to vote, *see, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (upholding a requirement of holding government-issued identification to vote); Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (striking down the requirement of property ownership or child custody for voting in school board elections), and racial and partisan districting, *see, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) (partially striking down a racially gerrymandered congressional district in Texas and upholding political gerrymandering there); Vieth v. Jubilirer, 541 U.S. 267 (2004) (upholding partisan gerrymandering of Pennsylvania congressional districts).

This is especially true when these policies are, in the wake of *Baker* and its progeny, otherwise susceptible to judicial review.

III
ASKING HALF A QUESTION: *LUTHER* AND THE MODERN ERA

A. Luther *and the Modern Law of Democracy*

Baker made possible what Richard Pildes has called "the constitutionalization of democratic politics."[153] Today, the Supreme Court routinely takes highly political cases, as *Bush v. Gore*[154] vividly illustrated.[155] The Court's docket is full of voting rights cases, campaign finance cases, and apportionment cases.[156] Yet, in the modern era, the shift from the Guarantee Clause's textual focus on substantive republicanism to a broader application of the Equal Protection Clause appears to have failed in some respects. As Richard Pildes and Samuel Issacharoff have argued, our party-based political system creates serious principal-agent problems.[157] Parties are self-aggrandizing institutions by nature, and they seek to create political rules that benefit themselves.[158] The Court's reluctance to engage with the substan-

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[153] Pildes, *supra* note 9, at 31, 45–48 (explaining the modern law of democracy's development through the Equal Protection Clause and through post-*Baker* litigation).

[154] 531 U.S. 98 (2000) (enjoining the state supreme court–ordered recount of ballots in Florida and effectively deciding the election for President of the United States on equal protection grounds).

[155] *See* Barkow, *supra* note 68, at 242–43, 273, 276–77 (arguing that the rise of judicial supremacy has nearly obliterated the political question doctrine and that *Bush* is the "nadir" of the doctrine). *Bush*, though, was a one-off case: The Court did not need to confront questions about what constitutes fair democratic structures in order to halt Florida's recount on equal protection grounds. *See Bush*, 531 U.S. at 109 ("Our consideration is limited to the present circumstances . . . .").

[156] *See, e.g.*, *Citizens United*, 130 S. Ct. 876 (regulation of campaign finance); *Wash. State Grange*, 552 U.S. 442 (party nominations); *Crawford*, 553 U.S. 181 (voter identification requirements); *Vieth*, 541 U.S. 267 (partisan gerrymandering); *League of United Latin Am. Citizens*, 548 U.S. 399 (partisan gerrymandering and racial gerrymandering).

[157] *See* Issacharoff, *supra* note 7, at 615–16 (discussing the politics as markets analogy and the value of competition); Issacharoff & Pildes, *supra* note 7, at 646, 709 ("[W]e ought to pay greater attention to the capacity of political actors to capture democratic structures."); *see also* POSNER, *supra* note 7, at 242–47 (analogizing between the regulation of politics and antitrust problems).

[158] *See* FRANCIS FOX PIVEN & RICHARD M. CLOWARD, WHY AMERICANS STILL DON'T VOTE AND WHY POLITICANS WANT IT THAT WAY 171–205 (2000) (explaining the incentives for incumbents and parties to manipulate electoral rules to achieve favorable outcomes); *see also* El-Haj, *supra* note 113, at 64 (explaining the concurrent rise of regulation of the democratic political sphere and the ability of those in power to shape political results through the resulting legal structures); Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1630–31 (1999) ("Political intermediaries are . . . superagents, who work to minimize the direct agency costs inherent in representation. But superagents are still agents—particularly powerful ones, in fact—and they introduce a

tive questions of what republican government should look like, rooted in *Luther*, leaves the law of democracy without guiding principles to resolve structural political entrenchment problems, such as lock-ups and party duopoly.

While the *Baker* Court paved the way for the adoption of a strict "one person, one vote" rule, it failed to provide durable analytical tools or constitutional standards capable of, for example, reigning in equipopulous partisan or bipartisan gerrymanders. Justice Douglas's *Baker* concurrence, which advocated overruling *Luther*, underscored the danger of maintaining a political question framework that would leave structural democracy in the hands of the political branches.[159] That danger may now have materialized.

Michael McConnell has suggested that the rigid formalism *Baker* planted at the heart of redistricting law is part of the problem.[160] "One person, one vote" is a bright-line rule, and it provides a clear answer when the question is simply who may vote: everyone equally, subject to regulations which are narrowly tailored to meet a compelling state interest.[161] However, it has been more difficult to craft the Equal Protection Clause's response to electoral structures designed to systematically favor one party, or to cement party duopoly, at the

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whole new set of possible agency costs. Sometimes the superagents . . . may have their own, rather than their principals', interests at heart. They may then encourage elected officials to deviate from the voters' interests in order to further those of the intermediaries."); Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 163–65 (2005) (describing intraparty political competition). In one of the more egregious examples of this phenomenon in the 2010 redistricting cycle, Republicans in Arizona recently voted to remove the independent chairwoman of the state's redistricting commission, citing "an overreliance on competitiveness as a factor in drawing new boundary lines" as one reason for the ouster. Mary Jo Pitzl, *Redistricting Chief Ousted*, ARIZ. REPUBLIC, Nov. 2, 2011, at A1. In the commission's draft maps, "districts currently seen as 'safe' Republican seats would become more competitive." *Id.*

159 *See* Baker v. Carr, 369 U.S. 186, 248 (1962) (Douglas, J., concurring) (without judicial review "entrenched political regimes [will] make other relief . . . illusory"). Douglas implied that leaving the political branches to determine whether a government is republican in form invites factional and partisan collusion with no constitutional remedy. *Id.* at 241–50.

160 McConnell, *supra* note 13, at 103–04, 106–07 (arguing that *Baker*'s clause shift privileged formal and easily administrable rule of equipopulousness over substantive concerns about what legislative districts should look like, while the Guarantee Clause provides better basis for proceeding into the political thicket).

161 This assumes that voting is a fundamental right, though. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969) (fundamental under the Fourteenth Amendment); *Baker*, 369 U.S. at 242 (Douglas, J., concurring) (fundamental based in the Guarantee Clause); *see also* Pildes, *supra* note 9, at 45–46 (explaining the fundamental right to vote). *Compare Vieth*, 541 U.S. at 293–94 (plurality opinion) (arguing that districting based on party affiliation does not receive strict scrutiny), *with id.* at 324–25 (Stevens, J., dissenting) (arguing for applying strict scrutiny). *But see Crawford*, 553 U.S. 190–91 (2008) (applying intermediate scrutiny in a challenge to voter ID requirements).

expense of political competition.[162] When one political party "packs and cracks" legislative districts, drawing districts to make the other party less competitive while maintaining an equal number of voters in each, "one person, one vote" does not provide a remedy.[163] Manipulating election rules for political self-dealing is wrong, if it is wrong, because it is antidemocratic—not because it is unequal.[164] Unfairness and the extent of unjustified entrenchment are in turn structural, not individual, questions.[165]

Because the scholarship has failed to engage Woodbury's concurrence in *Luther*, it has also failed to see another important connection between *Luther*, *Baker*, and the present day. Partisan gerrymandering claims challenge the prevailing formalist framework for judicial regulation of politics, and they thus draw the Court back into the debate that took place in *Luther* and that was skirted in *Baker*. Gerrymandering claims require the Court to explain why structural political matters are justiciable. They require, according to a plurality of the modern Court, discernable limitations on the Court's power to make democratic politics fair and competitive.[166] Now more than ever, Justice Woodbury's political question framework, with its emphasis on how popular sovereignty limits the justiciability of political matters, merits reexamination.

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[162] *See, e.g.*, ISSACHAROFF ET AL., *supra* note 110, at 841–43, 880–84 (discussing the judicial response to equipopulous and bipartisan gerrymanders).

[163] *See* Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census,* 50 STAN. L. REV. 731, 736 (1998) (arguing that "one person, one vote" is a placeholder for concerns about substantive fairness).

[164] *See* ELY, *supra* note 6, at 118 n.* (characterizing the *Baker* line of districting cases as Guarantee Clause cases about political fairness); Richard H. Pildes, *The Theory of Political Competition*, 85 U. VA. L. REV. 1605, 1606 (1999) ("[S]cholars . . . have begun to argue that this familiar framework inappropriately atomizes or disaggregates the issues at stake in 'political rights' cases. . . . [T]hese cases are best analyzed in terms of more comprehensive structural perspectives on democratic politics—in constitutional decisionmaking, this means the appropriate constitutional conception of democratic politics."); Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. 179 (2011) (arguing for use of the liberal standing doctrine where the claimed harm is to democracy).

[165] *See, e.g.*, Karlan, *supra* note 163, at 745 ("[T]he Court's reliance on the Equal Protection Clause as its source of judicial power . . . has 'situated apportionment claims within an individual rights framework,' thereby focusing the Court's attention on fairness to individuals rather than on fairness in the allocation of power among groups." (quoting Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One Vote*, *in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 207, 210 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997))); *see also* Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line: Judicial Review of Partisan Gerrymanders*, 153 U. PA. L. REV. 541, 578 (2004) (arguing similarly in the context of the Court's gerrymandering jurisprudence). These claims allege, in other words, "democratic harm." *Vieth*, 541 U.S. at 355, 361 (Breyer, J., dissenting).

[166] *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (noting the "absence of rules to limit and confine judicial intervention" in redistricting).

B. A Brief History of Partisan Gerrymandering Claims

Partisan gerrymandering claims began as "one person, one vote" equal protection claims. In *Gaffney v. Cummings*, in the wake of the 1970 census, the Court upheld Connecticut's attempt to cut legislative districts to approximate the statewide party breakdown.[167] But ten years later, in *Karcher v. Daggett*, the Court applied a strict "one person, one vote" standard to strike down New Jersey's districting.[168] In effect, the *Karcher* Court invalidated a state plan, which was otherwise within the census population count's margin of error, because it had sought "to minimize or eliminate the political strength of any . . . party."[169] Concerns about entrenchment and political fairness made the difference.[170]

Three years later, in *Davis v. Bandemer*, the Court found partisan gerrymandering claims to be justiciable on grounds independent from "one person, one vote" violations.[171] A plurality in *Bandemer* held that partisan gerrymandering claims may succeed when plaintiffs demonstrate a structural and continued inability to effectively "influence . . . the political process as a whole."[172] This standard certainly addressed the real-world problem of political entrenchment, although it set a high bar for plaintiffs.[173] It was, however, a problematic conception of equal protection.[174] The move away from the mathemati-

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167 412 U.S. 735, 754 (1973) (refusing to "invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and . . . provide a rough sort of proportional representation").

168 462 U.S. 725, 740–44 (1983).

169 *Gaffney*, 412 U.S. at 754.

170 *Compare Gaffney*, 412 U.S. at 738 ("The Board also consciously and overtly adopted and followed a policy of 'political fairness' . . . .") *with Karcher*, 462 U.S. at 763 (Stevens, J., concurring) ("The plan was sponsored by the leadership in the Democratic Party . . . and was signed into law the day before the inauguration of a Republican Governor. . . . [One expert's plan] 'was rejected because it did not reflect the leadership's partisan concerns.'" (citing Daggett v. Kimmelman, 535 F. Supp. 978, 982 (D.N.J. 1982))); *accord* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1655–59 (1993) (describing as "unfortunate" the Court's "inability . . . to convincingly" deal with *Karcher* as a "one person, one vote" case).

171 478 U.S. 109, 123 (1986).

172 *Id.* at 132.

173 In *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989), the court's analytical framework was the "fulcrum of political power." *Id.* at 672. This fulcrum approach seems broadly consonant with Madisonian republican government. *See* THE FEDERALIST NO. 39, at 228 (James Madison) (Bantam Dell 1982) ("It is *essential* to such a [republican] government, that it be derived from the great body of the society . . . otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might . . . claim for their government the honorable title of republic.").

174 *See* Issacharoff, *supra* note 170, at 1660 (criticizing *Bandemer* as treading "dangerously close to the divide between the justiciable and the truly political"); *supra* notes

cally rigid and manageable "one person, one vote" standard drew the Court back into a debate about the justiciability of political entrenchment questions.[175] By the time the Court decided *Vieth v. Jubilerer*, in the wake of the 2000 census redistricting, the equal protection basis for *Bandemer* was coming apart.

C. Luther, Baker, Vieth

The *Vieth* Court was unanimous in finding that at least some partisan gerrymandering may be unconstitutional.[176] But the Court was badly fractured on the question of the judicial role in providing redress. Justice Scalia, writing for the plurality, accepted the principle that "a majority of individuals must have a majority say."[177] But Scalia argued categorically that no manageable standard exists for the Court to determine who comprises a majority.[178] Justice Kennedy, concurring in the judgment, joined four other Justices in leaving open the possibility that some forms of partisan gerrymandering may be judicially cognizable constitutional violations.[179] Faced with the dissenters'

164–65 and accompanying text (noting the divergence between the literal meaning of equal protection and the political fairness concerns at play in disputed gerrymanders).

[175] Davis v. Bandemer, 478 U.S. 109, 144 (1986) (O'Connor, J., concurring) (arguing that partisan gerrymandering claims brought by major political parties are nonjusticiable). One post-*Bandemer* suit was successful. *See* Republican Party of N.C. v. Martin, 980 F.2d 943 (4th Cir. 1992). After North Carolina's districting was struck down, the opposition swept into power. Vieth v. Jubelirer, 541 U.S. 267, 287 n.8 (2004). Even before *Vieth*, unsuccessful lawsuits may still have checked excessive partisan gerrymandering, however. *See* Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J.L. & POL. 653, 694 (1988) (describing the threat of judicial redistricting as an effective method of regulation).

[176] *Vieth*, 541 U.S. at 292 ("The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy."); *infra* note 179 (describing opinions of concurring and dissenting Justices); *see* John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 621 (1998) ("*Bandemer* essentially eliminated political gerrymandering as a meaningful cause of action, but only after it had essentially declared the practice unconstitutional."); Issacharoff & Karlan, *supra* note 165, at 543 ("[T]he overall doctrinal structure governing redistricting makes it impossible actually to render such claims nonjusticiable.").

[177] *Vieth*, 541 U.S. at 290; *see also* Reynolds v. Sims, 377 U.S. 533, 565–66 (1964) ("[I]t would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. . . . [F]air and effective representation for all citizens is concededly the basic aim of legislative apportionment . . . .").

[178] *See Vieth*, 541 U.S. at 281, 290 (arguing that there is no standard by which to determine the effect of districting on the resulting representation, nor by which to judge how much representation is due to whom).

[179] *Id.* at 306 (Kennedy, J., concurring) ("I would not foreclose all possibility of judicial relief if some limited and precise rationale were found . . . ."); *see id.* at 346–47 (Souter, J., dissenting) (proposing a burden-shifting standard with a five-point test for a prima facie case); *id.* at 332–36 (Stevens, J., dissenting) (proposing the use of the same standard for partisan as for racial gerrymandering claims); *id.* at 365–67 (Breyer, J., dissenting) (pro-

three competing views of when partisan gerrymandering becomes unconstitutional, Justice Kennedy proposed using the First Amendment as a better prism through which to view the question.[180]

Justice Scalia's argument—that no judicially manageable standards exist by which to judge partisan gerrymanders—bore *Luther*'s imprint. In *Vieth*, as in *Luther*, the Court accepted the basic principle of a sovereign People who rule by majority but refused to acknowledge a judicial role in guaranteeing it. Scalia's opinion implicitly conjured Justice Woodbury's *Luther* concurrence and its balance between the Court's role in policing unconstitutional action and the Court's limits in regulating the sovereign People. In this way, Scalia placed his finger on the democratic theory question that Woodbury had probed.[181] However, Justice Scalia gave short shrift to the powerful "political process theory" argument, developed since *Luther*, for the judiciary's superiority in safeguarding republicanism precisely because of its insulation from republicanism's afflictions.[182] He also failed to develop the argument that the Court's inability to divine an authentic majority deprives it of jurisdiction.

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posing a test based on "strong indicia of abuse" indicating an unjustified entrenchment, typified by a minority holding the majority share of representation).

180 *Id.* at 314 (Kennedy, J., concurring).

181 *See* Issacharoff & Karlan, *supra* note 165, at 543, 560 ("[T]he treatment of political gerrymander cases as a species of antidiscrimination claim obscures a central issue of democratic theory.").

182 *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (indicating that a "more exacting judicial scrutiny under the . . . Fourteenth Amendment" may be appropriate for "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"); ELY, *supra* note 6, at 117 (arguing that voting cases protect rights "that are essential to the democratic process" and "whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo"); Pildes, *supra* note 9, at 81 (describing *Vieth* as at odds with the *Baker* Court's "rejection . . . of the view that the modern Congress was an effective forum for addressing problems such as malapportioned election districts" and noting that the political branches are additionally inadequate because the Framers did not anticipate the rise of political parties); *cf.* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 U. VA. L. REV. 747, 748 (1991) (charting the "[r]ise and [f]all" of political process theory and arguing that it remains "a viable theory of constitutional interpretation"). But courts may more easily identify political wrongs in the racial context. In *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 442 (2006), for instance, the Court held that certain congressional districts violated section two of the Voting Rights Act but found no partisan gerrymandering claim stated despite rampant corruption and partisan manipulation of the districting process. *See, e.g.*, R. Jeffrey Smith, *DeLay Indicted in Texas Finance Probe*, WASH. POST, Sept. 29, 2005, at A1 (discussing the indictment of House Majority Leader Tom DeLay for criminally conspiring to use corporate contributions to fund Texas state elections in order to help the Republican Party reorganize Texas congressional districts).

Scalia's central concern was the problem of distinguishing "good politics and bad politics."[183] This is a doubly difficult question to answer under the Equal Protection Clause because formal equality does not offer a ready distinction.[184] Scalia's argument reflected both Taney's concept of the tightly limited judicial role and Woodbury's concern about the necessity of strict legal principles to prevent the judiciary from becoming a sovereign itself.[185] But again, in Woodbury's conception, the key distinction is not between good and bad politics but between acts of the sovereign People and those of reviewable state actors.

Here, Justice Scalia's political science arguments undermined his opinion. Of course political parties "compete for specific seats."[186] But what they are really competing for is control.[187] Justice Scalia's argument—that the shifting winds of politics and the ability of incompetent candidates to lose in their registration strongholds render the effects of districting impermanent[188]—is inapposite even if it is correct. Voters can dislodge individual incumbents, but by what mechanism may voters dislodge incompetent parties?

Justice Scalia's admission of a constitutional problem raises the question: Why is the judiciary unable to act when the political branches are *the source of the problem*?[189] Regulating self-dealing

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183 *Vieth*, 541 U.S. at 299 (plurality opinion).

184 *Id.* at 290 ("[R]equiring judges to decide whether a districting system will produce a statewide majority for a majority party . . . asks them to make determinations that not even election experts can agree upon."); *see also* Issacharoff, *supra* note 170, at 1653–54 ("*Reynolds* provided no analytic tool for measuring aggregative claims beyond those based on the simple arithmetic function of ensuring equally populated districts."); *supra* notes 160–65 and accompanying text (describing mismatch between equal protection and structural democracy problems).

185 Courts must "be governed by *standard*, by *rule.*" *Vieth*, 541 U.S. at 278; *see* Luther v. Borden, 48 U.S. 1, 41 (1849) ("[B]y what rule could [the court below] have determined the qualifications of voters . . . unless there was some previous law of the State to guide it?"); *id.* at 52 (Woodbury, J., concurring in part and dissenting in part) (stating that courts are governed by "precedents, by sound legal principles, by positive legislation, clear contracts, moral duties, and fixed rules").

186 *Vieth*, 541 U.S. at 287 (quoting Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 60 (1985)) (internal quotation marks omitted).

187 *See, e.g.*, KENNETH JANDA ET AL., THE CHALLENGE OF DEMOCRACY 236 (2008) (defining a "two-party system" as one in which "two major political parties compete for control of the government").

188 *Vieth*, 541 U.S. at 287. Of course, this argument is *not* categorically correct, as at least some candidates and incumbents are elected and reelected despite corruption, senility, or felony convictions. Interestingly, Scalia wrote in the judicial nominations context that a candidate's "fair shot" is a legislative—a political—judgment. N.Y. State Bd. of Elections v. Lopez-Torres, 552 U.S. 196, 205–07 (2008).

189 Issacharoff & Karlan, *supra* note 165, at 560 ("[Scalia] proposes to stand aside . . . even though national [political] intervention [of the type the Framers intended] now actu-

behavior by long-term players such as political parties may be analytically difficult, particularly under the Equal Protection Clause,[190] but if partisan gerrymandering is unconstitutional, then there is a strong argument that the Court should regulate it. The notion that manageable standards for judging partisan entrenchment *categorically* cannot exist demands, for instance, a first-order claim that these decisions are made on pure "public policy alone" by the People themselves, in their sovereign capacity.[191] Justice Scalia did not make this argument.

The *Vieth* debate about "manageable standards," drawn from *Baker*, is a red herring. As Joshua Stillman notes, Scalia's demand for a clear, predictable, and readily administrable standard as a predicate for justiciability "could tear down most of constitutional law as we

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ally exacerbates the problems of partisanship rather than dampening them."). National Republicans pressured Pennsylvania legislators to create the gerrymanders in *Vieth*. 541 U.S. at 272; *see also* Baker v. Carr, 369 U.S. 186, 248 (1962) (Douglas, J., concurring) (noting the probability that "entrenched political regimes" will continue to entrench themselves). This was true at the time of *Luther* as well. *See generally* Conley, *supra* note 44 (describing national parties' involvement in the Dorr Rebellion conflict).

[190] Justice Scalia highlighted problems with the equal protection inquiry by pointing out that what is politically fair for an individual may indeed boil down to a "substantive 'notion of fairness.'" *Vieth*, 541 U.S. at 298 (quoting *id.* at 343 (Souter, J., dissenting)). Equal protection masked the underlying structural issue, and Scalia exploited this tension. *Vieth*, 541 U.S. at 288 (arguing that the Constitution "guarantees equal protection of the law to persons, not equal representation . . . to equivalently sized groups"). This allowed Scalia to dismiss the "democratic harms" at stake: "This Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms." *Id.* at 295. Stillman distinguishes between this "discernability" argument and Scalia's "manageability" arguments. Joshua S. Stillman, Note, *The Costs of "Discernible and Manageable Standards" in* Vieth *and Beyond*, 84 N.Y.U. L. REV. 1292, 1309 (2009). Scalia also exploited *Shaw v. Reno*, 509 U.S. 630 (1994), which had implied that only racial gerrymanders are subject to strict scrutiny. *Vieth*, 541 U.S. at 285–86, 293–94 (citing *Shaw*, 509 U.S. 630, 650); *see* ISSACHAROFF ET AL., *supra* note 110, at 850 (describing *Shaw* in relation to racial and political gerrymanders).

[191] Luther v. Borden, 48 U.S. 1, 51 (1849) (Woodbury, J., concurring in part and dissenting in part). Clearly interparty political competition *can* constitute "the people in political affairs": Woodbury himself was referring, in part, to a political conflict between a nascent party movement, the Suffragists, and an established group of powerful Whigs, one which culminated in the attempt to ordain a new People's Constitution. But *must* it? Where such interparty competition spills not into the streets and the realm of constitution-making, but is directed inwards towards the laws governing politics, in an effort to choke off future competition, a court is arguably called on to evaluate the constitutionality of a law rather than the level of support for a political movement or for a proposed constitution. Perhaps when judges stop political parties from bending the rules in their favor, they truly are imposing impermissibly on the messy, cutthroat process by which the People determine their representatives and govern themselves. Perhaps, on the other hand, such judicial intervention is necessary to maintain governments which are republican in form, to prevent parties from distorting the People's voice and usurping popular power. *See Vieth*, 541 U.S. at 310 (Kennedy, J., concurring) ("Our willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims makes it particularly difficult to justify a categorical refusal to entertain claims against this other type of gerrymandering.").

know it."[192] Moreover, while Scalia attacked each dissenter's proposed standards, the dissents show that it is clearly possible to fashion a standard by which to judge partisan gerrymanders.[193] The real debate in *Vieth* is about whether reviewing partisan gerrymanders constitutes control of "the people in political affairs."[194] That debate requires the Court to reengage with Woodbury's *Luther* concurrence.

Justice Kennedy's position simply cannot be taken as a "reluctant fifth vote for nonjusticiability."[195] Kennedy and Scalia fundamentally disagreed on the critical question of whether a court can and should act to remedy extreme political unfairness.[196] Kennedy was one of five votes for the proposition that structural barriers to popular control of government can become justiciable constitutional violations.[197] Yet Kennedy, as well as the dissenters, could have used Woodbury's framework to develop a more robust counter to Scalia's implicit, underdeveloped argument that there is no principled distinction between the adjudication of unconstitutional partisan gerrymanders and the regulation of the sovereign People. The implicit rationale for a judicial power to remedy extreme political unfairness is that, when that unfairness is the result of legal structures which were created to distort the People's voice and entrench a particular group or party, those legal structures should be viewed skeptically. Such a political process theory argument might dovetail with Justice Woodbury's conception of political questions: The more suspiciously partisan an election law, the less confident we should be that it represents "the people in political affairs" as opposed to a party-based attempt to stack the deck, and thus the less deference it deserves.

D. The Guarantee Clause as an Answer in Vieth

Justice Kennedy's call for a clean doctrinal slate is a sign that the *Baker* clause shift is faltering, that equal protection cannot distinguish between legitimate districting and the antirepublican aggrandizement

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192 Stillman, *supra* note 190, at 1309.

193 *Vieth*, 541 U.S. at 367–68 (Breyer, J., dissenting) (arguing against the claim that the existence of competing standards is evidence that there is no standard at all); *see supra* note 179 (listing standards proposed by different Justices).

194 *Luther*, 48 U.S. at 53 (Woodbury, J., concurring in part and dissenting in part).

195 *Vieth*, 541 U.S. at 305 (plurality opinion).

196 *See id.* at 309–10 (Kennedy, J., concurring) (criticizing the categorical refusal of justiciability in Scalia's plurality opinion).

197 *Id.*; *see also id.* at 317 (Stevens, J., dissenting) (noting the agreement among five Justices that gerrymandering claims are justiciable).

of incumbents and political parties at the People's expense.[198] Kennedy's invocation of the First Amendment as a way to extricate the Court from the Equal Protection Clause in the context of partisan gerrymandering seeks to exploit the richness of First Amendment law in the political realm.[199] But this workaround of a workaround might again simply ask "half a question," allowing the Court to avoid defining the norms of republican government.[200]

The Guarantee Clause might be more helpful in distinguishing between the lawful acts of an elected legislature and the antirepublican entrenchment of political parties at the People's expense. The Guarantee Clause might also serve as a repository for the democratic norms and values that have been established in other cases and are valuable in other contexts.[201] And reviving the Guarantee Clause would require the Court to reexamine *Luther*.

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198 *See* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1378 (1987) ("To put it mildly, no bright line separates the legitimate districting plan from the partisan gerrymander . . . .").

199 *Vieth*, 541 U.S. at 314–15 (Kennedy, J., concurring) (suggesting application of the First Amendment).

200 *Compare id.* (suggesting the First Amendment as an alternate constitutional basis for dealing with districting claims), *with* Baker v. Carr, 369 U.S. 186, 242 (1962) (Douglas, J., concurring) (suggesting the Guarantee Clause as an alternate basis for districting claims). *See* Issacharoff, *supra* note 7, at 614 ("Shifting the doctrinal categories may better capture the constitutional interest in the context of the extreme malapportionment . . . . [But] the same problems that challenge the Court's equal protection jurisprudence will reassert themselves in trying to give content to the equally open-textured Republican Form of Government Clause."). Enlarging the reach of the Equal Protection Clause, moreover, seems unrealistic given the Court's current direction. *Compare* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966) (striking down Virginia's $1.50 poll tax and applying strict scrutiny), *with* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 201–03 (2008) (upholding Indiana's voter identification requirement and not applying strict scrutiny). Expanding the Equal Protection Clause also risks creating more tension between the literal meaning of the clause and its application as a source of substantive democratic rights. *See* Pildes, *supra* note 9, at 48 ("For many years now . . . the most fully elaborated doctrinal frameworks have concerned individual rights and equal protection. But these frameworks of rights and equality are often ill-suited to the problems courts actually address.").

201 For example, the Justices have explained that, in our republic, the right to vote means a "fair and effective" vote, Reynolds v. Sims, 377 U.S. 533, 533 (1964), that elections should result in a legislature "collectively responsive to the popular will," *id.* at 565, and that they should be free from "[c]umbersome election machinery [that] can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote," Williams v. Rhodes, 393 U.S. 23, 38 (1968) (Douglas, J., concurring). The Court has also noted that public deliberation during campaign season may need protection from the "corrosive and distorting effects of immense aggregations of wealth," Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990), *overruled by* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010), and that states, in setting election rules, must "govern impartially," Karcher v. Daggett, 462 U.S. 725, 748 (1983) (Stevens, J., concurring). *See also Vieth*, 541 U.S. at 356 (Breyer, J., dissenting) ("In a modern Nation of close to 300 million people, the workable democracy that the Constitution foresees must mean more than a guaranteed opportunity to elect legislators

In *New York v. United States*, thirty years after *Baker*, Justice O'Connor described a republican form of government as one "accountable to the local electorate" and independently able "to set [its] legislative agenda[ ]."[202] The meaning *New York* ascribed to the Guarantee Clause might help the Court militate against *Luther*'s revenge—against the stultifying failure to address clearly the first-order question of the Court's role in our constitutional democracy—by providing a framework of popular accountability for structural democracy cases.[203] An anti-commandeering approach, focused on legislators' accountability to the People, also comports with Woodbury's view of the political question doctrine as preventing the Court from controlling "the people in political affairs."[204]

Such an approach might shield the People against *any* entity usurping their control of government. It might look to the People-State relationship, asking whether a wedge is being driven between the People and their ability to make a policy choice. If the Guarantee Clause polices the People-State divide, then it should not matter who is driving the wedge: the federal government, national political parties, private agglomerations of wealth, or the Supreme Court.[205] In evaluating districting, such an analysis would not be concerned with excessive partisanship for its own sake, but rather with the extent to which partisan considerations in a given case led to electoral structures which undermine the accountability of legislators to the local electorate. Elected representatives may make decisions on behalf of their constituents, but agents may not double deal or subvert control

representing equally populous electoral districts."). The Guarantee Clause might thus anchor a robust "democracy canon." *See* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 71–73 (2009) (describing state courts' use of a somewhat narrow democracy canon and urging its adoption by federal courts).

202 505 U.S. 144, 184–85 (1992) ("[T]he Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.").

203 *New York* may provide a doctrinal foundation to reevaluate *Luther*. *See id.* (noting that the nonjusticiability of the Guarantee Clause is a "difficult question"). *But see Vieth*, 541 U.S. at 277 (plurality opinion) (citing Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 143 (1912), for finding *Luther* "absolutely controlling" on the nonjusticiability of the Guarantee Clause).

204 Luther v. Borden, 48 U.S. 1, 53 (1849) (Woodbury, J., concurring in part and dissenting in part).

205 The argument that the Guarantee Clause can be a shield against federal intervention, for example, might alter the application of *Citizens United* to state campaign finance laws by allowing states' democracy-enhancing policy choices to function in a manner similar to provisions in state bills of rights. *Cf.* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 551 (1986) ("While the Fourteenth Amendment does not permit a state to fall below a common national standard, above this level, our federalism permits diversity.").

by their principal.[206] Reengaging Justice Woodbury's People-centered view of the political question doctrine, and borrowing from the Court's more recent development of the Guarantee Clause, may help move the debate over districting and democracy beyond the stale quest for manageability.[207]

CONCLUSION

This Note has presented a narrative, stretching from a nineteenth-century rebellion to contemporary politics, about the Court's role in dealing with political entrenchment. The *Luther-Baker-Vieth* narrative is important precisely because it shows how

[206] For example, in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the Court dealt with fusion voting, the practice of minor parties nominating major party candidates. The Court held that the Minnesota legislature's interest in the two-party system trumped minor parties' right to nominate candidates of their choice. *Id.* at 362–65. The Guarantee Clause might add force to challenges to the self-serving structural benefits enjoyed by the two-party system and instead favor competition and broader representation. Other areas might not change. Verifying voters' identities, without more, does not necessarily smack of entrenchment because accurate elections ensure majority rule and full minority representation. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008) (holding that Indiana's interest in preventing fraud justifies its mandatory voter identification rule and that the fact that the vote on the law was partisan does not militate the law's neutral justification). A re-emergence of the Guarantee Clause also might give constitutional depth and heft to a critical public debate about political entrenchment in America. *See, e.g.*, Jack M. Balkin, *Occupy the Constitution*, BALKINIZATION (Oct. 19, 2011, 8:31 AM), http://balkin.blogspot.com/2011/10/occupy-constitution.html ("A republican form of government is a government that pays attention to the welfare of the vast majority of its citizens, or in the words of OWS, it is a government that cares about and is responsive to the 99 percent, rather than a government that is captured by the 1 percent and to do that 1 percent's bidding."); *see also* Andrew Sullivan, *You Say You Want a Revolution*, DAILY BEAST: NEWSWEEK (Oct. 22, 2011, 11:30 PM), http://www.thedailybeast.com/newsweek/2011/10/23/how-i-learned-to-love-the-goddamned-hippies.html ("The theme that connects [Occupy Wall Street and the Tea Party movements] is disenfranchisement . . . . [A] 'democratic deficit' gets to the nub of it.").

[207] Adding the Guarantee Clause to the partisan gerrymandering analysis would not change the fact that it is nearly impossible to separate politics from the practice of legislative districting by legislators. *See, e.g.*, *Vieth*, 541 U.S. at 299 (noting that politics will and should play a role in creating district boundaries); *id.* at 308–09 (Kennedy, J., concurring) (arguing that districting is always political whether intentionally or not); *id.* at 358 (Breyer, J., dissenting) (noting that district boundaries make political sense because they are designed with politics in mind); Issacharoff, *supra* note 7, at 643 ("[T]he Court should forbid ex ante the participation of self-interested insiders in the redistricting process, instead of trying to police redistricting outcomes ex post."); Michael Waldman, Op-Ed, *Sucker Avoidance May Be Step to Presidency*, BLOOMBERG NEWS, Feb. 14, 2011, *available at* http://www.bloomberg.com/news/2011-02-15/sucker-avoidance-may-be-step-to-presidency-commentary-by-michael-waldman.html (arguing for nonpartisan commissions). But it might change the political question analysis, forcing the Court to distinguish between acts by the People in their role as a political sovereign and acts by partisan intermediaries like parties, and, in doing so, force the Court to deal squarely with the structural issue of democratic fairness.

doctrinal limits and the rationales behind them have developed and remained intact since the Court's early history. While contemporary scholars have demonstrated enormous concern for the problem of the judicial role in policing political entrenchment, neither they nor the Court have fully acknowledged the central role of the two *Luther v. Borden*s in this very modern problem.

This counterhistory does not lend itself to an obvious normative position. A normative stance depends on one's view of the role and limits of constitutional courts in a democracy governed by a sovereign People. What this Note does indicate is that this first-order question is shockingly unresolved, in large part due to *Luther* itself. It indicates that, for a coherent law of anti-entrenchment to emerge, the Court must first answer questions that have remained unresolved for over 150 years. And this Note indicates that Justice Woodbury's *Luther* concurrence is a promising place to start.